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Access to Civil Justice and Race, Class, and Gender Inequality

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Annu. Rev. Sociol. 2008. 34:339–58

First published online as a Review in Advance on April 14, 2008

The *Annual Review of Sociology* is online at soc.annualreviews.org

This article's doi:
10.1146/annurev.soc.34.040507.134534

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0360-0572/08/0811-0339\$20.00

Key Words

law, institutions, alternative dispute resolution, lawyers, procedural justice

Abstract

Access to civil justice is a perspective on the experiences that people have with civil justice events, organizations, or institutions. It focuses on who is able or willing to use civil law and law-like processes and institutions (who has access) and with what results (who receives what kinds of justice). This article reviews what we know about access to civil justice and race, social class, and gender inequality. Three classes of mechanisms through which inequality may be reproduced or exacerbated emerge: the unequal distribution of resources and costs, groups' distinct subjective orientations to law or to their experiences, and differential institutionalization of group or individual interests. Evidence reveals that civil justice experiences can be an important engine in reproducing inequalities and deserve greater attention from inequality scholars. However, the inequality-conserving picture in part reflects scholars' past choices about what to study: Much research has focused narrowly on the use of formal legal means to solve problems or advance interests, or it has considered the experience only of relatively resource-poor, lower status, or otherwise less privileged groups. Thus, we often lack the information necessary to compare systematically groups' experiences to each other or the impact of law to that of other means of managing conflicts or repairing harm.

INTRODUCTION

Access to civil justice is a perspective in the empirical study of law that focuses on people's experiences with civil justice events, organizations, and institutions. This article reviews the state of sociological knowledge about the relationship of access to civil justice to social and economic inequality, exploring how civil justice experiences reflect inequality, create inequality, and destroy inequality. I focus on race, social class, and gender, the three principal axes of social and economic inequality identified by sociologists studying modern complex societies, and on recent developments in the conduct and findings of empirical research (older synthetic treatments of parts of this literature can be found in Abel 1985, Carlin et al. 1966, Cappelletti et al. 1981, Emerson 1992, Galanter 1976, Marks 1976, Silbey & Sarat 1988). Because access to justice has been an area of considerable interdisciplinary activity, I draw on work of sociological interest conducted by scholars outside the discipline.

Taken together, existing evidence reveals that civil justice experiences can be an important engine in reproducing inequality, suggesting that access to civil justice merits greater attention from inequality scholars. In part, the importance to inequality of civil justice experiences stems from the fact that many involve bread-and-butter issues. In the United States, for example, the most commonly reported civil justice events involve housing (such as problems paying property taxes, concerns that tax assessments are too high, difficulty getting a landlord to make a repair, or being threatened with eviction) and finances (such as difficulty getting credit, being unable to pay one or more bills, or considering filing for bankruptcy) (Consortium on Legal Services and the Public 1994a; 1994b, table 3-3). These problems are empirically frequent and can have significant and far-reaching consequences for those who experience them. At the same time, use of the civil justice system is not merely one of several ways to respond to commonly encountered problems; it is also a form of participation in one of the major so-

cial institutions of contemporary societies. The study of inequality and access to justice both reveals the role of these experiences in reproducing and destabilizing inequality and provides a lens on the inclusion and integration of different groups into public life.

MEASURING ACCESS TO CIVIL JUSTICE

Social scientific studies of access to justice must manage a tension between normative and positive analysis. From its inception, the access perspective has been fueled by scholars' aspirations for social justice through law, a normative impulse that strongly colors extant work. The field emerged at a historical moment of tremendous optimism about law's capacity to reduce inequality, not only inequalities in people's use of legal means for resolving conflicts authoritatively and providing restitution for harm, but also social and economic inequality more generally (Cappelletti & Garth 1978, Johnson 1999, Trubek 1990). The normative impetus presents a challenge for sociological inquiries. An important strand of sociological thought holds that social science lacks the tools to make normative pronouncements (Weber 1946, 1949); at the same time, any substantive definition of justice is a fundamentally normative product. Scholars have typically managed this tension in one of two ways.

The first approach emphasizes behavior, looking at how legal personnel, organizations, or institutions do their work or how people behave with respect to law or civil justice events. In this research, inequalities in access to justice are identified either by comparing groups' experiences to each other or to some measure of law's ostensible purpose. In so-called gap or legal effectiveness studies, researchers take a definition of justice that has been formally institutionalized in some existing legal system as indicative of law's intentions, such as, for example, the U.S. constitutional guarantee of due process, or a right to legal counsel, or an administrative requirement that certain kinds of claimants have access to an impartial,

independent hearing. Scholars elaborate ideas about what people's experiences with law would look like if those intentions were realized and compare what they observe to that hypothetical standard. These studies typically find gaps and ineffectiveness, describing how law in action falls short of the identified goals (Black 1989, pp. 3–4; Sarat 1985). These studies rarely compare gaps across groups, so, although they find considerable evidence of legal ineffectiveness, they have little to say directly on questions about inequality in effectiveness. Alternatively, comparative equal justice studies ask whether different groups have similar or distinct experiences with the same civil justice event (e.g., being dunned by creditors), or part of the justice system (e.g., small claims court), or aspect of legal process (e.g., interacting with court clerks when filing the papers for a lawsuit or appearing for a hearing). Such research speaks directly to questions of race, class, and gender inequality.

The second approach to identifying justice emphasizes perception rather than behavior. Here, the metric of justice is people's subjective evaluations of their own experiences. The analyst defines some experience as justice-relevant—for example, attending a hearing to protest a parking ticket—and explores participants' beliefs about how fair it is, how satisfied they are with it, or whether they are willing to accept the outcome and comply with it. When inequality is revealed, it appears in peoples' different evaluations. An important strand of this research seeks to identify universal criteria by which people identify fairness. Perceptual research conducted to date tells us much about what kinds of experiences people believe to be fair but rather less about which groups are more or less likely to encounter fair-feeling experiences.

