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Race and the Political Economy of Civil Justice

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There are profound racial disparities in the U.S. civil justice system. According to best recent estimates, U.S. state courts handle over twenty million civil matters annually.[1] Some of the most common matters before these courts involve issues such as housing (roughly 15 percent of all cases), child custody, child support and child welfare (another 15 percent), and debt collection (roughly 5 percent).[2] These are all areas where scholarly literature has revealed dramatic overrepresentation of racial minorities and the poor among civil defendants.[3] The literature has also established that, in addressing such matters, courts frequently look, feel, and act in ways that are far removed from the model of courts described in law school lecture halls. Judges in these courts are pretty frequently not even lawyers, for example.[4] Even if they are lawyers, they may follow ad hoc procedures overseeing litigants who are often not even present. If they are present, they frequently lack a lawyer or other kind of legal adviser.[5]

[1] Colleen F. Shanahan et al., *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1486 (2022).

[2] *Id.* at 1533–37.

[3] On housing, see, for example, Peter Hepburn et al., *Racial and Gender Disparities among Evicted Americans*, 7 SOCIO. SCI. 649 (2020); Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88 (2012); MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016). On child welfare, see, for example, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001); Tonya L. Brito et al., *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027 (2015); DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES – AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022). On debt collection, Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods; Dalie Jimenez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41 (2015); Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403 (2020).

[4] Sara Sternberg Greene & Kristen Renberg, *Judging without a J.D.*, 122 COLUM. L. REV. 1287 (2022).

[5] Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1706 (2022); Greene & Renberg, *supra* note 4; Pamela K. Bookman & Colleen F. Shanahan, A *Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183 (2022).

The consequences of weak or nonexistent representation in these Kafkaesque courts are profound. A default judgment in such cases can lead to the loss of credit, one's home, or one's children. Worse, the civil justice gap confronting racial minorities likely extends far beyond what even these dismal statistics suggest. Many legal problems never become a case in a court docket.[6] Determining what happens to one's assets after death, starting a small business, getting the federal disability benefits to which one is entitled: These are common legal issues that state courts do not engage much, if ever. These are also issues where we can reasonably expect a strong relationship between race and problem resolution.[7]

At the same time as racial disparities in civil justice are troubling, civil justice is hardly the only public necessity that is under provided and distributed unequally according to race.[8] Indeed, we see similar issues in access to housing, education, banking, and still other areas.[9] Civil justice is also like these other necessities in the sense that contemporary political economies provide these goods through a coproduction of government and markets.[10] Notwithstanding the above-mentioned findings about how civil justice actually operates in the United States, at least theoretically civil justice is typically provided by lawyers in private practice. Lawyers are a professional class whose members are tightly connected to the government, not only through the kind of professional regulation that is typical of licensed professionals.[11] Indeed, lawyers are officers of the court who routinely participate in the process of the state authorizing pretty violent remedies such as taking a person's assets, even their kids – and that's just in U.S. civil courts.[12]

[6] Catherine R. Albiston et al., *The Dispute Tree and the Legal Forest*, 10 Ann. Rev. L. & Soc. Sci. 105 (Nov. 3, 2014).

[7] On racial gaps in small business formation, see, for example, Robert W. Fairlie et al., *Black and White: Access to Capital among Minority-Owned Start-Ups*, 68 Mgmt. Sci. 2377 (Apr. 2022); Aaron K. Chatterji et al., *The Impact of City Contracting Set-Asides on Black Self-Employment and Employment*, 32 J. Lab. & Econ. 507 (July 2014). On the relationship between wills, intestacy, and demographics, see, for example, Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 Quinnipiac Prob. L.J. 36 (2009); Reetu Pepoff, *The Intersection of Racial Inequities and Estate Planning*, 47 ACTEC L.J. 97 (2021). On the huge backlog in Social Security disability claims, see Jonah Gelbach & David Marcus, *Crushed: Social Security Legislation in the Federal Courts*, 101 Judicature 65 (2017), and on the racial incidence of disability status, see Alexa A. Hendley & Natasha F. Bilmoria, *Minorities and Social Security: An Analysis of Racial and Ethnic Differences in the Current Program*, 62 Soc. Sec. Bull. 59 (1999).

[8] Chloe Thurston, *Racial Inequality, Market Inequality, and the American Political Economy*, *in* The American Political Economy 133 (Jacob S. Hacker et al. eds., 2021).

[9] *Id.*

[10] Peter A. Hall & David Soskice, Varieties of Capitalism: The Institutional Foundations of Comparative Advantage (2001).

[11] Adam Bonica & Maya Sen, The Judicial Tug of War: How Lawyers, Politicians, and Ideological Incentives Shape the American Judiciary (2020).

[12] Diane Redleaf, They Took the Kids Last Night: How the Child Protection System Puts Families at Risk (2018).

Because lawyers are not the only potential providers of solutions to civil justice problems,[13] any more than doctors are the only possible providers of medical care, I will typically try to refer to the private market for services addressing civil disputes and issues as the "market for civil justice." In the status quo, the market for civil justice and the legal market largely overlap, but how they overlap is a policy choice with profound consequences for both efficiency and distribution. While it is easy to imagine an (almost) fully private or (almost) fully public system for providing housing or banking, with civil justice it is harder to see how one could possibly disentangle government and markets from one another. But on reflection, there are robust markets for civil justice where government has little if any involvement, for example international commercial arbitration[14] or religious courts.[15] And it is not impossible to imagine a system where all civil litigants had representatives assigned by the court and paid through public funds.

While it is an interesting question how necessary coproduction by government and markets is for any of these goods, empirically at least, governments rarely attempt to provide these services wholly on their own. Instead, governments encourage and oversee private provision with various public backstops, although exactly how they encourage, oversee, and backstop varies tremendously across contexts.[16] Governments pursue such coproduction strategies because these goods are important. Private provision of essential goods through markets with the help and oversight of government is what builds more houses, nursing homes, and hospitals, while hopefully making sure they are of the right kinds. While one presumes that a mixed public-private strategy does provide more, or better, or more *of* better than pure strategies would, racial inequality often remains a stubborn issue in private markets, whether nurtured by the government or not.

While civil justice is certainly a fraught problem in race and political economy in the United States, I would argue it is one of the most important problems in any political economy. Civil justice is a piece of hardware that is needed to make other markets run.[17] When there are disputes about housing, credit, health care, and labor, courts are the problem-solver of last resort.[18] Or if not courts, some private entity or public non-court adjudicator that often emulates the manner and process

[13] *See* Albiston et al., *supra* note 6.

[14] Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55 Int'l Org. 919 (2001).

[15] Rabea Benhalim, *Religious Courts in Secular Jurisdictions*, 84 Brook. L. Rev. 745 (2019).

[16] *See* Hall & Soskice, *supra* note 10.

[17] Daniel P. Kessler & Daniel L. Rubinfeld, *Chapter 5: Empirical Study of the Civil Justice System*, *in* Handbook of Law and Economics, vol. 1, 343 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[18] Austin Sarat & Joel B. Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 Am. Pol. Sci. Rev. 1200 (1975).

of courts, and even at times has overlapping personnel.[19] The market for civil justice is so intimately connected to the basic operation of government that interventions in these markets inevitably change how government works, and are intensely political in the sense that they influence who gets, what, when, and why.

