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Authors

Sandefur, Rebecca L
Teufel, James

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Assessing America's Access to Civil Justice Crisis

Rebecca L. Sandefur & James Teufel*

Many strongly believe the United States faces a crisis in access to civil justice but differ starkly in what they believe that means. Some observers believe the key issue is unrepresented litigants in trials and hearings, while others point to the tens of millions of people facing justice problems outside of the courts with no assistance. We offer definitions of three concepts central to assessing the crisis—justiciable events, legal needs, and cases—and examine the availability of consistently collected, nationally representative data measuring these three phenomena. Such data are sparse. Some information about justice experiences is collected for those justiciable events—a bare minority—that become court cases, but these data are not collected in uniform ways, nor are they always made available to researchers for analysis. The past few years have seen a growth in the number of civil justice surveys of the public, which give insight into the prevalence of specific kinds of justiciable events and their impacts on those who experience them. The concept at the core of the dominant understanding of the access to justice crisis, legal need, is ironically the phenomenon about which we have the least information.

We draw on ideas from the field of public health to develop two measures of access to justice that shift analytic focus away from granular experience with problems, court processes, or legal services to summarize Americans' justice experiences: Civil Justice Problem-Free Life Expectancy and Civil Justice Hardship-Free Life Expectancy. The measures report how many years of life people can expect to spend dealing with civil justice problems and experiencing health, economic, or relationship hardships as a result of those problems. Americans spend large proportions of their lives experiencing civil justice problems and suffering consequent hardships. For example, a typical woman in midlife can expect to be experiencing civil justice problems for over half of her remaining years, while a typical eighteen-year-old can look forward to spending thirteen years of their life experiencing health, economic, or interpersonal hardships as a result of civil justice problems. The new measures permit comparisons across groups, geography and time, and constitute new tools for assessing the impact of policy changes.

* Rebecca L. Sandefur is a Professor in the School of Social and Family Dynamics at Arizona State University and a Faculty Fellow at the American Bar Foundation, where she founded and leads the Foundation's Access to Justice research initiative. James Teufel is an Associate Professor and the Director of Public Health at Moravian College. The authors thank the World Justice Project for sharing data from the 2018 U.S. Access to Justice Survey and participants at the "Thinking about Law and Accessing Civil Justice" symposium at UCI Law, on February 7, 2020, and the University of Connecticut Law School faculty workshop on October 7, 2020, for helpful comments.

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There has been far too little research into what is actually happening There is virtually no accessible data as to what is going on in the courts, or as to the orders being made . . . let alone outcomes more generally There is a vast and ever increasing mountain of anecdotal material suggesting beyond all serious argument that there are very serious problems which cannot sensibly be ignored by any reasonable person.

—Sir James Munby, former president of the Family Division of the High Court of England and Wales¹

INTRODUCTION

Many observers strongly believe the United States faces a crisis in access to civil justice. In some interpretations, the crisis is a problem faced by litigants: “[M]illions [of Americans] lose their cases in civil court, not because they’ve done something wrong, but because they don’t have the information or legal help they need.”² In other declarations, the courts themselves are in crisis,

1. Owen Bowcott, *Reporting Restrictions Turning Family Courts into Black Hole, Say Ex-Judge*, GUARDIAN (Feb. 11, 2020, 1:00 PM), <https://www.theguardian.com/law/2020/feb/11/reporting-restrictions-family-courts-black-hole-judge> [<https://perma.cc/G86T-C9J9>].

2. *Our Civil Justice System Fails Ordinary Americans*, ALL RISE FOR CIV. JUST., <https://allriseforciviljustice.org/crisis/> [<https://perma.cc/CX44-2PQ2>] (last visited Jan. 17, 2021).

receiving too little funding to fulfill their role in upholding the rule of law,³ overwhelmed by case backlogs,⁴ and failing to shield vulnerable people who need the law's protection.⁵ In still other formulations, the crisis is with civil legal aid, where demand for lawyers' help has long outstripped its availability,⁶ and events like the Great Recession (2007–2009) widen the chasm between need and service.⁷ One account declares the access to justice crisis to be “bigger than law and lawyers[,] . . . a crisis of exclusion and inequality.”⁸ Whatever the formulation of the problem, systematically collected data necessary to understand it and create meaningful change are scarce.⁹

In this Article, we seek to bring some conceptual clarity to discussions of America's crisis of access to civil justice. Clarity of concept then guides an assessment of empirical evidence. In Part I of the Article, we offer definitions of three concepts central to contemporary discussions of civil justice: justiciable events, legal needs, and cases. In Part II of the Article, we assess the evidence of a crisis as revealed in available information about justiciable events, legal needs, and cases. In Part III, we offer new, summary measures for assessing access to civil justice that can be constructed with existing data and updated and expanded at reasonable cost.

I. CONCEPTS

No agreement exists on the nature of the access to justice crisis. For some observers, the crisis is one of unserved legal needs: millions of people who face civil justice problems that affect basic human needs like making a living, having a place to live, and being able to care for dependents must navigate these problems on their own, without any assistance.¹⁰ For others, the crisis is centered in the courts, where some reports suggest as many of 90% of tenants in eviction cases or 75% of litigants in family cases are unrepresented, putting pressure on judges and court staff to

3. RICHARD Y. SCHAUFFLER & MATTHEW KLEIMAN, *State Courts and the Budget Crisis: Rethinking Court Services*, in *THE BOOK OF THE STATES* 2010, at 289, 289 (The Council of State Gov'ts ed., 2010), <https://knowledgecenter.csg.org/kc/content/state-courts-and-budget-crisis-rethinking-court-services> [<https://perma.cc/WUX2-RD5E>].

4. Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, MIGRATION POL'Y INST. (Oct. 3, 2019), <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point> [<https://perma.cc/LB2R-R8S3>].

5. *Family Court Crisis: Our Children at Risk Film*, CTR. FOR JUD. EXCELLENCE, <https://centerforjudicialexcellence.org/multimedia/family-court-crisis-our-children-at-risk-film/> [<https://perma.cc/DP87-9VQE>] (last visited Jan. 16, 2021).

6. See, e.g., LEGAL SERVS. CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 7 (2009).

7. See *Introduction: The Current Crisis in Legal Services*, LEGAL SERVS. CORP., <https://www.lsc.gov/introduction-current-crisis-legal-services> [<https://web.archive.org/web/20200925225817/https://www.lsc.gov/introduction-current-crisis-legal-services>] (last visited Jan. 16, 2021).

8. Rebecca L. Sandefur, *Access to What?*, 148 *DAEDALUS*, Winter 2019, at 49, 49.

9. Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 *S.C. L. REV.* 295, 295 (2016).

10. Sandefur, *supra* note 8, at 49.

manage confused and anxious people navigating processes designed by and for lawyers.¹¹ For some, the crux is a lack of access to lawyers; for others, it is the denial of just or lawful resolution to problems that are endemic to contemporary life.¹²

Two factors animate the dissensus. One is the way the term “crisis” itself is used. In these formulations, “crisis” is not deployed as a technical term with an agreed-upon definition that describes some state of affairs. Rather, it is a rhetorical tool used to imply that a situation has reached a point that requires urgent attention in order to avoid significant negative consequences. A declaration of crisis makes action seem imperative. The concept of “epidemic” from the field of public health is sometimes borrowed and used for similar rhetorical purpose, as when Princeton University’s Eviction Lab references an “eviction epidemic.”¹³ Though many use the language of crisis, there is no empirical standard for identifying one.¹⁴

Declarations of the access to justice crisis often rely on stylized facts: “[C]laims about the kinds of things that exist in the world and the patterns of relationships between those things; and, simultaneously . . . claims about what parts of the social world are worth explaining.”¹⁵ Stylized facts serve a double purpose: they offer truths about how the world is and highlight which truths are worth investigating. Terms like “legal need” and “unrepresented litigant” are used not only to describe a situation that a person or community confronts, but also to highlight it as a problem worthy of explanation or action. In discussions of access to justice, terms like “legal need” and “justice problem” are often used as though they signify self-evident objects found in the world, when in fact they are socially constructed phenomena.¹⁶

The second factor underlying the dissensus is observers’ focus on different units of analysis, with the same unit defined in different ways by different authors. Some accounts focus on *justiciable events*, demonstrating that Americans experience many problems that raise civil legal issues.¹⁷ Others center on *legal needs*, showing the pervasiveness of situations that necessitate legal help.¹⁸ Still others highlight *cases*, matters formally filed with courts or other kinds of hearing bodies.¹⁹ Even

11. See Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249, 249 (2018).

12. *Why a Right to Counsel?*, NAT’L COAL. FOR CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/> [<https://perma.cc/2TMZ-MMWS>] (last visited Jan. 16, 2021); Sandefur, *supra* note 8, at 49.

13. *Why Eviction Matters*, EVICTION LAB, <https://evictionlab.org/why-eviction-matters/> [<https://perma.cc/75NB-NHLQ>] (last visited Jan. 16, 2021).

