

# Dædalus

Journal of the American Academy of Arts & Sciences

Winter 2019

## Access to Justice



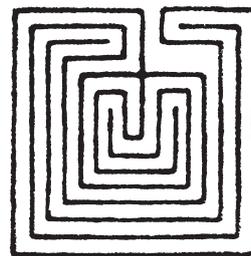
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& Rebecca L. Sandefur, guest editors

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Robert H. Frank · David F. Levi · Dana Remus  
Abigail Frisch · Gillian K. Hadfield · Tonya L. Brito  
D. James Greiner · Andrew M. Perlman · Sameer Ashar  
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Nigel J. Balmer · Kenneth C. Frazier · Fern A. Fisher  
Robert W. Gordon · Nathan L. Hecht



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Journal of the American Academy of Arts & Sciences



“Access to Justice”

Volume 148, Number 1; Winter 2019

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Inside front cover: *We Did Not Know What Happened to Us*

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# Dædalus

Journal of the American Academy of Arts & Sciences



The labyrinth designed by Dædalus for King Minos of Crete, on a silver tetradrachma from Cnossos, Crete, c. 350–300 BC (35 mm, Cabinet des Médailles, Bibliothèque Nationale, Paris). “Such was the work, so intricate the place, / That scarce the workman all its turns cou’d trace; / And Dædalus was puzzled how to find / The secret ways of what himself design’d.” –Ovid, *Metamorphoses*, Book 8

Dædalus was founded in 1955 and established as a quarterly in 1958. The journal’s namesake was renowned in ancient Greece as an inventor, scientist, and unriddler of riddles. Its emblem, a maze seen from above, symbolizes the aspiration of its founders to “lift each of us above his cell in the labyrinth of learning in order that he may see the entire structure as if from above, where each separate part loses its comfortable separateness.”

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This volume exists mainly because of the large commitment of time, energy, passion, and mastery of the contributors of the essays. In addition, at the American Academy, the Honorable Diane P. Wood, Chair of the Academy's Council and Chief Judge of the United States Court of Appeals for the Seventh Circuit, and the other members of the Council; John Mark Hansen, Chair of the Academy's Committee on Studies and Publications, and the other members of the Committee; Phyllis S. Bendell, Director of Publications and Managing Editor of *Dædalus*; Heather M. Struntz, Assistant Editor; Peter Walton, Associate Editor; Natalia Carbullido, Operations Assistant; Julian Kronick, former Program Coordinator for American Institutions, Society, and the Public Good; and many others helped define the *Dædalus* issue, organize and manage meetings that shaped the issue, and provide essential support in the editing and production process.

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# Introduction

*John G. Levi & David M. Rubenstein*

Emblazoned on the facade of the United States Supreme Court building are four simple words intended to embody the overriding principle of the U.S. legal system: EQUAL JUSTICE UNDER LAW. Yet after more than 225 years, the nation still has not developed the means to fulfill this principle.

There are many reasons for that failure, but perhaps foremost among them is that the legal system does not ensure that all individuals with a civil legal problem get access to and secure either competent legal counsel or some other kind of help in addressing their problem. For people without adequate financial resources or knowledge of the legal system, there is a considerable chance that they will not be able to afford or secure legal counsel or other help. There is no constitutional guarantee of counsel in civil matters parallel to what exists in serious criminal ones.

To be sure, the federal government, through the Legal Services Corporation, or LSC, and state governments, through a variety of programs, have a public goal of generally providing such counsel in civil matters. But the reality often falls embarrassingly short of the goal. The situation is actually getting worse: because of funding shortfalls; because those most in need of legal counsel are often unaware of their need for such counsel; and because of the growing complexity of the civil legal system.

The LSC's most recent survey of the justice gap – the difference between the civil legal needs of low-income Americans and the resources available to

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*Introduction* meet those needs – paints an alarming picture. The 2017 report found that some 71 percent of low-income households had experienced at least one civil legal problem in the previous year, including conflicts around health care, housing conditions, disability access, veterans’ benefits, and domestic violence. However, 86 percent of the civil legal problems reported by low-income Americans in 2017 received inadequate or no legal help. And due to scarce resources, those low-income Americans who sought legal aid from LSC-funded organizations received only limited or no help more than half the time.<sup>1</sup>

Another measure of the justice gap is the rapidly growing number of unrepresented litigants, what Kentucky Chief Justice John D. Minton Jr. called a “*pro se* tsunami hitting the nation’s courts.” The National Center for State Courts estimates that in almost 75 percent of civil cases in state courts, one or both parties go unrepresented.<sup>2</sup> They largely forfeit meaningful access to justice since they are far less likely to prevail than represented litigants, particularly when opposed by parties with lawyers. In some courts, this imbalance is common: in housing court, more than 90 percent of tenants facing eviction have no lawyer, while more than 90 percent of the landlords do.

Yet people often do not realize that their problem has a legal dimension. Human miseries that could be alleviated continue and cascade into disasters, jeopardizing the legitimacy of the legal system itself.

This story would be even more distressing if not for innovations in technology and pro bono service. The development of automated processes that provide lawyers with user-friendly, form-preparation assistance for the unrepresented; the creation of online court forms and development of mobile apps to bring meetings and hearings to litigants; and the expansion

of training and support for lawyers taking on pro bono cases are among the efforts that have helped civil legal providers stretch limited resources.

But as helpful as these developments are, the nation’s one million lawyers will never be enough to solve the access-to-justice problem. And they shouldn’t be expected to.

The American justice system belongs to all Americans, not just lawyers. We must find ways to reach out beyond the legal profession to the greater public, to the business, medical, science, engineering, media, and other communities, to educate them about the gravity of this crisis.

While the legal-aid community and some in government and academia are focused on the widening justice gap and the formidable challenges to providing legal assistance to low-income Americans, very few others are. In communities concerned about this crisis, there are powerful voices, but no maestro to bring them together. No one person or group is in charge or responsible for seeing that the legal system lives up to the expectations articulated at the country’s founding.

That is why this issue of *Dædalus* and the American Academy’s project on Making Justice Accessible are so important. The project is gathering information about the national need for improved legal access, and studying innovations piloted around the country to fill this need, to advance a set of clear, national recommendations for closing the justice gap between supply and demand for legal services.

The project will set a limited number of significant national goals and priorities for the improvement of legal access. A strategic, and perhaps even more ambitious, purpose is to multiply the voices addressing the access challenge and elevate the discussion and efforts necessary to meet these priorities and goals. The

fundamental objective is to bring the nation closer to achieving what the Supreme Court's facade proclaims as the guiding principle of the U.S. justice system.

For a century, the legal profession has taken the lead in this effort. Now, it is

time for national leaders in politics, business, the media, and other influential sectors to join, or rejoin, in this advocacy. The justice gap is a matter of basic concern and consequence for the nation.

*John G. Levi  
& David M.  
Rubenstein*

#### ENDNOTES

<sup>1</sup> Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (Washington, D.C.: Legal Services Corporation, 2017), 6.

<sup>2</sup> Robert Grey Jr., "There is No Justice as Long as Millions Lack Meaningful Access to It," *ABA Journal*, August 30, 2018, [http://www.abajournal.com/news/article/there\\_is\\_no\\_justice\\_as\\_long\\_as\\_millions\\_lack\\_meaningful\\_access\\_to\\_it](http://www.abajournal.com/news/article/there_is_no_justice_as_long_as_millions_lack_meaningful_access_to_it).

# How Rising Income Inequality Threatens Access to the Legal System

*Robert H. Frank*

*Abstract: Incentives that lead sellers to introduce quality improvements and cost-saving innovations in competitive markets also ensure that no opportunity to cheat consumers remains unexploited. That difficulty underlies many American laws. But many people lack the income necessary to pay for legal interventions against unjust treatment, preventing them from meeting basic needs, like protection against financial fraud and abusive relationships. Growing income inequality has made this justice gap worse by reducing public funds available for legal aid in real terms, while also making it more difficult for low-income people to make ends meet. Simple policy changes could ease both problems without sacrifices from anyone. Those who could afford tax increases necessary to pay for more social services, including competent legal representation for everyone, resist this step because they believe that it would make it harder to buy the special things they want. But that belief is incorrect because the supply of special things is limited. The ability to bid successfully for them is unaffected by higher taxes, which do not affect relative purchasing power.*

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When Mary Hicks's Washington, D.C., landlord was unresponsive to her repeated complaints about mold and mildew in her bathroom and holes in the walls, she began to withhold rent.<sup>1</sup> Her landlord sued her and threatened to evict her. Unable to afford a lawyer, Hicks sought help from a local law clinic. Advocating on her behalf in court, volunteer student attorneys blocked her eviction and persuaded the court to order the necessary repairs. In the process, they also discovered that the \$975 in monthly rent she had been paying was far in excess of the level permissible under local ordinance. The court ordered her rent reduced to \$480.<sup>2</sup>

Mary Hicks was lucky. According to a recent survey, more than 70 percent of low-income American households had been involved in civil legal disputes during the preceding twelve months, and in more than 80 percent of those cases, they lacked

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effective legal representation.<sup>3</sup> These disputes often involve issues far more serious than rental housing violations: they include custody disputes, health care coverage, child support, home foreclosures, domestic violence, disability access, veterans' benefits, bankruptcy, and divorces. That so many people must confront the legal system without help is obviously troubling. But progress toward a solution will require not only moral outrage, but also a clearer understanding of how market forces have contributed to this problem.

Many of Adam Smith's modern disciples celebrate his theory of the "invisible hand," which, in their telling, holds that market forces harness selfish individuals to serve the broader interests of society. As Smith wrote, "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."<sup>4</sup>

The invisible hand is a concept whose importance is difficult to overstate. Others before Smith understood that firms develop product-design improvements and cost-saving innovations not to serve humanity, but to increase their profits by capturing market share from rivals. But Smith saw more clearly than others that the story does not end there. Rivals are quick to copy new designs and improvements in production methods, and the resulting competition drives prices down to levels just sufficient to cover the new, lower costs of production. The ultimate beneficiaries of this process, Smith argued, are consumers, who enjoy a continuing stream of better and cheaper products.

Yet Smith was far more circumspect than many of his modern disciples about the power of the invisible hand. He understood that self-interest alone would not lead to the greatest good for the greatest number. He believed that markets could

not function adequately in the absence of an elaborate foundation of laws and ethical norms of the sort he described in detail in his *The Theory of Moral Sentiments* (1759), published almost two decades before his *The Wealth of Nations* (1776).

More recently, George Akerlof and Robert Schiller, both Nobel laureates in economics, published *Phishing for Phools* (2015), in which they argue that the same incentives that lead sellers to introduce quality improvements and cost-saving innovations also ensure that no profitable opportunity to cheat consumers will remain unexploited.<sup>5</sup> Behavioral economics suggests that such opportunities are abundant.

Behavioral economists work largely at the intersection of economics and psychology. Much of their attention has focused on impulse-control problems and systematic biases in people's perceptions, judgments, and decisions. As the late Amos Tversky, a Stanford University psychologist and a founding father of behavioral economics, liked to say, "My colleagues, they study artificial intelligence. Me? I study natural stupidity."

As research in this vibrant field has conclusively demonstrated, market forces alone are far from sufficient to eliminate widespread opportunities to exploit consumers. One can believe that markets have dramatically improved the human condition and, at the same time, believe that unless consumers also enjoy the protection of a well-designed system of laws and regulations, it is not reasonable to expect society to be just.

Even with well-considered consumer-protection laws and regulations on the books, however, there remains the matter of enforcement. Access to the legal system requires costly resources that should be employed only when they are likely to generate commensurate benefits. Most

Robert H.  
Frank

societies let families decide for themselves whether it makes sense to incur the necessary expenses to mount civic legal interventions. That might be a defensible position if everyone had adequate income. But many lack the income necessary even to consider such interventions.

Their inability to intervene often prevents them from meeting such basic needs as access to health care, safe and habitable housing, and protection against financial fraud and abusive relationships. As Martha Bergmark, executive director of Voices for Civil Justice, put it, “Individuals face really high stakes in the civil justice system. You can lose your children, you can lose your home, you can lose your livelihood without having legal help to get you through complicated legal proceedings.”<sup>6</sup>

An important component of the social safety net in the United States has been the Legal Services Corporation (LSC), the nonprofit corporation created by Congress with bipartisan support in 1974. But as LSC President James Sandman acknowledges in his contribution to this issue of *Dædalus*, estimates suggest, conservatively, that about 80 percent of the civil legal needs of poor people in America remain unmet.<sup>7</sup>

No one argues that this state of affairs is desirable. The support shortfall, which the LSC calls the “justice gap,” has grown not just because of decreasing congressional appropriations in real terms for the LSC, but also because the real purchasing power of low-income families has shrunk significantly. As I will explain, both declines are indirectly related to a common set of market forces.

During the three decades after World War II, incomes in the United States rose rapidly and at about the same rate – a bit less than 3 percent a year – for people at all income levels. The country had an

economically vibrant middle class. America’s roads and bridges were well maintained, and impressive new infrastructure was being built. The nation enacted Medicare, Head Start, the Earned-Income Tax Credit, and other features of a more ambitious and comprehensive social safety net.

The past four decades present a striking contrast. The economy has grown much more slowly than it had earlier, and virtually all income growth has been accruing to those atop the income ladder. The share of total income going to the top 1 percent of earners, which stood at 8.9 percent in 1976, had risen to 23.5 percent by 2007, but during the same period, the average inflation-adjusted hourly wage had declined by more than 7 percent. Much of the nation’s infrastructure had fallen into grave disrepair, and safety net programs faced growing shortfalls and threats of closure or privatization.

In *The Winner-Take-All Society* (1995), economist Philip Cook and I argue that these changes were driven largely by new technologies and market institutions that afford growing leverage for the talents of the ablest individuals.<sup>8</sup> For example, the best option available to patients suffering from a rare illness was once to consult with the most knowledgeable local practitioner. But now that medical records can be sent anywhere with a single keystroke, today’s patients can receive advice from the world’s leading authority on that illness.

Such changes didn’t begin yesterday. Alfred Marshall, the great nineteenth-century British economist, described how advances in transportation enabled the best producers in almost every domain to extend their reach. Piano manufacturing, for instance, was once widely dispersed, simply because pianos were so costly to transport. Unless they were produced close to where buyers lived, shipping

costs quickly became prohibitive. With each extension of the highway, rail, and canal systems, shipping costs fell sharply, and at each step, production became more concentrated. Worldwide, only a handful of the best piano producers now survive. It is, of course, a good thing that their superior offerings are now available to more people. But an inevitable side effect has been that producers with even a slight edge over their rivals went on to capture most of the industry's income.

Many of the environmental changes that have been occurring over time are analogous to reductions in shipping costs. That's true, for example, of reductions in tariff barriers and better communication technologies. Perhaps even more important has been the fact that an increasing share of what makes a product valuable is accounted for by the ideas embedded in it. Ideas don't weigh anything, so they are costless to ship.

Cook and I argued that these changes help explain both the growing income differences between ostensibly similar individuals and the surge in income inequality that began in the late 1960s. In domain after domain, we wrote, technology has enabled the most gifted performers to extend their reach and consolidate control of their market.

Growth in income inequality helps explain not only changes in government funding levels for services provided by the American social safety net, but also changes in the ability of low-income Americans to pay for those same services privately.

Many factors have contributed to America's failure to maintain historic levels of public investment in infrastructure and social services. But one in particular stands out: citizens' demands for government services have outstripped government tax revenue. That phenomenon, in

turn, has many causes, among them the sharply rising costs of health care and pensions associated with our aging population. But as Table 1 suggests, an additional contributing factor has been a long-term decline in the nation's top marginal tax rate. Many tax cuts were adopted in the hope that they would stimulate economic growth by enough to prevent a decline in overall tax revenues. That hope proved a fantasy. The nonpartisan Congressional Budget Office estimated that the George W. Bush tax cuts reduced federal revenue by \$2.9 trillion between 2001 and 2011. And in a widely cited *New York Times* article, Bruce Bartlett, a senior economic advisor in the Ronald Reagan and George H. W. Bush administrations, argued that the actual revenue shortfall caused by the Bush tax cuts was considerably larger.<sup>9</sup>

Because winner-take-all markets are highly competitive, successful contestants are almost invariably highly talented and hardworking. When thinking about the reasons for their own success, then, it is perhaps only to be expected that the narratives they construct are heavily shaped by memories of the long hours they put in, the difficult problems they solved, and the many formidable opponents they vanquished. Being spectacularly successful may reinforce the natural sense of entitlement to income produced by the fruits of one's own labor. As the seventeenth-century British philosopher John Locke wrote, "yet every man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his body, and the Work of his Hands, we may say, are properly his."<sup>10</sup>

But a more important change in the environment has been the capacity of successful individuals to influence the political system's response to their grievances about high top marginal tax rates. The role of money in contests for political

Table 1  
Maximum Marginal Tax Rates on Individual Income in the United States

Year	Tax Rate
1966	70%
1982	50%
1987	38%
1995	39.6%
2018	37%

Source: Tax Policy Center, “Historical Highest Marginal Income Tax Rates,” March 22, 2017, <http://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates>.

office had been growing even before the Supreme Court’s *Citizens United* decision in 2010, and has grown even more rapidly since then.

Congresspeople today spend an average of five hours per day calling potential donors, many of whom have clear preferences about marginal tax rates. Referring to the Tax Cuts and Jobs Act of 2017, which significantly cut corporate taxes and marginal tax rates for top earners, Republican Representative Chris Collins of New York said, “My donors are basically saying, ‘Get it done or don’t ever call me again.’”<sup>11</sup> In the wake of the enactment of that legislation, government borrowing has spiked sharply, provoking additional calls to cut social services.

Every human judgment depends critically on relevant frames of reference. On a sixty-degree day in Miami in November, is it cold out? What about a sixty-degree day in Montreal in March? Residents in Miami would be reaching for the heaviest coat they owned – I know because I grew up there – while the Montrealers would

be celebrating the warmth of spring. Or suppose you are driving with your daughter to visit her grandparents and she asks, “Are we almost there yet?” If ten miles remain on a twelve-mile journey, you’ll say no. But if those same ten miles remain on a 120-mile journey, you’ll say yes. Everyone understands how frames of reference shape judgments like these. Yet in traditional economic models, evaluation is independent of context. A century from now, economists will look back in wonder at that fact.

Standard economic models, which ignore the role of context, assume that each person’s spending is completely independent of what others spend. But if context matters, that can’t be right. Growing income inequality in recent decades has changed the contexts that shape spending decisions in ways that have made it more expensive for most families to achieve basic goals. People at the top of the income ladder are building bigger houses, for example, simply because they have more money. There is no indication that

the larger mansions of the wealthy make middle- and low-income people unhappy directly. On the contrary, the nonrich have a brisk appetite for pictures and video footage of the luxuries of the rich. But the larger houses of those at the very top shift the frame of reference that defines what those just slightly less wealthy consider necessary or desirable, so they, too, build bigger, and so on, all the way down the income ladder.

Without invoking this process, which I call *expenditure cascades*, it is difficult to explain why the median new house in the United States is now 50 percent larger than in 1980. Failure to keep pace with what peers spend on housing means not just living in a house that seems uncomfortably small, but it also means having to send your children to inferior schools, because better schools are almost always those in more expensive neighborhoods.

Figure 1 shows the toil index, a simple measure I constructed to track one important cost of rising inequality for middle-income families. To send their children to a school of at least average quality, median earners must buy the median-priced home in their area. The toil index plots the number of hours the median earner must work each month to achieve that goal. When incomes were growing at the same rate for everyone during the post-World War II decades, the toil index was almost completely stable. But income inequality began rising sharply after 1970, and since then, the toil index has risen in tandem. It now takes approximately one hundred hours a month to be able to afford that median home, up from only forty-two hours in 1970.

It's not just homes. Why does the average American wedding now cost \$31,000, almost three times as much as in 1980? There's been an expenditure cascade there, too: Like a good school, a special celebration is a relative concept; it must

stand out from what people expect. But when everyone spends more, the effect is merely to raise the bar that defines special, without improving anyone's relative position. Does anyone believe that couples who marry today are happier because their weddings cost so much more? The reverse may in fact be true. In one large sample of women, the marriages of those whose weddings cost more than \$20,000 failed at more than three times the rate of those whose weddings cost between \$5,000 and \$10,000.<sup>12</sup>

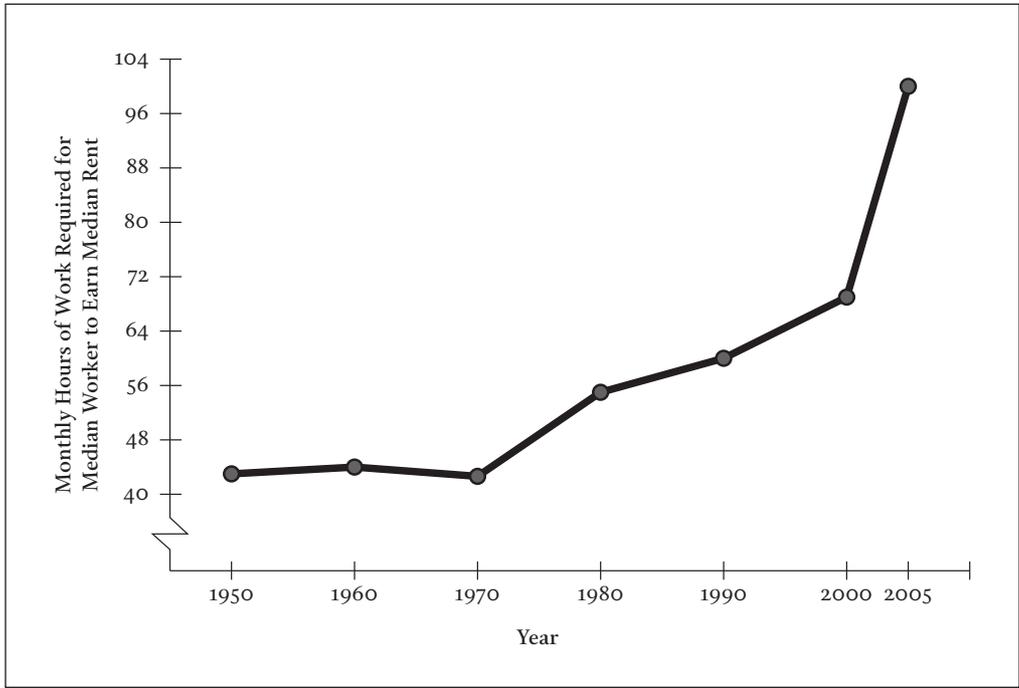
The median real wage in the United States is actually lower now than it was in the 1980s. If middle-income families must now spend more than before to achieve basic goals, how do they manage? They are exploiting every available option: saving less, borrowing more, working longer hours, and moving farther from work. Census data reveal clear links between these responses and regional variations in the growth of inequality.<sup>13</sup> Of the one hundred largest U.S. counties, those where income inequality grew most rapidly were also those that experienced the largest increases in three important symptoms of financial distress: divorce rates, long commutes, and bankruptcy filings. Standard economic models, which ignore context, predict none of these relationships.

The upshot is that even though people near the top of the income ladder have enjoyed unprecedented prosperity since 1970, those farther down are finding it more difficult than before to make ends meet. The Legal Services Corporation was inadequately funded even at the time of its creation in 1974, but the organization's inability to meet its clients' needs has increased dramatically in the years since.

The good news is that a relatively simple set of policy changes could ease both revenue shortfalls and household budget distress without requiring painful sacri-

How Rising  
Income  
Inequality  
Threatens  
Access

Figure 1  
The Toil Index



Source: Robert H. Frank, "Supplementing Per-Capita GDP as Measure of Well-Being," American Economic Association Annual Meeting Papers, Denver, Colorado, January 7, 2011.

fices. Yet the people who could easily afford the tax increases necessary to pay for a more complete suite of social services, including competent legal representation for everyone, do not agree: they believe it would make it harder for them to buy the special extras they want. But that belief is incorrect. The problem, as noted, is that the standards that define "special" in many domains of consumption are highly elastic. When everyone spends more, those standards adjust accordingly. Much private spending is thus mutually offsetting, much like across-the-board increases in weaponry in military arms races.

Before even learning how long his archrival's yacht would be, the multibil-

lionaire shipping magnate Stavros Niarchos instructed his naval architect to design a yacht fifty feet longer than the one Aristotle Onassis was building. If Niarchos's goal was to own a boat that would seem special, he succeeded, at least temporarily. But in the process, each man ended up with a vessel too large to visit many of the most beautiful ports of the world. Each might well have been happier had he built a little smaller.

The central role of context in evaluation causes prosperous people to overestimate the pain they would experience from a tax hike. Most of the events in life that leave someone with less money—home fires, job losses, business losses,

divorces, serious illnesses, and the like – are ones that reduce his or her income while leaving others' incomes unaffected. In such cases, Americans really do find it more difficult to buy what they want. But matters unfold differently when everyone's spendable income goes down at once, as when all pay higher taxes.

Because across-the-board declines in disposable income don't affect relative purchasing power, prosperous families could actually pay higher taxes without having to make any painful sacrifices. Failure to recognize that simple fact has helped spawn the tax resistance that has made it so difficult to restore our crumbling public infrastructure and maintain support for the social safety net, including the Legal Services Corporation.

Most economists celebrate reliance on market prices in the name of efficiency. Many go on to argue that market-determined rates of pay also promote a measure of fairness, rewarding those who work hard and invest in developing their skills. This is all well and good. Yet it is an overreach to claim that market-determined rates of pay are morally just. It is one thing to say that someone who works 10 percent harder, or is 10 percent more skillful, than another should be paid 10 percent more. But in today's winner-take-all marketplace, those who are only 1 percent more talented often earn thousands of times more than their nearest rivals.

Even more troubling, evidence suggests that chance events play a much larger role in market-determined pay now than in the past. There are natural limits on talent and effort, and in markets that attract many thousands of contestants, a substantial number will be close to those limits. Even if luck counts for only a small fraction of total performance, most winners in the highest-paid markets will actually be slightly less hardworking and

talented than their rivals, but substantially luckier.<sup>14</sup> That's because the most talented, hardworking contestant will be about as lucky, on average, as her closest rivals, but among those rivals, there will be at least some who are extremely lucky, which is all it takes for one of them to end up in the winner's circle.

Today's growing pay disparities generate additional moral concerns by making it more difficult for low- and middle-income families to achieve basic goals. One of Charles Darwin's most important insights was that life is graded on the curve. The absolute quantity of resources someone has matters less than how what she has compares with her competitors. Only half of all children can attend schools in the top half of the school quality distribution, which, again, are almost invariably those located in more expensive neighborhoods. It's not reasonable to ask parents to set aside their goal of sending their children to the best schools they can. When growing income inequality induces others to bid more intensively for houses in better school districts, most parents see failing to do likewise as an unacceptable option. In their efforts to keep up, other important dimensions of their lives suffer.

The result is difficult to square with anyone's conception of a just society. Most moral systems embrace some version of the golden rule: do unto others as you would have them do unto you. Some people are economically disadvantaged because they are lazy or made foolish choices, but most are struggling through no fault of their own. It is thus no surprise that most people find it painful to witness someone stricken with a serious illness and unable to afford medical care; or that they are similarly troubled by the knowledge that many parents cannot afford to educate their children; or that they recoil from the sight of people having to

confront difficult legal disputes without being able to afford a lawyer.

Empathy for people in difficult situations helps explain why most industrial societies provide relatively generous social safety nets for their citizens. These programs typically include state-sponsored public education and universal access to medical care. The same concerns

help explain why America created the Legal Services Corporation. But this element of the American social safety net, which was never generously funded, is even more critically short of resources today. The nation can remedy the issue without having to demand painful sacrifices from anyone. Americans should support leaders willing to attack this problem.

#### ENDNOTES

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- <sup>4</sup> Adam Smith, *The Wealth of Nations* (1776).
- <sup>5</sup> George A. Akerlof and Robert J. Schiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton, N.J.: Princeton University Press, 2015).
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- <sup>8</sup> Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society* (New York: The Free Press, 1995). For a brief summary of the changes in the relevant market forces, see Robert H. Frank, *Success and Luck* (Princeton, N.J.: Princeton University Press, 2016), chap. 3.
- <sup>9</sup> Bruce Bartlett, “Are the Bush Tax Cuts the Root of our Fiscal Problem?” *The New York Times*, July 26, 2011, <http://economix.blogs.nytimes.com/2011/07/26/are-the-bush-tax-cuts-the-root-of-our-fiscal-problem/>.
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- <sup>11</sup> Patricia Cohen, “Haste on Tax Measures May Leave a Trail of Loopholes,” *The New York Times*, November 13, 2017, <https://www.nytimes.com/2017/11/13/business/economy/corporate-tax.html?rref=collection%2Fsectioncollection%2Fbusiness&r=0>.
- <sup>12</sup> Andrew Francis-Tan and Hugo M. Mialon, “‘A Diamond is Forever’ and Other Fairy Tales: The Relationship between Wedding Expenses and Marriage Duration,” *Economic Inquiry* 53 (4) (2014).
- <sup>13</sup> See Robert H. Frank, Adam Seth Levine, and Oege Dijk, “Expenditure Cascades,” *Review of Behavioral Economics* 1 (1–2) (2014): 55–73.
- <sup>14</sup> See, for example, Frank, *Success and Luck*, chap. 4.

# The Invisible Justice Problem

*Lincoln Caplan*

*Abstract: Understanding is sparse about the lives of people who are poor and struggling economically and who need help in solving a legal problem and don't get it. Politics over the past half-century has made them largely invisible. In that period, attacks of the right on the provision of access to justice have rested on the triumph of laissez-faire views: the fresh embrace of markets and the free-enterprise system. The upshot has been the winner-take-all economy of the past generation, in which improved access to justice is largely a nonissue. For access to become a priority of a national movement, it needs champions in national politics, not just in the legal profession. It needs powerful champions who advocate for greatly increased and improved access to justice as a primary American commitment.*

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Arleen Beale was evicted from her home for the first time when she was twenty-two. During the next sixteen years, she rented twenty places to live and was evicted repeatedly. She was thirty-eight in January of 2008, when the sociologist Matthew Desmond was observing her life and the lives of other poor people in Milwaukee, Wisconsin, to understand the trauma they were experiencing because of poverty. She was evicted from an apartment after her thirteen-year-old son and his cousin threw snowballs at one passing car too many. The driver stopped, chased the boys to the apartment, and kicked down the door. The damage led the landlord, after only eight months, to evict Arleen (a pseudonym to protect her privacy) and her two boys. Her younger son was five.

They moved to a homeless shelter until April and then to a house where the water was regularly turned off. The rent was \$525 a month: 84 percent of her monthly stipend from a Wisconsin family-aid program. The city found the house “unfit for habitation” so Arleen and the boys had to move again, this time to an apartment complex known

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as a haven for drug dealers. The new rent took 88 percent of her stipend.

Arleen fell behind on the rent in her second month there: she was short of cash after the state reduced her stipend when she missed an appointment with her welfare caseworker, and she spent half the stipend on the funeral of one of her sisters. Her landlord decided to evict Arleen because she would never be able to make up the \$875 she owed in back rent. Two days before Christmas, her eviction hearing was held in Milwaukee's small-claims court. Most of the tenants with hearings that day were black women, including Arleen. Black women were only about 10 percent of the city's population, yet made up 30 percent of the city's formally evicted tenants.<sup>1</sup> The percentage was higher if you counted informal evictions, like when a landlord wanted a tenant out without a basis for evicting her so he paid her to move.<sup>2</sup>

When a tenant has a lawyer in small-claims court, she is much more likely to get a favorable outcome. Legal Action of Wisconsin offers the Eviction Defense Project to low-income tenants in Milwaukee County who are facing eviction. The representation provided is limited in scope, meaning that volunteer lawyers trained by Legal Action provide representation to one or two clients each shift, in what the organization calls "a lawyer-for-the-day pro bono opportunity." Since the Eviction Defense Project began in January of 2017, its clients have fared notably better than other tenants in Milwaukee.

Christine Thompson, who was twenty-six, and her two sons, seven and three, were beneficiaries of the program. For seven months in an apartment owned by a man she was in a relationship with, they had lived rent-free as tenants at will. Either she or he could end the tenancy at any time. When she ended the relationship in 2017, he tried to end the tenancy.

He gave her five days' notice to vacate the apartment and filed a lawsuit against her alleging that she owed \$3,175 of past rent, although, among other problems, the apartment was infested with cockroaches and bedbugs, requiring Thompson to get rid of many of her family's belongings.

She had to appear in court three times, and each time had a different volunteer lawyer. The first time, the lawyer didn't succeed in working out a settlement with the landlord, but was successful in arguing before a court commissioner that a tenancy at will required twenty-eight days' notice and that the case warranted trial before a judge. The second time, the judge delayed trial for six days after the lawyer explained that Thompson had filed for bankruptcy, which warranted additional time for preparing arguments because wiping out her debts could keep the landlord from pursuing the eviction. The third time, the lawyer got the case dismissed and the record of it sealed, so Thompson would not have an eviction action against her to explain when looking for a new apartment.

No landlord would rent to her when the eviction proceeding and the lawsuit were pending. But ten days after the case was dismissed and the record sealed, she was in a new apartment, with money for the first and last months of rent and for a security deposit from a GoFundMe account set up after her case was publicized on public radio. She had been working as a server at a fast-food restaurant. She took a new job at a Ramada Inn as a server and a housekeeper and a second job at a company that tracks inventory for chain stores. About the new place, she said, "It's a whole lot better. No bugs. No other big problems. It's pretty nice. We feel secure."

Arleen Beale's case left her feeling the opposite. She went to her hearing unrepresented. The hearing officer was the

chief judge of the Milwaukee County trial court.<sup>3</sup> The judge was smart, with a record of fairness, but her job was to be a neutral arbiter, not to protect Arleen's interests.

When Arleen confirmed she was behind on rent, the judge proposed a settlement that would avoid putting another eviction on her record. The trade-off was that Arleen had to move out within a week. If she had had legal counsel, the lawyer could have negotiated a better deal and had her eviction record sealed. But tenants with lawyers in court were exceedingly rare.<sup>4</sup>

A national database of unsealed evictions gives them the same destructive power as criminal convictions: it provides an excuse for a prospective landlord to reject a tenant. Desmond wrote, "As landlords like to say, 'I'll rent to you as long as you don't have an eviction or a conviction.'"<sup>5</sup> He concluded, "The blemish of eviction greatly diminishes one's chances of securing affordable housing in a decent neighborhood, stymies one's chances of securing housing assistance, and often leads to homelessness and increased residential mobility."<sup>6</sup> Eviction, in other words, is a pitiless cause of poverty, not just a cruel effect.

Arleen's landlord didn't have a lawyer either, which was unusual since 90 percent of landlords have lawyers in eviction hearings. But she was savvy about landlord-tenant law and accepted the deal when Arleen promised to leave before the new year. In the following months, Arleen tried and failed to get a new apartment eighty-nine times.<sup>7</sup> She and her boys lived for almost another month in a shelter (a month was the maximum time allowed).

On the ninetieth try, Arleen finally got an apartment and they moved in, until her older son kicked a teacher at school (his fifth school in two years because of all the moves) and the landlord asked Arleen to

move again. For six weeks, they lived in a bedroom of a girlfriend's apartment, where the friend turned tricks for cigarette money. They ended up moving back to a shelter, with Arleen and the boys often hungry and broke. In *Evicted: Poverty and Profit in the American City*, Desmond describes what these losses were reducing them to: "she was teaching her sons to love small, to reject what they could not have."<sup>8</sup>

The lives of poor people are generally smaller: harder, sadder, and shorter. Many suffer from anxiety, depression, and other mental illnesses that go untreated along with physical ones. They can't afford to have regular check-ups, so doctors and dentists don't catch health problems that could be treated to stave off a crisis. They don't get treatment for problems they are aware of, which often get worse. Because of erratic, often sugar-filled diets, they are more likely to get diabetes and, as a result, to lose a limb or go blind. The consequences of poverty are well-known.

Yet the effects on the lives of people who are poor and struggling economically and who need help in solving a legal problem and don't get it are not well documented or understood. Desmond, a Princeton professor and a MacArthur and Pulitzer Prize winner, wrote a brilliant case study of Arleen's predicament, but he was foremost reporting on poverty, not focusing on the need for this kind of legal help. In his account about the relentless trauma of grinding poverty, there are scores of characters. Few are lawyers or legal problem-solvers, because few of the people he reported on had their help. Legal help can reduce the number of evictions, ease the consequences when they happen, and attack the causes. Countless other distresses for tens of millions of poor and low-income people bring the

same kind of misery. Lawyers or other problem-solvers can reduce that suffering by attaining some degree of justice.

These distresses and miseries are rarely in the news or even in the deeper form of news reported by scholars like Desmond. Of moments like Arleen's in small-claims court, there is no equivalent of Dorothea Lange's 1936 "Migrant Mother" photographs of Florence Owens Thompson, which made the Great Depression visible and indelible. Thompson, then thirty-two, looks much older in Lange's most renowned portrait of her. She looks desperate. She told Lange that she and her children, then in a migrant camp, "had been living on frozen vegetables from the surrounding fields, and birds that the children killed."

Lange worked in the tradition of Jacob Riis, whose muckraking photographs of New York City slums and sweatshops in the Gilded Age showed "How the Other Half Lives" and provided a model for generations of other photographers. John Dominis was one of them. A combat photographer during World War II, he became a celebrated photographer for *Life*, America's leading picture magazine for a generation beginning in 1950. In 1964, the magazine published his photo essay "The Valley of Poverty" about people living in the broken hollows of Eastern Kentucky. The photographs recorded what the essay's text called

an impoverished people whose plight has long been ignored by affluent America. Their homes are shacks without plumbing or sanitation. Their landscape is a man-made desolation of corrugated hills and hollows laced with polluted streams. The people, themselves – often disease-ridden and unschooled – are without jobs and even without hope.<sup>9</sup>

Dominis's photographs helped propel one of the country's most progressive

policies of the past century. A few months after *Life* published them, President Lyndon B. Johnson went to the area Dominis had photographed to publicize his administration's war on poverty. The main instrument for carrying out this legislation was the Office of Economic Opportunity (OEO), which soon included a legal component designed to ensure that the campaign to increase the income and opportunity of America's poor would serve their interests as they understood them, and not necessarily as the government did. Its job, explained OEO Legal Services director E. Clinton Bamberger Jr. in a speech in 1965, was "to provide the means within the democratic process for the law and lawyers to release the bonds which imprison people in poverty."<sup>10</sup>

How is it possible that legal problems of the poor and the economically struggling have become invisible? Politics over the past half-century has made them so.

Searing photographs of the poor are plentiful – the writer Adam Haslett called them "a morally indignant anthropology"<sup>11</sup> – and the images played a significant part in launching the war on poverty and, indirectly, the Legal Services program that grew out of that effort.

Earl Johnson Jr., who succeeded Bamberger as the program's director and later became a California judge, reported in 1968 that the program had funded "250 locally-operated programs in forty-eight states" that had "set up 850 Neighborhood Law Offices" and hired "more than 1,800 full-time attorneys." There were "almost as many lawyers" in Legal Services projects than were "employed by the United States Department of Justice and all of the United States Attorneys Offices around the nation."

These offices provided legal aid to the poor. They also sought to reform law that penalized people for being poor. Before

the Legal Services program, during the near-century that legal aid had existed in the United States as a largely voluntary effort by a small minority of lawyers, the Supreme Court heard one case brought by a legal-aid lawyer. Between 1965 and 1974, Legal Services lawyers became the voice of the poor at the Court – often, a persuasive one. The Supreme Court accepted 64 percent of the cases the Legal Services lawyers asked them to, a remarkably high rate. Of the 110 cases considered, they won 62 percent, with conservative justices supporting those victories as often as the liberals.

The landmark victories included:

*Shapiro v. Thompson*, where the Court struck down state residency requirements for obtaining welfare benefits, ruling that it was unconstitutional to deny them “to otherwise eligible applicants solely because they have recently moved from state to state or to the District of Columbia”;<sup>12</sup>

*Sniadach v. Family Finance Corporation*, where the Court struck down the practice of garnishing the wages of an alleged debtor before a hearing had determined that the person owed any money;<sup>13</sup> and

*Goldberg v. Kelly*, where the Court ruled that officials could not terminate a recipient’s welfare benefits without giving notice or providing the opportunity to challenge the termination in a hearing:

[the] interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State’s interest that his payments not be erroneously terminated, clearly outweighs the State’s competing concern to prevent any increase in its fiscal and administrative burdens.<sup>14</sup>

Legal Services lawyers developed a new field of poverty law while often obtaining justice in individual cases.

From the beginning, however, the Legal Services program faced angry opposition from lawyers, bar associations, and politicians where the program funded legal aid, and from members of Congress. The favorite punching bag was California Rural Legal Assistance (CRLA), a network of offices in rural parts of the state set up to represent migrant farm workers against agribusiness, to which the program gave a million-dollar grant (about \$7.5 million today). Ronald Reagan, as California’s governor, vehemently opposed the network and the legal counsel it provided. This campaign helped catapult him to national power.

The State Bar of California joined him in opposition, on grounds that CRLA represented “militant advocacy on a statewide basis of the contentions of one side of an economic struggle now pending.”<sup>15</sup> In response, Sargent Shriver, who led the Office of Economic Opportunity, ribbed the state bar’s president: “Look, I’ll make an agreement with you. If you will agree that no lawyers in California will represent the growers, I will agree that no legal services people will represent the pickers.”<sup>16</sup>

Shriver’s joke captured the essence of the access that Legal Services lawyers were providing, but that wasn’t what concerned their opponents. The California bar portrayed Legal Services as anti-capitalist. The only vindication of the bar’s view would be elimination of Legal Services’ part in reforming law that penalized people for being poor. The bar’s premise – that lawyers had the ability to reduce poverty or even end it by diminishing capitalism – was surely wrong. Legal Services lawyers made a serious mistake in not challenging that premise. Poverty in America is a product of the combination of capitalism and a limited welfare state. No amount of creative lawyering can eliminate poverty.

As Clinton Bamberger explained, the program's view of the Legal Services lawyer's role was that the "poor are least equipped with the resources and resilience to obtain fair treatment" and "competent advocacy in the form of a lawyer – an articulate friend – can improve the lot and dignity of the poor. The OEO seeks the achievement of some greater approximation of equal justice for the poor – equal significance as human beings – than has ever been achieved before." He went on,

Lawyers must excise the evils that prey on the poor – challenge that minority of disreputable and unethical businessmen until their values and their actions conform to the high standards of the remainder of the commercial community and pierce the complacency of those federal and state bureaucrats who administer benefit programs arbitrarily on the premise that what the statute calls a right is really only a privilege subject to their Olympian discretion.<sup>17</sup>

Opponents of the program successfully yoked these aspirations of Legal Services lawyers to a threat to capitalism itself. To shield capitalism, opponents sought to prohibit Legal Services lawyers from using law reform and other tactics to create a larger political coalition to work on reducing inequality and poverty. Legal Services lawyers did a poor job of articulating their role in that effort, but their opponents likely would have rejected any positive account of the Legal Services vocation, because challenges to "evils that prey on the poor" were challenges to entrenched power.

The hostilities led, in 1974, to the creation of the Legal Services Corporation (LSC) as an independent organization funded largely by the federal government. Its purpose is to award grants to organizations providing legal aid to people who

lack money to pay for lawyers as a means of solving problems – but no longer with the aim of alleviating, let alone eliminating, poverty.

In the final year of the presidency of Jimmy Carter, the LSC budget reached its high point, allowing it to support 325 grantees, with 1,450 offices and 6,200 lawyers. But in 1981, after Reagan defeated Carter to become president, he brought his antipathy to Legal Services to the White House. His team submitted to Congress a zero-budget request for the LSC to shut them down. As an independent agency, the LSC submitted its own request for an increased budget. With some political wrangling, the organization ended up with a 25 percent cut in funding.

The law establishing the LSC mentioned neither the poor nor poverty; it alluded only glancingly to that profound challenge and to those who endure it: "there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program."<sup>18</sup> Instead, the law focused on the "need to provide equal access to the system of justice," now shortened to "access to justice."

In a rule-of-law nation, relying on a constitution to ensure equal justice, this was arguably the more ambitious choice, embracing the prospect of protecting low-income as well as poor Americans from exploitation. It was a choice about justice, not only politics. Yet the LSC law did what the law in general as an expression of the limits of political will has often done: it shifted attention from a substantive, morally defined end, to neutral-seeming means of process. That allowed the nation to pat itself on the back for its commitment to equal justice while freeing itself from providing an integral part of what that entails. The law separated the

American commitment to providing legal services for people who are struggling economically from concern about economic hardship.

In 2014, Earl Johnson Jr. published a three-volume work called *To Establish Justice for All* in which he told the story of the nation's and the legal profession's failure, since the beginning of the war on poverty, to provide equal justice for the poor with the same success and broad commitment as for the rich. In his words, it is "the story behind our nation's tardy and as yet unfinished effort to make those people unable to afford lawyers equal to those who can – and thus for the first time to establish justice for that segment of the population."

On the one hand, he recounted, this unfinished effort is the result of "a contest over two visions of what poor people deserve in the way of legal aid. To analogize to health care – should the government only provide them a network of first aid stations or should it also give them access to specialists and hospitals when they have serious illnesses." The former are called "everyday" or "routine" problems. The latter involves "impact work" or "high-quality legal services," "promoting measures" for the protection of the poor and others struggling economically.

On the other hand, for the last half-century, "legal aid for poor people has been a major political and ideological battleground, a target of nearly constant assaults from the right wing of U.S. politics as well as some powerful politicians and wealthy campaign contributors."<sup>19</sup>

The political and ideological struggle has been between two relatively small groups who believe fervently in the rightness of their opposing views, with a vast group in between who are indifferent and have over the past half-century moved considerably to the right in their politics. That description applies to the American

body politic and to the American legal profession.

Still, gloomy as that picture is, it understates the challenge for anyone convinced that increased access to justice for the poor and those who are economically struggling should be a central American aim. In the past half-century, attacks of the right on the provision of this access have rested on the triumph of laissez-faire views: the fresh embrace of markets and the free-enterprise system. This began as an assertion of the need for reinvigorated competition in business in the 1970s and 1980s. It grew to become the dominant ideology in American politics.

The upshot is the winner-take-all economy of the past generation. This phenomenon has had the aura of economic destiny, as if the resulting extreme inequality is the product of beneficent economic freedom. But winner-take-all politics has brought it about. That entails the substantial shift to the right of both major political parties, the majority's support for tax, investment, and other policies favoring the wealthy, and the resistance to economic redistribution: to reducing inequality and its consequences, including by making rules of society fairer and their consequences more equal.

The current state of the legal marketplace reflects this phenomenon: The wealthy can afford to hire a lawyer when they need one. The well-off can afford to do so with budgeting. Except for hiring a lawyer to handle a limited transaction like buying or selling a house, relatively few others can. The marketplace has failed and, in the ongoing winner-take-all politics, improved access to justice is a nonissue, despite the difference it would make in many of the lives of the one hundred million or more Americans who face a serious civil legal issue each year. That is five times the number who benefited

from the Affordable Care Act, which was the most fiercely debated social legislation of the past generation.

In the microclimate of the politics about funding legal services, it was positive that the Republican-controlled board of the Legal Services Corporation during the George W. Bush administration was earnestly committed to the improvement of legal services, and laid the foundation for efforts by the Democrat-controlled board during the Obama administration to make the LSC the best-run version of itself in the history of the organization.

But the form of legal services at stake addresses “everyday” or “routine” problems. It largely excludes reform, or impact, work. The LSC supports an essential method of solving problems, but without the means of producing significant enforcement of existing legal rights or the aim of addressing poverty and economic hardship. By law, legal-aid organizations receiving LSC grants can’t take part in class action lawsuits. They can’t get involved in litigation or other activities about immigration, abortion, assisted suicide, desegregation of public schools, or civil rights of prisoners, the LSC itself, or (with narrow caveats) criminal cases. They can’t engage in legislative or regulatory lobbying, political activities like voter registration and promoting ballot measures like referendums, or welfare reform. They can’t engage in or encourage public demonstrations, picketing, boycotts, or strikes.

The restrictions are meant to keep legal-aid organizations focused on solving legal problems for individuals and families. They are meant to keep them from engaging in collective action to reform laws and public policies, from representing large groups of people in lawsuits challenging government agencies or major corporations, and from taking sides in disputes about the most divisive social

issues. They are intended to safeguard the status quo, which harms people who are poor or struggling economically.

In 2017, the LSC released its important report about “the justice gap”: the difference between low-income Americans’ need for help in dealing with calamitous legal matters and the resources available to provide that help.<sup>20</sup> Despite the high incidence of these problems and their often-devastating consequences, in nearly nine out of every ten instances, the people involved lacked the help of a lawyer or other problem-solver, leaving them at the mercy of courts and other government agencies with byzantine rules, insufficient resources, and short supplies of mercy.

The organization is punctilious about documenting growth in the distance between the goal of providing justice in the form of legal representation for poor and low-income Americans and the realization of that goal. But the combination of the struggle in vain of American Legal Services lawyers to meet the nation’s needs and the triumph of the conservative resistance to redistribution makes clear how triumphant the resistance has been. Even among leading advocates for redressing inequality, improved access to justice is barely on the agenda.

Access to justice has been separated in both rhetoric and reality from its fundamental purpose: ameliorating the economic insecurity and inequality at the core of the problem. By law, the LSC cannot directly concern itself with this fundamental justice gap, which has left the nation with a yawning justice problem.

In 2016, the American Bar Association (ABA) released its *Report on the Future of Legal Services in the United States*, the product of a two-year study by an ABA commission.<sup>21</sup> A reader would be forgiven for thinking that the report was about

the issue of access to justice. The report presents the access issue as a subset of the larger issue that the report addresses: the future of legal services in general in the United States, not only legal services for poor and economically struggling Americans.

