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# THE FULCRUM POINT OF EQUAL ACCESS TO JUSTICE: LEGAL AND NONLEGAL INSTITUTIONS OF REMEDY

*Rebecca L. Sandefur\**

*“Equal access to justice” would mean that different groups in a society would have similar chances of obtaining similar resolutions to similar kinds of civil justice problems. If people had equal access to justice, a society’s institutions of remedy would work to equalize how they handled their civil justice problems and to ensure that similar problems were resolved similarly, even when different kinds of people—whether rich or poor, men or women, of any race or ethnicity—experienced them. When justice scholars and practicing attorneys address the problem of equalizing access to civil justice, they often begin by thinking about expanding access to law. But, when members of the public confront problems that raise issues in civil law, they do not share the same law-centric perspective of these attorneys and academics. In the United States and other developed nations, most civil justice problems are never taken to law. When one examines how people actually handle their civil justice problems, one observes both a widespread resignation to these problems and an enormous variety of attempted remedies, a minority of which involve the explicit use of law. A comparative analysis of the design and function of both legal and nonlegal institutions of remedy for civil justice problems reveals potential solutions to the problem of equalizing access to justice in an unequal society. By stepping back from law, we can expand and equalize access to substantive justice by selectively redesigning institutions of remedy so that they are remedial and give members of unequal groups more common and more equal experiences with their justice problems. This innovative approach relies on and bolsters the notion that access to justice is for everyone.*

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\* Assistant Professor of Sociology and Assistant Professor (by courtesy) of Law at Stanford University. This paper was presented at the “Access to Justice: It’s Not for Everyone” Symposium held at Loyola Law School Los Angeles, California, on February 6, 2009. Parts of the empirical analysis were made possible by Professor Pascoe Pleasence and the staff at the Legal Services Research Centre who generously shared data.

## I. INTRODUCTION

When justice scholars and practicing attorneys address the problem of access to civil justice, they often begin by thinking about expanding access to law. Such an expansion could involve creating a more comprehensive legal aid system that broadens the range of civil justice problems for which people can receive free or subsidized legal assistance.<sup>1</sup> Or, it could involve making civil legal assistance more generous by increasing the share of the population that is eligible to receive effective subsidies for lawyers' services.<sup>2</sup> It could also involve extending support for people utilizing the court system without the assistance of attorneys, for example by providing greater funding and more staff for court-based self-help programs.<sup>3</sup>

But when members of the public confront problems that raise issues in civil law, they do not share the same law-centric perspective of these attorneys and academics. In the United States and other developed nations, most civil justice problems are never taken to law. When one examines how people actually handle their civil justice problems, one observes both a widespread resignation to these problems and an enormous variety of attempted remedies, a minority of which involve the explicit use of law.<sup>4</sup>

In this Article, I argue that the diversity of public responses to civil justice problems, including both legal and nonlegal responses, is the appropriate terrain for theoretical and empirical inquiries about access to justice. Drawing on the insights provided by this

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1. See Francis Regan, *Why Do Legal Aid Services Vary Between Societies? Re-examining the Impact of Welfare States and Legal Families*, in *THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES* 187, tbl.8.1 (Francis Regan et al. eds., 1999).

2. *Id.*

3. The State of California, for example, has a large number of court-based self-help centers that provide information to self-represented litigants. See Fact Sheet from the Administrative Office for the Courts, *Programs for Self-Represented Litigants* (Feb. 2009), <http://www.courtinfo.ca.gov/selfhelp/pressroom/documents/summary.pdf>. The California Courts Self-Help Center provides assistance to self-represented litigants who are pursuing claims or defending against them in the state courts. California Courts, Self-Help Center, <http://www.courtinfo.ca.gov/selfhelp/> (last visited Sept. 26, 2009). See the Self-Represented Litigant Network ("SRLN") for more general information about the self-help movement. Self-Represented Litigation Network, Welcome Page, <http://www.srln.org/> (last visited Sept. 26, 2009). The SRLN describes itself as "an open and growing grouping of organizations and working groups dedicated to fulfilling the promise of a justice system that works for all, including those who cannot afford lawyers and are therefore forced to go to court on their own. The Network brings together courts and access to justice organizations in support of innovations in services for the self represented." *Id.*

4. See *infra* Part II.

broadened perspective, I identify potential solutions to the problem of equalizing access to justice in an unequal society.

For the purposes of this Article, “equal access to justice” would mean that different groups in a society would have similar chances of obtaining similar resolutions to similar kinds of civil justice problems. If people had equal access to justice, a society’s institutions of remedy would work to equalize how people handled their civil justice problems, and to ensure that similar problems were resolved similarly, even when different kinds of people—whether rich or poor, men or women, of any race or ethnicity—experienced them. This is a practical understanding of access to justice that focuses on public experience with justice problems and institutions. Through a comparative analysis of the design and function of institutions of remedy, including the public’s experience with those institutions, this Article identifies areas of innovation that policy makers could explore should they be ready to commit to the notion that access to justice is for everyone.

## II. REAL-LIFE EXPERIENCE WITH CIVIL JUSTICE PROBLEMS

In every market society studied, contact with civil justice problems<sup>5</sup> is widespread.<sup>6</sup> Many of these problems are quite mundane and involve the practicalities of everyday life in such societies. These justice problems exist at the “intersection of civil law and everyday adversity.”<sup>7</sup> People have difficulties paying bills, concerns that their property taxes are too high, trouble getting landlords or condo associations to make repairs, arguments with neighbors about the location of property lines, difficulty reaching

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5. A civil justice problem is one that has civil legal aspects and raises civil legal issues, though the person who has the problem may never think of as it a legal problem and may never take legal action to try to resolve it. Professor Dame Hazel Genn terms such problems “justiciable events.” HAZEL GENN ET AL., *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 12 (Hart Publ’g 1999). Professor Genn’s term is illuminating: it emphasizes the fact that while these problems have legal aspects, legal consequences, and (potentially) legal solutions, they may never be understood or treated as legal problems. *Id.*

6. See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class and Gender Inequality*, 34 ANN. REV. SOC. 339, 346 (2008) (Karen S. Cook & Douglas S. Massey eds., 2008). Civil justice studies reviewed in the article include those from the democratic market societies of Australia, Canada, England and Wales, Japan, Scotland, the United States, and the post-socialist transition society of China. *Id.*

7. 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 et al. eds., 2007).

agreement with ex-partners about child custody and visitation, and quarrels with service providers, to name only a few.<sup>8</sup> A recent compilation of national surveys of public experience with civil justice problems finds that, across eight market democracies studied between the early 1990s and the mid-2000s, between 19.5 percent and 52 percent of those surveyed reported experiencing at least one civil justice problem in the time period specified by the surveys, which ranged from twelve months to five years, depending on the study.<sup>9</sup>

Civil justice is not a problem only for the poor; civil justice problems are everybody's problems. Figure 1 reports the prevalence of civil justice problems concerning money or housing in the United States in 1992 and provides an illustration of the reach of these issues. The data presented report on the experiences of two subgroups of the US population: people eligible for means-tested civil legal aid funded by the federal government,<sup>10</sup> and people ineligible for this aid but still earning less than \$60,000 per year. As the figure shows, justice problems involving housing, finance, and livelihood were common, with at least 12 percent of both poor and moderate-income households reporting that they had experienced at least one of these problems during the past year. Similar kinds of civil justice problems are similarly widespread in other countries.<sup>11</sup> For example, an analysis of data from the England and Wales Civil and Social Justice Survey of 2004 found that all three major social class groups experienced similar rates of each of five different kinds of civil justice problems: livelihood troubles, troubles with other

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8. See *id.* at 121–22; Sandefur, *supra* note 6, at 341–43.

9. Currie, *infra* note 13, tbl.1. Currie reviewed studies from Canada, England and Wales, Japan, New Zealand, Northern Ireland, the Netherlands, Scotland, and the United States. *Id.*

10. In the United States, people whose household incomes are below 125 percent of the federal poverty level are eligible for Legal Service Corporation–funded civil legal assistance. ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 7 (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf> [hereinafter LEGAL NEEDS STUDY]. Because the ABA study largely sampled households with telephones, the findings do not represent the experiences of homeless people, people living in group homes or other institutional settings, and people who did not have land-line telephones. *Id.* at 12, 29.

