11. Legal consciousness and access to justice

Kathryne M. Young

Not long ago, I was approached by a legal aid organization that serves low-income people facing eviction. Like many academic researchers, I am occasionally approached by groups who are troubleshooting a problem and seek a fresh outside perspective. The legal aid organization wanted to know if I thought their intake process was "working for people."

At our first meeting, we introduced ourselves, then had the following dialogue[1]:

KMY: What happens when a person first calls you? Walk me through it.

LAO: First, we ask whether they have received a written notice from a landlord that they are being evicted. If so, we [he summarizes an impressively good process].

KMY: What if they have not received a written notice?

LAO: Then we let them know that if and when they receive one, we can help them.

KMY: What if their landlord has orally said, "I plan to evict you," but hasn't given them anything in writing? Does that ever happen?

LAO: Oh yeah—it happens a lot. We explain there's not much we can do for them because it's not an eviction yet.

KMY: What do you tell them?

LAO: We explain that no eviction process has been legally triggered.

KMY: But the person who calls still has a problem.

LAO: But not technically a legal problem we can help with, if they don't have written notice.

KMY: Presumably if your landlord is saying they'll evict you, something is going on, right? You might be behind in rent, or maybe there's something interpersonal with the landlord…

LAO: There are organizations in [our state] that deal with those other problems. If they ask for those numbers or websites, we can provide them.

KMY: Do you diagnose the kind of housing help someone needs if they call you for help but they aren't being legally evicted?

LAO: No. I mean, people have all kinds of things going on, but those other problems are not really what we do.

In the past several years, I have had numerous similar exchanges with legal aid organizations, access to justice[2] commissions, and public interest attorneys. I leave these conversations filled

[1] Our call was not recorded. This is reproduced from my memory following the call. It was a striking enough example of this phenomenon that I wrote it down immediately, but these are not exact quotes. "KMY" are the author's initials, and "LAO" stands for "Legal Aid Organization".

[2] I use the term "access to justice" to describe work on the gap between the civil legal problems people experience and their ability to achieve just resolutions to them. See Sandefur 2019, p. 49–50. Readers unfamiliar with this literature should know that "access to justice" is a term of art in this scholarly context. An extraordinarily large swath of law and society research is about

with admiration for these lawyers' work, but frustrated with the highly targeted, sometimes quite narrow role of their services in the larger context of their clients' problems (a frustration which, to be sure, many of these attorneys themselves share). Much as I admire their work, I cannot help but imagine the tens of thousands of people who have reached out to these organizations for assistance, not gotten it, and concluded that attorneys are unhelpful, that their problem is "not that bad," or that they were foolish to ask for help at all.

Most legal aid attorneys are well aware that their services are "siloed," but at the same time, their organizations are overwhelmed, understaffed, and underfunded. They might like to help with a wider variety of legal problems or take a more holistic approach, but their resources, and often their funding mandates, are so constrained that they can't even provide service for everyone who seeks help with the narrow set of problems in which they specialize. Some organizations provide referrals to other sources of help, although I know of very few that follow up to see whether prospective clients pursue these resources.

From a client's perspective, the market for one-off civil legal services is set up much like the market for anything else: they need to find an appropriate product at an appropriate price. This would be a perfectly reasonable system if finding the right legal help for a civil justice problem were similar to, say, shopping for fruit. But it is not.

WHY SHOPPING FOR CIVIL JUSTICE SERVICES IS DISSIMILAR TO SHOPPING FOR FRUIT

If someone goes to the grocery store in need of bananas so they can make banana bread, and the grocer has no bananas, the person will call around, ask a friend, or visit a different market. Most people have bought fruit before; their friends and family have also bought fruit. They have a decent working knowledge of fruit sales in their area, and this working knowledge gives them a sense of agency when it comes to pursuing a recipe's ingredients.

But if shopping for fruit were like finding help for a civil justice problem, it would look more like the following: a person knows they need to make banana bread, but does not know which stores carry bananas, nor whether bananas are $1 or $100 each, nor how many varieties of bananas exist. They Google "where to get bananas" and are presented with ads for free and low-cost fruit providers, but some of them look like scams. The person knows they should probably just go to a grocery store and ask questions, but it is difficult to know where to start—they have never been to a grocery store, have heard grocers are unpleasant, and suspect they could be billed if they ask questions about the recipe. Finally, they call a grocery store. The person who answers says *that* particular store only sells grapefruit, but that they think it might be better to make banana crème pie instead.

It is easy to see how someone might be deterred from fruit shopping. It has already proven confusing, the grocer was little help, and perhaps it is simpler to become accustomed to the absence of bananas. On a large scale, we might imagine that American diets would evolve in ways that accommodate and normalize a paucity of fruit. And this is precisely what has happened with civil legal help: Americans have become accustomed to not having very much of it.