A premise of the report is that the United States cannot solve the access-to-justice problem without understanding the state of the American legal profession and identifying where the access problem fits among the major problems facing the profession.

These problems include: the malfunctioning of the market for legal services in the United States, with many lawyers “unemployed or underemployed despite the significant unmet need for legal services”; the overburdened and often malfunctioning systems of state courts, in part because the “vast number of unrepresented parties in court adversely impacts all litigants, including those who have representation”; the transformation of this rule-of-law country into one frustrated by the rule of often arbitrary-seeming rules, in a system designed by lawyers for lawyers; and the undermining of public trust and confidence in the system and in the profession by the latter’s lack of diversity: of 1.3 million members of the bar in 2015, 88 percent were white and 12 percent minority, compared with the country’s population, which was 77 percent white and 23 percent minority.<sup>22</sup>

Each of these problems is real and serious. The report is well-done and useful. But as Rebecca Sandefur writes in this issue of *Dædalus*, “Lawyers’ fundamental interest is in maintaining their rights to define and diagnose people’s problems as legal, and to provide the services that treat them.” The ABA report acknowledges that the profession’s monopoly on legal services limits useful problem-solving for poor, low-income, and moderate-income

individuals and families: “The legal profession’s resistance to change hinders additional innovations,” the report says, including services by nonlawyers. The report strongly promotes innovations in technology that could displace lawyers. Yet the impression it leaves is that the legal profession cannot solve the access problem until it gets its own house in order. Even if unintentionally, that puts the interests of lawyers first.

In the half-century that the access problem has been left to lawyers to solve, the problem has gotten measurably worse, despite first-rate leadership of the LSC, substantial commitment of leading law firms and growing commitment of major corporations to the provision of pro bono legal services as a supplement to the work of legal-aid offices, growth in the use of technology to make legal-aid lawyering more efficient, and other positive steps. Most poor and low-income Americans, as well as the majority of moderate-income Americans, “do not receive the legal help they need.”

Politics over the past half-century has all but made these problems invisible, with the legal profession failing to make them visible again.

For access to justice to be a priority of a national movement, it needs champions in national politics, not just in the legal profession and among its allies. It needs champions who regard greatly increased and improved access as a primary commitment, not one of a list of needs whose fulfillment depends on solving a host of other problems of the legal profession. That is the conviction on which this *Dædalus* issue rests, as John Levi and David Rubenstein explain in their introduction.<sup>23</sup>

The purpose of access to justice is to ensure that people disadvantaged economically are not disadvantaged legally. That

entails: providing those who can use them effectively with information about the workings of the law and tools for navigating the legal process; changing legal procedures and proceedings and substantive law so they are only as complicated as they need to be and can be managed more easily by nonlawyers; deregulating some legal services, so consumers have access to more assistance and more advocacy from nonlawyer problem-solvers; reforming legal education so more law-school graduates are prepared to provide legal services and more can afford to take legal-services jobs; expanding the opportunities for non-legal services lawyers to take on legal-services representations; greatly increasing the public and philanthropic support for legal services; removing the bans on class actions and other forms of litigation and policy-making that penalize people for being poor; greatly strengthening state court systems; challenging corporate leaders to end forced arbitration and let their customers and employers use those systems to fight alleged corporate wrongdoing;

and according anyone without resources, as they deal with the challenge of a divorce, a natural disaster, a fraudulent telemarketer, or a health crisis, for example, the same dignity and respect as someone who is wealthy.

In *Winner-Take-All Politics*, the political scientists Jacob S. Hacker and Paul Pierson counsel that reversing the “economic hyper-concentration at the top” will require engaging in politics many more people “whose voices are currently drowned out”; developing new capacity “to mobilize middle-class voters and monitor government and politics on their behalf”; and reducing the ability of “entrenched elites to block needed reform.”<sup>24</sup>

For the access-to-justice issue to become salient again, it must become part of this effort. A key aspect of the agenda must be greatly increased and improved services for the poor, the economically struggling, and others who need help in solving a legal problem, and services to reform laws and other policies that penalize people for being poor. They must become visible again.

#### ENDNOTES

<sup>1</sup> Matthew Desmond, “Poor Black Women are Evicted at Alarming Rates, Setting Off a Chain of Hardship,” policy research brief (Chicago: MacArthur Foundation, 2014), [https://www.macfound.org/media/files/HHM\\_Research\\_Brief\\_-\\_Poor\\_Black\\_Women\\_Are\\_Evicted\\_at\\_Alarming\\_Rates.pdf](https://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf).

<sup>2</sup> Ibid.

<sup>3</sup> “Laura Gramling Perez: Biography,” *Urban Milwaukee*, <http://urbanmilwaukee.com/people/laura-gramling-perez/>.

<sup>4</sup> In 2016, the Milwaukee small-claims court had 13,457 eviction cases. Lawyers represented tenants in just 112 of them—less than 1 percent. In about 70 percent of the cases, often because the tenants were convinced the system was rigged, they didn’t even appear at their hearings. In 2017, the Eviction Defense Project increased the number of tenants with representation by about five hundred, making the total with lawyers about 4.5 percent of all tenants in court.

<sup>5</sup> Desmond, “Poor Black Women are Evicted at Alarming Rates.”

<sup>6</sup> Matthew Desmond, “Eviction and the Reproduction of Urban Poverty,” *American Journal of Sociology* 118 (1) (2012): 88–133, <https://scholar.harvard.edu/files/mdesmond/files/desmond.evictionpoverty.ajs2012.pdf>.

- <sup>7</sup> Matthew Desmond, *Evicted: Poverty and Profit in the American City* (New York: Penguin Random House, 2016). Lincoln Caplan
- <sup>8</sup> *Ibid.*, 240.
- <sup>9</sup> John Dominis, "The Valley of Poverty," *Life*, January 31, 1964.
- <sup>10</sup> Earl Johnson Jr., *To Establish Justice for All*, vol. 1 (Santa Barbara, Calif.: Praeger, 2014), 85.
- <sup>11</sup> James Agee and Walker Evans, *Cotton Tenants: Three Families*, ed. John Summers (Brooklyn: Melville House Publishing, 2013), 14.
- <sup>12</sup> Johnson, *To Establish Justice for All*, 170.
- <sup>13</sup> *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).
- <sup>14</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).
- <sup>15</sup> Johnson, *To Establish Justice for All*, 99.
- <sup>16</sup> *Ibid.*, 100.
- <sup>17</sup> E. Clinton Bamberger, "Legal Services Program of the Office of Economic Opportunity," *Notre Dame Law Review* 41 (6) (1966): 847–848.
- <sup>18</sup> Legal Services Corporation Act, 42 U.S.C. § 2996b (1974); see <https://www.lsc.gov/about-lsc/laws-regulations-guidance/lsc-act>.
- <sup>19</sup> Johnson, *To Establish Justice for All*, prologue.
- <sup>20</sup> Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (Washington, D.C.: Legal Services Corporation, 2017).
- <sup>21</sup> American Bar Association Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (Chicago: American Bar Association, 2016).
- <sup>22</sup> *Ibid.*, 5, 31.
- <sup>23</sup> John G. Levi and David M. Rubenstein, "Introduction," *Dædalus* 148 (1) (Winter 2019).
- <sup>24</sup> Jacob S. Hacker and Paul Pierson, *Winner-Take-All Politics* (New York: Simon and Schuster, 2011), 303.

# Reclaiming the Role of Lawyers as Community Connectors

*David F. Levi, Dana Remus & Abigail Frisch*

*Abstract: With the prospect of nonlawyers stepping in to do low-fee legal work, how should the legal profession conceive of its relationship to that work and ensure that nonlawyers bolster rather than undermine the value that lawyers add to society? Lawyers should reclaim their role as connectors in their communities: interstitial figures with the knowledge, skill, and trust to help resolve disputes, move beyond stalemates, dispel tensions, and otherwise bring people and resources together in productive solutions. They should do so, at least in part, through pro bono work for poor and low-income clients. It would be a mistake to stand in the way of innovative solutions to the justice gap. But it would also be a mistake, and a deep loss, if lawyers – particularly those who do not normally represent poor and low-income clients – turned their backs on the poor and low-income segments of our society.*

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For many years, there has been a serious debate about the legal profession's exclusive role in the market for legal representation. The debate has focused on how that role factors into the systematic underrepresentation of poor and low-income people. One side argues that all law-related problems, for all people, require a lawyer's training and unique social role. As such, law reformers must address the gap in access to justice within the bounds of the legal profession. The other side contends that, whatever the benefits of professional training and oversight in theory, in reality, lawyers have failed to address the justice gap. As such, to make way for innovative solutions, law reformers should not defend the profession's exclusive charter, or should not defend it beyond the work lawyers actually perform. Both sides have a point; both sides also oversimplify. The set of solutions proposed by each fails to account for changing social and professional realities, and risks shortchanging important values.

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A useful starting point is recognizing that lawyers and state bars will not continue to corner the market for work they do not do. The question is no longer whether nonlawyer providers (including paraprofessionals and artificial intelligence technologies) should enter the market for legal services; we are already past the point of no return. Non-lawyers have arrived in many places, and their arrival is imminent in many others. The question now is how to ensure that nonlawyer assistance serves, rather than harms, individual and societal interests. In particular, when faced with the prospect of others stepping in to address low-fee legal work, how should the profession conceive of its relationship to that work and ensure that nonlawyers bolster rather than undermine the value that lawyers add to society?

We propose that lawyers claim an essential role as connectors in their communities: interstitial figures with the knowledge, skill, and trust to help resolve disputes, move beyond stalemates, dispel tensions, and otherwise bring people and resources together in productive solutions. They should do so, in part, through pro bono work for poor and low-income clients. It would be a mistake to stand in the way of innovative solutions to the justice gap. But it would also be a mistake, and a deep loss, if lawyers – particularly those who do not normally represent poor and low-income clients – turned their backs on the poor and low-income portion of our society.

In 1950, Justice Robert H. Jackson described a lawyer who “understands the structure of society and how its groups interlock and interact,” and thereby gains a nuanced understanding of the role of the law in that community. That lawyer understands how the community “lives and works under the law and adjusts its conflicts by its procedures,” and

also understands “how disordered and hopelessly unstable it would be without law.”<sup>1</sup> Jackson’s description sets a challenge for the modern bar to reclaim that understanding by representing all segments of the society.

What the existing debate misses is that providing legal services to poor and low-income clients not only deepens the kind of community understanding that Justice Jackson highlighted, but also gives the lawyer an opportunity to learn about and embody the profession’s fundamental systemic role. The legal needs of poor and low-income clients often entail complex work, significant legal expertise, and professional judgment.<sup>2</sup> This work can also require an understanding of multiple layers of regulatory bodies and processes, and of possible public and private resources and interventions. This means that serving poor and low-income clients can create meaningful opportunities for lawyers to carry out their integral societal role through law reform advocacy. The bar should reinforce the underused idea that serving the community from within is meaningful education for lawyers, and is at least as worthy of continuing legal education credits as the refresher courses that most state bar associations require lawyers to take periodically.

Scholarly literature about the legal profession and the justice gap is generally divided into two camps. One side urges that only lawyers can competently and ethically perform legal work, and that maintenance and protection of the legal profession’s monopoly is necessary to the fair and equal treatment of poor and low-income members of society.<sup>3</sup> The other side asserts that the profession is mere cover for lawyers’ self-interest: a means of suppressing competition and increasing fees. The first camp argues that lawyers must address the justice gap

through increased pro bono or low bono services. The second camp argues that lawyers have proven themselves unwilling to perform such work and that the only solution is to deregulate provision of services for poor and low-income clients, allowing for less expensive providers who are not lawyers.<sup>4</sup> Behind this debate lurks further skepticism about lawyers' exclusive claim over even the most lucrative legal services, given the lower cost and perhaps comparable quality of nonlawyer alternatives.

This oversimplified, binary understanding of the problem produces oversimplified solutions.<sup>5</sup> There is no question that the profession is falling short in the provision of legal services to poor and low-income people, and that it can no longer maintain a monopoly over work that it has long failed to perform. Even if all lawyers were entirely devoted to addressing the justice gap with some portion of their time, the depth and breadth of the gap make it unlikely that the profession could address it on its own. But, as we will explain, there is also no question that the legal profession does some things very well, such that taking lawyers out of the picture for poor and low-income clients would impose great costs on society.

To start, the profession trains lawyers and judges to understand the importance of legal interpretation by persons deliberately independent from market forces and political pressures: to push against the rule of rulers and toward the rule of law.<sup>6</sup> The profession also trains lawyers and judges to operate according to norms that are counterintuitive to nonlawyers but that are at the basis of our legal system. For example, our society puts a high value on individual liberty: all criminal defendants, even those who appear guilty of heinous crimes, have important rights deserving of protection. Lawyers and judges fulfill structural roles that

reinforce the preference to see a guilty person go free rather than an innocent one put behind bars, even for the defendants who make that choice feel wrong.

Regarding access to justice, the legal profession can produce lawyers and judges who have a day-to-day understanding of the entire range of social life in a community. The profession can produce lawyers who, in the Jacksonian tradition, serve and embrace "persons of every outlook" and background.<sup>7</sup> These lawyers can better understand what it means to be poor or disabled or a member of a minority group and, at the same time, can understand how aggregations of power and wealth are organized and motivated in business, government, and elsewhere. They can put this broad knowledge and experience to good use in solving difficult and recurring social problems for the benefit of individuals and the community. In this way, efforts to troubleshoot the profession's shortcomings should challenge lawyers to live out the notion that they are an interstitial, unifying, stabilizing force in society.

Cost is certainly part of the problem and, for simple and routine tasks for which low-cost nonlawyer alternatives can be effective, cost can be part of the solution. Promising examples include interactive computer programs that produce legal forms, automated approaches to dispute resolution, and nonlawyer advocates trained to do repetitive work, like consumer bankruptcy filings and restraining orders in criminal and family cases.<sup>8</sup>

For more complex matters, however, a single-minded focus on cost shortchanges clients, lawyers, and society. Cost might not even be the gateway problem for many people in need of legal help. Empirical research suggests that more salient problems could be "lack of awareness or understanding that a problem is legal in

nature, lack of belief that a lawyer could help, embarrassment, perceived futility, fear, and resignation.”<sup>9</sup>

Even when cost is a core problem, it is not clear that nonlawyer alternatives will be less expensive.<sup>10</sup> Although lawyer earnings do not necessarily indicate the cost of services, the stratified market for legal compensation lends useful insight. If a “typical” lawyer salary ever existed, it disappeared twenty years ago when some Silicon Valley firms began paying associates \$125,000 annually.<sup>11</sup> Since then, associate salaries have had two tiers, a divide that grew during the 2008 recession as law firms merged and dissolved, and many clients increased pressure to keep costs low by outsourcing work to temporary contract lawyers, nonlawyers, and technology.<sup>12</sup> By 2014, the higher average salary was around \$160,000 and the lower around \$55,000 – not far from the \$50,000 estimated median salary for paralegals or the \$48,000 median for legal services attorneys.<sup>13</sup> Some lawyers and nonlawyers now work for less than they did a decade ago. In many locations, lawyers may be as willing to step in to handle low-fee work as nonlawyer paraprofessionals, though this point may be moot because of user-friendly and accessible technology.

Most important, cost-based solutions to the justice gap assume that the legal problems faced by poor and low-income people are the simplest and least important for lawyers to understand. But that perceived correlation does not hold up. Wealthy and indigent clients alike have some matters that are complex or of profound social consequence, and other matters that are simple and routine. Immigration, government benefits, child custody, housing, and civil rights work for poor and low-income clients may require understanding not just the particulars of the case, but also the context in

which the case arises. Lawyers who understand why these legal issues take shape have a road map to better navigate the path toward lasting solutions for their clients. And lawyers who undertake the further task of finding general solutions, whether through regulation, legislation, or class-wide injunctions, will call on sophisticated legal skills. Focus on cost, by contrast, has the troubling potential to define a lawyer’s professional obligations and abilities in terms of the client’s ability to pay, rather than in terms of the skills necessary to resolve the matter.

Clients and lawyers both stand to gain by expanding incentives for lawyers to seek out the complex cases to which professional counsel, competence, problem-solving creativity, and judgment add value. Clients gain access to the legal services they need, but also access to lawyers who can “distinguish legal from non-legal problems” and help with both, and who offer the important, nontechnical, non-cost-related attributes of “trustworthiness and ability to provide a close and personal relationship.”<sup>14</sup> Technologies and market-based solutions do not and cannot provide clients with this combination. Lawyers, for their part, gain good legal work and valuable experience. They derive significant satisfaction from solving problems for individuals who are in desperate straits. Society gains citizen lawyers who can guide the community’s overall approach to deep social problems that underlie specific cases.

For this reason, when experienced attorneys share stories about their most “important” cases, they often speak about pro bono matters or something similar. Emphasizing the educational, personally gratifying, and socially valuable aspects of service – and increasing its practicality – could drive essential change in how lawyers regard pro bono work and the amount of time they commit to it.

Justice Jackson captured the ideal of the interstitial lawyer with the paradigm of the “county-seat lawyer.” He lamented the mid-twentieth-century disappearance of lawyers who “did not specialize,” did not “pick and choose clients,” and “rarely declined service to worthy ones because of inability to pay.” Justice Jackson credited the “free and self-governing Republic” to the lawyer from a small town who “lives in a community so small” that it was possible to “keep it all in view.”<sup>15</sup> We find an important truth in this vision, one worth reclaiming and implementing. Part of the solution to the justice gap is to reinvigorate professional enthusiasm for traditional community obligations, by supporting the important practical and educational benefits available through legal work for all segments of society. That reframes the discussion about access to justice and the professional monopoly in a way that holds the profession accountable to its ideals. It offers an old and honorable vision of how the profession can renew itself. By clarifying that the struggle is – at least in part – about preserving the profession’s core tenets, fewer lawyers will be able to convince themselves they do not belong in the fray.<sup>16</sup>

Another part of the task is to identify matters for which professional judgment and skill are especially critical, and to abandon staunch monopolistic protections of work that does not call upon these qualities. Regardless of cost, does a matter affect pressure points in the system that require professional expertise to find good solutions on an individual and system-wide level?

If not, it should be opened to nonlawyer competition. Technology and nonlawyers are entirely appropriate for routine legal matters that do not require extensive professional judgment or understanding. These solutions exist and continue to grow.

If so, the legal profession ought to protect this work, which calls for lawyers’ acumen, expertise, and judgment, by giving lawyers incentives to seek it out. The increasingly successful law school clinical model – one study estimates that there were 1,433 clinics at American law schools in 2017, compared with 809 just a decade ago – reflects the Jacksonian ideal in many ways.<sup>17</sup> Students must develop a broader view of the set of legal problems clients face and come up with comprehensive solutions that rely on a variety of skills and knowledge about underlying causes and conditions.<sup>18</sup> Some law firms have taken steps in this direction by implementing programs that systematically build pro bono assignments into each lawyer’s standard workload.

The profession should build on this momentum, and state bars are in the best position to do so. One growing but underused solution is to offer continuing legal education credit for pro bono work. As of 2018, twelve states already do this, and four of those began doing so in the last couple of years.<sup>19</sup> Notably, attorneys in states featuring such programs do more pro bono work than attorneys in states that do not.<sup>20</sup>

The traditions of the legal profession encourage each lawyer to join the ranks of the many “unsung heroes of the Republic” who demonstrate heroism in their work as lawyers. The country needs to expand their numbers and extend their influence. Without the commitment of the legal profession to preserve and expand the profession’s broader interstitial role, the United States will lack the leadership it needs to address and bridge the justice gap.

ENDNOTES

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- <sup>1</sup> The quotations in this paragraph are from Robert H. Jackson, “The County-Seat Lawyer,” *American Bar Association Journal* 36 (1950): 497.
- <sup>2</sup> For our purposes, it is unnecessary to define or quantify legal complexity. As an example, however, the Legal Services Corporation sorts its cases between “limited service cases,” for matters that “require, on average, less staff time and resources to complete,” and “extended service cases,” for everything else. In 2017, 76.2 percent of reported cases were designated as limited service, and the remaining 23.8 percent designated extended service. Legal Services Corporation, *By the Numbers: The Data Underlying Legal Aid Programs, 2017* (Washington, D.C.: Legal Services Corporation, 2018), 40–42, <https://www.lsc.gov/media-center/publications/2017-lsc-numbers>.
- <sup>3</sup> See Lawrence J. Fox, “Can Client Confidentiality Survive Enron, Arthur Andersen, and the ABA?” *Stetson Law Review* 34 (1) (2004): 156; Lawrence J. Fox, “Ethics 2000: Is It Good for the Clients?” *Professional Lawyer* 12 (3) (2001); and Lawrence J. Fox, “Pro: Taking a Stand for Professionalism,” *Pennsylvania Lawyer* 14 (1992): 16.
- <sup>4</sup> See Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1988), 184–186; Richard L. Abel, *American Lawyers* (New York: Oxford University Press, 1989), 20; Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 88; Deborah L. Rhode, “Access to Justice: Connecting Principles to Practice,” *Georgetown Journal of Legal Ethics* 17 (2004): 371–372, 409; and Deborah L. Rhode, “Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice,” *New York University Review of Law and Social Change* 22 (1996): 709–713.
- <sup>5</sup> Long ago, Robert Gordon recognized the importance of avoiding an oversimplified understanding of the modern lawyer’s societal role. See, for example, Robert W. Gordon, “The Citizen Lawyer: A Brief Informal History of a Myth with Some Basis in Reality,” *William and Mary Law Review* 50 (2009): 1203–1206.
- <sup>6</sup> This independence is critical for the rule of law in a liberal democracy; indeed, every liberal democracy in the world has some form of an independent legal profession. Robert Gordon observes that case studies show that lawyers have been a “spearhead of bourgeois liberalism” for “societies that have succeeded in building liberal institutions like parliaments, competitive elections, and relatively independent courts.” Robert W. Gordon, “Are Lawyers Friends of Democracy?” in *The Paradox of Professionalism: Lawyers and the Possibility of Justice*, ed. Scott L. Cummings (New York: Cambridge University Press, 2011), 32.
- <sup>7</sup> Jackson, “County-Seat Lawyer,” 497.
- <sup>8</sup> For discussion of the aptitude of technology-based legal service providers, see Dana A. Remus and Frank Levy, “Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law,” *Georgetown Journal of Legal Ethics* 30 (2017): 518–519.
- <sup>9</sup> Dana A. Remus, “Reconstructing Professionalism,” University of North Carolina Legal Studies Research Paper No. 2676094 (Chapel Hill: University of North Carolina, 2015), 6.
- <sup>10</sup> For further discussion of this assertion, see *ibid.*, 40, notes 223–224.
- <sup>11</sup> David Leonhardt, “Law Firms’ Pay Soars to Stem Dot-Com Defections,” *The New York Times*, February 2, 2000, <https://www.nytimes.com/2000/02/02/business/law-firms-pay-soars-to-stem-dot-com-defections.html>. In the late 1990s, legal salaries fit a bell curve with a \$50,000 median. National Association for Law Placement, “What Do New Lawyers Earn? A 15-Year Retrospective 1994–2008,” *Bulletin*, August 2009, <https://www.nalp.org/aug09newlawyersal>.
- <sup>12</sup> For detail about the legal market’s postrecession structure and its effect on salaries, see National Association for Law Placement, “Top Salaries for First-Year Associates Remain Flat at \$160,000, But Prevalence Shrinks as Large Law Firm Market Becomes Less Homogenous,” press release, October 9, 2014, <https://www.nalp.org/uploads/PressReleases/2014ASSR>

- PressRelease.pdf; and National Association for Law Placement, “Salary Distribution Curves,” <https://www.nalp.org/salarydistrib> (accessed September 2, 2018). For discussion of client pressure to cut costs, see Remus and Levy, “Can Robots Be Lawyers?” 530–531. As for temporary contract attorneys, Anna Stolley Persky posits that clients focus more on reducing costs and “less on the pedigree of the people who conduct research and reviews.” Anna Stolley Persky, “Under Contract: Temporary Attorneys Encounter No-Frills Assignments, Workspaces,” *Washington Lawyer* 28 (2014): 26.
- <sup>13</sup> National Association for Law Placement, “Top Salaries”; United States Department of Labor, Bureau of Labor Statistics, “Occupational Employment and Wages, May 2017: 23-2011 Paralegals and Legal Assistants,” <https://www.bls.gov/oes/2017/may/oes232011.htm>; and National Association for Law Placement, “Findings from the NALP/PSJD Public Service Attorney Salary Survey,” *Bulletin*, June 2018, <https://www.nalp.org/o618research>.
- <sup>14</sup> Remus, “Reconstructing Professionalism,” 25.
- <sup>15</sup> Jackson, “County-Seat Lawyer,” 497.
- <sup>16</sup> This framing addresses a practical challenge that Deborah Rhode has identified: specifically, that lawyers “do not lack for reform strategies. The challenge remaining is to convince lawyers that they have a stake in that agenda for change.” Deborah L. Rhode, *The Trouble with Lawyers* (New York: Oxford University Press, 2015), 8.
- <sup>17</sup> David A. Santacroce and Robert R. Kuehn, *Report on the 2007–2008 Survey* (Ann Arbor: Center for the Study of Applied Legal Education, 2017), 8, <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>; and Robert R. Kuehn and David A. Santacroce, *The 2016–17 Survey of Applied Legal Education* (Ann Arbor: Center for the Study of Applied Legal Education, 2007), 8, [http://www.csale.org/files/Report\\_on\\_2016-17\\_CSAL\\_Survey.pdf](http://www.csale.org/files/Report_on_2016-17_CSAL_Survey.pdf).
- <sup>18</sup> Law students in the Durham Eviction Project (cosponsored by the Duke Civil Justice Clinic and Legal Aid of North Carolina) understand their clients’ needs to be sure, but further, they obtain a deep understanding of the landlords’ needs to identify legal and nonlegal issues and negotiate efficient, effective solutions. Charles R. Holton (director, Civil Justice Clinic, Duke Law School), conversation with Abigail Frisch, Durham, North Carolina, March 26, 2018. See Max Blau, “It Does Something to Your Soul When Everyone Losing Their Homes Looks Like You,” *Politico Magazine*, May 24, 2018, <https://www.politico.com/magazine/story/2018/05/24/what-works-next-durham-evictions-218416>.
- <sup>19</sup> Michael Smith (special assistant to the president, Legal Services Corporation), e-mail message to authors, March 16, 2018. States can determine how many pro bono hours equate to the typical continuing education hour. Lawyers in Colorado, for example, receive one credit for every five billable hours representing low-income clients. Continuing Legal and Judicial Education Committee, *Rule 250: Mandatory Continuing Legal and Judicial Education* (Denver: Colorado Supreme Court, 2018), 17, [http://www.coloradosupremecourt.com/PDF/CLE/CRCP250\\_Mandatory\\_Continuing\\_Legal\\_and\\_Judicial\\_Education\\_July\\_2018.pdf](http://www.coloradosupremecourt.com/PDF/CLE/CRCP250_Mandatory_Continuing_Legal_and_Judicial_Education_July_2018.pdf). The American Bar Association recently added pro bono work as an optional qualifying activity to fulfill its suggested fifteen-hour annual continuing education requirement, but it took “no position on whether such credit should be granted.” Standing Committee on Continuing Legal Education, *Model Rule for Minimum Continuing Legal Education* (Chicago: American Bar Association, 2017), 13, [https://www.americanbar.org/content/dam/aba/directories/policy/2017\\_hod\\_midyear\\_106.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2017_hod_midyear_106.authcheckdam.pdf).
- <sup>20</sup> Pro bono work in Washington, Tennessee, and Wyoming—where pro bono work earns continuing education credits—surpassed that of the twenty-one other states surveyed. Standing Committee on Pro Bono and Public Service, *Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers* (Chicago: American Bar Association, 2018), 38, [https://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/ls\\_pb\\_supporting\\_justice\\_iv\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.authcheckdam.pdf).

# More Markets, More Justice

*Gillian K. Hadfield*

*Abstract: People lack access to justice because the law is complex and expensive to use. Basic mechanisms of market competition can reduce both the complexity and the cost of law while securing law's principal function in society, which is to coordinate a community around a shared understanding of what is and what is not allowed. Creating markets for rules will make for better law and better legal systems by allowing people and organizations to select the rules and dispute-resolution processes that are best for them in a market in which providers of regulation compete on terms of cost and quality. Legal rules require special protection to make sure they deliver a more just, equitable world for all; this protection can be provided through a "superregulator," which licenses providers of law and legal services to sell their services in competitive markets.*

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In 1852, when the miners of Jackass Gulch needed a set of rules to manage the inevitable disputes that arose after hordes of hopefuls rushed in to stake a claim for California gold, they came up with six simple rules about how to stake and hold a claim. Everybody who wanted to pan for gold could understand them. Resolving disputes was quick and clear.

In the time of the California gold rush, the rules of mining mattered to ordinary people. Simple rules made the law accessible and useful. Today, the law of mining is the preoccupation, mostly, of commercial mining companies. Contemporary mining law is awash with statutes, regulations, and procedures, all adjudicated in case law accumulated over more than a century. It is no longer just about who gets the claim. There are rules about mine safety, environmental management, the interests of states and Native Americans, and more. Understanding the law of mining requires sophistication about a topic that fills volumes in a law library.

Today, most law has undergone the same transformation as mining law: law is complex for every-

one, big or small, whether people are seeking divorce, protection against eviction, or unfair treatment at work. It is complex for a small business trying to comply with regulations, manage employment relationships, and avoid legal liability. It is complex for anyone concerned about privacy or the security of their data online. Up to a point, more complex law helps address more situations and concerns. Yet when law becomes too complex, it stops performing its key function: to coordinate a community around a shared understanding of what is and what is not allowed.

As the law becomes more complex, a new and significant inequality emerges between those who can navigate legal rules and procedures and those who cannot. People who write the complex terms of service, consumer contracts, employment agreements, organizational policies, and administrative rules that govern daily life have a much clearer understanding of those rules than those who must “click to agree” to them. People and organizations that can retain expensive lawyers for help in navigating and sculpting complex legal terrain have an advantage over those who must muddle through alone, barely comprehending the landscape.

Calling for simpler rules is easy and tempting: Simplify the tax code! Use plain language! Cut the red tape! But these calls rarely succeed. They do not address the basic pressures creating greater complexity. To generate stable, simpler legal systems, we need to do what works to manage complexity in other segments of modern life: harness the incentives of markets. Competitive markets prompt the designers of smartphones and laptops, for example, to make them able to do more, without becoming harder to use. Creating markets for rules can similarly prompt private legal designers to develop better laws and better systems for the

users of law. Markets for legal rules make sense only if they can deliver a more just, equitable world for all, and if they can be made truly competitive. In many cases, this can and should be done.

At bottom, the law is a set of rules for structuring relationships among people, organizations, businesses, and governments. It helps resolve disputes among those actors and makes it easier for people and organizations to plan by making behaviors easier to predict. Accessing the law means having the capacity to prod others – employers, government agencies, neighbors, businesses, prosecutors, police, school officials, landlords – into following the rules. Securing that capacity takes knowledge: understanding the rules and how to take steps needed to activate and shape the behavior of officials charged with enforcing the rules.

The more complex rules and processes are, the costlier it is to secure the capacity to ensure that the relationships are structured by the rules. More complex rules and processes require more steps and inputs; more steps equal more time and money to achieve an objective. More complex systems present more opportunities for errors, meaning that getting a rule enforced costs more. More complex systems present more points of potential disagreement and dispute, creating yet more steps and complexity. And, most important, more complex systems require more expertise and specialization, which means people can’t access the system of rules if they can’t afford to hire expert help.<sup>1</sup>

Reducing the cost of accessing law requires reducing law’s complexity and the cost of specialized help. Reducing complexity is really about *optimizing* complexity. Eliminating all complexity would eliminate much of the benefit of law,

because it would make rules unresponsive to the subtleties, ambiguities, and varieties of life. For example, landlords could never/always evict someone, fathers would always/never get custody of children, and businesses would always/never be responsible for injuries suffered by users of their products. Since the kinds of laws people want to live with require some complexity, they also entail costly specialized help, consuming resources in the training and compensation of people who develop the expertise needed to manage the complex rules and systems.

A key reason that access to justice is out of reach for many people is that contemporary legal systems are highly complex.<sup>2</sup> Many lay people find complex and difficult to understand the procedures needed to do what lawyers see as routine: for example, when they seek to expunge a criminal record, respond to an eviction notice, or challenge a child support order.

Much of the law that governs everyday actions like buying and selling is contained in contracts and other documents produced by private providers of goods and services. Most legal documents are written in legalese that most Americans, who read on average at an eighth-grade level, cannot really understand. The terms of service that shoppers “click to agree to” average two thousand words. Online user license agreements are routinely written at college reading levels.<sup>3</sup> Health plan guidelines are written at advanced college levels.<sup>4</sup> One study estimated that it would take someone approximately 250 hours a year, or forty minutes a day, every day, to read all the privacy policies he or she encountered online – and the vast majority would still not understand what they had read.<sup>5</sup>

The procedures to interact with large organizations – employers, schools, city officials, courts, administrative agencies – can be bewildering to ordinary people.

A 2015 study found that one of the most common provisions in the contracts between such organizations and their consumers and employees – an arbitration clause – might as well be written in a foreign language: only 9 percent of people presented with a standard credit card contract containing an arbitration clause could answer these two questions correctly: Did the contract you read contain an arbitration clause? (Yes.) If you sign this agreement and the credit card company overcharges you, can you take that dispute to court? (No.)<sup>6</sup>

Procedures can be complex even when rules are not. When the Department of Justice investigated municipal court practices in the City of Ferguson, Missouri, after the Michael Brown shooting in 2014, investigators uncovered a system not only rife with racial bias and constitutional violations, but also one in which “it is often difficult for an individual who receives a municipal citation or summons . . . to know how much is owed, where and how to pay the ticket, what the options for payment are, what rights the individual has, and what the consequences are for various actions or oversights.”<sup>7</sup>

Producing simplicity is not simple. Legal reasoning tends toward complexity: litigants press alternative interpretations of language to achieve the outcomes they seek, judges attempt to reconcile general language with the infinite variety of concrete circumstances they must judge, and multiple sources of law arise over time and require reconciling to maintain coherence and minimize conflicts.<sup>8</sup>

This complexity is created in a closed system that gives providers of law very little feedback on how well they are doing in fulfilling the needs of those who use the system. Legal systems are controlled and staffed almost entirely by lawyers, who all receive similar education, take the same tests to achieve entrance to the

profession, and are bound by the same professional rules, ethics, and culture.<sup>9</sup> They usually work in environments that are almost exclusively populated by other lawyers. Their conversations and debates make sense only to the legally trained. In such a closed environment, the legal rules and procedures these lawyers and judges develop are produced with essentially zero feedback from the people affected by those rules: people, businesses, and organizations. Lawyers and judges face only muted costs when the legal system doesn't work well for the people who use it: people might complain, but most people who need the law have nowhere else to turn, so their complaints can be ignored.

For our legal systems to become simpler and less expensive, users of law must be able to provide the kind of feedback that creates incentives for providers to do better.

Competitive markets generate these kinds of incentives. Producers lose customers if they ignore information about what the consumers want. They increase revenue when they attract new users by designing and delivering goods or services that better meet users' needs. Consider smartphones again: The ones that most people carry are produced in relatively competitive markets. The producers of smartphones face strong incentives to design devices that can respond to more complex online environments, diverse users, and heightened consumer expectations, while simultaneously being easy to use. The market for smartphones creates incentives to *optimize* the complexity of those devices: to balance the benefits of increased complexity (devices able to do more things) against the costs (devices that are too confusing to use). Simplicity is the hard-won result of competition to give consumers what they want.

Much contemporary law, by contrast, is designed in a bubble. Whatever designers produce – courts, legislators, lawyers – is tested against feedback only from other lawyers. Unless those designers have their feet held to the fire – for example, if they stand to lose users and revenues because the legal forms they design are too hard to use or they offer inefficient procedures for resolving disputes – there is little hope of resisting the tides of complexity.

In practice, markets for law already exist. Contracting parties can choose the state law they want to govern their contracts, although in business-to-consumer markets (as opposed to business-to-business markets) the choice is largely made by the business and not the consumer. There is a similar market for corporate law in the United States: companies can incorporate under the corporate law of a state of their choosing.

The current “competitors” in these markets are public actors: state legislatures and courts. To the extent they have an incentive to drum up business for their courts and legal profession, they compete in the market for contracts and in the market for incorporating companies. Delaware, for example, wins the competition for incorporation by providing a highly competent bench and bar to judge corporate law cases, with many corporations choosing to incorporate in Delaware instead of their home state. New York competes for the business of supplying commercial contracting law by authorizing its courts to decide cases even if the parties to the contract have no connection to New York.

But public actors, such as courts and legislatures, are not strongly competitive. A more fully market-based system of contract law or corporate law would open up competition to provide rules and procedures to private actors, whether they

operate for profit or are not-for-profit. A private company could sell its services to transacting partners who wanted a less complex set of rules and procedures than that offered by state providers of law, like California or New York. The company could offer a suite of services that accomplish the objectives of contract law, like coordinating expectations between parties, managing disagreements that arise about what was intended or how to respond to unanticipated circumstances, and determining a fair allocation of risks and costs when things go awry.

The company's tools for achieving those objectives might look similar to those familiar from state law, or not. The company might use pre-announced rules and doctrines, as a state does when it provides law, or it might analyze data from the experiences of consumers and potential consumers to determine best practices to achieve these objectives. Dispute resolution might be aided by algorithms that reach smarter solutions to reduce the costs of conflict. The services such a company offered might involve full-scale litigation like modern courts; but they might also provide a much simpler set of procedures, with transparent trade-offs between accuracy and cost that can help consumers decide which procedures work best for them. eBay, for example, chose to provide buyers and sellers on its site with rules simpler than the law of most states about who is responsible when goods don't arrive, to reduce the costs of disputes.<sup>10</sup>

Setting up an effective market for laws faces three challenges. One is the great diversity in consumer sophistication. Not all parties to an arrangement have the ability to make good choices when dealing with a legal provider. Another challenge is making sure that the market is competitive. There is already the risk of

inadequate competition for monopoly technology platforms and services – like Google and Facebook – in setting rules for what is allowed and prohibited online. A third challenge is making sure all interests at stake can participate in choosing who provides the law. Employees and consumers who sign contracts containing an arbitration agreement, for example, need public law to make sure they are not being exploited by their limited capacity to understand and exercise choice about the law. Even bigger challenges arise when third-party interests are at stake, such as environmental issues, workplace safety regulation, or data security. Rules in a new market for rules must protect the interests of the public as well as consumers and employees.

Building effective markets for law does not mean abandoning the role of governments in protecting their citizens through regulations but, rather, rethinking it. Today, most regulations are written in fine detail by public officials: politicians, civil servants, and administrative judges. Rules and procedures are slow to change in the face of the pace and complexity of modern life.

A better approach would be for government to focus on the *outcomes* desired from regulation. For example, what frequency of accidents is tolerable on the roads? What principles should govern the interaction between large data-collection entities and their users? What interests should be protected in a divorce? *How* these outcomes are achieved – rules about who can participate in a business, what business practices they follow, how technology is deployed to monitor performance, how compliance is incentivized – should be figured out by market actors who are rewarded for coming up with more effective and more efficient (less complex and less expensive) ways of getting to those outcomes.

This market for rules would be governed through *superregulation*. Government would license private regulators to compete in a competitive market. Instead of directly regulating the businesses that supply goods and services to consumers, businesses would choose their regulator from the market for regulators. Governments would then regulate the regulators, making sure the regulation they impose on the businesses that sign up with them achieve the objectives the government has set.

Although the idea of a competitive market for private regulators may seem outlandish, parts of such a system already exist. Today, many regulations are written by private standard-setting bodies and either adopted by governments or implemented voluntarily by businesses. Sometimes these organizations compete for “customers”: the International Organization for Standardization, the Forest Stewardship Council, and the Canadian and American Pulp and Paper Associations, for example, offer environmental standards that companies can choose to implement to ensure their products come from properly managed forests. European law requires food suppliers to obtain certification from private independent certifiers to ensure compliance with relevant food safety standards. Brokers and dealers in U.S. securities are subject to oversight by a private nonprofit membership organization, the Financial Industry Regulatory Authority (FINRA). Many suppliers of large corporations like Apple and Nike are subject to rules written by those corporations with respect to issues like workplace safety, child labor, and environmental practices.

The difference between existing models and superregulation is that, in most of these existing cases, either the private regulator holds a government-granted monopoly – like FINRA, for example – or

compliance with private standards is voluntary – as with privately developed environmental standards. Although the private regulators may be subject to some governmental oversight, that oversight is not tied to licensing based on the achievement (or not) of designated outcomes. Superregulation focuses government efforts on the regulation of the regulator, on the basis of outcomes, and requires a competitive market for regulators.

The clearest example of this model today is the United Kingdom’s approach to the regulation of legal services. Parliament passed the Legal Services Act in 2007, creating the Legal Services Board, an independent agency whose members are appointed by government. The Legal Services Board has only one function: to approve the private bodies that apply to be the actual regulators of legal services. Parts of the system are clearly not (yet) very competitive: the primary regulators emerged out of the preexisting trade associations for barristers, solicitors, and legal executives and the barriers to switching regulators are high because those regulators impose different, and costly, educational requirements. But on the horizon is a closer competition for regulation of a new breed of legal provider in England and Wales known as “alternative business structures” – companies like Price Waterhouse or LegalZoom – that can now provide legal services in this market. As of 2015, these providers can choose between licensing by the Solicitors Regulation Authority or by the Bar Standards Board.

The strategy of specifying general principles or outcomes instead of specific rules is known in the field of regulation as outcomes-based or principles-based regulation. It is already used in some settings such as environmental law, where instead of specifying what technologies or procedures a factory must use to reduce

pollution, governments establish acceptable levels of pollution. Under current approaches, the government leaves it up to the factory to decide what technology or procedures to use to achieve the required levels of pollution.

Under superregulation, however, the government would license third-party private companies to come up with specific methods for achieving pollution targets. It would then require the factory to become a customer of one of those third-party companies, to buy its regulatory services and comply with the methods its regulator develops. Individual factories in an industry might choose different regulators – just as companies now choose different accounting firms or computer systems – but all of the regulators available to be chosen would be licensed and required to demonstrate to government that the systems they impose on their regulatory customers achieve the government’s required outcomes.

If the government requires that pollution not exceed a particular threshold, for example, then each private regulator would have to demonstrate that, across all of the factories it regulates, pollution does not exceed that level. Individual private regulators might achieve that objective in different ways: one might impose technology requirements on the factories it regulates, for example, while another might impose process requirements. They might charge different prices for their regulatory services. Those differences would be determined by the market; the role of governments would be to ensure that this market was competitive and that all of the providers offer systems that achieve the government’s pollution targets.

Superregulation inserts an additional layer between governments and regulated businesses, creating an industry of private regulatory services. Although this seems like it would just make regulation

more complex, if the market were competitive it could reduce complexity. The reason is the same as anywhere we see benefits from companies that specialize in part of a production process. For example, a company that manufactures automobiles can produce in-house all of the parts and perform all the services it needs as inputs. Or it can, as most do, contract out many of these parts and services to other companies: suppliers that specialize in building brakes, for example, or managing relationships with customers. Vertical integration looks less complicated, but it forgoes the benefits of specialization and scale. The companies that the auto-manufacturer contracts with can often produce higher-quality and lower-cost inputs than the auto-manufacturer itself because they dedicate themselves to innovating and excelling in this narrower task, and because they can achieve greater scale. The brakes manufacturer can sell to many vehicle manufacturers; the customer management service to many companies beyond the auto industry. This kind of specialization and decentralization is a key feature of the modern economy.

Superregulation recruits the benefits of specialization and scale for regulatory systems. By having for-profit and not-for-profit private companies, which are competing for business and motivated by the incentives of profit and mission, specialize in translating broad principles and specific regulatory outcome targets into rules, procedures, and technology, it is possible to have better, more cost-effective regulatory approaches that do a better job of balancing the costs and benefits of the complexity of the rules. To make that happen, governments must have the capacity to make sure that private regulators are competitive and producing systems that achieve government targets.

Consider whether this approach could improve the management of landlord-

tenant disputes, for example. Currently in many jurisdictions, more than 80 percent, sometimes more than 90 percent, of tenants in eviction cases are not represented by lawyers. They face housing laws and procedures that are complex and confusing. Courtrooms dealing with these cases are chaotic. Even for landlords – many with legitimate interests at stake – evictions through court cases can be slow, unpredictable, and expensive.

Under a superregulatory approach to housing regulation, governments would first establish the goals and results they want to see in housing markets. Good outcomes of a landlord-tenant dispute system would likely differ from polity to polity, but it is likely they would include such factors as a housing stock that is reasonably safe and healthy, and cost-effective opportunities for tenants and landlords to express and have considered their legitimate concerns. Private housing regulators would then develop their own procedures and methods for achieving the publicly agreed on housing goals. One regulator might take a proactive approach, engaging in active monitoring of housing standards and tenants' financial circumstances to gain early warning of potential problems. Another might be largely reactive, creating an online system for tenants to enter and document housing complaints and for landlords to enter and document payment problems, as well as a dispute resolution system that is relatively simple and low-cost in straightforward cases and somewhat more involved in complex ones to follow up. A third might seek to improve landlord-tenant relationships on an ongoing basis through community-building and better communication, increasing the likelihood of amicable settlement of disagreements.

Governments – city governments for example – would audit the performance

of each regulator to make sure that it is achieving the outcomes the governments have set: Are housing standards across all of the units a regulator oversees reasonably safe and healthy? Are rent payments generally timely? Are both landlords and tenants satisfied with their ability to get quick and fair resolution of their concerns? Does everyone in the system understand how it works and what their rights and duties are? Regulators that do not meet these goals would lose their licenses. The only way to compete with lower fees would be for the private regulator to come up with less costly ways of maintaining the goals set by the city. Simpler systems are likely to emerge because there is an incentive to make them simpler.

A superregulatory model would work only if a city is able to effectively regulate the regulators – to make sure it discovers when a regulator is no longer meeting the standards the city had set – and if the market is competitive. The democratic process will have held city leaders politically accountable for ensuring that licensed regulators are not cheating the standards the city has set, in the same way that we now hold the city accountable for ensuring that landlords are complying with housing codes.

A competitive market harnesses the incentives for regulators to reduce the cost of achieving housing standards, thereby making it more likely that standards are met even in lower rent settings. And it can also recruit the incentives for tenants, and tenants' organizations, to monitor and publicize the performance of private regulators. This is an easier task for the market – just as it is an easier task for city authorities – when there are only three, or five, or even ten private licensed regulators to keep track of, as opposed to thousands of landlords operating as individuals or behind shifting corporate

identities. If a private regulator made it as difficult for a tenant to obtain fair enforcement of its rules against landlords as our current public housing courts do, we could anticipate market backlash or public outcry, and those tenants *with* effective housing choices would put pressure on the regulator to do a better job, generating benefits for those with little choice.

A superregulatory system should include the goal of making it possible for people to manage many of their ordinary legal situations on their own. Realistically, though, people and businesses will always need help understanding, navigating, and securing the benefits and protections of law. That is why it is critical to increase the use of markets to develop laws and to improve the performance of markets for legal help. Fundamentally, this means removing costly rules and barriers that are responsible for inflating the cost of accessing legal expertise. Current costs reflect the cost of conventional help from a lawyer, and the limited availability of alternative sources of legal assistance.

The other way in which we should be using markets better to increase access to justice is by reforming the market for legal services. The rules of professional conduct throughout the United States impose on the practice of law a business model that generates massive inefficiency. In law, a very large fraction of the hourly rate that clients pay ends up covering the cost of operating a barely sustainable business. Consider the following shocking finding. CLIO is a company that sells practice management software and services to small law firms, most of twelve or fewer lawyers. Small law firms provide most of the legal services that individuals and small businesses consume. In 2017, CLIO did a study of billing data from approximately forty thousand of its law-firm customers. In an average

eight-hour work day, lawyers in these small firms engaged in billable work for 2.3 hours. Of that, they billed 1.9 hours and collected payment for only 1.6 hours. Even though the average hourly rate paid by clients was \$260, the effective hourly rate received by the law firm was only \$52. From that amount, the law firm had to pay administrative staff, rent, technology costs, marketing costs, insurance, and so on. There is no good estimate of the average cost of law firm overhead. Some suggest the overhead is as much as 50 percent, meaning the lawyers in this study actually took home about \$25 an hour. But even if overhead costs were much lower – a lawyer working out of a home office, working without a secretary or paralegal, spending little on marketing, forgoing malpractice insurance (which is not mandatory in the United States) – lawyers in these practices, at best, would be making between \$30 and \$40 an hour for their efforts.

The difference between the \$260 an hour paid by the client and the \$25 to \$40 an hour received by the lawyer is inefficiency. It is a consequence of the tiny scale of the law firms that serve ordinary individuals and small businesses.<sup>11</sup> Lawyers in these practices spend more of their work time finding clients, managing administrative tasks, and collecting payment than makes economic sense.<sup>12</sup>

These law practices are so tiny because the rules of professional conduct effectively require them to be. They require lawyers to work only in businesses that are 100-percent owned, managed, and financed by those lawyers.

A more efficient business model would be for the vast majority of these lawyers to be employed by a large-scale business that invested in developing brand identity, organizational practices, customer service protocols, and technological tools to deliver cost-effective legal help

to people and businesses. Most lawyers don't want to run small businesses, and most lack the aptitude for it. They – and their clients – would be better off letting already established companies like LegalZoom, Avvo, RocketLawyer, Axiom, UpCounsel, and the like build a service platform, research the market, figure out pricing, handle billing, manage customer complaints, optimize the use of nonlawyer staff, and arrange financing, among other tasks.<sup>13</sup> Economies of scale could drive out a huge fraction of the current inefficiency in providing what millions need and most cannot get: advice from a lawyer.<sup>14</sup> Consider how many more people could afford some legal advice at \$30 to \$50 an hour compared with \$260 – that is likely what a large-scale legal services company could deliver. And the lawyers would earn as much as they do today and spend more of their time practicing law, making the most of their expensive education and human capital.