14. Ibrahim M. Shaluf, Fakharu’l-razi Ahmadun & Aini Mat Said, *A Review of Disaster and Crisis*, 12 DISASTER PREVENTION & MGMT. 24, 25 (2003).

15. Daniel Hirschman, *Stylized Facts in the Social Sciences*, 3 SOCIO. SCI. 604, 605 (2016).

16. Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 104 (2013).

17. See *infra* notes 21–31 and accompanying text.

18. See *infra* notes 32–39 and accompanying text.

19. See *infra* notes 40–44 and accompanying text.

among observers focused on the same unit of analysis, important differences exist in how they define concepts and operationalize their measurement.²⁰

This Part of the Article develops definitions for these three concepts, in preparation for assessing available empirical evidence about the pervasiveness and impact of each in the United States. In our formulation, the foundational concept is that of a justiciable event. We then explicate our conceptualizations of legal needs and cases in reference to that foundational concept.

A. Justiciable Events

Though the diagnosis of a situation as “justiciable” can be a subject of debate, it is not merely a matter of opinion or subjective belief. Within any given legal regime, some activities of life raise civil legal issues and others do not; those that do are justiciable, actionable under the civil law by someone who is involved in the situation.²¹ For example, if someone gets into an argument with a sibling or a coworker, the experience might be very upsetting and emotionally painful, but the argument becomes justiciable when it involves activities or relationships governed by the civil law. If the family fight is about whom Mom loves more, the trouble is not likely to be justiciable. By contrast, if the family dispute is about who gets Mom’s house now that she has died, the dispute becomes a justiciable event, and the siblings could pursue legal resolution to the disagreement about who gets what. Similarly, if a workplace argument is about which colleague to bring on to a new project, it becomes justiciable when a participant articulates the position that one colleague is more suitable than another because of race, religion, age, gender, or disability status, but probably not when the argument is about whether one colleague is more efficient or kinder than another.²² Justiciable events are events or circumstances that have civil legal aspects, raise civil legal issues, and have consequences for people that are shaped by the civil law.²³

Figure 1 represents this concept graphically: justiciable events emerge at the intersection of the civil law and everyday life.²⁴ The volume of such events can increase as everyday life becomes more “law thick,” with more kinds of activity

20. For example, many analyses of justiciable events surveys report that “X% of people have a justice problem,” but no agreement exists on what problems to query or how to ask about them. See ORG. FOR ECON. COOP. & DEV. & OPEN SOC’Y FOUNDS., *LEGAL NEEDS SURVEYS AND ACCESS TO JUSTICE* 60–61 (2019), <https://www.sdg16hub.org/system/files/2020-07/legalneedsurveyandaccesstojustice.pdf> [<https://perma.cc/E8S3-8KRW>].

21. See HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 12 (1999).

22. The justiciability of some events is more straightforward to establish than others, and disputes about justiciability itself are sometimes resolved by litigation. See our discussion of “cases” below.

23. See GENN, *supra* note 21, at 12.

24. Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS* 112, 116–17 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007).

becoming actionable under the law.²⁵ Examples of this kind of expansion come from many areas of human life. Laws about leaving dogs unattended in parked cars make historically private choices about the care of family pets into matters of the public interest.²⁶ Zoning laws restrict the uses to which private property can be put, for example, by designating land as residential only or prohibiting multiunit residential buildings.²⁷ Antidiscrimination laws made justiciable behaviors that were previously not governed by the civil law at all, like not hiring people specifically because they happened to be women, Jewish, or Black.²⁸ When law seeks to order more activities of daily life, the frequency of justiciable events increases because more of the routine activity of life becomes justiciable.

The prevalence of justiciable events can also change because already-justiciable activity becomes more or less frequent. For example, the Great Recession saw an enormous increase in the frequency of home mortgage foreclosures. In 2005, the United States experienced about half a million foreclosure filings a year, representing less than 0.5% of housing units.²⁹ From that point, filings increased at a steady clip, peaking in 2010 at almost 2.9 million, or over 2% of housing units.³⁰ Over that five-year period, foreclosure filings increased by over 400%. By 2018, filings had fallen back almost to their 2005 levels.

In some instances, the justiciability of an event is straightforward to establish. For example, legally changing one's name is a justiciable event—there is no route

25. See Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21, 21 (Samuel Estreicher & Joy Radice eds., 2016).

26. See Rebecca F. Wisch, *Table of State Laws that Protect Animals Left in Parked Vehicles*, ANIMAL LEGAL & HIST. CTR. (2020), <https://www.animallaw.info/topic/table-state-laws-protect-animals-left-parked-vehicles> [<https://perma.cc/39CQ-AS4D>].

27. *A Practical Guide to Understanding Zoning Laws*, PROPERTYMETRICS, <https://propertymetrics.com/blog/zoning-laws/> [<https://perma.cc/72QQ-RSFA>] (Mar. 6, 2017).

28. See ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 30–31 (2017).

29. *U.S. Foreclosure Activity Drops to 13-Year Low in 2018*, ATTOM DATA SOLS. (Jan. 17, 2019), <https://www.attomdata.com/news/most-recent/2018-year-end-foreclosure-market-report/> [<https://perma.cc/WM8Z-N5HL>]. The data used to produce these figures are proprietary:

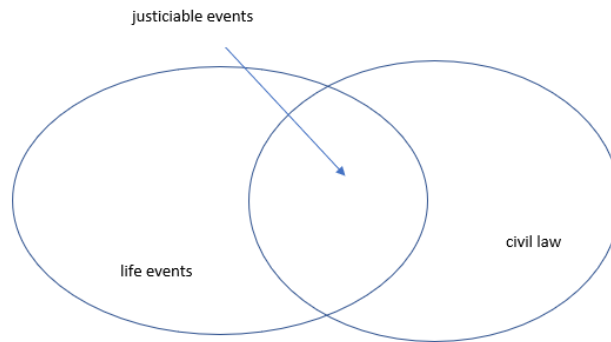
The ATTOM Data Solutions U.S. Foreclosure Market Report provides a count of the total number of properties with at least one foreclosure filing entered into the ATTOM Data Warehouse during the month and quarter. Some foreclosure filings entered into the database during the year may have been recorded in the previous year. Data is collected from more than 2,200 counties nationwide, and those counties account for more than 90 percent of the U.S. population. ATTOM's report incorporates documents filed in all three phases of foreclosure: **Default**—Notice of Default (NOD) and Lis Pendens (LIS); **Auction**—Notice of Trustee Sale and Notice of Foreclosure Sale (NTS and NFS); and Real Estate Owned, or REO properties (that have been foreclosed on and repurchased by a bank). For the annual, midyear and quarterly reports, if more than one type of foreclosure document is received for a property during the timeframe, only the most recent filing is counted in the report. The annual, midyear, quarterly and monthly reports all check if the same type of document was filed against a property previously. If so, and if that previous filing occurred within the estimated foreclosure timeframe for the state where the property is located, the report does not count the property in the current year, quarter or month.

Id.

30. *Id.*

to the desired result except through the civil law. The same is true of terminating a marriage through divorce. Similarly, being three or more months behind on rent payments is also justiciable, as this situation places a tenant in violation of a lease or rental agreement and at consequent risk of a lawsuit for unpaid rent that can result in eviction. For some events, however, justiciability is not self evident, and is indeed the subject of litigation. One example would be employment discrimination cases where a central issue is whether the conduct alleged is actionable under the law.³¹ For the purposes of an empirical assessment of activity, the challenge of establishing whether or not a given event is justiciable is a problem of measurement, of validly determining whether a specific event or situation is justiciable or not.

Figure 1. Justiciable events



B. *Legal Needs*

In this Article, a “legal need” is a specific kind of justiciable event, as Figure 2 depicts. Designating something as a legal need involves a judgement about how such situations should be handled: a legal need is a justiciable event that requires the application of legal expertise, such as might be offered by an attorney, in order to be handled properly. Many justiciable events are not legal needs, in two distinct senses.

The first element of legal need hinges on the meaning of “handled properly.” One definition of “properly” would be lawfully: justiciable events are handled properly when they

resolve with results that satisfy legal norms . . . [both the] substantive norms that govern the rights, duties, and responsibilities of the different parties to a transaction or relationship . . . [and the] procedural norms [of forums like courts and tribunals, if these are used], such as both sides

31. BERREY ET AL., *supra* note 28, at 46.

getting tell their side of the story, offer evidence for the story they tell, and have a mediator or decider who is neutral.³²

By this understanding of “properly,” only those justiciable events that require legal expertise for lawful resolution are legal needs.

