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Assessing Access to Justice: How Much “Legal” Do People Need and How Can We Know?

Hugh McDonald

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Assessing Access to Justice: How Much “Legal” Do People Need and How Can We Know?

Hugh McDonald*

As access to justice strategies evolve and expand, with user-centric, multifaceted, and more holistic approaches that seek to better match legal need and capability, and as the justice system sits on the cusp of digital transformation, empirical methods and measures that mirror evolving strategies are vital. Evolved empirical methods and measures are needed to not only assess access to justice, but also to learn “what works” to meet diverse legal need and capability across the community. Better, more effective, and cost-efficient access to justice appears to rest, at least in part, on improved ability to monitor diverse legal need and capability across the community: from differential legal need to differential justice system use and outcomes. In particular, how much “legal” do different people need to enjoy access to justice? If the justice system is intended to do justice, there is relatively thin user-centric evidence demonstrating how much “legal” is enough.

Improved measures of legal need and capability, and of justice system outcomes, will not only help assess access to justice, but design of user-centric legal assistance and justice system processes.

This Article draws on several access to justice challenges and considers three sources of empirical evidence of individual access to justice and legal need—access to justice and legal needs surveys, justice system administrative data and evaluative research efforts—to examine how empirical legal studies can throw new light on important access to justice questions. Without improved ability to monitor and measure legal need, capability and outcomes, ability to assess access to justice, user-centric policy reforms, and learn “what works” to effectively and efficiently meet that legal need is likely to remain stunted.

How much legal do people need to meet legal needs and enjoy access to justice? And how can we know?

* Principal Researcher, Victoria Law Foundation. Thanks very much to colleagues at the Law and Justice Foundation of New South Wales, Victoria Law Foundation, and the participants of the University of California, Irvine School of Law and Civil Justice Research Initiative conference Thinking About Law & Accessing Civil Justice: Legal Consciousness, Dispute Processing, and Civil Legal Needs Today (2020). Thanks especially to Emily Taylor Poppe for discussion of initial ideas and Dalíé Jiménez for discussant comments on a draft paper. This Article benefited tremendously from the excellent editing and suggestions of Patrick Randall and the other editors of the *UC Irvine Law Review*.

Learning “what works” to build foundational legal capability and effective pathways to justice are critical to the design of effective and efficient justice systems that mirror community legal needs and problem-solving behavior. The shift to a user-centric, bottom-up, multifaceted, and holistic approach to access to justice, to better cater to diverse legal need and capability, requires a commensurate user-centric shift in assessing access to justice.

Introduction	696
A. Legal Consciousness	696
B. Characterization and Legal Needs	698
C. User-Centric Justice.....	699
D. User-Centric Access to Justice Reform and Assessment	700
E. Overview.....	701
I. Legal Capability.....	701
A. Legal Capability Defined.....	702
B. Knowledge, Skill, Psychological, and Resource Dimensions	704
C. Legal Capability Frameworks.....	705
II. Access to Justice Trends and Challenges.....	706
A. Access to Justice Trends.....	706
1. Access to Justice: From Narrow to Broad Conception.....	706
2. User-Centric Service and System Design.....	708
3. Shift from “Top-down” to “Bottom-up” Strategies.....	709
4. Features of Multifaceted, More Holistic Approaches to Access to Justice	711
B. Digital Transformation of the Justice System.....	711
1. Private Legal Services Market.....	712
2. Public Legal Assistance Services and Other Justice Institutions	714
3. Transformation of Bottom-up Access to Justice.....	715
C. Access to Justice Challenges	716
1. Demand for Public Legal Assistance Outstrips Supply.....	716
2. Heightened Legal and Related Needs Linked to Higher Socioeconomic Disadvantage	717
3. Legal Capability Is Linked to Socioeconomic Disadvantage	719
4. Growing “Justice Gap” and “Missing Middle”.....	720
5. Unbundled Public Legal Assistance.....	721
6. Legal Capability Limits of Unbundled Legal Services	722
7. Triage to an Appropriate Service Channel	724
8. Cusp of Digital Transformation.....	725
9. Entrenched Legal Problem-Solving Behavior.....	727
10. Capturing Complexity and Nuance of Legal Need	728
III. Use of Survey, Administrative, and Evaluative Evidence.....	729
A. Access to Justice and Legal Needs Survey Research.....	729
1. Impact of Legal Needs Surveys on Access to Justice Policy	730
2. Limits of Legal Need Surveys.....	730
3. New Survey Methods to Measure Legal Knowledge, Capability, and Justice Attitudes.....	731
B. Administrative and Operational Data	733
1. Example: Australian National Legal Assistance Policy.....	734
2. Limits of Administrative and Operational Data	735

3. Nature of Administrative and Operational Data.....	736
4. Routine Collection of User Information	737
5. Public and Private Legal Assistance Services	739
6. Outcomes of Unbundled Legal Assistance	739
7. Nature and Level of Measurement	740
8. Inconsistent Practices and Use.....	741
9. Operational and Resource Challenges.....	742
10. Adding Value to Administrative and Operational Data	742
C. “What Works” Evaluation	744
1. Purpose of “What Works” Evaluation.....	745
2. Specification and Measurement of Interventions	745
3. Systematic Review and Meta-Analysis.....	746
4. Research and Policy Failure	747
5. Methodological Rigor.....	748
Conclusion.....	751

INTRODUCTION

Interest in access to justice and, increasingly, equal access to resolution through access to law and justice institutions, be they traditional narrow conceptions of lawyers and courts or broader conceptions of intertwined legal and social, endures.¹ In a context where demand for public legal assistance outstrips supply, where people commonly self-help and self-represent, and where consequences and outcomes are increasingly recognized as shaped by legal awareness, confidence, and capability, questions about who enjoys access to justice, and what might be done to better support effective access for others, have never been more important. Many people manage legal issues themselves, particularly civil legal issues. Whether they make use of law, accessing legal assistance and other justice institutions, however, depends on personal, situational, and systemic factors.

A. Legal Consciousness

Critical to improving access to law and justice system processes is understanding of how people see (or do not see) the full “legal” sphere of law, the justice system, and associated web of institutions. Legal here is used to refer to the iceberg of legality in its entirety rather than just the tip.² It is intended to refer to wider consciousness, awareness, and understanding of law and legality, entailing what may be needed to frame, characterize, or perceive law as relevant to troubles

1. Although access to justice is contested and defies precise definition, it is commonly understood as being “broadly concerned with the ability of people to obtain just resolution of justiciable problems and enforce their rights.” OECD & OPEN SOC’Y FOUNDS., LEGAL NEEDS SURVEYS AND ACCESS TO JUSTICE 24 (2019); *see also* Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS, Winter 2019, at 49, 51.

2. Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 332 (2005).

of everyday life, in the mundane as much as adversity, and events and circumstances that are potentially justiciable.³ Perhaps unsurprisingly, empirical research demonstrates that people often will not seek legal assistance or try to make use of the justice system unless they perceive the circumstances as somewhat legal in nature and, more broadly, see the law and its institutions as potentially relevant.⁴ Be it their own situation and circumstance, or that of another. And perhaps also unsurprisingly, empirical research points to what people can do and achieve with law, referred to as legal capability, as strongly patterned by legal problem and demographic characteristics.⁵

Only a minority resolve justiciable problems, particularly civil legal problems, by purchasing fully bundled casework and representation services from private legal practitioners.⁶ Most people either try to make use of unbundled forms of public legal assistance (such as legal information, self-help materials, and, if eligible, legal advice) and handle their justiciable problems themselves without the benefit of any legal assistance, or ignore and “lump” them.⁷

What people can do and achieve in terms of using the justice system depends upon their ability to meet legal needs, as affected by knowledge, skill, psychological (and emotional), and resource dimensions of legal capability.⁸ Legal awareness,

3. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 443 (2016); PASCOE PLEASANCE, NIGEL J. BALMER & CATRINA DENVER, *HOW PEOPLE UNDERSTAND AND INTERACT WITH THE LAW*, at v–vi (2015) (discussing “characterising problems as legal”); HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 12 (1999) (defining “justiciable event”).

4. See generally Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana & Stephanie Ramsey, *Legal Australia-Wide Survey: Legal Need in Australia*, in 7 ACCESS TO JUSTICE AND LEGAL NEEDS 1 (2012). See also HUGH M. McDONALD & JULIE PEOPLE, *LEGAL CAPABILITY AND INACTION FOR LEGAL PROBLEMS: KNOWLEDGE, STRESS AND COST* (Law & Just. Found. of N.S.W., Updating Just. Ser. No. 41, 2014); PASCOE PLEASANCE, CHRISTINE COUMARELOS, SUZIE FORELL & HUGH M. McDONALD, *RESHAPING LEGAL ASSISTANCE SERVICES: BUILDING ON THE EVIDENCE BASE 17–18* (2014) [hereinafter PLEASANCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*]; PASCOE PLEASANCE & NIGEL J. BALMER, *HOW PEOPLE RESOLVE ‘LEGAL’ PROBLEMS* 3 (2014); PLEASANCE ET AL., *supra* note 3, at 69–73; HUGH M. McDONALD & ZHIGANG WEI, *HOW PEOPLE SOLVE LEGAL PROBLEMS: LEVEL OF DISADVANTAGE AND LEGAL CAPABILITY* (Law & Just. Found. of N.S.W., Just. Issues Ser. No. 23, 2016); OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 33–34.

5. See PLEASANCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 5–18; OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 31–35; Pascoe Pleasance & Nigel J. Balmer, *Justice & the Capability to Function in Society*, 148 DÆDALUS, Winter 2019, at 140, 141–45.

6. This Paper uses the terms “legal problem” and “justiciable problem” synonymously. Genn used the term “justiciable problem” to describe situations which raise legal issues, regardless of whether or not the legal issues are recognized and whether or not any features of the justice system (e.g., lawyers, courts, and other justice system processes) are used in their resolution. See GENN, *supra* note 3, at 12. The term “legal problem” is, however, arguably more plain language and in common use by both justice system professionals and those seeking legal assistance or seeking to use justice institutions. See Coumarelos et al., *supra* note 4.

7. Note, however, that many justiciable problems will not simply “go away.” For example, while some legal problems can be unilaterally resolved by simply doing nothing, this will often not be the case should the other side in a dispute pursue the matter.

8. PLEASANCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 130.

confidence, consciousness, and subjective legal empowerment cover similar terrain as the concept of legal capability.⁹

B. Characterization and Legal Needs

What people do and achieve at law depends on whether or not they are aware of and perceive the legal character of the situation, the possibility that law may be relevant or potentially beneficial, what legal assistance, institutional processes, and options might be available to them, and what needs to be done to try and make use of them. It also depends upon the institutional environment, such as availability and accessibility of any assistance, to help determine what and how law and justice system institutions can be brought to bear.

A body of survey research in the last twenty-five years demonstrates both the ubiquity and inequity of legal need.¹⁰ A multitude of transactions, encounters, and activities, from the most mundane to the most extraordinary and life-changing, occur in a web of legal rights and responsibilities. Sometimes things go sour, people fall foul of authorities and others, and problems, disputes, and legal needs arise. Situations are often justiciable in the sense that legal rights, responsibilities, and processes can be invoked and potentially affect resolution and outcomes. Conceptually, accessing justice will often give rise to legal needs, irrespective of a person's awareness or understanding of the law, or even appreciation of how legal rights and responsibilities govern particular situations. This is because law needs to be used, actioned, or asserted (if not by individuals, then by authorities, etc.).

Society is "law thick."¹¹ Webs of administrative, business, civil, commercial, criminal, family, government, and property law touch upon most aspects of political, economic, and social life. Access to justice barriers affect what people can do and achieve with law, and whether or not, and how, they go about trying to use law. Considerable research has examined the degree to which people can meet their legal needs and enjoy access to justice.¹² Findings make clear that legal problem-solving and access to justice vary across the community.¹³ Some people enjoy timely, effective access, others less so. Recourse to law, in the form of seeking legal information and help, is subjectively patterned by circumstance and capability and, more broadly, the systemic environment.¹⁴ The use of law can affect consequences and outcomes, but not always. Some people can effectively handle legal situations themselves by obtaining legal information and/or advice, others less so.

But how much legal is enough to access justice? From whom and in what form? How can we gauge what makes a difference? How can we measure the impact

9. See Pleasence & Balmer, *supra* note 5, at 141.

10. OECD & OPEN SOC'Y FOUNDS., *supra* note 1, at 31–35.

11. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 133 (2010).

12. See sources cited *supra* notes 4–5.

13. See OECD & OPEN SOC'Y FOUNDS., *supra* note 1, at 31–35.

14. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 121.

on access, outcomes, and resolution? What about different types of legal issues? And given inequity and diversity of legal need and capability, how much access to justice is enough for different people and circumstances? What more do we need to know about “what works” to “do” justice? And what needs to be done to build the empirical evidence base from which to assess access to justice?

C. User-Centric Justice

Empirical insights point to the need for a stronger emphasis on people-centered, user-centric approaches to access to justice and legal need. User-centric approaches, however, require improved insight and evidence to assess just how much legality is needed to access justice. Insight and evidence are also needed to assess the impacts and consequences of access to justice reforms. And insight and evidence are needed to learn more about what access to justice strategies work to most effectively and efficiently meet diverse legal needs and capabilities across the community.

In an era of public legal assistance funding austerity, any significant access to justice improvement is more likely to come from so-called bottom-up strategies to improve legal functioning and capability. Rather than the top-down provision of increased resources for the provision of more lawyers, strategies to reform legal markets and more holistic and multifaceted approaches to service provision are widely identified.¹⁵ Particularly where supply-side resources are circumscribed, strategies to effectively manage and mitigate demand are needed. Examples include public legal information and education initiatives designed to empower and build foundational legal capability. These approaches can help people to perceive and act on legal needs as they arise, and potentially help to prevent legal needs escalating and cascading. Efforts to build foundational legal capability can also help facilitate more timely legal help seeking and assistance.

Widespread commentary suggests there will never be enough public resources to simply provide public lawyers to everyone who might benefit from access to one. Consequently, the route to enhancing access to justice more than likely lies with strategies and innovations that help people to do more to access and use law themselves. These are the bottom-up strategies to build legal capability and improve legal functioning.

Such a view also reflects the empirical reality that only a fraction of justiciable problems end up being resolved via formal dispute resolution processes.¹⁶ The

15. See Hadfield, *supra* note 11, at 156; see also Sandefur, *supra* note 3, at 459; Coumarelos et al., *supra* note 4, at 206–09; PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 177–80.

16. For example, Australian legal needs survey research found that legal professionals were used for only sixteen percent of all legal problems, that only “three per cent of [all] legal problems were finalised via formal legal proceedings in a court or tribunal, and [that only] a further three per cent were finalised via [other] formal dispute resolution [and] complaint-handling processes.” Coumarelos et al.,

overwhelming majority of court and tribunal matters are transactional and enforcement actions, such as those requiring a court or tribunal adjudication or order to be resolved or otherwise disposed of.¹⁷ Hence, civil and criminal justice systems tend to largely comprise debt, divorce and family, eviction, injury (tort), and probate matters along with various forms of enforcement and criminal prosecutions.¹⁸

Other access to justice gains may be achieved through strategic service and system reforms. This includes strategic litigation, legislative and policy reforms, minting of new legal rights, entitlements, and responsibilities, as well as new institutional and dispute resolution processes to more effectively deal with bulk areas of community need. For example, efforts to hold legal processes to account, to improve them, and to try and afford better, quicker, and cheaper justice are access to justice staples. Although such strategies are an enduring feature of access to justice reform and innovation, they are not the focus of this Article. This Article seeks to draw a nexus between user-centric access to justice reforms and the empirical methods and measures required to assess their access to justice consequences. What makes user-centric access to justice strategies work? And how will we know?

D. User-Centric Access to Justice Reform and Assessment

Growing research and policy interest concerning just how much legal and legality works to meet diverse legal needs and capabilities, and to maximize the use and utility of scarce public resources, heralds another wave of access to justice effort. Twinned with a long-envisioned digital transformation of the justice system, measures and methods to assess access to justice must mirror shifts in access to justice research and reform.

Empirical insight into legal problem-solving behavior has prompted calls for a broader and more holistic approach to justice, one that is user focused and multifaceted. This includes the potential for new digital solutions that may be better able to overcome perennial access to justice barriers, at least with respect to the legal needs of some people, at the very least, some of the time.¹⁹ Transformative justice system reform, as informed by data, human-centered design, and systems thinking and technological advances, are therefore likely to center on user-centric,

supra note 4, at xviii–xix. Similar findings have been obtained from legal needs surveys in other jurisdictions. See OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 33–35.

17. See, e.g., NAT’L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2018 DATA 7–8 (2018), http://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf [https://perma.cc/CD99-3PS2]; U.S. DIST. CTS., FEDERAL COURT MANAGEMENT STATISTICS, JUNE 2020, at 1 (2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf [https://perma.cc/2E5B-KNV2].

18. OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 31.

19. See generally James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241 (2012).

multifaceted strategies intended to cater for diverse legal need and capability in diverse ways.

Such an era requires empirical methods and measures that are appropriate to assess user-centric access to justice, gauge how much legal is needed, from where and in what form, and determine how it can most effectively be facilitated (be it through traditional legal practitioners or other nonlegal means). Gauging how much law works, for whom and for what, is also vital to building a smarter, learning justice system.

E. Overview

Drawing on the last twenty-five years or so of empirical research, this Article draws out how empirical measures can be improved to learn more about how much legality is needed for effective access to justice.²⁰

The Article first considers the concept of legal capability. It then sets out several access to justice challenges as they affect legal assistance and justice system design. Opportunity to better gauge how much legality is needed to access justice and build the evidence base to assess access to justice reforms are then considered. Three main sources of empirical information are examined in turn: access to justice and legal needs surveys; improved administrative data measures and methods; and rigorous approaches to the evaluation of “what works” in user-centric services and systems.

