

November 2010

## The Impact of Counsel: An Analysis of Empirical Evidence

Rebecca L. Sandefur

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/sjsj>

---

### Recommended Citation

Sandefur, Rebecca L. (2010) "The Impact of Counsel: An Analysis of Empirical Evidence," *Seattle Journal for Social Justice*: Vol. 9: Iss. 1, Article 3.  
Available at: <http://digitalcommons.law.seattleu.edu/sjsj/vol9/iss1/3>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized administrator of Seattle University School of Law Digital Commons.

## **The Impact of Counsel: An Analysis of Empirical Evidence**

---

Rebecca L. Sandefur<sup>1</sup>

### INTRODUCTION

In this article, I provide three lenses on empirical evidence about the American public's experience with civil justice problems: the depth of public experience, the scope of public experience, and the impact of counsel on public experience. The analysis of empirical evidence reveals a fundamental problem with traditional U.S. thinking and policy concerning access to justice: both are too narrowly focused on law and formal legal institutions. To move forward, we need both new understanding and new policies. New understanding comes from viewing justice problems from the public's perspective. New policies should include providing effective, accessible, *nonlegal* routes to solutions for common and significant civil justice problems; these routes will be a necessary complement to the traditional solution of more access to law.

The first two sections of this paper assess empirical evidence about how frequently Americans encounter civil justice problems and how these problems affect them and society at large. Millions of Americans are currently experiencing significant civil justice problems.<sup>2</sup> Such troubles are common and widespread, and their impact both on the people who experience them and the public as a whole can be deep and long lasting.<sup>3</sup> This article's third section reviews evidence about how lawyers affect public experience with civil justice problems, focusing particularly on how lawyer representation changes the outcomes of adjudicated civil cases. Most Americans' civil justice problems are never taken to lawyers for advice nor are they pursued in courts or tribunals.<sup>4</sup> When justice problems do become cases that are adjudicated, many people appear without attorneys.<sup>5</sup> When

people are represented by attorneys, they are, on average, more likely to win in adjudication than are people who are unrepresented.<sup>6</sup> But how much more likely varies greatly; the observed difference in case outcomes between attorney-represented and unrepresented members of the public varies widely across different kinds of civil justice problems and different studies of lawyers' impact.<sup>7</sup> One factor that seems to shape variation in the magnitude of lawyers' impact is procedural complexity—the complexity of the documents and procedures necessary to pursue a justice problem as a court case appears to account for some of lawyers' effect on case outcomes.<sup>8</sup>

Taken together, these findings support some traditional calls for reform, but they also suggest innovative avenues through which the United States might expand access to justice. Observers have advocated perennially for greater access to law—more access to counsel and simplified procedures that would allow ordinary people to pursue civil cases without legal representation. These traditional routes to expanding access to justice are clearly indicated. However, they will not go far enough. The solution is not more of the same; it is, rather, something new entirely. Our typical ways of conceptualizing people's experiences with civil justice problems focus too narrowly on law. Stepping back to look at the whole canvas of public experience with civil justice problems reveals that we need not merely additional access to law, but also more creativity in thinking about access to justice.

#### I. THE DEPTH OF CIVIL JUSTICE PROBLEMS' IMPACT

For many members of the American public, civil justice problems emerge “at the intersection of civil law and everyday adversity.”<sup>9</sup> These problems can involve family relationships, work, money, insurance, pensions, wages, benefits, housing, and property—to name just a few areas of contemporary life. Though these different types of problems affect different aspects of peoples' lives and concern different kinds of relationships, they share a

certain important quality: they are problems that have civil legal aspects, raise civil legal issues, and have consequences shaped by civil law, even though the people who experience them may never think of them as “legal” and may never attempt to use law to try to resolve them.<sup>10</sup> Such problems are both common, as I will describe in the next section,<sup>11</sup> and impactful, as I illustrate in this one.

A clear image of the depth of impact of civil justice problems is provided by allowing members of the public to speak for themselves about their own experiences. I tell a single story here, but it represents many. It comes from a series of focus groups that I conducted in two midsize cities in the Midwestern region of the United States during the autumns of 2005 and 2007. Participants in these groups were randomly selected to be invited to spend a couple of hours on a weeknight in a library or community center meeting room to discuss “problems facing American families today.” The first exercise in the focus groups was to go around the room and ask each person to tell a story about a problem that he or she had experienced in any of a variety of different arenas including with housing, finances, bills, child support, divorce, and the like. The focus group facilitator and I made no mention of the fact that the study was about civil justice problems or law; we simply asked people to tell us about problems they were having.<sup>12</sup>

Countless aspects of life in contemporary market democracies are shaped by civil law, so it will come as no surprise that a substantial proportion of everyday problems that people in the focus groups described were civil justice problems.<sup>13</sup> By this, I do not mean that people thought of these problems as “legal” problems—they typically did not—nor that these problems were necessarily best resolved through law. Rather, these problems raised civil legal issues, had civil legal aspects, and had consequences shaped by civil law, as the story I am about to recount illustrates.

This account was related by a woman in her mid-thirties. Though she earned too much to meet the means-tested requirements for Legal Services

Corporation (LSC)-funded civil legal aid (an income less than 125 percent of the federal poverty level), her family's income was still low in relative terms—less than 80 percent of her county's median income.<sup>14</sup> As we sat in plastic chairs around a slightly sticky table in the small community center's classroom, drinking soda and eating cheese crackers and oatmeal cookies, this is the story that she told:

About five years ago, I used to pay insurance. I used to pay about \$300 of insurance for my kids and then my kids weren't going to the doctor, so I decided I was going to take them off insurance and go on [Community Care, her state's insurance program for low-income children]. Well, right as I almost qualified for [Community Care], my thirteen-year-old got killed. So then, he didn't have no health insurance and neither did my fifteen-year old, who also got shot.

So then that leads back down here to collections and [the hospital] wants me to pay for it. And I keep telling them, "I'm not paying for that." So they want me to get a loan so that I can pay for it. So what I did was go back to the district attorney's office and see if the people who killed my son, pay for it. But since they're in prison, it's going to be on my credit forever. So that causes me a lot of pain because I can't even look at buying a house. Because they want me to pay for it and wait until the money trickles, you know, from here to thirty years. . . .

This is a particularly tragic account of experience with civil justice problems. It is not unique, however. As with many situations people described in the focus groups, here, an initial problem triggered a series of problems that would affect the lives of those involved for many years to come. Significant civil justice problems and the consequences they create are neither exceptional nor unusual.<sup>15</sup> Civil justice problems can have a wide-ranging and deep impact, not only on the people who experience them, but also on the societies in which these people live, both as illustrated above and as documented in research based on large, national population surveys.

Scholars working with the England and Wales Civil and Social Justice Surveys have found that people's experiences with civil justice problems can lead to physical health problems, mental health problems, the breakdown of family relationships, loss of housing, lost employment, and lost income—among other adverse consequences.<sup>16</sup> An initial civil justice problem can thus cascade into a shower of problems, some related to civil law and others not.<sup>17</sup>

The impact of civil justice problems is borne not only by the people who experience them but also by society at large. Research in the United Kingdom reveals that the adverse health consequences of civil justice problems can lead to increased public expenditures on the provision of medical services.<sup>18</sup> It also shows that lost employment as a consequence of civil justice problems can lead to increased expenditures on public benefits.<sup>19</sup> It further documents that, while some people who lose their housing as a result of civil justice problems are able to find new shelter, others are not and so must stay in temporary accommodation, some of which is publicly subsidized and, thus, represents an additional public expense.<sup>20</sup>

As other research shows, the costs are not solely fiscal in nature. A study drawing on a recent Canadian survey of public experience with civil justice problems finds that “[t]he mere fact of experiencing” a civil justice problem—whether or not the problem involves contact with the law or the justice system—is “related to the view that the law and the justice system are unfair.”<sup>21</sup> This sense of unfairness appears to be exacerbated when justice problems go unresolved.<sup>22</sup> These deep and wide-ranging consequences flow from civil justice problems that are quite common in contemporary America.

## II. THE SCOPE OF PUBLIC EXPERIENCE WITH CIVIL JUSTICE PROBLEMS

The United States' more than three hundred million people<sup>23</sup> experience many problems that have civil legal aspects and raise civil legal issues.<sup>24</sup> Here, and in other western market democracies, these problems are so common as to be "nearly normal features of everyday life."<sup>25</sup> The best estimates available for the scope of the American public's experience with civil justice problems are based on information that was collected long before the recent recession. In fact, the most recent survey of the population is from 1992, and it provides information representing the experiences of only a portion of the American public.<sup>26</sup> This 1992 survey is not comprehensive, as it excludes one-fifth of the population, the highest-earning 20 percent of households.<sup>27</sup> The last truly comprehensive surveys of public experience with civil justice problems are more than three decades out of date, conducted in the 1970s.<sup>28</sup>

Like most contemporary civil justice surveys, the 1992 survey presented respondents with lists of specific problems, each carefully selected to be problems that raised issues in civil law, and then asked whether respondents had experienced each during a specified period of time before the survey—in this case, one year.<sup>29</sup> General categories queried included those involving family, work, benefits, housing, debt, credit, and neighborhood problems. Specific problems included events like "not having money to pay bills,"<sup>30</sup> "serious dispute with tax people,"<sup>31</sup> "had difficulty collecting pay,"<sup>32</sup> and "separation, divorce, or annulment."<sup>33</sup>

The 1992 U.S. survey revealed that about half of surveyed households had been experiencing at least one serious civil justice problem in the twelve months prior to the survey.<sup>34</sup> If one project forward that rate of problems experienced to today, the projection implies that more than forty-four million households (in which live more than one hundred million people) are experiencing at least one nontrivial civil justice problem.<sup>35</sup>

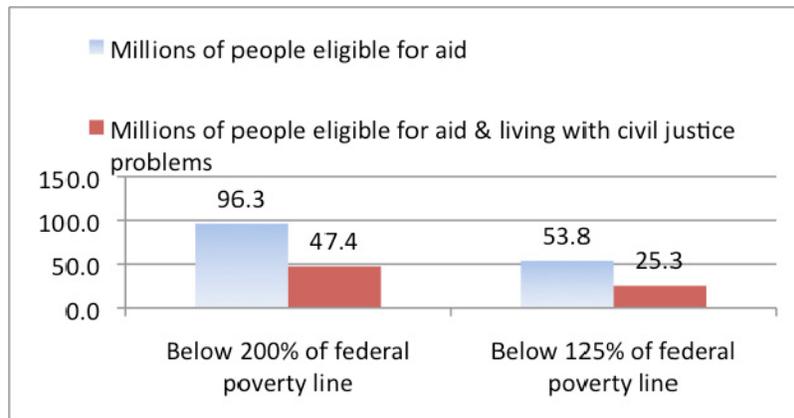
One hundred million people affected each year may seem staggeringly large—it is on the order of one-third of the U.S. population—but it is in fact a conservative estimate for the scope of the American public’s experience with civil justice problems. More than one hundred million people are estimated to live in households with incomes of less than \$90,000 a year and are experiencing at least one civil justice problem—this excludes the justice problems experienced by the rest of the population, the additional 90.9 million people who live in households with incomes of \$90,000 per year or more.<sup>36</sup>