11. Rebecca L. Sandefur, Civil Justice and Social Class Inequality: The Socioeconomic Impact of Civil Justice Problems (2010) (unpublished manuscript) (on file with author).

sources of household income, troubles with debts and credit, troubles with housing security, and troubles with housing conditions.<sup>12</sup>

Although studies reveal that different societies provide diverse routes for resolving civil justice problems, they also reveal that the majority of problems never make it to law, lawyers, or the civil justice system.<sup>13</sup> A pattern of pervasive alegality characterizes how ordinary people across societies handle their own everyday civil justice problems.

The reasons for this alegality are more subtle than might first seem to be the case. Certainly, one factor behind the pattern is the high cost of legal services. In some societies, lawyers are simply too expensive for people to afford on their own, and there is little subsidy for citizens' use of lawyers' services.<sup>14</sup> However, when one looks more deeply at how people actually respond to their own civil justice problems, one sees that cost is not the primary mechanism creating the pattern of alegality.

The legal nature of any given civil justice problem is socially constructed. The characterization of a specific situation as a legal problem reflects not only the thoughts and actions of the people who experience the troubles, but also those of the friends, neighbors, family members, and service providers to whom they bring their troubles.<sup>15</sup> The transformation of a civil justice problem into a legal problem is the result of a complex process in which the cost of legal services is only one factor among many.<sup>16</sup>

One reason to suspect that alegality is caused by more than simply the cost of legal services is that people sometimes do nothing about serious civil justice problems, even when taking action would

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12. *Id.*

13. See, e.g., Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is That the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 879 fig.2, 896–98 figs.12, 13 & 14 (2008) (compiling findings based on studies in Australia, Canada, England and Wales, Japan, the Netherlands, New Zealand, and the United States); see also GENN ET AL., *supra* note 5, at 83–84, 102–03 figs.3.2 & 3.3; PASCOE PLEASANCE, *CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE* 104 fig.3.3 (2006); Ab Currie, *The Legal Problems of Everyday Life*, 12 SOC. CRIME, L. & DEVIANCE 9 (2009); Sandefur, *supra* note 7, at 114 fig.1.

14. See, e.g., LEGAL NEEDS STUDY, *supra* note 10, at 28.

15. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 644–47 (1980–81); Leon H. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401, 403 (1975).

16. See Felstiner, *supra* note 15; Mayhew, *supra* note 15.

cost them no money.<sup>17</sup> For example, in the United States, people frequently opt for inaction—that is, they do nothing about serious problems—even when possible solutions would involve no out-of-pocket cost.<sup>18</sup> A study of how Americans handle common civil justice problems involving money and housing found that they frequently did not try to resolve these problems, even when problems involved serious threats to their physical safety, creditworthiness, ability to pay their bills, or household solvency.<sup>19</sup> When people explained why they took no action, they seldom attributed the inaction to financial costs.<sup>20</sup> Rather, people explained that they did nothing because they were embarrassed about a problem or ashamed of having it.<sup>21</sup> Alternatively, they expressed concern that they had too little power to achieve their goals with respect to a problem.<sup>22</sup> They also described how their inaction was a fruit of past experiences with trying to take action: people *learned* to do nothing about serious civil justice problems.<sup>23</sup> In particular, they described how they learned to fear the negative consequences of taking action, such as retaliation.<sup>24</sup> They also described how they had learned to avoid taking action as a way to express gratitude for offenders' previous good behavior. For example, they would refrain from filing complaints against landlords who failed to make repairs because they believed that the landlords' past good behavior made them deserving of forbearance.<sup>25</sup> People also described how they had come to resign themselves to current problems because past attempts to resolve similar problems had been both fruitless and frustrating.<sup>26</sup> In sum, people are inactive in the face of serious problems that present potentially far-reaching negative consequences for a wide variety of reasons. A lack of money to hire help—legal or otherwise—is one reason.<sup>27</sup> However, it is only one reason, and often not the primary

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17. *Sandefur*, *supra* note 7, at 114–15.

18. *Id.*

19. *Id.* at tbl.1.

20. *Id.* at 123.

21. *Id.*

22. *Id.* at 123–24.

23. *Id.* at 125.

24. *Id.* at 124.

25. *Id.* at 124–25.

26. *Id.* at 125–26.

27. *Id.* at 116.

one in people's own accounts of why they handle their problems as they do.

There is a second reason to suspect that the financial cost of using lawyers' services is not the only factor affecting how people respond to civil justice problems: people often do not consult lawyers even when lawyers' services are relatively inexpensive.<sup>28</sup> Consider the example of England and Wales. For many years, legal aid has been available to much of the population through a "Judicare system."<sup>29</sup> In such a system, eligible persons receive a voucher from the government that fully or partially funds their purchase of lawyers' services from the private practice bar.<sup>30</sup> Yet, the existence of civil legal aid as a formal entitlement of citizenship does not lead to the use of lawyers for the majority of civil justice troubles.<sup>31</sup> Recent work using the England and Wales Civil and Social Justice Survey of 2004 found that people took only 10 percent of "difficult to solve"<sup>32</sup> civil justice problems involving money or housing to lawyers, courts, or tribunals.<sup>33</sup> In a context where there was, at least in principle, widespread access to lawyers, there was hardly widespread recourse to them. Rather, people responded to these problems in other ways: of the problems under consideration, 85 percent were addressed by taking action through nonlegal avenues.<sup>34</sup>

Thus, turning to law should not be seen as the exclusive or even the predominant means through which people in market democracies attempt to handle their civil justice problems. Rather, turning to law should be seen as part of a richly textured terrain of possible responses and remedies. If we wish to expand or—even more ambitiously—to equalize access to justice, we must look to the breadth of this terrain.

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28. See *infra* Part IV.

29. For example, during the period between 2001 and 2005, 41 percent to 46 percent of the population was eligible for full or partial subsidy of the cost of their retention of private practice legal services for covered problems. ADAM GRIFFITH, ADVICE SERVICES ALLIANCE, DRAMATIC DROP IN CIVIL LEGAL AID ELIGIBILITY 1 (2008), <http://www.asauk.org.uk/fileLibrary/pdf/Dramaticdrop.pdf>.

30. Alan Paterson provides a useful description of the Judicare model and alternative schemes of legal aid. Alan Paterson, *Legal Aid at the Cross Roads*, 10 CIV. JUST. Q. 124, 126 (1991).

31. See GENN, *supra* note 13; PLEASENCE, *supra* note 13.

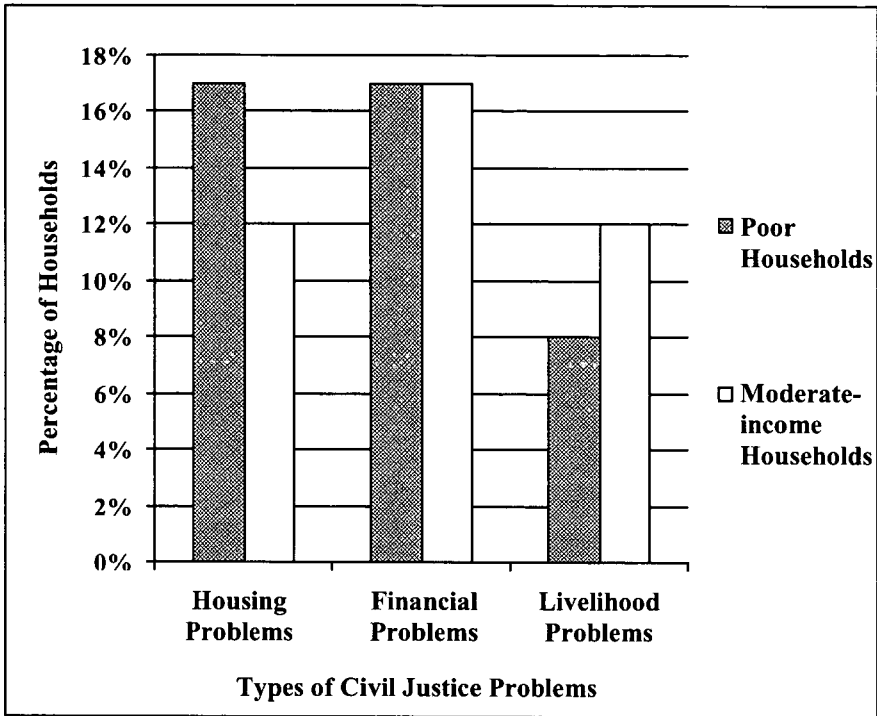
32. PLEASENCE, *supra* note 13.