Despite the rich, thorny political economy problem that civil justice represents, it is only slightly exaggerating to say that political economists have ignored the civil justice system. The main reason I would qualify that statement is "political economy" is a big tent, after all. But it really is no exaggeration at all to say that civil justice is off the radar of political scientists who think about economic problems, and also of economists who think about politics and government.[20] One might hope that with increasing awareness about the deep problems in many areas touching civil justice (i.e., eviction, debt, fines, and fees), that will begin to change. Racial inequality that exists in the civil justice system is likely to reproduce and multiply in every market where governmental intervention is needed to ensure racial equality, and especially where private rights of action are a key enforcement strategy.[21]

To the limited extent that scholars working on civil justice have focused on race, they have not often done so by thinking *first* and *foremost* about market dynamics. Owing to the disciplinary background and methodological approaches of most academics working on access to justice, the prevailing research methodologies are largely qualitative and have involved ethnographic and survey-based approaches. These research strategies have yielded valuable insights into how and why minorities distrust civil justice institutions,[22] inequalities with respect to obtaining counsel and in quality of representation,[23] the role of overlapping and intersecting identities in shaping legal needs,[24] and many other important facets of race and access to justice.[25]

[19] Yarik Kryvoi, *Private or Public Adjudication? Procedure, Substance and Legitimacy*, 34 LEIDEN J. INT'L L. 681 (2021).

[20] Proving that no one in an area of scholarship is paying attention is difficult, but recent high-level publications addressing the topic by well-known authorities cite few, if any, political scientists or economists. *See, for example*, Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49 (Jan. 2019); Jamila Michener et al., *From the Margins to the Center: A Bottom-Up Approach to Welfare State Scholarship*, 20 PERSP. POL. 154 (Mar. 2022).

[21] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATIONS AND PRIVATE LAWSUITS IN THE U.S. (2010).

[22] Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2015); Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705 (2012).

[23] *See, for example*, Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality* 148 DAEDALUS 128 (2019).

[24] Kathryne M. Young & Katie R. Billings, *An Intersectional Examination of U.S. Civil Justice Problems*, 3 UTAH L. REV. 487 (2023).

[25] Two useful references discussing the overall state of the race and access-to-justice literature are Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339 (Aug. 1, 2008), and Tonya L. Brito et al., *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243 (2022). It is unfortunately the case that both articles note that race has not had attention from the scholarly literature commensurate with its importance.

The importance of continuing to pursue research in these modalities and frameworks should go without saying. At the same time, the rational-choice perspective that political scientists and economists typically adopt also has great value for understanding why markets function or do not.[26] So too do the methods of causal identification that these disciplines typically favor. While civil justice scholarship has not exactly flourished in political science and economics departments, the study of race and markets truly has. There is much to gain in considering problems of race as problems of markets, and further in thinking about problems of civil justice as problems of markets.

My goal in this introduction has been to make the case for thinking like a political economist about civil justice in general and to see the dramatic racial inequality we see as an all too common, but uniquely important, market failure. Going forward, I wish to continue fleshing out what this perspective might entail. I must admit at the outset that all conclusions and recommendations are preliminary, because this line of inquiry is nascent. The ideas and proposals I offer are meant to provoke thought and debate. I will present findings that describe how severe the problem of racial discrimination is in legal markets and why it occurs. But I do not purport to offer here evidenced-based recommendations about what is to be done. In Section 2.1, which follows, I will introduce two key concepts that are important for contemporary debates in political economy about the causes of racial inequality in markets: racial preferences and statistical discrimination. I also discuss and explain why it is so important to distinguish between these two in thinking about policy solutions. Section 2.2 shows how recent work by myself and others has sought to document and explain the extent of racial disparities in legal markets. Section 2.3 discusses how and why broadening the base of legal service providers seems to be the key for ameliorating racial disparities in access to justice, and considers alternative paths to doing that, respectively through a civil right to counsel and loosening restrictions on alternative potential service providers, such as H&R Block.

2.1 UNTANGLING RACIAL PREFERENCES AND STATISTICAL DISCRIMINATION

The literature on discrimination in economics, both empirical and theoretical, has pursued questions of how race influences outcomes very directly. Its conceptual architecture for doing so is greatly indebted to the early mathematical models of Arrow and Becker.[27] These models distinguish *racial preferences*, which is when race

[26] Kenneth A. Shepsle, *Statistical Political Philosophy and Positive Political Theory*, 9 Critical Rev. 213 (Jan. 1995).

[27] Gary S. Becker, The Economics of Discrimination (1971); Kenneth J. Arrow, *The Theory of Discrimination*, *in* Discrimination in Labor Markets 3 (Orley Ashenfelter & Albert Rees eds., 1973); Kenneth J. Arrow, *What Has Economics to Say about Racial Discrimination?*, 12 J. Econ. Persp. 91 (May 1998).

directly influences an individual's enjoyment of a good or service, from *statistical discrimination*, which is when race is used to make inferences about the presence or absence of traits that influence enjoyment. For example, a widget-retailer exhibits a negative racial preference when he believes a black employee will sell as many widgets as a white employee, but nevertheless prefers to have the white employee to the black one simply because he likes white employees more. Equivalently, a widget-retailer who is willing to pay for the privilege of not working with a racial minority has negative racial preferences. By contrast, a widget-retailer *statistically* discriminates when she makes assumptions about the productivity of the workers based on what race they happen to be. This is to say, a widget-retailer who only cares about widget sales volume nevertheless may discriminate statistically if she has a belief structure enabling her discrimination (e.g., she believes minorities take too long to close a sale, believes minorities take off early on Fridays, whatever).

Racial preferences and *statistical discrimination* are not exclusive concepts. Indeed, evidence suggests that people with aversive racial preferences also tend to harbor racial stereotypes.[28] But because race marks so many aspects of American society especially, and because what is in people's heads is harder to see than what is written in an economist's equation, it is often very hard to determine whether disparities result from racial preferences or statistical discrimination. Why, then, does it help to distinguish between these two overlapping kinds of discrimination? Because the mechanisms of discrimination matter for why the discrimination happens and what would stop it. Potentially, problematic racial preferences require vastly different policy interventions than, say, problematic beliefs and inferences. An important, often implicit assumption of those operating from the economics perspective is that economically motivated agents are going to act according to the incentives determined by their beliefs. Particularly if those beliefs do have a strong empirical basis, changing behaviors implied by these beliefs will be tough or impossible.

As a more concrete illustration of why disentangling racial preferences from statistical discrimination matters for policymakers, I often gesture to the work of noted sociologist Devah Pager. Pager persuasively shows that in the absence of information, employers who hire low-skilled workers are more likely to assume that black male applicants have a criminal record than white male applicants.[29] Given the dismal statistics about criminal records in lower-income black versus white men, empirically their belief is well-justified. The upshot of Pager's observation is that well-intentioned policies that "ban the box" and prohibit employers from asking about criminal records in job applications or interviews risk hurting well-qualified minorities, who no longer have the opportunity to distinguish themselves from white

[28] Kyle Peyton & Gregory A. Huber, *Racial Resentment, Prejudice, and Discrimination*, 83 J. Pol. 1829 (Oct. 1, 2021).

[29] Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Socio. 937 (2003).

people with red flags in their background. Using the language of the economics literature, banning the box may encourage more statistical discrimination, not less, which could make racial disparities in hiring even worse.[30] Work such as Pager's illustrates why it is so important to ask *how exactly* race matters for the outcomes in question. If one does not consider the incentives of relevant actors in the system one wishes to reform, one may find one's solutions are counterproductive. Indeed, this is perhaps the real core of the economics perspective on race and discrimination. It is not simply about the introduction of terms like *racial preferences* and *statistical discrimination*, which are important but controversial in some quarters. Rather, an economics perspective is about disentangling *how* racial disparities emerge as a byproduct of some aspect of the strategic interaction between agents who follow the incentives determined by their beliefs but do not necessarily have the preferences and values we would hope that they would.

