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**WHAT WE KNOW AND NEED TO KNOW ABOUT
OUTREACH AND INTAKE BY LEGAL SERVICES PROVIDERS**

D. James Greiner *

Many of the contributors to this volume, including me, write in an effort to improve some element of access to justice. The right place to begin an effort to improve something is with the following question: what is that something for? It is hard to begin work on improving a thing without knowing the thing's purpose.

What are outreach and intake by civil¹ legal services providers (LSPs) for? As is true of most elements of our justice system, LSP outreach and intake have multiple purposes.² By notifying the eligible population of the services the LSP provides, outreach contributes to the generation of clients for the LSP to serve.³ Outreach can also build relationships with government agencies, charities, industry, and other service providers, relationships important for the LSP's service delivery.⁴ Intake elicits information used to determine eligibility for services (financial and otherwise),⁵ to identify the nature of the problem a potential client faces, and to assess whether the LSP has the know-how to address the problem.⁶ Intake also allows LSPs to express concern and to communicate empathy to a potential client, thereby beginning the process of attempting to induce feelings of well-being or hope, even if no services can or will be offered.⁷

But outreach and intake have other, perhaps less well appreciated, purposes. Outreach and intake are a primary mechanism by which LSPs select which portion of the otherwise eligible service population will receive services, and what services those selected will receive.⁸ To be more direct: LSPs choose their

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1. I consider only the case of civil legal services providers in this Paper. Outreach and intake by criminal legal services providers present different issues.

2. See *infra* text accompanying notes 8–17.

3. See STANDARDS FOR PROVIDERS OF CIVIL LEGAL SERVS. TO THE POOR § 6 cmt. at 34 (A.B.A. 2002) [hereinafter STANDARDS].

4. For example, the outreach efforts of an LSP participating with me in a study of the effectiveness of law student legal services include putting posters and notices in certain hospitals and doctors' offices that the LSP's service population frequents. The LSP almost always accepts for representation potential clients referred by these medical facilities. The reason is that the LSP provides assistance in SSI/SSDI disputes, and it often needs the medical facilities' assistance in building cases where its clients are in fact disabled.

5. See, e.g., Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321, 50 (1996) (prohibiting any entity receiving Legal Services Corporation funding from providing legal services to most non-citizens in the United States).

6. See, e.g., STANDARDS, *supra* note 3, § 2.1 cmt. at 40 (stating that the LSP should obtain sufficient information during intake to determine eligibility).

7. See *id.* § 1.1 cmt. at 26.

8. See *id.* § 2.2 cmt. at 41.

clients.⁹ LSPs choose what services those clients receive.¹⁰ In day-to-day LSP administration, clients have little say in the matter.¹¹ It could hardly be otherwise. When demand for services outstrips supply to such an extent that traditional attorney-client relationships can be offered only to a small fraction of eligible individuals,¹² then choice, rationing, and triage are inevitable. An LSP who chooses to accede to the wishes of an individual client who demands that all possible good faith efforts be made to address her individual legal problem thereby chooses to deny services to other similarly situated members of the service population.

How should LSPs choose which clients will receive services, and what services those clients will receive? There are a variety of frameworks available.¹³ Drawing on the medical ethics literature, Glenn Cohen evaluates the ethical desirability of several of the most familiar rationing frameworks in a 2013 article, including “first-come-first-serve, lottery, priority to the worst-off, age-weighting, best outcomes, and instrumental forms of allocation.”¹⁴

This Paper argues the following points. First, outreach and intake determine in large part the following aspects of any of the six forms of rationing Cohen identifies, or of any other method that an LSP might adopt: (i) which potential clients receive services; (ii) whether the implementation of the particular rationing system is, or can be made, coherent; and (iii) whether the services provided “succeed” in the sense of altering legal outcomes, including adjudicatory outputs.¹⁵ Second, at present, we know next to nothing about the prevalence of the different ways LSPs have chosen to conduct outreach and intake, the on-the-ground implications of those choices, nor whether it is possible to implement coherently some of Cohen’s six forms of rationing.¹⁶ Third, if the legal community’s response to resource shortages in access to justice is to move beyond bemoaning scarcity, protesting the importance of what

9. *Id.*

10. *See, e.g.*, REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 27 (Oct. 7, 2011), http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf (noting that some LSPs only offer certain kinds of services).