33. Sandefur, *supra* note 11.

34. *Id.*



**PREVALENCE OF THREE TYPES OF CIVIL JUSTICE PROBLEMS  
AMONG AMERICAN HOUSEHOLDS, BY HOUSEHOLD INCOME, 1992**



Prevalence rates represent all civil justice problems per household in 1992. "Housing problems" include problems with housing conditions, housing security, and the transfer of real property. "Financial problems" include problems with personal finances, credit, and consumer matters. "Livelihood problems" include employment-related problems and problems with public benefits.<sup>35</sup>

**FIGURE 1**

35. LEGAL NEEDS STUDY, *supra* note 10.

### III. INSTITUTIONS OF REMEDY FOR CIVIL JUSTICE PROBLEMS

Market democracies, such as the United States, design institutions of remedy for civil justice problems in diverse ways.<sup>36</sup> Some institutional designs encourage people to take action about civil justice problems, while others encourage people to lump and do nothing about them.<sup>37</sup> Similarly, some institutional designs moderate or reduce inequality in access to justice, while other designs encourage inequality.<sup>38</sup> This Part of the Article develops an analytic typology of institutions of remedy. Part IV will use this typology to guide an empirical analysis supporting the argument that these institutions shape people's action and inaction in response to their civil justice problems. Figure 2 represents this typology.

#### *A. Formal Institutions of Remedy*

The spectrum of possible solutions to civil justice problems includes those provided by formal institutions of remedy, institutions empowered to provide authoritative resolution to civil justice problems. In market democracies, the most well-known of these are courts and tribunals, accessed through lawsuits and litigation. These legal institutions are assisted by lawyers who not only represent actual litigants but also screen potential litigants by deciding which cases to take and which to refuse.<sup>39</sup> In addition to these legal institutions, market democracies also provide a whole set of formal institutions of remedy that are nonlegal in a very specific sense: these institutions do not involve any explicit contact between members of the public and legal organizations, formal legal processes, or legal staff. In short, nonlegal formal institutions of remedy are authoritative, but without requiring public contact with courts, tribunals, lawsuits, litigation, or lawyers.

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36. See *infra* Part IV and fig.3.

37. See Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 124-25 (1974). Galanter notes that some "lumpers" are unable to take action because they lack information or access, while others choose not to take action because the gain is too minimal or the cost too large. *Id.* The "lumpers" also include government actors who are limited by incomplete information, availability of resources, and policies regarding priorities. See *id.* Thus, to the extent some institutional structures may exacerbate or ameliorate these costs and benefits, they may alter behavior.

38. See *infra* Part IV.

39. See Sandefur, *supra* note 6, at 348-49.

### INSTITUTIONS OF REMEDY FOR CIVIL JUSTICE PROBLEMS

Institutional Component	Examples	Powers and Services
<p style="text-align: center;">Formal Institutions of Remedy</p>	<p><i>Legal</i></p> <ul style="list-style-type: none"> <li>• Courts</li> <li>• Tribunals</li> <li>• Lawsuits</li> <li>• Litigation</li> </ul> <p><i>Nonlegal</i></p> <ul style="list-style-type: none"> <li>• Government ombudsmen</li> <li>• Public compensation corporations</li> <li>• Administrative agencies</li> </ul>	<ul style="list-style-type: none"> <li>• Empowered to produce authoritative resolution to the public's civil justice problems</li> </ul>
<p style="text-align: center;">Auxiliaries</p>	<ul style="list-style-type: none"> <li>• Advice agencies</li> <li>• Community organizations</li> <li>• Media action lines</li> <li>• Trade organizations</li> </ul>	<ul style="list-style-type: none"> <li>• Information and advice about how to handle civil justice problems</li> <li>• Non-authoritative routes to problem resolution</li> <li>• Referrals to sources of information, advice, and assistance</li> <li>• Referrals to formal institutions of remedy</li> </ul>

**FIGURE 2**

Nonlegal formal institutions of remedy take a variety of forms. A prominent manifestation is the state or federal administrative agencies that regulate specific industries and are empowered to respond authoritatively to some of the public's civil justice problems.<sup>40</sup> For example, a person who finds herself in a dispute with a bank that she believes has engaged in unfair or deceptive acts may be able to resolve the dispute by filing a complaint with the Federal Reserve System.<sup>41</sup> In addition to state and federal agencies, there are also local regulatory agencies that perform similar functions, such as the enforcement of housing codes.<sup>42</sup>

A second prominent manifestation of nonlegal institutions of remedy is the government ombudsmen offices in some countries.<sup>43</sup> The primary purpose of these offices is not to regulate industries on matters like intra-industry competition or compliance with environmental laws, but rather specifically to investigate and authoritatively resolve the problems that individual members of the public report. For example, disputes about bills, debts, and contract

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40. See, e.g., Jeanne M. Hogarth & Maureen P. English, *Consumer Complaints and Redress: An Important Mechanism for Protecting and Empowering Consumers*, 26 INT'L J. CONSUMER STUD. 217, 217 (2002) (noting that U.S. federal law requires certain federal agencies to maintain consumer complaint programs and discussing one such program).

41. *Id.* at 218. In the United States, one responsibility of the Federal Reserve System is "the investigation and resolution of complaints filed by consumers against state member banks, primarily complaints that are related to the consumer credit and financial services area." *Id.* This organization cannot and does not resolve all of the problems that the public presents to it. A recent study found that more than half of complaints received by the Federal Reserve System were not about member banks and so were referred on to other agencies. See *id.* at 220. Of complaints that were handled by the Federal Reserve between October 1999 and September 2001, about two fifths (41.4 percent) were resolved in favor of the complainant. See *id.* at 222 tbl.1. Complaints that "involved a regulated activity (as opposed to an unregulated activity, such as a customer service issue)" were more likely to be resolved in the complainant's favor. *Id.* at 222, 224 tbl.3.

42. See, e.g., H. Laurence Ross, *Housing Code Enforcement as Law in Action*, 17 LAW & POL'Y 133, 134-35 (1995). Across localities in the United States, housing condition problems sometimes fall within the jurisdiction of municipalities, and at other times they fall under state health codes. *Id.* As with problems involving financial services, not all of the housing problems that the public perceives meet with resolution. An empirical study of housing code enforcement in three cities in the United States concluded that "[a]lthough visible and dangerous violations receive priority in enforcement generally, even these conditions may be tolerated" by authorities when the owners of rental housing cannot afford to pay for the repairs necessary to bring it up to code. *Id.* at 157.

43. See *infra* Part IV.

terms, as well as complaints about service, can be investigated and resolved authoritatively by ombudsmen.<sup>44</sup>

A third form in which these nonlegal institutions of remedy appear is public compensation corporations that handle individuals' claims of redress for personal injuries.<sup>45</sup> These government corporations may be funded through taxes or public insurance payments.<sup>46</sup> They receive and resolve claims seeking compensation for common injuries that are often the result of accidents, such as workplace injuries, professional errors, auto accidents, and injuries incurred in the use of facilities.<sup>47</sup> In societies where such corporations exist, they perform the same kind of work that a legal liability system (supported by private insurance companies and a personal injury bar) performs in other societies.<sup>48</sup>

### B. Auxiliaries

In market democracies, formal institutions of remedy are complemented by a whole set of auxiliary providers who are third parties with respect to the public's civil justice problems. Some auxiliaries work apart from formal institutions of remedy by providing problem-resolution strategies that, although not authoritative, may nevertheless be very effective from the public's perspective. Aggrieved members of the public may seek resolution to their consumer problems by writing to media action lines, or by complaining publicly in letters to the editor.<sup>49</sup> In addition, they may

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44. The United Kingdom's original ombudsman for financial services was created specifically "to meet the needs of consumers for rapid, effective and cheap redress" of their problems with financial services providers such as banks, investment advisors, and the like. See Jeremy Mitchell, *Ombudsman Schemes for Financial Services in the U.K.: A Consumer View*, 15 J. CONSUMER STUD. & HOME ECON. 299, 299 (1991).

