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Institutional Design for Access to Justice

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Decades of empirical research have confirmed the prevalence of troublesome situations involving civil legal issues in everyday life. Although these problems can be associated with serious financial and social harm, they rarely involve recourse to lawyers or formal legal institutions. Contemporary scholars and practitioners increasingly integrate this reality into the definition of access to justice. They understand access to justice to be concerned with equality in the ability of individuals to achieve just resolutions to the problems they experience, regardless of whether they pursue formal legal action. To achieve this goal, an emerging international set of best practices calls for access to justice interventions that are proactively targeted to those groups most in need of assistance, linked to other social service providers, aimed at addressing problems early to avoid escalation, and customized to the user's capabilities. In stark opposition to such an outward-facing, multifaceted approach, the civil justice system is structured to respond only to formal legal claims. We have few auxiliary institutions that provide alternative avenues to resolution and several barriers inhibit individuals' ability to address civil legal problems. As a result, access to justice, as contemporarily understood, is largely an orphan issue—a social problem for which no institution bears responsibility. In this Article, I propose an agenda of institutional reforms to better align key social institutions with a contemporary, evidence-based understanding of access to justice. These institutional reforms would enhance individuals' ability to access justice, within or without the courthouse walls.

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INTRODUCTION

At the last lecture of the semester, a 1L contracts professor once offered his students a bit of advice: remember that not everything in life is a legal dispute. In support, he asked his students to imagine an argument between a lawyer and his significant other involving the couple's pet. The lawyer, drawing on his training in doctrine and rhetoric, approaches the disagreement legalistically, framing the dispute in terms of enforceability, breach, and damages. With vigorous advocacy, the lawyer wins the argument . . . and loses the significant other.

By suggesting that not everything in life is best handled through a legal dispute, the professor sought to counter the impulse, common among law students,¹ to view the world through law-colored glasses.² In fact, this legalistic orientation is exactly

1. See, e.g., ALM Staff, *'I Started Seeing Torts Everywhere!' Big-Name Attorneys Recall Favorite Law School Classes*, LAW.COM (Aug. 22, 2016, 10:55 AM), <https://www.law.com/sites/almstaff/2016/08/22/i-started-seeing-torts-everywhere-big-name-attorneys-recall-favorite-law-school-classes/> [<https://perma.cc/2WLC-7B8J>] (recounting one lawyer's recollection that he "started seeing torts everywhere!" during his 1L year).

2. This might also be characterized as the "legal gaze." See MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON* 171–73 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

what legal education is designed to accomplish. The lawyers' role is to determine how law can be brought to bear in a given situation.³ In training their students how to “think like a lawyer,” law schools teach them to spot legal issues amongst the wreckage of unfortunate events⁴ and turn them into legal claims.⁵ The law of the hammer predicts that experts come to understand problems in ways that fit their expertise,⁶ and lawyers are no exception.⁷

This law-centric orientation is strikingly different from that of most Americans, despite popular claims about their litigiousness.⁸ Most individuals never even identify the civil legal problems they experience as “legal.”⁹ Only a tiny minority will ever seek legal advice in response to a problem, and most are more likely to do nothing than to file a lawsuit.¹⁰ Decades of empirical scholarship have confirmed that despite the prevalence of civil legal problems in everyday life, there is remarkably little recourse to formal law.¹¹

A burgeoning movement among scholars and practitioners seeks to incorporate this empirical reality into our understanding of access to justice. While

3. See MODEL RULES OF PRO. CONDUCT pmb. para. 2 (AM. BAR ASS'N 1983) (describing the various roles that lawyers play—advisor, advocate, and negotiator—all of which draw on legal knowledge, such as to “provide[] a client with an informed understanding of the client’s legal rights and obligations,” “zealously assert[] the client’s position under the rules of the adversary system,” and “examin[e] a client’s legal affairs”).

4. See Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 495 (2007) (noting, in describing how law students are taught to understand events in legalistic ways, that in presenting cases, law students “typically start by focusing on the content of the story,” but “[f]irst-year law professors insistently refocus the telling of these stories on the sources of authority that give them power within a legal framework”).

5. See Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 608 (1979) (“Laws and rules do not deal with individuals but with classes of empirical situations. One of the functions of lawyers is to determine the nature of the empirical situations presented by an individual case. . . . The successful invocation of [legal] remedies depends on the lawyer’s ability to characterize ‘the facts’ of the case in appropriate and equally standardized ways.”).

6. ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE* 28–29 (Transaction Publishers 1998) (1964) (“I call it *the law of the instrument* . . . : Give a small boy a hammer, and he will find that everything he encounters needs pounding. It comes as no particular surprise to discover that a scientist formulates problems in a way which requires for their solution just those techniques in which he himself is especially skilled. . . . The price of training is always a certain ‘trained incapacity’: the more we know how to do something, the harder it is to learn to do it differently . . .”).

7. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 LAW & SOC’Y REV. 631, 645 (1980) (“Lawyers . . . help people understand their grievances and what they can do about them. In rendering this service, they . . . define the needs of the consumer of professional services. Generally, this leads to a definition that calls for the professional to provide such services.” (citations omitted)).

8. DAVID M. ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON’T SUE* 3 (2016) (noting that “specious claims of a litigation explosion have been made so often that they have rooted themselves in the national psyche”).

9. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448 (2016).

10. See *infra* Section I.B.

11. *Infra* Section I.B.

earlier conceptualizations of access to justice focused on *access*—to lawyers, legal expertise, and legal institutions¹²—the emerging approach is centered instead on *justice*. With the goal of equalizing individuals' ability to achieve just resolutions to civil legal problems regardless of whether lawyers or courts are involved, it pragmatically seeks to acknowledge individuals' disinclination to turn to law while nevertheless promoting their ability to achieve justice.¹³

Realizing this objective requires expanding the access to justice toolkit. An international set of evidence-based best practices suggests that access to justice interventions be proactively targeted to those groups most in need of assistance, linked to other social service providers, aimed at addressing problems early to avoid escalation, and customized to the user's capabilities.¹⁴ By enhancing individuals' ability to resolve civil legal problems, such interventions could promote equality in their ability to thrive in society; without successful interventions, inequalities in access to justice are likely to continue to reproduce existing social and economic inequalities and perpetuate cycles of poverty.

Unfortunately, our institutional infrastructure is poorly suited to deliver these types of interventions. Responsibility for access to justice is primarily assigned to the civil justice system, which is a reactive institution limited to engaging with the "cases and controversies" before it.¹⁵ Thus, while it may work to increase access to legal representation, offer alternative means of resolving disputes, or provide resources for self-representation, it does so only in the context of the tiny minority of legal problems that enter its domain. Meanwhile, the vast majority of justiciable problems that people experience remain outside the boundaries of the legal system in an institutionally barren no-man's land. To an extent not often recognized, access to justice is an orphan issue, a social problem for which no institution bears responsibility.¹⁶

This has negative implications not only for individuals' ability to resolve justiciable issues, but also for the emergence of access to justice as a political issue.¹⁷

12. Kristen M. Blankley, *Online Resources and Family Cases: Access to Justice in Implementation of a Plan*, 88 FORDHAM L. REV. 2121, 2121–22 (2020) (“[M]ost scholars and practitioners use the term ‘access to justice’ to include ideas such as access to a court, a lawyer, a mediator or arbitrator, a settlement, or a court decision. Typical ‘access to justice’ initiatives include suggestions surrounding drafting and filing documents, increasing legal aid and other pro bono initiatives (including limited scope representation), providing legal services through technological assistance, and increasing use of paraprofessionals to help people in need of legal assistance accomplish routine tasks, among other things.” (citations omitted)); COMM’N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS’N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 1, 6–7 (2016) (offering recommendations for addressing access to justice, all of which involve access to courts, lawyers, or legal expertise).

13. See *infra* Section I.C.

14. See *infra* Section II.A.

15. See U.S. CONST. art. III, § 2.

16. See *infra* Section II.B.

17. See *infra* Section II.C.

Yet, we are living in a moment of upheaval—wrought by a global pandemic,¹⁸ a divisive populist president,¹⁹ rising economic inequality,²⁰ and a reckoning with systemic racism²¹ and sexism²²—that may produce an opening to reconsider our commitment to equity in access to justice. In this Article, I offer a blueprint for several institutional design reforms that might be implemented to capitalize on such an opportunity.

The Article proceeds as follows. In Part I, I describe the state of access to justice today. Drawing on empirical research, I document the prevalence and unequal distribution of justiciable problems and identify patterns of behaviors taken in response. I then explain how this empirical understanding has transformed our conceptualization of access to justice. In Part II, I describe the mismatch between the types of evidence-based interventions that could operationalize the contemporary conceptualization of access to justice and our near-exclusive reliance on the judicial system, whose mandate largely excludes such efforts. Part III contains my proposals for institutional design for access to justice.

I. ACCESS TO JUSTICE TODAY

We are in an era of renewed dedication to the goal of expanding access to justice domestically²³ and around the world.²⁴ Yet doing so requires that we define

18. *COVID-19: United States Cases by County*, JOHNS HOPKINS UNIV. & MED.: CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/us-map> [<https://perma.cc/5A45-D2PS>] (last visited Nov. 25, 2020).

19. See, e.g., Gregory Eady, Justin S. Vaughn & Brandon Rottinghaus, *Comparing Trump to the Greatest—and the Most Polarizing—Presidents in US History*, BROOKINGS: FIXGOV (Mar. 20, 2018), <https://www.brookings.edu/blog/fixgov/2018/03/20/comparing-trump-to-the-greatest-and-the-most-polarizing-presidents-in-u-s-history/> [<https://perma.cc/73SQ-FQ6H>]; Harry Enten, *Trump’s Unpopularity Isn’t New. It’s His Normal State.*, CNN POLS. (June 28, 2020, 8:49 PM), <https://www.cnn.com/2020/06/28/politics/trump-approval-rating-analysis/index.html> [<https://perma.cc/K27H-3CM3>] (noting that “Trump’s average net approval rating during his presidency has been the worst of any president in the polling era”).

20. See, e.g., Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/> [<https://perma.cc/5VK3-SRBU>] (reporting that “[t]he wealth gap between America’s richest and poorer families more than doubled from 1989 to 2016”).

21. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/ZL99-G56X>] (reporting results of surveys suggesting that “about 15 million to 26 million people” in the United States have participated in Black Lives Matter protests, which would make the protests “the largest movement in the country’s history”).

