

Marquette Law Review

Volume 103
Issue 2 *Winter 2019*

Article 10

Winter 12-1-2019

Reconceptualizing Access to Justice

Katherine S. Wallat

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>

Repository Citation

Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 Marq. L. Rev. (2019).
Available at: <https://scholarship.law.marquette.edu/mulr/vol103/iss2/10>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

RECONCEPTUALIZING ACCESS TO JUSTICE

KATHERINE S. WALLAT*

This Article argues that the assumptions that underlie how we currently conceptualize equal access to justice ensure that we will never achieve it. Much scholarly attention has been paid to the problem of access to justice for low-income people, which is typically defined as unmet legal need. Most of this attention focuses on the crisis in civil courts of unrepresented parties. These scholars suggest court-focused solutions centered on providing more lawyers and legal advice to help deal with this pro se crisis. But the vast majority of justiciable civil problems are resolved (or not) without any contact with the legal system or the use of lawyers. In the current access to justice framework, lawyers are solely providers of legal advice, guiding people through the legal system but with no role in ameliorating the underlying issue that caused the legal crisis in the first place. By conflating access to justice with access to the courts, current approaches both limit the reach of the lawyer's interventions and entirely miss the vast majority of people struggling with civil justice problems.

This Article therefore argues that the current conception of access to justice must be redefined because it is missing a crucial component: an examination of the limitations of our current legal services model. Lawyers must reimagine their role in achieving equal access to justice by considering and applying the lessons learned from poverty law and public interest scholars on how attorneys can achieve justice for the poor. Poverty law scholars have long advocated for the use of a wide range of lawyering skills in the broader fight against poverty and injustice, but this scholarly debate is entirely absent from our consideration of how to solve the problem of access to justice for low-income people. Applying lessons from poverty law reveals that lawyers must think creatively about their own ability to effectively intervene to solve civil justice problems beyond the confines of the courthouse.

I. INTRODUCTION	582
II. THE SCOPE OF THE ACCESS TO JUSTICE PROBLEM AS WE DEFINE IT	584

* Clinical Teaching Fellow, University of Denver Sturm College of Law. I wish to thank Jane Aiken, Alan Chen, Tamara Kuennen, Daria Fisher Page, Stephen Pepper, Govind Persad, Rebecca Sandefur, and Wyatt Sassman for their insightful comments and suggestions.

A. Legal Needs & Legal Services.....	584
B. The Impact	589
III. THE NARROW FOCUS ON PRO SE LITIGANTS.....	592
A. The Rise in Unrepresented Parties	593
B. The Response to the Crisis	597
1. Civil Gideon.....	598
2. Unbundled Legal Services	600
3. Court Reforms.....	601
IV. OUR LIMITED VIEW OF ACCESS TO JUSTICE IS DOOMED TO FAIL.....	602
A. What People Do When Faced with Problems: Not What You Think.....	603
B. We Cannot Achieve Equal Access to Justice as Currently Conceived.....	609
V. VIEWING ACCESS TO JUSTICE THROUGH A WIDER LENS	615
A. Our Narrow View of the Attorney's Role.....	615
B. A New Vision of Access to Justice	620
VI. CONCLUSION.....	625

I. INTRODUCTION

Ms. Smith lives on the northeast side of Washington, D.C. but is struggling to pay rent.¹ The faucet constantly leaks in her bathroom, her heater does not work well, and she shares her kitchen with mice. After her hours as a home health aide are cut and she is unable to pay rent for two months, her landlord files for eviction. Ms. Smith does not know that she has a viable defense against the eviction because of the problems in her apartment or that she may have access to emergency rental assistance from the city. She does not go to court, does not contact her landlord, and does not try to speak with a lawyer about her legal options. Instead, when she sees the court summons taped to her door, she sighs and starts packing up her things. She is out of the apartment before the case is called by the clerk in landlord tenant court.

Ms. Smith did not access the protections provided to her by civil law for her housing problem, a fate that befalls many low-income people.² This is an access to justice problem, which is often discussed as a problem of unmet legal need and framed as a resource problem: too many people need help to solve their civil justice problems, but there are not enough resources to provide that

1. Ms. Smith is based on a combination of real-life clients.

2. DEBORAH L. RHODE, *ACCESS TO JUSTICE* 3 (2004).

help.³ But the vast majority of problems like the one described here are solved in exactly the way Ms. Smith dealt with her housing issue: without any contact with the legal system or an attorney.⁴ Yet current scholarship thinks of the problem of access to justice as one of access to the courts, focusing on the rise of pro se litigants in civil courthouses.⁵ Nearly all of the solutions lawyers consider to achieve equal access to justice focus on alleviating the pro se crisis in courts by providing more attorneys or more legal help.⁶

This Article argues that conflating access to justice with access to the courts is tantamount to admitting that lawyers cannot achieve justice for the poor because we are unwilling to examine the limitations of our current legal services model. The current singular focus on lawyers as providers of legal advice in court treats the symptoms of civil justice problems already at their crisis points, neglecting earlier interventions that can be more effective in securing justice. Poverty lawyers have discussed this for years, debating the best ways to shift the lawyer's role from a courtroom advocate to a community participant in order to address issues before they reach the courthouse doors. This Article therefore contributes a novel redefinition of access to justice that includes what is absent from the current conversation: application of the lessons learned from poverty law scholars on the myriad ways in which lawyers can use their skills outside of the courthouse to achieve justice for low-income people.

This Article has four parts. Part II analyzes data on the scope of the access to justice problem, the prevalence of civil justice problems, and their impact on low-income people. In Part III, this Article explores the rise of pro se litigants in civil courtrooms and how alleviating this pro se crisis has become synonymous with solving the problem of access to justice. Part IV considers what people do when faced with civil justice problems and demonstrates why we cannot achieve equal access to justice as we currently conceive it. Finally, in Part V, this Article explores the narrow view of the attorney's role and

3. Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 721–22 (2015) [hereinafter Sandefur, *Bridging the Gap*].

4. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 451 (2016) [hereinafter Sandefur, *What We Know*].

5. See Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 743–45 (2015).

6. *Id.* at 745; Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 49, 50 (2019) [hereinafter Sandefur, *Access to What?*], https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Sandefur.pdf [https://perma.cc/A7VP-TMEW].

presents an alternative view of access to justice that applies the lessons learned from poverty law and public interest scholars.

II. THE SCOPE OF THE ACCESS TO JUSTICE PROBLEM AS WE DEFINE IT

Most people agree that the wealthy have an advantage in the justice system,⁷ notwithstanding that this goes against the fundamental ideals of “justice for all.” About four-fifths of Americans also believe that the poor are entitled by our Constitution to counsel in civil cases.⁸ In reality, the only low-income litigants entitled to counsel are criminal defendants,⁹ no matter what is at stake in a civil case, be it housing, income, or parental rights.¹⁰ As a result, it is a fact that low-income Americans are less able to get their civil legal needs met than higher income Americans.¹¹

When scholars and lawyers discuss this problem, they refer to a “justice gap,” often defined as the amount of unmet legal need.¹² The focus on needs that are “legal” as attorneys and policymakers define that term is a fixture of the conversation about access to justice, and the solutions proposed flow from this focus.¹³ As a result, most empirical work has compared the availability of legal services to the number of people who seek them. This Section presents some of that data.

A. Legal Needs & Legal Services

A commonly cited statistic is that 80% of the legal needs of the poor go unmet, though there is some debate about the accuracy of that statistic.¹⁴ In recognition of the disparity between low- and high-income Americans, Congress created the Legal Services Corporation (LSC) in 1974 to meet “a need

7. RHODE, *supra* note 2, at 4 (citing AM. BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 51, 59, 63, 65–66 (1999)).

8. *Id.* (citing Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 204 (1994)).

9. *Gideon v. Wainwright*, 372 U.S. 335, 339–41 (1963).

10. *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (holding there is no right to counsel when incarceration for civil contempt is at stake); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24–34 (1981) (holding there is no right to counsel when termination of parental rights is at stake); MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 303 (2016) [hereinafter *DESMOND, EVICTED*] (stating “low-income families on the edge of eviction have no right to counsel.”).

11. *See generally* RHODE, *supra* note 2.

12. Sandefur, *Bridging the Gap*, *supra* note 3, at 721 (defining the justice gap as the “difference between the number of people experiencing problems that could benefit from some form of legal assistance and the number who receive it.”).

13. *See infra* Part III.

14. Sandefur, *What We Know*, *supra* note 4, at 451.

to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances.”¹⁵ From its formation, the LSC’s purpose has been to assist low-income people seeking redress, presumably in court or some other institution of remedy. LSC provides funds to 133 organizations in every state, Washington, D.C., and the U.S. territories, to provide low-income people with free legal services.¹⁶ People are eligible to receive legal services funded by the LSC if they live at or below 125% of the federal poverty guidelines.¹⁷

The LSC is the single largest source of civil legal aid funding in the United States,¹⁸ but it is important to understand the limitations of its reach. The federal poverty guidelines that dictate who can be served by LSC-funded organizations were set in the 1960s, based on data on spending patterns from 1955.¹⁹ Since 1963, the federal poverty line has been adjusted only for inflation, despite significant changes in the way people make and spend money in the United States.²⁰ This leaves many people with an income level too high to qualify for LSC but still unable to afford legal help.²¹

Even focusing only on those who do qualify for LSC-funded legal services paints a dire picture. The unmet legal needs of the indigent have grown while

15. Legal Services Corporation Act, 42 U.S.C. § 2996(1) (1976). Congress also noted that “providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice” and “for many of our citizens, the availability of legal services has reaffirmed faith in our government and laws.” *Id.*

16. LEGAL SERVS. CORP., <https://www.lsc.gov/> [<https://perma.cc/RJ5U-V3YP>] (last visited Nov. 15, 2019).

17. *What is Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid> [<https://perma.cc/KCL5-LV2W>] (last visited Nov. 15, 2019).

18. *Who We Are*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are> [<https://perma.cc/4W3Z-L5F4>] (last visited Nov. 15, 2019).

19. DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 9 (2004).

20. The 1963 analysis is based on spending a third of income on food, and then multiplying that by the number of people in the family. It does not take into account the rising cost of housing or transportation. GORDON M. FISHER, *THE DEVELOPMENT OF THE ORSHANSKY POVERTY THRESHOLDS AND THEIR SUBSEQUENT HISTORY AS THE OFFICIAL U.S. POVERTY MEASURE* (1997), <https://www.census.gov/content/dam/Census/library/working-papers/1997/demo/orshansky.pdf> [<https://perma.cc/523D-QB7X>].

21. See, e.g., John M. Greacen, Amy Dunn Johnson, & Vincent Morris, *From Market Failure to 100% Access: Toward a Civil Justice Continuum*, 37 U. ARK. LITTLE ROCK L. REV. 551, 552 n.6 (2015) (noting “it may be that the poor have a greater likelihood of obtaining legal help than persons with moderate incomes who are unable to afford the standard retainers charged by civil and family lawyers”); JOHN M. GREACEN, *SERVICES FOR SELF-REPRESENTED LITIGANTS IN ARKANSAS: A REPORT TO THE ARKANSAS ACCESS TO JUSTICE COMMISSION* 2 (2013), <https://arkansasjustice.org/wp-content/uploads/2017/04/Arkansas-Final-Report-7-26-13.pdf> [<https://perma.cc/PE5B-KR2F>] (noting “most Americans of modest means cannot afford the cost of attorney’s fees needed for representation in civil matters.”).

the appropriations and funding streams for civil legal aid have shrunk to “scandalously” low levels.²² The Corporation’s budget has dramatically decreased since 1981, while the number of Americans eligible for aid has grown by fifty percent.²³ Between 2010 and 2012 alone, LSC programs had to eliminate more than ten percent of their staff.²⁴

A result of this dwindling support is that basic field funding, which funds direct legal services, came out to just \$5.85 per eligible person in 2016.²⁵ In 2013, LSC programs aided 1.8 million Americans but turned at least the same number of people away.²⁶ Put another way, for every person with legal needs who was served, another was turned away. The funding available in 2009 was estimated to be sufficient to serve only 20% of the civil legal needs of poor people.²⁷

However appalling these numbers are, LSC figures always underrepresent the scale of unmet legal needs. As noted above, these figures only count those eligible to receive legal services from LSC-funded organizations, ignoring those whose incomes are too high but still cannot access affordable legal services. This data is also limited only to those instances in which an individual sought help and was denied.²⁸ These figures thus do not include all of the

22. Sandefur, *Bridging the Gap*, *supra* note 3, at 721.

23. Memorandum from James J. Sandman, President, Legal Servs. Corp., to Finance Committee, Legal Servs. Corp., 28 (July 13, 2015), <http://lsc.gov/sites/default/files/LSC/about/bdguet/LSCFY17MgmtRecom.pdf> [<https://perma.cc/748X-EB7G>]. Only those “who live in households with annual incomes at or below 125% of the federal poverty guidelines—in 2015, \$14,713 for an individual, \$30,313 for a family of four” are eligible for LSC-funded aid. *Who We Are*, *supra* note 18.

24. LEGAL SERVS. CORP., 2012 ANNUAL REPORT 2 (2012), https://www.lsc.gov/sites/default/files/LSC/lscgov4/AnnualReports/2012%20Annual%20Report_FI_NAL-WEB_10.1.pdf [<https://perma.cc/BWF5-RXVX>].

25. LEGAL SERVS. CORP., FISCAL YEAR 2017 BUDGET REQUEST 2, <https://www.lsc.gov/media-center/publications/fy-2017-budget-request> [<https://perma.cc/L3FP-R7UE>].

26. *Who We Are*, *supra* note 18.

27. See Patricia E. Roberts, *From the “War on Poverty” to Pro Bono: Access to Justice Remains Elusive for Too Many, Including Our Veterans*, 34 B.C. J. L. & SOC. JUST. 341, 348 (2014) (noting that “at least eighty percent” of those eligible for LSC services do not receive them); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 13, 16 (2009) [hereinafter LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP], http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [<https://perma.cc/B2D8-KV7P>].

28. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP, *supra* note 27, at 12.

instances in which help was needed, whether it was sought or not, which is much more difficult to measure.²⁹

Most scholarship presenting the access to justice statistics focuses exclusively on the LSC data, presumably because it is readily available. However, the LSC-funded legal service providers are only one part of the provision of legal services to low-income people in America. There are also independently funded non-profit organizations, law school clinics, and other providers.³⁰ Conservative estimates suggest that public and private (i.e. both LSC and non-LSC funded) civil legal assistance received \$1.3 billion in funding in 2013.³¹ In comparison, the criminal justice system received an estimated \$228 billion in 2007³²—even though there are more civil cases than criminal cases filed in a given year.³³

The only other source of free or low-cost legal services is that provided by the private bar's pro bono efforts. While there has been a steady increase in pro bono efforts over the past decades,³⁴ the numbers are still far too low to make a dent in the need for legal services.³⁵ It is estimated that even if every single lawyer performed one hundred additional hours of pro bono work next year, it would result in an extra hour of legal work per problem per household.³⁶ Furthermore, the supply of pro bono attorneys does not match the demonstrated areas of need for legal services, because of the pro bono attorneys'—and their

29. Rebecca Buckwalter-Poza, *New Sheriff, Old Problems: Advancing Access To Justice Under The Trump Administration*, 127 YALE L.J. F. 254, 257 (2017); Sandefur, *What We Know*, *supra* note 4, at 451. This is discussed in more detail *infra* Part IV.

30. ALAN W. HOUSEMAN, CENTER FOR LAW AND SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2013, at 2 (2013), <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-3.pdf> [<https://perma.cc/L6YQ-G643>].

31. *Id.* This data acknowledges that we do not know the actual number of civil legal aid programs, much less their amount of funding.

32. See REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 17 (2011), http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf [<https://perma.cc/7Q24-DSS6>].

33. “Nationwide, the incoming civil caseload in 2010 was 13.8 million, compared to 10.6 million criminal cases.” DESMOND, EVICTED, *supra* note 10, at 357 (citing NATIONAL CIVIL AND CRIMINAL CASELOADS AND CIVIL/CRIMINAL COURT CASELOADS: TOTAL CASELOADS (2010)).

34. See MEREDITH MCBURNEY, AM. BAR ASS'N CENTER FOR PRO BONO, THE IMPACT OF LEGAL SERVICES PROGRAM RECONFIGURATION ON PRO BONO 1 (2003). Some of the LSC funds that organizations receive must be spent to encourage private attorney pro bono involvement. *Id.*

35. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 152 (2010).

36. *Id.*

law firms'—own self-interests.³⁷ Simply put, demand for the services does not drive the market—it is driven by the interests and priorities of those supplying the services.³⁸

Only one-half of one percent of all attorneys in the United States provide civil legal services (meaning services for low-income people, usually provided at no or a reduced cost).³⁹ This works out to about one lawyer for every 9,000 Americans who qualify for legal aid.⁴⁰ Conversely, there is one attorney for every 429 people not living in poverty.⁴¹ Most lawyers serve corporations, as opposed to individuals.⁴²

Irrespective of income, the basic fact is that legal help for individual civil problems is less and less available. Using American Bar Association (ABA) studies and other state surveys, Gillian Hadfield determined a rough estimate of the number of hours that individual American households seeking legal help were able to draw on to address a problem they were having in 1990 (4 hours) in comparison to 2005 (1 hour and 40 minutes).⁴³ Of course, most legal disputes require much more than a mere two hours of an attorney's time to be worked through.⁴⁴ These numbers also exclude the demand for legal assistance before problems arise because ex ante advice-related needs are not captured in studies that focus only on dispute-related needs.⁴⁵ This could mean that the number of legal needs is actually double what is found in studies focused on disputes.⁴⁶ The result is that all "Americans face a legal world that is thick with legal structure but thin on legal resources."⁴⁷

37. Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in 12 SOCIOLOGY OF CRIME, LAW AND DEVIANCE: ACCESS TO JUSTICE 145, 147 (Rebecca L. Sandefur ed., 2009).

38. *Id.*

39. Hadfield, *supra* note 35, at 140. Hadfield calculated this statistic using the number of attorneys documented in an early version of LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP, *supra* note 27, at 21.

40. Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 517 (2012) (citing David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 211 (2003)).

41. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP, *supra* note 27, at 19.

42. Hadfield, *supra* note 35, at 144 (stating that "[A]t most 40% of legal services are serving the needs of individual citizens as opposed to corporations and businesses.>").

43. *Id.* at 146.

44. See Roberts, *supra* note 27, at 354 (stating "[T]here are rarely disputes that require only one hour of an attorney's time to be resolved.>").

45. Hadfield, *supra* note 35, at 146. Note that corporations, of course, are able to access consistent ex ante advice from their legal representatives. This is discussed further *infra* Part V.

46. Hadfield, *supra* note 35, at 146.

47. *Id.* at 151.

Further contributing to this problem is how little we really know about it.⁴⁸ Although it is often cited that 80% of legal needs go unmet, it is unclear if this statistic is correct.⁴⁹ It should be noted that this number comes from an ABA study conducted in 1992,⁵⁰ and many studies done since then find higher percentages of unmet need.⁵¹ Some scholars think that, with the information we presently have, the actual size of the gap between lower and higher income people in accessing legal services is unknowable.⁵²

It is worth considering that nearly all of the empirical data we have about the justice gap comes from surveys, relying on people to self-report their experiences. Self-reporting is inherently flawed, resulting in data that is chronically low.⁵³ Memory failure poses one of the greatest problems for social surveys.⁵⁴ Some studies have estimated that, as a result of the problems inherent in self-reported data, as many as two-thirds of civil justice problems go unreported.⁵⁵ And there are additional challenges in the way the research is conducted. Often, sub-fields focus on particular niches within the data (such as what leads to the formation of social movements or institutional responses to problems) in a way that obfuscates fundamental questions that are shared across disciplines.⁵⁶

B. *The Impact*

To understand the impact of the lack of access to civil justice in America, we have to understand what we mean when we focus on civil legal needs. They are the everyday problems that involve “what the American Bar Association

48. See Sandefur, *Access to What?*, *supra* note 6, at 54 (noting that we lack information because there has been little investment in collecting data about civil justice for more than fifty years); Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295, 296 (2016).

49. Sandefur, *What We Know*, *supra* note 4, at 451.

50. AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994).

51. Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 U. D.C. L. REV. 35, 44–45 (2007).

52. Sandefur, *Bridging the Gap*, *supra* note 3, at 721.

53. Pascoe Pleasence, Nigel J. Balmer, and Tania Tam, *Failure to Recall: Indications From the English and Welsh Civil and Social Justice Survey of the Relative Severity and Incidence of Civil Justice Problems*, in 12 SOCIOLOGY OF CRIME, LAW AND DEVIANCE: ACCESS TO JUSTICE 43, 58 (Rebecca L. Sandefur ed., 2009); *see also* Buckwalter-Poza, *supra* note 29, at 260.

54. Pleasence, Balmer, & Tam, *supra* note 53, at 60. For example, the further back in time an event has occurred, the less likely it becomes that someone will remember it. *Id.*

55. *Id.*

56. Jennifer Earl, *When Bad Things Happen: Toward a Sociology of Troubles*, in 12 SOCIOLOGY OF CRIME, LAW AND DEVIANCE: ACCESS TO JUSTICE 231, 233 (Rebecca L. Sandefur ed., 2009).

has termed ‘basic human needs,’ such as livelihood, debts and credit, access to shelter, and the care of dependents.”⁵⁷ Typically, the civil legal needs that attorneys focus on when discussing the access to justice problem are those that end up being adjudicated in court.⁵⁸ These problems “exist at the intersection of civil law and everyday adversity.”⁵⁹ Civil laws regulate relations of the market, such as commercial transactions, lending and debt, and employment, as well as intimate personal relations between domestic partners and care of children and people no longer competent.⁶⁰ They also regulate a bigger share of indigent people’s lives than those who are higher income.⁶¹ For example, while access to income is regulated by the market for most people via their employment, for poor people whose incomes come from pensions, unemployment benefits, and public benefits, it is regulated by civil laws.

These problems can have significant consequences for many Americans. Low-income people suffer from more civil justice problems than higher income people,⁶² but these problems affect everyone.⁶³ Conservative estimates based on reports of national data suggest that as many as half of American households are experiencing at least one significant civil justice issue at a time.⁶⁴ Other surveys find even higher prevalence rates.⁶⁵ One survey found that closer to

57. Sandefur, *What We Know*, *supra* note 4, at 446; *see also* REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 16 (2014) [hereinafter SANDEFUR, *Accessing Justice*]; Ab Currie, *The Legal Problems of Everyday Life*, in 12 SOCIOLOGY OF CRIME, LAW AND DEVIANCE: ACCESS TO JUSTICE 1, 5 (Rebecca L. Sandefur ed., 2009) (saying they are “nearly normal features of everyday life.”).

58. Steinberg, *supra* note 5, at 748; *see infra* Part III. Some scholars include all problems that could be adjudicated, whether or not they actually result in contact with the courts, and term these issues “justiciable problems.” Sandefur, *What We Know*, *supra* note 4, at 443 (citing HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 12 (1999)). This distinction is important, because many people do not see their civil legal issues as relating the civil justice system. *See infra* Part IV. Note that this definition is also used in studies in England and Wales. *See, e.g.*, Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 881–82 (2008).

59. Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112, 113 (Pascoe Pleasence, Alexy Buck, & Nigel J. Balmer eds., 2007) [hereinafter Sandefur, *Importance*].

60. Currie, *supra* note 57, at 2; *see also* Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 56 (2010); Sandefur, *Importance*, *supra* note 59, at 119–20; Sandefur, *What We Know*, *supra* note 4, at 445–46.

61. Currie, *supra* note 57, at 2.

62. Sandefur, *What We Know*, *supra* note 4, at 447.

63. AM. BAR ASS’N, *supra* note 50, at tbl.3-1.

64. *Id.*

65. *See* MATTHEW SILBERMAN, THE CIVIL JUSTICE PROCESS: A SEQUENTIAL MODEL OF THE MOBILIZATION OF LAW 33 (1985) (stating that in a Detroit based survey of 1038 householders there

two-thirds of the population has experienced at least one civil justice problem in the previous eighteen months.⁶⁶

What might be considered mundane problems can lead to serious and wide-ranging consequences. These justiciable problems can result in the loss of homes, jobs, custody of children, or income (such as access to benefits or pensions).⁶⁷ They can also lead to additional justice problems, to the breakdown of relationships, to distrust of the legal system, and to impaired physical and mental health.⁶⁸ For example, studies show that as late as two years after an eviction, individuals can still suffer from depression related to that trauma.⁶⁹ Indeed, having a health or social problem is more likely if individuals have experienced a justiciable one.⁷⁰

The ultimate result can be social exclusion, a falling away from the social mainstream, as problems tend to generate more problems.⁷¹ A lack of a social safety net—family members and friends to call on during a time of crisis⁷²—as well as the dwindling of our federal safety net (public benefits such as food assistance,⁷³ supplemental income,⁷⁴ and housing assistance)⁷⁵ leaves many low-income families with little in the way of options when a crisis, such as eviction, befalls them.

Further, the impacts of these problems are not shared equally. People who are unemployed, who suffer from an illness or a disability, and who are younger report experiencing more justiciable problems than the employed, the well, and

were 2778 “everyday disputes” reported); BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 100* (1977) (stating that the mean number of problems reported were 4.8 per person); Currie, *supra* note 57, at 4.

66. SANDEFUR, *Accessing Justice*, *supra* note 57, at 7.

67. Sandefur, *Bridging the Gap*, *supra* note 3, at 724.

68. Currie, *supra* note 57, at 5, 28–29, 36.

69. See Matthew Desmond & Rachel Tolbert Kimbro, *Eviction’s Fallout: Housing, Hardship, and Health*, 94 *SOCIAL FORCES* 295, 296 (2015); Marc Fried, *Grieving for a Lost Home*, in *THE URBAN CONDITION: PEOPLE AND POLICY IN THE METROPOLIS* 151 (Leonard J. Duhl ed., 1963).

70. Currie, *supra* note 57, at 30.

71. *Id.* at 21.

72. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 *AMER. J. OF SOC’Y* 88, 118, (2012); Colleen Heflin & Mary Pattillo, *Poverty in the Family: Race, Siblings, and Socioeconomic Heterogeneity*, 35 *SOC. SCI. RES.* 804, 804–22 (2006).

73. Called “food stamps,” the official name is the Supplemental Nutrition Assistance Program.

74. Often referred to as “welfare,” here I am referring to cash assistance, officially called Temporary Assistance for Needy Families.

75. DOUGLAS RICE & BARBARA SARD, *CTR. ON BUDGET AND POLICY PRIORITIES, DECADE OF NEGLECT HAS WEAKENED FEDERAL LOW-INCOME HOUSING PROGRAMS: NEW RESOURCES REQUIRED TO MEET GROWING NEEDS* (2009).

the elderly.⁷⁶ Additionally, the adverse consequences that come from these problems are unequally distributed across the population,⁷⁷ clustering in the lives of the people who experience them and piling upon some groups in the population more quickly than others.⁷⁸ Some of these adverse impacts are felt by society, in addition to the individual who experiences them. For example, it is the community at large that must bear the cost of providing shelter to homeless citizens who have been evicted.⁷⁹ It is clear, then, that civil justice problems are very common, especially among low-income people, and their impacts are significant and widely felt.

III. THE NARROW FOCUS ON PRO SE LITIGANTS

The impact of unrepresented parties on the civil court system is so significant that the problem of access to justice has become framed as a pro se litigant problem.⁸⁰ Access to justice is typically defined as access to the courts and to legal advice.⁸¹ One result of this framing is a narrowing of the potential

76. PASCOE PLEASANCE, NIGEL J. BALMER, & REBECCA L. SANDEFUR, *PATHS TO JUSTICE: A PAST, PRESENT AND FUTURE ROADMAP* 30–31 (2013). Of course, these groups are more likely to be low-income, as well. See JULIETTE CUBANSKI, GISELLE CASILLAS, & ANTHONY DAMICO, KAISER FAMILY FOUND., *POVERTY AMONG SENIORS: AN UPDATED ANALYSIS OF NATIONAL AND STATE LEVEL POVERTY RATES UNDER THE OFFICIAL AND SUPPLEMENTAL POVERTY MEASURES* (2015), <http://files.kff.org/attachment/issue-brief-poverty-among-seniors-an-updated-analysis-of-national-and-state-level-poverty-rates-under-the-official-and-supplemental-poverty-measures> [<https://perma.cc/QC9N-Y29L>]; Pam Fessler, *Why Disability and Poverty Still Go Hand in Hand 25 Years After Landmark Law*, NAT'L PUB. RADIO (July 23, 2015, 3:38 PM), <http://www.npr.org/sections/health-shots/2015/07/23/424990474/why-disability-and-poverty-still-go-hand-in-hand-25-years-after-landmark-law> [<https://perma.cc/585U-6V7D>].

