Life in the Law Thick World: Legal Resources for Ordinary Americans

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Beyond Elite Law: Access to Civil Justice in America

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Beyond Elite Law: Editors' Preface
Samuel Estreicher & Joy Radice

Foreword
Dean Martha Minow

List of Contributors
xxix

Overview
Hon. Wallace B. Jefferson

Overview
Hon. Jonathan Lippman

PART I CURRENT STATE OF ACCESS TO LEGAL SERVICES

1 Access to Civil Justice in America: What Do We Know?
Ian Weinstein

2 Life in the Law-Thick World: Legal Resources for Ordinary Americans
Gillian K. Hadfield & Jamie Heine

3 The Need for a National Civil Justice Survey of Incidence and Claiming Behavior
Theodore Eisenberg

4 When Does Representation Matter?
Russell Engler

5 Self-Representation and the Dismissal of Chapter 7 Bankruptcy Cases
Rafael I. Pardo
CONCLUSION

To meet the demand for civil legal services, we rely on the market and on under-funded legal aid—a highly fragmented and uncoordinated approach. The barriers to legal assistance are so high that low- and middle-income individuals often ignore their legal problems, address them outside the courts, or represent themselves.
which distributes over $30 billion in 50,000 grants annually to medical researchers who collect, analyze, and are often required to share, data on disease, medical procedures and the impact of interventions.\textsuperscript{4} We don’t have the legal equivalent of public health departments, tracking the legal health of communities. We don’t have the legal analogs of specialists in epidemiology, studying the causes and patterns of legal problems in communities. While legal academia produces thousands of articles published in law reviews each year, such research typically focuses on law itself, not the public or markets the law serves. The major well-funded and regularly conducted studies on the legal system that do exist focus on the market for corporate legal services.\textsuperscript{5} As a result, systematic efforts to collect data about the health of legal systems for ordinary individuals are few and far between.

Of the small number of studies analyzing the performance of the legal system for non-corporate clients almost all focus 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 our legal systems is a matter of great importance throughout the income distribution. We all make decisions on a daily basis that rely on our understanding of the legal rules that structure our relationships with family, neighbors, schools, manufacturers, governments, and more.

Casually, most of us in the legal profession know that the bulk of civil legal services are ultimately provided not to ordinary people but to corporations. The 1995 Chicago Lawyers’ Survey—one of the very few systematic efforts to assess the allocation of legal work across client sectors—estimated that only 25% of Chicago lawyers’ efforts went to providing legal services to individuals or small businesses.\textsuperscript{6} The “personal plight” category—comprised of civil rights, criminal defense, divorce, family, and personal injury plaintiff work—accounted for a mere 16% of total effort.\textsuperscript{7} Both of these figures indicated drops relative to 1975 (from 40% and 21%, respectively);\textsuperscript{8} the survey has not been updated but in all likelihood there have been comparable drops in the past twenty years as well.

In this chapter we pull together the small and disconnected bits of available data on the legal resources available to ordinary Americans—the best we can do to shed some light on the performance of the U.S. legal markets serving non-corporate clients. We draw on some data from other countries to put our limited U.S. data into perspective. The goal is to try to get a handle on the health of the legal markets serving ordinary citizens as a whole. Our results suggest that, while the United States has a robust legal system with nearly twice as many lawyers per capita as most other countries, ordinary Americans have very little access to reasonably priced legal help in navigating that system.

We begin with a “macro” view, comparing the resources at an aggregate level that are devoted to the legal system in the United States as compared with other countries. Here we find evidence of a surprising fact: although public expenditure, legal aid, numbers of judges, and numbers of lawyers are comparable (or high) on a per capita basis, the much greater volume of cases in the United States implies that the United States devotes far fewer resources to supporting the legal system on a per case basis. That is, Americans choose or have no choice but to go through court-based processes at much higher rates, but compared to other countries, there are fewer public dollars, judges and even lawyers available to them when they do so. We then turn to a “micro” view, reviewing the available studies that track individual legal needs and the frequency with which individuals choose (or have no choice but) to represent themselves in court, comparing studies conducted at the national and state levels in the United States with studies carried out in comparably rich legal settings.

We identify here a troubling indication that Americans are led to “lump” their legal problems and do nothing about them at higher rates than is the case in these other countries. Looking closely at these studies suggests that one reason might be that Americans have fewer places to turn for legal help: environments in which people have more open regulatory systems that allow a wider variety of professionals to assist people with legal problems—not just lawyers, as is the case in the United States—appear to be ones in which people are significantly less likely to do nothing when troubles emerge. That is important: ignoring legal problems is likely to cause more problems. Moreover, both ignoring legal problems and muddling through without legal help undermines our confidence that the complex legal rules and entitlements we have put in place are, in fact, accomplishing the objectives they are designed to achieve.

\textbf{THE MACRO VIEW: AGGREGATE LEGAL RESOURCES}

The legal services industry in the United States is a multi-billion dollar industry and accounts for just under half of the revenue generated by the global legal services industry.\textsuperscript{9} In 2010, legal services provided by private practitioners generated $204 billion\textsuperscript{10} in gross domestic product in the United States; total receipts for law


\textsuperscript{5} See, e.g., Citi Private Bank, Annual Survey of Law Firm Financial Performance (conducted annually for the past twenty-five years); Altman Weil, Law Firms in Transition Survey (conducted annually for the past five years); ALM Legal Intelligence, Survey of Law Firm Economics (conducted annually for the past forty years).


\textsuperscript{7} Id.

\textsuperscript{8} Id.


\textsuperscript{10} U.S. Bureau of Economic Analysis, Gross Domestic Product by Industry 2010 (Value Added by Industry Table).
firms was $237 billion. Neither figure counts legal services provided within corporations, government, legal aid providers, or other private associations, which account for 18% of all lawyers. If we "gloss 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 $249 billion in GDP terms and $289 billion in expenditures on legal services. By way of comparison, in 2010 GDP in educational services was $166 billion; health care services $1.1 trillion; agriculture $58 billion; food, beverage, and tobacco products $219 billion; securities, commodities contracts, and investments $181 billion; and computer system design and related services $83 billion.

While the U.S. legal services market is massive, ordinary citizens consume well under half of these resources. Of the roughly $289 billion spent on legal services, approximately 34% is consumed by individuals as part of personal consumption expenditures ($97.7 billion in 2010). Another 1% ($2.89 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 $23 billion or 8%) as being on behalf of ordinary citizens. But clearly much of this expenditure is of little personal use to individuals. This suggests that at most 42% of legal services, and more reasonably a bit more than 55%, 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. As we noted earlier, the Chicago Lawyers' Survey estimated that in 1995 Chicago lawyers devoted 29% of total effort to services for individual or small business clients.13 These figures probably underestimate the total share of all legal services statewide and nationwide because of the concentration of corporate law firms in this major financial center.14 These numbers are in line with the census-based estimate presented earlier that approximately 35% of all legal services in the United States are available to individuals as opposed to corporations or governments.

