

Spring 2023

## Addressing the Failures of the U.S. Civil Legal System

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### Recommended Citation

Lupica, Lois R. and Hudson, Lauren (2023) "Addressing the Failures of the U.S. Civil Legal System," *Roger Williams University Law Review*. Vol. 28: Iss. 2, Article 3.

Available at: [https://docs.rwu.edu/rwu\\_LR/vol28/iss2/3](https://docs.rwu.edu/rwu_LR/vol28/iss2/3)

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## Articles

# Addressing the Failures of the U.S. Civil Legal System

Lois R. Lupica\* and Lauren Hudson\*\*

*“If I had an hour to solve a problem, I’d spend 55 minutes thinking about the problem and 5 minutes thinking about solutions.” – Source unknown*

### INTRODUCTION

Civil law underpins almost all of our social interactions and transactions. Signing a lease creates a contractual relationship between a landlord and a tenant, a denial of public assistance provides the beneficiary with a corresponding process for resolution or

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appeal, and credit usage triggers legal rights and responsibilities for both the borrower and the lender. Property rights are delimited by law, in the context of birth, adoption, marriage, divorce, and death. Familial relationships are subject to legal definitions and breaches in these relationships can lead to a host of legal issues. These everyday matters of life, whether they be trivial or consuming, all fall within the domain of civil law.<sup>1</sup> Those who experience problems in this domain have “justice needs.”<sup>2</sup>

A quandary arises, however, when people challenged by such everyday matters do not identify their problems, at least immediately, as “legal.” Issues that have law-related solutions are often viewed as just “problems”—problems with jobs, family, housing, insurance, public benefits, or transportation—and understandably so. The legal element is systemically masked due to a collective insensitivity to the idea that individuals have, at least theoretically, rights and responsibilities related to fair employment, decent housing, public benefits, and community and family composition.<sup>3</sup>

Even parties drawn into legal proceedings who see that they have a legal problem may not believe a satisfactory resolution is possible, thus defaulting to avoidance measures and hoping their problem will “go away.”<sup>4</sup> Vulnerable parties who are able to

1. Scott Bordow, *Exploring New Ideas About Civil Justice Reform*, ARIZ. STATE UNIV. NEWS. (Feb. 22, 2022), <https://news.asu.edu/20220222-solutions-exploring-new-ideas-about-civil-justice-reform>.

2. *Id.*

3. Paul Prettitore, *Do The Poor Suffer Disproportionately from Legal Problems?*, BROOKINGS (Mar. 23, 2022), <https://www.brookings.edu/blog/future-development/2022/03/23/do-the-poor-suffer-disproportionately-from-legal-problems> [<https://perma.cc/7VEE-9SP2>] (“Legal problems result in numerous negative impacts, most commonly affecting household allocation of time, loss of income or jobs, and health in the form of injuries from accidents or crime. Breakdowns of family relationships are common, producing their own negative effects.”).

4. Nationally, a high percentage of people who are sued in debt collection cases fail to respond to the summons, to file answers, or to appear at court hearings. Default is an example of inaction in the face of a justiciable problem. In a series of interviews conducted by students at the University of Maine School of Law, students reported this avoidance after seeing it first-hand. As one student interviewer put it:

I have now been to three separate small claims dockets in two different Maine courts. . . . Quick observations are as follows: The biggest barrier to justice in small claims when it comes to these credit card cases is the default judgment. I watched one session where the

identify and face legal issues regularly report unsatisfactory processes and outcomes.<sup>5</sup> Parties to legal proceedings have described their responses to the process as “scared,”<sup>6</sup> “confused,”<sup>7</sup>

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attorney for the collection company stood up right before the judge came out and called out a dozen names to see if any of the defendants were there. No one responded, and he walked away with a dozen default judgments. I know we’ve talked about encouraging pro se defendants to show up, but it was interesting to see how truly prevalent the practice was.

Interview by Peter Lacy, in Portland, Me. (Feb. 14, 2013). Another student, after spending the morning in small claims court:

There were about thirty-three credit card debt collection cases on the docket. Of those, only about five people showed up to court. The debt collection cases had the same attorney.

Interview by Rachel Deschuyter, in Portland, Me. (Apr. 11, 2013). The literature on small claims courts and in other court systems reinforces the student observations. *See, e.g.*, D. James Greiner & Andrea Matthews, *The Problem of Default*, Part I (June 16, 2015) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2622140](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622140) [<https://perma.cc/2K6P-LTSN>]; Suzanne E. Elwell & Christopher D. Carlson, Note, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990); Archibald S. Alexander, *Small Claims Courts in Montana: A Statistical Study*, 44 MONT. L. REV. 227 (1983); Richard M. Alderman, *Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York*, 24 SYRACUSE L. REV. 1217 (1973); Barkley Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 OR. L. REV. 302 (1972); Beatrice A. Moulton, Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

5. THE HAGUE INST. OF INNOVATION & L., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA 2021, at 128 (2021), <https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf> [<https://perma.cc/A35Y-ASND>] [hereinafter IAALS REPORT].

Roughly seven out of every 10 Americans with a legal problem in the past four years took some sort of action to resolve it. While taking action is common broadly speaking, there were differences in the likelihood of taking action across problem types, income groups, and age groups. Americans with family problems, for example, took action at a significantly higher rate than those with other problem types. Younger and poorer Americans were less likely to take action than their older and wealthier counterparts. This may indicate that people who lack life experience, experience navigating the legal system, or access to resources feel less empowered than the average American to resolve their legal problems. *Id.*

6. Notes on file with Author.

7. *Id.*

“intimidated,”<sup>8</sup> “uncertain,”<sup>9</sup> “ashamed,”<sup>10</sup> and “threatened.”<sup>11</sup> Given the central role the law has in our society and the number of touchpoints individuals have with the law, change is imperative and must focus on the development of interventions that address barriers to justice at the individual, community, and systemic levels.

At the individual level, the focus begins by examining the concept of *legal capability*,<sup>12</sup> defined as “the measure of a person’s real, practical ability to manage the legal aspects of everyday life.”<sup>13</sup> In short, legal capability recognizes that one must first be empowered with the necessary education and information to begin to address their justice needs.<sup>14</sup> Legal capability emerged as an important framework for the development of public legal education programs in the United Kingdom, Canada, and Australia.<sup>15</sup> Research in these countries recognizes that legal capabilities are not inherent and must be part of educational and skills programs. The legal capability framework has further shown “capability needs to go beyond knowledge of the law, to encompass skills like the ability to communicate plus attitudes like confidence and determination.”<sup>16</sup> With a focus on individual behavior and empowerment rather than on the acquisition of legal knowledge, public legal education initiatives across the globe are developing innovative strategies to improve the wide range of abilities a person needs to emerge from an enervated state and address their legal problems.

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8. *Id.*

9. *Id.*

10. *Id.*

11. One person we interviewed at Small Claims Court thought that upon receiving a debt collection summons, she would be incarcerated. Notes on File with Author.

12. *About Legal Capability*, ONT. JUST. EDUC. NETWORK, <https://ojen.ca/en/about/ojen/legal-capability> [<https://perma.cc/LE65-QA9X>] (last visited Apr. 1, 2023).

13. *Id.*

14. *Id.*

15. CMTY. LEGAL EDUC. ONT., *BUILDING AN UNDERSTANDING OF LEGAL CAPABILITY: AN ONLINE SCAN OF LEGAL CAPABILITY RESEARCH 2* (2016) (noting that legal capability is an important framework for the development of public legal education programs in the United Kingdom, Canada, and Australia).

16. MARTIN JONES, *LEGAL CAPABILITY 1* (2009).

The second target of focus is the idea of *legal consciousness*, a concept that recognizes strategies designed to enhance the legal capabilities of vulnerable people must also reflect the many contextual and community factors that may serve as a barrier to these individuals meeting their justice needs. Legal consciousness has been defined as, “the ways in which law is experienced and interpreted . . . as [people] engage, avoid, or resist the law or legal meanings.”<sup>17</sup> With legal consciousness, a broader lens is applied to explain why people may not view legal institutions or the civil law as integral to their lives. Additionally, scholars look at *relational* legal consciousness and emphasize community as a pivotal factor in one’s determination of the “absence as well as the presence of law.”<sup>18</sup>

This is an important perspective to consider because in developing interventions to help people better address their legal needs, we must discern how and why some people see a situation and know the law is implicated while others do not. The ability to see a problem as a justice issue has the effect of broadening “the nature of the emerging grievance, in the sense that implicating law changes its nature.”<sup>19</sup> For example, an understanding that a disagreement with a public benefits agency is a legal issue transforms the matter into a dispute governed by rules. It also enhances the possibility of resolution by allowing for an intervention that can provide a person some level of assistance.<sup>20</sup> Finally, “it affects the power dynamic between the participants as each recognizes that their decisions are bound by law.”<sup>21</sup> Detailing the legal consciousness framework credits the context and subjective perspectives of peoples’ interactions with the law.

Applying legal capability and legal consciousness reveals that legal service delivery methods are misaligned with the outcomes

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17. Kathryn M. Young, *What the Access to Justice Crisis Means for Legal Education*, 11 U.C. IRVINE L. REV. 811, 823 (2021) (quoting Susan S. Silbey, *Legal Culture and Legal Consciousness*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8623, 8626 (Neil J. Smelser & Paul B. Baltes eds., 2001)).

18. Lynette J. Chua & David M. Engel, *Legal Consciousness Reconsidered*, 15 ANN. REV. L. & SOC. SCI. 335, 336, 344–348 (April 30, 2019) [hereinafter *Legal Consciousness Reconsidered*].

19. Dave Cowan, *Legal Consciousness: Some Observations*, 67 MOD. L. REV., 928, 939 (2004).

20. *Id.*

21. *Id.*

they aim to produce. When people seek and receive legal counsel from community advisors, attorneys, family, friends, mental and physical health professionals, agency staff, limited licensed professionals, courts, or self-help materials,<sup>22</sup> such advice needs to be framed and presented in ways that can be heard and acted upon. The transfer of legal information must coincide with the context in which the recipient's legal needs arise. It is not enough for public and private sector legal service providers to simply offer legal information in the traditional way; the method of assistance delivery must account for the most vulnerable individuals' and populations' legal capacity and legal consciousness. Broadly speaking, our justice system fails to proactively respond to the full range of legal needs people present, resulting in a "significant gap between the main services provided by justice systems and the services best suited to meeting the everyday legal and justice needs of society."<sup>23</sup>

The objective of this article is to present innovative, effective justice interventions, both upstream and just-in-time, that will educate, motivate, and improve positive outcomes for legally vulnerable groups. As it stands, justice interventions must be reconstructed, and the dual lenses of legal capabilities and legal consciousness inform how we can upgrade our self-help infrastructure. In Part I, this article will discuss research on the specific justice needs encountered in the everyday lives of our vulnerable communities. Part II will examine legal capability and legal consciousness in the context of legally vulnerable communities and discuss the individual and systemic factors preventing engagement with the legal system.

Drawing on theories and practices from other disciplines, Part III then considers interdisciplinary concepts to expand our thinking beyond a "narrow legalistic approach" and encourages us to design and deploy an array of creative and effective solutions.<sup>24</sup> It will relate legal capability, legal consciousness, and legal service delivery to research findings from public health, change management,

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22. IAALS REPORT, *supra* note 5, at 160 (detailing the ways in which people get their legal information and counsel).