But one hundred million affected each year is a conservative estimate, even for the justice problems of the low- and moderate-income public. The current recession will likely have increased the number of people experiencing hardships like foreclosure,<sup>37</sup> job loss,<sup>38</sup> trouble paying medical bills,<sup>39</sup> difficulties with consumer debt,<sup>40</sup> and eviction<sup>41</sup>—all of which can produce civil justice problems or be civil justice problems in and of themselves.<sup>42</sup> In addition, the survey techniques used in the 1992 national study may lead to underestimates of how often people experience different kinds of justice problems. Traditional surveys typically use the past twelve months to five years as their frame of reference when asking people to report on their justice problems.<sup>43</sup> Some scholars argue that the retrospective focus of such studies leads to underreporting because people fail to remember or report all the problems that they have experienced in the past.<sup>44</sup> A recent study estimates that these kinds of surveys may understate the incidence of civil justice problems by a factor of as much as two-thirds.<sup>45</sup> We can conclude, therefore, that the American public faces a substantial volume of civil justice problems—probably many more problems than suggested by the most recent U.S. civil justice survey.

Under any expansion of access to legal services, whether as a right or through other means, only some of these more than one hundred million people living with civil justice problems would likely be eligible for publicly subsidized legal advice or lawyer representation. The current

means test for LSC-funded legal services is an annual household income of no more than 125 percent of the federal poverty level. For a family of four in 2008, this threshold would have been an income less than about \$27,530.<sup>46</sup> As Figure 1 demonstrates, in 2008 there were more than 53.8 million people living in households eligible by this means test. Based on projections from the 1992 survey, an estimated 25.3 million people eligible for LSC-funded services were living in households experiencing at least one civil justice problem. Some contemporary proposals would extend a government subsidy for access to lawyers' services farther along the household income distribution, up to 200 percent of poverty.<sup>47</sup> For a family of four in 2008, that threshold would have been a household income of around \$44,050.<sup>48</sup> If implemented as a national means test, the 200 percent of poverty standard would imply a projected more than 96.3 million people living in households eligible for subsidized civil legal services, an estimated 47.4 million of whom would be living in households experiencing at least one civil justice problem.

**Figure 1. Estimated Numbers of People Eligible for Civil Legal Aid and Living with Civil Justice Problems, by Means-Tested Household Income: USA, 2008.**



For the more than ninety-six million people living in households with incomes below 200 percent of poverty in 2008, these conservative, pre-recession estimates of experience with civil justice problems imply, for example:

- 12 million people living in households experiencing at least one civil justice problem related to livelihood (whether from employment, pensions, or public benefits), including discrimination, problems with wages or pensions, and problems with working conditions;
- 9.9 million people living in households experiencing at least one civil justice problem involving family or domestic situations, including problems involving divorce, elder abuse, domestic violence, or child support; and
- 16.4 million people living in households experiencing at least one civil justice problem involving personal finances, including problems with insurance, taxes, debt, and credit.<sup>49</sup>

### III. LAWYERS' IMPACT ON PUBLIC EXPERIENCE WITH CIVIL JUSTICE PROBLEMS

As these estimates suggest, civil justice problems are so common as to be “features of everyday life” in contemporary U.S. society.<sup>50</sup> And, while such problems are very common, legal responses to them are not. Turning to law is not Americans’ usual reaction to their civil justice problems.<sup>51</sup> In this respect, Americans are similar to residents of most other contemporary developed nations: “Although studies reveal that different societies provide diverse routes for resolving civil justice problems, they also reveal that the majority of problems never make it to law, lawyers, or the civil justice system.”<sup>52</sup>

Despite representations in the media that would imply otherwise,<sup>53</sup> Americans typically do not find legal remedies to their civil justice

problems. Forty years of civil justice surveys reveal that the vast majority of civil justice problems are never taken either to lawyers or to a court or other hearing body.<sup>54</sup> Most civil justice problems do not involve advice from an attorney.<sup>55</sup> The 1992 national survey of the American public's experience with civil justice problems found that 24 percent of problems involved consulting an attorney.<sup>56</sup> Such a consultation did not necessarily involve the receipt of legal services; in some instances, it went no further than a discussion about whether or not the attorney would take the case.<sup>57</sup> Earlier U.S. studies found similarly low rates of consultation with lawyers for help with civil justice problems,<sup>58</sup> and more recent state-level civil justice surveys focused on low-income populations also found low rates of lawyer consultation for civil justice problems.<sup>59</sup>

Most civil justice problems are not adjudicated in front of hearing bodies. According to the 1992 survey, only 14 percent of civil justice problems were taken to a court or hearing body.<sup>60</sup> Certain kinds of civil justice problems are more likely than others to lead to contact with courts or tribunals. For example, the 1992 survey found that 37 percent of family and domestic problems involved a court or hearing body, while 12 percent of employment-related problems and 11 percent of civil justice problems involving personal finances involved courts or other hearing bodies.<sup>61</sup> Notwithstanding this variation in the kinds of problems more and less likely to be taken to lawyers or heard in courts, most of the public's civil justice problems do not make it to the formal legal system.

When members of the public do seek resolution from a court or tribunal, they often appear as self-represented litigants. National statistics regarding self-representation do not exist, but studies in individual jurisdictions suggest that a majority of certain types of cases—including family and domestic cases and unlawful detainer disputes—involve at least one self-represented litigant.<sup>62</sup> Some states report that as many as 90 percent of certain kinds of cases involve at least one self-represented litigant.<sup>63</sup>

*A. Public Experience with Civil Justice Problems and a Right to Counsel*

Arguments for a right to counsel in civil matters have often centered on precisely this issue: that many members of the lay public who appear in civil hearings and trials do so without the representation of a lawyer.<sup>64</sup> Implied in this rationale is the belief that the presence of lawyers changes something important. For example, in the absence of lawyer representation, meritorious cases might nevertheless lose when presented by people who do not know how to communicate those merits effectively by using the terms and the means that courts and judges understand. In addition, attorneys may provide an advantage in litigation that is independent from the merits of a case. To the extent that courts treat the unsophisticated or inexperienced litigants who self-represent as equivalent to litigants who are represented by attorneys, attorney-represented litigants who square off against self-represented litigants may benefit from the sheer imbalance of representation. As Mark Galanter famously argued in his analysis of “why the ‘haves’ come out ahead,” the ability to hire attorneys is one of the advantages enjoyed by the “haves” that—regardless of the rightness of their cause—permit them to prevail more often than the “have nots.”<sup>65</sup> In this understanding, a right to counsel would be a move toward a basic equality of arms.<sup>66</sup>

Yet, only a modest amount of research effort has gone into investigating the question of how lawyers change what happens in courtrooms, perhaps because the claim that they do so seems self-evident to many observers. Over the past half century, a few dozen published<sup>67</sup> studies have empirically investigated the relationship between lawyer representation and what happens in adjudicated civil cases. These studies typically inquire into whether, and sometimes how, the presence of attorneys changes the outcomes of civil trials and hearings. By reviewing these studies together, one can gain new information about lawyers’ impact on public experience with civil justice problems.

*B. Empirical Evidence about Lawyer Representation and Public Experience with Civil Justice Problems*

My review of the evidence examines a very specific component of lawyers' impact: how much lawyer representation changes the outcomes of formal adjudication. This impact, of course, does not comprise all that lawyers do. Among other work, attorneys advise, counsel, and negotiate; they identify, cultivate, and pursue test and impact cases; they control access to law by screening cases for representation or not; they organize small claims that would go unattended into large classes that become the object of legal action and public scrutiny; and they engage in legislative advocacy and grassroots organizing. Nevertheless, a central part of the legal profession's contribution to the public's access to law and justice is the lawyers' work of advocacy in hearings and trials.

**1. Meta-Analysis**

This review takes the form of a meta-analysis—a quantitative research synthesis that uses the findings of extant research to produce a summary of general knowledge about a given phenomenon.<sup>68</sup> I focus on a single empirical question: how much does lawyer representation affect who wins and loses in adjudication? My review is agnostic about whether lawyers' work makes the outcomes of adjudication “better” in the sense of making them more legally accurate or substantively just. Rather, the inquiry is into what we know about whether lawyers make outcomes *different* than they would be in the absence of attorney representation.

Combining research in a synthetic review requires that the studies be comparable in design, and that they report all the information necessary to construct quantitative measures of the relationship between lawyer representation and case outcomes. Because no impact of counsel research canon yet exists in the literature, the various extant studies exhibit little consensus about terminology, methodology, or theoretical approach. In

conducting the synthetic review, a number of studies had to be excluded for reasons of research design or incomplete reporting of results.

To serve for the meta-analysis, studies had to present quantitative summaries of the outcomes of civil contests that were formally adjudicated—that is, actually taken to trial and heard—in courts or tribunals somewhere in the United States. In order to permit comparisons between other-represented and self-represented parties, studies had to include (on at least one side of the dispute) parties who could potentially appear unrepresented by any agent, i.e., private individuals. In order to provide information that could be generalized to the whole population of cases heard in a particular kind of forum, the studies had to report on a sample of cases that was representative of the population of cases being studied. The published reports needed to provide sufficient information to construct measures of the number of cases won and lost by the type of representation used. In particular, studies had to distinguish between cases represented by qualified attorneys and cases represented by other kinds of advocates, such as law students or paralegals. I did not exclude studies that distinguished between represented and unrepresented parties on only one side of a dispute, as this would have eliminated many otherwise eligible studies.

Twelve studies, comprising more than seventy thousand adjudicated civil cases, met the criteria for inclusion. In terms of the kinds of legal problems and courts empirically investigated, the studies included in the review closely resemble those that were excluded.<sup>69</sup> The only exception to this resemblance is the exclusion of all studies in family law. Because my analysis is of wins and losses, I excluded studies of family cases; as observers have noted, “[d]omestic disputes, unlike other civil disputes, are difficult to assess regarding winners per se.”<sup>70</sup>

Table 1 lists the included studies, the number of cases that contribute to the meta-analysis, the kinds of cases they include, and the kind of forum in which the cases are heard. As the table reveals, existing studies prominently feature areas of classical poverty law, such as administrative hearings about

benefits and eviction defense for low-income tenants. But the studies also include a range of civil justice problems faced across the population, including tax appeals and hearings to contest the special education classification of one's children, as well as problems of employment law, including social security disability insurance reconsideration hearings.<sup>71</sup> Two studies investigate asylum requests, each looking separately at two types of cases: those where people claim asylum as a defense to deportation and those where they seek asylum affirmatively. Two studies investigate hearings in small claims courts. Typically, the studies take the perspective of a focal party, usually a person facing a business, a landlord, or a government agency (such as a tenant facing eviction for nonpayment of rent, an "Aid to Families with Dependent Children"<sup>72</sup> recipient contesting a reduction or termination of benefits, or a person appealing a state tax bill).

