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Optimism, Skepticism, and Access to Justice

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SPRING 2015 RECONSIDERING ACCESS TO JUSTICE SYMPOSIUM

OPTIMISM, SKEPTICISM, AND ACCESS TO JUSTICE†

By: David Luban*

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I. INTRODUCTION

It has been more than twenty years since the American Bar Association published its pioneering study of the legal needs of low-income Americans. The bottom lines of this study are often cited: first, that each year, half of low-income people faced legal needs, defined as “situations, events, or difficulties any member of the household faced . . . [that] raised legal issues.”¹ Second, 70% of the legal needs of low-income people went unmet.

Twenty years later, it appears that nothing has changed, except for the worse. For one thing, the budget of the Legal Services Corporation (“LSC”) is 40% smaller today—in constant dollars—than it was when the Legal Needs Study appeared.² In fact, the LSC’s 2015 budget was 10% lower than it was just four years earlier.³ Today there are about 4,300 LSC-funded lawyers—about the same as in 1994, the

† This Article was originally delivered as the keynote address to the Texas A&M University School of Law’s conference “Reconsidering Access to Justice,” May 1, 2015. The present version aims to preserve the style of the spoken presentation. I am grateful to Deborah Rhode, Tanina Rostain, Jon Tippens, Rob Vischer, David Vladeck, David Wilkins, and participants at the conference for helpful comments and conversations, and to Molly Wilder for research assistance.

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1. A.B.A., *LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 2* (1994).

2. The 1994 funding, in 2013 dollars, was \$628,763,924. *2013 LSC by the Numbers*, LEGAL SERVS. CORP., <http://www.lsc.gov/media-center/publications/2013-lsc-numbers#bfrtoc-funding> [https://perma.cc/TU7L-5LXP] [hereinafter *2013 LSC by the Numbers*]. The 2015 funding was \$375,000,000. *LSC Funding*, LEGAL SERVS. CORP., <http://www.lsc.gov/lsc-funding> [https://perma.cc/H3EB-8E3W].

3. *2013 LSC by the Numbers*, *supra* note 2. The 2011 funding was \$418,504,591. *Id.*

year of the ABA's legal needs survey.⁴ This actually improved over the intervening years, when the number of LSC-funded lawyers dropped significantly.⁵ But the number of people eligible for legal aid has grown by 11 million since 1994 to a rather staggering 61 million people today, almost a fifth of the U.S. population.⁶

Of course, LSC is only part of the legal aid story, but other parts are no less grim. The economic crisis devastated alternative sources of funding for legal assistance. States have cut their legal aid budgets, law firms have pulled back their contributions, and low interest rates have devastated Interest on Lawyer Trust Account (“IOLTA”) programs.

Nor do pro bono and “low bono” services fill the unmet legal need, although by one estimate lawyers provide a quarter of a billion dollars' worth of pro bono service annually.⁷ The rapid restructuring of the legal services market has, notoriously, put lawyers under huge personal stress. Lawyers are working harder, or so it feels, to stay in place—and lawyers report that lack of time is the biggest factor discouraging them from pro bono representation. An *American Lawyer* study found a 12% drop in reported pro bono hours between 2008 and 2011 within AmLaw 200 firms—and not coincidentally, these were the roughest years of the economic crisis.⁸ To be sure, the most recent ABA study found that on average the legal profession somewhat exceeds the fifty hours per year of pro bono work that ethics rules recommend, and that most pro bono hours go to persons of limited means or to organizations serving them.⁹ But while that finding gives the private bar some bragging rights, we must take it with a grain of salt. The findings are based on self-reports, and fewer than 1% of those who received the ABA's questionnaire responded to it. It seems more than likely that the small minority responding to the pro bono

4. LEGAL SERVS. CORP., 2014 LEGAL SERVICES CORPORATION BY THE NUMBERS 2 (2015), <http://www.lsc.gov/sites/default/files/attach/2015/08/LSC2014FactBook.pdf> [<https://perma.cc/522V-J6YZ>]. In addition to the 4,318 attorneys, LSC grantees were staffed with 1,504 paralegals. *Id.* For the 1994 number, see *LSC Grantee Staffing 1990–2000*, at 35 (copy on file with author).

5. *Id.* In 2013, LSC-funded attorneys numbered only 3,071. *2013 LSC by the Numbers*, *supra* note 2 (reporting 2,623 staff attorneys and 448 supervising attorneys).

6. *People Below 125 Percent of Poverty Level and the Near Poor*, U.S. CENSUS BUREAU, <https://www.census.gov/hhes/www/poverty/data/historical/hstpov6.xls> [perma.cc/B9XG-FN2G]. The 61,339,000 people under 125% of the poverty line (the legal aid cutoff) in 2014 represent 19.4% of the population. *Id.*

7. Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST* 95, 96–98 (Robert Granfield & Lynn Mather eds., 2009).

8. Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—And Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 109–10 (2013).

9. STANDING COMM. ON PRO BONO & PUB. SERV., A.B.A., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS vi (Mar. 2013), http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lc_pb_Supporting_Justice_III_final.authcheckdam.pdf [<https://perma.cc/A9VH-96UV>].

survey do more pro bono than the vast majority who do not respond, so the results are likely to be skewed upward. Yet even if the number is reliable—or rather, *precisely* if it is reliable—it suggests that we cannot realistically expect lawyers to make up for the current shortfall by doing even more pro bono. The pro bono average is never going to go from fifty hours to seventy-five or 100.