A different understanding of “properly” could be in terms of welfare—is life better, at least for somebody, when legal expertise is applied to the problem.³³ Welfare approaches highlight the competing and sometimes incommensurable goods at stake in many justice problems. It might be good for lawyers to have a particular problem resolved through law, for instance, but bad for the people involved. Think of *Jarndyce v. Jarndyce* in Dickens’s *Bleak House*, where protracted probate litigation ends in the consumption of the entire estate by legal fees. Taking a welfare approach raises the question of whose welfare, which can be particularly thorny in an adversarial legal system. Many justice problems are oppositional, pitting one side’s interests and desires against another’s. In these kinds of situations, whether the problem is resolved properly will depend importantly on whose welfare is considered—one side’s or the other’s, or some community’s as a whole.³⁴ For example, is it better when indigent tenants prevail in eviction cases and are allowed to remain in their homes or when landlords can replace tenants who have trouble paying rent with those who can pay rent reliably?³⁵ By this understanding of properly, justiciable events that require the intervention of a legal expert in order to be resolved in a welfare-enhancing way constitute legal needs.

Whether a life experience becomes a “legal need” depends a great deal on the design of legal institutions. This design can create or reduce the necessity of access to concrete legal knowledge and skills—or what might be termed functional legal expertise—for resolving problems properly. For example, in state courts around the country, movements toward “simplification” seek to make court processes and documents easier to understand and navigate by people without legal knowledge or experience with courts.³⁶ Simplification efforts attempt to reduce the frequency of legal need by reducing the functional expertise necessary to respond to justiciable events by using the formal law.³⁷

Design of legal institutions also shapes the norms about when the application of such expertise is appropriate. For example, when communities institute a right

32. Sandefur, *supra* note 8, at 50–51.

33. See R.N. Vaughan, *Welfare Approaches to the Measurement of Poverty*, 97 *ECON. J.* 160, 160–61 (1987); see also Daniel T. Slesnick, *Empirical Approaches to the Measurement of Welfare*, 36 *J. ECON. LITERATURE* 2108, 2108–09 (1998).

34. See Eric Kramon & Daniel N. Posner, *Who Benefits from Distributive Politics? How the Outcome One Studies Affects the Answer One Gets*, 11 *PERSPS. ON POL.* 461, 461 (2013).

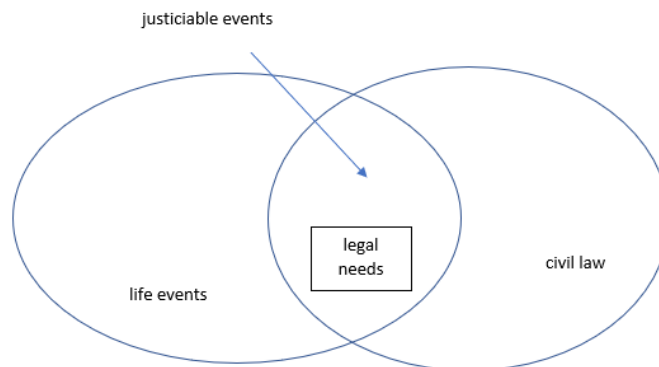
35. Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 *FORDHAM URB. L.J.* 507, 508–09 (1991).

36. Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 *DRAKE L. REV.* 845, 845 (2013); Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can’t Solve Inequality*, 148 *DÆDALUS*, Winter 2019, at 128, 128–29.

37. Shanahan & Carpenter, *supra* note 36, at 128.

to counsel for some kind of justice problem, such as eviction, they are creating a legal need for each person facing eviction: the judgement of the community is that these life circumstance require legal expertise to be handled properly.³⁸ To take another example, when judges in some jurisdictions routinely take the absence of a lawyer representative as a signal of the lack of merit of a litigant's case, this norm in judge behavior has created a legal need for litigants who appear before them.³⁹

Figure 2. Justiciable events and legal needs



C. Cases

Court systems and legal services providers select a subset of the problems presented to them by prospective clients and litigants to become “cases,” discrete bundles of events and circumstances that receive some kind of legal intervention, whether from a lawyer or a court, tribunal or other part of the formal justice system. As with the emergence of legal needs, the design of formal institutions plays a key role in what life events become cases. As the dashed triangle in Figure 3 illustrates, many justiciable events never become cases: they are not pursued as formal disputes in any kind of court or tribunal, and no lawyer takes them on for advice, negotiation, or litigation.⁴⁰ Some phenomena that start out as cases are later determined not to

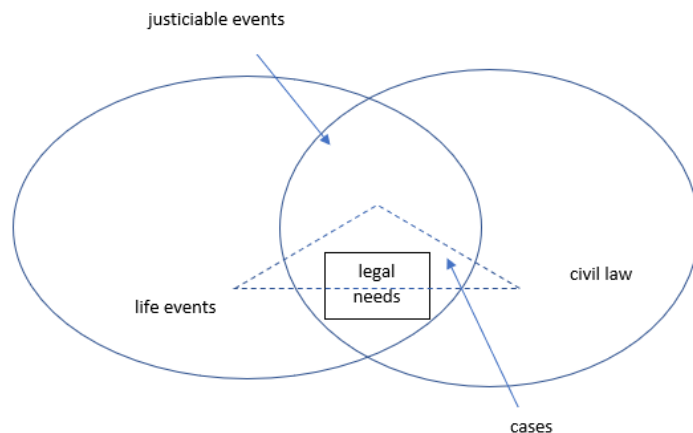
38. See Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 *YALE L. & POL'Y REV.* 503, 503 (1998).

39. See Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 *LAW & SOC. INQUIRY* 1091, 1091 (2017); see also Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 *AM. SOCIO. REV.* 909, 917 (2015).

40. The classic socio-legal frame for thinking about these dynamics is the “naming, blaming, claiming” framework developed in early U.S. studies of civil disputing, William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631, 631 (1980), and its more recent formulations, such as the “dispute tree,” Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 *ANN. REV. L. & SOC. SCI.* 105, 108–09 (2014).

be justiciable, whether on the basis of the facts of the situation or of the law believed to govern it. Some of the justiciable events taken on by lawyers or filed with courts or hearing bodies require expert legal intervention to resolve properly, and are thus “legal needs,” while others do not, even though they nonetheless receive the treatment of lawyers’ services or formal adjudication.⁴¹

Figure 3. Justiciable events, legal needs, and cases



Observers sometimes assume that specific kinds of cases self-evidently constitute legal needs. For example, the American right to counsel movement asserts that justiciable events involving core life issues such as shelter and child-rearing are legal needs.⁴² Other observers argue that being a litigant in a court case automatically constitutes a legal need; thus, an unrepresented litigant represents an unmet legal need.⁴³

41. A variety of studies demonstrate situations when legal expertise, usually in the form of lawyer-representation, is unnecessary or indeed makes the situation worse for the assisted party. *See, e.g.,* Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 *LAW & SOC'Y REV.* 627, 627 (1992); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 *YALE L.J.* 2118, 2118 (2012).

42. *See, e.g.,* U.S. *Supreme Court and the Civil Right to Counsel*, NAT'L COAL. FOR CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/about/history> [<https://perma.cc/X3WQ-MTZ6>] (last visited Jan. 16, 2021).

43. *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, 700 (2006); *cf.* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 38 (2010).

D. Summary

Clear definitions of central concepts allow more focused assessment of empirical evidence. We have offered here definitions for three concepts central to contemporary discussions of access to justice:

Justiciable events are events or circumstances that have civil legal aspects, raise civil legal issues, and have consequences for people that are shaped by the civil law.

Legal needs are justiciable events that require the application of legal expertise in order to be handled properly.

Cases are discrete bundles of events and circumstances selected for legal intervention by court systems, hearing agencies, and legal services providers from among the problems presented to them by prospective clients and litigants.

II. EVIDENCE

Assessing a national access to justice crisis would require nationally representative data describing the distribution and impact of justiciable events, legal needs, and cases. As we show below, little data exist to describe any of the three phenomena. Nonetheless, legal needs and cases are arguably less well understood, while justiciable events are currently best understood.

A. Justiciable Events

Justiciable events are probably the aspect of the crisis about which we have the most evidence: we are able to describe the prevalence and impact of these events across different parts of the population for many countries around the world. Globally, a typical way of investigating the frequency, distribution, and impact of justiciable events is through justiciable problems surveys.⁴⁴ These surveys, going under a range of names including paths to justice surveys, justice needs surveys, and (to add to the confusion) legal needs surveys, have been conducted for over six decades. Across the last twenty-five years, survey activity has increased markedly, with more than fifty such surveys across thirty countries around the world.⁴⁵

The various efforts differ in their details but share some common characteristics. All are surveys that seek to represent the experiences of some population of interest based on responses from a sample of that population.⁴⁶ All inquire about specific events that have been carefully selected by legal experts to be justiciable, in the sense that they raise legal issues and may be eligible for legal remedy.⁴⁷ Events queried are typically those that most people would consider

44. ORG. FOR ECON. COOP. & DEV. & OPEN SOC'Y FOUNDS., *supra* note 20, at 58.

45. *Id.* at 3.

46. *Id.* at 39.

