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WHAT WE KNOW AND NEED TO KNOW ABOUT THE LEGAL NEEDS OF THE PUBLIC

Rebecca L. Sandefur^{*}

In contemporary market democracies, law reaches deeply into many aspects of daily life. Thousands of Americans every day find themselves facing troubles that emerge “at the intersection of civil law and everyday adversity,” involving work, finances, insurance, pensions, wages, benefits, shelter, and the care of young children and dependent adults, among other core matters.¹ Though these different types of problems affect different aspects of people’s lives and concern different kinds of relationships, they are defined by a central important quality: they are *justiciable*. They have civil legal aspects, raise civil legal issues, have consequences shaped by civil law, and may become objects of formal legal action.²

This Paper reviews what we know about the civil legal needs of the public, focusing on the U.S. context but drawing on research from peer nations as well. In so doing, the Paper reveals some key gaps in our knowledge. Across a range of studies, we have good evidence that:

- Experience with civil justice situations is common and widespread, affecting all segments of the population.³ Many involve “bread and butter issues” at the core of contemporary life, affecting livelihood, shelter, or the care and custody of dependents.⁴
- Populations that are vulnerable or disadvantaged often report higher rates of contact with civil justice situations, and greater incidence of negative consequences from these events.⁵
- Most civil justice situations will never involve contact with an attorney or a court.⁶
- The most important reasons that people do not take their civil justice situations to law are:

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1. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 52 (2010) [hereinafter *Impact of Counsel*]; Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 113 (Pascoe Pleasence et al. eds., 2007) [hereinafter *Importance of Doing Nothing*].

2. HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 12 (1999) (defining “justiciable event”).

3. See *infra* Part I.A.

4. See *infra* Part I.A.

5. See *infra* Part I.B.

6. See *infra* Part II.

- (1) they do not think the issues are legal or consider law as a solution; and
- (2) they often believe that they understand their situations, and are taking those actions that are possible.⁷
- The cost of legal services or court processes plays a secondary role in people's decisions about how to handle the civil justice situations they encounter.⁸

Paradoxically, despite the stylized facts we often deploy in our arguments and advocacy, we do not know the answers to some of the million dollar questions. To be specific, we do not know:

- How many civil justice situations are actually civil legal needs;
- How many civil legal needs go unmet; and
- How civil legal needs affect the people who experience them and society at large.

I. WHAT WE KNOW

A. *Civil Justice Situations Are Common and Widespread, Affecting all Segments of the Population*

Our best evidence on the frequency of civil justice situations comes from surveys of the public. The typical method for assessing the prevalence of civil justice situations is to first develop a list of specific events that people might experience, each carefully selected to raise issues in civil law. These lists describe the events in lay rather than legal terms, so that they are recognizable to the people who may have experienced them.⁹ In the U.S. context, studies frame these situations for respondents not as legal issues or justice problems but rather as “things that were happening” or “situations you may have experienced.”¹⁰ Such lists might include, for example, situations such as: “being behind on and unable to pay utility bills,” “being fired,” or “insurance companies unfairly rejecting claims.”¹¹ The list is presented to a representative sample of people or

7. *See infra* Part III.

8. *See infra* Part III.

9. PASCOE PLEASENCE ET AL., PATHS TO JUSTICE: A PAST, PRESENT AND FUTURE ROADMAP 4 (2013) [hereinafter PLEASENCE ET AL., PATHS TO JUSTICE].

10. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 5 (2014) [hereinafter ACCESSING JUSTICE].

11. *Id.* at 7.

households, who are asked whether they have experienced each event during some reference period, such as three years or eighteen months.¹²

Though extant studies query many of the same events, there is no scholarly consensus on what exactly would constitute the full landscape of possible justiciable situations experienced by the public. Most studies inquire about situations related to consumer matters, government benefits, employment, housing, relationship dissolution and child custody, debt, and discrimination.¹³ Some ask about immigration, health, and other issues.¹⁴ Even the most extensive lists produce underestimates of the incidence and prevalence of justice situations: people forget some of the events they have experienced and so fail to report them.¹⁵

Civil justice situations are experienced across the population, by rich and poor, young and old, men and women, all racial groups, and all religions.¹⁶ All of the national data in the U.S. context are decades old, but conservative estimates based on their reports suggest as many as half of American households are experiencing at least one significant civil justice situation at any given time.¹⁷ More contemporary studies find even higher prevalence rates.¹⁸ In “Middle City,” a middle-sized city in the Midwest, a 2013 survey found that two thirds of

12. See Albert W. Currie, *The Legal Problems of Everyday Life*, in 12 SOCIOLOGY OF CRIME, LAW, AND DEVIANCE: ACCESS TO JUSTICE 1, 5 (Rebecca L. Sandefur ed., 2009); PLEASENCE ET AL., PATHS TO JUSTICE, *supra* note 9, at 6, 22.

13. PLEASENCE ET AL., PATHS TO JUSTICE, *supra* note 9, at 20–21 tbl.5.

14. *Id.*

15. See Pascoe Pleasence et al., *Failure to Recall: Indications from the English and Welsh Civil and Social Justice Survey of the Relative Severity and Incidence of Civil Justice Problems*, in SOCIOLOGY OF CRIME, *supra* note 12, at 44.