Finally, several implications of the rise of user-centric access to justice reforms, human-centered design, and systems thinking are drawn out. Understanding of access to justice and legal needs requires multidimensional approaches that ensure empirical data and methods are a fit to answer key access to justice questions. The common thread running through the Article is the need for improved measures of personal legal need and capability. Improved measures can potentially help put a price of justice and unlock investment in transformative strategies. Although the questions raised have wide application, this Article draws principally on Australian access to justice and legal needs research and policy reforms.

I. LEGAL CAPABILITY

There is considerable diversity in the way people respond to justiciable problems and who can use the justice system to do so. What people tend to do depends on the nature of the legal matter, the specific type of matter, how serious they see it, how substantively and procedurally straightforward it is, and, critically,

20. Although the Article draws mainly on Australian empirical access to justice and legal needs research, growing research around the world suggests a convergence of access to justice and legal assistance service challenges. For example, drawing on the access to justice and legal needs evidence and experiences in member nations, the Organization for Economic Co-Operation and Development (OECD) has examined the role access to justice plays in inclusive and sustainable growth and development. *See* OECD, EQUAL ACCESS TO JUSTICE FOR INCLUSIVE GROWTH (2019).

whether or not it is characterized as a legal rather than some other type of problem. For instance, quantitative and qualitative research has shown that characterizing something as “legal” colors the actions taken in response, and the advisers used.²¹ Some level of legal awareness, consciousness, and understanding appears necessary to seek to make use of law and enter into the legal world.

Some people ignore and “lump” their problems, whether perceived as legal or not, simply acquiescing to what the other side wants or allowing legal processes to run out. Others try to handle them themselves, often without trying to obtain any legal information, advice, or assistance. Some people have default judgments issued because they fail to turn up to scheduled proceedings, notwithstanding that actively participating, even without the benefit of legal information and assistance, may improve outcome, satisfaction, and favorability. This is one reason legal self-help strategies hold promise as a bottom-up access to justice strategy, especially for low- to moderate-income people who must navigate the civil justice themselves.²²

Depending on the nature and severity of the matter, many people can successfully take various forms of self-help action and handle matters effectively themselves.²³ They can achieve satisfactory and favorable outcomes, particularly for more transactional and straightforward matters. It is also common for multiple types of action to be taken, and multiple advisers to be consulted, to try and resolve justiciable problems.²⁴

A. Legal Capability Defined

Legal capability refers to the personal characteristics or competencies required to effectively and purposefully function in the legal sphere, including purposeful use of law and legal institutions. It encapsulates the ability to perceive potentially justiciable issues, access or obtain appropriate legal information and assistance, apply law to their circumstances, assess available options, and take appropriate steps to assert and defend rights.²⁵

The concept of legal capability has roots in Sen’s capability approach to disadvantage, extensive “law and society” scholarships examining how law and society are intertwined, as well as aspects of the classic socio-legal analysis of

21. Pascoe Pleasence, Nigel J. Balmer & Stian Reimers, *What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes*, 1 ONATI SOCIO-LEGAL SERIES, no. 6, 2011, at 1, 5; *see also* PLEASENCE ET AL., *supra* note 3, at v.

22. HUGH M. McDONALD, SUZIE FORELL & ZHIGANG WEI, UPTAKE OF LEGAL SELF-HELP RESOURCES: WHAT WORKS, FOR WHOM AND FOR WHAT? 16–22 (Law & Just. Found. of N.S.W., Just. Issues Ser. No. 30, 2019); *see also* D. James Greiner, Dalíé Jiménez & Lois R. Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1121 (2017). *But see* Coumarelos et al., *supra* note 4, at 213–14; McDONALD & WEI, *supra* note 4, at 9.

23. McDONALD ET AL., *supra* note 22, at 7–15.

24. OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 34–35.

25. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 130.

disputing behavior.²⁶ Legal capability sensitizes the range of capabilities required to make and carry through informed decisions to resolve justiciable problems, which otherwise may form exclusionary access to justice barriers.²⁷ In this respect, legal capability constraints may manifest as access to justice barriers.

Sen's capability approach to disadvantage is a normative framework to evaluate individual freedom and well-being. His approach broadly covers what people are effectively able to be or do (functionings) and what freedoms or opportunities they have to achieve particular functionings (capabilities).²⁸ The approach is used to explain why disadvantaged people and groups generally have lower capabilities and substantive freedom to fully participate in social, economic, and political life. The same can be said of the legal sphere and functioning in the justice system.²⁹

As Pleasence et al. explained,

[W]hat a person can be and do may be affected by a wide variety of factors, such as whether or not they are healthy, are literate, have a well-paying job, live free from violence, have personal efficacy, have trust and confidence in institutions, etc. Having a substantive opportunity to do certain activities — such as acting to effectively resolve legal problems — may in turn depend on having capability in one or more domains. Importantly, capability can also be undermined in multiple ways (e.g., through ignorance, illiteracy, poverty, oppression, starvation, etc.).³⁰

This explanation signals the multidimensional nature of personal legal capability. Coumarelos et al. drew on Felstiner, Abel, and Sarat's seminal "naming," "blaming," and "claiming" disputing model to examine dimensions of legal capability.³¹ This disputing model implies some legal awareness or understanding as a prerequisite to framing a dispute as "legal" and trying to make use of law to resolve that dispute. The model further implies that legal awareness or understanding is not in itself sufficient for action and resolution. A myriad of factors may constrain the use of law and the nature of any actions taken. This includes justice system shortcomings and systemic factors that hinder access to and effective use of legal information, advice, assistance, and redress.

26. Natalina Nheu & Hugh McDonald, *By the People, for the People? Community Participation in Law Reform*, in 6 ACCESS TO JUSTICE AND LEGAL NEEDS 1, 6–7 (2010); PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 123–24; *see also* Coumarelos et al., *supra* note 4, at 29; Pleasence & Balmer, *supra* note 5, at 141.

27. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 123–24.

28. Nheu & McDonald, *supra* note 26, at 6–7.

29. Pleasence & Balmer, *supra* note 5, at 141.

30. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 123.

31. Coumarelos et al., *supra* note 4, at 29.

B. Knowledge, Skill, Psychological, and Resource Dimensions

Several legal capability dimensions have been proposed.³² These commonly include knowledge, skill, and attitude or psychological aspects, such as confidence, preparedness, or willingness to act, to which Pleasence et al. added resources. Critically, experiencing constraints in any one or more dimensions can undermine overall capability. Capability factors are likely to be mutually reinforcing or compounding, positively and negatively, and have been shown to be situational, such that legal capability can vary over time. For example, the onset of health problems can in turn undermine legal capability.³³

The capability approach has been used to help explain legal problem-solving behavior, including whether people can recognize and deal effectively with justiciable problems.³⁴ Conceptually, legal capability appears increasingly important to making sense of empirical studies of legal need and disputing. The ability to effectively respond to justiciable problems is usually constrained by a lack of foundational elements of legal capability, namely “those elements of personal capability a person requires to be capable [and effectively function] in the domain of the law and [justice] institutions.”³⁵ This, in turn, appears to be associated with differential access to justice and legal problem-solving.

For instance, literacy is a foundational aspect of personal capability and legal capability will typically be enhanced by functional literacy. Illiteracy, in fact, is a fundamental access to justice barrier. It impedes knowledge and understanding of, and ability to assert, legal rights, particularly where law is embodied in written form. Foundational legal capability therefore also necessarily encompasses functional literacy.³⁶

Basic legal awareness and understanding have therefore been identified as an essential component of foundational legal capability. This awareness includes rudimentary awareness of the role of law in everyday situations and the ability to make informed decisions about whether or not to try to make use of law, legal services, or justice institutions.³⁷

Beyond the legal, people must also have the necessary skills to make use of law and/or legal services and/or the justice system. At its most rudimentary,

32. NIGEL J. BALMER, PASCOE PLEASENCE, TENIELLE HAGLAND & COSIMA MCRAE, *LAW...WHAT IS IT GOOD FOR? HOW PEOPLE SEE THE LAW, LAWYERS AND COURTS IN AUSTRALIA* 6 (2019); *see also* PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 123.

33. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 5.

34. *Id.* at 123–140 (discussing the capability approach to disadvantage, personal capability, legal capability and its relevance for legal service delivery, and legal problem-solving).

35. *Id.* at 130. *See generally* Coumarelos et al., *supra* note 4, at 29; BALMER ET AL., *supra* note 32, at 6.

36. Brian Maddox, *What Good Is Literacy? Insights and Implications of the Capabilities Approach*, 9 J. HUM. DEV. 185, 188 (2008); *see also* PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 128, 131.

37. Coumarelos et al., *supra* note 4, at 29; PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 130.

adequate literacy, language, communication, and information-processing skills are some of the abilities providing a foundation for legal capability. Coumarelos et al. note how functional literacy, the information-processing skill involved in being able to “locate, [interpret,] and act on information [and] advice in a problem-solving or goal-oriented way” is foundational, and how various other skills may at times be needed to function effectively in law.³⁸

Legal capability also requires the mindset, psychological willingness, and confidence to try and make use of law, legal services, and/or the justice system, and to persevere through resolution. Access to resources is another key component of capability. Financial, technological, social capital, and human capital resources can all increase capability. With respect to legal functioning, the trite example is that greater access to financial resources increases the ability to purchase legal assistance privately.

These features are not intended to suggest that people should be litigants or quasi lawyers. But rather, simply acknowledge that knowledge, skill, psychological, and resource factors affect what people can do and achieve through law. This also helps explain how and why justiciable problem-solving varies.

C. Legal Capability Frameworks

Several legal capability frameworks have been set out. Pleasence et al. set out frameworks of legal capability (noting various factors that affect legal capability: ability to “perceive and characterise” the legal; ability to “seek and obtain [appropriate] help or assistance”; and ability to “apply [and] use” help or assistance) and foundational legal capability (noting that “knowledge,” “skill,” “attitude,” and “resource” dimensions affect foundational and situation specific legal capability), and Balmer et al. recently set out a broad framework of legal capability building on these and other conceptualizations.³⁹ Balmer et al. set out legal capability in four distinct stages: recognition of issues, accessing information or assistance, resolving the issue, and wider influences and law reform (i.e., law-making and regulatory processes).⁴⁰ Across these stages, a person’s ability to deal with legal issues or the justiciable problems they face is shaped by knowledge (e.g., about the law, rights, obligations, assistance, information, and processes), skills (e.g., recognition of issues, “[i]nformation literacy,” “[c]ommunication,” decision-making, problem-solving, and “[d]igital literacy”), attributes (e.g., “[s]elf-awareness,” “[p]ersistence,” “[c]onfidence,” and “[a]ttitudes”) and resources (e.g., “[m]oney,” “[t]ime,” “[s]ocial capital,” and “[a]vailability of services” and processes).⁴¹

38. Coumarelos et al., *supra* note 4, at 29; *see also* Nheu & McDonald, *supra* note 26, at 149–53 (discussing functional literacy as it affects effective participation in law reform processes)

39. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 136–38; BALMER ET AL., *supra* note 32, at 7.

40. BALMER ET AL., *supra* note 32, at 7.

41. *See id.* at 60 tbl.1 (setting out a framework of legal capability).

Widespread interest in determining “what works” to meet diverse legal need requires a nuanced understanding of how the use of law, as well as legal services and other justice institutions, is affected by legal capability.

II. ACCESS TO JUSTICE TRENDS AND CHALLENGES

A. Access to Justice Trends

Access to justice is commonly described as a movement or project marked by successive waves of reform. Dating roughly from the postwar period of the 1950s, access to justice reforms were a feature of the social safety net intended to prevent people from falling into social and economic disadvantage and entrenched poverty.⁴² Although the number of waves of access to justice reform, their timing, content, and origins, varies between jurisdiction, the 2020s mark some seventy years of access to justice thinking, research, advocacy, and reform. Over this period a number of broad trends and shared challenges point to likely developments.

1. Access to Justice: From Narrow to Broad Conception

Access to justice has meant different things to different people at different times. It is contested and as an aspiration, has evolved with growing understanding and change of justice institutions. Initially access to justice was narrowly conceived of as “access to lawyers and courts,” but has subsequently expanded conceptually.⁴³ Coumarelos et al. noted how a dynamic relationship between conceptions of legal need and access to justice has meant that with each successive wave of justice system reforms, just what access to justice entails has further expanded.⁴⁴ A dynamic relationship between access to justice research and institutional reform shapes both reform and research agendas.

In its early and traditional conception, access to justice was mainly conceived as access to lawyers and courts.⁴⁵ The solution to access to justice was obvious and self-evident—help people use the justice system by providing access to lawyers. Early access to justice reform thus tended to be focused on providing equal access to lawyers and courts through “top-down” expenditure on legal aid schemes.⁴⁶ Access to justice barriers, however, remained. There were also insufficient resources to provide access to public lawyers to all people and legal matters where doing so

42. Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, JUDICATURE, Fall/Winter 2019, at 35, 37 (discussing the establishment of the Legal Services Corporation “as a component of Lydon B. Johnson’s war on poverty”).

43. Trevor C.W. Farrow, *What Is Access to Justice?*, 51 OSGOODE HALL L.J. 957, 970 (2014); Patricia Hughes, *Law Commissions and Access to Justice: What Justice Should We Be Talking About?*, 46 OSGOODE HALL L.J. 773, 777–79 (2008) (discussing the traditional approach of access to justice and the current “broader understanding of access to justice”).

44. Coumarelos et al., *supra* note 4, at 3.

45. *Id.*

46. *Id.*

may be beneficial.⁴⁷ Criminal law needs tend to trump both family and civil legal needs, and family legal needs tend to trump civil legal needs.⁴⁸ And those eligible to use public legal assistance for family and civil matters often failed to avail themselves of that assistance.⁴⁹ Affording access to justice came to be seen as requiring more than just the provision of lawyers and reforming justice institutions.⁵⁰

Coumarelos et al. further described how subsequent efforts broadened the scope of access to justice, by seeking to do the following:

[C]orrect[] inadequacies within the court and legal aid systems, demystifying the law through the plain language movement and public legal information and education, enhancing preventative law through alternative dispute resolution processes, and increasing public participation in law reform. In line with such reforms, the concept of access to justice has been extended to include access to legal information, legal education, non-court-based dispute resolution mechanisms and law reform.⁵¹

Empirical access to justice and legal needs research mirrors this expanding focus. Early research efforts assessed access to justice by measuring use of lawyers and courts.⁵² This approach, however, missed the overwhelming bulk of civil legal issues that are simply ignored, remain unresolved, or resolve beyond the purview of the formal justice system.⁵³ Legal needs survey methodology subsequently evolved to measure what people do in response to specific problematic circumstances potentially having legal dimensions and remedies (termed “justiciable problems”) irrespective of whether or not they are perceived as being “legal,” are resolved outside the formal justice system, are ignored, or remain unresolved.⁵⁴

This approach allows legal problem experience to be measured. Including what, if any, actions people take to try and resolve those problems. What, if any, advisers they use, whether or not they use any legal information and professionals,

47. See, e.g., James J. Sandman, *The Role of the Legal Services Corporation in Improving Access to Justice*, 148 *DÆDALUS*, Winter 2019, at 113, 113 (describing how the “Legal Service Corporation is the United States’ largest funder of civil legal aid for low-income Americans,” but that it is “badly underfunded”).

48. See, e.g., Coumarelos et al., *supra* note 4, at xiv–xv.

49. Cf. LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 38, 39 fig.8 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/64GG-UVK2>] (showing the eligibility requirements for public legal assistance in the United States and that the main types of cases for the Legal Services Corporation are family cases); *Civil Legal Aid 101*, U.S. DEP’T JUST., <https://www.justice.gov/olp/civil-legal-aid-101> [<https://perma.cc/JS35-5D8X>] (last updated Nov. 20, 2020) (stating that “63 million Americans qualify for free civil legal assistance” but “50% of those seeking civil legal help are turned away for lack of resources”).

50. Coumarelos et al., *supra* note 4, at 3.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 4 (discussing the broadening of focus of access to justice and legal needs survey work pioneered by the American Bar Association in its *Legal Needs and Civil Justice: A Survey of Americans* study in 1994 and by Hazel Genn in her seminal *Paths to Justice* study in 1999).

and what outcomes they achieve. The findings of legal needs surveys, in turn, provide empirical context on legal problem-solving behaviors and evidence of diverse legal need and capability.

As the conception of access to justice increasingly looks beyond the “legal” and formal justice institutions, and considers how the nonlegal and informal bare on legal functioning, expanded empirical methods and measures are also required.

2. *User-Centric Service and System Design*

Technological, economic, and demographic change has transformed expectations of services, systems, and institutions. Collection and analysis of increasingly nuanced user, customer, and client data across most service sectors provide increasingly sophisticated pictures of differentiated needs, wants, and behaviors.⁵⁵ More sophisticated understanding is reflected in a trend away from the standard, undifferentiated, “one-size-fits-all” approach to services and processes to ones that are increasingly personalized, tailored, and responsive to increasingly niche customer, client, and user interests, demands, and circumstances.

Health services and treatments, for example, are becoming increasingly personalized, based on wide diagnostic tests and assessments.⁵⁶ Education increasingly employs differentiated curriculums to better cater to the academic needs and circumstances of each student.⁵⁷ Business increasingly relies on sophisticated customer relationship management and intelligence software to draw insights about customers and target and tailor service offerings.⁵⁸ Advertising and marketing now have an unprecedented ability to “microtarget” hyperniche segments of the population.⁵⁹ Differentiation based on personal needs and wants has both effectiveness and efficiency benefits and is marketed as driving better business outcomes at more sustainable costs.⁶⁰

The transformation from standard to increasingly segmented and personalized user-centric services and processes is also observed with respect to access to justice issues. Standard “one-size-fits-all” legal service models are now seen as likely to be

55. See generally Muhammad Anshari, Mohammad Nabil Almunawar, Syamimi Ariff Lim & Abdullah Al-Mudimigh, *Customer Relationship Management and Big Data Enabled: Personalization & Customization of Services*, 15 APPLIED COMPUTING & INFORMATICS 94 (2018).