As Table 1 reports, the studies vary in two ways that will turn out to be useful in the meta-analysis, as both provide some information about how easy or difficult it might be for a lay person to attempt to represent himself or herself. As the third column of the table notes, some studies are of adjudication in traditional trial courts, while others are in tribunals or small claims courts. These latter two kinds of forums often employ relaxed evidence rules and sometimes permit a more narrative style of presentation than do traditional trial courts. One of the principal purposes of the reformers who pushed for these kinds of modified forums was to simplify rules and procedures so that lay people could more effectively represent themselves.<sup>73</sup> To the extent that reformers' aims were realized, we might expect that the advantage of being represented by an attorney is less in small claims courts or tribunals than it is in traditional trial courts.

The final column of the table includes an assessment of how complex the documents and procedures are in the field of law that comprises the cases included in each study. The measure comes from the 1995 Chicago Lawyers Survey, a contemporary study of practicing attorneys, in which these attorneys were asked to rate the procedural complexity of their own

work.<sup>74</sup> In this survey, a random sample of people eligible to practice law with offices in Chicago were asked to rate their own practices in terms of the degree to which someone without legal training or experience could easily understand the documents and procedures used in their work. The “procedural complexity measure” is the lawyers’ average rating on a scale indicating the extent to which the procedures and documents involved in the work required so much specialized skill and knowledge that they could not be understood by an educated layperson. Raters are attorneys who reported devoting at least 25 percent of their total work time to that field of law. That is, for each field of law, the measure is the practitioners’ average response to the item below:

Different kinds of law require different kinds of professional activities. [Below are] a series of paired statements that describe different demands made on the lawyer. These are presented as polar opposites. Please circle the number that best represents your position in relation to the two opposites. If the situation in your practice is midway between poles, circle code 3; if your situation is at one or the other extreme, circle 1 or 5; if your position leans somewhat to either pole, circle 2 or 4.

A	B
The type and content of my practice is such that even an educated layman couldn’t really understand or prepare the documents	A para-professional could be trained to handle many of the procedures and documents in my area of law

1 2 3 4 5

In computing the procedural complexity measure, I reverse coded the scale, so that higher ratings indicated greater complexity. I standardized the ratings for each field, so that fifty indicates the average score and each ten-

point change indicates one standard deviation. I classified each study into the broad field of law that most closely approximated the cases in the study.

Looking at the range of procedural complexity ratings, it is readily apparent that the studies are centered in fields of law that lawyers regard as average or below average relative to the scope of lawyers' work. Ten studies examine lawyers' impact in trials or hearings involving fields of law that lawyers rate as having roughly average complexity (a score of 46 to 51). Two studies examine lawyers' impact on the outcomes of trials or hearings that involve fields of law that lawyers rate as below average in procedural complexity (43 on the procedural complexity scale). This restricted range of complexity is an important factor to keep in mind when considering the range of case types to which these findings may generalize. Some kinds of civil justice problems encountered by people who might be eligible for civil legal assistance—such as Medicaid eligibility cases, for example—are arguably more complex than many of the kinds of cases considered here. In general, whatever the findings about representation and case outcomes, we cannot generalize those findings to highly complex fields of law, as we have no information about those fields.

**Table 1. Studies Contributing Data to the Meta-Analysis: Case Type, Study Citation, Number of Cases Contributed, Field of Law, Type of Forum, and Procedural Complexity Rating**

Type of Case (number of cases)	Field of Law	Forum Type	Procedural Complexity Rating
<b>State tax appeals</b> Kritzer, Herbert M. 1998. "The Wisconsin Tax Appeals Commission." <i>Legal Advocacy: Lawyers and Non-lawyers at Work</i> . Ann Arbor, MI: University of Michigan Press. pp. 79–110. (137 cases)	Personal income tax	Court	48

Type of Case (number of cases)	Field of Law	Forum Type	Procedural Complexity Rating
<p><b>Goldberg hearings</b>                      Hammer, Ronald P. and Joseph M. Hartley. 1978. "Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin." <i>Wisconsin Law Review</i>. pp 145–251.                      (1,065 cases)</p> <p>Cooper, Laura. 1979. "Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised is a Question of Law." <i>Minnesota Law Review</i> 64:1107–1179.                      (280 cases)</p>	General family practice: poverty-level clients	Tribunal	43
<p><b>Social Security Disability Insurance (SSDI) reconsideration hearings</b>                      Subcommittee on Social Security of the Committee on Ways and Means. 1975. "Report of the Disability Claims Process Task Force." <i>Recent Studies Relevant to the Disability Hearings and Appeals Crisis</i>. Washington, DC: GPO. pp. 1–124.                      (394 cases)</p>	Employment : Unions/Empl oyees	Tribunal	51
<p><b>Evictions</b>                      Fusco, Anthony J., Jr., Nancy B. Collins, and Julian R. Birnbaum. 1979. "Chicago's Eviction Court: A Tenants' Court of No Resort." <i>Urban Law Annual</i> 17:93–132.                      (1,061 cases)</p> <p>Seron, Carroll, Gregg Van Ryzin, Martin Frankel, and Jean Kovath. 2001. "The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment." <i>Law and Society Review</i> 35(2):419–434.                      (200 cases)</p> <p>Mosier, Marilyn Miller and Richard A. Soble. 1973–1974. "Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court." <i>University of Michigan Journal of Law Reform</i> 7:9–70.                      (4,094 cases)</p>	Real Estate: Landlord/Te nant	Court	46

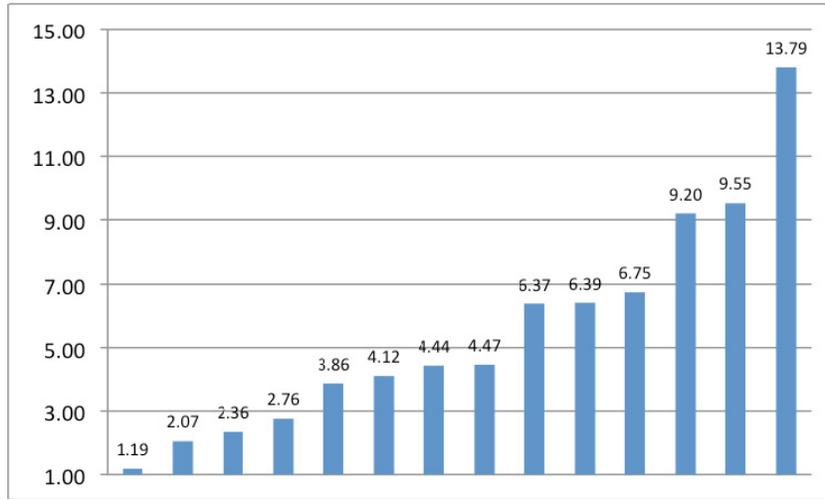
Type of Case (number of cases)	Field of Law	Forum Type	Procedural Complexity Rating
<p><b>Affirmative asylum requests</b> Kerwin, Donald. 2004. "Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded." <i>Immigration Briefings</i> 04-6:1-12. (35,760 cases)</p> <p>Schoenholtz, Andrew I. and Jonathan Jacobs. 2001. "The State of Asylum Representation: Ideas for Change." <i>Georgetown Immigration Law Journal</i> 16(4):739-772. (20,696 cases)</p>	Immigration	Court	48
<p><b>Defensive asylum requests</b> (i.e., focal party is facing deportation) Kerwin, Donald. 2004. "Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded." <i>Immigration Briefings</i> 04-6:1-12. (5,794 cases)</p> <p>Schoenholtz, Andrew I. and Jonathan Jacobs. 2001. "The State of Asylum Representation: Ideas for Change." <i>Georgetown Immigration Law Journal</i> 16(4):739-772. (2,803 cases)</p>	Immigration	Court	48
<p><b>Special education certification hearings</b> Kirp, David, William Buss, Peter Kuriloff. 1974. "Legal Reform of Special Education: Empirical Studies and Procedural Proposals." <i>California Law Review</i> 62:40-155. (25 cases)</p>	Civil litigation: personal	Tribunal	46
<p><b>Small claims consumer cases</b> Steadman, John Montague and Richard S. Rosenstein. 1972-1973. "'Small Claims' Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study." <i>University of Pennsylvania Law Review</i> 121:1309-1361. (67 cases)</p>	Consumer law: consumer/debtor	Small claims court	47
<p><b>Small claims court</b> Sarat, Austin. 1976. "Alternatives in Dispute Processing: Litigation in a Small Claims Court." <i>Law and Society Review</i> (Spring):337-376. (109 cases)</p>	Civil litigation: personal	Small claims court	48

## **2. The Observed Difference between Lawyer-Represented and Unrepresented Parties**

Lawyer-represented people are more likely to prevail than people who appear unrepresented, on average. Figure 2 reports for each study the difference in likelihood that lawyer-represented people win in comparison with the likelihood that unrepresented people win. Here, this difference, which I will refer to as the “observed difference” between lawyer-represented and unrepresented people’s case outcomes, is expressed as an odds ratio.<sup>75</sup> When an odds ratio equals one, the odds are even: unrepresented people have just as good a chance of winning their cases, on average, as do lawyer-represented people. Odds ratios less than 1.0 would indicate that lawyer-represented people tend to have worse outcomes than unrepresented people: the odds of their winning would be lower than the odds of unrepresented people winning. Odds ratios greater than 1.0 indicate that lawyer-represented people tend to have better outcomes (in terms of winning their cases), on average, than do unrepresented people.

All of the odds ratios for all of the studies are greater than 1.0. As Figure 2 shows, lawyer-represented people do better—on average, lawyer-represented people are more likely to win than are unrepresented people in every study. But, though this difference consistently indicates that lawyer-represented parties enjoy better outcomes than do unrepresented parties, just how much better varies considerably across studies—from a study where lawyer-represented people are 19 percent more likely to win than unrepresented people, to studies where lawyer-represented people are three or four times more likely to win, to a study which finds that lawyer-represented people are almost fourteen times (odds ratio = 13.79) more likely to win than are unrepresented people.