22. See, e.g., Maya Salam, *One Year After #MeToo, Examining a Collective Awakening*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/us/me-too-movement-women.html> [<https://perma.cc/5KZS-8Y8P>] (detailing the progress of the #MeToo movement).

23. See, e.g., Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 101 (2013) (noting that research on access to justice is “in the midst of a renaissance”).

24. Pascoe Pleasence & Nigel J. Balmer, *Justice & the Capability to Function in Society*, 148 DÆDALUS, Winter 2019, at 140, 141 (“Global interest in enabling access to justice has never been

the scope of the issue.²⁵ In this Part, I describe how a growing international body of evidence regarding the prevalence, distribution, and consequences of civil legal problems, as well as the most significant barriers to their resolution, has influenced the evolving definition of access to justice.

A. Justiciable Problems: Prevalence, Distribution, and Consequences

We live in a “law-thick” world²⁶ in which civil legal problems are both prevalent and consequential.²⁷ While this includes situations involving formal civil legal action, these represent only a tiny fraction—the tip of the iceberg—of the civil legal problems that individuals experience.²⁸

Survey research employing the analytic concept of *justiciable* events or problems to identify situations that raise nontrivial civil legal issues or have civil legal consequences, regardless of whether they are perceived as “legal” by those who experience them,²⁹ finds a much greater incidence of civil legal problems.³⁰ As many as half of all American households are estimated to be experiencing at least one justiciable problem at any given time,³¹ and many individuals report experiencing

greater.”); G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, at Goal 16.3 (Oct. 21, 2015), https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E [<https://perma.cc/Q32Y-CBVF>] (adopting a goal to “[p]romote the rule of law at the national and international levels and ensure equal access to justice for all”).

25. Rebecca Sandefur, *Access to What?*, 148 *DÆDALUS*, Winter 2019, at 49, 49–50 [hereinafter Sandefur, *Access to What?*] (noting that the appropriate remedy to the problem of inequalities in access to justice depends on our understanding of the problem).

26. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 133 (2010).

27. See OECD & OPEN SOC’Y FOUNDS., *LEGAL NEEDS SURVEYS AND ACCESS TO JUSTICE* (2019), <https://www.oecd-ilibrary.org/docserver/g2g9a36c-en.pdf?expires=1610948418&id=id&accname=ocid177578&checksum=936152EED32DA271238444554759DD11> [<https://perma.cc/A3ZZ-NV93>]; PASCOE PLEASANCE, NIGEL J. BALMER & REBECCA L. SANDEFUR, *PATHS TO JUSTICE: A PAST, PRESENT AND FUTURE ROADMAP* (2013).

28. Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 *S.C. L. REV.* 295, 299 (2016); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC’Y REV.* 525, 546 (1980) (noting the low rate of litigation relative to the number of grievances); Felstiner et al., *supra* note 7, at 636.

29. HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 12 (1999) (defining a “justiciable event”).

30. OECD & OPEN SOC’Y FOUNDS., *supra* note 27, at 33–34; PLEASANCE ET AL., *supra* note 27, at 27; GENN, *supra* note 29, at 23; HAZEL GENN & ALAN PATERSON, *PATHS TO JUSTICE SCOTLAND: WHAT PEOPLE IN SCOTLAND DO AND THINK ABOUT GOING TO LAW* 34 (2001); PASCOE PLEASANCE, NIGEL BALMER, ASH PATEL, ANDREW CLEARY, TOM HUSKINSON & TOBY COTTON, *CIVIL JUSTICE IN ENGLAND AND WALES* 8 (2011); NIGEL BALMER, *ENGLISH AND WELSH CIVIL AND SOCIAL JUSTICE PANEL SURVEY: WAVE 2*, at 9 (2013); CHRISTINE COUMARELOS, DEBORAH MACCOURT, JULIE PEOPLE, HUGH M. McDONALD, ZHIGANG WEI, REINY IRIANA & STEPHANIE RAMSEY, *LEGAL AUSTRALIA-WIDE SURVEY: LEGAL NEED IN VICTORIA* 57 (2012); TREVOR C.W. FARROW, AB CURRIE, NICOLE AYLWIN, LES JACOBS, DAVID NORTHROP & LISA MOORE, *EVERYDAY LEGAL PROBLEMS AND THE COST OF JUSTICE IN CANADA: OVERVIEW REPORT* 6 (2016).

31. Sandefur, *supra* note 9, at 445 (2016) (noting that “conservative estimates . . . suggest as many as half of American households are experiencing at least one significant civil justice situation at

multiple problems within a given period.³² These problems involve fundamental needs including housing, employment, finances, and intimate relationships.³³

Justiciable problems are prevalent across all sectors of the population, but they are more frequent among African Americans and Latinx individuals and among low-income individuals.³⁴ In addition, the types and number of justiciable problems that individuals experience are patterned by social and economic status.³⁵ Clusters of justiciable problems often co-occur, arising from similar situations or sociodemographic characteristics.³⁶

These problems are associated not only with negative legal and financial consequences, but also physical, social, and emotional harm.³⁷ The outcomes achieved vary, with the majority of justiciable problems going unresolved.³⁸ While some individuals are satisfied with their resolutions, at least one study found that less than half of respondents were able to achieve their main objectives in responding to a justiciable problem they experienced.³⁹

B. Barriers to Justice

Individuals' behavior in response to justiciable problems varies.⁴⁰ Despite potentially severe consequences, few individuals seek legal assistance to address

any given time"); CONSORTIUM ON LEGAL SERVS. & THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 9 (1994) (reporting that about half of all households surveyed in a national survey of legal needs had experienced at least one "situation that raised a legal issue" during the focal period). Earlier surveys using different question formulations also offer evidence of the prevalence of civil legal problems. *See, e.g.*, BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 100 (1977).

32. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 7 (2014) [hereinafter SANDEFUR, CNSS] (reporting that among those respondents to a survey of residents of a mid-size Midwestern city who had experienced at least one justiciable problem within the study's reference period, the average number of problems experienced was 3.3); CONSORTIUM ON LEGAL SERVS. & THE PUB., *supra* note 31, at 9.

33. SANDEFUR, CNSS, *supra* note 32, at 7.

34. *Id.* at 8–9.

35. PASCOE PLEASANCE, NIGEL BALMER & ALEXY BUCK, CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE 18–19 (2d ed. 2006).

36. Pascoe Pleasance, Nigel J. Balmer, Alexy Buck, Aoife O'Grady & Hazel Genn, *Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators*, 1 J. EMPIRICAL LEGAL STUDS. 301, 314–19 (2004) (identifying clusters of justiciable problems that co-occur and are more prevalent among certain socio-demographic groups); GENN, *supra* note 29, at 31–36; OECD & OPEN SOC'Y FOUNDS., *supra* note 27, at 32–33.

37. SANDEFUR, CNSS, *supra* note 32, at 10.

38. GENN, *supra* note 29, at 147 fig.5.1.

39. *Id.* at 196.

40. OECD & OPEN SOC'Y FOUNDS., *supra* note 27, at 33–34; Miller & Sarat, *supra* note 28, at 548, 552, 555; Felstiner et al., *supra* note 7, at 639–45; Herbert M. Kritzer, W.A. Bogart & Neil Vidmar, *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, 522 (1991); Leon Mayhew & Albert J. Reiss, Jr., *The Social Organization of Legal Contacts*, 34 AM. SOCIO. REV. 309, 310 (1969).

justiciable problems and even fewer take formal legal action.⁴¹ In contrast, almost half of individuals attempt to address problems on their own.⁴² Those who seek help typically do so from friends or family or from a nonlawyer advisor.⁴³ Another common but troubling response is to “lump it”⁴⁴ and do nothing.⁴⁵

Several factors help to explain the variation in individuals’ responses. Problem severity⁴⁶ and substance,⁴⁷ for example, are key predictors of individuals’ responsive behavior. In addition, the ways in which individuals perceive and characterize the problems they experience help to explain their behavior in response.⁴⁸ Individuals are much more likely to characterize their problems as “bad luck” or “part of God’s plan” than they are to see them as “legal,” and are much less likely to view lawyers as an appropriate approach to addressing “non-legal” problems.⁴⁹

An additional factor⁵⁰ that helps to explain observed variation in behavior is individuals’ capacity to take responsive action.⁵¹ Deficits in legal capability may be particularly important in understanding why individuals choose not to respond to justiciable problems.⁵²

41. SANDEFUR, CNSS, *supra* note 32, at 12; Miller & Sarat, *supra* note 28, at 544; CONSORTIUM ON LEGAL SERVS. & THE PUB., *supra* note 31, at 17–19.

42. SANDEFUR, CNSS, *supra* note 32, at 12.

43. *Id.*

44. William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC’Y REV. 63, 81 (1974) (defining “lumping it” as a “special form of avoidance” characterized by “ignoring the dispute, by declining to take any or much action in response”).

45. SANDEFUR, CNSS, *supra* note 32, at 12 (reporting that sixteen percent of respondents to a survey of residents of a mid-sized Midwestern city who had experienced a justiciable problem said they did nothing to respond to the problem); Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 116 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007).

46. Pascoe Pleasence, Nigel J. Balmer & Stian Reimers, *What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes*, 1 ONATI SOCIO-LEGAL SERIES, no. 6, 2011, at 1, 13 tbl.3; OECD & OPEN SOC’Y FOUNDS., *supra* note 27, at 34.

47. SANDEFUR, CNSS, *supra* note 32, at 11; GENN, *supra* note 29, at 141 (finding that “problem type tends to swamp other considerations” in predicting whether individuals seek advice, the type of advice they seek, and the amount they are willing to pay); Herbert M. Kritzer, *To Lawyer or Not to Lawyer, Is that the Question?*, 5 J. EMPIRICAL LEGAL STUDS. 875, 900 (2008) (finding significant variation in lawyer-use by problem type); Pleasence et al., *supra* note 46.

48. *See, e.g.*, SANDEFUR, CNSS, *supra* note 32, at 14; OECD & OPEN SOC’Y FOUNDS., *supra* note 27, at 33–34.

49. SANDEFUR, CNSS, *supra* note 32, at 14.

50. Arguably, legal capacity incorporates some factors listed separately here. *See* OECD & OPEN SOC’Y FOUNDS., *supra* note 27, at 34 (noting that “the majority” of a list of factors predicting behavior “are aspects of legal capability”).

51. Pleasence & Balmer, *supra* note 24, at 141 (“Legal capability is central to opportunities and choices about how to handle problems.”).