16. ACCESSING JUSTICE, *supra* note 10, at 7; Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. OF SOC. 339, 340 (2008) [hereinafter *Access to Civil Justice*].

17. AM. BAR ASS'N, CONSORTIUM ON LEGAL SERVS. & THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS; MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 8 tbl.3-1 (1994) [hereinafter LEGAL NEEDS AND CIVIL JUSTICE]. See generally BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 100 (1977) (stating that the mean number of problems reported were 4.8 per person); MATTHEW SILBERMAN, THE CIVIL PROCESS: A SEQUENTIAL MODEL OF THE MOBILIZATION OF LAW 33 (Donald Black ed., 1985) (stating that in a Detroit based survey of 1038 householders there were 2778 “everyday disputes” reported); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Accessing the Adversary Culture*, 15 L. & SOC'Y REV. 525, 536 (1980-1981) (stating that at least forty percent of households reported a grievance in a three year time frame).

18. ACCESSING JUSTICE, *supra* note 10, at 7. The temptation to tell a story about change over time may be strong when looking at these two surveys, but should be resisted for the present. The ABA study asked about 67 specific civil justice situations, while the Middle City study asked about 98. At the very least, one would want to compare findings for the subset of situations that is comparable across the two studies, before drawing conclusions about changes in the American public's behavior since the 1990s. See generally PLEASENCE ET AL., PATHS TO JUSTICE, *supra* note 9, at 1 (discussing “methodological issues, bring[ing] together findings, assess[ing] the impact of, and provid[ing] guidance and resources for the future development of surveys of justiciable problems”).

a representative sample of adults reported experiencing at least one civil justice situation in the eighteen months prior to the survey.¹⁹ The United States is a large nation, and these figures imply well over 100 million Americans living with civil justice problems, many involving what the American Bar Association has termed “basic human needs,” such as livelihood, debts and credit, shelter, and the care of dependents.²⁰

While these rates may seem high, the pattern is common across developed nations.²¹ Depending on how many civil justice events are queried, which kinds are queried, and the length of the reference period for their occurrence, surveys of the public in a range of market democracies find that between a fifth and two thirds of people or households report civil justice situations.²² This tremendous volume of civil justice activity is a consequence of the fact that contemporary societies have institutionalized in civil law a large share of the routine stuff of life.²³ For example, employment law shapes our work relationships; probate and family law shape our personal relationships; we conduct our relationships with the people and organizations that provide us goods and services under the rule of contract law and the supervision of government regulators. We live in a “law-thick world” where many common relationships and routine activities are governed by laws and regulations and can become objects of formal legal action by someone under some aspect of these.²⁴

B. Vulnerable and Disadvantaged Populations Report Higher Rates of Contact with Civil Justice Situations, and More Negative Consequences of Them

Civil justice situations affect not only the poor or other vulnerable groups, but occur across the population.²⁵ Little research systematically compares civil justice experience across groups.²⁶ However, that work often finds that, while

19. *Id.* at 4, 7.

20. *Id.* at 7, 16 (citing *The Impact of Counsel*, *supra* note 1, at 56; *Importance of Doing Nothing*, *supra* note 1, at 113).

21. PLEASENCE ET AL., PATHS TO JUSTICE, *supra* note 9, at 30.

22. Currie, *supra* note 12, at tbl.1 (reviewing findings from a dozen studies in eight countries); PLEASENCE ET AL., PATHS TO JUSTICE, *supra* note 9, at 5, 7–8 tbl.2 (reviewing the research design of studies in 14 countries).

23. Currie, *supra* note 12, at 2.

24. Gillian K. Hatfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 130–31, 152 (2010).

25. See LEGAL NEEDS AND CIVIL JUSTICE, *supra* note 17, at tbl.3-1.; CURRAN, *supra* note 17, at 101; ACCESSING JUSTICE, *supra* note 10, at 7; SILBERMAN, *supra* note 17, at 51; Leon H. Mayhew, *Institutions of Representations: Civil Justice and the Public*, 9 L. & SOC’Y REV. 401, 401, 405 (1974-75); Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 952 (2008-09) [hereinafter *Fulcrum Point*].

26. *Access to Civil Justice*, *supra* note 16, at 346–47.

all groups experience civil justice problems, the weight of them does not fall equally. For example, in the Middle City study, poor people (those eligible for federally funded civil legal assistance) were about 30% more likely to report civil justice problems than were people with incomes in the top quintile.²⁷ African Americans and Hispanics were more likely to report problems than were Whites.²⁸ People who are unemployed, who suffer from an illness or disability, and people who are younger report more situations than the employed, the well, and the elderly.²⁹ Certain life transitions—relationship dissolution and job loss, for example—are also associated with an increased incidence of civil justice problems.³⁰

Little research documents the consequences of civil justice situations in the United States (see below), but work that does so finds that not only problems but also adverse consequences of those problems are unequally distributed.³¹ Justice situations and their adverse impacts often cluster in the lives of the people who experience them.³² These “mounting problems” pile upon some groups in the population more quickly than others.³³ In the Middle City study, poor people were significantly more likely than higher income people to report negative consequences from the experience of civil justice situations, such as lost income, fear, and ill health.³⁴

II. MOST CIVIL JUSTICE SITUATIONS WILL NEVER INVOLVE CONTACT WITH AN ATTORNEY OR A COURT

While civil justice problems are common in the United States, turning to the legal system to try to handle them is not. A minority of the American public’s civil justice problems are ever taken to lawyers in the hopes of securing advice