A more efficient market for legal services requires changing the rules of professional practice to allow businesses that – like all other service businesses in our economy – are owned, managed, and financed by people other than the specialists who are providing services to clients to compete. More competition creates the incentive for people to invest in devising less costly ways to help people with their legal problems.

Some worry that lawyers employed by profit-making firms would cease to be independent and faithful lawyers for their clients. But changing the business model does not change the obligation of lawyers to give independent and loyal advice. Regulation of these new legal services providers would help ensure that, despite their corporate status, they delivered reliable and appropriate legal assistance. Legal services would be regulated as most

organizational activity is in an advanced economy. Yes, there are failures: auto manufacturers have cheated on emissions tests, banks have cheated on account openings, hospitals have failed to protect against disease outbreaks by skimping on protocols, and universities have failed to protect their students against on-campus sexual assaults by sweeping complaints under the rug. But the failures are only a small part of the picture: in the majority of the landscape, remarkably, most people are safe, every day; most get what they paid for, every day. It is possible to develop regulatory regimes that achieve this in law as well.<sup>15</sup>

Allowing legal services to be developed and delivered by entities with full access to the economic tools and business models used throughout the economy would foster the development of cost-reducing innovations in law. Some of these involve technology: phone apps that can take a photo of a legal document, decipher it, and deliver targeted advice; online services that can support people navigating court and administrative procedures alone; artificial intelligence that can help resolve basic disputes; and blockchain systems that can enforce judgments by taking advantage of blockchain's ability to automatically transfer digital assets when an adjudicator has reached a decision in a case. Others involve appropriate use of people who are not lawyers but have expertise in particular types of problems or procedures – for example, filing documents for an uncontested divorce; developing a plan for a child with disabilities entitled to educational benefits; presenting evidence to contest an invalid municipal ticket or summons; or developing a simple estate plan – rather than requiring a highly trained and expensive J.D. to do the work. Again, this makes most sense within the framework of the organizational practice of law, with

large organizations optimizing the deployment of different types and levels of expertise, to deliver cost-effective and high-quality legal assistance.

The key to all of this is opening up markets for innovation of new ways to deliver what people and businesses need: timely, reliable, and useful help navigating a

complex legal world. Without those markets, law cannot attract the innovation, investment, and creativity it needs, and it cannot get out of the tightly sealed box in which lawyers, through bar associations, have secured the practice of law. Solving this problem requires talking seriously, and sensibly, about markets in law.

#### ENDNOTES

- <sup>1</sup> For further discussion on the relationship between complexity and the price of access, see Gillian K. Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System,” *Michigan Law Review* 98 (4) (2000): 953–1006.
- <sup>2</sup> I present some of these measures in Gillian K. Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (Oxford: Oxford University Press, 2017), chap. 7.
- <sup>3</sup> Jens Grossklags and Nathan Good, “Empirical Studies on Software Notices to Inform Policy Makers and Usability Designers,” in *Financial Cryptography and Data Security*, ed. S. Dietrich and R. Dhamija (Berlin: Springer, 2007), 341–355; and Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, “Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts,” *Journal of Legal Studies* 43 (1): 1–35, 22. Grossklags and Good analyzed the fifty most popular software downloads in 2006 and found that the longest license agreement was associated with Adobe Reader, at 9,313 words.
- <sup>4</sup> John Aloysius Cogan Jr., “Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies,” *Roger Williams University Law Review* 15 (2010): 93–126.
- <sup>5</sup> Aleecia McDonald and Lorrie Faith Cranor, “The Cost of Reading Privacy Policies,” *I/S: A Journal of Law and Policy for the Information Society* 4 (3) (2008): 543–568.
- <sup>6</sup> Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, and Yuxiang Liu, “‘Whimsy Little Contracts’ with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements,” *Maryland Law Review* 75 (1) (2015): 1–134.
- <sup>7</sup> “The initial information provided to people who are cited for violating Ferguson’s municipal code is often incomplete and inconsistent. Communication with municipal court defendants is haphazard and known by the court to be unreliable. And the court’s procedures and operations are ambiguous, are not written down, and are not transparent or even available to the public on the court’s website or elsewhere.” United States Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* (Washington, D.C.: United States Department of Justice, 2015), 45, [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).
- <sup>8</sup> I call this the “entropy to legal complexity.” Hadfield, “The Price of Law.”
- <sup>9</sup> Lawyers all complete similar legal education and the vast majority completed an undergraduate degree in arts, humanities, or qualitative social sciences such as history, sociology, and political science; only 15 percent completed an undergraduate degree in economics or business, 6 percent in science or engineering. Law School Admissions Council, “Applicants by Major: 2017–2018,” <https://www.lsac.org/data-research/data/applicants-major>.
- <sup>10</sup> See Amy Schmitz and Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (Chicago: American Bar Association, 2018).

<sup>11</sup> There were about three hundred thousand law firms in the United States in 2012. Roughly half were solo practices and another 20 percent employed between two and ten lawyers (estimates based on ABA data for 2005, the latest year for which data were provided as of 2018).

<sup>12</sup> According to the 2017 CLIO study, lawyers in these small firms spent half of their unbilled time on administrative tasks and one-third on business development; the remainder was spent on licensing and continuing education.

<sup>13</sup> I am on LegalZoom's Legal Advisory Council.

<sup>14</sup> For a more detailed treatment of the efficiency benefits of scale, see Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the (Un)corporate Practice of Law," *International Review of Law and Economics* 38 (2014): 43–63.

<sup>15</sup> See Gillian K. Hadfield and Deborah L. Rhode, "How to Regulate Legal Services," *Hastings Law Journal* 67 (1) (2016): 1191–1224.

# Access to What?

*Rebecca L. Sandefur*

*Abstract: The access-to-justice crisis is bigger than law and lawyers. It is a crisis of exclusion and inequality. Today, access to justice is restricted: only some people, and only some kinds of justice problems, receive lawful resolution. Access is also systematically unequal: some groups – wealthy people and white people, for example – get more access than other groups, like poor people and racial minorities. Traditionally, lawyers and judges call this a “crisis of unmet legal need.” It is not. Justice is about just resolution, not legal services. Resolving justice problems lawfully does not always require lawyers’ assistance, as a growing body of evidence shows. Because the problem is unresolved justice issues, there is a wider range of options. Solutions to the access-to-justice crisis require a new understanding of the problem. It must guide a quest for just resolutions shaped by lawyers working with problem-solvers in other disciplines and with other members of the American public whom the justice system is meant to serve.*

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Most Americans confront at least one civil justice problem each year, commonly involving basic needs, like health, housing, employment, or money. Affecting somewhere between half and two-thirds of the population, that means there are well over one hundred million justice problems annually in the United States.<sup>1</sup> They concern wage theft, eviction, debt collection, bankruptcy, domestic violence, foreclosure, access to medical treatment, and the care and custody of children and dependent adults. When these problems do not get resolved effectively, the consequences can be homelessness, poverty, illness, injury, or the separation of families who want to stay together.<sup>2</sup> Tens of millions of Americans face justice problems that place them at risk of devastating outcomes.

Most of the civil justice problems that Americans experience receive no legal attention of any kind, ever. They never make it to court. They never receive consideration from any kind of legal professional such as a lawyer.<sup>3</sup> Often, the chasm between the vast number of people facing civil justice problems

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and the small number of people receiving lawyers' help is presented as a crisis of "unmet legal need." Yet embedded in this understanding is the key assumption that any problem with legal implications requires the involvement of a legally trained professional for a just, fair, or successful resolution. This diagnosis of the problem proceeds from a preference for a single specific solution: more legal services.

The definition of the crisis as one of unmet legal need comes from the bar. Lawyers' myopic focus on legal services is understandable. Judges and lawyers work at the top of an enormous iceberg of civil-justice activity, most of which is invisible to them and handled without their involvement. It escapes their attention. Their narrow focus on legal services reflects their experience: lawyers' daily practice shows them many instances when legal services they provide shape people's lives, sometimes for the better. Their narrowness also reflects any profession's interest in maintaining jurisdiction over some body of the problems that people experience. Such jurisdiction is the bread and butter of professions and their reason for existing.<sup>4</sup> Lawyers' fundamental interest is in maintaining their rights to define and diagnose people's problems as legal, and to provide the services that treat them.

The bar's account dominates the discussion because it is simple and sounds reasonable, not because it is accurate. Declaring a problem to have a single cause that leads directly to an obvious solution is pleasantly satisfying, particularly when the resulting story gives you a starring role in saving the day. Why explore the problem empirically and be forced to recognize that no single solution exists? The analytical error of legal myopia does not mean that none of Americans' justice problems are legal needs. But only some

are. Lawyers are only part of the problem. They are also only part of the solution.

A radically different perspective emerges from social-scientific research investigating "justice problems" or "justiciable events" – events like not being paid overtime owed by an employer or believing that a bill is incorrect – that have civil legal aspects, raise civil legal issues, and have consequences that are shaped by civil law. The focus of this research is on how those problems affect the lives of people who confront them and the communities and families those people live in. This research transforms the bar's assumption about the need for legal services into an empirical question: what assistance do people need?

The distinction between a justice problem and a legal need turns out to be crucial, for these two ideas reflect fundamentally different understandings of the problem to be solved. If the problem is people's unmet legal needs, the solution is more legal services. If the problem is unresolved justice problems, a wider range of options opens up. Rather than taking the position that unmet legal need is the crux of the issue, we have the option of formulating the access-to-justice crisis as being about, well, access to justice.

There is access when disputes and problems governed by civil law, like dissolving a long-term romantic partnership or owing several months of unpaid rent, resolve with results that satisfy legal norms. These include substantive norms that govern the rights, duties, and responsibilities of the different parties to a transaction or relationship, like employers and employees, landlords and tenants, siblings whose parents are deceased, or neighbors. When such problems are processed in some kind of dispute-resolving forum, like a court or a mediation service, these include procedural norms, such as both sides getting to

tell their side of the story, offer evidence for the story they tell, and have a mediator or decider who is neutral.

When the relevant substantive and procedural norms govern resolution, that resolution is lawful and we have access to justice, whether or not lawyers are involved in the resolution and whether or not the problem comes into contact with any kind of dispute-resolving forum. Access to justice is a good in itself. Its effects reach powerfully into people's lives. In landlord-tenant disputes, for example, access to justice – achieved with or without lawyers – means that both landlords and tenants conform to the terms of rental agreements and housing law. Other benefits often result from the lawful resolution of landlord-tenant disputes, such as better health for tenants and the prevention of eviction and homelessness and the related hardships and costs, borne by people directly affected and by society at large.<sup>5</sup>

If this is access, then America has a massive crisis, with two parts. The first is that access is *restricted*: only some people, and only some kinds of justice problems, receive lawful resolution. Some of those tens of millions of justice problems are lawfully resolved, but research and observation show that many – particularly those involving a vulnerable party like a low-income tenant facing a powerful party like a property management company – are not. The solution to the problem of restricted access is to *expand* access to justice. Access expands when lawful resolution happens for more people and problems than it does now.

The second problem is that access to justice is systematically *unequal*: some groups – wealthy people and white people, for example – are consistently more likely to get access than other groups, like poor people and racial minorities. The solution to this problem is to *equalize*

access to justice. Access is equal when the probability of lawful resolution is the same for all groups in the population: for example, men, women, and transgender; rich and poor; every race and ethnicity; each religion and those with none. When defined this way, the focus becomes creating wide and equal access to the lawful resolution of justice problems, rather than any specific route through which such resolution might be achieved.

**R**esolving justice problems lawfully does not always require lawyers' assistance. Evidence shows that only some of the justice problems experienced by the public benefit from lawyers' services or other legal interventions, while others do not. That is because such intervention is excessive or because it might be the wrong treatment for the problem. This finding holds true whether the outcome of interest is benefits to society or benefits to a person with a problem.

Most civil justice problems are handled by people on their own, or with advice from family and friends. The most common reason people give for not turning to lawyers is *not* the cost of lawyers' help. There is a much more important reason: people do not consider law as a solution for their justice problems; they do not think of their problems as being "legal," even when the legal system could help solve them. They think of them simply as problems: problems in relationships, problems at work, or problems with neighbors. One of the most important reasons that people handle their problems on their own rather than seeking any kind of formal help is that they believe that they already understand their situation and their options for handling it.<sup>6</sup>

Sometimes people are correct in these judgments. They write their own good complaint letters, they negotiate

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actively with the other side in a dispute, they complain to regulators or local government, and they accurately assess that a situation likely cannot be remedied and waste no further effort on it. The problem is that people can also be disastrously wrong: misled by false confidence, cynical about taking action, resigned to situations that could be remedied, or unable to recognize their capacity to exercise legal rights.<sup>7</sup> In these latter kinds of situations, legal services might be appropriate.

But lawyers are not always necessary even when problems become formal legal cases. As research shows in a range of contexts, lay people can and do accurately and successfully perform some parts of lawyers' work. Applications for no-fault divorce, filed by ordinary people using do-it-yourself divorce kits, contained fewer errors than applications filed by attorneys.<sup>8</sup> Petitioners in a tribunal handling claims about unemployment benefits who were randomly assigned to be offered assistance by a supervised law student or to no offer of assistance did equally well: those petitioners offered no representation of any kind won their appeals at the same rate as those represented by lawyer-supervised law students.<sup>9</sup> Across a number of common justice problems – for example, disputes about evictions and about custody of children, disputes over public benefits with government agencies – nonlawyer advocates and unrepresented lay people have been observed to perform as well or better than lawyers.<sup>10</sup> This steadily growing body of evidence shows that, if the goal is creating access to justice, other services can be more effective and efficient than lawyers.

Some of the so-called legal needs of individuals are a consequence of our legal system's relentless privatization, of basic court functions as well as civil law enforcement. In these instances, it is less an

individual person who has a "legal need" than the legal system itself, which requires lawyers' help to carry out its most basic tasks. A review of forty years of empirical studies of when and how lawyers change outcomes in cases investigated which factors created lawyers' superior outcomes: was it their knowledge of the substantive law or their mastery of legal procedures? One of the most striking findings was that lawyers' impact sometimes came by simply being present in the courtroom.

Many of the lower courts and administrative tribunals where Americans find themselves, such as when they face eviction or debt collection or contest a denial of unemployment benefits, can be lawless. Judicial staff in these forums sometimes do not follow the law about which side has the burden of proof. They sometimes fail to apply the rules about what counts as evidence and what is hearsay. They sometimes ignore the right of both sides to present their cases.

When lawyers are present on both sides of cases, courts act more like courts, following the rules they have made to guide their own activities.<sup>11</sup> Requiring every person facing eviction, debt collection, or loss of their livelihood to find a lawyer simply to make sure that a court follows its own rules places the responsibility with the wrong party. Courts, already paid for by public taxpayer dollars and empowered to act by the public they are supposed to serve, have the responsibility to solve this problem.

When a system is broken, the solution is systemic reform. Consider consumer debt. Today, small-claims and lower-civil-court dockets are flooded with debt claims against consumers. These claims have usually been sold by the original debtor, such as a credit-card company, to a third-party debt buyer in a bundle of hundreds or thousands of debts. Such claims against consumers are often based on

“bad paper,” insufficient documentation to sustain the debt owners’ claim to the amount demanded.<sup>12</sup> Courts spend scarce time and money processing hundreds of thousands of baseless claims. This situation persists because, in most states, courts do not require creditor-plaintiffs to show that they have documentation of ownership for the debt when they file lawsuits; individual debtors must appear in court and contest the documentation for each debt. In 2014, New York State’s then-Chief Judge Jonathan Lippman issued an order requiring debt-owners to produce documentation of the amount claimed at the time of filing.<sup>13</sup> The number of debt lawsuits against New York consumers dropped dramatically.

These are just a few examples from growing evidence that the current course of focusing narrowly on lawyers’ services is wrong, whether the goal is understanding the access problem or taking action to fix it. Looking only at the civil justice activity processed by lawyers or the court system misses most of the action. Focusing on existing programs that deliver legal services and on court cases will never provide a picture of all of the other civil justice activity that never makes it to the justice system – and that is the majority of civil justice activity. Practically speaking, it would be impossible for the nation’s existing courts, administrative agencies, and other forums that resolve disputes to process the estimated more than one hundred million justice problems that Americans experience every year. There is no reason to want them to. The rule of law means that most people can rely on most others to be basically compliant with legal norms most of the time, with a fair and accessible legal system as backup.

The access-to-justice crisis is a crisis of exclusion and inequality, for which legal services will sometimes provide a

solution. At other times, lawyers’ services will be too expensive and much more than necessary. At other times still, systemic reforms will be the right solution, not providing costly and inefficient assistance to individuals. Lawyers and social scientists have a limited understanding of how to determine which justice problems of the public need lawyers’ services and which do not.

The challenge is partly technocratic, a matter of understanding problems well enough to design feasible and effective solutions. It is partly normative, a matter of understanding what it means to want lawful resolution or justice. Neither part of the challenge is insurmountable, but tackling both will require lawyers to step back, because lawyers know only their own part of a complicated story and because the stakeholders in a democracy are much more plentiful and diverse than the contemporary legal profession.

Tackling the technocratic challenge requires investing in research that approaches the problem with a spirit of independence from any given solution. Solving the crisis of restricted and unequal access to justice requires a robust and reliable base of evidence: about when access to justice can be achieved without the use of law, courts, or legal services, and when such tools are necessary.

Also needed are means of determining when a “legal need” is better understood as belonging not to the individual with the justice problem, but rather to another actor in the legal system or the system itself. The “whens” in these questions will have many specific aspects, all of which are presently poorly understood. For example, “when” are legal interventions necessary for what kinds of problems, compared to what kinds of existing alternatives, for what characteristics of person, facing what kind of other party, and involved or not in what kind of process?

Today, the information needed to answer any useful formulation of most of these research questions does not exist, because there has been little investment in collecting meaningful data about civil justice in the United States for more than fifty years.<sup>14</sup>

This task raises the fundamental, and rightly contested, question of what “lawful resolution” means. Defining this term is a scientific question. It is also one about values. In a democracy, the public must engage that normative question, and not assume that the answer the guild

of lawyers offers will be in the public’s interest.

We the people allow the legal profession to control the justice system, which lawyers largely designed, substantially for themselves. Resolving the access-to-justice crisis requires that justice professionals shift their understanding of the access problem, and share the quest for solutions with others: other disciplines, other problem-solvers, and other members of the American public whom the justice system is meant to serve.

#### ENDNOTES

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- <sup>4</sup> Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1988).
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<sup>12</sup> Jake Halpern, *Bad Paper: Chasing Debt from Wall Street to the Underworld* (New York: Macmillan, 2014).

<sup>13</sup> James C. McKinley Jr., "Top State Judge Tightens Rules on Debt Collection," *The New York Times*, April 30, 2014.

<sup>14</sup> Rebecca L. Sandefur, "Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection," *South Carolina Law Review* 68 (2) (2017): 295–310.

# The Right to Civil Counsel

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*Abstract: The U.S. Constitution grants no categorical right to counsel in civil cases. Undaunted, the legal profession's renewed effort to improve access to justice for low-income unrepresented civil litigants includes a movement to establish this right. How this right is implemented turns out to be as important as whether such a right exists. To be effective, any new right must be national in scope, adequately funded, and protected from political influence. Lawyers must be available early and often in the legal process, so that they can provide assistance for the full scope of their client's legal problem and prevent further legal troubles. A right to civil counsel should encompass proceedings where basic needs are at stake, and not be influenced by inadequately informed judgments of who is worthy of representation.*

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Designing a right to counsel for people with civil justice problems is no simple task. Consider the state of the constitutional right to counsel in state criminal cases, which the U.S. Supreme Court recognized in 1963 in *Gideon v. Wainwright*.<sup>1</sup>

The public defender system is in crisis because most state governments do not allocate enough funding to fulfill their constitutional duty. *Gideon* is an unfunded federal mandate. In Missouri in 2016, the governor slashed the annual public-defender budget approved by the legislature from \$4.5 million to \$1 million. As a result, the director of the state's public-defender system lacked funding to hire the 270 additional attorneys needed to serve the criminal caseload. Advocates decided that a drastic measure was needed to draw attention to the problem, so the director appointed the governor (a lawyer) to represent a poor criminal defendant in place of a court-appointed lawyer.<sup>2</sup> The ploy was ultimately unsuccessful because a state court held that only the state's courts had the power to appoint a lawyer, but it generated national media attention for the budget issue.<sup>3</sup>

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The U.S. Constitution grants no categorical right to counsel in civil cases. Decades of Supreme Court jurisprudence have rejected constitutional claims to this right, most recently in 2011.<sup>4</sup> Undaunted, the legal profession's renewed effort to improve access to justice for low-income unrepresented civil litigants includes a movement to establish this right.

In recent years, there have been impressive gains toward this goal through legislation and court victories. In 2017, New York City became the first city in the United States to enact legislation providing low-income tenants facing eviction with legal representation.<sup>5</sup> In 2016, California put into force a 2009 state law establishing publicly funded counsel for poor litigants in cases about housing, child custody, conservatorship, and guardianship.<sup>6</sup> In 2016, the Supreme Court of New Jersey held that parents have a right to counsel in adoption cases.<sup>7</sup>

The right-to-counsel movement continues to build momentum. By 2018, eighteen right-to-counsel bills had been enacted in fourteen states, and an additional eighty-four were pending in Congress and in state legislatures.<sup>8</sup> The laws enacted include a San Francisco ballot measure providing a publicly funded right to counsel for tenants facing eviction, a Massachusetts law requiring appointment of counsel for anyone at risk of being incarcerated for failure to pay fees or fines, and a Wisconsin law creating a pilot project to provide a right to counsel for parents in child welfare proceedings.<sup>9</sup>

Because right-to-counsel victories like these have proceeded largely on an issue-by-issue basis, they have leapfrogged an important question. What types of problems or legal proceedings *should* trigger the right to civil counsel? In 2006, the American Bar Association (ABA) called on federal, state, and local governments

to provide legal counsel to people who are poor or have low income “as a matter of right at public expense” in cases where basic human needs are at stake, such as those involving shelter, food, safety, health, or child custody.<sup>10</sup> The ABA acknowledged that its proposal was “substantially narrower” than what would be necessary to close the justice gap documented in legal-needs studies, and advocated for a “careful, incremental” approach involving the “evolution of a right to civil counsel on a state-by-state basis.”<sup>11</sup>

Recent legislative activity has not followed the ABA's cautious approach. The victories, particularly laws creating a right in eviction cases, also challenge widespread political skepticism about state legislatures appropriating money to fund these new rights. Still, successes thus far are piecemeal and clustered in wealthier and Democratic-leaning states. If the right to civil counsel develops state by state, it will likely become more robust and better funded and cover a broader range of matters in blue states such as California, Massachusetts, and New York, while remaining limited and poorly funded in red states such as Oklahoma, Mississippi, and Texas.

To prevent these discrepancies, it would be best for Congress to establish a federal right to civil counsel that reached across state boundaries. To be effective, this right must be secure in the sense that it is adequately funded, resilient in the sense that it is protected from political interference, and unencumbered in the sense that it is not hobbled by limitations and restrictions. The right to counsel in criminal cases has been severely eroded in many states, nearly to the breaking point. Likewise, adjusted for inflation, federal funding for the Legal Services Corporation, which has provided funding for essential civil legal services to low-income Americans since 1974, has declined by

nearly 40 percent over the last three decades.<sup>12</sup> Restrictions dictate who can and cannot be sued by legal-aid attorneys, what procedural devices they can use, and what claims they can bring.<sup>13</sup> Legal-aid attorneys cannot address systemic problems or leverage the strength of mass claims to challenge wrongful conduct by powerful institutions or governmental entities.

Advocates for a right to civil counsel want to reject these restrictions, empowering legal-aid lawyers to confront systemic injustices on a mass scale. A right to publicly funded lawyers for people with civil legal issues will aid those served, but is unlikely to force changes in their adversary's usual behavior or practices. Providing representation to someone facing unlawful debt collection may resolve that person's case favorably, for example, but it does not prevent the debt collector from continuing to use abusive and deceptive practices with other debtors. A right to counsel that permitted mass claims, by contrast, would allow broader structural and injunctive relief impacting large groups of similarly situated people, a much more efficient and effective way to advance civil justice.

A resilient and secure right to civil counsel would require adequate funding and protection from political interference. The ABA estimates that a right to civil counsel when basic human needs are at stake would cost approximately \$4.2 billion in current dollars, or about 1.5 percent of total U.S. expenditures on lawyers.<sup>14</sup> Return-on-investment studies show that an expanded right to civil counsel can be economically feasible. One study estimated that establishing a right to civil counsel in eviction cases in New York City would save the city \$320 million per year through reduced spending on homeless shelters, medical care for the homeless, and law enforcement.<sup>15</sup>

Any right to civil counsel should be protected from political interference. Funding a broad expansion of a right to civil counsel with public money would likely encounter political resistance. Even solid evidence that the costs of a right to civil counsel are manageable will not deter detractors inclined to politicize publicly funded rights. Other basic rights in our society – for example, rights to public education, medical care, and welfare benefits – have a long history of political struggle as well as public support. The same is likely to happen with a right to civil counsel.

Funding approaches must insulate civil justice budgets from the vagaries of political winds, annual appropriations battles, and opposition that seeks to weaken the right to counsel. If not, any such right will be forever vulnerable to funding roll-backs (or even elimination), regardless of its cost-effectiveness and vital role in providing essential services. As the histories of the right to counsel in criminal cases and of the Legal Services Corporation show, detractors can undermine justice by burdening the right to counsel with all kinds of restrictions.

An effective right to civil counsel must be implemented so that the lawyers provided can both address existing legal problems and prevent future issues. People should be able to access the right at key turning points, and the right should be broad enough to address their full range of legal needs. At present, when these rights exist, they are highly restricted.<sup>16</sup> For example, in family law matters such as child welfare and child support enforcement, many states that provide access to counsel do so at the last possible moment, when the risk of serious loss is imminent, rather than from the start and throughout the case, leaving parties unrepresented at critical junctures in their case. These rights are also limited,

providing counsel only for the specific issue at hand.<sup>17</sup> In the case of child welfare proceedings, this means that, in some states, the right to civil counsel is available only to parents defending themselves in a termination-of-parental-rights proceeding.<sup>18</sup> Similarly, states that provide counsel in child support enforcement cases do so only in situations where the defendant is facing civil incarceration for failure to pay court-ordered support.<sup>19</sup> These are late-stage events when the unrepresented individual stands on the precipice of great loss: losing their children or their liberty. To provide counsel only at this eleventh hour is, to put it mildly, too little too late. Cases such as these can stretch back many months, even years. During the long span of time when the party is unrepresented, all kinds of critical events and decisions occur without benefit of advice or representation.

My own research examining the experiences of noncustodial parents in child support proceedings reveals that attorney representation earlier in the case and covering a broader scope of legal issues would substantially change case outcomes. The study seeks to understand how attorney representation and other more limited forms of legal assistance affect civil court proceedings for low-income litigants. Most noncustodial parents in these cases are very low-income black fathers who lack attorney representation and owe current and past-due child support, often in the thousands of dollars. The study examines how their cases are handled by the judges and government attorneys they encounter and how they navigate the civil process in proceedings in which they face a variety of increasingly punitive enforcement measures, including civil incarceration for failure to pay support.

The research reveals that a right to civil counsel would be considerably less

effective if restrictions limited when in the legal process appointed counsel were available. For example, lawyers-by-right are not made available when a child support order is established. They are also not provided when a parent must file a motion to modify an existing order to reflect a significant change in circumstances, such as losing one's job and income. In both instances, the timing and the scope of representation matter, whether the attorney provides full representation or is limited to performing only specific tasks. Having access to a full-service attorney earlier would ensure that initial orders are for appropriate amounts and are modified when circumstances warrant. Without counsel at these junctures and for broader purposes, pro se defendants are likely to fall behind in their child support payments and face mounting debts that result in contempt proceedings with a risk of civil incarceration and other harsh penalties.

Dearis Calahan's case illustrates how earlier appointment of counsel can be critical.<sup>20</sup> A fifty-three-year-old father of seven, he had three children with one woman, one child with another woman, and three children with a third woman. All of Dearis's children are now adults. When I spoke with him, he was in court because he owed past-due child support. Dearis recalled that he owed between \$7,000 and \$10,000 in past-due support. He was frustrated that the state would not explain how it calculated what he owed. Before his hearing, he made calls to several lawyers seeking legal help, but all wanted a retainer of at least \$2,500. The state had suspended his driver's license because of the amount he owed in child support. Dearis, representing himself, argued unsuccessfully for getting his license reinstated so he could drive.

In one of his cases, Dearis was not present in court at the initial hearing when the

amount of child support due was set. According to him, he did not receive notice of that hearing and, in his absence, “they kind of set it, gave me a certain number that they figured that it would be proper for me” to pay. Many child support orders are established as a default judgment when noncustodial parents do not appear in court, sometimes because they receive no notice to appear. Such orders are usually calculated based on presumed rather than actual earnings. For Dearis, his payments amounted to 20 percent of the earnings from a full-time, minimum-wage job, even though his actual earnings fell far short of that amount. Unable to pay the full amount, he fell behind and quickly accumulated child support debt.

Having access to an attorney at that earlier stage in the case – when the child support order was first established – could have made a significant difference. With representation, it is unlikely that a default judgment would have been entered and, even if it had been, an attorney would have filed a motion to vacate it because Dearis did not receive notice of the hearing. An attorney would have (at a minimum) advocated that the child support order be based on Dearis’s actual earnings, more realistically reflecting his ability to pay support. An attorney could also have advocated that the court apply low-income defendant guidelines when calculating support, or even for a reduction from the guidelines because Dearis was supporting several other children at the same time. Dearis lacked knowledge about these intricacies and thus could not raise them on his own behalf.

Maurice Shamble’s case shows why appointed counsel’s scope of representation matters. Until 2014, he had what he considered a good job, paying \$26,000 a year. Under an order set at 40 percent of his net income, the state guideline level for four children, payments came straight

out of his paychecks through wage garnishment. However, after he lost his job and his income, the order was not adjusted. He did not know that he had to notify the child support agency that he was no longer working. He assumed they would know because payments would no longer be coming directly out of his paycheck. He also did not know that losing his job provided grounds to reduce the award or that, to do so, he needed to file a motion to modify and appear at a court hearing. Instead, his arrears spiraled out of control. When I spoke with him, he owed past-due support of over \$10,000.

The other pro se fathers in the study also lacked steady, reliable employment. Some, like Maurice, lost their jobs after a period of relative stability. Others had a reduction in earnings when employers cut back their hours. Most, however, had jobs that did not pay a living wage and, like the low-wage labor force nationally, had precarious and volatile employment. Most were underemployed and struggled to make ends meet, cobbling together temp work, seasonal jobs, part-time jobs, cash jobs in the informal economy (like yard work for neighbors), and assistance from family and friends. Though they faced frequent changes in their employment status, their child support obligations remained static and did not reflect their ability to pay.

Appointed counsel is available only in situations where the defendant is facing civil contempt for nonpayment, and can address only the contempt proceedings themselves. So an appointed attorney may not file a motion to modify the order on the client’s behalf, even though an earlier failure to modify the order after a reduction in the parent’s earnings contributed to the arrearage and led to the contempt action. Without such a modification, the debt will grow ever-larger and lead a court to summon the defendant

again to explain why he should not be held in contempt for failure to pay support. Preventing an appointed attorney from addressing the essential underlying issue in the case makes no sense.

Navigating the modification process was no easy feat for the pro se litigants in my study, including Maurice. After he was civilly incarcerated for contempt of court because of the unpaid child support, Maurice realized that he had to understand the legal complications impacting his life. He spent many hours researching the law in the courthouse library and online. He had a binder full of handwritten notes and case printouts from his research and he shuffled through them repeatedly as he discussed his case with me. He believed he had found defenses in doctrines on jurisdiction and separation of powers, but it would be remarkable if Maurice understood all the intricacies of the legal principles he studied. Maurice reported that a judge dismissed his arguments as “Internet gibberish” and denied his motion.

The experiences of Dearis Calahan and Maurice Shamble show that *how* a right to civil counsel is administered is as important as *whether* a right exists. A right triggered only when a defendant faces a contempt action is woefully insufficient. Most of the judges and lawyers interviewed for the study believed that there was little a lawyer could do to help at that stage in the case. They argued that the matter was open and shut: there was a valid order to pay child support and the defendant had not complied; appointing a lawyer would not change the outcome. Their position is debatable, since counsel could argue that the defendant’s failure to comply with the order was not willful and, thus, grounds for contempt were not established. But appointing counsel earlier could have prevented these problems entirely.

Though the right to civil counsel for child support defendants is cramped and inadequate, it provides far more than is generally available from legal aid. Funding for civil legal services for indigent Americans falls far below the demand, and providers must necessarily establish service priorities. Few legal-services offices provide representation to noncustodial parents in child support cases. Compared with custodial mothers, noncustodial fathers are not sympathetic parties. Why devote limited resources to advance their claims? Men like Dearis, with his seven children by three different women, are demonized in politics and ridiculed in popular culture. Someone like him, who has fallen behind in his payments and seeks to reduce his monthly order, is more likely to be viewed as a “deadbeat dad” who is not providing for his children than as an economically vulnerable father who cannot pay his current order, despite his best efforts in the low-skilled, low-wage labor market.

The right to counsel in criminal cases is poorly implemented, yet it embraces values worth incorporating into a right to civil counsel: it is broadly available to indigent defendants at risk of incarceration, regardless of how disliked they may be. A right to civil counsel should likewise be broadly available. In the civil system, as in the criminal, a right to counsel should not be based on social acceptance. It should be based on a fair assessment of who needs a lawyer to make their case when the help really matters.

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ENDNOTES

- <sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- <sup>2</sup> Matt Ford, "A Governor Ordered to Serve as a Public Defender," *The Atlantic*, June 4, 2016.
- <sup>3</sup> A Missouri circuit court reinstated the lawyer, holding that only the state's courts had the authority to appoint a lawyer. See Celeste Bott, "Court Rules Public Defender Can't Appoint Missouri Governor as a Defense Attorney," *St. Louis Post-Dispatch*, August 25, 2016.
- <sup>4</sup> *Turner v. Rogers*, 564 U.S. 431 (2011); and Tonya L. Brito, David Pate Jr., Daanika Gordon, and Amanda Ward, "What We Know and Need to Know about Civil *Gideon*," *South Carolina Law Review* 67 (2) (2016): 223–243.
- <sup>5</sup> Ashley Dejean, "New York Becomes First City to Guarantee Lawyers to Tenants Facing Eviction," *Mother Jones*, August 11, 2017.
- <sup>6</sup> The law was passed in 2009 and the pilot program commenced in 2011. See Erin Gordon, "Advocates Promote a Right to Counsel in Civil Cases, Too," *ABA Journal*, February 2018; and Clare Pastore, "*Gideon* is My Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs," *University of the District of Columbia Law Review* 17 (1) (2014): 75–130. Conservatorship and guardianship are similar concepts in the law. A conservator is a person who has been appointed by a court to manage the estate of someone who is legally incapable of doing so, usually due to disability, illness, or injury. A guardian is a person who has been appointed to care for another's person or estate, or both, because of their infancy, incapacity, or disability.
- <sup>7</sup> *Adoption by J.E.V.*, 141 A.3d 254 (N.J. 2016).
- <sup>8</sup> The website for the National Coalition for a Civil Right to Counsel maintains a list of enacted and pending bills. See [http://civilrighttocounsel.org/legislative\\_developments/2018\\_civil\\_right\\_to\\_counsel\\_bills#pending](http://civilrighttocounsel.org/legislative_developments/2018_civil_right_to_counsel_bills#pending).
- <sup>9</sup> J. K. Dineen, "SF's Measure F Wins, Will Give Tax-Funded Legal Help to Tenants Facing Eviction," *San Francisco Chronicle*, June 5, 2018; *An Act Relative to Criminal Justice Reform*, Mass. Bill S.2371, 190th General Court (Mass. 2018); and *Relating to: a parent's right to counsel in a child in need of protection or services proceeding, providing an exemption from emergency rule procedures, granting rule-making authority, and making an appropriation*, Wisc. Assembly Bill 784, Regular Session of 2017–2018 (Wisc. 2018).
- <sup>10</sup> American Bar Association Task Force on Access to Civil Justice et al., *Report to the House of Delegates* (Chicago: American Bar Association, 2006). Many state and local bar associations have since passed resolutions similar to the ABA's. Deborah L. Rhode and Scott L. Cummings, "Access to Justice: Looking Back, Thinking Ahead," *Georgetown Journal of Legal Ethics* 30 (3) (2017): 485–500. Also, in 2016, the ABA issued a two-year *Report on the Future of Legal Services in the United States* that "urge[d] the legal profession to commit to the goal of 100 percent access to effective assistance for essential civil legal needs and [made] a number of recommendations that would go a long way towards achieving that goal, including providing civil legal aid as a matter of right when basic human needs are at stake and making wider use of innovative legal technologies"; American Bar Association Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (Chicago: American Bar Association, 2016).
- <sup>11</sup> American Bar Association Task Force on Access to Civil Justice et al., *Report to the House of Delegates*, 14, 12.

- <sup>12</sup> Deborah L. Rhode, “Legal Services Corporation : One of the Worst Cuts in Trump’s Budget,” *Tonya L. Brito The Legal Aggregate*, May 31, 2017. Legal Services Corporation (LSC) funding has increased over the years and the decline noted is a relative comparison. For a history of LSC funding, see Alan W. Houseman, “Civil Legal Aid in the United States: An Update for 2015, A Report for the International Legal Aid Group” (Washington, D.C.: Consortium for the National Equal Justice Library, 2015).
- <sup>13</sup> Catherine Albiston, Su Li, and Laura Beth Nielsen, “Public Interest Law Organizations and the Two-Tier System of Access to Justice in the United States,” *Law and Social Inquiry* 42 (4) (2017): 990–1022.
- <sup>14</sup> American Bar Association Task Force on Access to Civil Justice et al., *Report to the House of Delegates*.
- <sup>15</sup> Stout Risius Ross, “The Financial Cost and Benefits of Establishing a Right to Counsel in Eviction Proceedings under Intro 214-A” (Chicago: Stout Risius Ross, 2016).
- <sup>16</sup> Laura Abel and Max Rettig, “State Statutes Providing for a Right to Counsel in Civil Cases,” *Clearinghouse Review Journal of Poverty Law and Policy* 40 (2) (2006): 245–270.
- <sup>17</sup> *Ibid.*
- <sup>18</sup> *Ibid.*
- <sup>19</sup> *Ibid.*
- <sup>20</sup> All participant names are pseudonyms.

# The New Legal Empiricism & Its Application to Access-to-Justice Inquiries

*D. James Greiner*

*Abstract: The United States legal profession routinely deals with evidence in and out of courtrooms, but the profession is not evidence-based in a scientific sense. Lawyers, judges, and court administrators make decisions determining the lives of individuals and families by relying on gut intuition and instinct, not on rigorous evidence. Achieving access to justice requires employing a new legal empiricism. It starts with sharply defined research questions that are truly empirical. Disinterested investigators deploy established techniques chosen to fit the nature of those research questions, following established rules of research ethics and research integrity. New legal empiricists will follow the evidence where it leads, even when that is to unpopular conclusions challenging conventional legal thinking and practice.*

The U.S. legal profession routinely deals with evidence in and out of courtrooms, but the profession is not evidence-based in the scientific sense. Lawyers, judges, and court administrators, as they work in the U.S. justice system, make decisions that determine the lives of individuals and families. But they overwhelmingly rely on gut intuition and instinct, not on rigorous evidence. The choice to eschew evidence matters. The profession is asking the wrong questions about topics fundamental to our system of government, and “if they can get you asking the wrong questions, they don’t have to worry about answers.”<sup>1</sup>

Here are two examples:

Judges decide which arrestees to incarcerate versus who to release pending disposition of criminal cases in so-called bail hearings. They frequently focus on information available only from an interview of the arrestee, such as how long they have lived in the community, their employment situation, and the presence of any family in the area. But arrestee interviews raise concerns of self-incrimination,

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and are often unavailable because arrestees cannot be or do not choose to be interviewed. Scientific evidence suggests that if complete or nearly complete information on an arrestee's past criminal history (if any) is available – information from existing administrative records – an interview with the arrestee is unnecessary and provides little additional relevant information.<sup>2</sup>

In some jurisdictions, most low-income survivors of domestic violence petitioning for civil protection orders will not receive full lawyer representation. Over-subscribed legal-services providers often decide to provide a few survivors/petitioners full representation and to provide something less (such as self-help materials and/or an explanatory telephone call) to most. But in making these triage decisions, lawyers often ask themselves which cases they can win (meaning obtain a civil protection order), not in which cases their representation is likely to make a difference.<sup>3</sup> Winning a case and making a difference in a case are two different things. There is little evidence about how to identify cases in which full representation makes a difference.

These examples illustrate that the questions the legal profession chooses to ask about services it provides to poor and low-income people have substantial consequences about who spends time incarcerated and who obtains legal protection from abusers. In other words, these choices have immediate consequences for real people.

The new legal empiricism, which exists in pockets in the academy but only rarely outside of it, could transform the U.S. legal profession into an evidence-based field. As the examples above indicate, rationalizing those areas of law might reduce crime and incarceration and permit more effective triage decisions by legal-services providers. In other words, fewer

people could go to jail, and those who do go might spend less time there, with no increase in crime rates or threat to the administration of justice. More survivors of domestic violence could have judicial protection orders. None of this would require additional resources.

As of the 1930s, U.S. medicine was not yet a science either. Physicians relied almost exclusively on gut instinct and intuition, informed by dubious claims from drug companies, to decide which drugs to provide patients. Over the next forty years, medicine transformed itself into a field in which physicians made decisions about treatment based on evidence from randomized controlled trials (RCTs).<sup>4</sup> The U.S. population lives longer and healthier lives in part because of this transformation. The emergence of the new legal empiricism, one hopes, indicates that eighty-plus years later, law may begin to follow medicine's example.

What is the new legal empiricism? The “new” here modifies “legal,” not “empiricism.” New legal empiricism is simply strong empiricism, as developed and implemented over the past decades in fields outside of law, now finally applied to law. It is “new” in the sense that law has followed neither medicine nor other social sciences (sociology, economics, political science, psychology) in demanding that strong empiricism become the standard for investigations that researchers conduct and the basis for decisions that those in the field make.

There are many kinds of empiricism, and empirical projects can further a variety of goals. Historians engage in empiricism, frequently based on archival records and oral interviews with the elderly, and have their own standards of inference. Literary scholars sometimes investigate the lives of the authors whose work they interpret. The new legal em-

piricism involves investigations into how the current legal system works, and how to change the world for the better, however “better” is defined.

The first step in strong empiricism is sharply defining the questions to address. The legal profession frequently fails here, and when it does, nothing that follows matters. Relevant questions emerge from conversation among empiricists, practitioners in a field, and their customers or clients. In the “bail” release example above, a judge or a legislator might consult an empiricist for help in easing jail overcrowding or ameliorating racial disparities in incarceration. The empiricist might examine jail rosters to discover that a substantial portion of jail residents are arrestees awaiting trial on the charges leveled against them, examine whether some racial groups are over- or under-represented, and ask how decisions are made about whom to incarcerate before trial.

Those questions might lead to the following information: In practice, after a law enforcement officer arrests someone, the arrestee is taken to a jail and held there while a prosecutor files charges against him. In most U.S. jurisdictions, the arrestee is brought before a judge (or the equivalent) who decides whether to release the arrestee as he awaits trial on those charges, and if so, what conditions the arrestee will have to meet to secure release. As a matter of broad policy, judges could release all arrestees, but doing so carries risks that some arrestees will fail to return for hearings or will commit new crimes while on release, either of which undermines the administration of the case and the public’s confidence in the judicial system. Judges could release no arrestees, meaning incarcerate them all, but that carries fiscal and human costs. Judges in all U.S. jurisdictions, following dictates of statutes and court decisions that

vary in the degree of discretion delegated to judges and in the factors judges can or must consider, release some arrestees and not others, imposing conditions on all arrestees released. Bail is one well-known condition: the arrestee must arrange for the deposit of a certain amount of money, set by a judge, into a court account, with the money returned at the end of the case if the arrestee meets the conditions of release, but subject to forfeit to the court if the arrestee misbehaves.

My research suggests that judges making predisposition release decisions are attempting to minimize three rates: 1) the rate at which arrestees fail to appear at court hearings in their criminal cases; 2) the rate at which arrestees commit crimes (especially violent crimes) between arrest and case disposition; and 3) the rate at which arrestees are incarcerated. Judges and legislators are also often concerned about potentially unlawful racial disparities in the population of arrestees incarcerated at the bail stage and about whether criminal records or other risk factors justify racial disparities observed.

With that in mind, the empiricist and the judge or legislator might agree that the broad question is how to rank groups of arrestees according to the objective, unbiased risk that they will commit crimes or fail to appear if released. High-risk arrestees could be incarcerated, the remainder released. The empiricist might break this broader question into two: What observable factors classify arrestees according to their risk of committing crimes or failing to appear, without introducing racial bias into the bail decision? And does providing some kind of compilation or summary of those factors, for example, in the form of a score that classifies risk, result in reductions of some or all of the rates listed above?

To an empiricist, these last questions are of different types. The first, about

factors that classify (or predict) arrestee risk of misbehavior, gets at the way the world is. It is descriptive. The second, about whether providing information on risk to judges improves criminal justice outcomes, is causal. The causal question gets at whether doing something (providing risk information to judges) versus doing something else (not providing risk information to judges) alters a set of outcomes (the three rates above) in a desirable way.

Once the empirical questions to be explored have been identified, the empiricist must determine how to answer them. There will always be several options: *qualitative techniques*, such as structured interviews of potentially knowledgeable people; *focus groups*, in which an empiricist assembles groups of potentially knowledgeable people, provides them with open-ended questions, and elicits information from the resulting discussion; *structured observation of relevant events*; or *reviewing relevant documents* to look for patterns. Still other options include: *quantitative techniques*, such as surveys of randomly selected individuals or cases or judges; *predictive models*, which explore whether and how well precursor variables predict the value of ultimate variables; and *randomized controlled trials*, in which the empiricist randomly assigns cases, people, judges, or units of some kind to one condition or another and then measures which condition produces a more desirable set of outcomes. A practitioner of the new legal empiricism, like a practitioner of rigorous empiricism outside the legal context, chooses the method appropriate for the questions to be addressed.

To illustrate this second step, return to the two smaller empirical questions identified above: What factors accurately predict arrestees' risk of misbehavior if released on bail? And does providing

information to judges about those factors result in better reduction of the rates of failure to appear at hearings, new crimes committed between arrest and case disposition, and incarceration?

The empiricist will choose qualitative or quantitative techniques to address these questions. Which ones? In many situations, qualitative techniques are either superior to other options or an integral part of an overall research plan. For these two questions, however, I would look primarily to quantitative techniques. One reason is the objectivity of the information likely to be obtained by interviewing participants in the bail hearings. The goal of the empirical project is to improve the judges' decision-making in these hearings, so there is reason to be cautious about relying exclusively on talking to people and observing the settings that are the target of improvement efforts.

Instead, researchers exploring this question have compiled data potentially available to judges making arrestee release decisions, such as information about charges, arrestee criminal history, their history of appearing or not at past hearings, their ties to the community, their race or ethnicity, and other factors. Researchers have connected this information to information about key outcomes, such as judges' release decisions, arrestees' failure to appear, and arrestees' commission of new crimes. Applying statistical techniques to these data, researchers have created scoring systems or algorithms relating observable information about arrestees to release decisions, failures to appear, and new crimes.<sup>5</sup> The scoring systems or algorithms are known as "risk assessment" instruments or scores. They aim to use variables that are observable at release hearings and are racially unbiased, along with a set of weights derived from the data analysis exercise just described, to classify arrestees according

to the risk that they will fail to appear or commit new crimes if released. This is the new legal empiricism at work.

The new legal empiricism is about more than selecting and implementing the right research techniques to obtain and analyze the right data; it is also about creating research norms that protect the credibility of the research and researcher.

New legal empiricism practitioners must follow general norms of social science research that have emerged to safeguard research integrity and the appearance of research integrity. For example, empiricists should not engage in investigations in which they have a financial or other interest that might affect their impartiality. Independent researchers ordinarily produce more credible results. Researchers must also follow the evidence. If the strong empirical techniques suggest or lead to truths that are unpopular among certain constituencies, or even normatively creepy, the empiricist must report those results.

New legal empiricism practitioners should stay cognizant of the limits of research techniques, and remember to include a discussion of those limits in the publications they produce. Where possible, empiricists specify their methods and research goals before they start doing any research, for example, by “registering” a proposed study on one of several websites that exist for this purpose. Where possible, consistent with confidentiality- and use-agreement limits frequently grounded in concerns of ethics and privacy, empiricists make their data and statistical code publicly available to allow replication of results.

New legal empiricism practitioners should also separate, to the extent possible, the facts they investigate and generate from value judgments required in any policy decision. Returning to the example

of risk assessment instruments, recall that the aim was to minimize simultaneously the rates at which arrestees were incarcerated, failed to appear at court hearings, and committed new (and especially violent) crimes. Minimizing these rates might involve tradeoffs: more incarceration might mean few failures to appear and less crime. How to weigh these rates against one another in setting policy in this area is a value judgment, not an empirical question. Though 100 percent separation between empiricism and values is neither possible nor desirable, a fair amount of distance between them is achievable and essential to the empiricist’s credibility.

Returning to the running example of risk assessment instruments for bail hearings, assume that the initial step of constructing a risk assessment instrument is complete, so that an empiricist has identified a set of variables observable after arrest and not too closely associated with race that, weighted in a specified way, appears to classify arrestees according to risk of misbehavior. Assume that the researcher followed best practices with respect to research integrity.