**Figure 2. Observed Difference in the Likelihood People Win in Adjudication: Lawyer-Represented People Compared to Unrepresented People<sup>76</sup>**



N = 12 studies of 14 case groups, comprising 72,337 cases.

It is not clear from most existing studies how much of the observed difference reflects how lawyers actually change case outcomes and how much is due to other factors, such as characteristics of the lay litigants or the cases themselves. The kinds of people who seek out and secure representation by attorneys may be different from those who do not, and these differences may be related to skills or personality traits that would make these litigants more successful on their own, even without attorneys. For example, they may have greater facility with English, or be more organized, more persistent, or better at communicating information to legal professionals than litigants who do not seek out attorneys or cannot secure representation when they do. We might expect that people with the qualities of language facility, organization, persistence, and good communication skills would have been more likely to win their cases even without lawyers to represent them. Similarly, the kinds of cases that end up being

represented by lawyers are likely different from the kinds of cases that do not. For example, cases that lawyers take may have more legal merit, more easily available evidence, or better facts than cases that lawyers turn away. Both of these potential differences—differences in litigant capacity to represent themselves, and differences in the likelihood that cases will win given the facts and the law—combine with what lawyers actually do in litigation to create the differences in case outcomes that we observe between lawyer-represented and self-represented people.

One study avoids this problem of interpretation by employing a randomized trial. In this study, people waiting in line at a courthouse to respond to a summons for eviction for nonpayment of rent were randomly selected to receive lawyer advice and representation or to be told that no lawyer was available to assist them at that time. Both groups of people, those provided with attorneys as part of the research project and those told that they could be offered no assistance, were then followed through to the conclusion of their court cases. Because the research design matched litigants to the conditions of lawyer representation or no representation randomly (without reference to litigant characteristics or aspects of the case), the differences observed in the outcomes of lawyer-represented and unrepresented people are likely due to the presence of lawyers themselves, as the two groups of cases differ in no other systematic way. This randomized trial found a difference in the middle of the observed range. In this study, tenants facing eviction for nonpayment of rent who were represented by lawyers were more than 4.4 times more likely to retain possession of their apartments than similar tenants who were not represented.<sup>77</sup>

### **3. What Are Lawyers Doing that Creates the Observed Difference? Evaluating the Role of Procedural Complexity**

The magnitude of the observed difference varies widely across studies, but this variation is patterned in instructive ways. Figure 3 reports on the

average observed difference when studies are classified into four categories based on the two dimensions of variation introduced in Table 1—procedural complexity and type of hearing forum. The quantities in the figure are weighted averages, calculated for each study and then weighted within each category, so studies that contribute more cases weigh more heavily on the average than smaller studies that contribute fewer cases.<sup>78</sup>

The first dimension of variation, reflected in the color of the bars, is procedural complexity as rated by attorneys who practice in that field of law. The fields of law for which lawyers provided complexity ratings in the Chicago Lawyers Survey were not always at the same level of detail as the fields of law included in the studies of lawyers' impact. The process of classifying the studies into fields thus involves measurement error: in some instances, the fields of law for which we have complexity measures are much broader than the fields of law represented in the studies (e.g., civil litigation for personal clients versus education law, respectively). To the extent that this measurement error is random with respect to the variables of interest, it serves to reduce observed differences between categories of cases—that is, it will make the differences appear smaller than they actually are.<sup>79</sup> The second dimension of variation is the kind of forum in which the dispute is heard: it distinguishes traditional trial courts from small claims courts and tribunals. As noted above, these latter types of forum were specifically intended to be forums in which lay people could more easily pursue their own cases.<sup>80</sup>

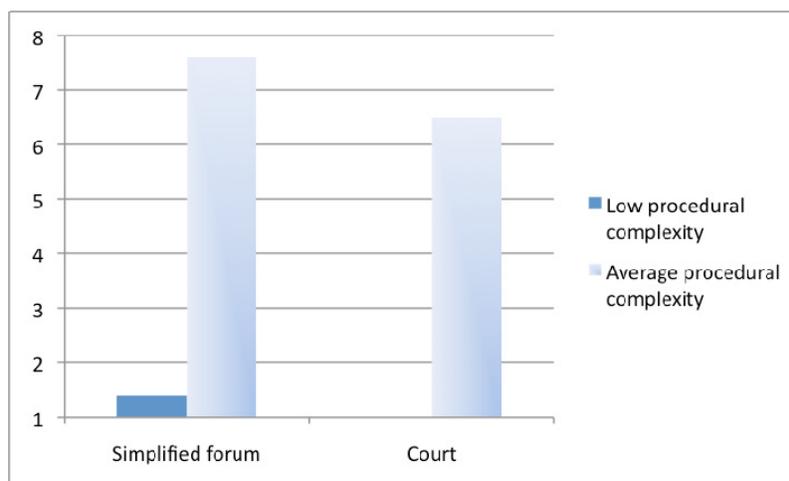
In the figure, studies in which the field of law is below average in procedural complexity, as rated by attorneys, are represented by the darker bar; studies in which attorneys rated procedural complexity as average are indicated by the lighter bars. The left pair of bars reports the observed difference in case outcomes between lawyer-represented and unrepresented people in simplified forums (tribunals and small claims courts), while the right bar reports the observed difference in traditional trial courts. None of

the studies includes cases in fields of law of average complexity that are heard in simplified forums.

The figure reveals a striking finding: the observed difference is much greater for cases in those fields of law that lawyers rate as involving greater procedural complexity. This is true even when such cases are heard in simplified forums such as tribunals and small claims courts. The smallest observed difference between lawyer-represented and unrepresented cases is found in the two studies of welfare fair hearings, which involve a field of law that attorneys rate as less procedurally complex and in which cases are heard in a tribunal. In these two studies, focal parties represented by attorneys are on average 40 percent more likely to prevail than are focal parties who represent themselves. In studies of cases in fields that lawyers rate as having average procedural complexity—tax, immigration, employment law, landlord/tenant, consumer claims, and general personal civil litigation—lawyers’ potential impact is much larger.

In this body of research, when procedural complexity is greater, the type of forum in which the case is heard appears to make little difference. In more complex fields of law, the observed difference in outcomes for lawyer-represented and unrepresented people is quite large, depending on whether the cases are heard in a court or in a simplified forum (like a tribunal or small claims court). In fields of average complexity in trial courts, lawyer-represented people are on average 6.5 times more likely to win their cases than are unrepresented people in trial courts. In fields of average complexity in tribunals, lawyer-represented people are on average 7.6 times more likely to win their cases than are unrepresented people.

**Figure 3. Observed Difference in Outcomes for Attorney-Represented and Unrepresented People, by Forum Type and Procedural Complexity of the Field of Law Involved in the Case: Odds ratios**



The finding that the observed difference is larger when procedures are more complex suggests that part of what lawyers do to affect litigation outcomes may be assisting people in managing procedural complexity. Of course, we cannot know that procedural complexity is the only, or even the largest, factor creating the differences we observe. And, as I noted earlier, we cannot know how much of the observed difference is due to what lawyers are doing and how much is due to differences in the kinds of cases or litigants that end up having attorneys to represent them. And, of course, we would like to have many more studies on which to base such a conclusion. But the finding that procedural complexity bears a relationship to the size of the observed difference is very suggestive.

#### IV. ACCESS TO LAW AND ACCESS TO JUSTICE

##### *A. The Impact of Expanded Access to Counsel*

The finding that procedural complexity may account for at least a portion of lawyers' impact on case outcomes provides some insight into how expanded access to counsel, whether through a "right" or other means, might affect the American public's experience with its civil justice problems. Procedural complexity involves two distinct kinds of practical challenges for a lay litigant: figuring out what is specifically legal about one's problems and figuring out how to pursue one's problems using the formal legal system. Complexity likely raises the bar on both of these dimensions: greater complexity makes it more difficult for lay litigants to identify legally cognizable claims, and it further makes it difficult for lay people to pursue those claims through hearings, trials, and legal documents.

Consider, as an example, a type of case that features in three of the studies in the meta-analysis: evictions. No national empirical picture of evictions exists, so we do not know how many evictions occur each year, nor do we know what most evictions are like. We do not know the typical issues of law raised in evictions around the country, nor do we know about the prevalence of different kinds of facts. For example, we do not know the usual reasons that landlords move for eviction. Nor do we know how many evictions involve fact situations that are favorable or unfavorable to one side or another, such as how many evictions for breach of lease involve actual breaches. One likely very common allegation in evictions is nonpayment of rent. One author suggests that "[p]erhaps the most common reason a landlord seeks a tenant's removal is because the tenant has not paid the rent."<sup>81</sup> A recent study in San Mateo County, California, found that almost two-thirds (65 percent) of eviction filings alleged nonpayment of rent. This proportion may have been lower than in typical years, as the mortgage crisis contributed to many post-foreclosure evictions (27 percent of those filed).<sup>82</sup> Because evictions for nonpayment of rent are apparently a

common—and perhaps the *most* common—type of eviction, I will take them as the exemplary case.

Lay litigants may have poor skills when it comes to figuring out what their peculiarly legal problems are. For example, among people who face eviction for not paying their rent, some will, in fact, have not paid it. The reasons they did not pay their rent may be socially legitimate reasons, in that both the defaulting tenant and many other people would recognize them as legitimate excuses for not paying rent. For example, someone may have a child who is very ill and requires expensive medication. If this family has no health insurance, because they cannot afford it, they will have to pay out-of-pocket for that medication. Given limited resources, they may have to choose between paying the rent and treating their child's illness with costly drugs. Or, the car that someone relies on for traveling to a job that supports her family may need expensive repairs. She must repair the car to keep the job but, given limited resources, that may mean not paying the rent. Most of us would probably be in sympathy with a parent's choice to pay for necessary medicines ahead of rent. Many of us would also sympathize with the parent who did what was necessary to keep her job even though that meant not fulfilling other obligations, such as paying rent as part of a rental contract. But neither of these defenses is typically legally cognizable.

A tenant who had not paid the rent might still have some means of staving off the eviction. In some jurisdictions, the tenant might be able to get some or all of the unpaid rent rebated under an implied warranty of habitability, if the premises were deficient under housing codes.<sup>83</sup> However, not all low-income housing is bad enough to justify rent rebates. Eviction requires that proper notice be served on the tenant. The notice of eviction might have been defective or improperly served.<sup>84</sup> However, notices are not always incorrect or improperly served. In the absence of a habitability claim or a defective notice, the tenant in rent arrears has little legal leverage to counter the eviction.