In the abstract and in isolation, it is difficult to say whether this share of legal services devoted to ordinary citizens' interests is "enough." In theory, if ordinary citizens demanded more legal services, the legal services market could supply them; and, 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 add further perspective on these numbers, we have 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, expenditures by households on legal services totaled $82.9 billion in 2012 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 $209 in 2012 dollars.15 Based on the total U.S. population for that year, this implies an average of 1.6 hours per person for the year or 4.3 hours per average household.16 Conducting the same calculation for 2012 (total expenditures of $105.1 billion and an average hourly rate of $263 for small-firm lawyers, both in 2012 dollars)17 yields an average of 1.3 hours per person or 3.3 hours per household, a decline of 30%.18

How does this compare with the availability of legal resources for those who live in comparably or even less law-thick environments around the globe? We do not have comparable data on personal expenditures on legal services and average hourly rates in other countries with which to do similar calculations. But we do have comparative data on expenditures in the legal system as a whole for a large set of European countries19 and it is to these data that we 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.20

11 This figure is based on Altman-Weil, Inc., The Survey of Law Firm Economics (2015), which is a self-selected proprietary survey and subject to substantial error. It is, however, the only quasi-systematic data we are aware of for hourly rates nationally in this year. We 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 Consumer Price Index.
12 Based on population estimate for 1990 of 248,790,925 and a household estimate of 93,347,000 (www.census.gov).
13 This figure is based on Altman Weil data for 2012, taking a straight average of rates for equity and non-equity partners and associates in firms of less than 9 and 10-24 lawyers.
14 Based on population estimate for 2012 of 313,873,685 and household estimate of 121,084,000, available at www.census.gov.
15 European Commission for the Efficiency of Justice, European Judicial Systems: Edition 2012 (data 2010): Efficiency and Quality of Justice. In all data reported later, curos are converted to U.S. dollars at an exchange rate of $1 = 60.785.
Table 2.1 Total resources and cases.

<table>
<thead>
<tr>
<th>Country</th>
<th>Population</th>
<th>Public expenditure on courts, prosecutors &amp; legal aid (SB)</th>
<th>Legal aid ($M)</th>
<th>Criminal cases (M)</th>
<th>Civil cases (M)</th>
<th>Judges</th>
<th>Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>313,914,540</td>
<td>56</td>
<td>3,500</td>
<td>20.8</td>
<td>28.6</td>
<td>31,930</td>
<td>1,268,011</td>
</tr>
<tr>
<td>France</td>
<td>65,026,889</td>
<td>5</td>
<td>460</td>
<td>1.1</td>
<td>2.3</td>
<td>6,045</td>
<td>51,758</td>
</tr>
<tr>
<td>Germany</td>
<td>81,735,662</td>
<td>11</td>
<td>487</td>
<td>1.2</td>
<td>5.8</td>
<td>19,831</td>
<td>155,679</td>
</tr>
<tr>
<td>Hungary</td>
<td>9,966,000</td>
<td>0.5</td>
<td>0.4</td>
<td>0.3</td>
<td>0.7</td>
<td>2,891</td>
<td>12,099</td>
</tr>
<tr>
<td>Netherlands</td>
<td>16,605,799</td>
<td>2.5</td>
<td>457</td>
<td>0.4</td>
<td>1.5</td>
<td>2,530</td>
<td>16,728</td>
</tr>
<tr>
<td>Poland</td>
<td>38,200,000</td>
<td>2.2</td>
<td>30</td>
<td>1.1</td>
<td>6.2</td>
<td>10,625</td>
<td>29,469</td>
</tr>
<tr>
<td>U.K. (England and Wales)</td>
<td>55,200,000</td>
<td>5.7</td>
<td>3,211</td>
<td>1.9</td>
<td>2</td>
<td>4,913</td>
<td>165,125</td>
</tr>
</tbody>
</table>


* Estimate includes public and private charitable sources for civil legal aid and indigent criminal defense.
### Table 2.2: Comparative resources per person and per case.

<table>
<thead>
<tr>
<th>Country</th>
<th>Public spend per capita</th>
<th>Public spend per case</th>
<th>Legal aid per capita</th>
<th>Legal aid per case</th>
<th>Judges per 100,000 persons</th>
<th>Judges per 100,000 cases</th>
<th>Lawyers per 100,000 persons</th>
<th>Lawyers per 100,000 cases</th>
<th>Criminal cases per 100,000 persons</th>
<th>Civil cases per 100,000 persons</th>
<th>Total cases per 100,000 persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>$1,178</td>
<td>$1,136</td>
<td>$12</td>
<td>$75</td>
<td>10</td>
<td>65</td>
<td>404</td>
<td>2,567</td>
<td>6,626</td>
<td>9,111</td>
<td>15,737</td>
</tr>
<tr>
<td>France</td>
<td>$77</td>
<td>$1,471</td>
<td>$7</td>
<td>$115</td>
<td>11</td>
<td>204</td>
<td>80</td>
<td>1,522</td>
<td>1,602</td>
<td>3,537</td>
<td>5,229</td>
</tr>
<tr>
<td>Germany</td>
<td>$135</td>
<td>$1,571</td>
<td>$6</td>
<td>$22</td>
<td>24</td>
<td>283</td>
<td>190</td>
<td>2,224</td>
<td>1,468</td>
<td>7,905</td>
<td>9,373</td>
</tr>
<tr>
<td>Hungary</td>
<td>$50</td>
<td>$500</td>
<td>$0</td>
<td>$20</td>
<td>29</td>
<td>280</td>
<td>121</td>
<td>1,210</td>
<td>3,094</td>
<td>7,010</td>
<td>10,104</td>
</tr>
<tr>
<td>Netherlands</td>
<td>$150</td>
<td>$1,316</td>
<td>$27</td>
<td>$241</td>
<td>15</td>
<td>133</td>
<td>100</td>
<td>880</td>
<td>2,400</td>
<td>9,000</td>
<td>11,401</td>
</tr>
<tr>
<td>Poland</td>
<td>$58</td>
<td>$501</td>
<td>$1</td>
<td>$4</td>
<td>28</td>
<td>146</td>
<td>77</td>
<td>404</td>
<td>2,880</td>
<td>16,230</td>
<td>19,110</td>
</tr>
<tr>
<td>U.K. (England and Wales)</td>
<td>$103</td>
<td>$1,462</td>
<td>$58</td>
<td>$823</td>
<td>9</td>
<td>126</td>
<td>299</td>
<td>4,234</td>
<td>3,442</td>
<td>3,623</td>
<td>7,065</td>
</tr>
</tbody>
</table>
number of cases per capita in the United States: 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. socioeconomic life is, as Robert Kagan has emphasized, substantially more reliant on law and legal management of relationships and yet the United States devotes far fewer resources to providing the legal services needed to translate law on the books into law on the ground.

THE MICRO-VIEW: LEGAL NEEDS

We turn now to a view closer to that ground. Few studies have attempted to quantify the legal needs ordinary Americans face. Existing data suggest that at least half of all households face a legal problem each year and those households who face legal problems average several per year. These studies likely undercount the extent of legal needs faced by ordinary people because they focus on erupted legal problems, but exclude instances where legal information and advice could aid in planning conduct and avoiding or mitigating legal problems upfront. This section explores the legal needs of ordinary Americans and how Americans respond to those needs. What we find suggests that while Americans face legal needs at rates comparable to those faced by people in other countries, Americans are more likely to take no action to resolve these problems. When they do take action, they do so with fewer legal resources available to them: the expenditure data we reviewed in the last section imply that the average household secures an average of less than half an hour of legal assistance per year with legal problems and what studies we have of this phenomenon suggest that Americans represent themselves in court more often than do people in other countries.