The same economic crisis that has drained the well of legal aid resources has provided an ocean of new legal needs. This is the double whammy of economic crisis: more need, fewer resources to meet it. The most conspicuous need the crisis generated is that of the millions of Americans who face foreclosures, personal bankruptcy, and ruinous levels of personal debt. More than five million people have already lost their homes, and millions more stand at the brink.¹⁰

These are precisely the kind of financial catastrophes that are at the same time legal needs. As the Federal Trade Commission (“FTC”) documents, the large debt-purchase industry has bought, at heavy discounts, vast amounts of so-called “zombie” debt—debts that creditors are not actually legally entitled to collect. Unsurprisingly, the industry pursues these debts through means that are often illegal: frivolous lawsuits about which consumers often receive inadequate notice, improper garnishments, suing or threatening to sue on time-barred debts, and unethical arbitration practices.¹¹ These are issues crying out for legal assistance, but it is mostly unavailable to debtors, neither through legal aid or pro bono, nor through the private market for legal services. I single out this issue from many I might have mentioned, both because ruinous debt affects millions, and because it is a more-or-less direct product of the same economic crisis that has put the crunch on legal services—the double whammy mentioned above, where the recession made legal need balloon at the same time it shrank the resources for meeting that need. I will come back to the subject of zombie debt later.

Apparently, then, the access to justice crisis is the same as it ever was, only more so. Or is it? To me, the conversation about legal need and access to justice seems different today than it did a decade ago, let alone three decades ago when I first began to read and write about it. Two comparatively new components have made the access to justice story more complex.

One might be called the “discourse of skepticism.” By skepticism I do not mean the familiar political attacks that have dogged legal ser-

10. David C. Vladeck, *Debt's Dilemmas: ACCI's Annual Colston Warne Lecture*, 47 J. CONSUMER AFF. 358, 359 (2013).

11. FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION ii (July 2010), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> [<https://perma.cc/6R6P-DPC9>].

vices for decades and are largely responsible for shrinking and handcuffing the LSC. The skepticism I have in mind comes from friends, not enemies, of the access to justice movement—friends who study the system empirically and coolly, and have come to doubt that lack of lawyers and lack of funding make a lot of difference in the real world.

Professor Milan Markovic's recent paper *Juking Access to Justice* is a skilled and thoughtful example of this skepticism.¹² Markovic focuses on two important recent findings. The first comes from Rebecca Sandefur's recent study, conducted under the auspices of the American Bar Foundation, of civil legal needs in a Midwestern city.¹³ An astonishing two-thirds of those surveyed had experienced a serious civil justice situation in the past eighteen months, and half that group suffered severe effects from it, including bad physical health. Yet only about a fifth of them sought third-party assistance. That is discouraging, but perhaps not surprising.

More surprising is that cost was not what drove them away. In fact, Sandefur's subjects reported that cost was a factor only 17% of the time when they chose not to seek third-party assistance. More often, they reported either that they did not seek help because the situation would resolve itself, or because third-party help would make no difference. It appears that their problem of access to justice is not primarily a money problem.

The second source Markovic draws on is one of the most significant contributions to the skeptical literature, the landmark studies of lawyer efficacy by Greiner and Pattanayak (with third co-author Jonathan Hennessy in the later studies).¹⁴ The first and best-known involved clients who applied to Harvard's Legal Aid Bureau for help appealing unemployment insurance eligibility decisions. For experimental purposes, they were divided into two groups at random (call them the *treated group* and the *control group*) and only those in the treated

12. Milan Markovic, *Juking Access to Justice*, 29 GEO. J. LEGAL ETHICS (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561558 [<https://perma.cc/CV7D-K4NE>].

13. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf [<https://perma.cc/RED4-QFQZ>].

14. Markovic, *supra* note 12; D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012) [hereinafter Greiner & Pattanayak, *Legal Aid Bureau Study*]; D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013) [hereinafter *District Court Study*]; D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *How Effective Are Limited Legal Services Programs? A Randomized Experiment in a Massachusetts Housing Court* (Sept. 1, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078 [<https://perma.cc/57MT-VB7H>] [hereinafter Greiner, Pattanayak & Hennessy, *Housing Court Study*].

group were offered legal aid.¹⁵ The research question was: Who fared better, clients in the treated group, who received offers of legal aid, or those in the control group, who did not? Greiner and Pattanayak found there was simply no difference. Those in the control group either represented themselves or in some instances found alternative representation. In fact, the only difference in outcomes was that on average they got their cases resolved faster than those in the treated group. In other words, even though the treated group members were represented by top-notch, highly committed law students from one of the best legal clinics in the country, the main effect of the representation was a delay in getting clients their money.¹⁶

It looks like not only do people not report being priced out of legal services, but in some contexts, those services might make no difference or even a difference in the wrong direction. If we take the discourse of skepticism at full face value, much of the access to justice debate about how to provide more funding for lawyers is simply asking the wrong question.

Alongside the discourse of skepticism is a second recent strand, what I'll call the "discourse of technological optimism" or simply the "discourse of optimism" for short. This is the view that new technologies are revolutionizing the delivery of legal services to such a degree that we might foresee a technical fix to many access-to-justice problems. A great deal of legal services are routine, and digital technology is extremely good at routines. Perhaps in the near future it will not take a killer advocate to help clients, merely a killer app.

A moment's thought shows that the discourse of optimism is, in its own way, also a form of skepticism about lawyers. Like the discourse of skepticism, it raises doubts about whether focusing on lawyers is a misplaced emphasis in the analysis of access to justice.

Before probing more deeply into the discourse of skepticism and the discourse of optimism, it will help to back up—very far up—and try to draw a conceptual map of what, exactly, access to justice is supposed to mean. That will help us see where skepticism and optimism belong on the map.