Behavioral Approaches

Most behavioral approaches to access to justice explore the mobilization of law. Mobilization scholars seek to understand “the process by which legal norms are invoked to regulate behavior” (Lempert 1976, p. 3), ultimately, “the

process by which a legal system acquires its cases” (Black 1973, p. 126; Silberman 1985, p. 14). Empirical work in this tradition tends to come at mobilization from the bottom up or from the top down. Top-down scholars focus on aspects of the legal system or law-related institutions that may affect individuals' or groups' likelihood of or experiences with turning to law. Bottom-up scholars start with individual or shared experiences of trouble or adversity and trace these experiences through parts of their social and legal histories.

Accessing justice from the bottom up.

Bottom-up research employs a variety of methods and theoretical perspectives, but a core concept uniting this work is that of justiciable events: happenings and circumstances that raise legal issues but that people may never think of as legal and with respect to which they may never take any legal action (Genn et al. 1999, p. 12; Sandefur 2007a, figure 1). Typically, though not exclusively, the events scholars choose to investigate are adverse, so that either the researcher or the person who experiences them considers them to be troublesome or problematic—for example, events like car accidents, children's school suspensions, or getting fired from a job. Three strands of research exemplify the bottom-up approach: justiciable problems, dispute processing, and legal needs.

Justiciable problems research documents the incidence of these problems and explores how people respond to them. Scholars investigate, for example, how common are problems with debt, what they entail, who has them, and what people do about them (Pleasence & Balmer 2007). In investigating how people respond, scholars examine people's contact with parts of the civil justice system, such as consulting lawyers or pursuing a claim in court. Some studies also investigate responses that do not involve law. This second category, nonlegal responses, is 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 (e.g., Genn et al. 1999, Genn & Paterson 2001, Nader 1980, Pleasence et al. 2003, Pleasence 2006, Sandefur 2007a). Some of this work also explores the consequences of experiencing such problems, including their impact on mental or physical health, personal relationships, financial stability, and the development of new, additional problems (Currie 2007, Pleasence 2006, Pleasence et al. 2007a).

Dispute processing research focuses on a subset of justiciable problems—grievances—defined as events or circumstances that people perceive as personally injurious and consider the fault of some other party (Felstiner et al. 1980/1981). A fruitful strand of dispute processing research investigates the transformation of grievances into claims for remedy and, when those claims are denied, disputes, some of which may be taken to law (Felstiner et al. 1980/1981). Researchers track grievances through successive behavioral filters defined largely in terms provided by legal institutions, such as making a claim for remedy to an aggrieved party (e.g., please pay for the repair of the mailbox you hit with your car), consulting a lawyer about the claim, filing a lawsuit based on the claim, settling before trial, or taking the lawsuit to trial. Collected histories of many disputes reveal a pyramid-shaped distribution of action, with only some experiences escalating from one level to the next, progressively narrowing as it reaches the top, typically defined as court proceedings (Miller & Sarat 1980/1981, p. 544; Murayama 2007, pp. 29–30; Nielson & Nelson 2005b; but see Michelson 2007a, 2008). The pyramid shape graphically depicts an empirical generalization that holds in most studied complex societies: Relatively few grievances are taken to lawyers, courts, or officials, and most never make it to trial. A rich body of qualitative work explores how specific groups, such as working-class New Englanders, upper-middle-class suburbanites, residents of small towns, or High Sierra ranch owners manage conflicts and

disagreements among themselves, in their communities or workplaces, or in contact with organizations like courts. These studies frequently find that people often do not think of their justiciable problems as having any connection to law or rights and also reveal powerful influences of local social context on how disputes are understood and pursued (e.g., Baumgartner 1988, Ellickson 1991, Engel 1988, Hoffmann 2005, Gilliom 2001, Greenhouse 1986, Greenhouse et al. 1994, Merry 1990, Yngvessen 1993).

Legal needs research investigates the mobilization of formal legal measures through consultation with legal professionals. This bottom-up approach starts with phenomena that researchers (*a*) determine should be served by lawyers or (*b*) observe that some people take to lawyers (Marks 1976). Typically, these are commonly experienced problems, such as facing eviction from an apartment or being dissatisfied with local services like policing or garbage collection, although some legal needs studies include events that most people would not consider adverse, such as purchasing a house or signing a lease. The empirical question of interest is who gets lawyers' services in response to these events. When an event that meets the researchers' criteria as a legal need does not receive service, unmet legal need exists. Outside the United States, social scientists and policy researchers have essentially abandoned the study of legal needs in favor of the study of disputing and justiciable events¹; these scholars have come to recognize that the concept of legal need defines away much of what is sociologically interesting, as well as policy-relevant, through its a priori identification of certain events as problems that should always be taken to lawyers or adjudicated in courts (Garth 1980, Marks 1976, Johnsen 1999).

¹The legal needs approach remains important for the U.S. access to civil justice policy community. See, for example, Consortium on Legal Services and the Public (1994a,b), the recent report of the Legal Services Corporation (2005), and the state legal needs studies archived at http://www.nlada.org/Civil/Civil.SPAN/SPAN_Library/document_list?topics=000055&list_title=State+Legal+Needs+Studies%3A+Reports.