U.S. Civil Legal Needs and the Availability of Legal Help

Civil legal needs surveys can help us get a better sense of people’s demand for legal services and their experiences as participants in the legal system. In 1993 the American Bar Association (ABA) conducted a study 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 distribution). The study defined “legal needs” as problems or disputes households had encountered, such as substandard housing, job loss, or divorce, and that could potentially 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 51% of households (47% of poor households and 52% of moderate-income households) had experienced one or more legal needs in the previous year. The average number of problems experienced by those with legal needs was 2. 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 entity (8%). Thirty-eight percent did nothing to resolve their problem, a course of action that has come to be called “lumping it” in the literature. Among moderate-income households, assistance from a third party was sought for 51% of problems, 39% from a specifically legal source (lawyers 28%, other legal/judicial 12%), and 26% of moderate-income households lumped their problems.

There has been no national study of legal needs in the United States in the two decades since this ABA study was published. State-level surveys have been conducted and they paint a largely similar picture. Table 2.3 summarizes the findings of 17 state legal needs surveys. Twelve of the surveys report legal needs experienced by low-income individuals or households. Georgia, Montana, Nevada, and Oregon surveyed households of low- and moderate-income; Arizona included households of all incomes. The list of problems provided to respondents was relatively consistent across states.

The data in Table 2.3 paint an ever grimmer picture of the legal environment facing ordinary Americans than the ABA study. It is clear from this collection of state studies that the incidence of legal problems occurred at least in 50% of households identified by the ABA study, the fact that numbers at least this high are consistently found in almost all state surveys supports the reliability of this estimate. A straight average across those states providing estimates at the household level suggests roughly 60% of American households are dealing with a legal problem at any one time. Moreover, a rough calculation taking a straight average across the state studies suggests the average number of problems in households experiencing problems has increased from the 2 found by the ABA to 3. The rate at which poor

26 ABA, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY ’97 (1994). In 1993, the top household income in this group was $60,000, approximately $97,000 in 2013 dollars. Id.
27 Id. at *17.
28 Id. at *17–18.
29 Marc Galanter may have been the first to use this phrase. See Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC’Y REV. 95 (1974).
30 Id.
31 New Jersey conducted a small-sample survey of higher-income households as well but these results are not generalizable to the larger population. We report only the lower-income New Jersey results. In addition, our research identified studies done in Arkansas, Idaho, Minnesota, and Nebraska. The published reports from these studies, however, do not provide enough detail to develop statistics comparable to those shown for other states in Table 2.3.
32 Although most of the state surveys focus on the poor, the 1993 ABA study found little difference in the prevalence of problems between poor- and moderate-income households; if anything, moderate-income households reported more problems.
### Table 2.3 State Legal Needs Surveys

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Prevalence of legal needs (% of households unless noted)</th>
<th>Average number of legal needs (respondents with at least one problem)</th>
<th>No steps taken to resolve problem</th>
<th>Contact with lawyer or legal institution (% of problems unless noted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama*</td>
<td>2006</td>
<td>48%</td>
<td>3.6</td>
<td>20%</td>
<td>16%</td>
</tr>
<tr>
<td>Arizona*</td>
<td>2007</td>
<td>32% (individuals)</td>
<td>4.1</td>
<td>24%</td>
<td>16%</td>
</tr>
<tr>
<td>Connecticut*</td>
<td>2002</td>
<td>65%</td>
<td>4.6</td>
<td>32%</td>
<td>16%</td>
</tr>
<tr>
<td>Georgia*</td>
<td>2007-08</td>
<td>65%</td>
<td>3.5</td>
<td>–</td>
<td>88%</td>
</tr>
<tr>
<td>Illinois*</td>
<td>2004</td>
<td>49%</td>
<td>3.6</td>
<td>45%</td>
<td>16%</td>
</tr>
<tr>
<td>Massachusetts*</td>
<td>2002</td>
<td>67%</td>
<td>–</td>
<td>–</td>
<td>&lt;16% (HHS, or head of households, at least one problem)</td>
</tr>
<tr>
<td>Montana*</td>
<td>2004</td>
<td>68%</td>
<td>&gt;3.5</td>
<td>–</td>
<td>16%</td>
</tr>
<tr>
<td>Nevada*</td>
<td>2007</td>
<td>68%</td>
<td>2.4</td>
<td>–</td>
<td>9% (HHS, all problems)</td>
</tr>
<tr>
<td>New Jersey*</td>
<td>2007</td>
<td>32% (individuals)</td>
<td>2.3</td>
<td>25%</td>
<td>26% (HHS, at least one problem)</td>
</tr>
<tr>
<td>New York*</td>
<td>2010</td>
<td>47%</td>
<td>&gt;2.0</td>
<td>23%</td>
<td>14% (HHS, at least one problem)</td>
</tr>
<tr>
<td>Oregon*</td>
<td>1999-2000</td>
<td>85%</td>
<td>3.9</td>
<td>&gt;56%</td>
<td>17% (HHS, at least one problem)</td>
</tr>
<tr>
<td>Tennessee*</td>
<td>2003</td>
<td>70%</td>
<td>4.7</td>
<td>–</td>
<td>18%</td>
</tr>
<tr>
<td>Utah*</td>
<td>2005-06</td>
<td>68%</td>
<td>1.3</td>
<td>25% (biggest problems)</td>
<td>24-40% (biggest problems)</td>
</tr>
<tr>
<td>Vermont*</td>
<td>2001</td>
<td>50% (est.)</td>
<td>2.2</td>
<td>–</td>
<td>30%</td>
</tr>
<tr>
<td>Virginia*</td>
<td>2005-06</td>
<td>55%</td>
<td>3.4</td>
<td>42%</td>
<td>&lt;32% (HHS, at least one problem)</td>
</tr>
<tr>
<td>Washington*</td>
<td>2002-03</td>
<td>87%</td>
<td>3.3</td>
<td>–</td>
<td>12%</td>
</tr>
<tr>
<td>Wisconsin*</td>
<td>2006</td>
<td>45%</td>
<td>2.1</td>
<td>–</td>
<td>12% (HHS, all problems)</td>
</tr>
</tbody>
</table>

*Low-income
*All-income
*Low- and moderate-income


**Georgia:** Report excludes from the “no action” category those who took no action but reported satisfaction with results (48%); results in chart are estimated to adjust to include those for comparability with other studies.

**Massachusetts:** Percentage contacting lawyer is upper bound because not corrected for those who contacted more than one type of legal provider (private lawyers, legal aid).

**Montana:** Average number of legal needs is across all households, including those with no legal needs.

**New Jersey:** Measure is incidence, not prevalence – includes only new legal needs in a given year – does not include problems pending from prior years; no action includes problems not yet resolved; higher-income sample analyzed in full report but not generalizable to full population.

**New York:** Percent taking no action is upper bound because 96% reported taking no action on any problem.

**Nevada:** Average number of legal needs is reported as average number of categories in which problems occurred; actual number of legal problems may be higher.

**Tennessee:** Average number of legal needs is estimate based on average number of problems in categories reported.

**Vermont:** Excludes households without phones.

**Virginia:** Percentage contacting lawyer is upper bound because not corrected for those who contacted more than one type of legal provider (private lawyers, legal clinic, legal aid).