"access to justice" in a much more literal sense; this is not how I use the term here. I am grateful to Anne Bloom for suggesting this clarification.

In the United States, most civil legal needs go unmet. In the face of a civil justice problem, one common reaction is to do nothing (Engel 2016; Sandefur 2007; see also, e.g., Abrego 2011; Engel 2012; Gallagher & Wang 2011; Genn 1999; Levine & Preston 1970; Merry 1990; Miller & Sarat 1980). Comparative work underscores the problem's acuteness. On the measure, "People can access and afford civil justice," the World Justice Project ranks the U.S. at number 115 out of 142 countries. Compared to countries with a similar income level, the U.S. ranks number 46 out of 46 (World Justice Project 2023). The problem is particularly acute for low-income Americans, for whom more than *nine out of ten* civil justice problems go unresolved (LSC 2022). Although seeking help for one's civil legal problems may not seem like a major obstacle, it emphatically is.

A system that assumes people are informed consumers with a robust sense of entitlement to assistance with legal problems—that is, a system that treats people's need for legal services like their need for a familiar and affordable product—fundamentally misapprehends the way people think about their legal problems and potential solutions. These misapprehensions miss important opportunities to help people with civil justice problems, as well as with associated problems, legal and nonlegal. The most effective provision of civil justice services would conceptualize and create interventions from the perspective of the people who need them,[3] not from the perspective of lawyers or other service providers.

This chapter details the mismatch between ordinary people's experiences and the (sometimes implicit, sometimes explicit) law- and lawyer-centric conceptualization of civil justice problems that looms large in the access to justice literature. I propose that investigating civil justice problems through the lens of legal consciousness offers a more expansive approach for understanding access to justice—one that can drive research forward and make civil justice services truly people-centered. I explain how the incorporation of legal consciousness could advance access to justice research, and the difference this shift could make to investigating and solving the U.S. civil justice crisis.

JUSTICIABLE PROBLEMS AND LEGAL NEEDS

Law professors teach students to parse justiciable problems from non-justiciable ones. We fill hypotheticals with red herrings irrelevant to the legal issues we want students to spot; the best answers ignore matters about which the law has little or nothing to say. We are fond of blending and layering issues to encourage precision in legal thinking. Students are trained to dissect these layers with surgical exactitude. Law school teaches them to parse legally actionable problems from problems that are merely irritating or unfortunate. Developing the ability to focus monomaniacally on legal issues—to adopt a "legal gaze" (Taylor Poppe 2021)—is a core part of what it means to "think like a lawyer." Although legal education has begun to focus on broader skill sets (e.g., Curtis 2008; Garrett et al. 2022; Lawton et al. 2022; Tsaoussi 2020), it is still a lawyer's job to know what *law* can do for a client.

[3] This argument is related to the work on critical lawyering, which—among other tenets—emphasizes litigating cases in ways that center clients' perspectives and the larger social context within which clients find themselves. See, e.g., Trubek 1991.

A few decades ago, access to justice scholarship was primarily centered on access to lawyers. But thanks to the work of Hazel Genn, Rebecca Sandefur, and many others,[4] this is no longer so. Contemporary access to justice scholarship generally recognizes that it is not possible (perhaps not even preferable) to match a lawyer to every justiciable problem (Genn 1999; Sandefur 2010; Sandefur 2019). This realization has spawned creative interventions that focus on "justice workers" or other non-lawyer legal advocates (e.g., Hurder 1999; Sandefur 2020), regulatory reform of the legal profession (e.g., Rhode & Ricca 2014; Hadfield & Rhode 2016; Steinberg et al. 2021: 1321; Sudeall 2022), self-help technologies (e.g., Fischer 2000; Lupica et al. 2017), and other means of solving legal problems creatively and often without lawyers (e.g., Hagan 2019; Cannon 2023).

Access to justice researchers often use the terms "legal needs" and "justiciable problems" (Sandefur & Teufel 2021). These terms represent similar, but not identical, ideas. A justiciable problem is legally cognizable. The Oxford English Dictionary definition of "justiciable" is "*capable* of being determined by a court of law" (emphasis added). A problem can be justiciable whether or not its resolution requires formal legal processes. For example, a person who suffers religious discrimination on the job might receive a suitable remedy by suing their workplace, but alternatively, might receive a suitable remedy by speaking with human resources. A legal *need*, on the other hand, is a justiciable problem that cannot be solved without using law or formal legal processes (Sandefur & Teufel 2021). For example, if someone no longer wishes to be married to another person, they must engage in a legal process to formally dissolve the marriage. Without a divorce, the legal category of marriage will generally still apply, along with consequences related to taxes, property, and various marital privileges.