Much legal needs, dispute processing, and justiciable problems research is survey-based. In such surveys, respondents are presented with long lists of specific events that vary from study to study but that cover the same basic categories of problems, including consumer matters (e.g., faulty goods and services, warranties), housing (e.g., buying a house, a landlord's failure to return a security deposit), employment (e.g., hiring discrimination, unpaid overtime), family (e.g., divorce, inheritance), community (e.g., unruly neighbors, inadequate municipal services), finances (e.g., disagreements with creditors about money owed, concerns about private pensions), public bureaucracies (e.g., disagreements with public agencies about taxes or benefit payments owed), and physical and economic injuries (e.g., slander and libel, accidents). Most surveys impose a triviality screen, asking only about problems that respondents consider serious or difficult to solve or that they value above a specific money threshold (for a methodological critique of survey approaches, see Johnsen 1999). Some surveys also ask about problems specific to certain populations, such as indigenous peoples, the elderly, or homeless persons (e.g., Mulherin & Coumarelos 2007, Pleasence et al. 2003). Respondents indicate which, if any, of these events they have experienced during some fixed period of time, ranging across studies from the previous 12 months to the previous 10 years.

Ethnographic and other qualitative research explores the social histories of conflicts and problems. These studies also start with events, catching them, for example, when an event has come to be understood as a problem (Sandefur 2007a), when a situation becomes a latent conflict (Baumgartner 1988, Greenhouse 1986), or when control of someone else's behavior becomes a matter taken to a local court (Conley & O'Barr 2005, Merry 1990). Researchers then collect life histories of these events, following them retrospectively back into the past or prospectively into the future, and exploring how people's understandings of such events are transformed through

their interactions with aggrieving parties, with friends, family, and neighbors, or with administrative agencies, government officials, lawyers, courts, mediation sessions, and the like (Emerson 1992).

Accessing justice from the top down. Top-down research explores inequality through analysis of how existing laws or legal systems do or do not facilitate different groups in achieving goals or realizing interests. At any moment in time, some interests or problems have been institutionalized as comprehended by law and legally actionable, whereas others have not, and still others are partially or precariously so, objects of active struggle (Mayhew 1975; e.g., Albiston 2005, Anderson 2003, Lawrence 1990, Skrentny 2002, Sterett 1998). Contemporary top-down studies explore aspects of the organization of civil justice institutions that may affect who is able to turn to law, through what avenues, for what purposes, and with what results, such as the complexity of legal procedures, the role of lawyers and other professionals as gatekeepers or as potential champions, and the provision of legal services.² Despite their various perspectives, these studies share a common insight, that institutionalization is a variable. Group differences in turning to law, in getting the attention of legal institution staff (such as lawyers, clerks who control the dockets of the lower courts, or Supreme Court justices), and in the results of attempts to mobilize law reflect differences in the extent to which different groups encounter events or have interests that

²Many top-down approaches echo themes raised in two famous studies of the middle 1970s. Cappelletti and colleagues' pathbreaking world survey charted the varied international terrain of law and law-like social institutions that enable people and groups to identify their interests, manifest them, and press for their realization (Cappelletti 1978/1979, Cappelletti et al. 1981). Galanter (1974) famously analyzed a single institutionalized system of dispute resolution, civil litigation under common law, and determined it to be intrinsically biased in favor of parties with more resources, the result of an interaction between the rules of the litigation game and parties' differing amounts of foresight, experience—often acquired through retention of attorneys—wealth, and organization (see also the pieces collected in Kritzer & Silbey 2003).

are represented in or comprehensible to civil justice institutions.

One common operational definition of access to justice in top-down studies holds that access to justice means the availability or affordability of lawyers. A comparative literature on civil legal assistance, sometimes termed legal aid, explores differences in access to lawyers across nations. Civil legal assistance comprises efforts to provide legal services with some subsidy that reduces their cost to the consumer, whether that subsidy comes from government, private donors, or service providers working for free or accepting a discounted fee. These arrangements vary widely across industrialized nations, from charitable models relying entirely on volunteer lawyers (pro bono), to legal assistance provided by specialized lawyers salaried by government (such as those funded by the U.S. Legal Services Corporation), to government subsidy of citizen purchase of private practice legal services (such as UK "judicare"), to a mixture of these models (Paterson 1991). Nations also differ notably in the share of their populations covered by civil legal assistance and in the range of legal problems eligible, from countries like Sweden, which covers most of the population for many kinds of court cases, to the United States, which covers only the poor and only for certain kinds of problems, to countries with no civil legal assistance at all (Regan 1999, table 8.1). Scholars consider why these systems differ cross-nationally and over time, generally following the lead of Cappelletti & Garth (1978) in viewing differences in the expansiveness of legal aid's extension to the populace or the amount of money spent on legal aid programs as reflecting the political and economic dynamics of welfare states (Blankenburg 1999, Goriely 1999, Regan 1999, Zemans 1996 [1985]; but see Cousins 1999). To the extent that these studies address inequality, they do so by examining variance in the supply of lawyers to different groups in the population.

A small body of provision studies represents a step in the direction of linking top-down information about how services are provided to bottom-up outcomes like people's consump-

tion of or demand for legal services. In these studies, the dependent variable is some measure of the quantity of civil legal services provided or, occasionally, the quality, with analysts comparing that measure across different models of provision, such as legal assistance systems that pay lawyers by the hour, those that pay lawyers a flat fee per case, and those that rely heavily on lawyer-supervised paralegals. Most of these studies focus exclusively on the cost of providing services, giving little attention to who receives them or what legal work the services actually involve (Meeker et al. 1991). Many provision studies are beset by methodological problems that render "the results produced . . . either tentative at best, or misleading at worst" (Meeker et al. 1991, p. 627; but see the fine work of Moorhead et al. 2001 for the UK). Scholars have also explored the dynamics of single models of assistance provision, for example investigating how conditions in legal services markets and professions' attempts to encourage volunteer lawyering are related to the amount of available legal aid (Sandefur 2007b), and how changes in fee shifting rules affect public interest lawyers' decisions about which cases to represent and which to reject (Albiston & Nielson 2007). A related body of work focuses on the market-ratified provision of legal services and examines how lawyers paid by their clients, rather than a third party, select from potential clients. Studies of lawyers' case screening have suggested intriguing links between inequality among lawyers and inequalities in access to their services, particularly links between lawyers' economic or political vulnerability and poor and other lower status clients' ability to get any legal services at all (Daniels & Martin 2002; Kritzer 2004; Michelson 2006; Trautner 2006, 2009). However, as these are studies of lawyers only, no direct connection is made between lawyers' behavior and actual or potential clients' outcomes or experiences.