The next question is whether sharing the risk assessment scores with judges will change their behavior, by facilitating release decisions that minimize racial imbalances along with rates of incarceration, failure to appear, and/or new criminal activity. This question is one of program effectiveness, suggesting that the backbone of research should be one or more RCTs, because answering the research question requires being able to compare judicial decisions (and results of those decisions) when the risk assessment instrument is available, and when it is not, to see which produces better outcomes. Only RCTs, with their random allocation of judicial decisions to a risk-assessment condition versus a

no-risk-assessment condition, can assure (up to statistical uncertainty) that differences observed in the outcomes are due to the difference in conditions and not some alternative factor.

In this example, without an RCT, a judge might choose to use a risk assessment only in cases the judge considers close or difficult. If so, and if defendants misbehave at higher rates in the cases the judge considers close or difficult, a comparison of misbehavior rates in cases with risk assessment scores to misbehavior rates in cases without such scores will show more misbehavior when risk assessment scores are considered, making it look like the risk assessment leads to worse outcomes. An RCT would prevent this kind of misrepresentation.

To answer a research question such as this, RCTs, though necessary, are not always sufficient. RCTs will disclose whether the availability of the risk assessment improves criminal justice outcomes but not *why* it does or does not. To find out why, a practitioner of the new legal empiricism should attempt to supplement the RCTs with other quantitative techniques, such as comparisons of rates of release, failures to appear, new criminal activity, and racial statistics before and after the risk assessment was adopted. A new legal empiricism practitioner should also deploy court observations, interviews, and other qualitative techniques. These techniques will generate information about how risk assessment scores work with judges' decision-making, and thus why scores do or do not help. That information, in turn, will allow a researcher to theorize about when scores might work in other court systems.

Now imagine that several researchers were at work on this question and they all found the same thing: When they compared release patterns, failures to appear, new criminal activity, and racial balances

before and after the implementation of the risk assessment program, they discovered improvements in some or all of these measures roughly coinciding with the implementation of a risk assessment score program. At the same time, however, RCTs showed no effect of the use of the scores on outcomes. Interviews with judges, prosecutors, defense attorneys, local government officials, and court administrators showed that communities ordinarily implement risk assessment scores as part of an overall package of criminal justice reforms. Such reform packages include reduction of time spent in jail before bail hearings, faster processing of information from law enforcement to prosecutors, and/or creation of programs providing differing levels of monitoring (ankle bracelets, drug testing, automated call-in services) that facilitate predisposition release. In the face of 1) a favorable before-after comparison, but 2) nothing statistically significant on the RCT comparison that evaluated the risk assessment instrument exclusively, a practitioner of the new legal empiricism might infer that the elements of the reform packages adopted contemporaneously with the risk assessment are probably responsible for the favorable changes, not the risk assessment itself.

The new legal empiricism means beginning with a specific set of questions. The questions to be investigated are not value judgments masquerading as factual inquiries; they are empirical. The investigation proceeds with an impartial investigator's deployment of established techniques chosen to fit the nature of the research questions. The investigator implements these techniques in a manner that protects the integrity of the investigation and her own neutrality. Helpful practices include prespecification, transparency, making data and coding available for

replication, and defining variables clearly. The investigator follows the evidence where it leads, including to unpopular conclusions, and she is careful to explain the limits of the techniques she deploys.

All of this is new only to law.

The new legal empiricism has a great deal to offer to the field of access to justice. The field misses out when researchers and their partners in the U.S. legal profession choose not to render the results of their research credible.

Consider a question at the heart of access to justice: how much difference, if any, do different levels of legal assistance make? This broad question can be addressed by identifying a particular level of service – for example, offering self-help materials to individuals faced with a certain kind of dispute – and identifying an alternative level of service – for example, offering attorney-client relationships to individuals faced with that same kind of dispute. Having identified differing service levels, a researcher attempts to ascertain how much each level costs as well as the outcome variables the services are designed to affect. Examples of typical outcome variables include obtaining a favorable adjudicatory result, addressing the underlying socioeconomic issue that led to the adjudication, assuring that each litigant feels that she is treated with dignity and respect during the adjudication, and reminding government officials (the judge, the court staff) that human beings are involved in each of the cases they adjudicate.

In the past, many researchers would have proceeded by identifying a set of cases in which a litigant experienced one service level (say, self-help materials) and a set of cases in which a litigant experienced a different service level (say, full attorney representation), comparing the outcomes of litigants in each set, and then attributing any observed disparities

in those outcomes to the difference in service levels. Sometimes, such researchers could measure observable background variables, such as race or gender or some measure of case complexity, and attempt to use statistical models to “control for” those background variables.

By contrast, a researcher working in the new legal empiricism proceeds by deploying an RCT, supplemented (ideally) by qualitative techniques, to understand how the adjudicatory system at issue functions. Only an RCT can assure, up to statistical uncertainty, that any differences observed on the outcome variables experienced by litigants with one service level (self-help materials) versus those experienced in another service level (full representation) are due really to the difference in service level offered as opposed to, say, differences in the individuals’ unobservable characteristics, such as motivation level, articulateness, or case characteristics.

This difference in methodology goes to the heart of what the new legal empiricism is and what it can offer. Practicing lawyers say that litigants who self-select into receiving self-help materials and litigants who obtain full representation do not have the same distribution of motivation, or articulateness, or case characteristics. Specifically, people who successfully search for a legal-services provider, find their way through its intake system, and persuade it to provide full representation – all sufficiently early in a matter for the attorney to provide real services – are likely more motivated, more articulate, and have cases that have different characteristics than those who do not. A new legal empiricism researcher’s use of an RCT-backed study provides credible measurements of how much difference the disparate service levels make, unconfounded by the effects of the disparate background variables. The new legal

empiricism offers credible evidence of the effectiveness, and cost effectiveness, of disparate legal-service levels. Other research offers little or nothing credible.

The difference in choice of method is real. A few years ago, statistician Cassandra Wolos Pattanayak and I compiled over one hundred studies comparing the effectiveness, and cost effectiveness, of legal-services providers' disparate levels of service.<sup>6</sup> This quantity of studies addressing the same research question demonstrates both the question's importance and the vastness of the effort dedicated to answering it. But of the more than one hundred studies, only about seven (depending on how one counts) deployed RCT-backbone methodology. These seven studies reach seemingly contradictory conclusions, with some suggesting the politically unpopular conclusion that for some legal settings, and some sets of clients, higher (and more expensive) levels of legal services make little difference vis-à-vis lower, less expensive levels. The other studies are, as detailed above, not credible. The potential of, and need for, the new legal empiricism is evident.

Nonetheless, legal-services providers continue to produce (and, apparently, rely on) studies that do not deserve credence. Many of these are implemented by or commissioned by the programs themselves. They almost invariably reach laudatory conclusions. By way of example, a recent study of telephone advice programs in one state concluded that the evaluated programs "are achieving the primary goal of telephone-based legal assistance, which is to make legal assistance accessible to every eligible person . . . without sacrificing service quality and effectiveness in the process." The researchers arrived at this conclusion by speaking to former clients they could reach and requiring the evaluated programs to conduct a "self-assessment."<sup>7</sup> The evaluators

spoke only to individuals who received telephone services (and who they could reach), so there was no comparison group of individuals who did not receive telephone services. There could be no comparison necessary to conduct any kind of evaluation, much less the randomized evaluation needed for credibility. Here is the essence of self-evaluation: *I am the greatest law professor on Earth. Just ask me.* This is not the new legal empiricism.

To take another example from access to justice, consider the following narrative: Low-income individuals frequently encounter civil legal problems. Most would like to obtain attorneys to help them resolve those problems. The primary reason they do not consult or retain attorneys is that they cannot afford lawyers' fees. To further access to justice, then, governments, philanthropists, and others should pump money into existing legal-services programs to fill the "justice gap."

The narrative above has two basic points: low-income individuals frequently encounter civil legal problems, and most would like to obtain attorneys to help resolve those problems but do not do so because the cost is too high. Is the first point true? Is the second?

For many in the U.S. legal profession, the answers to these two questions are too obvious to require research. As suggested by the phrase "justice gap," it simply must be the case that low-income individuals and families desire but cannot get legal services, specifically traditional attorney-client relationships. But a hypothetical new legal empiricism researcher would not accept the idea that truths this important are too obvious to investigate.

An editor of this volume, Rebecca Sandefur, did not accept that idea. She sought to find out whether low-income individuals encountered legal problems and, if so, whether they wanted attorney assistance, by asking low-income individuals.

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Deploying a well-executed set of focus groups, she found that the answers to the two questions identified above were complex and nuanced. The evidence suggests that low-income individuals frequently encounter legal problems, but even when they recognize those problems as legal (not always), they generally prefer to involve neither lawyers nor courts. Cost is often not the primary reason for their reluctance to turn to formal law.<sup>8</sup>

Neither Sandefur's research nor the RCTs on the effectiveness of different levels of legal services support the idea that legal services are worthless or that funding for legal services should be cut. This rigorous research does suggest, however, that standard narratives that exist in the U.S. legal profession are distorted in ways that matter.

The previous discussion suggests that the new legal empiricism has already provided much to challenge assumptions common in the U.S. legal profession. The approach could also offer much in the way of guidance for the profession's policy-makers, regulators, funders, reformers, and revolutionaries. Challenges to accepted truths are helpful, but the approach should also deliver constructive ideas. Early indicators are that it will be able to do so. Here are some questions about which, with adequate funding and with the political will among the members of the legal profession, a new legal empiricism could provide useful guidance:

- What would be the effects of partial deregulation of the U.S. legal profession?
  - Can limited licensed legal technicians, or other kinds of nonlawyer legal professionals, provide effective services at a cost accessible to low-income individuals?<sup>9</sup>
  - Can online legal-service providers like LegalZoom, or free online legal-ser-

vice providers, or nonprofits that provide a hybrid of online and traditional lawyer services provide an effective way for low-income individuals to benefit from the justice system?<sup>10</sup>

- Would changing legal ownership rules allowing lawyers, or unsupervised nonlawyer legal professionals, to work as salaried employees of corporations with convenient locations (think paralegals in offices at Walmart) improve access for low-income individuals and families?<sup>11</sup>
- What would be the effects of moving certain disputes to online or app-based adjudication?<sup>12</sup>
- Can algorithms and scoring systems, administered by human beings or computers implementing artificial intelligence programs, improve the functioning of courts, legal-services offices, court administrators, and other key actors within the justice system, as is already occurring in the medical profession?<sup>13</sup>
- Are there effective ways to divert individuals accused of crimes away from the traditional criminal law system?<sup>14</sup>

It is impossible to overstate the importance of these questions to the modern justice system. The new legal empiricism has much to offer.

If the new legal empiricism has already exploded some of the myths that previously masqueraded as truths, and if it has much to offer for the future, why has the U.S. legal profession yet to embrace it, and what can be done about the situation?

**B**ecause medicine and other disciplines have incorporated rigorous empiricism into their understandings of what counts as true, it cannot be that the new legal empiricism is inimical to the judgment-based reasoning that the legal profession offers in solving legal problems. Nor can

it be that rigorous empiricism is inconsistent with professional ethics, legal or otherwise. Again, the medical example shows as much. Rigorous empiricism can coexist with or alongside professional judgment.<sup>15</sup>

In the 1930s, when medicine began to turn to rigorous empiricism (particularly the RCT), medicine was less a science than an individualized craft, especially as it was practiced outside major cities and teaching/research facilities.<sup>16</sup> And in this period, published papers in both medicine and law began to make use of randomization to conduct empirically rigorous studies, suggesting that the intellectual foundation for transformation of the legal system into an evidence-based field was present then, just as it was in medicine.<sup>17</sup>

In prior work, Andrea Matthews and I speculated that perhaps lawyers (and thus judges, who in the United States are ordinarily former lawyers) resist rigorous empiricism because 1) they are trained to pursue goals that clients provide and their thought processes are therefore fundamentally instrumental (in the service of advocacy) as opposed to analytical; and 2) there may be social value to having lawyers appear certain when they argue and to having judges appear certain when they make decisions, even when there is little basis for that certainty, and to appear certain, lawyers and judges must convince themselves that they are.<sup>18</sup> The first observation, if true, might make it hard for lawyers and judges to embrace the new legal empiricism because they are trained more to argue than to analyze, and thus instinctively seek persuasion rather than truth. The second observation, if true, might make it hard for lawyers and judges to embrace this approach because certainty inhibits a desire for rigorous investigation.

Neither observation/argument is close to bulletproof. The duties of corporate

general counsels are less about advocacy and more about strategic decision-making and policy-making than those of, say, courtroom litigators. Yet we see little if any evidence of rigorous empiricism in corporate counsel offices, despite the supposed existence of market forces that might put a premium on using a new legal empiricism to discover money-saving truths. When Matthews and I provided our speculation, we stated that these two observations were likely insufficient to explain fully the U.S. legal profession's resistance to evidence-based thinking.

Medicine's partial turn to evidence-based thinking reflected leadership shown by particular members of the medical profession; these leaders worked primarily in urban teaching centers and had strong connections to federal agencies.<sup>19</sup> The legal profession needs leaders who can transform its thinking about what counts as useful knowledge. Law schools should create environments that introduce students to the issues discussed here. Legal academics aim to prepare the next generation of leaders in the U.S. legal profession to lead. A crucial element of that training is to teach about the need for, and about how to work with researchers to expand, the new legal empiricism.

ENDNOTES

- <sup>1</sup> Thomas Pynchon, *Gravity's Rainbow* (New York: Viking Press, 1973), 251.
- <sup>2</sup> Laura and John Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment* (Houston and New York: Laura and John Arnold Foundation, 2013).
- <sup>3</sup> Figures to support the statements about oversubscription are on file with author, from a survey of 2014 cases in an eight-county area around Akron, Ohio. The statements regarding lawyers' focus on whether they can win are the result of conversations with legal aid attorneys around the country, including in two Ohio locations.
- <sup>4</sup> Harry M. Marks, *The Progress of Experiment: Science and Therapeutic Reform in the United States, 1900 – 1990* (Cambridge: Cambridge University Press, 2000).
- <sup>5</sup> See Laura and John Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment*; and Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, et al., "Human Decisions and Machine Predictions," NBER Working Paper No. 23180 (Cambridge, Mass.: National Bureau of Economic Research, 2017), <http://www.nber.org/papers/w23180>.
- <sup>6</sup> D. James Greiner and Cassandra Wolos Pattanayak, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?" *The Yale Law Journal* 121 (8) (2012): 2175–2179, note 154.
- <sup>7</sup> Ken Smith, Kelly Thayer, and Kathy Garwold, *Final Report on the Assessment of Telephone-Based Legal Assistance Provided by Pennsylvania Legal Aid Programs Funded under the Access to Justice Act* (Traverse City, Mich.: The Resource for Great Programs, 2012), <https://www.paiolta.org/wp-content/uploads/2014/05/Report-on-Telephone-Based-Legal-Assistance.pdf>.
- <sup>8</sup> Rebecca L. Sandefur, "The Importance of Doing Nothing: Everyday Problems and Responses of Inaction," in *Transforming Lives: Law and Social Process*, ed. Pascoe Pleasence, Alexy Buck, Nigel J. Balmer, et al. (Norwich, United Kingdom: The Stationary Office, 2007). See also Rebecca L. Sandefur, "The Fulcrum Point of Equal Access to Justice: Legal and Non-Legal Institutions of Remedy," *Loyola of Los Angeles Law Review* 42 (4) (2009): 949.
- <sup>9</sup> See Washington State Bar Association, "Limited License Legal Technicians," updated September 24, 2018, <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians>.
- <sup>10</sup> See LegalZoom, <https://www.legalzoom.com/>; and Upsolve, <https://upsolve.org/>.
- <sup>11</sup> See American Bar Association, "Rule 5.4: Professional Independence of a Lawyer," [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_4\\_professional\\_independence\\_of\\_a\\_lawyer.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer.html).
- <sup>12</sup> See "Online Claims Service being Piloted in England and Wales," Out-Law, April 10, 2018, <https://www.out-law.com/en/articles/2018/april/online-claims-service-piloted-england-wales/>.
- <sup>13</sup> See Taylor Kubota, "Stanford Algorithm can Diagnose Pneumonia Better than Radiologists," Stanford News, November 15, 2017, <https://news.stanford.edu/2017/11/15/algorithm-outperforms-radiologists-diagnosing-pneumonia/>.
- <sup>14</sup> See Lone Star Justice Alliance, <https://www.lonestarjusticealliance.org/>.
- <sup>15</sup> D. James Greiner and Andrea Mathews, "Randomized Control Trials in the United States Legal Profession," *Annual Review of Law and Social Science* 12 (2016): 295.
- <sup>16</sup> Marks, *The Progress of Experiment*.
- <sup>17</sup> James Burns Amberson Jr., B. T. McMahon, and Max Piner, "A Clinical Trial of Sanocrysin in Pulmonary Tuberculosis," *American Review of Tuberculosis* 24 (1931): 401; and Frederick J. Gaudet, George S. Harris, and Charles W. St. John, "Individual Differences in the Sentencing Tendencies of Judges," *Journal of Criminal Law and Criminology* 23 (5) (1933).
- <sup>18</sup> Greiner and Matthews, "Randomized Control Trials in the United States Legal Profession."
- <sup>19</sup> Marks, *The Progress of Experiment*.

# The Public's Unmet Need for Legal Services & What Law Schools Can Do about It

*Andrew M. Perlman*

*Abstract: Civil legal services in the United States are increasingly unaffordable and inaccessible. Although the causes are complex, law schools can help in three ways beyond simply offering free legal clinics staffed by lawyers and students. Law schools can teach the next generation of lawyers more efficient and less expensive ways to deliver legal services, ensure that educational debt does not preclude lawyers from serving people of modest means, and conduct and disseminate research on alternative models for delivering legal services. These strategies will not solve all of the problems that exist, but they hold the promise of meaningfully improving the affordability and accessibility of civil legal services.*

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Access to affordable legal services is increasingly out of reach in the United States.<sup>1</sup> More than 80 percent of people living below the poverty line and a majority of middle-income Americans receive no meaningful assistance when facing important civil legal issues, such as child custody, debt collection, eviction, and foreclosure. These and many related problems have numerous causes,<sup>2</sup> but the cumulative effect is a legal system that is among the most costly and inaccessible in the world.<sup>3</sup>

Law schools can help. They can teach the next generation of lawyers more efficient and less expensive ways to deliver legal services, ensure that educational debt does not preclude lawyers from helping people of modest means, and conduct and disseminate research on alternative models for delivering legal services. These strategies are not a panacea, but they can help to improve access and affordability.

Traditionally, law schools have not prepared students to deliver legal services as efficiently as pos-

sible. Rather, they have trained students to engage in highly customized and expensive forms of lawyering, leaving them ill-equipped to keep costs low, reduce prices, and increase access to legal services.

For more than a century, law schools have relied on an educational model developed by Harvard Law School's Christopher Columbus Langdell. The model requires students to read court opinions, extract from those opinions basic legal doctrines and principles, and apply those doctrines and principles to new fact patterns. Through this process, students learn important legal reasoning and analytical skills, but they do not learn how to represent clients.

In recent decades, law schools have usefully supplemented the traditional method by teaching a wider range of skills. For example, most law schools now offer clinics where students learn important lawyering competencies while representing clients under the supervision of experienced clinical faculty. Students learn fact investigation, negotiation, oral and written advocacy, document drafting, client counseling, and other critical skills. Law schools have also introduced more legal research and writing instruction, various types of simulation courses, and other opportunities to gain practical experiences before graduating.

The expansion of experiential education has better prepared students to represent clients, but the curriculum contains a notable omission: it fails to teach students how to deliver services *efficiently*. Instead, most law schools and most clinical programs continue to teach a predominantly bespoke model of representation, in which each client receives highly tailored and time-consuming assistance that is necessarily expensive.

Law schools can teach their students how to drive down the cost and price of

legal services by introducing a wider array of knowledge and skills into the curriculum. For example, law schools are starting to teach concepts long used in the business world to improve effectiveness and efficiency, such as project management, process improvement, design thinking, and data analytics. Other schools are teaching students how to use technologies that can reduce costs, such as automated legal document assembly, online law practice management tools, and the effective use of basic law office software, such as Microsoft Word and Excel.

This kind of training can lead to innovative methods of legal services delivery. For example, one law school – Chicago-Kent College of Law at the Illinois Institute of Technology – partnered with the Center for Computer Assisted Legal Instruction in the early 2000s to create a web-based platform called A2J Author (A2J refers to Access to Justice) that allows legal professionals to prepare online “guided interviews” for self-represented litigants.<sup>4</sup> The guided interviews consist of easy-to-understand questions that, once answered, produce automatically generated legal forms. By 2018, more than 3 million people had used an A2J-Author guided interview and generated more than 1.8 million court documents. This effort has helped people gain access to effective self-help legal services and enabled courts to spend less time and money assisting self-represented litigants.

Other law schools have engaged in conceptually similar work. For instance, at Suffolk University Law School, where I serve as dean, we created the Legal Innovation and Technology Lab (LIT Lab), a new kind of clinical program that helps organizational clients, such as courts and legal-aid offices, make more efficient use of limited resources.<sup>5</sup> Illustrative LIT Lab projects include the creation of an app that uses a TurboTax-like interface

to generate letters for tenants to send to their landlords about a range of housing law-related issues and a tool that can help people identify public benefits to which they are legally entitled. We also established a first-of-its-kind three-year course of study that teaches students how to use technology and sound law-practice management to start or join law firms that can profitably represent underserved clients.<sup>6</sup>

These kinds of programs teach students skills that employers increasingly need yet often lack. In recent years, more clients have begun to demand alternative fee arrangements that are not tied to the amount of time lawyers spend on a matter. With this shift, some legal employers have begun to look for lawyers who understand how to deliver high-quality services more efficiently. The problem is that law firms, which have traditionally prized billable hours, do not have this native capacity and need to seek lawyers who have some of these competencies.<sup>7</sup> Law schools have an opportunity to meet this demand by giving their graduates a knowledge base and skill set that clients and employers increasingly expect while simultaneously helping to reduce the cost of legal services.

Law schools can have an even larger impact on the affordability and accessibility of legal services by teaching cutting-edge knowledge and expertise to more experienced legal professionals. Law schools have long helped the profession remain up-to-date on changes in the law, but law schools can also contribute to reducing the cost of legal services through continuing-legal education programs, certificates, and new degrees offered to those who want to deliver their services more efficiently.<sup>8</sup>

Teaching law students and existing lawyers to be more efficient will not solve the access-to-justice crisis. Because of

deep structural problems identified elsewhere in this issue of *Dædalus*, there will be significant unmet legal needs even if all lawyers become much more cost effective. Nevertheless, by supplementing the standard law-school curriculum and encouraging (or even requiring) students to learn new knowledge and skills, law schools can equip the profession with the tools needed to make legal services more affordable and accessible.

Law schools can also improve access to justice by making legal education more affordable. By reducing graduates' educational debt, a larger number of lawyers should be able to afford to lower their fees, perform more pro bono and "low bono" work, and pursue less lucrative careers serving the public.<sup>9</sup>

Educational debt is significant for this reason (and many others), but the relationship between law school loans and access to justice should not be overstated. Consider what would happen if someone were to borrow \$30,000 to attend law school instead of \$130,000 (the average amount that students at private law schools borrow today).<sup>10</sup> Assuming a twenty-year payment plan and an interest rate of 6 percent, this large reduction in debt would save the average lawyer approximately \$8,600 per year.<sup>11</sup>

This is a considerable reduction, yet it is unlikely that all, or even most, of this money would be passed along to the public in the form of lower prices or more low bono and pro bono work. For lawyers in larger law firms and corporate legal departments, their ability to perform pro bono work or to discount their fees has more to do with their employers' finances and policies than their own personal financial circumstances. As for lawyers in solo or small firm settings (whose personal finances are more directly related to the fees they collect), they may very

well pass along some of the savings to the public. That said, lawyers in these firms often face significant financial pressures, so many of them are likely to use substantial portions of the savings to improve their financial bottom lines rather than lower their prices.

Another possible benefit of lower debt is that law school graduates who currently feel compelled to pursue higher paying jobs might decide to start firms serving people of modest means. The size of this possible effect is unclear, but given the difficulty of sustaining law firms of this sort regardless of educational debt, the impact is likely to be modest rather than transformative.

Making law school more affordable is also unlikely to increase significantly the number of public interest and legal-aid lawyers who are available to provide civil legal services to people of modest means. The staffing of legal-aid offices typically turns on outside (often government) funding, and that funding supports only a certain number of lawyers, even at modest salaries. Although a reduction in educational debt might increase the number of people who are willing and financially able to accept these typically lower-paying legal-aid jobs, the reduction in debt is unlikely to affect how many legal-aid positions exist or how many clients receive access to a legal-aid lawyer.

A substantial reduction in educational debt, in other words, should have some impact on access to justice, but the cumulative effect is likely to be more modest than the impact of teaching lawyers how to deliver their services more efficiently. Consider that, by reducing the median lawyer's educational debt by \$100,000 and increasing that lawyer's take home pay by \$8,600, law schools can improve the median junior lawyer's post-tax income by approximately 18 percent and the median post-tax income of all

lawyers by about 11 percent.<sup>12</sup> Even if all of these savings were passed along to the public in the form of cheaper access to legal services or pro bono work (which is highly unlikely for the reasons described above), innovations in the delivery of legal services hold the promise of a much larger percentage improvement in prices and access.

The debt-reduction approach is also likely to be considerably more difficult to implement than incorporating new knowledge and skills into the law school curriculum. The latter can be achieved through relatively modest new costs, such as the use of adjunct faculty or reassigning existing faculty to teach new kinds of classes. In contrast, a reduction in educational debt by the amounts needed to have even a modest effect on the access-to-justice crisis is likely to be much more challenging. Options include shortening law school to two years, greatly enhancing and expanding income-based loan forgiveness programs (law school programs and government alternatives), liberalizing accreditation standards to allow for more flexibility in how legal education is delivered (such as permitting entirely online legal education), and making greater use of adjuncts and other part-time faculty. A combination of many or most of these changes would probably be necessary, but for a variety of political, pedagogical, and financial reasons, they are unlikely to be achieved in the near term.

This is not an argument for ignoring educational debt as one of many solutions to the access-to-justice problem. Law schools should work to make a legal education as affordable as possible, and schools have recently made progress toward this goal.<sup>13</sup> But while a massive reduction in the cost of legal education would certainly be helpful, such a reduction might not have the impact on access to justice that is sometimes assumed.

The most effective ways to address the access-to-justice crisis might involve permitting professionals other than lawyers to participate more meaningfully in the delivery of legal services.<sup>14</sup> Just as health care providers other than doctors now deliver a wide range of services and help to minimize costs, there is growing evidence that an array of legal-service providers other than lawyers can have the same effect.<sup>15</sup> Additional benefits may come from permitting professionals other than lawyers to have an ownership stake in law firms.

Several developments are noteworthy. An increasing number of courts are authorizing and regulating new categories of legal-services providers, such as document preparers, courthouse navigators, and limited license legal technicians.<sup>16</sup> Entrepreneurs have started companies that provide legal services and information to the public, often drawing on the expertise of professionals other than lawyers to develop new cost-effective delivery models. In an increasing number of countries, legal services are delivered through “alternative business structures” that include owners and partners who are not lawyers, and those arrangements may help to reduce prices in some areas of law.<sup>17</sup>

Through research and scholarship, law professors can play an important role in uncovering the extent to which these

innovations are improving access to legal services, affecting the quality of outcomes, and influencing client attitudes about the legal system. Such research can also explore procedural and regulatory reforms that are necessary to accelerate these changes and ensure that discussions about such reforms are grounded in evidence and reasoned discourse rather than speculation and self-interest. Through this scholarship, law schools can help to foster the replication of regulatory and market-based innovations that show great promise in helping to address the public’s unmet legal needs.

The access-to-justice crisis has many causes, including the government’s underfunding of civil legal aid, the limited right to counsel for people who need essential legal services, and the procedural complexity and expense of the American system of dispute resolution. Although law schools are relatively small players in a system with profound structural problems, they nevertheless have an important role to play beyond offering free legal services through clinics and encouraging more pro bono work. By reimagining the curriculum, helping minimize law school debt, and producing research on new models of legal-services delivery, law schools can better prepare students for professional success and make progress in addressing the public’s legal needs.

#### ENDNOTES

<sup>1</sup> American Bar Association Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (Chicago: American Bar Association, 2016). For additional problems, see Rebecca L. Sandefur, “Civil Legal Needs and Public Legal Understanding” (Chicago and Champaign: American Bar Foundation and University of Illinois at Urbana-Champaign, 2014), [http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_-\\_civil\\_legal\\_needs\\_and\\_public\\_legal\\_understanding\\_handout.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf).

<sup>2</sup> Regularly cited contributing factors include the procedural complexity of the U.S. court system, the limited government support for civil legal services, the absence of a government-recognized right to legal assistance in most essential civil legal matters, the legal profession’s monopoly over the delivery of legal services, the prohibition against lawyers partnering or sharing fees with other kinds of professionals, and the cost of legal education.

- <sup>3</sup> The World Justice Project ranks the United States 95th out of 113 countries with regard to the accessibility and affordability of civil legal services. World Justice Project, *World Justice Project Rule of Law Index 2017–2018* (Washington, D.C.: World Justice Project, 2018), [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf).
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- <sup>6</sup> “Accelerator-to-Practice Program,” Suffolk University Law School, <https://www.suffolk.edu/law/academics/31538.php> (accessed July 11, 2018).
- <sup>7</sup> Center for the Study of the Legal Profession at Georgetown University Law Center and Thomson Reuters Legal Executive Institute, *2018 Report on the State of the Legal Market* (Washington, D.C. and Eagan, Mn.: Center for the Study of the Legal Profession at Georgetown University Law Center and Thomson Reuters Legal Executive Institute, 2018), 18, <http://www.legalexecutiveinstitute.com/2018-legal-market-report/>.
- <sup>8</sup> “Graduate Program in Legal Innovation and Technology,” Illinois Institute of Technology Chicago-Kent College of Law, <https://www.kentlaw.iit.edu/academics/lm-programs/legal-innovation-technology> (accessed July 11, 2018); and “Suffolk University Law School’s Legal Innovation & Technology Certificate Program,” Suffolk University Law School, <https://www.legaltechcertificate.com/> (accessed July 11, 2018).
- <sup>9</sup> “Low bono” refers to services at below-market prices or below cost to those in need.
- <sup>10</sup> “Law students who graduated in 2016 incurred an average debt of \$90,217 by the time they completed their degree from a public school, compared with \$130,349 for those who attended a private school, according to data reported by 181 ranked law schools to *U.S. News and World Report* in an annual survey.” Farran Powell, “Infographic: Compare Different Types of Law School Loans,” *U.S. News and World Report*, <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2017-03-30/infographic-compare-different-types-of-law-school-loans> (last modified March 30, 2017); and Katie Lobosco, “Students are Graduating with \$30,000 in Loans,” *CNN Money*, October 18, 2016, <http://money.cnn.com/2016/10/18/pf/college/average-student-loan-debt/index.html>.
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# Access to Power

*Sameer Ashar & Annie Lai*

*Abstract: The traditional approaches to “access to justice” obscure the current distribution of economic, social, and political power, and how that distribution favors those who have power and burdens those who do not. Consequently, the traditional approaches foreclose possibilities for a truly just society. In the law clinic we led together for five years, we developed models of lawyering with our students and community partners focused on how lawyers can contribute to the redistribution of power in society from those who accumulate and deploy it to those who are deprived of it.*

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During its first two years in power, the Trump administration waged an open war on immigrants. One week into Donald Trump’s presidency, the executive branch “took the handcuffs off” of federal immigration agents and set the stage for some of the most overtly xenophobic U.S. policy actions in recent history.<sup>1</sup> The number of people in immigrant detention soared and enforcement became dangerously arbitrary.<sup>2</sup> Racial hostility was embraced at the highest levels of government and immigrants encountered ever more hurdles to making a claim for fair treatment in the workplace or to remain in the United States. The result was devastation, exploitation, and panic, with ripple effects felt across entire communities.

For many watching these events unfold, the response seemed simple. The country needed more lawyers. Lawyers to help immigrants make claims. Lawyers to counsel immigrants on how to make the best of a bad situation. Lawyers to think creatively about how to serve more people: by organizing clinics for those protected by the Deferred Action for Childhood Arrivals program, setting up complaint hotlines, and creating self-help materials. Lawyers to invoke the power of the judiciary to check executive power and clear the path for

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reform.<sup>3</sup> Lawyers to hold the line on due process and restore the rule of law.

At the Immigrant Rights Clinic at the University of California, Irvine (UCI) School of Law, which we codirected until 2018, we took a more skeptical approach. In our experience working with some of the most vulnerable immigrants in the United States, traditional access-to-justice approaches had not in fact produced justice. Those initiatives missed a crucial point. Legal process is a means by which the powerful are able to legitimize the system's outcomes, violent as they may be.<sup>4</sup> The legal system distributes rights and privileges based on a particular configuration of interests, favoring those who have power and burdening those who do not. Access-to-justice approaches that assume the existence of a legal system that dispenses justice obscure the structural and unequal distribution of economic, social, and political power and foreclose opportunities for people to work toward a truly just society.

For every case of a person facing deportation that the UCI Clinic learned of, there were many more immigrants who were summarily arrested, detained, and banished by the state. For every case of a worker subject to abuse by an employer that the Clinic saw, there were thousands of people who toiled in grueling shifts of labor who would never consult a lawyer or seek redress through the courts.

Legal disputes take place in the context of a larger political field. Pure access-to-justice initiatives that ignore this context and the structural conditions that impoverish and immiserate people along lines of race, class, gender, sexual identity, and disability may bring temporary relief on an individual level, but will not fundamentally change such conditions of life.

In contrast, initiatives that seek to center and build up the capacity of relatively

powerless people to discern their individual and group interests and to take collective action to further those interests hold greater promise for altering the current configuration of power. It is also true that relatively powerless people are better able to see the limits of law than legal elites.

For example, immigrants facing deportation have only a few, if any, narrow pathways to relief, in part due to shifts in policy that date back to the 1980s and 1990s.<sup>5</sup> Even if they are able to secure legal representation in their immigration proceedings, they still face punitive enforcement mechanisms of the state. Many of these same immigrants also live in overpoliced neighborhoods and experience the effects of racially biased criminal law enforcement and an underfunded indigent defense system, making them even more vulnerable to the detention-deportation machine.

Low-wage immigrant workers also constitute an underclass – created in part by the state with the tacit support of employers – increasingly called on to perform jobs with contingent status (as contractor or temporary workers) in industries with historically low or nonexistent government intervention.<sup>6</sup> Litigation may protect such workers against unjust conditions momentarily, partially, and individually: for example, by recovering back wages for which they were not paid or monetary damages for unlawful termination. But the severely unequal distribution of power between employers and low-wage workers remains entrenched.

Further, courts, administrative tribunals, and legislative processes – the conduits by which law is made – are increasingly tilted toward the powerful: the state that criminalizes and deports, the landlord who evicts, the employer who exploits, or, in other words, the owners of property, the concentrators of wealth,

and the police and bureaucrats that protect them.<sup>7</sup> They are rewriting rules of dispute resolution to remove legal advocates from the picture, resist collective action, and privatize legal systems, hiding proceedings from view. For example, in *Epic Systems Corp. v. Lewis*, the Supreme Court recently held, in a five-to-four decision, that the National Labor Relations Act does not protect the right of workers to participate in class action wage-and-hour litigation after they have assented to arbitration clauses with a group-action waiver at the start of their employment.<sup>8</sup> According to labor law scholar Katherine Stone, “over half of nonunion companies impose arbitration agreements on their workers, and nearly all include group-action waivers.”<sup>9</sup> The scholar Frank Pasquale describes a “web of rules woven by lobbyists and elite attorneys over decades” and corporations funding candidates in state judicial elections “who promote their vision of a stripped-down, nightwatchman state.”<sup>10</sup> These developments are possible because of the distribution of power and the deployment of the state against common people. There can be no real justice without altering this reality.

How can lawyers contribute to the redistribution of power in society from those who accumulate and deploy it to those who are deprived of it?

Individual casework is a prominent form of representation recognized and favored within public interest law by funders and law schools with clinics.<sup>11</sup> Their approach is to provide legal representation or pro se assistance to relatively powerless people increasingly operating in hostile forums with limited procedural protections. Most law school clinics, legal services offices, and pro bono attorneys confine their practice to seeking redress for harm within these traditional

channels; a few lawyers or programs (and their funders) work to identify sources of systematic exclusion through impact litigation and “grasstops” policy advocacy.<sup>12</sup> The ACLU and NAACP Legal Defense and Education Fund provides examples of this latter type of advocacy.

At the UCI Clinic, we offered students visions of practice that include these traditional dimensions of lawyering, as well as a third vision of change-oriented lawyering: working with organizers and community groups to develop the capacity of marginalized people to obtain and exercise power. In this type of legal work, lawyers support organizers and community groups so that they may themselves identify the causes of systematic disadvantage and alter the structures and public discourse that constrain their communities.<sup>13</sup>

As legal educators, we sought to help law students realize that it is the responsibility of lawyers, advocates, and organizers to support the mobilization of subordinated people and to remain accountable to them so that they may exercise greater power.<sup>14</sup> This creates openings for broader social change and motivates elites to defend the vulnerable and participate in the progressive redistribution of resources.

With students and community partners, we undertook two broader initiatives in the Clinic that built power from below.

In the first initiative, we partnered with organizers to create the Orange County Rapid Response Network (OCR RN). The network is an interconnected system of nonprofit and grassroots organizations, civil rights attorneys, law school clinics, and individuals working together to respond to dehumanizing immigration enforcement locally. Like other such networks, the OCR RN came together in the wake of the 2016 presidential election to respond to anticipated raids and other enforcement actions under the Trump

administration. One way the OCRRN responded to such enforcement actions was through the provision of legal assistance. However, rather than attempting the impossible task of finding a lawyer for every community member arrested by federal immigration authorities, the network adopted a “participatory defense” model of representation, pairing one organizer or community volunteer with each lawyer to work closely with a family on cases selected by a committee.<sup>15</sup> The goal was to empower supporters to take part in the case of the person arrested, connecting it to systemic issues and (when appropriate) systemic advocacy.

Our work with the OCRRN built on the Clinic’s collaboration with organizers in Santa Ana, California, on a previous community defense initiative: the successful passage of a sanctuary ordinance that served as a model for other jurisdictions.<sup>16</sup> Just after the election of Donald Trump, organizers sought to mobilize the Latino-majority city council to take a forthright stand against the coming immigration enforcement onslaught. The Clinic crafted language for a proposal that included creation of a “task force” of community members to advise the city on implementation and it has supported community groups as they have monitored the city’s compliance with the ordinance.

Immigrants who are most stigmatized, such as LGBT immigrants or those who have had contact with the criminal justice system, have been prioritized for intake in the Clinic, as are activists and individuals whose cases could be connected to broader policy campaigns. By collaborating with and defending immigrants who are themselves doing work to organize others to reclaim their political power, the Clinic taught students to recognize and nurture such work.

In the second broad initiative, the Clinic focused on the defense of immigrant

workers in low-wage sectors of the regional economy. The Clinic represented warehouse workers, day laborers, and hotel workers referred to it by immigrant worker centers and progressive union locals. The organizers, lawyers, and, eventually, clients understood that an individual wage theft case, or one hundred wage theft cases, or even a class action against a single large employer would not fundamentally alter the distribution of power between powerful employers and vulnerable workers. Instead, worker-center and union organizers develop workers’ voices and leadership and bring those worker-leaders into policy fights to alter the terrain of employment law across sectors.

In this effort, the Clinic sought to use individual cases in traditional channels of legal advocacy to build toward larger challenges to systematic subordination. For example, representing individual workers in their wage and hour cases in coordination with community organizations built their trust in those groups and motivated individuals to participate in political campaigns.<sup>17</sup> By exercising a high degree of intentionality in intake and forming strong, foundational relationships with organizers, the Clinic demonstrated a distinct model of lawyering that sought to change the distribution of social, economic, and political power. These initiatives embodied an aspiration to imbue lawyering in traditional channels with a deeper understanding of how the structural distribution of power creates conditions of severe injustice – conditions that are often immune to frontal legal attack.

The Clinic’s impact is hard to measure: it is limited to a low-volume practice, and our aspirations sometimes gave way to pragmatic concerns. But our vision resisted the notion that lawyers rather than the people they serve are the ones to achieve justice or that the current legal system is

Access to Power a system of justice. In doing so, we aimed to undertake representation that would open and facilitate – rather than foreclose – access to power.

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# The Center on Children & Families

*Shani M. King*

*Abstract: The University of Florida Levin College of Law Center on Children and Families addresses the instability many children face due to a wide range of challenges. They include poverty, violence, and the criminalization of youth of color. They also include inadequate health care, substandard educational opportunity, and the general failure of systems designed to support, protect, and treat children who are classified as dependent, delinquent, or otherwise in need. The Center's model rests on five premises that Professor Barbara Woodhouse and colleagues identified in their scholarship as essential for addressing crises rather than mitigating symptoms: curriculum, scholarship, conferences, advocacy, and clinics. Over the years, the Center has held numerous conferences to advance groundbreaking, practical research on family law and children's rights and has held youth summits in connection with those conferences to engage with youth on relevant legal issues. These efforts remain at the conceptual heart/core of the Center's work.*

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The Center on Children and Families at the University of Florida Levin College of Law, like other university-based interdisciplinary centers for children in the United States, is designed to address the instability many children face due to a variety of challenges. They include poverty,<sup>1</sup> violence,<sup>2</sup> and the criminalization of youth of color. They also include inadequate health care,<sup>3</sup> lack of educational opportunity,<sup>4</sup> and the general failure of systems designed to support, protect, and treat children who are classified as delinquent, dependent, or otherwise in need.<sup>5</sup>

Too often, children receive no help until they are in crisis, until they figuratively – and, at times, literally – have been admitted to the emergency room. Social service agencies, health care systems, the juvenile justice system, and even school districts are geared toward repairing damage rather than preventing it in the first place.<sup>6</sup>

Before the movement toward interdisciplinary services for children and families, law school clin-

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ics were also in the damage-repair business. They largely functioned as law offices that represented children and families in courts and other tribunals functioning in their own silos, removed from social workers, doctors, and other professionals who could help address clients' problems.

In 2001, Professor Barbara Woodhouse joined the University of Florida Levin College of Law to teach family law and address problems of children and families. She modeled what became the Center on Children and Families on a similar center that she had established two years earlier at the University of Pennsylvania, the first U.S. interdisciplinary center for children based at a university. But the Florida Center was distinguished from its predecessor by five premises on which the Center's model rests. Woodhouse and her colleagues identified them as essential for addressing family crises, rather than merely mitigating symptoms. The Center's work reflects them in each of its components: curriculum, scholarship, conferences, advocacy, and clinics. The premises are that:

- 1 *Its work is vertically integrated.* Research and policy must be tested in the provision of direct service to children and families, to ensure that solutions work in the real world as well as in theory.
- 2 *The work is interdisciplinary.* No one area of study has all the tools to address the problems that children face. Social work, medicine, law, political science, education, and sociology each have crucial insights to contribute.
- 3 *It is team oriented.* Healthy dialogue among stakeholders, including children and families, gives voice to diverse perspectives and approaches and raises the chances that a solution will meet the needs of the clients.

- 4 *It is child centered.* Children are at the core of the analysis: if a solution does not meet their needs, the Center is not fulfilling its mission.
- 5 *It is informed by research on child development.* The Center pays close attention to the latest child development research because the field is quickly evolving and solutions to problems of clients should reflect the best current thinking.

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Some of the Center's most impactful work is done through its clinics. This work, as illustrated by the case study below, embodies the Center's theoretical foundation. In particular, this case study exemplifies interdisciplinary, team-oriented representation that is informed by leading scholarship on domestic violence.

Jane Doe, a twenty-eight-year-old woman, is admitted to the hospital with stage four renal failure. She was previously on the transplant list, but removed for continuing health issues. Dialysis is prolonging her life. During this admission, a hospital social worker recently trained by the Center's Intimate Partner Violence Assistance Clinic to screen all patients for domestic violence discovers that Jane's boyfriend of the past four years has been physically, emotionally, and psychologically abusing her.<sup>7</sup> It was his abuse that led to her repeated illnesses and missed appointments, which caused her to be removed from the kidney transplant list. It was his abuse that drove Jane's family away from her. She is totally dependent on him for her medical and emotional support. No health provider had ever asked Jane about intimate partner violence.

Having earned Jane's trust, the clinic social worker, together with a legal intern, visits Jane in the hospital to provide information and assistance. To Jane's surprise, the social worker follows up with her at a

dialysis appointment. Jane feels connected and supported and calls the clinic to follow through with an injunction for protection against domestic violence by her partner. She now lives safely and goes to dialysis three times a week. Her health is improving.

In addition to the clinical offerings affiliated with the Center, law students benefit from one of the first U.S. programs offering a certificate in family or children's law. In connection with this concentration, a range of unpaid family- and child-related externships in government, judicial, and public interest settings provide practical legal experience to our students.

Law students also conduct field research on state and local issues, such as the practice of shackling children in ju-

venile courts. This research on shackling contributed to a report on the practice by the Florida Senate, which was followed by a Florida Supreme Court ruling limiting the shackling of juveniles.<sup>8</sup> Overall, the research has contributed to amicus briefs in numerous state and federal court cases.<sup>9</sup> It has strengthened the Center's scholarly and practical expertise and informed state-level legislation on counsel for children in dependency cases.

Over the years, the Center has held numerous interdisciplinary conferences to advance groundbreaking, practical research on family law and children's rights, and has held youth summits in connection with those conferences to engage with youth on relevant legal issues. These efforts remain at the conceptual core of the Center's work.

#### AUTHOR'S NOTE

I would like to thank Barbara Woodhouse for her vision, mentorship, kindness, and unwavering dedication to children and families. I would also like to thank Nancy Dowd for her continued leadership, commitment to carrying on and furthering the work of the Center, and unrelenting work on behalf of children. None of this could have been accomplished without the visionary leaders of the clinical programs described herein, specifically, Teresa Drake (Domestic Violence), Meshon Rawls (Dependency/Delinquency), Jeff Grater (Family Law), Robin Davis (Mediation), and Monique Haughton (Criminal Defense). There are many faculty members who contributed to building this Center and without whom the Center would not be what it is today; they include Kenneth Nunn, Berta Hernandez-Truyol, Joe Gagnon, Stacy Steinberg, Jason Nance, Lauren Fasig, Iris Burke, and Joseph Jackson. And, finally, I would like to thank former Dean Bob Jerry and current Dean Laura Rosenbury for their generous support of the Center and their commitment to children and families.

#### ENDNOTES

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<sup>3</sup> There are currently 251,598 children in Florida with no health insurance; U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, “Health Insurance Coverage Status and Type by Ratio of Income to Poverty Level in the Past 12 Months by Age,” <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkm>. In Florida in 2017, 13,515 children were born preterm with low birthweight and 1,355 infants under the age of one died. See Florida Department of Health, Division of Public Health Statistics and Performance Management, “Preterm with Low Birth Weight,” <http://www.flhealthcharts.com/Charts/DataViewer/BirthViewer/BirthViewer.aspx?cid=9874> (accessed July 23, 2018); and Florida Department of Health, Division of Public Health Statistics and Performance Management, “Infant Deaths,” <http://www.flhealthcharts.com/Charts/DataViewer/InfantDeathViewer/InfantDeathViewer.aspx?indNumber=0053>. According to the most recent National Surveys on Drug Use and Health, an estimated 13,000 children aged twelve to seventeen were alcohol dependent and approximately 38,000 needed, but did not receive, treatment for alcohol use for the last year measured (average of 2013/2014). Similarly, 56,000 children were born needing, but did not receive, treatment for illicit drug use. See Substance Abuse and Mental Health Services Administration, 2013–2014 *National Surveys on Drug Use and Health: Model-Based Estimated Totals (in Thousands) (50 States and the District of Columbia)* (Rockville, Md.: Substance Abuse and Mental Health Services Administration, 2016), Table 20, “Dependence or Abuse of Illicit Drugs or Alcohol in the Past Year, by Age Group and State: Estimated Numbers (in Thousands), Annual Averages Based on 2013 and 2014 NSDUHs,” <http://www.samhsa.gov/data/sites/default/files/NSDUHsaeTotals2014.pdf>.

<sup>4</sup> In Florida, 20 percent of high school students do not graduate from high school. In 2016, 45,000 children aged sixteen to nineteen in Florida were not enrolled in school and were not high school graduates, and 232,000 young adults between the ages of eighteen and twenty-four were not enrolled in school, not working, and had no degree beyond high school. See Florida Department of Health, Division of Public Health Statistics and Performance Management, “School-Aged Child and Adolescent Profile–2017,” <http://www.flhealthcharts.com/ChartsReports/rdPage.aspx?rdReport=ChartsProfiles.School-agedChildandAdolProfile>; Kids Count Data Center, “Teens Ages 16–19 Not in School and Not High School Graduates,” <https://datacenter.kidscount.org/data/tables/73-teens-ages-16-to-19-not-in-school-and-not-high-school-graduates?loc=11&loct=2#detailed/2/11/false/870,573,869,36,868,867,133,38,35,18/any/380,381> (accessed July 23, 2018); and Kids Count Data Center, “Persons Age 18 to 24 Not Attending School, Not Working, and No Degree Beyond High School, by State, 2016,” <https://datacenter.kidscount.org/data/tables/5063-persons-age-18-to-24-not-attending-school-not-working-and-no-degree-beyond-high-school#detailed/2/11/true/870/any/11484> (accessed July 23, 2018).