47. *Id.* at 58.

adverse—hence the term justiciable *problems*.⁴⁸ And all ask about those events in factual terms that do not require survey respondents to know about the law.⁴⁹ For example, the World Justice Project (WJP) asks American respondents about “[p]roblems with a landlord about rental agreements, payments, repairs, deposits, or eviction,” rather than about unlawful detainer, holdover, or implied warranty of habitability.⁵⁰ Overall, these surveys attempt to measure the prevalence of common civil justice issues, their potential impacts, and people’s attempts to handle them.⁵¹

While many other nations have conducted nationally representative justiciable problems surveys, with some doing so on a regular basis, until recently no one had done so in the United States context since the early 1980s.⁵² In 2018, the WJP surveyed a sample of over 1,000 Americans about their justice experiences.⁵³ That same year, the Pew Charitable Trust commissioned its own civil justice survey aiming for a nationally representative sample of similar size.⁵⁴ These projects were

48. *Id.* at 25.

49. *Id.* at 59.

50. WORLD JUST. PROJECT, GENERAL POPULATION POLL 2019, at 13 (2019), <https://worldjusticeproject.org/sites/default/files/documents/GPP%20Questionnaire%202019.pdf> [<https://perma.cc/BW97-J46E>].

51. *Id.*

52. Past national studies that seek to be nationally representative include: BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 33 (1977); DAVID M. TRUBEK, JOEL B. GROSSMAN, WILLIAM L.F. FELSTINER, HERBERT M. KRITZER & AUSTIN SARAT, STUDYING THE CIVIL LITIGATION PROCESS: THE CLRP EXPERIENCE, at I-29 to I-30 (Felicity Skidmore ed., 1983). The 1992 ABA-sponsored survey included only low- and middle-income households. CONSORTIUM ON LEGAL SERVS., PUBLIC REPORT ON THE LEGAL NEEDS OF THE LOW- AND MODERATE-INCOME PUBLIC (1994).

53. The WJP data for the United States were collected via an online survey of 1,084 people, and the aim was to collect a nationally representative sample. WORLD JUST. PROJECT, GLOBAL INSIGHTS ON ACCESS TO JUSTICE: FINDINGS FROM THE WORLD JUSTICE PROJECT GENERAL POPULATION POLL IN 101 COUNTRIES 116, 118 (Sarah Chamness Long & Alejandro Ponce eds., 2019). Respondents were queried about experience with thirty-four specific justiciable problems in the areas of “consumer, money and debt,” “housing, land and neighbor,” “public services,” “family,” and “employment and business.” WORLD JUST. PROJECT, MEASURING THE JUSTICE GAP: A PEOPLE-CENTERED ASSESSMENT OF UNMET JUSTICE NEEDS AROUND THE WORLD 20, 41 tbl.9 (Camilo Gutiérrez Patiño, Sarah Chamness Long, Jorge A. Morales & Alejandro Ponce eds., 2019) [hereinafter MEASURING THE JUSTICE GAP]. The collected sample in the United States over-represents the white and older populations, as Table 2 reports. *Id.* at 22 tbl.2. About 80% of the WJP sample is non-Hispanic white, while the U.S. Census estimates that 60.1% of Americans are white and not Hispanic. *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI825219> [<https://perma.cc/L8MG-6HK7>] (last visited Jan. 17, 2021). The distributions of respondents across gender and household income look more like the nation: median household income in the United States is around \$63,000, which corresponds roughly to the distribution of the survey data: about half of respondents are in households with incomes below \$60,000, while half are above. Women are 51% of Americans and compose 54% of the sample, a not uncommon finding in survey research, as women are more likely than men to consent to participate in surveys.

54. The Pew study was administered by landline and cell telephone to a representative sample of 1,002 people. As of this writing, Pew had not published information about the demographic composition of the sample, but the estimates are weighted to produce nationally representative estimates. SSRS, DECEMBER 18-23, 2018 OMNIBUS SURVEY – METHODS REPORT FOR PEW CHARITABLE TRUSTS (2018), <https://www.pewtrusts.org/-/media/assets/2019/04/ssrs-methods->

the first attempt in decades to survey a nationally representative sample on this topic.

The two surveys asked different questions about different kinds of justice problems, different numbers of justice problems, and experience of justice problems over different time frames. The two studies also report their findings for different units of analysis (adults versus households). Table 1 reports the basic findings.

Table 1. Justiciable Events: Prevalence, USA: 2018⁵⁵

Data source	Number of problems queried	Population	Sample size	Reference period	Prevalence
PEW Civil Legal Survey	11 (excluding traffic)	households	1002	One year	47% had at least one problem
World Justice Project	34	Adults	1086	Two years	66% had at least one problem

As the table shows, many Americans experience justiciable events. The Pew survey found that almost half (47%) of households had experienced one or more of eleven broad justice problems in the year prior to the survey. Conservatively, this implies over sixty million justice problems, affecting over 150 million people.⁵⁶ The

report.pdf [<https://perma.cc/JR7N-YC3G>]. The Pew study asked about eleven broad categories of problems, including “illness or injury caused by someone else,” “a traffic ticket,” “to take on the rights or responsibilities over a family member,” “a family breakup,” “violence or harassment from someone close to you,” or “an issue with credit, loans, or debt,” and problems or disputes about “government payments or public benefits,” “government services,” “housing,” “employment,” “services or something you have bought,” and “insurance or financial services.” SSRS, PEW CHARITABLE TRUSTS CIVIL LEGAL SURVEY: TOPLINE REPORT (2019) [hereinafter PEW CHARITABLE TRUSTS CIVIL LEGAL SURVEY], <https://www.pewtrusts.org/-/media/assets/2019/04/survey-topline-report.pdf> [<https://perma.cc/SXG9-V9PH>].

55. MEASURING THE JUSTICE GAP, *supra* note 53, at 20, 41; PEW CHARITABLE TRUSTS CIVIL LEGAL SURVEY, *supra* note 54.

56. According to the U.S. Census, in 2019, there were 128.58 million households in the United States. *Number of Households in the U.S. from 1960 to 2020 (in Millions)*, STATISTA, <https://www.statista.com/statistics/183635/number-of-households-in-the-us/#:~:text=How%20many%20households%20are%20in,million%20households%20in%20the%20U.S> [<https://perma.cc/PMH6-MM32>] (last visited Jan. 17, 2021). If 47% of those experienced at least one justice problem, that implies at least 60,432,600 problems. Average household size in 2019 is 2.52 people. *Average Number of People per Household in the United States from 1960 to 2020*, STATISTA, <https://www.statista.com/statistics/183648/average-size-of-households-in-the-us/> [<https://perma.cc/RTQ3-P4QS>] (last visited Jan. 17, 2021). This implies that at least 152,290,152 people were living in households affected by civil justice problems.

World Justice Project survey found that two-thirds (66%) of adults had experienced at least one of thirty-four more specific kinds of justice problems in the two years prior to the survey. Conservatively, this implies that Americans were experiencing over 167 million justice problems during that two-year period.⁵⁷

The overall pattern of differences between the findings of the two surveys is unsurprising: if one inquires about more types of events occurring over a longer period of time, it is reasonable that the result will be more events reported. But though the observed difference is reasonable, it illustrates one of the challenges of assessing the crisis in access to justice: there is at present no consensus on what types of events to ask about or how to ask about them.⁵⁸ As a result, limited basis exists for determining whether Americans are experiencing 60 million or so civil justice problems or 160 million odd.

The WJP and Pew surveys mark a major advance in the information available about the civil justice experiences of the American public, but both nonetheless have limitations. The sample sizes are relatively small, around 1,000 respondents, limiting the surveys' power to report on the experiences of smaller groups in a diverse country.

We were able to obtain the unit-record data from the WJP, which allowed us to compare the justice experiences of different groups in the population to the extent possible given the sample. The WJP survey collected data about respondents' demographic characteristics, so it is possible to calculate the distribution of justiciable events across different groups in the population. The small numbers of people in most of the detailed racial groups make estimates for these groups unstable, necessitating the comparison of white respondents to all other groups.

As table 2 shows, this distribution is uneven. Given the small sample size, few of the differences are statistically significant. People of color are more likely to report justiciable problems than people who are white, though this difference is not statistically significant. A similar pattern obtains for gender, with women slightly more likely to report problems than men; again, the difference is not statistically significant. Only the difference across income groups is significant, with justice problems least likely among the highest income group and most likely among the lowest income group. The general pattern of findings is consistent with the conclusion that justice problems are more common among some groups in the

57. According to the U.S. Census, in 2019, the year after the WJP survey, 253,729,151 people aged eighteen or older lived in the United States. *Quick Facts: United States*, *supra* note 53. If two-thirds of them had at least one civil justice problem, that implies at least 167,461,240 justice problems in 2019 because many people with justice problems experience more than one at a time. *See* REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 6 (2014) (reporting that a survey of residents of a middle-sized city reported an average of 2.1 justice problems each).