A second top-down project has been to explore how different legal procedures affect people's and groups' abilities to use law to solve their problems. Perhaps the largest body of

work in this area concerns alternative dispute resolution, or ADR (for entrée to a vast literature, see Abel 1982b, Delgado 1988, Galanter 1981, Garth 1982, Genn 1993, Silbey & Sarat 1988). ADR comprises an array of nontraditional, procedurally simplified, or less formal means of adjudicating disputes and enacting social control. Sometimes these alternative procedures are mandated for disputants, as in many instances of labor grievance arbitration and U.S. welfare fair hearing tribunals (Kritzer 1998, Lens 2007). In other instances, simplified, less formal, or more therapeutic procedures are optional, such as some mediation programs in small claims courts (LaFree & Rack 1996). Some of these nontraditional forums are attached to the formal legal system (e.g., McEwan & Maiman 1984, Vidmar 1985), others are embedded in workplaces as internal grievance procedures (e.g., Edelman et al. 1999, Hoffmann 2005), others are private services provided by nonlawyer professionals, and still others exist as community moots or accountability circles (Braithwaite 2002, Brodtkin 1992, Gwartney-Gibbs & Lach 1994). Scholars also sometimes include within the scope of informal justice those agreements that are negotiated in the “shadow of the law,” under threat of legal action or the inconvenience and expense of court processing and delay (e.g., Lazerson 1982).

Much ADR research is suffused with a strong advocacy component, for or against. Arguments about whether ADR is good or bad often rely on “simplistic equations” between lawyers’ involvement in disputes and the use of adversarial procedures on the one hand and protracted litigation and presumed outcomes on the other (Hunter 2003, p. 175). For those interested in inequality, the pertinent questions are whether and how different kinds of informality, in comparison with more formal procedures, exacerbate social inequalities, replicate them, or moderate them. Few studies directly tackle the relationship between varieties of formality or informality and race, social class, or gender disparity in access to justice.

Perceptual Approaches

An alternate lens on inequality and access to civil justice comes from research that explores people’s subjective evaluations of their experiences with civil justice personnel and institutions. Examples of this approach exist in the justiciable problems literature, where survey respondents are asked if they are satisfied with how a situation turned out or if they feel they achieved their objectives with respect to a problem or dispute (e.g., Genn et al. 1999, Genn & Paterson 2001, Pleasence 2006), but probably the most influential perspective is found in the social psychological literature on procedural justice (e.g., Tyler 1984, 1988, 1994, 2000, 2006; see also Thibaut & Walker 1975, 1978, and MacCoun’s 2005 incisive review). Procedural justice scholars explore how people’s subjective evaluations of their experiences with dispute resolution processes are related to their acceptance of adjudicators’ decisions and their beliefs about law’s legitimacy. A breakthrough insight of this program was recognition that people’s sense of whether an adjudication process is fair strongly colors their overall evaluation of outcomes: People care not only about whether or not they get what they want from a decision made by a judge or hearing officer, but also whether they are treated in ways that they understand to be fair and are allowed to tell their side of the story (MacCoun 2005).

Much procedural justice work has involved U.S. research subjects, who, scholars conclude, value adjudication processes characterized by “neutrality, lack of bias, honesty, efforts to be fair, and respect for citizens’ rights” (Tyler 2006, p. 7) and “[p]rocedures that allow [people] to present evidence on their own behalf” (Tyler 2006, p. 176). Such procedures permit “voice” and so “affirm status . . . [by] allow[ing] people to feel that they are taking part in their social group” (Tyler 2006, p. 176; MacCoun 2005). Tyler and collaborators interpret their findings as supporting “universalistic theories of procedural preference” (Lind et al. 1994, p. 287), concluding that members of all groups value fairness, and that “different types of people do

not evaluate the fairness of procedures against different criteria” (Tyler 2006, p. 165; see also Lind et al. 1990, p. 973, n. 28). The procedural justice literature has important implications about conditions under which people will fail to perceive or may unquestioningly accept inequality (MacCoun 2005). In particular, this work raises the question of whether the semblance of fair procedures encourages people to “substitute expressive satisfaction for the enforcement of rights” (O’Barr & Conley 1985, p. 661; see also Genn 1993). Little research has explored whether some groups are more likely than others to accept expression as a substitute for enforcement—for example, are men more likely to do so than women, or professionals more so than working-class persons—and under what conditions.

INEQUALITY AND ACCESS TO CIVIL JUSTICE

Civil justice experiences can reflect inequality in the sense that inequalities that exist prior to contact with or in some other way outside law and legal institutions are reproduced when people and groups come into contact with justiciable events or legal institutions. Such experiences can also create inequality, in the sense that differences between people or groups become disparities through contact with justiciable events or legal institutions. Finally, civil justice experiences can destroy or destabilize inequality, as disparities are reduced through contact with justiciable events or legal institutions. The next section of the paper reviews empirical evidence about civil justice and class, race, and gender inequality.

