

A conversation with Prof. Rebecca Sandefur, December 15, 2014

Participants

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Note: These notes were compiled by the Open Philanthropy Project and give an overview of the major points made by Prof. Rebecca Sandefur.

Summary

The Open Philanthropy Project spoke with Prof. Rebecca Sandefur as part of its shallow investigation into reforming U.S. civil legal services. Conversation topics included the accessibility of civil legal services, funding opportunities for improving civil legal services, and current attempts at reform.

Access to civil legal services

A justice problem is a problem with legal aspects or consequences shaped by the law. Examples of justice problems include:

- Being underpaid by an employer
- Demanding that the terms of a contract be met
- Negotiating a child custody plan
- Negotiating the terms of a divorce
- Dealing with an eviction

The last three problems are some of the most common civil justice problems.

It is estimated that only ~11% of U.S. citizens with justice problems ever make it to court. While some people may be able to resolve their justice problems elsewhere, if people had adequate access to legal services one would expect the proportion of citizens with justice problems that make it to court to be higher. Other facts that demonstrate the inaccessibility of civil legal services include:

- Prof. Sandefur recently conducted a study that showed that only 14% of people with a justice problem have contact with a lawyer in regard to that problem.
- The Legal Services Corporation (LSC), a nonprofit that offers civil legal services to low-income Americans, must turn away ~50% of the requests it receives for legal assistance each year due to capacity constraints.
- It is important to keep in mind that some people resolve their justice problems without an attorney, and we should not think of such people as having unmet legal need. So, some of these numbers might overstate the

inaccessibility of civil legal services. However, overall it is likely that many people who could benefit from civil legal services are not receiving them.

Reasons for lack of access

The U.S. has a strict regulatory structure for legal services that prohibits almost anyone other than a lawyer from giving legal advice. This is not the case in other countries; for example, in the U.K. there are many non-profits and other non-lawyer entities that legally advise citizens. One way to increase access to civil legal services in the U.S. is to allow non-lawyers to provide some of the legal services that lawyers currently provide.

Another often-proposed solution is to create more lawyers. However, Prof. Sandefur notes that there are already many lawyers available, but that people often do not use them. Cost appears to be a secondary factor; the most important reasons that people do not take civil justice problems to attorneys are: (a) they do not think their problems are "legal," and therefore do not think of lawyers as an appropriate source of help; (b) they often believe that nothing more can be done about their problem.

Current approaches to reforming civil legal services

There are currently several different approaches to reforming civil legal services.

The "civil Gideon" approach

The "civil Gideon" approach focuses on expanding access to traditional attorneys and working to establish a right to legal counsel for defendants in civil cases. To establish such a right, civil Gideon advocates search for cases where a defendant was not represented and the outcome of the case seemed unjust. The advocates then challenge the cases in an attempt to establish in case law that pre-existing constitutional rights were violated. For example, if a person is sentenced to prison for not paying child support, but did not have legal counsel before being sentenced, civil Gideon advocates may argue that the person's right to a fair trial was not realized.

The "ending the lawyer monopoly" approach

This approach seeks to allow non-lawyer entities to provide legal services. Those who take this approach have two primary strategies:

- Change the Unauthorized Practice of Law rules to open up the practice of law to a broader range of providers.
- Conduct empirical research that shows that non-lawyers' services are of acceptable quality.

The "academic" approach

The "academic" approach focuses on understanding how the civil legal system works and what impact reforms could have, without necessarily endorsing

particular policy goals. People taking this approach include Prof. Sandefur, Professor James Greiner at Harvard (who has conducted randomized controlled trials (RCTs) on various civil legal services reforms), and other academics conducting surveys, RCTs, or case studies.

Some people who do not take the academic approach are not very interested in evidence because they have strong normative commitments to their policy agendas. Generally though, there has been a shift toward desiring greater evidence.