45. See New Zealand Accident Compensation Corp., *Introduction to ACC*, <http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/index.htm> (last visited Sept. 13, 2009) [hereinafter *Introduction to ACC*].

46. See, e.g., New Zealand Accident Compensation Corp., *How We're Funded*, <http://www.acc.co.nz/about-acc/overview-of-acc/how-were-funded/index.htm> (last visited Sept. 13, 2009).

47. *Id.*

48. For example, New Zealand's Accident Compensation Corporation "provide[s] comprehensive, no-fault personal injury cover for all New Zealand residents and visitors to New Zealand." On account of this expansive coverage, individuals who suffer a personal injury while in New Zealand cannot "sue for personal injury, other than for exemplary damages." *Introduction to ACC*, *supra* note 45.

49. See Michael C. Mattice, *Media in the Middle: A Study of the Mass Media Complaint Managers*, in NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 485,

take their consumer complaints to the Better Business Bureau.<sup>50</sup> Moreover, community mediation and conciliation services can help disputing parties work out various types of problems without either side taking recourse to formal institutions of remedy.<sup>51</sup> Finally, the public can also take concerns to their elected political representatives.<sup>52</sup>

Other auxiliaries work in conjunction with formal institutions of remedy by providing support to people who pursue formal resolution. These auxiliaries may provide information or advice regarding what courses of action exist and how to follow them, and may refer interested parties to other auxiliary service providers, to formal institutions of remedy, or to lawyers.<sup>53</sup>

A society's institutions of remedy provide a large share of the total solutions available to the public for handling civil justice problems. The design of these institutions varies considerably across market democracies. When people experience justice problems, they can use only those routes to solution that they recognize as available, including the options of doing nothing and trying to resolve a problem on their own. Through a comparative institutional analysis, this Article argues that not only do institutions of remedy shape what

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485–86 (Laura Nader ed., 1980) (providing an extensive discussion of “action lines” through the use of four case studies).

50. The Better Business Bureau is a membership organization to which businesses pay dues in return for the Bureau's provision of services, including the resolution of complaints by the public against member businesses. Dennis E. Garrett, *The Debate Regarding the Better Business Bureau's Commitment to Neutrality: An Analysis of Local Better Business Bureau Boards of Directors*, 36 *NONPROFIT & VOLUNTARY SECTOR Q.* 22, 23–25 (2007). See generally Marian Eaton, *The Better Business Bureau: “The Voice of the People in the Marketplace,”* in *NO ACCESS TO LAW*, *supra* note 49, at 233, 240 (examining the extent to which the BBB resolves consumer issues and its reasons for doing so).

51. See Larry Ray, *Community Mediation Centers: Delivering First-Class Services to Low-Income People for the Past Twenty Years*, 15 *MEDIATION Q.* 71, 72 (1997). These kinds of organizations receive their clients through a variety of routes. Some of the problems that these organizations handle are referred to them by courts. Many other problems come from “walk-in” clients who arrive without previous contact with formal legal institutions. *Id.* at 73–75. For example, Project Sentinel, a non-profit organization based in Northern California, offers counseling, mediation, and complaint resolution services to those affected by housing-related issues, with an aim “towards resolution of conflicts outside the court system.” Project Sentinel, About Us, [http://www.housing.org/about\\_us.htm](http://www.housing.org/about_us.htm) (last visited Sept. 13, 2009).

52. See generally Angela Karikas, *Solving Problems in Philadelphia: An Ethnography of a Congressional District Office*, in *NO ACCESS TO LAW*, *supra* note 49, at 345, 350–371 (examining the costs and benefits associated with a legislator's devotion to resolving the problems of individual constituents).

53. See, e.g., Gregory Wilson & Elizabeth Brydolf, *Grass Roots Solutions: San Francisco Consumer Action*, in *NO ACCESS TO LAW*, *supra* note 49, at 417, 419.

people do about their problems by providing routes to solution, but they also shape *differences* in how people handle their problems by providing routes to solution that are more or less accessible, visible, and desirable to different groups in society.

#### IV. (IN)EQUALITY IN ACCESS TO JUSTICE THROUGH INSTITUTIONAL DESIGN

To explore how institutions of remedy shape how people handle their civil justice problems, this Article contrasts the responses of people facing similar kinds of problems in two different institutional contexts. One context has 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 other context 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. Although inequalities in access to justice appear in both of these societies, their manifestations are shaped by the particular institutions of remedy existing in each society.

This empirical analysis focuses on a group of civil justice problems that are very common and that can be highly consequential for the people who experience them, including the following money and housing problems:<sup>54</sup>

- Difficulty paying rent or mortgages
- Receiving notice of eviction
- Facing foreclosure
- Concerns that property taxes are too high or incorrectly assessed
- Belief that a landlord has unfairly withheld a security deposit

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54. See, e.g., GENN ET AL., *supra* note 5, at 83–84, 102–03 figs.3.2 & 3.3; LEGAL NEEDS STUDY, *supra* note 10, tbl.3-3; PLEASENCE, *supra* note 13, at 104 fig.3.3; Currie, *supra* note 13, tbl.2; Kritzer, *supra* note 13, at 879 fig.2, 896–98 figs.12, 13 & 14.

- Being unable to pay medical bills
- Concerns about unpaid overtime or other wages
- Trouble receiving pension or other benefit payments
- Concerns that service providers (e.g., veterinarians, doctors, hospitals) have over-charged<sup>55</sup>

Empirical research on bankruptcy and household finances finds that troubles with money and housing are tightly interlinked.<sup>56</sup> The successful resolution of these kinds of problems can make the “difference between homelessness and penury on the one hand, and stable housing, manageable cash flow and solid credit ratings on the other.”<sup>57</sup> Although people across the populations of different market democracies are at risk of encountering these kinds of problems, different nations provide different routes to resolution.<sup>58</sup> Figure 3 illustrates this difference for the two common law contexts that this Article described in abstract terms above: the United Kingdom and the United States.

The United Kingdom provides a rich and diverse assortment of institutions of remedy.<sup>59</sup> Law is one of these. To provide civil legal aid over the past sixty years, the United Kingdom has employed an expansive Judicare system in which the government subsidizes the public’s purchase of legal services from the private practice bar.<sup>60</sup> During most of this period, a majority of the population, including both the working and middle classes, has been eligible for these Judicare subsidies.<sup>61</sup>

In addition to formal legal remedies, the United Kingdom also has a multitude of formal nonlegal institutions of remedy, including regulatory agencies and a number of government ombudsmen who can address housing, local government, financial services, and health

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55. See, e.g., Sandefur, *supra* note 7, at 121–22.

56. See Raisa Bahchieva et al., *Mortgage Debt, Bankruptcy, and the Sustainability of Home Ownership*, in CREDIT MARKETS FOR THE POOR 73, 75 (Patrick Boulton & Howard Rosenthal eds., 2005).