23. OECD, GOOD PRACTICE PRINCIPLES FOR PEOPLE-CENTERED JUSTICE 2 (2021), <https://www.oecd.org/governance/global-roundtables-access-to-justice/good-practice-principles-for-people-centred-justice.pdf> [<https://perma.cc/K357-DHGF>].

24. IAALS REPORT, *supra* note 5, at 65.

psychology, and education, as well as foundational practices from many indigenous cultures—including using individual’s proper dialect, community elder leadership and communication through learning circles. In Part IV, we conclude by presenting a call for change with interventions that will improve legal capability and legal consciousness for the legally vulnerable through non-legal community support and technology. When we expand our exploration about why the United States has a profound access to justice crisis, we foster a greater understanding of the people impacted by our laws and discover new methods of constructing positive, lasting change.

#### I. UNDERSTANDING LEGALLY VULNERABLE COMMUNITIES

An individual is legally vulnerable when they are “particularly susceptible to harm or disadvantage” because of either their circumstances or systemic failures.<sup>25</sup> Often people present “overlapping layers of vulnerability, [such as] poverty and limited financial resources, race, sexual orientation, gender, language, lack of institutional trust, education level, and physical access to justice institutions like courts, lawyers, and other legal professionals.”<sup>26</sup> Importantly, a legal vulnerability analysis is not solely focused on the compromised individual in their particular situation – it also encompasses the intrinsic deficiencies of the legal system.<sup>27</sup>

Vulnerable populations are less likely to present the characteristics required to be deemed “legally capable,” or possess a high level of legal consciousness. These populations are “particularly susceptible to harm or disadvantage” by virtue of specific conditions, including legal institutions’ structure and procedures or a

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25. *Vulnerable Consumers in Regulated Industries*, NAT’L AUDIT OFF. (Mar. 31, 2017) (U.K.), <https://www.nao.org.uk/reports/vulnerable-consumers-in-regulated-industries/> [<https://perma.cc/N86V-9ZYR>].

26. Prettitore, *supra* note 3.

27. COMMUNITY RESEARCH, CONSUMER VULNERABILITY IN LEGAL SERVICES: RAPID REVIEW OF EXISTING LITERATURE 1–2 (2021), <https://legalservicesboard.org.uk/wp-content/uploads/2022/06/Consumer-vulnerability-in-legal-services-rapid-literature-review-FINAL-27.10.21-1.pdf> [hereinafter RAPID REVIEW]. It is important to note, however, that legal “vulnerability is not necessarily a permanent or fixed state, but instead can be permanent, sporadic or temporary. . . . [C]ircumstances and situations . . . can make any of us vulnerable at a particular moment, whether from financial stress, relationship difficulties, bereavement, [or] illness.” *Id.* at 4.



personal impairment that compromises their ability to “understand and navigate” their circumstances.<sup>28</sup> As observed, “[p]rior negative experiences and a feeling of having ‘gone round in circles’ create fear, anxiety and lack of confidence, while being in ‘survival mode’ makes it difficult [for vulnerable populations] to navigate complex systems.”<sup>29</sup>

The primary drivers of vulnerability include: (i) the presence of a specific adverse event, such as marital dissolution or a financial crisis;<sup>30</sup> (ii) a lack of experience and capacity, including a dearth of confidence and agency; (iii) having to navigate a difficult or convoluted system; and (iv) related mental stressors, such as “everyday” worries, as well as managing the costs attendant to having a legal problem.<sup>31</sup> Applying these factors to our current landscape, research has determined key vulnerable groups. According to the IAALS Study on barriers to justice in 2021, Multi-racial (non-Hispanic) and Black (non-Hispanic) Americans experienced more legal

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28. *Id.* at 3.

29. *Understanding Legal Needs and Supporting Early Intervention – Interim Findings From New Research*, L. FOR LIFE, <https://www.advice-now.org.uk/lawforlife/news/understanding-legal-needs-and-supporting-early-intervention-%E2%80%93-interim-findings-new> [https://perma.cc/5VCW-85L9] (last visited May 15, 2023).

30. It is important to note that having a legal need is itself a risk factor for vulnerability; by definition, being embroiled in a legal matter puts one in a susceptible position. *See generally* YOUGov, LEGAL NEEDS OF INDIVIDUALS IN ENGLAND AND WALES: TECHNICAL REPORT 2019/2020 (2019), <https://legalservicesboard.org.uk/wp-content/uploads/2020/01/Legal-Needs-of-Individuals-Technical-Report-Final-January-2020.pdf>; CMTY. RSCH., VULNERABILITY IN LEGAL SERVICES, RESEARCH REPORT 13–14 (2022), <https://legalservicesboard.org.uk/wp-content/uploads/2022/06/Vulnerability-in-legal-services-research-FINAL-REPORT.pdf> [hereinafter VULNERABILITY REPORT].

31. The Financial Conduct Authority provided guidance for financial firms by listing four drivers of financial vulnerability:

1. Health – health conditions or illness that affect one’s ability to carry out day-to-day tasks.
2. Life events – bereavement relationship break-down, job loss.
3. Resilience – ability to withstand financial and emotional shocks.
4. Capability – low knowledge/confidence; low literacy or digital skills.

FINANCIAL CONDUCT AUTHORITY, FINALISED GUIDANCE, FG21/1 GUIDANCE FOR FIRMS ON THE FAIR TREATMENT OF VULNERABLE CONSUMERS 9 (2021), <https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf> [https://perma.cc/H8DS-SXPK], *cited in* RAPID REVIEW, *supra* note 27, at 5.

problems than any other racial or ethnic group, with Black Americans facing the most serious legal problems.<sup>32</sup> Presenting a disability can further exacerbate legal vulnerability due to discrimination, rigid and ineffective information delivery methods, and the absence of people-first language and communication.<sup>33</sup> Additionally, members of “hidden communities,” such as people who are experiencing houselessness or who are formerly incarcerated, face unique and often extreme barriers to justice.<sup>34</sup> The findings that showed legal issues were most compelling among individuals who present “overlapping layers of vulnerability” is consistent with the results in other countries.<sup>35</sup>

Poverty provokes additional risk factors, including a higher likelihood of having a legal need, reduced access to helpful resources, and lower self-efficacy and self-confidence.<sup>36</sup> The IAALS

32. A recent study on barriers to access to justice in the United States prepared by the Institute for the Advancement of the American Legal System and the Hague Institution of Innovation and Law (IAALS Report) sheds light on Americans’ justice needs among vulnerable populations. IAALS REPORT, *supra* note 5, at 4. The IAALS Report found that the most vulnerable groups in the U.S. were: (i) lower-income Americans; (ii) women; (iii) multiracial (non-Hispanic) Americans; (iv) Black (non-Hispanic) Americans; (v) younger Americans; (vi) middle-aged Americans; (vii) urban Americans; and (viii) rural Americans. *Id.* at 29. This was measured by taking account of the prevalence of legal problems, the seriousness of issues, and the rate of resolution of legal matters. *Id.* at 28. The most burdensome legal problems to resolve, in terms of seriousness, average time and money spent, and rate of resolution: domestic violence and abuse, family, land, work and employment, and problems with the police. *Id.* at 30.

33. JULINDA BEQIRAJ ET AL., ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES: FROM INTERNATIONAL PRINCIPLES TO PRACTICE 22, 24 (2017), [https://www.biicl.org/documents/1771\\_access\\_to\\_justice\\_persons\\_with\\_disabilities\\_report\\_october\\_2017.pdf](https://www.biicl.org/documents/1771_access_to_justice_persons_with_disabilities_report_october_2017.pdf) [<https://perma.cc/RQP8-XRN5>].

34. *See generally* IAALS REPORT, *supra* note 5, at 217.

35. *See generally* Prettitore, *supra* note 3.

Looking at the justice crisis through the lens of socio-demographic and racial/ethnic groups reflects different constellations of problems, different experiences, and different outcomes. The result is that certain socio-demographic and racial/ethnic groups are particularly disadvantaged in terms of access to justice. The nature, seriousness, and resolution rates of the problems Americans experience are shaped in meaningful ways by their income, gender, race and ethnicity, age, and living environment. IAALS REPORT, *supra* note 5, at 8.

36. RAPID REVIEW, *supra* note 27, at 9. “A report into the debt advisors’ experiences of clients’ vulnerability describes the effects of poor mental health on people’s ability to make contact with debt advice services, to explain their

Study further revealed that not only are legal problems worse for lower income individuals, but there are also greater negative consequences that flow from these problems:

Lower income Americans and women experience more negative consequences as a result of their legal problems than higher income Americans and men. Nearly half (48%) of Americans from the lowest income group (who make less than \$25K in household income per year) reported experiencing negative consequences as a result of their most serious legal problem. This percentage decreases almost linearly with income, suggesting that income plays a substantial role in insulating Americans from the negative effects of legal problems. Negative consequences were also experienced more frequently by American women (47%) than men (41%). Women also experienced negative emotions as a result of their legal problems more often than men.<sup>37</sup>

When a consumer is vulnerable, they are “less able to [protect or] represent their interests in the market.”<sup>38</sup> Legally vulnerable individuals are more likely to be harmed by virtue of their legal problem, and that harm is likely to be more severe.<sup>39</sup> Research has shown that, particularly in marginalized low-income populations, once a single legal problem appears others tend to follow, resulting in the escalation and infection of other legal rights and relationships.<sup>40</sup>

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issues, to deal with paperwork, to understand information they are given, to make decisions, and to trust providers.” *Id.* at 10; see JAMIE EVANS ET AL., PERS. FIN. RSCH. CTR. ET AL., VULNERABILITY: THE EXPERIENCE OF DEBT ADVISERS 71 (2018), <https://www.moneyandmentalhealth.org/wp-content/uploads/2018/11/Vulnerability-the-experience-of-debt-advisers.pdf>.

37. IAALS REPORT, *supra* note 5, at 85.

38. RAPID REVIEW, *supra* note 27, at 3. Legal problems can increase the risk of “losing money/income, property, liberty, and access to family/loved ones.” *Id.* at 8.

39. See VULNERABILITY REPORT, *supra* note 30, at 25.

40. CMTY. LEGAL EDUC. ONT, LEGAL LIFE SKILLS FOR JOB SEEKERS: A CURRICULUM FOR ADULT LEARNERS 6 (2018) (Can.), <https://cleoconnect.ca/wp-content/uploads/2019/04/Legal-life-skills-curriculum-2018-full-set.pdf> [<https://perma.cc/ZHD3-26TP>] (“Often, civil legal problems start for people or get worse because people don’t have the knowledge, skills, confidence, or money to take care of the problem before it becomes big. And this can lead to more

In the absence of sufficient emotional, community, and financial resources, low-income households are more likely to experience legal problems, and these problems tend to multiply. While the relationship between income and legal vulnerability is not linear, legal needs surveys have revealed “[l]egal problems tend to cluster in the lower half of the income brackets.”<sup>41</sup> Furthermore, households in the poorest quartile were most often negatively reporting on their “time, income and jobs,” and had to “reallocate time away from working, studying, or caring for children toward resolving their legal problems.”<sup>42</sup>

The least resourced individuals may also have greater difficulty acting on problems and be less successful at coming up with an appropriate resolution than those who are not burdened with vulnerabilities. In their seminal book, *Scarcity*, Sendhil Mullainathan and Eldar Shafir posit that vulnerable populations struggling with limited resources have a more difficult time gaining knowledge, learning new information, and acting on it because so much of their “bandwidth” is spent thinking about what they are lacking.<sup>43</sup> The focus on what people don’t have enough of—time,

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legal problems down the road.”); see Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and the Importance of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 112–113 (Pascoe Pleasence et al. eds., 2006) [hereinafter *Importance of Doing Nothing*] (detailing the reasons that people do not act, even in the face of a serious legal issue).