58. There are best practices and excellent technical advice, but there is no apparent consensus. *See* ORG. FOR ECON. COOP. & DEV. & OPEN SOC'Y FOUNDS., *supra* note 20, at 78.

population than others, but the small sample size means that only large differences between groups will be statistically significant.⁵⁹

Table 2. Prevalence of Justiciable Events in the United States by Race, Gender and Household Income: 2018 World Justice Project Survey⁶⁰

Population	At least one problem	<i>n</i>
White	64%	888
Nonwhite	69%	198
Women	66%	588
Men	64%	498
Income		
Less than \$30,000	72%	228
\$30,000–\$59,999	65%	326
\$60,000–\$79,999	55%	165
\$80,000–\$119,999	70%	195
\$120,000 or more	59%	172
<i>N</i>	1086	1086

Notes: Estimates are unweighted. The difference in the chance of having at least one justice problem is statistically significant for income only ($\chi^2 = 16.7$, $df = 4$, $p < .01$).

Table 3 reports on the impact of justiciable events. Participants in the survey who reported justice problems were asked whether these led to a range of different consequences, such as negative impacts on health, lost income, lost employment or residential instability, damage to relationships, and substance abuse issues. As the table reports, just over a quarter of Americans (26%) reported at least one hardship as a result of a justiciable event they experienced. The most common hardship was illness, with 17% reporting it. Twelve percent had to relocate as a result of their justiciable event. Eleven percent experienced damage to relationships, while 3% reported that they had developed a substance use problem because of the event.

59. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 446–47 (2016).

60. Authors' original analyses of data from the WJP are on file with the authors. See MEASURING THE JUSTICE GAP, *supra* note 53 (describing the survey).

Table 3. Impacts of Justiciable Events: Hardships as a Result of Experiencing
Justiciable Events: World Justice Project, USA: 2018⁶¹

	% of Americans experiencing
Any hardship as a result of a justiciable event	26%
Physical or stress-related illness	17%
Lost income, employment, or had to relocate	12%
Relationship breakdown or damage	11%
Substance use problem	3%

The WJP data also permit examination the distribution of hardships across different groups in the population, as described in table 4. The first column reports the percentage of respondents with justice problems who reported that the problem caused a hardship, and compares this for race, gender, and income. People of color are more likely than whites (54% v. 43%, respectively) to report hardships caused by justiciable problems, though this difference is not statistically significant. Women are more likely to report problem-resultant hardships than men (48% v. 41%), and the difference is statistically significant. The relationship of household income to hardship experience as the result of a justice problem is not linear in these data, but the poorest group is most likely to experience hardships as the result of justiciable problems (58% of their problems caused at least one hardship); the differences across income are statistically significant. These overall patterns hold for each type of hardship, though not all of the differences are statistically significant: people of color are more likely than whites to report health, economic, interpersonal, and substance use problems caused by justiciable events; women are more likely than men to report all hardships except substance use; and the lowest income group is more likely than others to report each of the hardships as a consequence of their justice problems.

61. Authors' original calculations from WJP data are on file with authors. *See id.* (describing the survey).

Table 4. Distribution of Impacts of Justiciable Events: Percent of Those Reporting at Least One Justiciable Event Who Report Consequent Hardships, by Race, Gender, and Household Income. 2018 World Justice Project Survey⁶²

Population	Among those with problems, experienced hardship ^a	Health hardship ^b	Economic hardship ^c	Interpersonal hardship ^d	Substance use problem ^e	N
White	43%	28%	25%	18%	5%	888
Nonwhite	54%	31%	33%	30%	12%	198
Women	48%	31%	27%	21%	6%	588
Men	41%	25%	26%	20%	8%	498
Income						
Less than \$30,000	58%	40%	42%	23%	9%	228
\$30,000–\$59,999	42%	28%	24%	22%	7%	326
\$60,000–\$79,999	37%	19%	22%	18%	4%	165
\$80,000–\$119,999	39%	24%	20%	15%	7%	195
\$120,000 or more	43%	27%	22%	22%	4%	174
<i>n</i>	705	684	687	688	692	1086

Notes: Over 80% of respondents to this survey were white, leading to very small cell sizes for the analysis of racial differences. Accordingly, we distinguish white from nonwhite respondents.

^a Differences in the chance of experiencing a hardship are statistically significant for gender ($\chi^2 = 5.8$, $df=1$, $p < .05$) and income ($\chi^2 = 15.8$, $df=4$, $p < .01$).

^b Differences in the chance of experiencing a health hardship are statistically significant for income ($\chi^2 = 15.2$, $df=4$, $p < .01$).

^c Differences in the chance of experiencing an economic hardship are statistically significant for income ($\chi^2 = 24.1$, $df=4$, $p < .001$).

^d Differences in the chance of experiencing an interpersonal hardship are statistically significant for race ($\chi^2 = 8.7$, $df=1$, $p < .01$).

^e Differences in the chance of experiencing a substance abuse are statistically significant for race ($\chi^2 = 6.9$, $df=1$, $p < .01$).

All other observed differences are not statistically significant.

About justiciable events, we know that they are widely distributed across the population, that they are experienced by some groups more than others, and that many people experience hardships as a result of these problems, including lost income, damaged relationships, and negative health impacts.

B. Legal Needs

A legal need is a justiciable event that requires legal expertise in order to be handled properly.⁶³ Though this concept is central to contemporary discussions of access to civil justice, we actually know very little about its empirical distribution. This is because legal needs are quite complex to measure.

Traditionally, many observers assumed that civil justice problems experienced by members of the public required legal expertise for proper resolution. This

62. Authors' original analyses from WJP survey data are on file with authors. *See id.*

63. *See Sandefur, supra* note 8, at 50.

assumption underlies the common description of civil justice experience surveys as “legal needs surveys.”⁶⁴ But empirical research has never supported this as a blanket assumption. The sociolegal literature is replete with studies of communities where people resolve problems in ways that are lawful or welfare-enhancing without turning to the formal law.⁶⁵ When people do turn to the formal law with their justice problems, they do not always need legal experts’ assistance, and indeed sometimes that assistance actually makes things worse for those clients who receive it.⁶⁶

If we truly wished to assess the distribution and impact of unmet legal needs, we would need nationally representative data that would allow us to determine which justice problems constitute such needs. Some research explores this question by examining whether the intervention of legal expertise changes the outcome of problems. For example, D. James Greiner, faculty director of the Access to Justice Lab at Harvard Law School, aspires to make law an evidence-based profession through the use of randomized controlled trials that assess when and whether legal expertise shapes the conduct and outcomes of legal matters.⁶⁷ So far, the findings suggest that sometimes lawyers have a large impact on outcomes, and so we might designate such situations as legal needs. Other scholars have used the technique of meta-analysis to assess what it is about cases or justice problems that make them require the application of legal expertise to resolve property. One study of forty years of research on lawyers’ impact on case outcomes found that the substantive and procedural complexity of cases shapes the need for legal expertise: more complex cases could thus be classified as legal needs while simpler cases may not be.⁶⁸ Another approach focuses on the person facing the situation rather than the legal matter at issue, exploring who is more likely to experience a justice problem as a legal need. This research suggests that there are clear and common markers of vulnerability, including the lack of what some term “legal capability,” or possession of the “knowledge, skills and psychological readiness” needed to respond properly to a justice problem.⁶⁹

64. ORG. FOR ECON. COOP. & DEV. & OPEN SOC’Y FOUNDS., *supra* note 20.

65. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1991); David M. Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC’Y REV. 551, 552–54 (1984); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 60 (1963).

66. *See, e.g.*, Monsma & Lempert, *supra* note 41, at 651 n.27; Greiner & Pattanayak, *supra* note 41, at 2149–53.

67. *See* ACCESS TO JUST. LAB AT HARV. L. SCH., <https://a2jlab.org/> [<https://perma.cc/XXL3-DWXY>] (last visited Jan. 17, 2021). *See generally* Carroll Seron, Martin Frankel, Gregg Van Ryzin & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 426 (2001) (providing another example of a randomized experimental evaluation on how legal assistance shapes outcomes).

68. Sandefur, *supra* note 39, at 926.

69. PASCOE PLEASANCE, CHRISTINE COUMARELOS, SUZIE FORELL, HUGH M. McDONALD & GEOFF MULHERIN, RESHAPING LEGAL ASSISTANCE SERVICES: BUILDING ON THE EVIDENCE BASE 130, 136 (2014).

C. Cases

Cases are discrete bundles of events and circumstances selected for legal intervention by court systems, hearing agencies, and legal services providers from among the problems presented to them by prospective clients and litigants. Ultimately, lawyers, courts, and other authoritative hearing bodies like social security appeals tribunals or unemployment compensation hearing bodies decide which events of everyday life will become cases and which will not. Ironically, though cases are a core element of discussions of contemporary access to justice, no consistent and accessible source of data on cases exists that parallels the justiciable event surveys. Indeed, it is not known how many civil cases are filed in the United States in any given year, let alone how many of different types or how many involving litigants with or without lawyer representation.⁷⁰

While more information exists for the federal court system, 98% of the civil cases in this country are filed in state courts, which differ enormously among themselves in their data collection practices.⁷¹ The National Center for State Courts promulgates data standards, which some state court systems have adopted, and publishes estimates of case activity based on limited information compiled from a subset of states.⁷² The oft-cited estimates about numbers of unrepresented litigants are based on a small number of states that have published reports or released data.⁷³ Similarly, no entity collects consistent, nationally representative information about how many cases are taken on by attorneys each year.⁷⁴ No consistently collected, nationally representative information exists to inform on cases, their distributions, or their impacts.

