

Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans

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May 2009

ABSTRACT

In this paper I review the small amount of available data on the extent to which ordinary individuals in the U.S. have access to legal resources to navigate the law-thick world that Robert Kagan has famously called ‘adversarial legalism—the American way of law.’ I present this data in comparative context, relating what (little) we know about the availability of law in the U.S. to what (little) we know about the availability of law in other advanced societies and in countries transitioning to legally-mediated market democracy. I review first a set of ‘legal needs’ surveys that ask households about their experiences with difficult problems that are potentially subject to legal intervention or governance and their use of resources, including lawyers, to resolve those problems. The comparative analysis demonstrates that while the incidence of reported problems is relatively stable across countries (with the exception of Japan, which reports lower rates), and contact with lawyers is comparable, there are significant differences in the extent to which people in other countries are able to access other non-lawyer resources for help with a legal problem. Most strikingly, Americans appear significantly more likely to ‘lump’ their problems and do nothing as compared to people in other countries with arguably more robust delivery systems to provide individuals with access to legal resolutions. I then turn to macro indicators to shed light on the extent to which a country devotes resources to delivering the legal system in practice. Here I compare data on expenditure on courts and legal aid and numbers of judges, lawyers and cases in a set of European countries to the available US data. Here too we see that other countries, including those with still emerging legal systems, appear to expend considerably more resources than the US does on a per case. Together these ‘tidbits’ of data, which call for more careful empirical work, are suggestive of the conclusion that while the US system ostensibly relies heavily on law to mediate relationships among people and institutions, in practice there are few resources devoted to making law effective in practice, and apparently less so than in countries that are arguably less law-driven than our own.

I. Introduction

Lawyers don't like numbers—as I often joke with my students, that's why they choose to go to law school. Kidding aside, however, the relative discomfort with numbers among lawyers individually adds up professionally to a slim empirical base on which to assess how well American lawyers are doing at what they promise the public they will do: deliver legal services with competence and in the public interest. Even for the well-heeled client—the corporation that enjoys the services of our largest and most sophisticated firms, the ones to which the best and the brightest from our law schools flock—hard numbers on what legal services cost and what fraction of that cost is for real value are few and far between. We have little systematic data, for example, on legal costs and essentially none showing the relationship between expenditures and results.

Assessing the legal landscape for the ordinary citizen who has sporadic contact with the legal profession is a game played mostly in the dark. What little data there is tends to be focused on the corporate legal services market which has money to spend on such information: hourly rates for the largest corporate law firms, for example, are now surveyed annually and published in the American Lawyer Magazine and National Law Journal. The American Intellectual Property Lawyers Association publishes data on the total cost of IP litigation. Proprietary studies by legal consultants such as Altman-Weil (recently absorbed by American Lawyer Media) and Hildebrandt International provide data that law firm managers and general counsel can use to assess their own management practices, billing rates and profitability. Even when these studies purport to investigate the cost of legal services for non-corporate clients—individuals in need of family law or employment representation for example—the data quality is significantly inferior. For example, the Altman-Weil survey for 2005 reports average hourly rates for partners in General Business based on responses from 567 lawyers; for Family partners the average is based on responses from 34 lawyers. Labor-Management partner averages are based on 224 respondents; Labor-Union on 25. That implies the margin of error on the averages reported for

family lawyers or union-side labor lawyers is much bigger than that reported for lawyers providing general business advice or advising management.

Systematic efforts to assess how well the legal markets and institutions that American lawyers (together with the judiciary) claim they have exclusive authority to structure, serve and regulate are few and far between. In 1995, the ABA released a study of the extent to which poor and moderate-income households experienced a legal need—defined as a problem that could be addressed by the legal system—and how often those with a legal need sought the assistance of a private practitioner or legal aid lawyer. A proposal to update this study in 2005 was rejected as unnecessary and too expensive and as a substitute the Legal Services Corporation reviewed 9 state studies of legal needs of the poor, documented the extent to which LSC-funded providers had to turn away requests for assistance and calculated the number of legal aid attorneys in the country. Also in 2005 the ABA published a study on pro bono work, which concluded that American lawyers on average provide 39 hours a year of pro bono services to the poor.¹ That’s a little over 2% of all legal effort.

Not only are there few studies of the performance of the legal system for non-corporate clients (the distinction Marc Galanter draws between ‘natural’ and ‘artificial’ persons²), they are almost uniformly focused on the delivery of legal services to the poor as a form of charity or welfare assistance. While obviously of high significance, assessing only this segment of legal markets is a bit like assessing the performance of the U.S. health care system by asking only how well Medicaid and free clinics work. It treats the issues of access and cost for citizens as if they were entirely questions of the appropriate levels of charity (pro bono) and welfare spending. But the vitality of a market democracy premised on the rule of law depends on more than minimal provision for those in desperate need at poverty levels of

¹ American Bar Association, *Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers* (2005). This is the average for “tier 1” services to poor individuals or organizations serving the poor. It does not include “tier 2” services, which the ABA defined as services to other charitable or non-profit organizations, including “participating in activities for improving the legal system or the legal profession through groups such as bar associations.”

² Marc Galanter “Planet of the APs: Reflections on the Scale of Law and its Users” 53 *Buffalo Law Review* 1369 (2006).

income. And on more than the quality and cost of services available to corporate and other large entities.³ It depends on the success with which law manages to serve in fact, not merely on the books, as the fundamental organizing principle of the institutions and relationships of the ordinary citizen. Is law routinely available—to consult before deciding how to choose between market options, for example, or to evaluate how one has been treated in a relationship governed by legal principles? Or is law merely alive in moments of crisis? We know that even in those moments of crisis—the impending loss of a relationship with one’s child or the loss of one’s home to foreclosure or bankruptcy in the face of impossible medical bills or grievous injury in an accident—our legal system is not committed (as it is somewhat half-heartedly committed in the case of a felony charge) to ensuring that an individual is fully able to participate in the systems that will manage this crisis. But what of the everyday life that falls short of crisis, that sets the path on which a crisis may occur or may be averted? We live in an everyday world that is, in fact, flooded with law—how our children are supposed to be treated in school, what lenders are supposed to tell us when they sell us a mortgage, when our employers can and cannot change our conditions of work or pay, what is fair play in consumer markets, and so on. Every time we sign a document, click a box that says “I Agree”, enter a retail shop or get on a local bus we navigate a world that is defined by legal obligations and rights and, importantly, one that assumes that the ordinary citizen who moves in this world is doing so as a functioning, choosing, legal agent. Should that citizen end up in a crisis that requires more active use or response to the legal system—filing or responding to a lawsuit or enforcement action—she will inevitably be treated as if she functioned with this kind of legal agency on the path that brought her to this point: bound by the contracts she ‘agreed’ to or the risks she was given ‘notice’ of or the legal consequences of the actions she took in caring for her children.

³ I have recently looked at the problems faced in this corporate sector. See Gillian K. Hadfield “Legal Barriers to Innovation: The Growing Economic Cost of Professional Control of Corporate Legal Markets” 60 *Stanford Law Review* 1689 (2008).