57. Sandefur, *supra* note 7, at 117.

58. See *infra* Part IV.

59. See GENN ET AL., *supra* note 5, at 105–44.

60. See Paterson, *supra* note 30, at 126–27.

61. See *id.* at 131 n.23; GRIFFITH, *supra* note 29; Regan, *supra* note 1, at 187 tbl.8.1.



services issues.<sup>62</sup> Although not every type of ombudsman has the power to bind the parties, several of these offices can provide authoritative resolution to the public's problems.<sup>63</sup> To paraphrase the words of the Financial Ombudsman Service, these offices are "the official independent expert[s] in settling . . . complaints with the power to put things right."<sup>64</sup>

Formal institutions of remedy are complemented by a set of well-known, long-established, and nationally present advice providers. Chief among these are the Citizens Advice Bureaux ("CABx"),<sup>65</sup> which provide advice about how to handle justice issues and many other kinds of problems remotely over the Internet or telephone, or personally at more than 3,000 locations around the country.<sup>66</sup> Many local councils (city and county governments) have their own advice services and offices of trading standards.<sup>67</sup> According to a recent civil justice survey, these offices provided 15 percent of all successful advice contacts for the public's civil justice problems.<sup>68</sup> The CABx and other services that exist to assist the public in solving its justice problems have an important power: they may dispense legal advice.<sup>69</sup> While the legal profession still retains the sole right of appearance in some forums, various nonlegal professionals can and do dispense advice about when and how to use law to respond to justice problems.<sup>70</sup>

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62. See Citizens Advice Bureau, Advice Guide, How to Use an Ombudsman in England, [http://www.adviceguide.org.uk/nm/index/your\\_rights/civil\\_rights/how\\_to\\_use\\_an\\_ombudsman.htm](http://www.adviceguide.org.uk/nm/index/your_rights/civil_rights/how_to_use_an_ombudsman.htm) (last visited Sept. 13, 2009).

63. *Id.*

64. Financial Ombudsman Service, Home Page, <http://www.financial-ombudsman.org.uk/default.htm> (last visited Sept. 13, 2009).

65. See John Baldwin, *The Role of the Citizens' Advice Bureaux and the Law Centres in the Provision of Legal Advice and Assistance*, 8 CIV. JUST. Q. 24, 24-44 (1989).

66. See Citizens Advice Bureau, Citizens Advice, Key Facts, [http://www.citizensadvice.org.uk/index/aboutus/factsheets/cab\\_key\\_facts.htm](http://www.citizensadvice.org.uk/index/aboutus/factsheets/cab_key_facts.htm) (last visited Sept. 13, 2009).

67. See, e.g., City of Westminster Trading Standards, Home Page, <http://www.tradingstandards.gov.uk/westminster/> (last visited Sept. 15, 2009); Kent County Trading Standards, Home Page, <http://www.tradingstandards.gov.uk/kent/> (last visited Sept. 15, 2009); Lancashire County Council Trading Standards, Home Page, <http://www.tradingstandards.gov.uk/lancashire/> (last visited Sept. 15, 2009).

68. PLEASENCE, *supra* note 13, at 104 fig 3.3.

69. See Citizens Advice Bureau, *supra* note 65.

70. See Richard L. Abel, *Comparative Sociology of the Legal Profession*, in *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 80, 106-07 (Richard L. Abel & Philip S.C. Lewis eds., 1989).

**COMPARATIVE INSTITUTIONAL ANALYSIS:  
INSTITUTIONS OF REMEDY FOR CIVIL JUSTICE PROBLEMS  
IN THE UNITED STATES AND THE UNITED KINGDOM**

<b>United States</b>	<b>United Kingdom</b>
<p><i>Formal institutions of remedy</i></p> <ul style="list-style-type: none"> <li>• Law (with limited legal aid)</li> <li>• Administrative agencies (local, state, federal)</li> </ul>	<p><i>Formal institutions of remedy</i></p> <ul style="list-style-type: none"> <li>• Law (with expansive legal aid)</li> <li>• Administrative agencies (local and national)</li> <li>• Government ombudsmen</li> </ul>
<p><i>Auxiliaries</i></p> <ul style="list-style-type: none"> <li>• Strong lawyer monopoly on legal advice</li> <li>• Most auxiliaries are local, and not available in all localities (e.g., city landlord-tenant resource centers, community mediation centers, local media action lines, one's city, state, or federal elected representatives).</li> <li>• Nationally available resources include the Better Business Bureau and other trade organizations and professional bodies.</li> </ul>	<p><i>Auxiliaries</i></p> <ul style="list-style-type: none"> <li>• Advice about how to use law and handle justice problems provided by many non-lawyer sources</li> <li>• Well-established, well-known national advice providers (e.g., Citizens Advice Bureaux with 3,000+ locations)</li> <li>• Local resources are also available, including community organizations, elected representatives, and local council advice services.</li> <li>• Additional nationally available resources include trade organizations and professional bodies.</li> </ul>

**FIGURE 3**

The contrast between the United Kingdom and the United States is stark: the United States provides the public with law, though not much of it, and not much else.<sup>71</sup> To illustrate, when Americans face civil justice problems involving money or housing, they can go to law. If they cannot afford to pay for lawyers' services, they can try to turn to legal aid. However, the United States' legal aid system is a limited one in comparative terms:<sup>72</sup> it serves only the poor.<sup>73</sup> Further, relatively few legal aid providers are available for those Americans who are eligible for civil legal aid.<sup>74</sup> A study using data from 1997 found that all sources of organized civil legal assistance combined—including legal aid lawyers funded by local government, state government, federal government, or private sources and lawyers volunteering their services in organized pro bono programs—provided the equivalent of around one full-time lawyer for every five thousand people eligible for civil legal aid.<sup>75</sup>

If Americans do not go to law, they face relatively few alternative means of remedy, and the availability of any alternatives depends largely upon where they live. For authoritative resolution, one option is turning to the complaint-handling offices of local, state, or federal regulatory agencies for assistance with money and housing problems. These agencies will sometimes investigate and resolve a problem brought by a member of the public.<sup>76</sup> Beyond these regulatory agencies, the availability of other means to resolution for civil justice problems differs substantially from place to place. Some communities have effective and well-known services that assist people with specific types of problems, such as landlord-tenant

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71. See *supra* Part IV; see also DEBORAH L. RHODE, ACCESS TO JUSTICE 24–46 (2004) (criticizing the United States as having too much law for those who can afford it and too little for everyone else); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 877–91 (2009). See generally Mayhew, *supra* note 17 (arguing that the focus on extending the availability of the legal system limits the effectiveness of potential reforms).

72. Regan, *supra* note 1, at 187 tbl.8.

73. See *supra* note 11 and accompanying text.

74. Precisely how few is not known. Good information about the supply of legal aid is scarce, as is unfortunately often the case with the answers to empirical questions about how the U.S. civil justice system works for the public. See Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1021–23 (2009); Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in PUBLIC LAWYERS IN THE PRIVATE INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 21–23 (Robert Granfield & Lynn Mather eds., 2009).

75. Sandefur, *supra* note 73.

76. See *supra* notes 44–46 and accompanying text.

resource centers or media consumer-action hotlines.<sup>77</sup> Some communities have clearinghouses or referral systems that attempt to connect people with services that might help them with their problems; other communities do not have these resources.<sup>78</sup> For example, the United Way funds “2-1-1,” a system of 244 regional referral services around the country.<sup>79</sup> Although many of these are likely well-established, well-known, and expertly run, others may be less so.<sup>80</sup> One limitation that characterizes such resources in every part of the country, however, is that they typically cannot provide legal advice.<sup>81</sup> In the United States, the legal profession maintains a strong monopoly on the provision of advice about when and how to use law to solve one’s justice problems.<sup>82</sup>

Members of the public who face civil justice problems in these two countries thus have very different institutions of remedy available to them. The United States provides law, administrative agencies, and a patchwork of other resources that are limited in the assistance they can provide with legal problems and are available only in some localities.<sup>83</sup> The United Kingdom provides law, administrative agencies, government ombudsmen, and highly visible, nationally distributed auxiliary resources that can provide legal advice as well as information and referrals.<sup>84</sup> In the United

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77. See, e.g., D.C. Bar, Landlord Tenant Resource Center, [http://www.dcbar.org/for\\_the\\_public/programs\\_and\\_services/landlord\\_tenant.cfm](http://www.dcbar.org/for_the_public/programs_and_services/landlord_tenant.cfm); Fair Housing Resource Center, Home Page, <http://www.fairhousingresourcecenter.org/> (last visited Sept. 15, 2009).