Studies of legal needs and justiciable problems are a cornerstone of the research on access to civil justice. They build on the key insight that most people's biggest barrier to hiring a lawyer is not money (Kritzer 2010: 256–57); it is because most people do not think about their legal problems as legal in nature (Pleasance et al. 2011; Sandefur 2014).[5] Since only a small sliver of legal problems make it to courts or lawyers (see, e.g., Engel & Munger 1996; Engel & Munger 2003; Felstiner et al. 1980/81), empirical studies of legal needs and justiciable problems are useful because they reveal a broader swath of the world's legal problems than courts and lawyers ever see, and tell us something about who experiences them, shedding light on the "iceberg" of civil justice activity (Sandefur 2019: 50).

Typically, legal needs studies survey ordinary people[6] to find out whether they are experiencing, or have recently experienced, common problems that lawyers would agree are legally cognizable, but which laypeople may not identify as legal (e.g., Sandefur 2014; Legal Services Corporation 2017; Pew 2019; IAALS 2021). These studies reveal the ubiquity of justiciable problems in U.S. life and show that these problems are especially prominent in the lives

[4] And, of course, decentering lawyers in the study of law and legal processes is a longstanding research tradition in the broader field of law and society.

[5] The cited works are among the few to empirically connect the insight that people do not see their problems as legal to the *reasons* they do not seek formal legal help. For examples of the broader work on the manifold non-legal lenses through which people understand their legal problems, see Engel 1984; Engel 2016; Franks 2018; Wada 2018.

[6] Here, I use the term "ordinary people" to describe people who face civil justice problems. It is more precise than "laypeople," since attorneys, too, face civil justice problems. "Everyday people" is sometimes used in this literature as well.

of low-income Americans, Americans of color (Sandefur 2014; Legal Services Corporation 2017; Pew 2019; IAALS 2021), and people with intersectional (Crenshaw 1989; Crenshaw 1990) combinations of other characteristics, such as queerness, rurality, physical disability, and experiences of trauma (Young & Billings 2023).

Investigations of justiciable problems and legal needs rest on formal legal distinctions between legal cognizability and noncognizability. That is, the access to justice literature tends to be concerned with situations about which law *could* be used to solve a problem: for example, entitling someone to a remedy (e.g., recovering monetary damages or compelling someone else to cease a behavior) or enabling them to change a legal status (e.g., taking ownership of a business or changing their name). But if the law has nothing definite to say about a problem, or cannot be used to solve it, the work on justiciable problems and legal needs typically excludes it. On one hand, this exclusion is perfectly intuitive; on the other, it relies on formal law to delimit the field. That is, despite the strides access to justice researchers have made in de-centering lawyers as the ideal means of solving legal problems, access to justice research consistently centers *law* in conceptualizing the universe with which it is concerned. Even its broadest empirical construct—justiciable problems—relies on formal law because it hinges on legal cognizability.

Particularly for readers with legal training, this focus on formal law may seem natural, even axiomatic. After all, lawyers are not social workers or doctors or financial advisors. As the eviction attorney whose conversation I recounted at the start of this chapter said, "People have all kinds of things going on." No doubt, he is right. Not every family dispute, medical issue, or debt owed is an "access to justice" problem. And if we do *not* center law, defining "access to justice" becomes a complicated endeavor. How would we do it?

The question is partly philosophical (What is "justice" and who gets to define it?), partly empirical (What have we agreed, as a field, is the subject of our study?), and partly practical (If we do not use some version of justiciability or legal need to delimit our field, then couldn't almost *anything* constitute "access to justice?"). Nonetheless, it is useful to think about when and how de-centering law might enhance or enrich our conceptualization of civil justice as it is experienced in the lives of ordinary people. When it comes to thinking about civil justice equity writ large, are there some boundaries we have drawn too narrowly, artificially limiting the questions we ask, the studies we do, and the interventions we propose? Would access to justice look different as a field if we sometimes put justiciability and formal law aside and examined problems from the perspective of the people experiencing them?

This chapter asks what the field of access to justice would look like if we used legal consciousness to think about civil justice more systematically from the perspective of ordinary people. In the two sections that follow, I explain why this perspective is useful and how it would differ from existing approaches. Then I spend the remainder of this chapter detailing how this research agenda might unfold, and how it could advance the field of access to justice.

ACCESS TO JUSTICE FROM THE PERSPECTIVE OF ORDINARY PEOPLE

Most people do not go to law school. They are not trained to identify the point at which a problem becomes legally cognizable. As they see and experience the world, their problem is simply a *problem*. Although the threshold of legal cognizability—like written notice for an

eviction—may be glaringly relevant to a lawyer,[7] it is often no more significant to a layperson than any other aspect of a problem. One way into helping people with their civil justice problems is understanding those problems, from the ground up, from a layperson's perspective.