**Wisconsin:** Average number of legal needs is reported as average number of categories in which problems occurred; actual number of legal problems may be higher.
Americans lump their problems seems about as high in these studies as in the ABA study: averaging across the studies limited to low-income households, the rate is about 36%, compared with 38%; the two studies that included higher-income households and reported data on this show the same average rate (26%) as the ABA study. Finally, it appears that the 1993 ABA estimate of the likelihood that Americans receive help from a lawyer when dealing with legal problems is high relative to what the states are finding in these studies conducted a decade or so later. Again a rough calculation taking a straight average across the states that present a clear number on this (that is, excluding MA, NV, NY, TN, UT, VA, and WI), suggests that fewer than 15% of poor and 15% of moderate-income Americans have contact with a lawyer or other legal provider; this is substantially lower than the 29% (poor) and 36% (moderate income) rates found by the ABA.

A drop in legal help is consistent with the census data on expenditures on personal legal services that we reviewed earlier. Using the rough estimates of hourly rates for lawyers in small firms that we calculated there, the 1993 ABA estimate that the average household experienced one legal problem a year33 for 1990 and a straight average of the number of problems (2) per household reported by the state surveys34 for 2012, we estimate that in 1990 American households were able on average to draw on approximately four hours of legal time to address a legal problem and in 2012 they were able to draw on significantly less than half that amount: approximately an hour and a half.

An hour and a half of legal help per problem is a very low number, and yet it is still an overestimate. The legal needs surveys only ask about erupted civil problems — 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 — and these are the only problems we included in our earlier estimate. Our count of problems excludes the demand for legal assistance with criminal matters where public defender help is unforthcoming or inadequate. It excludes 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 extant advice-related need (as appears to be the case for large corporations35), 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.

The low rate at which Americans obtain legal assistance with their legal problems is also indicated by the information we have about publicly financed legal aid. According to the ABA, only 1% of American lawyers are either legal aid lawyers or public defenders; the number of legal aid attorneys providing civil legal services was calculated by the Legal Services Corporation (LSC) to be 7,931, just over one-half of 1% of all U.S. lawyers.36 Moreover, the availability of legal aid in practice is characterized by “fragmentation and inequality” and “geography as destiny.”37 Many who seek free legal assistance are turned away. LSC-funded legal aid agencies, reported in 2009 that, as a result of resource limitations, LSC-funded programs were only able to serve half of the poor who sought assistance.38

What do Americans do when they do not obtain help from lawyers with their legal problems? The U.S. civil legal needs surveys indicate that a large fraction of them — roughly a third — do nothing at all; the state surveys indicate that in some settings the number among the poor is closer to one-half. There can be many reasons that people take no action: they may not think the effort is worth it, they may not know what to do, they may have nowhere affordable to turn to, they may be too overwhelmed by this and other problems to act. Even with the caveat that not all decisions to do nothing are evidence of a failure of the legal system to provide adequate assistance,39 however, the rates at which Americans lump their problems is troubling. The legal needs surveys consistently identify serious legal issues, where failure to obtain any legal advice generates significant risk that outcomes will not be the ones judged by the law to be fair and appropriate — people losing homes they are entitled to keep, being unpaid when they are entitled to payment, or losing jobs on wrongful grounds; children put at risk or deprived of parental contact, legislated benefits, or adequate health care. Moreover, failure to act on legal problems can also breed more problems. Several researchers have found that legal problems tend to occur in clusters, with initial problems triggering others.40 The loss of a job or a failure to

33 This is based on the estimate that half of households experience problems and the average number of problems in these households is two; this averages to one per household across all households.
34 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. Table 2.1 reports average problems per household with a problem and the percentage of households with problems; we have calculated the average number across all households for each state and taken a straight average. We have excluded the data for New Jersey from this calculation because it is based on problems per individual, as well as the data for Montana because the survey does not report the percentage of households experiencing problems.
35 Mark Chandler, General Counsel of Cisco Systems Inc, reports that total legal expenditures in his company are 0.37% of company revenue with 0.16% coming from non-litigation expenses, available at www.law.com/sphilc/PubArticleHIC.jsp?id=188291741577.
39 See note 57 supra.
40 See, e.g., Herbert M. Kritzer, To Lawyer or Not to Lawyer: Is that the Question?, 5 J. LEG. STUD. 875 (2008) (arguing based on empirical evidence that the decision to obtain a lawyer is explained by several variables and that not all those who can afford to hire a lawyer choose to do so).
collect on amounts owed under a contract can lead to failures to pay rent or meet mortgage or other debt payments; financial stress can lead to marital stress and relationship breakdown; relationship breakdown can lead to employment or financial problems. Failing to act on legal problems may only lead to more legal problems – perhaps partly as a consequence of the failure to discover what taking action can accomplish. The person who responds to not being paid by going to small claims court, for example, discovers how that process works; they learn a bit more about the law; and they learn a bit more about themselves. This can be of benefit to them personally and to their communities when they are the ones to whom others turn for advice. Failing to do anything about half or more of these problems is clearly evidence of a large gap between what we think are the legal rules in our communities and people’s actual experiences in facing their legal needs. While Americans on average encounter as many as two legal problems each year, their actual experiences with the legal system are quite thin.

In some cases people choose, or have no choice but, to become involved with courts: the possibility to be too serious to be ignored and may require judicial orders – for child custody or bankruptcy, for example – or a person may be sued (for collection, divorce, foreclosure, probate, etc.) and forced to deal with the legal system. The numbers above indicate that when Americans do interact with the court system, they do so with little legal help. The ABA data may mask this phenomenon – they count as legal help contact with judicial institutions but this includes those who do not seek out legal help but rather are drawn into legal processes and may not find any of it to be legally helpful; moreover, court personnel in the United States cannot give litigants legal advice as they respond to summonses or participate in hearings and there is only so much judges can do without risking the loss of neutrality. Indeed, it is judges – under pressure to help the helpless – who are the most deeply aware of the crisis of unrepresented litigants in their courtrooms.

The annual Judicial Business report of the U.S. Courts provides information on the number of pro se filings in U.S. federal district courts. In 2012 roughly 28% of all filings in U.S. district courts were by pro se litigants. Roughly 65% of these were filed by prisoners challenging prison conditions or civil rights. Of filings by non-prisoners, 12% were filed by pro se litigants. To put this in perspective – recognizing that

much of the litigation in federal district courts involves businesses and other organizations enforcing contracts or responding to regulation – social security, civil rights, and labor cases make up about 7% of the caseload in federal district courts; torts account for less than 1%, are rarely filed without a (contingency fee) lawyer, and frequently are filed by corporate plaintiffs. This suggests a significant portion of ordinary individuals in federal district courts are pro se. A review of federal bankruptcy courts – which handle approximately 1.5 million cases a year, five times as many as federal district courts – indicates that in 2011 approximately 9% of bankruptcy petitions were pro se. The figure reaches as high as 27% in high-filing districts such as the central district of California.