77. SANDEFUR, *Accessing Justice*, *supra* note 57, at 8, 10 (stating that low-income households were more likely to report civil justice situations and negative consequences of those situations than higher income households).

78. See 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 STUD. 301, 301–02, 319–20 (2004); Pascoe Pleasance, Nigel J. Balmer, Alexy Buck, Marisol Smith, & Ash Patel, *Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS* 67, 79 (Pascoe Pleasance, Alexy Buck, & Nigel J. Balmer eds., 2007).

79. REBECCA L. SANDEFUR, *ACCESS TO JUSTICE: CLASSICAL APPROACHES AND NEW DIRECTIONS* ix–x (2010).

80. See Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 104 (2002) (stating “access to justice often presents itself as synonymous with a concern regarding access to representation”); Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 36 (2013) [hereinafter Engler, *Turner*] (defining the “access-to-justice movement” as arising from the recognition of the pro se crisis).

81. See Buxton, *supra* note 80, at 104; Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 950 (2009)

solutions that are considered to ameliorate the access to justice problem.⁸² This Section explores the rise in pro se litigants in state trial courtrooms and how nearly all of the solutions that have been proposed to solve the access to justice problem stem from attempting to alleviate the pro se crisis.

A. *The Rise in Unrepresented Parties*

The everyday, “bread and butter”⁸³ problems that end up in court are typically adjudicated in state trial courts (as opposed to federal district courts).⁸⁴ These courts are often referred to as the “poor people’s courts” and are the tribunals where people “seek restraining orders, resolve divorce and custody matters, defend against evictions, prosecute wage theft, and fight debt collection.”⁸⁵

The sheer number of cases in these courts illustrates the vast quantity of civil legal needs that people face on a daily basis that are taken to court. There were 16 million cases in state trial courts in 2017,⁸⁶ with only 292,000 in federal district courts that same year.⁸⁷ Another way to understand the scope is to consider that the New York City housing court alone adjudicates more cases annually than all civil cases in federal district courts combined.⁸⁸ It is clear that “[t]he vast majority of American justice is dispensed” in state courts.⁸⁹

[hereinafter Sandefur, *Fulcrum Point*] (stating that justice scholars and practicing attorneys think of access to justice as being equal to expanding access to law).

82. See Sandefur, *Access to What?*, *supra* note 6, at 50 (stating, “[t]his diagnosis of the problem [as unmet legal need] proceeds from a preference for a single specific solution: more legal services.”); Steinberg, *supra* note 5, at 760 (noting that “efforts have identified two principal pathways toward access to justice, both focused on increasing the presence of lawyers” in court); J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2008 (2017) (noting that making more or better representation accessible is “a familiar access-to-justice refrain”).

83. Sandefur, *What We Know*, *supra* note 4, at 443.

84. Steinberg, *supra* note 5, at 743.

85. *Id.*

86. Calculated using data from a 2017 study of state court caseloads. COURT STATISTICS PROJECT, STATE COURT CASELOAD DIGEST: 2017 DATA 3 (2019), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/Overview/CSP%202017%20Data%20-%20Spreads%20for%20viewing.ashx> [<https://perma.cc/2SQN-UFSR>].

87. U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS: TABLE C—U.S. DISTRICT COURTS—CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS (2018) <https://www.uscourts.gov/statistics/table/c/federal-judicial-caseload-statistics/2018/03/31> [<https://perma.cc/76K4-8ETF>].

88. Steinberg, *supra* note 5, at 749 n.22 (noting that 300,000 eviction cases are filed each year in New York City). Steinberg calculates that the funding for the New York City housing court in 2003 was less than one percent of the size of the 2003 federal judiciary budget. *Id.*

89. *Id.* at 748.

Most litigants in state trial courts are unrepresented.⁹⁰ In the past few decades, the number of pro se litigants in American state trial court rooms has risen dramatically. While in the 1970s, unrepresented parties appeared in fewer than ten to twenty percent of state trial court cases,⁹¹ data from the 2000s and the 2010s indicate that seventy to ninety-eight percent of cases in family law, domestic violence, landlord tenant, and small claims courts involve at least one unrepresented litigant.⁹² These numbers were only just beginning to rise in the 1980s and 90s.⁹³ Currently, there are no definitive national statistics on pro se litigation,⁹⁴ but we know that in some states, up to eighty to ninety percent of litigants appear unrepresented.⁹⁵ These figures are found in all jurisdictions where data has been collected, no matter what the demographics are (i.e. whether urban, rural, or suburban).⁹⁶ As Jessica Steinberg notes, “[I]t is not improbable to estimate that two-thirds of all cases in American civil trial courts involve at least one unrepresented individual.”⁹⁷

This rise in pro se litigation reflects a rise in caseloads at lower state courts. From 1984 to 1997, for example, there was a 77% rise in domestic violence related civil cases nationally.⁹⁸ In California, non-family law civil filings have

90. See, e.g., BOS. BAR ASS'N TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION 2, 4–5 (1998), <http://www.bostonbar.org/prs/reports/unrepresented0898.pdf> [<https://perma.cc/2L76-MKF7>] (discussing statistics from several jurisdictions); OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 1–2 (2005), http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/AJJI_SelfRep06.pdf [<https://perma.cc/R729-EQYR>] (finding that, according to an informal survey, approximately seventy-five percent of litigants are unrepresented in cases involving domestic violence, child custody, guardianship, visitation, support, and paternity).

91. *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 160 (1976).

92. Steinberg, *supra* note 5, at 743, 749–51 (calculated from multiple state court reports); see also Buxton, *supra* note 80, at 111.

93. Steinberg, *supra* note 5, at 751. But see D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 911–12 (2013) (suggesting that lawyers had created self-help assistance programs in the 1970s in recognition of the rise in pro se parties).

94. Steinberg, *supra* note 5, at 751.

95. See, e.g., OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, *supra* note 90, at 1.

96. See BOS. BAR ASS'N, *supra* note 90, at 4–5.

97. Steinberg, *supra* note 5, at 751.

98. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 128 (2001).

risen by one-third in just four years.⁹⁹ The increase in pro se litigants might reflect overall population growth, the expansion of rights, or changes in law and policy.¹⁰⁰ Other reasons behind the dramatic increase in pro se litigants are beyond the scope of this Article.

This explosive rise in unrepresented litigants in state trial courts has been recognized as a crisis by judges, advocates, scholars, and policy experts.¹⁰¹ Trial courts inherently rely on the presence of lawyers to manage the rules of procedure and to develop the substance (both legal and factual) of a case.¹⁰² As a result, unrepresented parties struggle at every step of litigation, starting with the initial procedural steps that will allow a case to be heard on the merits. Studies have shown that judges and other court staff routinely disregard the narrative style testimony of unrepresented litigants as legally irrelevant,¹⁰³ resulting in many cases failing at the first step where a pro se party begins by telling her story to a judge.¹⁰⁴ Even if unrepresented litigants are able to get a judge to hear the merits of their case, they face numerous challenges throughout the rest of the life of the case, from serving the opposing party and providing proof of that service to contending with the rules of evidence and following the processes for enforcement, if they are lucky enough to win at trial.¹⁰⁵ Indeed, many unrepresented people simply “sign stipulations of settlement, no matter how unbalanced,” because they fear the “daunting formality of a trial.”¹⁰⁶

This fear is warranted. Research suggests that represented parties achieve more favorable outcomes than pro se litigants. In landlord tenant cases, for

99. CHRIS BELLOLI, JUDICIAL COUNCIL OF CAL., TRIAL COURT CASELOAD INCREASES TO OVER 10 MILLION FILINGS 2 (2010), www.courts.ca.gov/documents/datapoints10.pdf [<https://perma.cc/6XL5-KRY9>].

100. Hadfield, *supra* note 35, at 150 (stating, “there is no clear or singular interpretation of the substantially higher number of cases *per capita* in the U.S. . . .”); *see also* Steinberg, *supra* note 5, at 753–54.

101. Steinberg, *supra* note 5, at 743 n.4.

102. *Id.* at 759–60. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999) [hereinafter Engler, *Justice for All*].

103. William M. O’Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC’Y REV. 661, 661–62, 696–98 (1985); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 535 n.7 (1992).

104. *See* Coleman, *supra* note 40, at 523 (discussing a pro se plaintiff’s difficulty articulating a narrative, particularly to a judge who does not share her background, race, or gender).

105. Steinberg, *supra* note 5, at 754–55.

106. N.Y. CTY. LAWYERS’ ASS’N, REPORT: THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? 13 (2005), https://www.nycla.org/siteFiles/Publications/Publications195_0.pdf [<https://perma.cc/3Y7R-34T3>].

example, studies find that represented tenants tend to be anywhere from two¹⁰⁷ to ten times¹⁰⁸ more likely to prevail in their cases than unrepresented tenants. In family law matters, studies have shown that represented mothers are nearly twice as likely to be awarded custody of their children¹⁰⁹ and two and a half times more likely to obtain a protective order in cases involving domestic violence¹¹⁰ than unrepresented people. A meta-analysis of studies conducted by Rebecca Sandefur that measured the effect of representation found that litigants who are represented by attorneys are up to 2352% more likely to receive favorable outcomes.¹¹¹

Unrepresented litigants struggling in the courtroom is not a new problem; it has been recognized by trial judges for decades. In 1998, more than one hundred trial judges from across the country reported that pro se parties struggle greatly to present evidence and to comply with procedural rules.¹¹² Even in 1998, a decade before reports of the “inexorably rising tide”¹¹³ of pro se litigants began, these judges thought that the number of pro se litigants presented a “severe threat to the judicial process” and could lead to “frustrated persons resolving their disagreements outside the process.”¹¹⁴ A 1983 study also showed that unrepresented parties are more likely “to believe that they had been

107. Steinberg, *supra* note 5, at n.67 (citing Greiner, Pattanayak, & Hennessy, *supra* note 93, at 919–20, 927).

108. REBECCA HALL, BERKELEY CMTY. LAW CTR., EVICTION PREVENTION AS HOMELESSNESS PREVENTION: THE NEED FOR ACCESS TO LEGAL REPRESENTATION FOR LOW-INCOME TENANTS (1991) (reporting on a study out of the University of California at Berkeley that tenants with counsel were ten times more likely to prevail in court than their unrepresented counterparts).

109. THE WOMEN’S LAW CTR. OF MD., FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND 48, tbl.16 (2006) <http://www.wlcmd.org/wp-content/uploads/2013/06/Families-in-Transition.pdf> [<https://perma.cc/PSL4-J2AE>].

110. Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL’Y & L. 499, 511–12 (2003).

111. Rebecca Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers’ Impact*, 80 AM. SOC. REV. 909, 920 (2015). Note that the 2352% figure is not a typographical error.

112. JONA GOLDSCHMIDT, BARRY MAHONEY, HARVEY SOLOMON, JOAN GREEN, AM. JUDICATURE SOC’Y, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND MANAGERS 53 (1998), cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/106.

113. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440 (2009).

114. GOLDSCHMIDT, *supra* note 112, at 52.

treated unfairly,” an indication that the crisis may also lead to a loss of public confidence in the courts.¹¹⁵

B. *The Response to the Crisis*

Alleviating the pro se crisis, particularly its impact on the courts and the unrepresented (and represented) litigants, has eclipsed any other discussion on how to increase access to justice.¹¹⁶ The solutions that scholars, judges, and lawyers propose seek to increase the access people have to legal services.¹¹⁷ These proposals are framed as solutions to the access to justice problem, and it is often thought that increasing access to justice is equivalent to expanding access to law.¹¹⁸ The attorneys’ role in alleviating this crisis is to provide legal advice and representation.¹¹⁹

Much of the “access to justice” scholarship has included empirical measurements of the scope of the pro se crisis,¹²⁰ attempts to measure the impact of unrepresented parties on the courts,¹²¹ as well as a robust discussion of potential solutions to this ongoing problem as outlined below. This coincides with an increase in conferences and symposia analyzing the impacts and proffering solutions,¹²² most of which focus on the courthouse experience as a proxy for access to justice issues more generally.¹²³

115. JANE W. ADLER, DEBORAH R. HENSLEY, & CHARLES E. NELSON, RAND CORP., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 72 (1983), www.rand.org/content/dam/rand/pubs/reports/2007/R3071.pdf [<https://perma.cc/NP8T-QGJP>].

116. Sandefur, *Fulcrum Point*, *supra* note 81, at 950; *cf.* Buxton, *supra* note 80, at 104 (stating that “access to justice often presents itself as synonymous with a concern regarding access to representation”).

117. Steinberg, *supra* note 5, at 745; Sandefur, *Access to What?*, *supra* note 6, at 50–51; *see also* Prescott, *supra* note 82, at 2008–09.

118. Sandefur, *Fulcrum Point*, *supra* note 81, at 950; *see also* Engler, *Turner*, *supra* note 80, at 36 (defining the “access-to-justice movement” as arising from the recognition of the pro se crisis). Many articles begin with a brief general discussion of access to justice, and then explain that the result of unmet legal need is a pro se crisis and focus the rest of their article on that crisis and the solutions that might alleviate it. *See, e.g., id.*

119. Steinberg, *supra* note 5, at 745; Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 913 (2009) (stating that at the moment, access to justice is framed as access of an individual to a lawyer to help deal with a problem).

120. *See, e.g.,* BOS. BAR ASS’N, *supra* note 90, at 5.

121. Engler, *Justice for All*, *supra* note 102, at 1988.

122. *See* Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 367–68 (2008) (listing a variety of national and regional conferences, publications, and websites geared toward helping the various players in the legal system adjust to the prevalence of pro se litigation).

