

# EXPANDING THE EMPIRICAL STUDY OF ACCESS TO JUSTICE

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## INTRODUCTION

Access to Justice (A2J) research is in the midst of a renaissance. A new crop of evaluation studies<sup>1</sup> have joined a broader body of contemporary research investigating the delivery of legal services<sup>2</sup> and

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1. See, e.g., W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS (1972); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2011); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, HARV. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1948286](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948286); 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).

2. See, e.g., Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010); Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006); Rebecca L. Sandefur, *Lawyers’ Pro*

public experience with civil justice.<sup>3</sup> A growing number of stakeholders regard this new research with serious interest. For example, in 2010, the Obama administration established for the first time an Access to Justice Initiative within the Department of Justice.<sup>4</sup> The Access to Justice Initiative is charged in part with “[e]xpand[ing] research on innovative strategies to close the gap between the need for, and the availability of, quality legal assistance.”<sup>5</sup> Similarly, in its 2012 strategic plan, the Legal Services Corporation committed to using “robust assessment tools” in identifying and promoting best practices in legal services delivery.<sup>6</sup> Three years ago, the American Bar Foundation, a leading national center for sociolegal research, established an A2J research initiative.<sup>7</sup> In December 2012, that initiative, with the sponsorship of the National Science Foundation, convened researchers and field professionals to identify and develop an A2J research agenda.<sup>8</sup> This is an exciting time for people who care about access to justice.

Like any renaissance, to be fruitful this one must include important rediscoveries alongside theoretical and empirical innovations. At this moment of tremendous promise and opportunity, we recognize the work that has led to this Colloquium and we call for an expansive research agenda drawing on what we already know from more than thirty years of sociolegal research. We appreciate all that Professor Greiner and his

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*Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC’Y REV. 79 (2007).

3. See, e.g., CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE (2010); Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC’Y REV. 11 (2005); Ellen Berrey et al., *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC’Y REV. 1 (2012); Rebecca L. Sandefur, *Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services*, in MIDDLE INCOME ACCESS TO JUSTICE 222 (Michael Trebilcock et al. eds., 2012) [hereinafter Sandefur, *Money Isn’t Everything*]; Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949 (2009) [hereinafter Sandefur, *Fulcrum Point*].

4. *Access to Justice Home*, U.S. DEPARTMENT JUST., <http://www.justice.gov/atj/> (last visited Feb. 2, 2013).

5. *Id.*

6. LEGAL SERVS. CORP., STRATEGIC PLAN 2012–2016, at 4, available at [http://www.lsc.gov/sites/default/files/LSC/lscgov4/LSC\\_Strategic\\_Plan\\_2012-2016--Adopted\\_Oct\\_2012.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/LSC_Strategic_Plan_2012-2016--Adopted_Oct_2012.pdf).

7. *Access to Justice*, AM. BAR FOUND., <http://www.americanbarfoundation.org/research/A2J.html> (last visited Feb. 2, 2013).

8. *Id.* A number of contributors to this symposium served on the organizing committee for this workshop, which was funded by the National Science Foundation, NAT’L SCI. FOUND., SES-1237958, WORKSHOP: ACCESS TO CIVIL JUSTICE: RE-ENVISIONING AND REINVIGORATING RESEARCH, CHICAGO, IL, FALL 2012 (2012).

colleagues have done to further the rigorous exploration of important questions regarding representation and case outcomes. In this Essay, we place these questions in the context of a larger research agenda that includes elements we believe are essential to intellectually exciting and pragmatically useful A2J research. We call for a research agenda that steps back from lawyers and legal institutions to explore not only whether existing policies are effective, but also how current definitions and understandings of access to justice may blind policy makers to more radical, but potentially more effective, solutions. An example from recent history illustrates.

Thirty years ago, researchers thought and wrote of disputes as if they were found objects in the world: quarrels that entered the legal system *sui generis* to be processed and resolved. This understanding of civil legal disputes changed dramatically when the landmark Civil Litigation Research Project (CLRP) transformed the way that sociolegal scholars conceptualized these events.<sup>9</sup> Before the CLRP, research typically focused on finding fair and efficient means for resolving those civil disputes that arrived at the courthouse door. By contrast, the CLRP stepped back to consider the social landscape of potential legal disputes and the processes through which these disputes came to the legal system in the first place. To consider this landscape, CLRP investigators surveyed ordinary households to determine whether they had experienced potentially legal problems such as disagreements about contracts, injuries, or discrimination.<sup>10</sup> They then asked how respondents responded to these events.<sup>11</sup>

CLRP's findings were startling and illuminating. Many more potential legal disputes existed than researchers had anticipated, and the vast majority never reached a lawyer or courthouse, let alone a judge.<sup>12</sup> Different types of potential disputes exhibited different patterns of resolution. For example, people nearly always pursued injuries that might result in tort claims, but they typically settled those claims before reaching court.<sup>13</sup> In contrast, people seldom pursued instances when they felt they had been targets of discrimination and rarely even confronted the responsible party about their concerns.<sup>14</sup> The CLRP findings challenged the dominant narrative that excessive American litigiousness

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9. For results from the Civil Litigation Research Project and commentary on those results, see the special issue of *Law & Society Review. Special Issue on Dispute Processing and Civil Litigation*, 15 *LAW & SOC'Y REV.* 391 (1980–81).

10. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525, 534–37 (1980–81).

11. *Id.* at 536.

12. *Id.* at 561.

13. *Id.*

14. *Id.* at 561, 563–64.

produced court overloads by comparing court caseloads to the unexpectedly large number of potentially legal problems experienced by the public. If anything, people appeared *under-litigious* because court dockets represented only a tiny fraction of potentially legal problems in the social landscape of disputes.<sup>15</sup>

The CLRP project revolutionized how scholars understood legal problems and disputes. Scholars stopped regarding disputes as found objects in the world and instead recognized disputes for what they are: social constructs.<sup>16</sup> Though this research tradition stepped back from law and legal processes, it still conceptualized people's experiences in terms that would seem very familiar to lawyers. The CLRP characterized legal disputes that arrived at the courthouse door as the products of a process of "naming," "blaming," and "claiming," that is, recognizing an injury, holding another responsible for it, and seeking legal remedy.<sup>17</sup> This social process involved "agents of transformation"—family, friends, coworkers, employers, and organizations—that shaped how respondents viewed their experiences and evaluated their options for action.<sup>18</sup> Not only resources (e.g., time, money, and lawyers), but also social meaning affected whether a potentially legal problem came to be perceived as such or reached a legal institution for resolution.<sup>19</sup> This insight opened up a broad new field of research focused on the emergence (or not) of disputes in nonlegal social settings and on the process through which those disputes progressed.<sup>20</sup> Though obvious to sociolegal scholars now, this reconceptualization was a radical shift at the time.

The CLRP was able to make these startling discoveries in part because researchers resisted "the pull of the policy audience": the tendency for researchers to frame research questions to fit policy makers' definitions of a problem and their policy goals for addressing that problem.<sup>21</sup> The CLRP interrogated the basic premises informing policy debates: in this case, the idea that disputes were preexisting problems and

15. *Id.* at 537, 561.

16. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1980–81).

17. *Id.* at 635–36 (emphasis omitted).

18. *See id.* at 639–49.

19. *See* KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *SIGNS* 421, 426 (1987).

20. *See, e.g.*, BUMILLER, *supra* note 19; Albiston, *supra* note 3; Bumiller, *supra* note 19, at 423–24; Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 *LAW & SOC'Y REV.* 67, 67–69 (1999); Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 *LAW & SOC. INQUIRY* 1151, 1151–53 (2000).

21. Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 *LAW & POL'Y* 97, 97–99 (1988).

that the primary policy goal is to find efficient ways for a legal system to process them.<sup>22</sup> Broadening the question beyond the narrow goal of efficient dispute processing deepened understanding and enabled a more constructively critical stance toward the legal system itself.<sup>23</sup>

Research on access to justice, legal need, and the delivery of civil legal services has reached a similar theoretical crossroads. A growing body of research attempts to evaluate the effectiveness of civil legal services and the need for representation in legal claims related to poverty and inequality.<sup>24</sup> Although this work explores important questions, alone it is far too narrow. Limiting our efforts to evaluation research risks allowing the policy agenda to define the research questions before the problem and potential responses are fully understood. It also does little to identify the mechanisms through which civil legal services might address troubling inequalities or change society. If we truly wish to address a crisis in access to justice, we need a broader understanding of both what access to justice means and what the current lack of access entails.

In the Parts that follow, we outline a framework for a research agenda that interrogates the premises of the policy model, opens up exploration of alternatives not yet considered, and expands the arenas of inquiry in access to justice. We have two goals. The first is to ensure that empirical research about access to justice is informed by and benefits from theoretical developments in the sociolegal field over the past thirty years. The second is to foster innovative, original approaches to access to justice that think outside the box of dispute resolution and program evaluation. To us, this means considering not only individuals, but also institutions, not only resources, but also social meaning, not only how civil legal services are provided, but how demand for those services is shaped, to name just a few issues. In the end, it is our hope that scholars *and* policy makers will come to understand access to justice in a different and more comprehensive way and, if all goes well, forge major new solutions to address poverty and inequality.

#### I. THE CONTRIBUTION OF RANDOMIZED CONTROLLED TRIALS IN LEGAL CONTEXTS

Our theoretical exploration begins with discussing how an important existing strand of research expands our understanding of access to justice. Several contemporary A2J studies focus on determining whether legal services improve outcomes for the clients of legal services organizations. These studies typically focus on cases that reach courts of

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22. *Id.* at 97.

23. *Id.* at 132–43.

24. *See, e.g., supra* note 1.

some type and compare the outcomes for represented and unrepresented litigants, testing a hypothesis that representation improves specific outcomes for one party or for courts.<sup>25</sup> Although these studies generally find that people represented by attorneys or other specialist advocates fare better than those who are unrepresented, the improved outcomes observed may also be the product of differences between clients or cases that obtain representation and those that do not.<sup>26</sup> Without a design that randomly assigns clients and cases to receive representation (treatment) or to be turned away (control), studies cannot tell us whether representation or some other factor caused better outcomes for represented clients.