The law and society literature offers a useful framework. Legal consciousness is inherently person-centered and inherently relational. It explores the social processes that underlie attitudes, beliefs, and experiences about law and legal processes (see Silbey 2001: 8626). It has been defined in a number of ways since the term's inception in the 1970s (Engel 1998) and grew out of multiple literatures within law and society, coalescing around questions about how the human "consciousness" of the law is created, and collectively and individually constructed (Engel 1998: 112–13).

Instead of investigating legal issues from a formal legal perspective, legal consciousness looks at people's "commonsense understanding" of law and legal processes (Nielsen 2004: 7). It includes the study of formal legal matters, the formation of lay beliefs about the law, people's willingness or unwillingness to pursue remedies and legal processes, the intersection of social characteristics and human relationships to law, and other questions that are related to legal matters but are not necessarily, themselves, legal matters. Drawing on traditions of legal pluralism, classic work on disputing, and other foundational literatures at the intersection of law and social science, legal consciousness has long recognized that "law" can be defined in any number of ways, as both formal and informal means of social ordering (Silbey 2001). This line of work de-centers lawyers, courts, and formal law, instead foregrounding the social mechanisms that underlie the production of ordinary people's beliefs and experiences about law (see, e.g., Engel 1998; Engel 2012; Ewick and Silbey 1998; McCann 2006; McCann 2012; McCann and March 1995; Silbey 2005).

Legal consciousness is not only an apt substantive match for people-centered access to justice research, but it also provides theoretical scaffolding to drive the research forward in new, concrete ways.

For example, consider an evaluation designed to assess the effectiveness of a (fictional) start-up called "Splitz." Splitz's goal is to facilitate amicable divorces for low- and middle-income people in the three states where Splitz is permitted to operate. Splitz uses a phone app to match potential users with non-lawyer advocates in their state to help them file their paperwork in divorce proceedings. The app is free to download and contains some basic information; then, Splitz charges $40 per hour for phone and chat sessions with a licensed, Splitz-affiliated non-lawyer legal practitioner.

Evaluating the "effectiveness" of Splitz through the lens of justiciability would compel certain questions. For example, are the non-lawyer advocates as effective as lawyers in reaching a lawful result? What proportion of users achieve their desired goal? These questions would help evaluate whether Splitz is as effective as a lawyer in achieving resolution for a legal problem. Researchers with business goals in mind might also evaluate Splitz from the perspective of consumer satisfaction, asking whether people found the app easy to navigate, whether they would recommend Splitz to a friend, whether the $40/hour rate seemed fair, and so on.

[7] As relevant as legal cognizability may be, the question of cognizability is, of course, frequently indeterminate and contestable. Just as a given layperson may or may not think of a problem as legal, a given lawyer may or may not believe that a particular problem is cognizable and may or may not believe a judge would view the problem as amenable to a legal solution. I am grateful to David Engel for helping to clarify this point.

Sometimes law-centered and business-centered questions are the only questions a researcher cares about. But a legal consciousness approach to evaluating the effectiveness of Splitz would—in addition to raising the questions above—compel additional questions relevant to access to justice more holistically. For example, a legal consciousness perspective would lead a researcher to ask:

- How does the problem evolve from a client's perspective? For example, at what point in a marriage's dissolution do people seek out Splitz? What did they try first?
- How effective is Splitz for different populations? For example: Do people of all races, genders, sexual orientations, and income levels have similar experiences of Splitz? Do they all use the app the same way?
- Who *doesn't* use the intervention? For example: Who could benefit from Splitz but is not using it? Are non-users avoiding formal legal resolution altogether, or is Splitz helping some people resolve a problem that would otherwise go unsolved?
- How does the intervention fit into the broader context of a person's life? For example: what other emergent legal problems do people tend to have when they seek out Splitz? Are Splitz users more likely to use technology to solve problems in the future? Do they feel a greater sense of agency? In what contexts?

Certainly, someone coming from a law-centric perspective *could* ask these questions. But legal consciousness is useful because it provides a systemic and intercontextual means of grounding the evaluation and assessment of access to justice interventions within the lives of the people they are designed to help. Understanding access to justice through the lens of legal consciousness contextualizes formal law *within* the relationships, events, perspectives, cultural beliefs, and social mechanisms via which a person's life is ordered.

LEGAL EMPOWERMENT: A KEY PIECE OF THE PUZZLE

One term that begins to get at the idea of centering ordinary people in achieving equitable civil justice outcomes is "legal empowerment." Increasingly part of the access to justice lexicon, legal empowerment has particularly gained traction in the legal tech and innovation worlds and proven a compelling framework in the global development space, urging governments to think about the tools through which citizens access legal processes (e.g., Brown 2015; Gisselquist 2018).