56. See generally Nikolas Rose, *Personalized Medicine: Promises, Problems and Perils of a New Paradigm for Healthcare*, 77 PROCEDIA - SOC. & BEHAV. SCIS. 341 (2013) (weighing the benefits and detriments of personalization in healthcare).

57. See generally SUSAN YONEZAWA, LARRY MCCLURE & MAKEBA JONES, PERSONALIZATION IN SCHOOLS (2012), https://www.researchgate.net/profile/Makeba_Jones/publication/265060024_Personalization_in_schools/links/564df6c108aefe619b0f2ce6/Personalization-in-schools.pdf [<https://perma.cc/URS5-NH48>] (arguing for increased personalization in education).

58. See, e.g., Anshari et al., *supra* note 55.

59. See generally Oana Barbu, *Advertising, Microtargeting and Social Media*, 163 PROCEDIA - SOC. & BEHAV. SCIS. 44, 44 (2014) (describing “microtargeting and its implications in promoting strategies in the present consumerist society”).

60. STEVE ROHLER & BRIAN MORAN, ACCENTURE, DELIVERING PUBLIC SERVICE FOR THE FUTURE: NAVIGATING THE SHIFTS 6 (2012).

ineffective and ill-suited to the legal needs and capability of some users.⁶¹ Standard service approaches can also create access to justice barriers and increase service inefficiency, especially when they fail to take account of diverse legal need and capability.⁶²

Findings of the Legal Australia-Wide Survey and other legal needs surveys led Coumarelos et al. to conclude that a new wave of access to justice reform was needed—a more holistic approach, employing multifaceted strategies, based on growing evidence of diverse legal need and capability across the community.⁶³ Pleasence et al. subsequently argued that client-focused approaches to service provision were required to best meet the needs of intended service users and that the design of legal assistance services “should start and end with the needs and capabilities of [intended] users.”⁶⁴ If they are to be effective, particularly with respect to the heightened legal needs of disadvantaged members of the community, legal assistance services should be increasingly targeted, timely, joined up, and appropriate to diverse legal needs and capability.

3. Shift from “Top-down” to “Bottom-up” Strategies

Successive waves of access to justice reform have not only broadened in scope but have shifted in focus from “top-down” to “bottom-up” initiatives (see Figure 1).

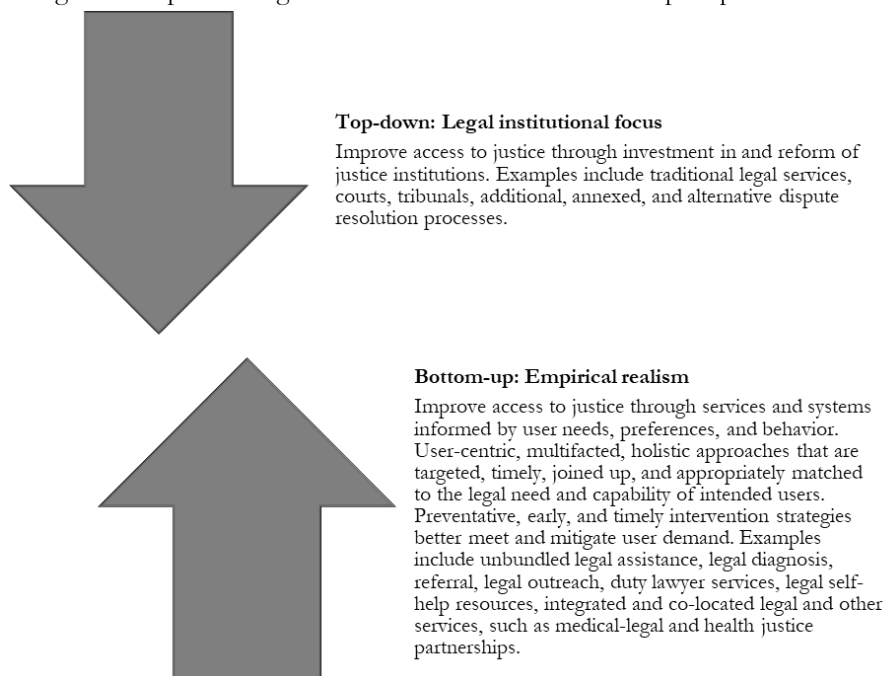
61. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 121.

62. *Id.*

63. Coumarelos et al., *supra* note 4, at 243.

64. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 163.

Figure 1: Top-down legal institutional focus and bottom-up empirical realism



First, community access to lawyers was increased by the provision of free or low-cost legal assistance, such as instituting and expanding legal aid schemes. Second, legislative, procedural, and other institutional reforms sought to increase access to courts. Third, additional and alternative dispute resolution processes and institutions were minted. Such solutions, although of no doubt beneficial to some, did not successfully realize access to justice for all. At the same time, constrained resource environments have tended to stunt expansion in the provision of public lawyers.

Although top-down strategies—such as the provision of more courts and tribunals, and more publicly funded lawyers, for a wider range of administrative, civil, criminal, and family areas of law—would undoubtedly also be transformative, the common observation in many jurisdictions is that there is unlikely to be sufficient public resources in the foreseeable future to provide everyone who might benefit with casework and representation services from legal professionals.⁶⁵

Public legal services remain the poor cousin of public services, typically comprising only a small minority of justice system expenditure and a fraction of overall government expenditure.⁶⁶ Civil legal services also remain the poor cousin

65. See, e.g., Sandman, *supra* note 47.

66. For example, in its *Access to Justice Arrangements* inquiry report, the Australian Productivity Commission calculated that for the 2012–13 financial year, the four public legal assistance providers, Aboriginal and Torres Strait Islander legal services, community legal centers, family violence prevention

of public expenditure on criminal legal services.⁶⁷ This reality has seen a shift to bottom-up strategies, as informed by the empirical realism of legal problem-solving behavior, and the potential utility of multifaceted and more holistic approaches to enhancing access to justice. The efficacy of such a shift, however, depends upon improved evidence of “what works,” for whom and for what, when, under what circumstances, and to what end.

4. Features of Multifaceted, More Holistic Approaches to Access to Justice

Based on the findings of the Legal Australia-Wide (LAW) Survey, Coumarelos et al. concluded that a broad approach, informed by the empirical reality of diversity in the experience, handling, and achieved outcomes of justiciable problems, should frame access to justice policy.⁶⁸ Some people ignore legal problems and achieve poor results, yet others ably self-help and achieve favorable outcomes. And yet there are also others, particularly those experiencing higher levels of socioeconomic disadvantage whose access to justice depends on considerable help from legal and other professionals.⁶⁹

Diversity of experience, handling, and outcomes suggest that access to justice approaches must be multifaceted. Specifically, Coumarelos et al. pointed to potential benefits stemming from more holistic approaches to access to justice that were both integrated and multifaceted.⁷⁰ This approach included all of the following: legal information and education, self-help strategies, accessible legal services, nonlegal advisers as gateways and pathways to legal services, integrated legal services, integrated responses to legal and nonlegal problems, tailoring of services for specific legal problems, and tailoring of services for specific demographic groups.⁷¹ A more holistic approach to access to justice involves potentially reshaping legal services and justice systems to target resources more effectively and efficiently, streamline access to justice, and enhance legal resolution.⁷²

B. Digital Transformation of the Justice System

The period in which empirical research has provided greater insight into legal problem-solving behaviors coincides with rapid information technology advances that have disrupted and transformed industries, markets, and service sectors.⁷³ Long predicted to inevitably also transform both the justice system and the legal services

legal services, and legal aid commissions together received some AUD \$730 million in federal, state, and territory funding, representing only 0.14% of all government expenditure. AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, ACCESS TO JUSTICE ARRANGEMENTS 26 (2014).

67. *Id.* at 32.

68. Coumarelos et al., *supra* note 4, at 202–04.

69. See MCDONALD & WEI, *supra* note 4, at 5, 10.

70. Coumarelos et al., *supra* note 4, at 243.

71. *Id.*

72. *Id.* at 246.

73. See sources cited *supra* notes 55–57.

market—including successfully tapping the latent legal need market and increasing overall access to justice through innovative service offerings—the digital transformation of the justice system and legal services has been somewhat slower than envisioned.

For instance, one widely held and repeated prediction is the view that much legal assistance and dispute resolution can, and will, eventually and inevitably move online.⁷⁴ Another is that online legal assistance services can empower people with everyday legal problems and provide access to justice through digital forms of legal help that they would otherwise be unable to obtain in a timely and cost-commensurate way offline.⁷⁵ New interactive and responsive technology holds the promise of better supporting self-help actions, legal problem resolution, and access to justice. This mirrors the promise of a successful bottom-up access to justice strategies.

1. Private Legal Services Market

There can be no doubt that the private market for legal service is being transformed by regulatory and technological change and enduring client needs (i.e., effective legal services) and wants (i.e., effective services as cheap as possible).⁷⁶ To date, technological innovation is most evident in the transformation of private legal service providers, including what they do, how they operate, and who they serve. This includes so-called “smart” business systems and automation—whether backed by new business insights driven by artificial intelligence (AI) or not—increasingly being harnessed to both increase productivity and reduce operating costs.⁷⁷ Many larger law firms, for example, have invested in a range of technologies to revolutionize operations and services offerings in pursuit of competitive

74. RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 111 (2d ed. 2017).

75. *See id.* at 96–100.

76. Regulatory change in several jurisdictions have seen new, nontraditional service providers enter the market. For example, in the interest of increasing competition and reducing cost to consumers, legal regulatory bodies in several jurisdictions have changed rules concerning the type of business structures and type of services that can lawfully be provided. *See, e.g.*, Legal Services Act 2007, c. 29, §§ 18, 27 (UK), <https://www.legislation.gov.uk/ukpga/2007/29/contents> [<https://perma.cc/2BMF-NCVX>]. The traditional legal firm, which had to be composed and governed by partners who were licensed legal practitioners, has come under challenge by opening up provision of legal services to alternative business structures. *Compare* MODEL RULES OF PRO. CONDUCT r. 5.4(b) (AM. BAR ASS’N 1983) (“A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”), *with* Legal Services Act 2007, c. 29, §§ 18, 27. In particular, the “Big Four” accounting and auditing firms, Deloitte, EY, KPMG, and PricewaterhouseCoopers have added some legal services to the portfolio of services they offer clients in various jurisdictions. David B. Wilkins & Maria J. Esteban Ferrer, *The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market*, 43 *LAW & SOC. INQUIRY* 981, 982 (2018).

77. Sean Semmler & Zeeve Rose, *Artificial Intelligence: Application Today and Implications Tomorrow*, 16 *DUKE L. & TECH. REV.* 85, 87–89 (2017) (describing three different private companies utilizing AI in their provision of legal services).

advantage.⁷⁸ Technology and overhauling business systems, however, are not cheap, nor necessarily straightforward.

Those with greater access to resources and risk tolerance appear much better placed to harness technological change and compete with newly emerging business operations and models.⁷⁹ This disparity has led to a shake-up of private legal service markets and lawyer-client relationships. Rise of in-house counsel, for example, has repositioned the relationships between so-called “big business” and “big law,” with clients increasingly able to demand specific ways of operating as they seek to manage their legal needs in the most cost-effective way.⁸⁰ In the competition to sustain and increase revenue in an era of substantial technological change and shifting client demands, the private legal services industry has tended to respond in a similar way to other sectors and industries faced with technological disruption and competition from new players in the slogan “get big, get niche, or get out.”⁸¹

“Getting big” through mergers or expansion into new territories and markets (local, national, and global) potentially increases the benefits derived from investment in new technologies that simplify and standardize operations, such as those associated with the benefits of automation and scalability.

“Getting niche” refers to increasing specialization in geographic area, area of legal practice, type of clients, and type legal service provided. Investment in bespoke technology, to support the performance of increasingly specific tasks as effectively and efficiently as possible, can drive competitive advantage. For example, private legal services can “get niche” through targeting increasingly niche areas of the latent legal needs market. Examples, amongst others, include issues with parking tickets, motor vehicle accidents, and tenancy services for landlords.⁸²

78. Victoria Hudgins, *ABA Survey: Only 10 Percent of Law Firms Are Currently Using AI*, 261 N.Y.L.J. 7, 7 (2019) (“While only 10 percent of respondents reported they used artificial intelligence-based technology tools, respondents at large law firms with over 100 attorneys were most likely to use the [AI] technology (26 percent).”).

79. *Cf. id.* (stating large firms, who inherently have more resources than smaller firms, are more likely to use AI than small firms).

80. David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 884 (1998). For example, in-house counsel often “jump ship” from big law firms. They have insight into the way these firms operate, including what the profit margins are, and how costs can be minimized. One emerging practice of in-house counsel, when legal services are put out to tender, is to require applicants to demonstrate how information technology will be used to minimize legal costs. Frank Ready, *5 Ways that Corporate Legal Departments Are Trying to Save Costs Post-COVID-19*, LAW.COM (July 16, 2020, 3:20 PM), <https://www.law.com/corpcounsel/2020/07/16/5-ways-that-corporate-legal-departments-are-trying-to-save-costs-post-covid-19/> [https://perma.cc/F5VJ-S7ZG]. Such practices affect who is able to compete for the work, and changes the incentives surrounding investment in technology-based business systems.

81. *See, e.g.*, Joel Chimoindes, *Get Big, Get Niche or Get Out!*, INAVATE (Oct. 31, 2019), <https://www.inavateonthenet.net/features/article/guest-column-get-big-get-niche-or-get-out!> [https://perma.cc/3JZY-NWYY].

82. *See, for example*, the DoNotPay website, DONOTPAY, <https://donotpay.com> [https://perma.cc/JVB5-QKRR] (last visited Jan. 1, 2021), is marketed as “the world’s first robot lawyer,” which initially helped people in the United States and United Kingdom fight parking tickets

“Getting out” is the warning that either doing nothing, continuing business as usual, or evening dabbling in a bit of technology in a haphazard way without a deliberative strategy is likely to result in a tenuous position that is increasingly squeezed by competitors on two fronts: those “getting big” and those “getting niche.”

Public legal services and other justice system institutions, by contrast, do not have similar incentives to invest in digital technologies and tend to be comparatively risk averse to investing in speculative technology development.⁸³

2. *Public Legal Assistance Services and Other Justice Institutions*

For public legal assistance services and other justice system institutions, not only are there different incentives to investing in technological transformation, but doing so comes with added concerns involving the use of scarce public resources.⁸⁴ Governments and public legal institutions have consequently tended to be conservative and wary of technology and change.⁸⁵ No doubt investment in technology to automate and streamline some tasks could help increase the productivity of public legal institutions and, through increased productivity, potentially increase access to justice.⁸⁶ A recent upswing in investment in technology-based legal assistance services and dispute resolution processes may, however, herald the end of the beginning of the technological transformation of legal services and dispute resolution envisaged to eventually and inevitably see “most legal dispute resolution . . . move online.”⁸⁷

through a chat bot and automation, but has since expanded to offer other services to help resolve problems with particular service providers as well as “suing anyone” in small claims court.

83. See James E. Carbal, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 264–65 (2012) (discussing principles adopted by the California’s Court Technology Advisory Committee including “preserv[ing] traditional access to courts for those persons challenged by technology” and ensuring that private information remains private).

84. JULINDA BEQIRAJ & LAWRENCE MCNAMARA, INTERNATIONAL ACCESS TO JUSTICE: BARRIERS AND SOLUTIONS 33–34 (2014), <https://www.cfcj-fcjc.org/sites/default/files/344/international-access-to-justice.pdf> [<https://perma.cc/LT98-P2TH>] (stating that the use of digital technology in the provision of access to justice services “is highly dependent on the availability of and access to technology in specific countries and/or areas”).

85. RODGER SMITH, ANNUAL REPORT ON DEVELOPMENTS 2017–2018: DIGITAL DELIVERY OF LEGAL SERVICES TO PEOPLE ON LOW INCOMES 39–40 (2018).

86. See, e.g., Carbal et al., *supra* note 83, at 246 (“Every state now offers a statewide legal aid website, where legal service providers collaborate with other access to justice organizations to provide a portal for self-help resources and a public entry point for intake and referrals to specific organizations that offer assistance.”).