41. Prettitore, *supra* note 3.

42. *Id.* Individuals in the next to lowest income bracket present the greatest legal needs:

Economic and social exclusion of these households in the lowest income bracket may preclude them from participating in actions that could be described as “legal problems” in the survey. Those in income brackets just above the lowest may have opportunities to more fully participate in economic and social life but lack the resources of those in higher income brackets to navigate legal frameworks and absorb legal shocks, making them particularly susceptible to legal problems. There is also the possibility that social safety net programs shield the poorest from legal problems, but also the reality that this group may find it more difficult to identify their problems as legal in nature and report them as such. *Id.*

43. See SENDHIL MULLAINATHAN & ELДАР SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 11–12 (2013) [hereinafter SCARCITY]; see also Heather Schofield & Atheendar S. Venkataramani, *Poverty-Related Bandwidth Constraints Reduce the Value of Consumption*, 118 PNAS art. no. e2102794118 (2021), <https://www.pnas.org/doi/epdf/10.1073/pnas.2102794118>; Crick Lund et al., *Poverty and Common Mental Disorders in Low and*

money, and emotional resources, referred to as “scarcity”—compromises a person’s ability to address new problems as they arise.<sup>44</sup> Decision-making that would objectively be in one’s self-interest falls to the wayside, as there is little mental room to consider new information. This phenomenon has the effect of exacerbating the hardships associated with poverty and marginalization.

Additionally, in the digital realm the increasing expansion of online legal resources means that digital exclusion has become an ever-more severe vulnerability spark. More services are being provided digitally, including everyday communication, as well as court proceedings and document access. Digital exclusion can intensify existing inequality, and thus, legal vulnerability.

There are many impacts and effects of legal vulnerability. At its extreme, vulnerability can mean exclusion – exclusion from recourse for harm, exclusion from public benefits, and an inability to understand or access the systems that create the framework for a healthy democratic society.<sup>45</sup> Vulnerability can also take a financial toll on consumers. These consumers may not be able to navigate the market for the most cost-efficient solutions and become susceptible to exploitation by creditors or other more powerful parties.<sup>46</sup> Vulnerable consumers are more likely to have a poor user experience from systems that do not account for their specific context and circumstance.<sup>47</sup> Thus, vulnerable consumers are more likely to have lower levels of legal capability and are less likely to view legal institutions as integral to their everyday lives. This suggests that interventions must reflect the unique vulnerabilities presented by different individuals and populations.

Finally, legal vulnerability can foster a distrust in legal institutions. Building confidence in the justice system requires more than just providing information about rights and procedures, as trust is not built or broken solely based on legal outcome.<sup>48</sup> Trust is formed through patterns, including opportunities to meet and have open and honest conversations with lawyers and judges. It is

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*Middle Income Countries: A Systematic Review*, 71 SOC. SCI. & MED. 517 (2010), <https://doi.org/10.1016/j.socscimed.2010.04.027>.

44. SCARCITY, *supra* note 43, at 7.

45. See VULNERABILITY REPORT, *supra* note 30, at 4.

46. *Id.*

47. *Id.* at 5–6.

48. OECD, *supra* note 23, at 3.

also formed by being heard and treated respectfully by community leaders, and by having terms and processes explained in an inclusive environment. At a minimum, all who work in the legal system must understand that every interaction is an opportunity to break the pattern. There is no shortage of factors, legal and non-legal, working against folks in vulnerable communities and preventing them from finding true justice.

## II. LEGAL CAPABILITY AND LEGAL CONSCIOUSNESS: MAKING SENSE OF OUR INTERACTIONS WITH THE CIVIL LEGAL SYSTEM

Legal capability and legal consciousness are two frameworks that color our understanding of why people do or do not seek help for legal issues.

### A. *Legal Capability*

The concept of legal capability is explicitly concerned with individual empowerment, focusing on the specific abilities people need to deal effectively with law-related issues. It grew out of the financial capability movement, which was founded on the idea that having a practical understanding of how to earn, save, borrow, and manage money is essential information for individuals to function in society.<sup>49</sup> To be legally capable, a person must have the abilities to identify and navigate law-related issues, including a base knowledge and understanding of the law and its processes.<sup>50</sup> More importantly, legal capability also requires that a person have the communication skills, persistence, self-confidence, and agency to be able to recognize and act on their knowledge and skills.<sup>51</sup> Understanding what is required to render an individual legally capable is a pragmatic evaluation of how likely one is to engage with the law and achieve a positive outcome.

Surveys of legal capabilities developed by public legal education and research organizations in the United Kingdom, Canada,

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49. SUZIE FORELL, *BEYOND GREAT EXPECTATIONS: DESIGNING RELEVANT, REALISTIC AND EFFECTIVE COMMUNITY LEGAL EDUCATION AND INFORMATION 2* (2015).

50. CMTY. LEGAL EDUC. ONT., *supra* note 15, at 3.

51. *Id.* at 2 (“Low capabilities can translate into outcomes such as inadequate income or education, poor health, low self-confidence or a sense of powerlessness.”); *see* INGRID ROBEYNS, *THE CAPABILITY APPROACH: AN INTERDISCIPLINARY INTRODUCTION 18* (2003).

and Australia were designed to shed light on how to increase the legal abilities of vulnerable members of the public.<sup>52</sup> These organizations found that low “legal capability levels are directly linked to social determinants such as education, unemployment and health status.”<sup>53</sup> Research also revealed that personal and social determinants, such as “low income, age and poor physical or mental health . . . have significant bearing on the ways in which legal problems will be experienced,” and addressed.<sup>54</sup> The survey results observed that soft skills including adaptability, organization, effective problem-solving and negotiating, as well as psychological readiness were also necessary elements to achieve legal capability.<sup>55</sup> These findings have led to the U.K., Australian, and Canadian governments’ devotion of significant public resources to community legal education, with the goal of identifying gaps and deficiencies in curricula and increasing the legal literacy and capability of their citizenry.<sup>56</sup>

These efforts in other countries to address legal capabilities provide an important conceptual model for understanding how and why legal systems and structures in the United States fail so many who present vulnerabilities. Due to gaps in our secondary educational curriculum and our culture of celebrating individualism, too many people in the United States are left behind, not

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52. See JONES, *supra* note 16, at 3–4. In a series of U.K. workshops, researchers asked participants to identify the capabilities people need to be able to deal with law related issues. *Id.* They specifically asked about knowledge, skills and attitudes. *Id.*

53. CMTY. LEGAL EDUC. ONT., *supra* note 15, at 7.

54. LISA WINTERSTEIGER, LEGAL NEEDS, LEGAL CAPABILITY AND THE ROLE FOR PUBLIC LEGAL EDUCATION 14 (2015), <http://www.lawforlife.org.uk/wp-content/uploads/Legal-needs-Legal-capability-and-the-role-of-Public-Legal-Education.pdf>.

55. JONES, *supra* note 16, at 4. More specifically, the knowledge needed included (i) an awareness of civil law so that legal issues are recognized, (ii) an understanding where to find more information, (iii) a cognizance of the legal issues implicated, (iv) knowledge of the path to a solution, (v) an awareness of where to go for help. The skills called for include, (i) effective communication, (ii) decision-making, (iii) the ability to make plans, (iv) and the organizational talent to keep track of communications. *Id.* Finally, the necessary attitudes were identified as (i) confidence, (ii) determination, (iii) belief in process, and (iv) detachment. *Id.*

56. See *Community Legal Education and Information*, VICTORIA LEGAL AID, <https://www.legalaid.vic.gov.au/community-legal-education-and-information> (Aug. 11, 2022).

understanding how being oblivious to their legal rights can result in a loss of money, time and dignity, and hamper full participation in their communities.<sup>57</sup> Even less common in the U.S. are programs designed to enhance legal capability that consider psychological states and attitudes such as personal initiative, self-confidence, optimism, and agency. Research has found that negative emotions were the most commonly reported impact of having a justice need, which can be explained by the lack of psychological and emotional support offered as part of “legal assistance.”<sup>58</sup> Legal capabilities, viewed through the lens of emotional strength, attitudes, and behaviors, shift the emphasis from simply providing legal information to helping overcome barriers of fear, anxiety, complacency, cynicism, and inaction.

These barriers are real and debilitating. In interviews with participants in connection with the Financial Distress Research Study,<sup>59</sup> anxiety, as well as feelings of threat and impending disaster, were commonly reported by parties to legal proceedings.<sup>60</sup>

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57. IAALS REPORT, *supra* note 5, at 6–7. The American Bar Association has formed a Division for Public Education that provides teacher education and a general overview of the law, but it does not address the troika of knowledge, skills and psychological states needed to be legally capable. *About Us*, A.B.A. DIV. FOR PUB. EDUC., [https://www.americanbar.org/groups/public\\_education/about\\_us/](https://www.americanbar.org/groups/public_education/about_us/) [<https://perma.cc/U7T5-7VPR>] (last visited May 16, 2023).

58. IAALS REPORT, *supra* note 5, at 8 (“The most common negative consequences endured by Americans were negative emotions, negative impact on mental health, loss of money, loss of time, and negative impact on financial well-being.”); see HUGH M. McDONALD & JULIE PEOPLE, LEGAL CAPABILITY AND INACTION FOR LEGAL PROBLEMS: KNOWLEDGE, STRESS AND COST 2 (2014) (illustrating the importance of the interrelationship of knowledge, skills, and psychological states).

59. See *Financial Distress*, A2J LAB, <https://a2jlab.org/financial-distress/> [<https://perma.cc/6LVQ-BXLH>] (last visited May 16, 2023).

60. More than one subject interviewed thought that she would be incarcerated upon receiving the summons. Interview by D. James Greiner with anonymous debt collection defendant, in Boston, Ma. (Feb. 14, 2013). Another cognitive interview revealed the following:

Q: How did you feel when you were first notified of the lawsuit in the summons and complaint?

A: Nervous.

Q: How do you think others feel who are less smart or knowledgeable than you?

A: More scared.



These people, interviewed in a vulnerable state,<sup>61</sup> were flummoxed about what steps to take and overcome by negative emotions.<sup>62</sup> These adverse feelings are just as strong among all people who present justice needs, no matter how they respond to them.<sup>63</sup> Accordingly, any effort to increase legal capabilities must address the broad range of taxing emotions experienced by individuals facing legal issues.

### B. *Legal Consciousness*

Legal consciousness, a broader concept than legal capability, focuses on an individual's "power and relationality" to society and to legal and community institutions.<sup>64</sup> It is the study and recognition of the role law plays in the context of people's lives as members of communities.<sup>65</sup> Scholars have observed three related factors that influence the level of an individuals' legal consciousness.<sup>66</sup> The first influence is a person's *relationship with their community*, especially

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Q: How did you feel when you came to court this morning?

A: Anxious . . . I wanted to get this done and get out of here.

Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Oct. 31, 2014).

61. The interviews took place outside a Small Claims Courtroom. Most people were in court defending debt collection actions. None of our interviewees were represented by counsel.

62. J. David Greiner et al., *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1124 (2017).

63. See *Importance of Doing Nothing*, *supra* note 40, at 112–13 (reviewing the reasons that many individuals do nothing in response to legal problems).

