

# LEGAL ADVICE FROM NONLAWYERS: CONSUMER DEMAND, PROVIDER QUALITY, AND PUBLIC HARMS

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*As new forms of legal services proliferate, jurisdictions around the country are reconsidering how they regulate the practice of law, including by permitting people and things that are not lawyers to provide legal advice and other kinds of legal services. This Article explores three kinds of empirical evidence that should inform considerations about nonlawyer legal advice providers, whether they are people or other sources of advice, like sophisticated computer programs. The analysis focuses on the personal client market, where users of services are human beings, rather than fictive persons like corporations or other kinds of organizations. Three questions guide the inquiry: (1) what is the consumer demand for legal advice? (2) what is the quality of the legal advice being offered by nonlawyers? (3) what harms result from the current restrictions on legal advice by nonlawyers? The body of research is clear: there is demand for legal advice and other services from nonlawyer providers, and such providers can produce services that are as good as or better than those of attorneys. If regulating the practice of law is to be guided by honest concerns for consumer protection, there is much more scope for nonlawyers to practice law safely and effectively than is permitted by the current rules.*

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## INTRODUCTION

The crisis in access to civil justice in the United States is well-established. Recently, the World Justice Project compared access to justice in nations across the globe based on surveys of ordinary people's experiences with civil justice problems. This study highlighted the United States' poor performance. Americans experience an enormous number of civil justice problems, many affecting basic needs and core areas of life: fully two-thirds of surveyed American adults reported having a justice problem in the past two years.<sup>1</sup> Of those reporting justice problems, only one third received any help, despite the fact that their problems caused hardships such as illness, economic adversity, or damage to important relationships for 45% of those who had them.<sup>2</sup> Most of the time people navigate these problems and their sequelae without help, much less help from a lawyer.<sup>3</sup>

One small change in the typical regulation of the practice of law could put a meaningful dent in this massive and to-date intractable problem: allowing people and things that are not lawyers to give legal advice. Expanding sources of legal

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1. WORLD JUSTICE PROJECT, GLOBAL INSIGHTS ON ACCESS TO JUSTICE 108 (2019), <https://perma.cc/Z5SU-S9MF>.

2. *Id.* Consistent with most contemporary survey research into public experience with civil justice problems, the World Justice Project Survey focuses on justiciable events: events and circumstances that have civil legal aspects, raise civil legal issues and have consequences shaped by the civil law. Because most of these events are adverse, they are often referred to as "justiciable problems." See OECD/OPEN SOC'Y FOUNDS., LEGAL NEEDS SURVEYS AND ACCESS TO JUSTICE 11 (2019), <https://perma.cc/4DNY-9PWJ>.

3. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448-50 (2016).

advice is part of a broader approach to access to justice, which recognizes that achieving justice is not the same as receiving a specific type of service, such as the services of a lawyer. Rather, achieving justice means realizing substantively just solutions to situations and conflicts that are endemic to contemporary life.<sup>4</sup>

This Article explores three kinds of evidence that should inform assessments of the permissibility of nonlawyer advice providers.<sup>5</sup> The analysis focuses on the personal client market, where users of services are actual human beings rather than fictive persons like corporations or other kinds of organizations. Three questions guide the inquiry: (1) what is the consumer demand for legal advice? (2) what is the quality of the legal advice being offered by nonlawyers? (3) what harms result from the current restrictions on legal advice by nonlawyers?

Others have ably assessed the constitutional validity of the current rules about the practice of law, traced their doctrinal and political history and the motivations for their creation, and explored better ways of regulating legal practice.<sup>6</sup> This Article instead focuses on empirical evidence about demand for services from nonlawyers, the quality of those services, and the harms to the

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4. Rebecca L. Sandefur, *Access to What?*, DAEDALUS, Winter 2019, at 49, 49-54.

5. Throughout this paper, I use the inelegant term “nonlawyer” to denote people and things—for example, computer programs, fixed-choice forms, books, do-it-yourself kits, human beings—that are not lawyers but provide legal services. The United States is unusual in the breadth of the legal profession’s monopoly: In most countries, lawyers’ monopoly focuses on rights of appearance, while in the United States it extends to the provision of legal advice. Hilary Sommerlad et al., *Paralegals and the Casualisation of Legal Labour Markets*, in *LAWYERS IN 21ST-CENTURY SOCIETIES* 29 (Richard L. Abel et al. eds.) (forthcoming). In a context like the United States where lawyers have a strong monopoly on much of the practice of law, it makes sense to distinguish between lawyers and everything else.

6. *E.g.*, RICHARD L. ABEL, *AMERICAN LAWYERS* 112-15, 229 (1989) (describing how efforts to defend the practice of law from other occupations began in 1870 and observing that “[a]lthough the profession justified these actions in the name of consumer protection, it offered no evidence that lawyers performed the restricted tasks better than others.”); Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297, 303 (2019) (arguing that the United States is moving toward evidence-based regulation of lawyers and legal services); Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011) (analyzing free speech protections for advice from attorneys); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012) (arguing that first amendment protections on free speech extend to legal information provided by attorneys); Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2615 (2014) (arguing that lawyers’ monopoly on the practice of law ended years ago and citing examples such as accountants, real estate agents, and nonlawyer advocates in federal tribunals); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 713 (1996) (offering an alternative regulatory framework to increase consumer choice, provide consumer protection, and offer services at lower cost); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2587-88 (2014) (providing the “first comprehensive overview of [UPL] enforcement practices” since the early 1980s and arguing that enforcement consistently focuses on the profession’s interests in market protectionism rather than consumer protection).

public of the current regulatory regime.

Findings from diverse studies and sources lead in the same general direction. The review of the evidence provides clear support for efforts to expand legal advice provision beyond the traditional source of licensed attorneys. First, consumers want legal advice, including from providers that are not lawyers.<sup>7</sup> Second, nonlawyer providers can be competent and effective in a range of case types.<sup>8</sup> And third, the current rules about nonlawyer practice restrict access to justice for millions of Americans, and have a chilling effect on grassroots efforts to organize to secure goods that benefit communities and society, such as fair wages, healthy and secure housing, and a clean environment.<sup>9</sup>

Regulators interested in consumer protection will find the evidence reviewed here informative as they consider what new activities to permit and how to regulate them.<sup>10</sup> This evidence can also inform consumers, who will continue to face increasing choice of types of legal services providers over the next few years.<sup>11</sup>

## I. WHAT IS LEGAL ADVICE?

Defining legal advice is challenging enough to have inspired both constitutional arguments<sup>12</sup> and extensive guides attempting to explain to nonlawyers how to avoid giving it.<sup>13</sup> What legal advice looks like in practice and how it differs from general information about the content of the law or legal processes is hotly debated.<sup>14</sup> In the present Article, *legal advice* involves the

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See generally Chambliss, *supra* note 6.

11. See REBECCA L. SANDEFUR, LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES (2019) (canvassing the wide range of consumer-facing legal technologies); Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 209-21 (2014) (describing developments in the areas of *pro se* assistance, pro bono by law students, and licensed paralegals who may practice law independent of lawyer supervision); Lauren Moxley, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice*, 9 HARV. L. & POL'Y REV. 553 (2015) (analyzing the service and business models of LegalZoom).

12. See, e.g., Knake, *supra* note 6.

13. See, e.g., M. ELLEN MURPHY & STEVE H. NICKELS, THE UNAUTHORIZED PRACTICE OF LAW FOR NONLAWYERS (2018) (attempting to define and explain the unauthorized practice of law to people who are not lawyers). This book is nearly 300 pages long.

14. See, e.g., John M. Greacen, *Legal Information vs. Legal Advice: Developments During the Last Five Years*, 84 JUDICATURE 198 (2001) (arguing the distinction is not meaningful); Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2843 (2014) (discussing when legal information is protected speech under the First Amendment); Center for Public Legal Education Alberta, *Legal Information vs. Legal Advice: What's the Difference?* (2015), <https://perma.cc/MG9S-4835> (providing public-facing definitions of the two concepts).

application of knowledge about laws, legal principles, or legal processes to specific facts or circumstances; creating an analysis of the situation (a diagnosis of its legal aspects); and suggestions about courses of action (proposed treatments). With some exceptions, legal advice in the U.S. is an activity typically restricted to licensed lawyers engaged in a lawyer-client relationship with the recipient of that advice.<sup>15</sup> Unauthorized providers, whether people, companies, or technology, can be subject to enforcement and penalties, including criminal sanctions in certain states.<sup>16</sup> Providing legal information, on the other hand, is not an activity restricted to fully qualified attorneys.

Because the line between advice and information can blur, a range of resources exist that try to explain the difference to people at risk of engaging in the unauthorized provision of legal advice. For example, law students are not licensed to practice law, so the American Bar Association advises students approached about legal problems by family and friends to keep their conversations in the realm of legal information by “talk[ing] in general terms about the area of law, without honing in on the specifics of the individual’s problems.”<sup>17</sup> Court clerks, at the front lines of the court system, receive many questions from the confused public. But clerks are not authorized to practice law in the context of their clerk duties, so the Judicial Council of California, in a handbook of practical advice, encourages clerks to

“explain and answer questions about how the court works and give general information about court rules, procedures, and practices;”

“provide court users with information from their case files, as well as court forms and instructions;” and

“provide court users with schedules and information about how to get a case scheduled,” as well as to “answer most questions about court deadlines and how to compute them;”

but not to

“tell a litigant whether a case should be brought to court or give an opinion about the probable outcome;”

“tell a litigant what words to use in court papers or what to say in court;”

or

“talk to a judge on behalf of a litigant.”<sup>18</sup>

In this Article, legal advice comprises acts of analysis and communication

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15. Rhode & Ricca, *supra* note 6, at 2588-89.

16. *Id.* at 2588.

