Access to What?

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

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

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

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

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

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

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

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

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

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

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

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

The second problem is that access to justice is systematically *unequal*: some groups – wealthy people and white people, for example – are consistently more likely to get access than other groups, like poor people and racial minorities. The solution to this problem is to *equalize* access to justice. Access is equal when the probability of lawful resolution is the same for all groups in the population: for example, men, women, and transgender; rich and poor; every race and ethnicity; each religion and those with none. When defined this way, the focus becomes creating wide and equal access to the lawful resolution of justice problems, rather than any specific route through which such resolution might be achieved.

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

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

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

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

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

Some of the so-called legal needs of individuals are a consequence of our legal system's relentless privatization, of basic court functions as well as civil law enforcement. In these instances, it is less an individual person who has a "legal need" than the legal system itself, which requires lawyers' help to carry out its most basic tasks. A review of forty years of empirical studies of when and how lawyers change outcomes in cases investigated which factors created lawyers' superior outcomes: was it their knowledge of the substantive law or their mastery of legal procedures? One of the most striking findings was that lawyers' impact sometimes came by simply being present in the courtroom.

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

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

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

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

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

The access-to-justice crisis is a crisis of exclusion and inequality, for which legal services will sometimes provide a solution. At other times, lawyers' services will be too expensive and much more than necessary. At other times still, systemic reforms will be the right solution, not providing costly and inefficient assistance to individuals. Lawyers and social scientists have a limited understanding of how to determine which justice problems of the public need lawyers' services and which do not.

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

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

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

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

This task raises the fundamental, and rightly contested, question of what "lawful resolution" means. Defining this term is a scientific question. It is also one about values. In a democracy, the public must engage that normative question, and not assume that the answer the guild of lawyers offers will be in the public's interest.

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

ENDNOTES

1 Rebecca L. Sandefur, "The Impact of Counsel: An Analysis of Empirical Evidence," *Seattle Journal for Social Justice* 9 (1) (2010): 56–57.

2 Pascoe Pleasence, Christine Coumarelos, Suzie Forell, Hugh McDonald, and Geoff Mulherin, *Reshaping Legal Services: Building on the Evidence Base* (Sydney: Law and Justice Foundation of New South Wales, 2014).

3 Rebecca L. Sandefur, "What We Know and Need to Know about the Legal Needs of the Public," *South Carolina Law Review* 67 (2016): 447–448.

4 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1988).

5 Matthew Desmond and Rachel Tolbert Kimbro, "Eviction's Fallout: Housing, Hardship, and Health," *Social Forces* 94 (1) (2015): 295–324; and Robert Pettignano, Lisa Radtke Bliss, Sylvia B. Caley, and Susan McLaren, "Can Access to a Medical-Legal Partnership Benefit Patients with Asthma Who Live in an Urban Community?" *Journal of Health Care for the Poor and Underserved* 24 (2) (2013): 706–717.

6 Pascoe Pleasence, Nigel J. Balmer, and Stian Reimers, "What Really Drives Advice Seeking Behavior? Looking Beyond the Subject of Legal Disputes," *Oñati Socio-Legal Series* 1 (6) (2011): 1–21; Rebecca L. Sandefur, "Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services," in *Middle Income Access to Justice*, ed. Anthony Duggan, Lorne Sossin, and Michael Trebilcock (Toronto: University of Toronto Press, 2012); and Sandefur, "What We Know and Need to Know about the Legal Needs of the Public," 448–450.

7 Laura Beth Nielsen, *License to Harass: Law, Hierarchy, and Offensive Public Speech* (Princeton, N.J.: Princeton University Press, 2004); Rebecca L. Sandefur, "The Importance of Doing Nothing: Everyday Problems and Responses of Inaction," in *Transforming Lives: Law and Social Process*, ed. Pascoe Pleasence, Alexy Buck, and Nigel Balmer (London: The Stationary Office, 2007); and Sandefur, "Money Isn't Everything."

8 Ralph C. Cavanagh and Deborah L. Rhode, "The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis," *Yale Law Journal* 86 (1) (1976): 104–184.

9 Jeanne Charn, "Celebrating the 'Null' Finding: Evidence-Based Strategies for Improving Access to Legal Services," *Yale Law Journal* 122 (8) (2013): 2206–2234; and James Greiner and

Cassandra Wolos Pattanayak, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make," *Yale Law Journal* 121 (8) (2012): 2118–2214.

[10] For example, Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* (Ann Arbor: University of Michigan Press, 1998); Karl Monsma and Richard Lempert, "The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board," *Law and Society Review* 26 (3) (1992): 627–667; Richard Moorhead, Alan Paterson, and Avrom Sherr, "Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales," *Law and Society Review* 37 (4) (2003): 765–808; Rebecca L. Sandefur, "Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact," *American Sociological Review* 80 (5) (2015): 909–933; and Rebecca L. Sandefur and Thomas Clarke, *Roles beyond Lawyers: Summary, Recommendations and Research Report of an Evaluation of the New York City Court Navigators Program and Its Three Pilot Projects* (Chicago and Williamsburg, Va.: American Bar Foundation and National Center for State Courts, 2016).

[11] Sandefur, "What We Know and Need to Know about the Legal Needs of the Public," 443.

[12] Jake Halpern, *Bad Paper: Chasing Debt from Wall Street to the Underworld* (New York: Macmillan, 2014).

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

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