The vast majority of U.S. litigation, however, occurs in state courts – approximately 95%. Here the rates of self-representation are much higher, even in general civil filings, a category that includes a large share of corporate, government, and organizational litigants who invariably have attorney representation. A 2004 New Hampshire study (2001 data) found that one party is self-represented in 48% of general civil cases in the state. A 2005 study of all types of cases in Woodbury County, Iowa, found that 58% of cases have a self-represented litigant. A 2004 California study found that 16% of petitioners at filing are self-represented in general civil matters. The California number underestimates, probably substantially, the level of self-representation in general civil litigation because it does not include defendants; nor does it reflect the rate of representation throughout the case or at disposition (many petitioners may choose to file a case while represented, but do not maintain representation throughout).

More dramatic evidence of the rate at which ordinary Americans deal with courts without legal help is provided by studies that focus on the types of cases that involve matters that individuals generally cannot ignore or where they are brought in as

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44 Ninety-six percent of bankruptcy filings in 2011-12 were non-business. Judicial Business of the U.S. Courts, Table F 2 (2012). A review of pro se debtors in bankruptcy court in Massachusetts also found that 66% of cases filed in 1997 were non-business or consumer filings, of which roughly 65% were pro se. Boston Bar Association Task Force, supra note 44, at 31 (citing National Consumer Law Center, Self-Representation in the Bankruptcy Court: The Massachusetts Experience), available at www.bostonbar.org/proseports/unrepresented598.pdf.

45 Recall, for example, the Chicago Lawyers Study which showed that in 1995 only 25% of legal work was done for personal rather than corporate, organizational or government clients, and only 16% in personal capacity, which are the matters we expect to see in court.


found that 69% of cases in Probate and Family Court in several counties in Massachusetts had at least one unrepresented party.\textsuperscript{59} A 2010 New York study found that 97% of parents in New York City and 95% of parents outside New York City are unrepresented in child support cases.\textsuperscript{60} Ninety-nine percent of tenants in New York City are unrepresented in eviction cases, 99% of borrowers in New York City are unrepresented in consumer credit cases, and 44% of homeowners are unrepresented in foreclosure cases throughout New York state.\textsuperscript{61} The Utah study found that 98% of evictions cases have a self-represented litigant.\textsuperscript{62} The New Hampshire study found that tenants were unrepresented in 96% of landlord–tenant cases. The Boston Bar Association report found that 79% of litigants in the Northeast Housing Court were unrepresented in 1997; with 50% of landlords and 92% of tenants in summary process actions being unrepresented.\textsuperscript{63} The Housing Court found that in 1996 90% of tenants were unrepresented in summary process eviction actions.\textsuperscript{64}

These statistics indicate that in some of life's most important defining circumstances self-representation is by far the norm. Together with the U.S. legal needs surveys, the data on legal expenditures and the fraction of lawyers in the United States who provide legal aid services, a clear picture emerges: the great majority of ordinary Americans navigate the law-thick world without legal help. This is in stark contrast to complex commercial and tort litigation. For instance, the Washington study found that only 2–3% of tort and commercial cases involve self-represented litigants. Similarly, a 1995 Bureau of Justice Statistics report examining 45 trial courts found that only 3% of tort cases involve a self-represented litigant.\textsuperscript{65}

Comparisons With Other Countries

In this section, we look at comparable data on civil legal needs and pro se representation in other advanced market democracies. Again the data are incomplete and difficult to evaluate but we see nonetheless evidence of significant differences, differences that we believe reflect the thin nature of the landscape of resources available to ordinary Americans dealing with the legal world.

\textsuperscript{59} Boston Bar Association Task Force, supra note 44, at 8.
\textsuperscript{60} The Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York (November 2010).
\textsuperscript{61} Id.
\textsuperscript{62} Committee on Resources for Self-Represented Parties, Strategic Planning Initiative Report to the Judicial Council (Utah, July 2006), at 5.
\textsuperscript{63} Boston Bar Association, supra note 44, at 15.
\textsuperscript{64} Id. at 16.
Since the 1993 ABA study, legal needs surveys have been conducted in at least fifteen countries. The gold standard for these surveys was developed by Hazel Genn in England in 1996. Genn’s methodology involved face-to-face interviews, presenting individuals with a series of cards listing types of problems – which were not identified as “legal” problems but which were “justiciable” in the sense that they were potentially resolvable using legal means. This methodology, with refinements, has since been used in several countries, and has been administered multiple times in England and Wales.

First a caution: surveys differ substantially across different jurisdictions and the results are not directly comparable. Most country studies survey all income levels; the ABA surveyed only the bottom 80% of the income distribution and most of the state studies focus only on poor households. Some studies ask whether anyone in the household has experienced a problem; others ask only the respondent about their problems. Some studies ask about problems in the last year – like most U.S. studies do – but some ask about problems in the last three or five years. This could increase the rate of problem reporting, although this does not follow as obviously as one might think: many problems are multi-year problems and, as at least one study has shown, people tend to remember and report the same number whether asked about one year or a longer period. Studies differ in terms of whether they include a signal of the interest of the researchers in specifically “legal” problems: the original ABA study did not but some do. There is evidence that people do not always characterize their problems as “legal” even if a solution might at least in part be found through legal processes. The 2010 New York study, for example, first asked people if they had experienced “legal problems” in the past year; 94% said “no.” Researchers then asked if people had experienced any of a list of specifically identified problems which clearly have legal dimensions – such as problems with child support, foreclosure, eviction, denial of benefits, job discrimination and so on. Forty-seven percent reported having at least one such problem.

Studies that include the reference to “legal” problems may therefore underreport them. Some studies expressly ask people about problems that were difficult to solve; others (like the ABA study) do not screen for triviality upfront, although they may (like the ABA study) frame some problem categories as asking about a “major,” “serious,” or “important” problem. This may not have as big an effect as one might think; people tend to forget or leave out less important problems. Surveys can differ somewhat in the list of problems they ask about – some (e.g., ABA 1993) ask about small business difficulties, for example, but most do not. Different survey techniques – in person, on the phone, online – can also influence responses. People may be more willing to report some types of problems online than in person; they may also be more inclined to avoid asking less important issues when face-to-face. Internet and (usually landline) phone methods too can influence the mix of respondents, making it harder to reach people without internet connections or who do not use landlines.

With these caveats in mind, however, evaluating the U.S. studies in light of studies from other countries is nonetheless illuminating about the legal landscape facing Americans. Table 2.3 presents data from the 1993 ABA study and rough averages from the combined state studies conducted between 2000 and 2010 together with results from a set of other comparable countries. The data indicate that the rate at which Americans report experiencing justiciable problems is comparable to the rate in other countries. Certainly there is nothing to suggest here that the U.S. studies are out of line with experiences in comparable market democracies with high per capita income and highly developed legal systems. And there is no reason to think the U.S. number is inflated, relative to other studies, by trivial or inconsequential matters. The U.S. study asked about the broadest range of problems (although it lacked a catch-all “other” category that several other studies use to compensate for a more restricted list of specific examples) but it also frequently used language such as “difficult” or “important” to qualify the type of problem in which the surveyor was interested. There is, however, evidence that the rates at which Americans do nothing about their legal problems is high relative to these comparison countries. Certainly, none of these studies reports “no action” rates anywhere close to the 50% range we see in some of the state surveys. But nor do these countries seem to reach rates in the 30% range that we see at the lower end in the state surveys and in the 1993 ABA national study. It is striking that the rates of no action picked up in several of these surveys – specifically those from the United Kingdom and from the Netherlands – are on the order of 5–10%. This includes the 6% rate in the Dutch study – where the use of the internet to conduct the survey might have been predicted, if anything, to have swept in more problems that people just didn’t think were worth doing.