We know that in the corporate client world, this is how the relationship with the legal system operates. Most corporate work is before-the-fact, everyday advice on what contracts to sign, which regulations apply, how conduct is likely to be interpreted by enforcement authorities or in the event of litigation, what the options are for modifying the extent of legal liability, how to manage a dispute before it becomes a lawsuit, and so on. But for ordinary citizens in the U.S. there is almost no functioning legal system in this ex ante sphere. This has implications not only for the probability of a crisis down the road that the legal system will have to address—with or without legal services made available to the individual in crisis—but, fundamentally, for the extent to which it is realistic to look at our elaborate legal and regulatory structures as effective, in fact, as the organizing principle for everyday relationships. That can have implications far beyond the consequences for a single individual, reaching into the efficacy of our legal systems and the rule of law as a whole.

Consider, for example, the recent economic crisis. Among the many interacting factors that led to the collapse of the sub-prime mortgage markets, and the banking system that was heavily invested in securities collateralized by sub-prime mortgages, were the sub-prime mortgage agreements entered into by millions of ordinary Americans. Lauren Wills in 2006 presciently documented the complexity of these mortgage, particularly refinancing, agreements and the utter failure of these markets to do what competitive markets are supposed to do, namely to match buyers' demands with sellers' offers.⁴ As she notes, it is almost impossible to determine the true cost of these complex contracts and thus for an ordinary home-owner with sub-prime credit to either evaluate what they are taking on or to compare across competitive providers. As a result, markets failed: people took on risk and obligations they could not afford and competition was ineffective in weeding out excessive or even abusive contract terms. (She notes that in the prime mortgage market, there is much greater uniformity across mortgage offers so that borrowers can much more easily compare terms and are unlikely to be hit with hidden

⁴ Lauren E. Wills "Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price" 65 Maryland Law Review 707 (2006)

components such as pre-payment penalties or high closing costs and other fees as lenders compete for their business.) This is market failure on, as we have seen, a massive scale, with enormous consequences for the entire economy and traceable to legal failure. That failure arose from reliance on complex legal rules which purportedly govern the relationship between lender and borrower on paper but which in fact are largely ineffective on the ground because of the complete absence in the individual consumer market of the kind of upfront contract review and advice that is routinely obtained in legal markets for corporate clients. Systemic failure of our ex ante advice legal markets for ordinary citizens has now precipitated millions of crises for individual homeowners and borrowers, with huge demands for back-end legal assistance in renegotiation of mortgages and management of foreclosure and bankruptcy processes. We can expect that few of those individual crises for ordinary people will be managed with legal assistance. As a result, the foundation on which our complex financial institutions and systems are built—globally—may well rest on a fundamentally lawless and unpredictable footing.

But we can say little concrete about just how law-less this footing might be. Empirically, we lack any real data on the quantity or quality of legal services available to ordinary individuals, although casually most of us in the profession know that the bulk of civil legal services, and especially ex ante advisory services, are ultimately provided not to ordinary folks but to corporations. Indeed, we could say that the utter lack of attention to the size and vitality of the legal markets serving ordinary individuals in the conduct of their everyday lives in a law-thick world is itself testament to how the profession has defined these markets out of existence. We can look—and in what follows I will try to give some sense of what we will find—but for the most part there is no there there.

To give some sense of just what is not there, after reviewing the well-worn few studies of legal needs that we have, I provide some tidbits of data that might shed some light on the size of the U.S. legal markets serving non-corporate clients. I draw in particular on some comparative data to put these tidbits into perspective. The methodology here is not to look at individuals and count up, but rather to

look for the macro indicators of the extent to which resources across the economy as a whole are devoted to providing legal inputs to ordinary citizens for civil matters. In doing so I hope to broaden the focus beyond the existing studies which focus largely on the poor in particular moments of legal crisis and dispute. The goal is to try to get a handle on the health of the legal markets serving ordinary citizens as a whole. The paucity and unreliability of the data, however, make this an exercise in questions, not answers. What we will see is that the U.S., despite being one of the most law-based socio-economic systems on the planet, arguably devotes significantly less to supporting the legal markets and institutions necessary to make all this law the organizing principle in fact, not just theory, of everyday relationships than most other countries, both developed and developing. This should be a major topic of careful data collection and analysis.

II. The Micro View: Comparative Civil Legal Needs Surveys

In 1993 the ABA conducted a study, published in 1995, assessing the legal needs of the poor, defined as those living at or below 125% of the poverty line, and those with moderate income (those with incomes falling in the middle 60% of the income distribution⁵). The study defined 'legal needs' as problems or disputes households had encountered, such as sub-standard housing or job loss or divorce, and that could be addressed through the civil legal system. With few exceptions (review of documents for a real estate transaction, for example) the focus of the study was on ex post dispute resolution and the nature of the legal assistance that might be offered.

The study found that approximately 50% of households (47% of poor households and 52% of moderate-income households) were at the time of the survey experiencing one or more legal needs. Of those with legal needs, 38% of the poor sought assistance from a third-party for resolution of the problem, 29% from a specifically legal third-party such as a lawyer (21%) or other legal/judicial actor or

⁵ In 1993, the top household income in this group was \$60,000, approximately \$88,000 in 2007 dollars.

entity (8%). Among moderate-income households, assistance from a third-party was sought with 51% of problems, 39% from a specifically legal source (lawyers 28%, other legal/judicial 12%).

It is difficult to interpret the significance of this legal needs survey in a vacuum in terms of what it tells us about the vitality of the legal environment in which ordinary Americans live and the extent to which law is a real, rather than illusory, structural principle in their everyday lives. A comparison with similar studies in other countries, however, may tell us more.

Similarly comprehensive (and in many ways, more comprehensive) surveys of legal needs were conducted by Hazel Genn in England in 1996⁶ and by Genn and Alan Paterson in Scotland in 1997. Like the ABA study, the Genn and Paterson studies surveyed individuals about their experience with problems that could in theory be addressed through the civil legal system. These studies did not filter respondents based on household income and so I will compare the results to the weighted average of low-income and moderate-income results from the ABA.⁷

The results for England and Wales show a comparable, level of what Genn and Paterson call “justiciable problems” as the ABA study,⁸ with 40% of respondents experiencing at least one problem in the last five years.⁹ The Scottish study shows a significantly lower incidence of 26%. But the results for both U.K. studies show a significantly higher percentage of those with these problems resolve them with third-party help than in the U.S.: 60% in England and Wales and 65% in Scotland versus 48% in the U.S. Strikingly, Genn reports that 91% of households in England and Wales reported having received third-

⁶ Hazel Genn *Paths to Justice: What People Do and Think About Going to Law* (1999).

⁷ Together, the ABA surveys drew samples from 80% of the U.S. household income distribution. I have therefore weighted poor households (the lowest 20%) at 25% of the total and moderate-income at 75%.