27. ACCESSING JUSTICE, *supra* note 10, at 8–9 Figure 3.

28. *Id.*

29. PLEASENCE ET AL., PATHS TO JUSTICE, *supra* note 9, at 30–31 tbls.7–9.

30. PASCOE PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES: BUILDING ON THE EVIDENCE BASE: A DISCUSSION PAPER 109 (2014), [http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/Reshaping_legal_assistance_services_web.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/Reshaping_legal_assistance_services_web.pdf) (citing CHRISTINE COUMARELOS ET AL., LAW & JUSTICE FOUND., LEGAL AUSTRALIA-WIDE SURVEY: LEGAL NEED IN AUSTRALIA 14 (Geoff Mulherin ed., 2012), [http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/LAW_Survey_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf)).

31. See ACCESSING JUSTICE, *supra* note 10, at 8, 10 (stating that low income households were more likely to report civil justice situations and negative consequences of those situations than higher income households).

32. See Pascoe Pleasence et al., *Multiple Justifiable Problems: Common Clusters and Their Social and Demographic Indicators*, J. EMPIRICAL LEGAL STUD. 301, 302 (2004) [hereinafter *Multiple Justifiable Problems*].

33. See Pascoe Pleasence et al., *Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 67, 79 (Pascoe Pleasence et al. eds., 2006) [hereinafter *Mounting Problems*]; *Multiple Justifiable Problems*, *supra* note 32, at 319–20.

34. ACCESSING JUSTICE, *supra* note 10, at 9–10 Figure 4.

or representation.³⁵ The Middle City study found that people took just over a fifth (22%) of their civil justice situations to someone outside their immediate social network, and only some of those made it to lawyers: 8% involved contact with a lawyer and 8% had court involvement of some sort.³⁶ The most recent U.S. national survey, from the early 1990s, found that 24% of situations were taken to attorneys, and 14% involved courts.³⁷ When ordinary Americans face civil justice problems, turning to law is a relatively uncommon response.³⁸

Though Americans seldom go to law with their justice problems, they frequently try to do something about them. The most common course of action is self-help: trying to handle the situation on one's own.³⁹ When Americans do connect with assistance, they go to a wide range of sources, including churches, housing counselors, social workers, city agencies, national membership organizations, the Better Business Bureau, and their elected representatives.⁴⁰ In the Middle City study, people reported doing "nothing" in response to 16% of situations.⁴¹ Doing nothing is more common for some groups than for others.⁴² A study of people's experiences with money and housing problems found that poor people were more likely to do nothing about such problems than were people who were not poor.⁴³ As we will see below, perhaps surprisingly, the cost of doing something was not a prominent reason reported for inaction.⁴⁴

III. PEOPLE OFTEN DO NOT THINK OF JUSTICE PROBLEMS IN TERMS OF LAW OR RIGHTS, NOR CONSIDER LAW AS A SOLUTION

Among the most important reasons that people do not take their justice problems to lawyers or other legal professionals is that they usually do not think of the problems as legal. As socio-legal scholars have long recognized, the legal nature of any given civil justice problem is socially constructed.⁴⁵ A range of

35. *Id.* at 11–12.

36. *Id.*

37. LEGAL NEEDS AND CIVIL JUSTICE, *supra* note 17, at tbl.5-1. See also Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875 (2008).

38. ACCESSING JUSTICE, *supra* note 10, at 11.

39. *Id.*; see also *Fulcrum Point*, *supra* note 25, at 961 (stating that people use the solutions they know are available to them to solve their problems, and one of these solutions is to use self-help).

40. Laura Nader, *Alternatives to the American Judicial System*, in NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 3, 13 (Laura Nader ed., 1980); ACCESSING JUSTICE, *supra* note 10, at 11; *Fulcrum Point*, *supra* note 25, at 957–62 (describing the range of institutions of remedy that exist for people's civil justice problems in contemporary market democracies).

41. ACCESSING JUSTICE, *supra* note 10, at 11.

42. *Importance of Doing Nothing*, *supra* note 1, at 113 (citing LEGAL NEEDS AND CIVIL JUSTICE, *supra* note 17, at tbl.5-1; LEGAL NEEDS AND CIVIL JUSTICE, *supra* note 17, at tbl.5-1).

43. *Importance of Doing Nothing*, *supra* note 1, at 114.

44. See *infra* Part III.

45. See generally PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PRACTICE OF LAW: STORIES FROM EVERYDAY LIFE 18 (1998); William L.F. Felstiner et al., *The Emergence and*

studies reveals that people often do not think of justiciable events in terms of law or rights.⁴⁶ Whether investigating suburbia, cattle ranchers, small towns, poor mothers, churchgoers, or people harassed in public, researchers consistently find that problems that look legal to lawyers do not seem particularly legal to the people who experience them.⁴⁷ Only 9% of the civil justice problems reported in the Middle City study were described by the person who experienced the problem as “legal.”⁴⁸ People were much more likely to describe their justice situations as “bad luck/part of life” or “part of God’s plan”—that is, in terms that suggest that people may understand these events as things that simply happen.⁴⁹ People often describe being resigned to their civil justice problems.⁵⁰ For a substantial minority of problems, about a fifth, Middle City residents described the problem in a way that suggested that they might not believe third party intervention was appropriate; instead, these problems were understood as “private (i.e., not something to involve others with)” or “family/community” matters, “i.e., something to be dealt with within the family/community.”⁵¹ Thinking of a justice problem as “legal” plays a large role in whether or not people consider lawyers as a solution.⁵² The Middle City study found that people were more than twice as likely to at least consider using lawyers for situations they understood as “legal” than for those situations that they did not.⁵³