2.2 RACE, ACCESS TO JUSTICE, AND THE LEGAL SERVICE MARKET

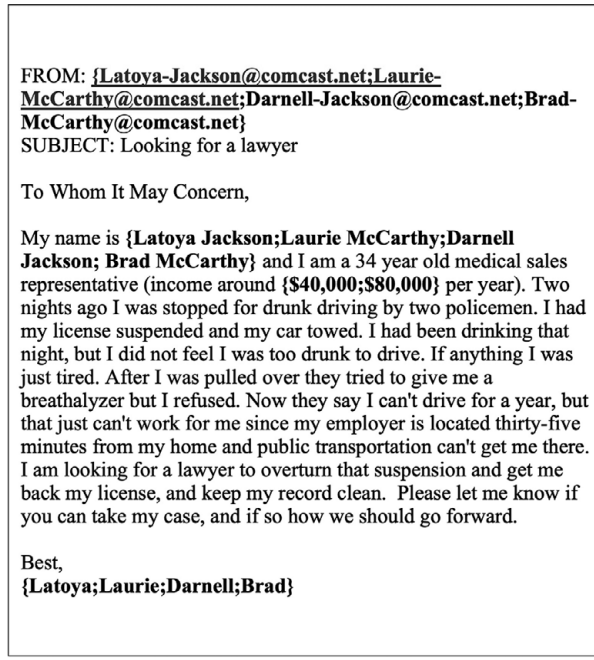
Returning to the topic of access to justice, there are many entry points for thinking about the distinct role of race in an economics framework. We could think about the rational expectations and aversive preferences of judges, of juries, and of plaintiffs and defendants, both in the courtroom and also even earlier in the dispute resolution process. But perhaps the simplest and most direct way of relating these literatures is through the question of how race impacts the ability of a person with a legal problem to hire a lawyer. Getting a lawyer is a key step in the folk model of dispute settlement that naive and sophisticated commentators alike bring to the table.[31] It is also a step that an extraordinarily large number of self-represented or unrepresented minorities caught up in eviction, debt collection, and other matters have not taken, in many cases despite attempts to do so.[32] Two empirical questions, which I engage in much more detail in a law review article called *Getting a Lawyer while Black*,[33] are (a) whether race makes any difference in the ability of an individual to get a lawyer to help them solve their legal problem; and (b) if there is a difference, whether that difference is due to racial preferences or statistical discrimination. Greater details are available in the article, including greater

[30] *See also* John W. Patty & Elizabeth Maggie Penn, *Ban the Box? Information, Incentives, and Statistical Discrimination*, 18 Q. J. Pol. Sci. 513 (2023).

[31] Young & Billings, *supra* note 24 (noting that until recently scholarship had typically conflated access to justice with access to lawyers, and supporting a broader perspective incorporating legal needs and justiciable events that overlap but do not subsume court cases).

[32] Tonya L. Brito, *The Right to Civil Counsel*, 148 Daedalus 56 (2019) (discussing the legal trouble of one Dearis Calahan who failed to appear in one case and represented himself in another after his attempts to secure a lawyer failed).

[33] Brian Libgober, *Getting a Lawyer while Black: A Field Experiment*, 24 Lewis & Clark L. Rev. 96 (2020).



FROM: **{Latoya-Jackson@comcast.net;Laurie-McCarthy@comcast.net;Darnell-Jackson@comcast.net;Brad-McCarthy@comcast.net}**
SUBJECT: Looking for a lawyer

To Whom It May Concern,

My name is **{Latoya Jackson;Laurie McCarthy;Darnell Jackson; Brad McCarthy}** and I am a 34 year old medical sales representative (income around **{$40,000;$80,000}** per year). Two nights ago I was stopped for drunk driving by two policemen. I had my license suspended and my car towed. I had been drinking that night, but I did not feel I was too drunk to drive. If anything I was just tired. After I was pulled over they tried to give me a breathalyzer but I refused. Now they say I can't drive for a year, but that just can't work for me since my employer is located thirty-five minutes from my home and public transportation can't get me there. I am looking for a lawyer to overturn that suspension and get me back my license, and keep my record clean. Please let me know if you can take my case, and if so how we should go forward.

Best,
{Latoya;Laurie;Darnell;Brad}

FIGURE 2.1 Prospective client solicitation in the California experiment.

justifications and caveats than I have space for here; however, I focus here on the big picture conclusions.

To answer the question of whether race influences the ability of an individual to get a lawyer to help solve their problem, I rely on the popular audit study methodology.[34] Posing as a prospective client, I contacted California criminal attorneys in private practice via email asking whether they could help me regain my driver's license, which had been taken when I refused a breathalyzer. Figure 2.1 provides the email template used in the experiment. Crucial to the audit methodology, the email template varied several factors at random, including the name I pretended to have, as well as an off-handed description of my income. The names I used were Brad McCarthy, Laurie McCarthy, Darnell Jackson, and Latoya Jackson, each of which is strongly suggestive of an individual's race, both based on survey evidence and analysis of birth certificates. Figure 2.2 shows the difference that a name makes in an otherwise identical email. Laurie and Brad had a 40 percent chance of getting a reply to this email, while Darnell and Latoya had a 19 percent chance of getting a reply to the exact same email. Such a tremendous difference in response rates, with

[34] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991 (2004); Audit Studies: Behind the Scenes with Theory, Method, and Nuance (S. Michael Gaddis ed., 2018).

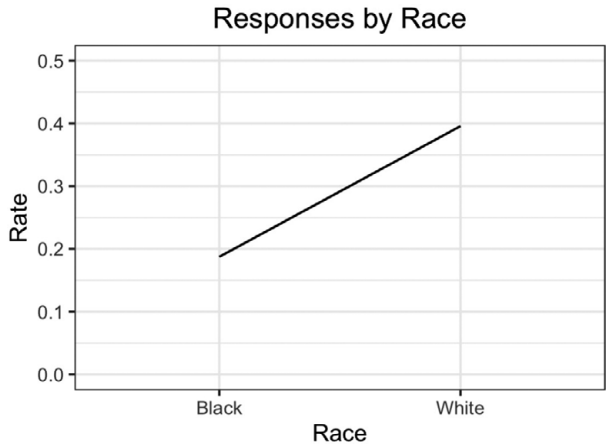


FIGURE 2.2 Response rate of California criminal lawyers based on likely race of prospective client.

white-named clients more than twice as likely to get a reply, was unlikely to be due to chance. Put differently, the estimates imply that the anticipated race of the client mattered to about 20 percent of the California criminal bar in choosing whether to reply to this solicitation. Unusually for social scientific research, this experiment was subject to a second and even third replication. The results were substantially similar each time, at least in California.

To begin to answer the question of *why* race seems to matter for one in five of the lawyers sampled, one can examine Figure 2.3, which shows the difference that claiming twice as much annual income makes. Surprisingly, response rates were slightly *lower* for individuals claiming to make more money. That said, the difference is quite small and could easily emerge if the self-represented income did not matter to lawyers one way or another. The fact that lawyers do not respond to explicit signals of income is evidence that racial preferences drive these results rather than statistical discrimination. This is not to say that statistical discrimination would never emerge in client selection. Indeed, it seems to me relatively likely that statistical discrimination would emerge in contexts where the ability to pay is truly in question, for example, bankruptcy, or the lawyer has a long running matter the client has to pay for entirely, for example, complex felonies. Yet for relatively simple, routine, and self-contained legal problems, one would not expect concerns about the ability to pay to dominate lawyers' thinking. And the evidence suggests they do not. Based on my own prior qualitative research in designing the study, lawyers who do this sort of work know exactly what they will charge and know that people with relatively modest incomes (for instance, even as little as $40,000 a year) will be able to find the cash to fund the work, especially when confronted with the much more economically damaging prospect of losing their ability to drive a car.