Social Class and Socioeconomic Inequality

Social class and socioeconomic differences appear in many aspects of civil justice. The incidence of justiciable problems is widespread across the socioeconomic orders of studied societies (e.g., for Australia, Fishwick 1992; for Canada, Bogart & Vidmar 1990; Currie

2007, 2009; for China, Michelson 2007a, 2008; for England and Wales, Genn et al. 1999, Pleasence 2006; for Japan, Murayama 2007; for Scotland, Genn & Paterson 2001; for the United States, Consortium on Legal Services and the Public 1994a,b, Curran 1977, Miller & Sarat 1980/1981, Silberman 1985), but some groups are more likely to report such problems than others. In capitalist contexts, problem occurrences increase with household income and/or education, in part because people of higher socioeconomic status engage in more consumer and investment activity (Bogart & Vidmar 1990; Consortium on Legal Services and the Public 1994a,b; Mulherin & Coumarelos 2007; Pleasence et al. 2004, p. 324; Silberman 1985; but see Pleasence 2006, p. 21). In contrast, in postsocialist transition societies such as China, people with politically well-placed associates such as local officials report a lower incidence of grievances. In these contexts, “the fusion of the legal system to the rest of the state bureaucracy valorizes political connections” in ways that not only help people resolve problems, but also prevent their occurrence (Michelson 2007a, p. 462).

Once people confront problems, class is predictive of how they will respond, but the patterns are complex. People of higher socioeconomic status are usually found to be more likely both to take some action (as opposed to no action) in response to problems and to take an action involving law than are poor or other lower status people (Genn et al. 1999, table B1; Genn & Paterson 2001, table B1; Miller & Sarat 1980/1981, table 4; Michelson 2007a, table 1; Pleasence 2006, p. 88; Sandefur 2007a, table 1; Silberman 1985, tables 3.11 and 5.6). Some studies find that middle-income groups are the most activist about their problems, the lowest and highest income groups being less likely to turn to law or seek other advice (for the United States, see Silberman 1985, table 3.11; for Scotland, see Genn & Paterson 2001, table B1; cf. Kritzer 2005).

Social class and socioeconomic differences in responses to problems in part reflect the social distribution of problems of different types.

Strategies for dealing with adversity are partly a function of the kinds of problems people have; thus, differences in exposure to different sorts of trouble account for some observed class differences in how people respond. Certain problems and actions have been firmly institutionalized in law and require a formal legal sanction. For example, dissolving a marriage often requires a court decree; consequently, relationship breakdown, child custody, and support matters are relatively likely to involve turning to law (Bogart & Vidmar 1990, table 4.3; Consortium on Legal Services and the Public 1994a, 1994b; Genn et al. 1999, table B1; Genn & Paterson 2001, table B1; Pleasence 2006, figure 4.3). Problems with higher monetary stakes are more likely to result in action, and the distribution of stakes likewise explains part of observed socioeconomic differences (Miller & Sarat 1980/1981, table 6). However, the relationship between class position and action—whether the measure of action is doing something versus doing nothing about recognized problems, making claims about grievances, seeking advice, turning to government agencies, or turning to law—often persists when type of problem is held constant or otherwise controlled (Genn et al. 1999, table B1; Genn & Paterson 2001, table B1; Michelson 2007a, table 1; Miller & Sarat 1980/1981, tables 4, 5; Sandefur 2007a, table 1).

The most common explanation for class or socioeconomic differences in whether people turn to law extends the metaphors of economic analysis to civil justice situations (Sandefur 2007c). Researchers conceptualize decisions about how to handle problems as reflecting a calculus that balances resources, costs, stakes, and the expected returns of different courses of action. Costs, potential returns, and decision points are usually defined with reference to law, and the resources scholars consider are frequently those that would facilitate law's use (but see Michelson 2007a), such as money to pay for attorneys, court fees, or bribes to officials, knowledge about law and legal institutions, and connections to legally sophisticated or politically influential parties (e.g., Carlin et al. 1966;

Lochner 1975; Michelson 2007a, 2008). Costs and the stakes at risk are typically limited to money, but some scholars also consider social costs in the form of disrupted relationships, hostility, or lost goodwill (e.g., Silberman 1985, Michelson 2008). Although clearly part of the story, an explanation based on cost, resources, and stakes is insufficient to explain the full pattern of class differences. For example, low-income households are not only less likely to turn to law with their justiciable problems, but are also more likely to do nothing to try to resolve them, even when they have knowledge of actions that involve no out-of-pocket costs; this finding suggests that simple deficits of money and information are not the only deterrents to action (Sandefur 2007a). Factors reflective of social rank, such as a sense of entitlement or feelings of powerlessness, as well as differences in past experiences with civil justice problems, may play an important role in creating class-stratified patterns of action and inaction (Gilliom 2001; Pleasence et al. 2003; Pleasence 2006, p. 145; Sandefur 2007a,c; see also Munger 1992).

Class differences in how people respond to problems are important not only because they reveal class inequality, but also because they may reproduce it. Whether people try to do something about a problem and what actions they take are associated with whether problems are resolved or persist (Mulherin & Coumarelos 2007, table 4; Genn et al. 1999, table B2), how they are resolved (Pleasence 2006, figures 4.1, 4.2), and whether people feel they have achieved their objectives in trying to resolve them (Genn et al. 1999, table B3; Pleasence 2006, pp. 142–43, table 4.1). How people respond to an initial problem may also predict whether it begets new ones in cascades of trouble (Genn et al. 1999, Pleasence et al. 2004). Social class and socioeconomic differences in how people experience problems and respond to them can mean that the same initial event—for example, disputing a property tax assessment—creates very different consequences for those in different class positions. However, as this question has not been studied systematically, we have no sense of

how large or significant such differences might be.