70. Sandefur, *supra* note 9, at 297.

71. BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 3 (1995), http://www.courtstatistics.org/__data/assets/pdf_file/0031/29749/1993-EWSC.pdf [<https://perma.cc/Q39R-25Q7>]; see *National Open Data Standards (NODS)*, NAT'L CTR. FOR ST. CTS., <https://www.ncsc.org/services-and-experts/areas-of-expertise/court-statistics/national-open-court-data-standards-nods> [<https://perma.cc/4M2P-7BVJ>] (last visited Jan. 17, 2021); see also Carpenter et al., *supra* note 11, at 258 n.27 (discussing the differences in data among states); cf. Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1061 (2020) (“Computer systems and data collection become standardized throughout local courts.”).

72. See, e.g., Brenda K. Uekert & Richard Y. Schauffler, *The Need for Improved Adult Guardianship Data*, 15 CASELOAD HIGHLIGHTS, Nov. 2008, at 1, 4, http://www.courtstatistics.org/__data/assets/pdf_file/0021/23970/15_2_adult_guardianship_data.pdf [<https://perma.cc/K27V-2ZG7>].

73. See, e.g., NAT'L CTR. FOR STATE CTS. & STATE JUST. INST., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 16 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/U2CT-8RMC>] (reporting on rates of unrepresented litigations using data from courts in 10 of the nation's over 3,000 counties).

74. Companies like Clio report selected information about the lawyers who purchase their case management services, but these do not represent the U.S. legal profession as a whole. See CLIO, LEGAL TRENDS REPORT 2019, at 61 (2019), <https://www.clio.com/wp-content/uploads/2019/10/2019-Legal-Trends-Report.pdf> [<https://perma.cc/7VSE-LREN>].

D. Summary

The state of knowledge about the crisis in access to justice in the United States parallels the remark by Sir James Munby that opens this Article: any reasonable person can see that there are very serious problems, but it is difficult to discover how large the problems are and whom they affect most because there are so little accessible data. At present, we know more about cases and justiciable events than we do about a core phenomena in the crisis, legal needs.

III. SIMPLE SUMMARY MEASURES OF ACCESS TO CIVIL JUSTICE

Rigorous empirical assessment of the state of access to civil justice in the United States is severely hampered by lack of access to basic facts, such as which justice problems are legal needs and who has them, or how many cases of a particular type are filed in any given year. This state of affairs obtains because, since the early 1980s, the nation has invested relatively little in research and evaluation in the civil justice space.⁷⁵

In this Part of the Article, we develop measures that summarize the state of access to civil justice and can be constructed with existing data. The measures we offer are consistent with the “people-centered” focus of contemporary access to justice research and policy, in that they assess access to civil justice based on the experiences of the public—the outputs of justice institutions and people’s interactions with them—rather than through examination of court staffing, justice expenditures, or other input measures.⁷⁶ The measures we offer are responsive to the fact that most justiciable events do not become formal cases, and that many people use other sources of assistance to handle their civil justice problems.⁷⁷ The measures are also responsive to the fact that whether any given justiciable event is a legal need is very difficult to assess with existing data. We illustrate the measures with data from the United States, focusing on exposure to justiciable events and problems related to those events.

A. Definition: Civil Justice Problem-Free Life Expectancy (CJPFL) and Civil Justice Hardship-Free Life Expectancy (CJHFLE)

We offer two composite measures of Americans’ experiences with justiciable events over the life course. The measures summarize access to justice by describing the number of years someone can expect to live free of having to deal with civil justice problems and hardships consequent to them. They parallel “disability-free life expectancy,” which describes the number of years someone can expect to live

75. See generally Sandefur, *supra* note 9.

76. ORG. FOR ECON. COOP. & DEV., EQUAL ACCESS TO JUSTICE FOR INCLUSIVE GROWTH: PUTTING PEOPLE AT THE CENTRE 56 (2019), <https://www.innovatierechtspleging.nl/wp-content/uploads/2019/07/Equal-Access-to-Justice-for-Inclusive-Growth-Putting-People-at-the-Centre.pdf> [<https://perma.cc/CVA9-H33D>].

77. See, e.g., Sandefur, *supra* note 59, at 443–44.

free of a disabling condition such as heart failure or blindness. The measures offered here can be calculated for any population for which the required pieces of information are available, enabling comparisons across time, geography, and social characteristics such as race, social class, gender, age, or disability status.

As life expectancy continues to increase across the globe, questions regarding life have focused more on the type or quality of life rather than solely on the number of years people can expect to live.⁷⁸ Contemporary research also focuses on inequalities in life expectancy. For example, despite global life expectancy being on average the highest in human history, observed inequalities between the longest and shortest life expectancies have grown at the same time as average life expectancy has increased.⁷⁹

To calculate the measures of problem- and hardship-free life expectancy, we use the Sullivan Method,⁸⁰ which permits estimation of the quantity of years spent in a condition (e.g., health, disability, or injustice) experienced across the life course. Developed in the United States to assess disability-free life expectancy and popularized in Europe as healthy life years, the Sullivan Method has been the most common method used to estimate life expectancies since the 1970s.⁸¹ The Sullivan Method requires a projection of the number of years expected to be lived experiencing a condition (in this case, justiciable events or civil justice hardship). The resulting CJPFLE and CJHFLE are quasi-longitudinal measures based on life tables and age-specific prevalence of justice issues and related hardships. The Sullivan Method is a useful and reasonably accurate measure of states across the life

78. See Renata Tiene De Carvalho Yokota & Herman Van Oyen, *Operationalization of Concepts of Health and Disability*, in INTERNATIONAL HANDBOOK OF HEALTH EXPECTANCIES 3, 6 (Carol Jagger, Eileen M. Crimmins, Yasuhiko Saito, Renata Tiene De Carvalho Yokota, Herman Van Oyen & Jean-Marie Robine eds., 2020), https://link.springer.com/chapter/10.1007/978-3-030-37668-0_1 [<https://perma.cc/E7Y2-6Q3D>].

79. U.N. DEP'T OF ECON. & SOC. AFFS., POPULATION DIV., WORLD POPULATION PROSPECTS 2019: HIGHLIGHTS, at 3, 30, U.N. Doc. ST/ESA/SER.A/423, U.N. Sales No. E.19.XIII.4 (2019); MICHAEL MARMOT, THE HEALTH GAP: THE CHALLENGE OF AN UNEQUAL WORLD 48 (2015); see Jean-Marie Robine, Carol Jagger, Eileen M. Crimmins, Yasuhiko Saito & Herman Van Oyen, *Trends in Health Expectancies*, in INTERNATIONAL HANDBOOK OF HEALTH EXPECTANCIES 19, 30 (Carol Jagger, Eileen M. Crimmins, Yasuhiko Saito, Renata Tiene De Carvalho Yokota, Herman Van Oyen & Jean-Marie Robine eds., 2020), https://link.springer.com/chapter/10.1007/978-3-030-37668-0_2 [<https://perma.cc/3UX2-NYS4>].

80. The Sullivan Method has traditionally been used to measure health expectancy (years expected to live in health from a referent age) or disability-free life expectancy. The following resources can be reviewed for detailed descriptions of the Sullivan Method. See CAROL JAGGER, HERMAN VAN OYEN & JEAN-MARIE ROBINE, HEALTH EXPECTANCY CALCULATION BY THE SULLIVAN METHOD: A PRACTICAL GUIDE 2–3 (New Castle Univ., 4th ed. 2014); see also MICHAEL T. MOLLA, DIANE K. WAGENER & JENNIFER H. MADANS, CTRS. FOR DISEASE CONTROL & PREVENTION, SUMMARY MEASURES OF POPULATION HEALTH: METHODS FOR CALCULATING HEALTHY LIFE EXPECTANCY 1, 2 (2001) (discussing health life expectancy).

81. Carol Jagger & Jean-Marie Robine, *Healthy Life Expectancy*, in INTERNATIONAL HANDBOOK OF ADULT MORTALITY 551, 553–54 (Richard G. Rogers & Eileen M. Crimmins eds., 2011); see also JAGGER ET AL., *supra* note 80; Robine et al., *supra* note 79, at 22.

course, assuming that there are not sudden increases or decreases in justice experiences across time.⁸²

One reason for the Sullivan Method's popularity is its facility in leveraging available existing data, a feature of which we take advantage here. Cross-sectional prevalence data for events of interest, such as diagnosis of a disabling condition or experience with a civil justice problem, can be combined with life tables, which report the average years of life remaining for different groups in a population.⁸³ Since life tables are updated annually using consistent methods,⁸⁴ opportunities to calculate civil justice problem-free life expectancy and civil justice hardship-free life expectancy are constrained primarily by the availability of data about people's civil justice experiences. The Sullivan Method enables comparison of populations' experiences of a condition (e.g., civil justice problem experience) across time or subgroups of a population at the same point in time.⁸⁵ The measure we offer adjusts for experiences relative to life expectancy—that is, we report the number of years expected to be lived experiencing justice problems and resultant hardships, as well as the proportion of life expected to be affected by these experiences.

