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

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HIGHER DEMAND, LOWER SUPPLY? A COMPARATIVE ASSESSMENT OF THE LEGAL RESOURCE LANDSCAPE FOR ORDINARY AMERICANS

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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 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. For example, we have little systematic data 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

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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 I.P. 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.[1] Labor-Management partner averages are based on 224 respondents; Labor-Union on 25.[2] 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 1994, the American Bar Association ("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.[3] A proposal to update this study in 2005 was rejected as unnecessary and too expensive.[4] As a substitute, the Legal Services Corporation ("LSC") reviewed nine 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.[5] Also in 2005, the ABA published a study on pro bono work, which concluded that American lawyers on average provide

1. ALTMAN-WEIL INC., THE SURVEY OF LAW FIRM ECONOMICS 114 (2005).

2. *Id.* at 115.

3. AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY *8 (1994), *available at* http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf.

4. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 3 (2007), *available at* http://www.lsc.gov/JusticeGap.pdf. The first edition of this study was published in 2005, but citations in this article refer to the 2007 edition, which is "virtually the same." *Id.* at preface.

5. *See id.* at 3.

thirty-nine hours a year of pro bono services to the poor.[6] That is 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" persons[7]), those that exist 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 income. And it depends on more than the quality and cost of services available to corporate and other large entities.[8] 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, for example, to consult before deciding how to choose between market options, 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, the loss of one's home to foreclosure, 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

6. AM. BAR ASS'N, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 4 (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 "participation in activities for improving the legal system or the legal profession through groups such as bar associations." *Id.* at 9.

7. *See generally* Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 BUFF. L. REV. 1369 (2006).

8. 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 STAN. L. REV. 1689 (2008).

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.

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 organizing principles 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 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. In 2006, Lauren Wills presciently documented the complexity of these mortgages, 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.[9] As she noted, it is almost impossible to determine the true cost of these complex contracts and equally difficult for an ordinary homeowner with sub-prime credit to either evaluate what they are taking on or to com-

9. Lauren E. Wills, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707 (2006).

pare 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.[10] This is market failure on a massive scale with enormous consequences for the entire economy, and is 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 legal advice 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 concretely, we can say little about just how lawless 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 to corporations rather than ordinary folks. 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 nothing there.

To give some sense of just what is missing, after reviewing the few existing—and well-worn—legal needs studies, 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

10. *Id.* at 806-07. Wills 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 components such as pre-payment penalties, high closing costs, and other fees as lenders compete for their business.

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 support than most other countries—both developed and developing—to the legal markets and institutions necessary to make all this law the organizing principle in fact, not just theory, of everyday relationships. This should be a major topic of careful data collection and analysis.

I. THE MICRO VIEW: COMPARATIVE CIVIL LEGAL NEEDS SURVEYS

In 1993, the ABA conducted a study, published in 1994, assessing the legal needs of the poor (defined as those living at or below 125% of the poverty line), and of those with moderate income (those with incomes falling in the middle 60% of the income distribution).[11] The study defined "legal needs" as problems or disputes that households had encountered, such as sub-standard housing, 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 experiencing one or more legal needs at the time of the survey.[12] Of those with legal needs, 37% 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 from a non-legal third party (8%).[13] 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%).[14]

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

11. AM. BAR ASS'N, *supra* note 3, at *7. In 1993, the top household income in this group was $60,000, approximately $88,000 in 2007 dollars. *Id.*

12. *Id.* at *9.

13. *Id.* at *17.

14. *Id.* at *18.

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 1996[15] and by Genn and Alan Paterson in Scotland in 1997.[16] 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.[17]

The results for England and Wales show a level of what Genn and Paterson call "justiciable problems" comparable to the ABA study,[18] with 40% of respondents experiencing at least one problem in the last five years.[19] The Scottish study shows a significantly lower incidence of 26%.[20] But the results for both U.K. studies show that 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[21] and 65% in Scotland[22] versus 48% in the U.S. Strikingly, Genn reports that 93% of households in England and Wales reported having received third-party advice on a problem at some point in the past, 68% having received specifically legal advice at some

15. HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999).

16. HAZEL GENN & ALAN PATERSON, PATHS TO JUSTICE SCOTLAND: WHAT PEOPLE IN SCOTLAND DO AND THINK ABOUT GOING TO LAW (2001).

17. 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%.

18. Genn's 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. *Compare* GENN & PATERSON, *supra* note 16, at 32-33, *with* AM. BAR ASS'N, *supra* note 3, at *31-33. 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 five years, whereas U.S. respondents were asked about problems in existence at the time of the survey and in the past year.