In recent years, a handful of innovative randomized design outcome studies have evaluated the impact of representation in various contexts. These studies focus on legal representation provided to poor clients who are either plaintiffs or respondents in different kinds of formal civil legal actions. Two of these studies find that representation by attorneys improves outcomes for poor clients,<sup>27</sup> one finds at best a modest improvement in outcomes for poor clients,<sup>28</sup> and one finds that an offer of representation by a law student delays resolution of poor clients' claims without increasing their probability of success.<sup>29</sup> These very useful studies increase our knowledge by using randomized design to reduce the impact of selection bias on measured outcomes. This research provides an important piece of the puzzle; however, by their very nature, randomized trials cannot tell us all that we need to know for meaningful evaluation of civil legal services and policy formulation.

First, randomized controlled trials that explore the impact of advocacy on outcomes can tell us whether or not representation improves outcomes, but they often provide little information about *why* representation mattered. That is, these studies test the impact of a treatment, but usually do not explore the mechanisms that create the

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25. See, e.g., Engler, *supra* note 1.

26. See generally Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51 (2010) [hereinafter Sandefur, *The Impact of Counsel*] (evaluating lawyers' effects on case outcomes in light of factors such as procedural complexity); Rebecca L. Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* (Oct. 15, 2012) [hereinafter Sandefur, *Elements of Expertise*] (unpublished manuscript) (on file with authors) (comparing lawyers' effect on case outcomes in different procedural and substantive contexts).

27. See Seron et al., *supra* note 1, at 426–27 (represented tenants are less likely to receive judgments against them); Greiner et al., *supra* note 1, at 19–21 (representation increases likelihood of retaining possession of housing unit).

28. See STAPLETON & TEITELBAUM, *supra* note 1, at 66–73 (showing mixed results for represented juvenile delinquents in hearings).

29. See Greiner & Pattanayak, *supra* note 1, at 2149 (unemployment insurance administrative proceedings).

impact. Understanding these mechanisms is important because policy makers need to know *why* outcomes differ to formulate effective policies. For example, does representation make a difference because lawyers present the case effectively in court, because lawyers provide detailed legal information that enables clients to obtain favorable settlements in their own negotiations with the other side, or because lawyers understand how to navigate informal relationships in the court system that help produce smoother case processing and resolution?<sup>30</sup> When representation does not produce better outcomes, is this because lawyers provide assistance that is not necessary, or because clients turned away without study-provided representation are able to find help elsewhere? These mechanisms remain an unspecified black box in most outcome studies, but the answers to these questions are essential to policy choices among, for example, providing legal advice in favor of providing full representation, simplifying court procedures, or shifting scarce resources away from one type of service or client to another.

Randomized design field studies, of course, differ in important ways from experimental studies in laboratory settings that hold factors other than the experimental treatment constant. Field studies obviously cannot hold clients in a controlled setting until their cases resolve. Consequently, these studies cannot tell us whether the actual experiences of the control group (e.g., perhaps they found representation elsewhere), the response of institutional actors to unrepresented claimants (e.g., perhaps unrepresented litigants get more help from the judge), the reaction to being turned away randomly (e.g., perhaps some claimants become angry and try harder while others become discouraged and give up), or some other unmeasured variable affected the results. Without this information, policy makers cannot determine the mechanisms that generate these differences and that should inform policy decisions.

Second, policymakers should recognize the substantial conceptual and evidentiary difference between finding a statistically significant relationship between representation and improved outcomes, and failing to find a statistically significant relationship. Put succinctly, an absence of evidence does not mean evidence of the absence of this relationship. As a formal matter, random design studies of causation test falsifiable hypotheses—that is, conjectures about the world that are capable of being disproven by empirical evidence. Statistics used in these studies test what researchers call “the null hypothesis”—in this case, the hypothesis that representation has no effect on outcomes. When researchers find that representation significantly affects outcomes, statistically what they mean is that it is unlikely that the observed

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30. Sandefur, *The Impact of Counsel*, *supra* note 26, at 69–71; *see also* Sandefur, *Elements of Expertise*, *supra* note 26, at 40–43.

relationship between representation and outcomes would have occurred by chance. This is essentially an argument by contradiction; if there is a very small probability that the relationship would have been found just by chance, it is highly unlikely the null hypothesis is true.<sup>31</sup> Importantly, in an argument by contradiction, *lack* of a significant relationship does not produce the same inference; that is, the absence of evidence is *not* statistically significant evidence of the absence of a relationship between representation and improved outcomes. What this means as a practical matter is that random design studies that find positive effects from representation and those that find no effect should not be treated as equivalent evidence on opposite sides of the scale. For this reason, policy makers should avoid formulating policy on a null result, particularly without more information about the mechanisms and context of representation.

Which brings us to our third point: studies of outcomes in individual cases may miss the forest for the trees by leaving out much of the civil justice picture. We know that most people experiencing civil justice problems, whatever their income level—poor, rich, or middle income—do not go to lawyers and ask for assistance.<sup>32</sup> Studies of the impact of attorneys on cases that make it to legal forums tell us nothing about potential claimants who failed to come to the legal services office in the first place—that is, they tell us nothing about the majority of potential claimants and the majority of civil justice problems experienced by the public.<sup>33</sup> Studies that focus on the benefits of representation for a focal party, the poor defendant or petitioner, also tell us nothing about benefits of civil legal services that accrue to someone other than that focal party. For example, to date such studies have not explored benefits like increased legitimacy for the legal system when citizens perceive it to be fair and accessible, improved skills and expertise for the law students providing representation, or judicial education and reduction in court workloads resulting from well-presented claims. All of these benefits may accrue even if case processing time is extended for represented litigants. Existing studies also tell us little about how representation interacts with legal institutions, although sociolegal scholars have long known that institutional responses may be endogenous to representation

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31. The probability statistic (p-value) indicates the probability of getting the test statistic by chance. DAVID FREEDMAN ET AL., *STATISTICS* 442 (1978). If the p-value is very small (by convention less than five percent) researchers “reject” the null hypothesis that there is no relationship between representation and outcome. *Id.* Data cannot *prove* the null hypothesis, i.e., that there is *no* relationship between representation and outcome; data can only show that the results were insufficient to reject the null hypothesis. *Id.*

32. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 341–42 (2008).