Although defined inconsistently in the literature (see, e.g., Golub 2010: 10–11; Gramatikov and Porter 2011; Domingo and O'Neil 2014: 4; Joshi et al. 2022: 138), "legal empowerment" typically means something akin to "the ability of people to engage in law-related processes" (Goodwin and Maru 2017) or the ability of people to know, use, and shape their legal rights (Dhital and Walton 2020: 582; Open Society Foundations 2021: 5). As the name suggests, it focuses on giving people the power to use what is already rightfully *theirs*: law and the legal system. Especially when it is coupled with participatory design, legal empowerment is an extremely promising approach to civil justice design (for several concrete applications see, e.g., Open Society Foundations 2021). Its key contribution lies in its recognition of a democratic political ideal: placing the law's power in the hands of the people the law is supposed to

serve. At the same time, it is important to realize that legal empowerment is not itself *coextensive* with access to justice (see also, e.g., Joshi et al. 2022: 54–55). My reasons for extending this caution are twofold.

First, giving people *power* suggests that they are being equipped to do something: to take the reins, to know their rights, to solve their own problems. These capabilities are important and good. However, access to justice approaches that treat legal empowerment as either a prerequisite for just solutions or as the sole end goal, as opposed to one means of achieving it, also risk putting the onus for action on people who, in an immediate sense, are disempowered and need help. Requiring people to navigate systems—even user-friendly systems with minimal administrative burden—relies on the idea that users will have some amount of cultural capital. As the sociological literature demonstrates, cultural capital shapes people's actions in all manner of self-help situations, such as parents' ability to advocate for their children's needs (Lareau 1987; 2002), students' help-seeking from teachers (Calarco 2011; Jack 2016), people's assertion of rights in police-citizen encounters (Young & Billings 2020), and patients' interactions with health care providers (Shim 2010). On one hand, legal empowerment may be a way to grow or unlock this important kind of cultural capital. On the other, thinking about access to justice solely in terms of empowering people risks conceiving of solutions to civil legal problems in ways that require ordinary people to have a sense of entitlement and personal agency that has been tamped down over the course of their lives (see Domingo and O'Neil 2014: 10–11; see also Engel 2016 for a discussion of the reasons people "lump" problems). To date, the legal empowerment literature has not grappled with how to cultivate that enduring sense of agency. As I discuss later in this chapter, empirical examination of these questions is an important area for future research.

Second, and relatedly, if we understand legal empowerment as coextensive with access to justice, we risk defining access to justice in a way that overlooks system-level approaches, such as organizational or institutional changes that could create access to justice by enabling just results without empowering the beneficiaries of the results to *do* anything. One illustrative example is tax filing. Pursuing legal empowerment, we might build a free tech tool to assist people in filing taxes. The tool would answer questions and present forms in lay language. It would empower people to file their taxes by making it easier for them to engage in the law-laden process of figuring out how much money they owe. Thus, it would create greater access to justice. But on the other hand, consider a different approach: in some countries, the government simply calculates the tax people owe and sends them a bill. As U.S. experiments have also shown, using these "ready returns" decreases the rate of nonpayment, error, confusion, and administrative burden (see, e.g., Bankman 2008; Bankman et al. 2016). Arguably, this latter approach is inconsistent with a typical legal empowerment approach. Filling out people's taxes for them minimizes their engagement, as opposed to giving them tools to understand, use, or shape the legal process of tax filing. However, it *is* a form of access to justice because it creates a just result for more people (see Herd et al. 2023). It does so by understanding and solving a legal problem from the perspective of ordinary people, since most people would rather pay a bill than assemble and send in forms.

Legal empowerment is an important framework for thinking about access to justice because it is inherently democratizing. It focuses on putting the law in the hands of the people the law is supposed to serve, instead of a top-down autocratic approach that claims to know what people need and deliver it to them efficiently, ultimately eroding democratic values and undermining independent judicial systems (Satterthwaite et al. 2024). But thinking of legal empowerment

as the access to justice "endgame" risks embedding limitations that could foreclose other kinds of solutions. As the tax example illustrates, making it easier for people to know, use, and shape the law is not always the only way to achieve just outcomes. To learn how to create a civil justice system that centers the people it is supposed to serve, access to justice research needs to center the overarching project of understanding the way ordinary people see the world, and building solutions grounded in that perspective.

A LEGAL CONSCIOUSNESS APPROACH TO ACCESS TO JUSTICE

At its heart, the field of access to justice is a robust investigation of the pervasiveness of civil justice problems and the ways they perpetuate material inequality and make people's lives harder. The civil justice system that is supposed to help people solve these problems has proven inadequate for, and largely inaccessible to, the people it is supposed to help. Research on legal needs and the prevalence of justiciable problems reveals a massive justice gap that amplifies existing patterns of social inequality. A key goal of access to justice research has been to understand the justice gap's manifestation and think about how to solve it, with or without lawyers. It wants to know what *works*. As a field, access to justice has not generally been concerned with theoretical development.