78. See, e.g., U.S. Department of Housing and Urban Development, Multifamily Housing Clearinghouse, <http://www.hud.gov/offices/hsg/mfh/hc/mfhc.cfm> (last visited Sept. 15, 2009); Welcome to LawHelpCalifornia.org, <http://www.lawhelpcalifornia.org/> (last visited Sept. 15, 2009).

79. See United Way | AIRS, 2-1-1 US, Nationwide Status, <http://www.211us.org/status.htm> (last visited Sept. 13, 2009).

80. Although the United Way estimates that 78 percent of Americans have access to 2-1-1, that percentage varies across the country. See UNITED WAY OF AMERICA, PERCENT OF POPULATION COVERED BY 2-1-1 IN EACH STATE (2008), <http://www.211us.org/documents/2-1-1%20Coverage%20Map-Nov%202008.pdf>. While there are many states with 100 percent coverage, there are also states with less than 20 percent coverage. *Id.* The extent to which 2-1-1 service is available may serve as a rough proxy for its visibility and efficacy.

81. See, e.g., ARIZ. REV. STAT. ANN. § 32-261 (2009); CAL. BUS. & PROF. CODE § 6125 (Deering 2008); MICH. COMP. LAWS § 600.901 (2009). See generally JUSTINE FISCHER & DOROTHY H. LACHMANN, UNAUTHORIZED PRACTICE HANDBOOK: A COMPILATION OF STATUTES, CASES, AND COMMENTARY ON THE UNAUTHORIZED PRACTICE OF LAW (1972) (describing specific limitations on legal advice throughout the country).

82. See Abel, *supra* note 70, at n.47; Rhode, *supra* note 71, at 105–06.

83. See *supra* Part IV.

84. See *supra* Part IV.

Kingdom, people experiencing justice problems face many entry points into a rich network of remedy. In the United States, people with similar problems face few entry points into a sparse network.<sup>85</sup> These differing institutional designs produce different patterns of public problem solving.

In the United States, people respond to their money and housing problems by choosing between what is broadly available: law or nothing.<sup>86</sup> In the United Kingdom, where a much wider variety of assistance with civil justice problems is available, people respond to justiciable money and housing problems in a wider variety of ways.<sup>87</sup> Figure 4 illustrates this finding by reporting the actions that people took in response to serious civil justice problems involving money or housing.<sup>88</sup> The quantities in the graph are the shares of total reported money and housing problems that people handled by (a) doing nothing about that problem; (b) taking that problem to one or more nonlegal third parties, whether for advice or authoritative resolution; or (c) going to law, by consulting a lawyer or going to a court or tribunal, whether in conjunction with other actions or not.<sup>89</sup> This information is reported for two groups of people: (1) respondents to the 1992 American Bar Association civil justice survey, who in this analysis represent the experience of the American public with civil justice problems;<sup>90</sup> and (2) respondents to the 2004 England and Wales Civil and Social Justice Survey, who here represent the experience of the public in the United Kingdom.<sup>91</sup>

The money and housing problems queried in both surveys were carefully selected to be justiciable: they are problems that raise issues in civil law, have civil legal aspects, and have consequences shaped by civil law.<sup>92</sup> The specific problems analyzed in each survey are similar, but not identical. In the data for the United States, the specific problems included housing conditions (e.g., pests, repairs),

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85. See *supra* Part IV.

86. See *infra* fig.4 and accompanying text.

87. See *infra* fig.4 and accompanying text.

88. See *infra* fig.4 and accompanying text.

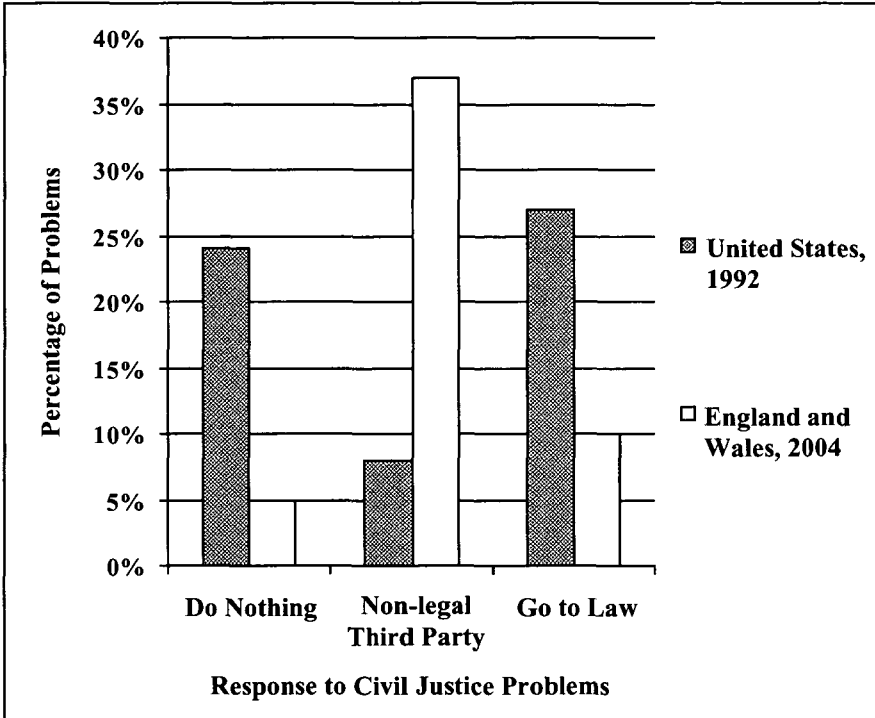
89. See *infra* fig.4 and accompanying text.

90. See LEGAL NEEDS STUDY, *supra* note 11.

91. PLEASENCE, *supra* note 13, at 104 fig.3.3.

92. See LEGAL NEEDS STUDY, *supra* note 10, at 5–6; PLEASENCE, *supra* note 13, at 5–10.

**A Comparison of How People Handle Civil Justice Problems Involving Money and Housing: United States (1992) and England and Wales (2004)**



Data for the United States are based on 1,077 problems involving housing, real property, personal finances, and consumer needs from a sample of 3,087 households. The reference period for problems is one year.<sup>93</sup> Data for England and Wales are based on 453 problems involving livelihood, other sources of household income, housing security, housing conditions, and debt and credit from a sample of 4,667 individuals. The reference period for problems is three years or since the respondent turned eighteen.<sup>94</sup>

**FIGURE 4**

93. LEGAL NEEDS STUDY, *supra* note 10.

94. ANDREW PHELPS ET AL., BRITISH MARKET RESEARCH BUREAU, 2004 ENGLISH AND WELSH CIVIL AND SOCIAL JUSTICE SURVEY (2005).

housing security (e.g., eviction, foreclosure), and personal finances (e.g., bills, debts, credit).<sup>95</sup> The data for England and Wales included similar categories of problems as well as problems with livelihood.<sup>96</sup> There are a number of other differences between the two surveys.<sup>97</sup> While perfect correspondence between the two surveys would have been ideal, similarity is what we have to work with. These data do not permit precise comparisons, but they do allow glimpses of an overall pattern.

Figure 4 reveals a clear pattern of national difference in how people respond to similar kinds of civil justice problems. In the United States, where one's choices are broadly between law and nothing, two responses account for a majority of civil justice money and housing problems: people attempt to resolve them by turning to law, or they take no action at all. As the solid bars of the graph indicate, Americans responded to nearly a quarter (24 percent) of money and housing problems by doing nothing. They took a similar share (27 percent) of their civil justice money and housing problems to law as a first, intermediate, or last resort. Only 8 percent of civil justice problems involving money and housing were handled with the assistance of a nonlegal third party: taken to administrative

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95. See Sandefur, *supra* note 7, at tbl.1; LEGAL NEEDS STUDY, *supra* note 10, at 5–6.