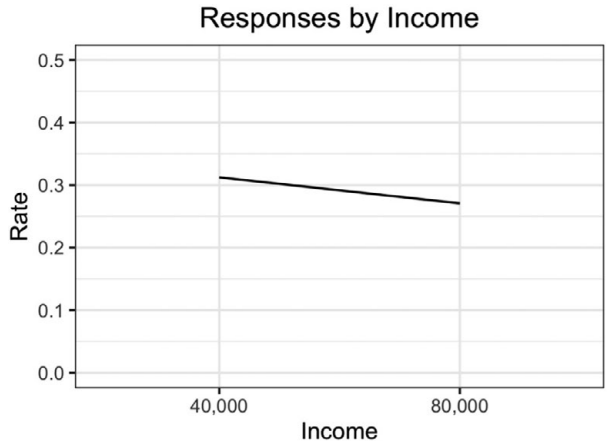


FIGURE 2.3 Response rates of California criminal lawyers based on self-described client income.

These findings present strong evidence that race sometimes influences the ease with which a prospective client finds a lawyer, and, particularly in routine legal matters, race has this influence to a substantial degree because of taste-based discrimination by lawyers, rather than some kind of economic stereotyping. Further, another recent study by Frankenreiter and Livermore in the *Journal of Legal Studies* that uses similar audit methods also finds that race often matters a great deal.[35] But in both their study and mine, the story gets a bit more complicated because it seems that *the degree of racial disparities varies greatly across legal markets*.

Figure 2.4 provides striking evidence that disparities vary geographically. This remarkable diagram, which is based on a full-color figure deep in the Online Appendix of Frankenreiter and Livermore's article, shows how the response rates vary by state among some 24,211 personal injury lawyers found on a commercial database. Darker areas are those where their audit study found greater preference for white-named clients. White areas are those where they found no preferences or preferences actually tilting toward minorities. While the California effects do appear more muted than in Libgober (2020), they are directionally similar, and Frankenreiter and Livermore do make equally strong findings of discrimination as I initially did in both the rural west (Montana, Utah) and the densely urban Northeast (Rhode Island). Because of differences in sample recruitment strategies (e.g., commercial database in their approach versus bar directory in mine), the effects found across the two studies are not directly comparable and should not be regarded as direct tests of replicability. Even so, the crazy quilt pattern of

[35] Jens Frankenreiter and Michael A. Livermore, *Are Lawyers' Case Selection Decisions Biased? A Field Experiment on Access to Justice*, 62 J. OF LEGAL STUDIES 273 (2023).

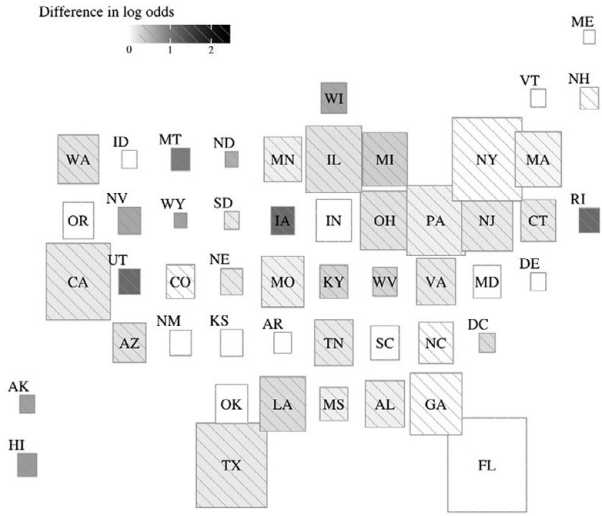


FIGURE 2.4 Size of treatment effects by state based on findings of Frankenreiter and Livermore (2023), reported originally as OA6 in their supplemental materials. Source: *Are Lawyers' Case Selection Decisions Biased? A Field Experiment on Access to Justice*, 62 J. OF LEGAL STUDIES 273 (2023).

discrimination is clearly evident in their figure. There are "red states" where no racial discrimination against minorities is detected through these methods, and "blue states" with intense discrimination against minorities found.

Frankenreiter and Livermore's work confirms the remarkable geographic variation in the degree of discrimination within the United States, which my earlier study too picked up on. Understanding some details of what I did previously is necessary to go forward and explain my proposed resolution. Returning then to the mid-2010s, after conducting my audit study in California, I sought to examine whether the very strong effect found in California was limited to criminal lawyers or if it was visible in other practice areas as well. In particular, the argument could be made, as I have above, that driving under the influence ("DUI") cases do not lend themselves to statistical discrimination. For this reason, I sought to examine further practice areas with different payment models to see if that mattered at all.

For technical reasons, the California bar directory at the time did not lend itself to these kinds of endeavors, so I made a switch to field a much larger follow-up experiment in Florida, where doing so was more practicable. At the time, I did not expect the state context to matter. If anything, I expected effects of potential clients' race would be larger in Florida. And yet, my results regarding personal injury, criminal, and divorce lawyers in Florida were remarkably in line with what Frankenreiter and Livermore later found about personal injury lawyers in Florida: practically *no discrimination* against prospective clients whose names suggest minority status. This geographic variation was difficult to believe, and for this reason

I undertook very extensive internal replication efforts described at greater length in Libgober (2020). These replication efforts confirmed that there were indeed huge disparities by race in California but not in Florida. If Florida and California are different, and if as Frankenreiter and Livermore later would find two states are often quite different, the main question is why.

In my prior study, I proposed several possibilities and tried as best I could with data on hand to offer answers. One possibility is that far fewer lawyers in Florida have aversive racial preferences than in California. For several reasons, I rejected that explanation, most importantly because both subtle and unsubtle methods of determining aversive racial preferences among the general public find that California is more racially progressive than Florida. If racial preferences among the bar were the only thing that mattered, we would see about the same or bigger effects in Florida than California, not the muted effects we do find there.

After puzzling through several alternatives, I eventually came to the view the best explanation for geographic variability in discrimination is the prevalence of lawyers and the profitability of legal practice. Put differently, it's not the state or geography *per se*, it's the fact that states in these studies represent different legal markets, and the market plays a large mediating role in the emergence of racial disparities. Florida and California appear quite different in both dimensions of lawyer prevalence and lawyer profitability. According to the Bureau of Economic Analysis, there are about 20 percent more lawyers per capita in Florida than in California.[36] Unsurprisingly, Florida lawyers make considerably less. The mean hourly wage for a Florida lawyer is $65 per hour, while in California it is $97 per hour.[37]

Why do lawyer prevalence and profitability matter? Because both speak to the supply constraints of the lawyers who participate in these audit studies. A lawyer who has the capacity to undertake additional work has strong incentive to do so, regardless of their race, while a lawyer who continuously works at or near capacity can act in a choosy fashion about their clientele. And if someone can be choosy, they are likely to do so for all sorts of idiosyncratic reasons. It would be very surprising if race were not occasionally an important factor for some. In California, it seems that race is an important factor for about 20 percent, while in Florida it is likely a similar percentage but because of economic incentives those individuals "get over it." A regression analysis within Florida counties provides some confirmatory evidence of this theory, with counties where lawyer pay is stronger observing *more* disparities in response to client solicitations. Frankenreiter and Livermore did not use their national set of data to do the same sort of regression analysis I did within Florida to test mechanisms, but perhaps future work can do so. Even so, racialized service rationing remains an intuitive interpretation for the surprising

[36] *Occupational Employment and Wages, May 2017: 23-1011 Lawyers*, Bureau of Lab. Stats., https://www.bls.gov/oes/current/oes231011.htm (last accessed Mar. 22, 2024).
[37] *Id.*

geographic patterns we see across audit studies, and an interpretation supported by limited observational evidence.