Perhaps among the most surprising findings of contemporary research in the U.S. context is that people do not typically highlight the cost of legal services as

Transformation of Disputes: Naming, Blaming, Claiming . . ., 15 L. & SOC’Y REV. 631 (1980). See also Susan S. Sibley, *After Legal Consciousness*, 1 ANN. REV. L. SOC. SCI. 323, 324 (2005).

46. ACCESSING JUSTICE, *supra* note 10, at 13.

47. See generally M.P. BAUMGARTNER, *THE MORAL ORDER OF A SUBURB* 3 (1988) (studying the management of conflict in suburbia); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 1 (1991) (investigating “law in action” in the Shasta County cattle ranching community); JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY* 1–2, 5 (2001) (studying the legal consciousness of welfare mothers); CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* 23–24 (1986) (studying views about conflicts and disputes among churchgoers in “Hopewell”); LAURA BETH NIELSON, *LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH* 1–2 (2004) (studying people’s responses to incidents of street harassment); David M. Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOC’Y REV. 551, 552, 554 (1984) (discussing personal injury complaints in a rural county in the Midwest).

48. ACCESSING JUSTICE, *supra* note 10, at 14.

49. *Id.*

50. Rebecca L. Sandefur, *Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services*, in *MIDDLE INCOME ACCESS TO JUSTICE* (Tony Duggan et al. eds., 2012) [hereinafter *Money Isn’t Everything*]; *Importance of Doing Nothing*, *supra* note 1, at 123, 125.

51. ACCESSING JUSTICE, *supra* note 10, at 14.

52. Pascoe Pleasence et al., *What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes*, OñATI SOCIO-LEGAL SERIES (Sept. 27, 2011), <http://ssrn.com/abstract=1934140>.

53. *Id.*

a main reason for not turning to law for the justice problems that they face.⁵⁴ When asked to assess lawyers in the abstract, Americans can recite the prevailing wisdom that lawyers are too expensive and value their fees more than justice.⁵⁵ But surveys of Americans who have actually used lawyers' services find that the majority are happy with what they paid.⁵⁶ Studies of the actual costs of common legal services, while rare, find that many routine services are affordable for middle income families.⁵⁷ In the national study conducted in the 1990s, moderate-income households reported that they did not seek legal help because of cost for 6% of problems; the remaining 94% of their justice situations were handled in other ways, for other reasons.⁵⁸ For problems not taken to anyone outside the respondent's immediate social network, the Middle City study asked respondents why they did not do so.⁵⁹ In Middle City in 2013, cost explained the failure to seek assistance for 17% of reported justice problems; the reason for not seeking further help for the other 83% of problems was something else, not cost.⁶⁰ In Middle City, the most common reasons people reported for not seeking help are revealed to be variants on, "I don't need any."

Even when lawyers are free we see an interesting lack of recourse to them. Studies in other countries where people receive substantial government subsidies for lawyers' fees—up to the point of no cost at the point of service for some portion of the population—find that people do not turn to law even when they do not have to pay any money to do so.⁶¹ This does not mean that cost plays no role in shaping how people handle their justice problems. It does suggest that the role it plays is more subtle than we might expect.

IV. WHAT WE NEED TO KNOW

We know that there is a tremendous amount of civil justice activity, in the sense of a high volume of justiciable events. Because people's rights under law are by definition implicated in civil justice situations, some observers conceptualize these situations as "legal needs," by which they usually mean situations or events that require the assistance of an attorney.⁶² When civil justice situations are thought of as legal needs, all available evidence reveals that such needs typically go unmet. Only a small minority of people ever acquire an

54. *Id.* at 12.

55. LEO J. SHAPIRO & ASSOCS., PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 13–14, 19 (2002), <https://www.cliffordlaw.com/abaillinoisstatedelegate/publicperceptions1.pdf>.

56. *Id.* at 24.

57. *Money Isn't Everything*, *supra* note 50.

58. *Id.*

59. ACCESSING JUSTICE, *supra* note 10, at 12.

60. *Id.* at 13.

61. *Fulcrum Point*, *supra* note 25, at 969–76.

62. *See, e.g.*, LEGAL NEEDS AND CIVIL JUSTICE, *supra* note 17.

attorney, as we saw above.⁶³ Thus we have the commonly cited figures of today, such as that 80% of the legal needs of the poor go unmet.⁶⁴ However, we have no idea whether or not this “fact” is true.