17. ABA Center for Professional Responsibility, *Some Advice . . . on What’s Legal Advice*, ABA FOR LAW STUDENTS (June 17, 2016), <https://perma.cc/ABD7-NXBU>.

18. JUDICIAL COUNCIL OF CAL., MAY I HELP YOU? LEGAL ADVICE VS. LEGAL INFORMATION: A RESOURCE GUIDE FOR COURT CLERKS 2-7 (2003), <https://perma.cc/7CK2-3M78>.

defined by their content rather than by who engages in them. In providing legal advice, someone or something applies an understanding of law to particular facts and shares the results of that application with a person placed to do something guided by the analysis. Legal advice can thus include diagnosing a problem of everyday life—for example, being three months behind on one or more bills, needing to enroll a grandchild in school—as having legal aspects; helping someone identify relevant law and apply it to the facts of their situation; or giving guidance, based on a diagnosis of legal aspects, about potential routes of action and costs and benefits of each.

Because the focus of this Article is on empirical evidence of demand, quality, and harm, the definition of legal advice offered here is functional, focused on *what is being provided*, rather than positional, focusing on how that provision occurs. This contrasts with the approach to legal advice pursued in formal unauthorized practice of law (UPL) enforcement, in which the relationship between the client and the provider is a core consideration, since restrictions often focus on the provision of “personalized assistance.”<sup>19</sup>

By the definition offered in this Article, some activity currently treated by regulators as legal information would be considered advice, because that activity diagnoses someone’s situation and offers a solution based on an understanding of the law. For example, the New York City Mayor’s Office to Protect Tenants sponsored a public education campaign about tenants’ rights. On signs around the city, people could read:

If your landlord says: “I need three months’ security deposit before you move in” . . . Tell them the law says: Security deposits can only be one month’s rent.<sup>20</sup>

Here, the law (housing law) is being applied to specific facts (a landlord’s demand for a security deposit of a certain amount), resulting in suggestions about what to do (tell the landlord the law says he can’t make you pay the amount he demands, but rather only a different specific amount). The fact that the application and recommendation are produced by a public notice, rather than offered by a neighbor, explained by an organizer at tenants’ union meeting, or conveyed by an attorney to a paying client is not relevant for the purposes of the analysis in this paper, though these distinctions would be important for contemporary UPL enforcement.<sup>21</sup>

The next Part reviews empirical evidence about consumer demand for legal advice and other legal services from providers that are not traditional attorneys. I then turn to a review of evidence on the competence of nonlawyer providers and the quality of the services they provide, before concluding with discussion

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19. Rhode & Ricca, *supra* note 6, at 2589.

20. Michael Gartland, *NYC Launches Renters’ Rights Awareness Campaign Months After Albany Passes Reforms*, N.Y. DAILY NEWS (Oct. 22, 2019), <https://perma.cc/65D5-TEXC>.

21. Rhode & Ricca, *supra* note 6, at 2588-89.

of the harms created by the current prohibitions on nonlawyer advice.

## II. CONSUMER DEMAND

In the United States, the current menu of consumer choice among legal advice providers is highly restricted. Licensed attorneys may offer legal advice, as can a few other kinds of providers in limited circumstances.<sup>22</sup> Because choice is so restricted, consumption patterns reveal limited information about what services people would prefer: people can only consume goods or services that are actually available, that they know are available, and that they can afford. Take fruit as an example. If bananas and apples are cheap and widely available and we see people purchasing some of one and a lot of the other, that tells us something about fruit preferences. But if bananas are incredibly expensive and apples are illegal, the fact that bananas are routine only for the wealthy and an occasional treat for the rest, while virtually nobody is eating apples, does not mean that everyone hates apples and would love to buy more bananas if only they could afford them. When something (e.g., legal advice) can usually be offered by only one type of provider (e.g., lawyers), people cannot reveal their preferences for other kinds of providers by using existing providers' services. The review of evidence about consumer demand for legal advice thus by necessity looks beyond preferences revealed by current U.S. consumer purchases to a range of other sources of information about what members of the public want when they face justice problems.

### A. Evidence from the United States

#### 1. Consumers already use nonlawyer providers

When American consumers have the choice of using an authorized nonlawyer provider, many do so. In the U.S., a number of both state and federal adjudicatory forums permit people who are not fully-qualified attorneys to provide representation. For example, people who are not licensed attorneys are permitted to represent clients in patent applications, real estate closings, unemployment compensation appeals, labor grievance arbitration, and in some state tax and immigration courts.<sup>23</sup> Nonlawyer advocates in those settings offer consumers not only advice about their legal situation and possible courses of action, but also assistance in preparing documents and representation in their disputes pursued in specific kinds of hearing forums.<sup>24</sup> Characteristic of all of these nonlawyer providers is the *limited* ambit of their practice: they are

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22. *Id.* See also Levin, *supra* note 6, at 2615-16.

23. See Levin, *supra* note 6, at 2615.

24. *Id.*

permitted to perform their tasks only for specific kinds of legal issues that come before specific hearing forums.

When these nonlawyer advocates are available, Americans do, in fact, use their services. One study in Wisconsin found nonlawyers serving as 22% of all employee representatives in unemployment compensation appeals in 1991.<sup>25</sup> In state tax appeals, the same study found that 38% of representatives were nonlawyers between 1991 and 1994.<sup>26</sup> For social security disability appeals, nonlawyers represented about 15% of those appealing denial of benefits nationally between 1986 and 1994.<sup>27</sup> And in immigration, over 2000 federally accredited nonlawyer immigration representatives are currently employed by approved nonprofit organizations around the country that deploy these nonlawyers' services in dealing with legal matters faced by their clients.<sup>28</sup> Consistent with this revealed demand for legal services from nonlawyers, states like Washington and Utah have already created, and states like Arizona are creating or expanding, the powers of specialized nonlawyer providers of limited legal services.<sup>29</sup>

Not all nonlawyer assistance that consumers currently use is authorized. A well-known and controversial example of unauthorized practice is the *notario*, a nonlawyer who provides a range of document preparation and translation services as well as assistance in navigating the U.S. immigration system.<sup>30</sup> In a survey of low-income immigrant households in five U.S. cities in the early 1990s, 13% of respondents had used the services of a *notario*,<sup>31</sup> and “[n]early

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25. Though unemployment insurance is a federal program, it is administered at the level of states. Kritzer reported representation status for 5480 cases heard in Wisconsin in 1991 for which the representation status of both sides was known. HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYER AND NONLAWYERS AT WORK 23, 51 (1998) (on file with author).

26. Kritzer collected data on 170 appeals heard by the Wisconsin State Tax Commission between July 1991 and June 1994. *Id.* at 82-83.

27. *Id.* at 113-14.

28. Nonlawyer “Accredited Representatives” can provide representation in immigration courts as employees of or volunteers with “Recognized Organizations,” which must be nonprofit and tax exempt. Exec. Office for Immigration Review, *Recognition & Accreditation (R&A) Program*, <https://perma.cc/PK3G-R2AZ>.

29. The growth of Washington’s Limited License Legal Technician program has been slow, with just over thirty technicians currently practicing in the entire state. *See Limited License Legal Technicians*, WASH. STATE BAR ASS’N, <https://perma.cc/4UV6-KD37>. Utah’s LPP program issued its first licenses in 2019. *See Lyle Moran, Utah’s Licensed Paralegal Practitioner Program Starts Small*, ABOVE THE LAW (Dec. 12, 2019), <https://perma.cc/ZJK6-M8CN>. Arizona is considering changing limitations on legal document preparation. Brenna Goth & Joel Skolnik, *Arizona Weighs Role of Non-lawyers in Boosting Access to Justice*, BLOOMBERG LAW (Aug. 15, 2019), <https://perma.cc/JS2D-8L8S>.

30. Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-Attorney Immigration Practitioners*, 64 VILL. L. REV. 165, 171, 172 n.33 (2019).

31. ROBERT L. BACH, INST. FOR RESEARCH ON MULTICULTURALISM AND INT’L LABOR, BECOMING AMERICAN, SEEKING JUSTICE: THE IMMIGRANTS’ LEGAL NEEDS STUDY 12-13 (1996) (on file with author). During 1993 and 1994, the study conducted a telephone survey

half (48%) of undocumented immigrants went to a *notario* for help.”<sup>32</sup> Clearly, there is demand for *notarios*’ services.

## 2. Consumers want legal advice

When people have civil justice problems, they often look specifically for legal advice. One illustration of this comes from live chat queries on legal information websites, which provide rich data. Every state has a legal aid-affiliated website that provides at least some free legal information, and sometimes simple or interactive legal forms for taking common actions like filing for divorce, amending a parenting plan, or answering a petition for nonpayment of rent.<sup>33</sup> A live chat function on many of these websites allows visitors to pose questions to actual human beings who staff the chats.<sup>34</sup> Although some staff on these websites are lawyers, others include nonlawyers like AmeriCorps members, paralegals, or law students.<sup>35</sup>

A recent study examined what people sought when they queried the operators on these live chats: were they asking for a lawyer, for information, or for legal advice?<sup>36</sup> In an analysis of live chat streams from two different legal aid websites, one in a rural state and one in a state where a majority of the population resides in a single large metropolitan area, researchers found that visitors sought legal advice—an analysis of their legal situation and suggestions about how to

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of “over 2,500 impoverished immigrant households in five large cities:” Los Angeles, New York, Houston, Miami and Chicago. The survey was administered in multiple languages: English, Spanish, Haitian Creole, Polish, Chinese and Vietnamese. *Id.* at 3.

32. *Id.* at 53.

33. LEGAL SERVS. CORP., STATEWIDE WEBSITE ASSESSMENT: REPORT FOR THE JUSTICE COMMUNITY 5-7 (2017), <https://perma.cc/2DLT-ZPEV>.