33. *Id.* at 342.



and claiming.<sup>34</sup> So, for example, availability of civil legal services may deter courts and administrators from cutting corners or favoring more powerful parties, and thus benefit both represented and unrepresented claimants. Our point is that results-based evidence regarding civil legal services is needed not only at the individual level, but also at the institutional and societal level. Randomized design studies cannot provide this system- and institution-level information because we cannot randomly assign countries, states, or counties to alternative dispute processing regimes that differ by court system, budget, or substantive law.

Finally, we call for researchers to rethink the current focus on studying the effectiveness of legal representation by focusing solely on the poor. Unlike randomized trials in medicine, to date, randomized trials in legal contexts have focused on poor people. We think this emphasis both hampers understanding and raises ethical issues that need to be explored. By conducting evaluation studies only on lawyers who serve poor populations that may differ from other populations in important respects, the knowledge we produce about “representation” is in fact knowledge about a highly specialized group of lawyers—those who serve poor people exclusively, work on a fairly restricted range of justice problems, and operate in less than ideal circumstances. We know that civil justice problems occur across a range of issues in contemporary life and are ubiquitous across the population, including among people who are above the poverty line but nevertheless unable to afford a lawyer.<sup>35</sup> The questions that existing studies explore about nonprofit legal services could be raised about private, for-profit legal services as well. Given this, we are curious as to why researchers have so far studied the effectiveness of legal services only on the poor.

Perhaps the answer is that we collectively believe that private litigants are free to pay for ineffective legal services if they so choose, but when the state’s scarce resources are at stake, we want to ensure that representation matters. Perhaps the answer is that this research makes a virtue of necessity: effectiveness research on the poor exploits the scarcity of accessible representation to study an issue that affects everyone with legal problems. Yet we do not study medicine this way, by randomly assigning some patients in the public hospital emergency waiting room to receive medical assistance and treat others turned away

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34. See generally MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 76–93 (1992); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 *LAW & SOC’Y REV.* 15 (1967); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 *LAW & SOC’Y REV.* 585 (1987).

35. Sandefur, *supra* note 32, at 346–47.

due to lack of capacity as a control group.<sup>36</sup> Why, ethically, we have fewer qualms about restricting research about the effectiveness of legal representation to the needy deserves more thought and analysis than it has received to date.<sup>37</sup>

Studying access to justice by focusing only on the poor is not only ethically challenging, it also limits our understanding of the relationship between legal services and inequality. In the United States, access to justice is often treated as an aspect of anti-poverty policy, which belies the fact that we know surprisingly little about inequalities in access to civil justice. Because we have expended so much of our research effort on studying the poor exclusively, we have little basis for understanding differences between poor people and everyone else.<sup>38</sup> From a smattering of studies, we know that social class is related to how people respond to their civil justice problems and to how the staff of civil justice institutions—court clerks, bailiffs, judges, and attorneys—treat them; but, we know little of why or with what impacts.<sup>39</sup> We know that legal interventions intended to equalize treatment along the lines of race or gender are often diluted or weakened in their implementation, but we know little about race and gender differences in civil justice experiences generally.<sup>40</sup> And we know little of the impacts of inequality in access to justice on other forms of social inequality—for example, race, class, gender, immigration status, disability, and age—that divide our society.<sup>41</sup> We have some hypotheses about these inequalities, but few robust theories that can guide research or inform policy. To study these questions adequately, we must study access to legal representation for both privileged and disadvantaged communities, a comparison that addresses institutional and structural factors, rather than simply

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36. Nor do medical research ethical standards permit testing treatments against the absence of treatment when some treatment exists; instead, innovations must be tested against the existing standard of care, and only when the benefits of the research outweigh the potential harm to the subject. World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects* (Oct. 2008), available at <http://www.wma.net/en/30publications/10policies/b3/> (particular provisions to note include A.6, B.17, B.18, B.21, and C.32).

37. One might argue that, unlike medical emergencies, civil legal problems are not life threatening, and for many legal problems this may be true. Nevertheless, domestic violence victims seeking temporary restraining orders against their attackers, families about to be evicted from housing, and welfare recipients about to lose access to food stamps and funds they need to survive also present serious threats to safety and welfare.

38. Sandefur, *supra* note 32, at 349.

39. *Id.* at 347–48.

40. *Id.* at 349–52.

41. *Id.* at 339–58.

attributing inequality to group-based differences in behavior, resources, or culture.