The CJPFLE and CJHFLE measures assess, for people of different ages, the number of years of future life they can expect to be free of the need to deal with civil justice problems or the experience of health problems, economic losses, damaged relationships, or problems with substance use as a result of those civil justice experiences. Combining the data on the prevalence of problems and hardships with data on life expectancy raises some challenges, not least because different civil justice studies ask about different numbers and types of problems across different periods of time.

B. Findings: Civil Justice Problem-Free Life Expectancy (CJPFLE)

To calculate these measures, the estimates of period prevalence of civil justice events and hardships must align with life tables that are based on one-year increments. Therefore, we adjust the period prevalence of justice events and hardships from the WJPs two-year estimate of 66% to a one-year estimate of 43.3%.⁸⁶ That is, the CJPFLE is constructed based on the assumption that the

82. Colin D. Mathers & Jean-Marie Robine, *How Good Is Sullivan's Method for Monitoring Changes in Population Health Expectancies*, 51 J. EPIDEMIOLOGY & COMMUNITY HEALTH 80, 85 (1997).

83. See Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2017*, 68 NAT'L VITAL STAT. REPS., June 24, 2019, at 1, 1–2, https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_07-508.pdf [<https://perma.cc/GCM2-LGST>].

84. See *Actuarial Life Table: Period Life Table, 2017*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/STATS/table4c6.html> [<https://perma.cc/8X27-RXKX>] (last visited Jan. 17, 2021).

85. See JAGGER ET AL., *supra* note 80, at 2–3.

86. A challenge in using the 2018 WJP survey to estimate annual prevalence is that participants were asked about experiences of justiciable events across the last two years instead of one year. WORLD JUST. PROJECT, GENERAL POPULATION POLL 2018, at 13 (2018), https://worldjusticeproject.org/sites/default/files/documents/GPP%20Questionnaire%202018_FINAL.pdf [<https://perma.cc/4PW5-N98A>]. Since a one-year prevalence estimate is preferred to estimate CJPFLE, prevalence was calculated after examining estimates based on both liberal and conservative assumptions. The liberal

overall annual prevalence among adults of experiencing at least one justiciable event is 43.3%. It is likely that this assumption is conservative. For example, the 2014 Middle City Study found that 66% of a representative sample of adults in a medium-sized city had experienced at least one justiciable event within the last eighteen months,⁸⁷ while the 1994 national American Bar Association survey found that 49% of a representative sample of low- and middle-income households experienced one or more justiciable events in the previous year.⁸⁸ The Pew Charitable Trust Civil Legal Survey reported an annual prevalence of justiciable events of 47% of households.⁸⁹

An example will illustrate the method. In 2017, an American aged eighteen to nineteen years of age was expected to live 61.3 more years on average, to a total life span of 79.3 to 80.3 years.⁹⁰ From the WJP data, we estimate that the percentage of young adults (age eighteen to thirty-four) experiencing a civil justice problem in any given year was 46%. After accounting for the proportion of civil justice problems and life years in subsequent age groups, this means that the average young adult aged eighteen to nineteen can anticipate living 34.5 years, or 56% of their life, free of experience of civil justice problems; conversely, that same person can anticipate 44% or 26.8 years of life would include the experience of a civil justice problem.⁹¹

estimate assumes that the WJP prevalence estimate applies equally to both years. The conservative estimate assumes that the WJP prevalence estimate applies to first year in total and nothing toward the second year. Based on the liberal assumption, 21.1 years of an average adult's life expectancy would be civil justice problem-free. In other words, 34.5% of adult life expectancy would not include the experience of a civil justice problem. Under the conservative assumption, 41.2 years of life would be civil justice problem-free (or 67.2% of adult life expectancy). A review of previous research suggests it is likely that the liberal assumption is too liberal (66% prevalence of justiciable events each year) and the conservative assumption too conservative (32% percent prevalence of justiciable events each year). For the estimates presented here, we make a middling assumption that the two-year estimate applies, on average, 75% to each of the two years assessed through the 2018 WJP survey (100% for year one and 50% for year two; using a divisor of 1.5).

87. SANDEFUR, *supra* note 57, at 3, 6.

88. See CONSORTIUM ON LEGAL SERVS. & THE PUBLIC, AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 9 (1994).

89. Erika Rickard, *Many U.S. Families Faced Civil Legal Issues in 2018*, PEW CHARITABLE TRS. (Nov. 19, 2019), <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/19/many-us-families-faced-civil-legal-issues-in-2018> [<https://perma.cc/ZA5C-GR7X>].

90. See, e.g., Arias & Xu, *supra* note 83, at 10.

91. All these quantities reflect our original calculations from the WJP and life table data. A conceptual overview of the calculation is briefly described here. More details on methods can be found in the documents referenced in footnote 74. The number of civil justice free years of life expectancy is calculated based on multiplication of the following factors: prevalence of justice problems by age group (from justice problem prevalence survey), the number of participants in each age group of the justice prevalence estimate (from justice problem prevalence surveys), the number of people surviving to lower ends of age category boundaries (from life tables), the number of age years included in each age category (from life tables), and the total years civil justice problem free by age category (a function of justice and life table data). Multiplying these elements enables the estimation of civil justice problem free life expectancy by age grouping. Dividing civil justice free life expectancy by the life expectancy from each lower boundary year (e.g., from eighteen to nineteen years of age; from life tables) enables the estimation of the proportion of total life expectancy that would be expected to be lived without a civil justice

This method is applied to each of the age groups (i.e., eighteen to thirty-four, thirty-five to forty-four, forty-five to fifty-four, fifty-five to sixty-four, and sixty-five to eighty-nine), producing estimates that suggest that the proportion of life expectancy that is free from civil justice problems increases with age. As noted, Americans aged eighteen to thirty-four can expect to live 56% of their expected remaining years free of experience of civil justice problems. Adults aged thirty-five to forty-four can expect to live 57% of their remaining life years civil justice problem-free (25.8 problem-years of their 45.3 years of expected additional life). Those aged forty-five to fifty-four can expect 20.9 years of remaining life, or 58%, to be justice problem free, while people in the fifty-five to sixty-four age group can anticipate 16.7 years of future justice problem-free life, 61.2% of their life expectancy, and people aged over sixty-four can expect that 63.5%, 12.3 years, of the rest of their lives will be civil justice problem free.

Considered as descriptors of Americans' experiences, these measures show starkly that civil justice problems are pervasive throughout the life course and that people spend large portions of their lives experiencing them. Americans aged twenty to sixty-four can expect to live about 84% of their lives free of disabling health conditions,⁹² while those same age groups can anticipate no more than 63.5% of their future lives to be free of civil justice problems.

C. Findings: Civil Justice Hardship-Free Life Expectancy (CJHFLE)

While the CJPFLFLE measures exposure to civil justice problems, the CJHFLE measures the impact of those problems in the form of the hardships that they cause or involve. The calculation parallels that of the Problem-Free Life Expectancy, with the only difference being the use of prevalence data for experience with hardships related to problems rather than problems themselves. In the WJP data, estimated annual prevalence of experiencing at least one civil justice hardship, based on the 2018 WJP Survey, is 19.5%.⁹³ Based on this, eighteen-to-thirty-four-year-olds can anticipate 48.7 years, or 79% of their life expectancy, to be free from civil justice hardships. This also means that 21% of adult life expectancy (or 12.6 years) in this group is spent experiencing civil justice hardship. For three other age groups of forty-five to fifty-four, fifty-five to sixty-four, and sixty-five to eighty-nine, the

problem. The complement is used to estimate the life years experiencing a civil justice problem or the proportion of life years with a civil justice problem.

92. Eileen M. Crimmins, Yuan Zhang & Yasuhiko Saito, *Trends over 4 Decades in Disability-Free Life Expectancy in the United States*, 106 AM. J. PUB. HEALTH 1287, 1291 tbl.3 (2016).

93. Like civil justice problem prevalence, civil justice hardship was adjusted from twenty-four months to twelve months using a middling assumption (using a divisor of 1.5). See Arias & Xu, *supra* note 83, at 6–7. The resulting estimated twelve-month prevalence of experiencing at least one civil justice hardship, based on the 2018 WJP Survey, was 19.5%. This adjustment to the 2018 WJP Survey hardship twenty-four-month prevalence seems reasonable in comparison to the Middle City Study that found 31% of participants experiencing at least one civil justice hardship across eighteen months (66% reported an event and 47% of events resulted in hardship resulting in a product of 31%). See SANDEFUR, *supra* note 57, at 7, 10.