64. There are numerous definitions and approaches to exploring the topic of legal consciousness.

[D]iffering assumptions about aims and methods have generated vigorous debate, typically resulting from a failure to recognize that three different clusters of scholars [of legal consciousness—Identity, Hegemony and Mobilization]—are pursuing different goals and deploying the concept of legal consciousness in different ways. Scholarship associated with these three schools demonstrates that legal consciousness is actually a flexible paradigm with multiple applications rather than a monolithic approach.

*Legal Consciousness Reconsidered*, *supra* note 18, at 335; see Kathryn M. Young & Katie R. Billings, *Legal Consciousness and Cultural Capital*, 54 LAW & SOC'Y REV. 33, 34 (2020).

65. Cowan, *supra* note 19, at 929.

66. *Legal Consciousness Reconsidered*, *supra* note 18, at 336.

their level of trust in community institutions.<sup>67</sup> If an individual does not see themselves as a member of a durable community, they are less likely to think community institutions' can be relied upon or trusted in moments of distress or crisis. The second factor is related to an individual's *perception* of events; whether a situation or circumstance is understood as being "normal, problematic, harmful or wrong."<sup>68</sup> For example, if one accepts and shrugs off abusive behavior at work, chalking it up to having a jerk for a boss, that person is less likely to see their problem as having a legal solution. Alternatively, if a person has a positive experience with seeking legal redress for a problem, they are more likely to view the law and their corresponding legal rights as both relevant and valuable.<sup>69</sup>

The third factor affecting one's legal consciousness focuses on the *decisions* an individual makes with respect to when and how they use the law.<sup>70</sup> The influences that inform this decision to address a problem by using the law are related to one's vision of their role in their community, their level of trust in community institutions, as well as their perceptions of certain conditions as harmful but able to be remedied.<sup>71</sup> By way of example, if an individual has experienced the process of applying for public benefits and found it dehumanizing, they may hesitate to exercise their right to appeal if denied. They may be even less likely to see a law-related solution to their justice needs if their life circumstances and experiences have resulted in a low level of trust in institutions.<sup>72</sup> Thus, they may not see the "law" as part of their lives and are less likely to see the law as a vehicle for resolving their problems.

Legal consciousness scholars seek to "explain when and how law becomes active in social life."<sup>73</sup> The finding that "law tends to

67. *Id.* at 337.

68. *Id.* at 336–37.

69. Pascoe Pleasence & Nigel Balmer, *Measuring the Accessibility and Equality of Civil Justice*, 10 HAGUE J. ON RULE L. 255, 285 (2018).

70. *Legal Consciousness Reconsidered*, *supra* note 18, at 337.

71. Young, *supra* note 17, at 823. The author notes, "people's perceptions of and willingness to use the law is sometimes referred to by other descriptors such as legal cynicism and legal mobilization—concepts closely related to legal consciousness, and which we might think of legal consciousness as encompassing." *Id.*

72. Cowan, *supra* note 19, at 941–46 (discussing interviews with a cohort of homeless individuals who were denied public housing in the U.K.).

73. *Legal Consciousness Reconsidered*, *supra* note 18, at 345.

insinuate itself into the cracks and crevices of daily routines, and its direct and indirect influence can be detected in the most mundane and seemingly nonlegal interactions of everyday life,” is an important, but not merely an academic, insight.<sup>74</sup> While many socio-legal scholars are focused on how the “law-culture-society nexus should best be studied,” we are interested in understanding how to elevate the visibility and centrality of the law so that its positive effects are more widespread, and legal needs are better able to be met.<sup>75</sup>

The achievement of meaningful legal consciousness requires that we understand the context of an individual’s problem and the conditions shared in communities that shape people’s perceptions and decisions about how and when to access legal remedies.<sup>76</sup> This includes recognizing “how people come to hold beliefs and attitudes about the law,” and why or why not they choose to pursue legal solutions to their civil justice problem.<sup>77</sup> Understanding how people come to view the ways the law does (and does not) have relevance in their lives can offer some insights into why the legal system, as it is currently instituted in this country, fails so many and may also suggest some remedial approaches. In designing policies, programs, and interventions, legal consciousness demands that we meet people where they are with a combination of “legal and extra-legal solutions.”<sup>78</sup> This requires outreach and communication that directly addresses past negative experiences with the law and courts, as well as other institutions.<sup>79</sup> It also means crediting the cultural, psychological, emotional, and cognitive barriers that many vulnerable consumers face when dealing with serious problems.<sup>80</sup>

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74. *Id.* at 346.

75. *Id.*

76. Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 *LAW & SOC. INQUIRY* 60, 70 (2017).

To talk about how law influences individual behavior in a vacuum, devoid of social context, is to ignore the ways that group identity interacts with law to provide motivations to comply. These include motives to cooperate, to be loyal to the group, to adhere to group norms, and to avoid social exclusion. *Id.*

77. Young, *supra* note 17, at 826.

78. *See id.* at 827.

79. *Id.* at 824–25.

80. Griener et al., *supra* note 62, at 1135–36. *See also* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 *IOWA L. REV.* 1263, 1270

Both legal and non-legal solutions to law-related problems require an understanding of how individuals' legal consciousness frames their "willingness and ability to pursue particular solutions over others."<sup>81</sup>

### III. INTERDISCIPLINARY RESEARCH AND REMOVING BARRIERS TO ACCESSING JUSTICE

#### A. *Deconstructing Barriers to Justice*

There are a plethora of barriers to Americans' justice needs, and each barrier must be understood and deconstructed one by one. First, our educational system has neglected many and contributed to low levels of legal capabilities. Deficiencies in a base knowledge of the law, shaky communication and negotiation skills, negative experiences with institutions of authority, and psychological and emotional challenges are all common among people with legal needs. In addition, there are cohorts of people who have adverse prior experiences with addressing their justice needs, compromised relationships with necessary institutions, a history of failed trusted relationships, and no strong community support. Such communities are further marginalized and excluded when faced with problems that may have legal solutions.

In studies of legal needs conducted in New South Wales, Australia, researchers found the reasons for hesitancy or inaction in the face of a justice need included (i) people did not know what to do, (ii) taking action was too stressful, and (iii) taking action would cost too much.<sup>82</sup> In another qualitative study, reasons cited for inaction included, "shame, a sense of insufficient power, fear, gratitude, and

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(2016) (explaining that "access problems are broader than just structural and systemic restraints—there are also cultural and cognitive barriers to access that need to be considered").

81. Young, *supra* note 17, at 825.

82. *Legal Consciousness Reconsidered*, *supra* note 18, at 345–46. In a study conducted in New South Wales, Australia,

[a]t least one of the three reasons for taking no action examined here was provided for 1561 of the 3496 legal problems where no action was taken. Specifically, respondents who took no action to try to resolve their legal problems reported that they "didn't know what to do" in 20.6 percent of cases. They reported that they thought it "would be too stressful" in 28.3 percent of cases, and that it "would cost too much" in 25.9 percent of cases.

McDonald & People, *supra* note 58, at 3.

frustrated resignation.”<sup>83</sup> Because “civil justice problems that go unresolved can create additional social, economic and health problems that become costly burdens both for those who experience them and for society at large,”<sup>84</sup> these reasons for “doing nothing,” especially when cited by those in poverty, must be credited.

Moreover, the United States legal system serves in and of itself as a barrier to justice.<sup>85</sup> With its arcane language, convoluted procedures, and intimidating settings, it is no wonder many see the law and the courthouse as alien and unfriendly.<sup>86</sup> While in theory access to the law is widely available, in practice, access—and more importantly, the ability to deploy the resources that are available—is heavily dependent on cultural capital, financial reserves, emotional fortitude, and strategic knowledge.<sup>87</sup> The formal legal system is simply not designed for people lacking significant resources.

Accordingly, most civil legal issues faced by vulnerable populations, if dealt with at all, are addressed informally. These informal resources include self-help materials, family members, friends, community agencies, low-cost lawyers, mental health professionals, medical professionals, employers, and financial institutions.<sup>88</sup> Direct negotiation with adversaries is also a common method of

83. *Importance of Doing Nothing*, *supra* note 40, at 116.

84. Pascoe Pleasence et al., *Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS* 71–91 (Pascoe Pleasence et al. eds, 2007).

85. SRLN – 2020 Report, U.S., SELF-REPRESENTED LEGAL NETWORK (2021), <https://www.srln.org/node/21/about-srln> [<https://perma.cc/R5EK-XJE3>]. In the U.S., out of forty-six million, 75% of cases for divorce, custody, child support, guardianship, housing, and consumer involve at least one person who is self-represented. *Id.*

86. Natalie Anne Knowlton & Logan Cornett, *Paths to Racial Justice: Our System Must Acknowledge Shortcomings and Take Concrete Action*, IAALS (Mar. 9, 2022), <https://iaals.du.edu/blog/paths-racial-justice-our-civil-system-must-acknowledge-shortcomings-and-take-concrete-action> [<https://perma.cc/DZ9M-8D8V>].

87. Meaning access to information, to legal professionals, to self-help materials and to court and administrative systems.

88. IAALS REPORT, *supra* note 5, at 104–07. The IAALS Report noted that the type of the resources accessed were dependent upon the nature of the problem. *Id.* For example, police served as a significant resource when the problem implicated criminal law. *Id.* at 107.

dispute resolution.<sup>89</sup> Lawyers and the courts comprise just a slice of the resources that are being deployed to help people address their legal needs.<sup>90</sup>

All of this suggests the need for considering a broader array of interventions and reforms that will help people recognize and address their legal needs. A targeted spotlight on specific barriers to justice can allow us to think expansively about how to lower and remove such barriers.

### B. *Interventions*

Interventions are strategies or treatments that improve the situation of a population in order to influence policy, alter practices, and positively impact outcomes. Introducing an intervention means making a change—or intervening—to see if the outcome differs. For example, if a member of a community regularly meets with friends in a local community center to seek guidance from them about their justice needs, an intervention would occur if a psychologist joined the conversation and contributed to the advice circle. Researchers in other disciplines have discovered effective interventions that have improved communication skills,<sup>91</sup> enhanced people's sense of agency and confidence,<sup>92</sup> augmented psychological readiness,<sup>93</sup> and empowered people to act in the face of psychological and emotional challenges.<sup>94</sup> Studies have further shown the ways adults most effectively learn,<sup>95</sup> what types of communication styles present challenges,<sup>96</sup> and how to overcome digital

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89. *Id.* at 105. In this context, self-agency means the ability of an individual to advocate for herself and to represent her best interest. See Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 85–86 (1996).

90. REBECCA L. SANDEFUR, CIVIL LEGAL NEEDS AND PUBLIC LEGAL UNDERSTANDING 1 (explaining that that most legal problems are never taken to lawyers or courts), [https://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_-\\_civil\\_legal\\_needs\\_and\\_public\\_legal\\_understanding\\_handout.pdf](https://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf) [<https://perma.cc/X7ZU-Y9TW>].

91. See IAALS REPORT, *supra* note 5, at 18.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

hesitance.<sup>97</sup> In developing appropriate interventions, it is important to identify the service and service delivery method best suited in each circumstance, taking into account culture, history, and context. It further requires that the selected formal or informal legal service develops a protocol to address the psychological challenges faced by vulnerable individuals, including self-empowerment, agency, and autonomy.