In sum, randomized field studies of the impact of counsel are an important piece of the puzzle, but they can achieve their promise only if understood in a larger context. We encourage researchers to attend to this larger context, which requires, we believe, three elements: better theories of effectiveness, better theories of how civil legal services are delivered, and better theories of how people understand and handle their civil justice problems.

## II. THE NEED FOR THEORY I: WHAT IS “EFFECTIVENESS?”

Much existing A2J research begs an important question: how should the “effectiveness” of civil legal services be defined? This is a fundamental theoretical question to which the recent push to evaluate the effectiveness of legal services pays scant attention. Researchers who lack an explicit theory of effectiveness risk deferring to the policy audience once again about how to define both the problem and the solution. But this need not be the case. The sociolegal literature offers a broad base for conceptualizing and studying effectiveness on the individual, institutional, and societal level.

Even at the individual level, effectiveness of legal representation encompasses more than case outcomes. Consider, for example, the time and effort required to obtain a particular outcome without representation, including a litigant’s time off from work (and associated loss of income), late nights spent learning legal rules, and time negotiating with opponents or appearing in court. Researchers might also consider comparing represented and unrepresented litigants’ process costs to evaluate effectiveness. These costs include lost access to housing, employment, food support, or medical care before an eventual case outcome is reached, even if that outcome is positive.<sup>42</sup> How do these losses affect claimants, their families, and their children? Not every outcome of interest is legal: consider, for example, comparative health outcomes between represented and unrepresented individuals, including the effects of the stress and uncertainty associated with navigating legal proceedings on depression and mental health more generally.<sup>43</sup> Civil justice research must step back from narrow definitions of effectiveness that are limited to case outcomes and consider the broader, systemic effects of representation on individuals and those around them.

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42. Pascoe Pleasence et al., *Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS* 67 (Pascoe Pleasence et al. eds., 2007).

43. *Id.* at 86–87.

Not all outcomes relevant to effectiveness are material; some operate at the level of social meaning. Consider, for example, empowerment (or disempowerment) of individuals who claim their legal rights. When lawyers help individuals resolve their claims successfully, clients may feel empowered in other areas as well. But not necessarily; sociolegal research indicates that legal rights affect individuals' self-conceptions and identity in complex and counterintuitive ways. Although some research finds that individuals who understand their legal rights feel empowered,<sup>44</sup> other research suggests individuals are reluctant to claim legal protections that construct their identity in a way that undermines their perceived strength, independence, or self-worth.<sup>45</sup> If we believe that effective representation should empower rather than undermine clients, we need to understand the factors that contribute to empowerment and that avoid negative constructions of identity.

Negative social meanings can discourage people from accessing needed support services or taking advantage of legal protections, but lawyers can be agents of transformation who shape how their clients understand their experiences and evaluate viable options for action. For example, faced with negative stereotypes that they are lazy, abusing the system, and dependent,<sup>46</sup> some welfare recipients try to demonstrate self-worth and independence by limiting their use of services to only extremely dire circumstances.<sup>47</sup> By providing information about legal entitlements and rights, lawyers may be able to reframe what it means to receive services and to encourage individuals to claim much needed support.<sup>48</sup> Social stigma similarly attaches to the failure to pay debts, and consumers declaring bankruptcy experience shame and pressure to pay their debts to meet social expectations.<sup>49</sup> Research indicates that creditors may prey on this social dynamic to convince consumers to “voluntarily”

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44. Albiston, *supra* note 3, at 28–29; *see also* David M. Engel & Frank W. Munger, *Rights, Remembrance, and the Reconciliation of Difference*, 30 LAW & SOC'Y REV. 7 (1996) (examining how the Americans with Disabilities Act of 1990 shaped the self-conceptions of individuals with disabilities).

45. *See, e.g.*, BUMILLER, *supra* note 19, at 66–70; Bumiller, *supra* note 19; Quinn, *supra* note 20; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

46. Karen Seccombe et al., “*They Think You Ain't Much of Nothing*”: *The Social Construction of the Welfare Mother*, 60 J. MARRIAGE & FAM. 849, 849–55 (1998); *see also* Rebecca Joyce Kissane, *Poor Women's Moral Economies of Nonprofit Social Service Use: Conspicuous Constraint and Empowerment in the Hollow State*, 55 SOC. PERSP. 189, 195 (2012).

47. Kissane, *supra* note 46.

48. COREY S. SHDAIMAH, *NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL JUSTICE* 103–09 (2009).

49. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 540–41 (1993).

reaffirm debts and take on new obligations.<sup>50</sup> Legal advisors may provide alternative interpretations of the choice to discharge debts by, for example, discussing the client's obligation to children who may want to attend college or the moral culpability of creditors whose practices facilitate overextension of consumers.<sup>51</sup> In these circumstances, "effective" legal representation helps clients overcome subjective barriers to accessing legal rights that address poverty and inequality.

Finally, legal representation may provide important benefits beyond an individual case. For example, an enormous literature on procedural justice shows that when individuals perceive a dispute resolution process to be fair, they are more satisfied with the outcome, they view the legal system as more legitimate, and they are more likely to comply with judicial decisions.<sup>52</sup> Perceptions of fairness depend on the opportunity to be heard, including presenting one's own side of the story, which in our adversary system can depend on legal representation.<sup>53</sup> Also, the mere availability of civil legal services may help ensure fair treatment by the state and deter violations of the law so that legal claims do not arise in the first place. In addition, litigants acting as "private attorneys general" relieve the state from enforcing important public policies that benefit not only the litigant but also the broader public.<sup>54</sup> These enforcement actions also convey the moral importance of civil rights protections.<sup>55</sup> Measuring effectiveness solely in terms of case outcome ignores these important systemic effects on actors beyond individual claimants.