52. HUGH M. McDONALD & JULIE PEOPLE, LEGAL CAPABILITY AND INACTION FOR LEGAL PROBLEMS: KNOWLEDGE, STRESS AND COST (Law & Just. Found. of N.S.W., Updating Just. Ser. No. 41, 2014), [http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_41_Legal_capability_and_inaction_for_legal_problems_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_41_Legal_capability_and_inaction_for_legal_problems_FINAL.pdf) [https://perma.cc/VA48-WL5Z] (noting that among a nationally representative sample of Australians, common explanations for inaction in response to a legal problem were that the individual “didn’t know what to do,” thought it “would be too stressful,” and thought it “would cost too much”).

These various factors are interrelated⁵³ and overlaid with sociodemographic variation.⁵⁴ This makes the question of why individuals choose to respond to justiciable problems in the ways that they do complex and challenging to answer. However, what is clear is that oversimplifications—such as the idea that the cost of legal services is the singular barrier to invoking law in response to civil legal problems—are inconsistent with the empirical evidence.⁵⁵

C. Defining Access to Justice

This emerging empirical understanding of the role of civil law in everyday life and individuals' disinclination to respond through legal action has implications for our understanding of access to justice. At its narrowest, access to justice has been equated with access to legal counsel in civil litigation. Driven by the fact that legal representation is associated with more favorable outcomes⁵⁶ but a tremendous number of Americans involved in civil actions are self-represented,⁵⁷ this approach is embodied by the movement for a right to government-provided legal representation for indigent litigants,⁵⁸ a so-called civil *Gideon*.⁵⁹ While proponents of the right to counsel may recognize that not all situations require the services of a lawyer, the movement prioritizes access to legal expertise over other means of achieving satisfactory outcomes.⁶⁰

Empirical work on the incidence of “legal needs” fosters a more expansive definition of access to justice by focusing on the occurrence of justiciable problems,

53. See, e.g., Pleasence et al., *supra* note 46.

54. See OECD & OPEN SOCIETY FOUNDATIONS, *supra* note 27, at 31–32; Pleasence et al., *supra* note 46.

55. Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 721–22 (2015) (recounting, and rejecting, the two common “money story” explanations for inequalities in access to justice).

56. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 39–40 (2010); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 51–52 (2010); Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOCIO. REV. 909, 910 (2015) [hereinafter Sandefur, *Elements*].

57. NAT'L CTR. FOR STATE CTS., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/YU6G-6JA7>]; Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Court*, 45 LAW & SOC. INQUIRY 567, 574 (2020) (reporting that “[b]etween 1999 and 2018, over 1,517,000 federal district court cases, or 28 percent of all cases filed, involved at least one pro se party”).

58. See, e.g., Tonya L. Brito, *The Right to Civil Counsel*, 148 DÆDALUS, Winter 2019, at 56, 57.

59. The name refers to *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the right to counsel is a constitutionally protected element of due process in criminal cases).

60. See Tonya L. Brito, David J. Pate Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 225 (2016) (noting that “[w]hile advocates for Civil Gideon do not claim that an attorney is essential in every case involving an unrepresented litigant, they place greater emphasis on securing a right to civil counsel than on increased resources and innovation for self-representation”).

regardless of the involvement of legal actors or institutions.⁶¹ However, the expansiveness of this definition is circumscribed by the classification of “unmet legal needs” as all justiciable problems that do not involve legal assistance.⁶² This approach implicitly assumes that justiciable problems cannot be satisfactorily resolved without recourse to legal counsel or formal legal institutions, retaining a law-centric view of access to justice.⁶³

Foundational socio-legal scholarship on dispute processing is similarly centered on civil litigation as the pinnacle in resolving grievances.⁶⁴ To be fair, the goal of this scholarship is to understand the genesis of legal claims,⁶⁵ making its focus on that terminus a logical choice. However, the assumed procedural linearity and the lack of curiosity about alternate pathways reinforce a court-centric understanding of justiciable problems and a correspondingly narrow understanding of access to justice.⁶⁶

Yet the fact that most Americans who face a justiciable problem do not understand it as a legal problem and are unlikely to use formal law to address it militate against a court- and lawyer-dominated conceptualization of access to justice.⁶⁷ So, too, does our understanding of individuals’ experiences of law in

61. See, e.g., CONSORTIUM ON LEGAL SERVS. & THE PUB., *supra* note 31, at 8 (1994) (“[P]eople sometimes find ways of dealing with circumstances they face without turning to a lawyer, a mediator, or the courts. These circumstances are still considered ‘legal needs’ although there is no implication they must of necessity be brought to the justice system.”).

62. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/3P56-QYKK>] (reporting that “LSC defines the justice gap as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs”).

63. Sandefur, *supra* note 9, at 451 (noting that popular computations of “unmet legal needs” rely on a gross oversimplification and that “a legal need is a justice problem that a person cannot handle correctly or successfully without some kind of legal expertise [and that] [n]ot all justice situations are legal needs in this sense”).

64. Miller & Sarat, *supra* note 28, at 545 (introducing the concept of the dispute pyramid); Felstiner et al., *supra* note 7, at 633–37 (providing an analytic framework to explain the emergence and transformation of events experienced in life into formal civil legal disputes).

65. See, e.g., Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 LAW & SOC’Y REV. 105, 105 (1990) (“[Because] few disputes . . . become legally framed and resolved, the lawsuits in medical malpractice studies represent only the tip of the iceberg. In this research we investigate the shape of the iceberg and analyze what characterizes the grievances that make their way to the tip visible on the legal docket.”).

66. Not all work on dispute processing can be characterized in this way. See, e.g., Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 ANN. REV. L. & SOC. SCI. 105, 106, 108 (2014) (characterizing the dispute pyramid as “an inadequate representation of the broad social processes that resolve justiciable disputes” and proposing the “dispute tree” in its stead); Sally Lloyd-Bostock & Linda Mulcahy, *The Social Psychology of Making and Responding to Hospital Complaints: An Account Model of Complaint Processes*, 16 LAW & POL’Y 123, 133–34 (1994) (focusing on the social dynamics in play in the iterative process of making a complaint).

67. Sandefur, *Access to What?*, *supra* note 25, at 50–51.

everyday life⁶⁸ and their ability to resolve civil legal problems without recourse to formal legal institutions.⁶⁹

Building on these insights, a new iteration in the ongoing evolution of access to justice is emerging.⁷⁰ Encapsulating this shift, Professor Rebecca Sandefur frames access to justice as a problem of inequality, proposing that we will have achieved access to justice when the probability is the same for all groups in the population that “disputes and problems governed by civil law” are resolved in ways that satisfy substantive and procedural legal norms, regardless of the method of resolution.⁷¹ Thus, while advocates for access to justice today continue to be disturbed by inequalities in the experiences and outcomes of unrepresented litigants in civil litigation,⁷² the field is concerned with the much broader challenge of helping the vast majority of individuals—whose problems never make their way to a lawyer or legal forum—access justice.⁷³

The rationality of this conceptualization of access to justice—as being concerned with equality in the outcomes to justiciable problems achieved by individuals—belies its radicality. The novelty of the approach is particularly conspicuous with regard to the set of resolution processes that it encapsulates. The idea that access to justice involves the universe of nontrivial justiciable problems is not novel; the legal needs tradition has long shared this precept. However, unlike

68. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 45 (1998) (defining legal consciousness).

69. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

70. Earlier generations of scholars also provide examples of calls for renewed, evidence-based understandings of access to justice. See, e.g., Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *BUFF. L. REV.* 181, 182 (1978) (describing the “most recent phase of a long historical struggle—the struggle for ‘access to justice’”). For analyses of previous transitions in the access to justice movement, see David M. Trubek, *Critical Moments in Access to Justice Theory: The Quest for the Empowered Self*, in *ACCESS TO CIVIL JUSTICE* 107 (Allan C. Hutchinson ed., 1990).

71. Sandefur, *Access to What?*, *supra* note 25, at 50–51; see also Rebecca L. Sandefur, *Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 *LOY. L.A. L. REV.* 949, 951 (2009) [hereinafter Sandefur, *Fulcrum Point*] (defining “equal access to justice” as meaning “that different groups in a society . . . have similar chances of obtaining similar resolutions to similar kinds of civil justice problems”). On a more theoretical note, one might ask whether it is possible to achieve access to justice, so defined, without law; if it is legal principles that generate our definition of just processes and outcomes, non-court process may be understood as a form of legal pluralism.

72. See, e.g., Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 *DENV. L. REV.* 469 (2016); Sandefur, *Elements*, *supra* note 56; Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro se Status*, 42 *LAW & SOC. INQUIRY* 1091 (2017).

73. OECD & OPEN SOC'Y FOUNDS., *supra* note 27, at 24 (“[A]ccess to justice is broadly concerned with the ability of people to obtain just resolution of justiciable problems and enforce their rights, in compliance with human rights standards; if necessary, through impartial formal or informal institutions of justice and with appropriate legal support. . . . In functional terms, this does not mean that use of legal services is necessary to ensure access to justice, only that appropriate services are available for those who are unable to achieve otherwise appropriate solutions to justiciable problems.” (citations omitted)).

the legal needs tradition, which directs its attention to court- and lawyer-based interventions, this definition rejects the idea of a one-size-fits-all response. Instead, this approach includes within the access to justice bailiwick a much more diverse array of mechanisms through which individuals may respond to justiciable problems.

In addition, by shifting attention more heavily toward the resolutions achieved by individuals, as opposed to just their ability to access the legal process, this definition adopts a more demanding objective. In doing so, it imposes a greater affirmative duty to engage individuals who lack the capability or inclination to address justiciable problems on their own. This, in turn, necessitates consideration of the many overlapping forms of inequality that push and pull individuals into various approaches and invites greater attention to the links between justiciable and other social problems.

II. AN ORPHAN ISSUE

In this Part, I evaluate the United States' capacity to implement this contemporary conceptualization of access to justice. I begin by identifying the types of interventions that operationalize this approach, drawing on a series of international evidence-based best practices. I then describe how our institutional infrastructure presents a major obstacle to the implementation of these practices. Finally, I consider the implications of this institutional design problem for our political imagination and the possibility of reform.

A. Interventions for Access to Justice

Effective policy interventions for access to justice must incorporate an empirical understanding of individuals' behaviors in response to justiciable problems.⁷⁴ Building on this evidence base, a series of best practices for access to justice programs are emerging, summarized by Australian scholars and practitioners as follows: interventions should be targeted, joined up with other social services, timely, and appropriate to the capabilities of affected individuals.⁷⁵ In the sections that follow, I describe each of these best practices in turn.