19. GENN, *supra* note 15, at 23. *See also* PASCOE PLEASENCE, CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE 9 (2004) (36% and 33% of respondents to, respectively, 2001 and 2004 U.K. surveys had experienced justiciable problems in the previous three-and-a-half years).

20. GENN & PATERSON, *supra* note 16, at 34.

21. GENN, *supra* note 15, at 68.

22. GENN & PATERSON, *supra* note 16, at 86.

point in the past.[23] 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,[24] 29% in Scotland[25] versus 26% in the U.S.[26] 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),[27] 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 60-65% of U.K. cases.[28] 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%[29] versus 29%.[30] This suggests a very different legal environment for the ordinary citizen in the U.K. than in the U.S.

As a further comparison, consider a legal needs survey that I helped design for the government of the Slovak Republic, 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 level of legal need comparable to the U.S. and England, with 45% of households saying they had experienced at least one serious problem in the past two years.[31] For those experiencing a legal need, 30% contacted a lawyer,[32] another 13% had con-

23. *Id.*

24. GENN, *supra* note 15, at 83.

25. GENN & PATERSON, *supra* note 16, at 102.

26. AM. BAR ASS'N, *supra* note 3, at *18 (statistics weighted as described, *supra* note 17).

27. The U.K. has no unauthorized practice restrictions on the provision of legal advice. *See* GENN, *supra* note 15, at 82.

28. *Compare* AM. BAR ASS'N, *supra* note 3, at *17, *with* GENN, *supra* note 15, at 68, *and* GENN & PATERSON, *supra* note 16, at 86.

29. 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. *Id.* at 45. A more recent survey in the U.K. indicates that the comparable "no action" rate in 2004 was 10%, suggesting a decline. PASCOE PLEASENCE, CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE 81 (2d ed. 2006).

30. AM. BAR ASS'N, *supra* note 3, at *18 (statistics weighted as described, *supra* note 17).

31. The list of potential problems in the Slovak study largely tracked the U.K. studies, with the addition of problems with small business. *See generally* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD ECONOMIC SURVEYS, SLOVAK REPUBLIC 112 (2005) [hereinafter OECD ECONOMIC SURVEYS].

32. 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. *See id.* at 107. If we exclude notaries and bailiffs, who perform quasi-public functions more akin to a

tact 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 lawyer, judge or court personnel.) Slovak citizens, in a country with GDP per capita of less than $8000 in 2004[33] (GDP in the U.S. that year was approximately $41,000[34]), 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.[35] The Canadian study from 2006, surveying low and moderate-income households, found that 47.7% of the population reported one or more legal needs in a three year period[36]; there is no report of how those with needs dealt with the problem, only that 33.9% of problems remained unresolved within the study period.[37] The New Zealand study from 2006 found that 29% of respondents faced at least one problem in the past year[38] and reported that during that year, 44%, had sought or would seek third-party help.[39] 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 took to resolve

judge, the percentage who contacted a "lawyer" is 22%. This and other uncited Slovak statistics come from a study I completed for the World Bank. This is the first reporting of such statistics.

33. OECD ECONOMIC SURVEYS, *supra* note 31, at 20.

34. 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.

35. *See* Herbert Kritzer, *Empirical Legal Studies Before 1940: A Bibliographic Essay*, 6(4) J. EMPIRICAL LEGAL STUD. 925. I am grateful to Ted Eisenberg for drawing this paper to my attention on seeing an earlier draft of my paper.

36. Ab Currie, A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns 5 (April 2005) (unpublished manuscript, *available at* http://cfcj-fcjc.org/docs/2006/currie-en.pdf).

37. *Id.* at 11.

38. New Zealand Legal Services Agency, Report on the 2006 National Survey of Unmet Legal Needs and Access to Services 15 (2006) (unpublished manuscript, *available at* http://www.lsa.govt.nz/documents/2006NationalSurveyofUnmetLegalNeedsandAccesstoServices_002.pdf).

39. *Id.* at 35.

their problems. The 2004 study in the Netherlands[40] (which tracks the U.K. methodology) and the 2007 study in Japan[41] (which also has a comparable methodology to the U.K. study) provide a basis for some comparison with the U.S., U.K., 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 years,[42] 10% did nothing, and 44% relied on third party assistance.[43] Note that in The Netherlands, as in the U.K., non-lawyers may provide legal aid and assistance.[44] The Japanese reports a low 19% rate of problems.[45] Of those with problems, 25% apparently did nothing (the data reports what percentage had contact of any kind with the other side),[46] and that 61% contacted a third party for assistance.[47] Only 4% turned to a lawyer.[48] Thirteen percent turned to a legal provider or institution other than a lawyer.[49]

40. *See generally* Ben C.J. van Velthoven & Marijke ter Voert, Paths to Justice in the Netherlands (2004) (unpublished manuscript, *available at* http://media.leidenuniv.nl/legacy/RM%202004.04.pdf).