⁸ Genn and Paterson’s studies had a more restrictive list of potential problems than the ABA study: the ABA included small business concerns and problems with the level of public services such as garbage collection, for example, which were not included in the U.K. studies. The U.K. studies were at the individual, not household level—leading to a smaller reported percentage in that a respondent could not report the problems others in their household had experienced. But the U.K. studies also could lead to higher reports, in that respondents were asked about the past 5 years, whereas U.S. respondents were asked about problems in existence at the time of the survey and in the past year.

⁹ 34% in the 2004 survey reported in Pascoe Pleasance *Courses of Action: Civil Law and Social Justice* (2006) (Legal Services Commission)

party advice on a problem at some point in the past, 68% having received specifically legal advice at some point in the past. Interestingly, the specific use of lawyers in the U.K. surveys is roughly the same as in the U.S.: 27% in England and Wales, 29% in Scotland versus 26% in the U.S. Where the substantial difference emerges is in the use of other third-parties. Moreover, because non-lawyers in the U.K. are authorized to give legal advice (such as volunteer-staffed Citizens Advice Bureaux or proprietary legal advice centers)¹⁰ the effective difference is even greater: Americans received advice from those who are able to give legal advice in only 37% of cases, compared to 60% to 65% of U.K. cases. Furthermore, a far smaller percentage of the U.K. respondents as compared to U.S. respondents “lumped” their problem by doing nothing at all: fewer than 5%¹¹ as compared to 29%. This suggests a very different legal environment for the ordinary citizen in the U.K. as compared to the U.S.

As a further comparison, consider a legal needs survey I participated in designing for the Slovak government, a country transitioning to market democracy from communist government; Slovakia joined the European Union in 2004 and adopted the euro in 2009. The study was conducted in 2004. Slovak respondents reported a comparable level of legal need as in the U.S. and England, with 45% of households saying they had experienced at least one serious problem in the past two years.¹² For those experiencing a legal need, 30% contacted a lawyer¹³; another 13% had contact with a legal actor (such as with a judge or court personnel) other than a lawyer and a further 1% represented themselves in court without reporting any other contact with a legal professional. (A total of 21% represented themselves in court; almost all of these also reported contact with at least one legal actor such as a

¹⁰ The U.K. has no unauthorized practice restrictions on the provision of legal advice.

¹¹ This 5% figure excludes those who said they took no action because the problem was trivial; including these respondents generates a ‘no action’ rate of 16% for England and Wales. A more recent survey in the U.K. indicates that the comparable ‘no action’ rate in 2004 was 10%, suggesting a decline.

¹² The list of potential problems in the Slovak study largely tracked the U.K. studies, with the addition of problems with small business.

¹³ In Slovakia, as in many civil law countries, the category of “lawyer” also includes notaries and bailiffs, who hold law degrees, and are authorized to execute judgments—in most U.S. states, this function is performed by a sheriff or other public officer. If we exclude notaries and bailiffs, who perform quasi-public functions more akin to a judge, the percentage who contacted a ‘lawyer’ is 22%.

lawyer, judge or court personnel.) Slovak citizens, in a country with GDP per capita of less than \$8000 in 2004¹⁴ (GDP in the U.S. that year was approximately \$41,000¹⁵), thus had higher rates of contact with a lawyer and substantially higher rates of contact with the legal system as a whole than poor citizens in the U.S. and somewhat higher than middle income Americans. Also striking is the fact that Slovak citizens appear substantially less likely to “lump” their situation than either poor or middle income Americans: only 18% of Slovaks took no steps to resolve their problem.

Legal needs studies have also recently been reported in Japan, the Netherlands, Canada and New Zealand.¹⁶ The Canadian study from 2006, surveying low and moderate-income, households found that 48% of the population reported one or more legal needs in a three year period; there is no report of how those with needs dealt with the problem, only that 34% of problems remained unresolved within the study period.¹⁷ The New Zealand study¹⁸ from 2006 found that 29% of respondents faced at least one problem in the past year and reported that 44%, during that year, had sought third party help; because of the focus only on the past year and the inclusion of ongoing problems, the study does not allow us to determine what steps, if any, respondents ultimately take to resolve their problems. The 2004 study in the Netherlands¹⁹ (which tracks the UK methodology) and the 2007 study in Japan²⁰ (which also has a comparable methodology to the UK study) do provide a basis for some comparison

¹⁴ OECD Economic Surveys *Slovak Republic* (2005)

¹⁵ U.S. Dept of Labor, Bureau of Labor Statistics *Comparative Real Gross Domestic Product per capita and per employed person; 16 Countries; 1960-2007* (2008) available at <http://www.bls.gov/fls/flsgdp.pdf>.

¹⁶ I have piggy-backed here on Bert Kritzer’s identification of these studies in his paper for this conference, forthcoming in the *Journal of Empirical Legal Studies*; I am grateful to Ted Eisenberg for drawing this paper to my attention on seeing an earlier draft of my paper.

¹⁷ Ab Currie, “A National Survey of the Civil Justice Problems of Low and Moderate Income Canadian: Incidence and Patterns” (April 2005), unpublished manuscript available at <http://cfcj-fcjc.org/docs/2006/currie-en.pdf>.

¹⁸ New Zealand Legal Services Agency (2006) Report on the 2006 National Survey of Unmet Legal Needs and Access to Services. Wellington, NZ: IgniteResearch. Available at http://www.lsa.govt.nz/documents/2006NationalSurveyofUnmetLegalNeedsandAccessToServices_002.pdf

¹⁹ Van Velthoven, B. C. J., & M. ter Voert (2004) “Paths to Justice in the Netherlands,” paper presented at the Fifth International Legal Services Research Conference. Cambridge, UK. Available at http://www.justiceinitiative.org/db/resource2?res_id=103540

²⁰ Murayama, Masayuki (2007) “Experiences of Problems and Disputing Behaviour in Japan,” 14 *Meiji Law J.* 1. Available at [http://www.kisc.meiji.ac.jp/~ilss/english/murayama-mlj-vol.14\(2007\).pdf](http://www.kisc.meiji.ac.jp/~ilss/english/murayama-mlj-vol.14(2007).pdf)

with the US, UK and Slovak studies and are included in Table 1. The Dutch study reports that 67% of the population experienced one or more problems in the past five years²¹; 10% did nothing and 44% relied on third party assistance; note that in The Netherlands, as in the U.K., non-lawyers may provide legal aid and assistance. The Japanese study, which reports a low 19% rate of problems²²; of those with problems, 25% apparently did nothing (the data reports what percentage had contact of any kind with the other side) and that 61% contacted a third party for assistance; only 7% turned to a lawyer. 35% turned to a legal provider or institution other than a lawyer.²³

Table 1: Actions taken by those reporting legal problem

Country	No steps taken	Sought 3rd party assistance	Contact with lawyer	Contact with other legal provider/institution	Contacted other 3rd party
US Poor	38%	38%	21%	8%	9%
US Middle Income	26%	51%	28%	12%	11%
England & Wales	5%*	60%	27%	33%	
Japan	25%	61%	7%	35%	26%
Scotland	3%*	65%	29%	36%	
Slovakia	18%	[44%]**	30%	14%	No data
Netherlands	10%	44%	26%***	44%	

*Based on main sample which excluded those in screening survey who indicated that taking no action was due to triviality of problem (16% (England & Wales) and 7% (Scotland) in screening survey took “no action”)

**Minimum given lack of data about non-legal third party contacts.

***Percentage of total contacts. Lawyers, including bailiffs and notaries, are 22% of first contacts.

²¹ The Dutch study was conducted over the internet, rather than by face-to-face interviews and this may account for the higher reported prevalence of problems.