11. *See* Mary Helen McNeal, *Report of the Working Group on Limited Legal Assistance*, 67 *FORDHAM L. REV.* 1819, 1820 (1999).

12. Most would agree that such is the current status of U.S. legal services. *See* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 *YALE L.J.* 2118, 2122–23, 2122–23 nn.6–10 (2012) (distinguishing between nascent and expressed demand, and collecting citations on how both vastly outstrip current supply).

13. *See, e.g.*, I. Glenn Cohen, *Rationing Legal Services*, 5 *J. LEGAL ANALYSIS* 221, 224 (2013) (listing six possible rationing frameworks).

14. *Id.*

15. *See infra* text accompanying notes 18–37.

16. *See* Greiner & Pattanayak, *supra* note 12, at 2209.

we do, and issuing increasingly shrill and increasingly ignored demands for more resources, we need to know a great deal more about outreach and intake.¹⁷

I. OUTREACH AND INTAKE DRIVE THE RESULTS OF ANY TRIAGE SYSTEM

The implementation, coherence, and results of any form of rationing turn on LSP choices regarding outreach and intake.

A. Implementation

The implementation of any form of LSP triage depends on the LSP's choices regarding outreach and intake. To see why, suppose an LSP chooses either a first-come, first-serve or lottery method of rationing. Perhaps the LSP chose to follow the medical ethics arguments of James Childress in claiming that concerns of human dignity mitigate against LSPs making intentional choices among potential clients who present themselves.¹⁸ Or perhaps the LSP has chosen to deceive itself into thinking that a choice to use a first-come, first-serve method or lottery method of triage will prevent the LSP and its personnel from having to make hard decisions about which potential clients it will serve and what services those potential clients will receive.¹⁹

The question then becomes, how is it that potential clients line up in the queue (for a first-come, first-serve system) or enter the pool (for a lottery)? Rudimentary economics demonstrates that such questions are in part determined by what economists call "search costs."²⁰ "Search costs" are the effort, time, and attention a potential client who has recognized that she has a problem to which the formal legal system may provide a solution, and who has decided to address that problem via the formal legal system,²¹ must expend to find an LSP who might help her.²² Search costs exist, i.e., they are not zero. Analogously, for a

17. *See id.* at 2210.

18. James Childress, *Who Shall Live When Not All Can Live?*, 96 *SOUNDINGS* 237, 246 (2013).

19. One of my hopes in writing this Paper is to explode the myth that first-come, first-serve or lottery triage mechanisms allow an LSP or any individual lawyer to avoid such choices. *See* Justine A. Dunlap, *I Don't Want to Play God—A Response to Professor Tremblay*, 67 *FORDHAM L. REV.* 2601, 2607 (1999) (noting that a first-come, first-served or lottery method are deficient).

20. *See, e.g.*, Gerald E. Smith et al., *Diagnosing the Search Cost Effect: Waiting Time and the Moderating Impact of Prior Category Knowledge*, 20 *J. ECON. PSYCHOL.* 285, 286 (1999) ("A central thesis of economics . . . is that buyers search for information until the . . . search [costs] exceed [] the marginal benefit.").

21. By now, we know better than to assume that the recognition of a particular problem that can be solved by accessing the formal legal system will result with the decision to do so. Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS* 112, 112 (Pascoe Pleasence et al. eds., 2007).

