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## Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA

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# Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA

REBECCA L. SANDEFUR\* AND THOMAS M. CLARKE\*\*

*Most of the civil justice problems Americans experience never receive service from an attorney. Indeed, daily around the country, thousands of people arrive at court not only without a lawyer to represent them, but also without an understanding of where to go, what to do, or what will happen while they are there. Many jurisdictions are experimenting with models for assisting unrepresented people through the use of “roles beyond lawyers,” roles staffed by people who are not fully qualified attorneys but perform some of the tasks traditionally performed only by attorneys. One interesting aspect of these developments is their source: courts and bar associations, stewards of the jurisdictional core of the legal profession, are in a sense designing their own competition as they create these new roles that nibble at the U.S. legal profession’s strong monopoly on both representation and legal advice. This project creates frameworks for evaluating the functioning and impacts of these emerging programs, with a particular focus on their potential to contribute to solving the contemporary crisis in access to justice, sometimes termed the “justice gap.” One framework identifies elements on which any such program should be evaluated, focusing on the key challenges of appropriateness, efficacy, and sustainability. The other framework identifies key choice points in program design that are likely to affect programs’ success at meeting the three key challenges.*

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## INTRODUCTION

Broad agreement exists that many people in the United States—particularly the poor—who need assistance handling civil justice issues do not obtain it. Daily, around the country, thousands of people arrive at court not only without a lawyer to represent them, but also without an understanding of where to go, what to do, or what will happen while they are there. People are particularly likely to appear without representation, or as “self-represented litigants,” in cases involving evictions, family and domestic matters, and debt collection. For example, the state of California counted 4.3 million unrepresented court users in 2003, noting

that over ninety percent of defendants in eviction actions and domestic violence restraining order cases appeared unrepresented.<sup>1</sup> A recent survey of court managers in New York City reported that managers estimated that approximately seventy-five percent of family court litigants and ninety percent of housing court litigants “appear without lawyers for critical types of cases: evictions; domestic violence; child custody; guardianship; visitation; support; and paternity.”<sup>2</sup> Faced with so great a volume of unassisted court users, courts often do not have sufficient staff to handle the inquiries of so many unrepresented litigants, who often find themselves facing a lawyer who represents the other side.

Emerging strategies for solving what some term an access to justice crisis include a growing number of experiments involving new roles for individuals who are now authorized to provide certain specific services traditionally supplied only by lawyers in the U.S. context. In some of these roles, attorneys supervise the individuals. In others, they do not. In some, the individuals can participate in court proceedings; in others, they cannot. One interesting aspect of these developments is their source: courts and bar associations, stewards of the jurisdictional core of the legal profession,<sup>3</sup> are in a sense designing their own competition as they create these new roles that nibble at the U.S. legal profession’s strong monopoly on both representation and legal advice. This project creates a framework for evaluating the functioning and impacts of these programs with a particular focus on their potential to contribute to solving this “justice gap.”<sup>4</sup>

This Article presents initial versions of conceptual frameworks for understanding programs in which people who are not fully qualified attorneys provide assistance that was traditionally only available through lawyers. We term these programs “Roles Beyond Lawyers” (“RBLs”). Such initiatives provide a range of services to litigants appearing without attorneys, sometimes called “self-represented litigants,” from information to moral support to legal advice. We present these frameworks as both a resource to those who may be envisioning their own RBLs projects and as an opportunity for this research project to receive feedback and comment. These will be refined through insights gained from their application to the study of two existing programs, the Court Navigators

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1. Madelynn Herman, *Pro Se Statistics*, NAT’L CTR. FOR ST. CTS. (June 26, 2006), [https://www.nacmnet.org/sites/default/files/04Greacen\\_ProSeStatisticsSummary.pdf](https://www.nacmnet.org/sites/default/files/04Greacen_ProSeStatisticsSummary.pdf).

2. OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES: THE RESULTS OF TWO SURVEYS I (2005).

3. See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988) (discussing how professions are organized around abstract knowledge); Rebecca L. Sandefur, *Work and Honor in the Law: Prestige and the Division of Lawyers’ Labor*, 66 AM. SOC. REV. 382 (2001) (analyzing the developments in the context of the legal profession).

4. Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 721 (2015).

of New York and the Limited License Legal Technicians of Washington State.

The Article proceeds as follows: The first Part presents examples of RBL programs that exist at present in the United States. The second Part describes a framework for evaluating these programs. This Part starts with the common goals that RBL programs seek to achieve and develops common evaluation criteria that assess achievement of those goals. The evaluation framework identifies major questions to be asked regarding any such program, as well as means through which those questions can be answered, providing conceptual, methodological, and practical guidance for designing evaluation projects to study RBLs. The approach enables researchers to compare programs using consistent evaluation criteria and method, so that research results reflect the workings of program design and implementation rather than differences in evaluators' criteria. It is organized as a series of nested, increasingly elaborate (and expensive) evaluation activities. Researchers may select from a range of menus of topics and measures according to their interests and available resources. The third Part of the Article builds upon the analysis of program goals and evaluation criteria to develop a framework for classifying the many different types of programs that exist and could be designed to provide legal services or procedural assistance through RBLs. Classification of such programs will aid evaluators who wish to compare similar programs for effectiveness and sustainability.