34. For example, as reported in an early study, one live chat visitor asked, “My husband just left and I need get [sic] all the information I can about what I need to insure [sic] I keep my home. Can I get finacial [sic] help and if so what paper do I need. He says I can keep the house if he pays no child support, is it possible to get public assitance [sic] with no child support.” RICHARD ZORZA, LIVEHELP PILOT PROJECT: CHAT SERVICES FOR ACCESS TO JUSTICE WEB SITE USERS 46 (2007), <https://perma.cc/H55C-TJBZ>.

35. *Id.* at 1, 26.

36. Author’s original analyses of data from the Legally Empowering Technologies project, on file with the author. In this study, with assistance from legal aid providers, the research team collected all of the live chat interactions in one populous and one rural state during a specific time period. In order to ensure that both states provided roughly equal amounts of data, one month’s worth of chats (April 2018) were analyzed from the populous state, while six months’ worth (November 2017-April 2018) were analyzed from the rural state. A team of four research assistants then reviewed and double-coded the nearly 800 live chat interactions collected to reflect what the visitor asked for from the operator on the site: advice (guidance about what to do in their specific circumstances, help handling the situation), information (general questions about the law or process without reference to their own specific circumstances), and/or a lawyer (asked for a lawyers’ services, a referral to a lawyer, or how to find a lawyer).

handle it—about two-fifths of the time: in 38% of queries in the rural state and 42% in the more urban state.<sup>37</sup> But prohibitions on the delivery of legal advice outside of lawyer-client relationships prevented operators from answering with legal advice. Instead, chat operators referred visitors to other places on the website or to resources offline.<sup>38</sup> People visiting legal information websites and asking questions through live chat were far less often seeking the services of lawyers: in 10% of chats in the rural state people asked about finding a lawyer to help them, while they did so in 31% of chats in the more urban state.<sup>39</sup>

When people seek help with justice problems from others in their communities, they are often seeking legal advice. An illustration comes from a survey that queried ordinary Americans about their experiences with civil justice problems.<sup>40</sup> In 2013, the Community Needs and Services Study surveyed a representative sample of adults in a middle-sized Midwestern city about their experiences with events that had civil legal aspects, raised civil legal issues, or had consequences shaped by the civil law.<sup>41</sup> The most common way people responded to justice problems was to handle them on their own, without any assistance.<sup>42</sup> If people did reach out to a third party for help—whether to a friend, family member, community organization, government agency, lawyer, or anyone else—the survey asked participants what they had wanted from their contact with that potential helper.<sup>43</sup>

Respondents could report seeking multiple kinds of assistance, including acts of advocacy, referrals to other services, and moral support. But the help people sought often looked a lot like legal advice. In half (50%) of contacts seeking help with a justice problem from any source, survey respondents said they wanted the helper to do one or more of the following:

Help you understand your rights/the different ways you could go about handling the situation;

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37. *Id.*

38. *Id.*

39. *Id.*

40. While civil justice surveys have become more widely used globally, nationally representative survey data for the civil justice experiences of Americans at all income levels has not been collected since the 1980s. *See* Rebecca L. Sandefur and James Teufel, *Assessing America's Access to Civil Justice Crisis*, 14, 21 (Mar. 13, 2020), (unpublished manuscript), (on file with author); *see generally* OECD/Open Society Foundations, *supra* note 2.

41. *See generally* REBECCA L. SANDEFUR, AM. BAR FOUND., U. ILL. AT URBANA-CHAMPAIGN, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY*, (2014), <https://perma.cc/8FD7-SQ7X>. This single-site study was the first in recent years to survey a sample that included all income levels. *Id.* at 6. The survey was administered face-to-face, usually in respondents' homes, during the summer and fall of 2013, and had a completed sample size of 668. *Id.* at 5-6.

42. *Id.* at 11-12.

43. Rebecca L. Sandefur, Community Needs and Services Study survey instrument (on file with author).

Help you understand anything the other side had said or any letter or emails you received;

Get information or advice for you about the situation;

Help you write letters or fill in forms; and/or

Write letters or fill in forms.<sup>44</sup>

By contrast, only 25% of contacts consisted of requests for referrals to a place or person where they “could get help to handle the situation.”<sup>45</sup> They were seeking advocacy—having the helper communicate directly or negotiate with the other side, or handle the situation for them—in 28% of contacts.<sup>46</sup>

When the analysis is restricted only to help sought from third parties outside of respondents’ immediate social networks, the pattern is even clearer. When people went to formal sources of assistance for help with civil justice problems, advice was the most common form of assistance sought (64% of contacts), followed by advocacy (45% of contacts), with referrals to help lagging behind as the hoped-for outcome of 24% of contacts.<sup>47</sup>

## B. Evidence from Other Countries

### 1. When given a choice, consumers often prefer nonlawyer providers over lawyers

The experience of jurisdictions outside the United States that offer a wider range of nonlawyer legal services reveals strong consumer demand for these services. The first example comes from Canada. Until 2007, legal practice by independent paralegals was unregulated in Ontario.<sup>48</sup> When regulation began, over 2000 already-existing paralegal practices entered the licensing scheme: consumers had already been using their services.<sup>49</sup> As part of a study five years into the new regulatory regime, 1001 people who had used paralegal services at

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44. Author’s original analyses of data from the Community Needs and Services Study (on file with author).

45. *Id.*

46. *Id.*

47. *Id.*

48. The offered justification for increased regulation of paralegals was access to justice: “[T]he Ontario government introduced paralegal regulation in 2007 with the promise that regulation would increase access to justice by ensuring paralegal competence, increasing choice of qualified legal services provider, and making legal services more affordable.” Lisa Trabucco, *What Are We Waiting For? It’s Time to Regulate Paralegals in Canada*, 35 WINDSOR Y.B. OF ACCESS JUST. / RECUEIL ANNUEL DE WINDSOR D’ACCÈS À LA JUSTICE, 2018, at 149.

49. THE LAW SOC’Y OF UPPER CAN., REPORT TO THE ATTORNEY GENERAL OF ONTARIO PURSUANT TO SECTION 63.1 OF THE *LAW SOCIETY ACT 2* (2012).

least once in the previous two years participated in an online survey about their experiences.<sup>50</sup> The results revealed that people went to paralegals for help with a wide range of justice problems, including traffic, small claims, landlord/tenant, worker's compensation, real estate, probate, and family issues.<sup>51</sup> Among these consumers, over two fifths (43%) had used the services of paralegal at least twice during the previous two years.<sup>52</sup> The most common reasons that consumers reported turning to paralegals were because paralegals were cheaper than lawyers (46%), because people believed their matters were too simple to require a lawyer (41%), and because they believed the paralegal to be an experienced specialist (33%).<sup>53</sup>

A second example of consumer preference for nonlawyer providers comes from the United Kingdom, where providing legal advice is not a "reserved activity"—it is not a regulated part of the practice of law.<sup>54</sup> A wide range of different kinds of providers offer legal advice, which means that consumers have a much broader choice of authorized sources than in the United States.<sup>55</sup> For example, litigants can use the services of lay people to accompany them to court and "provide moral support," "take notes," "help with case papers," and "give advice on any aspect of the conduct of the case;" these nonlawyer assistants are often known as McKenzie Friends.<sup>56</sup> Consumers use their services. For example, in a purposive sample of 151 family law cases observed in five courts in 2013, 24 (16%) involved the assistance of a McKenzie Friend.<sup>57</sup> Some McKenzie Friends are friends or family of litigants, but others are paid service providers.<sup>58</sup> The Society of Professional McKenzie Friends, a membership organization for fee-charging McKenzie Friends, lists 26 Friends, their fees and contact information on a "Find a McKenzie Friend" page.<sup>59</sup> A recent study estimates that

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50. The survey was conducted in March 2012, using a proprietary panel. No further information is available about how respondents were selected or recruited. DAVID KRAFT ET AL., STRATCOM STRATEGIC COMM'NS, FIVE YEAR REVIEW OF PARALEGAL REGULATION: RESEARCH FINDINGS. FINAL REPORT FOR THE LAW SOCIETY OF UPPER CANADA 6 (2012).

51. *Id.* at 36.

52. *Id.* at 12.

53. *Id.* at 37.

54. *Reserved Legal Activities*, LEGAL SERVS. BD., <https://perma.cc/M96B-266J>.

55. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV., 949, 963-66 (2009).

56. LORD NEUBERGER OF ABBOTSBURY & SIR NICHOLAS WALL, PRACTICE GUIDANCE: MCKENZIE FRIENDS (CIVIL AND FAMILY COURTS) 1 (2012), <https://perma.cc/36H9-JNAE>.

57. LIZ TRINDER ET AL., MINISTRY OF JUSTICE, LITIGANTS IN PERSON IN PRIVATE FAMILY LAW CASES 94 (2014).

58. LEANNE SMITH ET AL., CARDIFF UNIV. & UNIV. OF BRISTOL, A STUDY OF FEE-CHARGING MCKENZIE FRIENDS AND THEIR WORK IN PRIVATE FAMILY LAW CASES 5-6 (2017).