Since lawyers are not the primary source of assistance used by vulnerable populations for civil legal needs, there must be an integration of professionally developed legal information with existing judicial, community, social, and healthcare resources.<sup>98</sup> This requires us to reconsider what it means to provide legal assistance. Legal resources—or at least every formal legal resource—should consider: (i) acquiring an expanded skill set to include the ability to attend to people with justice needs’ emotional and psychological challenges or partner with people with such skills; (ii) dramatically changing the way information is communicated, drawing on social science and public health research; (iii) expanding community programs to include specific programs that focus on the community members’ empowerment, agency and self-confidence; (iv) creating strategies and tactics that account for the way people actually behave, learn information, and deploy it; (v) developing an upstream intervention program, such as legal check-ups and check-ins; and (vi) preparing self-help materials with attention paid to how adults learn and what it takes for them to absorb and act on information.

### C. *Communicating “Hard-to-Hear” Advice in the Public Health Field*

Public health researchers have long wrestled with the question of how best to communicate challenging messages that people do not necessarily want to hear in a way that such messages are heard and acted upon. Addressing public health threats has varied as

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97. *Id.*

98. See IAALS REPORT, *supra* note 5, at 13.

unsafe sex practices, smoking,<sup>99</sup> alcohol use,<sup>100</sup> obesity,<sup>101</sup> sedentary lifestyles<sup>102</sup> and vaccine hesitancy, researchers have tried a variety of interventions designed to get people to make the

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99. Smoking cessation strategies have regularly attracted the attention of public health researchers. A series of studies evaluating the effectiveness of behavioral (non-pharmacological) interventions to help people quit smoking revealed a number of interesting findings. *See generally* Handan Terzi et al., *Effectiveness of Non-Pharmacological Community-Based Nursing Interventions for Smoking Cessation in Adults: A Systematic Review*, 40 PUB. HEALTH NURSING 195 (2023). One study found value in the form of behavioral change in population-based proactive interventions outside of a clinical medical context. Sara Kalkhoran et al., *Proactive Population Health Strategy to Offer Tobacco Dependence Treatment to Smokers in a Primary Care Practice Network*, 34 J. GEN. INTERNAL MED. 1571, 1576–77 (2019). Community-based nurses who regularly engaged in health promotion were also found to be effective in encouraging patients' quitting. *Id.* In research focusing on a population with a high percentage of daily smokers, Aboriginal and Torres Strait Islanders, the study found that "even brief advice from a doctor increases cessation." David P. Thomas et al., *Smoking Cessation Advice and Non-Pharmacological Support in a National Sample of Aboriginal and Torres Strait Islander Smokers and Ex-Smokers*, 202 MED. J. AUSTL. S73, S76 (2015).

100. Studies have further shown the effectiveness of self-affirmation exercises in helping curbing alcohol use. In one study, two hundred seventy-eight participants were randomized to one of three interventions: a self-affirming questionnaire, a self-affirming implementation intention, and a control questionnaire. The results revealed "significant public health gains and statistically significant decreases . . . in alcohol consumption" among the two groups receiving the affirmations. Positive messaging and a focus on an individual's increased perception of threat serve to alter behaviors. *See* Christopher J. Armitage et al., *Evidence That Self-Affirmation Reduces Alcohol Consumption: Randomized Exploratory Trial with a New, Brief Means of Self-Affirming*, 30 HEALTH PSYCH. 633, 633 (2011).

101. Non-medical interventions designed to encourage long-term weight loss maintenance have also been the subject of much research. With the goal of changing an individual's perception of the cost-benefit ratio of maintaining weight loss, successful interventions have included community support programs, the varying of interventions to entertain and address monotony of dieting, the development of self-regulating skills through professional counseling, and self-help group meetings. *See, e.g.*, Sirpa Soini et al., *Long-Term Weight Maintenance After Successful Weight Loss: Motivational Factors, Support, Difficulties, and Success Factors*, 42 AM. J. HEALTH BEHAV. 77 (2018); Michael G. Perri et al., *Effect of a Multicomponent Maintenance Program on Long-Term Weight Loss*, 52 J. CONSULTING & CLINICAL PSYCH. 480 (1984).

102. In a study designed to discover an effective intervention to encourage seniors to regularly exercise, the researchers found that self-efficacy exercises provide significant motivation and thus behavioral change. Ling-Ling Lee et al., *Using Self-Efficacy Theory to Develop Interventions That Help Older People Overcome Psychological Barriers to Physical Activity: A Discussion Paper*, 45 INT'L J. NURSING STUD. 1690, 1696 (2008).



connection between current detrimental behaviors and these behaviors' future negative consequences.<sup>103</sup> Evidence from these studies suggests that messaging with sensitivity to psychological challenges was more effective than education, dictates, or instruction alone. The importance of addressing people's confidence, attitudes and beliefs has also been proven.

The most successful of these interventions have included positive trusted professional and peer messaging, communication strategies that makes the risk of harmful behavior more salient, self-affirmation and self-efficacy strategies, and messaging that highlights how the information is relevant to an individual's life. For example, the World Health Organization (the "WHO") and the Pleasure Project reviewed more than 7,000 interventions designed to encourage people to practice safer sex.<sup>104</sup> The majority of these interventions focused on "risk reduction and preventing disease." The most successful campaigns, however, were found in positively focused messaging promoting "intimacy, pleasure, consent and well-being."<sup>105</sup> This review concluded that "programs which better reflect the reasons people have sex, including for pleasure, see better health outcomes."<sup>106</sup> Safer sex campaigns in Australia also used humor and group identity to shape "a safe sex culture" in the LGBTQ+ community.<sup>107</sup> The "Up Ya Bum" campaign was a long-running safe sex campaign that "included a variety of themes and imagery ... to target different communities and sub-cultures."<sup>108</sup>

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103. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 70 (2011) [hereinafter THINKING FAST]. Kahneman's "prospect theory" states that "when people think about decision-making, they are much more concerned for the near future than the distant future. Put differently, they are motivated by immediate and emotional short-term gains and losses, placing "much more weight on losses than gains." *Id.*

104. Stephanie Nolen, *Bringing Sexy Back – To Fight HIV*, N.Y. TIMES (Nov. 15, 2022), <https://www.nytimes.com/2022/11/15/health/safe-sex-pleasure-condoms.html>; see Mirela Zaneva et al., *What Is The Added Value Of Incorporating Pleasure In Sexual Health Interventions? A Systematic Review And Meta-Analysis*, PLOS ONE (Feb. 11, 2022), <https://doi.org/10.1371/journal.pone.0261034> [<https://perma.cc/UT4U-Y5ST>].

105. Nolen, *supra* note 104.

106. *Id.*

107. *6 Iconic Condom and Safe Sex Campaigns*, ENDING HIV (Nov. 5, 2014), <https://endinghiv.org.au/blog/6-iconic-condom-and-safe-sex-campaigns/#>.

108. *Id.* (stating that a subtitle to the "Up Ya Bum" campaign read, "Carry your own gift wrapping with you these holidays - Condoms are portable").

Other campaigns in the same series were affirmatively both “pro-gay and pro-sex,”<sup>109</sup> thereby targeting the specific audience they were trying to reach.<sup>110</sup>

Similarly, researchers in the Netherlands designed the “Excuses Campaign” to discover best messaging practices to challenge young people’s false beliefs about condom use.<sup>111</sup> The study question was whether a campaign that did not have knowledge acquisition as its focus would be successful.<sup>112</sup> The campaign confronted the excuses young people use to not have safe sex by featuring a photo of a young person and a written “belief statement.”<sup>113</sup> The belief statement was a common excuse for not practicing safe sex, such as, “She doesn’t need condoms because her friend doesn’t mention them either.”<sup>114</sup> The study ascertained that this messaging successfully changed young people’s perception of their risk of sexually transmitted diseases, and concluded that their adaptive behavior was “a joint function of subjective risk and threat appraisal.”<sup>115</sup> If the risk of harm becomes more salient, then a person is more likely to measure the risk of action (or inaction) accurately. Unlike interventions designed to provide information and increase knowledge, “personal vulnerability—a measure related to our measure of personal relevance—was positively related to behavioral change.”<sup>116</sup>

The challenge of encouraging widespread vaccination compliance faced by public health officials during the 2020 COVID-19 vaccine roll-out in the United States provides another lesson. Despite a public information campaign citing facts and statistics about safety and efficacy, it was difficult for the government to persuade

109. *Id.* (explaining that an HIV positive poster artist noted, “It is often important to be able to clearly and explicitly depict or represent HIV positive people in resources as there is usually an assumption that safe sex educational messages are only directed at those who are HIV-negative”).

110. *Id.*

111. Ernest M.M. de Vroome et al., *Evaluation of A Safe Sex Campaign Regarding AIDS and Other Sexually Transmitted Diseases Among Young People in The Netherlands*, 6 HEALTH EDUC. RSCH, 317, 317 (1991), <https://www.jstor.org/stable/45111251> [<https://perma.cc/QN8V-2ECQ>].

112. *Id.*

113. *Id.* at 318.

114. *Id.* at 319.

115. *Id.* at 318.

116. *Id.* at 324.

people to get the highly tested vaccine because there was a high degree of vaccine hesitancy in the United States. People who were reluctant to get the vaccine cited reasons such as, “vaccine safety and side effects, wanting to wait for additional information, thinking they were not personally at risk, and distrust of the government, the Centers for Disease Control and Prevention, or vaccines.”<sup>117</sup> Researchers at the UMass Chan Medical School tested the question of what the most persuasive approach to was overcoming vaccine hesitancy. The method that yielded the most positive results was an affirmative and specific recommendation by a known physician (“I recommend that *you* get it”), coupled with a statement about the importance of protecting others (“It’s the best way to protect the people you are close to and keep them healthy”).<sup>118</sup>

This COVID vaccine public health research confirms many findings in the other public health studies. Behavioral change, correlated to perception of increased personal risk, was triggered when told that “you” should get the vaccine, not simply a general vaccine message. Moreover, when faced with difficult choices, people are more likely to follow recommendations when they come from someone they trust. When that trusted source frames the advice affirmatively, focusing on the benefits rather than the consequences of not acting, it is more likely to alter behaviors. Advice that is communicated positively also provides a collective motivation, which positions the individual’s decision in the larger context of their community’s health and well-being.

These studies have implications for increasing legal capabilities, including developing agency and greater self-confidence. More than mere information is needed to persuade someone to do something beneficial but hard; the messaging needs to highlight how the information is relevant to the listeners’ lives. The message should

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117. Kathleen Mazor & Kimberly Fisher, *A Direct Recommendation from A Doctor May Help with Vaccine Hesitancy*, UMASS CHAN MEDICAL SCH. (Sept. 17, 2021), <https://www.umassmed.edu/news/news-archives/2021/09/a-direct-recommendation-from-a-doctor-may-help-with-vaccine-hesitancy> [https://perma.cc/D7RX-F4DW].

118. *Id.* (emphasis added). In April 2020, University of Massachusetts Doctors asked 1,000 adults across the U.S. about whether they were planning on getting a COVID vaccine. *Id.* “Around 3 in 10 were not sure whether they would get vaccinated, and 1 in 10 planned not to get vaccinated.” *Id.* When presented with this messaging, 27% of the study population became more likely to get vaccinated. *Id.*

further enable the listeners' self-assessment of personal vulnerability. Messages should be self-affirming, targeted and culturally appropriate. When substantive or procedural information is needed, a positive framing of why action should (or should not) be taken is more effective than highlighting the negative consequences of inaction.