<sup>5</sup> In 2016, there were 225,173 total referrals in Florida for abuse and neglect; of those, 166,465 were referred for investigation. See U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau, *Child Maltreatment 2016* (Washington, D.C.: U.S. Department of Health and Human Services, 2018), Table 2–1, “Screened-In and Screened-Out Referrals,” <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf>. In June 2018, there were 24,118 children in

Florida living apart from their families in out-of-home care, 19,689 of whom were under twelve years old. See Florida Department of Children and Families, “Children-In-Out-Of-Home-Care,” <http://www.dcf.state.fl.us/programs/childwelfare/dashboard/c-in-oo.html> (accessed July 23, 2018).

- <sup>6</sup> Take zero-tolerance policies, for example: the philosophy, policy, and practice of responding to school infractions with automatic, exclusionary punishments regardless of context. These policies have been roundly criticized for the lack of evidence for improving school, community, or student-related climate, safety, and academic outcomes; for spurring schools’ reliance on the juvenile justice system; and for lack of consideration for the context of adolescent development. Innovative school leaders reject this approach and instead implement strategies that take into consideration the developmental need for autonomy, and in which children play an active role in crafting and adjudicating school rules not for the purpose of demanding obedience, but for building community norms that preserve learning time and support positive, healthy relationships among students and between students and staff.
- <sup>7</sup> Informed by important research in this area, the clinic’s practice is to ask clients about domestic violence proactively. Studies show that 92 percent of women who are physically abused by their partners do not voluntarily discuss these incidents with their physicians, and 70–81 percent of patients report that they would like their providers to ask them privately about domestic violence. Rose S. Fife and Sarina Schrage, *Family Violence: What Health Care Providers Need to Know* (Burlington, Mass.: Jones and Bartlett Learning, 2011), 210.
- <sup>8</sup> The Florida Senate, Committee on Criminal Justice, *A Policy Analysis of Shackling Youth in Florida Courts*, Interim Report 2010-110 (Tallahassee: The Florida Senate, 2009), [http://archive.flsenate.gov/data/publications/2010/senate/reports/interim\\_reports/pdf/2010-110cj.pdf](http://archive.flsenate.gov/data/publications/2010/senate/reports/interim_reports/pdf/2010-110cj.pdf).
- <sup>9</sup> For example, we have drawn from our child development research in amicus briefs in *Adoptive Couple v. Baby Girl*, 570 U.S. \_\_\_\_ (2013) [Indian Child Welfare Act section barring involuntary termination of parent’s rights in absence of a heightened showing that serious harm to Indian child is likely to result from parent’s continued custody of child does not apply when Indian parent never had custody]; and in *D.M.T. v. T.M.H.*, No. SC12–261 (Fla. 2013) [ground-breaking assisted reproduction and child custody case] to help define a child’s best interests.

# Techno-Optimism & Access to the Legal System

*Tanina Rostain*

*Abstract: For legal technologists, apps raise the prospect of putting the law in the hands of disadvantaged people who feel powerless to deal with their legal problems. These aspirations are heartening, but they rest on unrealistic assumptions about how people living in poverty deal with legal problems. People who are poor very rarely resort to the law to solve their problems. In the situations when they do seek solutions, they confront educational and material impediments to finding, understanding, and using on-line legal tools effectively. Literacy is a significant barrier. More than 15 percent of all adults living in the United States are functionally illiterate, meaning that, at best, they read at the fourth-grade level. Inadequate access to the Internet and limited research skills compound the challenges. To reach people from marginalized groups, access-to-justice technologies need to be integrated with human assistance.*

Imagine a world where a man convicted of a crime can use an app to legally expunge his record so he can get a job.<sup>1</sup> Or where a cleaning lady paid by the hour can use an app to figure out whether her employer is stealing her wages.<sup>2</sup> Or where a tenant can use an app to document the mold growing in her bathroom and get her landlord to follow the law and eliminate the mold.<sup>3</sup>

For legal technologists, apps like these raise the prospect of putting the law in the hands of disadvantaged people who feel powerless to deal with their legal problems. Self-help apps aim to enable users to address their legal issues themselves, educate them about the legal system, and motivate them to pursue their rights and seek positive political change.<sup>4</sup>

To their creators, self-help tools represent an important step toward fulfilling the democratic promise that law be accessible to everyone and redressing power imbalances in the legal system that stem from economic and other forms of inequality.

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In this techno-optimistic vision, self-help technologies will loosen the control of lawyers over the legal system and lead to a broader collective capacity to address the system's failings and the conditions of poverty more generally.<sup>5</sup>

These aspirations are attractive, but they rest on unrealistic assumptions about how people living in poverty actually deal with legal problems. In particular, they overlook the cultural, material, and educational hurdles this group confronts when attempting to find legal help. People who are poor rarely resort to the law to solve their problems.<sup>6</sup> In 2017, the Legal Services Corporation found that the large majority of people who face legal problems don't seek legal assistance or even information.<sup>7</sup> Many people don't look for help because they believe they can handle their problems on their own. Some African Americans, a separate study concluded, are deeply distrustful of the civil legal system because of their experiences with the criminal justice system.<sup>8</sup>

Others don't know where to turn, and many do not even recognize that their problems have legal dimensions.<sup>9</sup> It turns out, too, that knowledge about which problems are legal varies with the type of problem. The large majority of poor people know they need to go to court to seek adjustments to their family arrangements, like adopting a child or getting a divorce. But they might not know that severe asthma caused by mold in a rental unit or getting unfairly fired from a job is also a legal problem. Yet housing and employment problems have the most significant material effects on poor people's lives.<sup>10</sup>

Even when people recognize that their problem is legal, they face significant impediments to finding, understanding, and using online legal tools effectively. A recent study found that only half of people with household incomes at \$30,000 or below have broadband Internet access at

home. Cell phones are ubiquitous among the wealthy and middle class in the United States, yet one-third of poor Americans do not own one.<sup>11</sup> Nearly half of low-income households reach their data caps on a monthly basis or are forced to cancel their service because they can't pay for it.<sup>12</sup>

People living in poverty often do not have the literacy and computer skills needed to use legal digital tools effectively. Although efforts are being made to simplify the process of searching online for legal information for people without legal expertise, finding trustworthy and applicable resources on the Internet is a major challenge for low- and middle-income people.<sup>13</sup>

The problem is significantly compounded by America's low literacy rates. Some 14 percent of all adults living in the United States are functionally illiterate.<sup>14</sup> Another 30 percent can only read and understand common phrases. Altogether, this means that close to half of the adult U.S. population struggles as readers.<sup>15</sup> And this segment of the population is disproportionately poor, meaning that an even higher percentage of the people who need civil legal services are illiterate or barely literate.<sup>16</sup>

In the face of these challenges, the legal self-help movement has put significant energy into creating "plain language" resources written at a sixth-grade level or below, but there are likely to be limits to how intelligible laws can be made to people with limited literacy.<sup>17</sup> The law is word-heavy, and full of technical and complex concepts. For poor people, the struggle of dealing with chronic scarcity of money and food and lack of physical security makes it even more difficult to absorb and act on legal information.<sup>18</sup>

Many of these limitations apply equally to most other technologies created in recent years to bridge the justice divide.

With thirty million self-represented litigants in state courts every year, many state courts have installed kiosks in clerks offices and self-help centers for self-represented litigants that produce tailored pleadings and other legal documents.<sup>19</sup> Despite the enthusiasm surrounding them, without human assistance, these tools can only provide limited help to litigants.

Self-help technologies can play a useful role in assisting low- and moderate-income people, but they may not be the most effective means to redress power imbalances produced by income, racial, and other forms of inequality. To reach people from marginalized groups, legal technologies need to be supplemented by other strategies.

A complementary, and potentially more effective, approach puts tools in the hands of people in positions of trust – nonlegal professionals, community leaders, and others – so they can function as intermediaries between disadvantaged people and the legal system. The Legal Risk Detector app permits social workers who serve the home-bound elderly to conduct “legal health checks” to identify their clients’ potential legal problems.<sup>20</sup> Through a series of simple questions, the app allows a social worker to determine whether a client has a landlord-tenant, health care, or consumer-debt problem, or is a victim of financial exploitation or physical abuse. If the social worker discovers a potential issue, he or she can link the client to legal resources and connect the client with an attorney.<sup>21</sup> The app allows a service provider to spot problems early and make an intervention before they turn into crises.

Prohibitions against the unauthorized practice of law, which exist in every state, present a substantial barrier to this approach. As of 2018, there have been no publicized attempts to enforce these bans

against nonprofit organizations. Nevertheless, they lead nonlawyers who want to assist people to find legal help to steer clear of activities that appear to overlap with providing legal advice, preparing documents, or doing other tasks that might be characterized as practicing law. In most states, the practice of law is defined broadly and vaguely.<sup>22</sup> As a consequence, providers of nonlegal services are reluctant to go beyond providing general information about the law. As a recent report of the Pew Research Center showed, among African Americans and poor people who go to libraries, half seek help finding information from librarians, making libraries potential sites for assisting disadvantaged people with legal problems.<sup>23</sup> But librarians, like other nonlawyer service providers, are wary of crossing the line by providing individualized guidance that could be construed as giving legal advice.<sup>24</sup>

Legal technologists seeking to build effective access apps might borrow a strategy now being developed to address health care disparities experienced by disadvantaged groups. In areas with high concentrations of African Americans, barber-shops and hair salons are promising settings for providing medical screening and referral services for people who underuse preventive health services. In one study reported in *The New England Journal of Medicine*, barbers working with pharmacists on-site provided black patrons with information promoting healthy habits, blood-pressure screening, and medication. The result was dramatically decreased rates of high blood pressure among those patrons.<sup>25</sup> The success of the approach turned on the long-term relationship of trust between the clients and their barbers. Medical-legal partnerships, in which health care providers and lawyers offer services together, reflect a similar strategy.<sup>26</sup>

There are still relatively few legal technologies intended for trusted intermediaries, but they have great potential. Unlike self-help tools, they do not depend on people being able to identify their legal problems in advance, so they eliminate an important barrier to obtaining help. They also do not require a person in need of help to seek it. Instead, they offer resources where that person lives or spends time. They rely on a relationship of trust between the person in need of legal assistance and the person providing it. That person can provide empathy and reassurance, as well as knowledgeable guidance. By assisting poor people to solve their problems, this approach holds the promise of increasing their capacity for self-determination and improving their lives.

Tools for intermediaries that address housing, employment, or consumer-debt problems might be embedded in a range of community institutions, such as churches, libraries, tenant associations, or bodegas and nail salons. If these types of tools are found to be effective and proliferate, they can contribute to an ecosystem that provides more integrated service delivery and addresses poor people's legal needs at any earlier stage. Simultaneously, these tools can create a corps of "justice actors" and be part of a larger strategy of collective empowerment by educating members of marginalized communities about the potential, as well as the limits, of the legal system to serve their needs.

#### AUTHOR'S NOTE

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- <sup>2</sup> Unreleased demonstration app developed by Georgetown University Law Center students.
- <sup>3</sup> JustFix.nyc, <https://www.justfix.nyc/>.
- <sup>4</sup> Richard Susskind and Daniel Susskind, *The Future of the Professions* (Oxford: Oxford University Press, 2015).
- <sup>5</sup> Ibid.
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- <sup>20</sup> Center for Elder Law and Justice, “Legal Risk Detector App,” <https://elderjusticenyc.org/resources/legal-risk-detector-app/>. Students at Georgetown University Law Center built this tool in collaboration with an organization serving the aging. The app is built in the software platform Neota Logic that does not require an app’s developer to know how to code.
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# Marketing Legal Assistance

*Elizabeth Chambliss*

*Abstract: Much of the American conversation about access to justice focuses on regulatory barriers to new forms of service delivery and treats regulatory resistance as the primary problem to be solved. Meanwhile, obstacles to consumer awareness and engagement have received less attention. This essay reverses the order of analysis and considers strategies for expanding access first from a marketing perspective. What models of legal assistance have been most successful in building consumer awareness and trust? To what extent can successful marketing help to sidestep or overcome regulatory resistance? And what are the implications for reformers interested in expanding access to justice?*

The legal market in the United States is increasingly tilted toward large, corporate clients and away from individuals. Data from the U.S. Census Bureau's 2017 Economic Census show a 10 percent drop from 2007 to 2012 in law firm receipts from individual clients – the so-called PeopleLaw sector – even as total law firm receipts increased.<sup>1</sup> Since the late 1980s, consumer spending on legal services has declined significantly relative to consumer spending on other goods and services, including other professional services.<sup>2</sup> Currently, most people go it alone in handling civil legal problems and disputes.<sup>3</sup>

Within the legal profession, the conversation about access to justice often focuses on regulatory barriers to new forms of service delivery, in particular lawyers' monopoly over the practice of law and the profession's continued resistance to non-lawyer ownership and investment in legal services. While other Anglo-American jurisdictions, such as Australia and the United Kingdom, have opened their legal markets to nonlawyer providers and investors, the United States remains bound to a state-based, court-centered system of professional self-regulation in which new models for service delivery have met sustained and, historically,

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successful resistance from the organized bar. State bar associations, backed by state courts, have used unauthorized practice of law (UPL) statutes and other anticompetitive regulation to challenge the activities of paraprofessionals, self-help legal software publishers, and other nonlawyer providers of legal information and services, as well as lawyers' own efforts to market their services through online networks and platforms.

Yet while regulatory resistance has been persistent and important in structuring the U.S. legal market, focusing on anticompetitive regulation and other supply-side barriers to access emphasizes supply-side strategies for reform: for instance, civil right-to-counsel and pro bono initiatives to increase access to lawyers; state licensing and local regulatory initiatives to increase access to paraprofessionals and limited scope legal services; and technology initiatives to increase online and mobile access to legal information and services. These efforts undoubtedly have improved access to some types of legal assistance in some contexts, but supply-side initiatives can go only so far in addressing information failure and consumer habits in the use – and nonuse – of legal resources.

Consider Washington State's limited licensing initiative. In 2012, the Washington State Supreme Court authorized the licensing of a new category of independent paraprofessionals, limited license legal technicians (LLLTs), to provide limited-scope legal assistance to individuals in family court, such as information about court procedures and help filling out forms. The initiative was the product of a hard-fought, twelve-year campaign to amend state court rules to allow paralegals to provide limited legal advice without lawyer supervision, with the aim of lowering the cost of legal assistance, initially in family law matters.

The economic viability of the model was a concern from the start, since many of the barriers to low-cost assistance from lawyers are also present for paraprofessionals. The proponents' goal, however, was to "get a rule through."<sup>4</sup> By winning the profession's approval for limited advising in the family law context, they hoped that the model could be expanded gradually to include additional services in additional areas, and perhaps additional business models through further regulatory change. Proponents also envisioned a training partnership with American Bar Association–approved law schools, which could be a mechanism for scaling the program and spreading the LLLT model to other states.

Yet the LLLT initiative appears to be foundering. The initial cohorts of LLLT candidates were smaller than expected, making specialized training costly to provide. Two of the state's three law schools have declined to offer training, citing financial constraints, and the third is offering training at a loss, which is unsustainable. The regulatory costs for the LLLT board and the Washington State Bar Association also have been substantial, with a breakeven point five to seven years away. Meanwhile, LLLTs are struggling to develop viable family law practices. Only a handful of LLLTs work full-time as independent practitioners; instead, most practice part time out of law firms, while also working as traditional paralegals. Many report difficulties in standardizing and pricing their services, and thus fall back on hourly rates around or above those of paralegals. Most are unable to attract enough clients to run a viable business even though "the evidence for a sufficient pool of potential clients is strong."<sup>5</sup>

Regulatory barriers undeniably are part of the problem. Though Washington

amended its rules to allow for limited licensing, it continues to ban nonlawyer investment in legal services, which could benefit LLLTs as well as lawyers aiming to provide limited scope legal services. If such barriers fall, the LLLT model could be scaled up considerably. In addition, however, LLLTs have a marketing problem. The LLLT model is not well known or understood by the public; it is difficult for potential clients to discover what “LLLTs” are or when it might make sense to use them. Even clients who use LLLTs report confusion about what services they offer and the boundaries of the LLLT role. A preliminary evaluation of the LLLT program concludes that “effective marketing is perhaps the critical link for business success at this point.”<sup>6</sup>

Effective marketing is the critical issue for many forms of legal assistance, even in the absence of regulatory barriers. Many people with civil justice problems do not recognize their problems as “legal,” even when those problems raise clear legal issues and have legal remedies.<sup>7</sup> Most people with civil legal problems never consider using a lawyer, but rather rely on their own understanding and support networks to deal with the problem, or do nothing, even when the potential stakes are high.<sup>8</sup> Many people forgo available legal assistance even when it is free.<sup>9</sup>

People’s lack of awareness and engagement with potential legal resources is compounded by the enormous variety of small-scale models for legal assistance in different locations. A 2017 review of civil legal aid in the United States describes one pilot project after another, but few mechanisms for national coordination or branding.<sup>10</sup> Even national and federal initiatives might be rebranded at the state or local level. Many of the resources available to people who face common legal problems are not determined by the nature of the problem but rather by “where

they happen to live,”<sup>11</sup> and are not easy to discover.

Online, too, there is a “crucial disconnect between the resources available for accessing the justice system and their use by the public.”<sup>12</sup> Although there is no shortage of designers and marketers promising to drive traffic to law firm websites, most people are not interested in law firm websites. Studies show that even young people who have used the Internet all their lives have trouble finding usable legal information online.<sup>13</sup> And while mobile technology has enormous potential to increase access to legal assistance, efforts to market access-to-justice apps are underdeveloped, leaving many potentially valuable apps all dressed up with nowhere to go. Of twenty access-to-justice apps featured in a 2015 article, nearly half are currently unavailable on the App Store or Google Play, or have had no downloads over the past year.<sup>14</sup> Supplying resources is, at best, half the battle.

Rather than fighting the bar to open the market to new suppliers, reformers should focus on attracting and mobilizing consumers to win over the bar. Demand creation has been an essential component of successful entry into both corporate and consumer legal markets. In the consumer sector, companies such as LegalZoom and Avvo have gone to market without asking permission and have successfully fought state bar resistance, or maneuvered around it.

LegalZoom began in 2001 as an online provider of legal documents, fighting and settling state-by-state unauthorized practice of law challenges along the way. In 2010, it expanded its business model to include subscription-based legal service plans, drawing on a branded network of independent lawyers who use LegalZoom as a marketing platform. In 2014, LegalZoom joined the Federal Trade

Commission in calling for increased antitrust scrutiny of professional licensing boards, resulting in a Supreme Court antitrust ruling that effectively quieted UPL challenges to LegalZoom's business model at the national level.<sup>15</sup> By 2015, LegalZoom was among the most widely recognized legal brands in the United States, despite continuing regulatory restrictions on its ability to deliver legal services directly. In the words of one observer, "With respect to LegalZoom, the train has left the station. . . . They've got a couple million satisfied customers and it's going to be really hard for anyone to shut them down."<sup>16</sup>

Likewise, Avvo began in 2007 as an online lawyer directory and ratings platform, scraping data from public sources to generate profiles of lawyers; it then invited lawyers to claim and enhance their profiles as a marketing tool. State bar associations blustered and took steps to regulate lawyers' participation, and Avvo faced several early lawsuits from lawyers objecting to their ratings, but Avvo successfully defended their ratings platform on First Amendment grounds. In January 2018, Avvo entered a deal to be acquired by Internet Brands, the parent company of WebMD and the Martindale-Nolo Legal Marketing Network. "Scale . . . is really everything," explained Marc Britton, then-CEO of Avvo.<sup>17</sup> Avvo is competing with Google to be the go-to site for people who are searching for lawyers.

Access to capital helps fuel these innovations. Because they do not deliver legal services directly, LegalZoom and Avvo are not subject to professional restrictions on nonlawyer investment, and they have benefited from venture capital funding that is unavailable to traditional law firms. This money means that they can finance state-by-state litigation and national marketing campaigns. LegalZoom and Avvo each spent more

than \$10 million on television advertising in 2015.

Yet even within current professional rules, there are opportunities for traditional law firms to improve marketing and outreach for their own benefit as well as for consumers'. And the external regulatory environment is changing, owing in part to pushback from alternative providers such as LegalZoom. The regulatory battle is a red herring. Marketing matters whatever the contours of professional regulation. The dog is about to catch the car. Time to focus on what comes next.

Providers should market targeted solutions to problems as understood by consumers, rather than selling themselves as providers of generalized "legal" services. Marketing "solutions" for corporations' problems is all the rage in the corporate legal market. But problem-focused marketing is also proving effective, and scalable, in the consumer market. For instance, mobile apps and websites providing a convenient response to parking tickets and traffic citations are gaining traction. Fixed was a California startup founded in 2013 that allowed users to dispute parking tickets simply by uploading a photo of the ticket. The cost to the consumer was twenty-five percent of the ticket if the dispute was successful; otherwise, the user paid nothing. The app generated so much demand that city agencies fought to shut it down, ultimately commissioning a technical block to prevent Fixed from accessing city parking ticket websites. Fixed responded by altering its business model to focus on moving violations and, in 2016, was acquired by Lawgix, a multistate law firm that uses Fixed as a front-end interface to "onboard new clients."<sup>18</sup> Off the Record, a Seattle startup operating in eighteen states, uses a similar interface as a referral platform for ticket defense lawyers and advertises a 97 percent success rate.

The private bar resists the commoditization of legal services, which leads to price competition and arguably drives down quality. Off the Record's fees for San Francisco lawyers ranged from \$195 to \$1,100 when the company started in 2015 but, by 2017, had dropped to an average of \$200 to \$250. Among lawyers, mass marketing originally was the project of consumer "legal clinics" that, in 1977, sued for the right to advertise fixed-price legal services such as wills, name changes, and uncontested divorce.<sup>19</sup> By most accounts, the clinics were successful in stimulating consumer demand, but, by the early 1990s, most firms had abandoned the clinic model, hampered by low profits and increasing price competition. Since then, direct legal marketing has been overwhelmingly dominated by personal injury lawyers, who spend an estimated \$1.5 billion per year on highly targeted advertising, and have proven resistant to price competition in the contingent fee context.<sup>20</sup> Most ads focus on differentiating firms from their rivals based on quality ("MAXIMUM RECOVERY!") rather than stimulating demand.<sup>21</sup> Like LegalZoom and Avvo, the biggest advertisers are nationally branded, highly capitalized firms, such as Sokolove Law, that serve as marketing platforms for local providers. Many of the original legal clinics, such as Jacoby and Meyers, have rebranded as personal injury firms.

Notwithstanding the bar's resistance, however, increasing commoditization is coming to the consumer legal market. TIKD, a Florida startup that fights traffic tickets, is engaged in a likely groundbreaking battle with the Florida Bar, which is seeking an injunction against TIKD for the unauthorized practice of law. TIKD has countered with an \$11.5 million antitrust lawsuit that looks like a clear winner under the Supreme Court's recent antitrust ruling. Notably, the De-

partment of Justice has filed a statement of interest on TIKD's behalf, stating that disruption to "business models entrenched for decades . . . almost invariably" benefits consumers.<sup>22</sup>

The challenge for the bar will be to expand beyond defining new categories of service, such as limited licensing and limited scope representation, which do not correlate with specific tasks and are difficult for consumers to understand. Lawyers must design standardized products and services targeted to consumers' discrete legal needs. They will need to invest in research on individual legal needs, identifying areas in which consumers currently forgo potentially valuable legal action. They will need to design service menus based on research about price sensitivity, as well as demographic and other sources of market segmentation. Lawyers will need to identify where provider quality is marketable to consumers, and where it should be regulated to protect them. For the private bar, the long game in both market and regulatory battles depends on credible quality claims. The bar has enormous incentives to invest in quality assessment research.

To mobilize public demand, lawyers must make a business case to consumers and to related service providers, such as health care providers, state and local governments, and court administrators. Cost-benefit arguments for legal assistance are proving successful in the non-profit sector. For instance, medical-legal partnerships integrate civil legal assistance into health care teams to address underlying, health-harming legal needs, such as poor housing, consumer debt, and barriers to eligibility for public benefits. The National Center for Medical Legal Partnerships promotes the medical-legal partnership model in part by emphasizing the economic returns to providers,

such as the benefits to hospitals from the resolution of denied benefit claims. As of 2018, medical-legal partnerships have been established in 373 health organizations in forty-seven states. In September 2011, the Department of Veterans Affairs (VA) issued a directive encouraging VA Medical Centers to make space available for legal service providers, and research analyzing the impact of VA medical-legal partnerships is ongoing. Proponents note that “Congress would only need to appropriate half of one percent (.5%) of the VA’s healthcare spending to exceed federal funding of the Legal Services Corporation.”<sup>23</sup>

Another project, Justice in Government, promotes the inclusion of legal assistance in state government programs to “ensure maximum benefit from dollars spent on low- and moderate-income people and communities.”<sup>24</sup> Legal assistance can be shown to provide a positive return on investment in areas such as eviction defense, criminal record-clearing for job-seekers, and legal intervention on behalf of domestic violence victims. This evidence-based, economic pitch for “good government” is distinct from the normative pitch for “access to justice,” and can help drive policy change. In 2017, New York City passed a law guaranteeing a right to counsel for every tenant facing eviction, after proponents commissioned a cost-benefit analysis showing that the costs of providing counsel were lower than the costs of homelessness and its consequences, such as job loss and juvenile justice costs.

Marketing legal assistance requires a political strategy and efforts to improve and coordinate political messaging. The American legal profession is facing profound – some would say existential – challenges regarding the value of lawyers’ services and the justifications for anti-

competitive regulation.<sup>25</sup> Corporate clients are voting with their feet, making increasing use of alternative providers for work previously performed by large law firms. Individual clients are scarce on the ground and many solo and small law firms are struggling. Public funding for legal assistance and court administration is low. Law school enrollment is at its lowest point in more than forty years.

These challenges require lawyers to rethink their marketing in the broadest sense of the term. This project will require bar leadership, planning, and attention to public messaging. Bar associations must free themselves from capture by incumbents focused on their own short-term revenues and look for sustainable ways to improve the value of legal services for clients and consumers. They must build their capacity for industry research, and engage with scholarly research, to promote new forms of assistance without sacrificing consumer protection. Lawyers must educate themselves, their legislatures, and the public about the economic and normative value of civil legal assistance and its importance for the rule of law in civil society. These efforts are in the profession’s self-interest and they are an integral part of its duty to the public.

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# Community Law Practice

*Luz E. Herrera*

*Abstract: Community-embedded law practices are small businesses that are crucial in addressing the legal needs that arise in neighborhoods. Lawyers in these practices attend to recurring legal needs, contribute to building a diverse profession, and spur community development of modest-income communities through legal education and services. Solo practitioners and small firm lawyers represent the largest segment of the lawyer population in the United States, yet their contributions to addressing the legal needs of modest-income clients are rarely recognized or studied. This essay sheds light on the characteristics, motivations, and challenges these law practices face in providing access to justice to modest-means communities.*

For nearly forty years, attorney Salvador Alva-Ochoa has provided legal services to the Latino working-class residents of Huntington Park, California. He represents business owners, victims and perpetrators of domestic violence, women and men undergoing divorce and eviction, and community members who face criminal charges. Alva-Ochoa joined the California bar in 1980 after graduating from the UCLA School of Law. He first worked for California Rural Legal Assistance and then briefly with a local solo practitioner before setting up his law practice in a predominantly Latino community where the typical household income is about half that of California as a whole.

Shantelle Argyle graduated from the University of Utah S. J. Quinney College of Law in 2013 committed to help “people of modest means and without a lot of options for legal representation.” Her family’s struggles with civil justice problems during her childhood fueled her passion to assist “those in the middle, who are working hard but can be easily crippled by a legal setback.”<sup>1</sup> Argyle and a colleague, Daniel Spencer, launched Open Legal Services (OLS) in downtown Salt Lake City. The

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nonprofit law firm provided legal services in criminal and family law on a sliding fee scale based on a client's income.<sup>2</sup> Argyle and Spencer believe that everyone, including those of modest means, should have access to lawyers.

Solo practitioners and small law firm lawyers represent the largest segment – almost half – of the lawyer population in the United States.<sup>3</sup> There are small law firm practitioners who earn six-figure salaries, collecting million-dollar settlements on class action lawsuits or retainers from stable relationships with corporations, wealthy families, and individuals who can pay top dollar for legal services.<sup>4</sup> On the other end of the spectrum, there are solo and small law firm practitioners who struggle to make ends meet. Some supplement the income generated by their law practices with contract work for other law firms or by taking a second job outside of the legal profession. In the middle are lawyers like Alva-Ochoa and Argyle, whose community-embedded law practices provide legal services to individuals, locally owned family businesses, nonprofits, and other community organizations. Such community-embedded lawyers provide most of the legal services available to individuals in local communities, but their contributions are not sufficiently known or studied.<sup>5</sup>

Community-embedded law practices have three key characteristics. First and foremost, these law practices are small businesses that entrust their communities with their own livelihoods. Second, they are implanted socially as well as economically in their communities, through shared experiences and identities such as race, ethnicity, class, or immigration history. Finally, these law practices serve as first responders to systemic injustices and routine personal legal problems. Their presence contributes to community de-

velopment by helping community members understand their legal rights and responsibilities. Community-embedded lawyers are critical to advance law and justice. Their presence increases community empowerment through information, legal assistance, and counsel about legal matters that impact personal and collective well-being.

Community-embedded lawyers, regardless of whether they structure their practices as for-profit ventures or nonprofit entities, primarily depend on income from fees or donations from community members. Though they may provide free legal services to a subset of clients, their livelihood depends on their ability to develop a sustainable business model through pricing structures that reflect community members' ability to pay. The modest-means clients they serve may require payment plans or may be able to afford only limited assistance.

These lawyers must juggle community needs with their own need for viability. These attorneys may enjoy greater social capital than their community peers as a result of their law degree. But because they often return to the communities they are from, they share many of the financial realities of their client base. Lawyers who come from the communities they serve may struggle to build their businesses, buy their homes, and pay off their debt because they have little capital to start. The start-up phase can be difficult and, like other small businesses, not all survive it.<sup>6</sup>

Some small law practices take on cases that do not require clients to pay attorneys' fees. Attorneys offer contingency plans: if the client wins the case, the attorney's fees are paid by the losing party. Since it can take months for the attorney to collect these fees, it is often challenging to develop a sustainable contingency-fee practice.<sup>7</sup> For this reason, community-

embedded lawyers have to diversify their work portfolio to include cases that generate enough income to subsidize the contingency work. If community-based lawyers do not start out with sufficient capital – or a wealthy spouse or parent – they may struggle to build and maintain their law firms.

Community-embedded lawyers keep costs down because the communities they serve require it. Lawyers must limit the scope of their representation, charge flat fees, and work out payment plans for their clients. Some of this work requires that lawyers write letters or pleadings without being identified as the drafters. This practice, called “ghostwriting,” is particularly common in preparing clients for representing themselves in court.<sup>8</sup> Limited-scope representation requires a partnership in which the client takes the lead in her own case and the lawyer remains in the background. While full representation is still regarded as the gold standard in the legal profession, community-embedded lawyers may best help a client by serving as a coach for the legal matter. In this role, community-embedded lawyers routinely equip clients to be advocates for resolution of their own legal problems.

Ultimately, community-embedded law firms are businesses. Some fail, while others change form over the course of a lawyer’s career. Argyle and Alva-Ochoa remain connected to the communities they serve; however, some attorneys move away entirely, shifting to new communities they believe will yield greater profit. Lawyers leave their communities or close their practices for a variety of reasons: more stable employment, the opportunity to merge with a larger firm, or non-economic personal reasons. Alva-Ochoa and his family moved from Huntington Park to a more affluent community after six years because he sought better

educational opportunities for his daughters. He maintains his community law practice, but visits less frequently since he plans to retire soon.<sup>9</sup> After five years, the legal services program at OLS closed because one of the founders of the organization and its board of directors had different goals.<sup>10</sup> Still, Argyle continues to consult with other attorneys who want to start sustainable sliding scale models.<sup>11</sup> Meanwhile, Argyle recently started her own practice and continues to charge on a sliding scale.<sup>12</sup>

The community-embedded law practices discussed here are businesses, yet each reflects a lawyer’s personal commitment to a vision of service through law. Lawyers who start community-embedded law firms share socioeconomic characteristics with the client base they serve, such as history, geography, or identity based on race, class, language, or immigration history. For attorneys in community-embedded law practices, building a practice that serves their peers is critical to their sense of identity and purpose. These lawyers build a niche practice, defined by a combination of service, price range, type of product, and client demographics.

Alva-Ochoa attended law school because he wanted to be a voice for people like himself and his family. He was the third of eleven children and the last born in Mexico to parents who immigrated to the United States when he was an infant. His father was a butcher who worked in the meat-packing plants in Southeast Los Angeles County and his mother worked as a seamstress in the Los Angeles garment district. He considered his family lucky compared to others because his father was able to secure medical and dental insurance through his union. Alva-Ochoa set up his law office a mile and a half from his father’s workplace. He bought his office space from a white lawyer who

retired after much of the white working-class community moved away.<sup>13</sup>

Today, Huntington Park is 97 percent Latino and approximately 48.3 percent immigrant. Nearly 30 percent of the population lives in poverty.<sup>14</sup> Alva-Ochoa understood his immigrant Latino client base because he shared their experience. And many of his clients, themselves first- and second-generation Latino Americans, sought an attorney who shared their experience. He estimates that he has served over six thousand clients in approximately forty years of practice.<sup>15</sup>

Practices like his are critical to realizing the promise of access to law for minority and immigrant communities.<sup>16</sup> In 2017, 23.1 percent of the U.S. population was nonwhite.<sup>17</sup> By 2060, estimates for the nonwhite portion of the U.S. population range up to 64 percent.<sup>18</sup> At the same time, the American legal profession remains overwhelmingly white: in 2015, 88 percent of U.S. lawyers were white. Shared experience and background can make for greater understanding and greater accessibility.

Several years after starting his practice, Alva-Ochoa ran for municipal-court judge after local judges passed a rule prohibiting court clerks from speaking Spanish. He was one of a number of Latino lawyers who challenged white incumbent judges who attempted to hinder access to the courts by implementing such rules.<sup>19</sup> Alva-Ochoa ran for judicial office twice but lost. Despite his losses, Alva-Ochoa is proud of his work in those elections because he and his team were successful in registering 2,400 new voters, engaging college students in politics, and getting campaign volunteers interested in becoming lawyers. Alva-Ochoa was later appointed as the city attorney of a local city but continued to run his law practice by contracting with other lawyers to serve his clients. As he explained,

“It [has] never been about the money, it is the desire to be helpful.”<sup>20</sup>

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For Argyle, starting the OLS was all about the money: that is, the money that potential clients did not have. She describes her upbringing as “dancing along the poverty line,” changing schools often because her family was evicted or could no longer afford the rent.<sup>21</sup> Her parents were construction workers whose incomes fluctuated. During downturns in the industry, the family qualified for free services. Argyle knew the construction industry had improved when she no longer qualified for the free lunch program and she began to take for her lunch ham sandwiches prepared at home. Argyle remembers “being pulled over by police because the blinker on my car did not work and my parents did not have the money to get it fixed.” Her family was often behind on bills so they alternated payments for the utilities each month to ensure that they paid just enough to keep the water and lights on, and the house warm. So her mother could qualify for needed medical services, her parents divorced. Argyle became the first person in her family to attend law school. There she met Daniel Spencer, who grew up in a more stable middle-class family but who had ADHD and did not graduate from high school. The two shared an interest in helping those who were otherwise dismissed by traditional approaches to providing services.

Together, Argyle and Spencer built a law practice that prioritized their shared commonalities. They both sought economic stability but wanted to help individuals who traditional law firms rejected. Between 2012 and 2016, approximately 19 percent of Salt Lake City’s population fell below the federal poverty threshold.<sup>22</sup> Clients of OLS were individuals who made between 125 percent and

400 percent of the federal poverty thresholds. Under their sliding fee scale, a family of four that earned \$47,500 per year paid OLS \$70 per hour for legal services rendered. If that family earned \$72,000 per year, the rate would shift to \$115 per hour. At that time in Salt Lake City, the average hourly rate for lawyers ranged from \$175 to \$230.<sup>23</sup> During its five years in operation, the firm served 1,700 clients of modest means. OLS estimated that its niche market included 53 percent of Utah residents.<sup>24</sup>

Argyle and Spencer graduated in 2013, when the legal market for new lawyers did not provide many jobs for public-interest practice.<sup>25</sup> Argyle wanted to become a public defender. Spencer dreamed of working with the local district attorney's office. When they graduated, they realized that they had to create their own employment. They chose the nonprofit model because they knew they had to raise money to subsidize their work and the tax exemption that a nonprofit organization offers for donors was critical to their survival. Incorporating as a nonprofit also gave them access to the Public Service Loan Forgiveness Program, which eliminates the balance of certain federal student loans after 120 monthly payments for those working full time for a charitable organization.<sup>26</sup> The nonprofit model is attractive for new attorneys with high educational debt who want to serve low-income communities and can attract donors to subsidize their work. However, the nonprofit model does not give attorneys the freedom to decide how to structure and run their law practices.

Community-embedded lawyers understand their communities in a personal way. Their practices often serve niche markets, like those established by Alva-Ochoa and Argyle, that are critical to diversifying the bar and extending access to

justice to the poor, the near-poor, and so many others who operate on the fringes of society. The clients that community-embedded lawyers represent are often drawn to their identities, not just to their professional expertise.

Like other small businesses, nonprofit organizations and microenterprises such as solo law firms contribute to community development by creating jobs and helping local people understand their legal rights and responsibilities. Lawyers at such firms also serve as role models and leaders in their communities. Community-embedded lawyers commonly volunteer at local organizations and events to provide the community with “know your rights” or legal-education workshops. These activities help market their law firm, and they also allow the lawyers to diagnose local legal needs from the types of questions community members ask.

Some community-embedded lawyers use technology to make the law more transparent and accessible. Technologically sophisticated community-embedded lawyers improve the process of filing claims or asserting rights by giving clients the opportunity to engage with them through an online interview. This permits the consumer to take the lead in diagnosing the problem and perhaps even identifying possible solutions. The more technologically savvy lawyers provide resources on their websites that facilitate client self-help, document automation, and otherwise empower people with legal problems to exercise autonomy and responsibility in addressing their own legal needs. A few even produce videos or write blogs that help educate the community about their rights, opportunities, and responsibilities.

Community-embedded lawyers also provide clients with the support and tools to navigate solutions to their legal problems. Some of the most common legal

needs in communities require lawyers, or other paraprofessionals, simply to serve as mediators in dispute resolution. Family and neighbor disputes, inheritance issues, child custody, divorce, and business dissolution are common legal problems that lawyers can help with simply by acting as experts and mediators. These dispute-resolution methods often end up being less expensive because parties reach an agreement they deem equally beneficial and therefore engage in less conflict long term.

Community needs range from the personal to the collective. Addressing individual legal needs may not command front-page news coverage, but for underserved populations, having a lawyer who understands the community is crucial. Individual legal needs are often symptoms of larger institutional problems that communities must address. Lawyers in underserved communities are often the first ones to identify injustices in laws or legal processes. They recognize patterns that require systemic change.

When community-embedded lawyers are not the change-makers themselves, their local knowledge is crucial to policy changes or legal challenges to community problems or injustices. Lawyers who understand local legal needs are helpful in identifying plaintiffs for impact litigation cases and policies that benefit entire communities of clients. Such lawyers are instrumental in helping community leaders identify legal resources and political strategies to effect change. As advocates and connectors, community-embedded lawyers help raise people's consciousness that their legal problems may not be just a consequence of bad luck but may have a root cause or solution in the legal system.

Efforts to increase access to law and justice must include the voices of community-embedded lawyers who represent modest-income individuals. These lawyers are crucial in addressing the legal needs that arise in neighborhoods; they contribute to building a diverse profession; and they inform systemic change that addresses the legal needs in other communities.

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#### ENDNOTES

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# The Role of the Legal Services Corporation in Improving Access to Justice

*James J. Sandman*

*Abstract: The Legal Services Corporation is the United States' largest funder of civil legal aid for low-income Americans. The LSC funds legal-aid programs that serve households with annual incomes at or below 125 percent of the federal poverty guideline. Legal-aid clients face a wide variety of civil legal problems: wrongful evictions, mortgage foreclosures, domestic violence, wage theft, child custody and child support issues, and denial of essential benefits. This vital work is badly underfunded. The shortfall between the civil legal needs of low-income Americans and the resources available to address those needs is daunting. Federal funding is necessary because support for civil legal aid varies widely from state to state. The LSC uses the "justice gap" metaphor to describe the shortfall between legal needs and legal services. Narrowing the gap is central to the LSC's mission.*

The Legal Services Corporation is the United States' largest funder of civil legal aid for low-income Americans. The LSC funds legal-aid programs that serve households with annual incomes at or below 125 percent of the federal poverty guideline. Legal-aid clients face a wide variety of civil legal problems: evictions, mortgage foreclosures, domestic violence, wage theft, child custody and child support issues, and denial of essential benefits. Most clients are women. Many are seniors, veterans, or people with disabilities.

This vital work is badly underfunded, and the shortfall between the civil legal needs of low-income Americans and the resources available to address those needs is daunting. Federal funding is necessary because support for civil legal aid varies widely from state to state. Florida and Idaho, for example, provide no state funds of any kind for civil legal aid, while New York appropriated \$100 million in 2018. Local, private, and foundation sources of funding are also uneven and limited. In a dozen

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states and territories, the LSC provides the majority of civil legal aid funding for its grantees.<sup>1</sup> It is the backbone of legal-aid funding across the United States, ensuring that there is at least some support everywhere.

Created by an act of Congress in 1974, the LSC is an independent nonprofit corporation headed by a bipartisan board of directors whose eleven members are appointed by the president and confirmed by the Senate. The LSC is a grant-making organization funded almost entirely by an annual appropriation from Congress. It distributes more than 93 percent of its appropriation to eligible nonprofits delivering direct civil legal aid services. The LSC currently funds 132 independent legal-aid organizations with more than eight hundred offices serving every county in the United States and the American territories.<sup>2</sup>

The LSC uses the “justice gap” metaphor to describe the shortfall between legal needs and available legal services. Narrowing the gap is central to the organization’s mission. In June of 2017, the LSC issued a report titled *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*. The report, prepared by the LSC and the National Opinion Research Center at the University of Chicago, found a wide justice gap for the almost 20 percent of Americans eligible for LSC-funded assistance. In a given year, this population receives inadequate or no legal help in addressing 86 percent of the civil legal problems it faces.<sup>3</sup> The need is widespread: 71 percent of low-income households experience at least one civil legal problem a year, and about one-quarter of this population experience six or more civil legal problems a year.<sup>4</sup>

Another measure of the justice gap is the number of unrepresented litigants in the nation’s courts. The National Center for State Courts estimates that in almost 75 percent of civil cases in state courts,

one or both parties are unrepresented.<sup>5</sup> The numbers are even higher in some types of high-volume, high-stakes cases. It is common in American courts: for example, more than 90 percent of tenants facing eviction have no lawyer, and more than 90 percent of parents in child support cases go without counsel.<sup>6</sup>

Every day across America, LSC-funded legal-aid providers help victims of domestic violence seeking protection, veterans trying to avoid homelessness, consumers facing wrongful evictions or foreclosures, and others with challenges to their security and well-being.

A disabled veteran named Ronnie Pitcock, for example, was living with his wife of twenty years when his leg required amputation. As he recovered from surgery, Pitcock’s spouse left him and took all of his money. With no other options, he moved into a homeless shelter and was referred to the veterans relief project at Legal Aid of Western Missouri. Living on Social Security Disability benefits, he could not pay his medical and other expenses. With the help of a legal-aid attorney, he was able to discharge his student loans on the basis of his disability, obtain a divorce settlement, and terminate the power of attorney he had previously given his wife so that he could protect his income going forward.

Domestic violence cases are common for LSC grantees and usually require much more than filing for divorce. After an abusive husband in Kansas threatened to shoot his wife, for example, she met with a Kansas Legal Services attorney who devised a safety plan and filed for emergency protective orders. The attorney then litigated a divorce action in which his client obtained fifty-four months of spousal support so she could get back on her feet.

Legal-aid agencies also join forces with health care providers in medical-legal

partnerships to deal with a wide variety of civil legal and health issues. For example, a Los Angeles resident suspected her children's respiratory illnesses were related to broken pipes and mold in her apartment. She was not able to get her landlord to address these problems, so she brought her children to St. John's Well Child and Family Center, a community clinic in South Los Angeles, to treat their respiratory symptoms. When her doctor learned of the conditions at her apartment, he asked an attorney from Neighborhood Legal Services of Los Angeles County, stationed at the clinic as part of a Medical-Legal Community Partnership, to assist the family. As a result of the legal intervention, the landlord brought the premises up to code. The children's visits to the doctor for respiratory problems dropped significantly. The health of the neighbors improved as well.

Legal-aid providers have also broken new legal ground through litigation. For example, Southeast Louisiana Legal Services Corporation won an appeal that allowed a domestic violence victim to litigate child custody in the state she moved to rather than in Louisiana where her abuser sued her. This case established the right of domestic violence victims to litigate custody in a refugee state.<sup>7</sup>

In Maine, a pro bono lawyer handling a foreclosure case for Pine Tree Legal Assistance realized the mortgage company he was suing was mass-producing flawed paperwork to seize homes illegally. He initiated investigations into robo-signing and other practices that helped lead to a \$25 billion settlement and forced the nation's largest banks to halt improper foreclosures based on bad documentation.<sup>8</sup>

Because of the wide disparity between available resources and the civil legal needs of low-income Americans, the LSC has undertaken a number of initiatives to

leverage its federal appropriation, to promote innovation in the delivery of legal services, and to maximize the efficiency and effectiveness of the work it funds.

Technology can stretch limited resources for legal-aid providers in many ways. It allows them to automate functions that lawyers would otherwise handle and provides them with self-help checklists, instructional videos, and document-preparation help for unrepresented people. Technology also aids in preparing legal forms and provides support for private pro bono lawyers taking on cases in unfamiliar areas of law. The LSC has been a leader in promoting the use of technology in legal aid.

Since it was founded in 2000, the LSC's Technology Initiative Grants (TIG) program has played a significant role in promoting technology to address the civil legal needs of low-income people. The TIG has funded more than seven hundred projects totaling more than \$63 million.<sup>9</sup> They include:

- *Developing a national network of legal-aid websites* that provide information on the locations and services of legal-aid offices, offer pro bono opportunities and subject-matter support for volunteer private lawyers representing legal-aid clients, and present a broad range of self-help resources for low-income people with civil legal problems.
- *Funding the development of LawHelp Interactive*, which uses technology to improve the process for self-represented litigants in preparing legal forms and other documents. Used in more than forty states and U.S. territories, LawHelp Interactive is available through many statewide legal-aid websites.<sup>10</sup>
- *Helping legal-aid organizations create and share educational content.* Statewide Legal Services of Connecticut developed LearnTheLaw.org, through which legal-

aid programs from any state can access resources for online classes to train volunteers about a specific legal issue, guide self-represented parties through often confusing legal processes, produce trainings for pro bono lawyers, and meet other training needs.

- *Using text messaging systems to help litigants keep important appointments and to track outcomes in client matters.* Legal Services of Northern Virginia uses text messages in addition to phone calls to remind self-represented litigants of court dates and other important appointments. Since beginning the program in 2014, the organization has reduced client failures to appear in court by 45 percent.<sup>11</sup> Montana Legal Services Association sends text reminders to clients about meetings they have scheduled at self-help clinics. These reminders have increased attendance by as much as 40 percent at the clinics since they began in 2017.<sup>12</sup> The Legal Aid Society of Cleveland developed a system in 2016 to text-message clients who received advice or limited service, to learn the outcomes resulting from the help provided. The system collects outcomes data related to housing conditions, eviction, foreclosure, simple divorces, criminal record sealing, and debt problems. More than half of the people who have received a text message asking them to report case outcomes have responded.
- *Developing online intake systems.* The TIG program has funded initiatives to provide online intake for prospective clients, allowing them to apply online for assistance at any time of day from any location. These systems have saved significant staff time and resources: Legal Aid of Western Ohio, for example, determined that online intake saved approximately ten to fifteen minutes of staff time for every application accepted, which amounts to a savings of about one to one and a half of a full-time staff member's time per year. The Michigan Guide to Legal Help, an online triage tool developed through a 2015 TIG, is improving intake through a simple format. After visiting Michigan-LegalHelp.com and filling out a ninety-second questionnaire, users are directed to a customized, comprehensive list of referrals, legal information, and forms tailored to their circumstances. If someone is deemed eligible for legal aid and has a priority case, he or she will be directed to the Michigan statewide online intake system. The Michigan Guide collects no personally identifying information, so users are anonymous until they submit an application for help through the secure online intake system. In the first six months of 2018, an average of 180 people a day accessed the Guide: 70 percent finished it and 60 percent were referred to legal services. Nearly 90 percent said it was easy to use.<sup>13</sup>
- *Enhancing data collection and analysis.* Several grants have supported innovations at Illinois Legal Aid Online. One supported the work of a team of data scientists to model complex sets of website data and better predict how users would interact with the legal aid organization's website.
- *Helping military members, veterans, and their families.* StatesideLegal.org is a free resource for members of the military, veterans, their families, and advocates. Administered by Pine Tree Legal Assistance, the website helps users access benefits, find free legal help, and navigate their legal issues. Users can access an extensive library of original content, including interactive forms and instructional videos.
- *Partnering with Microsoft and Pro Bono Net to develop online, statewide "portals" to*

*direct individuals with civil legal needs to the most appropriate civil legal assistance.* The portals are being designed to provide easy, statewide access for people seeking help with civil legal matters and will be piloted in Alaska and Hawaii in 2019.

**I**ncreasing the role of private lawyers in civil legal aid can help narrow the justice gap. The LSC requires that its grantees spend 12.5 percent of their LSC funding to support legal services by private attorneys. This spending can be used to fund infrastructure to support unpaid, volunteer pro bono lawyers, to compensate private attorneys for taking on cases from legal-aid programs, or both.