59. *Find a McKenzie Friend*, SOCIETY OF PROFESSIONAL MCKENZIE FRIENDS LTD. <https://perma.cc/EE4A-CMWG>. Their rates range from £40-£125, or roughly \$50-\$160 per hour. *Id.*

about 100 McKenzie Friends offer legal advice for fees in England and Wales.<sup>60</sup> That same study finds that people choose to work with McKenzie Friends because they are “cheaper than lawyers,” “flexible, available and informal,” and seen as “allies.”<sup>61</sup>

2. Even when lawyers are free, people sometimes prefer nonlawyer legal services providers

Finally, consumers sometimes prefer the services of nonlawyers even when traditional lawyers’ services are free. One of the most striking findings about demand for legal advice comes from a comparative study of how people handle justice problems in jurisdictions where legal advice is widely available from nonlawyers, while lawyers’ services are at the same time free or greatly subsidized. In such contexts, consumer choice is less constrained by cost. In England and Wales, consumers have a wide range of choices of legal advice providers, including a national network of Citizens’ Advice offices staffed by trained volunteers who provide legal advice about a range of issues, as well as the McKenzie Friends described above.<sup>62</sup> At the time of the study, a majority of the population of England and Wales was eligible for free or subsidized services from lawyers through a *judicare* scheme, where citizens receive government vouchers to pay private lawyers for their services.<sup>63</sup> By comparison, the United States limits federally-funded civil legal aid to people with incomes no more than 125% of the federal poverty level, a group comprising about 16% of the U.S. population.<sup>64</sup> Existing free civil legal services in the U.S. are so strapped that legal aid offices turn away at least as many people as they serve due to lack of resources.<sup>65</sup> And, of course, in the United States, legal advice is generally not available from anyone other than lawyers. A comparison of consumer behavior in these two contexts reveals that even when lawyers are *free*, if legal advice from nonlawyers is available, people are more likely to use these advice services

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60. TRINDER ET AL., *supra* note 57, at 14-15.

61. *Id.* at 36-40.

62. *Introduction to Citizens Advice Service*, CITIZENS ADVICE, <https://perma.cc/YLW4-MS8K> (last visited May 26, 2020).

63. Sandefur, *supra* note 55, at 963.

64. For the eligibility guidelines see *Income Eligible*, LEGAL SERVS. CORP., <https://perma.cc/VBL4-6YFL>. For the population of the U.S. living below 125% of the federal poverty level, see *POV01: Age and Sex of All People, Family Members and Unrelated Individuals Iterated by Income-to-Poverty Ratio and Race: 2018 Below 125% of Poverty—All Races*, U.S. CENSUS BUREAU, <https://perma.cc/U69H-L8TS>. See generally EARL JOHNSON, JR., *TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES* 919-24 (2013).

65. LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 43 (2017), <https://perma.cc/4RLR-8XBH>.

than the services of fully qualified attorneys.<sup>66</sup>

### C. How Consumers Decide

Consumers shop around. For example, a 2019 survey of a representative sample of 2000 American consumers found that nearly three fifths (57%) of people who had sought the services of a lawyer contacted more than one law firm in that search.<sup>67</sup> People found lawyers both through referrals from family and friends and through their own searching on the internet and in paper directories like the phonebook.<sup>68</sup> And while price was one element in their consideration, the most common things clients reported looking for from lawyers were timely response and help understanding processes and next steps—all goods that can be provided by nonlawyers, as shown below.<sup>69</sup>

To the extent that researchers have explored how consumers choose between different kinds of legal services providers, their findings suggest that people weigh a range of factors. A 2009 U.K. study that presented hypothetical justiciable problem scenarios to members of the public and asked how those problems should be handled found that people were more likely to recommend lawyers for problems that they judged to be more severe and that they understood to be legal in nature.<sup>70</sup> Problems that people regarded as less severe or as not legal problems were more likely to be recommended for nonlawyer services.<sup>71</sup> Since research has shown that American consumers are highly unlikely to consider their justiciable problems to be legal in nature,<sup>72</sup> sources of assistance that connect with their problems in the terms in which they understand them are an essential tool in access to justice, as such services are more likely to actually

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66. Sandefur, *supra* note 55, at 969-71. The study compared how consumers reporting civil justice problems in the areas of money and housing handled them in the United States in 1992 and in the United Kingdom in 2004. *Id.* Data came from two surveys: the 1994 American Bar Association report on the *Legal Needs of the Low- and Moderate-Income Public* and the 2004 England and Wales Civil and Social Justice Survey. Further details about the data and analysis are available in the cited article.

67. CLIO, LEGAL TRENDS REPORT 26 (2019). According to Clio, the “sample was representative across all adult age groups, genders, and geographic regions in the United States.” *Id.* at 6.

68. *Id.* at 21.

69. *See infra* Part IV (discussing nonlawyers’ success in meeting consumer needs).

70. Pascoe Pleasence et al., *What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes*, OÑATI SOCIO-LEGAL SERIES 1, 16-17 (2011). The online study surveyed 1031 people between the ages of sixteen and sixty-six who were recruited from the ipoints™ panel, which provides rewards in exchange for completing surveys. *Id.* at 6.

71. *See id.* at 16-17.

72. For example, in a survey of a representative sample of adults in a middle-sized city in the American Midwest, people recognized only 9% of the civil justiciable problems they experienced as “legal.” Sandefur & Teufel, *supra* note 40, at 14.

be used.<sup>73</sup>

Existing evidence shows that the cost of services is sometimes but not always a factor. Consumers do at times report turning to nonlawyer providers because they believe them to be cheaper.<sup>74</sup> But they also report turning to nonlawyers for help with justice problems even when attorneys' services are free.<sup>75</sup> Consistent with that finding, consumers report turning to nonlawyers because they find them competent and accessible.

Another factor that shapes how people choose legal services providers is the complexity of the issues they confront. People are more willing to select nonlawyer providers for simpler legal issues. For example, a situation being too simple to justify hiring a lawyer was a motivation for 41% of the consumers using paralegal services in the Ontario study.<sup>76</sup> Similarly, a study comparing the use of lawyers and do-it-yourself kits in divorce and bankruptcy cases in Arizona in the early 1980s found that people were much more likely to use kits for the legally simpler problem of divorce than the legally more complex problem of bankruptcy.<sup>77</sup> The study also found that people were less likely to use kits and more likely to use lawyers when their divorce or bankruptcy situations were more factually complex.<sup>78</sup>

#### D. Summary

In sum, a range of evidence indicates robust demand for legal advice. Consumers often seek it, and when they are able to access it and other legal services from providers who are not lawyers, they often do so. What evidence exists on how consumers make choices between types of providers indicates that they make reasoned choices, considering not only cost but also the nature and complexity of the situations they confront.

### III. NONLAWYER COMPETENCE AND EFFECTIVENESS

Legal advice can be competent or incompetent, well-intentioned or

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73. See Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 736 (2015) (reviewing evidence that people are more likely to use assistance with justice problems if that assistance is timely, targeted to problems as people understand them, and provided through trusted sources).

74. See *supra* notes 61, 69, and accompanying text.

75. See *supra* note 67 and accompanying text.

76. See KRAFT ET AL., *supra* note 50, at 12.

77. STEVEN R. COX & MARK DWYER, A REPORT ON SELF-HELP LAW: ITS MANY PERSPECTIVES 21 (1987) (on file with author). The study analyzed "large case samples . . . selected at random for each of six years (1980-85)." *Id.* at 72. For the analysis of the factors shaping choices between types of assistance, a smaller subsample of cases was selected for detailed analysis. *Id.* at 73.

78. *Id.* at 25.

malicious, regardless of who or what provides it. To be done competently, the analysis of a person's legal situation and recommendations about what to do require knowledge of relevant laws, rules, legal procedures, and standard operating practices of courts and other parts of the justice ecology, and also more-or-less correct application of that knowledge to specific factual circumstances.

Regardless of the source, consumers benefit from access to legal advice only when that advice is competent. Vanishingly few systematic empirical studies assess the quality of lawyers' work,<sup>79</sup> and little research compares the quality of the legal work produced by lawyers to that produced by people or things that are not lawyers. Nonetheless, some investigations into work product quality exist, as well as studies that assess consumer satisfaction and that compare the outcomes achieved by different kinds of legal services providers. In what follows, I review findings from five different sources of information about the quality or competence of nonlawyers' work: effectuation, consumer satisfaction, consumer complaints, case outcomes, and expert review of completed legal work.

#### A. Effectuation

One measure of the effectiveness of a service is effectuation<sup>80</sup>—is the user of the service able to complete a desired step in a legal process, like producing a viable document or receiving a divorce decree after petitioning for divorce. One common means of assisting consumers in effectuation is to convey legal expertise in paper or digital form, outlining choices in plain language and guiding the user through the steps and choice points in taking a legal action.<sup>81</sup> For example, New York state courts created an eviction form that offers tenants the choice of 17 different reasons for contesting a landlord's petition, ranging from poor conditions to improper service to having actually paid the rent.<sup>82</sup> This form

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79. Though the literature is small, empirical research into lawyer quality does exist. One strand, prominent in the United Kingdom, draws on peer assessments of the quality of legal work. *See, e.g.,* Avrom Sherr & Alan Paterson, *Professional Competence: Peer Review and Quality Assurance in England and Wales and in Scotland*, 45 ALTA. L. REV. 151 (2008). Another strand, more prominent in the United States, explores lawyers' bad practice through the lens of ethical failure. For example, Richard Abel's *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008) explores violations of trust through neglect, overcharging, and "excessive zeal" in advocacy. Bruce L. Arnold and Fiona M. Kay investigate how the social isolation of solo practitioners contributes to these kinds of ethical failures in *Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-regulation*, 23 INT'L J. SOC. L. 321, 330-32 (1995).

80. I thank Elizabeth Chambliss for suggesting this term.

81. *See The Case for . . . Court-Based Forms and Instruction Programs*, SELF-REPRESENTED LITIG. NETWORK, <https://perma.cc/W7JA-XWQC> (explaining how a court-based forms and instructions program operates and why it is helpful to litigants).

82. *Answering in Writing and Verification*, N.Y.C. HOUSING CT.,

is the tenant's answer to the landlord's petition, and must be filed within a specific time in order to avoid default, set the first court date, and establish defenses to the claim.<sup>83</sup> Before forms like this one, people lacking legal assistance had to figure out what the relevant law was that governed their opportunities to offer defenses or raise claims and what the possible defenses or claims could be. Based on that analysis, they then had to write a narrative outlining their legal argument.<sup>84</sup> With these kinds of forms, lay people can simply read and select what may apply in their specific case.