Legal consciousness has been, at *its* heart, a theoretical literature about the relationship between law and people: the way people, relationally and individually, experience and interpret law as they engage, avoid, or resist law and legal meanings (see, e.g., Engel 1998; Ewick and Silbey 1998; Silbey 2001; McCann 1994; McCann and March 1995; Merry 1990; Podgorecki 1977; Trubek 1984)[8]. It includes people's thoughts and attitudes about law, willingness to use law, and experiences of law in civil and criminal contexts (Young 2014: 501). One major project of legal consciousness research has been to understand the social processes that create and sustain legal hegemony, state power, and the gulf between the law on the books and the law in action (McCann 1994; Silbey 2005). As a field, legal consciousness has not generally been concerned with concrete policy proposals or legal interventions.

Bringing together legal consciousness and access to justice can synergistically deepen our understanding of the justice landscape in the U.S.A. The combination offers a powerful set of theoretical and empirical tools to investigate why and how so many Americans live their lives

[8] Here, I want to acknowledge two possible objections from readers. First, legal consciousness is defined in different ways by different scholars. My characterization is not intended to elevate some definitions over others, but to convey their common core. Second, many other terms have emerged to describe how people think about and relate to law, including "legal alienation" (Gargarella 2003), "legal cynicism" (Sampson and Bartusch 1998), and "legal estrangement" (Bell 2017). My conception of legal consciousness is such that legal alienation, cynicism, estrangement, and the like can be usefully understood as subcategories or varieties of legal consciousness, as opposed to discrete theoretical constructs. It is not the project of this chapter to make that argument, but I want to make it clear that when I talk about "legal consciousness," my conception includes these other lines of research; I am referring broadly to the ways people think about, experience, understand, and engage with the law and legal processes, formal and informal, individually and collectively, relationally and in isolation, and in civil and criminal contexts.

under the constant burden of civil justice problems—and to create new research and policy approaches to improve people's lives by relieving this burden.

The remainder of this chapter explains what could be gained by this framework. What would a legal-consciousness-infused access to justice research agenda look like? How would it differ from current approaches? What could it teach us about understanding and shrinking the justice gap? In the sections that follow, I sketch four research agendas that could stem from the union I propose. All have the potential to create theoretical scaffolding for the field of access to justice and to open new avenues for on-the-ground justice solutions.

(1) Solving Civil Justice Problems at Earlier Stages

A chief limitation of the justiciability and legal needs approaches is that defining civil justice problems from a law-centric perspective omits *emergent legal problems*: legal problems that are still "below the surface" and have not yet become cognizable.[9] If we think of the activity that lawyers and judges see as the tip of the civil justice iceberg (Sandefur 2019), and justiciable problems and legal needs as somewhere around the lower middle, then emergent legal problems are at the iceberg's base, perhaps even below the water's surface. These problems may or may not become legally cognizable, or their legal cognizability may be uncertain.

Emergent legal problems of this ilk include, for example: a neighbor becomes increasingly loud and disrespectful; an employer promises that missing overtime pay will appear in the next paycheck; a benefits applicant believes they meet the requisite criteria, but benefits are denied. In most jurisdictions, none of these problems is clearly justiciable. But for a person who experiences them, the problem may be acute. It may cause or worsen other problems, erode well-being, contribute to mental or physical ailments, prevent them from paying for basic necessities, and strain personal or professional relationships—all essentially the same way a full-blown justiciable problem would. As the examples also illustrate, emergent legal problems implicate subject matter with which access to justice researchers are frequently concerned, such as housing, employment, and government benefits.

Yet, few emergent legal problems show up in traditional studies of legal needs or justiciable problems. Indeed, despite their relevance to core access to justice issues, these problems don't necessarily fit into the extant access to justice literature at all. Conceptually, it is unclear what they are considered a case *of*. We know little about their frequency or distribution, little about their likelihood of developing into acute legal needs, and little about which groups of people use which strategies for help-seeking (see Young 2024).