The argument that inadequate supply of lawyers is an important cause of access to justice issues is not new. Nor is the expectation that the burdens of inadequate supply will fall in disparate ways along racial lines. But the idea that when supply shortages are present it allows lawyers who would ration services along racial lines to do so is a novel point. It also raises the racial stakes on all sorts of questions about professional regulation and licensing reform, which is perhaps more useful politically. The point is not to solve the fundamental racial inequities in American (or other) societies. Rather, a more modest goal is to provide enough supply that the typical lawyer does not ration their services along racial lines. California does not need to try to achieve some utopian economic vision; they can simply try to make their legal market look more like Florida's. Whether the Bar will want to do that given the differentials in lawyer pay is another matter; however, racial justice is a powerful political angle that often does have traction in progressive political climates like California.

To summarize where these findings fit in the broader understanding of race and access to justice, we know from extensive research across the social sciences that race is conspicuously related to many varied civil justice problems. At the same time, it is questionable whether these are simply correlates of a racially inegalitarian society or more directly a consequence of racism by key intermediaries in the civil justice system (i.e., lawyers, judges, juries) or in parts of the broader world that have a tight connection with civil justice problems (i.e., landlords, credit rating agencies, social workers, and others). The stakes of answering this question are both practical and political. On the one hand, one wants an accurate diagnosis if one wants an effective cure. One imagines that interventions making access to justice more equitable will tend to benefit previously underserved demographic minorities more than white people, just as the expansion of health care access was disproportionately beneficial to racial minorities because their situation was previously the most precarious. But perhaps not, or perhaps not enough, unless the interventions do not pay attention to the key mediators.

On the other hand, political claims about racism are different from claims about economic disadvantage. In some cases, the argument that a system is racist or enables racism may prove more powerful and persuasive than claims that this system is disadvantageous to the poor.[38] The findings discussed above work on both levels. In some jurisdictions, the bar exhibits profound negative racial preferences over clients as distinct from favoring the affluent, who are perhaps less likely to come from minority backgrounds. But crucially, the legal market does seem to mediate these preferences, as political economists might suppose. If the market actually

[38] Jan E. Leighley, Strength in Numbers?: The Political Mobilization of Racial and Ethnic Minorities (2001).

makes lawyers pay the price for their racial preferences, most of those who would like to discriminate in client selection will decline to do so. The upshot is that in designing policy interventions about access to justice, the likely continuing presence of racism by large enough fractions of the bar must be considered.

Moreover, there is to my mind a powerful political argument here, that severe constraints on the number of attorneys that practice in a given field of law in a given legal market basically encourage and enable segments of the bar to be choosy over the race of their clients in a way that is at odds with the official, anti-racist sentiment expressed by all major legal professional associations.

2.3 IS ATTORNEY SUPPLY THE KEY TO DE-BIASING?

Having resituated my own research findings within the broader topic, I wish to turn and examine the policy implication. If the basic claim is that insufficient supply of attorneys creates conditions whereby racial discrimination against clients by lawyers becomes likely, then that obviously pours additional gasoline (as if that were needed) on previous arguments made by authors such as Deborah Rhode,[39] Herbert Kritzer,[40] and others going back many decades that liberalization of the professional monopoly is necessary to improve access to justice. Particularly in the large number of routine legal matters where underrepresentation is most acute, representational discrepancies appear to be more strongly rooted in racist preferences of sizable segments of the bar rather than background economic inequality or statistical discrimination. Greater liberalization of the professional monopoly implies more market discipline against racist preferences by legal service providers. At this point, I could continue to recapitulate arguments about the benefits of liberalizing the professional monopoly, but I will instead emphasize some perhaps more surprising connections that attention to race might imply.

2.3.1 *Rethinking the Rationale for Affirmative Action*

If we seek to increase attorney supply, we must also pay attention to the need to increase the supply of black and brown attorneys. In *Getting a Lawyer While Black*, for example, I explore the extent to which black lawyers behave differently than white lawyers in response to client solicitations.[41] There, I find evidence that black lawyers have a greater interest in serving black clients than white lawyers do.[42]

[39] Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

[40] Herbert M. Kritzer, *Rethinking Barriers to Legal Practice: It Is Time to Repeal Unauthorized Practice of Law Statutes*, 81 JUDICATURE 100 (1997).

[41] Libgober, *supra* note 33.

[42] *Id.* at 99. In one branch of the experiment, 122 black criminal lawyers showed a 13.5 percent greater response rate to client solicitations using a distinctively black name than a distinctively

These findings factor into older (and perhaps once again new) debates about the use of affirmative action in admission to educational institutions. In particular, my findings support a governmental rationale for affirmative action already described in *Bakke* but not evaluated at great length.[43] In *Bakke*, the University of California system argued that having enough minority health care providers was necessary to guarantee essential services to minority communities. The court agreed that "in some situations, a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification."[44] Apparently, however, the University of California did not present sufficient evidence to show that the university's policy advanced this interest, and the court dismissed the argument on the ground that the University had not shown that its admissions policy was narrowly tailored to advance that interest, while leaving the door open that in some cases, it might be.[45]

Today's access-to-justice crisis may be such a case. There is abundant evidence that minority communities are badly underserved in legal contexts, and also evidence that having more minority lawyers would improve access to lawyers for individuals of minority backgrounds. Enough evidence to survive strict scrutiny of a hostile court? In *Getting a Lawyer While Black*, I expressed some doubts about that. Today, when the court has all but eliminated affirmative action, I have even more doubt.[46] Still, whatever the constitutional situation, the important point is that as a *policy matter* one must understand why preserving and enhancing professional diversity is so important.

It is worth zeroing in on the meaning of "diversity" in this context. In discussing diversity, one often focuses on distribution or composition – for example what share of the profession comes from which racial, gender, or other background.[47] Yet it is hardly clear that distribution matters as much for access to justice as the overall number of providers. Most arguments about affirmative action address a fair or

white name, a borderline statistically significant difference ($p = 0.094$). This black lawyer for black client preference was not observed in other arms of the experiment, but equally there was no evidence against a small preference in any other arms. Overall, I regard the evidence as consistent with the view that black lawyers do sometimes exhibit substantial preferences for black clients, although that preference is context dependent and not likely to be overwhelming.

[43] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978).

[44] *Id.*

[45] *Id.* The Court endorsed the speculation of the lower court that there might be white applicants who had demonstrated and expressed an interest in serving minority communities would be even better for remediating shortages than an applicant who merely grew up in a poor minority community but would otherwise be preferred.

[46] *See* Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023).