The theoretical move of redefining effectiveness more broadly shifts focus from individualistic measures limited to legal remedies to consider how legal problems affect the well-being of claimants, their families, and society in multiple, interconnected ways. Legal representation, in this view, can provide support to individuals across many dimensions, and representation can have far-reaching effects beyond the individual client. We stress that these are not abstract, intangible benefits; they can be measured using readily available data collection and analysis methods. But what has been missing to date is an explicit theory of the meaning of effectiveness from which these empirical measures may be derived. It is

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50. Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1401-02 & nn.164-65 (2008).

51. Braucher, *supra* note 49, at 541-42.

52. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 64-65 (1988).

53. *Id.* at 219-20.

54. Albiston & Nielsen, *supra* note 2, at 1089. Private litigants bring more than ninety percent of the enforcement actions filed pursuant to most civil rights statutes, such as Title VII. *Id.* at 1089-90.

55. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

our view that researchers need to prioritize this theoretical development, rather than implicitly ceding the question to the policy audience.

### III. THE NEED FOR THEORY II: SUPPLY SIDE ACCESS TO JUSTICE

Another relatively unexplored aspect of access to justice involves “supply side” questions. How do we currently deliver services to people facing civil justice problems? In fact, we know little about what is currently available, except that it is geographically extremely variable.<sup>56</sup> What kinds of services are provided through the current legal services delivery system? How are those services constrained by professional rules and norms? Where else, besides lawyers, do people go with their justice problems? How are those delivery systems supported financially? What are the comparative advantages and disadvantages of various delivery systems? How do American delivery systems compare to those in other countries? Understanding what services are being provided, by whom, and under what restrictions and limitations will help clarify how supply side systems affect access to justice. Comparative research helps us discover what other delivery models might be possible.

These are not merely descriptive questions; choice of delivery system also has important structural and normative implications. For example, delivery systems that rely on the private bar to provide the traditional model of private representation, such as fee-for-service models, pro bono representation through the private bar, or litigation supported through attorney fees recovery, will move services toward litigating the cases that come in the door.<sup>57</sup> To be sure, representation in active legal disputes is important, but a representation/litigation model may not be the most effective approach for addressing systemic issues related to poverty or inequality. Waiting for a case to come in the door is essentially an emergency room model that provides representation at the point a legal crisis comes to a head. Moreover, scarce resources mean that even emergency room representation is likely to be rationed through income eligibility criteria that leave many individuals unrepresented.

One might focus instead on legal interventions that address legal problems that can lead to poverty, such as unemployment, loss of

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56. REBECCA L. SANDEFUR & AARON C. SMYTH, AM. BAR FOUND., ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT, at v (2011), available at [http://www.americanbarfoundation.org/uploads/cms/documents/access\\_across\\_america\\_first\\_report\\_of\\_the\\_civil\\_justice\\_infrastructure\\_mapping\\_project.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf).

57. Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, LAW & SOC. INQUIRY (forthcoming 2013) (manuscript at 30) (on file with authors).

housing, health crises or disability, insolvency, and domestic violence. Swift intervention in these circumstances may prevent more serious emergency room scenarios.<sup>58</sup> Interventions might include a letter on the attorney's stationary discouraging an employer from illegally firing a client, a petition for a temporary restraining order in a domestic violence case, or targeted outreach regarding legal protections and services for those experiencing health crises that threaten their jobs and their financial stability.<sup>59</sup> Established legal aid offices with expertise based on experience may be the best way to provide these interventions, which often cannot wait for a lengthy intake process or referral to a private attorney. There may also be other models of service provision that are more effective than our existing system. We will recognize the need to ask this empirical question only if we step back from our current system to consider alternative arrangements as well.

On the other end of the spectrum are large, systemic reform actions that no individual attorney is likely to take on a pro bono or fee-for-service basis. These include technically complicated voting rights enforcement cases, complex class actions in discrimination cases such as *Wal-Mart Stores, Inc. v. Dukes*,<sup>60</sup> and reform actions against state entities on behalf of socially stigmatized plaintiffs such as prisoners or welfare recipients. Despite their far-reaching effects, these systemic reform actions are very expensive and offer diminishing chances for monetary damages or recovery of attorneys fees.<sup>61</sup> Recognizing a doctrinally important case, understanding how that case fits into the developing law in the field, and thinking creatively about novel legal theories often requires experience and years of practice in a field. In these instances, nonprofit organizations that house dedicated "cause lawyers" who develop strategic litigation plans for change may be the most desirable model. But again, whether that is the most desirable model is an empirical question, and there may be other, not yet identified ways to accomplish these important enforcement goals that have yet to be evaluated. We can only recognize the need to ask this question if we step back from the status quo.