123. Buxton, *supra* note 80, at 105; Blasi, *supra* note 119, at 913.

This same trend is apparent in the governmental response to access to justice issues. Formal access to justice commissions have been created in at least forty-four states.¹²⁴ Nearly all of these commissions frame their role of expanding access to justice in terms of alleviating the pro se crisis by increasing access to the courts and to legal services.¹²⁵ Similarly, the United States Department of Justice under President Obama established an Office for Access to Justice in March 2010.¹²⁶ Its role was to “address the access-to-justice crisis in the criminal and civil legal system[,] . . . to increase access to counsel and legal assistance[,] and to improve the justice delivery systems that serve people who are unable to afford lawyers.”¹²⁷ The National Center for Access to Justice states clearly that it is “dedicated to achieving reform that helps people obtain justice in the courts.”¹²⁸

Thus, the dominant reforms currently being discussed by scholars, courts, poverty lawyers, and the organized bar focus on supplying more lawyers to provide legal advice and assistance in court and making changes in how trial courts are run.¹²⁹ This Article will discuss each of these in turn.

1. Civil Gideon

One robust and seemingly simple solution to the pro se crisis is a “civil Gideon,” or a right to an attorney in civil cases. This solution seeks to help litigants who are going to court, by guaranteeing them lawyers for full representation in those cases. This proposal is based on the right in criminal cases established by the Supreme Court in *Gideon v. Wainwright* in 1963.¹³⁰ After that decision, advocates thought that penalties in some civil cases resulted

124. *Access to Justice Commissions: Directory and Structure*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/atj-commissions/commission-directory/ [https://perma.cc/KKA8-3842] (last visited Mar. 14, 2019).

125. See Steinberg, *supra* note 5, at 760 (stating, “[m]ost states have now convened formal access to justice commissions tasked with crafting solutions to the pro se crisis.”); SANDEFUR & SMYTH, *supra* note 32, at 3, 27.

126. This Office was closed by the Trump administration. 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> [https://perma.cc/LW34-LEFF].

127. *Office for Access to Justice*, U.S. DEP’T JUST., <https://www.justice.gov/archives/atj> [https://perma.cc/E73F-FQXH] (last visited Nov. 15, 2019).

128. *National Center for Access to Justice*, FORDHAM L. SCH., <http://ncforaj.org/> [https://perma.cc/N2VA-2VVF] (last visited Nov. 21, 2019).

129. Steinberg, *supra* note 5, at 745; Sandefur, *Access to What?*, *supra* note 6, at 50–51; see also Prescott, *supra* note 82, at 2008–09.

130. 372 U.S. 335 (1963).

in deprivations that were “so great that a quasi-criminal level of protection was appropriate,” requiring the provision of attorneys for the indigent under the Due Process Clause of the Fourteenth Amendment.¹³¹ However, after the Supreme Court held in 1981 in *Lassiter v. Department of Social Services* that the Constitution did not require the appointment of counsel for litigants facing termination of parental rights, the push for a civil Gideon was essentially halted.¹³² Two decades later, the fortieth anniversary of the original *Gideon* case coincided with the explosion in pro se litigants, resulting in a revitalization of advocacy for a civil Gideon.¹³³ Some argue that support for a civil Gideon is stronger now than it has ever been.¹³⁴

The concept of a civil Gideon is distinct from the right to counsel in criminal cases in that there is no push for counsel in all civil cases. Instead, supporters seek the appointment of counsel for the indigent in cases where critical rights are at stake.¹³⁵ These rights often include “the right to be free from domestic abuse, the right to remain housed, and the right to parent one’s children.”¹³⁶ In 2006, the ABA unanimously passed a resolution urging governments to provide counsel at public expense as a matter of right “to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”¹³⁷

The support for civil Gideon, though widespread among trial judges,¹³⁸ the ABA, access to justice commissions, and legal services advocates,¹³⁹ is largely

131. Benjamin H. Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1238–42 (2010).

132. 452 U.S. 18 (1981).

133. Steinberg, *supra* note 5, at 762.

134. Engler, *Turner*, *supra* note 80, at 35–37; *see also* Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1025 (2009).

135. Steinberg, *supra* note 5, at 762.

136. *Id.* at 762–63.

137. The ABA House of Delegates adopted the resolution on August 7, 2006, at its Annual Meeting. AM. BAR ASS’N, RESOLUTION 112(A), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclai_d_06A112A.authcheckdam.pdf [<https://perma.cc/DP7L-GWK3>].

138. LINDA KLEIN, AM. BAR ASS’N COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 2–3 (July 12, 2010), http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf [<https://perma.cc/MD8Z-FZND>].

139. *See, e.g.*, Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 699, 703–04, 714 (2006) (arguing that New York City residents who face eviction proceedings should have a right to counsel).

support for a theoretical idea. This is because there are significant challenges relating to the practicalities of implementing such a fundamental change in the civil court system.¹⁴⁰ The first obvious challenge is a lack of support for the expansion of rights, in both state¹⁴¹ and federal courts¹⁴² as well as in legislatures.¹⁴³ The second is a clear lack of support for funding current legal services, much less the drastic increase in funding that civil Gideon would require.¹⁴⁴ A third challenge is a lack of public support for civil Gideon.¹⁴⁵ These challenges are, of course, intertwined with one another and often difficult to parse. While it is hard to argue against the idea that a right to representation in civil matters would lead to more access to justice, it is also difficult to envision a clear path forward to realizing this goal. Indeed, the increased support behind the idea of implementing civil Gideon has not resulted in clear steps that have been, or could be, taken to overcome these challenges.¹⁴⁶

2. Unbundled Legal Services

Another proposed solution for solving the crisis in America's trial courts is to provide limited representation to unrepresented parties as a way around the realities that stymie the push for a civil Gideon.¹⁴⁷ Also known as unbundled legal services, in this type of practice a lawyer provides help with a discrete legal task in lieu of traditional full service representation.¹⁴⁸ These services can

140. Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2221 (2013) (discussing the practical limitations of implementing a civil Gideon).

141. See, e.g., *King v. King*, 174 P.3d 659, 661–69 (Wash. 2007) (en banc).

142. *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (holding there is no right to counsel when incarceration for civil contempt is at stake); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24–34 (1981) (holding there is no right to counsel when termination of parental rights is at stake).

143. Steinberg, *supra* note 5, at 768–70 (noting that “most of” the legislative efforts “have failed.”).

144. Three billion dollars is a “low-ball” estimate of the cost of civil Gideon. Steinberg, *supra* note 5, at 770–71. While there have been some pilot projects that have used small sources of grant funding to provide attorneys to a select population of low-income litigants, there do not appear to be plans to implement them more broadly yet. See, e.g., D.C. BAR, *Housing Right to Counsel Project*, <https://www.dcbbar.org/pro-bono/about-the-center/right-to-counsel-project.cfm> [<https://perma.cc/Q6LX-M4TS>] (last visited Nov. 15, 2019).

145. Steinberg, *supra* note 5, at 772 (noting, “[i]t is hard to conjure up the name of a single prominent non-lawyer who believes a right to counsel is a public priority.”); RHODE, *supra* note 2, at 4.

146. Charn, *supra* note 140, at 2210–13.

147. Justice Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1108 (2002).

148. Steinberg, *supra* note 5, at 745.

include everything from helping parties fill out forms, providing limited legal advice via hotline, ghostwriting documents, self-help centers located inside courthouses, or entering one-time court appearances (such as to file an answer in a landlord tenant case but not continuing the representation after that action).¹⁴⁹ Often, an attorney–client relationship is not formed.¹⁵⁰

Although at first, some parts of the bench and bar discouraged unbundling,¹⁵¹ by 2002, the ABA amended their Model Rules of Professional Conduct to explicitly authorize these types of legal services.¹⁵² The trend toward providing limited legal services has spread to almost every state in the nation¹⁵³ and is now considered nearly ubiquitous.¹⁵⁴

3. Court Reforms

In addition to a push for increased attorney involvement in unrepresented litigants' cases, there have also been proposals for reforms in the courts themselves to help alleviate the plight of unrepresented litigants.¹⁵⁵ Many scholars propose changes in the trial courts in particular to help unrepresented litigants attempting to navigate the civil justice system without assistance.¹⁵⁶ These proposals include simplifying court forms and altering court rules to better reflect the reality of who is filling them out.¹⁵⁷ Other articles debate how

149. Fisher-Brandveen & Klempner, *supra* note 147 at 1109; Steinberg, *supra* note 5, at 760–61, 774; see also Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 276 (2010); *Landlord Tenant Resource Center*, D.C. BAR, <https://www.dcbar.org/for-the-public/help-for-individuals/landlord-tenant.cfm> [<https://perma.cc/5CRT-BN4N>] (last visited Nov. 15, 2019). Note that these services are typically exclusively focused on claims in court and are usually provided within the physical courthouse.

150. Greiner, Pattanayak, & Hennessy, *supra* note 93, at 907.

151. *Id.* at 911.

152. See MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 2011).

153. See *Unbundling Resources by State*, AM. BAR ASS'N, https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state/ [<https://perma.cc/Q5WQ-LJBN>] (last visited Nov. 15, 2019).

154. Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825, 826 (2012). Steinberg notes, however, that unbundling is often considered a second choice to full representation, as a way to distribute available legal help in a rational manner to the high greater need. Steinberg, *supra* note 5, at 761. This reflects that full representation to individuals in court is thought of as the gold standard to solving the access to justice crisis.

155. See, e.g., Barton, *supra* note 131, at 1238.

156. See, e.g., 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 (2010) [hereinafter Engler, *Connecting Self-Representation*]; Barton, *supra* note 131, at 1238.

157. Steinberg, *supra* note 5, at 787–88.

judges, clerks, and other court staff should conduct themselves to assist unrepresented parties.¹⁵⁸ Some of this discussion includes advocating to change the rules prohibiting non-lawyers from giving legal advice as a way to increase access to limited legal information.¹⁵⁹ There has also been an increased focus on the role technology could play in alleviating some of the burdens felt by pro se parties.¹⁶⁰ An additional push has been made for an increase in the use of Alternative Dispute Resolution, viewed as a way to relieve pressure on the overburdened courthouses.¹⁶¹ Another proposal includes changing the way legal assistance is paid for by allowing for third party litigation funding.¹⁶²

Each of these proposed solutions seeks to help people solve problems that have ripened into legal claims in court. They flow directly from the limited way attorneys, scholars, and judges have framed the problem of access to justice.¹⁶³ The proposals also reflect a singular view of the role attorneys can play in achieving justice: the provision of legal advice and representation in court.¹⁶⁴ The vast majority of the scholarship surrounding these issues is limited to discussing these types of solutions, but this framing is rarely discussed or acknowledged.

IV. OUR LIMITED VIEW OF ACCESS TO JUSTICE IS DOOMED TO FAIL

Our singular focus on alleviating the pro se crisis to solve the problem of unequal access to justice ignores how people actually experience the civil legal problems that affect their lives.¹⁶⁵ It also entirely misses those civil justice

158. Engler, *Justice for All*, *supra* note 102, at 1988; Richard Zorza, *A New Day for Judges and the Self-Represented: Toward Best Practices in Complex Self-Represented Cases*, 51 JUDGES' J. 36, 41–42 (2012).

159. *See, e.g.*, Matthew Longobardi, *Unauthorized Practice of Law and Meaningful Access to the Courts: Is Law Too Important to be Left to Lawyers?*, 35 CARDOZO L. REV. 2043, 2045 (2014); Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2242 (1999).

160. *See, e.g.*, Prescott, *supra* note 82, at 2011.

161. *See, e.g.*, James Holbrook, *The Effects of Alternative Dispute Resolution on Access to Justice in Utah*, 2006 UTAH L. REV. 1017, 1019–20.

162. *See, e.g.*, Tara Q. Higgins, Note, *Bridging the Gap: Providing "Access to Justice" For Middle-Market Litigants*, 51 SUFFOLK U. L. REV. 289, 294 (2018); Sasha Nichols, *Access to Cash, Access to Court: Unlocking the Courtroom Doors with Third-Party Litigation Finance*, 5 U.C. IRVINE L. REV. 197, 201–202 (2015).

163. Sandefur, *Access to What?*, *supra* note 6, at 53.

164. *See infra* Part V.

165. *See* Currie, *supra* note 57, at 2 (noting that “[i]t is now a familiar theme in the literature of access to justice that many problems encountered in people’s everyday lives have legal aspects, potential legal consequences and potential legal solutions If we are interested in justice writ large,

problems that never see the inside of a courtroom.¹⁶⁶ This Section analyzes some of the research that has been conducted on how laypeople experience problems and describes how we cannot achieve equal access to justice in the way it is currently conceived.

A. What People Do When Faced with Problems: Not What You Think

There is a longstanding, intractable idea that Americans are, in general, very litigious. However, this has been shown time and again to be mostly myth.¹⁶⁷ On a fundamental level, turning to the legal system to handle civil justice problems is simply not common.¹⁶⁸ In fact, the *minority* of civil problems are taken to lawyers to secure advice or representation.¹⁶⁹ Most studies agree that surprisingly few people seek any legal redress for problems they face in America.¹⁷⁰ While the idea that people in the United States are not actually very litigious has not bubbled up into the popular conception of America, this is an accepted fact in the scholarly literature.

This is especially true for low- or moderate-income people. The ABA's Comprehensive Legal Needs Study reported that less than three in ten of the legal problems of low-income households were brought to the justice system.¹⁷¹ Moderate-income households reported a similar rate, bringing only four in ten of their legal problems to the courts.¹⁷² Significantly, the study also found that "in seventy-nine percent of the low-income households having legal problems, no lawyer was involved."¹⁷³ Rebecca Sandefur's Community Needs and Services (CNS) study drew similar conclusions, finding that turning to courts or lawyers for assistance with civil legal problems was rare. In her study, only 22% of legal problems were taken to a third party who was not a member of the

in justice as a social institution, not limited to the formal laws and system of justice, this is the terrain that is relevant.").

166. Cf. Prescott, *supra* note 82, at 2009 (noting that "narrowing the scope of reform efforts to those that focus exclusively on enhancing lawyer involvement risks blindness to nonlegal factors").

167. Kritzer, *supra* note 58, at 876.

168. Sandefur, *What We Know*, *supra* note 4, at 448.

169. SANDEFUR, *Accessing Justice*, *supra* note 57, at 11; AM. BAR ASS'N, *supra* note 50, at 27, tbl.4-7. This study is discussed in more detail below.

170. Kritzer, *supra* note 58, at 876.

171. AM. BAR ASS'N, *supra* note 50, at 22, tbl.4-2; Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 *FORDHAM L. REV.* 1879, 1883 (1999).