[47] *See, for example*, Am. Bar Ass'n, *Member Diversity, Equity, and Inclusion Plan* https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/new-bog-approved-member-dei-plan.pdf (last accessed Feb. 13, 2025) ("We strive to strive to mirror population demographics of the United States and to represent the communities the ABA serves.").

desirable composition of, say, a matriculating class of students.[48] From the standpoint of access to justice for underserved communities, it is less clear why the composition of the bar matters. If one doubled the number of minority lawyers, while quintupling the overall number of lawyers, then the share of the profession of diverse backgrounds would decrease, but there would be more providers of minority backgrounds. Presumably, minorities would then have an easier time finding an attorney to help them with their legal issues. And if the market logic holds, the additional supply of nondiverse lawyers would also help remedy shortfalls.

In my view, this line of reasoning presents the biggest challenge to providing essential services to underserved communities as a rationale for affirmative action. What is the overwhelming governmental interest in keeping the profession's size fixed that justifies the consideration of otherwise and normally forbidden racial factors? Certainly, states have not fully explored methods for producing sufficient numbers of lawyers from every community background. For example, few states have an apprenticeship path to the bar,[49] even though that is a well-precedented approach that would at least marginally increase the size of the profession, potentially bringing in more providers of minority backgrounds.[50] States differ in the Uniform Bar Exam score they require for admission,[51] and although I am not aware of any specific studies, it is likely that lowering these requirements would have a demonstrably positive impact on lawyer supply and the number of lawyers from underrepresented backgrounds. The major conceptual argument against weaker *ex ante* controls like these is that the quality of legal services will suffer; however, the fascinating chapter by Rebecca Haw Allensworth (Chapter 3 in this volume) shows that the weak *ex post* oversight on known bad apples raises doubts about how necessary it is to have stringent *ex ante* controls.[52] Surely, there is a way to have tougher controls on the backend and looser controls on the front end, especially if it helps deal with the twin and as we now know related crises of insufficient racial diversity in the profession and disproportionate over participation by racial minorities in civil justice procedures.

In considering how to increase the number of diverse lawyers, without necessarily worrying too much about their relative abundance in the profession, it is important

[48] *See, for example*, Grutter v. Bollinger, 539 U.S. 306 (2003) (contrasting affirmative action quotas based on percentages of the class with the similar, if squishier and for some time permissible, notion of a "critical mass" of minority students in a cohort).

[49] *Advocating for Apprenticeship*, Center on the Legal Profession at Harvard Law School (Jan./Feb. 2024), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/rethinking-licensure/advocating-for-apprenticeship/ (last accessed Mar. 22, 2024).

[50] *See, for example*, *Case Studies*, ApprenticeshipUSA, https://www.apprenticeship.gov/case-studies (this webpage is no longer accessible) (describing numerous Department of Labor sanctioned apprenticeship programs, such as Building Pathways, Inc., that have outsized impacts on diversity).

[51] *UBE Minimum Scores*, Nat'l Conf. Bar Examiners (undated), https://www.ncbex.org/exams/ube/ube-minimum-scores (last accessed Mar. 22, 2024).

[52] See Chapter 3 in this volume.

to recognize that many of the profession's most obvious *ex ante* entry barriers, such as the bar exam, only bind lawyer supply in the short run. In the long run, it seems that there are other important reasons why lawyers are so few and far between. In 2010, 52,404 students started the first year of law school, but those numbers have declined precipitously. In 2022, for example, there were only 38,019.[53] As many lawyers have been trained in recent years as in the early 1970s, but today the overall U.S. population is 60 percent *larger*.[54] The fact that law schools a decade ago were training 40 percent more students, and absorbed a full 3,000 additional students in 2021 when the pandemic temporarily made law school a relatively attractive option, certainly suggests law schools have the capacity to train more students. The situation is not like medicine, where the limited number of residency placements discourages medical schools from creating more seats, in turn creating an extraordinarily competitive process for all seats available in U.S. medical schools.[55]

As the declining enrollment statistics reveal, the issue with U.S. law schools is really one of limited student demand. Why not get a law degree if one is a smart, hard-working, and ethical individual? Some of the obvious detractors: The law degree is expensive;[56] lawyer pay is relatively high, but jobs in finance, consulting, tech, and so forth may have wages that are competitive or higher;[57] and surveys indicate that lawyers are remarkably unhappy as a profession.[58]

Not all of these aspects are fully within the control of the legal profession, but the costs of getting a degree are very conspicuously a professional policy choice. The United States is virtually alone in requiring an additional three-year degree on top of the baccalaureate for individuals to practice law. Law school attendees are somewhat less racially diverse than college students, but the compositional differences are

[53] *Law School Enrollment Trends, 1963–2023*, Law Sch. Transparency, https://www.lawschooltransparency.com/trends/enrollment/all (last accessed Mar. 22, 2024).

[54] *See Population*, USAFacts.org, https://usafacts.org/data/topics/people-society/population-and-demographics/population-data/population/ (last accessed Feb. 13, 2025) (line chart of census data showing US population at a little above 200 million in 1970 and at roughly 330 million in 2020).

[55] Rebekah Bernard, *Match Day 2023 a Reminder of the Real Cause of the Physician Shortage: Not Enough Residency Positions*, Med. Econ. (Mar. 15, 2023), https://www.medicaleconomics.com/view/match-day-2023-a-reminder-of-the-real-cause-of-the-physician-shortage-not-enough-residency-positions (last accessed Feb. 13 2025).

[56] Melanie Hanson, *Average Cost of Law School*, EducationData.org (Sept. 13, 2023), https://educationdata.org/average-cost-of-law-school (last accessed Feb. 13, 2025) (pegging average total cost of law school at $220,335).

[57] Sarah Butcher, *Pay in Banking vs. Consulting vs. Tech vs. Medicine vs. Law*, eFinancialCareers.com (Jan. 15, 2020), https://www.efinancialcareers.com/news/2020/01/pay-in-banking-vs-consulting-vs-tech-vs-medicine-vs-law (last accessed Feb. 25, 2024).

[58] Yair Listokin & Raymond Noonan, *Measuring Lawyer Well-Being Systematically: Evidence from the National Health Interview Survey*, 18 J. Empirical Legal Stud. 4 (discussing the profession's reputation for unhappiness, while critiquing existing evidence and providing more credible evidence that is still somewhat mixed).

less dramatic than some might suppose.[59] Even so, the number of individuals attending college annually dwarfs the number of those attending law school (i.e., in 2010, there were twenty-one million college students[60]), and the number of bachelor degrees awarded in a *single* law-adjacent major like political science is roughly similar to the total number of JDs admitted from *many such* majors, for example, economics, history, sociology, and so forth.[61] There are a large number of law schools housed at flagship state schools, and from an outsider perspective it is hard to see why these law schools could not relatively quickly turn around and expand their services to educating undergraduates, with for example a five- or six-year BA/JD.[62] It is far from obvious that requiring a second educational institution and degree enhances the quality of individuals serving in the profession, although it greatly enhances the cost of getting a law degree, keeps the size of the profession small, and diminishes the number of diverse practitioners. While I do not see much reason to believe that addressing the educational barriers to entry would produce a bar that is more racially *representative*, it is almost inevitable that lowering these barriers would bring more diverse practitioners to the profession.