How could an attorney assist in this hypothetical case—perhaps a very common one—where a poor person faces eviction for not paying rent that she, in fact, has not paid? An attorney could have the expertise to understand, explain, and collect the evidence for habitability violations. The attorney could also make that case for the tenant in court. An attorney could do similar tasks if the notice of eviction were defective. Even if the case involved good notice and safe and secure premises, an attorney could advise the tenant about the situation and the tenant's options and try to help limit the collateral damage of being sued for eviction. The attorney could help the tenant file an answer, which would effectively stay the judgment until a trial date and give the tenant a few weeks in which to try to find new premises.<sup>85</sup> The tenant, with the attorney's assistance, could also try to settle with the landlord without proceeding to trial. An attorney might also help the tenant get out of the apartment without an adverse judgment that would appear on his or her credit rating.<sup>86</sup>

However, ironically, the attorney might be least useful in this situation when representing the tenant in court. Given the usual law and these hypothetical facts (unpaid rent, properly served notice, no habitability issues), if the tenant followed the eviction all the way through to trial, the outcome of adjudication could well be the same whether or not the tenant was represented by an attorney; the landlord would regain possession of the apartment, and the tenant would receive a judgment of eviction.

This example highlights two ways that an expanded access to counsel might affect public experience with civil justice problems. First, the example suggests that greater access to attorneys could be a form of public legal education. Attorneys could give members of the public assistance in figuring out what their *legal* claims might be or, indeed, whether they have any legal claims at all. Many unjust, unfair, appalling, and regrettable events happen in the world; the legal system, for better or for worse, has remedies for only a few of them. Part of the impact of an expanded access

to counsel could be to better inform the public about the practical scope of the legal system.

If this reasoning is correct, then an expanded access to counsel would increase the share of litigants who appeared in court with legally cognizable claims and defenses. Part of this change in the pool of adjudicated cases would occur because people with legally cognizable claims (who currently do not know how to identify those claims) would be able to make claims with the assistance of lawyers. At the same time, more cases with legal grounds would be appearing on dockets in part because greater access to attorneys would lead to fewer groundless cases in court. In some instances, lawyers might well advise potential litigants to forgo pursuing their claims through law and assist them in seeking out other solutions, like attempting to negotiate mutually acceptable resolutions with the other parties involved in their civil justice problems.

Second, the example suggests that greater access to attorneys might lead to more legally accurate decisions on the part of adjudicators. The second aspect of complexity that I identified involved getting the problem through the formal legal process: filling out and filing legal forms, writing pleadings, making motions, presenting legal arguments, figuring out what is admissible as evidence, using that evidence appropriately and effectively, etc. Part of the reason that unrepresented litigants fare so poorly may be the sheer confusion created by all of the documents and procedures that are outside their usual experience. Studies investigating the experiences of lay people who appear unrepresented in courts and tribunals show that many have great difficulty translating their goals and experiences into legal terms, and that court staff are often not helpful to them.<sup>87</sup> The impact of expanded access to lawyers would likely be to increase the rates at which currently unrepresented people won their cases, because lawyers' understanding of procedure would reveal meritorious claims that are currently buried under unrepresented litigants' confusion about, and misunderstanding of, the formal legal process. In pools of cases where the people in these studies

typically face opponents who have lawyer representation, expanded access to lawyers for these people might also help to reduce the advantage currently enjoyed by their lawyered-up adversaries.

Focusing narrowly on the small share of civil justice problems that ever become court cases, these findings suggest considerable scope for the impact of lawyers. It is not clear, though, that lawyers are *necessary* to achieve the impacts identified here—at least not for the types of ordinary litigation in fields of low to average complexity that have been investigated in the studies reviewed. Recall that the complexity that appears to trip up the lay public does not seem especially complex to lawyers. The studies in which we observe the largest differences between lawyer-represented and unrepresented people involve law that holds average complexity compared to the full scope of lawyers' work.

This average level of complexity might be manageable through other means than expanded access to attorneys. In some U.S. forums, nonlawyer advocates are already allowed to appear.<sup>88</sup> My own research, and that of other scholars, suggests that these nonlawyer advocates, when trained and experienced, can be at least as effective as attorneys in assisting people in pursuing their claims in tribunals.<sup>89</sup> Similarly, if complex procedures create barriers in access to justice, jurisdictions might tackle this problem directly by simplifying the procedures themselves, in favor of supplying representatives to assist lay people in navigating them.<sup>90</sup>

All three of these solutions are quite traditional and have been repeatedly proposed for years: more access to lawyers,<sup>91</sup> more access to nonlawyer advocates,<sup>92</sup> and simplified procedures that would allow lay people to more easily use law to pursue resolution of their justice problems.<sup>93</sup> What is traditional about all of these solutions is their focus on formal legal institutions as the universal response to justice problems.

*B. Beyond Access to Law: Access to Justice***1. Three Empirical Realities Ignored By the Traditional Focus on Law**

This traditional focus on law is, unfortunately, myopic.<sup>94</sup> It ignores three empirical realities that should inspire us to new thinking about access to justice. The first reality is that Americans typically do not understand their civil justice problems as legal problems. Decades of research show not only that Americans usually do not turn to lawyers and courts with their justice problems,<sup>95</sup> but also that law often does not even enter their thinking about these problems.<sup>96</sup> Perhaps Americans act and think this way because law is not available; but, perhaps they would also prefer the opportunity to have access to other nonlegal sources of advice and assistance for these very common problems.

In the United Kingdom (U.K.), another common law country, people appear quite happy to go to an established advice sector (staffed by nonlawyers) to gain information and advice for resolving their justice problems, often without taking formal legal action. People in the U.K. go to this advice sector even when lawyers' services are heavily subsidized or free (as they are for more than two-fifths of the population).<sup>97</sup> U.K. residents also enjoy another resource absent in the American context: a group of government ombudsmen's offices, empowered to independently investigate and authoritatively resolve civil justice problems involving a variety of regulated industries, including common problems with insurers, pensions, banks, and the like.<sup>98</sup>

Whether lawyers and courts are the proper solution to a justice problem depends on what one's goals are, and the traditional U.S. approach to legal aid assumes the goal is more law. But, in fact, we know very little about the American public's goals with respect to their own justice problems. U.S. civil justice surveys do not ask people what they *would have liked to do* about their justice problems, but rather about whether or not they consulted a lawyer for those problems. Instead of a day in court, what members of the

public may often want is simply to have their problems resolved or their options explained to them. The U.K. experience reviewed above suggests that lawyers and courts are not always necessary for resolution and explanation. Conceptually, empirically, and in policy, we should be considering a much wider range of sources of resolution, rather than forcing a single vision on a very diverse public experiencing a wide variety of justice problems.

The second reality is that when poor people in the United States do have access to law, they seldom receive complex legal services. One can see this pattern in the LSC's reports of the services that its grantees provide. Most of the LSC's civil legal services provided to poor people do not involve representation in court. In 2008, most cases taken by the LSC (60.3 percent) were closed with "counsel and advice," which includes services such as "the advocate ascertain[ing] and review[ing] relevant facts, exercise[ing] judgment in interpreting the particular facts presented by the client and in applying the relevant law to the facts presented, and counsel[ing] the client concerning his or her legal problem."<sup>99</sup> Another 18.7 percent of cases were closed with "limited action," which includes actions like "communication by letter, telephone or other means to a third party" and "preparation of a simple legal document such as a routine will or power of attorney."<sup>100</sup>

A minority of closed cases received representation in some kind of court case or hearing, though it is not possible to determine precisely how many, given the way the LSC collects case reporting data. Contested court decisions and appeals combined closed 3.7 percent of cases;<sup>101</sup> 4.6 percent of cases were closed by "settlement with litigation."<sup>102</sup> Agency decisions closed 3.2 percent of cases, and 2.4 percent of cases received "extensive services," which can include "extensive ongoing assistance to clients who are proceeding pro se."<sup>103</sup> So, something less than 20 percent of the cases served by the LSC-involved lawyers appearing on behalf of clients in courts or hearings. The pattern of services, which heavily favors information, advice, and basic assistance over representation, in part reflects legal aid

agencies' strategic decisions about how to effectively use scarce resources.<sup>104</sup> But it is also, in part, a reflection of what many people may typically need with respect to common justice problems, as illustrated in the eviction example above. We might consider whether it is actually necessary that lawyers per se provide these basic legal services.

The third problem with the field's narrow focus on the formal legal institutions of lawyers and courts is that it presumes a questionably feasible solution to an empirically enormous problem. In 2008, LSC-funded programs closed something fewer than nine hundred thousand cases,<sup>105</sup> receiving total funding from all sources that amounted to about \$990 per closed case.<sup>106</sup> Recall that by a conservative estimate, more than twenty-five million LSC-eligible people are living in households already affected by at least one justice problem. No one knows precisely how much is spent to subsidize access to civil justice in the United States, but one observer puts this figure at around one billion dollars each year.<sup>107</sup> To expand the basic levels of services currently provided to serve every LSC-eligible client with a civil justice problem, how much more funding would we need? Lawyers are expensive. A recent estimate suggests that providing one additional hour of lawyers' services to the existing justice problem for each household would require "a twenty-fold increase in current U.S. levels of public and private (charitable) legal aid funding."<sup>108</sup> Twenty billion dollars is small change in the context of \$3.6 trillion or so in total federal spending and a gross domestic product of \$14.6 trillion.<sup>109</sup> However, it is a massive increase in the context of current levels of funding for access to civil justice. More access to law is part of the answer, but only part.