22. For a somewhat dated review and study of search costs, *see generally* Smith et al., *supra* note 20 (examining the impact of different types of search costs on consumers of differing knowledge levels).

potential client, the LSP's process of undergoing intake is also costly. Completing intake requires time and organizational capacity; depending on how badly intake telephone lines or other systems are jammed, undergoing intake may also require persistence and patience, even doggedness.

Economists have long known that at least two things determine whether a search for some service or good is successful (or whether it is ever undertaken): the cost of the search and the extent of the searcher's prior knowledge.²³ As applied to the present context, these principles suggest that how hard an LSP is to find determines the kind of potential clients who will find it. In the case of an LSP that is harder to find, one would expect the resulting clients to be those with more prior knowledge of LSPs or law generally, or those with more ability to pay search costs. To be clear, potential clients "pay" search costs with their time, their attention, their determination, and their mental bandwidth, as they search for institutions to help with justiciable problems, figure out how to contact those institutions, then initiate and complete intake systems.

And here's the key point: there is little reason to think that clients that have more prior knowledge of LSPs, or greater ability to pay search costs, are a random sample of the eligible population. Nor is it likely that clients with either greater knowledge or greater ability to pay are among the more needy or vulnerable members of the service population. To the contrary, it seems likely that such clients have greater economic resources, stronger social networks and more ability to use them, greater knowledge of English and the Internet, etc. Similarly, one would expect clients with the capacity to survive an intake process to be those with more time, organizational capacity, persistence, stamina, and ability to advocate for themselves.

Economists have also long known that one way to reduce search costs is advertising,²⁴ i.e., outreach. Similarly, one would expect that shorter and more streamlined intake processes would allow potential clients with less time, organizational capacity, persistence, stamina, and advocacy skills to enter the hypothetical LSP's queue or lottery pool. If so, reducing search costs with outreach (or increasing search costs by ending or failing to conduct outreach) is likely to alter the set of clients who can "pay" (with time, mental energy) those costs. Streamlining or complicating intake should have the same effect.

The upshot of all of this is that an LSP's choices about outreach and intake determine the extent to which the LSP culls its client base. Note the choice of the words "extent to which." Some culling is inevitable, just as some rationing or triage is inevitable. The same resource constraints that prevent LSPs from offering a traditional attorney-client relationship to each eligible potential client who finds her way to an LSP's doorstep also prevent the LSP from appearing on each potential client's own doorstep to interview her regarding any potential

23. *Id.* at 286.

24. Kyle Bagwell, *The Economic Analysis of Advertising*, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1701, 1706 (Mark Armstrong & Rob Porter eds., 2007).

legal problems, known or unknown. Once an LSP decides that it will not make periodic visits at convenient times to the homes or offices of each member of its service population to conduct legal “check-ups,” search costs, rationing, triaging, and culling are a fact of life.

All of this is true with respect to first-come, first-serve and lottery triage mechanisms. One can see, then, that it must be equally true, if not more so, with other methods of rationing, such as priority to the worst-off, age-weighting, best outcomes, and instrumental forms of allocation. All other methods depend to some extent on using information gained at intake to target specific classes or categories of potential clients with varying levels and kinds of legal services.²⁵ As such, these other methods are more dependent on outreach (to find members of those favored classes or categories) and intake to support the contemplated targeting.²⁶

B. Coherence and Results

The above analysis goes a long way to demonstrating that outreach and intake determine the coherence and results of any form of rationing. This section provides additional discussion.

Regarding coherence, consider an LSP using a “best outcomes” method of triage, in which an LSP “looks at how much an individual will gain (or avoid losing) from the intervention as opposed to other possible” potential clients.²⁷ Performing this comparison depends on having accurate predictions about the future. Suppose that for a particular problem type (say, unemployment benefits), an LSP offers two levels of service, either a traditional attorney-client relationship or a self-help assistance packet.²⁸ To implement a best outcomes method of triage, an LSP must use the information gleaned at intake to predict two potential outcomes for the individual: the outcome the individual will experience if the LSP offers a traditional attorney-client relationship, and the outcome the individual will experience if the LSP offers a self-help assistance packet.²⁹ Only by comparing these two predicted potential outcomes can the

25. See, e.g., Cohen, *supra* note 13, at 276 (“LSPs would want to consider . . . way[s] in which their case selection would help remedy other existing actions harming their client population, . . . harms from clients that *never come about* because of the success of their litigation [] or the threat that they will represent a party aggrieved in the future.”).