#### D. *Power of Nudges & Inclusive Design*

Behavioral economists study why humans do not always make rational decisions. Despite long-standing economic models based on rationality, people typically do not approach decision-making in a way that "maximize(s) utility" under uncertain conditions.<sup>119</sup> Indeed, researchers have argued that in many instances, "individuals make pretty bad decisions—decisions they would not have made if they had paid full attention and possessed complete information, unlimited cognitive abilities and complete self-control."<sup>120</sup> There are a variety of reasons why people under stress make decisions that are not in their long-term interest.<sup>121</sup> Fortunately, a variety of strategies and tools can be deployed to "nudge" people into better decision-making.<sup>122</sup>

Human beings like familiarity, consistency, and default options.<sup>123</sup> Studies have shown that repeated exposure to an action or an idea when *not* followed by an adverse event sends a safety signal.<sup>124</sup> Because of that signal, that action or idea is likely to be repeated, as "repetition induces cognitive ease and a comfortable feeling of familiarity."<sup>125</sup> Any choice that induces "cognitive ease" is more likely to be taken.<sup>126</sup> Moreover, if a proposed idea or course of action can be tied to an existing belief or preference, or if it comes from a trusted source, it is more likely to be affirmed because of the reduction of cognitive strain.<sup>127</sup>

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119. THINKING FAST, *supra* note 103, at 66.

120. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 5 (2009).

121. *See id.* at 8.

122. *Id.*

123. THINKING FAST, *supra* note 103, at 66.

124. *Id.* at 67.

125. *Id.* at 66.

126. *Id.*

127. *Id.* 64.

People also default to making decisions based upon what they perceive as their intuition.<sup>128</sup> Messages that support one's intuition get stored in their memory, and one negative interaction is often sufficient to establish "long-term aversion and fear" of a place or situation.<sup>129</sup> If a circumstance triggers a negative memory, people will consistently stay away from anything that reminds them of that circumstance. While fear can be learned, it can be addressed when accounted for.

Priming people to act in positive ways is also an effective nudge.<sup>130</sup> Researchers found that checking on people's intentions before they act affects their behavior, and the mere hint of a reminder will trigger an association and stimulate action.<sup>131</sup> Another study found that asking people to make a plan to take an action and then querying them for details about how they will execute their plan dramatically increased the chances of action being taken.<sup>132</sup> Simply put, if people are informed about the importance of taking an action and then asked before the event if they intend to take such action, they are more likely to act.<sup>133</sup>

Inclusive design can also be employed to aid in maximizing people's utility. Institutions, such as courts, administrative agencies, social services, law offices, health care facilities, and community centers can benefit from changes to their status quo design and processes.<sup>134</sup> Known as "choice architecture," small changes in the "context in which people make decisions" can have significant

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128. *Id.* at 1–5 (discussing how Kahneman refers to this as "System 1 Thinking").

129. *Id.* at 237.

130. THALER & SUNSTEIN, *supra* note 120, at 70–71.

131. *Id.*

132. *Id.* Researchers told a group of students about vaccine availability. *Id.* Half of the group was also asked about their plan, and details about how they were going to get to the clinic. *Id.* Significantly more students who were asked about their plans chose to get vaccinated than the cohort who were not asked. *Id.*

133. *See id.*

134. *See id.*

impacts on behavior.<sup>135</sup> As Sunstein and Thaler have noted, there is “no such thing as neutral design.”<sup>136</sup>

For example, we can begin by “adjusting backwards.”<sup>137</sup> Rather than adopting the current practice of designing for the “average consumer,” we can start the design (or re-design) process by crediting the needs of non-standard and vulnerable consumers.<sup>138</sup> The radical idea is that we design products, services, processes, and places so that they can be accessed by everyone.<sup>139</sup> The “lived experiences” of the most vulnerable would be discovered by consulting with them and then designing from their perspective.<sup>140</sup> In this way, the lived experiences of the users of processes, places, or services would be respected and accounted for.

Inclusive design practices must have a broad reach, and should touch upon the following areas: access to redress; accessible marketing and promotion; staff training; flexibility in hours and appointments; tailoring communications; extra support & advocacy; assessing for additional needs; establishing the preferred method of communication; information and clarity about expectations and costs; proactive approach to identifying vulnerability; practical advice; tools and resources to offer an enabling and empowering approach; and anticipating consumers problems to prevent them from happening “rather than simply responding retroactively to consumers’ problems as they arise.”<sup>141</sup>

The process of inclusive design and choice architecture requires co-designing with users so that pain points are identified and tailored solutions are developed. The study of consumers’ not-always-rational decision-making, inclusive design, and nudges have implications for any and every touch an individual has with sources of assistance for legal needs.

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135. *Id.* at 70.

136. *Id.* at 1–2. The authors recount an experiment where the rearrangement of how food was displayed in a school cafeteria affected the school children’s lunch choices. *Id.*

137. RAPID REVIEW, *supra* note 27 at 20.

138. *Id.*

139. *Id.* at 21.

140. *Id.*

141. *Id.* at 20–21.

E. *Marketing the Law*

Another facet of inclusive design is marketing. Marketing is the art and science of developing strategies for selling goods and services. It allows for the processing of information about a market's needs and transforms that data into language that resonates with end-users. In the context of increasing access to justice, legal service delivery providers must consider marketing principles to effectively resonate with targeted populations.<sup>142</sup>

Obstacles to consumer awareness and engagement may be overcome by teachings from marketing science. “Content marketing” is one strategic marketing approach of relevance, as it hones in on cultivating “valuable, relevant and consistent content to attract and acquire a clearly defined audience—with the objective of driving profitable customer action.”<sup>143</sup> Rather than pitching products or services, the goal is to deliver information that makes buyers more intelligent.<sup>144</sup> In essence, when a business delivers high-value and reliable information to buyers, the buyers in turn participate and provide loyalty to the business.

In the context of providing legal services, the goal is to deliver tailored information to “customers”—legally vulnerable communities. Generating profits is not the objective; driving individual action, especially when taking an action is difficult, is. Taken to its logical conclusion, the development of a strong reputation for value, relevance, utility, and consistency in legal content and services not only centers information delivery but increases a “buyers” legal capability and legal consciousness, which then prompts more engagement with the legal system.<sup>145</sup>

Another sector of marketing research ripe with insight focuses on the *practices* used by product and service providers.<sup>146</sup> Research

142. See generally *Definitions of Marketing*, AM. MKTG. ASS'N, <https://www.ama.org/the-definition-of-marketing-what-is-marketing/> [https://perma.cc/LFV6-72LD] (last visited May 16, 2023).

143. Josh Steimle, *What is Content Marketing?*, FORBES (Sept. 14, 2014, 11:16 AM EDT), <https://www.forbes.com/sites/joshsteimle/2014/09/19/what-is-content-marketing/?sh=625f35cb10b9> [https://perma.cc/NTV7-MA25].

144. See *id.*

145. See *id.*

146. See Melissa Archpru Akaka & Hope Jensen Schau, *Value Creation in Consumption Journeys: Recursive Reflexivity and Continuity*, 47 J. ACAD. MKTG SCI. 499, 514 (2019).

indicates people seek out products or services based on what the product or service will enable them to do or experience—what is called the “consumption journey.”<sup>147</sup> This journey places the individual in a situation or circumstance that aligns with their identity and is not necessarily based on “hedonic experiences or recreational practice.”<sup>148</sup> The focus on the consumer’s journey allows for the imagining of how that product or service can be a part of the user’s enhanced life. Relating these principles back to the way legal services are (or should be) provided, it becomes clear that “selling” or advertising the legal product or service may not be enough to trigger action. Instead, legal product and service providers should shift the focus to user outcomes, the positive effects of the product on the user’s life, and how using the product or service will align with or promote progressive growth in the user’s identity.

F. *Communication Theory & Legal Self-Help Materials*

An individual’s mental state partially determines their receptivity to helpful but uncomfortable and intimidating information. Vulnerable people find much in their life outside of their control and thus suffer from a lack of confidence and self-agency. This suggests that any intermediary, such as a friend, community leader, medical professional, or law trained individual, must attend to the person who is seeking help’s mental state before they can begin to offer advice about the law. The same is true of self-help materials. To be effectively deployed, self-help materials must acknowledge and address the negative emotions the users are inevitably feeling during this time of great anxiety and stress.<sup>149</sup>

Affirming the positive aspects of the individual’s world and reinforcing a sense of agency is essential for the advice in the self-help materials to be followed.<sup>150</sup> Messaging that reminds individuals that they are fair, generous, and strong can make them more receptive to information designed to improve their lives, particularly when such information may initially be perceived as threatening. In addition, individuals can feel an absence of agency, particularly

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147. *Id.*

148. *Id.*

149. Griener et al., *supra* note 62, at 1130.

150. William M.P. Klein & Peter R. Harris, *Self-Affirmation Enhances Attentional Bias Toward Threatening Components of a Persuasive Message*, 20 PSYCH. SCI. 1463, 1463 (2009).



those who are involved in unfamiliar and intimidating legal proceedings. To be effectively deployed, self-help materials must include supportive language affirming their entitlement to exercise their rights by participating in the legal system. Such materials should also minimize the user's embarrassment in the context of navigating an unfamiliar system, as well as inspire self-confidence in their abilities. This can be accomplished by explicitly noting that lots of people present problems such as theirs and that they are not alone.

Visual imagery and details about what someone experiencing a legal issue can expect eases the user of self-help materials' anxiety and increase their ability to learn and deploy information. Research has shown that "visual depictions of ideas and actions can improve learning," and that simple line drawings are preferred to more detailed imagery. Challenged learners have trouble distinguishing important features in photographs or complex drawings from irrelevant details.<sup>151</sup> Encouraging words and images can also help people stay motivated throughout lengthy and arduous processes.

There are also lessons to be learned from research in such varied fields as adult education, communication theory, graphic design, and behavioral economics. Adults learn unfamiliar material most effectively when they are provided with procedural, rather than conceptual, information.<sup>152</sup> Most self-help materials focus on the wrong information and not enough on the *exact* steps needed to address a legal need.<sup>153</sup> It is often not necessary for a user of legal self-help materials to understand *why* the solution to their problem is the way it is or *how* to apply the solution in different situations, rather, instructions for following a set of sequential steps will get

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151. Griener et al., *supra* note 62, at 1136.

152. *Id.* Conceptual knowledge may, however, be needed in certain instances, such as when a user of self-help materials has to respond to a query outside the scope of a script. Research shows that when conceptual understanding is required, analogies are useful to explain complex concepts. *See id.*

153. *See generally* *The Flesch Grade Level Readability Formula*, READABILITY FORMULAS, <http://www.readabilityformulas.com/flesch-grade-level-readability-formula.php> [<https://perma.cc/Q5KG-E3P3>] (last visited May 17, 2023) (noting the Flesch-Kincaid Reading Level Test can be used to test the reading level of self-help materials).

them to the solution they need.<sup>154</sup> Mundane and often overlooked details, such as what documents need to be gathered and how to complete court forms, should be highlighted. The inclusion of minute and logistical details of what the user will experience and encounter is essential for confidence to develop. No detail is too prosaic to include, from methods of transportation to the courthouse, to what an agency waiting room will look like. It has been observed, “if self-help materials designed to be helpful fail on the small things, such as where to sit and what to expect next, why should the user trust them on the big things?”<sup>155</sup>

Self-help materials must also present information so that it can be easily understood and deployed by its user. They should be written the way people speak: the tone should be conversational, and it does not necessarily have to be grammatical or follow formal conventions.<sup>156</sup> The developer of self-help materials should use short declarative sentences, simple language, and include just enough information about the process so the user learns what issues are at stake and how to deal with them. The goal should be to direct the user, rather than to educate them.<sup>157</sup> Clear direction can be accompanied by graphic representations.