87. McDONALD ET AL., *supra* note 22, at 4. Notable recent exceptions, which may signal the end of the beginning of digital transformation of legal services and dispute resolution include the Rechtwijzer (Roadmap to Justice) in the Netherlands, the Civil Resolution Tribunal in British Columbia, Canada, efforts to move to online courts in the United Kingdom, and development of online dispute resolution to assist separating couples in Australia. Roger Smith, *The Decline and Fall (and Potential Resurgence) of the Rechtwijzer*, LEGAL VOICE (Sept. 12, 2017), <http://legalvoice.org.uk/decline-fall-potential-resurgence-rechtwijzer/> [<https://web.archive.org/web/20201029201921/http://>

3. Transformation of Bottom-up Access to Justice

McDonald, Forell, and Wei recently described three waves of innovation in the provision of legal self-help resources that point to the juncture of digital-based, unbundled legal assistance.⁸⁸ They outlined the first wave of legal self-help resources that were provided in hardcopy format, such as factsheets, leaflets, step-by-step “do-it-yourself” kits, and the like.⁸⁹ Targeted dissemination also sought to facilitate access to and use of legal self-help materials where potential users were likely to need and seek such material.⁹⁰ With more information being produced to help lay users help themselves, the plain language movement also sought to make legal resources clearer and easier to comprehend.⁹¹

The rise of the Internet, which brought with it easier, cheaper, and more direct dissemination to interested users via public legal institution websites, saw a second wave whereby hardcopy legal self-help materials were transferred online.⁹² Improved Internet connections and performance subsequently saw Web2.0 applications, development of guided pathways to assist self-represented litigants, such as A2J Author and the like, and, subsequently, improved online audio, video, and interactive communication.⁹³

Continuing technological development has seen a new wave of digital self-help intended to further enhance access to justice, one that seeks to empower users through sophisticated technology-based tailoring of information and assistance, as well as improved user experience and outcomes in increasingly niche and discrete areas of law.⁹⁴ Rather than simply reproduce legal self-help material online and use basic decision trees, McDonald, Forell, and Wei point to a new digital wave of legal self-help that is blurring “distinctions between legal information, legal advice and

legalvoice.org.uk/decline-fall-potential-resurgence-rechtwijzer/]; Elizabeth Raymer, *B.C.’s Civil Resolution Tribunal Keeps ‘Doors Open’ During Pandemic*, CANADIAN LAW. (Mar. 27, 2020), <https://www.canadianlawyermag.com/practice-areas/adr/b.c.s-civil-resolution-tribunal-keeps-doors-open-during-pandemic/328037> [https://perma.cc/KF8A-5JL7]; NAT’L AUDIT OFF., EARLY PROGRESS IN TRANSFORMING COURTS AND TRIBUNALS 5 (2018), <https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progress-in-transforming-courts-and-tribunals.pdf> [https://perma.cc/5W4E-VJND]; *Family Dispute Resolution (Mediation)*, RELATIONSHIPS AUSTL., <http://www.relationships.org.au/services/family-dispute-resolution/family-dispute-resolution-mediation-text> [https://perma.cc/A8L7-5CWF] (last visited Sept. 16, 2020).

88. MCDONALD ET AL., *supra* note 22, at 4.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Mike Wolcott, *What Is Web 2.0?*, CBS NEWS (May 1, 2008, 5:34 PM), <https://www.cbsnews.com/news/what-is-web-20/> [https://perma.cc/7ZBY-CBWK]; A2J AUTHOR, <https://www.a2jauthor.org> [https://perma.cc/H3DZ-4FA3] (last visited Sept. 16, 2020).

94. JUDITH BENNETT, TIM MILLER, JULIAN WEBB, RACHELLE BOSUA, ADAM LODDERS & SCOTT CHAMBERLAIN, NETWORKED SOC’Y INST., CURRENT STATE OF AUTOMATED LEGAL ADVICE TOOLS 14 (2018); Margaret Hagan, *The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services*, 20 VA. J.L. & TECH. 394, 402–04 (2016); MCDONALD ET AL., *supra* note 22, at 4.

legal resolution” whilst also being “capable of integrating triage, tailored legal information and access to expert advice, guiding users through intake, and canvassing possible solutions and resolution.”⁹⁵

The improved capability offered by digital self-help material may well be one way to make substantial access to justice gains. It may also help to realize the effectiveness and efficiency potential of bottom-up access to justice strategies that successfully empower users, meet legal needs, facilitate effective dispute resolution, and build legal capability.

C. Access to Justice Challenges

Notwithstanding extensive and ongoing reforms, several legal assistance and justice system challenges continue to bedevil access to justice as well as resources available to build the empirical evidence base.

1. Demand for Public Legal Assistance Outstrips Supply

Demand for public legal assistance for civil legal matters exceeds supply in many jurisdictions.⁹⁶ Service eligibility and scope are the primary tools available to public legal assistance service providers to target and prioritize civil legal assistance within available resources.⁹⁷ These two aspects of access to justice affect what legal assistance services are provided, to whom, for what, and in what form. Service scope and eligibility criteria also provide the basis for client intake, assessment, and triage to, first, available service channels, and second, referral to other sources and forms of assistance.⁹⁸ These tools, however, are relatively blunt.

So long as the quantum of public legal assistance funding remains dislocated from measures of need and evidence of what user-centric strategies are most effective and efficient in meeting that need, service providers face insidious decisions. When need escalates but funding does not, service providers face having to determine how to tighten service scope and eligibility, or eke out efficiency gains, to stay within operational budgets.

Tightening service scope and eligibility typically takes one or more forms: narrowing the areas of law and particular types of legal matters for which legal assistance is available;⁹⁹ restricting the level of service provided for different types

95. MCDONALD ET AL., *supra* note 22, at 4.

96. See, e.g., *Civil Legal Aid 101*, *supra* note 49 (“50% of those seeking civil legal help are turned away for lack of resources.”).

97. Hagan, *supra* note 94, at 412–13; MCDONALD ET AL., *supra* note 22, at 3.

98. MCDONALD ET AL., *supra* note 22, at 4.

99. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 13. Public legal assistance service providers typically provide legal assistance in defined areas of law, to certain types of people, and in particular circumstances. For example, legal representation provided under a grant of legal aid in most jurisdictions is mostly provided for criminal matters. Fewer grants of aid are typically provided for administrative, civil, and family areas of law. See, e.g., AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, *supra* note 66, at 26 fig.5. In those jurisdictions where grants of legal aid are

of legal matters, such as shifting the level of legal assistance provided for certain matters, or to certain people, to a less intensive form of unbundled legal assistance;¹⁰⁰ and tightening of means and merits tests, and service eligibility guidelines.¹⁰¹

Notwithstanding posited downstream efficiency benefits of targeted and timely legal assistance appropriate to legal need and capability, and preventative and early or timely intervention initiatives, evidence of the marginal difference that different levels and forms of legal assistance make remains thin. Improved understanding of differential legal need and capability across the community, what services models “work,” for whom, for what, when, under what circumstances, to what end, and at what costs are vital to building the economic business case for investing in bottom-up legal assistance strategies.

2. Heightened Legal and Related Needs Linked to Higher Socioeconomic Disadvantage

Legal needs survey research consistently points to inequity in the experience of legal problems. Inequity in the experience of legal problems is linked to socioeconomic disadvantage. For instance, Australian research found that a small minority of respondents, less than nine percent, accounted for nearly two-thirds of the legal problems reported.¹⁰² Legal problem prevalence was higher amongst

provided in noncriminal areas of law, their scope and eligibility requirements tend to come under threat by rising expenditure on grants of legal aid in criminal areas of law. *Id.* at 32.

100. MCDONALD ET AL., *supra* note 22, at 3. For example, moving certain types of legal matters and client groups out of “legal representation” under a grant of legal aid and into a “legal advice” service channel, and moving certain types of legal matters and client groups out of “legal advice” and into a “legal information” service channel.

101. *See generally* Michael Zander, *English Legal Aid System at the Crossroads*, 59 A.B.A. J. 368, 368 (1973). Means and merits tests are used to target scarce public legal assistance resources to particular types of people, facing certain legal circumstances. Service eligibility typically tightens as the level of service intensity (and expenditure) increases, with eligibility requirements becoming progressively stricter for provision of legal information to representation. Means, merits, and service requirements usually require service providers to determine service eligibility on the basis of information about personal and legal circumstances. *See, e.g., id.* (discussing the application of “the merits test, which in civil cases is whether a solicitor would advise a reasonable client who had the means to spend his own money”). Although different public legal assistance providers strike balances differently in setting service eligibility, means tests usually set service ceilings based on the income, wealth, and financial capacity (which may or may not require some form of co-payment or reimbursement from a successful applicant). *See, e.g., id.* (stating that the “means test consists of three categories” one of which is “those so poor that they are entitled to free [legal] services.”). Merits and other service eligibility requirements consider factors such as the severity of the matter, likely benefit to the individual, likelihood of success, and potential consequences. *See* Charles George & Gregory Jones, *Legal Aid: The Legal Merits Test in Judicial Review*, 4 JUD. REV. 14, 15 (1999) (listing what “an applicant [must] show to satisfy the legal merits test for judicial review proceedings”).

102. Coumarelos et al., *supra* note 4, at 59. Scholarship, however, has demonstrated that the composition and method of legal need surveys are likely to affect findings. PASCOE PLEASENCE, NIGEL J. BALMER & REBECCA L. SANDEFUR, *PATHS TO JUSTICE: A PAST, PRESENT AND FUTURE ROADMAP*, at iii–iv (2013); OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 30–31.

disadvantaged population groups.¹⁰³ Similar findings of a minority of people experiencing the majority of legal problems have also been reported in other legal needs surveys, although methodological and analytical differences undermine comparative analysis of survey findings.¹⁰⁴

Survey research demonstrates that legal problems are particularly prevalent among those with compounding health and welfare needs, such as those with chronic ill-health/disability, who are single parents, unemployed, and live in disadvantaged housing.¹⁰⁵

People experiencing socioeconomic disadvantage have also been shown to be at heightened risk of a range of interlinked, clusters of legal and related social problems.¹⁰⁶ Those variously described as being socially and economically disadvantaged, socially excluded and marginalized, and living in poverty are often characterized by the experience of multiple and complex legal and other needs, and lower personal capability, across several socioeconomic indicators.¹⁰⁷ Socioeconomic disadvantage can concentrate and compound vulnerability to multiple legal problems, with each additional indicator of disadvantage having an additive effect increasing the average number of legal problems experienced.¹⁰⁸

The experience of socioeconomic disadvantage can increase vulnerability to legal and related problems, just as experience of legal and related problems can extend and entrench socioeconomic disadvantage. In particular, socioeconomic disadvantage is associated with increased vulnerability to the defining characteristics of certain types of legal matters associated with so-called “poverty law.” Examples include credit and debt, government benefit, rented housing problems, etc.¹⁰⁹ Certain types of legal and social problems can also trigger experience of, or otherwise increase vulnerability to, additional legal and social problems. For example, onset of personal injury and illness can manifest a variety of interrelated legal and other social needs, including employment, financial, credit and debt, housing, homelessness, and family problems. Legal and social needs can spiral and escalate.¹¹⁰

Associations between legal and related needs and socioeconomic disadvantages point to potential benefits of more intensive and integrated forms of legal assistance to meet the access to justice and legal needs of those at greater risk

103. HUGH M. McDONALD & ZHIGANG WEI, CONCENTRATING DISADVANTAGE: A WORKING PAPER ON HEIGHTENED VULNERABILITY TO MULTIPLE LEGAL PROBLEMS 2–3 (Law & Just. Found. of N.S.W., Updating Just. Ser. No. 24, 2013).

104. PLEASENCE ET AL., *supra* note 102, at 5, 29; OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 32–33.

105. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 5–12.

106. OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 32.

107. McDONALD & WEI, *supra* note 103, at 3–4; PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 5–12.

108. McDONALD & WEI, *supra* note 103, at 4.

109. Coumarelos et al., *supra* note 4, at 72 tbl.3.9.

110. *Id.* at 15, 91.

of multiple legal and related social problems. And in particular, these associations point to benefits for those experiencing higher levels of socioeconomic disadvantage. For instance, Pleasence et al.'s review of the access to justice and legal need evidence found the following:

Four themes in particular stand out. Legal assistance services for disadvantaged people should as far as practicable be:

- targeted to reach those with the highest legal need and lowest capability
- joined-up with other services to address complex life problems
- timely to minimise the impact of problems and maximise the utility of services
- appropriate to the needs and capabilities of users.¹¹¹

The heightened legal and related social needs of socially and economically disadvantaged people also point to the importance of effective pathways between legal and other human assistance services and the potential utility of systematic legal diagnostic, assessment, triage, and referral tools for use in diverse legal and other human assistance service settings.

3. Legal Capability Is Linked to Socioeconomic Disadvantage

Legal needs survey research further indicates that those most vulnerable to legal problems tend to be those with less of the legal knowledge, self-help skills, motivation, confidence, and resources required to effectively deal with legal problems without assistance. They also tend to exhibit delayed, crisis-driven help seeking and face additional access to justice barriers. This includes additional barriers stemming from the experience of socioeconomic disadvantage. Unresolved legal problems also “tend to cluster, overwhelm, and [disproportionately] blight” the lives of those experiencing socioeconomic disadvantage.¹¹²

Survey research also demonstrates how legal problem-solving behavior is shaped by legal matter and demographic characteristics. Although the strongest predictor of legal problem-solving tends to be legal problem characteristics, demographics are also important.¹¹³ Greater access to financial and other resources (e.g., having a friend, colleague, or family member who is a legal practitioner), perhaps unsurprisingly, is also associated with an increased likelihood of acting to try and resolve a justiciable matter.

Not only are higher levels of socioeconomic disadvantage associated with higher vulnerability to legal problems, but also poorer legal problem-solving behaviors, including increased likelihood of lumping legal problems and acting

111. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at iii.

112. *Id.* at 121.

113. *See generally* PASCOE PLEASENCE, NIGEL BALMER & ALEXY BUCK, *CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE* (2d ed. 2006); Coumarelos et al., *supra* note 4; PLEASENCE ET AL., *supra* note 102; OECD & OPEN SOC'Y FOUNDS., *supra* note 1.

without the benefit of any legal information and advice.¹¹⁴ Perhaps unsurprisingly, those experiencing greater socioeconomic disadvantage also tend to face more barriers to accessing and actioning self-help materials compared to those who are less disadvantaged.¹¹⁵ As socioeconomic disadvantage increases, the likelihood of self-help action informed by legal self-help materials, such as hardcopy and website materials, has recently been shown to decrease.¹¹⁶

Socioeconomic disadvantage, therefore, presents challenges for bottom-up strategies to enhance legal capability and access to justice.

4. Growing “Justice Gap” and “Missing Middle”

Circumscribed resourcing for public legal assistance services, dislocated from community needs, points to an increasing “justice gap.”¹¹⁷ That is, the gap between those who are eligible for public legal assistance and those able (or think that they are able) to afford legal assistance privately.¹¹⁸ More specifically, a similar “representation gap” is also described, that is the gap between those eligible for public legal representation and those able (or think that they are able) to afford legal representation services privately.¹¹⁹

In those jurisdictions with public legal aid schemes, when legal representation status is plotted against income or financial resources, those who tend to be legally represented in formal dispute resolution processes tend to be found at the lower and higher ends of the financial spectrum.¹²⁰ Those in the middle, who typically have to self-represent, are also known as the “missing middle.”¹²¹ Provision of grants of legal aid for legal representation is the main strategy deployed to equalize access to legal representation, although it tends to do so only for the most disadvantaged suffering from the most serious legal matters.

An enduring access to justice challenge is, therefore, “determining precisely how to make the most of limited services by seeking to help more people in proportionate and appropriate ways [that ‘work,] without depleting public resources away from aiding the most disadvantaged.”¹²² And further, where eligibility for grants of legal aid are tightened, it tends to have a residualizing effect whereby publicly funded legal representation services are increasingly provided only to those experiencing increasing levels of disadvantage and facing increasingly severe matters. In addition, there also tends to be a squeezing effect whereby scarce resources are prioritized to criminal rather than civil matters.¹²³

114. MCDONALD & WEI, *supra* note 4, at 2, 8–9.

115. *Id.*

116. MCDONALD ET AL., *supra* note 22, at 8, 10.

117. *Id.* at 3.

118. *Id.*

119. *Id.*

120. *Id.*

121. AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, *supra* note 66, at 20.

122. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 122.

123. AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, *supra* note 66, at 32.

5. Unbundled Public legal Assistance

In the early, narrow conception of access to justice, access to lawyers was often equated with access to full casework and representation services, giving rise to traditional lawyer-client relationships and professional obligations.¹²⁴ In the traditional relationship, a lawyer takes on the carriage of a matter and acts on the client's instructions. Where there are insufficient public lawyers to go around, however, access has to be rationalized and prioritized to particular types of matters and people.¹²⁵

Unbundling of legal assistance is a common strategy public legal assistance providers use to attempt to cope with service demand outstripping capacity. Also known as “discrete task assistance” and “limited scope services,” unbundling refers to the separation of legal assistance into discrete components.¹²⁶ It is distinguished from traditional forms of “fully bundled” services, where legal advisers handle all elements and tasks to achieve legal resolution.¹²⁷ Unbundling is also sometimes a way to defray private legal costs, such as where a client performs some tasks and others are left to the legal adviser.¹²⁸ In the context of public legal assistance, however, unbundling most commonly refers to the provision of only the level of assistance to which a client is entitled, such as only legal information, advice, and minor task assistance, or, depending upon the service model, some combination thereof.¹²⁹

Evaluative work points to different combinations of unbundled legal assistance as potentially being more effective and efficient depending on the nature of the legal issues and the legal need and capability of the client or user. Legal information and education strategies, for example, may be vital to building effective referral pathways to support uptake of legal outreach services by hard-to-reach groups.¹³⁰ Minor task assistance may be vital to support effective resolution for low capability clients who may otherwise face overwhelming barriers to actioning legal advice. The provision of legal advice may be necessary for those unable to apply legal information to their circumstances as well as those facing complex legal matters, where possible options and their consequences need to be investigated and weighed.

Unbundling is also a strategy to stretch scarce public resources to provide some form of legal assistance to *more* people.¹³¹ There is, however, a trade-off in terms of service intensity. Either provide more intensive (or heavier and expensive) forms of legal assistance, such as legal representation services to *fewer* people, or

124. See *supra* Section II.A.1.

125. See, e.g., AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, *supra* note 66, at 32.

126. PLEASANCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 141.

127. *Id.*

128. *Id.*

129. *Id.* at 141–42.

130. *Id.* at 60.

131. *Id.* at 141.

provide less intensive (or lighter and cheaper) forms of assistance, such as legal information, advice, and minor task assistance, to *more* people.¹³²

A range of unbundled public legal information and education efforts are intended to help lay people meet their legal needs, navigate the justice system, and resolve justiciable problems themselves. As legal assistance is increasingly unbundled, however, recipients retain increasing responsibility for, and carriage of, legal resolution and outcomes.