At the LSC's request, Congress first funded the LSC's Pro Bono Innovation Fund in 2014 for \$2.5 million. By 2018, Congress increased funding to \$4.5 million. The initiative has invested \$14.5 million in pro bono projects in twenty-eight states.<sup>14</sup> These projects have involved collaborations with nearly one hundred partners, including bar-sponsored volunteer lawyers' programs, health care providers, law firms, corporations, technology providers, and law schools.

Over the first years of the program, the LSC has detected three trends:

- *Pro bono is becoming more efficient.* All grantees are expected to modernize, digitize, and streamline existing systems to support and communicate with volunteers. The initiative has invested hundreds of thousands of dollars in both simple and large-scale technology improvements that save numerous hours of volunteer, legal-aid staff, and client time.
- *Pro bono is becoming more focused on quality and impact over processing and volume.* Nearly 90 percent of Pro Bono Innovation Grant funding has been directed toward personnel, such as substantive experts or dedicated staff with

experience in both legal aid and law firms, who can ensure that volunteers are well trained, supported, and provided with pro bono opportunities that are well-matched to their experience, skill, and available time. James J. Sandman

- *Pro bono programs are developing opportunities that are more substantive and provide helpful legal assistance to clients.* Grantees are encouraged to engage pro bono attorneys in substantive and meaningful legal assistance to clients. Taking advantage of court rules that permit limited as opposed to full representation of a client, and through same-day, on-site, court-based representation projects, many of these pro bono opportunities allow volunteer pro bono lawyers to provide valuable assistance to clients without extensive time commitments.

**T**he LSC has launched multiple initiatives to improve its grantees' effectiveness. The LSC is the repository of more information about the delivery of civil legal aid than any other organization in the United States. Its goal is to use that and other data to promote evidence-based improvements in client services and legal-aid management. In 2016, the LSC began requiring its grantees to track the outcomes of all cases in which clients were provided with extensive services, and then, in 2017, to report to the LSC on how grantees are using the outcomes data they collect to improve client services and program management.

In 2014, the LSC launched an effort to raise private funds to complement its Congressional appropriation to support new initiatives that extend and amplify its work. Examples of privately funded projects include:

- The *Justice Gap* study, mentioned above.
- A Rural Summer Legal Corps, comprising up to thirty law students each

- summer who serve with LSC-funded civil legal aid providers in rural locations.
- A Midwestern disaster-preparedness project to develop coordinated plans between disaster-preparedness organizations and legal-service providers.
  - The LSC's first grant initiative to support leadership training in the field of civil legal aid.
  - The development of a legal-aid curriculum for public librarians, who are often the first people low-income Americans consult when seeking help in finding legal aid.
  - A toolkit and online guide that enable LSC grantees to use client outcomes data to improve client service and internal management.
  - An evaluation of the accessibility and usability of state- and territory-wide legal-aid websites, which currently differ in the quantity and quality of information they provide, and the development of a toolkit to implement recommendations for improvements.
  - National task forces to address the civil legal aid challenges caused by natural disasters and the opioid crisis.

One of the biggest challenges in resolving the crisis in civil legal aid is the invisibility of the issue: the widespread ignorance of the magnitude of the justice gap in the United States.

Among the public, research has shown a common misperception that there is a right to counsel in civil cases. There is not. Even those who understand that representation is not guaranteed in the civil justice system do not understand how many people receive no civil legal aid because of a lack of resources.

Some private funders think this a narrow issue for lawyers to resolve. Others think of civil legal aid as just another

discretionary spending program, or even worse, a form of charity.

Funding civil legal aid is not charity; it is an essential and financially sound investment. A growing body of research demonstrates that investment in civil legal aid stimulates significant economic benefits for communities, state and local governments, and individuals. Studies in several states illustrate that civil legal aid positively affects the housing market, homeless shelter costs, foreclosure and eviction rates, and employment, while reducing domestic abuse costs.

The LSC has worked to raise public awareness of the crisis in civil legal aid and to attract partners beyond the traditional civil legal aid community. The organization initiated this effort at a forum cohosted with the White House in April of 2012. It has held similar forums at LSC board meetings in twenty states and has held a national convening in Washington each year since 2012 to focus attention on the need for expanded civil legal services and to promote innovations in meeting that need.<sup>15</sup> These forums have included leaders from business, government, philanthropy, and the greater legal community.

This broader focus continues with another LSC initiative: the LSC Leaders Council. Comprising leaders in law, business, academia, sports, and other disciplines, the Leaders Council is helping raise awareness of the LSC and its grantees' essential work. These initiatives are intended to engage broader participation in the LSC's mission of promoting access to justice: to expand beyond the traditional legal-aid community and involve American leaders of all kinds.

Funding civil legal aid is an investment in the stability of American democracy. If the United States cannot ensure access to the legal process, the nation cannot expect respect for the rule of law or the

democratic institutions that depend on it. The American justice system belongs to and is meant to serve all Americans, not just lawyers. The United States must educate all Americans about and engage them in the challenges posed by the justice gap.

James J.  
Sandman

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# Participatory Design for Innovation in Access to Justice

*Margaret Hagan*

*Abstract: Most access-to-justice technologies are designed by lawyers and reflect lawyers' perspectives on what people need. Most of these technologies do not fulfill their promise because the people they are designed to serve do not use them. Participatory design, which was developed in Scandinavia as a process for creating better software, brings end users and other stakeholders into the design process to help decide what problems need to be solved and how. Work at the Stanford Legal Design Lab highlights new insights about what tools can provide the assistance that people actually need, and about where and how they are likely to access and use those tools. These participatory design models lead to more effective innovation and greater community engagement with courts and the legal system.*

A decade into the push for innovation in access to justice, most efforts reflect the interests and concerns of courts and lawyers rather than the needs of the people the innovations are supposed to serve. New legal technologies and services, whether aiming to help people expunge their criminal records or to get divorced in more cooperative ways, have not been adopted by the general public. Instead, it is primarily lawyers who use them.<sup>1</sup>

One way to increase the likelihood that innovations will serve clients would be to involve clients in designing them. *Participatory design* emerged in Scandinavia in the 1970s as a way to think more effectively about decision-making in the workplace.<sup>2</sup> It evolved into a strategy for developing software in which potential users were invited to help define a vision of a product, and it has since been widely used for changing systems like elementary education, hospital services, and smart cities, which use data and technology to improve sustainability and foster economic development.<sup>3</sup>

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Participatory design's promise is that "system innovation" is more likely to be effective in producing tools that the target group will use and in spending existing resources efficiently to do so. Courts spend an enormous amount of money on information technology every year. But the technology often fails to meet courts' goals: barely half of the people affected are satisfied with courts' customer service.<sup>4</sup>

No wonder: high-profile technology solutions, like a prospective, unified case-management system for California's courts, which would have laid the groundwork for online, statewide court services, fizzled out after \$500 million had been spent.<sup>5</sup> In Alameda County, California, a new court case-management system, rolled out in 2016, led to many people wrongly arrested and jailed, or forced to register as sex offenders.<sup>6</sup> Other technologies have been built with the expectation that people without lawyers will use them to prepare for their court proceedings, but people do not use them. An Arizona project called "Computers that Speak of the Law," for example, was intended to empower Navajo and Hopi communities through legal kiosks with satellite connections that would provide legal education and guidance, but the target communities did not use them.<sup>7</sup>

Most models for incorporating technology into the provision of legal services have similar characteristics. They are grounded on the notion that providing people with information about court processes will increase their capacity to navigate them. Yet they avoid customizing the information to specific people, out of concern that this might violate legal ethics rules about unauthorized practice of law, or court rules around neutrality. They are also aimed primarily at people who are already in the process of determining their legal options and getting legal tasks done.

Access-to-justice innovation projects usually consist of online guides and tools related to legal forms. The idea behind these projects is that more information and semiautomated tools will allow more litigants to navigate legal processes without lawyers. The most common types of offerings are: self-help websites describing legal processes; form-filling tools for preparing petitions, motions, and other court forms; and e-filing portals for submitting forms online rather than bringing them to court or mailing them. There are also more detailed types of guides, like videos, that walk a litigant through specific court processes.

These tools sometimes include physical access points, where people who do not otherwise have access to online resources can use them, such as kiosk workstations at libraries or other public institutions with computers and printers; or video conferencing support, with high-speed Internet and fax machines. These models aim to help people access legal information and connect remotely with lawyers. Increasingly, programs involve remote communication with legal professionals, in which a person can live-chat on a legal website; call an intake phone line or hotline; or enter an online advice clinic to talk briefly about their issues. In most instances, this remote communication provides generic information about legal processes, but not about the substance of individual cases.

Finally, the legal profession has invested in back-office capacity to gather and make sense of information about the people using their systems, so that they can make better referrals and better manage their cases. This entails building shared case-management systems that can sync across organizations and jurisdictions, and allow more remote operations and interoperation. It also means wide area networks that improve the connectivity

*Margaret Hagan*

of offices, so they can use high-speed network capabilities to work.<sup>8</sup>

What these tools have in common is how they were developed: by legal-aid and court-administration groups and by lawyers driven by their own views about what will best engage the community. These tools were also usually funded by the same source: the Legal Services Corporation, a central funder and key supporter of technological innovation in access to justice, whose grant money goes to legal-aid groups staffed largely by lawyers.

By contrast, participatory design involves actively consulting and collaborating with a wide range of stakeholders in a system to understand their perspectives and incorporate their priorities into system innovation. Participatory design asks people who are meant to use a system's services to help identify where it needs to be reformed, define what "better" operation would look like, and design new interventions to reform it. Teams of designers working with customers and professionals generate innovations that users rate as better than traditional innovations.<sup>9</sup>

One tool of participatory design is the *envisionment design workshop*. Service users, service providers, and design facilitators identify key problems of the current system, map out their experiences and ideas for improvement, and draft new concepts for possible implementation. These concepts crystallize hypotheses about how services could be improved, which other developers can use to draft more refined prototypes.

Another technique is the *co-design jam*. Co-design, or collaborative design, involves a mixed group of stakeholders working together to design a prototype and plan for its pilot implementation. The jam focuses on making something

that can be implemented (rather than, for example, exploring a challenge area to draw out insights). A jam is similar to a hackathon: that is, a concentrated sprint of work in which a variety of collaborators and experts work together to develop and refine a new idea.

Different user-testing strategies work best at different points in the design process. Interview and focus-group testing is good for showing early-stage prototypes to target users and asking for their edits and additions. A design team may create an idea book – a catalogue of possible new interventions – and then have stakeholders rank the ideas. Another strategy is to show a prototype of a new solution and ask users to assess its usability and value, while evaluating their engagement with and comprehension of the prototype.

Some groups have pioneered structures for conducting user-testing on a regular basis. Smart Chicago – a nonprofit that works on improving civic software in the city – launched the Civic User Testing Group.<sup>10</sup> They recruit testers through advertisements in local libraries and community spaces, where software testers organize focus groups and usability testing sessions. Participants are paid for their feedback. Blue Ridge Labs in New York City, affiliated with the nonprofit innovation group Robin Hood Labs, runs the Design Insight Group, which regularly tests new civic applications and startups.<sup>11</sup> The federal government, in particular through the group 18F, also conducts user testing of new government websites and interactive services.<sup>12</sup>

In recent years, government and nonprofit labs have formalized a participatory-design approach to government services and policy-making, providing models for legal system professionals. There are several emerging types of labs: government-based policy labs, nonprofit

social innovation labs, and living labs, which are often associated with universities and local governments.<sup>13</sup> Government-based policy labs allow for a design-driven process to guide the development of policy, including stakeholder interviews and observations; prototyping and testing of new interventions or rules; and collaborative design with stakeholders.<sup>14</sup> Social-innovation nonprofits run similar policy labs.<sup>15</sup>

Another structure is the *living lab model*, which has grown out of Europe and has spread throughout Asia, North America, South America, and beyond.<sup>16</sup> A living lab entails ongoing policy discussions and prototyping in neighborhoods where potential users live. The labs identify a key future challenge or problem that a community faces, like environmental concerns, the development of smart interconnected city infrastructure, or the development of new food systems. The living lab hosts activities in which members of a core team, which might include policy-makers, designers, technologists, and researchers, interact with members of the community.

The team at Stanford's Legal Design Lab, which I direct, is exploring ways that participatory design can be used in the civil justice system. The lab takes a prototyping approach to the research, and has tried several different models of gathering feedback on-site at the court and through our lab. For example, the lab has worked with the University of Denver Court Compass project to run a series of divorce redesign workshops with former litigants, court staff, and lawyers in Massachusetts and Iowa.<sup>17</sup> These were envisionment workshops in which participants reflected on the processes and experiences they went through, and then generated new concepts for divorce rules and service changes. Participants placed a high value on simplifying court processes for filing and disclosure of financial information, and

expressed a strong interest in an online tool that would provide procedural updates, automated forms, and filings in one coordinated pathway. The lab's core design team will take these requirements and concepts into the next phase of co-design jams that will involve more technologists, professional designers, and policy experts to refine interventions based on what the former divorce litigants prioritized.

Workshops like these are resource-intensive. They require a core team of researchers and designers to establish partnerships with courts, recruit litigants for full-day participation, compensate them for their time, and work alongside them to create new designs. Trained design facilitators usually guide the process, though court staff could also be trained for this role.

Less resource-intensive methods include court user testing and agenda-setting sessions. These can involve activities with litigants who are in the courthouse waiting to access other services. In California's Santa Clara County, for example, lab staff asked users of the court system what *they* believed the agenda for innovation should be. In an idea-ranking session, they evaluated different types of innovations (new products, services, organizations, or policies) based on the benefits to them individually and to their community. In a location-ranking session, they advised about where resources should be spent to make legal help resources more accessible.

In the agenda-setting activity, participants were presented with an array of cards. One initiative was written on each card that could possibly make their experience of the legal system better. The initiatives came from an inventory of concepts and priorities gathered through previous research. Blank cards allowed participants to suggest new ideas.

The lab told participants to imagine that they had been hired by a civic foundation to spend its budget to make courts more user-friendly for people without lawyers. They were shown each of the ten concepts for “access to justice innovation,” one at a time, and instructed to rank their possible value. Then they were given cards for each idea and a grid with four categories: high value (\$100,000 to each idea), medium value (\$50,000 to each idea), low value (\$10,000 to each idea), and no value (\$0 to each idea). They could put a maximum of four cards in each category. For each idea ranking, as well as for the allocation/category game, the lab asked the participants to explain their thinking and to add any further ideas.

A similar exercise focused on possible venues for providing legal help resources. The ten locations used in the experiment included places in the community, like churches, schools, or transit centers, as well as digital platforms, like text messages or websites. Again, participants were asked to distribute limited resources to these proposed venues, and to think like a community leader when setting their agenda. Both sessions occurred within a twenty-minute time frame, with one facilitator talking with the participant and one taking notes. In these sessions, the most popular concept was personalized chats with lawyers, librarians, and staff via a mobile phone or website. The second-most popular concept was virtual courts, in which a person could appear before clerks, attorneys, or judges via videoconference or text. Remote, personalized services that would give more universal access to court services were championed as the highest priority. In large part, this was to solve logistical challenges of taking time from work, finding child care, and paying for parking and transit, as well as to prevent the wasted time of waiting in lines in person. The

least valued ideas were kiosks and workstations, along with paper-based explanations of the court process.

For the location-ranking game, participants overwhelmingly chose public libraries as the best place to put legal-help information. They also prioritized Internet-based solutions on desktop computers, mobile phones, and smart-home assistants (like Amazon’s Alexa). They recommended much more investment in information that is available online and in its interactivity. Other community locations, like shopping malls, churches and other places of worship, and transit centers were less valued. They reasoned that these places were inappropriate for legal matters because they were for other purposes – whether commercial, spiritual, or family – and they doubted that people would engage with legal resources, workshops, or services there.

One overarching message from the participants was that they wanted a face-to-face feeling in their services, but do not need face-to-face experiences with staff. They expressed a hunger for personalized guidance tailored to their situation. This translated to a priority on technology that would allow a person to have a conversation with a court authority and accomplish tasks (like filing documents and scheduling appointments), and not just learn about the process in the abstract. Though many participants did not consider themselves technology experts, they prioritized technology-based solutions via web, text, or mobile applications. They were willing to learn more about the technology to get more prompt and remote services.

This prototyping exercise was a relatively inexpensive and low-barrier way to introduce public input into new technology options, form designs, and service offerings. Because of the large number of users of the court system who are usually waiting in the court for service, there is a

ready population of people to participate in feedback and co-design sessions. It was relatively easy to recruit at least ten people every two hours to speak for twenty minutes at a time. Most respondents had been to the court several times before. They had expertise, insights, and frustrations about the system, which translated into thoughtful recommendations about court reforms. Participants expressed appreciation for being given an opportunity to talk about their experiences and hope that the system could learn from their input to be better for future litigants.

These kinds of research efforts can be scaled. Court staff, potentially in partnership with local law schools, for example, could conduct weekly court user testing at self-help centers, clerk's offices, or other waiting areas at the court. The essential elements are a budget to compensate people for their feedback, a standardized recruitment and consent protocol, and a partnership with the director of the self-help center or other office.

The court and legal-aid community can embrace participatory design as a method for access-to-justice innovation. As other government and social agencies have increasingly done, the civil justice sector can experiment with community-led agendas for innovation efforts and better situate and launch new technologies and services. A participatory approach can ground new initiatives in understanding about what the community will trust and use, so that legal professionals do not build new software or services that only they themselves will use. It can also ensure that the right problems are being solved, so that any new innovation is addressed to the kinds of problems that people actually frequently face.

This work could combine intensive workshops and co-design jams, which require high amounts of planning and

trained staff, with lightweight feedback and agenda-setting sessions. Participatory work can also employ online data and machine learning. Online reviews, comment sections, and social media posts can be scanned and mined for key frustration points with courts and legal-aid services. By collecting user feedback and ideas from platforms online, civil justice actors can learn where there is a high need for innovation and why people are frustrated by the justice system.

Courts can also establish new units and services that lower the logistical burden of running these sessions. Courts and legal-aid providers could use existing services, like Amazon's Mechanical Turk, an online study-recruitment system, to recruit members of the public to answer questions, give reviews, or test out new software before the organization invests in a new solution. Like city governments, courts could also build civic panels, in which they recruit existing and recent litigants to join a prescreened list of people to participate in design. Panel members might be trained to become innovation leaders themselves, taking on the management of setting the innovation agenda and piloting projects. Finally, legal organizations might invest in gathering their own data about users' (or potential users') behavior in the current system. As other government policy labs have begun to do, they can measure analytics from their websites, the numbers of people who have problems completing certain tasks, the flow of people through their buildings, and other markers of people's behavior in their system. These data points can show where the system is failing, whether because the rules are too complicated, the paperwork too hard to get right, the website not easy enough to use, or the building too hard to navigate.

This kind of research allows legal organizations to be more intentional about

how they spend resources. It empowers community members to help in deciding how funding, technology, and staff time are used in reforming the legal system. It can be a source of promising ideas

for innovations and community partnerships, and it can harness stakeholders to help make the system work better for people it is supposed to serve.

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# Simplified Courts Can't Solve Inequality

*Colleen F. Shanahan & Anna E. Carpenter*

*Abstract: State civil courts struggle to handle the volume of cases before them. Litigants in these courts, most of whom are unrepresented, struggle to navigate the courts to solve their problems. This access-to-justice crisis has led to a range of reform efforts and solutions. One type of reform, court simplification, strives to reduce the complexity of procedures and information used by courts to help unrepresented litigants navigate the judicial system. These reforms mitigate but do not solve the symptoms of the larger underlying problem: state civil courts are struggling because they have been stuck with legal cases that arise from the legislative and executive branches' failure to provide a social safety net in the face of rising inequality. The legal profession and judiciary must step back to question whether the courts should be the branch of government responsible for addressing socioeconomic needs on a case-by-case basis.*

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State civil courts are at the core of the modern American justice system and they are overwhelmed. These courts handle 98 percent of the tens of millions of civil legal cases filed each year, including those concerning people's homes, family relationships, and finances.<sup>1</sup> About 75 percent of these cases involve at least one party without a lawyer, and there is little possibility this reality will change anytime soon.<sup>2</sup> As a result, millions of people each year struggle to navigate state civil courts to solve their problems.

In the face of this crisis, there are many calls for change. One is for more and different assistance for litigants. These reforms include creating a civil right to counsel, or allowing paralegals or others to represent individuals in legal matters just as lawyers do now. They include improving information through explanatory documents or other materials to explain court processes. Another approach to reform seeks to simplify courts themselves: reducing the complexity of legal processes and systems so that ordinary people can navigate

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them without lawyer assistance. Called *court simplification*, this approach is a logical, compassionate response to this quandary: if people do not have access to the help they need to navigate the court system as it is designed, why not redesign the court system so that people can navigate it on their own? If unrepresented litigants could successfully navigate the procedures, forms, and interactions with clerks and judges in state courts, it would be an improvement on the status quo. The more modern-sounding versions of these ideas – like “legal design” or “legal tech” – have visceral appeal. Courts, state bars, and other institutions are investing in this approach.<sup>3</sup>

The need is real: the volume of cases in state civil courts overwhelms their resources. The number of civil cases brought to state courts hovers around twenty million per year.<sup>4</sup> This number would be even greater if all civil problems were brought to court, but millions of Americans do not even attempt to resolve their problems through the court system.<sup>5</sup> In some court systems, 80 to 90 percent of litigants appear without lawyers.<sup>6</sup> The system is an adversarial one, designed for represented parties. But there is no right to an attorney in civil cases. There are not, nor are there likely to be in the future, the resources to provide a lawyer in every civil matter before the courts. An enormous number of Americans appear in state civil courts without any assistance to navigate the litigation process, and courts have no choice but to serve these litigants despite the mismatch between design and reality.

State civil courts were not always so overwhelmed. In the 1970s, and even in the 1980s and 1990s, reported rates of pro se litigants were much lower, from the single digits to around 20 percent.<sup>7</sup> Around the turn of the century, scholars and judges started to call attention to the

“dramatic increase” of pro se litigation.<sup>8</sup> There are some common explanations for this change.

The first is the growth of poverty and inequality in the United States. There are over forty million Americans in poverty, almost double the number in the mid-1970s and a significant increase from the approximately thirty million people in poverty in 2000.<sup>9</sup> Some types of civil cases can be logically tied to growing inequality, such as dealing with family matters, housing, and consumer debt.<sup>10</sup> These types of cases directly reflect the problems an individual encounters when she struggles economically: she misses rent payments and her landlord attempts to evict her, her marriage or custody arrangements are unstable, and her unpaid bills are subject to collection. In each of these circumstances, a state civil court case is the ultimate result. In addition, litigants appearing without lawyers often explain that they do so because they cannot afford attorneys, so these same cases are likely to be ones in which the litigants are navigating the court system on their own.<sup>11</sup>

A second explanation is that the problem is not only an increase in the number of poor people and accompanying state civil court cases but also, because other branches of government have failed to respond to growing inequality, changes in the kinds of cases that state courts see. The executive and legislative branches have aggressively pared back social safety net programs, and the judicial branch is required to hear the cases that result. For example, since the welfare reform efforts of 1996, fewer welfare benefits are available for poor families with children. For poor families, child support now replaces rather than supplements welfare benefits.<sup>12</sup> The number of custodial parents with a support order has risen 44 percent since 1999.<sup>13</sup> As a result, state courts – as the ones that handle child support issues

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– see far more support cases than they did two decades ago. As another example, federal funds for public housing are as low as they were four decades ago.<sup>14</sup> Only one in four of the nineteen million families that qualify for housing assistance receive it.<sup>15</sup> Median rent has doubled over the past twenty years.<sup>16</sup> Increasing inequality, higher rent, and less public-housing assistance mean that millions of Americans face eviction each year, a process handled by state civil courts. Further, eviction triggers a cascade of other problems that lead people back to state civil court, such as additional housing disputes, consumer debt, divorce and child custody, and child welfare cases.

Courts cannot decline cases presented to them, so the absence of action by the legislative and executive branches leaves courts managing litigants' socioeconomic needs, which courts are neither designed nor equipped to address. A state family court judge in any county in America is likely to hear a case today in which a wife (who has no lawyer) seeks a divorce from her husband (who has no lawyer), custody of their child (who has no lawyer), and a protective order asking the husband to stay away from her because of threats and violence. Under state law, this is a dispute about domestic violence, divorce, and custody, appropriately resolved in a state civil court.

If you sat in the preliminary hearing for this case, you would recognize many other problems wrought by inequality and the absence of safety net programs. You would hear allegations that the husband struggles with substance abuse. You might infer that the wife suffers from untreated mental illness. You would hear that the wife cannot access affordable child care and cannot find a job with hours to accommodate this challenge. You would hear that both parties have housing instability, rotating staying with

family and friends. You would hear that the family's consumer debt is growing. You would hear that neither the husband nor the wife completed education beyond high school.

The case is a matter of civil law, yet it presents a range of socioeconomic needs intertwined with inequality and its consequences – problems that are not being addressed by the services and resources of other branches of government. The husband does not have access to affordable substance abuse treatment, affordable housing, or adequate educational opportunities. The wife does not have access to mental health care, affordable child care or flexible employment hours, affordable housing, or adequate educational opportunities. Judges and courts faced with cases like these attempt to meet the challenge out of a combination of compassion, pragmatism, and legal obligation. State civil courts have been forced to expand their roles significantly.

**B**ut are state civil courts the appropriate institution to address individual socioeconomic needs like untreated substance abuse and mental illness, domestic violence, and unstable housing that manifest in a society with stagnant wages and rising inequality? Court simplification and related access-to-justice reforms rest on the premise that more accessible courts would allow litigants to achieve justice or otherwise solve the problems they grapple with in state civil courts. This might be true if state civil courts were not being asked to play their new, expansive role. But they are, and it is worth exploring why courts might not be the appropriate institution to play this role, and why court simplification will not necessarily lead to more substantive justice for low-income litigants.

First, the core purpose of civil courts is to resolve disputes between parties and,

as the legal scholar Frederick Schauer wrote, to “get the facts right.”<sup>17</sup> In state civil courts, the judges are the key actors in a context in which the “fact finder is at the mercy of the parties.”<sup>18</sup> But the reality of state civil court litigation is often entirely different from this ideal. The adversarial process breaks down when parties lack skilled legal counsel, as occurs in most state cases, especially when an unrepresented, poor individual faces a represented party such as a landlord or a bank. Even if the less powerful party receives more information or a simpler process, the more powerful party is still advantaged by representation and the expertise, relationships, and resources that come with it. Further, the less powerful party will continue to have the burden of the related social problems entangled with the legal dispute, which exacerbate the power imbalance.

For example, a tenant in an eviction matter will surely benefit from information that explains that lack of proper notice is a defense against eviction and also explains the use of a standardized court form that elicits related facts from the tenant. At the same time, a landlord’s lawyer with expertise in this area of law who is a repeat player in this courthouse, with all the benefits that flow from that and with economic resources to devote to the eviction proceeding, will still have more power in the dispute than the tenant. One indicator of this dysfunction in the system is the default rates in state courts, which show that large numbers of cases are resolved through one party not participating in the process. According to the National Center for State Courts, the results in 18 percent of landlord-tenant cases, 24 percent of debt-collection cases, and 29 percent of small-claims cases were default judgments.<sup>19</sup> Court simplification might address some of this lack of participation, yet it does not address the

inequality that underlies the asymmetric power in state civil courts.

Second, many of the problems that civil courts handle are symptoms of inequality. The design of civil courts constrains the substantive law and procedural tools at their disposal to address these symptoms. By the time the tenant comes to a state civil court, she has already lost her job and failed to pay her rent, which the law says she can be evicted for. Court simplification might make the legal process of eviction easier to navigate for the tenant, and perhaps allow her to identify a defense that delays her eviction or reduces the amount of money she owes her landlord, but the underlying problem remains. Even in this improved scenario, the court’s capacity is limited. It could give the tenant thirty additional days before she loses her home because the landlord failed to provide sufficient notice, but it cannot help her with the other challenges related to her eviction, such as finding affordable child care, health care, or employment that leads to savings to protect against future eviction. Courts cannot create and fund social safety net programs, expand the availability of affordable housing, or fulfill other functions of the legislative and executive branches. The socioeconomic needs that flow from inequality and push parties into civil courts cannot be simplified away within the judicial branch.

To the extent that courts have historically and could in the future play a meaningful role in addressing larger questions of inequality, that role has taken the form of adjudicating issues of rights writ large, and not addressing individual socioeconomic needs in the absence of a social safety net. A focus on rights and systemic reform necessarily involves lawyers as core players who identify, build, and litigate these resource-intensive and complex cases. Court simplification – especially the

version that contemplates a parallel set of rules and procedures for unrepresented parties – undermines lawyers' ability to identify individual disputes from which these systemic cases emerge.<sup>20</sup> This risks losing the collective law development that leads to systemic equality or equity for these same litigants. In trying to improve the litigants' ability to navigate the overwhelmed state civil courts, court simplification may risk making inequality worse.

Finally, pursuing court simplification without challenging the idea that state civil courts should address socioeconomic needs case by case runs the risk of contributing to dissatisfaction with the judicial system. If the structural problems underlying the civil access-to-justice crisis persist, unrepresented litigants will continue to struggle in both the courts and society. Americans, regardless of party affiliation, are already skeptical of courts' enforcement of public policy.<sup>21</sup> Public dissatisfaction increases the challenges for state courts: low public opinion of courts will not help convince legislatures that courts are underresourced. Low public opinion of courts, in its most extreme form, also risks undermining the balance of power in our democratic government by lowering the credibility of courts as a coequal branch of government.

What if courts rose to the challenge presented by the failure of other branches of government by developing the expertise, systems, and resources to address litigants' socioeconomic needs so that their civil legal needs could be successfully met? In the criminal court system, alternative or problem-solving courts have tried something similar to this approach. Problem-solving courts are specialized courts focusing on a subset (often a very small number) of criminal defendants with shared needs for social services, on the belief that addressing these needs will

increase compliance with the law. The court functions as a clearinghouse and catalyst for individuals to obtain services and address those needs. The goal of a problem-solving court shifts from punishment and incarceration to treatment of a social problem, like drug addiction or mental illness. Problem-solving courts have been heralded as great successes and proposed as a model for civil courts.<sup>22</sup>

The success of problem-solving courts reveals why state civil courts are ill-suited, even in an idealized version, to address litigants' socioeconomic needs. Criminal problem-solving courts have been successful because they can offer defendants the chance to choose social services over incarceration. While criminal and civil litigants share unmet needs for social services, the punishment framework of criminal courts shapes both the courts' role and the definition of success. Success is staying in drug treatment and thus not returning to jail (for noncompliance with treatment or the commission of a new crime). This message of success would hardly satisfy a civil problem-solving court. As New York's former Chief Judge Judith Kaye, a pioneer of problem-solving courts, put it,

the innovations discussed here – enhanced treatment, special staffing, and judicial monitoring – can accomplish only so much in an individual's life. They are not going to make up for problems like chronic poverty, substandard education, shoddy housing, and inferior health care.<sup>23</sup>

Problem-solving courts create miniature or partial versions of executive branch functions in the court systems. For example, criminal problem-solving courts shift the location of care for the core service (such as drug treatment) from a social service agency in the executive branch to the judicial branch. An unfair aspect of this shift, with systemic consequences in the

age of mass incarceration, is that it criminalizes care: if a court participant does not use the care, the individual is subject to a criminal penalty to which they would not be subject if they had not participated in the problem-solving court.<sup>24</sup> Problem-solving courts have been praised for saving state and local governments money by doing work that other branches of government used to do less successfully.<sup>25</sup> If the benefit of problem-solving courts is that they are functionally relieving the other branches of government of responsibility for meeting social service needs, this new role is less a long-term solution than a short-term mitigation, which masks yet does not solve the problems of an insufficient social safety net in the face of growing inequality.

Problem-solving courts were motivated by the belief that judges have an obligation to solve the problems people bring to court. Judges – and the legal profession – do have an obligation to litigants who are forced to present state civil courts with their socioeconomic needs in the absence of other alternatives. But the judiciary and the legal profession should fulfill this obligation outside the courthouse. Rather than accepting the theoretical, institutional, and political shifts that have cast state civil courts as the agencies responsible for addressing individuals' socioeconomic needs, courts – and the legal profession as a whole – must actively question whether they should be playing this role. The profession must resist the temptation to address the consequences of this change without also insisting that the other branches of government provide a social safety net to deal with the consequences for individuals of poverty and inequality.

About a decade ago, state courts used theories of inherent judicial power to stand up to state legislatures over issues

of court funding. These same theories could prove useful in calling attention to the inappropriateness of the expansion of the role of state civil courts. If a state court system insisted on adequate funding to provide the services that state courts are implicitly being asked to provide, it could expose the flaws in this model and reveal that courts should not be playing this role.

The most disadvantaged individuals in society are also those most hurt by state courts that are pressed into service as the government branch of last resort. It might seem inappropriate and politically untenable for the legal profession to focus on better mental health care or housing support for low-income Americans, but there is a broader structural problem that threatens the profession's self-interest. If the civil court system continues to be asked to play this role, it will continue to struggle to function at all. By resetting the balance of obligations among the branches of government, courts would have the opportunity to function as they are intended to.

Changing the narrative of the role of courts in this era of crisis will require revealing facts that are hard to come by. Much is hidden about the work of state civil courts. Court systems and scholars have begun to partner to research state court systems, and that research should include examination of the role that state civil courts are playing in addressing socioeconomic needs. Understanding that role will help illuminate the path forward.<sup>26</sup>

Any change must begin with courts and lawyers refusing to blindly accept the courts as a last resort against the legislative and executive branches' failures to address inequality. As a profession, lawyers need to accept that court simplification, self-help, unbundled legal services, design thinking, and similar ideas

address only short-term symptoms and perpetuate the underlying problems. It is in the profession's self-interest and consistent with lawyers' role as stewards of

law and justice to resist the theoretical shift, and to advocate for courts doing less of what they are not well-suited to do and more of what they are.

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# Corporate Support for Legal Services

*Jo-Ann Wallace*

*Abstract: The gap in pro bono legal services provided by corporate legal departments and large private law firms is not surprising: The formalization of pro bono work by large firms has been underway on a significant scale for far longer than it has within corporations. This process has made large firm pro bono efforts more efficient and effective through improved practices. It has also led firm leaders and lawyers generally to expect more volunteerism of this sort. Companies that apply their resources, business experience, or other assets have successfully expanded the impact of their pro bono hours. Because of the scale of this need, and because legal-services lawyers have specialized expertise that corporate lawyers can't easily replicate, corporate pro bono efforts will not, on their own, close the justice gap. But these efforts have the potential to contribute significantly more to the ability of legal-aid organizations to serve their clients, and to help close this gap.*

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When the Trump administration sought to end federal funding for civil legal aid in 2017, a broad cross section of the American legal community spoke up in support of legal services for the poor. General counsel from nearly two hundred top American corporations joined together in a letter to members of Congress that favored increased funding.<sup>1</sup> They described how their companies worked to support access to justice for all with “countless hours of pro bono representation provided by corporate legal departments and in-house attorneys.”<sup>2</sup>

These lawyers undertake a significant amount of volunteer legal services. While they usually address matters of family law, immigration law, and corporate law for nonprofit organizations, they also deal with many other types of legal problems.<sup>3</sup> Over the past decade, corporate legal departments have increasingly expanded and formalized their pro bono commitments. Corporate pro bono efforts have a potentially significant and multifaceted role in helping meet the needs of poor and low-income Americans.

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The volunteer activities of attorneys in private practice, particularly those at large law firms, are well documented.<sup>4</sup> The “Pro Bono Scorecard” published annually by *The American Lawyer* reports on the contributions of the top two hundred American law firms (ranked by revenue, size, and other indicators). In 2017, the average number of annual volunteer hours reported at these firms per attorney was 59.7, or about one and one-third weeks of average billable hours per year.<sup>5</sup> To a lesser extent, there is information about “low bono” efforts, done at reduced fees by smaller firms, where pro bono cases tend to come in through personal contacts and existing clients.<sup>6</sup>

There is not equivalent data about efforts by large corporations, nor is there a strong understanding of the pro bono activities of smaller businesses. But a survey conducted by the American Bar Association Standing Committee on Pro Bono and Public Service found that, in 2016, across firms and businesses of all sizes, lawyers in private practice contributed roughly 3.5 times more pro bono hours on average than lawyers who were employees of corporations.<sup>7</sup> In-house attorneys have some catching up to do, but the gap is not surprising. The formalization of pro bono programs by large law firms has been underway on a significant scale for far longer than at corporations. Unless there is some undiscovered and immutable feature of corporations that would prevent a transformation on that scale, the trajectory of pro bono efforts in that setting should continue to increase substantially.

In 2006, when the Pro Bono Institute entered its second decade and launched a Corporate Pro Bono Challenge Initiative for major American corporations, only twenty-five agreed to participate.<sup>8</sup> By the start of 2018, this number had jumped to 180. Participants have reported that,

while only a minority of companies employ sophisticated practices to increase this work, like giving corporate lawyers financial incentives to do so, the vast majority of large corporations have laid a foundation for a culture supportive and encouraging of pro bono work.

The National Legal Aid and Defender Association, which is devoted to excellence in the delivery of legal services to those who cannot afford to pay for legal counsel, asked leaders at twenty civil legal aid programs to describe their experiences working with in-house lawyers providing pro bono services. Law firms and corporations often rely on legal-services organizations to make their pro bono efforts possible. Legal-aid programs extend access to clients, offer guidance on the types of pro bono work needed, and provide substantive expertise, supervision, and training to ensure effective service.

A common view is that clients would have more successful outcomes if corporate lawyers doing pro bono work had more training and were more comfortable working in the substantive areas of law relevant to their pro bono clients’ cases. The mismatch between corporate lawyers’ expertise and pro bono clients’ needs presents a dilemma. Training requires investment of time and resources by a legal-aid program, which is difficult to justify if the commitment of a lawyer being trained is transitory. This issue can most effectively be addressed by leadership of a company. If pro bono work is not a priority for a general counsel or chief legal officer, it can be difficult for an in-house lawyer to feel free to engage in or maintain a commitment to pro bono work, which can prevent a legal-aid program from developing a partnership with that company. But the opposite is also true: leadership can cultivate a

culture of pro bono commitment that is broad in scope and impact.

Almost without exception, corporate pro bono efforts come with other resources that strengthen or add capacity to the business functions of a legal-aid program. Companies that apply their legal expertise such as in corporate or contracts law, or other nonlegal assets such as business process, marketing, or IT expertise, have successfully expanded the impact of their pro bono hours by improving the functioning and operations of legal-aid programs themselves. Examples include providing nonprofit clients with assistance in governance and management, in-kind specialized contributions in real estate matters or cybersecurity issues, as well as traditional financial support.

The Pro Bono Partnership, an innovative corporate initiative that seeks to maximize corporate assets, was founded in 1997 by GE, IBM, Pepsi, and other corporations in Fairfield County, Connecticut, and Westchester County, New York. The concept was to use corporate funds to hire independent staff lawyers experienced in working with the underrepresented. These attorneys would learn the critical legal issues facing nonprofit social-service agencies in those counties and find lawyers with requisite expertise inside the participating corporations to provide pro bono services to address them.

The issues covered a wide range of key operating problems for nonprofits: employment and human resources, taxes, corporate law, governance, nonprofit mergers and consolidations, contracts and leases, and more. These pro bono legal services addressed prominent day-to-day problems of the agencies and saved substantial expenditures that could instead be used for the community. The Partnership met the desire of corporate

lawyers who wanted to provide pro bono services but could not easily find pro bono clients from corporate headquarters.

In the first year of its operation, the Partnership assisted 81 clients on 130 matters with the assistance of 186 volunteer corporate lawyers. By 2017, it assisted 800 clients on 1,772 matters. In its twenty-year history, the Partnership has assisted 2,800 nonprofits on more than 13,000 legal matters with 5,000 volunteers. It has spawned partnerships in Atlanta, Georgia, and Cincinnati, Ohio. In addition, the original Partnership expanded to use lawyers from major New York-area law firms, not just corporations.

This is one of many viable models for the much-needed expansion of pro bono services that corporate America can provide. Because of the scale of the need, and because legal-services lawyers have a depth of expertise and experience that corporate lawyers cannot replicate, pro bono efforts will not, on their own, close the gap between the need for and availability of legal services for low-income individuals. But these efforts have the potential to contribute significantly more – in myriad ways – to the ability of legal-aid organizations to serve their clients and to help close this gap.

## AUTHOR'S NOTE

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# Justice & the Capability to Function in Society

*Pascoe Pleasence & Nigel J. Balmer*

*Abstract: All over the world, civil legal problems are ubiquitous. But while all groups in every society that has been studied experience civil justice problems, these problems and their consequences do not fall equally. Socially disadvantaged people report more problems, more serious problems, and more negative consequences from them. The lack of legal capability – the lack of the capacity to understand and act on justice problems – plays a key role in creating these inequalities. A growing evidence base should support and enable global, national, and other policy-makers to achieve stated policy goals and enable people to respond effectively to the myriad legal problems that can threaten their aspirations and well-being.*

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We live in a “law-thick” world.<sup>1</sup> Across our planet, everyday life plays out within a complex legal framework extending across almost all activities: commerce, education, employment, the environment, family life, and more. Problems that raise legal issues are everywhere. They are among the “wicked” problems of social policy.<sup>2</sup> Neither abstract nor esoteric, civil legal problems – being unfairly sacked by an employer, injured as a result of someone else’s negligence, involved in a divorce, or facing eviction from your home – contribute to the harshest episodes of people’s lives. They can diminish people’s capability to function effectively in society. This makes access to justice – the just and efficient resolution of civil legal problems in compliance with human rights standards and, when necessary, through impartial institutions of justice and with appropriate support – a matter of considerable importance. Yet the United Nations Commission on Legal Empowerment of the Poor estimates that four billion of the seven billion people on Earth live outside the protection

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of the law: “the majority of humanity is on the outside looking in . . . on the law’s protection.”<sup>3</sup>

Global interest in enabling access to civil justice has never been greater. There is increasing recognition that, beyond the constitutionally important function of “allowing people to uphold and exercise their rights,” enabling access to justice is also “instrumental in realizing a range of other development goals.”<sup>4</sup> Reflecting this, in September of 2015, the UN unanimously adopted Sustainable Development Goal Target 16.3 to “promote the rule of law at the national and international levels, and ensure equal access to justice for all.”<sup>5</sup>

Against this backdrop, access-to-justice policy is shifting slowly from a “top-down” institutional perspective, focused on “tip of the iceberg” legal problems that involve formal processes, to a “bottom-up” perspective focused on the ability of individuals to resolve problems. In countries with well-established legal infrastructures – particularly public legal-assistance services – this shift has been borne of acknowledgment that the public’s experience of civil legal problems occurs mostly beyond the sight of legal institutions and professionals. In the context of economic development, the shift has also been informed by ideas about “legal empowerment”: “the process through which the poor become protected and are enabled to use the law to advance their rights and their interests, vis-à-vis the state and in the market.”<sup>6</sup>

Legal-empowerment efforts often seek to expand people’s and communities’ legal capabilities: the disparate capabilities required for people to have opportunity to resolve problems fairly, including to make decisions “about whether and how to make use of the justice system.”<sup>7</sup> Legal capability can best be understood as an aspect of economist Amartya Sen’s idea

of capability as “the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles).”<sup>8</sup>

This broader idea of capability can also help explain patterns of civil legal problem experience and problem-resolution behavior.<sup>9</sup> Diminished capability (“unfreedom” in Sen’s language) increases vulnerability to problem experience. In turn, problems can diminish capability through their impact. Legal capability is central to opportunities and choices about how to handle problems.

The policy shift and emerging conceptual model just outlined have been informed by a growing base of evidence, including the findings of an increasing number of “legal needs surveys” designed to investigate the experience of civil legal problems by those who face them.<sup>10</sup> The past twenty-five years have seen the conduct of more than fifty large-scale, stand-alone national legal-needs surveys in over thirty countries.<sup>11</sup> Though conducted in different nations and for a variety of purposes, the broad narrative of these studies is remarkably consistent. They have made clear that, to be truly effective, access-to-civil-justice policy must be grounded in an understanding of the many options people face when dealing with civil legal problems, of the reality of people’s behavior in resolving problems, and of the reasons for underlying patterns of options and behaviors.

All over the world, civil legal problems are commonplace. Estimates from national legal-needs surveys suggest that between one-third and two-thirds of adults experience such problems over the periods covered by these surveys, which are typically three to four years.<sup>12</sup> This ubiquity of civil legal problems in a law-thick world is not surprising. Nor is it surprising that the relative incidence of different

kinds of civil legal problems is similar across the globe. Wherever people live, there is much commonality in everyday life. For example, the universality and frequency of commerce means that consumer and money problems are among those most often reported. Similarly, the regularity of interactions among neighbors results in frequent conflicts. Predictably, other common problem types involve employment, family life, housing, public services, welfare benefits, and obtaining official documentation.

Of course, there are exceptions to these truths. The prominence of agriculture in, for example, Mali and Uganda is reflected in problems there frequently concerning land.<sup>13</sup> Such problems often have to do with issues such as access to land, access to water, land-grabbing, and nationalization (such as for agribusiness or mining purposes); these issues are uncommon in rich countries. Conversely, consumer problems are less common in Mali and Uganda. In Mali, after land, the five most common problems concern employment, family, neighbors, housing, and money. Likewise, in Uganda, the most common problems after land concern family, neighbors, money, employment, and public services.

While commonplace, civil legal problems are disproportionately experienced by certain individuals and, importantly, particular social groups. For example, in a recent study in Australia, “nine per cent of respondents accounted for 65 per cent of the legal problems reported.”<sup>14</sup> The nature of some civil legal problems links them to particular social groups or stages of life.<sup>15</sup> Problems concerning children are largely restricted to those who have children, problems concerning welfare benefits are largely restricted to those with low incomes, and problems concerning employment are largely restricted to those of working age. Overall, there

is also a general tendency for the experience of problems to increase along with socioeconomic activity, which gives rise to the opportunity to experience many types of problems over the course of one’s life.<sup>16</sup>

Consistently, also, “socioeconomic disadvantage is pivotal” in determining who faces problems.<sup>17</sup> For example, unemployment and long-term illness/disability have been found to be strongly associated with problem experience.<sup>18</sup> The association with illness/disability is well-supported by the broader social epidemiology literature, which “points to causal connections between legal problems and morbidity/disability; connections that can operate in both directions, and build to perpetuate morbidity and social disadvantage.”<sup>19</sup> This chimes with Sen’s description of “the conversion handicap” that necessitates greater resources being expended to achieve the same results for those with a disability, and contributes to people with disabilities being “among the most deprived human beings in the world.”<sup>20</sup>

Sometimes, gender has also been found to link strongly to problem experience. For example, in some countries, surveys have shown that women’s lower level of capability – their “weaker agency and lower social and economic participation” – leads to very different patterns of problem experience from men.<sup>21</sup> For example, the 2017 *Justice Needs and Satisfaction Survey* in Jordan found that a higher percentage of men reported problems concerning land, employment, public services, money, and negligent accidents, while a higher percentage of women reported problems concerning families, children, and neighbors.<sup>22</sup>

Not surprisingly, civil legal problems adversely affect people’s lives. For example, 32 percent of Macedonian survey respondents described their justice problems as “destroying my life.”<sup>23</sup> The

impact of such problems on people's capabilities and vulnerabilities "may partly define the dynamics that create and perpetuate poverty."<sup>24</sup> As family medicine scholar Elizabeth Tobin Tyler and colleagues illustrated in the context of the strong links between civil legal problems and ill-health (Figure 1), there are many ways that civil legal problems can contribute to vicious cycles of poverty.<sup>25</sup>

People facing civil legal problems adopt many different strategies for resolving them. Often, these strategies involve little (or no) reference to law. A consistent finding of legal-needs surveys has been the peripheral role of formal justice institutions in helping people address their problems. One-quarter of the fifty national legal-needs surveys conducted around the world over the past twenty-five years have found that 5 percent or fewer of civil legal problems were resolved by courts or tribunals.<sup>26</sup> Formal legal process was generally associated with particular problem types, such as those concerning family breakdown. In some lower-income jurisdictions, traditional dispute-resolution processes are more common than court processes. In Bangladesh, for example, people are more likely to turn to the *Shalish* than to courts.<sup>27</sup> The general picture the world over is that most problems are addressed through informal methods, if addressed at all. Beyond lawyers, common sources of formal help include independent advice organizations, unions, community leaders, public service workers, and public officials. However, the nature of sources of help varies considerably between jurisdictions, reflecting sociocultural differences and differently constituted and regulated legal-services markets.