Funding models for providing representation are central to supply side access to civil justice, and sources of funding may enhance or inhibit effectiveness. Research suggests, for example, that pro bono lawyers

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58. See, e.g., Jeffrey Selbin & Mark Del Monte, *A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender-Specific Legal Services to Women with HIV*, 5 DUKE J. GENDER L. & POL'Y 103, 125–26 (1998) (describing an early intervention model of service provision designed to prevent incipient legal problems from developing into more dire legal circumstances).

59. *Id.*

60. 131 S. Ct. 2541 (2011).

61. Albiston & Nielsen, *supra* note 2.

supported by the private bar are vulnerable to backlash when they sue the private bar's clients, deterring them from asserting certain claims.<sup>62</sup> State-funded legal services remain extremely vulnerable to political attacks, which in the past have cut funding radically and placed restrictions on attorneys' activities.<sup>63</sup> Some critics argue that foundation support can be fickle, and relying on foundations may allow foundation programmatic priorities rather than legal need to drive the priorities of civil legal representation.<sup>64</sup> Moreover, political vulnerability and the preferences of elite supporters risk potential stratification in the delivery of civil legal services: the "deserving" and sympathetic poor, such as children or the elderly, may benefit, while vulnerable but less socially appealing clients, such as prisoners, immigrants, or welfare recipients, may be slighted.<sup>65</sup> Once again, understanding how sources of financial support influence effectiveness is an empirical question that requires shifting our focus away from evaluating current policies and toward comparing them to alternatives.

As all these issues suggest, A2J research requires more than evaluating the service delivery models we already have on the outcomes of individual cases that have already reached the emergency room stage. Institutional design affects sustainability, independence, effectiveness, and inequality in access to representation. But institutional design also depends on what we hope to accomplish through civil legal services—avoiding the emergency room may require a different model than treating the emergency, for example. Once again, innovative solutions require scholars to resist the pull of the policy audience and conduct more basic research about the problems and the potential supply side solutions for access to civil justice.<sup>66</sup>

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62. See Mark Kessler, *Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting*, 24 *LAW & SOC'Y REV.* 121, 136–37 (1990).

63. Albiston & Nielsen, *supra* note 57. Law school clinics at state-funded universities have also been subject to attack. Jeff Selbin, *Defending Law School Clinics from Political Interference*, *DAILY J. (L.A.)*, Apr. 13, 2010, at 6.

64. See J. Craig Jenkins, *Channeling Social Protest: Foundation Patronage of Contemporary Social Movements*, in *PRIVATE ACTION AND THE PUBLIC GOOD* 206 (Walter W. Powell & Elisabeth S. Clemens eds., 1998); JOAN ROELOFS, *FOUNDATIONS AND PUBLIC POLICY: THE MASK OF PLURALISM* (2003).

65. See Jenkins, *supra* note 64, at 206.

66. Determining what we hope to accomplish from civil legal services is a deeply substantive and normative inquiry. Do we seek, for example, to ensure procedural fairness, end poverty, empower clients, organize communities, and/or change society? Although we do not explore these issues here, it would be folly to attempt to evaluate the effectiveness and utility of civil legal services before coming to some conclusions on these first principles.



## IV. THE NEED FOR THEORY III: DEMAND SIDE ACCESS TO JUSTICE

On what might be termed the “demand side” of access to justice, we have only a very rudimentary understanding of how people come to think about and act on their potentially justiciable experiences and of the consequences of these experiences for them and for society. For example, we know very little about the forces that shape public demand for legal services. Here, the pull of the policy audience has resulted in a limited and restricting understanding of “legal need.” Well-meaning observers often speak and write as though access to justice is only an issue for the poor, and assume that poor people desire lawyers’ services but cannot obtain them because those services are so very expensive.<sup>67</sup> In fact, the picture is much more complex: civil justice problems are ubiquitous,<sup>68</sup> both poor and nonpoor people typically do not think of their civil justice problems in legal terms,<sup>69</sup> people often do not think of lawyers’ services as a helpful route to solving civil justice problems,<sup>70</sup> private lawyers’ services are not always that expensive,<sup>71</sup> and concerns about cost play only a small role in people’s decisions not to turn to lawyers or to courts.<sup>72</sup>

An expanded research agenda must explore the dynamics of how people come to think about their civil justice problems and their options for responding to them. Surveys of the American public that ask people whether they sought a lawyer’s help for a justice problem find that rich and poor alike do not turn to law, which suggests that concerns other than the cost of lawyers and court filings guide behavior.<sup>73</sup> Surveys that ask people why they did not seek out lawyers for help with their justice problems routinely find that fears about cost explain only a minority of decisions not to turn to law; rather, people do not turn law for other reasons, such as being resigned to their problems or handling them in other ways.<sup>74</sup> How people understand their problems plays a large role in how they respond to them.<sup>75</sup> For example, a recent study in Britain found

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67. See Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 *LOY. L.A. L. REV.* 1021, 1045–46 (2009); Sandefur, *Money Isn’t Everything*, *supra* note 3.

68. Sandefur, *supra* note 32, at 346–49.

69. Sandefur, *Money Isn’t Everything*, *supra* note 3, at 233.

70. Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS*, *supra* note 42, at 112.

71. Sandefur, *Money Isn’t Everything*, *supra* note 3, at 229.

72. *Id.* at 238.

73. See, e.g., Sandefur, *supra* note 32, at 346–49 (noting that while socioeconomic status does affect the likelihood of seeking legal help, “an explanation based on cost . . . is insufficient to explain the full pattern of class differences”).