When scholars and activists in the public-interest community talk about "access to justice," they usually have in mind access to lawyers. The recent movement for civil *Gideon* makes that pretty obvious. Although I titled my first book *Lawyers and Justice*, and argued for the indispensable role of lawyers in pursuing justice, it seems that the equivalence is by no means an analytic truth. It actually rests on a trio of other supposed equivalences:

15. This was not ethically problematic, because the Legal Aid Bureau receives more applications than it can handle—thus, applicants for legal aid would inevitably be turned away with or without the experiment.

16. Greiner & Pattanayak, *Legal Aid Bureau Study*, *supra* note 14.

- (1) Access to justice means access to law—that is, to *legal* justice.
- (2) Access to law means access to professional legal services.
- (3) Access to professional legal services means access to lawyers.

Of course, students of the “access to justice” issue do not invariably treat these as equivalences. Indeed, as I will explain, the discourses of skepticism and optimism come precisely from questioning some of these equivalences. It behooves us, then, to look at the equivalences with some care. To what extent are they valid?

For the moment let’s postpone the biggest and most philosophically deep of the equivalences—that between law and justice. First, let’s look at the other two.

II. ACCESS TO LAW = ACCESS TO PROFESSIONAL LEGAL SERVICES?

Let’s start with the supposed equivalence between access to law and access to professional legal services, perhaps provided by lawyers but perhaps by alternative providers. To question this equivalence is to question whether human beings are essential for access to justice. If not humans, then what? The answer given by optimists is that new technologies can take over the burden. What if it turns out that intelligent machines can do as well or even better at routine legal services than human providers? In that case, access to law would not require professional legal services nearly as often as we sometimes suppose.

Of course, machines cannot be advocates, at least not outside of science fiction. But advocacy is not the main thing lawyers do. After all, a lot of routine legal need consists primarily of the need for legal information, and we can already Google an astonishing amount of that. Of course, it is one thing to Google the information and another to understand it or to process it in a way that’s practically useful. But technology might be able to make those interpretive chores easier—perhaps even as easy as a living, breathing legal professional, be it a lawyer or a paralegal, could make it.

One class of cases for which that may be true consists of those where professional advisors are simply going through a checklist. Why not substitute a smart computer? A paradigm example is TurboTax and its equivalents. The software asks you questions, and you fill in the answers. Sometimes, there will be a node in the decision tree, where the next line of questions depends on what you answered previously. That’s not a problem: computers are grandmasters of decision trees. A living, breathing tax preparer would need to ask the same questions, in roughly the same order, and would calculate your taxes based on the answers in much the way the software does. It is just that the software does it better.

How many routine but very pressing legal services are TurboTax-like in the relevant ways? A lot, as it turns out. In my neck of the

woods, Georgetown students in a practicum taught by my colleague Tanina Rostain have built a number of ingenious access-to-justice apps.

- They built a New York City “Earned Sick Time Advisor” that instructs claimants how to calculate and claim their sick leave under a New York City statute.¹⁷
- They made an app to help small businesses figure out how to comply with the Americans with Disabilities Act.¹⁸
- To help pro se clients in unemployment benefits hearings, they built an Unemployment Benefits Hearing Coach app; and a similar app helps parents prepare for hearings with school administrators tailoring Individualized Education Programs.¹⁹
- A Pennsylvania Children’s Medicaid Appeals Advisor gives personalized guidance to parents, and helps them generate a customized letter to initiate their appeal.²⁰
- A Debt & Eviction Navigator app helps social workers advise the home-bound elderly who face evictions and consumer debt.²¹
- The Baltimore lawyer Jon Tippens has built a Criminal Record Expungement app, which allows individuals with records to find out in minutes whether they are eligible to have their record expunged, and tells them what to do next.²²
- Tippens and his colleagues have also constructed an app to help Baltimoreans facing tax sale and foreclosure on their property.²³

17. *New York City Earned Sick Time Advisor*, A BETTER BALANCE, <https://applications.neotalogic.com/a/nyc-sicktime> [https://perma.cc/9LUX-RV35]. It also appears on the page of legal resources made available online by the NGO A Better Balance. *Documents & Resources—Sick Leave*, A BETTER BALANCE, <http://www.abetterbalance.org/web/news/resources/sickleavedocs> [https://perma.cc/Z62H-2DZ7].

18. See Terry Carter, *Professor Tanina Rostain Has Her Students Developing Access-to-Justice Apps*, LEGAL REBELS (Sept. 23, 2015, 9:00 AM), http://www.abajournal.com/legalrebels/article/tanina_rostain_profile [https://perma.cc/T4Y2-KD56].

19. See *Unemployment Benefits Hearing Coach*, DC OFF. ADMIN. HEARINGS, <https://applications.neotalogic.com/a/oah-advisor> [https://perma.cc/NZ76-93AQ]; see also *Student-Designed Apps Provide Access to Justice*, GEO. L. (Apr. 28, 2014), <https://www.law.georgetown.edu/news/web-stories/student-designed-apps-provide-access-to-justice.cfm> [https://perma.cc/39UH-HFYF].

20. See *Pennsylvania Children’s Medicaid Appeals Advisor*, PA. HEALTH LAW PROJECT, <https://applications.neotalogic.com/a/phlp-appeals-advisor> (last visited Feb. 8, 2016).

21. See *DEN: Debt & Eviction Navigator*, JASA, <https://applications.neotalogic.com/a/jasa-den> [https://perma.cc/5JMG-N74]; see also *Student-Designed Apps Provide Access to Justice*, *supra* note 19.

22. *It’s Time for a Do-Over*, EXPUNGEMARYLAND, <http://www.expungemaryland.org/> [https://perma.cc/2SFN-UAH2].