When people take action, social class may be associated with very different outcomes of those actions. Studies of small claims courts find that litigants who use “powerless language,” a style characterized by “deference, subordination and nonassertiveness” (Conley & O’Barr 2005, p. 65), are “believed significantly less often than their powerful counterparts” (Conley & O’Barr 1990, p. 80). Litigants who are “rule-oriented,” interpreting “disputes in terms of rules and principles that apply irrespective of social status” and “structur[ing] their accounts as a deductive search for blame” (Conley & O’Barr 1990, p. 58), are more successful in communicating their cases to judges and other adjudicators than are litigants who employ a “relational” style, “interpreting rights and allocating responsibility for events” in a way that “focus[es] heavily on status and social relationships” (Conley & O’Barr 1990, p. 58). If these styles of communication are associated with class position, they may explain part of observed class differences in the outcomes of problems. An ethnographic literature from the United States describes working-class people who express a strong sense of legal entitlement, willing to take interpersonal disputes to court (Merry 1990), in sharp contrast with upper-middle-class people who keep their conflicts private, managing them through avoidance, “moral minimalism” (Baumgartner 1988, p. 10), and an “ethic of restraint” (Greenhouse 1986, p. 20). At the same time, some of these authors also find that working-class and poor petitioners who take their problems to courts and tribunals are often diverted, discouraged, or delayed by clerks, hearing officers, and other gatekeepers of formal legal resolution (e.g., Merry 1990, pp. 96–171; Lens 2007). Taking action is often reported as stressful (Pleasence 2006, p. 149; Sandefur 2007a): One study notes that “many respondents [trying to resolve problems] entered into agreements that they regarded as unfair; often because they would have found it too stressful to go on” (Pleasence 2006, p. 152). However, little research compares groups’ ex-

periences of diversion and discouragement at the hands of courthouse staff or explores differences in groups’ tendencies to accept unfair agreements rather than endure continued stress.

Studies of another important body of legal gatekeepers, contingent fee lawyers, suggest additional routes through which social class inequalities may be reflected or exacerbated through going to law; their findings have implications for what kinds of people and what kinds of problems receive lawyers’ services at all. In China, attorneys laboring under the double strains of “enormous economic pressure” and “scant institutional support” for protecting unpopular interests “screen out commercially undesirable cases brought by socially undesirable prospective clients” (Michelson 2006, p. 27; see also Michelson 2007b). Studies of U.S. personal injury lawyers reveal that case screening decisions involve predictions about whether the contingent fee share of the client’s anticipated award would be sufficient to cover expenses and provide a profit (Kritzer 2004); this criterion may disadvantage the economically marginal—for example, the very young, the elderly, and the chronically unemployed—as these people have little in lost wages or potential earnings to claim in damages (Trautner 2006, 2009). Lawyers also select between cases based on their predictions of success at showing legal liability and presenting to a jury an injured party whom jurors will find likable; local legal context, particularly tort reform, may affect the relative importance of plaintiff attractiveness and defendant liability for case selection (Trautner 2006, 2009). It is not clear, though, what these findings mean for race, class, or gender inequality in access to justice, as likability and social undesirability vary from community to community (Trautner 2006, 2009; see also Diamond & Rose 2005, Rose 2009). Little work explores directly the question of race, class, or gender disparity in lawyers’ case screening.

Research into how lawyers do their work suggests that, once they secure lawyers’ attention, more affluent clients may receive more or higher quality legal services, but, once again,

the evidence is circumstantial. Less affluent clients who pay for legal services may be likely to take their problems to lawyers working in markets where the economics of practice encourage high case volumes. For any given client, the “quality [of service] is a tradeoff between cost, thoroughness and deadlines” across all the cases a lawyer has active at a given point in time (Seron 1996, p. 123; see also Kritzer 2004; Mather et al. 2001, pp. 133–56). More affluent clients can afford their lawyers the time for greater thoroughness. Economically marginal and socially isolated practitioners, who are perhaps more accessible to poor and working-class clients, may be more vulnerable to ethical lapses as a consequence of their marginality and isolation (Arnold & Kay 1995). Although the large law firms patronized by wealthier clients also sometimes act unethically, these organizations engage in more and possibly more effective surveillance of their lawyers’ activities (Shapiro 2002). However, little research explores directly the relationship of client resources or social class to the quality and quantity of legal services received (see, generally, Paterson & Sherr 1999).

In general, one sees evidence that lawyers, officials, and legal authorities, as well as perhaps legal procedures themselves, exhibit impaired comprehension of the disadvantaged and less powerful (Merry 1990, Scheppele 1994, White 1990). However, in the case of class inequality, because we have no studies comparing different groups’ experiences handling similar problems or in similar hearing settings, we do not know how widespread are experiences of frustration and diversion, nor how particular they are to certain types of participants. We know little about the relative importance of different causes of diversion and discouragement or, for that matter, accessibility and empowerment. For example, to what extent do these patterns result from the enacted class biases and prejudices of civil justice staff, or from constraints created by how people have decided to organize legal work environments, or from facially class-neutral procedures that favor some groups over others.

Race Inequality

Race and gender inequality have been more often approached from the top down. In part, this reflects scholars’ interest in race- and gender-targeted legal reforms of the past 50 years, such as antidiscrimination law. Another factor hampering the bottom-up study of race and gender inequality and access to justice has been scholars’ tendency to focus on monetary costs and class-linked resources. Much early access research was driven by interest in poverty or social class; later work has often drawn on it to conceptualize gender and race disparities in terms borrowed from class studies (for an exception, see Bobo 1992; for a potential new direction, see Munger 1992).