Expanding access to nonlegal institutions of remedy for civil justice problems is an innovative solution that responds to all three of these empirical realities—the fact that Americans often do not think of their justice problems as legal; the fact that many could benefit from services that could be provided by nonlawyers and; the high cost of lawyers' services as they are currently produced. Nonlegal institutions of remedy provide

advice, information, and authoritative resolution of civil justice problems, but “without requiring public contact with courts, tribunals, lawsuits, litigation or lawyers.”<sup>110</sup> A robust and effective set of nonlegal institutions would include both a component that is “empowered to produce authoritative resolution to the public’s civil justice problems”<sup>111</sup> and a set of auxiliaries that “work apart from formal institutions of remedy by providing problem-resolution strategies that, although not authoritative, may nevertheless be very effective from the public’s perspective.”<sup>112</sup>

## **2. Twin Pillars for New Nonlegal Institutions of Remedy**

These new nonlegal institutions of remedy would rest on two pillars. The first would be a nationally present, nonlawyer advice sector that centers its work around substantive problems that people commonly confront. As in the U.K., these advisors should be empowered to give legal advice. Their advice would not be limited to legal routes to obtain solutions; rather, it would be focused on helping people understand their options and resolve their substantive problems. Such services could provide many Americans with the information and assistance they need to resolve many of the kinds of justice problems they face today, often without recourse to formal law. These advice services might be public or charitable, but we also might consider market-based models for the provision of nonlawyer advice. In any event, implementing this policy would, of course, require relaxing lawyers’ monopoly on the provision of legal advice, as has been advocated by others.<sup>113</sup>

The second pillar of the new U.S. nonlegal institutions of remedy would be authoritative nonlegal routes to the resolution of justice problems. One of the most promising forms of such institutions is government ombudsmen’s offices. Ombudsmen’s offices are empowered to independently investigate and authoritatively resolve complaints by the public about vendors in the industries that they oversee.<sup>114</sup> As the U.K.’s Financial Ombudsman Service puts it, “these offices are ‘the official independent expert[s] in settling . . .

complaints, with the power to put things right.”<sup>115</sup> As noted above, my own research shows that, in contexts where such nonlegal solutions are available, people use them, doing so even when publicly subsidized attorney services are also available.<sup>116</sup> In the contemporary United States, perhaps the most prominent regulated industries appearing in the public’s civil justice problems are financial services and health care, including health insurance.<sup>117</sup> In addition to the new Consumer Financial Protection Bureau czar,<sup>118</sup> we should seriously consider a Consumer Financial Protection Ombudsman. A similar office could be created to resolve consumers’ problems with health insurance providers. These problems are frequent now, but likely will become much more common as many more people will soon have health insurance; the recent health care reform bill will expand the population covered by both public and private insurers by thirty million people.<sup>119</sup>

## CONCLUSION

Many millions of people in this country face civil justice problems that can and often do have far-reaching effects on their lives. More than fifty million people are currently eligible for LSC-funded civil legal aid. The best available evidence suggests that at least half of them are living in households facing at least one civil justice problem. Even though most of these problems never make it to courts, tribunals, or attorneys’ offices, the existing legal aid resources of the country are overstretched by any measure. The tens of millions of people facing civil justice problems and eligible under current means tests for aid have access to perhaps one full-time civil legal assistance attorney for every five thousand people eligible for that attorney’s services—and that is if one includes as sources of civil legal assistance not just LSC-funded legal aid, but also legal aid lawyers salaried from other sources and lawyers working in organized civil pro bono programs.<sup>120</sup> Given these facts, it is no surprise that, in recent studies of its own offices’ capacity to serve, the LSC found that these offices must turn

away for lack of resources at least as many people as they are able to help.<sup>121</sup>

The seemingly overwhelming nature of the present problem constitutes a necessity that can spur innovation, both in how we think about access to civil justice and in what we do about it. Choosing what solutions to employ in any given reform should be substantially an empirical question—that is, we should use empirical evidence to guide us in deciding when simplifying procedures would be an adequate solution, when a nonlawyer advocate or legal advice from a nonlawyer advisor would be sufficient, or when situations need fully qualified attorneys. We certainly do not yet have the evidence base we need to make these kinds of determinations. The significant deficits in our understanding should be an impetus to get working.

But choosing between solutions cannot be a completely empirical question. We first have to decide on what goals we want these solutions to achieve. The people bearing the greatest weight of the current failures of our institutions of remedy for civil justice problems are the public. They should be consulted about what they want when they face civil justice problems.

---

<sup>1</sup> This paper is a revision of a presentation prepared for a Symposium, *Civil Legal Representation and Access to Justice: Breaking Point or Opportunity to Change* (Feb. 19, 2010), [http://www.law.seattleu.edu/Continuing\\_Legal\\_Education/Event\\_Archives/2010/Korematsu.xml](http://www.law.seattleu.edu/Continuing_Legal_Education/Event_Archives/2010/Korematsu.xml) (last visited Oct. 8, 2010) (The symposium was jointly sponsored by the Korematsu Center for Law and Equality at Seattle University School of Law, University of Washington School of Law, and Gonzaga University School of Law). Research reported herein was supported in part by a Stanford University Office of Technology Licensing Junior Faculty Incentive Grant and the UPS Endowment Fund. I thank Stanford Sociology PhD students Justine Tinkler (now on the faculty of the Department of Sociology at Louisiana State University) and Colin Beck (now on the faculty of the Department of Sociology at Pomona College) for research assistance, as well as Laura Abel, Jeanne Charn, Russell Engler, Tomas Jimenez, Herbert Kritzer, Paul Marvy,

Monica McDermott, Paolo Parigi, Carroll Seron, and participants at the Seattle University School of Law symposium for comments and suggestions.

<sup>2</sup> See discussion *infra* Section III.

<sup>3</sup> See discussion *infra* Section II.

<sup>4</sup> See *infra* pp. 9–10.

<sup>5</sup> See *infra* p. 11.

<sup>6</sup> See discussion *infra* Section IV.

<sup>7</sup> *Id.*

<sup>8</sup> See discussion *infra* Section IV, Part iii.

<sup>9</sup> Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 1, 113 (Pascoe Pleasence et al. eds., 2007).

<sup>10</sup> *Id.*; see also HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 1, 12–13 (1999) (providing the definition of “justiciable event”).

<sup>11</sup> See discussion *infra* Section III.

<sup>12</sup> See *Importance of Doing Nothing*, *supra* note 2, at 117–123, for a detailed description of the focus group procedures.

<sup>13</sup> See also Ab Currie, *The Legal Problems of Everyday Life*, in ACCESS TO JUSTICE 1, 2 (Rebecca L. Sandefur ed., Emerald Group 2009) [hereinafter *The Legal Problems*]. “So many aspects of ordinary daily activities of life are lived in the shadow of the law, it should not be at all surprising that a study of the extent or incidence of civil justice problems should reveal that a large proportion of the population should experience problems that have a legal aspect.” *Id.*

<sup>14</sup> See *Importance of Doing Nothing*, *supra* note 9, at 119.

<sup>15</sup> See discussion *infra* Section III.

<sup>16</sup> See Pascoe Pleasence et al., *Mounting Problems: Further Evidence on the Social, Economic and Health Consequences of Civil Justice Problems*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 1, at 72–76 tbls. 2, 3 (Pascoe Pleasence et al. eds., 2007); Rebecca L. Sandefur, *The Socio-Economic Impact of Civil Justice Problems: Civil Justice and Social Class Inequality* tbl.4 (2010) (unpublished manuscript, on file at the American Bar Foundation).

<sup>17</sup> GENN, *supra* note 10, at 35 (the term “cascade” comes from Genn’s study).

<sup>18</sup> Pleasence et al., *supra* note 16, at 83–84.

<sup>19</sup> *Id.* at 84.

<sup>20</sup> *Id.* at 85; see also Pascoe Pleasence et al., *Causes of Action: First Findings of the LSRC Periodic Survey*, 30(1) J. L. & SOC’Y 11, 19 (2003) (finding a great proportion of people living in temporary accommodation “were living in [them] as a consequence of justiciable problems they had experienced.”).

<sup>21</sup> Ab Currie, *‘A Lightning Rod for Discontent’: Justiciable Problems and Attitudes Toward Law and the Justice System*, in REACHING FURTHER: INNOVATION, ACCESS AND QUALITY IN LEGAL SERVICES 100, 111–12 (Alexy Buck et al. eds., 2009) [hereinafter *Lightening Rod*].

<sup>22</sup> *Id.* at 107. Other research suggests that public perceptions of the justice system are also affected by how people evaluate their experiences with the system itself. For

example, procedural justice research suggests that people evaluate the justice system based in part upon how fairly they feel they are treated in interactions with that system. See Tom R. Tyler, *What is Procedural Justice: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988); see generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

<sup>23</sup> This estimate of the U.S. population comes from, U.S. BUREAU OF THE CENSUS, <http://www.census.gov/main/www/popclock.html> (last visited Oct. 11, 2010).

<sup>24</sup> See GENN, *supra* note 10.

<sup>25</sup> *The Legal Problems*, *supra* note 13, at 5, tbl. 1 (Table 1 reviews problem incidence rates based on twelve recent civil justice surveys in seven nations).

<sup>26</sup> According to the National Bureau of Economic Research, the current recession began in December 2007 and ended in June 2009. *Press Citations on NBER Business Cycles*, THE NAT'L BUREAU ECON. RES., <http://www.nber.org/cyclescites.html> (last visited October 12, 2010).

<sup>27</sup> CONSORTIUM ON LEGAL SERVS. AND THE PUB., *LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 1*, 3–5 (Am. Bar Ass'n 1994).

<sup>28</sup> BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (AMERICAN BAR FOUNDATION, CHICAGO 1977); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980–81).

<sup>29</sup> *The Legal Problems*, *supra* note 13, at 2–3, tbl. 1.

<sup>30</sup> CONSORTIUM ON LEGAL SERVS., *supra* note 27, at 56.

<sup>31</sup> *Id.* at 54.

<sup>32</sup> *Id.* at 33.

<sup>33</sup> *Id.* at 20.

<sup>34</sup> *Id.* at 3 (reporting that 47 percent of households with incomes below 125 percent of the federal poverty line were experiencing one or more civil justice problems in the year prior to the survey, while 52 percent of households with incomes above 125 percent of the federal poverty line (but no more than \$60,000 per year) were experiencing at least one civil justice problem.).

<sup>35</sup> The 1994 ABA report surveyed households with incomes within the eightieth percentile of the household income distribution, or \$60,000 per year in then-current dollars. In inflation-adjusted 2008 dollars, this would have been \$90,972 per year. The estimate of the number of households affected by civil justice problems reflects the prevalence rates from the 1992 survey projected forward on to the distribution of households by income as reported in: *Table HINC-06. Income Distribution to \$250,000 or More for Households: 2008*, U.S. CENSUS BUREAU, [http://www.census.gov/hhes/www/cpstables/032009/hhinc/new06\\_000.htm](http://www.census.gov/hhes/www/cpstables/032009/hhinc/new06_000.htm) (last visited Oct. 11, 2010). The estimate of people exposed to problems comes from calculating the number of people living in households with incomes below \$90,000 per year in 2008 from: *Table HINC-03. People in Households -- Households, by Total Money Income in 2008, Age, Race and Hispanic Origin of Householder*, U.S. CENSUS BUREAU, [http://www.census.gov/hhes/www/cpstables/032009/hhinc/new03\\_001.htm](http://www.census.gov/hhes/www/cpstables/032009/hhinc/new03_001.htm) (last visited Oct. 11, 2010), and then dividing that number by half, an estimation strategy which

assumes that civil justice problems are evenly distributed with respect to household size. This strategy may produce a conservative estimate of the number of people living in households affected by civil justice problems, as large households may be more likely to have civil justice problems than are smaller households. *See supra* note 27, Table 3–5 (reporting that 55 percent of households of five or more people reported at least one civil justice problem, in comparison with 42 percent of four-person households, 51 percent of three person households, 41 percent of two-person households, and 47 percent of one-person households).

<sup>36</sup> Table HINC-03, *supra* note 35.