66 For a comprehensive review of these surveys, see Pascoe Pleasence, Nigel J. Balmer & Rebecca L. Sandefur, Paths to Justice: A Past, Present and Future Roadmap (2013).
68 Pascoe Pleasence, Nigel J. Balmer & Stian Reimers 2010, Comparing Apples and Oranges: Methodological Issues Affecting the Comparative Analysis of the Public’s Experience of Legal Problems (undated presentation), University College of London, (on file with authors).
69 The Task Force supra note 60, at Appendices 16.
70 Id. at 17.
72 For an extended analysis of differences in survey methodology across national studies, see Paths to Justice, supra note 67.
### Table 2.4 Actions taken by those reporting legal problem.

<table>
<thead>
<tr>
<th>Country (year of data collection)</th>
<th>Prevalence (reference period, years)</th>
<th>Dealt with problem alone or informally</th>
<th>Contact with other legal provider or judicial institution</th>
<th>Contact with provider not authorized to provide legal help</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>U.S. National</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poor + Middle Income (1993)</td>
<td>51% (1) [hh]</td>
<td>23%</td>
<td>23%</td>
<td>26%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>U.S. State Average</strong> (2000-06)</td>
<td>62% (1) [hh]</td>
<td>33%</td>
<td>14%</td>
<td></td>
</tr>
<tr>
<td><strong>Australia</strong></td>
<td>50% (1) [ind]</td>
<td>18%</td>
<td>16%</td>
<td>15%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Canada</strong></td>
<td>45% (1) [ind/partner]</td>
<td>22%</td>
<td>22%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>England &amp; Wales (1997-98)</strong></td>
<td>40% (1) [ind/partner]</td>
<td>35%</td>
<td>35%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>England and Wales (2008)</strong></td>
<td>32% (1) [ind/partner]</td>
<td>16%</td>
<td>7%</td>
<td>22%</td>
</tr>
<tr>
<td><strong>Netherlands</strong></td>
<td>61% (5) [ind]</td>
<td>6%</td>
<td>42%</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>N. Ireland</strong></td>
<td>36% (3) [ind]</td>
<td>14%</td>
<td>17%</td>
<td>43%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Scotland</strong></td>
<td>26% (5) [ind/partner]</td>
<td>5%</td>
<td>20%</td>
<td>36%</td>
</tr>
</tbody>
</table>


N/A applies to countries that do not restrict the practice of law to bar-licensed lawyers, which the United Kingdom and the Netherlands do not.

**U.S. National:** Phone survey supplemented by in-person of non-phone households.

**U.S. State Average:** Straight averages when data available from state surveys in Table 2.3; prevalence excludes A2, NJ; no action excludes TN; contact with lawyer is contact with lawyer or legal institution and excludes MA, NV, NY, TN, UT, VA, WI.

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**Table 2.4 (continued)**

**Australia:** Phone survey; research purpose framed as “legal”; problem set included criminal, which was second-most prevalent problem; contact with lawyer includes court personnel and community law centers; contact with other legal is estimated minimum; contact with non-legal provider is maximum, excluding estimated minimum of non-legal advisors who gave legal advice.

**Canada:** Phone survey; no action includes those who took no action due to perceived triviality of problem, excluding those, 15% took no action; non-legal includes informal; “alone or informally” is alone only.

**England & Wales 1997-98, Scotland, Northern Ireland:** In-person survey; actions taken excludes those who took no action due to perceived triviality of problem.

**England & Wales 2008:** In-person; other legal estimated by subtracting contacts with lawyers from total contacts with formal advisors.

**Netherlands:** Internet survey; allocation of contacts across lawyers, other legal and non-legal are estimates based on transition matrix.

Anything about. Even if we are cautious about the difficulties comparing across different surveys, this seems substantially lower than the rates found in American studies. The rates observed in Canada and Australia also appear significantly lower than the ABA study and the lower rates in the state surveys, although the difference is not as striking and may be attributable to methodological differences.

Interpreting the significance of the numbers in Table 2.4 in terms of access to legal help is a bit more complex. First, given the multiple caveats about comparing data from different surveys and the variance across studies, Table 2.4 probably should not be interpreted to support a finding that Americans are more or less likely to handle their legal problems on their own or with only informal help from friends and family. It’s possible the United States is low on this number, but we would need a much closer look to decide that. Second, there is no suggestion here that Americans contact lawyers about their legal problems more or less frequently than elsewhere. The rate of contact with a lawyer from the 1993 ABA study is relatively high (27%) — but quite comparable to what we see in England and Wales in 1997 and Scotland in 1998. The average from the U.S. state studies is significantly lower — 14% — but so, too, are the rates in all the other country studies conducted in the 2000s. Collectively, the evidence suggests that use of lawyers may have fallen in many places from the 1990s to the 2000s. We may think that...

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73 Minimum estimated by considering advice received from non-legal advisors when these are main advisor and using largest rate reported from: advice on legal rights or procedures; help with legal documents; help with court or tribunal proceedings or preparation; help with formal dispute resolution. See Christie Coulmaceos, Deborah Macnutt, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Irina & Stephanie Ramsey, 7 Legal Australia-Wide Survey: Legal Need in Australia, p. 130, Table 6.14 (2012).

74 One concern with internet surveys is that they can be biased because those who have internet access may be a wealthier group or one with more resources to bring to bear on problems. In the Netherlands in 2014, for example, 94% of households had internet access, the highest rate in Europe. Eurostat STAT/688, December 14 2011. In 2009, the year the Netherlands legal needs study was conducted, 90% of households had internet access. Eurostat, Broadband and connectivity — households (code iso_bdc1sb_h).
14% or even 27% is low relative to an ideal, but we cannot glean from the comparison with other countries that the United States is in a significantly different predicament.

There does seem to be support, however, for the possibility that Americans have access to less legal help overall than individuals in these comparison countries. First, we see that rates of self-representation in settings where there is little choice about being in court are significantly lower in other countries than they are in the United States. A 2004 study of family law cases in the United Kingdom, for example, found that there was at least one self-represented litigant in 70% of adoption cases, 19% of cases involving financial matters such as child support and property orders, 61% of divorce cases, 33% of Children Act cases, and 28% of domestic cases involving restraining orders. In the Australian Family Court, 17% of finalized cases and 27% of trials had at least one self-represented litigant. A study in the Canadian province of British Columbia found that 11.5-24.6% of litigants were self-represented in family matters. A New Zealand study from 2006 to 2007 found that at least one self-represented litigant was present in 38% of cases. Although some of these numbers are high, they are still significantly below the percentages – some topping 95% – reported in comparable American family law cases.

Finally, that Americans navigate the legal world with less legal help than in comparable countries is suggested by the data in Table 2.4 about help from legal providers other than lawyers. Looking at the American, English/Welsh and Scottish studies from the 1990s – with relatively high and comparable lawyer rates – we see that people in the United States appear significantly less likely to get legal help from non-lawyer providers. The same is true if we compare the average from the U.S. state studies – where the “contact with lawyer” number includes other legal providers – and the other country studies conducted between 2000 and 2010. These other countries demonstrate significantly higher rates at which people seek out those who can provide legal help. To understand the numbers in Table 2.4, however, requires a better understanding of the scope of legal resources available to individuals in different countries. We turn to this now.