The conventional understanding greatly oversimplifies the idea of “need.” If a justice problem is a situation that has civil legal aspects, raises civil legal issues, and has consequences shaped by civil law, we can consider a legal need as a special case of this phenomenon: a legal need is a justice problem that a person cannot handle correctly or successfully without some kind of legal expertise. Not all justice situations are legal needs in this sense. People are perfectly capable of handling some situations on their own without understanding the legal aspects of those problems, in the sense that the problem is resolved in a way that is roughly consistent with the law but without reference to it or contact with it. Without a doubt, many situations are resolved in this way. Neighbors work out tree-trimming agreements without finding out where property lines are or consulting homeowners’ association rules. Married couples separate without divorcing and informally arrange child custody and support agreements, and unmarried couples do the same.⁶⁵ Landlords and tenants devise informal arrangements that balance flexibility about timely rent payments with flexibility about timely repairs.⁶⁶ The research challenge is figuring out when these informal solutions are consistent enough with formal norms not to threaten the rule of law and social order, and when they are badly unlawful. Sometimes we do want to make sure that people resolve their justiciable problems with explicit reference to law. For those situations where we do, people’s justice situations become legal needs.

Identifying these situations is not a purely empirical task, but is further a matter of policy goals and normative commitments. For example, we can ask empirically whether legal services affect how situations turn out, such as whether representation by lawyers changes the outcomes of court cases.⁶⁷ But there are

63. See *supra* Part II.

64. Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, Mar. 15, 2013, <http://www.nytimes.com/2013/03/16/us/16gideon.html>.

65. See, e.g., KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 158–67 (1997) (describing why poor women sometimes choose informal over formal means of arranging child visitation and support with their former partners).

66. See, e.g., *Importance of Doing Nothing*, *supra* note 1.

67. See, e.g., Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers’ Impact*, 2015 AM. SOC. REV. 1 (2015) (presenting a meta-analysis of studies of lawyers’ impact on the outcomes of formal trials and hearings) [hereinafter *Elements of Professional Expertise*]; 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, 2124 (2012) (employing a randomized controlled trial to study impact of assistance by law students on outcomes in claims for unemployment) [hereinafter *Randomized Evaluation*]; D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs?: A Randomized Experiment in a Massachusetts Housing Court*

normative aspects here as well. For example, we as a society have decided that if people want to end a marriage, they ought to go through law to do it. You do not have to go to court to get approval to marry, but you do have to do so to get permission to divorce.⁶⁸ This decision was made long ago, when lawmakers and others believed it was important for society, through law, to engage in some surveillance and regulation of the dissolution of these intimate personal relationships.⁶⁹ A time may come when that normative position changes; for now, people have to use law to end marriages, doing so requires some kinds of legal expertise.

Once we could agree on the set of situations that require legal expertise either technically or normatively, we would then be in a position to ask when the need for that expertise goes unmet. This *can* be made into an empirical question. Demonstrably, attorneys are not the only means of providing legal expertise. People can sometimes, without the assistance of lawyers, acquire the information they need to understand their rights and possible remedies, make informed decisions between different courses of action, and take the necessary actions to enact their rights under law or otherwise solve their problems in ways that are consistent with the law. Indeed, this capacity among members of the public is the foundation of the “self-help” approach that informs many courts’ initiatives to increase the public’s access to justice.⁷⁰ It also is part of the logic of limited scope representation (aka unbundling), which distributes to the client some of the work that was historically performed by a full-service attorney.⁷¹ The United States does not have a functioning legal services “system” for any group in the population: there is no integrated network of coordinated providers and institutions.⁷² If such a system did exist, one highly desirable feature of it would

5–6 (Mar. 12, 2012) (unpublished manuscript on file with Univ. of Chi. Sch. of Law) [hereinafter *Limited Legal Assistance Programs*].

68. See Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 115 (1976) (“First, it can be argued that, despite the advent of no-fault reforms, marital dissolution remains an adjudicatory process.”).

69. See *id.*

70. See generally John M. Graecen, *Self-Represented Litigants and Court and Legal Responses to Their Needs: What We Know*, <http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf> (unpublished paper prepared for Ctr. for Families, Children & the Courts, California Admin. Office of the Courts) (last visited Mar. 31, 2016) (finding that a significant number of *pro se* litigants felt the case was simple enough to handle alone and did not want to hire counsel); see also RICHARD ZORZA, *THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS* 27–31 (2002) (arguing, for example, that courthouses should be built and organized to effectuate quick resolution of cases for litigants who represent themselves; such methods may include technological advances, or a single desk where litigants may obtain the necessary forms for bringing a case).

71. See Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (“Unbundling these various services means that the client can be in charge of selecting from lawyers’ services only a portion of the full package and contracting with the lawyer accordingly.”).

72. REBECCA L. SANDEFUR & AARON C. SMYTH, *ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT* 21 (Oct. 7, 2011),

be the capacity to connect people to the least expensive and intrusive service necessary to meet their actual legal needs. This service would not always be an attorney.⁷³

Our current knowledge about which justice situations actually require lawyers to provide the necessary legal expertise is thin. Legal expertise is today available from a wide range of sources, both human and not, from Internet resources like LawHelp,⁷⁴ to the Nolo “Law for All”⁷⁵ software products and books, to court-based self-help programs, to nonlawyer personnel who assist litigants in navigating courthouse buildings and legal processes.⁷⁶ These many different sources of legal assistance meet some number of legal needs in an adequate fashion. We simply have no idea how many are adequately served. Asking litigants and potential clients about their experiences does not go far in answering this question. As we saw above, people often believe they understand their situations, the possible courses of action, and the likely outcomes.⁷⁷ Sometimes they are correct, and sometimes they are disastrously wrong. Lay people can be poor judges of whether they have enacted their rights, because they may well have no idea what their rights are and what remedies are actually available to them.⁷⁸ Consequently, they may believe that they have handled a situation well, when in fact more or different legal expertise could have completely changed the game. In sum, at present, we have no idea of the actual volume of legal need, and no idea of the actual volume of unmet legal need.