41. Masayuki Murayama, *Experiences of Problems and Disputing Behaviour in Japan*, 14 MEIJI L.J. 1, 3 (2007).

42. Van Velthoven & ter Voert, *supra* note 40, at 4. 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. *Id.* at 1.

43. *Id.* at 7.

44. In Table 1 *infra*, I have counted solicitors, civil notaries, bailiffs (who assist in collecting judgments and are legal officers), legal aid centres, legal consultants, legal insurance, and law shops as "lawyers."

45. Murayama, *supra* note 41, at 6. 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. *Id.* at 2. 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.

46. *Id.* at 13.

47. *Id.* at 16.

48. *Id.*

49. *Id.* 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 individuals may have also contacted a lawyer.

Table 1. Actions Taken by Those Reporting Legal Problem

Country	No Steps Taken	Sought Third Party Assistance	Contact with Lawyer/ Legal Professional	Contact with Other Legal Advisor/ Institution	Contacted Other Third Party
U.S. Poor†	38%	38%	21%	8%	9%
U.S. Middle Income†	26%	51%	28%	12%	11%
England & Wales*	5%*	60%	27%	33%	
Japan**	25%	61%	15%	21%	34%††
Scotland*	3%	65%	29%	36%	
Slovakia***	18%	[44%]	30%	14%	No data
Nether-lands**	10%	44%	14%	5%***	25%

† Based on most formal action taken. Source: See AM. BAR ASS'N, *supra* note 3.

* "No steps" 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"). Lawyer/legal professional includes solicitor, other legal professionals negligible. Other calculated as residual and includes those (17% England, 14% Scotland) who, possibly in addition to contacting a solicitor, sought advice from a citizen advice bureau calculated. Source: see GENN, *supra* note 15, at 85, and GENN & PATERSON, *supra* note 16, at 104.

** Lawyer or legal professional includes lawyer, consultation bureau at city hall, a bar association, court or legal aid center and legal professionals other than lawyers (Japan) and legal aid centre, law shop, legal consultant, legal insurer, bailiff, solicitor and notary (Netherlands). Data on types of advice in original source are reported as percentages of instances of advice. Data in table apply percentages of contacts to percentage of those who seek advice to estimate percentage of those with problems who sought particular types of assistance. Statistic for lawyer/legal professional contact in table includes multiple responses and thus overstates percentage of those seeking advice in category as a whole. Statistic for other legal advisor/institution includes contact with court, police, ombudsman, and includes those who may also have sought advice from legal professional. Contact with "other third party" calculated as a residual. Sources: see Murayama, *supra* note 40, at 16-17 (Japan), and van Velthoven and ter Voert, *supra* note 41, at 12 (Netherlands).

*** Statistic for third party assistance is minimum, given lack of data about non-legal third party contacts. Source: unpublished data on file with author.

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 ad-

vanced 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 all 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 ("LSC") in 2005 published a study drawing on nine 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.[50] 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.[51] 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.[52]

Table 2 summarizes the findings of twelve 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, and others as a percentage of problems. Not all the surveys 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 more recent studies that were not included in the 2005 LSC review,[53] show an incidence of legal problems that is generally higher than that shown in the ABA study.[54] Those reporting data on this difference suggest even higher rates at which poor people in America "lump" their problems, doing nothing to resolve difficulties that include relatively severe problems with family disputes, debt, housing, and

50. LEGAL SERVS. CORP., *supra* note 4.

51. *Id.* at 8.

52. *Id.* at 16.

53. ARIZ. FOUND. FOR LEGAL SERVS. & EDUC., VOICING A NEED FOR JUSTICE (2007); UTAH LEGAL SERVS., THE JUSTICE GAP: THE UNMET LEGAL NEEDS OF LOW-INCOME UTAHNS (2006); ACCESS TO JUSTICE STUDY COMM., STATE BAR OF WIS., BRIDGING THE JUSTICE GAP: WISCONSIN'S UNMET LEGAL NEEDS (2007).

54. LEGAL SERVS. CORP., *supra* note 4, at 16.

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 29% that the ABA 1994 study suggested,[55] with almost half of the studies showing legal assistance rates in the 9-12% range. This is well below the near 30% use of lawyers found in the English and Slovak studies, and the much higher percentage (perhaps as high as 60% in both the U.K. and Slovakia) who contact either a lawyer or some other person or entity who is authorized to provide legal assistance.