²² The Japanese study indicates that respondents were recruited with a letter explaining that the study was focused on “legal problems” and this may explain the lower reported rate of problems. Most legal needs surveys do not ask respondents about “legal” problems in case this leads respondents to apply their own understanding of what is “legal” or not in filtering their responses.

²³ This includes: police, legal consultation bureau at city hall, legal professional other than a lawyer, and consultation bureaus at a court, bar association or legal aid association.

These studies suggest that the U.S. legal system plays a significantly smaller role in providing a key component of what law provides—ordered means of resolving problems and disputes—than either comparable advanced market democracies or countries still in the early stages of establishing the basic institutions of democratic governance and a market economy. This is not due to a lower incidence of situations in which there might be demand for what law provides—with the exception of Japan, the levels of potential legal need are roughly comparable at about 50% of the population at any given time.

There is no reason to think that the situation today is any better in the U.S. Although the ABA opted not to update the 1994 Legal Needs studies, the Legal Services Corporation in 2005 published a study drawing on 9 state surveys assessing the incidence of legal needs among the poor and the experience in LSC-funded programs with unmet demand for legal aid and the number of legal aid lawyers. If anything, these studies suggest the situation is worse. LSC-funded programs reported that, as a result of resource limitations, they were only able to serve half of the poor who sought assistance. The number of legal aid attorneys providing civil legal services was calculated to be 6,581, a little over one-half of one percent of all U.S. lawyers.

Table 2 summarizes the findings of 12 state legal needs surveys. All the surveys, other than Arizona and New Jersey, report legal needs experienced by households. The surveys differ substantially in how they report the use of legal services: some report only the use of lawyers; some report actions taken as a percentage of households, others as a percentage of problems; not all report whether a respondent took no action whatsoever. The list of “problems” provided to respondents was relatively consistent across states with the exception that Massachusetts included municipal and language problems that are arguably not susceptible to assistance by a lawyer; these are excluded from “incidence” shown in Table 2.

These state studies, including three 2007 studies that were not included in the 2005 LSC review, show an incidence of legal problems that is generally higher than that shown in the ABA study; those

reporting data on this suggest even higher rates at which poor people in American 'lump' their problems, doing nothing to resolve difficulties that include relatively severe problems with family disputes, debt, housing and employment. And they paint the same story about how much less frequently Americans compared to citizens in other countries are able to draw on the law through contact with a lawyer or legal institution to help resolve their problems. With the exception of Tennessee, the state studies suggest that among the poor the use of lawyers or others able to provide legal assistance is even rarer than the 21% the ABA 1994 study suggested, with almost half of the studies showing legal assistance rates in the 9-12% range. This is well below the close to 30% use of lawyers found in the English and Slovak studies, and the much higher percentage who (perhaps as high as 60% in both the UK and Slovakia) contact either a lawyer or some other person or entity who is authorized to provide legal assistance.

Table 2: State Legal Needs Surveys

State	Year	Incidence of Legal Needs (% of households unless noted)	Average Number of Legal Needs	No steps taken to resolve problem (% of problems unless noted)	Contact with lawyer or legal institution (% of problems unless noted)
Arizona	2007	32% (individuals)	-	21% (households)	12.5% (households)
Connecticut	2003	65%	2.7	53%	10%
Illinois	2005	49%	1.7	-	16.4%
Massachusetts	2003	58%	2.02	45%	[< 14%*] (households)
Montana	2005	-	3.5	-	16.4%
New Jersey	2002	33% (individuals)	1.8**	41%	11%
Oregon	2000	45%	2.1	-	17.8%
Tennessee	2004	70%	3.3	24.5%	24% (lawyers) 15% (legal aid)***
Utah	2007	67.5%	1.3	-	12.3% (lawyers) (households)
Vermont	2001	50% (est.)	1.1	30%	9%
Washington	2003	87%	1.1	-	12% (lawyers)
Wisconsin	2007	45%	2.1	-	12% (households, help all problems) 27% (households, help on a problem)

* Combines percent contacting each of a list of different legal providers, not corrected for those who contacted more than one

** New legal needs in given year; does not include those pending from prior years; per individual

*** Percent contacting each type of provider, not corrected for those who contacted both

Sources: State Legal Needs Studies, available at

http://www.nlada.org/Civil/Civil_SPAN/SPAN_Library/document_list?topics=000055&list_title=State+Legal+Needs+Studies%3A+Reports&start=1.

III. The Macro View: Comparative Legal Resources

The legal needs surveys give us a close-to-the-ground look at the legal problems encountered by ordinary Americans, albeit with a heavy focus on poor Americans. As we have seen, these surveys suggest that ‘law’ plays a very small role in the everyday handling of potentially justiciable problems in the U.S. and apparently significantly less than is the case in a comparable advanced market democracy

such as the U.K. or even in a developing market democracy such as Slovakia. Put differently, and echoing a recent report by the U.N. Commission on the Legal Empowerment of the Poor, the vast majority of the legal problems faced by (particularly poor) Americans fall outside of the ‘rule of law,’²⁴ with high proportions of people—many more than in the U.K., for example—simply accepting a result determined not by law but by the play of markets, power, organizations, wealth, politics and other dynamics in our complex society.

As we know, however, the normative power of the existing focus on the legal needs of the poor is largely constrained to a humanitarian concern of wealth redistribution and fairness towards the most disadvantaged. But is there a deeper threat to the structure of a democratic society that purports to organize its relationships on the basis of law and legality suggested by the finding that Americans are far more likely than those in the U.K. and Slovakia to “do nothing” in response to the legally cognizable difficulties they face? That they are far less likely to seek out others in their community capable of helping them to align their experiences with those contemplated by the laws and procedures that stack up in the voluminous legal materials of regulation, caselaw, statutes and constitutions? Is there a paradox lurking in here that in the system of adversarial legalism that Robert Kagan describes as distinctive of the “American way of law”²⁵ (to be contrasted with the greater reliance on bureaucratic means of policy making and implementation found in Europe) that law is in practice less a salient part of everyday life in the U.S. than elsewhere?

In what follows in this section, I review some indicators—incomplete at best—of the overall extent to which the U.S. devote resources at a macro level to the delivery of legality, both in absolute terms and in comparison to other countries. By focusing on the macro perspective, I hope to move the emphasis away from the provision of legal support to the poor in ex post crisis and towards the systemic everyday use of law in fact by ordinary citizens throughout the income spectrum.