We are beginning to learn the answers to these questions, however. One clever means of determining whether something is a legal need is to employ an old trick from medicine: diagnosis by treatment. In the justice context, we ask whether, if we give people some kind of legal assistance, it makes any difference

<http://www.americanbarfoundation.org/research/A2J.html> (scroll down for sub-heading “Access Across America” and follow “download full report” hyperlink) [hereinafter ACCESS ACROSS AMERICA].

73. See, e.g., WAYNE MOORE, DELIVERING LEGAL SERVICES TO LOW INCOME PEOPLE 387–94 (2011) (describing several different methods that litigants may choose instead of hiring counsel; such options include court-delivered self-help services, legal hotlines, and online social networks); Richard Zorza, *The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DEN. U. L. REV. 859, 866 (2012) (arguing that such a system “should direct cases into routes and services that involve the least cost and inconvenience for both litigants and the system, consistent with a fair determination”).

74. LAWHELP.ORG, <http://www.lawhelp.org>.

75. NOLO LAW FOR ALL, <http://www.nolo.com>.

76. See Rebecca Sandefur & Thomas M. Clarke, *Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA*, HASTINGS L.J. tbl.1 (forthcoming 2016) (citing examples of such programs currently in existence). See THE NEW YORK CITY COURT NAVIGATORS PROGRAM, www.courts.state.ny.us/courts/nyc/housing/rap.shtml (allowing volunteers to aid eligible *pro se* litigants in state housing courts by offering general information, written materials, and one-on-one assistance).

77. See *supra* Parts II & III.

78. See, e.g., William M. O’Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 L. & SOC’Y REV. 137, 159 (1988) (arguing that lay people come to court with varying expectations of justice that are often in contrast to the realities of the legal process).

in outcomes that we care about. If it does, we might declare that kind of situation a legal need. We have a few of these studies, and their findings are quite interesting. The preeminent scholar using this technique is Jim Greiner, who in a series of increasingly sophisticated field experiments explores lawyers' impact in unemployment hearings, eviction cases, social security claims, and consumer debt.⁷⁹ In a study of indigent claimants in unemployment tribunals, Greiner and his colleagues randomly assigned claimants to either an offer of representation by a lawyer-supervised law student working in a clinical program or to no offer of representation.⁸⁰ Because the assignment was random, the merits and other aspects of the two groups of cases did not systematically differ: there would have been sure winners and bad losers in both groups.⁸¹ The results achieved by the claimants offered representation were no better than those experienced by people who were not offered representation, and in some respects could be considered worse.⁸² Similar findings emerge in non-experimental research as well. A study from the 1970s comparing divorce filings prepared by lay people using a self-help kit to those prepared by lawyers famously found that the lay people did *better* than the lawyers, making fewer omissions in the documents.⁸³ A synthesis of findings from 40 years of research across a range of studies of the impact of lawyers on case outcomes, using a technique known as "meta-analysis," found that lawyers did not always out-perform lay people representing themselves, and that nonlawyer advocates sometimes achieved results comparable to those attained by fully qualified attorneys.⁸⁴ Among other things, these findings suggest that, at least in some kinds of legal matters, people can be quite successful at handling their own civil justice situations—if our benchmark of success is the outcomes achieved by legally trained professionals.⁸⁵ One commentator urges us to "celebrate the null finding": a finding of no impact of attorneys can be a demonstration that some courts and some legal processes are already accessible to the public.⁸⁶

Using the findings from this kind of work to determine what justice situations constitute legal needs and how to meet them will require some careful thought. Generalizing from a single study will not work. These studies typically

79. See *Randomized Evaluation*, *supra* note 67, at 2143 (unemployment cases); *Limited Legal Assistance Programs*, *supra* note 67, at 3 (evictions); Dalié Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL'Y 449, 450 (2013) (consumer debt) [hereinafter *Improving the Lives*].

80. See *Randomized Evaluation*, *supra* note 67, at 2143; *Limited Legal Assistance Programs*, *supra* note 67, at 3; *Improving the Lives*, *supra* note 79, at 450.

81. *Randomized Evaluation*, *supra* note 67, at 2143.

82. *Id.* at 2122.

83. See Cavanagh & Rhode, *supra* note 68.

84. *Elements of Professional Expertise*, *supra* note 67, at 12.

85. *Id.*

86. Jeanne Charn, *Celebrating the 'Null' Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2233 (2012).

consider specific populations in specific courts or tribunals engaged in specific kinds of cases, such as indigent tenants in Manhattan housing courts⁸⁷ or people contesting state income tax bills in Wisconsin.⁸⁸ Interventions that are necessary to achieve the outcomes desired in policy for some populations may not be needed for other populations.⁸⁹ An obvious example would compare the legal needs of highly educated people to populations where mental illness, illiteracy, language proficiency, or cognitive impairments reduce people's capacity to take action on their own behalf. Similarly, interventions that are needed into situations that are complex (e.g., an adult child attempting the conservatorship of an unwilling parent) will not be needed when the law and the facts are simple (e.g., the uncontested divorce of a childless couple with few assets in a no-fault jurisdiction). In the U.S. context, we are just beginning to see the kinds of comparative research projects that can give information about when different kinds of legal expertise are necessary. A recent study of lawyers' impact on case outcomes in lower civil courts and tribunals compares that impact across different hearing fora and fields of law.⁹⁰ This study finds that—for this subset of ordinary litigation—"lawyers affect case outcomes less by knowing substantive law than by being familiar with basic procedures."⁹¹