Outcomes of increasingly unbundled forms of legal assistance increasingly rely on user legal capability and ability to meet legal needs. Someone deemed eligible to receive only public legal information, for example, will need to interpret that information, apply it to their particular circumstances, and take positive steps to action it. This process will be more complex and difficult in circumstances where rights and responsibilities are clouded. Doing so may be more complex again where there are several courses of action, possible consequences, and preferred outcomes to weigh.

6. Legal Capability Limits of Unbundled Legal Services

The utility and effectiveness of unbundled legal assistance depends on the ability of people to make effective use of that assistance. For instance, to meet legal needs, unbundled forms of legal assistance have to be sought, obtained, and used.

As legal assistance services are increasingly unbundled, resolution and outcomes of justiciable problems increasingly depends on personal legal capability. Legal capability can, therefore, impose upper bounds, or limits, on what unbundled forms of legal assistance can be expected to achieve with respect to particular types of legal problems and users.

Service innovations intended to promote bottom-up access to justice and facilitate self-help action, such as online legal resources and applications, public legal information and education, and legal self-help kits, tools, and guidance materials, have been made available to varying degrees in different jurisdictions.¹³³ Such assistance, however, may be ill matched to the legal need and capability of certain people and groups.

Self-help materials would ideally be both accessible and easy to use by those they are intended to assist. Empirical research, however, suggests that self-help materials may be particularly ill suited to those experiencing higher levels of socioeconomic disadvantage, who tend to disproportionately experience legal and related problems and have the least legal capability to effectively deal with them.¹³⁴

Recent analysis of the Legal Australian-Wide Survey, for example, has shown important links between the use and helpfulness of legal self-help materials and the

132. *Id.* at 141 n.121.

133. *See supra* sources cited notes 84, 87 and accompanying text.

134. MCDONALD ET AL., *supra* note 22, at 5.

outcomes achieved for justiciable problems.¹³⁵ This survey asked respondents whether or not they had sought help from any “website, book, leaflet, or self-help guide” for legal problems experienced, where they had been used, and how helpful those materials were.¹³⁶ Both the use and helpfulness of self-help materials were found to vary significantly by legal problem¹³⁷ and socioeconomic characteristics.¹³⁸

McDonald et al. found that self-help materials were used for less than twenty percent of legal problems and that they were rarely the only type of assistance used or action taken.¹³⁹ In fact, respondents used self-help materials and took no action at similar rates.¹⁴⁰ When they were used, self-help materials were only rated as helpful for sixty percent of justiciable problems.¹⁴¹ Although self-help materials were significantly more likely to be used for legal problems rated by respondents as being more severe, they were significantly less likely to be rated as helpful for more severe problems.¹⁴² Use of self-help materials was also associated with increased use of professional advisers and other self-help actions.¹⁴³ Obtaining self-help materials that users rated helpful were found to increase both legal problem outcome satisfaction and favorability.¹⁴⁴ Outcomes were also improved when the main adviser used provided the respondent with prepackaged legal information.¹⁴⁵

These findings have several implications with respect to bottom-up access to justice efforts. First, the findings signal the importance of considering legal self-help a complementary, rather than an alternate or substitute legal assistance strategy. Empirically, those who obtain legal self-help materials are likely to also seek and use other forms of assistance. This finding, therefore, points to the potential utility of well-designed, multifaceted service models that integrate targeted and tailored self-help materials with access to other complementary forms of legal assistance. The findings also suggest that there is a segment of the population that is better

135. *See id.* at 16–22.

136. Coumarelos et al., *supra* note 4, at 281. Respondents who reported experiencing more than three justiciable problems in the previous twelve months were only asked about actions taken with respect to the three most serious problems. *See id.* at 50.

137. Self-help materials were used at significantly higher than average rates for consumer, employment, family, government, health, housing, and money problems and were used at significantly lower than average rates for motor vehicle accidents, crime, and personal injury problems. MCDONALD ET AL., *supra* note 22, at 10 tbl.2. When they were used, however, they were more likely to be rated as helpful for accidents and housing problems, and less likely to be rated as helpful for government problems. *Id.* at 11.

138. Self-help materials were significantly less likely to be used by older people (aged 65+ years) compared to all younger age groups (i.e., 15–17; 18–24; 25–34; 35–44; 45–54; 55–64). *Id.* at 8, 10 tbl.2. These materials were also significantly less likely to be used by those with lower education levels, with a non-English main language, and living in a remote or regional area. *Id.*

139. *Id.* at 7.

140. Respondents used self-help materials for 19.5% of legal problems and took no action for 18.3% of legal problems. *Id.* at 7.

141. *Id.* at 10.

142. *Id.* at 10, 20.

143. *Id.* at 7.

144. *Id.* at 13.

145. *Id.*

equipped to access and use legal self-help materials effectively. Investments in self-help materials are therefore likely to pay access-to-justice dividends, at least with respect to a subset of users.

Second, there appears to be limits in the utility and helpfulness of self-help materials that stem from both the nature of the legal problem and sociodemographic characteristics of the user. Another subset of the population appears to be less capable of effectively using self-help materials, tending to not even try to access or use them, and when they do, are more likely to find them unhelpful. Users who found legal self-help materials unhelpful were also less likely to achieve satisfactory and favorable outcomes.

Finally, McDonald et al.'s findings point to the importance of determining just what makes self-help materials helpful for different types of legal problems and users, as well as the importance of understanding user experiences and outcomes for design of effective self-help strategies.¹⁴⁶ This insight points to the importance of user-testing and human-centered design approaches to information and systems. Further research is particularly needed to identify features and factors that affect the helpfulness of legal self-help materials, as well as research pinpointing which materials are more likely to be helpful for what type of legal matters and users. Like questions of “what works” more broadly, the utility of legal self-help materials as a strategy to enhance legal capability and access to justice appears to depend upon having improved capacity to monitor and learn what legal self-help materials work, for whom, and for what legal matters. This understanding further points to the need for improved capacity to design legal self-help interventions for particular target users and legal issues, to measure and monitor what users can do along with the outcomes they achieve.

Design of improved, more accessible, and effective unbundled services also stands to benefit from wider information about what nonusers do and achieve and follow-up studies that compare outcomes of different types of users, nonusers, and service models. There is also substantial scope for rigorous studies to employ randomization to determine for whom and for what unbundled legal services “work.”

7. Triage to an Appropriate Service Channel

A central feature of user-centric legal assistance service models would, ideally, be assessment and triage on the basis of knowledge of anticipated outcomes and service strategies that “work.”¹⁴⁷ This equates to rationalizing services by sorting the

146. See MCDONALD ET AL., *supra* note 22, at 22.

147. CHRISTINE COUMARELOS & HUGH M. MCDONALD, DEVELOPING A TRIAGE FRAMEWORK: LINKING CLIENTS WITH SERVICES AT LEGAL AID NSW 13 (2019); D. James Greiner, *What We Know and Need to Know About Outreach and Intake by Legal Services Providers*, 67 S.C. L. REV. 287, 291–92 (2016).

right type of users and clients into the service channel or slot that matches their legal need and capability and what they stand to gain or lose.¹⁴⁸

Tailoring legal services to user need and capability is not new, although efforts to learn about “what works” for diverse users and legal problems in a structured way is still in its infancy. Effective service design and triage, therefore, points to the need for improved knowledge about how legal need and capability affects what people do and achieve through different legal service models.

Qualitative analysis of interviews with public legal practitioners in Australia has demonstrated that legal practitioners often differentiate the legal assistance services they provide on the basis of their professional experience, assessment of the specific nature of the client’s legal need and capability, and service environment.¹⁴⁹ This finding led Pleasence et al. to pinpoint questions about how legal assistance might be better supported to systematically tailor provision of public legal assistance so as to appropriately meet user need and capability—at all stages from service uptake and intake, to assistance, referral, and follow-up.¹⁵⁰

An important feature of user-centric service models may, therefore, be improved by understanding how users’ level of legal capability affects the helpfulness and effectiveness of different forms of legal assistance. For instance, it would be ineffective and wasteful for a person to be triaged to an inappropriate form of legal assistance.

Of course, a prior assumption for such approaches is first having a range of different service options to triage people to. In the case of one-size-fits-all services, there is no need to triage.

8. Cusp of Digital Transformation

As already noted, justice institutions are widely identified as ripe for digital transformation.¹⁵¹ As information technology rapidly advances and changes sweep sector after sector, it is increasingly likely that people will expect legal information to be readily available, inexpensive, and available at a time and in a form that can easily be used to meet their needs. Digital solutions in the form of guided pathways, automated document assembly, and online dispute resolution are becoming increasingly common. Whether or not they are annexed to or integrated with legal assistance and formal dispute resolution processes and whether or not they are

148. HUGH M. McDONALD, AMANDA WILSON, ZHIGANG WEI, SARAH A. RANDELL & SUZIE FORELL, IN SUMMARY: EVALUATION OF THE APPROPRIATENESS AND SUSTAINABILITY OF VICTORIA LEGAL AID’S SUMMARY CRIME PROGRAM 162, 182 (2017); *see also* COUMARELOS & McDONALD, *supra* note 147, at 12; Greiner, *supra* note 147, at 291–92; I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 240 (2013).

149. SUZIE FORELL, HUGH M. McDONALD, STEPHANIE RAMSEY & SARAH A. WILLIAMS, REVIEW OF LEGAL AID NSW OUTREACH LEGAL SERVICES, STAGE 2 REPORT: EVOLVING BEST PRACTICE IN OUTREACH – INSIGHTS FROM EXPERIENCE 56 (2013); *see also* PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 157.

150. PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 157.

151. *See supra* Section II.B.3.

backed by other innovations such as artificial intelligence, natural language inquiry, online human and virtual assistants, intelligent automation, and predictive analytics, digital solutions are widely touted as a means to transform legal services, better serve the latent legal need market, and fill the “justice gap.”¹⁵²

With improved information technology capability providing the means to enhance legal capability, given the limits of unbundled legal assistance discussed above, digital transformation may be better suited to the legal needs and capabilities of those in the “missing middle” experiencing less disadvantage. This segment of the population appears to be a good candidate to benefit from digital transformation, although as already noted, more needs to be known about what forms of unbundled legal assistance are helpful and “work,” for whom and for what, irrespective of the means by which they are provided.

There has also been increasing recognition that digital solutions specially designed for the legal needs of low capability users, as well as those designed to augment and enhance the ability of the advisers and professionals who work with them, may also be effective strategies to enhance overall access to justice and legal capability.¹⁵³ These prospects, therefore, point to the legal and digital capability of target users as central to the likely effectiveness and efficiency of digital access to justice strategies.

A nuanced understanding of how personal legal capability intersects with digital capability is therefore needed, both to inform the design of digital solutions as well as to augment and integrate them with other forms of assistance and service models as may be appropriate. This may also be key to realizing any substantial access to justice gains from digital transformation, designing of digital solutions that are helpful and “work,” and gauging and assessing access to justice impacts and consequences.

In particular, so-called “digital first” and “digital by default” strategies risk marginalizing, excluding, and defaulting those with elevated and complex legal needs.¹⁵⁴ Where they do, they are also likely to forge even fiercer access to justice barriers.¹⁵⁵ Gauging for whom and for what digital solutions do and don’t “work” is vital to avoid digital solutions that reproduce, extend, and entrench access to justice inequality.¹⁵⁶

Determining the impact of digital solutions on access to justice requires baseline evidence about the uptake and utility of different legal assistance service strategies. In the case of digital solutions, this requires contextual information about how they are being used, by whom, for what, how helpful they are, and what outcomes are achieved. For example, digital solutions may possibly increase access

152. *See generally* Cabral et al., *supra* note 83.

153. MCDONALD ET AL., *supra* note 22, at 5.

154. *Id.*

155. *Id.* at 21.

156. *Id.* at 5.

to digital material and platforms but have little or no impact on legal needs and resolution—at least for some types of legal problems and users.

Digital solutions have wide policy appeal as attractive, cost-effective means of improving access to justice, particularly with respect to the “easy-to-solve” types of everyday legal problems experienced by the people who are “easy-to-reach,” “easy-to-serve,” and who are otherwise underserved by the traditional private legal markets.¹⁵⁷ Digital transformation operates on at least two fronts: harnessing advancing technology to better help laypeople to self-help, and progress and resolve legal problems, as well as helping legal assistance services to increase their capacity to provide legal assistance to more people.¹⁵⁸

Efficiency dividends potentially derived from better targeted and more effective use of resources can potentially provide more accessible and appropriate forms of legal help to more people. Reaping these dividends, however, requires improved ability to personalize and tailor digital legal assistance, seamlessly match individual user legal need and capability, and do so at scale.

9. *Entrenched Legal Problem-Solving Behavior*

Some legal needs surveys have found that legal problem-solving behavior is learned and can become entrenched and persistent.¹⁵⁹ That is, the strategy used by someone for one legal problem, such as doing nothing, using self-help strategies, or seeking professional legal assistance, tends to be what they do to try and solve subsequent legal problems. For example, McDonald et al. found that people who had used legal self-help resources for one justiciable problem were significantly more likely to also use legal self-help resources for other justiciable problems.¹⁶⁰ Similar results were also found with respect to legal self-help resource helpfulness. Specifically, those who rated the legal self-help resources they used for one justiciable problem as being “helpful” were significantly more likely to rate the legal self-help resources that they used for other justiciable problems as also being “helpful.”¹⁶¹

Such findings suggest that legal problem-solving behavior and capability is patterned at the personal level. This has important consequences for access to justice strategies.

First, it suggests that enhancing access to justice may, at least in part, rest with efforts to change entrenched poor legal problem-solving behaviors or otherwise instill and support more beneficial behaviors. Second, it suggests that building legal capability and facilitating access to justice for one legal problem can endure and

157. See generally Hadfield, *supra* note 11; Hagan, *supra* note 94; SUSSKIND, *supra* note 74; BENNETT ET AL., *supra* note 94; SMITH, *supra* note 85.

158. Hagan, *supra* note 94, at 399.

159. PLEASENCE ET AL., *supra* note 113, at 79; Coumarelos et al., *supra* note 4, at 36–37; PLEASENCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 23.

160. McDONALD ET AL., *supra* note 22, at 10, 15.

161. *Id.* at 11.

improve legal capability and access to justice for subsequent legal problems. Third, investing in foundational legal capability, through digital and other efforts, to build bottom-up access to justice is likely to have individual as well as system-level benefits. Those with foundational-level legal capability may be more likely to perceive and effectively act on their legal needs. Fourth, strategies to increase public understanding of law, assist people to perceive when and how they may benefit from legal assistance, and how that assistance can be obtained appear to be beneficial.

The ability to express and act on legal needs, in turn, may help make those who are otherwise hard to reach both *cheaper* and *easier* to assist. This ability may be particularly helpful when timely action is taken before legal needs escalate, cascade, and increase in both their severity of consequence and complexity to resolve. People who can take action and reach out for assistance will almost certainly be easier and cheaper for public legal assistance services to assist. By comparison, legal outreach services may be necessary to meet the needs of those vulnerable and marginalized *hard-to-reach* groups with reduced ability to appropriately express their legal needs. Examples of hard-to-reach groups include, amongst others, minority ethnic groups, those with cognitive impairment, homeless people, people in institutional care, and people living in extreme poverty.¹⁶² This difficulty may be due to lack of legal awareness or consciousness as well as various knowledge, skill, psychological, and resource constraints that undermine their ability to appropriately frame and express legal needs.¹⁶³

10. Capturing Complexity and Nuance of Legal Need

Another important access to justice challenge is the lack of available information and data to monitor and assess access to justice and legal need. This obstacle arises from theoretical, practical, and technical barriers and resource challenges to capturing user and problem complexity and outcomes with sufficient nuance to, first, determine how individual legal need and capability affect legal problem-solving and resolution, and second, inform suitably nuanced analysis of “what works.”¹⁶⁴ These issues are intertwined. For example, public legal assistance and judicial case management would, ideally, be based on evidence of “what works” for different users. The issue of suitably nuanced methods and measures to capture the complexity of user-centric legal need and capability is examined in further detail in the following section.

162. PLEASANCE ET AL., RESHAPING LEGAL ASSISTANCE SERVICES, *supra* note 4, at 47–49, 60.

163. *Id.*

164. See HUGH M. McDONALD, COSIMA MCRAE, NIGEL J. BALMER, TENIELLE HAGLAND & CLARE KENNEDY, APPLES, ORANGES AND LEMONS: THE USE AND UTILITY OF ADMINISTRATIVE DATA IN THE VICTORIAN LEGAL ASSISTANCE SECTOR 93–94 (2020).

III. USE OF SURVEY, ADMINISTRATIVE, AND EVALUATIVE EVIDENCE

A. Access to Justice and Legal Needs Survey Research

Meaningful understanding of user-centric access to justice is crucial for the development of effective access to justice policies and justice institutions. Representative surveys provide an empirical basis for understanding legal problem experience, handling, and consequences that cannot be achieved through other methods. Other types of surveys and empirical research provide a basis for examining phenomena and developing insights to test through representative surveys.

Access to justice and legal needs surveys collect information about the experience, handling, and consequences of justiciable problems.¹⁶⁵ This information includes both good and bad experiences of legal problems, institutions, and outcomes.