Studies of race-equalizing rights and remedies have produced mixed findings regarding the capacity of law to effect social change. In general, legal reform can be shown to “shape the strategic landscape within which citizens (and elites) negotiate with each other as legal subjects” in ways that facilitate change (McCann 1994, p. 291). At the same time, racial disparities once enforced through law and then targeted for elimination by law persist, as is the case with school desegregation (e.g., Orfield & Eaton 1997, Rosenberg 1991). Similarly, despite its illegality, discrimination on the basis of race in housing, employment, and consumer purchases continues, as revealed in both audit studies and complaints to officials (e.g., Ayers 2005, Donohue & Siegelman 2005, Galster 1990).

Much discrimination and racial harassment goes unreported (e.g., Nielson 2004), and one important line of inquiry explores why people do not mobilize law in response to such behavior. Some research suggests that people who perceive discrimination against themselves are “often reluctant to make this claim publicly, . . . in part” because claimers are “viewed negatively by others even when the claim is well justified” (Major & Kaiser 2005, p. 285). Some groups may also be concerned that law “eventually w[ill] be used against those it was designed to protect,” and this concern may lead to reticence in turning to public

authorities (Nielson 2004, p. 124). One question that emerges from this work concerns which aspects of people's beliefs about law's capabilities or limits and law's impartiality or bias come from their own experiences with law (e.g., Tyler et al. 1989), and which reflect broader experiences connected to their social location in an unequal society (e.g., Gilliom 2001, Sandefur 2007a). This question has yet really to be explored, perhaps because most scholars have been focused only on the mobilization of law.

The survey literature reports some race differences in experiences with justiciable problems and disputes (Bogart & Vidmar 1990, Miller & Sarat 1980/1981, Mulherin & Coumarelos 2007, Pleasence 2006), but no work from the contemporary national surveys has yet focused on measuring and explaining race differences in the incidence of problems, in disputing behavior, in how problems are handled, or with what results. Nor has work from these surveys yet explored race differences within socioeconomic groups or among people experiencing similar kinds of problems. No major qualitative study has focused expressly on race and disputing, justiciable problems, or contact with civil courts or staff.

Few empirical studies of civil justice institutions explore the relationship of participants' race to the consequences of mobilizing law, but those that do present intriguing findings about race and access to justice. In a study of evictions for nonpayment of rent before a Hawaiian public housing board, Lempert & Monsma (1994) compare the judgments received by Samoan and non-Samoan tenants, finding that "[a]mong tenants behind in their rent, Samoans fare worse than do non-Samoans," but not because of housing board members' anti-Samoan prejudice (Lempert & Monsma 1994, p. 890). Rather, Samoans are more often evicted because they "make unpersuasive excuses [for not paying rent] more often than other tenants" (Lempert & Monsma 1994, p. 890). Their excuses, such as sending rent money back to Samoa to help pay for a family member's funeral, are "reasonable in the context of Samoan culture" but often

"do not seem reasonable to judges from another ["Western"] culture." The authors term their finding "cultural discrimination" (Lempert & Monsma 1994, p. 890). LaFree & Rack (1996, p. 768), in a study comparing mediated and arbitrated small claims cases in Albuquerque, New Mexico, sought to test a "disparity hypothesis," "that minority and female disputants . . . receive poorer outcomes" than men and whites, and an "informality hypothesis," that "effects of ethnicity and gender [are] greater in mediated than adjudicated cases." Significant race differences in money recovery appeared in both types of resolution (LaFree & Rack 1996, table 2). In adjudicated cases, these differences were accounted for by case characteristics, parties' previous court experience, and whether or not parties were represented by attorneys. In mediated cases, race differences in money recovery persisted after these controls (LaFree & Rack 1996, table 3), leading the authors to assess "limited support for the informality hypothesis" (p. 789). The authors attribute race inequalities in outcomes in part to differences in the way case participants—both parties and decision-makers—responded to claims based on the claimant's race. Parties responding to claims for damages were "more willing to legitimate the monetary claims of Anglo than of minority claimants" (LaFree & Rack 1996, p. 789). Some mediators, particularly whites, "were more likely to assume that monetary claims brought by Anglos were nonnegotiable while claims by minorities were more open to . . . resolutions . . . that minimized monetary outcomes" (LaFree & Rack 1996, p. 789). At the same time, "minority claimants defined their claims in less stringently monetary terms" and were more likely to drop them (LaFree & Rack 1996, p. 790). These innovative studies produced suggestive findings, but they are among a small handful that explore such questions directly.

Gender Inequality

With gender, as with race, most attention has centered on the complexities of

institutionalizing group-equalizing rights and remedies. Extant research suggests that most people who believe they have experienced gender discrimination or sexual harassment do not make formal complaints, particularly if the experience occurs in their workplace (Edelman 2005, p. 349; see also Bumiller 1988, Marshall 2003, Miller & Sarat 1980/1981, Nielson 2004, Quinn 2000). Forces that limit women's mobilization of law appear at a variety of levels. Women who experience public sexual harassment, for example in parking lots or on train platforms, report responding by trying to avoid their harassers and by minimizing the significance of their experiences. They often report believing that they should have been able to control the situation themselves or that law is unable to control such situations (Nielson 2004, pp. 98–132). Similar findings emerge in studies of workplace harassment (e.g., Bumiller 1988, Scheppele 1994, Tinkler 2007). Employers' internal mechanisms for handling complaints of discrimination and harassment may domesticate law's more equalizing attempts both before people's experiences become legal claims and afterwards. In the first case, internal grievance procedures may cool out complainants before they reach out of the organization to law. Employers' grievance handling practices often treat harassing behavior as a managerial problem, rather than as a matter of law or rights (e.g., Marshall 2005). By shaping how employees think about their own experiences, these procedures may discourage employees' complaints at the same time that they encourage their forbearance in the face of others' unwanted behavior (Marshall 2005). In the second case, as demonstrated in two decades of work by Edelman and colleagues, judges have become deferential to employers' own definitions of their compliance with law. Anti-discrimination law, devised to control employer behavior from without, has become substantially "endogenous . . . generated within the social realm that it seeks to regulate" (Edelman 2005, p. 337, italics removed; Edelman et al. 1999).