23. *Welcome to Tax Sale Help Baltimore!*, MD TAX SALE APP, <http://www.tax-salehelpbaltimore.org/> [https://perma.cc/83EA-XVVZ].

Both the University of Richmond and Vanderbilt University have similar initiatives.²⁴

Other apps can improve quality and efficiency of legal services that lawyers deliver—machine and human working side by side in synergy. Rostain and her students built an intake and assessment app to help Virginia Legal Services do intake triage,²⁵ and are currently building another app to assist veterans benefits administrators to make complex legal determinations.²⁶ That turns out to be a crying need, because audits show that unassisted administrators currently get it wrong one time out of four. We can readily imagine an app that would help criminal defenders evaluate the collateral consequences of pleading guilty to crimes that might lead to deportation, loss of jobs, or loss of licenses—consequences buried in unrelated statutes across all fifty states, and which defense lawyers will almost certainly never notice.

In each of these, a user-friendly app can walk you through the decision tree and give you a reasonable facsimile of the kind of legal advice you would get from a professional. If the apps are free or cheap, they could, in principle, take over much of the role of human providers and provide low-cost access to law. Legally trained people would still be necessary in the minimal sense that code writers and digital engineers would need to work with them to create the apps, but after that their job would be done, and their handiwork would take over the downstream business.

How far can digitized law go? It might be thought that only a tiny subset of legal problems could be solved this way, namely the problems in which legal thinking can be modeled as a decision tree. But this conclusion underestimates the power of artificial intelligence (“AI”). One interesting insight of AI experts is that far more subtle forms of thinking like a lawyer might also be coded into algorithms.

The *Eureka!* moment came, not when Deep Blue beat Garry Kasparov at chess, but when Deep Blue’s younger cousin Watson beat the world Jeopardy champion. Unlike chess, Jeopardy is a game played in natural language requiring knowledge of the wider world outside the game. Watson was able to match key phrases in the Jeopardy clues with an inhumanly vast corpus of natural-language utterances. Attack-

24. See, e.g., *Technology in Legal Practice*, VAND. L. SCH., <http://law.vanderbilt.edu/courses/340> [<https://perma.cc/D5EM-R5W6>] (showing Vanderbilt’s course information for Mark Jenkins’s “Technology in Legal Practice” course).

25. See VA. LEGAL AID SOC’Y, <https://applications.neotalogic.com/a/vlas-eligibility> [<https://perma.cc/M6JZ-Y5FB>]; see also *Student-Designed Apps Provide Access to Justice*, *supra* note 19.

26. See David E. Boelzner, *Law Students Participate in Veterans Law-Technology Course*, VETERANS L. J., Spring 2015, at 5, <http://www.cavcbar.net/SPRING%202015%20VLJ.pdf> [<https://perma.cc/J85W-DENM>].

ing each problem with multiple data-mining algorithms, Watson could produce a winning guess in seconds.²⁷

It quickly dawned on observers that Watson's method is very much like what trained professional experts do when they confront problems. Medical diagnosticians like television's Dr. House search their memories for bits of information matching the symptoms and test results—and medical diagnosticians were among the first to appreciate the promise of Watson's achievement. Dr. House has thousands of disease patterns in his memory; Watson can effortlessly store millions. Currently, Watson is being “trained” as a cancer specialist, with extremely promising results.²⁸

Very likely, the search-and-match-and-guess method is what lawyers do too. They match fact patterns with the thousands they have confronted from the moment they read *Payne v. Cave* in their first hour as a law student. That's how they recognize the client's problem as a contracts problem or a fraud problem or a public benefits problem. Perhaps, then, that mystical and evanescent thing we call “thinking like a lawyer”—the know-how that we law teachers see our students mastering somewhere in the middle of their second year—is something that a very smart machine could be trained to do. Like Ronald Dworkin's mythical Judge Hercules,²⁹ the machine can store entire law libraries in its memory. Certainly it won't happen today, and maybe not tomorrow—but technology moves fast, and it took only five years to develop the machine that now holds the world Jeopardy crown. Lawyers who nervously watch litigation associates replaced by computers in document review should have a proper sense of respect for Watson and its offspring—tempered, perhaps, with anxious dismay at the brave new world. In the access to justice debates, we should recognize that what is bad for the livelihoods of litigation associates might become a boon for clients, as cutting edge software gets cheaper and makes its way onto your smartphone.

The discourse of optimism sees technology solving the problem of access to law. Are the optimists right? Nowadays, we're inclined to a kind of breathlessness in the face of the Digital Revolution. For my part, I confess that I am *not* a true believer in the brave new world where life's enduring problems are slain by killer apps. But the claims of hi-tech enthusiasts certainly have the salutary effect of forcing us to reflect on what constitutes legal judgment. They ask a challenging

27. See, e.g., Jo Best, *IBM Watson: The Inside Story of How the Jeopardy-Winning Supercomputer Was Born, and What It Wants to Do Next*, TECHREPUBLIC, <http://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/> [https://perma.cc/Q6M6-GJBC].

28. Ariana Eunjung Cha, *Watson's Next Feat? Taking on Cancer*, WASH. POST, June 28, 2015, at A1.

29. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 105 (1978) (introducing Judge Hercules).

question: What does a human legal adviser have to offer that a smart machine can't be trained to do?

The first thing, it seems to me, is emotional intelligence. Civil justice deficits are not simply information problems. They are emotional problems as well, and dealing with those emotions—the fears, stresses, and anxieties that Rebecca Sandefur's survey subjects report³⁰—may be an essential part of the legal solution. Let me illustrate with a personal example.

Drawing up a simple will is often viewed as a paradigm case of routine legal service that might not require a trained lawyer. Perhaps people could download a simple form together with an app that walks them through the process of filling it out. Many people buy off-the-shelf standardized forms to make their wills.