²⁴ U.N. Commission on the Legal Empowerment of the Poor, Report (2008)

²⁵ Kagan *Adversarial Legalism: The American Way of Law* (2001)

In 2005, legal services provided by private practitioners generated \$180.9 billion²⁶ in gross domestic product in the United States; total receipts for law firms totaled \$221.6 billion.²⁷ Neither figure counts legal services provided within corporations, government, legal aid providers or other private associations, which account for 18% of all lawyers.²⁸ If we 'gross up' these numbers to value the contributions of lawyers in these other settings, the total size of the legal services sector in the United States is thus roughly \$226 billion in GDP terms and \$277 billion in expenditures on legal services. (By way of comparison, in 2005 GDP in educational services was \$116 billion, health care services \$860 billion, agriculture \$123 billion, food, beverage and tobacco products \$176 billion, securities and investment services \$168 billion and computer services \$141 billion.)

Of the roughly \$277 billion spent on legal services, approximately 31% is consumed by individuals as part of personal consumption expenditures (\$85.6 billion in 2005).²⁹ Another 1% (\$2.8 billion) can be attributed to services provided by legal aid lawyers and public defenders. Some share, but it is not possible to easily say how much, of the expenditure on government lawyers other than legal aid and public defenders may be attributable to providing services to individual Americans; in some sense, one could classify all of those expenditures (approximately \$22 billion or 8%) as being on behalf of ordinary citizens. This suggests that at most 40% of legal services are serving the needs of individual citizens as opposed to corporations and businesses.

These figures comport with data from the only U.S. study of the allocation of legal effort across different types of matters and clients. The Chicago Lawyers' Survey, first conducted in 1975 and updated in 1995, estimated that Chicago lawyers devoted 29% of total effort to services for individual or small business clients with an additional 6% serving organizations such as unions, environmental

²⁶U.S. Bureau of Economic Analysis, Survey of Current Business 2007, Gross Domestic Product (Table 648)

²⁷U.S. Census Bureau, Service Annual Survey 2005 Current Business Reports (2007)

²⁸American Bar Foundation, *The Lawyer Statistical Report 2004* (2000 data). 74% work in private practice, 5% are inactive or retired, 3% serve in the judiciary and 1% in legal academia.

²⁹U.S. Bureau of Economic Analysis, Survey of Current Business, April 2007.

plaintiffs, state administrative agencies or municipalities for a total of 35%; this is a decrease from 45% in 1975. These figures probably understate the total share of all legal services state-wide and nationwide because of the concentration of corporate law firms in this major financial center.³⁰ (Correcting for this and looking province-wide in Ontario, Ronit Dinovitzer and I estimated that in 1998 Ontario lawyers devoted 42% of their effort in total to services for individual as opposed to corporate clients; in Toronto, a city of comparable size and financial significance as Chicago, the figure was 31%.³¹) These numbers are in line with the census-based estimate above that something less than 40% of all legal services in the U.S. are available to ordinary citizens, including those (approximately 8%) wielded on behalf of ordinary citizens by governments.

In the abstract and in isolation it is difficult to say whether this share of legal services devoted to ordinary citizen's interests is 'enough'; of course, the ordinary citizen benefits from the operation of a well-regulated and efficient market and thus from the availability of legal services to corporate entities as well. To put further perspective on these numbers, I have therefore calculated what the personal share of the legal services market represents in terms of available legal effort and how this has changed over the last few decades.

In 1990, total expenditures by households on legal services was \$62.2 billion in 2000 dollars. At that time, the average hourly rate for lawyers in small firms (less than 20 lawyers, where we find most of the lawyers providing services to individuals) was roughly (very roughly!) \$157 in 2000 dollars.³² Based on the total U.S. population for that year, this implies an average of 1.6 hours per person for the year or

³⁰ John P. Heinz, Edward O. Laumann, Robert L. Nelson and Ethan Michelson "The Changing Character of Lawyers' Work: Chicago in 1975 and 1995" 32 *Law and Society Review* 752 (1998).

³¹ Unpublished data on file with author. We also estimated that an additional 10% worked in government thus suggesting that a total of close to 55% of legal work if on behalf of ordinary citizens.

³² This figure is based on Altman-Weil data, which is a self-selected proprietary survey and subject to substantial error. It is, however, the only quasi-systematic data I am aware of for hourly rates nationally in this year. I took a straight (unweighted) average of rates for those with 4-5 years experience and those with 11-20 years experience for firms with less than 9 and 9-20 lawyers and inflated based on the CPI.

4.15 hours per average household.³³ Conducting the same calculation for 2005 (total expenditures of \$67.4 billion in 2000 dollars, an average hourly rate of \$182 for small-firm lawyers³⁴) yields an average of 1.3 hours per person or 3.34 hours per household, a decline of 20%. As a rough calculation, using the ABA 1994 Legal Needs estimates of numbers of problems per household in a given year (1.0) and a straight average of the number of problems per household reported by the state surveys (2.0)³⁵ for 2005 this suggests that in 1990 American households were able on average to draw on approximately 4 hours of legal time to address a legal problem and in 2005 they were able to draw on 1 hour and 40 minutes of legal time to address a problem.

These are startlingly low numbers, and they reflect only the corner of the legal landscape that involves a crisis such as a dispute over employment or a foreclosure or a denial of health care or the risk of injury to or a diminished relationship with a child. They exclude the demand for legal assistance before problems arise, such as legal advice in assessing a complex mortgage offer or employment options or insurance coverage or the potential for conduct to influence custody of a child. If for every dispute-related need there is an ex ante advice related need (as appears to be the case for large corporations³⁶), this implies that today the average household is able to draw on less than an hour's worth of legal advice or assistance in dealing with the points at which their everyday lives intersect with the legal system in such a way as to require them to assess legal rights or consequences.

How does this compare with the availability of legal resources for those who live in ostensibly less law-thick environments around the globe? I do not have comparable data on personal expenditures

³³ This relies on an estimate of average household size of 2.6. U.S. Census, *Households by Type and Size: 1900 – 2005* (available at <http://www.census.gov/statab/hist/HS-12.pdf>)

³⁴ This figure is based on Altman-Weil data for 2005, taking a straight average of rates for equity partners and associates in firms of less than 9 and 9-20 lawyers (\$206) and deflating by the CPI.

³⁵ These surveys are of problems facing poor households but the ABA Legal Needs Survey suggests that the rate for poor households is not significantly different from that for moderate-income households. I have excluded the data for New Jersey from this calculation because it is based on problems per individual.