96. See Sandefur, *supra* note 11, at tbl.2.

97. The two surveys differed in the following ways:

- The U.S. survey sampled households, while the survey in England and Wales sampled individuals.
- Socioeconomic groups are defined in different ways in the two surveys: by income in the United States and by occupation in England and Wales.
- The England and Wales survey was comprehensive, while the United States survey covered only the lowest-earning 80 percent of the population.
- The U.S. survey was administered over the telephone, while the survey in England and Wales was administered in person.
- In the U.S. survey, respondents reported about problems they had experienced during the past year, while the respondents to the survey in England and Wales reported about problems encountered during the past three years or since they had turned eighteen, whichever was most recent.
- Both working and non-working respondents are included in the data from the two surveys, but the non-working populations likely differ in some ways.
- The two surveys were conducted in different years: 1992 in the United States and 2004 in England and Wales.

Further, data at the individual level for the United States are not available, so one is left with only the published tabulations as data for the present analysis. See LEGAL NEEDS STUDY, *supra* note 10, at 5–6; PLEASENCE, *supra* note 13, at 5–10.

agencies, local government, the Better Business Bureau, community organizations, elected representatives, or other nonlegal third parties for assistance.<sup>98</sup>

In the very different institutional context of the United Kingdom, people handled similar problems in different ways. As the hatched bars of the graph indicate, only a small share of money and housing problems were handled by doing nothing (5 percent). In contrast with the United States, few money and housing problems were taken to lawyers, courts, or tribunals (10 percent). On the other hand, in England and Wales, the public frequently took its civil justice problems with money and housing to nonlegal third-party advice providers, administrative agencies, and ombudsmen: 37 percent of problems were handled in this way, which is more than four times the share of money and housing problems taken to nonlegal third parties in the United States.<sup>99</sup>

Institutions of remedy not only receive clients, they also *create* their clienteles.<sup>100</sup> In a context where nonlegal third parties are well-established and empowered to provide authoritative resolution and legal advice, a large clientele exists for these parties even when there is legal aid available to support the purchase of private practice legal services.<sup>101</sup> In a context where nonlegal third parties are few, unevenly distributed around the country, and limited in the services they can provide by restrictions on who may give legal advice, fewer people turn to them for help with justice problems.<sup>102</sup>

Institutions of remedy not only shape what people do about justice problems, but also shape group differences in what people do. In both the United States and the United Kingdom, one observes social class inequalities in access to justice: different socioeconomic

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98. The household handled the remaining problems by taking some action on its own, such as trying to work out a solution with another party involved in the problem. *See generally* Sandefur, *supra* note 7.

99. As in the United States study, the respondents handled the remaining problems by taking an action that did not involve any assistance from a third party. *See generally* Sandefur, *supra* note 11.

100. This dual dynamic of client reception and client generation occurs both at the institutional level and at the level of the individual organizations that compose institutions of remedy. For example, as Mayhew notes, "Any given legal agency, be it a private law firm, a neighborhood law office, or a civil rights commission, in part receives and in part generates a clientele." Mayhew, *supra* note 15, at 403.

101. *See id.*

102. *See id.*



groups or social classes handle similar civil justice problems in different ways.<sup>103</sup> But the character of this inequality is different in the two countries. Figures 5 and 6 report on how socioeconomic differences affect the public's responses to money and housing problems in the United States and the United Kingdom, respectively. The quantities in the figures are odds ratios, which indicate the magnitude and direction of the difference in the likelihood that two different socioeconomic groups handle their problems in a particular way.<sup>104</sup> When an odds ratio is 1.0, there is no difference between the two groups; the odds of taking a given action in one group are the same as in the other group.<sup>105</sup> When an odds ratio is larger than 1.0, this indicates that one group is more likely to take the action than the comparison group.<sup>106</sup> When an odds ratio is smaller than 1.0, one group is less likely to take the action than is the comparison group.<sup>107</sup>

As figure 5 reports, American poor households are only half as likely (odds ratio = 0.50) as American moderate-income households to take their problems to nonlegal third parties, and 39 percent less likely (odds ratio = 0.61) to take their problems to lawyers. In favor of legal or nonlegal third party assistance, American poor households often take no action to resolve money and housing problems; in the United States, poor households are twice as likely (odds ratio = 2.0) to do nothing about civil justice problems involving money or housing as are moderate-income households.<sup>108</sup> In the American context, more people are likely to do nothing about serious problems, and poor people are especially likely to do nothing.<sup>109</sup>

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103. See Sandefur, *supra* note 7, at 114–17 (finding that poor households in the United States are less likely than non-poor households to seek advice or help in resolving justice problems); cf. Kritzer, *supra* note 13, at 876–77 (proposing that the type of problem, not the characteristics of the person, is the major predictor of whether a person will seek the aid of a lawyer). See generally Sandefur, *supra* note 6, at 346–49 (reviewing evidence from several countries about social class differences in how people handle civil justice problems).

104. An odds ratio is a measure of the difference between two probabilities. Odds are calculated as  $[p/(1 - p)]$ , where  $p$  is the observed probability of taking an action in the income group. An odds ratio is the ratio of two odds. See ALAN AGRESTI, CATEGORICAL DATA ANALYSIS 14–16 (1990).

105. *Id.*

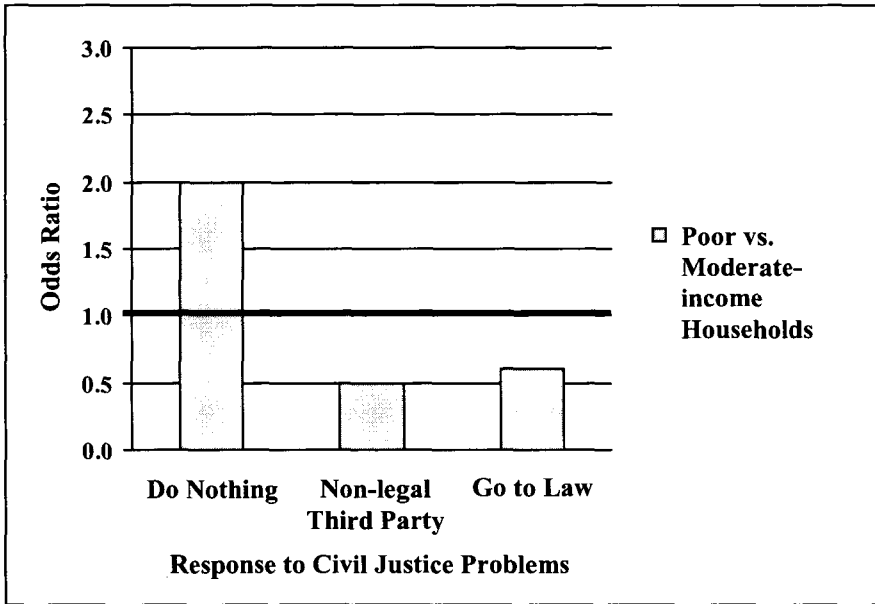
106. *Id.*

107. *Id.*

108. In this study, low- and moderate-income households were found to be about equally likely to handle problems by taking action on their own, without third-party assistance or advice. See Sandefur, *supra* note 7, at tbl.1.