Regulation of Legal Resources

Legal resources available to ordinary persons include lawyers and other providers of legal advice, the court system, and legal aid. The scope of legal resources in the United States is relatively narrow; the World Justice Report ranks the United States below the Netherlands, Germany, Sweden, the United Kingdom, Australia, Canada, and France on access to civil justice. Currently, all U.S. states permit only licensed lawyers to practice law. The market for legal services is regulated by state bar associations, which impose qualitative restrictions on who may practice law and what the “practice of law” includes. State definitions of the “practice of law” generally include the provision of almost any legal service or advice, with limited exceptions in some consumer-service areas. An ABA task force defined the “practice of law” as “the application of legal principles and judgment to the circumstances or objectives of another person or entity.” This definition suggests that the provision of all legal services in the United States is limited to licensed attorneys. Moreover, ethical rules in all states except the District of Columbia (which has modest exceptions) prohibit lawyers from providing legal services in organizations that are to any extent owned, managed, or financed by non-lawyers; lawyers are also prohibited from entering into contractual arrangements with non-lawyers in any setting that can be interpreted to mean that the lawyer is splitting a fee with a non-lawyer. Lawyers must provide services directly to clients; they cannot be employed to do legal work for the

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75 Richard Moorhead & Mark Selton, Litigants in Person: Unrepresented Litigants in First Instance Proceedings at 7, 31, Table 9 (2015). We categorize as “self-represented” those unrepresented litigants who were fully or partially active in the case. This excludes unrepresented parties who do not participate at all; this category is labeled “default.”
76 The Family Court of Australia, Annual Report 2009-10. A 2002 study found that 31% of litigants in contested cases at first instance were self-represented and 18% in appeal cases had been self-represented at some stage. E. Richardson et al., Self-Represented Litigants: Literature Review, Australian Centre for Court and Justice System Innovation, at 35 (citing Rosemary Hunter et al., The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia (Research Report) Law and Justice Foundation (August 2002)).
public by organizations (such as consumer associations) or corporations. These restrictions prohibit lawyers from contracting with document or question-and-answer web platforms or other service delivery mechanisms, such as retail stores or banks, for the provision of legal help.

Canada, Australia, and France also have relatively restrictive systems. Like the United States, these countries prohibit anyone other than a bar-licensed lawyer from providing legal services, which include giving advice, drafting contracts, or assisting with the completion of documents. Anyone with a legal problem in these three countries is limited to the choice of finding and then paying for a private attorney, although Australia was the first jurisdiction in the world to permit non-lawyers to own legal practices.

The legal systems in many other countries are much more open, providing a broader range of sources for legal assistance. Finland, which has been characterized as the most open legal system, does not restrict who can provide legal advice or represent others in court. Sweden maintains a comparably open system. Slightly more restrictive, but still quite open legal systems include the United Kingdom and the Netherlands, both of which reserve little other than representation in courts to licensed lawyers; there are no restrictions on who may provide legal advice. The United Kingdom permits non-lawyers to provide legal advice and licenses a variety of competing professional groups (including barristers, solicitors, legal executives, and licensed conveyancers) to perform most legal tasks. The Netherlands also has multiple legal providers, including non-lawyer legal professionals, legal insurers who provide legal assistance through staff lawyers or paralegals, social workers who have additional training in legal matters and are employed by larger cities and towns to provide advice to constituents, government networks of legal advisors operating as a legal “help desk” through offices, websites, chat systems, telephone and email advice, providing legal information, referrals to lawyers and up to 30 minutes of individualized advice; and student-staffed legal clinics operated independently of law schools but supervised by lawyers. The United Kingdom also permits legal services to be provided through non-lawyer-owned organizations, including both for-profit and non-profit corporate entities, and does not place restrictions on what in the United States is called fee-sharing. One consequence of the more open regulatory regime is that there are increasingly robust online services available to provide one-on-one legal advice or assistance with legal matters such as filing for divorce or seeking a change in spousal or child support orders. In Germany, lawyers do not have a monopoly on legal representation; numerous persons and entities can represent clients in civil cases. In Hungary, lawyers do not have a monopoly on legal representation, even before a county court in civil matters, but only lawyers may represent clients in civil cases before appeals courts and the Supreme Court. In Poland, lawyers only have a monopoly on representation of criminal defendants; in civil cases, family members, joint participants, associations, or trade unions may represent clients in court.

There are also differences in the types of financial assistance available to ordinary individuals seeking legal services. Most countries have some form of legal aid, usually with income cutoffs to determine eligibility. Some countries provide loans or insurance for legal expenses. For instance, Germany provides loans to low-income individuals for legal aid services. While the loans are required to be repaid if the borrower is financially able to do so, in practice loans are repaid only 15% of the time. Sweden’s legal system offers legal expense insurance instead of legal aid and 97% of residents have add-on legal expense insurance. Seventy-five percent of Finns have a legal expense insurance policy; Finland provides legal aid in addition. 40% of Dutch households have legal insurance, at a cost of approximately $250, which provides access to staff lawyers or paralegals (although often excludes family and criminal matters.)

This comparison adds to our understanding of the legal needs surveys discussed in the previous section. In reporting the data on contact with legal providers in Table 2.4, we distinguished between lawyers and others authorized to provide legal assistance. In the United States, there are no other entities besides lawyers authorized to provide legal assistance; this category in the 1993 ABA study

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85 There are some narrow exceptions: lawyers working for non-profit organizations can assist people with immigration matters pro bono; unions and political associations such as the NAACP are protected by the First Amendment, and may provide staff attorneys to assist their members; in some states (e.g., Texas), insurers may use staff attorneys to defend an insured under a policy that promises to pay legal costs of defense when there is no conflict of interest with the insurer. For a discussion, see Gillian K. Hadfield, The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law, 38 INT’L REV. OF LAW AND ECON. 43 (2014).
86 See id.
88 SFO Economic Research, Regulation of the Legal Profession and Access to Law, at 61, t.3.8.
90 Id.
largely refers to contact with courts. But in countries with much less restrictive systems such as the Netherlands and the United Kingdom, any formal advisor is potentially a source of legal advice; we noted in Table 2.4 that there really is no category of formal advisors who are not authorized to provide legal help. These non-lawyer sources of legal assistance play a substantial role in raising the rates at which citizens in these countries enjoy some legal help in dealing with legal problems above those we see in the United States despite the fact that rates of assistance from a lawyer do not appear to differ.

The apparently greater access to diverse sources of legal help in the United Kingdom and the Netherlands may also provide insight into the rates at which people lump their problems rather than try to deal with them. Table 2.4 indicates that the lowest rates of “no action” are found in the Netherlands and the countries of the United Kingdom. In these countries, people with legal problems are not faced with the stark choice between locating an affordable lawyer, doing nothing, or going it alone. They can also turn to the volunteer-staffed Community Advice Bureau, government networks of legal help desks, online services, insurers, banks, grocery stores, unions, consumer organizations, and more. It seems quite possible that this range of options makes a strategy for action both more visible and more accessible, woven more securely into everyday settings and forms of interaction.