³⁶ Mark Chandler, General Counsel of Cisco Systems Inc. reports that total legal expenditures in his company are .3% of company revenue with .16% coming from nonlitigation expenses. <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1188291741577>.

on legal services and average hourly rates in other countries with which to do similar calculations. But we do have recently released comparative data on expenditures in the legal system as a whole for a large set of European countries³⁷ and it is to these data that I turn for (again, rough) estimates of the availability of legal resources in the economy as a whole for ordinary citizens to address their relationships with and through the legal system.³⁸

Table 3 provides data for the U.S. and a selection of European countries showing total population; total public expenditure on courts, public prosecution and legal aid; total numbers of criminal and civil cases; and total numbers of judges and lawyers. These data should be read carefully, keeping in mind the potential for differences in the categories of what is counted and how data requests in the European survey were interpreted.³⁹ U.S. criminal cases includes serious crimes and misdemeanors but excludes the 55 million traffic cases that also appear in state courts; the European data cover both serious crimes and misdemeanors but purport to exclude administrative offences and those processed by the police such as minor traffic offences. Civil cases include all non-criminal filings in the U.S. state and federal courts but exclude filings before administrative agencies that are not appealed to a court.

³⁷ European Commission for the Efficiency of Justice, *European Judicial Systems: Edition 2008 (data 2006): Efficiency and Quality of Justice*. In all data reported below euros are converted to U.S. dollars at an exchange rate of \$1 = €0.74.

³⁸ Justice Earl Johnson Jr. first drew attention to just how low the U.S. expenditure on civil legal aid was relative to other advanced market democracies. Justice Earl Johnson Jr., "Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies" 24 *Fordham International Law Journal* 583 (2000).

³⁹ It is particularly important to note that the data reported here differ substantially from data reported in Christian Wollschlager, "Exploring Global Landscapes of Litigation Rates" in Jurgen Brand and Dieter Stempel (eds.) *Soziologie des Rechts: Festschrift fur Erhard Blankenburg* (1998). Wollschlager reports many more cases per capita for Germany than the data here; this is because Wollschlager includes summary debt collections that are excluded here. Although Germany has by far the highest number of cases per capita in his data, and the U.S. ranks 5th just ahead of the U.K. and Hungary, he notes that if the summary debt cases are excluded, the U.S. is the highest per capita after Israel. (p. 583). In addition Blankenburg "The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany" 28 *Law and Society Review* 789 (1994) suggests that The Netherlands has a much lower and Germany a much higher number of cases than is reported here. I was unable to determine from the published studies what might account for these differences; one possibility is change over time. Blankenburg appears to be drawing on data from the 1980s.

Table 3: Total Resources and Cases

Country	Population	Public Expenditure on Courts, Prosecutors & Legal Aid (\$B)	Legal Aid (\$ M)	Criminal Cases (M)	Civil Cases (M)	Judges	Lawyers
U.S.	300,000,000	47.0	3,857*	20.8	24	30,000	1,162,124
France	63,195,000	4.59	409	1.1	1.7	7,532	47,765
Germany	82,351,000	11.76	753	1.2	1.1	20,138	138,104
Hungary	10,006,600	0.54	0.27	0.3	0.2	2,838	9,850
Netherlands	16,334,210	2.16	466	0.4	1	2,072	14,955
Poland	38,125,479	2.03	30	2.1	1	9,853	25,972
U.K. (England & Wales)	53,728,000	7.16	4,081	1.1	2.1	3,774	143,381

Sources: European Judicial Systems (2008, 2006 data); U.S. Census Bureau; National Center for State Courts 2005 State Court Statistics; Federal Judicial Center Annual Report of the Director: Judicial Business of the United States Courts (2007); American Bar Foundation Lawyer Demographics (2008); Bureau of Justice Statistics: National Survey of Indigent Defense Systems (1999) (scaled up using population share from data for 100 most populous counties); Bureau of Justice Statistics: Annual Government Finance Survey (2005); Alan W. Houseman "The Future of Civil Legal Aid: A National Perspective" 10 U.D.C.L.Rev. 35 (2007) (estimate includes public and private charitable sources

**Includes private charitable expenditure on civil legal aid*

The European counts of cases include litigious and non-litigious cases but exclude enforcement, land and business registry cases and, for those countries with separate administrative law courts, administrative law cases. The count of judges for the U.S. includes all full-time federal and state judicial officers including magistrates, but does not include judicial officers sitting *pro tem* (temporary judges) or administrative law judges in state or federal governments; in the European data, I include full-time professional judges and exclude part-time professional judges and lay-judges. The count of lawyers includes both advocates and legal advisors who are members of a bar. This is a particularly difficult number to compare. While the count of lawyers who belong to a bar association in the U.S. is a very

good measure of the availability of legal advice and representation—as only these people can provide these services—in most other countries bar membership is not co-extensive with an authorization to provide services. In the U.K. for example, anyone may provide legal advice, although only bar members (barristers and solicitors) are counted here. In many European countries lawyers who are employed by a company, government or organization need not, in some cases may not, be a member of the bar and thus are not counted. In several of these settings also, while representation in courts is restricted to bar members, legal advice may not be. With these caveats in mind, Table 4 calculates the availability of legal resources per person and per case in the system.

Table 4 suggests a stark picture of how few resources the U.S. economy as a whole may devote to delivering the legal system. While public expenditure *per capita* on courts, judges, prosecutors and legal aid is the highest among this set of both advanced and transitioning European countries, when we take into account the apparently vastly higher numbers of cases in the U.S. system, public expenditure per case is significantly lower than in other advanced democracies—less than half compared to the U.K. and barely one-fifth of the expenditure in Germany—and comparable or higher than that spent in emerging market democracies that are still seeking to build the rule of law in their countries. Legal aid *per capita* is lower than in the Netherlands and the U.K. and higher than in other advanced and emerging democracies; but legal aid per case is well below that expended in other advanced democracies, exceeding only the low levels available in Hungary and Poland. Legally-trained personnel also appear much less available in the U.S. when we take into account the number of cases in the U.S. The number of judges *per capita* is significantly lower than in Germany, Poland and Hungary, comparable to the levels in France and the Netherlands and higher than in the U.K.

But again the intensity of legal demand in the U.S., as measured by number of cases, reveals that per case there are far fewer judges available than in any of these European countries: half as many

Table 4: Comparative Resources Per Person and Per Case

Country	Public expenditure per capita	Public expenditure per case	Legal Aid per capita	Legal aid per case	Judges per 100,000 persons	Judges per 100,000 cases	Lawyers per 100,000 persons	Lawyers per 100,000 cases
U.S.	\$157	\$1,049	\$13	\$86	10	67	387	2594
France	\$73	\$1,665	\$6	\$148	12	273	76	1731
Germany	\$143	\$5,031	\$9	\$322	24	862	168	5909
Hungary	\$54	\$1,048	\$0	\$0	28	550	98	1909
Netherlands	\$132	\$1,507	\$29	\$325	13	144	92	1042
Poland	\$53	\$645	\$0	\$9	26	313	68	826
U.K. (England & Wales)	\$133	\$2,270	\$76	\$1,294	7	120	267	4545

as in the U.K. and the Netherlands, roughly a quarter of those available in France and less than one-tenth of those in Germany and Hungary. Lawyers do not clearly make up the difference: while there are more lawyers, counted as bar members, per capita in the U.S. than in this set of comparison countries, again the numbers per case reveal that Germany and the U.K., with more than twice the number of judges per case, also have more than twice as many lawyers per case. The U.S. numbers per case look in Table 4 to be higher than in France, Hungary, the Netherlands and Poland—but recall that in those countries bar members do not have the complete monopoly on provision of legal services that they do in the U.S. and so the European numbers are (perhaps significantly) understated. Moreover, given that we are ultimately interested in legal services available to individuals as opposed to business, the relatively large corporate sector in the U.S. also suggests that the U.S. figure is an overstatement.