Yet one of my most vivid memories is how emotionally fraught it was when, years ago, my wife and I made our first will. We did not expect it to be; we thought it would be cut and dried. At the time, we had two small kids and for all practical purposes no assets to pass on to them except our life insurance—no savings and next to no home equity. We went to an estates lawyer, Adena, who started asking questions that, in some sense, a computer could have asked as well. Who do you want to leave the money to? What if David dies first? What if Judy dies first? So far, so mechanical. Then came the first difficult one: what if you both die, perhaps simultaneously in an accident? Who do you want to raise your kids?

Then came some even less comfortable questions. Is that the same person you want to name as executor to your will? Do you want some of your insurance money to go to the step-parents, so they can buy a bigger house to make room for the newcomers? And what if your insurance money means your kids are more comfortably set up than their kids? Do you want some of the money to go to the step-parents' kids, for the sake of family harmony?

It should be obvious that these are deep questions. Who do you trust with your kids? Are they the same people you love? Are they your relatives, or someone else? If you leave your children in the care of someone else, will your relatives be bitter at being passed over, poisoning their relationship with the children? And one background issue hovers over everything: Do you really want to think about car crashes, tragedy, your death, your wife's death, your children as heart-stricken orphans? As Tom Shaffer wrote in one of his most beautiful legal ethics articles, estate planning inevitably deals with "deep family things."³¹ Estates lawyers have told me that their clients often procrastinate

30. Sandefur, *supra* note 13, at 9–10.

31. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 976 (1987).

minate executing their wills for months, simply because human beings are not very good at confronting our own deaths.

Obviously, the fact that we were sitting in Adena's office shows we had thought about our deaths in at least an abstract prudential way. But her job was to make the abstraction real. It was a surprisingly hard conversation, which she managed with skill and kindness and finesse.

The point here is simple. In theory, an automaton could have walked us through the same questions Adena asked. The decision tree for a simple will is no more complex than TurboTax. But in real life, it took a skilled human being to manage the conversation so that we would and could deal with the hard questions rationally. When I complimented her psychological skills, Adena shrugged it off. "Well, lawyers don't go into my line of practice if they can't work with people on that level." In other words: sometimes this seemingly cut-and-dried process of making a simple will takes a mensch, not an app.

One obvious objection to what I have been saying is that not every lawyer is an Adena. We all know lawyers with less empathy and emotional intelligence than the average housecat; they're called "partners." In fact, didn't your contracts teacher try her damndest to beat the empathy out of you by making you argue the coal company's side in *Peevyhouse* in your third week of law school?³²

Even so, it still seems to me that the least emotionally intelligent human being is better at it than the smartest smartphone will ever be. Even the fascinating AI experiments in machine analysis of facial expressions don't persuade me that a machine could ever do what Adena did on our simple will: talk us through our own mortality calmly.³³

Part of the reason is that human beings can have moral authority, and machines have none. After all, in Shaffer's terms, what Adena did was conduct a moral conversation with us about two deep things: death and property. Moral sense is not quite the same as emotional intelligence, but it is an indispensable piece of legal judgment and legal advice.

Next consider a very different example of a moral conversation that I believe needs a human, not a computer. The example comes courtesy of my colleague David Vladeck, who for four years ran the Federal Trade Commission's Consumer Protection Bureau. One of the

32. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962).

33. See, e.g., Maja Pantic, *Machine Analysis of Facial Behaviour: Naturalistic and Dynamic Behaviour*, 364 PHIL. TRANSACTIONS ROYAL SOC'Y B 3453 (Dec. 2009), <http://rstb.royalsocietypublishing.org/content/364/1535/3505> [<https://perma.cc/4WAG-ACU4>]; Maja Pantic & Marian Stewart Bartlett, *Machine Analysis of Facial Expressions*, in *FACE RECOGNITION* 377 (Kresimir Delac & Mislav Grgic, eds., 2007), http://www.emotient.com/wp-content/uploads/Pantic_MachineAnalysis_2007.pdf [<https://perma.cc/CV4N-SJKZ>].

issues that most concerned the FTC was one I mentioned earlier: the tsunami of debt that has washed over middle- and lower-income people since the financial crash, causing untold misery.

A great deal of this debt is legally uncollectible because it has run the statute of limitations. Most debtors know nothing about the statute of limitations, and unsurprisingly, debt collectors are in no hurry to tell them. The law prohibits a creditor from suing or threatening to sue to collect a time-barred debt, although I suspect it happens all the time; but the law does not require them to tell the debtors that their debt is time-barred and that, as a result, they do not have to pay. Nor do creditors need to warn them that even a tiny partial payment—indeed, even a verbal agreement to pay in order to get that hectoring collection agency off the phone—waives the statute of limitations defense. In these cases, even minimal information about the law could save debtors from ruin. This is the kind of information one would suppose could easily be provided on-line by a suitably designed app.

One problem is that the debtor population is not composed of tech-savvy millennials, but in many cases uneducated working people who do not know English very well and do not solve daily problems by downloading apps. But the FTC discovered another, quite unexpected obstacle to legal relief: many debtors do not believe in the statute of limitations. They believe that if they owe an honest debt, they must repay it, time-barred or not.