Also on this line of reasoning, what is currently reported as self-help – acting on one’s own or with help only from friends and family and not a formal advisor – may also be indicative of a more generous legal resource landscape. The high rate of self-help in the 2010 England and Wales survey is particularly intriguing here. On the one hand, it may indicate a failure of the legal environment relative to 1997 – and certainly access to legal aid during this period has been significantly cut back. It may, as the researchers suggest, reflect only the fact that the 2010 survey asked about all problems, not only those that were difficult to solve – potentially sweeping in a larger number of problems that were in fact amenable to self-help (although this seems inadequate to explain the 25-point increase in self-help). But the increase in self-help may also reflect the changing landscape in the United Kingdom, with more resources available for self-helpers. Many of these services may not have been reported as consultation with an advisor; and the survey design does not appear to solicit information about whether people used, for example, an online or retail service for help answering questions about legal rights and procedures, filing for a “d-i-y” (“do-it-yourself”) divorce, preparing a will, or navigating probate.

The question we want to raise then is this: are the apparently higher rates at which we see Americans lumping their problems in the ABA and state surveys a consequence of the more restrictive scope of legal help available to them? Or are they just evidence that although Americans may be facing on average two or more justiciable problems in a year, they simply choose not to do anything about them, despite having reasonable options to respond?

We need to be cautious here because simple differences in rates alone are not enough to support an inference of something more fundamentally different in these legal settings given the differences in the survey and reporting methods. The surveys from England, Wales, and Scotland, which report the lowest rates of “no action,” exclude from the denominator cases in which the respondent says he or she took no action because the problem wasn’t important enough. The researchers take care to document in those reports, the impact of what they call the “triviality threshold” is very small. Nonetheless, given the absence of careful cross-national studies, it is impossible to say whether or not there is a causal relationship between the legal resource landscape and the rates at which people take no action on their problems or deal with them on their own is correct. Clearly, the data suggest that the rate at which Americans lump their problems cannot easily be written off to triviality or choice. Instead the data should be interpreted as a potentially important indicator of the panacy of options available for resolving legal issues.

CONCLUSION

American society is often seen as emblematic of the rule of law, and its adversarial legalism makes it a particularly dense legal environment. But the evidence presented above about Americans’ experiences with the legal system and the availability of legal resources paints a different picture than that envisioned by a highly law-based society. The evidence is suggestive only. The data that we have reviewed do not control 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.

The 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 United States. 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.

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95 Genn, Paths to Justice, supra note 17, at 37; Hazel Genn & Alan Paterson, Paths to Justice Scotland 50 (2001).

96 Notably, the survey methodology in England & Wales was changed with the 2010 survey, eliminating the triviality threshold. Moreover, the survey questions in 2010 only asked about “problems” and not, as in the original Genn approach used in 1997, problems that were “difficult to solve.” Here we do see an increase in the no action rate in England & Wales – from 5% to 10% – between 1997 and 2010, but not a major leap upwards.

What accounts for the significantly lower level of legal resources — public expenditure, legal aid, judges, and (for Germany and the United Kingdom) lawyers — available at the macro level in the United States as compared to other advanced market democracies? For the more than 50% decline over the past fifteen years in the total effective number of hours of legal services per household per problem? For the more than 50% drop in the use of lawyers’ services by the poor in addressing their problems in the decade since the 1993 ABA study? The lack of systematic data makes causal analysis difficult and speculative. Clear are the need for substantial 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 we 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, we 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 less than 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 twenty-five minutes per U.S. person a year, or about thirty minutes per dispute-related (potentially litigation-related) problem per household using the average number of legal problems reported in the state legal needs surveys.105 This does not even begin to address the realistic demands that ordinary households have for ante assistance with navigating the law-thick world in which they live, some of which could reduce the need for 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 just one extra hour of legal aid on each dispute-related problem per household would be on the order of $64 billion annually at a market rate of $265 per hour.104 Even if we thought we could find enough lawyers willing to supply that help at $150 an hour, this level of assistance would entail a more than ten-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 United States. The United States 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 way of structuring courts and delivering legal services 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. But the United Kingdom is a powerful counterexample to the hypothesis that we are seeing a difference between common law and civil code systems. The United Kingdom 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 United Kingdom follows the common law practice of much greater reliance on the adversarial resources of parties to structure litigation. What explains this?

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 when the data from the Netherlands, which has a comparably open system allowing many non-lawyer service providers, is viewed alongside that of the United Kingdom. The striking difference in the rate at which people do nothing in response to legal difficulties between the United States (25% or higher105) and the United Kingdom (10%) and the Netherlands (6%) 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.106

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105 Twenty-nine percent is the figure from the ABA study; the state legal needs surveys report rates ranging from 21% to 35%.
David Luban and Barlow Christensen. 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.

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. We hope this chapter helps paint a clearer picture of the legal needs of and legal resources available to ordinary people. With a better grasp on the dimensions of the problem, we hope it can be more readily tackled.

3

The Need for a National Civil Justice Survey of Incidence and Claiming Behavior

Theodore Eisenberg

This chapter by the late distinguished Cornell Law professor proposes the development of a national civil justice survey to improve our base of knowledge of civil justice needs. Using a large data sample from households across the country, this survey would estimate the incidence of civil legal problems that people face, and document how they address them, if they do at all. It would gather demographic data about the respondents including where they live and their age, gender, race, and income level. The survey data would offer a comprehensive tool for understanding what civil legal needs exist and how they might be addressed.

Civil justice issues play a prominent role in society. Family law issues such as divorce, child custody, consumer victimization issues raised by questionable trade practices, and tort issues raised by surprisingly high estimated rates of medical malpractice, questionable prescription drug practices, and other behaviors are part

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3 See, e.g., Chunlin Zhan & Marlene R. Miller, Excess Length of Stay, Charges, and Mortality Attributable to Medical Injuries During Hospitalization, 290 JAMA 1868 (2003).

4 See, e.g., Gregory D. Cuffman et al., Expression of Concern: Bombardier et al., "Comparison of Upper Gastrointestinal Toxicity of Rofecoxib and Naproxen in Patients with Rheumatoid Arthritis," N Engl J Med 2000; 343:1320-1328, 353 New. Engl. J. Med. 2813, 2813 (2005) ("It now appears ... from a memorandum dated July 5, 2000, that was obtained by subpoena in the Vioxx litigation and made available to the New England Journal of Medicine, that at least two of the authors knew about the three additional myocardial infarctions at least two weeks before the authors submitted the first of two revisions and 42 months before publication of the article"); see also Theodore Eisenberg & Martin T. Wells, Statins and Adverse Cardiovascular Events in Moderate Risk Females: A Statistical and Legal Analysis with Implications for FDA Preemption Claims, 17 J. EMPIRICAL LEGAL STUD. 507 (2008) (questioning the marketing of the world's best-selling prescription drug); Editorial, Cholesterol Drug Bombs, N.Y. Times, Jan. 16, 2008, at A22 ("[I]t was ... very disturbing to learn this week that a heavily promoted cholesterol-lowering drug had flunked a clinical trial of its effectiveness in reducing fatty deposits in arteries. The two companies that reap billions from the drug had been cynically sitting on the results for more than a year").