Research shows that these forms can help unrepresented litigants present their cases in legally cognizable terms. In a random sample of cases in a New York City housing court, for instance, all of the answer forms were legally cognizable: the forms were accepted and provided the basis for tenant defenses in every case, whether the case involved a tenant who received no discernible assistance in filling out the form, the assistance of a nonlawyer following a legal information script, or a tenant represented by an attorney.<sup>85</sup> Many states have standardized forms meant to be accepted in every court. As of 2016, 23 states had moved to put at least some interactive, standardized court forms online to be accessible to the general public.<sup>86</sup> As one study concluded, the success of projects assisting unrepresented litigants with helpers short of a fully qualified attorney "depends heavily upon the . . . development and use of simplified pleading forms."<sup>87</sup> As unglamorous as court forms may be, they are a valuable tool in promoting access to justice by codifying legal expertise in a way that nonlawyers can use.

Legal expertise can also be provided effectively by computer programs. For example, a Michigan study compared divorces attempted by people with no representation on record, people who had no lawyer but used interactive forms from a website, and people represented by attorneys. People using the interactive forms were about as likely to achieve a central goal of filing for divorce, i.e. actually getting divorced, as people represented by attorneys: among those using

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<https://perma.cc/F8B7-BKA5>.

83. *Answering a Case*, N.Y. ST. CTS., <https://perma.cc/WQR6-FLHU>.

84. John M. Greacen has documented some of the challenges faced by unrepresented litigants trying to navigate legal processes without guidance. For example, "I just got this here summons and complaint . . .", a litigant asked court staff. And, "What is an answer? What does one look like? What does it say?" or "What does 'interrogatory' mean?" John M. Greacen, "No Legal Advice from Court Personnel" *What Does That Mean?*, JUDGES JOURNAL 10, 10 (1995).

85. REBECCA L. SANDEFUR & THOMAS CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 29-30 (2016). The authors reviewed 181 randomly selected case files collected during the summer of 2015. *Id.* at 54.

86. *SRL Interactive Court Forms by State (2016)*, NAT'L CTR. FOR STATE COURTS, <https://perma.cc/KJ3W-AA9>.

87. Michael Millemann et al., *Rethinking the Full-Service Legal Representation Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178, 1182 (1996).

the forms, 74% achieved a judgment of divorce, while among those working with attorneys, 77% achieved divorce.<sup>88</sup> Notably, people represented by attorneys were only marginally more likely (at 77%) to achieve a judgment of divorce.<sup>89</sup> The biggest difference observed between lawyers and interactive forms was the likelihood of involuntary dismissal: six percent of people represented by lawyers had their cases involuntarily dismissed, while this was the fate of eighteen percent of those using the interactive forms and twenty-one percent of people who tried to get divorced without either representation or the assistance of the form.<sup>90</sup> The most common reason for involuntary dismissal was lack of service.<sup>91</sup> However, service is another procedural aspect of divorce that could be automated, and thereby made easier for those pursuing divorce without a lawyer.

## B. Consumer Satisfaction

Consumer satisfaction measures reveal lay people's subjective assessment of expert services. While this information is valuable, it is only loosely tied to professional competence. Consumers readily report their experiences of things they can evaluate, like demeanor, customer service, and the like. But the nature of professional services is that lay people are not able to fully evaluate the quality of the work, because they lack the expertise to do so.<sup>92</sup> It is for this reason that economists conceptualize professional services as 'credence goods:' "producers of credence goods identify and treat problems that their clients do not know how to solve and may not even know they confront."<sup>93</sup> Evidence about consumer complaints bears this out. Consumers typically do not complain about legal errors, such as inappropriate choice of forum or specious legal arguments; rather, consumers most commonly complain about neglect.<sup>94</sup> Consumers know when

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88. BRIDGEPORT CONSULTING, MICHIGAN LEGAL HELP EVALUATION REPORT 6, 23 (2015), <https://perma.cc/R2TA-JLMK>. The study drew a sample of divorce filings from counties across the state that was "designed to be representative of all cases filed in Michigan in 2013." *Id.* at 13. Within each county, the project randomly selected case files of three types: those using the online forms, those where the petitioner was unrepresented and did not use the forms, and those where an attorney drafted the documents. *Id.*

89. *Id.* at 23.

90. *Id.* at figs.10, 12. For example, as Figure 10 reports, 25% of people using the forms had their cases dismissed, while 19% of people represented by lawyers had their cases dismissed. As Figure 12 reports, 27% of dismissals experienced by people using the forms were by the parties, meaning that 73% of their dismissals were initiated by court. Thus, 73% of the 25% of cases that were dismissed were dismissed involuntarily, meaning that 18% ( $0.25 \times 0.73 = 0.18$ ) of all cases pursued by people using the interactive forms were involuntarily dismissed.

91. *Id.* at fig.12.

92. Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 911 (2015).

93. *Id.*

94. ABEL, LAWYERS IN THE DOCK, *supra* note 79, at 57. Seventy-five years of research

their lawyers are unresponsive, but they are likely less adept at recognizing whether unresponsiveness is legally significant. It is one thing to miss an important filing date through inattention, and another to be slow at returning phone calls, as infuriating as the latter can be for clients. The first is malpractice; the second is bad customer service.

When customer satisfaction is the measure of quality and competence, existing studies reveal high customer satisfaction with paralegal services. This is true even of studies that compare satisfaction with paralegals to satisfaction with lawyers. In the above-mentioned study of consumers of paralegal services in Ontario, most people (74%) were satisfied with the services they received, and most believed that the paralegal they worked with behaved professionally (79%), understood the law (75%), and knew how to do their job (71%).<sup>95</sup> Asked whether being able to use paralegals as well as lawyers made the justice system “better,” 85% either agreed that it did so or believed it had no impact one way or the other.<sup>96</sup> A study of litigants in Maryland who received legal advice from law students similarly found that consumer satisfaction with this nonlawyer service was “high,” particularly when the task the consumer needed assistance with was “most mechanical,” as in the case of an uncontested divorce.<sup>97</sup> Consumer satisfaction dropped somewhat as the student-advisors were required to use more discretion and make more complex judgments.<sup>98</sup>

Studies that compare satisfaction with lawyers to nonlawyers also find that nonlawyers are highly rated, sometimes even more highly rated than attorneys. In the United States, the Immigrants Legal Needs survey described earlier assessed consumer satisfaction with different kinds of legal services providers. This survey found that 70% of people who used *notarios* were satisfied with the service they received.<sup>99</sup> By comparison, only 54% of the clients of legal aid

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reveals that neglect—most often, unresponsiveness—is the most common complaint against lawyers filed by individual consumers. Neglect is likely a much more common experience than complaint data reveal; indeed, it appears to be endemic to the profession. For example, a recent study of email handling practices by a sample of 1,000 law firms found that 71% of firms provided responses that were “unsatisfactory:” they were delayed, confusing, answered none of the client’s questions, and gave little information about process and next steps. CLIO, *supra* note 67, at 33. The sampled firms had “equal representation across five practice areas, including Family, Criminal, Bankruptcy, Business Formation, and Employment, and comprised firms of all sizes.” *Id.* at 6.

95. KRAFT ET AL., *supra* note 50, at 13.

96. *Id.* at 48-49.

97. Milleman et al., *supra* note 87, at 1185. Beginning in the mid-1990s, Michael Milleman and colleagues at the University of Maryland School of Law trained law students to provide “legal information and advice to otherwise unrepresented parties in family law cases” at courthouses. As part of an evaluation conducted by a statistician unaffiliated with the clinical project, 275 consumers who had used the law students’ services were contacted and interviewed about their experiences roughly a year after receiving the service. *Id.* at 1181.

98. *Id.* at 1186.

99. BACH, *supra* note 31, at 60.

agencies and 65% of the clients of private attorneys were satisfied, though 85% of the clients of law firms were satisfied.<sup>100</sup> A 1999 U.K. study comparing the work of solicitors and nonprofit agencies providing legal advice across a range of civil case types found greater customer satisfaction with nonlawyers than with solicitors.<sup>101</sup> Nonlawyers received higher customer ratings than lawyers on seven of ten different criteria of evaluation, including “really standing up for [the client’s] rights,” “telling [clients] what was happening” and what “would happen at the end,” and “knowing the right people to speak to.”<sup>102</sup> A 2011 U.K. study comparing the work of specialist will-writers to that of solicitors found that 77% of will-writers’ clients were satisfied with the quality of their will, while 84% of solicitors’ clients were satisfied.<sup>103</sup> Consumers appreciated that the will-writers provided a more flexible and accessible service, including through visits to consumers’ homes.<sup>104</sup> Clients of will-writing companies “were more likely [than clients of solicitors] to have spent over an hour discussing their personal circumstances:” 47% of will-writing clients responding to a survey reported spending at least an hour with their advisor, compared with only 16% of the clients of solicitors.<sup>105</sup> “Respondents who spent longer” talking with advisors “tended to be more satisfied with the overall quality of their will.”<sup>106</sup>

### C. Consumer Complaints

Another measure of service quality is the frequency and severity of mistakes. In the United States, key sources of information about legal professionals’ mistakes are consumer complaints and malpractice claims.<sup>107</sup> Complaint data likely underreport some kinds of lawyer errors—in particular, errors that require legal expertise to recognize—and overreport behaviors that consumers may not

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100. *Id.*

101. RICHARD MOORHEAD ET AL., QUALITY AND COST: FINAL REPORT ON THE CONTRACTING OF CIVIL, NON-FAMILY ADVICE AND ASSISTANCE PILOT (The Stationery Office 2001). The findings reflect 867 responses to a survey sent out in November 1999 to clients in a sample of cases closed during the last week of August in 1999. Sample characteristics differ somewhat from the population of clients; however, the differences are small in absolute size. *Id.* at 124. The study authors concluded that the differences “do not lead to the conclusion that overall the representativeness of this sample of respondents is compromised.” *Id.* at 125.