2.3.2 *Civil Gideon's Hidden Potential: Countering Professional Demoralization*

Besides cost, another important reason why fewer individuals enter the legal profession is the relatively limited prospects for having the kind of meaningful career that individuals want. While the true extent of unhappiness in the profession is debatable,[63] it is agreed that the "institutional glide path"[64] of many law schools is toward

[59] ABA data from 2023 counts 2,969 black students admits to accredited law schools and 5,368 Hispanic admits against 37,886 total, implying 7.8 percent and 14.2 percent of admits are Black students or Hispanic, respectively. Am. Bar Ass'n, *2023 First-Year Enrollment by Gender & Race/Ethnicity (Aggregate)*, https://www.americanbar.org/groups/legal_education/resources/statistics/ (last accessed Feb. 13, 2025). By contrast, 13.4 percent of college students are Black and 19.5 percent are Hispanic. Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EducationData.org (Jan. 10, 2024), https://educationdata.org/college-enrollment-statistics (last accessed Feb. 13, 2025).

[60] Hanson, *supra* note 56.

[61] John Ishiyama, *Rethinking the Undergraduate Political Science Major*, Pol. Sci. Today (Summer 2019), https://educate.apsanet.org/rethinking-the-undergraduate-political-science-majo (last accessed Feb. 13, 2025) (claiming there were 40,000 US political science majors in 2011–12 and that this number was around 34,000 in 2015–16). Other sources suggest there are far more political science BAs than law students, for example *2023 Political Science & Government Degree Guide*, college factual, https://www.collegefactual.com/majors/social-sciences/political-science-and-government/ (last accessed Apr. 23, 2024).

[62] *See, for example*, *Accelerated Dual Degree BA or BS/JD*, Quinnipiac, https://law.qu.edu/programs/accelerated-dual-degree/ba-or-bs-jd/ (last accessed Mar. 22, 2024).

[63] Listokin & Noonan, *supra* note 58.

[64] Nancy Levit & Douglas O. Linder, The Happy Lawyer: Making a Good Life in the Law 138–40 (2010).

large law firms where lawyers, especially younger lawyers, are often miserable despite enviable pay.[65] It is in this context that I would view questions about the advisability of recent efforts to legislatively establish civil Gideon in particular settings, which it is hard to overlook as a potential solution to gaps in civil justice. To recapitulate this policy idea, the Supreme Court's decision in *Gideon v. Wainwright* established a right to counsel in criminal matters. In so doing, the Supreme Court issued an unfunded mandate that resulted in profound government subsidies for legal work that would otherwise have limited economic value – work representing the criminally accused and economically indigent.[66] While the Supreme Court declined to create a similar right in civil matters, several jurisdictions have started on the path to enshrining this right in certain very high stakes areas, such as housing or child welfare.[67] Unsurprisingly from a political economy perspective, the American Bar Association has also voiced strong support for civil Gideon.[68]

While it is easy to suppose that civil Gideon would help with the huge civil justice needs that fall disproportionately on minorities, it is questionable whether civil Gideon provides the best bang for the buck. Nor is it clear that civil Gideon would avoid the issues of the criminal public defender system, including chronic underfunding and, potentially, worse outcomes for criminal defendants represented by public defenders.[69] Moreover, I find myself substantially in agreement with Tonya Brito's claim that the right to civil counsel is fundamentally conceptualized in such a way as to be too little too late.[70] At the point at which a counsel is appointed to help with a civil problem, the issues will have gotten so out of hand that there is little to be done in terms of reconciliation or problem-prevention.[71] Indeed, evaluations of programs that provide free civil legal assistance have failed to find the anticipated benefit.[72]

[65] Martin E. P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001).

[66] David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 MINN. J.L. & INEQ. 373 (2014) ("*Gideon* imposed an unfunded mandate on state and local governments, and criminal defendants are among the most disliked and politically powerless constituencies in our polity.").

[67] Brito, *supra* note 32.

[68] *See Civil Right to Counsel*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counseli/ (last accessed Feb. 13, 2025) Am. Bar Ass'n, *ABA Toolkit for a Right to Counsel in Civil Proceedings* (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_toolkit_for_crtc.pdf (last accessed Feb. 13, 2025).

[69] *See* Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2678 (2013) (discussing correlative evidence suggesting that individuals represented by public defenders were more likely to be convicted than those with private attorneys, and suggesting that self-represented defendants may fare better than those represented by public defenders).

[70] Brito, *supra* note 32.

[71] Certainly, such findings and theories should not discourage yet-to-be-attempted access-to-justice reforms. But they should alert us to the fact that we lack abundant theories and evidence regarding what truly effective legal-assistance interventions might be.

[72] D. James Greiner, *The New Legal Empiricism & Its Application to Access-to-Justice Inquiries*, 148 DAEDALUS 64 (Jan. 2019); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized*

But regardless of debates around civil Gideon's potential efficacy, it may hold promise as a device for addressing the legal profession's dismal recruitment problems, and in particular, its inability to attract individuals in sufficient numbers and with sufficient diversity to address the legal needs of American society. Few individuals go to law school with an idea of what the Legal Services Corporation is,[73] but most presumably have an idea of what it is that a public defender does. And those who seek to do the kind of work that a public defender does know they must go to law school to do it.

That said, working with the criminally accused is not for everyone. There are likely many individuals potentially open to civil defense work on eviction, debt collection, family, and other civil law matters overwhelming our court system, but for various reasons less likely to want to work with the criminally accused.[74] Indeed, that public financing of legal services only is available for criminal defense work presents public-service-minded prospective lawyers with unfortunate tradeoffs. They have to choose between jobs where they will have to work defending criminals who are actually guilty of heinous crimes, or doing public interest work at all. "If I do not want to work as a public defender," many law students ask themselves, "what other kind of public interest work can I do?" The answer is frequently not clear, and the hydraulic pull of working on rich people's problems can become very strong.[75] To the extent that civil rights to counsel create visible pathways for law students to have stable careers that are readily understood as addressing the public's real legal needs, perhaps one might see increasing student demand, and especially minority student demand, for degrees and careers in law.

2.3.3 *Race and an Expanded Legal Services Marketplace*

In addition to civil Gideon, commentators often wonder whether other sorts of providers can play a greater role. Professor Kritzer, for example, looks to the United Kingdom and argues that their Citizens Advice Bureaus represent a potential (if somewhat expensive) model for what could get built in the United States.[76] But

Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?, 121 YALE L.J. 2118 (2012).

[73] The Legal Services Corporation is a government-run entity and is the nation's largest provider of funding for civil legal aid for low-income Americans. *See About*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc (last accessed Mar. 24, 2024).

[74] Patrick C. Brayer, *The Power of the Public Defender Experience: Learning by Fighting for the Incarcerated and Poor*, 53 WASH. U. J.L. & POL'Y 105 (2017) ("The first and most predominant reaction from a student assigned to meet with a client in jail, alone, is fear.").

[75] Leeor Neta, *The Most Common Path to a Public Interest Career Is also the Least Discussed*, NALP BULL. (Jan. 2012), http://digitalcommons.law.ggu.edu/pubs/457 (last accessed Feb. 13, 2025) ("[M]ost future public interest lawyers. . . . averse to jump ship to the private sector option.").

[76] Kritzer, *supra* note 40.

given the United States' political economy, it is reasonable to anticipate that black and brown communities underserved by existing civil infrastructure would also receive underwhelming services from a new public venture in the model of Citizens Advice Bureaus. This is not to say that supporters of racial equity in access to justice should reject such ideas. It is notable that advocates for postal banking often base their arguments in the fact that civil infrastructure like post offices are more accessible to underserved communities than most other mechanisms for delivering banking services. Still, it is important to recognize that, without special attention, public alternatives to service provision are unlikely to generate perfectly equitable solutions.