Existing legal services, even when they do meet apparent legal needs, may not be the simplest, cheapest, most lawful, or most effective way to meet legal need. Simply because lawyers appear impactful under the current state of affairs does not mean that they are the best solution to problems we observe. Sometimes, the right route is systemic reform; a narrow focus on existing solutions and their effectiveness can blind us to that.⁹² For example, courts around the country are moving to simplify legal actions through the use of plain language forms. If a court action requires a pleading, the litigant has to figure out what law applies, what that law says, what counts as evidence and how to present her case in legal terms that court staff understands. When courts replace pleadings with plain language forms with fixed choice options, much of the legal

87. See Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 420 (2001) (using low-income tenants in New York City's Housing Court as the specific population in a test to determine the effects of a program that provided legal representation).

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

89. PASCOE PLEASANCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES: BUILDING ON THE EVIDENCE BASE* 17–18 (2014) (finding that those who opted not to take legal action were "more likely to be characterised by [social] disadvantage" and could, in most cases, be eligible for legal assistance).

90. *Elements of Professional Expertise*, *supra* note 67, at 4.

91. *Id.* at 2.

92. Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 114–15 (2013).

expertise necessary to draft the pleading becomes commodified in the form.⁹³ “Legal needs” are here met for many people by straightforward simplifications of process, without the provision of a live legal expert. A few projects are comparing the efficacy of different modes of providing legal expertise, but our evidence base is as yet quite small.⁹⁴

It is also not always clear who has the legal need. One of the most striking findings of some of this work is that legal needs may actually be better understood as belonging to the court or the justice system, rather than to the litigant or potential client.⁹⁵ Some courts are, frankly, lawless: judges and other court staff behave in ways that are inconsistent with the law’s requirements.⁹⁶ As one study notes:

Evidence of some of the largest potential impacts of lawyers on case outcomes emerges from settings in which cases are often treated perfunctorily or in an ad hoc fashion by judges, hearing officers and clerks . . . Observers in such settings report that judges often shortcut the law: They do not hold landlords to statutory burdens of proof . . .; they fail to examine eviction notices to confirm their validity and proper service . . . In some courts, parties are rarely sworn in before giving testimony . . . Judges often do not require landlords to rebut self-representing tenants’ defenses to eviction or otherwise do not recognize their defenses . . . Because lawyers know the rules and when they are being violated, their presence may encourage court staff to obey them and so enhance people’s chances of winning their cases.⁹⁷

In these situations, an important source of the legal expert’s impact is through making the court act lawfully. If courts would simply follow their own rules about, for example, who bears the burden of proof and what counts as evidence, much apparent “legal need” on the part of litigants would likely vanish.

93. See, for example, the consumer credit answer form from New York City. Civil Court of the City of New York, CIV-GP-58b Written Answer Consumer Credit (12/08), <https://www.nycourts.gov/courts/nyc/civil/forms/CIVGP58B.pdf> (last visited Mar. 31, 2016).

94. See, e.g., *Limited Legal Assistance Programs*, *supra* note 67; *Improving the Lives*, *supra* note 79, at 452 (testing the effectiveness of financial counseling versus a lawyer’s assistance in helping people escape from financial distress). See generally D. James Greiner et al., *Lay Deployment of Professional Legal Knowledge* (Aug. 2, 2015) (unpublished manuscript) (suggesting a different way to test proposed self-help materials, such as by having people view hand-drawn illustrations of legal disputes); *Elements of Professional Expertise*, *supra* note 67, at 4 (using results from a range of general civil cases to compare the effects of counsel-representation versus self-representation).

95. *Elements of Professional Expertise*, *supra* note 67, at 17.

96. *Id.*

97. *Id.*

V. WE KNOW LITTLE ABOUT THE CONSEQUENCES OF THESE SITUATIONS, EITHER FOR THE PEOPLE WHO EXPERIENCE THEM OR FOR SOCIETY AT LARGE

The same law that constitutes as legally actionable many everyday problems also shapes the consequences of those problems for the people who experience them and for society at large. Successfully resolving justice problems may mean the difference between stable housing, predictable cash flow, custody of one's children, employment, and access to credit on the one hand, and bad credit, uncertain housing, family separation, unemployment, or bankruptcy on the other.⁹⁸ Evidence from other jurisdictions suggests that legal needs can lead not only to hardships for those who experience them, but to costs that are borne more broadly, such as the costs to society of temporary shelter for those made homeless by legal needs, income support for those unemployed due to legal needs, and lost productivity from and medical care for those made ill by legal needs.⁹⁹ We believe these consequences can be substantial, but we have little systematic research.