Here is where a conversation with a living, breathing human being can do things that the Internet cannot. A legal professional can talk through the moral issue with the client. She can explain what the statute of limitations is for. She can explain that the original creditor wrote off the debt long ago, and indeed went belly up because of unsound lending practices. She can explain that the debt buyer paid only a few cents on the dollar for it at a Resolution Trust Corporation auction; that the reason the buyers got it so cheap was they knew it was uncollectible but were betting they could inveigle enough debtors into paying anyway. She can explain that often, the debt buyers do not even know that the Michael Smith they are dunning for money is the wrong Michael Smith; they don't much care, and the name is common. And chances are that quite a few wrongly identified Michael Smiths owe money to someone somewhere, and mistakenly suppose the debt they're being dunned for is really theirs. The legal advisor can vividly remind the client about loved ones to whom he has financial responsibilities. And then she can ask him the big question: Knowing all this, are you still sure you want to pay debt the law does not require you to pay?

Michael Smith might not budge: in his mind, a debt is a debt, end of story. In that case, a lawyer must respect that moral choice, but at

least she will have made sure her client made it eyes wide open.³⁴ And one could expect that many clients *will* change their minds; after all, the reason they came to the lawyer is unmanageable debt.

Here, the crucial difference between the human and the machine is very simple: the human can talk back. She can offer counter-reasons and moral suasion to the client's reasons. More than a century ago, Elihu Root wrote: "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."³⁵ Having someone tell us we're being damn fools is a crucial check on our own bad judgment that every one of us needs.

So far I have mentioned two aspects of human judgment that we should not expect technology to model, at least not anytime soon: emotional intelligence, and the give-and-take of reasons, what might be called *dialogical* rather than *computational* rationality. This does not mean it is impossible in principle for silicon circuitry to do the job; after all, neural circuitry does. But don't hold your breath.

There is a third human ability that computers cannot model, and that is human creativity. Human beings make intuitive leaps to solve problems. Technologies don't. Those of you who read popular science probably know that the million-dollar unanswered question in computer science is whether every problem whose solution can be algorithmically verified by a fast computer can, therefore, be algorithmically solved by a fast computer.³⁶ Many computer scientists think the answer is no. If they're right, it shows that problem solving involves something more than rote calculation, even by the fastest machines.

In sum, technological optimism should be tempered by a realistic understanding of which parts of human judgment can be machine modeled and which parts cannot. My argument has been that even if technology can excel at a surprising amount of legal analysis, real legal problems will often require human, not technological, solutions. The same is true in medicine. Itifat Hussain, who directs the mobile app curriculum at Wake Forest Medical School, strongly believes machines will never supplant human doctors completely, because computers lack human instincts and empathy.³⁷ As Hussain explains:

34. The client, not the lawyer, sets the goals of representation. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 1980).

35. PHILIP C. JESSUP, 1 ELIHU ROOT 133 (1938).

36. This is the so-called P = NP problem. P is the class of problems that are easy to solve; NP is the class of problems that are easy to check. Hence the question: does P = NP? The Clay Mathematics Institute has offered a million dollars to anyone who can solve it. See *Rules for the Millennium Prizes*, CLAY MATHEMATICS INST., <http://www.claymath.org/millennium-problems/rules-millennium-prizes> [https://perma.cc/7B2X-9QUF]; see also *P vs NP Problem*, CLAY MATHEMATICS INST., <http://www.claymath.org/millennium-problems/p-vs-np-problem> [https://perma.cc/QVH8-N5SF] (providing an informal explanation as well as a technically precise formulation of the problem).

37. Cha, *supra* note 28, at A6.

“There are a lot of things you can deduce by what a patient is not telling you, how they interact with their families, their mood, their mannerisms. They [i.e., computers] don’t look at the patient as a whole,” Hussain said. “This is where algorithms fail you.”³⁸

The argument also reveals something noteworthy about legal education. The aspects of human judgment that machines cannot replicate—emotional intelligence, moral give-and-take (and knowing when to engage in it), and creativity—are conspicuously absent from the standard legal curriculum. Some law schools offer courses on interviewing and counseling, and many law school clinics teach it. A few law schools offer courses on problem solving. But these are marginal parts of the standard curriculum, as marginal as the course on admiralty. If my arguments about human and artificial intelligence are valid, instruction in counseling skills should be central to legal education.

The takeaway point is that access to law sometimes *is* equivalent to access to a flesh-and-blood legal professional.

III. ACCESS TO PROFESSIONAL LEGAL SERVICES = ACCESS TO LAWYERS?

Next let’s turn to the second equivalence, between access to legal professionals and access to lawyers. Is it sound?

Scholars and consumer organizations have been arguing for years that it is not. Non-lawyer professionals may be fully capable of delivering high-quality legal services in specialty contexts. The trouble is that for decades the bar has ruthlessly tried to suppress nonlawyer competition, using unauthorized practice laws to bludgeon lay competitors out of the market. The unauthorized practice regime chokes off access to justice and serves primarily as protectionism for lawyers.

This critique is a long-time theme of my friend and co-author Deborah Rhode, one of the nation’s deepest students of access to justice.³⁹ And Deborah is right. A lot of legal problems can be solved by paralegals, and legal aid organizations already use paralegals to stretch their thin resources. As most of you know, Washington state has pioneered a program of licensed legal technicians: limited-purpose legal services providers trained in a handful of very particular legal specialties that do not require a generalist law background.⁴⁰ As the bar has grudgingly come to accept unbundled and limited-purpose le-

38. *Id.*

39. It is a theme from her first publication to her most recent book on the legal profession. Deborah L. Rhode & Ralph C. Cavanagh, Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 *YALE L.J.* 104 (1976); DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 41–51 (2015).

40. *Limited License Legal Technician Program*, WASH. STATE BAR ASS’N, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> [<https://perma.cc/9L37-GTTL>].

gal representations by lawyers, the need for a fully-trained, barred legal generalist becomes harder to justify. These are well-known themes, and I won't say more about them now.