A significant proportion of those who face civil legal problems take no action to resolve them. Estimates for inaction

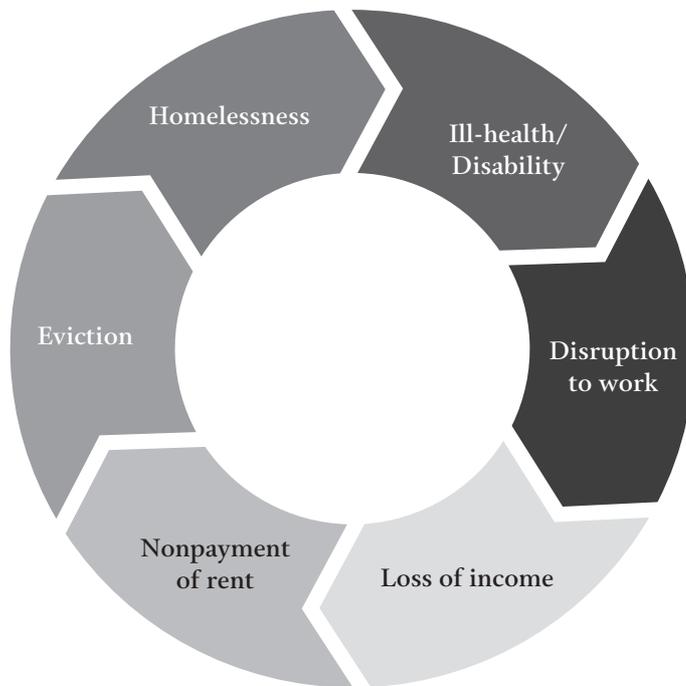
from national legal-needs surveys range up to 44 percent (although 10 to 20 percent is typical).<sup>28</sup> While there are good and bad reasons for such inaction, reasons provided by respondents "convey, on the whole, a rather negative and powerless quality."<sup>29</sup> Many of those who take no action to resolve problems lack key elements of legal capability: for example, people report taking no action because of a lack of knowledge, time, money, or confidence.<sup>30</sup>

Of those people who do act to resolve civil legal problems, many attempt to do so without seeking help, though increasingly people turn to online resources for assistance.<sup>31</sup> People seek help from a wide range of sources, informal and formal, with many sources appearing somewhat "unpromising" and many people indicating "real uncertainty as to the most effective way of responding to [legal] problems."<sup>32</sup> When people seek help from an inappropriate source, it diminishes the likelihood that they will go on to obtain appropriate aid. The phenomenon of "referral fatigue" means that even those who receive a referral become progressively less likely to act on a referral, the more times they are referred on.<sup>33</sup>

As with inaction, people's reasons for choosing different courses of action indicate that legal capability, or lack of it, lies at the heart of decision-making. People who handle problems alone, rather than with help, most often see no need to obtain help. While people who seek aid often explain that they do so because of "an inability to resolve problems alone."<sup>34</sup> Of course, those who see no need for help make "this judgment without the benefit of any advice."<sup>35</sup> Others who choose to act alone report being unaware of options or having concerns about the time, cost, repercussions, or likely impact of help.<sup>36</sup>

Many challenges face those trying to resolve civil legal problems, requiring many

Justice & Figure 1  
the Capability Vicious Cycle Involving Ill-Health/Disability, Work Disruption, and Civil Legal Problems  
to Function in Society



Source: Adapted from Elizabeth Tobin Tyler, Ellen Lawton, Kathleen Conroy, et al., *Poverty, Health and Law: Readings and Cases for Medical-Legal Partnership* (Durham, N.C.: Carolina Academic Press, 2011).

capabilities. People require the ability to “name” their grievances, “blame” them on someone, and “claim” some remedy to originate disputes.<sup>37</sup> They may also need to, for example, understand and evaluate the law and sources of help and procedural options, as well as have the confidence to act as necessary, be resilient, communicate effectively, and manage the resolution process.<sup>38</sup> Potentially, “lack of capability poses the most fundamental . . . barrier to access” to a legal solution.<sup>39</sup>

Capability also plays an important role in the use and usefulness of different forms of legal assistance. For example,

the ability to recognize the legal dimensions of problems strongly links to the use of legal services.<sup>40</sup> Also, as the 2008 *Legal Australia-Wide Survey* found, “different population groups are associated with different propensities to use the different modes of communication,” such as in-person, telephone, or Internet.<sup>41</sup> Men, young people, and those with poor English-language skills, lower levels of education, mental health problems, the lowest incomes, as well as those living outside major cities were more likely than other respondents to use in-person visits as their only means of seeking

assistance.<sup>42</sup> Other studies have found that services delivered by telephone can be unsuited to people with lower education levels, language difficulties, and lower income.<sup>43</sup> As for the Internet – the source of much hope for the expansion of access to legal-assistance services – research suggests that young people, while heavy users, are not particularly effective users of online legal assistance.<sup>44</sup>

Though legal capability is central to how people handle their justice problems, measures of capability have only recently begun to be included in surveys. To date, attempts have been largely ad hoc, exploring, for example, knowledge of law, awareness of legal-assistance services, and subjective legal empowerment.

Recently, an attempt was made to develop standardized measures of legal capability using modern psychometric approaches.<sup>45</sup> This research focused on “legal confidence,” a domain-specific form of “self-efficacy” that is “concerned with judgments of personal capability.”<sup>46</sup> This new research yielded three confidence-related scales: General Legal Confidence (GLC), Legal Self-Efficacy (LEF), and Legal Anxiety (LAX).<sup>47</sup> Its broader findings illustrate the central role that legal capability plays in shaping experience with legal problems.

Experience of civil legal problems was not, in itself, related to GLC, LEF, or LAX scores. However, positive or negative experiences of problems, or with lawyers and courts within the previous five years, were significantly associated with scores. Respondents who felt that they had achieved fair outcomes to problems tended also to be more legally confident, as did those who were satisfied with their own handling of problems. There were also similar, although not as uniform, findings relating to satisfaction with past lawyer and court use. Higher and lower levels

of legal confidence were often, although not always, found to correlate with positive and negative experiences, respectively, of lawyers, courts, and tribunals.

Legal confidence is strongly socially patterned. Respondents who reported that there was someone they could rely on when faced with problems reported significantly higher legal confidence. Higher levels of education were also associated with higher confidence, as measured by the LEF and LAX scales. In contrast, long-term ill-health or disability was associated with significantly lower confidence, as measured by the LEF and LAX scales. Finally, older respondents were more legally confident, as measured by the LAX scale, and men were more confident than women, as measured by the GLC scale.

Bringing together these findings, legal-needs surveys have revealed the inequality of the incidence of legal problems (not every person is equally likely to experience such problems), the inequality of access to legal assistance (not every person is equally able to access the assistance they need), and the inequality of benefits gained from legal assistance (not every person is equally able to benefit from particular services).

At the heart of inequality in experience, diminished capability increases vulnerability to and follows from problem experience. Complex vicious cycles create and compound poverty, undermine socioeconomic development, and contribute to broader social inequality. Enabling people to access justice has benefits well beyond the solution to their legal problem. At the heart of inequality in access to legal assistance, legal capability or the lack of it drives the opportunities and choices of those facing problems. If people require legal assistance, their prospects of gaining it can be undermined by, for example, lack of awareness of services, inaccessibility of services, lack of

recognition (or misdiagnosis) of legal aspects of problems, lack of confidence, or lack of financial resources. At the heart of inequality of benefits gained, people's capabilities determine the benefits they take from different services.

Changes in access-to-justice policy and practice need to focus on addressing capability deficits. This suggests a need for a rich diversity of forms and channels of legal-assistance service provision to match the diverse legal needs and legal capabilities of the public, notwithstanding that some regulatory environments present challenges to change.<sup>48</sup> This is not easy to achieve, but appropriate approaches to access-to-justice policy are emerging.

For example, in Australia, government and agency policy is now directed toward better targeting legal-assistance services (to reflect patterns of experience and capability), outreach (to enable obstacles to access to be overcome), timeliness of assistance/intervention (to prevent vicious cycles of experience), joined-up services (to facilitate people's journeys to and through assistance services), appropriate-

ness of services (to match legal capability), and community legal education (to increase legal capability).<sup>49</sup> And, in a development context, as noted at the outset of this essay, the concept of legal empowerment drives much of bottom-up policy and practice.

Further insight into the nature and patterning of legal capability will help support moves to bottom-up policy and practice. Development of standardized measures of different dimensions of legal capability, using modern psychometric approaches, provides new insights. However, much remains unknown about the complex nature of legal capability, what lies behind it, and how it affects behavior in resolving problems and in efforts to affirm wider rights. Legal capability is a human capability that can and should be measured. The goal in doing so is to enable global, national, regional, and local policy-makers to achieve stated policy goals and best help individuals, families, social groups, and others respond to the many problems that can squash their aspirations and threaten their well-being.

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# Why Big Business Should Support Legal Aid

*Kenneth C. Frazier*

*Abstract: Corporations are part of the fabric of society. As members of American society – often, very powerful and influential ones – corporations have a deep interest in the health of the nation’s democracy, a mainstay of which is the system of justice writ large. The concept of justice for all is so important to this democracy that the founders placed it in the Constitution’s first line. But the system is not perfect. Attaining equal justice for all citizens and governing by the rule of law too often are merely aspirations. Corporations have a stake in ensuring that their disputes with others are resolved fairly, in a legal system that is viewed as treating all litigants equally under the law, regardless of size, wealth, or power. Corporate engagement in strengthening legal services in the United States is, in this way, an expression of corporate self-interest.*

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Why do corporations have a stake in the issue of justice? What is their interest in lifting up the poor, improving the lives of low-income and disadvantaged people and groups, and striving for equal access to justice for all? How is supporting a well-functioning, fair, and accessible legal system an act of deep political, economic, and social self-interest for a corporation?

Beyond engaging with and depending on various elements of the justice system, corporations are part of the fabric of society. As members of American society – often, very powerful and influential ones – corporations have a deep interest in the health of the nation’s democracy, a mainstay of which is the system of justice writ large. While corporations can have very clear identities – brands, trademarks, and other symbols that can be familiar to the public – they (and other forms of business associations) are wholly products of law.

As Chief Justice John Marshall wrote in the early days of the Supreme Court: “A corporation is an

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artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>1</sup> Whether only a few people or thousands make up its shareholders, leaders, and employees, they are not the corporation: under law, the corporation exists as an entity unto itself, with equal standing and responsibility for some purposes as if it were a person.

Like people, corporations must pay taxes and follow rules and regulations, and they can enter into contracts and buy and sell property. Corporations can also sue and be sued, and then be bound by the result: recovering or owing compensation, or being subject to other court orders that resolve a dispute. Corporations can be held criminally accountable for breaking laws, just as natural persons can. Corporations, as legally recognized entities, routinely interact with the law.

Depending on the nature of their business, corporations interact with different segments of the law, with some areas so routinely that they are part of the corporation’s day-to-day work. The patent system can be particularly important, to take an example. Under the United States’ patent laws, inventors may obtain the reward of a patent – a time-limited monopoly over one’s own invention – in exchange for disclosing the invention to the public, which adds to human knowledge and allows for future advancements. Patents, Congress declared, can cover “anything under the sun that is made by man.”<sup>2</sup>

Patents are granted in all types of industries and sciences. In the pharmaceutical industry in which Merck operates, and in other high-technology areas, patents are critical; they are a fundamental means of protecting the inventive work of our employees. At Merck, where I am chairman

and CEO, when our scientists develop a novel, lifesaving medicine or vaccine, we seek for it the legal protection of a patent.

The U.S. patent system dates back to the Constitution, in which the founders gave Congress the right to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>3</sup> Congress soon exercised this right for inventors in the first Patent Act, just as it protected the writings of authors in the Copyright Act. The U.S. Patent and Trademark Office – the agency responsible for assessing whether a claimed invention meets the legal qualifications for a patent – has issued over ten million patents. In the past decade, the ever-increasing pace has reached about three hundred thousand patents granted each year.

Like other corporations, Merck also uses the U.S. trademark system to protect our company’s brand names and the reputations of our medicines. And like other corporations, Merck routinely engages with the U.S. Food and Drug Administration. We make commitments to that agency for new medicines that we would like to launch, selling and marketing our products once the agency approves products for distribution.

Other areas of law – occupational health and safety requirements, employee benefits, consumer protection, and contracts to own and rent property, facilities, and equipment or to distribute or supply our goods and services – likewise directly influence the way Merck carries out its work. The corporation’s lawyers and business leaders give them significant attention. The company routinely appears in courts across the country to address legal issues that arise.

Corporate power and engagement are often put to use to ensure, or drive toward, well-developed, sophisticated legal

regimes; the patent laws, for instance, have undergone various iterations, tweaks, and wholesale changes, with the result that the American patent system today is well-developed and its legal doctrines extensive. These and other laws relevant to corporate enterprises can guide company behavior and reduce the number of disputes, so that corporations like Merck can produce the benefits to society – in our case, lifesaving therapeutics and vaccines – for which the societal “charter” described by Chief Justice Marshall was intended.

The U.S. legal system – a system fundamental to the healthy functioning of democracy, reaching far beyond issues of corporate governance and business – aspires to be egalitarian. The founders premised this nation on the rule of law – a legal principle that citizens would not be governed by the arbitrary power of autocracy or tyranny, but by laws that administer justice fairly and peaceably – to which all, in this diverse society, are accountable, and from which all benefit. No one is above the law, and all deserve equal treatment under the law.

The concept of justice for all is so important to this democracy that the founders placed it in the very first line of the highest legal authority. The Constitution begins: “We the People of the United States, in Order to form a more perfect Union, establish Justice” before ensuring domestic tranquility or providing for the common defense. This promise of equal standing before the law – justice for all – is among the noblest of ideals that our nation’s founders espoused. Alexander Hamilton put it this way: justice is “the first duty of society.”

But the system is not perfect. Attaining equal justice for all citizens and governing by the rule of law too often are merely aspirations. When one looks objectively

at how the system dispenses justice to the poor and disadvantaged, the inequities are obvious. The system, in civil and criminal matters, is not a fair and even playing field, or equally accessible to all.

A major roadblock to equal access to the justice system is competent counsel. Private legal counsel is often expensive. Successful corporations can afford counsel, and the quality representation provided by the lawyers whom Merck hires matters. The difference between good, bad, or nonexistent legal representation can make or break any case. More fundamentally, it can shape law in a certain direction. But for individuals, the cost of counsel can be significant. For the vast majority of the poor and economically struggling, it is prohibitive: they are not able to hire an attorney to advocate for their most basic legal needs.

The Supreme Court has held that the Constitution guarantees legal counsel to indigent defendants charged with crimes that could lead to significant jail time, although, even here, the system for meeting this constitutional requirement is far from adequate. Court-appointed criminal defense lawyers too often are undercompensated and overworked, with untenably large caseloads. While courts sometimes appoint lawyers in civil cases based on a litigant’s financial need, and pro bono lawyers – that is, those who work for the public good, without compensation (*pro bono publico*) – help fill the gap, legal services do not fully meet the overwhelming need for legal counsel. Given the growing rate of poverty and income inequality, the need for pro bono legal assistance is even more critical and expanding.

My representation of James Willie “Bo” Cochran, a death-row inmate in Alabama wrongly accused and convicted of murder, opened my eyes to the

extraordinary unfairness and inequity of our justice system, and to the difference that competent legal representation can make. Mr. Cochran's case also impressed on me that all stakeholders in this society – businesses and individuals alike – have a duty to challenge the system as a whole to do better.

Mr. Cochran, a black man, was convicted of the 1976 shooting death of a white grocery store manager in Birmingham, Alabama, by a jury composed of eleven white jurors and one black juror. As punishment, the jury sentenced Mr. Cochran to death.

I was introduced to Mr. Cochran, whom I later came to know well as “Bo,” in 1991, before I joined Merck. I was working as a corporate litigator in Philadelphia at Drinker Biddle & Reath, a national law firm, and I was representing Merck and other companies in their business cases. The late Esther Lardent, a prominent advocate for death penalty reform, brought Bo's case to my attention. I learned that he had been convicted on the basis of highly circumstantial evidence.

A store robbery had occurred the night of the homicide, and Bo admitted to the robbery. But there was no eyewitness to the fatal shooting, which took place in a trailer park where the manager had followed the robber out of the store. The homicide happened around the time that two armed police officers, also white, arrived at the park to investigate the robbery; residents heard gunfire, but no one saw who fired the shots. There was no physical or forensic evidence tying Bo to the shooting. There was, however, evidence suggesting an accidental police shooting and subsequent cover-up.

Bo insisted he did not commit the murder, and he needed a lawyer to advocate for him on death row. I agreed, and an extremely dedicated team of lawyers successfully overturned Bo's conviction in

1995. Two years later, he was retried and acquitted.

Kenneth C.  
Frazier

Without a doubt, Bo's ultimate acquittal is the high point of my legal career. It was one of the most challenging and rewarding cases I have ever handled.

Bo obtained his freedom and vindication after spending nineteen years on death row. His long unlawful imprisonment, and the injustice it did to Bo, his family, and the credibility of our legal system, cannot be overestimated. I learned that the lack of quality representation for Bo – he first met his court-appointed trial lawyer *at his trial* – and the prosecution's deliberate weeding out of African Americans for his jury are typical of many criminal cases across the nation.

Sadly, Bo passed away in 2016, but his optimism and his confidence in our legal team affirmed for me the social, moral, and political obligation of all citizens – and particularly the powerful – to reform our justice system for the good.

In many ways, the criminal case in which I represented Bo could not be more different from the business cases and laws with which Merck engages. Why should a corporation care about the poor quality of representation that Bo initially had? Even if Bo had received the representation required by law, why should corporations care to support a higher quality than that minimal level – a level that lawyers throughout the legal profession know is notoriously low? Why, too, should corporations support legal aid in civil matters, where the law generally does not require any representation at all? More broadly, why should a corporation care about meaningful access to justice *for all*?

Some may argue that, from a corporation's perspective, it suffices to focus on business aspects of the law – for instance, a well-functioning patent system

for corporations like Merck that depend on patent rights – and that if business law works well, that is enough. Some may posit further that a legal system (by design or not) that has strong institutions for businesses but not for individuals, and particularly not for the disadvantaged, is exactly what corporations *should* want. Improving the system for others could undermine the advantages to corporations of a system disproportionately favorable to them.

These positions are shortsighted and unrealistic. Certainly, corporations have an interest in the segments of the law that most directly affect them. But while corporations may always place a higher value on advocating for reform and success in those areas, it is not an either-or proposition. A healthy corporation should nevertheless appreciate the extent to which it depends on a well-functioning system as a whole. Effective corporations take that broader perspective. Corporations may have little direct interaction with various segments of the law – family law and the world of indigent criminal defense, among others – but they have just as much at stake as individuals in the fairness of how justice is dispensed. Forward-thinking companies realize that compartmentalized justice is unlikely to work for them or others.

A strong legal system is an important bulwark against the often imperceptible, but terribly damaging, erosion of democratic institutions and principles: “democratic backsliding,” as it has been termed. To protect against this, the legal system must be strong. To that end, legal aid for the less fortunate is critical. The Honorable Learned Hand, the great judge of the United States Court of Appeals for the Second Circuit, in speaking to the oldest legal-aid organization in the United States in 1951, captured the need to support legal aid this way: “If we are

to keep our democracy, there must be one commandment: Thou shalt not ration justice.”<sup>4</sup>

It is not only government, or individuals, or the tireless staff of legal-aid organizations who can be stewards of the arc of justice. Business has a stake in this work, too. If corporations are indifferent to, or seek to take advantage of, a rigged legal system, American society is not likely to fare well. This is the deeper business case for corporate engagement with, support for, and championing of legal aid that I will tease out here.

**T**he credibility of the legal system – people’s faith in the fairness of the system and its rulings – is critical to its success. And the ongoing health of democracy demands a well-functioning system.

That credibility necessarily includes equal access to the doors and halls of justice, regardless of one’s circumstances. As Nelson Mandela said, “Overcoming poverty is not a gesture of charity. It is an act of justice.”<sup>5</sup>

A judicial system that fails to serve as a refuge and shelter for those whose rights and privileges are trampled on, either by the government itself or by others acting under the color of laws that are supposed to govern all equally, is not good for the social order because it undermines the credibility of the system as a whole.

The crisis of inadequate legal representation likewise threatens the legal system’s credibility. The system is not credible when it treats the poor, marginalized, and disadvantaged – a sizable portion of the population – differently.

Legal aid that levels the playing field and promotes meaningful reform is an important component to improving the credibility and integrity of the system, so corporations have as much stake in those efforts as the recipients do. By ensuring that everyone, regardless of his or her

circumstances, has a path toward equal justice, a trustworthy legal system promotes social cohesion. Business has an interest in promoting this goal. The rate at which societies fall apart, and chaos ensues, accelerates exponentially when people have no stake in the social order, or at least believe they do not. Companies – no matter how strong or profitable – simply cannot operate in such an environment. Consider how many companies have felt compelled to pull out of failed or failing states (like Venezuela) in recent years when citizens have taken to the streets to protest the lack of transparency and fairness in their country’s justice system. The rule of law matters to business.

Recent events underscore that civil discord could similarly affect the United States. Consider the weeks of unrest in Ferguson, Missouri, following the fatal shooting of Michael Brown, an unarmed black teenager, by a white police officer in 2014. There can be little doubt that the angry reaction of so many of Ferguson’s citizens was a direct result of the perceived failure of the justice system to provide those citizens equal protection of justice. Although the consequences of this failure are most directly borne by black citizens, who have long suffered this unequal treatment, the resulting damage to the credibility of the justice system is harmful to all citizens, including corporations. Just ask the many companies in and around Ferguson that were unable to do business during this tense period about the business costs of such public unrest.

The health of the legal system is inextricably intertwined with a corporation’s most precious asset – the public’s trust – and, conversely, its biggest liability – public distrust. A corporation’s products or services are, of course, a principal

means for engendering public trust, but those are not the only ways. The manner in which a corporation operates toward others can also be critically important.

Fairness in the legal system is paramount to ensuring corporate public trust, particularly when corporations dwarf their opponents. If the public believes that corporations exist to take advantage of those less powerful, the vital necessity of public trust is absent, and distrust is fostered.

Corporations have a stake in ensuring that their disputes with others are resolved fairly, in a legal system that is viewed as treating all litigants equally under the law, regardless of size, wealth, or power. In the health care industry, we know that our work touches lives, often in personal ways. To have credibility in the outcomes of litigation that involve such issues and to maintain the public trust, the system needs to be fair not just to Merck and other corporations, but also to individuals, including those with whom corporations seek resolution in court.

Corporations are also drivers of novel, cutting-edge issues and legal principles – today’s fast-paced changing technology has this effect on patent law. But groundbreaking legal victories will not be as long-lasting or as meaningful as they should be if the system that produces them is not fair and reliable.

A strong and healthy legal system serves other long-term interests for corporate self-expression through the support of legal aid. Corporations are made up of employees, stockholders, officers, directors, and board members; and facing outward, corporations have customers, collaborators, and competitors.

Corporations have a stake in affording equal access to justice to these individuals. There are, of course, short-term

financial gains to a corporation if the justice system efficiently and fairly addresses and assists employees with legal disputes; the workplace will be less disrupted and less earnings will be lost. But corporations also have a deeper stake in justice reform beyond the aspects on which they may directly depend. The individuals they interact with and their loved ones may have fundamental legal needs: for example, related to housing, special education, health care, veterans' rights, or criminal charges. Justice-system reform can force changes in these and other areas – changes that can facilitate employees being committed and confident contributors to the corporate enterprises where they work, and all with whom corporations interact to reach their full potential and engage in good citizenship.

The fairness of the legal system also relates to corporate interest in developing human capital for the next generation. Corporations will suffer if they cannot tap into the talent of individuals left behind by society. The core of the American dream is the tenet that, if people work and study hard enough, they can lift themselves up. Poverty is largely a matter of lack of opportunity, not a willing choice or unavoidable fate for those who find themselves in need. When access to the justice system is equal, those who face economic challenges are more likely to prosper and contribute: becoming the next scientist who discovers a groundbreaking compound in the laboratory, the next lawyer who secures an important acquisition in the deal room, or the next front-office administrator who keeps the company in good standing. That is good for the individuals, and for the business. But when the legal system deals justice unevenly, it limits that potential for good.

Corporations have a stake in combating myths about the poor, the disadvan-

taged, and those who are discriminated against. Even though factually wrong, insidious myths remain today: that people who are socioeconomically disadvantaged or who have endured discrimination are fundamentally different from the “rest of us,” that they are content with their station in life and do not want to contribute to our society, and that they will always be poor. Besides blinding many to the imperfections of the justice system, these myths create divisions, a first step toward weakening social cohesion and, in turn, making democratic, collective institutions vulnerable to incremental erosion. Supporting legal aid is a powerful way that corporations and their leaders speak and act to correct these myths about those who live with needs or conditions different from their own, and to strengthen the collective social endeavor.

I know firsthand that much of the mythology of disadvantage is untrue. I was born and raised in an impoverished community in North Philadelphia. My father was a hardworking janitor with limited formal education. He was also one of the most intelligent people I know. He devoured two newspapers a day and, later on, sampled my siblings' and my college textbooks as well. He taught me that I could, and should, become the best version of myself. I take seriously the responsibility to help others have the same chance. A justice system that is unfair, unresponsive, or based on myth undermines that possibility.

Business has another stake in shoring up our legal institutions, one that underlies the rest: corporations are citizens just like you and me, and if America is to have a long-term healthy democracy, all Americans need to participate. This is a reality for businesses and individuals alike, given the too-frequent stalemate that our national government finds itself in.

In many ways, corporations have special opportunities to operate as model citizens. Not every moment in the limelight might be welcome to corporate leaders. But corporations have an excellent platform from which to speak and be heard, and to act and lead by example. Corporations also have flexibility and nimbleness, particularly compared with government institutions that must operate within the constraints of public budgets, votes, and partisan divisions. And American corporations are among the most imaginative, innovative, and scrappy in the world.

Using their bully pulpit, corporate leaders can put resources and expertise to use to change the mindset about inequality. They can set tones and inspire. They can marshal valuable skills to make equal opportunity for justice a living, breathing reality, and can mobilize other passionate individuals to join and grow the efforts. Corporate citizenship may be a “legal fiction”; yet that does not mean corporations have no soul. Their leaders can reflect and shape those souls.

When I think about model corporate leadership, Dr. P. Roy Vagelos, Merck’s CEO from the 1980s to the early 1990s, comes immediately to mind. Dr. Vagelos was the key advocate in Merck’s decision to make one of its medicines freely available. A Merck scientist, Dr. William Campbell, and a Japanese collaborator, Dr. Satoshi Omura, had recently discovered a compound that ultimately led to the development of Mectizan, a drug that treats onchocerciasis, a debilitating eye disease also known as “river blindness” that is prevalent in poor, remote areas such as in Africa and Latin America. Very soon after their breakthrough, Merck, under Dr. Vagelos’s leadership, launched a program that would make a tremendous impact on the tens of millions of people infected: Merck has partnered

with organizations to donate Mectizan to everyone who needs it, until river blindness is entirely eradicated.

Begun in 1987, Merck’s Mectizan donation program has successfully eliminated the disease in numerous countries, improving possibilities for families, communities, and entire nations. The discovery by Dr. Campbell and Dr. Omura earned them a Nobel Prize. Mectizan is a tremendous source of pride for Merck scientifically. But not lost on me is the impact that a corporation and its leaders can have, as demonstrated by Dr. Vagelos and his leadership in Merck giving away one of its greatest inventions.

I have sought to lead Merck with similar commitment, and I am particularly proud of our signature Merck for Mothers program. In this global initiative, Merck has dedicated \$500 million since 2012 to help end preventable maternal mortality worldwide. We have worked with more than ninety partners to establish over fifty programs in thirty-plus countries, and we are seeing impressive progress in improving access to quality maternal health care and family planning services. These examples reflect what a pharmaceutical company striving to improve the world can do. Corporations engaged in everything from entertainment to financial services to retail to technology have their own expertise and creative talents to bring to bear.

For corporate engagement with justice reform in particular, a prime corporate resource is the legal department. Today, the head of a corporate legal department – the corporation’s general counsel – often serves dual roles as the company’s chief lawyer and a corporate executive. That was my experience at Merck, when I served as general counsel and executive vice president.

When the chief corporate lawyer also serves in an executive capacity, she brings

a legal perspective to the day-to-day work of the corporation and to its big-picture goals and aspirations. Lawyers have taken an oath to their profession and share a collective responsibility to the fundamental belief in justice for all. That view strengthens corporate understanding of our critical participation in what makes our democratic society function.

Merck's legal department has long engaged with legal aid. The formalization of this program resulted in part from the chief lawyer having an executive role. Our program began in 1994, under the leadership of then-General Counsel and Senior Vice President Mary McDonald. Today, almost two hundred Merck employees (lawyers, paralegals, and support staff) devote thousands of hours a year to pro bono work, contributing in a broad array of areas, including bankruptcy, immigration, landlord/tenant disputes, domestic violence, family law, social security disability, special education, and veterans' affairs.

Active citizenship by a corporation and its employees does not mean Americans should absolve government leaders of their responsibility for making the nation's aspirational notions of justice a reality. A healthy democracy demands that its elected representatives be engaged in furthering the greater good, and corporations, like other citizens, should seek to hold them accountable.

As a recent example, I am proud that Merck joined over 180 other companies in publicly advocating for congressional support of the Legal Services Corporation (LSC).<sup>6</sup> The LSC was created in 1974 with bipartisan congressional sponsorship as the primary funder for legal-aid organizations across the United States, with more than 90 percent of its funds currently distributed to over 130 different legal-aid programs in every state and territory. The LSC is also a thought leader on

how to engage corporations and in-house counsel in financially supporting and undertaking pro bono work. Corporations have a stake in using our powerful voices to demand government support for the LSC and other organizations that fight for equal justice in America on a daily basis.

Corporations generally want to leave a lasting imprint on society. Corporations might merge, be acquired, or reorganize themselves, but they plan to operate for the long haul. Merck is such a company. For over 125 years, Merck has been a global health care leader dedicated to helping the world be well through its innovative health solutions.

A corporation's legacy is personal to those who lead and work there. We see ourselves as stewards of businesses that have a significant impact on the public, and we want our life's work to reflect who we are.

Hand in hand with achieving our long-term goals and taking charge of our legacy is a well-functioning and fair justice system—one that provides meaningful access to all. An example is my representation of Bo Cochran. Death penalty cases are intense, expensive, and lengthy. The appeal of Bo's death sentence was still pending when I went in-house to Merck. I am grateful to the company for allowing me to serve actively on Bo's legal team for what turned out to be several more years.

And now, as Merck's CEO, the company's commitment to improving the lives of others is always at the front of my mind. Another of my predecessors, George W. Merck, famously said in 1950, "Medicine is for the people. It is not for the profits. The profits follow, and if we have remembered that, they have never failed to appear."<sup>7</sup> Merck aims to be a good corporate citizen. That is our desire for our legacy.

This deeper sense of corporate citizenship – people before profits – is intertwined with ensuring the dignity of people when they have civil or criminal legal needs. Corporate engagement in strengthening legal services in the United States

is, in this way, an expression of corporate self-interest. The best corporate citizens see *value* and *values* as aligned. They recognize the true reward of devoting time and energy to ensuring adequate justice: the opportunity to improve many lives.

Kenneth C.  
Frazier

#### ENDNOTES

- <sup>1</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 4 Wheat. 518, 636 (1819).
- <sup>2</sup> *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) [quoting S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952); and H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952)].
- <sup>3</sup> U.S. Constitution, art. I, § 8, cl. 8.
- <sup>4</sup> Learned Hand, “Address at the New York Legal Aid Society’s 75th Anniversary Dinner,” New York City, New York, February 16, 1951.
- <sup>5</sup> Nelson R. Mandela, “Address for the Campaign to Make Poverty History,” London, United Kingdom, February 3, 2005.
- <sup>6</sup> “Letter to All Members of Congress,” *The Wall Street Journal*, March 28, 2017, <http://online.wsj.com/public/resources/documents/CorporateCounselLSCLetter.pdf>.
- <sup>7</sup> George W. Merck, “Address to the Medical College of Virginia at Richmond,” Richmond, Virginia, December 1, 1950.

# Executive Branch Support for Civil Legal Aid

*Karen A. Lash*

*Abstract: For government, access to justice is about more than legal justice. Legal services are essential tools to enable government programs to achieve a wide range of goals that help to provide an orderly, prosperous, and safe country. Recent efforts have transformed how some federal and state government officials think about and use civil legal aid to get their work done. Key in convincing them has been empirical evidence about the effectiveness and cost-efficiency of including legal services alongside other supportive services.*

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Ensuring justice is a fundamental purpose of government. The Preamble to the Constitution proclaims its goal to “establish Justice,” among other aims, and proponents of civil legal aid rightly focus on that imperative.

An initiative called the Legal Aid Interagency Roundtable – created at the federal level and now in play in a handful of states around the country – takes another tack. This model uses access to justice to support other core purposes of government outlined in the Constitution: domestic tranquility, general welfare, and the blessings of liberty.

Most people agree that government should use its legislative and regulatory powers to pursue these ends effectively. Too few realize that government efforts to secure tranquility, welfare, and liberty for the sixty million Americans living in or near poverty are more effective when these efforts include civil legal aid. Government agencies not dedicated to justice often need access-to-justice tools to put scarce resources to better use and achieve policy goals.

Ensuring access to civil justice concerns far more than the courts, lawyers, litigants, and rights. It

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helps ensure that government programs intended to assist people meet their basic needs actually do. More policy-makers, funders, service providers, and people in need should know how access to justice helps secure the necessities of life: a home, health care, employment, education, safety, and stability. But those who are most in need of legal aid to secure these necessities often do not recognize that their problem has a legal solution. And for those who do, too often they cannot access legal help. Eighty-six percent of low-income Americans who have a legal problem receive inadequate or no legal assistance.

A wide range of government programs can work at maximum efficiency only if people have access to legal services. Wages go up and recidivism goes down following legal help to expunge or seal a criminal record.<sup>1</sup> For low-income tenants in Massachusetts facing eviction who had full representation, approximately two-thirds remained in their homes compared with one-third of unrepresented tenants.<sup>2</sup> More victims of domestic violence break the cycle of violence if they get a restraining order against an abusive partner and legal custody of their children.<sup>3</sup> Having access to legal aid can make the difference between successful government programs and ineffective ones, whether working to combat domestic violence and human trafficking; prevent homelessness and predatory lending; moving children of opioid-addicted parents from foster care into permanent families; or helping job trainees with criminal records gain a second chance to succeed.

Federal government objectives, like getting Americans working and keeping children in school, also animate policy discussions at the state level. Governors call for increased commitment to greater effectiveness amid severe fiscal

challenges. They talk about what effective government should do: increase opportunities for job-seekers; increase access to health care; attack the opioid crisis; expand housing and aid to homeless people; improve foster care; give second chances to people leaving the criminal justice system; help disaster recovery; prevent violent crime; ensure services for children, seniors, and homeless veterans; and address the needs of rural residents.

For example, a recent State of the State speech by Hawaii Governor David Y. Ige lamented the homelessness and housing problems on the islands: “Probably no issue challenges us as a society more than the daily sight of those who are now living on our streets and in our parks.”<sup>4</sup> Wisconsin Governor Scott Walker called for greater attention to the opioid epidemic, declaring that “Along with coverage for general health care needs, we must continue to find new ways to fight the opioid and illegal drug addiction crisis in the state.”<sup>5</sup>

Governors – and those who work with them – increasingly understand that incorporating civil legal help and partnering with legal-aid and self-help service providers support state and federal goals of fiscal responsibility and effective social services and produce better outcomes. That help plays an invaluable role in solving underlying problems that trap people in poverty and closing the service gap in their states.

Those in the legal profession who seek to ensure that the government is “establishing justice” often focus their actions on the judicial and legislative branches of government. Civil justice advocates make and change laws through lawsuits and legislation, and secure funding to provide free legal help to those who could not otherwise afford it through attorneys’ fees, court rules, and budget appropriations.

However, during my tenure as a political appointee in the U.S. Department of Justice Office for Access to Justice and as the executive director of the White House Legal Aid Interagency Roundtable, we turned our focus to the third branch of government: the executive. Our aim was to identify programs, policies, initiatives, and law-enforcement goals that could be more effectively accomplished if their implementation included civil legal aid. To illustrate with one example, while it may seem counterintuitive, effective health care often requires legal services. A doctor can get a child's asthma attack under control. But to prevent traumatic and costly repeat emergency room visits, the doctor needs to prescribe legal help to enforce housing codes and eradicate the underlying rodent infestation in the family's apartment that triggers the asthma. At medical-legal partnerships, health care and legal professionals join forces to promote health. That's why the Health Resources and Services Administration (HRSA) of the U.S. Department of Health and Human Services designated legal services as an "enabling service": meaning that HRSA-funded health centers can use federal dollars to pay for legal assistance for patients.<sup>6</sup> The HRSA supported the new policy with training and technical assistance that helped cultivate and support medical-legal partnerships at community health centers across the country, contributing to the rise in medical-legal partnerships nationally and, more important, to improvements in people's health.<sup>7</sup>

Instead of focusing on legal aid for its own – or justice's – sake, this approach shifts the terms of discussion, focusing on the tools that most effectively achieve government goals with already appropriated funds. When the government has already chosen to act, the questions for executive-branch experts involve how

best to effectuate that mandate. By the time the White House roundtable published its first annual report to then-President Barack Obama, twenty-two executive agencies and partners – from the Administrative Conference of the United States to the U.S. Department of Veterans Affairs – were involved.<sup>8</sup>

Executive agency personnel were often persuaded to embed legal services in their programs by empirical evidence demonstrating that it works. Executive agency staff – lawyers and nonlawyers, political appointees and career public servants – learned about how legal aid can improve programs as varied as housing homeless veterans and helping families impacted by the opioid crisis. Ideological opposition to lawyers sometimes heard elsewhere or disagreement about the proper role of the federal government evaporates when the main topic is the executive branch's duty to meet policy goals and produce the best outcomes possible.

The sailing is not always smooth. Congress, the courts, and outside watchdog groups can constrain the actions of risk-averse federal agencies, which tends to preserve the status quo. Each agency has its own mandate and concerns, so broad generalizations about the value of legal services are not persuasive. Many factors make each agency unique, including its authorizing law, the nature of its mandate, the agency's structure and culture, and the values and personalities of career staff and political appointees. Discovering the person to persuade is not always easy; sometimes it is unclear who has the authority to make necessary changes within an agency. A project's success at the federal level depends on accommodating all of these differences.

The roundtable and its new counterpart at the state level – The Justice in Government Project at the American University Justice Programs Office – reach for the

lower-hanging fruit, avoiding big questions about the reach, source, and implications of agency authority. The work stays in the uncontroversial zone: helping state executive branch agencies and actors use legal aid to help them reach their established goals and objectives, on which they have clear authority to act, and incorporating legal services informed by a solid evidence base.

The roundtable grew out of efforts to do more good with existing resources. To address the crisis in the civil and criminal justice system, Attorney General Eric Holder Jr. established the Office for Access to Justice at the Department of Justice in 2010. The Office was tiny: it had only eight staff members and no budget for law enforcement, grant-making, or research. We discovered early on that most federal agency staff did not know what civil legal aid was or why they should care about it. But that knowledge gap turned into the Office's opportunity. Explaining how civil legal aid – whether delivered by legal-aid attorneys, pro bono volunteers, self-help opportunities, court-based services, navigators, or via community education and outreach – could help agencies better work on what they were mandated to address, helped them see why they should be funding and partnering with civil legal aid providers.

The Office educated agencies throughout the executive branch. For example, the U.S. Department of Labor's Employment and Training Administration heard about how legal services support programs designed to help people get and keep jobs. The U.S. Department of Health and Human Services and U.S. Department of Veterans Affairs learned about the effectiveness of medical-legal partnerships for improving health outcomes. The U.S. Department of Homeland Security considered research about how legal assistance can help eligible immigrants

become citizens. Agencies responding to the opioid epidemic learned how legal help gives kinship caregivers legal custody to enroll children in school and take them to the doctor while parents recover from substance use disorder. This educational work was customized to each agency's purpose, but the central aim was always to explain how legal aid could further *their own* goals and identify precisely how.

Perhaps surprisingly, in hundreds of conversations across the executive branch, the Access to Justice staff never encountered the political pushback that legal aid has historically encountered in Congress. Rather, most agency leadership and career public servants were genuinely interested in learning more about evidence-based strategies with the potential to improve their programs' effectiveness. They wanted to get their work done, and to do it well. What mattered to them was empirical evidence that demonstrated how providing legal aid could make government action more effective and efficient.

For example, they appreciated research documenting that the majority of low- and moderate-income Americans and their social-service providers too seldom see the issues they encounter as legal problems. A family concerned about unsafe housing conditions or harassment from debt collectors often assumes that they simply have personal or social problems, or just bad luck. So they miss out on the legal solution.<sup>9</sup> To achieve the goals of federal policy, like safe housing or financial literacy and self-sufficiency, federal policy-makers need their social-service grantees and state and local government partners to connect people with the right services for their needs.

President Barack Obama directed the executive branch to fund only "evidence-based practices" that work, so research was necessary to identify those practices.<sup>10</sup> Agency staff and leadership particularly

responded to studies showing that providing legal assistance to people who cannot afford it addresses root problems that keep people from climbing up the economic ladder and often provides substantial return on investment by preventing harm and financial waste.<sup>11</sup>

A small but growing body of research connects legal help to many core agency objectives. Civil legal aid significantly reduces incidents of domestic violence by helping victims obtain child custody arrangements and child support payments that enable them to leave abusive relationships. Legal help increases tenants' chances of keeping their homes when facing eviction.<sup>12</sup> It positively impacts individual and public health while driving down health care costs.<sup>13</sup> It addresses unmet needs of homeless veterans.<sup>14</sup> It improves efficiency and cuts costs in public programs by helping children leave foster care faster.<sup>15</sup> It increases income and job opportunities for people who have a criminal record expunged. Resolving these problems can reduce government expenditures in responding to crime, injuries, and homelessness, as well as individual, family, and community social, emotional, and financial harms.

The Legal Services Corporation's *The Justice Gap* report demonstrated that current funding for civil legal aid covers only a fraction of the civil legal needs of low-income Americans.<sup>16</sup> As agency personnel often realized with surprise, these statistics describe only those at 125 percent of the poverty line or below: they leave out the tens of millions of moderate-income Americans who need legal help but cannot afford a private lawyer. It was news to many that four out of five Americans will experience some kind of economic hardship, such as relying on a government program for the poor or living at least one year in poverty or close to it.<sup>17</sup>

In 2015, the roundtable was elevated to a White House initiative when President Obama issued a Presidential Memorandum about its work. He called on the federal agencies to work together "to help the most vulnerable and underserved among us. . . . By encouraging Federal departments and agencies to collaborate, share best practices, and consider the impact of legal services on the success of their programs, the Federal Government can enhance access to justice in our communities."<sup>18</sup> This endorsement made the roundtable a mandated activity, elevating its work to the highest level of each agency. It called on the attorney general and the director of the White House Domestic Policy Council or their designees to cochair three meetings per year. When invitations for the first meeting went out from Attorney General Loretta Lynch and Domestic Policy Council Director Cecilia Muñoz, they attracted top-level leaders from each agency.

By this stage, the agencies' accomplishments included: getting legal services designated as fundable services in at least two dozen major federal grant programs, such as those involving reentry into society for people with criminal records, access to health care, applications for citizenship, and services for homeless veterans; clarifying that other federal programs should allow legal services that would further their goals; new training and technical assistance opportunities; new research about civil legal aid; and strategic partnerships between agencies and legal-aid programs to achieve enforcement and outreach goals.<sup>19</sup>

In 2018, Attorney General Jeff Sessions closed the Office for Access to Justice and transferred its duties to the Justice Department's Office of Legal Policy.<sup>20</sup> But the work continues. Federal agencies are still thinking about and incorporating legal aid into their work. For example, the

Department of Labor's Second Chance Act grants allow and sometimes mandate legal services to assist some of the seventy million Americans – one in three adults – with criminal records who have paid their dues and done their time in finding and keeping employment. The Departments of Health and Human Services and Veterans Affairs continue to support medical-legal partnerships to assist with preventing illegal evictions, secure health care benefits, and address the social determinants of health through interconnected civil legal problems. In 2018, the Department of Justice and its grantee Equal Justice Works debuted the Crime Victims Justice Corps Legal Fellowship grant, enabling over sixty lawyers to increase access to civil legal assistance and enforce the rights of victims of human trafficking, campus sexual assault, and consumer fraud.

Federal government policy is high profile and has national reach, but an enormous amount of the implementation of programs and policies takes place in the states. An effort similar to the roundtable is underway at the state level, thanks to funding from the Open Society Foundations, Public Welfare Foundation, and The Kresge Foundation. This state-focused version operates through The Justice in Government Project at the American University Justice Programs Office. The Project launched in 2017 with a pilot program focused on four geographically and politically diverse states – Arizona, California, Mississippi, and Wisconsin – and added additional efforts in South Carolina and Hawaii over the first year.

Like federal officials, state executive branch public servants in executive departments and agencies use appropriated state and federal funds to implement legislative mandates and executive policies, and rely on specialized expertise to guide efforts to provide maximum benefit from

those public dollars. As with the federal roundtable, many of those efforts could be more effective, efficient, and fair to low- and moderate-income people and communities if they included legal aid.

State law affects most Americans' everyday lives, and most people interact more with state agencies than federal ones. State programs shape education, employment, public health, and social services. As the new effort develops, initiatives must be customized to fit the conditions of each state: state norms and processes are sometimes even more complex than their federal counterparts, with great variety within each state and across states.<sup>21</sup> State policy choices reflect many factors: the structure and authority of those agencies; the political orientation of state leaders; the strength of the state's infrastructure; the extent to which decision-makers rely on new evidence regarding policy effectiveness; the interplay among the three branches and then among agencies; the role of interest groups and advocacy coalitions; and the influence of federal mandates and cost-sharing programs.

In each state, the Project searches for opportunities to connect good government with access to justice. Some opportunities arise in state-legislated and -funded programs and policies. Many opportunities flow from states' powers to administer federal funds: every state gets a share of the many federal block and formula grants ("block grants") for federally funded programs. Federal block grants set amounts and basic spending parameters, but they give states flexibility to tailor spending to local priorities and local infrastructure.

States receive a significant influx of capital through block grants – the average is 31 percent of a state's budget – as long as they follow the purpose and parameters defined by the legislation creating the grant.<sup>22</sup> Because each block grant has

its own rules, regulations, formulas, and degrees of flexibility, the Project's work builds on the roundtable's efforts at the federal level, which includes cataloging the federal block grant funds that allow state spending on civil legal services.

Two approaches launched as part of the Project show how support for civil legal partners can be made more consistent and pervasive: one focuses on a specific block grant that allows spending on legal aid and its role in advancing particular state policy goals; the other focuses on a specific issue relevant to state policymakers and legal aid – for example, helping people with criminal records get a second chance to succeed – which can tap several different federal block grants as well as local funding streams.

Consider the Victim Assistance Formula Grant Program under the federal Victims of Crime Act (VOCA). It directs funding allocations to state agencies that make awards to direct service providers assisting crime victims. Since Congress passed the act in 1984, its funds have dramatically increased services to crime victims.<sup>23</sup> The Department of Justice has documented the importance of civil legal assistance to many types of crime victims. Legal help is one of the most critical yet too often unmet needs of domestic violence victims, who are typically the largest group of crime victims that states serve using these funds.

Three considerations made VOCA ideal for demonstrating how to connect good government with access to justice: a solid evidence base documents unmet civil legal needs among crime victims and the importance of civil legal help to solve myriad problems related to victimization; Congress consistently supports the act and recently increased funding; and a new rule clarifies that these funds can be used for comprehensive legal assistance for legal needs that flow from

victimization, including domestic violence, child abuse and neglect, elder abuse, human trafficking, financial and consumer fraud, identity theft, and other issues routinely addressed by legal-aid programs.

In about forty states, this effort has greatly increased legal help for crime victims. For some states, such as California, funds under the act were used to create new grant programs to provide legal services. At least five states – Massachusetts, Washington, Vermont, Michigan, and Pennsylvania – launched statewide VOCA-funded legal-aid programs.<sup>24</sup> The statewide models show great promise to raise the overall standard of care through joint provider trainings, data-sharing to better identify statewide patterns and trends, greater collaboration among legal-aid providers, and perhaps most important, extending legal aid to rural areas and communities where it has not been available due to fragmented and limited legal-aid funding.

Participating states are moving beyond emergency restraining orders for domestic violence victims to include legal assistance for a much broader list of crime victims. VOCA funds now support legal services to address abusive debt collection practices in Washington, D.C., elder abuse in Michigan, farmworker wage theft and hate crimes in California, and human trafficking in North Carolina.

The second approach focuses first on stated policy priorities and then asks how already appropriated funds can support both the policy and legal aid. For example, our Arizona partners identified successful reentry and reduced recidivism as one of their top agenda items. The need is there, and Governor Doug Ducey confirms it. Roughly 1.5 million Arizonan adults have criminal records that appear in background checks.<sup>25</sup> Studies and data show that expungement or

set-asides for eligible arrests and convictions, child support order adjustments, drivers' license reinstatement, and other civil legal needs can stabilize lives in ways that support getting a job while reducing recidivism.<sup>26</sup>

Arizona is following the lead of other states like Maryland, Illinois, and South Carolina and cities like Los Angeles that are already working to deploy legal aid in efforts to remove obstacles to employment. Two Maryland and multiple Illinois American Job Centers have embedded legal-aid lawyers alongside other social-service providers to help people get jobs. South Carolina's Department of Employment and Workforce Director of Policies and Procedures issued guidance urging local workforce administrators to provide legal services consistent with a 2016 Workforce Innovation and Opportunity Act federal rule that lists legal aid among the supportive services considered "necessary to enable an individual to participate" in workforce activities.<sup>27</sup> And city governments can – and have – also used state funds in a similar way to how states use federal funds. For example, the Los Angeles Mayor's Office of Reentry opted to use some of their share of state funds – generated when voters passed Proposition 47 to reinvest savings from reduced prison spending in crime prevention and support programs – in a multidisciplinary program that includes employment, behavioral health, and legal services.<sup>28</sup>

The next step in Arizona and other states seeking to help their hard-to-employ job-seekers is reviewing funding options. Several federal block grant prospects for supporting legal services include: U.S. Department of Labor's Workforce Innovation and Opportunity Act Statutory Formulas funds, U.S. Department of Health and Human Services' Temporary Assistance for Needy

Families, and U.S. Department of Housing and Urban Development's Community Development Block Grant. Each of these federal agencies has a published federal rule or other guidance about state use of these block grants for legal help to remove obstacles to employment.

As with the federal Legal Aid Interagency Roundtable, state-based efforts can encounter choppy waters. Risk aversion and the gravitational pull of the status quo can constrain state actors. Scarce resources can prevent innovations. Sometimes opaque bureaucracies and uncertain decision-making processes so muddy the waters that well-meaning advocates cannot see the way forward. An added challenge may be navigating local organizations' expectations that their existing grants will continue year after year. Legal-aid organizations and courts-based projects should avoid real or perceived accusations of "robbing Peter to pay Paul," taking away money from other needed services. In reality, though, this is often not the result: budgets may have enough flexibility to experiment; appropriations sometimes increase; partnerships with local grantee organizations may be possible; local priorities shift with changing needs and political leadership; and examination of new studies shows what works and where investments can lead to better results and government savings.