74. Pleasence & Balmer, *supra* note 24, at 141 (noting that several decades of empirical research "have made clear that, to be truly effective, access-to-civil-justice policy must be grounded in an understanding of the many options people face when dealing with civil legal problems, of the reality of people's behavior in resolving problems, and of the reasons for underlying patterns of options and behaviors").

75. PASCOE PLEASENCE, CHRISTINE COUMARELOS, SUZIE FORELL & HUGH M. McDONALD, LAW & JUST. FOUND. OF N.S.W., RESHAPING LEGAL ASSISTANCE SERVICES: BUILDING ON THE EVIDENCE BASE 25–29 (2014) [hereinafter PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE], [http://www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/\\$file/Reshaping_legal_assistance_services_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/$file/Reshaping_legal_assistance_services_web.pdf) [<https://perma.cc/4A7P-B92D>]; CHRISTINE COUMARELOS, HUGH M. McDONALD, SUZIE FORELL & ZHIGANG WEI, LAW & JUST. FOUND. OF N.S.W., COLLABORATIVE PLANNING RESOURCE

1. Targeted Outreach and Interventions

Targeted interventions aim to increase the efficiency and efficacy of access to justice initiatives by ensuring that assistance is accessible to those groups that are most in need.⁷⁶ Particular attention is dedicated to reaching those groups that are most disadvantaged vis-à-vis the civil legal system because they are both more likely to experience justiciable problems and less likely to be able to handle them independently.⁷⁷ Targeted strategies are proactive, recognizing that “legal service delivery will fall dramatically short of providing access to justice for all if it relies on servicing only those clients who make it through the lawyer’s ‘front door.’”⁷⁸

Examples of targeted outreach include advertising,⁷⁹ in-person outreach at set or traveling locations, and technology-based engagement such as legal aid hotlines,⁸⁰ Internet chat-based services, or online conferencing.⁸¹ In coordination with these outreach efforts, there is a need for simplified entry points for accessing legal services, to allow both targeted individuals and the general public to access assistance and to streamline referrals from other service providers who serve as “problem noticers.”⁸² Ideally, these gateways should be visible, easily accessible, able to triage clients’ issues, and well connected to a range of more specialized service providers.⁸³

There is substantial consistency over time and space in the characteristics of groups that are likely to benefit from targeted interventions.⁸⁴ However recent crises like the global pandemic,⁸⁵ the Financial Crisis,⁸⁶ and natural disasters⁸⁷ have

– SERVICE PLANNING (2015), [http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/CPR_Service_Planning_Nov2015.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/CPR_Service_Planning_Nov2015.pdf) [<https://perma.cc/92L4-KF9C>].

76. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE*, *supra* note 75, at 31–33.

77. *Id.*

78. *Id.* at 32–33.

79. Sandefur, *supra* note 55, at 734; Elizabeth Chambliss, *Marketing Legal Assistance*, 148 *DÆDALUS*, Winter 2019, at 98, 100.

80. Emergency services have claimed 911, some localities use 311 for non-emergency city services, 411 is information, and some phone companies use 611 to report service issues. Perhaps we should adopt 711 for justice (although that number might leave some users craving a Slurpee).

81. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE*, *supra* note 75, at 37–39.

82. *Id.* at 33–34.

83. *Id.* at 33.

84. OECD & OPEN SOC’Y FOUNDS., *supra* note 27, at 32.

85. *See, e.g.*, THE ABA CORONAVIRUS (COVID-19) TASK FORCE, AM. BAR ASS’N, SUMMARY REPORT: SURVEY REGARDING LEGAL NEEDS ARISING FROM THE COVID-19 PANDEMIC (2020), <https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:4f7c11ac-fc44-428a-88a9-6c1b0d101b80#pageNum=1> [<https://perma.cc/5UCJ-TETD>] (reporting results of survey finding a rise in legal needs regarding unemployment benefits, housing and landlord/tenant issues, issues relating to government benefits, employment, insurance coverage, guardianship, and family law, among others).

86. FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT 402 (2011), <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [<https://perma.cc/2JQY-N8MU>] (describing the dramatic rise in foreclosures during the Financial Crisis).

87. *See, e.g.*, BayLegal, *Legal Services for Individuals and Families Impacted by Northern California Wildfires*, BAY AREA LEGAL AID (Oct. 23, 2017), <https://baylegal.org/northern-california-wildfire/> [<https://perma.cc/BFX6-HQY5>] (advertising assistance for legal issues arising from wildfires, including housing, public benefits, consumer, insurance, employment, and missing documents).

all made it clear that legal needs can evolve over time. Thus, ongoing data collection and monitoring are also important underlying access to justice strategies.

2. *Joined-Up*

Joined-up interventions combine legal and nonlegal service providers⁸⁸ to better identify and address justiciable problems.⁸⁹ For example, partnerships with established local agencies can help to overcome some of the difficulties in engaging hard-to-reach target groups.⁹⁰ These partnerships can vary greatly in their level of integration and form, and optimal arrangements will likely depend on context and funding and other operational considerations.⁹¹

In the United States, medical-legal partnerships are the most established form of joined-up access to justice intervention.⁹² Other potential partnerships include those with libraries and social workers,⁹³ as well as efforts in schools, churches, or other community organizations.⁹⁴ Barbershops and hair salons have also been noted as possible sites for legal outreach efforts, particularly for outreach to the African American community.⁹⁵ The potential for this approach is bolstered by the success of similar partnerships with medical providers.⁹⁶

88. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE*, *supra* note 75, at 70.

89. *Id.* at 70.

90. *Id.* at 47.

91. *Id.* at 70–71.

92. Elizabeth Tobin Tyler, *Medical-Legal Partnership in Primary Care: Moving Upstream in the Clinic*, 13 AM. J. LIFESTYLE MED. 282, 283 (2019), <https://journals.sagepub.com/doi/pdf/10.1177/1559827617698417> [<https://perma.cc/C9DW-R27E>] (noting that medical-legal partnerships are “now rapidly expanding across the country, with programs in nearly 300 health centers and hospitals in 41 states”); *The Response*, NAT’L CTR. FOR MED.-LEGAL P’SHP, <https://medical-legalpartnership.org/response/> [<https://perma.cc/4BEC-DKMQ>] (last visited Jan. 18, 2021) (noting that the organization “has helped cultivate programs . . . at 450 hospitals and health centers across the U.S.”).

93. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE*, *supra* note 75, at 87.

94. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1316 (2016).

95. Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 DÆDALUS, Winter 2019, at 93, 95.

96. Ronald G. Victor, Kathleen Lynch, Ning Li, Ciantel Blyler, Eric Muhammad, Joel Handler, Jeffrey Brettler, Mohamad Rashid, Brent Hsu, Davontae Foxx-Drew, Norma Moy, Anthony E. Reid & Robert M. Elashoff, *A Cluster-Randomized Trial of Blood-Pressure Reduction in Black Barbershops*, 378 NEW ENG. J. MED. 1291, 1291 (2018), <https://www.nejm.org/doi/pdf/10.1056/NEJMoa1717250?articleTools=true> [<https://perma.cc/XTB9-ED79>] (reporting results of a study comparing hypertension outcomes among black male patrons of barbershops that were randomly assigned to either a pharmacist-led intervention (treatment) or a barber-led intervention (control) that found reductions in average systolic blood pressure among participants in both groups, but a statistically-significantly greater reduction among participants in the treatment group).

3. *Timely*

Timely, or early, interventions aim to resolve justiciable problems before they escalate.⁹⁷ Examples of early access to justice interventions range from education, legal capability building, and more general information distribution to supported information provision, advice, and dispute resolution services.⁹⁸ These kinds of interventions have the potential to be an efficient use of legal service resources because they can help to avoid the need for more intensive—and more costly—interventions later.⁹⁹ They can also help to expand the reach of legal services by assisting more people with a more diverse range of legal needs, although with the tradeoff of pulling limited resources away from the most essential legal needs or most disadvantaged populations.¹⁰⁰

This type of approach could help to address the dearth of transactional and advisory legal services for the general public. Professor Gillian Hadfield has highlighted the failures of the legal services market in this area, noting the sharp contrast to the extensive “before-the-fact” advice that corporate clients regularly receive from their lawyers.¹⁰¹ She notes that the absence of such services can set individuals on a trajectory toward legal crises that are the primary focus of many access to justice interventions.¹⁰²

4. *Appropriate*

Finally, access to justice interventions must be appropriate to the needs and abilities of their intended audience.¹⁰³ Interventions will be ineffective if the parties they reach cannot deploy them,¹⁰⁴ a problem that is particularly acute for many common types of self-help interventions.¹⁰⁵ Building on the expansive body of empirical evidence documenting persistent inequalities in individuals’ behavior in

97. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE, *supra* note 75, at 101.

98. *Id.* at 102.

99. *Id.* at 102–03.

100. *Id.* at 103–04.

101. Hadfield, *supra* note 26, at 132 (noting that “for ordinary citizens in the U.S. there is almost no functioning legal system in this ex ante sphere”).

102. *See id.* at 131–32.

103. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE, *supra* note 75, at 122; D. James Greiner, Dalí Jiménez & Lois R. Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1124 (2017).

104. Greiner et al., *supra* note 103, at 1124; Catrina Denvir, *Online and in the Know? Public Legal Education, Young People, and the Internet*, 92–93 COMPUTS. & EDUC. 204, 211 (2016), <https://reader.elsevier.com/reader/sd/pii/S036013151530052X?token=9F0543663CF549DC52F1022D0B6DB1E503AB3FB3DB141228C23CEE3EA6D79AD15E025067E400AB46C274B1734AA57235> [<https://perma.cc/42WL-6WUN>].

105. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE, *supra* note 75, at 122 (noting that “websites, hotlines, public legal education and information, self-help tools and other forms of unbundled legal services” may be “ill-suited and ill-matched to the legal needs and capabilities of some groups”).

response to justiciable problems and their explanations for actions taken, a growing body of research seeks to develop our understanding of legal capability.¹⁰⁶

A multidimensional construct,¹⁰⁷ legal capability seeks to capture the skills, attitudes, and beliefs that affect individuals' ability to resolve justiciable problems.¹⁰⁸ Researchers have developed approaches to measuring several constituent elements of legal capability including legal confidence¹⁰⁹ and attitudes toward the civil legal system.¹¹⁰ Future work is likely to develop additional measures and to deepen our understanding of the role of legal capability.¹¹¹

The importance of developing interventions that are consistent with the legal capability and circumstances of their intended audience is increasingly recognized in the context of technological approaches to increasing access to justice.¹¹² Some of these concerns are specific to that context, such as inequalities in Internet access and digital literacy.¹¹³ However, many are equally applicable to other kinds of access

106. See, e.g., *id.* at 122. A related, but somewhat theoretically distinct, formulation focuses on legal consciousness as a form of cultural capital. Kathryn M. Young & Katie R. Billings, *Legal Consciousness and Cultural Capital*, 54 LAW & SOC'Y REV. 33, 35 (2020) (drawing on a "Bourdieuian framework . . . to think about legal consciousness as a social process and to explain continued inequality within legal systems").

107. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE, *supra* note 75, at 130–33.

108. Pascoe Pleasence & Nigel Balmer, *Development of a General Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies*, 16 J. EMPIRICAL LEGAL STUDS. 143, 144 (2019) (noting that specifications of legal capability have incorporated "knowledge of law, the ability to spot legal issues, awareness of legal services, understanding of and the ability to assess dispute resolution options, planning and management skills, communication skills, confidence and emotional fortitude").

109. *Id.* at 153 (presenting the General Legal Confidence Scale).

110. Pascoe Pleasence & Nigel Balmer, *Measuring the Accessibility and Equality of Civil Justice*, 10 HAGUE J. ON RULE L. 255, 276, 280 (2018) (presenting an "Inaccessibility of Justice Scale" and a "Perceived Inequality of Justice" scale).

111. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE, *supra* note 75, at 122.

112. See, e.g., Rostain, *supra* note 95, at 94 (cautioning against overoptimistic expectations for technological solutions to inequalities in access to justice); CATRINA DENVER, ASSISTED DIGITAL SUPPORT FOR CIVIL JUSTICE SYSTEM USERS: DEMAND, DESIGN, & IMPLEMENTATION (2018), <https://www.judiciary.uk/wp-content/uploads/2018/06/cjc-report-on-assisted-digital-support.pdf> [<https://perma.cc/FZ7R-GBS6>] (offering empirical evidence of the need for greater assistance to enable individuals to use online justice services); Margaret Hagan, *The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services*, 20 VA. J.L. & TECH. 394, 401 (2016); REBECCA L. SANDEFUR, LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES 3 (2019) [hereinafter SANDEFUR, LEGAL TECH], http://www.americanbarfoundation.org/uploads/cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf [<https://perma.cc/QYY9-U7JP>] ("Using many tools requires resources or capabilities that some groups and communities are unlikely to have.")

113. Rostain, *supra* note 95, at 93 (noting limited access to broadband Internet and data caps on cell phone plans that restrict access to online resources); SANDEFUR, LEGAL TECH, *supra* note 112, at 12.

to justice interventions.¹¹⁴ There remains much to be done to integrate these insights into other forms of access to justice outreach.¹¹⁵

Thus, building on a broad base of empirical evidence, scholars and practitioners advocate for the adoption of access to justice interventions that are proactive, customized, and nested within a broader network of social services, undergirded by rigorous evaluation and ongoing data collection. In the next Part, I describe how institutional design severely limits our ability to implement these types of interventions in the United States.

B. Institutional Responsibility for Access to Justice

In some countries, multiple legal and nonlegal formal institutions, along with a broad set of auxiliaries, share overlapping responsibility for addressing justiciable problems.¹¹⁶ In the United States, by contrast, the options are much more limited. As Professor Rebecca Sandefur writes, “If Americans do not go to law, they face relatively few alternative means of remedy.”¹¹⁷ As I will describe, this has profound implications for our ability to act on the emerging understanding of access to justice.

Effective institutional design requires the appropriate allocation of both substantive and functional authority.¹¹⁸ That is, institutions must be vested with responsibility for carrying out the multiple functions necessary to address a given substantive issue. These functions include, among others, funding; research, data collection, and monitoring; data compilation and dissemination; data analysis; planning; standard setting; and implementation.¹¹⁹ The goal is to assign these underlying functions to institutions with substantive jurisdiction and functional capacity in ways that enhance the delivery of high-level objectives.

In the case of access to justice, one primary high-level objective is providing authoritative resolutions to justiciable problems. While there is increasingly a “private legal order” created by organizations to address disputes in alternative dispute processing fora,¹²⁰ public formal institutions of remedy are limited to the civil justice system and administrative agencies.¹²¹

114. Rostain, *supra* note 95, at 94 (noting that many of the limitations of self-help technologies “apply equally to most other technologies created in recent years to bridge the justice divide”).

115. *See, e.g.*, Greiner et al., *supra* note 103, at 1122 (noting that “there has been little analysis of, and no rigorous testing of, self-help materials in the legal context” despite their prominent role among access to justice interventions).

116. Sandefur, *Fulcrum Point*, *supra* note 71, at 957–62.

117. *Id.* at 966.

118. ALEJANDRO E. CAMACHO & ROBERT L. GLICKSMAN, REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL FRAMEWORK 21 (2019). While this work is focused exclusively on the allocation of authority among government entities, the analytic framework can logically be extended to incorporate private entities.

119. *Id.* at 26–28.

120. Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 943, 953 (1999).

121. Sandefur, *Fulcrum Point*, *supra* note 71, at 957–62.

However, it is not only the limited number of institutions that can address justiciable problems that has implications for access to justice, but their substantive and functional jurisdiction. The civil justice system bears responsibility for promoting equity only in those situations in which justiciable problems give rise to formal legal claims; courts are reactive institutions¹²² limited to resolving the cases and controversies that appear before them.¹²³ Similarly, administrative agencies are empowered to formally resolve justiciable problems that fall within their domain,¹²⁴ but do not bear responsibility for inequalities beyond those boundaries.¹²⁵ Thus, while our formal institutions of remedy increasingly include options for alternative forms of dispute resolution and engage in efforts to assist individuals within the adjudicatory process,¹²⁶ their mandates prevent them from addressing the bulk of justiciable problems, which remain outside their reach.

Importantly, this is a problem of institutional design,¹²⁷ not simply resource allocation. For example, even if a massive influx of funding provided high-quality legal representation to every litigant who appeared at every state and federal courthouse or before every administrative agency, it would ignore the vast majority of individuals who never identify their justiciable problems as “legal” and never seek formal adjudication.

Moreover, it is not just that these institutions fail to provide authoritative resolutions to the majority of justiciable problems, they also fail to carry out the other underlying functions that are necessary to address the social problem of inequalities in access to justice. Developing and delivering effective access to justice

122. Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 691 (1983).

123. *See, e.g.*, U.S. CONST. art. III, § 2 (limiting the jurisdiction of the federal courts to particular cases and controversies).

124. *Id.*

125. This is not to suggest that there is not more that administrative agencies could do to promote equality in access to justice. For example, agencies could reduce administrative burdens, including the “learning, psychological, and compliance costs that citizens experience in their interactions with government.” PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22 (2018). These burdens are not inevitable but constructed. *See id.* at 259. Left unaddressed, they can give rise to justiciable problems. *See, e.g.*, SANDEFUR, CNSS, *supra* note 32, at 7 (finding that sixteen percent of respondents in a mid-size Midwestern city reported experiencing at least one situation involving government benefits).

126. *See, e.g.*, AM. BAR ASS’N, ONLINE DISPUTE RESOLUTION IN THE UNITED STATES (2020), <https://www.americanbar.org/content/dam/aba/images/centerforinnovation/odrvisualizationreport.pdf> [<https://web.archive.org/web/20201023103105/https://www.americanbar.org/content/dam/aba/images/centerforinnovation/odrvisualizationreport.pdf>]; REBECCA L. SANDEFUR & AARON J. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 14 (2011) (describing the prevalence of self-help centers in courthouses).

127. To be clear, the focus of my institutional analysis is understanding the extent to which existing institutions are responsible for addressing access to justice as a social issue. This is in contrast to the central focus of the literature on dispute system design, which considers how institutions that are responsible for dispute resolution can be designed to optimize various outcomes. *See, e.g.*, Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

interventions requires data collection and analysis regarding the incidence of justiciable problems, program evaluation to assess the efficacy of interventions, planning to coordinate interventions that span functional or substantive boundaries, and funding to direct resources where they are most needed. While other institutions may help to address some of these gaps,¹²⁸ the current matrix of substantive and functional jurisdiction of institutions leaves many functions essential to enhancing access to justice unaddressed¹²⁹ and no single institution bears responsibility for resolving this or for the issue writ large.

As a result, access to justice as contemporarily understood is largely an orphan issue, a problem for which no institution bears responsibility.

C. Implications of Institutional Design

This lack of institutional responsibility for all necessary aspects of access to justice not only has negative consequences for the resolution of individual justiciable problems, but also follow-on implications for broader structures of inequality and efforts to enact change.¹³⁰ As recent events have tragically illustrated, leadership and accountability are essential in addressing social crises.¹³¹ Without better institutional design, it is unlikely that the problem of inequalities in access to justice will be understood or addressed systemically.¹³² This not only constrains individual services, but also hinders the development of innovations that could expand access to justice.¹³³

It also has negative ramifications for the potential for systemic reform. Politics create policies, but policies also create politics.¹³⁴ As individuals respond to

128. For example, legal information is disseminated on the Internet by a variety of sources beyond just the court system. Denvir, *supra* note 104, at 204 (“The Internet offers a platform for the exchange of information, much of which is freely given by a range of stakeholders, including: charitable organisations and/or government departments who have as their mission to improve access to justice; commercial enterprises who can often raise profile through providing a small amount of content or who can raise revenue by charging to access content; and users themselves who can provide information gathered by way of experience, expertise or interest in a topic.”).

129. See, e.g., SANDEFUR & SMYTH, *supra* note 126, at 22 (“One characteristically American-style aspect of U.S. access to justice is the absence of any central entity that either researches or directs the provision of civil legal assistance.”).

130. See Lincoln Caplan, *The Invisible Justice Problem*, 148 DÆDALUS, Winter 2019, at 19, 28 (noting that access to justice has been “invisible” and calling for its politicization).