Researching civil legal services reform

Civil legal services reform is challenging in part because there is not much quality information about how the civil justice system currently works, what reforms are promising, and how those reforms might perform. Some of the most important open questions are:

- How are justice problems solved outside of courts? Little is known about whether or not people with justice problems who do not go to court are able to solve their problems on their own. If they are able to find solutions, then it may be that extensive civil legal services reform is not necessary. However, if people are not solving their problems independently (or if the solutions they develop are not satisfying the law), then reforms are needed.
- How could non-lawyer providers be used for reform? There is now some information available on how law students or non-lawyer providers can competently take on parts of a lawyer's job. However, nobody is gathering data that would help estimate the cost of using substitutes for lawyers, so it is uncertain (although probable) whether using non-lawyers is any more cost-effective than using lawyers. Additionally, nobody has developed a model to guide researchers on this question. A helpful model would suggest the type of data researchers should gather and would predict which programs are most promising (and so should be evaluated).
- In what ways should the courts be reformed? There is a good understanding of the ways in which courts are difficult for unrepresented litigants, but reforms have not been sufficiently developed or tested.

To collect more rigorous data on how to meet people's legal needs, one could conduct a survey asking about justice problems, then hire a legally competent interviewer for follow-up conversations with the survey participants who described legal problems. From these conversations, one could get a better sense of which problems required legal assistance and which did not. This would be good information to have when trying to redesign legal service delivery. However, this would be an expensive method of collecting data.

Funding opportunities

Current funding landscape

There is very little funding for civil justice research for several reasons, including:

- Many people think that the limited funding for civil justice projects should go toward providing concrete legal services, not research.
- There are common narratives about law in the U.S. that may cause funders not to prioritize this issue.

One of the common narratives that may influence funders is that there is already too much litigation in the U.S. In actuality, most cases do not make it to court, and those that do tend to be businesses suing other businesses. Nevertheless, narratives about excessive litigation make funding work related to increasing access to legal services appear less necessary.

A second narrative is that controlling crime should be the primary goal of justice reform. This narrative began in the 1980s, developing along with the war on crime and the war on drugs. Now, many discussions about justice reform focus on how to deal with the high incarceration rates that these policies have caused. This focus makes it hard to interest funders in civil justice research.

Potential funders for civil justice research include:

- **The American Bar Foundation**—a foundation that only funds its own researchers.
- **The National Science Foundation (NSF)**—a federal government agency that funds basic science research.
- **The Public Welfare Foundation**—a foundation in Washington D.C. that focuses on anti-poverty policy, and has a small civil justice initiative.
- **The MacArthur Foundation**—a foundation that funds research around housing issues, which Prof. Sandefur believes could be used for some civil justice projects, although she has not seen an example of this happening yet.

The U.S. Department of Justice used to have funding available for such work, but that funding ran out in the 1980s.

Organizations that are providing civil legal services receive funding from:

- Foundations, e.g., the a local community foundation funds part of the Court Navigator program.
- Interest on Lawyer's Trust Accounts (IOLTAs).
- State appropriations (every state contributes some funding).

Alan Houseman writes a report every year in which he totals up all of the legal aid funding in the U.S. based on a survey of each state; he reports that it is around \$1.1 billion.

Funding opportunities for large donors

Institutional change

If a funder would like to support institutional change, then he or she should begin by looking for innovative reform ideas and then support the implementation and evaluation of the reform.

Intellectual impact

Prof. Sandefur suggests that supporting RCTs could be part of an agenda to have an intellectual impact, though not the whole agenda.

RCTs that catch justice problems before they go through the justice system and then evaluate how those problems develop after going through the justice system would be especially valuable (although likely expensive). For example, Prof. Sandefur can imagine embedding an RCT in a high-volume court system: each person who came to the court with a pre-specified type of justice problem would be offered a randomized resource (e.g., a pamphlet, an attorney, or a non-lawyer assistant). The study participants would be surveyed at the point they first come into the court, then followed to see how well their problems were resolved. Ideally, the RCT would examine several different types of justice problems (e.g., divorce and unpaid wage claims).

However, RCTs have limitations and a broader research agenda is appropriate. Alone, RCTs can tell whether a "treatment" (e.g., representation by a lawyer) works, but they often don't tell how it works, and understanding the mechanisms through which the treatment works is important because they can usually be provided in a range of ways (e.g., procedural reform, judicial education, non-lawyer assistance, public legal education, etc.). Another problem with relying only on RCTs is that they do not offer a basic descriptive understanding of how things work—for example, RCTs would never on their own reveal the gaps in service provision that Prof. Sandefur and others, such as David Udell at Cardozo with the Justice Index, have documented. This understanding is necessary under any circumstances, including to be able to accurately interpret the findings of RCTs. Finally, it is difficult (though not impossible) to design RCTs that catch justice problems before they become "cases," which is the vast majority of justice problems, as most problems never make it to court or to an attorney.