Surveys of public understanding of law and legal needs investigate knowledge, attitudes, experiences, and handling of justiciable problems from the bottom-up perspective of those who face them, rather than from the top-down perspective of justice system professionals and institutions.¹⁶⁶ They can also provide insight into how legal capability and other sociodemographic factors affect what people can do and achieve through law.¹⁶⁷

In the last twenty-five years, considerable research effort has examined factors affecting whether or not people are able or need to access justice to resolve their legal needs.¹⁶⁸ Legal needs surveys typically examine prevalence of different types of justiciable problems, what, if any, actions are taken to try and resolve these problems, including whether any legal information and professional advice is obtained, and what outcomes are achieved.¹⁶⁹ These surveys have built up a substantial evidence base around client and user perspectives of legal services and institutions. For instance, the OECD and Open Society Foundations recently reported that some fifty-five national legal need surveys have been conducted by governments and civil society organizations in more than thirty jurisdictions in this period.¹⁷⁰ A “thick” body of survey findings demonstrate several broadly consistent insights about access to justice, legal need, legal problem-solving behavior, and legal institutions:

- Legal problems are widespread.
- Legal problem-solving behaviors vary across the community.
- Many people take no action to try and resolve their legal

165. Coumarelos et al., *supra* note 4, at iii–iv.

166. OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 11–12.

167. *See, e.g., supra* text accompanying notes 162–63.

168. OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 25.

169. Coumarelos et al., *supra* note 4, at iii–iv.

170. OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 25.

problems, while many others act without the benefit of any legal information or assistance.

- Courts, tribunals, and other formal justice system processes are rarely used to resolve some legal problems.
- Health, economic, and social consequences can be substantial, and vary by legal problem and demographic characteristics, as well as legal problem-solving behavior.
- Legal and related problems often cluster and can heighten vulnerability to additional legal and related problems.
- Barriers to trying to use justice institutions to resolve legal problems are commonly experienced.¹⁷¹

Legal needs surveys provide compelling evidence of inequity in legal need and access to justice.

1. Impact of Legal Needs Surveys on Access to Justice Policy

Studies have also shown that legal needs surveys have been effective in identifying areas for access to justice policy reform and, more broadly, have influenced public policy approaches to access to justice and legal assistance around the world.¹⁷² This identification includes, for example, the “policy flip” from top-down to bottom-up user-centric approaches, informed by and responsive to the empirical reality of the diverse legal need and problem-solving behavior across the community.¹⁷³

2. Limits of Legal Need Surveys

The OECD and Open Society Foundation’s recent guidance on legal needs surveys and access to justice note several limits of legal need surveys.¹⁷⁴ Administrative data and other data collection methods are needed for the type of rigorous evaluation necessary to assess the impact of access to justice interventions and reforms, whether they “work,” for whom, and for what.¹⁷⁵ An in-depth qualitative investigation is also required to understand *how* and *why* service and system reforms work, or not.

Pleasence et al. conducted stakeholder interviews to assess the impacts of legal needs surveys across international jurisdictions.¹⁷⁶ This included stakeholder views of research gaps. Participants identified a variety of gaps:

171. *See generally id.*; PLEASENCE ET AL., *supra* note 102; PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4.

172. PLEASENCE ET AL., *supra* note 102, at 51–56; OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 37–38.

173. OECD & OPEN SOC’Y FOUNDS., *supra* note 1, at 37.

174. *Id.* at 30–31.

175. *See* MCDONALD ET AL., *supra* note 164, at 97–98.

176. PLEASENCE ET AL., *supra* note 102, at 51.

- More effective measures of “the impact of advice and the cost/benefit of services”
- “[M]ore evaluative information [to identify] ‘what works’ in respect of policy responses in the field of civil justice and how legal need [can] better be addressed through policy interventions”
- “[M]ore specific information relating to the problem-solving behavior of individuals”
- “[H]ow information [can] be effectively communicated to those with civil justice problems”
- Effective ways to communicate “the value of seeking legal help”
- What options to address access to justice needs are acceptable for different client groups.¹⁷⁷

Many of these gaps touch on aspects of legal capability and the need for more nuanced understanding of factors affecting what people do and achieve with respect to legal needs and use of law.

3. *New Survey Methods to Measure Legal Knowledge, Capability, and Justice Attitudes*

Legal needs surveys have variously examined one or more of the knowledge, skill, psychological, and resource legal capability dimensions.¹⁷⁸ For example, legal needs survey research commonly seeks to gauge respondent awareness of available sources of legal assistance. There is, however, a need for improved understanding of relative legal capability concerning specific situations and how this potentially shapes legal problem-solving behavior. Legal needs surveys have also used demographic indicators, such as level of education, income, and disadvantage, as proxy measures to infer legal capability. In examining how legal problem-solving was patterned by the level of socioeconomic disadvantage, McDonald and Wei employed a composite measure based on a count of indicators of disadvantage.¹⁷⁹

The shift to user-centric access to justice strategies, however, puts a premium on improved understanding of how issues such as legal awareness, confidence, and empowerment, broadly overlapping with the concept of legal capability, affect what people need to wield law effectively and act with legality. New survey methods and measures are especially needed to expand conceptualization, theorization, and understanding of factors affecting legal capability.

For example, Pleasence and Balmer have recently developed and operationalized a General Legal Confidence Scale for use in access to justice and legal needs surveys.¹⁸⁰ This scale can be used to gauge subjective legal confidence,

177. *Id.* at 57–58.

178. OECD & OPEN SOCIETY FOUNDS., *supra* note 1, at 86–87.

179. MCDONALD & WEI, *supra* note 4, at 2–3.

180. Pascoe Pleasence & Nigel J. Balmer, *Development of a General Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies*, 16 J. EMPIRICAL LEGAL STUD. 143 (2019).

an important theorized aspect of the psychological dimension of legal capability. New methods and measures to explore legal consciousness, the accessibility of courts and lawyers, and digital capability have also been recently been developed and deployed in the Victoria Law Foundation's *Community Perceptions of Law Survey*. These methods and measures shed new light on foundational aspects of legal capability, including whether people "recognize law as relevant to everyday justiciable problems," how "importance of lawyers and legal advice" is assessed "in the context of [specific] problems," and how accessible people see fundamental legal institutions such as "lawyers and courts."¹⁸¹ In Victoria Law Foundation's forthcoming Public Understanding of Law Survey (PULS), these, and additional measures of legal literacy, will be used to explore what people know and understand about Victoria's justice system and how they see it playing a part in their lives.¹⁸²

PULS will be the first comprehensive, large-scale, representative survey of legal knowledge, legal capability, and attitudes to justice conducted worldwide. Information from this survey will provide an evidence base to better understand and quantify public legal need and capability, and help to further inform the design of user-centric justice institutions. For example, PULS will explore variation in public understanding of law, capability, and attitudes by legal topic, demography, and geography.¹⁸³

With respect to the *Community Perceptions of Law Survey*, Balmer et al. reported that the nature of justiciable problems, demography, geography, and previous experience all matter and affect perceptions of the importance of law and accessibility of courts and lawyers. Justiciable problems varied in perception as "legal," whether or not a lawyer would be important, and whether or not lawyers and courts would be accessible.¹⁸⁴ Consistent with previous research, justiciable problems characteristics (i.e., type and severity) affected whether or not law was seen as relevant, lawyers as more important, and courts as more accessible. Those justiciable "[p]roblems where law was considered relevant were typically the same as those where a lawyer was considered to be important," although Balmer et al. further note that "law was considered relevant more often than lawyers were considered to be important."¹⁸⁵ Particularly for less severe justiciable problems, lawyers were typically seen as being less important than law. This points to a range of everyday justiciable problems where people may have a legal need, but where lawyers just do not figure.

Balmer et al. also found that while the personal experience of courts and lawyers was uncommon, it was generally positive. In contrast, secondhand accounts (i.e., from friends, family or colleagues) about courts and lawyers were more

181. See BALMER ET AL., *supra* note 32, at 2.

182. *Id.* at 12, 54–55.

183. *Id.* at 55 n.120.

184. *Id.* at 2.

185. *Id.* at 3.

common but also more negative.¹⁸⁶ Personal experience and secondhand accounts were both strongly related to how people viewed law's relevance, the importance of lawyers, and the accessibility of both courts and lawyers.¹⁸⁷ Positive or negative experience with a lawyer affected perceptions of their accessibility.¹⁸⁸ Negative experiences of lawyers negatively affected perceptions of their accessibility.¹⁸⁹ Those who had personal experience of courts, and particularly those who felt that they were fair, however, were likely to perceive courts as being more accessible compared to those with other experiences and views.¹⁹⁰ Negative secondhand accounts of courts were associated with increased perceptions of inaccessibility.¹⁹¹

These findings offer valuable insights on how justiciable problems are perceived and how public legal education and other strategies might be used to respond to and build legal capability concerning different justiciable problems. Once again, Balmer et al. identified benefits of targeted, integrated, collocated and outreach services that harness intermediaries to negate the need for people to identify the importance and relevance of the law and legal institutions. As the authors conclude, the "findings reinforce the importance of 'bottom-up' access to justice policy" and further position improved legal assistance and justice system design as having to "start[] and end[] with the needs and capabilities of users."¹⁹²

These findings demonstrate the potential for new survey methods and measures to improve understanding of legal capability and operationalize ongoing assessment of access to justice.

B. Administrative and Operational Data

The justice system generates substantial administrative and operational data. There are, however, several systemic challenges to using this data to assess access to justice at both user and system levels of abstraction. These challenges also limit meaningful assessment of the access to justice effects and consequences of legislative, policy, and institutional reform.

What and how administrative data might be used to assess and monitor access to justice depends on the nature, form, consistency, and quality of the available measures and data.

The utility of administrative and operational data for assessing justice access and other questions about institutional and policy reform, however, remains embryonic. For example, successive Australian access to justice inquiries, reviews, and reports continue to lament the state of the available justice system data, the evidence base to assess the access to justice arrangements, and more broadly,

186. *Id.* at 3–4.

187. *Id.*

188. *Id.*

189. *Id.* at 4.

190. *Id.*

191. *Id.*

192. *Id.*

fundamental questions about the performance of legal institutions and access to justice policy.¹⁹³

Lack of an evidence base that includes outcome measures makes the quantification of unmet legal need, the extent of potential underfunding of civil and family legal assistance, and assessment of the effectiveness and efficiency of different access to justice strategies, problematic.¹⁹⁴

Although the Australian national legal assistance policy has shifted in response to research evidence demonstrating inequity in access to justice and diverse legal need and capability across the community, as yet, this shift has not been mirrored by any substantial improvement in administrative and operational data.

1. Example: Australian National Legal Assistance Policy

Australian national legal assistance policy illustrates the mismatch between administrative and operational service data and the shift to client-centric legal assistance policy. Australia's *National Legal Assistance Partnership* (NLAP) supports "the *National Strategic Framework for Legal Assistance* by contributing to integrated, efficient, effective, and appropriate legal assistance services, which are focused on improving outcomes and keeping the justice system within reach for vulnerable people facing disadvantage."¹⁹⁵

The NLAP is intended to facilitate the achievement of the outcomes detailed in the *National Strategic Framework for Legal Assistance*, which sets out the following shared aspirational objective for all Australian Commonwealth, state, and territory government funded legal assistance: "To further a national, integrated system of legal assistance that is focused on keeping the justice system within reach, maintaining the rule of law, and maximising service delivery within available resources. Within this system, legal assistance services should be delivered in a high quality and culturally appropriate manner."¹⁹⁶

The *National Strategic Framework for Legal Assistance* specifies the purpose of legal assistance services as follows: "Legal assistance is intended to help vulnerable people facing disadvantage, who are unable to afford private legal services, to access

193. See generally AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, *supra* note 66, at 30, 33, 39; DEP'T OF JUST. & REGUL., VICT. STATE GOV'T, ACCESS TO JUSTICE REVIEW 1 (2016).

194. Notwithstanding measurement deficits, Australia's Productivity Commission determined that there should be an addition of AUD \$200 million per year in additional funding from Australian state and territory governments for civil and family legal assistance services. AUSTRALIAN GOV'T PRODUCTIVITY COMM'N, *supra* note 66, at 30.

195. COUNCIL OF AUSTRALIAN GOVERNMENTS, NATIONAL LEGAL ASSISTANCE PARTNERSHIP 1 (2020), <https://www.ag.gov.au/system/files/2020-06/National-Legal-Assistance-Partnership-Agreement.pdf> [<https://web.archive.org/web/20200901070415/https://www.ag.gov.au/system/files/2020-06/National-Legal-Assistance-Partnership-Agreement.pdf>].

196. COUNCIL OF ATT'YS-GEN., NATIONAL STRATEGIC FRAMEWORK FOR LEGAL ASSISTANCE 4 (2019), <https://www.ag.gov.au/system/files/2020-06/National-Strategic-Framework-for-Legal-Assistance.pdf> [<https://perma.cc/MN6T-8JRD>].

and engage effectively with the legal solutions and the justice system in order to address their legal problems.”¹⁹⁷

Australian national policy positions publicly funded legal assistance services as “a key component of the justice system,” “crucial in maintaining the rule of law by working to ensure that the law is able to be accessed by all people equitably,” and helping to ensure “that fundamental rights are upheld.”¹⁹⁸ The national policy specifies the purpose of legal assistance services, and what they are intended to achieve, in the following way:

Legal assistance services are intended to enable and empower individuals to make informed decisions about asserting or defending their legal rights, meeting legal duties and obligations or otherwise using the law and justice system to try to progress or address a legal problem.

By addressing legal problems in a holistic manner, legal assistance services allow for timely and cost-effective outcomes to an individual’s life and wellbeing, prevent the exacerbation of disadvantage, contribute to community safety, and provide broader socio-economic benefits, including the overall efficiency of the justice system and other taxpayer funded services.¹⁹⁹

This purpose points to the need for client-centric measures and data collection to support assessment of performance against the objectives and outcomes of the NLAP and the *National Strategic Framework for Legal Assistance*. This, again, points to the need for measures and methods to assess client-centric service provision and performance, such as whether legal assistance services successfully empower users to make informed decisions about asserting or defending their legal rights and meeting legal duties and obligations.

2. *Limits of Administrative and Operational Data*

Justice system administrative and operational data collected by public legal service providers, courts, and other justice institutions are indispensable for performance monitoring and assessment. This data, however, is qualitatively different to research and survey data. It can only be used as a measure of certain forms of express legal need. It cannot shed any light on justiciable problems handled informally or be used to measure latent or unexpressed legal need stemming from justiciable problems that are ignored.

The use and utility of administrative and operational data as a measure of access to justice depends on the nature and quality of the data points collected. At a system level, administrative data is often fragmented and partial, principally serving day-to-day operational needs of constituent institutions (i.e., legal services, courts, tribunals, etc.). Inconsistent measures and data points across the justice

197. *Id.* at 5.

198. *Id.*

199. *Id.*

system frustrates both aggregation and comparison and, worse, can mislead when administrative data is divorced from operational context, such as where data quality deficits are masked by aggregation.²⁰⁰

3. *Nature of Administrative and Operational Data*

Public legal services and other justice institutions collect a wide range of information about justice institutions, operations, and users. For example, legal matter type, party type, level of legal assistance, legal representation status, number of pending matters, filing fees received and waived, staffing, use of interpreters, matter duration, case backlogs, adjournments, mediations, finalizations, file integrity, disposal method and stage, matter outcome, final orders, and expenditure are some measures that may be available from justice system administrative and operational data.²⁰¹

There are, however, challenges to using the extensive data collected to assess the access to justice, just how much legality people need and enjoy, and what differences legal assistance and other institutional operations make to diverse legal need and capability. Administrative data is principally developed and used for administrative functions, although it can often be repurposed for some research and other performance questions.

For instance, justice system administrative data systems are variously used to monitor performance against key indicators, manage and monitor workload and workflow, manage facilities, staff, services, and manage and acquit expenditure.²⁰² Utility for assessing access to justice is often limited and depends on the nature and quality of the available measures and indicators.

Public legal assistance services keep records about users and services, while courts, tribunals, and other dispute resolution processes record details of cases and their disposition. Performance of public legal assistance services and other justice institutions is variously assessed against measures such as the following: the number of inquiries received, the number of referrals made, the number of self-help kits downloaded, the number of legal education sessions provided, the number of clients provided legal advice, the number of legal advices and assistances provided, the number and percentage of applications for legal aid received and granted, the number of cases lodged, the number and average number of adjournments per matter, how many and at what stage matters were finalized, and average time from

200. MCDONALD ET AL., *supra* note 164, at 99.

201. International efforts have also sought to implement standardized justice system performance indicators. For example, the International Consortium for Court Excellence's framework includes eleven core performance measures based on a mix of administrative and survey questionnaire measures: court user satisfaction, access fees, case clearance rates, on-time case processing, duration of pretrial custody, court file integrity, trial date certainty, court employee engagement, compliance with court orders, and cost per case. INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, GLOBAL MEASURES OF COURT PERFORMANCE 2 (2d ed. 2018).

202. *Id.* at 4.

lodgment to disposal.²⁰³ Productivity and benchmark measures can gauge performance by individual lawyers and judicial officers, geographic location, area of law, and type of matter.²⁰⁴

Depending on the service setting, however, there may be some opportunity for service providers to learn more about what users can do and achieve. For instance, in their evaluation of Victoria Legal Aid's summary crime duty lawyer services, McDonald et al. found duty lawyers sometimes came to observe clients who had been assessed as eligible to receive only legal information, or only legal information and advice, subsequently self-representing in court while they were waiting to assist other clients who were eligible to receive in-court advocacy.²⁰⁵ Duty lawyers reported that some clients appeared to successfully use the legal information and advice provided and achieved the expected outcomes.²⁰⁶ However, duty lawyers also reported sometimes watching people making poor guilty pleas: "Particularly when you've spoken to them and they've told you things and then you've said, 'Well, I can't appear for you' and then you're sitting in court when they appear and they're not saying half of the things they should be saying . . ." ²⁰⁷

Those eligible to receive legal advice and information only, unsurprisingly, were found to vary in their ability to follow and use the advice and information provided.²⁰⁸ Such information, however, unless systematically collected, will usually be limited to anecdote.