131. Michael D. Shear, Noah Weiland, Eric Lipton, Maggie Haberman & David E. Sanger, *Inside Trump’s Failure: The Rush to Abandon Leadership Role on the Virus*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-coronavirus-response-failure-leadership.html?action=click&module=Top%20Stories&pgtype=Homepage> [https://perma.cc/6BDD-LN2T] (characterizing the Trump administration’s approach of divesting itself of responsibility for the coronavirus pandemic as “a catastrophic policy blunder”).

132. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE*, *supra* note 75, at v (noting how structural design factors can limit the ability to develop and implement access to justice services to meet the needs of a particular group or individual).

133. See, e.g., SANDEFUR, *LEGAL TECH*, *supra* note 112.

134. Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595, 596 (1993).

justiciable problems without recourse to formal institutions of remedy, their experiences reinforce the limited role of these institutions in addressing such problems. For example, perceptions of legality are believed to be, in part, a function of the availability of legal services to address the problem.¹³⁵ In this way, institutional failures create a negatively reinforcing loop: because existing social institutions fail to address many justiciable problems, institutions of remedy are not perceived as appropriate mechanisms for addressing such problems. Individuals' political imagination is thus constrained, and the responsibility of our institutions of remedy with regard to access to justice fails to become politicized.¹³⁶

Yet, at the same time, policies and arguments rejected as “off the wall” in one era may be embraced in another,¹³⁷ and the current moment may offer an opportunity for reform. The contours of the 2020 presidential race indicate the appetite—at least among a portion of Americans—for a progressive policy agenda.¹³⁸ The combination of the pandemic, structural racism, economic inequality, and an ongoing reckoning with sexual violence and gender inequality has raised awareness of national failures that may be a “necessary prelude to fixing our country.”¹³⁹ As calls for defunding the police illustrate, shifting public understanding of social issues can generate support for institutional reform.¹⁴⁰ Perhaps it is time to capitalize on this moment in favor of institutional change for access to justice.

135. Pleasence et al., *supra* note 46, at 5.

136. Some have suggested that the opposite situation, in which greater access to assistance in addressing justiciable problems leads to greater use of services, will increase individuals' likelihood of perceiving problems as requiring assistance; that is, that an increase in supply will increase demand even if underlying problem rates remain stable. See Frances Kahn Zemans, *Framework for Analysis of Legal Mobilization: A Decision-Making Model*, 1982 AM. BAR FOUND. RSCH. J. 989, 990 (predicting that “changes in the delivery system will change demand—that is, if legal services are made cheaper and more available, there will be greater demand whatever the ‘need’”).

137. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATL. (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [https://perma.cc/WVF3-63KD]; J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703 (1997).

138. The Ed. Bd., Opinion, *The Democrats' Best Choices for President*, N.Y. TIMES (Jan. 19, 2020), <https://www.nytimes.com/interactive/2020/01/19/opinion/amy-klobuchar-elizabeth-warren-nytimes-endorsement.html> [https://perma.cc/VRR9-5VB7] (“Nearly any of [the Democratic candidates for President] would be the most progressive president in decades on issues like health care, the economy and government’s allocations of resources.”).

139. See, e.g., Nicholas Kristof, Opinion, *We Interrupt This Gloom to Offer . . . Hope*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/opinion/sunday/coronavirus-blm-america-hope.html> [https://perma.cc/BPP4-VZNW].

140. See Giovanni Russonello, *Have Americans Warmed to Calls to ‘Defund the Police’?*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/07/03/us/politics/polling-defund-the-police.html> [https://perma.cc/XGE9-DEST].

III. INSTITUTIONAL DESIGN FOR ACCESS TO JUSTICE

Recognizing that achieving equality in access to justice is a matter of institutional design,¹⁴¹ this Part proposes a series of institutional reforms. This includes amending the mandates of existing institutions—changing their substantive or functional jurisdiction—and establishing new ones to address needs not captured within the current institutional ecosystem. To be clear, my claim is not the originality of these prescriptions, many of which have been espoused by others at various times.¹⁴² Rather, the contribution of this Article is to situate these recommendations within the larger context of our evolving understanding of access to justice and, by joining them together, to propose a more complete policy response.

A. The Office for Access to Justice, 2.0

As described above, enhancing access to justice is a multifaceted endeavor, but many essential elements fall outside the purview of existing institutions. To ensure that all necessary aspects are addressed, there is a need for a central, organizing force with a mandate broad enough to fully encompass the contemporary conceptualization of access to justice. The Office for Access to Justice (ATJ) in the Department of Justice, if reconstituted under a future administration, could serve this role.

Established during the Obama administration, the ATJ's mission was to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status. ATJ staff work[] within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers.¹⁴³

While this court-centric mandate might appear too limiting, further description of the ATJ's actions reveal a more comprehensive approach. To further its mission, ATJ sought to “[a]dvance new statutory, policy, and practice changes,” “[p]romote less lawyer-intensive and court-intensive solutions to legal problems,” and “[e]xpand research on innovative strategies.”¹⁴⁴

This type of institutional support for addressing the issue of access to justice could be transformational. During its short tenure, ATJ staff filed amicus briefs,

141. See *infra* Section II.C.; see also Sandefur, *Fulcrum Point*, *supra* note 71, at 976–77 (“The fulcrum point in equalizing access to justice is institutional design.”).

142. See, e.g., Danielle Root & Maggie Jo Buchanan, 5 *Principles for Civil Justice Reform*, CTR. FOR AM. PROGRESS (Dec. 19, 2019, 9:00 AM), <https://www.americanprogress.org/issues/courts/news/2019/12/19/478875/5-principles-civil-justice-reform/> [<https://perma.cc/6W5N-QZDJ>]; Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79 (2007).

143. *Office for Access to Justice*, U.S. DEP'T JUST. ARCHIVES, <https://www.justice.gov/archives/atj> [<https://perma.cc/AXS9-PW65>] (last visited July 19, 2020).

144. *About the Office*, U.S. DEP'T JUST. ARCHIVES, <https://www.justice.gov/archives/atj/about-office> [<https://perma.cc/UND8-X44R>] (Oct. 24, 2018).

launched an interagency roundtable focused on civil legal aid, and served on the U.S. Delegation to the United Nations, among other activities.¹⁴⁵ A revitalized ATJ could build upon these efforts by setting a national agenda for access to justice issues, serving as a liaison to other institutions, facilitating data-collection efforts, and developing evidence-based policies and practices. Employment prospects and heightened visibility could also help to entice talented individuals to the field.

Of course, as with any institution, the level of material support will impact its effectiveness. By withdrawing material support, the ATJ was effectively terminated by the Trump administration.¹⁴⁶ Even when the ATJ was still operating, its reach was reportedly curtailed by the size and composition of its staff.¹⁴⁷ Yet these problems are not unique to the ATJ.¹⁴⁸ The most obvious parallel is the Consumer Finance Protection Bureau, which represented a breakthrough in government responsiveness to consumer problems driven by an increased understanding of these issues as topics meriting government action.¹⁴⁹ It, too, suffered under the Trump administration,¹⁵⁰ as did many other components of the administrative state.¹⁵¹

Another possible challenge is the decision to site the office within the Department of Justice. Echoing many of the issues raised by Professor Irene Oriseweyinmi Joe in her analysis of public defender agencies—housed variously in executive and judicial branches—it is not immediately clear where a governmental office dedicated to access to justice should be located.¹⁵² If housed within the

145. *Accomplishments*, U.S. DEPT. JUST. ARCHIVES, <https://www.justice.gov/archives/atj/accomplishments> [<https://perma.cc/99ME-98A5>] (Oct. 24, 2018).

146. Katie Benner, *Justice Dept. Office to Make Legal Aid More Accessible Is Quietly Closed*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/us/politics/office-of-access-to-justice-department-closed.html?searchResultPosition=1> [<https://perma.cc/TZ42-KM8T>] (noting that Trump-appointed Attorney General Jeff Sessions “effectively shuttered” the office by “moving its resources elsewhere”).

147. *Id.* (noting that the office “never gained much visibility within the Justice Department because it did not oversee a large staff of prosecutors”).

148. Similarly, the Consumer Finance Protection Bureau emerged as a response to increased understanding of consumer issues as topics of public concern and was gutted by the current administration.

149. *See, e.g.*, Elizabeth Warren, *Product Safety Regulation as a Model for Financial Services Regulation*, 42 J. CONSUMER AFFS. 452, 458 (2008).

150. *See, e.g.*, Emily Stewart, *Mick Mulvaney Changed the CFPB's Sign to BCFP*, VOX (June 11, 2018, 7:00 PM), <https://www.vox.com/policy-and-politics/2018/6/11/17451292/mick-mulvaney-cfpb-bcfp> [<https://web.archive.org/web/20200708192957/https://www.vox.com/policy-and-politics/2018/6/11/17451292/mick-mulvaney-cfpb-bcfp>]; Adam Liptak & Alan Rappaport, *Supreme Court Lifts Limits on Trump's Power to Fire Consumer Watchdog*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/us/politics/cfpb-supreme-court.html> [<https://perma.cc/V9JM-DJJC>] (noting that the Supreme Court’s decision to allow the removal of the head of the agency “could . . . open it to greater politicization, effectively turning its director into something akin to a cabinet member who serves at the pleasure of a president”).

151. *See* Kathy Wagner Hill, *The State of the Administrative State: The Regulatory Impact of the Trump Administration*, 6 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 25, 26 (2019).

152. *See* Irene Oriseweyinmi Joe, *Structuring the Public Defender*, IOWA L. REV. (forthcoming 2021) (manuscript at 5), <https://law.ucdavis.edu/faculty/joe/files/Structuring-the-Public->

judiciary, there is a danger that the agency could skew too heavily toward a more limited and court-centric view of the issue. If the agency is housed in the executive branch, it may be less independent and more heavily influenced by political fluctuations. While valid, these concerns are most relevant in situations where the architecture of an entity is entirely up for debate; here, there are benefits of building on the existing precedent for ATJ].