Systematic empirical research about emergent legal problems can create a knowledge base from which to design civil justice interventions at an "upstream" stage—interventions that prevent or interrupt legally cognizable issues earlier, rather than reacting to them after they are already acute. It could help us understand which emergent problems are most likely to become severe, and to identify the points past which a problem is unlikely to recede on its

[9] The tradition of thinking about legal problems at emergent stages is a long one in law and society, most centrally the "disputing pyramid." As Calavita and Jenness write, "An extensive scholarship examines the processes through which people come to recognize a circumstance they confront as a problem, assign responsibility or blame for that circumstance, and lodge a grievance or mobilize action over it" (2013). See, e.g., Albiston 1999; Coates and Penrod 1980–81; Edelman et al. 1993; Felstiner et al. 1980–81; Merry 1979; Nielsen 2004; Sarat 1990; Yngvesson 1976.

own. It could allow us to identify situations where people resist using particular resources and to understand the amount of time and money people will spend at which stages of a problem.[10]

This knowledge would be useful for creating new interventions and refining existing ones. One obvious example is regulatory reform for the provision of legal advice—a prerequisite to many access to justice initiatives—which several states are experimenting with (Murphy 2021; Siegel 2021). As regulatory reform spreads, a base of empirical knowledge about emergent civil justice problems would allow states, local agencies, and other organizations and institutions to make proactive decisions instead of relying on assessments of the handful of existing programs in locations whose needs and demographics may not mirror their own.

(2) Learning When and Where to Situate Help

Access to justice research would also be enhanced by a systematic and detailed understanding of how different problems are related to one another, and when, in both a causal and a correlative sense. Legal consciousness can fuel the consideration of problems' interrelationships by compelling a holistic conception of "legal problem" from the point of view of people who experience the problem. This is useful because it allows us to investigate how people's conception of a problem maps onto formal legal understandings.

Consider, for example, someone who rents an apartment with poorly functioning heat, who cannot regularly pay the rent on time, and who is having interpersonal conflicts with a noisy neighbor. Though all related to housing, these problems are also discrete legal needs that might be remedied through different means of civil legal assistance. But for the person experiencing the problem, they may all seem like *one* problem—e.g., "I have a lousy landlord." Conversely, a person whose landlord is simply rude or abrupt might describe the problem the same way: "I have a lousy landlord." Although the second person's problem likely has no legal recourse, these two people may label their problems identically. Understanding the range of problems people describe in a particular way, and the range of language they use to express these problems, can help us understand how to communicate with people about the problems they encounter. It can help us frame our questions, create help tools, design studies, and advertise justice interventions more effectively.

(3) Discovering Empirical Relationships Between Legal Problems

Understanding which problems tend to co-occur can point to legal and non-legal interventions where help could be embedded. For example, we might imagine that difficulty enrolling a child in school (often encountered by non-parent primary caregivers, such as grandparents) could be associated with difficulty claiming, redirecting, or collecting child support. Yet, the caregiver in question may not know whether they are entitled to any child support. If this turns out to be true, including information about child support at the point of school enrollment might be a useful intervention. Alternatively, it could turn out that most non-parent caregivers already know about the caregiving benefits to which they are entitled. If so, the proposed

[10] A related question stemming from the investigation of emergent legal problems is one with which access to justice scholars already engage: at what stage in a problem's development, regardless of its justiciability at that stage, would a lawyer be helpful (see Brito 2019: 60)?

intervention would waste time and money. But without understanding a problem from the perspective of the person experiencing it, it is difficult to know which interventions would be most helpful, and when.

Extant work provides several models of co-locational legal services. One example is domestic violence clinics that address client needs holistically. Realizing that survivors of interpersonal violence often face instability related to housing, employment, and financial security, some clinics are expanding the palette of issues they address, helping clients with multiple types of legal challenges even after they are safe from immediate danger of violence (Balser et al. 2023). Other powerful examples of co-locational services include medical-legal partnerships (Cannon 2023) and veterans' services. We might imagine many more, from food trucks to laundromats to nail salons.

Understanding access to justice through the lens of legal consciousness can also help us think through the relationship between the civil and criminal justice systems. Although lawyers, legal scholars, and to some extent social scientists tend to think about the civil and criminal legal systems as separate, in the minds of ordinary people, the separation is much less clear (Sternberg Greene 2016). Work on fines and fees (e.g., Harris 2016; Martin et al. 2018), the "child welfare" or "family policing" system (Roberts 2022; Baughman et al. 2021), and other contexts makes clear that considering the criminal and civil justice systems in isolation misses the powerful ways these systems work together to entrench inequality. Yet, we tend to separate these systems in theory and practice (Young et al. 2024). A public defender may not be able to advise a client about the employment consequences of a guilty plea. A lawyer who specializes in rent arrears may not be able to tell a client whether it is a crime to house a relative who is wanted for a misdemeanor. These boundaries may seem natural to lawyers, but they are non-intuitive and confusing for laypeople.[11] Knowing more about where people encounter confusion can help us create better solutions for problems that sit at the interstices of legal systems and help us think about how to relieve people of the tremendous burden of navigating multiple systems to solve what they understand as a single problem.

(4) Creating the Theoretical Tools to Build a Larger Base of Empirical Knowledge

It has long been the project of civil legal needs research to map *who* experiences which legal problems, but rarely to map *how* different people think about their problems. Creating theoretical tools and building a more robust knowledge base is critical to the long-term advancement of the field. This, perhaps, is where legal consciousness holds the greatest potential for access to justice.