172. AM. BAR ASS'N, *supra* note 50, at 22, tbl.4-2.

173. Barry, *supra* note 171, at 1884; AM. BAR ASS'N, *supra* note 50, at 27, tbl.4-7.

person's social network¹⁷⁴—and these third parties “seldom” included lawyers or courts.¹⁷⁵ A review of the research across a range of methods and approaches, also conducted by Sandefur, revealed that, simply put, people “hardly ever” take their problems to lawyers or pursue them in court.¹⁷⁶

If people do not take their justiciable problems to court, a good research question is what they do when faced with them. Several studies have been conducted that have attempted to quantify what people do when faced with civil justice situations, such as those related to housing, finances, income, domestic relations, and the care of dependents.¹⁷⁷ The simplest answer is that most people do nothing in response to these problems,¹⁷⁸ even when doing nothing has been shown to have negative consequences.¹⁷⁹ Indeed, doing nothing is the most common response by low-income people when faced with this sort of problem.¹⁸⁰ “[P]oor households [are] 200 percent more likely to do nothing,” in response to civil justice problems, “than [are] moderate-income households.”¹⁸¹ The CNS study found that doing nothing was most common in response to employment situations (28%), and to issues relating to government benefits (21% of the time) and insurance (21% of the time).¹⁸² Doing nothing is so common that it is referred to in shorthand as “lumping it” by many scholars.¹⁸³ This is despite the fact that the negative consequences of doing nothing when faced with a problem can be significant.¹⁸⁴

174. SANDEFUR, *Accessing Justice*, *supra* note 57, at 11. In this study, “participants were asked about a range of ‘situations you may have experienced,’ all of which were carefully selected to be situations that have civil legal aspects, raise civil legal issues, and have consequences shaped by civil law.” *Id.* at 5.

175. *Id.* at 12.

176. See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class and Gender Inequality*, 34 ANN. REV. SOC. 339 (2008) (reviewing research demonstrating this finding across a range of methods and theoretical approaches).

177. Sandefur, *What We Know*, *supra* note 4, at 443.

178. SANDEFUR, *Accessing Justice*, *supra* note 57, at 12; see also AM. BAR ASS'N, *supra* note 50, at 21–22; Earl, *supra* note 56, at 233.

179. See GENN, *supra* note 58, at 20.

180. Sandefur, *Importance*, *supra* note 59, at 113.

181. Sandefur, *Fulcrum Point*, *supra* note 81, at 975. For a brief discussion of the socioeconomic factors that may play a role in this, see notes 189–95 and accompanying text.

182. SANDEFUR, *Accessing Justice*, *supra* note 57, at 11.

183. Earl, *supra* note 56, at 233; see also Kritzer, *supra* note 58, at 876 (noting that “we now have an extensive literature on the likelihood of grievants taking action”).

184. See *supra* Part III.

For example, in landlord tenant cases between 35% to over 90% of tenants do not appear in eviction court the day their case is called.¹⁸⁵ These cases, which are stamped automatically by the clerk, are par for the course in most eviction courtrooms.¹⁸⁶ In the context of landlord tenant law, doing nothing when faced with an eviction notice on your door could mean that you are forced to move your belongings and your family to live with a family member or friend, you simply wait until you are forcibly removed by the city and go to a homeless shelter, or you work something out with the landlord ad hoc (i.e. without the court or the law ever becoming aware of it) to stay another month. In any event, your legal rights and defenses are generally not a part of the equation, and the end result is often a forced move.¹⁸⁷ The landlord tenant context illustrates that even the service of a notice summoning a person to court does not necessarily result in that person utilizing the legal system to assert her legal rights.¹⁸⁸

Studies have shown that socioeconomic status plays a significant role in people's actions—or inactions—when faced with consequential civil problems. The very people who most need the rights and protections offered in civil law are the very people least likely to take action when faced with justiciable problems.¹⁸⁹ Research has shown differences in information- and help-seeking behavior between socioeconomic classes. “Some authors have described a middle class ‘sense of entitlement’ that contrasts with poor and working class ‘sense of constraint,’”¹⁹⁰ and of working class “conformity to external authority” versus middle class “self-direction.”¹⁹¹ For example, middle class parents and their children are more likely to ask professionals like doctors to

185. DESMOND, EVICTED, *supra* note 10, at 358 n.4 (first citing Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 821 (1994); then citing Erik Larson, *Case Characteristics and Defendant Tenant Default in a Housing Court*, 3 J. EMPIRICAL LEG. STUD. 121, 140 (2006); and then citing DAVID CAPLOVITZ, *CONSUMER IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* (1974)).

186. DESMOND, EVICTED, *supra* note 10, at 99.

187. *See id.* at 100.

188. One can imagine in comparison how much rarer it would be for a person to consider going to court with their civil justice problem—for example, an insurance issue—without the receipt of a summons.

189. SANDEFUR, *Accessing Justice*, *supra* note 57, at 11; Sandefur, *Importance*, *supra* note 59, at 113 (stating that low-income people do nothing more often).

190. Sandefur, *Importance*, *supra* note 59, at 117 (first citing ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE AND FAMILY LIFE* (2d ed. 2003); and then citing Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 AMER. SOC. REV. 747 (2002) [hereinafter Lareau 2002]).

191. *Id.* (citing Melvin Kohn, *CLASS AND CONFORMITY: A STUDY IN VALUES* 84 (2d ed. 1977)).

explain and justify diagnoses and proposed treatments¹⁹² or demand that a school customize their child's learning experience than poor and working-class families.¹⁹³ The most vulnerable people on the lowest socioeconomic rungs are the least likely to "take actions that might protect or further their own interests, whether those actions involve seeking information or advice, pressing claims with others seen as causing a problem, or attempting to mobilise third parties in the furtherance of their goals."¹⁹⁴ This may be related to the "high correlation between social class and education."¹⁹⁵

Instead of turning to law or lawyers to solve their problems, low-income people usually handle their civil legal problems on their own or with the advice of family and friends—in 46% of problems in the CNS study.¹⁹⁶ In that same study, people described 21% of the problems they experienced as private (not something to involve others with), or family/community problems (something best dealt with within family or community).¹⁹⁷ Multiple studies have found that only around a fifth, or perhaps a fourth, of all civil justice problems are taken to attorneys.¹⁹⁸ This means that people face their problems and "engage in a wide range of problem-solving activity entirely without lawyers" or the legal system.¹⁹⁹ It is estimated that in Milwaukee, for example, nearly half of all forced moves among renters are off-the-books displacements that never see a court filing.²⁰⁰

192. Lareau 2002, *supra* note 190, at 766–71.

193. ANNETTE LAREAU, HOME ADVANTAGE: SOCIAL CLASS AND PARENTAL INTERVENTION IN ELEMENTARY EDUCATION 35 (2d ed. 2000).

194. Sandefur, *Importance*, *supra* note 59, at 117.

195. Blasi, *supra* note 119, at 934. It should be noted here that the cost of attorneys or legal assistance has not been found to be a major factor in the decision to bring a problem to a lawyer or a courthouse. See Kritzer, *supra* note 58, at 877–78. In the ABA study described previously, only eight percent of moderate-income and sixteen percent of low-income respondents cited cost as the reason they did not seek help from the legal or judicial system. AM. BAR ASS'N, *supra* note 50, at 26, tbl.4-6. In the CNS study, people cited money as the reason they did not go to lawyers in less than one-fifth of the problems they experience. Sandefur, *Bridging the Gap*, *supra* note 3, at 722. We also know that cost is not the determinative factor because people sometimes do nothing even when taking action would cost them nothing financially. Sandefur, *Importance*, *supra* note 59, at 116.

196. Sandefur, *Bridging the Gap*, *supra* note 3, at 725–26.

197. *Id.* at 725.

198. SANDEFUR, *Accessing Justice*, *supra* note 57, at 11; AM. BAR ASS'N, *supra* note 50, at 27, tbl.4-7.

199. Blasi, *supra* note 119, at 931 (citing Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984), which examines how lawyering can be better understood by studying the "lay-lawyering" that occurs when human beings help each other solve everyday problems in everyday life); Sandefur, *What We Know*, *supra* note 4, at 448.

200. DESMOND, *EVICTED*, *supra* note 10, at 398.

It can be surprising, especially for lawyers, to learn that so many people do nothing, or do not seek out the civil legal system, when faced with a significant justiciable legal issue. There are many reasons behind these responses, most of which are outside the scope of this Article.²⁰¹ But the data points to one fundamental, well-accepted fact: for laypeople (i.e. non-lawyers), the transformation of a civil justice problem into a legal one is a complex process.²⁰² While facing these problems is a daily occurrence for most people, framing them in legal terms is not.²⁰³

Felstiner, Abel, and Sarat described this process in three steps in their seminal work.²⁰⁴ First, the problem is noticed and identified (“naming”).²⁰⁵ Second, some of these problems are attributed to a third party (“blaming”), and the problem becomes a grievance.²⁰⁶ This step is only met if the person who has suffered the injurious experience not only finds fault in someone else (or some institution) but also determines that there is some remedial action that could be taken.²⁰⁷ Third, the person does something to remedy the problem, perhaps ultimately in a court of law (“claiming”).²⁰⁸ This is a complex, unstable, subjective, and reactive process, and many civil justice situations do not make it past one or another of the steps.²⁰⁹ Fundamentally, disputes are social constructs, and the characterization of a situation as a legal problem reflects not only the thoughts of the people experiencing the problem but also those in their community (friends, neighbors, family members, service providers) to whom they bring their problems.²¹⁰

201. See *infra* Section IV.B for a brief discussion of some of the reasons people give for their inaction.

202. William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 634–36 (1980–81).

203. Blasi, *supra* note 119, at 931; Sandefur, *Fulcrum Point*, *supra* note 81, at 950 (stating that people do not share law-centric perspective of attorneys or academics).

204. Felstiner, Abel, & Sarat, *supra* note 202, at 634–36.

205. *Id.* at 635.

206. *Id.*

207. *Id.* This is significant because while many people do find blame, the idea that some remedy could be taken is not always obvious. Sandefur, *Importance*, *supra* note 59, at 123–24 (finding that one reason people do not get to the claiming stage is because they are aware of power imbalances between themselves and who they blame for their problem); see also *infra* Section IV.B.

208. Felstiner, Abel, & Sarat, *supra* note 202, at 635–36.

209. *Id.* at 636.

210. Sandefur, *Fulcrum Point*, *supra* note 81, at 971; Felstiner, Abel, & Sarat, *supra* note 202, at 636. In the forty years since the Felstiner, Abel, & Sarat Article was published, some scholars have sought to clarify various steps in the process or introduce new ones. See, e.g., Blasi, *supra* note 119,

This complicated process is a reflection of the basic fact that most people do not think of their problems as legal ones. This is the very simple, but often overlooked, contributing factor explaining why most laypeople do not bring their problems to lawyers or think of the law as a mechanism for solving them.²¹¹ Much of what looks legal to lawyers does not seem particularly legal to the laypeople who experience these problems.²¹² In general, most people do not think of their role in their problems in terms of law or rights.²¹³ The CNS study found that only 9% of the civil justice problems experienced by a group of people (most of which were in fact actionable under civil law) were reported by the person experiencing them as being “legal.”²¹⁴ Instead, people described over half (56%) of their civil justice problems as “bad luck/part of life” or “part of God’s plan.”²¹⁵ This data has significant consequences, for there is a wide chasm between the belief that problems you are facing are things that simply happen or are ordained to happen and the belief that what is happening is wrong and you have a right to challenge it.²¹⁶

This lack of conceptualizing problems as legal will most likely come as no surprise to antipoverty advocates and legal aid lawyers. Many civil attorneys who serve indigent clients find that their clients do not consider the law as a mechanism for solving their problems and do not think of lawyers at all outside

at 931–32. However, the process articulated in this seminal article is still widely accepted as an accurate description of the process one goes through when faced with a problem or dispute.

211. Sandefur, *What We Know*, *supra* note 4, at 448. As early as 1967, a study in Detroit demonstrated that people did not seek justice or a vindication of their legal rights, but rather resolution of their problems in a more or less expedient way. Leon Mayhew & Albert J. Reiss, Jr., *The Social Organization of Legal Contacts*, 34 AM. SOC. REV. 309, 309–10 (1969).

212. Sandefur, *Bridging the Gap*, *supra* note 3, at 723.

213. SANDEFUR, *Accessing Justice*, *supra* note 57, at 13; Sandefur, *What We Know*, *supra* note 4, at 448; Sandefur, *Access to What?*, *supra* note 6, at 51; Sandefur, *Bridging the Gap*, *supra* note 3, at 723, 725. It should be noted that there is no evidence that the rise in litigation of unrepresented parties, described *supra* in Part II, is due to an increased understanding of legal rights or an increased number of people viewing their problems in legal terms.

214. The problems described were not only actionable, but a means of acting on the issue already existed (and there were lawyers who did that type of work). Sandefur, *Bridging the Gap*, *supra* note 3, at 725, 727–28; SANDEFUR, *Accessing Justice*, *supra* note 57, at 14. It is particularly significant that those few problems that were seen as legal were much more likely to be taken to lawyers or to the courthouse to be dealt with. Sandefur, *Bridging the Gap*, *supra* note 3, at 725. This further demonstrates the idea that the lack of recognition of the issues as legal plays a major role in not bringing the problems to the law or lawyers.

215. *Id.*

216. *See id.* Putting in Felstiner, Abel, and Sarat’s terms, these problems were named, but never made it to the “blaming” step. *See* Felstiner, Abel, & Sarat, *supra* note 202, at 635.

of the criminal context.²¹⁷ This was underscored in my own experience at a holistic services organization, where even the staff often did not consider the problems of their clients to be something appropriate for a lawyer to handle. Despite repeated trainings and other educational methods, like posters and flyers, non-legal staff (such as social workers, medical professionals, and food and clothing pantry clerks) did not understand when clients had problems that were “legal” in nature. Thus, a social worker would talk to a client about a housing matter, for example, and it would never occur to either party in the conversation that this was an issue that a lawyer could help with. The proximity between the attorneys and the social workers (down the hall, within the same building) did not seem to have an effect on overcoming this barrier.