Access to justice is an essential purpose of government. But it is also necessary to enable government to achieve a wide range of goals related to providing the basic necessities of life and a tranquil, healthy, prosperous, safe country. That's why the Legal Aid Interagency Roundtable's focus on the federal executive branch agencies, and now The Justice in Government Project's focus on their state counterparts, works to embed civil legal aid into the machinery of good

government's existing priorities, generally without the need for new funding or legislation. These efforts seek to improve government policies, programs, and initiatives by incorporating civil legal services, leveraging research and data to achieve better results, and, sometimes,

even saving public dollars. More people can get or stay housed, healthy, in school, and employed. More families and communities can find and sustain stability.

And, as an added bonus, it also brings us all a little closer to the promise of establishing justice for all.

#### AUTHOR'S NOTE

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# Why Judges Support Civil Legal Aid

*Fern A. Fisher*

*Abstract: To fulfill their role as neutral deciders in an adversarial legal system, judges need lawyers. Unrepresented litigants tax the court system and burden the people who work in it. Judges around the country, of all political stripes, are resolute in their support of civil legal aid. Judges support civil legal aid because they value equal justice and the protection of the disadvantaged. They support legal aid because it assists in the efficient and effective administration of the courts they run. They also support legal aid out of self-interest, because it makes their work lives less threatened and more effective.*

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The United States judicial system is designed to be adversarial, to resolve disputes of fact and law before a neutral judge.<sup>1</sup> The premise of the system is that each party in a court case is capable of understanding and using the law, since each must present the law and the facts to the judge. An effective adversarial system requires the presence of legally trained experts, typically lawyers, on both sides of a case.

The civil legal needs of both low- and moderate-income individuals in the United States are not being met.<sup>2</sup> The need for legal assistance by over one hundred million people in this country is dire.<sup>3</sup> Today's courts look nothing like the ideal. Around the country, state and federal courts regularly encounter pro se litigants: that is, litigants without attorney representation.<sup>4</sup> When opposed by an adversary with a lawyer, litigants representing themselves often lose even when the merits of the case favor them. The imbalance leads to injustice.

For the many millions of unrepresented litigants appearing in American courts each year, mastering the rules of the adversarial system is next to impossible.<sup>5</sup> Such litigants often do not understand the rules of evidence, and so cannot understand what facts are relevant or how to present them to a judge.

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An attorney opposing an unrepresented litigant is more likely to withhold evidence favorable to the litigant who is unlikely to know that such evidence must be turned over or to ask for it.

The required briefs, memoranda of law, motions, and pleadings are governed by rules that can be difficult for untrained individuals to comply with.<sup>6</sup> Courts sometimes sanction unrepresented litigants who are ignorant of the law or become too emotional in the courtroom for not complying with court rules or for frivolous litigation.<sup>7</sup> For these reasons and others, a litigant without an attorney is much more likely to fail than one who is represented.<sup>8</sup>

Lawyers are necessary outside of traditional litigation, too. Many disputes today are resolved through settlements negotiated outside of court. Even when managed by a professional mediator, the inequality inherent in negotiations between an untrained lay person and a lawyer remains.<sup>9</sup> Even when both parties represent themselves, one or the other often unintentionally negotiates away rights or entitlements that are theirs under the law, because they do not know what is due them.<sup>10</sup>

All of these challenges are made worse by the disparity in education between lawyers and many low-income individuals, who generally read at lower reading levels and are more comfortable with oral communication, in particular by relating stories. The American justice system depends on written rules and on written orders and decisions, written at a reading level much higher than that of the average low-income litigant. Without a lawyer (or other kind of legal problem-solver) to explain the rules, navigate the legal process, and translate orders and decisions into accessible terms, a low-income litigant is likely to be lost in the system and to lose his case.<sup>11</sup>

Either the United States must abandon a pure adversarial system and adopt another justice model – for example, relying on magistrates to find the facts in disputes – or the nation must commit to providing substantially more civil legal services for those who cannot afford them.

The cost of providing attorneys for everyone who needs but cannot afford one would be huge. Providing just one hour of legal services to each person unable to afford it would cost an estimated \$20–\$25 billion.<sup>12</sup> Courts cannot possibly cover this cost: cutbacks in court budgets by state legislatures mean that many courts cannot even cover their basic operating expenses.<sup>13</sup> Few courts have money in their budgets to provide lawyers for the indigent. With \$100 million for civil lawyers, New York State recently had more money for this purpose than any other state. Though the funding was far from enough to close the justice gap, the state saw a significant decline in the number of unrepresented litigants in the courts.<sup>14</sup>

In response to the shortage of lawyers, despite insufficient resources, many court systems are trying to find ways to level the playing field by making legal forms and processes simpler and easier to use by people without lawyers. Simplification works for some kinds of cases, but it is not a substitute for lawyers when people have complicated substantive or procedural defenses or claims to pursue. Providing a lawyer, or a legal problem-solver, to those who cannot afford one is often the only way to equalize justice. Other forms of legal assistance are helpful and necessary, but they are inadequate to close the gap in access to justice.

Judges of all political stripes and at every level of government support providing lawyers for people who cannot afford them. As the late Justice Antonin G. Scalia put it, “in today’s law-ridden society,

denial of access to professional legal assistance is denial of equal justice.”<sup>15</sup> Judges support legal aid because they want to make good on providing equal justice, or coming much closer to doing so, and because they want to improve the efficient administration of justice, as well as out of self-interest.

Judges support civil legal aid as a means of ensuring that the most vulnerable people in society can have decent, safe, and healthy lives. Adversarial proceedings regularly involve basic human needs, such as shelter, food, safety, health, and child custody. They regularly affect vulnerable groups such as senior citizens, domestic violence victims, and veterans with post-traumatic stress disorder.

While judges supporting civil legal services often cite the lofty ideals of equal justice and assisting the disadvantaged, maintaining an efficient and neutral system is also a motivation. Codes of judicial ethics require judges to be impartial and neutral.<sup>16</sup> But neutrality is not the same as passivity. Judges are permitted “to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”<sup>17</sup> Yet judges worry about appearances: they are concerned that assisting an unrepresented litigant will make them seem to be taking sides, forsaking their neutrality.<sup>18</sup> This concern has led judges to recuse themselves from cases after they have provided assistance to unrepresented litigants.<sup>19</sup>

Because courts are burdened by large numbers of litigants without lawyers, many judges are likely to experience the tension between their duty of neutrality and their responsibility to ensure that pro se litigants are fairly heard.

As the Conference of Chief Judges wrote to the federal Office of Management and Budget in 2017,

Our research makes clear that the large number of unrepresented citizens over-

whelming the nation’s courts has negative consequences not only for them but also for the effectiveness and efficiency of courts striving to serve these and other segments of the community who need their disputes resolved. More staff time is required to assist unrepresented parties. In the absence of a fair presentation of relevant facts, court procedures are slowed, backlogs of other court cases occur, and judges confront the challenge of maintaining their impartiality while preventing injustice.<sup>20</sup>

Judges also support greatly increased funding for lawyers in civil cases for litigants who cannot afford representation out of self-interest. Most local and state judges are elected or appointed to serve for a specified term, to which they may be either reelected or reappointed.<sup>21</sup> They are periodically evaluated by the public or the appointing authority. Judges perceived as showing partiality – for example, by providing permitted assistance to unrepresented litigants – may lose elections or reappointments. Judges’ careers can be marred by complaints from unrepresented litigants who, because they do not have the benefit of legal advice, have unreasonable expectations about courts and law.<sup>22</sup> The presence of lawyers on both sides of a case insulates judges from perceptions of impartiality and from litigant complaints.

Judges typically have no training in how to cope with unrepresented litigants who may have mental illnesses, or are in the grip of powerful but unfounded feelings that the system is biased and working to hurt them. Unhappy litigants can pose physical danger to judges.<sup>23</sup> Handling cases with unrepresented litigants and writing decisions that can be understood by them takes longer, putting pressure on already full workdays. Unrepresented litigants tax the system and the resilience

of judges. Stressed out and overwhelmed judges cannot do their work well.<sup>24</sup>

The United States ranks an abysmal twenty-five out of thirty-five countries with similar per capita incomes, measured on accessibility and affordability of civil justice in the Rule of Law Index prepared by the World Justice Project.<sup>25</sup> The United States consistently fails to provide accessible and adequate legal assistance, and will continue to do so as long as an adversarial system continues and until much more civil legal service funding is provided. Judges foresee the continued erosion of public confidence in the justice system as it becomes increasingly beleaguered by unrepresented litigants, over-taxed courts, and overwhelmed judges.

The justice system cannot function without the confidence of the public.<sup>26</sup> Lack of confidence will eventually lead to distrust of the system and the rule of law. Trust in the rule of law is an essential part

of democracy. Although the public trusts the judiciary more than the other branches of government, confidence in the U.S. civil justice system is low.<sup>27</sup> In an adversarial system, unrepresented litigants threaten public confidence: when individuals perceive or receive unequal treatment, they lose respect and confidence in the institution that is supposed to deal fairly with them.

Other voices in the citizenry must join with the judiciary to ensure that adequate funding is available to provide lawyers to the indigent and to develop mechanisms to make lawyers affordable to moderate income individuals. Lack of action will devastate the justice system. That will leave the rule of law in ruins, shattering the foundation of American democracy. Any other course will diminish the respect and moral standing the United States has enjoyed as a leader of democratic governments.

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- <sup>18</sup> Stienstra et al., *Assistance to Pro Se Litigants in U.S. District Courts*, 22– 23, Table 18.
- <sup>19</sup> *Floyd v. Cosi*, 14-cv-3772 (E.D.N.Y. January 21, 2015).
- <sup>20</sup> John D. Minton and Arthur W. Pepin, letter to John Michael Mulvaney, “Conference of Chief Justices, Conference of State Court Administrators” (Washington, D.C.: Government Relations Office, 2017), <https://www.olaf.org/wp-content/uploads/2018/01/Conference-of-Chief-Justices-LSC-Letter.pdf>.
- <sup>21</sup> Brennan Center for Justice, “Judicial Selection: Significant Figures,” May 8, 2015, <https://www.brennancenter.org/rethinking-judicial-selection/significant-figures> (accessed August 10, 2018).
- <sup>22</sup> As the judge in charge of the Civil Court of the City of New York, which includes the housing court and all trial courts in New York City courts, for over twenty years, I supervised a

number of judges who experienced difficulties with reappointment due to treatment of unrepresented litigants. A number were not reappointed.

- <sup>23</sup> Lorelei Laird, “Judges Reflect on Dealing with Difficult Pro Se Litigants,” *ABA Journal*, July 31, 2015, [http://www.abajournal.com/news/article/judges\\_reflect\\_on\\_dealing\\_with\\_difficult\\_pro\\_se\\_litigants/](http://www.abajournal.com/news/article/judges_reflect_on_dealing_with_difficult_pro_se_litigants/); Arkansas Access to Justice Commission, “Survey of Arkansas Circuit Court Judges Regarding Self-Represented [Pro Se] Litigants” (Little Rock: Little Rock Access to Justice Commission, 2008), <http://arkansasjustice.org/wp-content/uploads/2017/04/CompositeCircuitJudgeSurvey2008.pdf>; and Allen Baddour, “Civil Pro Se Litigants,” October 2010, [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course\\_materials/Baddour\\_ProSeCivilLitigants.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Baddour_ProSeCivilLitigants.pdf).
- <sup>24</sup> Beverly W. Snukals and Glen H. Sturtevant Jr., “Pro Se Litigation: Best Practices from a Judge’s Perspective,” *University of Richmond Law Review* 42 (2) (2007), <http://www.ppcforchange.com/pro-se-litigation/>; United States District Court, District of Minnesota, and the Federal Bar Association, Minnesota Chapter, *The Pro Se Project* (Minneapolis: United States District Court, District of Minnesota, and Federal Bar Association, Minnesota Chapter, 2011), 2, <http://www.fedbar.org/proseproject2011>; and Commonwealth of Massachusetts, The Trial Court, Probate and Family Court Department, *Pro Se Litigants: The Challenge of the Future* (Boston: Commonwealth of Massachusetts, 1997), 16, <https://www.mass.gov/files/documents/2017/11/01/prosefinalreport.pdf>.
- <sup>25</sup> WorldJustice Project, Rule of Law Index 2017–2018, “United States,” <http://data.worldjusticeproject.org/#/groups/USA> (accessed August 13, 2018).
- <sup>26</sup> *In Re Raab*, 100 N.Y.2d 305, 315–316, 763 N.Y.S.2d 213, 218 (2003).
- <sup>27</sup> National Center for State Courts, *Call to Action: Achieving Civil Justice for All* (Williamsburg, Va.: National Center for State Courts, 2016), 37, <https://www.ncsc.org/~media/microsites/files/civil-justice/ncsc-cji-report-web.ashx>; Rob Faucheux, “By the Numbers: Americans Lack Confidence in the Legal System,” *The Atlantic*, July 6, 2012, <https://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/>; and GBA Strategies, “2017 State of the State Courts—Survey Analysis,” November 15, 2017, <http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSc-2017-Survey-Analysis.ashx>.

# Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History

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*Abstract: Ideally, justice is a universal good: the law protects equally the rights of the rich and powerful, the poor and marginal. In reality, the major share of legal services goes to business entities and wealthy people and the prestige and prosperity to the lawyers who serve them. This essay deals with the history of access to justice – chiefly civil justice – and with the role of lawyers and organized legal professions in promoting and restricting that access. In the last century, legal professionals and others have taken small steps to provide access to legal processes and legal advice to people who could not otherwise afford them. By doing so, they have inched closer to the ideals of universal justice. Though the organized bar has repeatedly served its own interests before those of the public, and has restricted access to justice for the poor, it has been a relatively constructive force.*

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In no profession is the gulf greater between ideals and practices than it is for lawyers. Ideally, justice is a universal good: the law protects equally the rights of the rich and the poor, the giant corporation and the small business, the innocent and the criminal accused. The ethical imperative that lawyers must zealously serve the interests of their clients can be justified, and reconciled with the goal of universal justice, only if all other affected parties (including the clients' adversaries) will be competently represented as well. In practice, of course, access to the complex and expensive procedures of law and the services of lawyers is largely determined by clients' ability to pay: the major share of legal services goes to business entities and wealthy people. The lawyers who enjoy the greatest professional success and prestige do most of their work on behalf of the rich and powerful.<sup>1</sup>

This essay examines the history of access to justice – chiefly civil justice, with a brief note on criminal defense – and the role of lawyers and organized

legal professions in promoting and restricting that access. Traditionally, access to justice has meant at minimum the effective capacity to bring claims to a court, or to defend oneself against such claims. Although many courts allow parties to represent themselves, it is clear that effective access usually requires the services of a competent lawyer, since lawyers hold the monopoly of rights of practice in courts and the skills and experience that accrue from that practice. The costs of litigation, however, are very high – in court costs, administrative costs, witness fees, and lawyers’ fees – so much so that even middle-class parties are foreclosed from using the courts for any but routine transactions unless they can tap into financing from some other source, such as contingent fees and attorney-fee awards paid by the adverse party, or state-subsidized legal services.

In the modern world, access to justice requires more than the capacity to litigate in courts. It requires help with navigating the mazes of bureaucratic government and filling out its forms, and with contesting adverse government actions. It requires help in planning for major life events, like founding a business, adopting a child, or divorcing a spouse. It requires effective assistance with challenging adverse actions of business corporations or professionals, say, as employees or customers. It requires access to powerful decision-makers, or agents in a position to influence them. Lawyers are not exclusive providers of such out-of-court services – they have to compete with accountants, financial consultants, and lobbyists, among others – but they tend to dominate.

In the last century, legal professions, governments, and charitable providers have taken small, partial steps to provide access to legal processes and legal advice to people who could not otherwise afford

them. By doing so, they have inched closer to the ideals of universal justice. They have also, on occasion, acted to restrict access to law by the poor and powerless. Despite inspiring rhetoric – and more inspiring models and exemplars – that American lawyers use to trumpet their commitment to equal justice for all, they have generally served their own interests before those of the public, in particular the poor and economically struggling. They serve best the rich and powerful, serve some middle-class clients and interests to the extent that it generates adequate fees, and, with notable exceptions, either serve minimally or not at all virtually everyone else.

**B**efore 1900, mentions in Anglo-American legal records of aid to the poor are scattered. Most of the references are to judges who appointed counsel to poor clients or to lawyers who voluntarily took their cases.

Medieval canon law was full of injunctions to lawyers to serve persons too poor to pay their fees, and “persons of humble status” were frequent enough litigants to suggest that some lawyers did.<sup>2</sup> Common lawyers also recognized some duties to the poor, codified in statute in 1495, when

Parliament provided . . . that poor persons could petition to plead *in forma pauperis* in all courts of record without the payment of any court fees, and provided further that the Chancellor and Justices should assign to such poor persons attorneys and learned counsel who should give their counsels without taking any reward.<sup>3</sup>

Lawyers’ fees in medieval times were not high per case (most serjeants-at-law made their serious money via retainers), but English law was already so technical that no one could navigate pleading rules without a lawyer. Scattered reports refer to poor litigants represented by appointed

or volunteer counsel: there is no way to know how frequently. It is likely that most poor persons' disputes were heard in more informal courts like the Court of Requests, or manorial or borough courts. Before the early eighteenth century, middle-class litigants like tradesmen and well-off farmers appeared frequently in common-law courts. But as long ago as the mid-eighteenth century, lawyers' fees and court costs had escalated above even most middle-class pocketbooks.<sup>4</sup>

Until the mid-eighteenth century, a criminal accused was not allowed a lawyer to contest the facts of the cases against him, but had to conduct his own defense. This began to change around the mid-eighteenth century, when lawyers were permitted, but without pay.

With respect to criminal defense, reflecting the colonists' experience on the receiving end of imperial prosecution, the new republic definitively rejected earlier English practice by providing federal and state constitutional rights to counsel in criminal cases. They provided no funding to support the right, but in serious felony cases, especially for murder, courts would often appoint prominent lawyers to defend without pay. They often welcomed the chance for publicity in notorious trials.

Most small claims for civil justice in the earlier nineteenth century were pursued without lawyers in local informal tribunals, like justice of the peace courts or county courts. Anyone, including wives, minors, and slaves, could come under the jurisdiction of these courts, which were regulatory agencies and enforcers of local laws as well as dispute-settlers. Yet even in regular trial and appellate courts, the reports show many cases with lawyers litigating relatively small sums like \$50 to \$100. Entry barriers to the profession were almost nil in most states, so litigants could have the benefit of low-cost advice.

Subsidized advice in the United States to help poor people deal with social and legal problems began with the Working Women's Protective Union in 1863 in New York, which helped workers collect fraudulently withheld wages. The union's example gradually spread to other cities. Staffed, at first, mostly by volunteer women nonlawyers, the Chicago Protective Agency for Women and Children expanded the model. By 1905, it had a paid staff and was handling four thousand cases. The Protective Agency also brought wage claims, but specialized in helping victims of domestic violence, who were often ignored by courts. Around the same time, the Chicago Bureau of Justice was founded. Its clients were mostly poor people with small debts to tradesmen, landlords, and mortgage lenders. Like the Protective Agency, it distrusted the formal legal system: it saw many judges as corrupt and the lower bar as incompetent. The two Chicago organizations merged in 1905 to form the Legal Aid Society of Chicago.<sup>5</sup>

New York City opened its own Legal Aid Society in 1900, largely to aid floods of newly arrived Jewish immigrants. The society grew out of an earlier bureau giving legal advice to German immigrants. Unlike the women's protective unions, New York Legal Aid was mostly staffed by lawyers and defined its work as strictly legal rather than social work. But it was also strongly paternalistic, seeking to educate in American values those whom the lawyers saw as quarrelsome litigious Jews. It generally sought only money damages for clients rather than seeking broader solutions to their family problems, and refused to act if defendants had no assets.

In the early-twentieth-century wave of professionalization, social work emerged as a recognized credentialed profession. Lawyers, spearheaded by new national and local bar associations, sought to raise

their own professional standards with new educational and bar exam requirements. Among lawyers, Reginald Heber Smith of Boston became the most prominent advocate for legal aid with his Carnegie Foundation Report on *Justice and the Poor* (1919), an indictment of unequal access to justice that was the leading manifesto for the legal-aid movement for the rest of the century.<sup>6</sup> Smith maintained that providing lawyers for the poor and people of moderate means was an elementary requirement of justice, which the legal profession had an obligation to supply rather than leave to charity.

His report ignored the existence of substantial women's legal-aid organizations. He and his disciples fought a running battle with the social workers, insisting that law was a masculine sphere in which clients could exercise legal rights only with the help of a trained lawyer. Eventually, these quarrels were resolved by compromise, with the recognition that many poor clients' problems could not be addressed solely by means of the law. Smith estimated in 1919 that about \$600,000 would suffice to fund adequate legal-aid services in the nation's cities – a contribution of \$5 per lawyer – but complained that lawyers and their guilds were mostly indifferent to the responsibility to supply it.

Some bar leaders continued to promote legal aid, but the rank-and-file remained apathetic and sometimes actively hostile. Until the mid-1960s, the American Bar Association (ABA) condemned as socialism the idea of state-funded – as opposed to bar- and charity-funded – civil legal services, just as the American Medical Association had condemned Medicare. Most urban legal-aid programs remained severely underfunded, unable to accept most potential clients, and prohibited from helping clients divorce or go bankrupt for fear of offending charitable funders. These programs were averse to

taking adversarial stances against landlords or businesses, favoring conciliation rather than the vindication of rights.<sup>7</sup>

The landscape changed in 1965 with the funding of the Office of Equal Opportunity Legal Services Program (since reorganized as the Legal Services Corporation, or LSC) as a component of Lyndon B. Johnson's war on poverty. In a major shift of policy, national bar leaders at the ABA supported this program at the time and have since become its stalwart defenders against multiple political attacks. Federal services expanded the total national legal-aid budget from under \$5 million per year to \$321 million in 1980 – 1981.

Program lawyers, including many top graduates of elite law schools, saw a much more ambitious role for the LSC than traditional legal aid. Rather than simply trying to help clients solve their problems one by one, they favored bringing strategic test-case suits before sympathetic liberal federal judges, and helping client groups like welfare recipients to form organizations capable of making their own demands. Their most controversial efforts were the work of program-funded California Rural Legal Assistance lawyers for Cesar Chavez's farmworkers and program lawyers' support for the militant National Welfare Rights Organization, which lobbied for a right to universal basic income.

The lawyers made fierce enemies among those interests that their clients sued. These included Governor Ronald Reagan of California (as president, he tried to abolish the program in 1981, and succeeded in cutting its budget by 25 percent); local and national welfare officials; real-estate interests targeted by new tenants' organizations; established city patronage machines; and – not least – local lawyers and bar associations unhappy about competition from the new legal-

services bar. The battle over federal legal services has continued since.

The LSC survives with the backing of elite lawyers, the ABA, and the judiciary, but under many and increasing restrictions on the kinds of clients and cases it can accept. The legal-services offices it funds may not bring class actions, lobby legislators, or represent unions, noncitizens, prisoners, or organizations promoting abortion, school desegregation, or welfare reform.<sup>8</sup> The general aim of conservatives has been to limit LSC-funded lawyers to individual personal aid, and to steer them away from actions with collective consequences like law reform, class actions, impact litigation, or aid to political organizing.<sup>9</sup>

In the same political moment as the founding of the Legal Services Program, the Ford Foundation and other grantors supplied funding to create “public interest” law firms that would supply the resources to pursue systemic reform projects affecting the poor. Ford also funded clinical legal education in law schools. The clinics have supplied a significant proportion of liberal-progressive lawyering. These efforts supplemented the longstanding work of the NAACP Legal Defense Fund (LDF) and the American Civil Liberties Union (ACLU), venerable nonprofits funded by subscribers, to seek court decisions favorable to their causes (African American equality for LDF; first, labor organizing and, later, free expression generally and women’s rights for the ACLU).

Institutionalized pro bono lawyering – although still sparse in relation to the perceived need – came out of the same generation as the lawyers who staffed the Legal Services Program. It has persisted and expanded, in part as a means to attract new associates to corporate practice and give them some on-the-job training with real clients. Most pro bono work is performed

by lawyers in large firms, who often collaborate effectively with established public interest firms to fund and staff major litigation efforts. Law firm pro bono services now exceed in value the entire federal legal-services budget. Some firms also fund public interest fellowships, as the global Skadden firm does with the Skadden Fellowships.

Like LSC lawyers, however, though for different reasons, law firm pro bono lawyers are restricted in the types of work they are allowed to take on: they generally have to avoid clients such as environmental or labor interests whose general aims may be adverse to the firm’s paying clients.<sup>10</sup> Many bar associations have flirted with proposals to make some pro bono service mandatory, but have abandoned the idea in the face of member opposition.<sup>11</sup> Some state court judges, however, have strongly supported pro bono work. In 2012, New York State made performance of at least fifty hours of pro bono work by students during law school a condition of their admission to the bar. Yet reliable estimates are that, nationwide, American lawyers, on average, perform about half an hour of pro bono work, broadly defined, per year. They make only derisory financial contributions to legal-aid and public interest organizations.<sup>12</sup>

At the same time that bar associations – formed and dominated for the early part of the twentieth century by elite lawyers – were mostly ignoring calls for civil justice for the poor and middle-class, they were actively campaigning against lawyers for a particular kind of client: plaintiffs’ personal-injury lawyers. Personal-injury lawsuits proliferated in the late nineteenth century as a response to the large-scale carnage of the industrial age: injuries and deaths from mining operations, railroads, street railways,

and, eventually, automobiles. A specialized bar, mostly Jewish and night-school-trained, developed to serve the injured and their families. They took a contingent fee: 30 to 40 percent of any damages recovered, nothing if they lost. The elite lawyers who represented businesses like railroads and streetcar companies tried to close down the night schools. They used the new bar associations to restrict entry to practice, to draw up ethical codes targeting personal-injury lawyers with prohibitions on advertising and soliciting clients, and to discipline the lawyers for violating the codes.<sup>13</sup> (The Supreme Court struck down the prohibitions on advertising in 1977, though the Court has upheld most restrictions on soliciting paying clients.<sup>14</sup>)

After World War II, the personal-injury lawyers seemed to have prevailed in that battle. They formed a powerful trade association, the American Trial Lawyers Association (ATLA; since renamed the American Association for Justice), that lobbied legislatures and argued in courts for broader theories of liability and damage awards. The ATLA portrayed the plaintiffs' lawyers as populist champions, representing the little guy against wealthy and well-lawyered corporations.<sup>15</sup> Their cause was aided by the expansions of liability to include strict liability for defective products (such as pharmaceuticals) and changes in the civil procedure rules to favor class actions and multiparty litigation; and by the Supreme Court decision invalidating the bar's prohibition on advertising.

The defense bar struck back during the general business revolt against regulation beginning in the 1970s and 1980s. Corporate and insurance practitioners warned of a "litigation explosion" of worthless claims that would make American businesses uncompetitive. The trial lawyers were portrayed as greedy exploiters of

naive or opportunistic plaintiffs, looking to score settlements out of nuisance suits supported by "junk science."<sup>16</sup> Some of the critiques were valid, such as that plaintiff and defendant class action lawyers sometimes colluded against the interests of the injured to settle cases early and cheaply, assisted by trial judges trying to clear their dockets.<sup>17</sup> The "litigation explosion" claims have proved mostly mythic, and "junk science" was surely as widely used by defendants (think tobacco) as plaintiffs. But the propaganda of the "tort reform" movement was a huge public relations and political success.<sup>18</sup> Federal and state legislation and court decisions have put limits on both punitive and ordinary damage claims, sometimes imposing strict caps on liability that have the effect of removing lawyers' incentives to take complex cases.<sup>19</sup> Congress has allowed class action defendants to remove cases to federal courts that are expected to treat plaintiffs less generously.<sup>20</sup>

Most observers have concluded that the chief defect of the personal-injury contingent-fee system for handling tort claims is not that it encourages frivolous claims, but that it filters out too many meritorious claims because they do not promise to yield an adequate recovery.<sup>21</sup> Its other main defect is its inefficiency: about 50 percent of recoveries are eaten up by administrative costs, including lawyers' fees.<sup>22</sup> Some reforms have been proposed, such as enabling outside investors to fund litigation for the big, mass tort claims, which would require loosening ethical prohibitions on fee-sharing with nonlawyers.<sup>23</sup>

**I**n the American legal system, in which courts have ample authority to make law through precedent and constitutional rulings, it is not surprising that interest groups should use lawsuits as vehicles

of policy-making. In the heyday of what is now called classical legalism (1870–1932), many such suits were brought by corporations to invalidate Progressive Era legislation adverse to their interests. But social movements for subordinated groups have used the same vehicles. In the nineteenth century, antislavery lawyers brought freedom suits for their slave clients and sought to invalidate the fugitive slave laws and prevent the extension of slavery into new territories.

The most famous and effective uses of lawsuits to create new rights were, of course, those of civil rights and civil liberties organizations like the NAACP Legal Defense Fund, the National Lawyers' Guild, and the ACLU, among others, on behalf of African Americans, women, political and religious dissenters, labor, the disabled, and gays and lesbians. This was lawyering for a cause, but also lawyering for clients who could not find other lawyers. The NAACP and other movement lawyers represented black criminal defendants whom no Southern lawyer, black or white, could act for without risking loss of all his other clients, as well as movement activists and demonstrators served with injunctions or thrown into jail. Guild lawyers acted for accused communists shunned by the respectable bar. The ACLU was founded to represent pariahs like labor organizers and anti-World War I protestors.<sup>24</sup> These movements were largely staffed by lawyers marginal to the higher reaches of their profession: racial minorities, Jews, women, and a few maverick patricians.

As with federal legal services, the successes of these legal strategies on behalf of social movements inspired attempts to cripple the lawyers and legal organizations that staffed them. In the civil rights era after *Brown v. Board of Education*, the cream of the establishment bar in the South worked with officials to hobble

the public interest lawyers who brought claims to challenge racial segregation and defend protestors from arrest and prosecution. The states demanded lists of NAACP members, accused lawyers in group practices of ethical violations like soliciting clients, and brought suits for stirring up litigation.<sup>25</sup> Most of these efforts were ultimately rebuffed by the Supreme Court, which carved out an exception to the antisolicitation rules for non-profit public interest lawyers.<sup>26</sup> In the civil rights era, liberal Congresses and judges also created new avenues for private plaintiffs to enforce antidiscrimination statutes, often through the incentive that, if successful, their lawyers could recover attorney fees from the losing side.

“Equal justice under law” sounds like an uncontroversial slogan. But claims to equal rights are also claims to redistribution of resources, status, and authority: when groups shut out of the justice system get lawyers to make those claims effective, the result can be to sharply challenge existing hierarchies of wealth, power, and status. The rights revolution provoked a severe backlash.

Conservative Supreme Courts since the 1980s have cut back the doctrines and remedies favored by liberal courts in the 1960s and 1970s. Conservative judges are generally reluctant to find that Congress has authorized private rights of action unless it has said so explicitly.<sup>27</sup> They are more likely to insist on proof of discriminatory intent, as well as disparate impact, in hiring practices; and to disfavor comprehensive remedies such as structural orders to desegregate school systems or to institute compensatory affirmative action hiring plans.

The Court has also made plaintiffs' cases more difficult to prove and finance. It has tightened pleading rules to impose more procedural roadblocks to get

to discovery; heightened plaintiffs' burdens of proof while enlarging defenses; severely cut back on punitive damages awards; and made it much harder for public interest plaintiffs to recover attorney's fees by denying fee awards if defendants agree to settle.<sup>28</sup> In an important string of recent decisions, the Court has approved the now widespread practices of mandatory arbitration clauses in employment and consumer contracts, by which employers require their employees, and consumer products and financial services sellers require their customers, to submit all of their disputes to arbitration and to forgo class actions. The Court has held that federal law preempts and invalidates many state laws that attempt to regulate such practices.<sup>29</sup> By denying plaintiffs the ability to aggregate claims, the Court effectively precludes them from addressing and trying to deter and remedy widespread small violations (such as imposing hidden fees). In some contexts – such as nursing homes that mistreat or neglect their vulnerable patients – that removes any incentive for lawyers to accept cases even to avert horrendous harms.

Criminal prosecution is the sharp end of the state, its most coercive process short of war. Lawyers have long been aware that having a good lawyer who can afford to challenge the state's evidence and sway a jury confers significant advantages on a criminal defendant. So important was the right to counsel considered that it was enshrined in the early constitutions. Yet the great majority of defendants are indigent. They cannot buy an adequate defense on the market. Nineteenth-century courts gave some recognition to the problem by appointing counsel in serious felony cases, especially capital cases. Some of the law reform-minded bar groups formed in the Progressive Era (not the

ABA) began to recognize the problem. There followed a long history of reports and initiatives to try to solve it.

A new urgency to fund criminal defense came from Supreme Court decisions requiring states to provide for indigent defense of federal felony defendants (1938), state felony defendants (1963), and, finally, all accused facing loss of liberty (1972). States responded variously: some expanded existing public defender offices, others (like most states of the Old Confederacy) assigned counsel – often the dregs of the bar – to represent accused persons, but paid so little (like \$500 for a capital case) that all any counsel could hope to get for her client was a hastily negotiated guilty plea. Meanwhile, the wars on crime and on drugs, following a spike in violent crime peaking around 1990, effectively transferred charging and sentencing discretion from judges to prosecutors, reducing even further defense counsel's only leverage – the credible threat to take a case to trial – in plea negotiations. Now, fifty-five years after *Gideon v. Wainwright*, criminal defense remains in a state of crisis.<sup>30</sup> Despite many publicized exonerations of defendants in capital cases wrongly convicted by the state's misconduct or mistakes, funding for criminal defense has little popular support – in part because most defendants are black or brown – and almost no effective political lobby, though by now the organized bar has taken up its cause.

Contrast England and Wales. After World War II, under pressure to reduce enormous class disparities among a people who had shared equally in wartime sacrifice, the government resolved to try to make the common-law courts, which had been priced far out of the range of most citizens, more accessible. (The pre-war and wartime governments tried to compensate by funding Citizens Advice

Bureaus that dispensed informal advice to people with legal, or potentially legal, problems. These still exist: there is no law in England giving the profession the monopoly over advice-giving.) The route chosen was a form of judicare: Parliament provided a generous system of state support for solicitors and barristers to represent the indigent. By the 1960s, barristers were receiving over half their collective income from legal-aid cases.

A series of governments, beginning with Margaret Thatcher's conservative one and followed by conservative and neoliberal ones, decided this scheme was too costly and wasteful, and have gradually dismantled it in favor of central state control over lawyers' costs and outsourcing to nonprofit providers of more "holistic" services that favor mediation and conciliation over adversarialism in family cases. Personal-injury cases are now, as in the United States, financed by contingent fees. Since 2000, control over providers has been tightened further, subordinating clients' welfare and rights entirely to budgetary concerns, abandoning audits of quality, and leaving to providers how to deal with exploding caseloads.<sup>31</sup> The legal profession's responses to these changes have been mixed. Initially, they were outraged by some of the reforms targeting their traditional privileges, like barristers' monopoly of rights of audience in courts, and solicitors' monopoly of conveyancing practices.<sup>32</sup> More recently, however, lawyers and judges have rallied to protest cuts in legal services budgets and to try to protect rule-of-law values in a system of administrative controls.

The highest barriers to access to the legal system are its complexity and costs.<sup>33</sup> Complexity calls for personnel with the training to deal with it, and their time and that of the other experts who support

their work – forensic accountants, scientific and medical experts, and the like – is expensive. Some blame the complexity of law on lawyers themselves, and there is probably some truth to that charge. But the most likely cause is that a pluralist, fragmented political system like the United States' proliferates multiple and conflicting laws, and interpretations of those laws, to satisfy the demands of interest groups. Legal procedures are distended to meet the capacities and budgets of their highest-end users: business corporations.<sup>34</sup> The adversary system adds extra expense because investigating facts is left to the parties, their lawyers, and their hired experts rather than to a neutral magistrate as in Europe. Litigation seems not to have been expensive in the nineteenth century, but became much more so in the twentieth, even though actual trials have almost vanished in civil and criminal cases.

Cost and complexity naturally give rise to counterpressures to reduce both. Some well-known studies of litigation rates over time show that with industrialization, they rise sharply, but then start to decline. The reason suggested is that many areas traditionally handled in courts become routinized in administrative procedures, or shunted off to more informal dispute-settlement.<sup>35</sup>

There are several examples within the American judicial system:

Compensation for employee injuries beginning around 1910 were shifted out of the tort system into administrative workers' compensation systems. (Lawyers were at first excluded from the claims system, but forced themselves, and then were allowed, back in.)

Claims for auto accident compensation were, early in the twentieth century, largely relegated to insurance agency adjusters, who determined the merit and value of claims, with the courts as

*A Brief History* a backstop for unsettled cases.<sup>36</sup> Minor “soft-tissue” injuries from accidents are increasingly the province of settlement mills, which send demands for compensation to insurance companies, take a cut of the proceeds, and never try cases.<sup>37</sup>

The veterans benefits claim system from the Civil War to 1988 excluded lawyers by providing they could be paid no more than \$10 per case.<sup>38</sup>

Divorce has been mostly delegalized, taken out of the court system by no-fault divorce, and self-help form-filling in uncontested cases. Many divorce lawyers’ offices now offer mediation services to clients.<sup>39</sup>

More ominously, as mentioned above, many tort and contract claims that might otherwise be heard in courts have been relegated to arbitration by mandatory arbitration clauses in most consumer and employee contracts.

Federal immigration rules permit certain kinds of nonlawyer advisors to act for immigrants.<sup>40</sup>

Another project of the organized bar that has obstructed access to justice, broadly conceived, has been its sustained efforts to maintain its monopoly over advice-giving that has any legal component. Throughout the twentieth century, using statutes prohibiting the “unauthorized practice of law,” the bar has fought turf wars with many competitors, some won and some lost.<sup>41</sup> The bar ceded most tax preparation work to accountants, and real-estate closings in many states to title companies and realtors. It is currently challenging firms like LegalZoom and RocketLawyer, which supply mostly standardized legal services for relatively routine transactions.

Many current proposals are in the air to relax unauthorized practice rules to allow paraprofessionals who have gone through a short training and certification

program to help clients navigate disputes and adverse government actions. Segments of the organized bar, although still mounting phalanxes of resistance, have begun to perceive the inutility and bad public relations of resisting nonlawyer involvement in markets its monopoly does not serve. There are many areas of practice in which specialized paraprofessional providers could give better service than barely competent generalist graduates of law schools (immigration law is a prime example).

An ABA Commission on Nonlawyer Practice recommended in 1995 that unauthorized-practice rules be relaxed to permit the licensing of paraprofessionals.<sup>42</sup> The ABA ignored the report. In 2012, the Supreme Court of Washington State agreed to license paralegals, but, as of 2018, they were limited to twenty-eight paralegals in family practice, regulated by the state bar, and not allowed to appear in court; and they face hostility from family lawyers.<sup>43</sup> In general, it is unrealistic to expect bar associations, representing a profession facing high levels of unemployment among recent law graduates, to go very far to welcome competing providers.

In the profession’s long history, leading lawyers and judges have recognized and sporadically acted on the profession’s public obligations to open paths to legal services for relatively poor people. They have frequently acknowledged that the ideal of the rule of law requires universal access to justice. The profession’s ideals have inspired some of its exceptional members to devote their careers to serving and promoting service to poor or unpopular clienteles. Those ideals and their heroic exemplars still lead students to apply to law schools and, once in practice, to seek out occasions for pro bono work or charitable or government service.

But most lawyers, most of the time, are concerned with making a profitable living, and not much interested in supplying or financing legal services for others: they put their own interests first, then their clients', and only as an afterthought, the public's and nonpaying clientele's. More disturbing, lawyers for powerful clients facing opposition from weaker adversaries have proved all too willing to subvert the ideals of equal access to law, under the pretext of economic efficiency, by denying a level playing field to lawyers for the other side. Remember, for example, the campaigns against the tort plaintiff's bar and for mandatory arbitration clauses in employment and consumer contracts, and the attacks on law reform efforts of legal services and on fee awards supporting the public interest and civil rights bars.<sup>44</sup>

Professional organizations such as bar associations have always had a dual character: they are official spokesmen for the public aspirations of the profession to serve the ideals of the rule of law and universal justice, and often sponsors of programs to make the ideals effective; but

they are primarily guilds whose aim is to protect and expand monopoly domains for their members' work, demand for their services, and their fees and profits. When those public aims and the guild's interests conflict, the leaders and the rank-and-file of the bar tend, not surprisingly, to favor the guild's. Initiatives to make justice more accessible have been more likely, when they come, to originate with those marginal to or outside of the profession.

European societies have long accepted the responsibilities of providing legal services, just as they provide health care, to people who cannot afford them as basic responsibilities of the state.<sup>45</sup> In the United States, the government underwrites over half of the cost of health care (through Medicare, Medicaid, and programs of the U.S. Department of Veterans Affairs). But for legal services, we are still depending on direct client funding plus a stingy and hobbled federal program and a mishmash of volunteer and philanthropic efforts. That is no way to run a system that aspires to equal justice.

#### ENDNOTES

<sup>1</sup> If empirical support is needed for so obvious a proposition, see the classic study of the Chicago Bar: John P. Heinz, Robert L. Nelson, Rebecca L. Sandefur, and Edward O. Laumann, *Urban Lawyers: The New Social Structure of the Bar* (Chicago: University of Chicago Press, 2005).

<sup>2</sup> James A. Brundage, "Legal Aid for the Poor and the Professionalization of Law in the Middle Ages," *American Journal of Legal History* 9 (169) (1988): 171, 174.

<sup>3</sup> David J. Seipp, "Legal Services for the Poor in the Early Common Law," in *Law and Society in Later Medieval England and Ireland: Essays in Honour of Paul Brand* (Abingdon, United Kingdom: Routledge, 2018), discussing An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, Statute 11 Hen. 7, chap. 12, reprinted in *Statutes of the Realm*, vol. 2 (1495), 578.

<sup>4</sup> See Christopher W. Brooks, "Litigation and Society in England, 1200–1996," in *Lawyers, Litigation and English Society Since 1450* (London: Hambledon Press, 1998), 63, 94–95.

<sup>5</sup> For the pioneering role of the women's societies, see Felice Batlan, *Women and Justice for the Poor: A History of Legal Aid, 1863–1945* (Cambridge: Cambridge University Press, 2015).

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- <sup>8</sup> The restrictions on LSC-funded lawyers are summarized at Legal Services Corporation, “About Statutory Restrictions on LSC-Funded Programs,” <https://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs>. For more information on their effects, see Brennan Center for Justice, *Restricting Legal Services: How Congress Left the Poor with Only Half a Lawyer* (New York: Brennan Center for Justice, New York University School of Law, 2000).
- <sup>9</sup> The definitive history of OEO-LSP and LSC is by one of the program’s early directors, Earl Johnson Jr., *To Establish Justice for All*.
- <sup>10</sup> See Scott Cummings, “The Politics of Pro Bono,” *UCLA Law Review* 52 (1) (2004): 116–123.
- <sup>11</sup> Deborah L. Rhode, *Access to Justice* (Oxford: Oxford University Press, 2004), 148–151.
- <sup>12</sup> *Ibid.*, 154–155.
- <sup>13</sup> Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford: Oxford University Press, 1976).
- <sup>14</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); and *Ohralik v. Ohio State Bar*, 446 U.S. 447 (1978).
- <sup>15</sup> John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, Mass.: Harvard University Press, 2009), chap. 4.
- <sup>16</sup> See, for example, Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books/St. Martin’s, 1991); Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America’s Rule of Law* (New York: Truman Talley Books/St. Martin’s, 2003); and Philip K. Howard, *The Death of Common Sense: How Law is Suffocating America* (New York: Random House, 1994).
- <sup>17</sup> See, for example, John C. Coffee Jr., “Class Wars: The Dilemma of the Mass Tort Class Action,” *Columbia Law Review* 95 (1343) (1995).
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- <sup>20</sup> Class Action Fairness Act of 2005 (CAFA), 28 U.S. Code § 1332(d).
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- <sup>24</sup> See Mark Tushnet, “The Rights Revolution in the Twentieth Century,” in *The Cambridge History of Law in America*, vol. 3, ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 377–402.
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- <sup>31</sup> See Hilary Sommerlad, “Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid,” *Journal of Law and Society* 31 (345) (2004).
- <sup>32</sup> Richard L. Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford: Oxford University Press, 2004).
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- <sup>38</sup> Codified in 38 U.S. Code § 3404(c)(2).
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- <sup>44</sup> For a catalog of several such efforts, see David Luban, “Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers,” *California Law Review* 91 (209) (2003).
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# The Twilight Zone

*Nathan L. Hecht*

The television drama *The Twilight Zone* portrayed characters in disturbing situations set in the murky area between reality and the dark unknown. Most episodes had a moral. Here's my thought for a new one: You're driving across the country. It's late afternoon, you haven't eaten for hours, and hunger's starting to gnaw at you. You enter a town, eager to find food. You're about to enter the twilight zone.

The first place you stop is lit up with a big neon sign. You get out of your car and walk up to the front door. It's locked and dark. "That's strange," you think. Other places are open, and the sign is all lit up, but this place is closed. "I'll take my business elsewhere," you mutter as you walk back to your car.

You drive down the street. There's another place. It, too, is all lit up, and this time you see people inside. You get out of your car and walk up to the door, but again, it's locked. You pound on it, but no one inside seems to notice. Beside the door, there's a machine with a sign on it: "To enter, please insert cash. \$100 bills only." You think, "That's outrageous. Just to get something to eat? No way."

Frustrated, you drive farther down the street. You come to another place, and this time there's a fellow sitting out front. You tell him you're looking for something to eat. "You a member?" he asks. "Member?" you respond, "This isn't a club! I just need something to eat." "Nope," he says, "not a member. You don't belong here." You turn on your heels and stomp back to your car.

This is getting crazy, but hope lies ahead: another place, this one with the lights on, the door open, and lots of people inside. Finally, you think, some food. Inside, you're handed an order form, several pages long and complicated. You must order with codes, but you have no idea what they are. "This is impossible," you think. You look around. All the food that's offered requires extended, professional preparation, and is expensive. Nothing simple for a hungry traveler.

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Despairing, you wander out, and a voice behind you says, “Have a nice day. Come back any time.” What kind of town has nothing for an ordinary person to eat? You trudge to your car. Dusk is falling. You’re in the twilight zone.

Food is important. So is justice. But for many, justice seems as far out of reach as food for my traveler. The signs out front are all lit up. The American commitment to the rule of law is fabled. When I was a trial judge, I told jurors as each case began: “You are privileged to be a part of the best system of justice not just in the world, but in the history of the world.” Most were proud to serve. But when people need the system to serve *them*, in far too many instances, it can seem beyond reach.

America’s claims about the nation’s justice system are lofty. James Madison famously wrote in Federalist No. 51: “Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”<sup>1</sup> His collaborator, Alexander Hamilton, is said to have called justice “the first duty of society.” Yet in poll after poll, Americans report that the justice system is too expensive, too hard to navigate, too far removed from real people, as closed as if the doors were locked. Across the country, millions of people try to represent themselves in court. Abraham Lincoln had it right: “He who represents himself has a fool for a client.” But for many, there is no other choice.

And far too many Americans have no idea they need the justice system. They have no way to recognize legal problems when they arise. They don’t know they’re “hungry.” Most distressing of all, many Americans’ view is that the justice system – like the government in general – is simply not “theirs.”

Much work is being done to improve access to justice. Lawyers, in a proud tradition of their profession, represent needy clients without charge – *pro bono publico* – for the *public* good. The Texas Bar Association estimated that lawyers in the state, where I am a judge, donate more than two million hours annually, conservatively worth half a billion dollars. Legal aid provides basic civil legal services free of cost to the poor and economically struggling: that is, people whose income is usually no more than 125 percent of the federal poverty guidelines (in 2018, \$15,175 for a single person). Funding comes from Congress through the federal Legal Services Corporation, sometimes from state appropriations and other public sources, and sometimes from bar associations and private contributions.

Legal aid, like *pro bono* legal services, is not an entitlement. It’s not welfare. It’s simply good government. This is an American idea, not a liberal one or a conservative one. As a judge sometimes identified as a conservative, I support improved access to justice because I am convinced this nation is strongest when its basic institutions fulfill their missions and, as a judge, I feel a special responsibility to help legal institutions fulfill theirs.

Basic civil legal services help: victims of domestic violence; veterans returning from deployment needing employment, housing, and benefits; children in school; and the elderly. Legal aid is compassionate and morally right. Helping individuals resolve legal problems strengthens families and communities. Legal aid is socially constructive.

Study after study, around the country, concludes that legal aid, directly and indirectly, benefits economies. Legal aid is good for businesses and taxpayers. Legal-aid providers offer cases and training to lawyers willing to work pro bono who have no other way of contacting poor clients needing help, thus leveraging legal-aid funding to provide more representation. Legal aid is efficient; the public gets far more than its money's worth. And legal aid makes the promises of the American justice system real when they would otherwise be a farce. In that way, legal aid is critical to the integrity of the rule of law.

Yet legal aid is available to only a fraction of those who need it: by some estimates, no more than half, by others, less than one-fifth. Justice for only those who can afford it is neither justice *for* all nor justice *at* all. If the justice system is to deliver on the faith America asks people to place in it and on the values it claims to preserve, greatly improved access to justice is an imperative.

#### ENDNOTES

- <sup>1</sup> James Madison, "The Structure of the Government Must Furnish the Proper Checks and Balances between the Different Departments," *The Federalist Papers*, No. 51 (1788).

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