Keeping organized during a long and laborious process can also be a challenge and a barrier to starting and completing a process. Self-help materials that use headings, checklists, and advanced organizers offer users a better understanding of the big picture and result in better learning outcomes.<sup>158</sup> Graphic examples, quizzes,

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154. Griener et al., *supra* note 62, at 1131–32. Deployable self-help materials must include specific direction as to how to respond to actions taken in the legal proceeding and what to expect. *See id.* They should include needed details about the relevant legal process, including, in the context of a lawsuit, how one initiates or responds to the first step, how one responds to the other party, and how one communicates with the court. *See id.*

155. *Id.* at 1133–35. Users of self-help materials do not need statutory cites, history or jargon. Any complicated jargon or process should be clearly defined and explained without significantly increasing the user’s cognitive load.

156. Weight Watchers gives out charms as a reward for hitting regular weight loss milestones. *Everything You Need to Know About WW Milestone Charms*, WEIGHT WATCHERS (Dec. 3, 2019), <https://www.weightwatchers.com/us/blog/weight-loss/milestone-charms> [<https://perma.cc/YE9Z-67M5>]. These charms are designed to motivate, applaud, and remind the members of their success. *See id.*

157. *See* Griener et al., *supra* note 62, at 1133.

158. *Id.* at 1154–56.

and rewards for positive performance, such as self-affirming phrases to the user after completing a task, can also be part of the messaging.<sup>159</sup> Research has revealed that “rewards for improved performance work better than punishment of mistakes.”<sup>160</sup>

G. *Neuroscience’s Contribution to Overcoming Psychological Barriers to Action*

In the recent decades, there has been increasing interest in neuroscience as a source of explanation on how people engage in certain behaviors. Although much of this interest has been focused on understanding criminal behavior,<sup>161</sup> there are important insights that can be gleaned from thinking about behavior change in the realm of access to justice.<sup>162</sup>

Research tells us that social influences can alter the brain’s functioning and operation.<sup>163</sup> This has been referred to as “plasticity”:<sup>164</sup>

The brain is constantly being shaped, wittingly and unwittingly, by environmental forces that impinge upon organisms. The circuitry implicated in social and emotional behavior is among those circuits that appear importantly shaped by experience, and early experience in these domains likely plays a key role in governing differences among individuals in their vulnerability or resilience to future adversity.<sup>165</sup>

159. *Id.* at 1139.

160. THALER & SUNSTEIN, *supra* note 120, at 172.

161. *See generally* Tuomas K. Pernu1 & Nadine Elzein, *From Neuroscience to Law: Bridging the Gap*, 11 FRONTIERS PSYCH. 1862 (2020).

162. We are not claiming, by any means, to be experts in the complex field of neuroscience. In reviewing some of the more salient research in the fields, we have observed, however, how some tested interventions may impact behaviors. Thus, this literature has relevance to our field of interest.

163. *See generally* Richard J. Davidson & Bruce S. McEwen, *Social Influences on Neuroplasticity: Stress and Interventions to Promote Well-Being*, 15 NATURE NEUROSCIENCE 689, 689 (2012).

164. *Id.*

<sup>165</sup> *Id.* The more primitive parts of our brain conspire against our thinking about the future. *Id.* Our amygdala is designed to be hyper alert to signs of threat, but only immediate threat. *Id.* At the same time, we’re powerfully pulled to immediate gratification, even if it’s undermining our own long-term well-being. *Id.*

Thus, the ability of one's brain to make the connection between current negative behaviors and these behaviors' future consequences is impacted by a host of environmental forces. One such force that severely impacts people's behavior is stress. Stress is a physiological response to a stimulus; the body reacts to the threat with a "physical, mental, or emotional adjustment."<sup>166</sup> Exposure to stress is manifested as anxiety, restlessness, forgetfulness, anger, lack of focus, irritability, social withdrawal, fatigue and depression.<sup>167</sup> These manifestations of stress are all barriers to solving justice needs in that they impede the ability to learn new information, impact decision-making, and can lead to passivity.

The problem of stress is worse among those who are poor, marginalized, and vulnerable.<sup>168</sup> Studies have shown a strong correlation between those in poverty, high levels of stress, and compromised mental health.<sup>169</sup> Having to regularly worry about not having adequate shelter, sufficient food, reliable transportation, and basic health care can have a dramatic effect on neural circuitry.<sup>170</sup> This means that the poor and vulnerable have less mental energy and cognitive capacity available for making "productive decisions."<sup>171</sup> Executive functions—self-regulation and self-directed actions that people use to manage their lives effectively—suffer, resulting in people in poverty being less able to focus on any matters that are not currently front and center. This leads to

166. Anil Kumar et al., *Stress: Neurobiology, Consequences and Management*, 5 J. PHARMACY & BIOALLIED SCIS. 91, 91 (2013).

167. Mayo Clinic Staff, *Stress Symptoms: Effects on Your Body and Behavior*, MAYO CLINIC (Mar. 24, 2021), <https://www.mayoclinic.org/healthy-lifestyle/stress-management/in-depth/stress-symptoms/art-2005098>.

168. See Clancy Blair & C. Cybele Raver, *Poverty, Stress, and Brain Development: New Directions for Prevention and Intervention*, 16 ACAD. PEDIATRICS 30, 30 (2016); Lund et al., *supra* note 43, at 517.

169. Lund et al., *supra* note 43, at 517.

170. See Carol Graham, *The High Costs of Being Poor in America: Stress, Pain, And Worry*, BROOKINGS (Feb. 19, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/02/19/the-high-costs-of-being-poor-in-america-stress-pain-and-worry/> [<https://perma.cc/HL39-9KPD>] (explaining that being victims of discrimination—gender, race, sexual orientation, identity, disability—has shown to be associated with high levels of stress).

171. Schofield & Venkataramani, *supra* note 43, at 1. This randomized control trial found that poverty was correlated with reduced cognitive bandwidth. *Id.*; see SCARCITY, *supra* note 43, at 8.

compromised long-term decision-making, denial, and paralysis in the face of new problems.

There is a growing body of research that reveals certain interventions, including moderate exercise, cognitive therapy, mindfulness and meditation, laughter, and various relaxation techniques such as yoga and deep breathing exercises, can “induce plasticity-related alterations in the brain and support a range of positive behavioral outcomes.”<sup>172</sup> These strategies can also keep people more focused on the present, and improve the ability to address new challenges as they arise.

If the goal is, however, to increase vulnerable individuals’ legal capacity, it is not as simple as offering the advice to take a deep breath and practice more yoga. There must be targeted attention to the effect of stressors on people’s brains by those in a position to provide legal assistance. The providers of legal assistance in the United States must expand their focus from simply offering legal information to attending to the physiological, psychological, and emotional barriers that prevent many people from hearing, understanding, and being able to act on such information. Any consultation or advice must affirmatively acknowledge and address the challenges people under stress have and marshal the wide range of skills necessary to address legal needs.

#### IV. REIMAGINING INTERVENTIONS IN THE CIVIL JUSTICE SYSTEM

By design, our system of laws and remedies is opaque, dense, and intimidating. If the goal is to have a system where everyone has the opportunity to effectively and efficiently resolve their civil justice issues, efforts at reform in the United States need coordination, recalibration, and a sharper focus on just-in-time and upstream interventions. System designers, anthropologists, and technologists can be brought together to design a justice system infrastructure that addresses the needs of the people who use it.

It is unsurprising that all too often the bar’s proposed solution to the access to justice crisis is more lawyer representation. A single solution, however, does not credit the diversity and complexity of justiciable problems that people present. In some instances, a social worker or allied health professional may provide a more

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172. Davidson & McEwen, *supra* note 163, at 689.

nuanced identification of a problem, as well as the empathy, skills and expertise needed to address it. In other circumstances, a technology-based “expert system” may be the best resource for someone seeking a relevant and tailored understanding of their rights.

People in the United States need a broader range of interventions.<sup>173</sup> “There is no single intervention that has increased the likelihood of a problem being completely resolved. However, applying a greater number of interventions significantly increases the likelihood that the problem becomes completely resolved.”<sup>174</sup> This demonstrates that the quantity (and types) of interventions matters.<sup>175</sup> The following two examples highlight emerging and established interventions for legal service providers which, when used alone or in conjunction with other methods, show promise at improving the success of human-centered, nuanced interventions.

#### A. *Non-Legal Community Organizations as Points of Contact*

The formal legal system is typically not where individuals receive information about the law. Instead, people get legal counsel from friends, family, health providers, direct experiences, and local organizations. These often-tapped informal, community-driven resources, coupled with vulnerable individuals’ distrust of formal institutions, are precisely why non-legal community organizations are essential for increasing legal capabilities and consciousness in the United States.

Consider the following example. Much of the housing inhabited by low income, vulnerable people is expensive as well as “predatory, substandard, or otherwise adverse.”<sup>176</sup> This reflects a

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173. IAALS REPORT, *supra* note 5, at 22–23. The survey addressed the following access to justice categories: the costs of justice, including money and time spent on the process, as well as stress and negative emotions; the quality of procedures, including voice and neutrality, respect and legal clarity; the quality of outcomes, including fair distribution, damage restoration, problem resolution and outcome explanation. *Id.*

174. *Id.*

175. *See id.* (“On average, 3.2 interventions were used per legal problem, and 2.5 interventions were applied per source of help. While effective combinations of interventions exist for some problem types, the individuals who are able to resolve their legal problems effectively tend to be those with lower impact problems.”).

176. Jamila Michener, *Civil Justice, Local Organizations and Democracy*, 122 COLUMB. L.REV. 1389, 1397 (2022). “In 2019, 46 percent of renter households (20.4 million renters) were cost burdened, paying in excess of 30% of their

political economy marked by unequal “relationships of power” between those who profit from housing (landlords, speculators, investors, etc.) and those who rely on it for their survival (tenants).<sup>177</sup> Local grass-roots organizations can serve as intermediaries between these two factions and can foster solidarity and collective action amongst neighbors. Because “tenants are a recognizable class of people who are relatively easy to locate and regularly come into contact with one another,” “[t]enancy creates opportunities to develop social bonds and communicate grievances.”<sup>178</sup> It also serves to embed people “in specific places where they can be found by groups seeking to mobilize and organize them.”<sup>179</sup> Grass roots organizations—as an integral part of the “processes of obtaining, retaining, protecting, and securing housing” for members of their communities—can also be empowered to provide legal assistance to neighbors when needed.<sup>180</sup>

Non-legal community organizations can also develop more refined mechanisms for engaging in the legal system in and outside of the courtroom by collaborating with legal aid organizations, advocating from the vantage point of the legally vulnerable, providing trainings, and organizing collective withholding of rent for repairs. They may also engage in community lawyering (where lawyers follow and not lead), give advice on legal language, alert people to problems they were not aware of, and facilitate deeper engagement of organizations with civil legal processes.<sup>181</sup> When individuals are involved in formal legal proceedings, members of these organizations can help them access necessary transportation and child care, serve as advocates or support people, observe and collect data on

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incomes toward rent. Nearly 25 percent (10.5 million renters) were severely cost burdened, spending more than half of their incomes on housing.” *Id.*; see JOINT CTR. FOR HOUS. STUD. OF HARVARD U., THE STATE OF THE NATION’S HOUSING 2021, at 4 (2021), [https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_State\\_Nations\\_Housing\\_2021.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2021.pdf) [<https://perma.cc/47CY-CAGS>].

177. PETER MARCUSE & DAVID MADDEN, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 89 (2016) (noting that “housing preeminently creates and reinforces connections between people, communities, and institutions, and thus it ultimately creates relationships of power.”).