Not all the lawyers in these counts, of course, are delivering litigation-related services such as those that would be demanded by individuals (and businesses—the data here do not separate out client types) in court cases. But we can interpret the number of cases in the courts as an indicator of the level

of overall demand in the economy for legal inputs for the planning and management of social and economic relationships. There is no clear or singular interpretation of the substantially higher number of cases per capita in the U.S.: this could be because of more law, greater willingness to use courts as opposed to alternative means for dispute resolution and/or higher levels of unmet needs for ex ante legal advice, planning and dispute resolution assistance. But this is precisely what makes the strikingly low levels of legal resources so salient: U.S. socio-economic life is, as Robert Kagan has emphasized, substantially more reliant on law and legal management of relationships and yet the U.S. devotes far fewer resources to providing the legal services needed to translate law on the books into law on the ground.

The data in Table 4 thus reinforce what we learned from a comparative look at the legal needs surveys. Although, interestingly, (poor) Americans do not identify significantly higher rates of legal problems than (average income) citizens in other countries, they do report much lower use of legal assistance in resolving their problems—and much higher rates of simply giving up and assuming nothing can be done. Table 4 suggests the macro context in which these differences emerge. Americans face a legal world that is thick with legal structure but thin on legal resources.

IV. Conclusion

The evidence presented above is suggestive only. This is not a careful study that controls for the nature of legal problems, the opportunity for problems to be resolved in less litigious ways and the resources necessary to achieve that goal. The thinness of the available data simply do not allow for such careful comparison, although they clearly suggest the need for such a study to be conducted.⁴⁰ But the

⁴⁰ Herbert M. Kritzer “To Lawyer or Not to Lawyer: *Is that the Question?*” 5 *Journal of Empirical Legal Studies* 877 (2008), examining the relationship between income and the decision to use a lawyer across several countries, is an important step in that direction. I note that Kritzer’s findings are supported also by the numbers I report here, namely that the likelihood of using a lawyer is roughly the same across different countries (with the exception of Japan), although the rates of using non-lawyer (but potentially still ‘legal’) resources and ‘doing something’ seems significantly higher elsewhere.

results, as rough and ready as they are, nonetheless do present a serious challenge to the American legal profession which has, for the last 100 years, claimed exclusive authority to regulate the entire legal system in the U.S.⁴¹ The profession's assertion of regulatory authority has arguably blocked the capacity for federal or state regulatory or policy responses to the crises in U.S. legal systems.

What accounts for the significantly lower level of legal resources—public expenditure, legal aid, judges and (for Germany and the U.K.) lawyers—available at the macro level in the U.S. as compared to other advanced market democracies? For the roughly 60% decline over the past fifteen years in the total effective number of hours of legal services per household per problem? For the apparent 50% drop in the use of legal services by the poor in addressing their problems in the decade since the 1995 ABA study? The lack of systematic data makes causal analysis difficult and speculative. Clearly we need substantially more attention to detailed study of the nature of legal systems and how they shape and meet the demand for legal services. In this concluding section I offer some preliminary thoughts on how those studies should be framed.

The access problems in the U.S. legal system are largely conceptualized by the profession as problems of the ethical commitments of individual lawyers to assist the poor and the failure of federal and state bodies to provide adequate levels of funding to legal aid agencies and the courts. The first conceptualization fails, I believe, to come to grips with the dimensions of the problem, which cannot be solved with an increase in pro bono efforts, as welcome as such an increase would be. Pro bono currently accounts for at most 1-2% of legal effort in the country; even if every lawyer in the country did 100 more hours a year of pro bono work, this would amount to an extra thirty minutes per U.S. person a year, or about an hour per dispute-related (potentially litigation-related) problem per household. This does not even begin to address the realistic demands that ordinary households have for ex ante

⁴¹ See Thomas M. Alpert "The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis." 32 *Buffalo Law Review* 525 (1983); Gillian K. Hadfield "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control of Corporate Legal Markets" 60 *Stanford Law Review* 1689, 1696-1701 (2008).

assistance with navigating the law-thick world in which they live, some of which could indeed reduce the need for ex post legal representation in litigation and crisis. The problem is not a problem of the ethical commitment of lawyers to help the poor. Nor is an increase in public legal aid likely to make a substantial impact. The cost of even that extra hour per dispute-related problem per household would be on the order of \$20 billion annually at a market rate of \$200 per hour.⁴² That would entail a twenty-fold increase in current U.S. levels of public and private (charitable) legal aid funding. Again, more legal aid funding would be welcome and is clearly called for, but it cannot make a serious dent in the nature of the problem.

So what is the problem? The bits of data we can see in the comparative analyses are suggestive of an important role for the regulatory and policymaking structure governing legal markets in the U.S. The U.S. stands largely alone in the world in terms of the extraordinary extent to which the bar and judiciary wield exclusive authority for shaping the cost and market structure of legal goods and services. Some of this difference can be seen to come from the structure of the courts and legal profession as elements of the civil service bureaucracy in countries such as Germany and France; this locates policy and funding decisions squarely within a government agency. In addition, civil law systems emphasize a much broader role for the judge, as opposed to parties and their lawyers, in the conduct of litigation. This arguably accounts for the substantially higher allocation of resources to the court systems in Germany, with many more judges per case; it may also account for the higher number of lawyers 'per case' given that legal fees in Germany are frequently governed by statute in cases involving ordinary individuals. But the U.K. is a powerful counterexample to the hypothesis that we are seeing a difference between common law and civil code systems. The U.K. clearly devotes substantially more resources to the provision of legal services to ordinary citizens, measured in terms of public expenditure, legal aid or judges per 'case', even though the U.K. follows the common law practice of much greater reliance on

⁴² This is a little below the average I calculated from Altman-Weil data for lawyers working in solo or small firm (fewer than 20 lawyers) practice in 2005. See n. 34 supra.

the adversarial resources of parties to structure litigation. What explains this? Again I believe it has to do with the central role for governments in overseeing and regulating the legal system. Although the U.K. does not have a civil service judiciary as in civil code regimes, it has until very recently had central responsibility located in a single office, that of the Lord Chancellor who historically has been simultaneously the chief justice of the highest court (the House of Lords), a cabinet minister and a member of Parliament. This merger of functions (recently disaggregated to separate out the judicial functions of chief justice from the executive and parliamentary functions of a minister of justice) created a single policy head capable of making decisions about civil procedure, the staffing and funding of courts, and the regulation of legal services providers. The longstanding commitment to robust legal aid arguably has sharpened the quality of policymaking in this integrated setting: because the government, ultimately led in this regard by someone who is both a judge and a politically accountable member of Parliament, pays the bills for legal aid it has been both motivated to and capable of ensuring that ordinary citizens have wide access to a variety of sources of legal advice and assistance. And indeed, the U.K., especially after significant reforms in 2007, has probably the most open access legal system in the world. A wide variety of non-lawyers can provide legal advice and some representational services, these can be offered through corporate entities with either private equity investment or publicly-traded shares and non-lawyer owners and managers. There are multiple legal professions with separate regulatory bodies, all of which are accountable to a super-regulatory body which must be composed of a majority of non-lawyers, which is appointed by the Minister of Justice (formerly Lord Chancellor).