Consequently, information about outcomes and what forms of unbundled legal assistance "work" tends to be limited. Unless service providers have the time, resources, and interest to follow-up on what users do and what outcomes they achieve, administrative service data will continue to have limited utility with respect to unbundled forms of legal assistance. This deficiency is a fundamental impediment to learning more about how much legality works, for whom, for what, and in what circumstances.

This is especially the case for civil areas of law, where, as noted above, provision of fully bundled public legal assistance is relatively rare.²⁰⁹

4. Routine Collection of User Information

For many other parts of the justice system, there is usually *even less* meaningful user information routinely collected. Higher and appellate courts tend to routinely collect far more information about parties' legal representatives than they do

203. See, e.g., LEGAL SERVS. CORP., *supra* note 49, at 32 fig.5, 42 tbl.1, 43 fig.10, 45 tbl.2; Giuliana Palumbo, Giulia Giupponi, Luca Nunziata & Juan Mora-Sanguinetti, *Judicial Performance and Its Determinants: A Cross-Country Perspective* 25 fig.10 (OECD Economic Policy Papers, Working Paper No. 05, 2013).

204. See, e.g., Palumbo et al., *supra* note 203, at 25–27.

205. MCDONALD ET AL., *supra* note 148, at 184–85.

206. *Id.* at 184.

207. *Id.* at 185.

208. *Id.* at 184–85.

209. See *supra* Section I.C.5.

information about the parties themselves.²¹⁰ This reflects the administrative imperative of maintaining accurate addresses for court and legal correspondence and the fact that most parties in the higher and appellate courts are represented by legal counsel.²¹¹ Even for lower courts, which handle the overwhelming bulk of judicial proceedings, information routinely collected about parties tends to be scant.²¹²

For example, some recent efforts to map court and tribunal data in Australia have revealed that, beyond questions of data quality, lack of routine collection of demographic information about parties means that basic information about the socioeconomic mix of court users and parties is limited.²¹³ While party name is recorded (which can be used to infer natural or legal person status), there is typically little other information about natural persons, such as socioeconomic status or ethnicity, and little other information about legal persons, such as type of business entity or turnover.²¹⁴

Due to the nature of the data collected, administrative and operational data also tends to lack the utility for measuring the impact and consequences of access to justice reforms. For example, where courts do not systematically record the number of people appearing without legal advice or representation, there is limited ability to determine impact of legal advice and representation on case flow, disposal, and outcome. This deficiency further extends to limited ability to determine whether or not the number and proportion of unrepresented litigants is increasing or decreasing over time, for particular legal matters, or amongst particular types of self-represented litigants.

Similarly, the lack of suitable measures also hampers the assessment of the impacts of the operational and access to justice impacts of substantive and procedural reforms. The common refrain of civil procedure reform is “better,

210. *See, e.g.*, SUZIE FORELL, CHRISTINE COUMARELOS, AMANDA WILSON, NIGEL BALMER, ZHIGANG WEI, CATRIONA MIRRLEES-BLACK, MARIA KARRAS & EMILY HINTON, DATA INSIGHTS IN CIVIL JUSTICE: NSW SUPREME COURT 40 (2018) (“[P]arties’ addresses are often not entered on JusticeLink or only their lawyers’ addresses are entered.”).

211. *Id.*

212. SUZIE FORELL, CATRIONA MIRRLEES-BLACK, SARAH A. WILLIAMS, CHRISTINE COUMARELOS, HUGH McDONALD, GEOFF MULHERIN, DANKA PRODANOVIC, AMANDA WILSON, ZHIGANG WEI & CHLOE ZHANG, DATA INSIGHTS IN CIVIL JUSTICE: NSW LOCAL COURT 10 (2016) [hereinafter NSW LOCAL COURT] (“[T]his report has only skimmed the surface of questions and answers that may be found in this data.”).

213. *See generally id.*; SUZIE FORELL, CATRIONA MIRRLEES-BLACK, CHRISTINE COUMARELOS, MARIA KARRAS & SARAH WILLIAMS, DATA INSIGHTS IN CIVIL JUSTICE: NSW CIVIL AND ADMINISTRATIVE TRIBUNAL: OVERVIEW NCAT PART 1 (2016); CATRIONA MIRRLEES-BLACK, SUZIE FORELL, SARAH A. RANDALL, CAMPBELL BURNS-McRUVIE, JESSICA CHENG, NENA JANSSENS & FELIX TAAFFE, DATA INSIGHTS IN CIVIL JUSTICE: NSW DISTRICT COURT (2017); SUZIE FORELL ET AL., *supra* note 210.

214. NSW LOCAL COURT, *supra* note 212, at 5. Note that it may be possible to deduce further information from legal person name such as whether an entity is a private or public organization. Registers of business names and corporations can also be consulted to deduce further information about the nature of the party.

quicker, cheaper” justice.²¹⁵ Lack of suitable court and wider justice system administrative data, however, often prevents comprehensive assessment of the access to justice impacts of these reforms, such as whether intended “better, quicker, cheaper” benefits have been realized, or not, and whether or not they are enjoyed for all matters and by all parties.

5. Public and Private Legal Assistance Services

The availability of legal assistance service data is typically limited to publicly funded rather than private legal services.²¹⁶ Often such data is limited to a count of services, such as the number of grants of legal aid made or legal advices provided.²¹⁷ Comparatively little is known about private legal services, such as the volume of inquiries they receive, the number of clients and matters they take on, the nature of any referrals they make, or the volume and nature of legal assistance services they provide.

What is known from public legal assistance providers also depends upon how they operate, and what administrative and operational measures they use. For instance, public legal assistance services may or may not maintain records of the inquiries they receive from people seeking legal assistance, or how those inquiries are assessed.²¹⁸ Generally, the more intensive the level of public legal assistance provided, the more administrative and operational information recorded. For example, more administrative and operational information is typically recorded with respect to grants of legal aid than for provision of legal advice, information, and referral.²¹⁹ Matter outcomes are generally only recorded for casework and legal representation services and are usually unavailable with respect to unbundled forms of legal assistance.²²⁰

6. Outcomes of Unbundled Legal Assistance

A feature of unbundled legal assistance is that service provider contact typically ends with the provision of one-off legal information, advice, task assistance, and referral.

Currently, evidence on the utility and effectiveness of unbundled legal assistance services remains thin. Little is also known about whether and how people

215. S. REP. NO. 101-416, at 1 (1990), as reprinted in 1990 U.S.C.C.A.N. 6802, 6804 (stating that the purpose of civil procedure reform in the United States was the “just, speedy, and inexpensive resolution of civil disputes”).

216. See generally LEGAL SERVS. CORP., *supra* note 49.

217. See, e.g., *id.*

218. See, e.g., *id.* at 38 (“LSC grantees tracked the individuals who contacted them seeking assistance with civil legal problems. Individuals coming to LSC grantees with problems were grouped into three main categories: unable to serve, able to serve to some extent (but not fully), and able to serve fully.”).

219. See, e.g., *id.* at 14 (determining that “LSC-funded legal aid programs” will not be able to meet the legal needs of Americans).

220. See, e.g., *id.* at 32 fig.5 (relaying the “Types of Services Received from Legal Professionals”).

involved in formal dispute resolution processes make use of unbundled legal assistance, such as whether they have obtained any legal information or advice. Whether and how unbundled assistance affects outcomes has been identified as a critical gap in understanding of access to justice.²²¹ This also makes evaluation of unbundled legal service effectiveness, and particularly questions of the cost-effectiveness of different service models and justice processes, vexed.

Comprehensive user and outcome information is both cost prohibitive and methodologically difficult for unbundled services. Resources required to gather this information will often be disproportionate to the expenditure on legal assistance, particularly with respect to provision of lighter forms of unbundled assistance, such as legal information and advice. Cost per user for telephone legal information and referral may be on par with or exceeded by the cost per user in measuring user outcomes of that telephone service. As such, routinely measuring user outcomes would either double cost per user or potentially halve the number of users able to be assisted.

This consequence does not mean, however, that the utility of administrative data for assessing access to justice cannot be improved. There are undoubtedly opportunities to increase the utility of administrative data and improve the evidence base for access to justice policy, service provision, institutional reform, and system design.

7. Nature and Level of Measurement

Most official statistics available for the justice system come from administrative data records. Measures used in official statistics have the advantage of being relatively stable across time. It also has the advantage of usually covering the whole population of matters.

However, not all justice system administrative and operational data are based on the same unit of analysis. For instance, public legal assistance services tend to record details about service users and services, whereas courts and tribunals tend to record information at case or matter level.²²²

The nature and type of administrative and operational data typically collected is more attuned to assessing the performance of justice system *institutions* rather than assessing the access to justice of *users*. For example, economic analysis assessing the performance of judicial systems is inevitably limited by the data available and types of empirical analysis that can be conducted and has tended to

221. PLEASANCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 122, 161–62.

222. *Compare* LEGAL SERVS. CORP., *supra* note 49 (recording details about service users and services for a public legal assistance service provider), *with* NAT'L CTR. FOR STATE CTS., *supra* note 17 (recording information about cases more generally).

use measures such as appeal rates and trial length as proxies, respectively, for the predictability of judicial decisions and judicial efficiency.²²³

Available service and user data tend to be both *partial* and *siloed*. It is partial in terms of what aspects of access to justice service and users' data might be used to assess, either directly or as a proxy. And it is siloed in terms of the particular organizations and institutions that hold the data, in what form and quality. For confidentiality, privacy, and ownership reasons, access to justice system data is often restricted.²²⁴

8. Inconsistent Practices and Use

There are also limits associated with inconsistent administrative data measures and practices.

Data definitions and practices often lack uniformity across legal assistance service providers and other justice system institutions. This consequently hampers comparability as well as prospects for data integration and linkage. Differences across services and institutions tend to reflect respective operational roles and administrative requirements to perform those roles.

Again, experiences in the Australian context are telling. One aspect of the national legal assistance policy was the introduction of a National Legal Assistance Data Standards Manual.²²⁵ This manual sought to standardize collection of legal assistance service data across all Australian, state, and territory government funded legal assistance services.²²⁶

Achieving consistent and comparable data collection, however, has proven challenging, and recent reviews indicate that improved data practices are required to enhance data quality, consistency, and accuracy.²²⁷ The Victoria Law Foundation's project to map Victoria's civil justice system administrative data identified the need for a "[D]ata [Q]uality [F]ramework" as well as dedicated resourcing to improve data practices, before legal assistance service data can be meaningfully used for comparative analysis.²²⁸

223. See, e.g., Giuliana Palumbo, Giulia Giupponi, Luca Nunziata & Juan S. Mora-Sanguinetti, *The Economics of Civil Justice: New Cross-County Data and Empirics* (OECD Econ. Dep't, Working Paper No. 1060, 2013).

224. NAT'L CRIM. JUST. ASS'N, JUSTICE INFORMATION PRIVACY GUIDELINE: DEVELOPING, DRAFTING AND ASSESSING PRIVACY POLICY FOR JUSTICE INFORMATION SYSTEMS 40–41 (2002), https://it.ojp.gov/documents/ncisp/privacy_guideline.pdf [<https://perma.cc/9R4C-PRHK>].

225. ATT'Y-GEN.'S DEP'T, NATIONAL LEGAL ASSISTANCE DATA STANDARDS MANUAL (2015), <https://www.ag.gov.au/sites/default/files/2020-03/National-Legal-Assistance-Data-Standards-Manual.pdf> [<https://perma.cc/X9EH-GWYC>].

226. *Id.* at 1.

227. MCDONALD ET AL., *supra* note 164, at 90–91.

228. *Id.* at 96–97.

9. *Operational and Resource Challenges*

Administrative data is also typically limited to formal institutional justice system processes. What happens informally, in the shadow of the law (and beyond), typically falls outside the purview of formal institutional measures and data collection. For instance, civil disputes are often settled privately, notwithstanding that formal civil proceedings may have been commenced.²²⁹ This example is another reason other empirical methods, such as surveys and well-designed, rigorous evaluative research, are needed to fill empirical gaps concerning legal problem-solving and outcomes.

The use of administrative data for assessing access to justice, however, is limited by the design, content, and quality of administrative data systems. There is a wide range of information potentially affecting access to justice and legal need that could be collected. For practical and resource reasons, however, it is often not feasible to collect such information. In busy frontline public legal assistance and dispute resolution contexts, it may be too impractical and expensive to collect additional information about the nature of parties, nature of legal issues, and the wider circumstances, all of which are factors potentially important for assessing access to justice questions.

One operational and methodological challenge to improving utility of administrative service data, especially in the context of user-centric, multifaceted, holistic approaches to legal assistance service provision, is adequately capturing and accounting for user capability and matter complexity. Again, efforts to account for legal need and capability are in their infancy and can be disproportionate to the expenditure services provided.

Stakeholder incentives are also important. Where public legal service providers rationalize service provision through service eligibility and triage to different levels of assistance, they may have little or no interest in learning whether or not legal information, advice, and referral services actually “work,” particularly where access to additional resources to do anything more is limited. This reality points to the need for evaluation to answer questions about the best use of available resources. Other types of information and data, such as legal needs survey data or evaluative data, are required to make such distinctions and assess access to justice.

10. *Adding Value to Administrative and Operational Data*

What can be done to improve the utility of justice system administrative data, to better match the shift from top-down to bottom-up, user-centric access to justice strategies, and assess access to justice?

229. Paula Hannaford-Agor, Robert C. LaFountain & Shauna Strickland, Nat'l Ctr. for State Cts., *Trial Trends and Implications for the Civil Justice System*, 11 CASELOAD HIGHLIGHTS: EXAMINING THE WORK OF ST. CTS., no. 3, 2005, at 1., <https://cdm16501.contentdm.oclc.org/digital/collection/civil/id/25> [<https://perma.cc/8V2D-5REN>].

On one hand, any marginal improvement in administrative data utility is likely to add value. On the other, the challenge is minimizing the burden of any additional data collection and maximizing its utility. There are at least four areas where improved justice system data collection would be beneficial to assessing access to justice, particularly with respect to assessing questions of “what works” in bottom-up, unbundled legal assistance. Options worth further research and development include the following:

- Development of legal capability indicators. Such indicators might be based on a combination of sociodemographic measures but must be able to be easily deployed in operational and frontline service contexts.
- Improved ability to capture legal matter and user complexity. This metric is particularly important for gauging the effectiveness and cost-effectiveness of different legal assistance service models.
- Additional demographic measures of justice institution users. More information about what types of people do, and do not, make use of formal dispute resolution processes is needed to routinely monitor and gauge their use.
- Follow-up methods and measures to gauge user experience and outcomes. In many other sectors it is now common to routinely follow-up on service provision to find out about users’ experiences and outcomes.²³⁰ Routine following of unbundled legal assistance service could help determine, for example, if the service met user needs, was helpful, and why or why not. This action would be one way to learn more about user experience and outcomes and could also potentially improve data concerning factors affecting user ability to make effective use of unbundled legal assistance services. Concern about burdens of additional data collection could be mitigated by randomly following-up with a small proportion of users. The cost of not doing so includes provision of unbundled legal assistance that, at best, risks potentially providing services that are inappropriate and ill matched to user legal need and capability, and thus potentially waste scarce resources, and at worst, undermine access to justice, confidence in the justice system, and rule of law.

Systematic follow-up of unbundled services and outcomes measurement is also required to “close the loop” and design more effective and efficient legal intake, assessment, triage, and service. Pleasence et al. identified benefits of follow-up procedures for improving legal assistance service models:

One approach to more systematically managing the provision of

230. See, e.g., *Customer Service: Why Following up Is So Important*, U.S. DATA CORP.: MKTG. BLOG, <https://www.usdatacorporation.com/blog/customer-service-following-up/> [<https://perma.cc/JB24-9JQC>] (last visited Sept. 20, 2020).

appropriate legal services is to utilise follow-up procedures. This might be a useful strategy for fostering a “smart” public legal services system, that is, one that has the capacity to learn “what works, and for whom” from the experience of past service provision.²³¹

Follow-up procedures may also be “beneficial as a safeguard against [user] inability to action any legal assistance received due to limited capability” and systemic barriers.²³² “At the least, for the purposes of evaluation, follow-up procedures should be considered in the context of service innovation[,]” although there will be greater utility in also instituting routine follow-up on a sample of standard services.²³³

Simply learning more about “what works” is also responsible public policy. What comes of the significant public expenditure on public legal information and education? How might it be made more effective? For whom and for what is it ineffective and wasteful?

Improved administrative data can thus potentially be harnessed to create a justice system where systematic data about past services and users can be used to inform the design of improved services and processes. Improved justice system administrative data is also important for more sophisticated and rigorous “what works” evaluation.

C. “What Works” Evaluation

Although there is widespread research and policy interest in “what works” in access to justice,²³⁴ understanding of what evaluation requires in practice remains underappreciated, underinvested, and underrealized.

Whereas the empirical legal needs evidence base is thick (although there is always more to learn), the “what works” evidence base by comparison is thin.²³⁵ Across all aspects of legal assistance and other justice institutions, there are substantial gaps in understanding “what works.”

As a result, there is much based on received or conventional wisdom, which is driven from the perspective of institutional and system needs, rather than the needs of the individual clients and users.

To better build the “what works” evidence base, there are substantial gaps to fill. And as has been noted, asking “what works” in the legal assistance context is “really a convenient short[hand]” for a more complicated “set of research and

231. PLEASANCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 160.

232. *Id.*

233. *Id.* at 161.

234. *See, e.g., id.* at 160; MCDONALD ET AL., *supra* note 22, at 22.