109. *Id.*

**SOCIOECONOMIC DIFFERENCES IN RESPONSES TO CIVIL JUSTICE PROBLEMS INVOLVING MONEY AND HOUSING: ODDS RATIOS BY HOUSEHOLD INCOME, UNITED STATES, 1992**

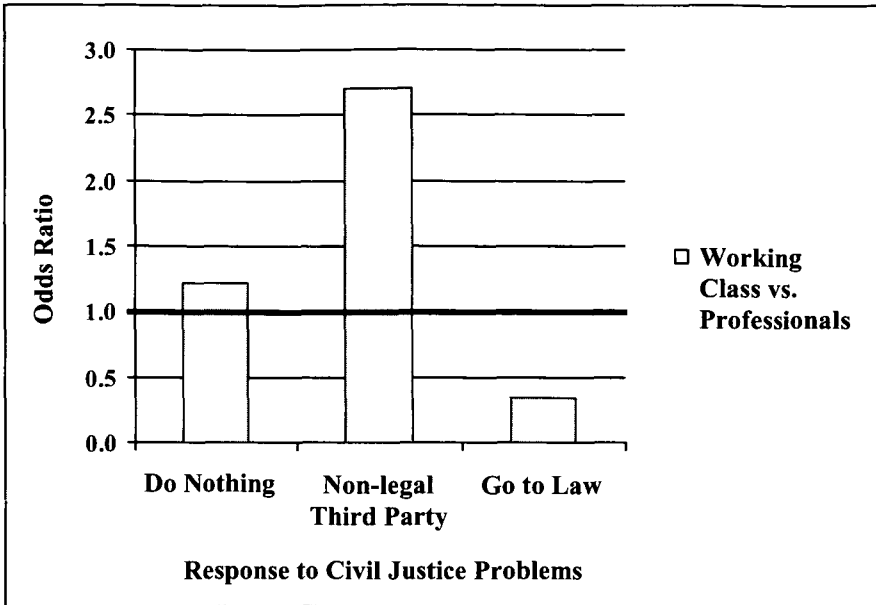


Data for the United States are based on 1,077 problems involving housing, real property, personal finances, and consumer needs from a sample of 3,087 households. The reference period for problems is one year. “Poor households” are those with incomes below 125 percent of the federal poverty level. “Moderate-income households” are those with incomes between 125 percent of the federal poverty level and \$60,000 per year in 1992 dollars.<sup>110</sup>

**FIGURE 5**

110. LEGAL NEEDS STUDY, *supra* note 10.

**SOCIOECONOMIC DIFFERENCES IN RESPONSES TO CIVIL JUSTICE  
PROBLEMS INVOLVING MONEY AND HOUSING:  
ODDS RATIOS BY SOCIAL CLASS,  
ENGLAND AND WALES, 2004**



Data for England and Wales are based on 453 problems involving livelihood, other sources of household income, housing security, housing conditions, and debt and credit from a sample of 4,667 individuals. The reference period for problems is three years or since the respondent turned eighteen. The measure of socioeconomic standing is social class as indexed by occupation, which is grouped into three categories: (1) routine and manual occupations (“working class”); (2) intermediate occupations; and (3) professional and managerial occupations (“professionals”). The figure compares the odds of each response to civil justice problems by the working class to the odds of each response to civil justice problems by professionals.<sup>111</sup>

**FIGURE 6**

111. PHELPS ET AL., *supra* note 94.

In the United Kingdom, one also observes that different socioeconomic groups handle similar problems in different ways, but the pattern of difference is not the same as in the United States. As figure 4 illustrates, doing nothing is rare in England and Wales. As figure 6 demonstrates, in England and Wales, doing nothing about a problem is rare for both working class people and for professionals: money and housing problems experienced by routine and manual workers are only about 20 percent more likely (odds ratio = 1.21) to be handled with inaction than are similar problems experienced by people working in professional or managerial occupations. By comparison, in the United States, poor households were 200 percent more likely to do nothing than were moderate-income households. Available data do not permit a more precise comparison, but these two patterns are strikingly different.

Further inspection of the two figures reveals another difference between the two institutional contexts. In the United States, poor households were more likely than moderate-income households to do nothing about their problems, and they were less likely to turn to any kind of third party, whether legal or nonlegal. In England and Wales, both routine and manual workers, and professional and managerial workers were unlikely to do nothing about justice problems; however, when these two groups took actions, they took different actions. The money and housing problems of routine and manual workers were 2.7 times more likely than similar problems experienced by professional and managerial workers to go to nonlegal third parties, such as advice services, ombudsmen, local councils, members of parliament, and the like. On the other hand, the money and housing problems of professional and managerial workers were much more likely to go to law: routine and manual workers' money and housing problems were only a third as likely to go to law (odds ratio = .33) as were similar problems experienced by professional and managerial workers.

Taking these findings together and acknowledging limitations in the available data, I present the following interpretation as a hypothesis. The United Kingdom's institutions of remedy are relatively inclusive: they draw in a greater share of the population, so everyone is likely to do something to try to resolve their justice problems. On the other hand, the United States' institutions of

remedy are relatively exclusive. They discourage action both in general and on the part of certain groups—the poor in particular.

Institutions of remedy shape—or, more aptly, create—inequality in access to substantive justice. By shaping how people handle their justice problems, institutions shape both inequality in access to different routes to solving justice problems and inequality in whether or how those problems are resolved. How people handle their civil justice problems bears a relationship to how those problems turn out. Available evidence suggests that doing nothing about civil justice problems can have negative consequences.<sup>112</sup> For example, Professor Dame Hazel Genn's landmark *Paths to Justice* study found that when people did not seek advice about justice problems, those problems were less likely to be resolved, whether through an agreement between the parties or through an authoritative decision by a third party like a court or an ombudsman.<sup>113</sup> This finding held controlling for other factors such as the type of problem, the remedy the person sought for the problem, and the characteristics of the person who had the problem, such as age, education, income, and employment status.<sup>114</sup> Inequality in access to justice has the potential to create social and economic inequality, because different groups of people can experience different consequences from similar justice problems.<sup>115</sup> Thus, we see a pattern in which existing institutions of remedy can reproduce social inequality: inequality comes in to institutions of remedy, and more inequality comes out the other side.

## V. CONCLUSION

A fulcrum point is where a lever pivots.<sup>116</sup> It is the central support that makes the action of lifting a weight or moving a body possible; where one places the support determines both how much one can lift and how far that weight can be moved.<sup>117</sup> The fulcrum

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112. GENN ET AL., *supra* note 5.

113. *Id.*

114. *Id.* at 281–82 tbl.B2; see also Geoff Mulherin & Christine Coumarelos, *Access to Justice and Disadvantaged Communities*, in TRANSFORMING LIVES, *supra* note 7, at 9, 29 tbl.4; Sandefur, *supra* note 6 (briefly reviewing research on the relationship between what people do about their justice problems and how those problems turn out).

115. See generally Sandefur, *supra* note 6; Sandefur, *supra* note 11.

116. 24 ENCYCLOPEDIA BRITANNICA 451 (15th ed. 1988).

117. *Id.*

point in equalizing access to justice is institutional design. Greater access to lawyers will unquestionably be part of expanded and equalized access to justice. But, by stepping back from law, we can examine additional opportunities to expand and equalize access to substantive justice by selectively redesigning institutions of remedy. We can begin to imagine institutions of remedy that are remedial and give members of unequal groups in an unequal society more common and more equal experiences with their justice problems.

This analysis, suggestive as it is, raises many questions. For example, I have presented evidence that supports my argument that institutions shape how people handle their problems, but of course, other differences between the United States and the United Kingdom may affect the outcomes I have examined. To what extent the differences I have demonstrated are attributable to institutional design or to other factors cannot be determined from the data that we have at present. The scarcity of reliable, comparable information gathered in a careful, systematic manner means that there are many unanswered questions about what institutions of remedy do, how they work, and how people interact with them. Recognizing what we do not know should serve as an impetus for future empirical research. Part of making access to justice “for everyone” will be gaining better understanding about the impact of institutions of remedy.<sup>118</sup>

My analysis raises another set of questions that are emphatically not empirical. For example, I have shown evidence that the United Kingdom’s institutions of remedy are more inclusive than those in the United States. However, I have also shown that in that same inclusive context with relatively generous legal aid, working-class people are less likely than professional people to take their money and housing problems to law. Is this acceptable? Is it a good thing that the working class may have its own institutions of remedy, while professionals and managers prefer the legal system? Should we be deeply concerned? Is one country’s unequal pattern better than another’s? No amount of carefully collected data or sophisticated empirical analysis can provide an answer to these kinds of questions because they are ultimately not questions about facts: they are questions about values. In a democracy, values questions are

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118. See Charn, *supra* note 74, at 1044–57; Sandefur, *supra* note 72, at 19–22.

appropriately the terrain of the people who have to live with the system that reflects and enacts those values. These people include not only our scholarly selves, but also the public and its representatives. In addition to learning more about how these institutions work, we should be spending much more time soliciting the input of the many and diverse members of the public about what they need and want when they face civil justice problems.