The access to justice survey data provides little information about gender differences because much of it has been collected at the household level. In the Western democracies for which we have reports on individual experience, women confronting justiciable events are sometimes found to be more activist than men in the sense that they are more likely to respond with an action that involves a public third party, such as consulting an advice agency or an attorney about a problem (Pleasence 2006, p. 88). This pattern sometimes holds controlling for problem type, household income, and other measures of socioeconomic status (Genn & Paterson 2001, table B1; but see Mulherin & Coumarelos 2007, table 4). As the above discussion of harassment and discrimination suggests, the meaning of greater activism with respect to law, public authorities, and formal process is complex. In some contexts, such as the workplace, women may turn to formal dispute resolution procedures provided by the organization because "they lack access to the networks necessary to accomplish informal dispute resolution," whereas men may resolve grievances informally because they have access to those networks and do not wish to jeopardize them (Hoffmann 2005, p. 32).

Despite the creation of new rights and new legal remedies, some of the problems to which women may be particularly vulnerable—such as harassment, workplace discrimination, and domestic violence—may remain more difficult for law to comprehend than are other kinds of problems. One reason for this may reflect distinctions between the way these problems are experienced and the kinds of information law understands. For example, formal rules of evidence require the recounting of specific events, prefer precise dates and times, and privilege happenings that leave "visible marks in the world" (Scheppele 1994, p. 996; see also Frohmann & Mertz 1994). By comparison, the nature of harassment, discrimination, and domestic violence is often to be persistent, repeated, and ongoing and to have elements of psychological threat as well as of physical

action. Furthermore, an important strategy of self-defense from such assaults is avoidance (Nielson 2004, Scheppelle 1994). Thus, some of what happens to the targets of these behaviors may not be translatable into legally comprehensible accounts (Frohmann & Mertz 1994, Scheppelle 1994; see also Conley & O'Barr 2005). This work suggests ways that access to justice may paradoxically reproduce or exacerbate inequalities that law ostensibly seeks to destroy. But, as so often in this field, the evidence is largely circumstantial.

CONCLUSIONS AND FUTURE DIRECTIONS

From this review, three kinds of mechanisms emerge through which civil justice experiences may reflect or affect inequality. The first involves a balance of resources and costs: People take actions that they can afford in order to protect stakes that are valuable to them. Differences in civil justice experiences thus reflect the distribution of resources, such as money, information, and useful social connections, and of the estimated costs of taking particular courses of action, such as the money at stake in a dispute, lawyers' fees, or relationships that may be disrupted by open conflict. The second kind of mechanism involves subjective orientations, such as beliefs about law's legitimacy or efficacy, beliefs about what constitutes fair treatment, or beliefs about what one is entitled to or is likely to get from pursuing some course of action. Differences in civil justice experiences can create differences in these subjective orientations by affecting people's beliefs, and they can also reflect the impact of these orientations on behavior. The third kind of mechanism involves differential institutionalization. Some kinds of problems and some interests have been institutionalized as comprehended by law and legally actionable, whereas others have not, and still others are partially or precariously so, objects of active struggle. Race, class, and gender differences in turning to law, in getting the atten-

tion of legal institution staff, such as lawyers, clerks who control the dockets of the lower courts, or Supreme Court justices, and in the results of attempts to mobilize law reflect differences in the extent to which different groups encounter events or have interests that are represented in or comprehensible to civil justice institutions.

Because law is a public social institution, the study of inequality and access to justice both reveals the role of civil justice in reproducing and destabilizing inequality and provides a lens on the inclusion and integration of different groups into public life. If research is to produce new discoveries that speak to these two aspects of access to justice, three innovations will be necessary. First, scholars will move away from single-case case studies of the experiences of lower status, lower resource groups in favor of explicitly comparative studies that investigate group and individual differences in civil justice experiences. Only comparative work can produce knowledge directly relevant to questions about inequality. Second, scholars will expand out from a narrow focus on the mobilization of law to look at the broad array of problem-solving and conflict-handling institutions that exist in contemporary societies. Only work that compares civil law to its alternatives can produce knowledge that speaks directly to the question of how civil justice experiences and institutions are specifically or uniquely implicated in inequality. Finally, the broadened empirical focus will be complemented by a rejection of vague concepts like disadvantage in favor of a deep engagement with existing theories of inequality, particularly sociological theories about what race, class, and gender are and how they work. Only work that is empirically comparative, theoretically informed, and analytically precise can accurately reveal relationships between civil justice and inequality. Such knowledge will be useful not only to sociologists, but also to those who wish to create procedures and institutions that are by some standard more equal or more just.

DISCLOSURE STATEMENT

The author is not aware of any biases that might be perceived as affecting the objectivity of this review.

ACKNOWLEDGMENTS

This research was supported by Stanford University, which funded the work of Sherri Hansen, Maia Shanklin-Roberts, John Waldmann, and Joseph Weismantel, through Vice Provost for Undergraduate Education Faculty Research Grants, and the work of Colin Beck and Kathryn Tafolla Young through graduate research assistantships. Terence Hagans II, Deborah Sohn, and Jessica Yurkovsky also contributed research assistance. Bryant Garth, Ethan Michelson, Pascoe Pleasence, Carroll Seron, and an anonymous reviewer provided comments on a previous draft. The strengths of the paper reflect their contributions; any errors or omissions remain my own.

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