235. *Compare* LEGAL SERVS. CORP., *supra* note 49, at 6 (noting various statistical measures of the unserved civil legal problems faced by low-income Americans), *with* MCDONALD ET AL., *supra* note 22, at 1 (“We need to learn more about ‘what works’, for whom and for what, to better meet the diverse legal need and capability of all Australians.”).

evaluation questions: ‘what works, for whom, [what], when,’” under what circumstances, to what end, and at “what cost?”²³⁶

1. Purpose of “What Works” Evaluation

“[T]he primary role of evaluation—and any related monitoring and data collection—is to inform decision-making,”²³⁷ such as whether to continue, modify, or stop doing certain things, or perhaps recommend trying other activities that appear more promising. Throughout the life of a service, program, or process, different types of evaluation questions can be asked (reflecting different interests and purposes). Evaluation questions can also be asked of organizations and institutions collectively. Different types of evaluation questions “require different research designs and data collection” approaches.²³⁸ As Pleasence et al. observed, evaluative work will need to be combined in an effort to learn “what works”:

Addressing “what works” requires a multifaceted, coordinated, and systematic approach to service monitoring and evaluation. . . . Broad improvement of our understanding of “what works” will require that policy makers, service providers and researchers become more “joined up,” that partnerships are forged, and there is collaboration, coordination, and systematic learning; perhaps even the development of a formal research framework that stakeholders can contribute to realising.²³⁹

Evaluation, therefore, takes a range of forms, such as testing and analyses to examine various features of “what works,” and explore questions of “theory, design, process, efficiency, [and] impact.”²⁴⁰

With respect to emergent user-centric legal assistance, strategies intended to increase legal awareness, capability, empowerment, and well-crafted evaluation are essential to determining questions of efficacy as well as assessing access to justice consequences.

2. Specification and Measurement of Interventions

A prerequisite for “what works” evaluation is the specification of the scope and purpose of the intervention or phenomena to be evaluated. What is “what”? What does “working” look like? And how will “successful” working be measured and determined?

Where the effectiveness of the intervention is at question, specific research methodologies are required. “An intervention is effective [where] it directly increases the likelihood [of] a desired outcome . . . occur[ing] and . . . does [so]

236. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 175.

237. *Id.*

238. *Id.*

239. *Id.* at 175–76.

240. BALMER ET AL., *supra* note 32, at 55.

independently of the effects of other concurrent factors”²⁴¹ Analysis of effectiveness, therefore, not only requires the specification of the intervention (what it is and is not), but also the identification of one or more specific outcomes, and a causal link between the intervention and the outcome, while also accounting for as many other possible causes for the outcome identified as possible.²⁴²

Outcomes can also be measured at different levels of abstraction. For example, a particular legal assistance service model may produce outcomes for users as well as program, provider, sector, and system level outcomes. Outcomes can therefore be examined across several domains:

- outcomes for the client (e.g., impact on clients’ legal matters, impact on broader client outcomes, impact on client experiences, etc.)
- outcomes for the program (e.g., impact on service appropriateness, etc.)
- organizational outcomes (e.g., impact on sustainability and cost, etc.)
- outcomes for systems (e.g., impact on justice system operations, effectiveness, and efficiency etc.).

Beyond these, it is also important to note that defining desired outcomes is an inherently political task and that views as to “success” are likely to be contested.

3. *Systematic Review and Meta-Analysis*

Systematic-review methodologies and meta-analyses, such as those adopted by Cochrane and The Campbell Collaboration, seek to determine the effectiveness of different service provision approaches and identify the most cost-effective service strategies.²⁴³ Application of these methods for access to justice and legal need questions, however, suffers from a mismatch between the quantity, quality, and style of evidence that a systematic review assumes and requires and what is available for legal assistance services and justice system processes.²⁴⁴

241. EROL DIGIUSTO, EFFECTIVENESS OF PUBLIC LEGAL ASSISTANCE SERVICES: A DISCUSSION PAPER, 2 (Law & Just. Found. of N.S.W., Just. Issues Ser. No. 16, 2012).

242. *Id.* at 10.

243. *See generally* Eamon Noonan & Arild Bjørndal, Editorial, *The Campbell Collaboration*, COCHRANE LIBR. (Sept. 8, 2010), <https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.ED000011/full> [https://perma.cc/K7KT-ERED]. Systematic review uses transparent procedures to find, evaluate, and synthesize the findings of relevant research. *See generally* Khalid S. Khan, Regina Kunz, Jos Kleijnen, Gerd Antes, *Five Steps to Conducting a Systematic Review*, 96 J. ROYAL SOC’Y MED. 118 (2003). Procedures are explicitly defined in advance to minimize bias and ensure both transparency and replicability. *Id.*

244. Lack of quality evidence extends beyond the quantitative studies required for meta-analysis, as evidence for systematic review of qualitative and economic studies is also lacking. SUZIE FORELL & ABIGAIL GRAY, OUTREACH LEGAL SERVICES TO PEOPLE WITH COMPLEX NEEDS: WHAT WORKS? 20 (Law & Just. Found. of N.S.W., Just. Issues Ser. No. 12, 2009).

Forell and McDonald identified several challenges that undermine the utility of systematic review of evidence on the effectiveness of legal assistance services:

- “the lack of a central repository for relevant evaluative research, with studies crossing multiple disciplines and often buried deep in grey literature, if published at all”
- “relatively few studies on the effectiveness of different legal assistance service strategies”
- “even fewer” studies with sufficient data and methodological rigor to evaluate “‘effectiveness,’ including the identification” and measurement of an appropriate “counterfactual”
- “diverse and often poorly specified service models and strategies, such that it” may not be possible “to ascertain whether” or not like is being compared with like
- “poor or no articulation of the desired outcomes,” and how the intervention model should work;
- “limited or no reporting of inputs or costs”
- difficulty “identifying and measuring” legal assistance service outcomes.²⁴⁵

Other factors further contributing to a lack of quality evidence for systematic review also include the somewhat limited history and culture of empirical research and evaluation within the legal assistance and justice system and, as detailed in the previous section, the lack of available justice system administrative and operational data of sufficient scope and quality to support such work. The lack of outcome measures, particularly for unbundled legal assistance services, also means that rigorous, quality “what works” evaluation tends to be cost prohibitive.

Evaluation work has therefore tended to rely upon antiquated administrative data systems, developed for the purpose of reporting outputs and measuring organizational performance. Lack of input and outcome measures circumscribe “what works” evaluation and rule out the analysis of effectiveness and cost-effectiveness.

4. Research and Policy Failure

Legal capability has the potential to confound socio-legal studies and vex evaluation of legal service provision. Unless differential user legal capability is considered, and controlled for, it can obscure and mask how other user and legal problem characteristics affect outcomes.

Pleasence et al. for instance, discussed how an initiative may produce good outcomes for certain users, but poor ones for others, for reasons related to

245. Suzie Forell & Hugh M. McDonald, *Evaluation of Legal Service Delivery: Challenges, Opportunities and Work Towards a Framework 3* (June 13, 2017) (unpublished conference paper), https://www.researchgate.net/publication/318198930_Evaluation_of_legal_service_delivery_challenges_opportunities_and_work_towards_a_framework [https://perma.cc/EGF6-BCTU].

knowledge, skill, attitude, and resource aspects of legal capability.²⁴⁶ Thus, any legal capability assumptions underpinning particular service initiatives need to be made explicit for robust evaluation to take place. Pleasence et al. further explained how personal and situational factors affecting legal capability can confound both service design and evaluation:

If sociodemographic factors and legal capability are not taken into account in the design of the evaluation, it is likely that whether or not the initiative is considered to be a “success” will be affected by the legal capability of test and comparison groups. . . . To determine what types of services are necessary for clients with particular legal needs and capability, comparison groups need to be matched in terms of legal capability. Evaluation aims should include specifying in what problem and people circumstances different services “work.” Ideally, a growing evidence base of “what works, and for whom” with respect to diverse legal needs and capabilities across the community will contribute to the provision of more effective and efficient public legal services.²⁴⁷

This evidence on the effectiveness of unbundled legal assistance is a research and policy failure. There are several compelling reasons why this is so.

First, for a variety of access to justice challenges, legal service data traditionally and typically counts and reports outputs—namely types and episodes of service, and often at broad levels of abstraction and aggregation. Lack of user and matter outcome measures means that operational, policy, and research learning about “what works,” for whom, and for what, has been limited with respect to both standard and innovative practices.

Second, many evaluation studies are undertaken by or for legal service providers and other justice institutions. However, they may not be subsequently published or else are often difficult to find in so-called “grey literature.”²⁴⁸

Third, evaluation studies may lack the sufficient rigor to the effectiveness of the intervention.

Fourth, legal assistance funding and policy often prioritizes expenditure on frontline legal assistance services over research and data collection, as well as investment in the type of methods and data collection required to determine “what works.”

These failures make comprehensive evaluation arduous without sufficient resources for robust research designs and additional data collection.

5. *Methodological Rigor*

Randomized controlled trials (RCTs) are the so-called “gold standard” method to determine whether a policy or service intervention is working and for quantifying

246. PLEASENCE ET AL., *RESHAPING LEGAL ASSISTANCE SERVICES*, *supra* note 4, at 161.

247. *Id.*

248. Forell & McDonald, *supra* note 245.

effects.²⁴⁹ For access to justice and legal need interventions, RCTs are also a rigorous method to control for differences between intervention and control groups due to user legal capability.²⁵⁰

RCTs employ random assignment to intervention and control groups.²⁵¹ This method enables the effectiveness of an intervention to be compared to what would have happened if nothing had been changed (the control). This eliminates several sources of bias and other factors that otherwise undermine evaluation.²⁵² Having a control group allows effects to be attributed to the intervention, and not some other factor.²⁵³ Well-conducted RCTs can demonstrate whether and how well an intervention is working.²⁵⁴ They also usually simplify statistical analysis as well as communication of findings and can demonstrate value for money in public expenditure and build the business case for further investment in the intervention.

Haynes et al. set out nine steps for conducting RCTs on public policy:

Test

1. Identify two or more policy interventions to compare” (e.g., old vs new policy; different variations of a policy).
2. Determine the outcome that the policy is intended to influence and how it will be measured in the trial.
3. Decide on the randomisation unit: whether to randomise to intervention and control groups at the level of individuals, institutions (e.g., schools), or geographical areas (e.g., local authorities).
4. Determine how many units (people, institutions, or areas) are required for robust results.
5. Assign each unit to one of the policy interventions, using a robust randomisation method.
6. Introduce the policy interventions to the assigned groups.

Learn

7. Measure the results and determine the impact of the policy interventions.

Adapt

8. Adapt your policy intervention to reflect your findings.

249. Sophie Webber & Carolyn Prouse, *The New Gold Standard: The Rise of Randomized Control Trials and Experimental Development*, 94 *ECON. GEOGRAPHY* 166, 166 (2017).

250. See LAURA HAYNES, OWAIN SERVICE, BEN GOLDACRE & DAVID TORGERSO, TEST, LEARN, ADAPT: DEVELOPING PUBLIC POLICY WITH RANDOMISED CONTROLLED TRIALS 4 (2012).

251. *Id.* at 5.

252. *Id.* at 4.

253. *Id.* at 4 fig.1.

254. *Id.* at 4.

9. Return to Step 1 to continually improve your understanding of what works.²⁵⁵

Positive impacts can provide powerful arguments and business cases for both additional funding and expansion of programs, while negative or “null” results also provide crucial information that call into question the program logic and assumptions underpinning the service intervention.²⁵⁶ It may also simply demonstrate that “new” service models or “innovation” are no better than the “old” or “standard” service model.²⁵⁷

Despite being the “gold standard,” RCTs nevertheless sit at the midpoint of the hierarchy of evidence for evidence-based practice because they are individual unfiltered observations. Increasingly rigorous and robust evidence comes from filtered information involving critical appraisal and systematic review.

Methodologically rigorous evaluations of initiatives intended to increase access to justice, such as those intended to redress various legal capability deficits, are essential for the assessment of “what works” in legal assistance services and justice system design.

While RCTs are not without practical and ethical challenges, they constitute the type of high-quality evidence essential for meaningful systematic review and meta-analysis.²⁵⁸ Although evaluation of legal assistance services employing randomized design remains in relative infancy in comparison to fields such as medicine and development studies, there is a growing body of empirical legal research employing RCT designs.²⁵⁹

Rigorous evaluation is a valuable tool for guiding the efficient targeting of finite resources. Coumarelos et al. opined that quality rigorous evaluation can impact the targeting of resources:

- determine the efficacy of programs in reaching relevant client groups and producing quality outcomes for clients
- inform the efficient targeting of resources to meet different types of needs
- inform the continued improvement of programs and the continued identification of further worthwhile service initiatives
- inform the ongoing accountability and cost-efficiency of legal service provision.²⁶⁰

255. *Id.* at 5.

256. *Id.* at 15.

257. *Id.* at 4.

258. See BALMER ET AL., *supra* note 32, at 55.

259. See D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession*, 12 ANN. REV. L. & SOC. SCI. 295, 305–308 (2016); see also Mike Gibson & Anja Sautman, *Introduction to Randomized Evaluations*, J-PAL, <https://www.povertyactionlab.org/resource/introduction-randomized-evaluations> [<https://perma.cc/7UJC-K9G7>] (July 2020); *Access to Justice Lab at Harvard Law School*, A2J LAB, <https://a2jlab.org/> [<https://perma.cc/6EM4-UN6N>] (last visited Nov. 28, 2020).

260. Coumarelos et al., *supra* note 4, at 242.

The shift to bottom-up, user-centric strategies necessitates investment in rigorous evaluation to learn more about the programs, services, and strategies that effectively facilitate access to justice.

CONCLUSION

Realizing potential access to justice and efficiency gains through the provision of legal services and design of justice systems responsive to diverse legal need and capability requires both further research and improved methods and measures.

Greater understanding of how legal capability interacts with experience of legal problems, problem-solving behavior, and legal assistance and justice system use is needed to fill knowledge gaps. With respect to legal service provision, a greater understanding of how legal capability affects behavior—at all points from problem perception and characterization to resolution—is particularly needed.

The concept of legal capability also requires further theoretical conceptualization and articulation. A greater understanding and specification of the interrelationship between knowledge, skill, attitude, and resource dimensions of legal capability is also necessary to establish the most effective strategies to build and extend foundational legal capability, as well as strategies to enhance the legal capability of certain demographic groups and people in particular problem circumstances.

Further theoretical conceptualization and research are also required to examine how legal capability is interrelated to other capability dimensions, such as digital capability. Given moves to digital provision of legal assistance as well as some justice system operations moving online, an improved understanding of the legal and digital capability nexus is also important to help assess access to justice consequents of digital transformation.

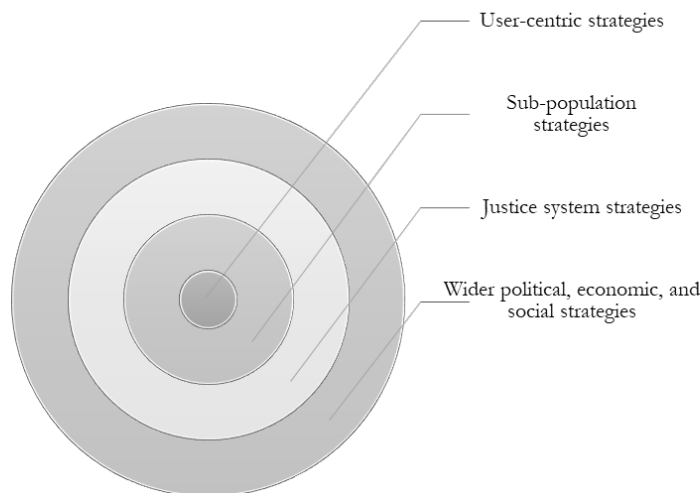
Three main sources of empirical information are used to assess access to justice: access to justice and legal needs surveys, administrative and operational justice system data, and evaluative studies. Each is appropriate to assess particular access to justice questions. Each can also be fruitfully employed to investigate, from a bottom-up, user-centric perspective, questions about just how much legality is needed to make use of law and justice institutions. Each is also useful for informing the design of user-centric services and systems. The survey, administrative, and evaluative evidence are complementary. They can be used to triangulate and situate assessment of access to justice and legal need.

Beyond user-centric strategies, other approaches to enhancing access to justice rest with strategies at other levels. Figure 2 depicts strategies that lie beyond the individual user, such as those at a subpopulation level, as well as wider justice system strategies and wider political, economic, and social strategies. Strategies at these levels may stem from research and evaluation as well as systemic and strategic legal and policy reform efforts.

So long as inequality persists and “justice gaps” are empirically observed, the access to justice project remains afoot. Notwithstanding different trajectories and

reforms, the contemporary challenge of access to justice remains broadly the same as ever: legal need is widespread, demand for public legal assistance outstrips supply, and new waves of reform and justice system transformation are seen as the way of maximizing access to justice within existing, or declining, budgets. In the face of increasing community demand, it is common for eligibility for public legal assistance to be tightened, residualizing legal assistance to increasingly severe legal matters and/or socioeconomically disadvantaged population groups, thereby increasing the “justice gap” through an expanding “missing middle.”

Figure 2: Beyond user-centric access to justice strategies



While justice system-level indexes and indicators are useful for monitoring access to justice and provide some basis for comparison across jurisdictions, they are limited in the insights they provide on the interface between justice system institutions and diverse subpopulations. Access to civil justice indicators, however, especially those built from legal needs surveys, can potentially increase the visibility of civil justice barriers and highlight the diverse experiences of particular subpopulations.

Monitoring access to justice and assessing the effectiveness and efficiency of justice system performance and reforms also requires improved user-centric information—that is, improved individual-level measures and data. In particular, the shift to a user-centric, bottom-up, multifaceted, and holistic approach to access to justice, intended to better cater to diverse legal need and capability, requires a commensurate user-centric shift in survey, administrative, and evaluative approaches to assessing access to justice.