26. See STANDARDS, *supra* note 3, § 1.6 cmt. at 35, § 2.1 cmt. at 39–40.

27. Cohen, *supra* note 13, at 258.

28. The choice of an attorney-client relationship or a self-help assistance packet is simply examples of different levels of interventions that an LSP might provide. The point stands regardless of the types of service the LSP offers.

29. See, e.g., Cohen, *supra* note 13, at 276 (explaining that the best outcomes method compares the predicted outcome of an individual to that of other possible claimants).

LSP determine how much the potential client will gain or lose at different service levels.³⁰

Alas, it gets harder. To implement a “best outcomes” determination, the LSP cannot concentrate on only the client it sees on a particular day. Instead, it must compare the potential outcomes of a particular potential client to those of potential clients that it anticipates it will see tomorrow, the next day, the next week, or the next month. The reason is, again, scarcity. Each time an LSP offers a scarce resource (such as a traditional attorney-client relationship) to one potential client, it prevents itself from making a similar offer to other potential clients.³¹ The coherence of a “best outcomes” approach depends on finding the “right” clients to whom to offer services, and knowing which clients are the “right” ones depends on predicting what will happen to them if they are offered different levels of service.³² Again, those predictions depend on intake information.

Predictions of potential outcomes can be difficult to make. It is hard to know at the conclusion of an intake what further factual investigation might reveal. Law is indeterminate, uncertain, and resistant to reduction to simple if-then statements.³³ Predicting what will emerge from a factual investigation is also a challenge. Potential clients’ recollections may not match information from records. Witnesses may say different things. And even in cases with clear law and straightforward facts, much may depend on the judge, the jury, or the opposition.

The point of all this is that an LSP has no hope of making the needed predictions unless it has elicited the right information at intake.³⁴ In this way, the coherence of a “best outcomes” triage mechanism depends on outreach and intake.³⁵ The ethical backbone of best outcomes is the promise of achieving some approximation of the greatest good for the greatest number in a consequentialist sense.³⁶ The fulfillment of such a promise, even approximately, presupposes that the LSP has enough of the right kind of potential clients

30. *Cf. id.* at 263 (explaining that the best outcomes method may give priority to those with strong chances of avoiding shorter sentences over those with poor chances of avoiding longer sentences).

31. *See, e.g., id.* at 258 (providing an example of a LSP that must choose between representing a death-eligible defendant or one or more defendants facing prison time).

32. *Cf. id.* at 258 (explaining that the best outcomes method compares the predicted outcome of an individual to that of other possible claimants).

33. DEBORAH CAO, *TRANSLATING LAW* 19 (Susan Bassnett et al. eds., 2007).

34. And the hope is to obtain the right information, not the most information. There is evidence from the study of triage in the medical context that human beings sometimes over accumulate information, and that human triage decisions based on protocols that use less information can be more effective than those that use more. GERD GIGERENZER & PETER M. TODD, *Fast and Frugal Heuristics: The Adaptive Toolbox*, in *SIMPLE HEURISTICS THAT MAKE US SMART* 3, 4 (1999).

35. *Cf. id.* (noting that triage methods which use less information are more effective than ones that use more information in the medical context).

36. *See* Cohen, *supra* note 13, at 268.

walking through its door and surviving its intake system, specifically, those clients for whom legal services can do the greatest good. Outreach and intake determine to a large extent whether this presupposition is approximately true.