Legal consciousness has spent decades grappling with questions related to social sources of variation in how people think about law. For example, why do working-class people take things to court and how do they understand the processes when they get there (Merry 1990)? How do poor people on welfare think about legal power (Sarat 1990)? How do queer people's interactions with social institutions shape their relationship to law (Hull 2016)? How does the way people think about rights shape the way they think about and pursue resolution of a

[11] A parallel phenomenon that vexes laypeople is mandated information-sharing between criminal and civil justice institutions, which people may be unaware of, and which can have severe consequences for families and individuals (Presler 2021; Harvey et al. 2021).

problem (Engel and Munger 1996)? Legal consciousness approaches offer templates for thinking about how social factors affect people's interpretations of, or responses to, civil justice problems—and in turn, how these patterns might map onto the justice gap. It can help identify mechanisms through which characteristics such as race or resources such as cultural capital affect access to justice by shaping how people interpret legal problems and approach the civil justice system, and to explain how these patterns, in turn, reproduce legal inequalities and reinforce legal hegemony (see Young & Billings 2020).

At its core, the justice gap is a product of legal hegemony. People may have all manner of rights or entitlements on the books, but the inadequate and unequal realization of these rights is maintained via a collection of social mechanisms and material disparities, from administrative burden and institutionalized racism to dense legal prose and inadequate public transportation. To get our collective minds around the myriad ways the justice gap is entrenched, we need to understand the social processes through which it is maintained.

The approach brings several decades' worth of theoretical scaffolding to support the continued investigation of the justice gap. The justice gap is deep, intersectional, and variegated. Knowing when civil justice remains out of reach, for which groups, and—crucially—*why* this is so—is central to creating interventions that meet ordinary people where they already are. It offers theoretical tools for thinking about access to justice, raising questions such as: which community partnerships are useful for solving which problems? What partnerships will work in which places? Why might an intervention that works on the Acoma Reservation in New Mexico not work in Queens, New York? How can we get better at predicting these outcomes? How should we think about importing a successful justice workers' program in Alaska to Mississippi? Although we know that people tend not to think of their civil justice problems as legal, we know much less about how they *do* think of them. Research at the intersection of legal consciousness and access to justice can ground solutions that resonate with groups' experiences and worldview, and are tailored to the way they perceive and interact with law.

Legal empowerment is an important democratizing lens through which to understand access to justice. Here, too, legal consciousness can help answer important questions. Specifically, when is it more effective to empower people to know, use, and shape the law, and when is it more effective to create structural interventions that solve people's problems for them (the "tax bill" approach)? How enduring are the effects of legal empowerment over time and substance? Is a person who keeps her home thanks to an eviction clinic more likely to stand up to a boss who shorts her paycheck? Via what mechanisms? Are there best practices for helping people in ways that increase long-term legal empowerment and spur people to help others in their community? Research has not yet answered these central empirical questions about legal empowerment, and researchers can build on legal consciousness approaches to maximize legal empowerment's democratizing potential and decide where, when, and how it can effect the most change. These wider-lens questions are critical to thinking about the relationship between access to justice and other forms of social equality.

CONCLUSION: BUILDING STRONG EMPIRICAL GROUNDING FOR THE FUTURE OF ACCESS TO JUSTICE

Access to justice cares about *what works*. This appetite for innovation is a major strength of the field. As access to justice scholarship grows, it could be strengthened by incorporating legal

consciousness into its perspective, assumptions, and research agenda. Without systemic theoretical grounding in the way people experience legal problems, the research field of access to civil justice risks becoming a collection of innovations, pilot programs, and evaluative frameworks that are exciting and make intuitive short-term sense to the people who are already doing this work, but which may not be strong enough to withstand deepening inequalities in America, to sustain new generations of research in the field of law and society, or to solve new access to justice challenges.

Legal consciousness brings diverse empirical approaches, theoretical constructs, and an unwavering focus on ordinary people's experiences of law and legality. Infusing access to justice research with this perspective will allow us to create a more people-centered, systemic, and theoretically cohesive understanding of *how* and *why* interventions work—and what access to civil justice means for the everyday lives of ordinary people. For the access to justice movement to realize its potential and sustain its impact, we need solutions that grow from, and resonate with, the way ordinary people understand and experience the world.

BIOGRAPHY AND ACKNOWLEDGEMENTS

Kathryne M. Young is Professor of Law at George Washington University Law School, Associate Professor (by courtesy) in the Sociology Department at George Washington University, and an affiliated faculty member at the American Bar Foundation, where she was formerly an Access to Justice Faculty Scholar. She can be reached at k.young@law.gwu.edu.

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