102. *Id.* at 132.

103. LEGAL SERVS. CONSUMER PANEL, REGULATING WILL-WRITING tbl.7 (2011). The study surveyed 500 people who had recently purchased a will from a solicitor or will-writing company. *Id.* at 1.4.

104. *Id.* at 1.8.

105. *Id.* at 4.26.

106. *Id.*

107. Herbert M. Kritzer & Neil Vidmar, *When the Lawyer Screws Up: A Portrait of Malpractice Claims and Their Resolution*, in DUKE SCH. OF PUB. L. & LEGAL THEORY RESEARCH PAPER SERIES 15-16 (June 2015).

like but that are actually not errors, as discussed above.<sup>108</sup>

Some complaints will eventuate in lawyers' claims to malpractice insurers, but such claims can only be observed for those lawyers who carry malpractice insurance. Only Oregon and Idaho require lawyers to do so, though lawyers in other states purchase it nonetheless.<sup>109</sup> Malpractice claims present a high bar as a measure of practitioner error: the consumer must pursue the complaint to a point where there is a demand for a remedy that is successful in convincing the lawyer to make a claim on their insurance. As one scholar observes, "Legal malpractice often goes undetected. Even when a client learns of lawyer malpractice, the problem is sometimes resolved informally without notifying the LPL insurer of a possible claim."<sup>110</sup> Nonetheless, such claims are made: a recent study of lawyers' malpractice insurance claims between 2009 and 2013 finds insurers reporting between 2.71 and 12 claims per 100 lawyers insured, depending on the year, the state, and the insurance provider.<sup>111</sup> Seven or more years of university training and a law license clearly do not guarantee protection against error.<sup>112</sup> Lawyers make mistakes, as do providers of legal services that are not lawyers. The question is whether nonlawyer providers make more or worse mistakes.

Among nonlawyers, *notarios* are prominent providers of legal advice. Most of the scholarly literature on *notarios* focuses on fraud—misrepresentation of the service being offered—rather than competence.<sup>113</sup> Some *notarios* pass themselves off as attorneys when they are not, others charge fees but do nothing for their clients while purporting to be providing legal services, and some provide low quality services.<sup>114</sup> Much of the data on the quality of *notario* practice is,

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108. See *supra* notes 94-96 and accompanying text.

109. See Leslie C. Levin, *Book Review: When Lawyers Screw Up*, 32 GEO. J. LEGAL ETHICS 109, 111, 115 (2019) (noting that in most jurisdictions, lawyers can purchase malpractice insurance for \$3,000 or less annually).

110. *Id.* at 110.

111. See Kritzer & Vidmar, *supra* note 107, at 15-16.

112. Nor are mistakes unique to American lawyers. Peer review audits of the quality of legal work in individual attorneys' casefiles in Scotland found that about a tenth (9.7%) were inadequate. Sherr & Paterson, *supra* note 79, at 18. A parallel review of case files from private law firms participating in the England and Wales legal aid scheme found that about 20% received a failing grade from at least one reviewer. *Id.*

113. See generally Travis B. Olsen, *Combating Notario Fraud Locally*, 22 BERKELEY LA RAZA L.J. 383 (2012); Jamie G. Longael & Benjamin Fleury-Steiner, *Beware of Notarios: Neoliberal Governance of Immigrants As Crime Victims*, 17 THEORETICAL CRIMINOLOGY 359 (2013).

114. Jean C. Han, *The Good Notario: Exploring Limited Licensure for Non-Attorney Immigration Practitioners*, 64 VILL. L. REV. 165, 171 (2019). Han observes that *notario* fraud can take several forms: *notarios* may overcharge for their services, may charge for a service they never intend to render, and/or file inappropriate, inaccurate and untimely paperwork" with immigration authorities. *Id.*

unfortunately, anecdotal.<sup>115</sup>

Though government agencies collect complaints about *notarios*, these are not reported in official statistics.<sup>116</sup> However, a recent analysis of complaints obtained through Freedom of Information Act requests found that American consumers reported 2,314 immigration law scams between 2011 and 2014.<sup>117</sup> Like all complaint data, these will underestimate the incidence of bad practice by *notarios*, but underreporting is likely more acute here because immigrants may fear making themselves visible to immigration and law enforcement authorities.<sup>118</sup> In recent years the FTC has received 200-600 complaints annually about immigration services, despite the fact millions of immigrants have likely consulted *notarios*. Just as with lawyers, consumer complaints about *notarios* are an incomplete picture of bad practice. Nonetheless, in recognition that many *notarios* do indeed provide accessible, affordable, needed services, a number of observers call for regularizing them as legal services practitioners.<sup>119</sup>

#### D. Case Outcomes

Evidence shows that nonlawyer advocates can perform as well or better than lawyers in social security appeals, state tax courts, and unemployment compensation appeals in the United States, and in a range of government tribunals in the United Kingdom.<sup>120</sup> If the measure is prevailing in some kind of

115. *Id.* at 171-72.

116. See *Description of Report Categories*, U.S. FED. TRADE COMM'N (last updated 2019), <https://perma.cc/5BAM-2BLJ> (describing various fraud report categories, which do not include notarios).

117. Juan Manuel Pedroza, *Making Noncitizen's Rights Real: Evidence from Legal Services Fraud Complaints* 16-17 (2019) (unpublished manuscript) (on file with author).

118. See generally Asad L. Asad, *On the Radar: System Embeddedness and Latin American Immigrants' Perceived Risk of Deportation*, 54 L. & SOC'Y REV. 133, 139 (2020); Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOC. Q. 593 (2011) (describing how the threat of deportation renders undocumented Latino migrants vulnerable to labor abuses and crime victimization).

119. See, e.g., Han, *supra* note 114, at 190-91 (advocating for a new licensing regime that includes notarios); Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 GEO. IMMIGR. L.J. 1, 28, 34 (2004); Deborah L. Rhode, *Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms*, 39 HASTINGS INT'L & COMP. L. REV. 111, 116-17 (2016).

120. Kritzer, *supra* note 25; HAZEL GENN & YVETTE GENN, *THE EFFECTIVENESS OF REPRESENTATION AT TRIBUNALS* 243-44 (Lord Chancellors Department and Queen Mary College, University of London 1989). The U.K. study explored the impact of lawyer and nonlawyer representation in four types of tribunals through analysis of hundreds of tribunal files, observation of hundreds of hearings, and interviews with tribunal staff, representatives, appellants and applicants. *Id.* at 6-9. Most interviewees believed that specialization and experience, rather than a legal degree, were the most important qualifications for good representation. *Id.* at 245-46.

case before a court or hearing body, the general finding is that nonlawyer advocates perform as well or better than lawyers when nonlawyers are specialized and experienced.<sup>121</sup> At the same time, while nonlawyer advocates can be very good at some things, they may not always be appropriate when clients face complex legal issues.<sup>122</sup>

Studies that compare lawyers to nonlawyers highlight the importance of specialized expertise over generalized legal training. A U.S. study comparing the performance of lawyer and nonlawyer advocates in unemployment compensation appeals, state tax appeals, social security disability appeals, and labor grievance arbitration concluded that specialized expertise in a given area of practice was more important than general legal training in explaining the effectiveness of different types of advocates.<sup>123</sup> A U.K. study exploring the impact of lawyer and nonlawyer representatives in social security appeal tribunals, immigration adjudication hearings, industrial tribunals, and mental health review tribunals found that only in industrial tribunals did fully qualified lawyers lead all forms of lay specialists in terms of their positive impact on a case; in the other settings, nonlawyers were as positively impactful or more impactful than lawyers.<sup>124</sup> The authors concluded that “[i]n all tribunals, representatives who specialize and are experienced in presenting tribunal cases provide the greatest assistance to their clients and to the tribunals before whom they appear,” and that “in some tribunals specialist lay representation is presently as effective as legal representation.”<sup>125</sup>

While nonlawyers are demonstrably effective at many of the tasks currently reserved to fully qualified lawyers, they may not be effective at all parts of legal practice. For example, authors of a study of unemployment insurance appeal hearings in Washington, D.C. concluded that “[n]onlawyers developed, through experience, specialized expertise in basic legal principles and . . . basic procedure” that amounted to the “functional equivalent of certain aspects of lawyers’ legal expertise.”<sup>126</sup> Thus, “[w]hen lawyers and nonlawyers appear at hearings, they disclose evidence, present documentary evidence, present testimony at similar rates, and have similar case outcomes.”<sup>127</sup> However, the

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121. See *infra* notes 123-25 and accompanying text.

122. See *infra* notes 128-31 and accompanying text.

123. Kritzer, *supra* note 25, at 194-97, 201.

124. GENN & GENN, *supra* note 120, at 243-46 (discussing the relative impact of different types of representatives in different types of tribunals).

125. *Id.* at 247.

126. Anna E. Carpenter et al., *Trial and Error: Lawyer and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023, 1049 (2017). This study analyzed data from 5,150 unemployment benefits appeals cases heard in Washington, D.C. between January 2011 and June 2013, as well as interviews with “representatives who appeared most often before the court, including lawyers, law firms, nonlawyers, and supervising attorneys at law school clinical programs.” *Id.* at 1034.

127. *Id.* at 1049.

authors also found that the nonlawyer advocates they studied were “not equipped to challenge or disagree with judges on substantive or procedural legal issues,” because most of their understanding of law and procedure was based on what they had learned from the judges before whom they appeared.<sup>128</sup> As currently trained, there were some tasks, like challenging judges’ interpretations of points of law, that nonlawyers in this setting could usually not do effectively<sup>129</sup>—but, of course, jurisdictions could reconsider how these advocates are trained.