<sup>37</sup> In 2008, foreclosure filings topped three million, a level 81 percent above that of 2007 and 225 percent above that of 2006. Stephanie Armour, *2008 Foreclosure Filings Set Record*, USA TODAY, (Jan. 15, 2009), [http://www.usatoday.com/money/economy/housing/2009-01-14-foreclosure-record-filings\\_N.htm](http://www.usatoday.com/money/economy/housing/2009-01-14-foreclosure-record-filings_N.htm).

<sup>38</sup> 2008 was the worst year for job losses since 1945, with 2.6 million total jobs lost over the course of the year. David Goldman, *Worst Year for Jobs Since '45*, CNNMoney.com (Jan. 9, 2009), [http://money.cnn.com/2009/01/09/news/economy/jobs\\_december/](http://money.cnn.com/2009/01/09/news/economy/jobs_december/).

<sup>39</sup> The Centers for Disease Control and Prevention reported that, in 2008, one in five Americans aged eighteen to sixty-four were without health insurance for at least part of the year. *FastStats: Health Insurance Coverage*, CENT. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/hinsure.htm> (last updated Apr. 2, 2009).

<sup>40</sup> The 2008 Financial Literacy Survey, a Harris Poll-mounted survey of about one thousand adult Americans, found that about a quarter (27 percent), or more than sixty-two million people, reported that they did not pay all of their bills on time. *2008 Financial Literacy Survey: Summary Report and Topline*, NAT'L FOUND. FOR CREDIT COUNSELING, 4 (Apr. 29, 2008), [www.nfcc.org/NewsRoom/FinancialLiteracy/files/2008SummaryReportTopline.pdf](http://www.nfcc.org/NewsRoom/FinancialLiteracy/files/2008SummaryReportTopline.pdf).

<sup>41</sup> National eviction data are not available, but reports from individual jurisdictions suggest a rise. In Massachusetts, fiscal year 2007-08 saw an 8.8 percent increase in evictions over the previous year. *Eviction spike leaving more Bay Staters out in the cold: Foreclosures driving homelessness*, Boston Herald (Nov. 23, 2009), available at [http://www.beaconhillpg.com/uploads/Eviction\\_Spike.pdf](http://www.beaconhillpg.com/uploads/Eviction_Spike.pdf). In Cleveland, Ohio, the housing court noted a near doubling in eviction filings, which it attributed to increased foreclosures. Testimony of David Rothstein of Policy Matters Ohio for the Ohio House of Representatives, *Pol'y Matters Ohio*, 2 (Mar. 5, 2009), available at [http://www.policymattersohio.org/pdf/HB9TestimonyDavidRothstein2009\\_03.pdf](http://www.policymattersohio.org/pdf/HB9TestimonyDavidRothstein2009_03.pdf).

<sup>42</sup> For example, job loss due to the recession can lead people to seek to collect unemployment insurance. *See* Jason DeParle, *Contesting Jobless Claims Becomes a Boom Industry*, N.Y. TIMES, Apr. 4, 2010, at A1 (describing a company that “helps [employers] decide which applications [for unemployment benefits] to resist and how to mount effective appeals”).

<sup>43</sup> *The Legal Problems*, *supra* note 13, at tbl. 1.

<sup>44</sup> Jon Johnsen, *Legal Needs Studied in a Market Context*, in THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES, 205, 217–18 (Francis Regan et al. eds., 1999). (Legal needs studies employing typically used survey methods appear to

be “vulnerable to *under-reporting*. When asked about past problems, people forget details. They are also likely to experience emotional barriers to reporting sensitive cases. So far surveys have usually measured problems experienced *in the past*, not the amount and structure of unsolved problems that currently exist. But we could expect people to be more concerned about their current problems than those in the past. Often they also have vague memories of, and are less willing to talk about, past problems.”)

<sup>45</sup> Summarizing their findings from the English and Wales Civil and Social Justice Survey (CSJS), Pascoe Pleasence, Nigel J. Balmer, and Tania Tam conclude: “As our results demonstrate, maybe two-thirds or more of civil justice problems that CSJS respondents would regard as falling within the scope of the survey go unreported. Incidence of civil justice problems is therefore likely to be much higher than CSJS estimates suggest.” 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 ACCESS TO JUSTICE 43, 60 (Rebecca L. Sandefur ed., Emerald Group 2009).

<sup>46</sup> *Poverty Thresholds for 2008 by Size of Family and Number of Related Children Under 18 Years*, U.S. CENSUS BUREAU, [http://www.census.gov/hhes/www/cpstables/032009/pov/new35\\_000.htm](http://www.census.gov/hhes/www/cpstables/032009/pov/new35_000.htm) (last visited Oct. 4, 2010).

<sup>47</sup> E.g., *Assembly Bill No. 590*, OFFICIAL CALIFORNIA LEGIS. INFO., [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_05510600/ab\\_590\\_bill\\_20091011\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_05510600/ab_590_bill_20091011_chaptered.pdf) (last visited Oct. 11, 2010) (the legal advice and assistance pilot projects to be funded under California State Assembly Bill 590). See also *Fact Sheet: Pilot Projects under the Sargent Shriver Civil Counsel Act (AB 590 [Feuer])*, CALEGALADVOCATES.ORG, [http://www.calegaladvocates.org/library/folder.239857-AB\\_590\\_Feuer](http://www.calegaladvocates.org/library/folder.239857-AB_590_Feuer) (last visited Oct. 11, 2010).

<sup>48</sup> Based on data presented in *Poverty Thresholds*, *supra* note 46.

<sup>49</sup> Author’s calculations based on findings presented in CONSORTIUM ON LEGAL SERVS., *supra* note 27, and population estimates and poverty thresholds from the US Bureau of the Census in U.S. BUREAU OF THE CENSUS, *supra* note 23.

<sup>50</sup> *The Legal Problems*, *supra* note 13, at 5.

<sup>51</sup> See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class and Gender Inequality*, 34 ANN. REV. SOC. 339, 347–48, 350 (2008) (reviewing information about the impact of civil justice problems on the people who experience them); Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Non-Legal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 969 (2009) (documenting that the majority of American’s civil justice problems involving money and housing are not taken to courts, tribunals, or attorneys’ offices).

<sup>52</sup> *The Fulcrum Point*, *supra* note 51, at 953; *Access to Civil Justice*, *supra* note 51, at 341–42 (The public’s nonlegal responses to their justice problems are “quite diverse, ranging from doing nothing about a problem; seeking punitive publicity from media consumer reporters; writing letters to the editor of local or national newspapers; visiting nonlawyer advice or mediation services; and seeking the intervention of legislators, government ombudsmen (in countries where these exist), administrative agencies, or consumer advocacy groups.”).

<sup>53</sup> In defiance of fact, Americans have, for years, been portrayed as a deeply litigious people, ever ready to file law suits and pursue frivolous claims. See, for example, responses to the famous McDonald's Coffee Case. Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate Over Tort Reform*, 26 CAP. U. L. REV. 701, 724–30 (1997). Or, consider a recent claim by the chairman of Lloyd's of London in a speech to a Chicago business group: "The U.S. system of civil litigation has spawned an American pastime, something that ranks alongside catching a game of baseball or basketball: going to court to sue other people, or companies, or organizations, or the Government." *Litigious Culture is Suppressing American Enterprise*, LLOYD'S (Apr. 8, 2003), [http://www.lloyds.com/Lloyds/Press-Centre/Press-Releases/2003/04/Litigious\\_culture\\_is\\_suppressing\\_American\\_enterprise](http://www.lloyds.com/Lloyds/Press-Centre/Press-Releases/2003/04/Litigious_culture_is_suppressing_American_enterprise).

<sup>54</sup> See Sandefur, *supra* note 51, at 342 (reviewing findings from studies of public experience with civil justice problems.) Empirical studies of court filings also reveal litigation patterns that differ sharply from media representations of a litigious American public. Marc Galanter, in a study of trends in product liability filings in federal district courts between 1985 and 1991, found that tort claims unrelated to asbestos *declined* over the period. See his *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 91 (1993). A study of federal litigation involving the nation's 2000 largest corporations between 1971 and 1991 found that "although the aggregate volume of business litigation grew during the 1970s and early 1980s," litigation subsequently declined "in all major categories of cases." The study further found that "business-related litigation [was] heavily concentrated, with an extremely limited number of business 'mega-litigants' accounting for most of the activity . . . with the result that" tort cases involving companies that were not "mega-litigants" actually held steady or declined over the period. The study also reported that "a good deal of the growth in litigation outside the tort area can be attributed to business itself," with businesses increasingly suing each other. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQUIRY 497, 497 (1996).

<sup>55</sup> *Access to Civil Justice*, *supra* note 51, at 342.

<sup>56</sup> Author's calculation based on information reported in CONSORTIUM ON LEGAL SERV., *supra* note 27, tbl. 4–7.

<sup>57</sup> In 16 percent of lawyer contacts by low-income respondents, the "most involved lawyer" did not agree to provide legal assistance with the respondent's civil justice problem. *Id.* at tbl. 5–9. In 11 percent of lawyer contacts by moderate-income respondents, the "most involved lawyer" did not agree to provide legal assistance with the respondent's civil justice problem. *Id.*

<sup>58</sup> CURRAN, *supra* note 28, at fig. 4.26; Miller & Sarat, *supra* note 28, at tbl. 2.

<sup>59</sup> *Documenting the Justice Gap in America*, LEGAL SERVS. CORP., 12, (June 2007), <http://www.lsc.gov/JusticeGap.pdf>; *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans: An Updated Report of the Legal Services Corporation*, LEGAL SERVS. CORP., at tbl. 4 (2009).

<sup>60</sup> Author's calculation based on information reported in CONSORTIUM ON LEGAL SERV., *supra* note 27, tbl. 4–10.

<sup>61</sup> *Id.*

<sup>62</sup> John M. Greacen, *Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know*, CENTER FOR FAMILIES, CHILD. & CTS., 7, <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf> (last visited Oct. 17, 2010). Madelynn Herman, *Self Representation: Pro Se Statistics Memorandum*, NAT'L CENTER FOR ST. CTS., (Sept. 25, 2006), <http://www.ncsconline.org/wc/publications/memos/prosestatmemo.htm#statecourt>.

<sup>63</sup> Herman, *supra* note 62.

<sup>64</sup> See, e.g., BOSTON BAR ASS'N TASKFORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 1, 4 (2008).

<sup>65</sup> See Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV., 95 (1974).