Rather than creating a new (and expensive) public venture, the United States has previously sought to deputize and expand existing private capacities for delivering services. The major issue here is that the private companies that tend to specialize in serving economically marginal communities also often take advantage of the marginal position of their clients. For example, the U.S. system for delivering the Earned Income Tax Credit (EITC) deputizes large numbers of private tax preparers to determine who is eligible for this very important public benefit. Collectively, private tax preparers earn billions of dollars in exchange for doing this work,[77] and some 98 percent of families with incomes below $30,000 receive assistance from a tax preparer.[78] Chain tax preparers such as Jackson-Hewitt and H&R Block have thousands of storefront locations that particularly concentrate in zip codes where EITC recipients live.[79] Historically, they have sold to these communities financial products that are essentially fast, often high-interest loans that use anticipated returns as collateral.[80] The American Prospect reported one typical case, where an individual expecting $9,697 from the Internal Revenue Service (IRS) paid their tax preparer $970 in total fees, or about 10 percent of the total refund.

Access-to-justice advocates are unlikely to receive warmly the idea of having private, storefront entities such as H&R Block providing for a fee the sort of services a government-funded Citizens Advice Bureau might offer for free. Indeed, it seems

[77] Alan Berube et al., *The Price of Paying Taxes: How Tax Preparations and Refund Loan Fees Erode the Benefits of the EITC*, Brookings (May 1, 2002), https://www.brookings.edu/articles/the-price-of-paying-taxes-how-tax-preparation-and-refund-loan-fees-erode-the-benefits-of-the-eitc/ (last accessed Feb. 13, 2025).

[78] Elain Maag, *Paying the Price? Low-Income Parents and the Use of Paid Tax Preparers*, Urban Inst. (Feb. 1, 2005), https://webarchive.urban.org/publications/411145.html (last accessed Feb. 13, 2025).

[79] Paul Weinstein & Beathany Patten, *The Price of Paying Taxes II: How Paid Tax Preparers Are Diminishing the Earned Income Tax Credit*, Prog. Pol. Inst. (Apr. 2016), https://www.progressivepolicy.org/publication/the-price-of-paying-taxes-ii-how-paid-tax-preparer-fees-are-diminishing-the-earned-income-tax-credit-eitc/ (last accessed Feb. 13, 2025).

[80] Berube et al., *supra* note 77.

likely that instead of private providers skimming billions off government benefit programs, one could fund directly a governmental entity to do this work for less. On the other hand, building programmatic capacity is tough. Through flipping the right combination of regulatory switches, the private sector can self-organize a system that works better than no system at all or a system that is so overworked it barely functions. Given the dismal situation in many state courts, especially for minorities, it is worth seriously considering regulatory changes that would allow entities already facilitating usually routine, possibly complex, legal issues the ability to do more. It is pretty easy to imagine that companies such as a tax prep chain might have a large comparative advantage in the development of software, as well as the training of personnel, necessary to provide many basic form and process services for which a lawyer may seem too expensive and self-service too confusing or difficult. It is in some sense outrageous to ask someone already struggling to make ends meet to fork over $29.95 to H&R Block to help them file a notice to appear with a court in an eviction matter, for example, when courts could without much difficulty provide defendants with a postcard to indicate whether they wish to defend the matter or not. But the hidden costs of requiring individuals to file at a courthouse or navigate confusing online resources, particularly those who are going through an eviction, are also high. The value to the consumer from having a legal solution at hand may certainly exceed that fee.

Of course, people with legal problems are in distress, and the risks of price gouging seem high.[81] Liberalization in this direction needs to consider those risks, for sure. But the costs for services can also be monitored and regulated, as other fees routinely are.[82] The EITC already effectively subsidizes a large amount of private administrative capacity in the form of these storefront tax preparers, which it so happens already do disproportionately congregate in minority communities. It is hard to avoid the expectation, however disagreeable, that allowing these kinds of entities to do more basic form filing would help close the racial justice gap.

A major reason why entities like H&R Block stay in their tax lane and do not expand into other legal and benefit services is the presence of laws criminalizing the unauthorized practice of law, which prohibit nonlawyers from providing legal advice. As discussed in much greater detail by Genevieve Lakier (Chapter 14 in this volume),[83] current challenges to such laws have been met with success, providing hope that nonlawyer service providers may be able to expand the services they can

[81] Annamaria Lusardi & Carlo De Bassa Scheresberg, *Financial Literacy and High-Cost Borrowing in the United States*, Nat'l Bureau of Econ. Rsch. (Apr. 2013).

[82] Brian Deese et al., *The President's Initiative on Junk Fees and Related Pricing Practices*, The White House (Oct. 26. 2022), https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/ (this webpage is no longer accessible).

[83] See Chapter 12 in this volume.

provide, including to black and brown communities. From a 30,000-foot policy-view, it is strange for New York to insist on creating new programmatic capacities in already thinly stretched nonprofits, when it could leverage the thousands of existing storefront operations to assist with legal document preparation for a small fee.[84]

As one descends from 30,000 feet, the most pressing concern seems to be that, unless there are the right *ex ante* constraints on who gets to provide these services, exploitative outcomes are likely to result. And as the exploitative practices of tax preparers show, there are very real concerns about these storefront operations as well. But the status quo is also an exploitative one. Courts are not well-suited to designing entire regulatory regimes,[85] but that should not prevent other governmental actors from venturing to do so. They are not able to broadly examine how much specialization and background is really necessary to provide which service, nor what level of compensation is appropriate for particular services as opposed to exploitative. Still, the statement that courts are not going to design a good regime of alternative providers is no argument against the possibility of someone else designing such a regime. The fact that the United States provides so much financial assistance to document preparers involved with the tax system, and that these preparers have such a large footprint in the very underserved communities access-to-justice advocates want to reach, has to be taken seriously in thinking about reforms.

We may not like these kinds of entities. And in an ideal world, perhaps we would want someone else serving clients. But for the sake of argument, and following the estimates above, let's suppose a fifth of the bar is somewhat racist in the sense that, all else equal, they would prefer not to have minority clients. For the clients' sake, we would probably not want them to take minority clients either, in an ideal world. Yet ours is not an ideal world. Provided the right incentive and professional regulatory structure they can deliver helpful legal assistance, even to minorities. And, it seems, in some jurisdictions that problematic fifth of the bar does actually serve minorities, where in others it does not.

2.4 CONCLUSION

Perhaps the most important lesson of the political economy perspective on this topic is recognizing that eliminating racism is neither necessary nor sufficient to generate more racially just outcomes. We are not going to fix peoples' hearts overnight, or even over decades. Instead, we need to carefully think about why minorities *do* achieve justice outcomes on par with white people in cases where they do, in spite of

[84] *Number of H&R Block Locations in the United States in* 2024, ScrapeHero (Feb. 12, 2024), https://www.scrapehero.com/location-reports/H&R%20Block-USA/ (reporting 8,788 H&R Block locations in the United States, with 444 in New York).

[85] Richard A. Posner, *Regulation (Agencies) versus Litigation (Courts): An Analytical Framework*, *in* Regulation versus Litigation: Perspectives from Economics and Law (Daniel P. Kessler ed., 2010).

likely racism, and why they do not in other cases. To the extent that they do not achieve equal outcomes because of incentives facing providers of solutions to legal problems, it is politically and rhetorically useful to note that many individuals who claim to have good hearts nevertheless actively sustain and support incentive systems that enable racially disparate outcomes. There is a lot of letting perfection be the enemy of the better, particularly among those with the luxury of comfortably waiting for greater racial justice. The severity of the civil justice disparities belies that comfort and makes understanding its causes particularly urgent.