74. Sandefur, *Money Isn’t Everything*, *supra* note 3, at 237.

75. Albiston, *supra* note 3.

that a significant predictor of whether people would take a problem to a legal advisor was whether or not they understood the problem as a legal problem, rather than as a social problem, a moral problem, a private problem, or just bad luck.<sup>76</sup> Similarly, research reveals that when Americans are asked about their experiences with problems or situations that happen to be justiciable, “they often do not think of their justice problems in legal terms.”<sup>77</sup> Studies demonstrate this failure to connect civil justice problems with law or rights in people’s experiences with a wide variety of justice problems, including those involving family relationships, property damage, personal injury, insurance, and employment and working conditions.<sup>78</sup> Americans express a wish for assistance with these problems, but it is not usually legal assistance that they wish for.<sup>79</sup> When Americans do not take their justice problems to lawyers or courts, the most common reason is that the use of lawyers or the justice system is simply not considered at all.<sup>80</sup>

The social construction of a problem or situation as legal or something else is shaped not only by “agents of transformation”<sup>81</sup> but also by the institutional arrangements that exist for handling events that might bring one into contact with the civil justice system. In other countries, where a variety of lawyer and nonlawyer providers exist to assist people with civil justice issues, people seem very happy to turn to nonlawyers for help with their justice problems. Indeed, in the United Kingdom, where until the recent legal aid reforms, publicly subsidized lawyers’ services were provided to forty to sixty percent of the public in a *judicare* scheme, people were *less likely* to go to lawyers for advice about civil justice problems than in the United States, where only about a fifth of the population is eligible for free civil legal assistance.<sup>82</sup> In

76. Pascoe Pleasence, Nigel J. Balmer & Stian Reimers, *What Really Drives Advice Seeking Behaviour? Looking beyond the Subject of Legal Disputes*, 1 OÑATI SOCIO-LEGAL SERIES, no. 6, 2011, at 1.

77. Sandefur, *Money Isn’t Everything*, *supra* note 3, at 233.

78. See, e.g., ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* (2001); CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* (1986); David M. Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 *LAW & SOC’Y REV.* 551 (1984).

79. Sandefur, *Money Isn’t Everything*, *supra* note 3, at 235.

80. *Id.* at 232–39; see also Sandefur, *supra* note 70; Calvin Morrill et al., *Legal Mobilization in Schools: The Paradox of Rights and Race among Youth*, 44 *LAW & SOC’Y REV.* 651 (2010).

81. Felstiner et al., *supra* note 16, at 639.

82. Sandefur, *Fulcrum Point*, *supra* note 3, at 955 & n.29. In the United States, twenty-seven percent of civil justice problems involving money and housing were taken to lawyers or courts, *id.* at 969–71, in comparison with ten percent of such problems in England and Wales, *id.* at 955.

contrast to the United States, the United Kingdom provides many alternative institutions of remedy, including government ombudsmen for a variety of regulated industries and nonlawyer services that can provide legal advice and specialized assistance with civil justice problems.<sup>83</sup> People appear quite happy to use these nonlawyer services instead of lawyers, even when lawyers are free. This finding suggests that what members of the public want and how they understand their justice problems may differ sharply from the vision that informs our contemporary legal aid policy. We should be asking how members of the public understand access to justice, not only in terms of access to legal services, but also in terms of access to remedy and access to participation in a major public social institution: law.

#### CONCLUSION

This is an exciting time in access to justice, ripe with potential. Our aim in this Essay has been to sketch out what we see as the elements of a research agenda that can achieve the promise of this moment.

A broader framework for understanding access to justice is not only intellectually and practically desirable, it is also politically beneficial. Recognizing the pervasiveness of civil justice needs makes it possible to frame access to justice as a universal issue rather than a concern limited to stigmatized groups such as the poor, immigrants, or the disabled. Considerable evidence suggests that universal appeals may be more likely to succeed politically and more resilient to attack down the road.<sup>84</sup> For example, those American social insurance programs that have survived both general austerities and assaults on the welfare state are durable in large part because so many in the population participate. Thus, expanding the empirical study of access to justice will be valuable intellectually, practically, and politically.

We have suggested several dimensions through which to expand the study of access to justice. Researchers should consider not only individuals, but also institutions, such as courts, administrative bodies, and other potential structural constraints on access to justice. Researchers should consider how access to justice is impeded not only by lack of resources, but also by constructed social meanings, such as the stigmatized identity of rights claimants or the failure to understand a problem as a legal one. Finally, researchers should consider not only demand for civil legal services, but also the many potential supply-side

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83. Sandefur, *Fulcrum Point*, *supra* note 3, at 959–60.

84. See Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313 (2011).

models for addressing civil legal concerns, *including* nonlegal approaches and service delivery models that may not yet exist.

We also urge that scholars consider the diversity of civil legal concerns, and not presume a one-size-fits-all solution is appropriate or even available. Indeed, improving access to justice will likely require a multitude of systems working together. It will also require a much better theoretical and empirical understanding of both the problem and the potential solutions, including those we have not yet begun to imagine. It is our hope that this Essay will help guide this process of discovery by providing a foundation of sociolegal research on which to base the expanded empirical study of access to justice.