Findings from a systematic review of forty years of U.S. research comparing lawyer and nonlawyer performance bear out the importance of complexity. This study found that when complexity is low—when the processes and documents necessary to pursue a case are rated as simple by lawyers, or when the substantive law itself is rated as simple by lawyers—average differences in the likelihood that lawyers and nonlawyer advocates win cases for their clients are relatively small, with lawyers observed to be 20% more likely on average to win than nonlawyer advocates in these simpler contexts.<sup>130</sup> However, in practice areas with more complex processes or substantive law, lawyers are much more likely to outperform nonlawyer advocates, being between 50% and 320% more likely to win their cases than are nonlawyers.<sup>131</sup>

#### E. Expert Review

One of the most valuable sources of evidence about the competence of nonlawyer practice comes from studies that rely on expert review of completed legal work. In this form of research, practitioners experienced in a given area of law or legal problem audit other practitioners’ work and rate its quality and competence. Such studies are rare, but those that exist provide important evidence about the capability of nonlawyers to provide legal services.

Expert review studies find that lawyers sometimes make more mistakes than unrepresented litigants. An early and famous U.S. study compared the work of lawyers to that of lay people using paper-based kits for divorce.<sup>132</sup> As discussed above, when legal knowledge is distilled into forms, these can be effective in helping people produce their own legal documents and move their cases

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128. *Id.* at 1050.

129. *Id.*

130. Sandefur, *supra* note 92, at 922-23, tbls.3, 4 (2015). The study was a meta-analysis, or “study of studies” of the impact of representation on case outcomes. The data were compiled from existing research reports and analyzed to synthesize the general patterns of findings across studies.

131. *Id.* at 923, tbl.4. The calculations reported here make no allowances for selection of cases into different forms of representation; these are the observed difference across studies. The referenced paper provides multiple estimates of lawyers’ impact, based on different assumptions about selection into different forms of representation.

132. Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 105 (1976).

forward.<sup>133</sup> As divorce became more common and many states moved to simpler no-fault divorce laws, a range of do-it-yourself divorce kits were developed that commodified legal advice into a set of instructions and forms.<sup>134</sup> Based on reviewing case files and auditing the quality of the legal work contained in them, the authors found that lay people using a do-it-yourself divorce kit could do so effectively and sometimes made fewer errors in the preparation of routine paperwork than did lawyers.<sup>135</sup>

Studies of will-writing similarly find that nonlawyers outperform lawyers when legal issues are simpler.<sup>136</sup> A U.K. study conducting expert assessments of wills prepared by solicitors and those prepared by nonlawyer staff at will-writing companies found similar rates of error in both groups: both solicitors and will-writing companies had a failure rate of about twenty percent.<sup>137</sup> Errors included sloppy drafting, omission of standard clauses, and failure to follow the client's instructions.<sup>138</sup> In the preparation of simple wills, specialist nonlawyer will-writers actually out-performed solicitors.<sup>139</sup> When wills were complex, however, solicitors out-performed will-writers.<sup>140</sup>

A landmark U.K. study comparing nonlawyer and solicitor providers of legal advice across a range of civil case types, including benefits, housing, debt, personal injury, immigration, and employment, assessed the quality of services provided through peer review of closed case files.<sup>141</sup> Nonlawyers and solicitors were equally likely to receive failing grades for their work: a quarter of the case

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133. See *supra* notes 85-91 and accompanying text.

134. Marilyn A. Meredith, *Divorce Kit Dilemma: Finding the Public Interest*, 19 U. LOUISVILLE J. FAM. L. 729, 729-30 (1980).

135. Cavanagh & Rhode, *supra* note 132, at 128. For example, unlike lawyers, pro se petitioners were not observed to put the wrong judge's name on their decree forms. *Id.* at 127.

136. See LEGAL SERV. CONSUMER PANEL, *supra* note 103, at 24. Wills are a significant access to justice issue. They help preserve assets within families, enact the wishes of property owners, and avoid disputes and litigation by providing clarity and direction. Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, U.C. DAVIS L. REV. 4-5 (forthcoming) (on file with author). Increasing rates of home ownership and complex family relationships have led to a growing number of people needing specialist advice in preparing wills. See LEGAL SERV. CONSUMER PANEL, *supra* note 103, at 20.

137. LEGAL SERV. CONSUMER PANEL, *supra* note 103, at 20. Poor overall quality was the most common reason for will failure. *Id.* The findings are based on review of 101 wills that were "shadow shopped," or requested by mystery shoppers trained to act as will-writing clients. *Id.* at 12.

138. *Id.* at 24.

139. 25% of solicitor-prepared simple wills failed, while only 11% of simple wills prepared by will-writers did so. *Id.* at tbl.2.

140. Solicitor-prepared complex wills failed 19% of the time, while will-writers' complex wills failed 27% of the time. *Id.*

141. MOORHEAD, *supra* note 101, at 23. In such studies, "an independent person with significant practical specialist expertise in the relevant field" evaluated "the quality of the work" and its "management . . . against specified criteria and levels of performance." *Id.*

files prepared by each failed the quality review.<sup>142</sup> However, nonlawyers were six times more likely than lawyers to produce work that reviewers rated as excellent.<sup>143</sup> Nonlawyers can not only perform as well as lawyers, they can perform better.

#### F. Summary

The available evidence reveals that nonlawyers can provide competent and effective legal advice. Nonlawyer sources of assistance make mistakes, but when working on appropriate matters usually make no more mistakes than lawyers do. As this research review shows, nonlawyers do a great deal of effective and high quality work, which is likely one reason why a 2013 U.S. study of personnel heading up state authorized practice of law committees across the country found that fewer than one third of those responsible for policing the practice of law “could . . . recall an instance of serious injury [caused by nonlawyer practice] in the past year.”<sup>144</sup> At the same time, nonlawyer assistance is not always sufficient. In some situations that raise complex issues of law, nonlawyers as currently trained may not be fully equipped to provide adequate service.

### IV. PUBLIC HARMS

The current restrictions on nonlawyer practice harm the public in multiple ways. By mandating that most legal services must be obtained from lawyers, they limit consumer choice.<sup>145</sup> In addition, the high cost of becoming a lawyer, which in the U.S. requires an advanced, post-baccalaureate degree, plays a key role in creating a legal services market where providers are much less diverse than the public they are meant to serve.<sup>146</sup> In this Part, I focus on two additional harms of the current restrictions on nonlawyer practice. First, many Americans who face civil justice problems receive no assistance from anyone with legal expertise because the current rules prevent them from getting competent help. Second, the current restrictions also limit the ability of communities to organize around their own interests.

Perhaps the most obvious harm of the current restrictions is that people are

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142. *Id.* at tbl.5.6.

143. *Id.*

144. Rhode & Ricca, *supra* note 6, at 2595.

145. Compare the United Kingdom, where consumers have a wider choice of different types of providers and use many different types. *See, e.g.*, LEGAL SERV. CONSUMER PANEL, TRACKER SURVEY 2019, <https://perma.cc/3BES-R4MF>.

146. *See* Rebecca L. Sandefur, *The Face of Access to Justice: Diversity, Debt and Aspiration Among American Lawyers*, in IILP REVIEW 2014: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 62, 62 (Elizabeth Chambliss ed., 2014) (comparing the relatively homogenous racial and ethnic background of contemporary lawyers to that of the much more racially and ethnically diverse nation).

prevented from getting help when they need it.<sup>147</sup> In any given year, ordinary Americans experience at least 100 million civil justice problems in their personal capacity, not including those they may encounter as owners of small businesses or sole proprietorships.<sup>148</sup> These problems affect their capacity to make a living, their access to safe and healthy shelter, and their ability to care for dependent adults and children in their lives.<sup>149</sup> Most will handle these issues without assistance from anyone other than their family and friends.<sup>150</sup> People facing justice problems without legal assistance can forfeit significant rights or fail to understand important obligations.<sup>151</sup> With America's high volume of civil justice problems, it is simply not feasible to provide a fully qualified attorney to everyone who might benefit from legal advice. To illustrate, one scholar estimated that the cost of giving a single hour of lawyers' advice to all of the American "households with an unmet dispute-related need" would amount to at least \$50 billion annually.<sup>152</sup> To put that quantity in perspective, current U.S. spending on civil legal aid from all sources—local, federal, state, philanthropy—is estimated at about \$1.6 billion per year.<sup>153</sup> Of course, the quantity of a single hour is only illustrative: some people would need less, others would need much more. Providing the services of fully qualified lawyers for every civil justice problem experienced by Americans would not be impossible—we find ourselves able to spend much larger amounts on things like roads, healthcare, and the military—but it is unlikely to happen. Fortunately, as the evidence reviewed here shows, providing fully qualified lawyers in every instance is not necessary to achieve access to justice. Continuing restrictions on nonlawyer advice provision effectively shut out millions of people from competent help.

The harm of the current restrictions is not just that individuals who need help cannot get it. Another concerning consequence of the status quo is the way it can chill the kinds of organic, grassroots activities that keep democracy vital and enable people to use their own laws. I provide three examples below. Two come from my own research; in describing those, I have changed some details to protect the work and identities of people involved. Another comes from public reports of how powerful interests have attempted to restrict ordinary people's access to their own laws.

The first example concerns community attempts to combat wage theft, when

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147. Levin, *supra* note 6, at 2613.

148. Sandefur, *supra* note 4, at 49.

149. Sandefur, *supra* note 3, at 443.

150. SANDEFUR, *supra* note 41, at fig.5.

151. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators and Clerks*, 67 *FORDHAM L. REV.* 1987, 1989 (1999).

152. Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 *INT'L REV. L. & ECON.* 44, 45 (2014).

153. ALAN W. HOUSEMAN, *CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2017* 5 (Mar. 2018), <https://perma.cc/T62L-Z9Y7>.

an employer fails to pay all that a worker is owed. Such theft is distressingly common in this country. Millions of people every year get less pay than they have earned, resulting in the loss of billions of dollars from their paychecks.<sup>154</sup> A worker whose wages were being stolen lived in a city where community groups offered “know your rights” workshops and information about how to write firm, polite, clear letters to employers asking that back wages be paid.<sup>155</sup> This worker wrote a such a letter.<sup>156</sup> When the employer did not respond, the worker wrote a second letter to the state’s labor authority.<sup>157</sup> The amount in dispute was about \$500, a substantial sum for someone in a low-wage job.<sup>158</sup>

The worker’s employer hired a lawyer, who defended the employer before the state labor authority.<sup>159</sup> The lawyer also filed a complaint with the state’s attorney disciplinary authority against the community group, alleging that telling someone what the law says and helping her write a letter asking for what is hers by right is the unauthorized practice of law.<sup>160</sup> The community group was subsequently required to scale back its activities.<sup>161</sup> While the first act of the lawyer—defending the employer—can stop one claim of unpaid wages, the second—reducing the capacity of a grassroots organization to help a poor community—can stop many such claims.

A more public instance of how rules about nonlawyer practice can be used to squash community efforts to look after their own interests is illustrated in the attacks during the late 1990s on Tulane University’s environmental law clinic. These began after members of the predominantly African-American community of Convent, Louisiana asked the clinic for legal help to challenge the placement of a large chemical facility in their town.<sup>162</sup> Clinic students represented the community in public hearings and filed lawsuits challenging the issuing of permits necessary to build and operate the plant, asserting that permit decisions were made by officials who were biased or had conflicts of interest.<sup>163</sup> Clinic students also filed a complaint with the federal Environmental Protection Agency alleging “that the state’s actions in issuing permits to the plant violated residents’ rights under Title VI of the Civil Rights Act of 1964.”<sup>164</sup>

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154. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year*, ECON. POLICY INST. (May 10, 2017), <https://perma.cc/J57J-5UTP>.

155. Confidential Telephone Interview with an attorney supporting the community organization (Sept. 25, 2019).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Law Clinic*, 4 WASH. U.J.L. & POL’Y 33, 37-38 (2000).

163. *Id.* at 47-49.

164. *Id.* at 49.

When these “legal efforts [against business interests] were largely successful,”<sup>165</sup> the clinic faced a significant backlash. This included industry groups encouraging the state supreme court to investigate clinic activities and change the student practice rules to restrict the activities that law students were able to pursue and limit their ability to represent community organizations.<sup>166</sup> “Attorneys representing businesses that were defeated in proceedings by clinic students played a prominent role in the effort to restrict availability of clinic services.”<sup>167</sup> The court subsequently investigated the clinics and changed the student practice rules, making it “impractical” for clinic students to “appear on behalf of citizen organizations in state forums.”<sup>168</sup> Students also may no longer represent clients if the clinic reaches out to that potential client; clients must make the “first contact.”<sup>169</sup> Thus, an effective nonlawyer support to communities seeking to organize around their own interests was made less effective in supporting that grassroots activity.

Regulators need not actively engage in suppression to prevent nonlawyers from giving advice. As part of my research into consumer-facing legal technologies, I spoke with a number of technology developers who worried about being pursued for the unauthorized practice of law if the tools they created were too effective at assisting people with their civil justice problems. Among these was a nonprofit that works closely with community groups to assist people with a very common type of civil justice problem among low-income communities, safe and healthy housing. Nationally, millions of renters live in housing where conditions are “inadequate” by federal standards.<sup>170</sup> As one advisor to this project explained to me, a prosecution of this small nonprofit organization for the unauthorized practice of law could quickly bankrupt the program and stop its activities, whether or not the program was ultimately found to be “practicing law.”<sup>171</sup> Complaints about unauthorized practice of law come less from consumers or clients, and more from the bar itself.<sup>172</sup> And most complaints are

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165. *Id.* at 50.

166. Adam Babich, *How the Tulane Environmental Law Clinic Survived the Shintech Controversy and Rule XX Revisions: Some Questions and Answers*, 32 ENVTL. L. REP. 11476, 11476 (2002).

167. Kuehn, *supra* note 162, at 72 (capitalization altered).

168. Babich, *supra* note 166, at 11477.

169. *Id.*

170. A 2013 study found that 9.8% of rental units in the U.S. evidenced “severely” or “moderately” inadequate conditions. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, AMERICA’S RENTAL HOUSING EVOLVING MARKETS AND NEEDS 16 (2013), <https://perma.cc/TT6E-6QJQ>. At that time, the United States had at least 43 million households living in rented accommodations. *Id.* at 1.

171. Confidential in-person interview with the author (Jan. 14, 2019).

172. Rhode & Ricca, *supra* note 6, at 2591-92. As Table 3 shows, about a quarter (26%) of jurisdictions reported that a majority of complaints come from consumers. By contrast, Table 4 shows that 42% of jurisdictions reported that a majority of complaints come from lawyers.

about the activities of nonlawyers.<sup>173</sup> At present, this pernicious dynamic prevents activity that would bring to many American communities both access to justice and the collective goods that flow from it, like a healthy environment and safe and healthy housing stock.

#### CONCLUSION

The facts lead in a clear direction. Consumers value and purchase legal services from providers who are not fully qualified attorneys. The legal work produced by nonlawyers can be as good as—and sometimes better than—that of lawyers. The current restrictions on nonlawyer practice are unsupported by evidence about nonlawyer quality or consumer demand. Nor are the current restrictions supportive of access to justice or of communities’ ability to organize around their own interests in our democracy. Millions of people who need help with their justice problems and could benefit from nonlawyer services currently cannot get any help. And groups around the country that seek to mobilize around their rights are hampered by fears of the bar’s attempts to police their activities. The facts are friendly to advocates of expanded roles for nonlawyers.

As is so often the case in the empirical study of civil justice, the evidence base is uneven and composed mostly of case studies of specific populations, services, products, programs, or courts.<sup>174</sup> Nonetheless, the tendency of the body of research is clear: there is demand for legal advice and other services from nonlawyer providers, and such providers can produce services that are as good or better than those of attorneys. If the regulation of the practice of law is to be guided by honest concerns for consumer protection, the evidence shows that there is much more scope for nonlawyers to practice law safely and effectively than is permitted by the current rules.

These facts are also friendly to regulators and other members of the profession who heed Elizabeth Chambliss’s call to “engage in the growing national research conversation about access to justice, and . . . expand [their] commitment to evidence-based” regulation of legal services.<sup>175</sup> A growing evidence base can guide smarter regulation that expands consumer choice and opens up access to justice for millions currently excluded.

Lawyers are sometimes essential to ensuring lawful resolution of justice

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173. *Id.* at 2591.

174. See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class and Gender Inequality*, 34 ANN. REV. SOC. 339, 352 (2008) (reviewing many such studies and arguing that scholars should move away from “single-case case studies”); Rebecca L. Sandefur, *Paying Down the Civil Justice Data Deficit: Leveraging Existing National Data Collection*, 68 S.C. L. REV. 295 (2016) (documenting the lack of reliable and consistently-collected data about civil justice in the U.S. context and offering solutions); Sandefur & Teufel, *supra* note 40, at 3-4.

175. Chambliss, *supra* note 6, at 350.

problems.<sup>176</sup> The point of reviewing the evidence in this paper is to demonstrate that, in fact, they are frequently also *not* essential for this purpose. For people whose legal situations are complex enough to require a fully qualified lawyer's expertise, competent nonlawyer advice service will be second-best to full representation by an attorney. However, it will often be better than navigating a life-changing justice problem with no legal assistance at all, which is the situation many currently confront. At the same time, the research reviewed here shows that nonlawyer legal advice will not only be sufficient for the needs of some individuals—it will be actively preferred.

Nonetheless, expanding the scope of nonlawyer practice is not enough. A just and accessible legal system would include a range of kinds of providers, both traditional lawyers and others. It would also include means for connecting people with services that they need and want and that are appropriate and proportionate to their situations.<sup>177</sup> A more just and accessible system is completely achievable: it requires only the will to change.

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176. For evidence-based approaches to exploring when this is the case, see Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37 (2010) (reviewing studies of the impact of counsel and analyzing factors that make lawyers necessary and unnecessary), and the work of Harvard's D. James Greiner (e.g., D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* 901 (2012) (reporting on a randomized controlled trial of limited legal assistance and showing that this is not always sufficient)); ELLEN DEGNAN ET AL., *TRAPPED IN MARRIAGE* (2018) (reporting on a randomized controlled trial of the need for lawyer representation in divorce proceedings), <https://perma.cc/XY48-KHW6>.

177. See PASCOE PLEASENCE ET AL., *RESHAPING LEGAL SERVICES: BUILDING ON THE EVIDENCE BASE* iii (2014) (reviewing a decade of research evidence and arguing that legal aid services should be targeted to people's needs, linked with other services likely to be needed, timely, and appropriate to the capabilities of those receiving the service); Sandefur, *supra* note 73, at 729 (reviewing a range of evidence in support of the conclusion that legal services delivery to personal clients should be through channels that are timely, targeted to people's needs as they understand them, and via trusted sources); Richard Zorza, *The Access to Justice "Sorting Hat": Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 *DENV. U. L. REV.* 859, 886 (2011) (advocating and offering design principles for an integrated system of triage of a variety of legal services and court processes, because "[w]e will never build either an efficient court system or a 100% access-to-justice system without a triage system").