Instead, I wish to turn to the Greiner-Pattanayak-Hennessy studies mentioned earlier. That is because the first study seems to show something very unexpected: that offers of legal services by highly committed, top-notch law students make no difference to client outcomes in unemployment benefits appeals in Massachusetts. Maybe lawyers aren't really necessary.

Greiner and Pattanayak certainly do not go that far, by a long shot. Their conclusions are cautious, and they take care not to over-generalize; indeed, the only axe they have to grind is that studies of lawyer efficacy are not careful enough. Their theme is that the only gold standard for studying the effectiveness of legal services is randomized studies like theirs. As a result, in their view virtually all past efforts to study effectiveness are worthless; that is their only polemical claim.

But the fear is that many readers will miss this caution flag. For careless readers, the four simple words *no difference in outcomes* are the takeaway. If there is no difference in outcomes between offers of legal representation and no offers, why think lawyers are so indispensable?

Many members of the legal aid community—perhaps fearing that the study would become propaganda fodder for political attacks on legal aid—complained that Greiner and Pattanayak asked the wrong question. They did not compare outcomes of represented versus unrepresented people; rather, they compared outcomes of people who had been offered legal assistance to people whose request for legal help was turned down.⁴¹ Greiner and Pattanayak freely concede that some of those people found assistance elsewhere. So maybe representation really does make a decisive difference.

But I do not agree that Greiner and Pattanayak asked the wrong question. If the access to justice movement's goal is making legal aid available to those facing legal issues, asking whether an offer of legal aid makes a difference is very much to the point, because all that legal services providers can do is offer aid. If offers of aid make no difference in outcome, then perhaps expanding capacity is less vital than we think.

Why weren't the outcomes different between the treated group and the control group? Greiner and Pattanayak offer some hypotheses that make sense. Maybe unemployment appeals are unusually easy to do pro se, or maybe the judges cut some slack for pro se litigants. The authors' main speculation, though, is that the kind of people who get

41. Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 49-51 (2012).

it together to apply to the Harvard Legal Aid Bureau (“HLAB”) are already a self-selected subset on the upper tail of the curve in terms of initiative and organization. They are “go-getters.”

The best evidence for that hypothesis is that the win rate for members of the control group not offered HLAB representation was substantially higher than the statewide average: 65% rather than 47% on appeals, 83% rather than 75% defending employer appeals.⁴² If so, it shows—paradoxically—that the people who show up at the door of a legal aid office are probably not the people who need it most. That is a paradox worth thinking about, although this Article does not explore it further.

One noteworthy part of the Greiner-Pattanayak study is their point that many of those in the control group who got no offer of help from the Bureau may have obtained legal aid elsewhere and achieved their good outcomes that way. A critic of legal aid might conclude that if so, the need to offer more legal aid might be exaggerated because, without it, people can find help elsewhere. But that conclusion (which, I emphasize, is not one Greiner and Pattanayak draw) rests on a fallacy. First, to say that a low-income person denied legal aid by A will find it from B assumes there is a B to find it from—but the well of legal services providers affordable by low-income clients is not a deep one, and legal aid critics want to make it shallower. Second, the fact that alternative legal aid is available locally cannot be scaled up to the conclusion that alternative legal aid is available globally, because across the nation there are simply not enough providers. So the upshot of the Greiner-Pattanayak study might be very hard to generalize—as they themselves insist.

Further, their two subsequent studies, done with third co-author John Hennessey, confirm just that and paint a very different picture of the efficacy of lawyers. Both studies involved low-income tenants defending against evictions. The first, done in a state district court, compared outcomes between tenants who received only limited unbundled assistance in the form of how-to sessions for self-help, and those who got legal representation as well. Here, the difference between lawyer-represented tenants and unrepresented tenants was dramatic: tenants with lawyers prevailed twice as often as those without. So, if the first Greiner-Pattanayak study stands for the proposition that offers of legal aid do not matter as much as we might suppose, the District Court Study supports the conclusion that lawyers matter a lot.

But not so fast. The second eviction study, done in a specialty housing court rather than a district court, yielded a very different outcome from the first. In this study, tenants in the control group got an additional form of unbundled assistance besides self-help training, namely help by a lawyer on the day of the hearing in the form of hallway

42. Greiner & Pattanayak, *Legal Aid Bureau Study*, *supra* note 14, at 2173.

settlement negotiations and mediations. Tenants in the treated group were offered full-fledged legal representation. And here, unlike the District Court Study but like the Harvard Study, the finding was no difference at all in outcomes.

How do we interpret these dramatic differences in results? One diagnosis of the two eviction studies is that a little lawyer goes a long way: in the District Court Study the unbundled legal service did not include representation, but in the Housing Court Study it did. Maybe even modest and limited help from lawyers made the difference. If so, it provides a strong argument for unbundling legal services by lawyers.

Unfortunately for the bragging rights of lawyers, another explanation seems all too likely: the outcomes did not differ much in housing court because the full-service attorneys were not aggressive enough. Even though the average fully represented tenant got almost 11 more hours of legal help than those receiving unbundled representation, the full-service lawyers “pursued a risk-averse representation style designed to [facilitate a] settlement, as opposed to a high risk, aggressive, or confrontational style designed to put pressure [on] an opposing party.”⁴³ The treated group “saw an average of .18 prejudgment motions per case versus .16 for the control” and the demand for jury trials in the treated group was also only 18%.⁴⁴ In other words, the full-service lawyers seldom filed motions or demanded jury trials. They saw their job as simply working out settlements. By comparison, the full-service attorneys in the District Court Study filed motions and demanded jury trials in an average of more than 80% of the cases.⁴⁵ That’s four and a half times as often as their counterparts in Housing Court.⁴⁶ Perhaps it is not surprising that when the smoke had cleared, their clients kept possession of their dwellings twice as often as those in the Housing Court Study.