B. Bureau of Justice Statistics

As a foundational matter, developing effective access to justice interventions requires an empirical understanding of existing and emerging legal needs and their distribution throughout the population.¹⁵³ While court records could be a helpful source of information, their usefulness is curtailed by their bias; they reveal information only about those who seek formal legal remedy. Alternative data sources are needed to generate a more comprehensive picture, requiring investment in our woefully underdeveloped knowledge infrastructure.¹⁵⁴

The substantive jurisdiction of the Bureau of Justice Statistics (BJS) could be amended to include such data collection among its duties. Part of the Office of Justice Programs within the Department of Justice, the mission of the BJS is “[t]o collect, analyze, publish, and disseminate information on crime, criminal offenders, victims of crime, and the operation of the justice systems at all levels of government. These data are critical to federal, state, and local policymakers in combating crime and ensuring that justice is both efficient and evenhanded.”¹⁵⁵

While BJS has periodically collected data on civil cases,¹⁵⁶ it has not undertaken analysis of the incidence or distribution of civil legal problems parallel to its work on crime victimization. Such regular, repeated survey data on the experience of justiciable problems would greatly enhance our understanding of the most prevalent and consequential problem types. Data collection and analysis surrounding the mechanisms of advice- and information-seeking for particular problems would also be beneficial. Moreover, the BJS might also investigate attitudes toward the civil legal system, important information that is also currently lacking.¹⁵⁷ Similar surveys

Defender.pdf [https://perma.cc/RL4M-NVT6] (noting that “[e]ach assignment decision provides both benefits and handicaps”).

153. See *supra* Section II.A.

154. Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295, 295 (2016) (describing the dearth of existing data on civil justice).

155. *About the Bureau of Justice Statistics*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=abu> [https://perma.cc/SL3W-AG3W] (last visited July 19, 2020).

156. *Civil Cases*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=45> [https://perma.cc/CP48-LT6P] (last visited July 19, 2020).

157. The General Social Surveys (GSS) have periodically included questions about Americans’ confidence in various courts. See, e.g., TOM W. SMITH & JAE SOK SON, GENERAL SOCIAL SURVEY 2012 FINAL REPORT: TRENDS IN PUBLIC ATTITUDES ABOUT CONFIDENCE IN INSTITUTIONS (2013), https://www.norc.org/PDFs/GSS%20Reports/Trends%20in%20Confidence%20Institutions_Final.pdf [https://perma.cc/7TTP2-EGS4]. However, the GSS do not include questions about the

in other countries have made significant contributions to policy development.¹⁵⁸ Broadening the mandate of the BJS to incorporate these tasks could offer similar benefits. Given the overlap between criminal and civil legal matters,¹⁵⁹ this work might even be seen as enhancing the existing mandate of the BJS.

C. Courts

As the central institution of remedy for civil legal problems, the civil justice system will always occupy a central role in addressing inequalities in access to justice. While revising its substantive mandate to encompass a more holistic understanding of access to justice—one that encompasses problems that remain outside of the court system—could dramatically alter the institutional landscape for access to justice, this seems unlikely. Yet, a more feasible tweak to its existing functional mandate could also support access to justice.¹⁶⁰

Contained within the millions of pages of records courts process and retain each year is an incredible amount of information. Certainly, it reveals truths about the civil legal process.¹⁶¹ However, data contained within public court records also reveals patterns in the incidence of justiciable problems,¹⁶² which could help to develop targeted interventions. It might also offer additional benefits.¹⁶³

experience of justiciable problems of use of the civil legal system. Combining questions on these topics into a single survey would enable analysis investigating links between these attitudes and behavior.

158. OECD & OPEN SOC'Y FOUNDS., *supra* note 27, at 33–34; PLEASENCE ET AL., *supra* note 27.

159. *See, e.g.*, Sternberg Greene, *supra* note 94, at 1289–90.

160. In addition to the data collection described, by embracing evidence-based interventions in self-help resources and the provision of legal assistance within court settings, court systems on both the state and federal level could enhance their access to justice efforts; as a matter of institutional design, however, it is difficult to know how to encourage such an effort.

161. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 120–21 (2002) (synthesizing empirical data regarding multiple phases of litigation); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1920–21 (2009) (providing empirical observations on the six phases of litigation); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 187 (2010) (examining the trajectories of employment discrimination claims filed in federal court); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 (2004) (identifying the declining trend in trials).

162. *See, e.g.*, Emily S. Taylor Poppe, *Why Consumer Defendants Lump It*, 14 NW. J.L. & SOC. POL'Y 149, 169 (2019) (mapping the locations of individuals facing foreclosure in New York City using information from property records and court filings); Matthew Hall, Kyle Crowder & Amy Spring, *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation*, 80 AM. SOCIO. REV. 526, 531 (2015) (estimating the impact of foreclosures on residential segregation by geocoding foreclosures using information drawn from property records); Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOCIO. REV. 629, 635 (2010) (finding that subprime mortgage lending and foreclosures were disproportionately concentrated in segregated black neighborhoods using data drawn from property records).

163. For example, by analyzing big data on the distribution of decedents' estates, some have suggested that the courts might be able to distribute estates based on probabilistic guesses about individuals' dispositive preferences. Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1419 (2014). At the very least, this information

Yet, these records are often not stored in accessible formats, curtailing their usefulness.¹⁶⁴ As a result, we have limited information about what occurs within formal legal actions,¹⁶⁵ and even less about other aspects of justiciable problems that might be gleaned from them. Although there are exceptions,¹⁶⁶ much of the usable data comes from for-profit private companies that compile the records, extract relevant information, transform it into usable data, and then sell it at a profit.¹⁶⁷ With investments in infrastructure that are long overdue, the massive amount of data maintained by the court system could instead be processed in-house and harnessed to enhance justice delivery.

However, apart from its usefulness in enhancing the efficient operation of the courts, the current mandate of the civil justice system offers little incentive to take on these types of activities. Injecting into the mandates of the administrative offices of courts a greater emphasis on data collection could further access to justice efforts. Finally, it is also important to note that courts could benefit from many of the other institutional reforms proposed. For example, evaluations of self-help interventions and empirical analysis of emerging trends in justiciable problem incidence could

could guide the development of more accurate default rules. In other situations, the civil justice system might be able to provide pre-filled forms that reduce the burdens of access.

164. See, e.g., *Methods*, EVICTION LAB, <https://evictionlab.org/methods/#how-collected> [<https://perma.cc/49MH-DNM7>] (last visited Nov. 28, 2020) (describing the process used to collect data on evictions: “First, we requested a bulk report of cases directly from courts. These reports included all recorded information related to eviction-related cases. Second, we conducted automated record collection from online portals, via web scraping and text parsing protocols. Third, we partnered with companies that carry out manual collection of records, going directly into the courts and extracting the relevant case information by hand.”). In contrast, the *availability* of court records relating to criminal matters presents different challenges. See SARAH ESTHER LAGESON, *DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE* (2020); Kathryn M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1322 (2016) (book review) (drawing on a review of socio-legal books to highlight the “far-reaching” nature of informal criminal justice control resulting, in part, from the use of expansive data on the identities of individuals who have had encounters with the criminal justice system).

165. See, e.g., Sandefur, *supra* note 56, at 60 (noting that “[n]ational statistics regarding self-representation do not exist” for matters handled in state courts).

166. See *Project: Caselaw Access Project*, LIBR. INNOVATION LAB, <https://lil.law.harvard.edu/projects/caselaw-access-project/> [<https://perma.cc/PT5S-ECC4>] (last visited Jan. 18, 2021) (describing a Harvard Law School Library-based initiative that has “digitized over 40 million pages of U.S. court decisions”).

167. See, e.g., REALTYTRAC, <https://www.realtytrac.com/> [<https://perma.cc/F3NT-KXFX>] (last visited Nov. 25, 2020) (selling a subscription service to access their inventory of foreclosures, foreclosed homes for sale, auctions, and bank-owned homes); see also *Methods*, *supra* note 164, <https://evictionlab.org/methods/#data-source> [<https://perma.cc/R8VH-RKWN>] (“[M]any states either did not centralize their eviction data or were unwilling to release this information. Accordingly, the Eviction Lab then purchased more comprehensive datasets of public eviction records from two companies: LexisNexis Risk Solutions and American Information Research Services Inc.”). Similarly, data on members of the legal profession maintained by public entities is accessible primarily through private intermediaries. See, e.g., Adam Bonica, Adam S. Chilton & Maya Sen, *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 287–88 (2016) (explaining the author’s reliance on the Martindale-Hubbell Legal Directory by noting that, “although many states keep good records of individuals who are licensed to practice law in their state, no such national databases exist”).

enhance the efficacy of court-based access to justice interventions and changes in the regulation of the legal profession could open new possibilities for assisting litigants.

D. Legal Services Corporation

Ameliorating inequalities in access to justice beyond the confines of the court system also requires adapting the mandate of the Legal Services Corporation (LSC). Although hampered by funding cuts,¹⁶⁸ LSC remains the primary source of financial support for legal aid in America.¹⁶⁹ In some states, it is the only source of legal aid funding.¹⁷⁰ Despite its key role, LSC continues to face challenges to its survival.¹⁷¹

The mandate LSC espouses is deeply scared by this struggle. Although it was established as part of a wave of anti-poverty efforts,¹⁷² ongoing opposition and restrictions on LSC's activities pushed it toward a direct-service model.¹⁷³ This approach hinders LSC's ability to address issues systemically,¹⁷⁴ leading to calls for the adoption of community-based services.¹⁷⁵ While any shift away from the provision of individual legal services may seem to undermine the potential to realize the contemporary conceptualization of access to justice, deeper consideration reveals the compatibility between these movements. For example, both approaches build on similar insights about individuals' engagement—or lack thereof—with the legal system.¹⁷⁶ In addition, community-based legal services programs seek to empower communities to address issues,¹⁷⁷ offering alternative mechanisms for the

168. ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 6–7 (2013), <https://repository.library.georgetown.edu/bitstream/handle/10822/712951/Securing-Equal-Justice-for-All-2013-Revision%281%29.pdf?sequence=1&isAllowed=y> [<https://perma.cc/NZ7E-QAT4>]; James J. Sandman, *The Role of the Legal Services Corporation in Improving Access to Justice*, 148 DÆDALUS, Winter 2019, at 113, 113 (noting that legal aid is “badly underfunded”).

169. *About LSC*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc> [<https://perma.cc/P93L-293Q>] (last visited Nov. 25, 2020) (“LSC is the single largest funder of civil legal aid for low-income Americans in the nation.”).

170. Sandman, *supra* note 168, at 113.

171. Dorothy Samuels, *Trump Targets the Legal Services Corporation*, AM. PROSPECT (Apr. 11, 2017), <https://prospect.org/justice/trump-targets-legal-services-corporation/> [<https://perma.cc/QY5K-88MQ>] (discussing Trump's budget proposal calling for defunding of LSC).