178. *Id.* at 90.

179. Michener, *supra* note 176, at 1397.

180. *See id.*

181. *Id.* at 1389.

court processes to provide oversight and accountability, facilitate interactions with court and law enforcement officials, and take direct action when rights are not honored.<sup>182</sup>

### B. *Technology, Coordination, and Community Messaging*

Another way that legal self-help materials are being reimagined is through the use of technology tools that can be used to create bespoke legal services at scale. The Survey on U.S. Legal Technologies found that “the most common uses of legal tech for access to justice issues” include “technology that provides information,” “technology that connects individuals to attorneys,” and “technology that automates and produces documents.”<sup>183</sup> Efforts have only been accelerated by the pandemic, which sparked the widespread implementation of remote courthouse technologies for those who cannot access in-person services.<sup>184</sup>

Across all technologies, effective legal tools must provide a positive “user experience” (UX), which is an idea that reflects a genuine understanding of all the “touch points along the way that led someone to use a product and how that may affect the experience they have with it.”<sup>185</sup> These specific UX choices encompass more than

182. *Id.*

183. Zorik Pesochinsky, *Leveraging Legal Technology to Improve Access to Justice*, THOMSON REUTERS (July 29, 2021), <https://www.thomsonreuters.com/en-us/posts/legal/leveraging-legal-tech-access-to-justice/> [<https://perma.cc/DQ79-N3U4>]. The Survey on U.S. Legal Technologies identified more than 300 technologies that assist with access to justice problems for non-lawyers. *Id.* A study in Louisiana in the form of a geodata hackathon, with Geospatial Information Systems (GIS) expertise resulted in the following findings: many people live more than 45 minutes away from their closest in-person civil legal resource; more than 600,000 income eligible Louisianan (34%) live in places where meaningful legal assistance is simply out of reach. La. Access to Just. Comm’n, *Justice for All in Louisiana: Working Together to Expand Access to Civil Justice*, JUST. FOR ALL IN LA. (Jan. 30, 2023), <https://storymaps.arcgis.com/stories/45fb46ed32854ab2b88a7e459f022068> [<https://perma.cc/W7TD-8WAP>].

184. See Cassandre Coyer, *Louisiana Judge Schlegel, Founder of an ‘Online Court,’ Explains Why Zoom Doesn’t Cut It*, LAW.COM (Nov. 4, 2022, 12:50 PM), <https://www.law.com/legaltechnews/2022/11/04/louisiana-judge-schlegel-founder-of-an-online-court-explains-why-zoom-doesnt-cut-it/> [<https://perma.cc/S6GP-DRTB>].

185. Victoria Hudgins, *How to Create Access-to-Justice Tech for Courts That People Will Actually Use*, LAW.COM (Jan. 24, 2022, 10:10 AM), <https://www.law.com/legaltechnews/2022/01/24/how-to-create-access-to-justice-tech-for-cou>



font and color<sup>186</sup> and require keen understanding of the specific circumstances of the legally vulnerable communities being served.<sup>187</sup> To illustrate, a strong UX could take form through an application's automatic generation of a follow-up email, the delivery of reminder emails based on calculated deadlines, or setting certain options as the "default" position. Technology tools can also include a feature that informs the user on how long a process can take to complete and an automatic connection to relevant, non-legal resources.

What is more, recent breakthroughs in generative artificial intelligence ("AI") technology are poised to "democratize the delivery of legal services," open doors for new ways to expand legal capabilities and legal consciousness through digital services, and disrupt the role of the lawyer itself.<sup>188</sup> In the globally-hyped ChatGPT, powered by OpenAI's language model GTP-4,<sup>189</sup> a user can simply type out their questions in a natural language chat query and obtain a curated, well-written, and intelligent response in just seconds.<sup>190</sup> While there are clear knowledge gaps and growth areas for the tool, experts predict this kind of technology could eventually educate vulnerable groups on their rights and synthesize complex

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rts-that-people-will-actually-use/?slreturn=20221121012621 [https://perma.cc/ME4Z-TV53].

186. Although font and color are important. *Id.*

187. *Id.*

188. Mark A. Cohen, *How Transformative Will Generative AI and Other Tools Be For The Legal Industry?*, FORBES (Jan. 23, 2023), <https://www.forbes.com/sites/markcohen1/2023/01/23/how-transformative-will-generative-ai-and-other-tools-be-for-the-legal-industry/?sh=1dd821614334> (discussing how Richard Susskind, a prominent legal futurist, understands the long-term impacts of generative A.I. for the access to justice crisis); see Jenna Greene, *Will ChatGPT Make Lawyers Obsolete? (Hint: Be Afraid)*, REUTERS (Dec. 9, 2022), <https://www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09/> [https://perma.cc/AX67-AFG8].

189. *GPT-4 is OpenAI's most advanced system, producing safer and more useful responses*, OPENAI (March 13, 2023), <https://openai.com/gpt-4> [https://perma.cc/U6BB-RW8Z] (discussing the release of GPT-4). See also James Vincent, *OpenAI CEO Sam Altman on GTP-4: "People Are Begging to Be Disappointed and They Will Be"*, VERGE (Jan. 18, 2023), <https://www.theverge.com/23560328/openai-gpt-4-rumor-release-date-sam-altman-interview> [https://perma.cc/XUJ9-W7P8] (noting GPT is predicted to be forthcoming in Q1 of 2023).

190. See Samantha Murphy Kelly, *Chatgpt Passes Exams From Law And Business Schools*, CNN BUS., <https://www.cnn.com/2023/01/26/tech/chatgpt-passes-exams/index.html> [https://perma.cc/4TVT-8V6L] (Jan. 26, 2023).

laws.<sup>191</sup> In addition, free access (or a reasonably-priced subscription) to an AI tool of this nature would significantly lower, if not eliminate, the monetary burden of legal empowerment.<sup>192</sup> The most difficult advancement, however, will not be a technical one, and instead will require a fundamental shift towards trusting the use of generative AI. Indeed, the use of generative AI by the legal profession for access to justice issues is already being challenged.<sup>193</sup> Despite mounting concerns regarding legal ethics,<sup>194</sup> economic disruption, data security, and privileges, it is evident the wheels of change are in motion.<sup>195</sup> Now is the time to begin architecting and championing technology that balances the human element of lawyering with technology to produce an access to justice solution that is “something better than machine or human could do alone.”<sup>196</sup>

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191. See Cohen, *supra* note 188.

192. In 2021, almost one-half of low-income Americans cited cost as a reason for not getting legal help in the past year. LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 52 (2022), <https://lsc-live.app.box.com/s/xl2v2uraitobbzrhwtjlgioemp3myz1>.

193. See Megan Cerullo, *AI-Powered “Robot” Lawyer Won’t Argue In Court After Jail Threats*, CBS NEWS, <https://www.cbsnews.com/news/robot-lawyer-wont-argue-court-jail-threats-do-not-pay/> [<https://perma.cc/GY2Q-2G9J>] (Jan. 26, 2023) (explaining that “state bar prosecutors” threatened jail time to the CEO of DoNotPay, an AI tool, if they used it to help a defendant fight a traffic ticket in court by generating argument responses in real-time and whispering those responses to the defendant through a headset); Stephanie Pacheco, *ANALYSIS: DoNotPay Lawsuits: A setback for Justice Initiatives?*, BLOOMBERG LAW (March 28, 2023), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-donotpay-lawsuits-a-setback-for-justice-initiatives> [<https://perma.cc/6EBZ-BM5K>] (discussing that DoNotPay dropped the plan to debut in California court and now faces “two class action lawsuits and one pre-action discovery dispute” which are all unrelated to the traffic court case).

194. Amy B. Cyphert, *A Human Being Wrote This Law Review Article: GPT-3 and the Practice of Law*, 55 U.C. DAVIS L. REV. 401, 423–25 (2021) (discussing the Model Rules of Professional Conduct Rules 1.1, 5.3, and 8.4 and how they would be implicated by AI, specifically, GPT-3).

195. See Bob Ambrogi, *New GTP-Based Chat App from LawDroid is a Lawyer’s ‘Copilot’ for Research, Drafting, Brainstorming, and More*, LAWSITES (Jan. 25, 2023), <https://www.lawnext.com/2023/01/new-gpt-based-chat-app-from-lawdroid-is-a-lawyers-copilot-for-research-drafting-brainstorming-and-more.html> [<https://perma.cc/PZ2H-5BAY>] (explaining how Louisiana Judge Scott Schlegel is using CoPilot, a tool from LawDroid using GTP-3.5 to digitally assist criminal defendants); Stephanie Wilkins, *ChatGPT Is Impressive, But Can (and Should) It Be Used in Legal?*, LAW.COM (Dec. 15, 2022), <https://www.law.com/legaltechnews/2022/12/15/chatgpt-is-impressive-but-can-and-should-it-be-used-in-legal/> [<https://perma.cc/4LC2-MPPF>].

196. Greene, *supra* note 188.

Legal self-help materials should also be cross-jurisdictional coordinated efforts. A national scale inventory on how materials are similar and different—from state-to-state and state-to-federal—and how this might impact the way people access and respond to materials must be completed. An individual’s lack of awareness and engagement with legal resources is compounded by the enormous variety of small-scale models for legal assistance in different locations.<sup>197</sup> One study examined one pilot project after another and ultimately concluded there were few mechanisms for national coordination or branding.<sup>198</sup> Even national and federal initiatives might be rebranded at the state or local level. In practice, this means resources and time must be put into researching similar materials in other jurisdictions and efforts must be made to maintain cohesive language and branding for users of the same legal issue.

Finally, technology-based self-help materials should implement community messaging, tailored for the legally vulnerable communities the materials are meant to serve. Materials must show an understanding of the community by using plain language in the language(s) required<sup>199</sup> and creating mobile friendly applications, ensuring they can be understood by people with disabilities and of all ages. Materials should demonstrate a recognition of people’s fears and use affirming and reassuring language. Furthermore, self-help resources must not only provide information, but also provide the opportunity for additional hands-on interventions, such as contacting a legal aid organization or getting help from a rental assistance provider.

#### CONCLUSION

Efforts at access to justice reform in the U.S. need coordination, recalibration, and a sharper focus on just-in-time and upstream interventions. When reimagining legal service delivery, new

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197. See Tom Braegelmann, *O Silo Mio! – LegalTech Silos Are on The Rise, and That’s Bad*, ARTIFICIAL LAW. (Oct. 1, 2018), <https://www.artificiallawyer.com/2018/10/01/o-silo-mio-legaltech-silos-are-on-the-rise-and-thats-bad/> [https://perma.cc/8FQL-M9XC].

198. *Id.*

199. MICHELE M. ASPREY, PLAIN LANGUAGE FOR LAWYERS 12 (4th ed. 2010) (“Plain language writing is just the practice of writing English (or French or German or whatever else) in a clear and simple style.”); see Greiner et al., *supra* note 62, at 1124–25.

interventions will only be successful if the people behind it holistically understand the legal capability and legal consciousness of all impacted vulnerable communities. We must zoom out and view the range of possible strategies for addressing civil legal needs from an interdisciplinary perspective, shattering antiquated conventions of providing help and embracing emerging technologies. We must also zoom in, however, and gain meaningful context of the lives of the legally vulnerable individuals of whom we are trying to serve, their relationships with their community, and their community at large. Positioning the solution to our access to justice crisis as a simple knowledge transfer is a disservice to the cause. We must instead problem-solve access to justice issues with an innovative, informed, and collaborative approach, equipped to deploy multiple tailored interventions to those who need it most.