<sup>66</sup> Both of these arguments—the argument that the presence of lawyers leads to more legally accurate decisions by adjudicators and the argument that the presence of a lawyer on only one side of a case advantages the represented party—assume that the lawyers in question are competent. Of course, this is not always the case—lawyers can be, and sometimes are, incompetent, negligent, malfeasant, and unacceptably rude, to name just a few failures of their professional responsibilities. Richard L. Abel's recent *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008) provides examples of this behavior. The challenges to ensuring acceptable quality under a civil right to counsel would be considerable, but they are the topic for another paper. Laura K. Abel discusses lessons about quality and quality control that may be gleaned from the criminal justice context in her *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 538–41, 546–49 (2006).

<sup>67</sup> Here, publication is broadly construed to mean that an organization judged the report to be fit for public consumption. Thus, the universe of published literature includes reports put out by foundations, agencies and congressional committees, as well as work that has gone through some form of independent editorial review. A minority of representation studies have been peer-reviewed, as most appear either in law reviews or in foundation or agency reports. Rebecca L. Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* (2010) (under review).

<sup>68</sup> T.D. Stanley, *Wheat from Chaff: Meta-analysis as Quantitative Literature Review*, 15 J. ECON. PERSP. 131 (2001).

<sup>69</sup> See *Elements of Expertise*, *supra* note 67.

<sup>70</sup> Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 171 (2003).

<sup>71</sup> While most Social Security disability beneficiaries probably “would have difficulty obtaining well-paying jobs even in the absence of their disabilities,” many people whose disabilities prevent them from obtaining well-paying jobs also receive such benefits. A recent study found that a substantial minority (22.8 percent) of recipients had received some college education or a college degree. Gina A. Livermore, Nanette Goodman, and Debra Wright, *Social Security Beneficiaries: Characteristics, Work Activity, and Use of Services*, 27 J. VOCATIONAL REHABILITATION 85, 87 (2007). Another recent study found

that 3.7 percent of college-educated men aged fifty-five to sixty-four and 5 percent of college-educated women of the same age were receiving Social Security disability benefits in 2004. These receipt rates were substantially lower than those among comparably aged, high-school drop outs, but nevertheless illustrate the fact that disability occurs across the socioeconomic structure. See David H. Autor & Mark G. Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, 20 J. ECON. PERSP., 71, 83 tbl. 3 (2006).

<sup>72</sup> Aid to Families with Dependent Children was a federal assistance program in effect from 1935–1996.

<sup>73</sup> See generally Hazel Genn, *Tribunals and Informal Justice*, 56 MOD. L. REV. 393 (1993); Yngvesson, Barbara & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219 (1975).

<sup>74</sup> See generally JOHN P HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (University of Chicago Press 2005), for a description of the survey and a review of many findings.

<sup>75</sup> An odds ratio is a ratio of two odds. An odds is a probability divided by its complement (i.e.,  $p/(1-p)$  where  $p$  is the probability that some event of interest occurs. For example, if in a given study of lawyers' impact, the authors observe that unrepresented parties win 10 percent of their cases, the odds of winning unrepresented are .11 [= (.10/.90)]. If lawyer-represented parties in the same study win 50 percent of their cases, the odds of winning when represented by an attorney are even, or 1.0 [= (.50/.50)]. We can compare the odds of winning represented to the odds of winning unrepresented by using the odds ratio. In this case the odds ratio is about 9 (=1.0/.11): in this hypothetical study, lawyer-represented parties are nine times more likely to prevail than are unrepresented parties.

<sup>76</sup> Author's compilation from the studies listed on pp. 16–18, tbl. 1.

<sup>77</sup> 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 LAW & SOC'Y REV. 419 (2001).

<sup>78</sup> See generally Joseph L. Fleiss, *Measures of Effect Size for Categorical Data*, in THE HANDBOOK OF RESEARCH SYNTHESIS 245 (Harris Cooper & Larry V. Hedges eds., 1994); W. W. Hauck, *Odds Ratio Inference from Stratified Samples*, in COMMUNICATIONS IN STATISTICS 767 (1989).

<sup>79</sup> HUBERT M. BLALOCK, JR., *SOCIAL STATISTICS* 412 (2d ed. 1972) ("In general, measures of association will be attenuated by random measurement errors.").

<sup>80</sup> See generally Genn, *supra* note 72; Yngvesson, *supra* note 73.

<sup>81</sup> Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process A Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 766 (1994), also citing evidence from Cleveland, Ohio, that more than 90 percent of evictions are for nonpayment of rent. *Id.* at 766 n.25.

<sup>82</sup> Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services* (forthcoming).

<sup>83</sup> Gerchick, *supra* note 81, at 826.

<sup>84</sup> *Id.* at 812, 824.

<sup>85</sup> *Id.* at 826.

<sup>86</sup> *Id.* at 788–89.

<sup>87</sup> *Id.*; This general pattern is illustrated in a number of studies, including: Barbara L. Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, (1992) (study of the Baltimore housing courts); William O' Barr & John M. Conley, *Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives* 19 LAW & SOC'Y REV. 661 (1985) (study of lay people's experiences in small claims courts); Vicki Lens, *In the Fair Hearing Room: Resistance and Confrontation in the Welfare Bureaucracy* 32 LAW & SOC. INQUIRY 309 (2007) (study of petitioners in welfare fair hearings); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG THE WORKING CLASS* (1990) (study of working-class petitioners in lower courts).

<sup>88</sup> Nonlawyer advocacy has been allowed in a number of federal hearing forums for some time. See generally Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. FOR STUDY OF LEGAL ETHICS 197 (1996).

<sup>89</sup> See Sandefur, *supra* note 67 (reviewing findings from studies that compare case outcomes for people represented by lawyers and those represented by non-lawyer advocates); See generally HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998) (reviewing evidence about lawyer and nonlawyer advocacy in several distinct kinds of civil legal cases); Ralph C. Cavanaugh & Deborah L. Rhode, *Project, The Unauthorized Practice of Law and Pro Se Divorce*, 86 YALE L.J. 104 (1976) (comparing the experiences of pro se and lawyer-represented divorce petitioners).

<sup>90</sup> See *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979).

<sup>91</sup> See generally REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW, WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* (The Merrymount Press 1919); EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE LEGAL SERVICES CORPORATION* (2nd ed. 1978); DEBORAH L. RHODE, *ACCESS TO JUSTICE* (Oxford University Press 2004).

<sup>92</sup> For example: Cavanaugh and Rhode, *supra* note 89, at 105; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 199 (1990); HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (University of Michigan Press 2001); Gillian K. Hadfield, *Higher Demand, Lower Supply? Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L. J. 129 (2010).

<sup>93</sup> See generally Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123 (1993).

<sup>94</sup> Rebecca L. Sandefur, *Introduction to ACCESS TO JUSTICE*, at xvi (Rebecca L. Sandefur ed., Emerald Group 2009).

<sup>95</sup> See *supra* Section IV.

<sup>96</sup> The literature includes many studies documenting that many groups of Americans do not think about their justice problems in legal terms, including: David Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18

LAW & SOC'Y REV. 551 (1984) (study of personal injuries in small town America); M.P. BAUMGARTNER, *THE MORAL ORDER OF A SUBURB* (Oxford University Press 1988) (study of the upper-to-middle class' hesitance in turning to law); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (study of cattle trespass in the High Sierras); *The Importance of Doing Nothing*, *supra* note 9 (study of how low- and moderate-income Americans handle civil justice problems involving money and housing).

<sup>97</sup> See *Fulcrum Point*, *supra* note 51, at fig. 4.

<sup>98</sup> *Id.*

<sup>99</sup> *Documenting the Justice Gap*, *supra* note 59.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> “[R]ecognizing the limitations of scarce resources, the LSC in the late 1990s” decided that, “[r]ather than insisting on full representation for all of its clients,” it would seek “to increase the availability of legal services to eligible persons by providing legal information and limited assistance to those individuals with relatively uncomplicated legal problems. It would then reserve full representation for those individuals with more complicated cases, and those who, due to cognitive or emotional limitations, would be unable to pursue claims effectively on their own.” Paula L. Hannaford-Agar, *Helping the Pro Se Litigant: A Chancing Landscape*, 39 CT. REV. 9 (2003).

<sup>105</sup> *Documenting the Justice Gap: Updated Report*, *supra* note 59, at 15.

<sup>106</sup> This figure is a very rough estimate calculated by dividing total funding from all sources (LSC and non-LSC) received by LSC-grantees in 2008 by total cases closed in 2008. *Id.* at 10. It is not possible to know the true cost per case for a variety of reasons. For example, the funding received by LSC programs paid not only for services provided to cases closed in 2008, but also for services provided to cases that had not yet closed by the end of the reporting year. Similarly, funding received by LSC-grantees in the reporting year may not reflect what the programs spent on services during that year.

<sup>107</sup> Jeanne Charn, *Legal Service for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1030 (2009).

<sup>108</sup> Hadfield, *supra* note 92, at 152.

<sup>109</sup> *Table S-1, Updates Budget Summary: Fiscal Year 2010* (2009), <http://www.gpoaccess.gov/usbudget/fy10/pdf/summary.pdf>.

<sup>110</sup> *The Fulcrum Point*, *supra* note 51, at 957.

<sup>111</sup> *Id.* at 958.

<sup>112</sup> *Id.* at 960.

<sup>113</sup> See generally Hadfield, *supra* note 91; Cavanaugh and Rhode, *supra* note 88; Rhode, *supra* note 92.

<sup>114</sup> *The Fulcrum Point*, *supra* note 51, at 959–60.

<sup>115</sup> *Id.* at 964.

<sup>116</sup> See generally *The Fulcrum Point*, *supra* note 51.

<sup>117</sup> In the 1992 U.S. civil justice survey, 17 percent of low income households were experiencing personal finances or consumer civil justice problems; 12 percent of moderate-income households were experiencing such problems. Six percent of low-income households reported health-care-related problems, while 5 percent of moderate-income households reported experiencing such problems. CONSORTIUM ON LEGAL SERV., *supra* note 27, at 10.

<sup>118</sup> Transcript of Jeffrey Brown interviewing Elizabeth Warren, *Consumer Czar Warren Sees Transparency in Banking as Top Priority* (Oct. 5, 2010), [http://www.pbs.org/news/hour/bb/business/july-dec10/elizabethwarre\\_10-05.html](http://www.pbs.org/news/hour/bb/business/july-dec10/elizabethwarre_10-05.html).

<sup>119</sup> *Overview of Health Care Reform*, N.Y. TIMES, [http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health\\_insurance\\_and\\_managed\\_care/health\\_care\\_reform/index.html](http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health_insurance_and_managed_care/health_care_reform/index.html) (last updated Oct. 7, 2010).

<sup>120</sup> Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST 95, 99 (Robert Granfield & Lynn Mather eds., Oxford University Press 2009).

<sup>121</sup> *Documenting the Justice Gap*, *supra* note 59, at 5; *Documenting the Justice Gap: Updated Report*, *supra* note 59, at tbl. 1.