B. We Cannot Achieve Equal Access to Justice as Currently Conceived

Understanding people’s responses to their problems “encourages an analytic step back from law and legal services” to examine these issues and our responsive actions.²¹⁸ The conception of a problem as a legal one is a viewpoint that comes not from the people experiencing the problems but from the attorneys seeking to help solve them.²¹⁹ The data show that the law is not the exclusive, or even the predominant, means through which people in market democracies attempt to handle their civil justice problems.²²⁰ People often end up just accepting the result determined not by law but by the “play of markets, power, organizations, wealth, politics, and other dynamics.”²²¹

The logical conclusion, then, to achieving the current conception of access to justice (i.e. access to law), would be to get more people to think about their problems as legal in nature. Indeed, some scholars suggest that public education must be one part of any solution to the access to justice crisis.²²² If we can get more people to understand their problems as legal ones, the argument goes, more people can exercise their rights and take advantage of the protections provided in civil law. In this way, we can continue to strive to meet

217. Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117 (2013) (noting that “people often do not think of lawyers’ services as a helpful route to solving civil justice problems”) (citing Sandefur, *Importance*, *supra* note 59, at 112).

218. Sandefur, *Importance*, *supra* note 59, at 113; *see also* Currie, *supra* note 57, at 18.

219. *See* Sandefur, *Bridging the Gap*, *supra* note 3, at 723 (stating that “the [legal] profession and the public, in many instances see different landscapes of actionable events and speak different language about them.”).

220. Hadfield, *supra* note 35, at 143; *see also* Felstiner, Abel, & Sarat, *supra* note 202, at 635.

221. Hadfield, *supra* note 35, at 143.

222. Sandefur, *Importance*, *supra* note 59, at 128; Buckwalter-Poza, *supra* note 29, at 254–55.

the promise of the law that attorneys in particular hold dear: the normative belief that one function of law is to rebalance some of the inherent imbalances that result from market forces.

An obvious example of this rebalancing effect is the development of landlord tenant law. Early on, when the landlord tenant relationship was focused mainly on rural land, landlords' sole responsibility was giving the land's possession to the tenant to use in peace.²²³ The landlord was not paid by the tenant to do anything besides turn over the land.²²⁴ Over time, as people moved into cities and into buildings, landlords' obligations to their tenants grew,²²⁵ most notably through the implied warranty of habitability.²²⁶ Landlords not only became responsible for leasing possession of the space but also for providing a habitable space.²²⁷ The implied warranty was then read into residential leases in most states and made mutual with the tenant's duty to pay rent.²²⁸ This shift to a lease being a contract meant that, under the law, the two parties were made symmetrical.²²⁹ This reflected the demographic shift from rural land leases to units in buildings in cities, but more importantly, the inherent imbalances that were present in a landlord tenant relationship.²³⁰ Before the warranty, all a tenant could do was ask a landlord to fix something that was broken or to provide things such as heat, electricity, and water. If the landlord did not comply, the tenant did not have much in the way of legal recourse.²³¹

223. Thomas M. Quinn & Earl Phillips, *The Law of Landlord Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 *FORDHAM L. REV.* 225, 227 (1969).

224. *Id.* at 228. The doctrine of absolute liability for rent was adopted from the laws of England's landed gentry, "which held tenants unequivocally responsible for payments even in the event of fire or flood." DESMOND, *EVICTED*, *supra* note 10, at 250; FRANK A. ENEVER, *HISTORY OF THE LAW OF DISTRESS FOR RENT AND DAMAGE FEASANT* 111 (1931).

225. Quinn & Phillips, *supra* note 223, at 231.

226. David A. Super, *The Rise and Fall of The Implied Warranty of Habitability*, 99 *CALIF. L. REV.* 389, 394 (2011).

227. Quinn & Phillips, *supra* note 223, at 254.

228. Super, *supra* note 226, at 394.

229. *Id.* at 401.

230. See Quinn & Phillips, *supra* note 223, at 233 (noting "the prospect of a tenant's being forced to continue paying rent under pain of summary eviction when heat is not supplied seems preposterous to one who expects basic fairness from the law"); Super, *supra* note 226, at 393 (noting "these measures, eventually adopted in almost every state, seemed to reverse the landlord's historical dominance of the landlord-tenant relationship").

231. Slums in cities were often cut off from basic municipal services, requiring tenants to beg for water in other parts of town. LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 462-63 (1961); ELIZABETH BLACKMAR, *MANHATTAN FOR RENT, 1785-1850*, at 199 (1989); DESMOND, *EVICTED*, *supra* note 10, at 250.

Decades later, there are jurisdictions that take these landlord responsibilities farther. Tenants in Washington, D.C. who have housing code violations in their units and who have informed their landlords about those violations can use those violations as an affirmative defense for not paying their rent in an eviction case.²³² This reflects an attitude of the legislature that tenants should not have to pay the full amount of rent that is owed if the unit is damaged in some way and the landlord is aware of that damage.²³³ Even the creation of a robust housing code demonstrates the use of the law to provide protections to those who remain unprotected in the marketplace.²³⁴

This attempt to rebalance inherent imbalances in the market is a fundamental fixture of civil law protections. Yet when laypeople are asked why they did nothing in response to a problem they identified having in their past, their answers belie this central underpinning to our legal system. In the CNS study, people were asked about problems they had faced which were carefully selected to be situations that had civil legal aspects and consequences shaped by civil law (those related to employment, money—finances, government benefits, debts—insurance, and housing).²³⁵ People gave three main reasons for why they did nothing to solve one of these problems: (1) shame or embarrassment that the problem was happening to them (particularly problems related to debt or money), (2) a recognition of an unfavorable power imbalance (that the party they were up against, such as a big insurance company, had access to more legal help than they themselves did), and (3) lessons learned from past experience, such as fear (of retaliation), gratitude (toward a landlord who previously did something nice, for example) or frustrated resignation.²³⁶

These latter two responses are particularly significant in what they say about the ability of law to rebalance the unfavorable power imbalance inherent in these civil relationships. If landlord tenant laws were created to require landlords to go through a civil legal procedure in order to forcibly evict tenants and to protect tenants' rights (such as the aforementioned warranty of habitability), the idea that tenants are not using these mechanisms because of a sense of the power imbalance inherent in the landlord tenant relationship is profoundly troubling. It would mean that the goals and purposes of some of our civil laws are being unrealized by nature of the very power imbalance the

232. D.C. Mun. Regs. tit. 14, § 14-301 (LexisNexis 2019); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1073, 1082–83 (D.C. Cir. 1970). This describes Ms. Smith's situation, assuming she informed her landlord of the problems in her unit and gave him adequate time to respond.

233. D.C. Mun. Regs. tit. 14, § 14-301; *Javins*, 428 F.2d at 1073, 1082–83.

234. See Quinn & Phillips, *supra* note 223, at 254.

235. SANDEFUR, *Accessing Justice*, *supra* note 57, at 5, 7.

236. Sandefur, *Importance*, *supra* note 59, at 123–25.

laws are in place to subvert. Fear of retaliation from, gratitude toward, and feelings of frustrated resignation about the party to whom one assigns blame for causing one's problem are similarly fraught. These reasons are given for doing nothing in response to consequential problems despite the laws protecting people from retaliation,²³⁷ the legal requirements of a landlord or debt collector's duties,²³⁸ and the very purpose of the law to give rights to the "little guy" in these civil relationships.

The problem, of course, is that if every low-income person in every jurisdiction truly understood her legal rights when it comes to the landlord tenant relationship, and if all of them made educated decisions about whether or not to exercise those rights in court, the civil legal system as it exists today could utterly collapse.²³⁹ Looking solely at landlord tenant law, we know that between 35% and 90% of tenants simply do not show up to their court hearings,²⁴⁰ but courthouses around the country are already suffering under the crush of too many cases.

The impact the current volume of cases is having on the courts is well documented.²⁴¹ Civil trial courts are already struggling to meet their current dockets, resulting in significant delays. A majority of family law judges surveyed in 2004 agreed that overcrowded court dockets delay finding safe, permanent homes for children in foster care.²⁴² The average wait time between filing for an appeal of a Social Security denial and a hearing date is more than fifteen months and is often closer to twenty-two months in many places.²⁴³

237. See, e.g., D.C. CODE § 42-3505.02 (1985); D.C. Mun. Regs. tit. 14, § 14-4303 (1986).

238. See, e.g., D.C. CODE § 42-3505.01(a).

239. See Sandefur, *Access to What?*, *supra* note 6, at 53 ("Practically speaking, it would be impossible for the nation's existing courts, administrative agencies, and other forums that resolve disputes to process the estimated more than one hundred million justice problems that Americans experience every year.").

240. Desmond, *EVICTED*, *supra* note 10, at 358 n.4 (citing Gerchick, *supra* note 185, at 821; Larson, *supra* note 185, at 140; CAPLOVITZ, *supra* note 185).

241. See, e.g., JOHN M. GREACEN, CTR. FOR FAMILIES, CHILDREN & THE COURTS, CALIFORNIA ADMIN. OFFICE OF THE COURTS, SELF-REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSE TO THEIR NEEDS: WHAT WE KNOW 12 (2002).

242. FOSTERING RESULTS, VIEW FROM THE BENCH: OBSTACLES TO SAFETY & PERMANENCY FOR CHILDREN IN FOSTER CARE 4 (2004), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/news/press_releases/foster_care_reform/fosteringresults070104pdf.pdf [https://perma.cc/28B9-CVES]. Among judges whose docket is composed of more than three-quarters abuse and neglect cases, nearly two-thirds (64%) say overcrowded dockets delay permanency.

243. Calculated using figures from U.S. SOC. SEC. ADMIN., HEARINGS AND APPEALS: AVERAGE WAIT TIME UNTIL HEARING HELD REPORT (FOR THE MONTH OF FEBRUARY 2019) (2019),

Dealing with overcrowding in courtrooms is also resulting in practices that could at best be described as increasing efficiency and at worst as decreasing justice. In describing a typical day in landlord tenant court in Massachusetts in 2013, D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Hennessy calculated that judges heard anywhere from thirty to sixty summary eviction matters in the morning alone, in order to have enough time for a full criminal docket in the afternoon.²⁴⁴ Similarly, in New York City Housing Court, roughly 400,000 eviction cases are filed per year, leaving judges to see an average of thirty-three cases a day.²⁴⁵ These cases are disposed of at an average rate of five to fourteen minutes per case, or as the Committee noted, a “jurisprudence of ultimate expedition.”²⁴⁶

Facing the vast numbers of cases called each day results in changes to the way they are handled, which may or may not have anything to do with justice. Parties are often required to meet and negotiate in the hallway before the dispute is even described to a judge or court clerk.²⁴⁷ As many cases as possible are referred to mediation, and parties (particularly parties without representation) are often cajoled into settlement not only by the opposing party but also by court staff and judges.²⁴⁸ Trials are conducted infrequently and are often curtailed.²⁴⁹

This reality is part of the reason why the solutions to the problem of access to justice that lawyers focus on are centered on those people who have already

https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html [<https://perma.cc/3T8Y-PPY8>] (last visited Mar 14, 2019).

244. Greiner, Pattanayak, & Hennessy, *supra* note 93, at 942. Leaving the docket open in the afternoon was important because of the potential for the criminal cases having constitutionally or statutorily mandated timelines. *Id.*

245. 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 960 (Civ. Ct. 1992) (citing Committee on Legal Assistance of the Association of the Bar of the City of New York, Housing Court Pro Bono Project, Pts. I & II (June, Nov 1988) (unpublished study)); Engler, *Justice for All*, *supra* note 102, at 1988.

246. 144 Woodruff Corp., 585 N.Y.S.2d at 960.

247. See, e.g., Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiation with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 120 (1997) [hereinafter Engler, *Out of Sight*] (citing CAPLOVITZ, *supra* note 185); Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 665 (2006).

248. Engler, *Justice for All*, *supra* note 102, at 2020 (stating that “judges routinely encourage and pressure litigants to settle.”); Engler, *Out of Sight*, *supra* note 247, at 120.

249. PAUL HANNAFORD-AGOR, SCOTT GRAVES, & SHELLEY SPACEK MILLER, NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 35 (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<https://perma.cc/6EPC-ZCK9>]; Greiner, Pattanayak, & Hennessy, *supra* note 93, at 943.

made it to the courthouse. Discussion about civil Gideon generally does not focus on the mechanisms by which that theoretical army of lawyers would conduct outreach to ensure that all of those who are facing a court date would become aware that they have the right to an attorney.²⁵⁰ Those advocating for a civil Gideon do not usually argue for an increase in low-income people exercising their rights in court who might not otherwise have but rather the provision of attorneys to protect people from losing particular rights, typically when they are already in court.²⁵¹

Similarly, the vast majority of unbundled legal services programs reside within the courthouse walls. These programs typically do not focus on efforts to increase the number of people who come to court to utilize them.²⁵² The other solutions described in Part III of this Article to change the culture of the officers of the court, change court forms, or provide more access through other mechanisms are all entirely focused on the current population of people already in court. The idea of increasing the number of people coming to court to exercise their rights is absent from the conversation discussing these potential reforms.

The fact is that we cannot significantly increase the number of people accessing the courts or administrative agencies, even if we were able to successfully help more of them conceptualize their problems as legal in nature.²⁵³ Our current frame of reference is to conflate access to justice with access to law and the courts. The structural nature of the limits of the courts and other institutions of remedy to solve the civil justice problems low-income people face means this conception of achieving access to justice is doomed to

250. While some civil Gideon pilot programs certainly contain an element of outreach (and will include as part of the measurement of their outcomes a discussion of this outreach), this important aspect of the provision of legal services is absent from the scholarship discussing civil Gideon. See Steinberg, *supra* note 5, at 745; D.C. BAR, *supra* note 144.

251. Steinberg, *supra* note 5, at 745, 761–63.

252. While legal services organizations may work to ensure that people are aware of the court-based programs, the stated goals of these unbundled programs is typically not to conduct outreach beyond those people already in court. *Cf.* Steinberg, *supra* note 5, at 745.

253. The data on overcrowding in debt collection, landlord tenant, and small claims courts in particular suggest that there is little room to grow. See NAT'L CTR. FOR STATE COURTS, PROBLEMS AND RECOMMENDATIONS FOR HIGH-VOLUME DOCKETS: A REPORT OF THE HIGH-VOLUME CASE WORKING GROUP TO THE CCJ CIVIL JUSTICE IMPROVEMENTS COMMITTEE app. I, p. 6 (2015), <https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Appendices-I.ashx> [<https://perma.cc/Y2VR-W7N9>]. This is particularly true with the decreases in state court budgets over the past decade. See HANNAFORD-AGOR, GRAVES, & MILLER, *supra* note 249, at 38. While there is an argument to be made that there may be more value in litigants appearing in court and settling than, for example, getting a default judgment, without more data on the impacts of settlement in various types of cases, we cannot know for sure.

fail. The assumptions that underlie how we currently conceptualize equal access to justice, then, ensure that we will never achieve it.