U.S. research into the consequences of civil justice problems has been limited largely to investigations of how people's experiences with courts and legal system staff affect law's legitimacy, as exemplified in the vibrant literature on procedural justice.¹⁰⁰ On the criminal side, recent studies have demonstrated how the workings of the U.S. criminal justice system affect both the people who have contact with that system and society.¹⁰¹ Thus, we have studies of the

98. See, e.g., Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. SOC. JUST. 139, 145 (2010) (reviewing evidence of the impact of legal assistance to people facing challenges to their ability to meet basic human needs, such as the care and custody of dependents); Raisa Bahchieva et al., *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, in CREDIT MARKETS FOR THE POOR 73, 76 (Patrick Bolton & Howard Rosenthal eds., 2005) (describing the hardships faced by many middle class families with debt); TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 171 ("In the midst of affluent modern America, a family can still be struck down overnight.").

99. *Mounting Problems*, *supra* note 33, at 67, 83–85.

100. See generally Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 193 (2005) (arguing that procedural justice is a "double-edged sword"; while it fulfills peoples' desire for their voice to be heard, it also potentially allows abuse by those in control of the processes); see also Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103, 127 (1988) (finding that people were concerned with the ethicality, honesty, and effort of the procedural authorities who were involved in their cases); Tom R. Tyler, *Governing and Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & SOC'Y REV. 809, 827 (1994) (arguing that the results from his research suggest that the use of fair decision-making procedures enhances the legitimacy of national-level governmental authorities).

101. See generally Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequity in the Contemporary United States*, 115 AM. J. SOC. 1753, 1755 (2010) (for example, testing the effects of monetary sanctions imposed on criminal defendants and determining that this "legal debt" created further inequality within society).

impact of incarceration and arrest on people's access to employment and housing, as well as studies of how social patterns of incarceration have shaped the outcomes of presidential elections and fundamental conditions in labor markets.¹⁰²

Yet relatively little attention has graced any study of the consequences of civil justice troubles in the United States. The Middle City study cited above found that people reported lost income, fear, lost confidence and—most frequently—negative impacts on health as a consequence of justice problems.¹⁰³ A recent study using data from the Fragile Families and Child Well-Being study of low-income mothers found that the experience of eviction was associated with increased material hardship and parenting stress, as well as a higher incidence of depression for mothers and reports of worse health for both mothers and their children.¹⁰⁴ The consequences of some civil justice problems are severe, wide-ranging, and damaging not only to those who experience them but to their families and to society at large.¹⁰⁵ We just do not know very much about which justice problems have these impacts, and for whom.

Linking back to the question of whether justice problems with adverse consequences are best understood as legal needs, the knowledge gap yawns wide here, as well. We simply do not know much about the relative efficacy of *legal* as opposed to other kinds of interventions. If our goal is to prevent these problems and their costly consequences, legal intervention will be part of the answer sometimes, but probably not all the time. Taking the example of eviction, maybe the generating problem is a lack of affordable housing, or a lack of decent jobs for people without college degrees or who live in certain areas. If those are the real problems, representation in an eviction case by an attorney may not be much of a solution. We have a great deal to learn, but we are beginning, slowly, to learn the answers to these questions.

102. See, e.g., Harris et al., *supra* note 101, at 1777 (finding that people with legal debt have limited access to status affirming institutions, such as housing, education, and economic markets); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 192 (2006) (finding that, in Florida, and during the 2000 presidential election, “[i]f disenfranchised felons had been permitted to vote, Al Gore would certainly have carried the state, and thus the election. There are more disenfranchised felons in Florida than in any other state (approximately 827,000 in 2000)”; Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 956 (2003) (finding that many employers use information about a potential employee's criminal history as a screening mechanism, without attempting to probe deeper into the content or complexities of the person's situation); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 119 (2006) (finding that men who have been incarcerated face significantly lower wages, employment rates, and annual earnings than those who have never been incarcerated and that high rates of incarceration make the U.S. unemployment rate appear lower than it truly is).

103. ACCESSING JUSTICE, *supra* note 10, at 3.

104. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 316 (2015).

105. See generally *id.*; ACCESSING JUSTICE, *supra* note 10, at 3.

VI. CONCLUSION

We live in a society with scarce resources where we must make difficult decisions about allocation. Currently, we decide how to allocate legal expertise based largely on three factors: potential clients' willingness to seek legal assistance; potential clients' ability to pay; and, the willingness and interests of specific local providers to do particular kinds of work.¹⁰⁶ In this context, socioeconomic inequalities become justice inequalities,¹⁰⁷ and "geography is destiny," in the sense that available services are determined not by people's actual needs but rather by what happens to be available where they happen to live.¹⁰⁸ Probably, we bear large social costs that could be eliminated if we allocated existing resources in different ways. We can imagine a more rational and more democratic approach, where we decided what needs to target after informed public discussion, based on information about the likely costs and benefits. To have that discussion, we will need a better understanding of what existing legal needs actually are, when they truly go unmet, and how they affect us, as individuals and as a society.

106. See ACCESSING JUSTICE, *supra* note 10, at 112 ("The probability of taking no action varies inversely with income, with poor households least likely to take any action to attempt to resolve problems."). See also Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC'Y REV. 79, 105 (2007) (arguing that the success of pro bono services depends upon the "willingness and capability of lawyers in pro bono programs to do whatever work is presented to them," and it is essential that legal aid services enlist both law firms and individual lawyers in their efforts).

107. See *Access to Civil Justice*, *supra* note 16, at 346–49 (arguing that the justice system can not only reflect but also create inequality).

108. ACCESS ACROSS AMERICA, *supra* note 72, at v.

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