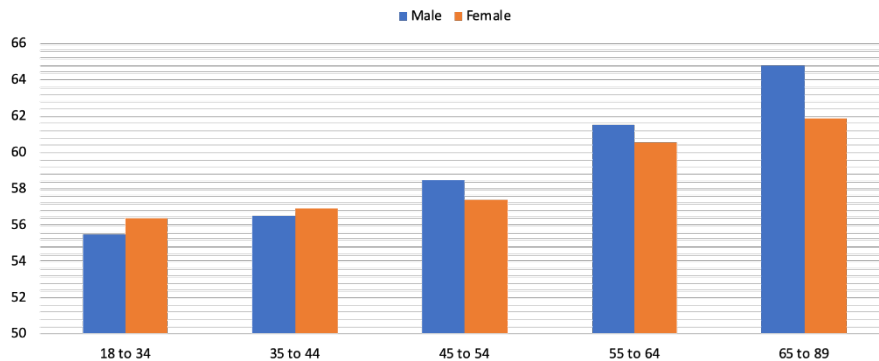
percentage of civil justice hardship free life expectancy would be 83.2%, 86.1%, and 88.7% respectively. This means that a typical eighteen-year-old today could expect approximately thirteen years of subsequent life experiencing a hardship linked to a justiciable event, while a thirty-five-year-old could expect to spend nine years, a forty-five-year-old six years, a fifty-five-year-old four years, and a sixty-five-year-old two years. As with the CJPFL, the proportion of remaining life impacted by hardship decreases as people age according to these estimates.

D. Findings: Gender Inequality in Exposure to Civil Justice Problems and Consequent Hardships

While absolute measures of exposure to justice problems and their consequences are useful, the ability to compare justice experiences across groups with these measures greatly increases their value. Given samples of sufficient size, one could compare these measures across groups that differ in their gender, race, ethnicity, income, education, age, or disability status. If prevalence data were available over time, one could compare these measures before and after the implementation of specific policies, such as the creation of a right to counsel in evictions or courts' shift from in-person to online hearings. Given the data presently available from life tables about life expectancy and from justice surveys about experience with justice problems and resultant hardships, gender is the only comparison that can be made with any confidence.

Figures 4 and 5 report on these analyses. Figure 4 reports for five different age groups the percentage of remaining life years that will on average be free of civil justice problems for men and for women. Figure 5 reports for those same groups the share of remaining life years that can be expected to be free of hardships caused by civil justice problems. As figure 4 shows, when women are younger, they can look forward to a greater proportion of their lives free of civil justice problems, though the differences are small (e.g., 55.5% of the remaining life years of men aged eighteen to thirty-four will be civil justice problem-free, while 56.4% of the life years of similarly aged women will be free of civil justice problems). As people age, the gender difference flips: in the three older age groups, men can look forward to spending a greater proportion of their lives civil justice problem-free than can women. The differences in the number of years expected free of justice problems by gender for each age group is not statistically significant, however.

Figure 4. Expected share of life to be lived civil justice problem free, by gender and age⁹⁴

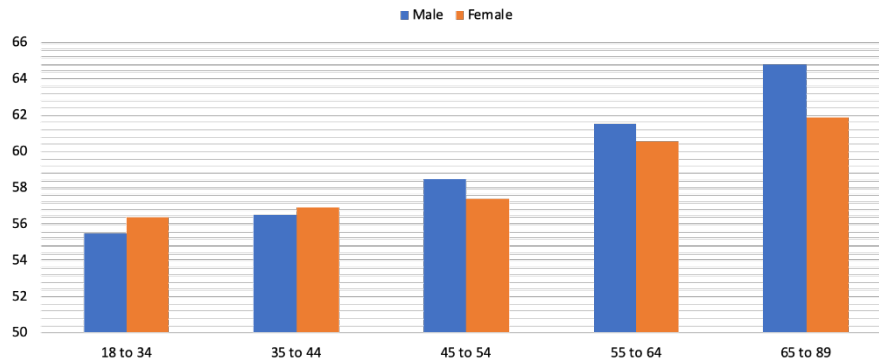


The patterns more consistently favor men when examining the distribution of hardships caused by civil justice problems across the life course. As figure 5 shows, men can look forward to a greater proportion of their lives free of hardships caused by civil justice problems than women, though, again, the differences are not statistically significant.⁹⁵ It is distinctly possible that women spend more of their lives burdened by civil justice-related hardships than men do. With a larger sample size, these differences may well be statistically significant.

94. Authors' original analyses of data from the WJP are on file with the authors.

95. The Sullivan Method allows for estimating statistical ζ scores and 95% confidence intervals to evaluate mean differences. See generally JAGGER ET AL., *supra* note 80 (providing examples of how the Sullivan Method can be applied). None of the ζ scores exceeded ± 1.96 , and all confidence intervals include zero, which means that although there is evidence supporting the trends discussed, the differences are not statistically different. Larger samples would reduce the standard errors and potentially yield statistically significant differences. To supplement the Sullivan Method, logistic regression analyses were used to analyze the relation of three predictors (age, gender, and the interaction of age and gender) and two outcomes (events and hardships). Neither gender nor the interaction of age significantly predicted the odds of experiencing a justiciable event. However, age in years significantly predicted the odds of experiencing a justiciable event ($OR=0.966, p<.05$), with older age predicting lower odds of reporting a justiciable event. When regressing hardship on gender alone, there was a significant increase in odds among females in experiencing a hardship ($OR=1.31, p<.05$). However, after adjusting for age and the interaction of age and gender, gender was no longer a statistically significant predictor of hardship. As with justiciable events, hardships were significantly predicted by age ($OR=0.96, p<.05$) with younger adults more likely to report hardships than older adults. The Sullivan Method and logistic regression results support concordant findings. Differences in justiciable events and hardships by gender are no longer statistically different after accounting for age or life expectancy.

Figure 5. Expected share of life to be lived civil justice hardship free, by gender and age⁹⁶



CONCLUSION

As greater attention turns to America's access to justice crisis, clear concepts, good data, and useful measures become increasingly important. To use Sir Munby's words, "beyond all serious argument there are very serious problems which cannot sensibly be ignored by any reasonable person," but at the same time "there has been far too little research into what is actually happening," in large part because "there is virtually no accessible data." This Article has sought to bring some conceptual clarity to discussions about access to civil justice and, building on that work, to offer summary measures of access to justice that can be constructed with existing data.

Little consistently collected, nationally representative data exist for the three key concepts at the core of contemporary understandings of the access to justice crisis—justiciable events, legal needs, and cases. In the face of this data deficit, we have drawn on ideas from the discipline of public health to construct two measures of access to justice that summarize people's experience with civil justice problems. These measures focus on contact with justice problems and problems' impact. Consistent with other research that shows a large volume of civil justice problems affecting all groups in the population,⁹⁷ we show that Americans spend large proportions of their lives experiencing civil justice problems: for example, eighteen-to-thirty-four-year-olds can expect that, on average, 44% of the rest of their lives will be overshadowed by these problems. And these problems involve a range of hardships, affecting health, relationships, financial and housing stability, and substance use. Consequently, Americans can also look forward to spending large proportions of their lives suffering from hardships related to civil justice problems. For example, people aged eighteen to thirty-four can anticipate that over a fifth (21%) of their future lives will be characterized by hardships caused by civil

96. Authors' original analyses of data from the WJP are on file with the authors.

97. See, e.g., PLEASENCE ET AL., *supra* note 69.

justice problems. To many observers, this state of affairs will indeed bear the hallmarks of a crisis.

The measures offered here also support findings from other research that problems and their hardships are not distributed equally. Our illustrative analysis focused on gender, and found that once women become middle aged, they may spend more of their lives dealing with civil justice problems than will men; and, throughout their lives, women will likely spend more of their years suffering from hardships that result from civil justice problems. If more data were available, other group comparisons would be possible, including for factors such as race that are at the core of debates about the criminal justice system. The documented racial inequalities that pervade the criminal system may strongly characterize civil justice experience as well.

The creation and use of summary measures of civil justice, like Civil Justice Problem-Free Life Expectancy and Civil Justice Hardship-Free Life Expectancy, open up new avenues of research. Under the right conditions and with adequate data, cross-national research could compare how different legal systems shape access to justice as measured by these quantities. For example, do residents of civil law countries experience less of their lives burdened by civil justice problems and their sequelae than do residents of otherwise similar common law countries? Do residents of countries with better-funded or more expansive civil legal aid schemes experience more of their lives free of civil justice problems and resultant hardships than those living in otherwise similar countries with less generous schemes? Do residents of countries where nonlawyers can provide legal advice experience less of life characterized by civil justice problems or their negative impacts than those living in otherwise similar jurisdictions where nonlawyers cannot give legal advice? Such measures could also provide useful ways of assessing the impact of policy changes. For example, if the United States creates a right to counsel for a civil matter such as eviction, how does that shape access to justice as measured by ordinary Americans' experiences? Do expected years of hardship decrease as people who previously struggled with these problems without legal assistance now have help? Do expected years facing justice problems decrease because landlords file fewer eviction lawsuits once many more tenants are represented? Key questions about whether policies achieve their desired results could be explored using these measures.

Effective action on America's crisis of access to civil justice is possible only if that crisis is understood. Understanding it requires access to fundamental facts and a clear understanding of what those facts represent.