Promising reforms

Reducing redundancy

The U.S. spends ~\$1 billion each year on legal services for eligible clients (a client must have an income at or below 125% of the federal poverty level in order to be eligible for federal legal aid). However, these funds are not spent as effectively as they could be; there are gaps in which programs are funded and which populations are served. This means that a person's access to federal legal funding depends not only on his or her income level, but also on where he or she lives.

Prof. Sandefur believes that coordinating legal aid providers to utilize their resources more efficiently could have a large positive impact. Some groups are already attempting coordination: there are Access to Justice Commissions in

approximately 40 states which encourage providers to work together to serve their populations. Most of the Commissions do not have much political power because they do not control legal providers' budgets. Some Commissions are fairly successful; Maryland's Access to Justice Commission is especially strong.

Improving outreach

Clients often have difficulty understanding the legal options that are offered to them and do not always know which services will best meet their needs. Legal providers could try to improve clients' understanding, but many legal aid providers already have more clients asking for help than is possible to serve, so providers are not incentivized to reach out. Prof. Sandefur would like to see the development of best practices for connecting people to services, information, and education.

Improving access to justice

Innovative state programs

In California there is a program called JusticeCorps that hires young, bilingual college students to help clients fill out legal paperwork, with lawyers to check the paperwork afterwards. These students are trained and commit to work for six months. They wear uniforms, so that people entering the courts can recognize them. This program not only expands the capacity of lawyers, but also cultivates a new generation of attorneys, because it strengthens the students' applications to law school.

California also has been conducting an evaluation of pilot projects that expand civil legal services under the Sargent Shriver Civil Counsel Act. The projects and the evaluation are funded by the Californian legislature.

Washington State developed the Limited License Legal Technician (LLLT) Rule, which creates a category of non-lawyers who are allowed to provide legal advice. LLLTs have some training, licenses, and malpractice insurance. They can help with large sections of divorce and parenting plans, as well as with other legal problems. California is observing the LLLTs in Washington, and may adopt a similar rule if the program proves successful.

In New York, the Chief Judge of the Court of Appeals—Jonathan Lippman—is interested in increasing access to justice. Justice Lippman has worked with Judge Fern A. Fisher of New York City to create an easier system for litigants. They have developed the Court Navigator Program, which hires community college students to assist people in moving through the justice process. Court Navigators give clients moral support and help them find any information they need.

Department of Justice's Access to Justice Initiative

The Department of Justice has an Access to Justice Initiative. The people working for the Initiative are dedicated, but the team is small (~10 employees) and has very little funding. Karen Lash, who was a previous interim director of the Access to

Justice Initiative, worked hard to encourage policymakers and practitioners of civil law to collaborate with researchers.

The American Bar Foundation

40 years ago, the American Bar Association founded the ABF to research law and justice issues. Most of the ABF's work is focused on scholarly understanding, not on applied research. Prof. Sandefur started working at the ABF in 2010 and founded the access to justice research initiative there (which is mostly focused on civil justice). Some surveys, an evaluation of Washington's LLLT program, and some meetings between researchers and policymakers were all supported by the ABF's access to justice initiative.

The LSC Technology Innovation Grants

The LSC has made several small grants to improve access to justice or delivery of legal services via improving technology. Organizations submit proposals to the LSC, and several of those proposals are selected to receive funding. Some of the grants have gone toward helping courts move from using paper to using computers for their work. Other grants have improved web interfaces, created automated forms, or developed intelligent answering systems.

Other people to speak with

- Richard Zorza—founder of the Self-Represented Litigation Network and involved in programs that assist people who do not have attorneys.
- Bonnie Hough—works in the Administrative Office of the Courts in California.
- Thomas Clarke—the Vice President for Research at the National Center for State Courts. He conducts research, provides continuing legal education for judges, and works on court innovation and evaluation.

*All Open Philanthropy Project conversations are available at
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