A similar analysis can be conducted for most other rationing mechanisms. Their ethical justification depends on the client base they will produce, or on the ability of LSPs to make fine predictions and judgments, or both.

A similar argument demonstrates that outreach and intake determine, not just the coherence, but also the results, of a rationing process. Regardless of the triage system used, what comes in determines what comes out.³⁷ This is essentially a restatement of the point made in the previous section regarding the culling of the client base. While the previous section's discussion focused on how outreach and intake determined the kind of potential clients an LSP sees, the current argument depends on the idea that the kind of potential clients an LSP sees affects the results the LSP will be able to achieve on their behalf.

II. WE KNOW LITTLE ABOUT LSP OUTREACH AND INTAKE

It is hard to prove the absence of knowledge. One way to start is to describe what knowledge about outreach and intake might look like, if we had it. A knowledge base about outreach and intake might include theories about what outreach and intake are for. As suggested above, they can serve multiple purposes. Probably, then, which methods of conducting outreach and intake are best depends on what set of purposes an LSP is attempting to further. Discussion of such normative principles would be useful.

Next, a knowledge base about outreach and intake might include factual information about what methods LSPs currently use, or used in the past, and the prevalence of such methods. Given the dizzying variety of LSPs in the United States,³⁸ and the equally dizzying variety of services offered,³⁹ one might not expect a comprehensive listing, even as of any one point in time. But some identification of methods and quantification of frequency would be helpful.

Finally, one might hope to see evaluations of various outreach and intake methods. Particularly useful would be head-to-head, randomized evaluations comparing the capacities of different outreach and intake strategies in terms of each's capacity to further pre-specified outcome variables. Andrea Matthews and I are conducting one such evaluation. At the request of an LSP, we designed an outreach strategy intended to persuade debt collection defendants to attend court, where an LSP's lawyer was available to assist them for the day.⁴⁰ We

37. See, e.g., Greiner & Pattanayak, *supra* note 12, at 2124 (explaining that the outreach and intake system's selection of clients may affect the outcome).

38. SANDEFUR & SMYTH, *supra* note 10, at 9.

39. *Id.*

40. D. James Greiner & Andrea J. Matthews, *The Problem of Default* pt. III.A. (Feb. 17, 2015) (draft on file with author). As of the time of this writing, only about half of the outcome data for this study is available, so we have not yet publicly circulated our draft.

tested our outreach strategy with a randomized control trial comparing a no-intervention control group's attendance rate to that of two intervention groups.⁴¹ There is at least one other ongoing randomized evaluation of a medical-legal partnership, in which a major medical facility is used as an entry point for an LSP's services.⁴² There is no evidence of any other randomized evaluations of outreach and intake programs at this time.

In general, our lack of knowledge of outreach and intake is emblematic of a larger problem. "At the national level and within most states, civil legal assistance is organized much like a body without a brain: it has many operating parts, but no guiding center."⁴³ A brain is a good thing to have. A brain can perform many useful functions, such as thinking about what we should do, accumulating knowledge about what we are doing, and evaluating what works. If we only had a brain.

III. CONCLUSION: WE NEED TO KNOW MORE ABOUT OUTREACH AND INTAKE

We need to know more about outreach and intake. The implementation, coherence, and results of the systems LSPs rely on to address the extreme scarcity that characterizes all aspects of the civil legal assistance system depend on something about which we know almost nothing. Under such circumstances, we have as much hope of having a modestly effective civil legal assistance system as a stopped clock has hope of telling the correct time. For a community that purports to care about the population it services, such a situation is intolerable.

41. *Id.* at pt. III.E.1.

42. M.B. Curry et al., Health Education Advocacy and Law Program (HEAL): A Randomized Pilot Study (Abstract Presentation, Medical-Legal Partnership National Meeting, Seattle, WA, Apr. 2014) (discussion of preliminary findings).

43. SANDEFUR & SMYTH, *supra* note 10, at 21.