When the data from The Netherlands, which has a comparably open system allowing many non-lawyer service providers, is viewed alongside that of the U.K., the importance of investigating with careful empirical studies the hypothesis that the regulatory system accounts for the failure of the U.S. legal system to provide an adequate level of legal inputs for ordinary people becomes even more apparent. The striking difference in the rate at which people do nothing in response to legal difficulties

between the U.S. (29% or higher⁴³) and the U.K. (3-5%) and The Netherlands (10%) is highly suggestive of the role that a robust system of legal inputs plays in making a legal system a real, rather than apparent, basis on which everyday lives are structured. A careful study of how different regulatory regimes influence not only the use of legal resources in resolving problems once they have erupted but also the use of these resources ex ante to decide what transactions and relationships to enter into, leave, modify and so on is clearly called for by these results.

Those concerned with access to justice have long emphasized how the extreme approach to unauthorized practice of law in the United States drastically curtails the potential for ordinary folks to obtain assistance with their law-related needs and problems. Key contributions have been made in this regard by Deborah Rhode⁴⁴, David Luban⁴⁵ and Barlow Christensen.⁴⁶ American lawyers often take for granted that it is natural that anyone who wishes to practice law must be an authorized member of a bar association and subject to the admissions, ethical and disciplinary controls of the profession, including the judiciary. The regulatory problem, however, goes beyond a straightforward restriction on supply. The more fundamental problem with the existing regulatory structure is traceable to the fact that the American legal profession is a politically unaccountable regulator, which lacks the funding levers and policymaking apparatus needed for a sector that is a huge share of the American economy and one that plays an increasingly important role in a rapidly changing and decentralized economic system. Many critics of the bar's self-regulation have decried the tendency for the bar to put professional self-interest ahead of public interest.⁴⁷ But this is what one would predict given that the

⁴³ 29% is the figure from the ABA study; the state legal needs surveys report rates ranging from 21% to 53%.)

⁴⁴ Deborah L. Rhode "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions" 34 *Stan. L. Rev.* 1 (1981); Deborah L. Rhode "Professionalism in Perspective: Alternative Approaches to Non-Lawyer Practice" 1 *J. Inst. For Study Legal Ethics* 197 (1996); Deborah L. Rhode *In the Interests of Justice: Reforming the Legal Profession* (2003); Deborah L. Rhode *Access to Justice* (2004).

⁴⁵ David Luban *Lawyers and Justice: An Ethical Study* (1988).

⁴⁶ Christensen "The Unauthorized Practice of law: Do Good Fences Really make Good Neighbors—or Even Good Sense?" 1980 *American Bar Foundation Research Journal* 159 (1980)

⁴⁷ See, e.g., William H. Simon "The Ideology of Advocacy: Procedural Justice and Professional Ethics" 1978 *Wis. L. Rev.* 29 (1978); William H. Simon, "The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's

bar is not a politically accountable policymaker. Even if the bar's narrow focus on ethical duties that govern attorney-client relationships were, as it likely often is, a well-intentioned execution of the norms that are absorbed through the process of legal training, rather than craven self-interest, the fact remains that like any body it responds to its constituencies. The bar has by and large steered utterly clear of the idea that it is responsible, politically responsible, for the system-wide cost and complexity of the legal system, far beyond the ethical call to help the poor and perform pro bono work. It requires a political process to shift perceptions—much as perceptions about the federal government's responsibility for high gas prices or stock market failures are molded not in the abstract but in the crucible of political contest and public debate. The public does not hear policy positions from the policymaker—the bar—and does not vote or otherwise express its views on how the policymaker is executing on policy.

Because the bar, together with the state judiciaries, asserts exclusive policy authority in this field but is not in fact a politically accountable policymaking body there is effectively no mechanism for policy change. There is nowhere to address policy proposals and no process for influencing policy adoption. The process is a wholly closed shop; indeed, legal researchers who like myself are not members of any bar have nowhere to address policy recommendations and no avenues through which to put substantive policy options on the agenda. That this does not seem an extraordinary way for an advanced market democracy to make economic and social policy is itself a consequence of the framing that results from

Temptations of Evasion and Apology” 23 *Law & Soc. Inquiry* 243 (1998); William H. Simon “After Confidentiality: Rethinking the Professional Responsibility of the Business Lawyer” 75 *Fordham L. Rev.* 1453 (2006);⁴⁷ Richard L. Abel, “Why Does the ABA Promulgate Ethical Rules?” 59 *Tex. L. Rev.* 639 (1981); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes.* 59 *Tex. L. Rev.* 689 (1981); Stephen Gillers “What We Talked About When We Talked About Ethics: A Critical View of the Model Rules.” 46 *Ohio St. L.J.* 243, 245 (1985); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799 (1992); ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 378 (1993); Jonathan Macey, “Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession,” 74 *FORDHAM L. REV.* 1079, 1096 (2005); Benjamin H. Barton, “An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?”, 37 *GA. L. REV.* 1167 (2003); Benjamin Hoorn Barton, “Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation”, 33 *ARIZ. ST. L.J.* 429 (2001); Charles Silver, “When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs”, 44 *ARIZ. L. REV.* 787 (2002); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 *ARIZ. L. REV.* 829 (2002).

the bar's assertion of authority. The bar bases its role on its expertise in the attorney-client relationship—and it styles its regulatory functions as the promulgation and enforcement of ethical standards. There are indeed ethical demands on lawyers and their professional bodies. But this defines out of the frame the fundamentally economic character of the market regulation the bar and judiciary control. But the problem of access to justice needs to be seen not as an ethical problem but as a market regulatory problem. Lawyers do not possess the expertise, the accountability, the tax-and-spend authority or the policy making apparatus necessary to design and implement economic policy.

The problem we face in the American legal system is not a problem of how to increase pro bono or legal aid (although we should do that too), which are ultimately mere drops in the bucket on the order of a few percentage points of total legal effort and resources. The problem is one of urgent need for structural reform in the regulatory and policy/funding system responsible for the critical infrastructure of market democracy, particularly one that draws as heavily as the American system does on law and legalism to structure economic, political and social relationships.