#### I. ROLES BEYOND LAWYERS: A FAMILY OF INNOVATIONS

Table 1 provides a snapshot of selected RBL programs currently operating in the United States.<sup>5</sup> As the table reports, these programs differ widely in a number of respects. They differ in who pays for the service. They differ in how and whether providers are trained and certified. They differ in what compensation, if any, providers receive. And they differ in the scope of providers' powers of action on the behalf of those they serve.

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5. For more information about the RBL programs featured in Table 1, see *Self-Represented Litigant Coordinator—Moffat, Routt, & Grand*, COLO. JUD. BRANCH, [https://www.courts.state.co.us/Courts/District/Custom.cfm?District\\_ID=14&Page\\_ID=471#](https://www.courts.state.co.us/Courts/District/Custom.cfm?District_ID=14&Page_ID=471#) (last visited May 29, 2016) (discussing our Program); *Courthouse Facilitators*, WASH. ST. CTS., [https://www.courts.wa.gov/committee/?fa=committee.home&committee\\_id=108](https://www.courts.wa.gov/committee/?fa=committee.home&committee_id=108) (last visited May 29, 2016); *About JusticeCorps*, CAL. CTS., JUD. BRANCH CAL., <http://www.courts.ca.gov/justicecorps-about.htm> (last visited May 29, 2016); *Court Navigator Program*, N.Y. ST. UNIFIED CT. SYS., [http://www.courts.state.ny.us/courts/nyc/housing/rap\\_prospective.shtml](http://www.courts.state.ny.us/courts/nyc/housing/rap_prospective.shtml) (last visited May 29, 2016); *Hennepin County District Court*, MINN. JUD. BRANCH, <http://www.mncourts.gov/district/4/?page=765> (last visited May 29, 2016).

TABLE 1: SELECTED NONLAWYER ASSISTANCE PROGRAMS OPERATING IN THE UNITED STATES—FALL 2015

Program	Provider Compensation	Training and Certification	Service Funder	Services Provided
<b>Limited License Legal Technicians</b>	Paid occupation	Educational requirements and passage of bar examinations	Client	In a single area of law (family), give legal advice and draft documents for clients.
<b>Self-Represented Litigant Coordinators (“SRLC”)</b>	Paid occupation	Minimum three years of legal work experience	Court	For family law cases, provide info about court process and forms, review documents, and compute child support.
<b>Courthouse Facilitators</b>	Paid occupation	--	Client through fees or surcharges, court	For family law cases, assist self-represented parties with cases in superior court, excluding advice and representation.
<b>Justice Corps</b>	Educational grant	Thirty hours of training and service commitment	Court system, Americorps	Assist self-represented litigants with legal forms, provide info, referrals, and language services for civil matters, including housing and family matters.
<b>Court Navigators</b>	Most are volunteers; may receive course credit; some are paid	Three to eight hours of training and service commitment; or, paid occupation	Court, philanthropy	Provide info, assistance with forms, and moral support to unrepresented litigants in housing and consumer debt courts; accompany unrepresented litigants and answer factual questions addressed to them by a judge or court attorney.
<b>Domestic Violence Advocate</b>	Volunteers	Training provided by non-profit advocacy groups	Philanthropy	Info about and accompaniment of victims through domestic violence proceedings.
<b>Council of Parent Attorneys and Advocates</b>	Paid	Forty hours of advocate training	Client	Nonattorney advocates assist, advocate for, and represent families/students in special education proceedings, as permitted by state rules.
<b>Certified Legal Document Preparer</b>	Paid	Training and experience reqs; must pass exam and be certified by state supreme court; continuing education reqs	Client	Prepare official legal documents for people not represented by attorneys; cannot provide legal advice.

## II. ROLES BEYOND LAWYERS: FRAMEWORK FOR EVALUATION

### A. CHALLENGES PROGRAMS MUST MEET

RBL programs attempt to balance the goals of increasing access to justice and ensuring consumer protection through delivering services traditionally provided only by lawyers by means of people who are not fully legally qualified. Achieving the dual goals of access and protection requires programs to respond to the challenges of *appropriateness*, *efficacy*, and *sustainability*. These three challenges are the criteria on which RBLs are evaluated.