55. AM. BAR ASS'N, *supra* note 3, at *17-18.

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	2006	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.

II. 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 it does 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,"[56] 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—especially one 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, case law, statutes, and constitutions? Is there a paradox lurking here that in the system of adversarial legalism that Robert Kagan describes as distinctive of the "American way of law"[57] (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 this section, I review some indicators—incomplete at best—of the overall extent to which the U.S. devotes 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

56. *See generally* U.N. COMM'N ON THE LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE (2008), *available at* http://www.undp.org/legalempowerment/report/Making_the_Law_Work_for_Everyone.pdf.

57. ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3-6 (2001).

and towards the systemic everyday use of law in fact by ordinary citizens throughout the income spectrum.

In 2005, legal services provided by private practitioners generated $180.9 billion[58] in gross domestic product in the United States; total receipts for law firms totaled $221.6 billion.[59] Neither figure counts legal services provided within corporations, government, legal aid providers, or other private associations, which account for 18% of all lawyers.[60] 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.[61]

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).[62] Another 1% ($2.8 billion) can be attributed to services provided by legal aid lawyers and public defenders.[63] 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 addressing 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 plaintiffs, state administrative agencies

58. U.S. BUREAU OF ECON. ANALYSIS, SURVEY OF CURRENT BUSINESS tbl.648 (2007), *available at* http://bea.gov/scb/pdf/2007/01%20January/D-Pages/0107dpg_e.pdf.

59. U.S. CENSUS BUREAU, SERVICE ANNUAL SURVEY 2005, CURRENT BUSINESS REPORTS tbl.6.1 (2007), *available at* http://www2.census.gov/services/sas/data/Historical/sas-05.pdf.

60. AM. BAR FOUND., THE LAWYER STATISTICAL REPORT 2004 6 (2000 data). Seventy-four percent work in private practice, 5% are inactive or retired, 3% serve in the judiciary, and 1% in legal academia.

61. 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. U.S. BUREAU OF ECON. ANALYSIS, SURVEY OF CURRENT BUSINESS tbl.648 (Apr. 2007).

62. *Id.* at tbl.655.

63. This is an (overestimate) based on the fact that 1% of lawyers work as legal aid lawyers or public defenders. AM. BAR FOUND., *supra* note 60, at 28.

or municipalities for a total of 35%; this is a decrease from 45% in 1975.[64] These figures probably understate the total share of all legal services statewide and nationwide because of the concentration of corporate law firms in this major financial center.[65] Correcting for this problem by looking province-wide in Ontario, Ronit Dinovitzer and I estimated that in 1998 Ontario lawyers devoted 42% of their effort 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%.[66] These numbers are in line with the census-based estimate referenced above, indicating that 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.[67]

In the abstract and in isolation it is difficult to say whether this share of legal services devoted to ordinary citizens' interests is enough. Of course, the ordinary citizen benefits from the operation of well-regulated and efficient markets 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 were $62.2 billion in 2000 dollars.[68] 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.[69] Based on the total U.S. population for that year, this implies an average of 1.6 hours per person for the year or 4.15 hours per aver-

64. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 752, 765 (1998).

65. *See id.* at 757-58.

66. 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 is on behalf of ordinary citizens.

67. *See supra* text accompanying notes 62-63.

68. U.S. BUREAU OF ECON. ANALYSIS, SURVEY OF CURRENT BUSINESS tbl.655 (Apr. 2007).

69. 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. *See* ALTMAN-WEIL, *supra* note 1, at 81-134.

age household.[70] Conducting the same calculation for 2005 (total expenditures of $67.4 billion in 2000 dollars, an average hourly rate of $182 for small-firm lawyers[71]) 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)[72] and a straight average of the number of problems per household reported by the state surveys (2.0)[73] 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, a foreclosure, 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, employment options, insurance coverage, or the potential for conduct to influence custody of a child. Suppose that for every dispute-related need there is an ex ante advice-related need (as appears to be the case for large corporations),[74] meaning that there are twice as many legal needs as those measured by studies asking only about dispute-related needs. This would then imply that 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.

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 on legal services and average hourly rates in other countries with which to do similar calcula-

70. U.S. CENSUS, HOUSEHOLDS BY TYPE AND SIZE: 1900-2002, *available at* http://www.census.gov/statab/hist/HS-12.pdf (using an estimated average household size of 2.6 people).

71. 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. ALTMAN-WEIL, *supra* note 1, at 104.

72. 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. AM. BAR ASS'N, *supra* note 3, at *9.