V. VIEWING ACCESS TO JUSTICE THROUGH A WIDER LENS

One crucial aspect that is missing from our current access to justice debate is a consideration of the role attorneys play in achieving access to justice, including the limitations of our current legal services model. This Section presents an alternate view of access to justice that takes into account what low-income people actually need in the broader fight against poverty and injustice. This new definition of access to justice requires attorneys to reimagine their role in order to achieve it.

A. *Our Narrow View of the Attorney's Role*

In our current framing of the access to justice problem, the role lawyers play is conceived of as limited to providing legal advice, almost exclusively in court.²⁵⁴ This vision of our role does not acknowledge the limitations of operating under a crisis-based legal services model. It is well accepted among poverty law scholars that “[l]egal services cannot end poverty,”²⁵⁵ yet our conversation about access to justice focuses entirely on legal services. Providing legal services, particularly in court, is operating on what many call “a legal emergency-room model.”²⁵⁶ Attorneys in this model provide legal advice when a problem has become a dispute that requires a court to solve—in other words, intervening when the problem has already become a crisis.²⁵⁷ These services are litigation-oriented, retrospective, and tend to focus on providing legal help to the most vulnerable people who are experiencing the most extreme crises.²⁵⁸ In this way, they are like the services provided in a medical emergency room, which typically treat the acute symptoms, as opposed to the root causes, of illness. In the landlord tenant context, this is the difference between defending a tenant in court against an eviction action, when she is on the verge of losing her housing, and helping the tenant prevent the filing of an eviction action in the first place.

254. *See supra* Section II.B.

255. Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L. J. 1669, 1705 (1995).

256. *See, e.g.*, Albiston & Sandefur, *supra* note 217, at 114; David I. Schulman, Ellen Lawton, Paul R. Tremblay, Randy Retkin, & Megan Sandel, *Public Health Legal Services: A New Vision*, 15 GEO. J. ON POVERTY L. & POL'Y 729, 731 (2008).

257. Albiston & Sandefur, *supra* note 217, at 114 (describing how legal representation “provides representation at the point a legal crisis comes to a head”).

258. Schulman, Lawton, Tremblay, Retkin, & Sandel, *supra* note 256, at 731.

Early intervention can be a much more effective way to keep people from becoming impoverished (for example, by addressing issues such as unemployment or loss of housing before they impact clients).²⁵⁹ Avoiding an eviction action could involve advocating for available emergency funding from a local government agency or nonprofit, negotiating with a landlord to allow for a payment plan, or informing a landlord in writing that the rent is being withheld until documented housing code violations are dealt with.²⁶⁰ All of these interventions could take place well before a summons is affixed on the door of the unit at issue. These actions have the added benefit of helping to avoid some of the well-documented collateral consequences that stem from having an eviction action on a person's record.²⁶¹

Ideally, to effectively solve problems for low-income people, lawyers would provide preventive legal services.²⁶² Instead, in our current conception of solving access to justice, the lawyer's job is to provide only "specialized crisis intervention."²⁶³ These solutions abandon people when they need the help the most—before their problems have ripened into legal disputes that require the court to solve. Our vision of equal access to justice does not offer low-income people the type of *ex ante* legal advice that is fundamental to how attorneys serve their corporate and higher income clients. For a low-income person, this type of advice could be the difference between falling into poverty or making ends meet, but it is almost entirely ignored in our current discussion of access to justice.²⁶⁴ It is almost as if it is inconceivable for attorneys to

259. See, e.g., Jeffrey Selbin & Mark Del Monte, *A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender-Specific Legal Services to Women with HIV*, 5 DUKE J. GENDER L. & POL'Y 103, 125–26 (1998) (describing an early intervention model designed to prevent problems from developing into crises); J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 49 (describing how an early intervention model "leverages existing services for the greatest effectiveness. Advocates can often resolve a potential housing problem, such as a public assistance error that suspends rent payments, with a letter or phone call. Proper planning and client services can prevent some litigation, such as eviction proceedings, altogether."); Albiston & Sandefur, *supra* note 217, at 114–15.

260. The examples provided here could all benefit from the actions of a lawyer, as opposed to another type of provider (like a social worker). It should be noted that they involve the type of *ex ante* advice or action that corporations and wealthy clients expect from their legal representatives.

261. See DESMOND, EVICTED, *supra* note 10, at 140–45, 190–91; Desmond, *supra* note 72, at 118.

262. See, e.g., Smyth, *supra* note 259, at 49.

263. Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2147 (1994).

264. Gillian Hadfield is one of the few scholars that have considered the lack of *ex ante* legal advice for ordinary individual Americans (as opposed to corporations). Hadfield, *supra* note 35, at 152 (noting that her calculations of the limited impact pro bono attorneys could have on the crisis of access to justice do "not even begin to address the realistic demands that ordinary households have for

imagine a world where they provide the same type of advisory services for low-income people as they provide for corporations or high-income earners.

The limits of effectiveness in this crisis model of legal services is rarely discussed or acknowledged by lawyers describing the access to justice crisis. Consider the advocates for civil Gideon. While there is a robust body of scholarship discussing how to achieve a right to counsel in civil cases legislatively or through the courts,²⁶⁵ or alternatively the reasons why it will be a hard path forward,²⁶⁶ almost no one acknowledges the fact that having a right to an attorney in civil cases would not achieve justice for many low-income people. A civil Gideon would not address the systemic limitations of litigation. Lawsuits are limited in what they can accomplish, particularly for low-income people.²⁶⁷ It can also be alienating or even traumatic for people to appear in court, with or without an attorney to represent them.²⁶⁸ Put bluntly, the “legal system is an inherently dangerous place for those in poverty.”²⁶⁹ The right to an attorney in such a system would not ensure equal access to justice.

Despite this, attorneys remain stubbornly focused on increasing legal advice in court as the main solution to the access to justice problem. This limited viewpoint makes some sense as the American lawyer’s monopoly on legal advice is fundamental to her self-identity in the role she plays in American society. Indeed, the exclusive right to provide legal advice was carefully crafted and effortfully sought after for fifty years.²⁷⁰ The bar and the courts

ex ante assistance with navigating the law-thick world in which they live, some of which could indeed reduce the need for ex post legal representation in litigation and crisis.”). Certainly, many legal services programs provide this type of ex ante legal advice when helping a client with multiple problems. The entry point to receiving those legal services, however, is more often than not the result of a legal crisis, due to the triage that must be done by providers. Schulman, Lawton, Tremblay, Retkin, & Sandel, *supra* note 256, at 731.

265. See *supra* Part II.

266. Engler, *Connecting Self-Representation*, *supra* note 156, at 39; Barton, *supra* note 131, at 1238.

267. Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123, 127 (1992) (stating that lawsuits “make very little difference to client circumstances in any larger sense.”); Nancy Cook, *Looking for Justice on a Two-Way Street*, 20 WASH. U. J.L. & POL’Y 169, 184 (2006) (“Often, in fact, the poor receive less than nothing from the legal system.”).

268. Tremblay, *supra* note 267, at 127 (discussing that lawsuits are alienating for clients in poverty); DESMOND, EVICTED, *supra* note 10, at 194.

269. Karen L. Tokarz, *Poverty, Justice, and Community Lawyering: Interdisciplinary and Clinical Perspectives*, 20 WASH. U. J.L. & POL’Y 1, 11–12 (2006) (citing Cook, *supra* note 267, at 185–86) (describing Professor Cook’s perspective).

270. Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 166–69, 185. 1870–1920 was the seminal period in this campaign. Leslie C. Levin, *The Monopoly Myth and Other Tales About*

now contend that the very rules they crafted to establish lawyers' monopoly on legal advice help protect the public from non-lawyers, who "are not governed as to integrity or legal competence" and not "committed to high standards of ethical conduct" like lawyers are.²⁷¹ This effort has resulted in the definition of what it means to be a lawyer, not only in the public perception but in our own conception of ourselves, to become equivalent to the provision of legal advice.

This conception of the role lawyers can play in solving the access to justice crisis is also a reflection of what lawyers think that people need. If the problem is unmet legal need, then what people need is more legal advice.²⁷² This is not, however, what people say they themselves need when faced with civil justice problems. There is evidence that laypeople would rather get advice from informal advisors than lawyers.²⁷³ Perhaps the best demonstration of this is through analyzing comparative studies of the use of lawyers and non-lawyer advice providers in other countries with similar legal systems but which structure access to advice much differently, like the U.K.²⁷⁴ Barristers in the U.K. do not have an exclusive monopoly on the provision of legal advice.²⁷⁵ Other third parties are authorized to give both legal and non-legal advice, such as volunteers at Citizens Advice Bureaux or proprietary advice centers.²⁷⁶

the Superiority of Lawyers, 82 FORDHAM L. REV. 2611, 2612 (2014). The organized bar worked to demonstrate that only barred attorneys held both the technical expertise and the moral fiber necessary to be a member of the profession and entrusted with legal work. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 272, 287, 361 (1950); Christensen, *supra* note 270, at 175. It did this by raising admission standards to require formal legal education, bar examinations, and robust character and fitness requirements. See HURST, *supra* note 270 at 36; Christensen, *supra* note 270, at 175.

271. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-3 (AM. BAR ASS'N 1969).

272. Sandefur, *Access to What?*, *supra* note 6, at 50.

273. Charn, *supra* note 140, at 2224.

274. Sandefur, *Fulcrum Point*, *supra* note 81, at 962 (describing the U.K.'s approach as having the following characteristics: "there are several possible paths to the resolution of civil justice problems; these paths are long-established, well-known, and available throughout the country; many legal advice providers exist in addition to lawyers; and a number of nonlegal sources of authoritative resolution complement law. By comparison, [the U.S.] . . . is characterized by the following details: there are few routes to the resolution of civil justice problems; many of these routes are available only to people who live in particular cities or counties, as some geographic areas have very little in the way of auxiliary services; and few (if any) legal advisors exist aside from attorneys, due to strong restrictions on who may give legal advice.").

275. GENN, *supra* note 58, at 83.

276. *Id.* at 83; see also *Who We Are and What We Do*, CITIZENS ADVICE BUREAU, <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/who-we-are-and-what-we-do/> [<https://perma.cc/PQ5V-RU5G>] (last visited Nov. 15, 2019); *What We Do*, COUNCIL LICENSED CONVEYANCERS, <https://www.clc-uk.org/about/what-we-do/> [<https://perma.cc/W9FX-SW4P>] (last visited Nov. 15, 2019).

Comparing the use of attorneys and non-attorney advice in the two countries is striking. While the specific use of lawyers is roughly the same in the U.K and the United States,²⁷⁷ in the U.K., many more people rely on the use of third parties to get advice.²⁷⁸ The end result is that more people in the U.K. resolve their issues with third party help—even though they have a similar number of civil justice problems as Americans.²⁷⁹ In 1999, 93% of households in England and Wales reported having received third-party advice on a problem at some point in the past with 68% having received specifically legal advice.²⁸⁰ In comparison, Americans received third-party legal advice to solve problems in only 37% of cases that same year.²⁸¹ Remarkably, only 5% of people in the U.K. did nothing in response to a housing problem,²⁸² while nearly a third (29%) of people in the United States did nothing in response to similar housing problems.²⁸³

This data suggests that where the option of help to solve problems from people other than attorneys is readily available, people take advantage of it. Indeed, when Americans are asked about this directly, they do describe wanting help to solve their problems, but it is not legal help that they wish for.²⁸⁴ One could argue that this is a reflection of people’s misconceptions of their problems as not legal in nature, when in fact they involve civil law—in other words, that this is a problem of the public’s perceptions. This viewpoint ignores the fact that the understanding of problems as legal only matters to the extent that we have defined the problem of access to justice as one of unmet legal needs.²⁸⁵ It

277. GENN, *supra* note 58, at 83; AM. BAR ASS’N, *supra* note 50, at 18.

278. By “third-party,” I am referring here to non-family, professional advice, outside of personal networks.

279. Hadfield, *supra* note 35, at 135 (calculated using AM. BAR ASS’N, *supra* note 50, at tbl.3-1 and GENN, *supra* note 58, at 68).

280. Hadfield *supra* note 35, at 135–36 (citing data from HAZEL GENN & ALAN PATERSON, *PATHS TO JUSTICE SCOTLAND: WHAT PEOPLE IN SCOTLAND DO AND THINK ABOUT GOING TO LAW* 86 (2001)).

281. *Id.* at 136. This advice was from attorneys.

282. Sandefur, *Fulcrum Point*, *supra* note 81, at 971.

283. AM. BAR ASS’N, *supra* note 50, at 18. The CNS study had similar findings. Only 22% of people in the United States took their problems to a third party who was not a member of the person’s social network. SANDEFUR, *Accessing Justice*, *supra* note 57, at 11.

284. Rebecca L. Sandefur, *Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services*, in *MIDDLE INCOME ACCESS TO JUSTICE* 222, 235 (Michael Trebilcock, Anthony Duggan, & Lorne Sossin eds., 2012) (describing how “[p]eople wanted help with their problems, but it was not often legal help that they described wishing for or turning to.”); *see also* RHODE, *supra* note 2, at 81 (noting that “[w]hat Americans want is more justice, not necessarily more lawyering”).

285. *See* Sandefur, *Access to What?*, *supra* note 6, at 50.

is only because attorneys have determined that what people need is legal advice that having people think of their problems as legal has an impact on increasing access to that advice.²⁸⁶

B. *A New Vision of Access to Justice*

Our reliance on maintaining our current narrow conception of access to justice is an admission that we are limited in our capacity to achieve justice for the poor. We must redefine what equal access to justice means. Our definition should reflect how people think about their problems instead of how attorneys do. It should provide what people say they actually need, instead of what attorneys focus on providing. And it should incorporate in its conception of justice the broader struggle against the injustices of poverty and inequality.²⁸⁷ This conception of access to justice should not limit itself to access to legal help or to expanding the legal needs that get met. Instead, achieving equal access to justice should be defined more broadly: achieving just and fair solutions to problems for all people as part of the broader fight against poverty.