172. HOUSEMAN & PERLE, *supra* note 168, at 12–13; Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996).

173. HOUSEMAN & PERLE, *supra* note 168, at 34.

174. Sameer Ashar & Annie Lai, *Access to Power*, 148 DÆDALUS, Winter 2019, at 82, 83.

175. *Id.*; Raymond H. Brescia, Robin Golden & Robert A. Solomon, *Who's in Charge Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 840 (1998) (criticizing the direct-services legal aid model and advocating for a shift to community-based legal services).

176. *See, e.g., id.* at 841 (noting the fragility of the direct services model, stating, “[i]f the breadth or quality of the legal problem does not lend itself to individual client representation, or clients fail to present their problems to legal services offices in a timely manner, or staff is unavailable or unwilling or incapable of addressing the problem, then the services actually available to clients lose their significance”).

177. Ashar & Lai, *supra* note 174, at 84; *see also* Brescia et al., *supra* note 175, at 845 (noting that legal aid that is dislocated from the community, by contrast, “creates a lawyer-driven system that often

resolution of justiciable problems. They also result in better alignment between legal services and the needs of the community.¹⁷⁸

Thus, although direct services to individuals are a fundamental tool in the access to justice arsenal, there are ways in which other forms of legal services could better promote equality in access to justice. Adapting the mandate of the LSC to encompass these efforts could help to operationalize the contemporary conceptualization of access to justice.

E. The Legal Profession

The mandate of the legal profession, as reflected in the regulations that govern it, must also be amended to further equality in access to justice. While many justiciable problems do not require formal legal advice or representation for their resolution, others do. We rely on a combination of the private market for legal services, legal aid, and pro bono to meet this need for in-person legal services, but the supply remains insufficient.¹⁷⁹ For that reason, equalizing access to civil justice requires that we consider nonlawyer service-providers and better equip individuals to address their justiciable problems. For this to occur, the legal profession must relinquish its monopoly over the provision of legal services.¹⁸⁰

This topic has been discussed extensively elsewhere,¹⁸¹ so I will not address it in depth here. However, it does raise an interesting institutional design question: To what extent will the legal profession alienate alternative forms of legal services providers, as opposed to incorporating them within an expanded conception of the bar? The structural arrangements through which such nonlawyer legal service providers are educated and credentialed,¹⁸² the ways in which they are embedded or excluded from traditional firms and legal aid organizations,¹⁸³ and the degree to

results in fewer clients served ultimately, both because of the narrowing of the subject matter of the representation and the breakdown of lines of communication between legal services programs and low-income communities”).

178. Brescia et al., *supra* note 175, at 856–57.

179. Sandefur, *supra* note 142, at 80.

180. See, e.g., Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J.C.R. & C.L. 283, 284–85 (2020); Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1194 (2016) (arguing that current regulations make legal practice inefficient and expensive, reducing access). With regard to the implications for legal technology that might expand access to justice, see, for example, SANDEFUR, LEGAL TECH, *supra* note 112, at 16 (noting how the regulatory regime inhibits the development of effective digital legal technologies); Benjamin H. Barton, *Technology Can Solve Much of America's Access to Justice Problem, If We Let It*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 444 (Samuel Estreicher & Joy Radice eds., 2016).

181. See, e.g., sources cited *supra* note 180.

182. See, e.g., Letter from Debra L. Stephens, C.J., Washington State Sup. Ct., to Stephen R. Crossland, Chair, Ltd. License Legal Technician Bd., Rajeev Majumdar, President, Washington State Bar Ass'n, and Terra Nevitt, Interim Exec. Dir., Washington State Bar Ass'n (June 5, 2020) (reporting the Washington State Supreme Court's decision to terminate the Limited Legal Technician program in light of the “overall costs of sustaining the program and the small number of interested individuals”).

183. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 1983) (limiting fee-sharing).

which they share with lawyers an obligation to expand access to law¹⁸⁴ could all have implications for access to justice in the future. Let us hope that they will be structured in ways that promote equality in access to justice rather than perpetuate existing inequities.

F. Academic Field

Finally, the need for institutional design that supports access to justice extends to the academic sphere. Several scholars are helping to lead the movement toward a more expansive and less lawyer-centric understanding of access to justice. Institutional design could assist in the development of an intellectual field that builds upon, and furthers, this understanding.

There is much that law schools,¹⁸⁵ grant-making institutions, and scholarly communities do within their existing structures and mandates that is in alignment with a contemporary understanding of access to justice. However, there is a need for additional institution building to support the emergence of access to justice as a field. In the law school context, for example, hiring decisions, curricular design, and law school clinic operations can all be oriented to support an evidence-based understanding of access to justice.¹⁸⁶ The rise of new law-school-affiliated institutions focused explicitly on the promotion of access to justice¹⁸⁷ offer the potential for even greater advancement of the field. Similarly, public entities like the National Science Foundation and the Fulbright Program and private grant-making institutions including the Russell Sage, Carnegie, Open Society, and MacArthur Foundations have all provided important support to scholars doing work on access to justice.¹⁸⁸ However, support that is exclusively focused on access to justice

184. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 1983) (imposing an ethical obligation to provide pro bono publico services).

185. By highlighting the role of law schools, I do not wish to denigrate the valuable contributions of other disciplines.

186. See, e.g., Andrew M. Perlman, *The Public's Unmet Need for Legal Services & What Law Schools Can Do About It*, 148 DÆDALUS, Winter 2019, at 75, 75 (“They can teach the next generation of lawyers more efficient and less expensive ways to deliver legal services, ensure that educational debt does not preclude lawyers from helping people of modest means, and conduct and disseminate research on alternative models for delivering legal services.”); Martha F. Davis, *Institutionalizing Legal Innovation: The (Re)Emergence of the Law Lab*, 65 J. LEGAL EDUC. 190, 199 (2015) (describing the potential of law labs).

187. See, e.g., NAT'L CTR. FOR ACCESS TO JUST. FORDHAM L. SCH., <https://ncforaj.org/> [<https://perma.cc/J3GY-Z4XP>] (last visited Jan. 11, 2021); *Center for Access to Justice*, GA. ST. UNIV., <https://law.gsu.edu/faculty-centers/center-for-access-to-justice/> [<https://perma.cc/M94M-2VGE>] (last visited Nov. 25, 2020); *Center for Access to Justice & Technology*, CHI.-KENT COLL. L., <https://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology> [<https://perma.cc/3BMY-QNXR>] (last visited Nov. 25, 2020).

188. See, e.g., SANDEFUR, LEGAL TECH, *supra* note 112, at 3 (acknowledging funding support from the Open Society Foundations for data collection effort regarding “existing digital technologies that assist with justice problems in US jurisdictions”); *Award Abstract #1839537, Workshop: Computing, Information Science, and Access to Justice*, NAT'L SCI. FOUND. (June 30, 2020), https://nsf.gov/awardsearch/showAward?AWD_ID=1839537&HistoricalAwards=false [<https://perma.cc/5288-N85L>]; *Award Abstract #1823791, Access to Civil Justice: Integrating and Advancing*

scholarship is much rarer.¹⁸⁹ Finally, while several academic organizations provide opportunities for access to justice scholars to network and share their research, events and organizations explicitly dedicated to access to justice are less common.¹⁹⁰ Expanding the institutional infrastructure for academic investigation of access to justice—including our understanding of justiciable problems, responsive behavior, and evidence-based interventions—could help to further promote a contemporary understanding of access to justice.

CONCLUSION

Individuals' ability to resolve civil legal problems affects their ability to participate in society, escape poverty, and lead healthy and productive lives.¹⁹¹ Yet despite the importance of access to justice as a policy issue, it is largely invisible.¹⁹² In part, this is a function of institutional design. Because earlier definitions of access to justice focused on access—to courts, lawyers, and formal law—the civil justice system has been vested with primary responsibility for this issue. Yet as a reactive institution concerned only with the small number of justiciable problems that give rise to formal legal claims, the civil justice system is ill suited to deliver justice more broadly. Instead, what is needed are proactive interventions that can address justiciable problems before they escalate, are embedded within a larger net of social services, and take into account the abilities and circumstances of those they are designed to assist. Implementing these strategies requires that we radically alter the institutional landscape for access to justice. In this Article, I offer several recommendations for how to do so, including the creation of new institutions and the reorientation of others. Together, these reforms could operationalize a new

Theory and Practice (July 23, 2018), https://nsf.gov/awardsearch/showAward?AWD_ID=1823791&HistoricalAwards=false [<https://perma.cc/R4N4-NH74>]; Lois Lupica, *Fulbright Research in Australia*, UNIV. ME. SCH. L. (Mar. 15, 2019), <https://mainelaw.maine.edu/faculty/fulbright-research-in-australia/> [<https://perma.cc/PVY9-EJX2>]; Emily Ryo, CARNEGIE CORP. N.Y., <https://www.carnegie.org/grants/grants-database/grantee/emily-ryo/#!/grants/grants-database/grant/137650180.0/> [<https://perma.cc/3Z9A-Y95C>] (last visited Jan. 18, 2021); Rebecca Sandefur, MACARTHUR FOUND. (Oct. 4, 2018), <https://www.macfound.org/fellows/1022/> [<https://perma.cc/QYQ4-YBMY>]; Tonya Brito, RUSSEL SAGE FOUND., <https://www.russellsage.org/visiting-scholars/tonya-brito> [<https://perma.cc/3EYR-YL32>] (last visited Nov. 25, 2020).

189. *But see, e.g., ABF/JPB Foundation Access to Justice Scholars Program*, AM. BAR FOUND., http://www.americanbarfoundation.org/research/Fellowshipopportunities/ABF_JPB_Foundation_Access_to_Justice_Scholars_Program0.html [<https://perma.cc/J8D5-YQ85>] (last visited Nov. 25, 2020) (announcing program “committed to building the field of access to justice research and creating a network of access to justice scholars”).

190. *But see, e.g., 39. Everyday Legality*, Section in *Collaborative Research Networks*, LAW & SOC'Y ASS'N, <https://www.lawandsociety.org/crn.html#39> [<https://perma.cc/TB3D-CFSR>] (last visited Nov. 25, 2020) (describing research network for, “scholars who study everyday approaches to legality: how people understand, perceive, and think about different aspects of law and legal situations, the degree to which legality structures social life, and the consequences of those understandings for individual and organizational action”).

191. Pleasence & Balmer, *supra* note 24, at 140–43 (noting that justiciable problems can limit individuals' “capability to function effectively in society”).

192. Caplan, *supra* note 130, at 28.

definition of access to justice, one that is dedicated to equality in individuals' ability to resolve civil legal problems and achieve justice, within or without the courthouse walls.