73. I have excluded the data for New Jersey from this calculation because it is based on problems per individual. *See supra* tbl.2.

74. 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. Leslie A. Gordon, *Meet an In-House Cost Cutter Who Believes in Fixed Fees*, CORPORATE COUNSEL, Aug. 29, 2007, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1188291741577.

tions. But we do have recently released comparative data on expenditures in the legal system as a whole for a large set of European countries[75] 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.[76]

Table 3 provides data for the U.S. and a selection of European countries showing the following: 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.[77] United States criminal cases include serious crimes and misdemeanors but exclude the fifty-five million traffic cases that also appear in state courts; the European data cover both serious crimes and misdemeanors but purport to exclude administrative offenses and those processed by the police such as minor traffic offenses. 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.

75. EUROPEAN COMM'N FOR THE EFFICIENCY OF JUSTICE, EUROPEAN JUDICIAL SYSTEMS: EDITION 2008 (DATA 2006): EFFICIENCY AND QUALITY OF JUSTICE ch. 2. In all data reported below euros are converted to U.S. dollars at an exchange rate of $1 = €0.74.

76. 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. Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83, 93-94 (2000).

77. It is particularly important to note that the data reported here differ substantially from data reported in Christian Wollschlager's *Exploring Global Landscapes of Litigation Rates*, *in* SOZIOLOGIE DES RECHTS: FESTSCHRIFT FUR ERHARD BLANKENBURG 582 (Jurgen Brand & Dieter Strempel eds., 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 fifth, 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. *Id. See also* Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany*, 28 LAW & SOC'Y REV. 789 (1994) (suggesting 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 UDC/DCSL L. REV. 35 (2007) (estimate includes public and private charitable sources).

* Includes private charitable expenditure on civil legal aid.

The European case counts 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. The European data includes full-time professional judges and excludes 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 ex-

ample, 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—and in some cases may not—be a member of the bar and thus are not counted. In addition, 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. Comparative Resources Per Person And Per Case[78]

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

Table 4 suggests a stark picture of how few resources the U.S. economy as a whole may devote to delivering to the legal system. U.S. public expenditure *per capita* on courts, judges, prosecutors, and legal aid is the highest among this set of both advanced and transitioning European countries. U.S. public expenditure per case, however, is significantly lower than in other advanced democracies, when accounting for the apparently vastly higher numbers of cases in those countries (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. American 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

78. All calculations were conducted from data noted in Table 3.

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 American 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 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 *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. In Table 4, the U.S numbers per case appear 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 the ultimate goal is making 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 in 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,[79] 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.

79. *See* KAGAN, *supra* note 57, at 51-54.

The data in Table 4 thus reinforce what we learned from a comparative look at the legal needs surveys. Interestingly, although poor Americans do not report 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.

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 does not allow for such careful comparison, although the existing data clearly suggest the need for such a study to be conducted.[80] The results, however, as rough and ready as they are, nonetheless present a serious challenge to the American courts which have, for the last 100 years, claimed exclusive authority to regulate the entire legal system in the U.S.[81] 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 A.B.A. 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 de-

80. Herbert M. Kritzer, *To Lawyer or Not to Lawyer:* is *that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 885 (2008) (examining the relationship between income and the decision to use a lawyer across several countries). 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.

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

mand 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 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.[82] 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 policy-making 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

82. This is slightly above the average I calculated from Altman-Weil data for lawyers working in solo or small firm (fewer than 20 lawyers) practice in 2005. *See supra* note 69and accompanying text.

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 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 empirically investigating 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 higher)[83] 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 Rhode,[84] David Luban,[85] and Barlow Christensen.[86] 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.[87] But this is what one would predict given that the bar is not a politi-

83. Twenty-nine percent is the figure from the ABA study. AM. BAR ASS'N, *supra* note 3, at *17-18 (weighted average); the state legal needs surveys report rates ranging from 21% to 53%. *See supra* tbl.2.

84. *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); 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 NonLawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996).

85. *See generally* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

86. *See generally* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159 (1980).

87. *See, e.g.*, ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 378 (1993); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37

cally 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 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 law-

GA. L. REV. 1167, 1169 (2003); Benjamin H. Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 488-89 (2001); 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); Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1096 (2005); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 689-90 (1981); Charles Silver, *When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs*, 44 ARIZ. L. REV. 787, 789 (2002); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453 (2006); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 143; William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 L. & SOC. INQUIRY 243, 263-65 (1998); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 812 (1992); 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, 861-64 (2002).

yers and their professional bodies. But this defines out of the frame the fundamentally economic character of the market regulation the bar and judiciary control. The problem of access to justice, however, 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. Rather, 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.