This conception of equal access to justice does not require any particular problems to be solved in any particular way. Indeed, we know that many situations are resolved without any party understanding the legal aspects of the situation, and without any contact with or reference to the law.²⁸⁸ The results of some of these resolutions may be, for the most part, roughly consistent with the law, or at least be the result of good faith negotiating where neither party feels they have been taken advantage of or not heard.²⁸⁹ Thus, achieving equal access to justice would not require every landlord tenant issue to be worked out

286. People who think of their problems as legal are more likely to take their problems to lawyers. Pascoe Pleasence, Nigel J. Balmer, & Stian Reimers, *What Really Drives Advice Seeking Behaviour? Looking beyond the Subject of Legal Disputes*, 1 OÑATI SOCIO-LEGAL SERIES 6, 1 (2011). The CNS study found that people were twice as likely to think of lawyers in the cases that they thought the problem was legal in nature. SANDEFUR, *Accessing Justice*, *supra* note 57, at 14. One response to this data is to suggest that it is not lawyers, but other service providers, who should be doing this work. This is discussed *infra* note 305.

287. Mark R. Rank, *Toward a New Understanding of American Poverty*, 20 WASH. U. J.L. & POL'Y 17, 26 (2006); Leigh Goodmark, *Can Poverty Lawyers Play Well with Others? Including Legal Services in Integrated, School-Based Service Delivery Programs*, 4 GEO. J. ON FIGHTING POVERTY 243, 244 (1997) (stating “[u]ltimately, our efforts should help [our clients] . . . escape their poverty.”).

288. Sandefur, *What We Know*, *supra* note 4, at 451. Measuring the frequency with which these lawless resolutions happen would be a virtually impossible research question.

289. *Id.* (noting that “neighbors work out tree-trimming agreements without finding out where property lines are or consulting homeowners’ association rules. Married couples separate without divorcing and informally arrange child custody and support agreements, and unmarried couples do the same. Landlords and tenants devise informal arrangements that balance flexibility about timely rent payments with flexibility about timely repairs.”).

in landlord tenant court or every divorce and custody issue to be resolved in family court. There is no requirement for lawyers or legal advice or even the law to play a role. This conception of access to justice recognizes that the law is only one part of a “richly textured terrain of possible responses and remedies.”²⁹⁰ The goal is not to have more problems solved by the law, only that the problems are solved justly.

Similarly, the role of the “institutions of remedy” is, by design, also absent from this way of looking at access to justice.²⁹¹ This reflects that the use of court to solve civil legal problems is often not the most effective, and usually not the least traumatic, way to do so. This conception of access to justice does not require an increase in the framing of problems as ones that legal actors can help with.²⁹² Instead, this vision of equal access to justice recognizes that we cannot use a law-centered approach to envisioning equal access to justice.²⁹³ This new view reflects how people think of their problems, instead of how attorneys do.

What this definition of access to justice does require is a reimagining of the role attorneys should play in working to achieve it. Attorneys need to step out of the courthouse and begin applying their broader skills, as poverty law scholars have long advocated.²⁹⁴ There is robust debate among these scholars about the myriad roles lawyers can play beyond individual representation in helping their clients achieve justice, meaning working toward equality and the

290. Sandefur, *Fulcrum Point*, *supra* note 81, at 955. In fact, the role of law in solving problems is even less significant in the United States than other countries. Hadfield, *supra* note 35 at 139–40 (stating that the “U.S. legal system plays a significantly smaller role in providing a key component of what law provides—ordered means of resolving problems and disputes—than either comparable advanced market democracies or countries still in the early stages of establishing the basic institutions of democratic governance and market economy. This is not due to lower incidence of situations in which there might be demand for what law provides.”).

291. The definition of access to justice presented here is thus distinct from Rebecca Sandefur’s. She describes “equal access to justice” as meaning that all groups “in a society would have similar chances of obtaining similar resolutions to similar kinds of civil justice problems,” and that “a society’s institutions of remedy would work to equalize how [people] handled their civil justice problems.” Sandefur, *Fulcrum Point*, *supra* note 81 at 951. Here, it is not suggested that the institutions of remedy play any role in achieving this new vision of equal access to justice.

292. In this way the definition is also distinct from that presented by Gary Blasi. Blasi argues that access to justice should be framed as a right to assistance “in claims making which would include assistance not only with problems that have ripened into clear legal controversies but also with those that might do so with the benefit of legal assistance.” Blasi, *supra* note 119, at 924–25.

293. See Sandefur, *Fulcrum Point*, *supra* note 81, at 950.

294. Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL’Y 37, 44 (2002).

elimination of poverty.²⁹⁵ From the early foundation of modern legal services, attorneys did not see their role as merely providing access to dispute resolution, but rather of making social change.²⁹⁶ On one end of the spectrum, many poverty law advocates conduct impact litigation or use “focused case” approaches to changing the law overall, in reflection of the patterns they and their clients see and experience.²⁹⁷ Oftentimes, these advocates argue, class actions or group claims are a necessary or an efficient way to meet collective goals.²⁹⁸

But the roles lawyers play in seeking to help their clients escape poverty on a more fundamental level are exercised more often than not outside of the courtroom. In his seminal 1970 article *Practicing Law for Poor People*, Stephen Wexler argued that organizing was an essential aspect of an effective practice fighting poverty.²⁹⁹ Other scholars have argued similarly that community organizing may be required in some instances to solve collective action problems that make effective legal representation possible in the first place.³⁰⁰ There has also been much written about interdisciplinary practices as the best model for providing holistic support to solve multiple problems, including (and especially) non-legal problems.³⁰¹ Others envision “community lawyering” approaches, which focus “on empowering communities, promoting

295. See, e.g., Blasi, *supra* note 119, at 925.

296. Edward V. Sparer, *The New Legal Aid as an Instrument of Social Change*, 1965 U. ILL. L.F. 57, 60 (1965); see also MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–1973, at 22–39 (1993) (discussing Sparer’s role in the welfare rights movement).

297. Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 121–22 (1977), <http://www.garybellow.org/garywords/solutions.html> [<https://perma.cc/J6HG-BFGX>] (advocating for the use of individual representation strategically through “focused case” approach). Similarly, enforcement of court outcomes can be a challenge for low-income litigants, which is almost entirely missed by our current conversation around access to justice. *But see* Sandefur, *Importance*, *supra* note 59, at 128 (discussing the need to target the institutions responsible for problems so that people bear less of a burden to enforce the law).

298. See Blasi, *supra* note 119, at 914 (describing the need for tenant organizing).

299. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970). Other scholars have explored the value that is added by lawyers to organizing. Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 39 (2011) (stating “lawyers provide resources in the form of knowledge, skills, relationships, access to legal forums, and, perhaps surprisingly, values and traditions, all of which can be valuable to groups in the process of organizing.”).

300. Blasi, *supra* note 119, at 939; see also GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE 3, 7–10 (1992); Luban, *supra* note 40, at 225.

301. Goodmark, *supra* note 287, at 252.

economic and social justice, and fostering systemic change.”³⁰² Most of this work is not done in the courtroom,³⁰³ but in the community, and includes work ranging from “community education and legislative advocacy to transactional work and community economic development.”³⁰⁴

There is a general agreement among poverty law scholars that lawyers must play many roles beyond individualized representation to achieve justice for the poor.³⁰⁵ All of these additional efforts beyond litigation in court recognize the complexity of achieving justice for low-income people in American society, and yet we discuss access to justice as if it is an unrelated issue. The application of these lessons to the access to justice debate is strikingly absent.³⁰⁶ This Article does not attempt to wade into the debate about which methods are most effective for helping low-income people achieve justice. It instead argues that attorneys must apply the lessons learned from public interest scholars on broadening our conception of the roles we can and should play to achieve justice for poor people.³⁰⁷ An individual representation approach to access to justice entirely misses these interwoven aspects of achieving justice for poor people outside the courtroom.

302. See, e.g., Karen Tokarz, Nancy L. Cook, Susan Brooks, & Brenda Bratton Blom, *Conversations on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL’Y 359, 363–64 (2008).

303. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428 (1995).

304. Tokarz, Cook, Brooks, & Blom, *supra* note 302, at 363; see also Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 76 (2000) (stating that “a lawyer must include the social, political, and economic aspects in analyzing the community’s problems and in the development and implementation of strategies to address them.”).

305. The ongoing debate centers instead on which roles are most effective to serve low-income clients. The question of which type of provider (e.g., social worker, lawyer, community organizer) would be best from an efficacy standpoint to perform these types of services for low-income clients is another focus of the poverty law debate and is outside the scope of this Article. See, e.g., Steven Gibens & Bernard Hubeau, *Socially Responsible Legal Aid in Belgian Society: Time for a Thorough Rethink?*, 20 INT’L J. LEGAL PROF. 67 (2013); Tokarz, Cook, Brooks, & Blom, *supra* note 302 at 370; Wexler, *supra* note 299 at 1053.

306. Albiston & Sandefur, *supra* note 217, at 113; Blasi, *supra* note 119, at 925–26 (noting that discussions of the issues and considerations of tradeoffs between “service” and “impact” cases in poverty law practice “seem strangely absent from current mainstream discussions about increasing access to justice”).

307. The author recognizes that this argument leaves open many unanswered questions, particularly in articulating what roles lawyers should actually play to effectively respond to this reconceptualization of equal access to justice. What specifically are the lessons lawyers should take from poverty law scholars? What is the value of having lawyers out in communities instead of in the courthouse? What might the expansion of the roles attorneys play actually look like, and how should it work with other professions? These questions will be explored in a companion article.

A fundamental shift in viewing the lawyer's role in the fight for equal access to justice has other benefits. The first is that expanding the attorney's role outside the courthouse would, by definition, encourage collaboration with people in other disciplines.³⁰⁸ While our monopoly on legal advice means that, for the most part, attorneys who provide legal services in court interact almost exclusively with judges, clerks, and other attorneys, broader organizing or community work would, by its nature, involve people in other disciplines.³⁰⁹ This reflects the reality that attorneys do not have a monopoly on many of the skills required to help low-income people solve their problems before they become legal disputes as part of a broader community approach.

This collaboration would also result in expanding the current conversation around how to solve our access to justice problem to include non-lawyers.³¹⁰ The scholarly conversation about, and the work being done at state and local governments toward, equal access to justice is almost entirely being done by attorneys. The problem with the limited role we currently play in helping to solve the problems that low-income people face is that what attorneys know best is only what makes it into our offices and into the courtrooms where we operate.³¹¹ Though the majority of civil justice problems are dealt with outside the rule of law and without attorneys or any contact with the legal system, by nature of the role we currently play of providing legal advice, we do not have exposure to that activity. As members of the bar, we work "at the top of an enormous iceberg of civil justice activity."³¹² This means that our positioning in relationship to the broader access to justice problem is inherently myopic. The lens through which we view civil justice problems (and their solutions) is

308. Alan W. Houseman, *Legal Presentation and Advocacy under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 30 CLEARINGHOUSE REV. 932, 938 (1997) (noting that solving the problems of poor clients requires "utilizing skills of people from a variety of different disciplines and developing interdisciplinary and holistic approaches to advocacy.").

309. See, e.g., Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105, 120–21, 133 (1997) (describing collaborations involving legal services, clinic, and grassroots entities); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J.L. & POL'Y 195, 204 (2003) (describing interdisciplinary collaboration involving law, business and local community groups); Tokarz, Cook, Brooks, & Blom, *supra* note 302, at 363 (noting that "community lawyering clinicians also tend to collaborate regularly with other professionals.").

310. RHODE, *supra* note 2, at 4 (noting that "[w]hat perpetuates the problem is the lack of public recognition that there is a serious problem").

311. Sandefur, *Access to What?*, *supra* note 6, at 50, 53.

312. *Id.* at 50.

limited by the nature of the work that we do.³¹³ Re-envisioning our role in the fight to achieve equal access to justice as broader than providing legal advice in the courthouse would shift that dynamic, expanding the conversation about access to justice to include the others with whom we are collaborating.³¹⁴

The second significant benefit of this reimagining of the attorney role in fighting for access to justice is the broader view it would provide in diagnosing the structural problems facing the poor and creating meaningful change. Some of the systemic problems inherent in the legal system have already been mentioned, and many of the broader structural issues that underlie unequal access to justice in America have been described better elsewhere.³¹⁵ There is no question that these systems are ultimately part of what must change on a fundamental level to achieve true access to justice.³¹⁶ Getting lawyers outside of the courtroom and into communities, along with expanding our roles beyond providing legal advice in preparation for court, will help us combat the inherent myopia of our current positions. This will allow for a better viewpoint to understand the systems that need to change to truly achieve equal access to justice.

VI. CONCLUSION

It is a fact that low-income Americans are less able to get their civil legal needs met than higher income Americans. Most lawyers call this unmet legal need the access to justice crisis and seek to solve the problem by alleviating the plight of pro se litigants in court. In so doing, lawyers have conflated access to justice with access to the courts, even though the vast majority of civil justice problems are resolved without any contact with the legal system. We cannot significantly increase the number of people accessing the courts to solve these problems, so this conceptualization of access to justice is doomed to fail. We need to broaden our definition of access to justice to include an exploration of the limitations of our legal services model and expand our vision of the roles lawyers can and should play in achieving justice for the poor. Incorporating the lessons from poverty law scholars in applying our skills outside the

313. Sandefur, *Bridging the Gap*, *supra* note 3, at 723 (stating that “constructive action is powered by recognizing important sources of the gap in rigid and myopic thinking on the part of the [legal] profession.”).

314. Sandefur, *Access to What?*, *supra* note 6, at 54.

315. See, e.g., Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865, 871 (2004); Sara Sternberg Greene, *Race, Class, and Civil Justice*, 101 *IOWA L. REV.* 1263, 1267 (2016); William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 *WASH. U. J.L. & POL’Y* 101, 110 (2006); Rank, *supra* note 287, at 20.

316. See, e.g., Blasi, *supra* note 315, at 874; Diamond, *supra* note 304, at 73; Greene, *supra* note 315, at 1267; Quigley, *supra* note 315, at 110; Rank, *supra* note 287, at 25.

courtroom, in the community, and in collaboration with people from other disciplines will help us achieve true equal access to justice.