In keeping with their cautious, evidence-based approach Greiner and his co-authors are reluctant to draw conclusions their analysis cannot prove: they insist their conjecture that zealous advocacy made the difference is sheer speculation.⁴⁷ But it is plausible speculation.

What lessons can we draw from these very sophisticated studies? First is the lesson that Greiner and his co-authors consider to be their main conclusion: analyses of legal services programs should be rigorous and evidence-based. Their reluctance to speculate and prognosticate beyond what the data shows is skepticism at its best. Second, the very disparate results of the studies suggest that context matters enormously. Third, the two eviction studies by no means underwrite skepticism about the value of lawyers—the conclusion that some might

43. Greiner, Pattanayak, & Hennessy, *Housing Court Study*, *supra* note 14, at 23.

44. *Id.*

45. *Id.* at 44.

46. *Id.*

47. *Id.* at 40.

have drawn from the unemployment study. If anything, the eviction studies might make us appreciate the value of a zealous lawyer even more. And so, like the discourse of optimism, the discourse of skepticism has its limits.

IV. ACCESS TO JUSTICE = ACCESS TO LAW?

The third of the equivalences that define the access to justice movement raises the question: Does access to justice really mean access to law, that is, access to *legal* justice?

Clearly, it depends on what you mean by non- or extra-legal justice. Obviously, access to legal justice will seldom create the beatific vision of social justice that, in the words of Martin Luther King and the biblical prophet Amos, should roll down on us like waters in a mighty stream.⁴⁸ Amos inveighs against those who trample upon the poor, afflict the righteous, and turn aside the needy at the gate. Unfortunately, legal justice may do all the things that Amos condemns, for legal justice enforces unjust laws as well as just. The Bible also cautions us: “You shall not pervert justice, either by favouring the poor or by subservience to the great.”⁴⁹ If distributive and social justice requires favoring the poor far more than the law currently does—which is certainly what I believe!—access to law may have little to do with justice. In any event, legal aid is seldom the instrument of large-scale change in the basic distributive structure of society. It will not institute John Rawls’s difference principle, or eliminate the New Gilded Age economic inequality Thomas Piketty warns about.

Mostly, access to legal justice works at the molecular level, not the molar. It means not only possessing legal personality but also having the wherewithal to go to court or apply for benefits. It means being able to work the levers of the law out of court, by making a will, getting a permit to open a store, adopting a child, or getting an Earned Income Tax Credit. None of these things is Justice with a capital “J,” but obviously, they matter to the people they matter to.

The lack of full congruence between justice and law also crops up when we turn from macro-justice—Justice with a capital “J”—to what we might call micro-justice: justice between persons, especially in interpersonal disputes. For Aristotle, justice is not fundamentally about an abstract distribution of goods and rights—it is a personal virtue, and “the truest form of justice is thought to be a friendly quality.”⁵⁰ That is because, for Aristotle, both justice and friendship mean looking out for the interests of others. One of the most common com-

48. *Amos* 5:24 (New English Bible); Martin Luther King, Jr., *I Have a Dream*, Speech Delivered at the Lincoln Memorial (Aug. 28, 1963), in *A TESTAMENT OF HOPE* 217–20 (James Melvin Washington ed., 1986).

49. *Leviticus* 19:15 (New English Bible).

50. Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 1059 (Richard McKeon, ed., 1941), bk. 8, ch. 1, 1155a26-29.

plaints about excessive legalism and rights-consciousness, shared by communitarians on the left and the right, is that it undermines the basis for social solidarity, the kind of collective friendship that Aristotle believed lies at the very foundation of political communities.⁵¹ One view of justice emphasizes restorative justice and reconciliation—the mending of broken relationships—and not legalistic justice. That view is not only communitarian; it also reflects an important strand of feminist thought, the ethic of care developed by Carol Gilligan.⁵² We should not expect law to help much in justice, as it is understood in Aristotle’s or Gilligan’s terms.

There is another way, though, that justice clearly requires access to law. Access to law is itself a distributive good that is closely tied not only to the protection of basic rights but also to human dignity. And exclusion from the law is in itself a form of injustice. Practically, it puts America’s neediest people in peril of losing their homes, apartments, and basic entitlements. But, more abstractly, it also deprives them of the equal respect and concern that Ronald Dworkin taught us is the fundamental virtue of law.⁵³

That too was part of Dr. King’s message, when he denounced unequal laws as “difference made legal.”⁵⁴ Difference made legal, King argued, is a violation of natural law—a violation that just men and women are obligated to resist. It is, after all, one of the things the prophet Amos denounces: turning aside the needy at the gate, which surely includes the gate to full and equal protection of the law. Access to law may not yield justice in either the macro-sense we associate with Rawls or Piketty nor Aristotle’s and Gilligan’s sense of the virtue that lies at the foundation of collective friendship.

But sometimes a lawyer can ward off tangible injustices, and guard vulnerable people at the brink of the precipice. Whenever that happens, the equivalences we have been examining—between access to justice, access to legal justice, access to legal assistance, and access to lawyers—take on concrete reality, regardless of their conceptual and practical differences. Those moments of convergence are among the most rewarding that lawyers experience. And that is enough to make access to justice worth reconsidering at law schools.

51. Aristotle, *Politics*, in THE BASIC WORKS OF ARISTOTLE, *supra* note 50, at 1189, bk. 3, ch. 9, 1280b38.

52. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 74 (1982).

53. DWORKIN, *supra* note 29, at 184–205.

54. Martin Luther King, Jr., Letter from Birmingham City Jail (Apr. 16, 1963), *supra* note 48, at 289–302.