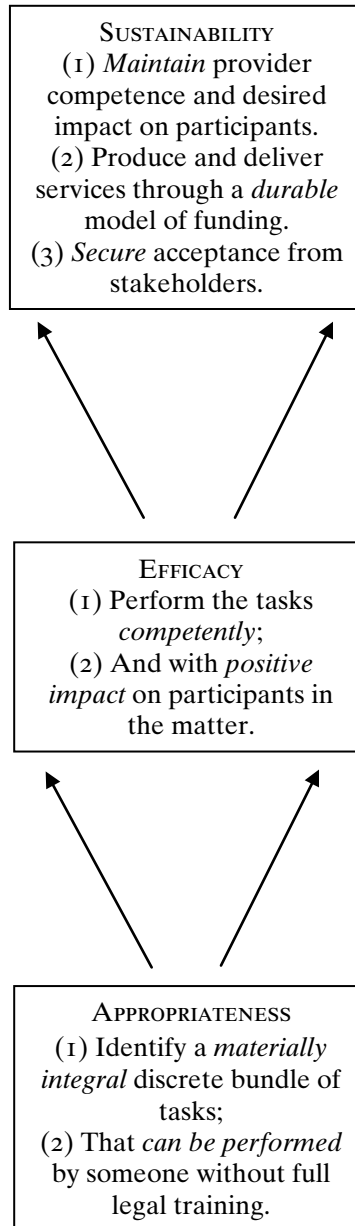
(1) *Appropriateness*. Program designers must identify a discrete bundle of services that can *both* make a material difference in the conduct of justiciable events *and* be *competently* performed by staff who are not fully trained attorneys. Achieving appropriateness is the foundational goal of any program using RBLs. If this goal is not met, the innovation will be ineffective even if well implemented and sustainable.

(2) *Efficacy*. The discrete bundle of services provided must be both competently performed and positively impactful on the work of participants in the legal matters served. Participants may include courts and their staff who have interests in the timely, efficient, and lawful processing of cases, and litigants, who have interests in these same goals. Litigants also have interests in the outcomes and experience of justice processes in their own particular matters. Stakeholders may also include attorneys who participate on the “other side” in cases involving RBL-assisted litigants. If appropriateness is meeting the challenge of designing an RBL that could work, efficacy is about implementing it so that it does work in attaining its specific goals for service delivery.

(3) *Sustainability*. Sustainability is perhaps the greatest challenge confronting any method of delivering appropriate and efficacious services. Services must be produced by personnel managed through durable models of training, supervision, and regulation that ensure the consistent delivery of services of adequate quality. The means of funding production and delivery must be durable, whether the source is public funds, charity or philanthropy, client fees, or some combination of these. Models of service production successful at a small scale may require revision to succeed on a larger scale. Sustainability requires not only maintaining material efficacy, but also legitimacy. Stakeholders, who include the public and organized legal profession as well as individual litigants and courts, must accept and employ the new roles as means of delivering assistance.

These three challenges unfold sequentially in the implementation of innovations. Figure 1, below, represents these graphically from the ground up.

FIGURE I: THREE CHALLENGES OF LEGAL SERVICES DELIVERY INNOVATION





## B. MAJOR COMPONENTS OF EVALUATION

Like all exercises in evaluation research, this project aspires to determine how well a program, practice, or policy achieves certain specific, measurable goals.<sup>6</sup> These goals may be operative at different levels of analysis. For example, observers may want to understand the impact of a program on both individuals who receive its services as well as the organizations that provide it.

Any evaluation must begin with a clear understanding of the goals that program designers seek to achieve. Common motivations for introducing RBLs include aspirations such as increasing access to justice for the public or reducing costs to courts. It is essential to identify what attaining program goals would look like in specific, practical terms. For example, increasing access to justice might mean that more people turn to courts for a specific type of matter; or, it might mean that more people who commence a specific formal legal process, such as dissolving a marriage, formally complete it; or, it might mean that the decisions produced by a formal legal process become more legally accurate. Similarly, reducing costs to courts might mean that fewer people use the courts for a specific type of matter; or, it might mean that a formal legal process comes to require less court staff time; or, it might mean that work formerly funded by the court system is now funded through other means. The reality of many RBLs is that different stakeholders can hold different, sometimes conflicting, goals for the RBL, and also that designers may not always have a clear idea of precise goals when they launch the innovation.<sup>7</sup>

Any evaluation of an RBL must also begin with a clear description of the role itself. Most importantly, this description identifies the specific bundle of tasks and powers that is foreseen for incumbents of the role. It clarifies the intended limits of the RBL's scope of action and differences between what the RBL is meant to do and what a lawyer's role or an unassisted layperson's role would be in the legal process at issue.

Another essential task in designing evaluations of RBLs is mapping the context into which the RBL will enter. Context mapping includes three key components. The first component of context is the participants in the actual legal process into which the innovation will intervene. Identifying these participants provides a map of the human infrastructure

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6. See generally PETER H. ROSSI ET AL., *EVALUATION: A SYSTEMATIC APPROACH* (7th ed. 2004) (informing on how to design, implement, and appraise social programs by evaluation); CAROL H. WEISS, *EVALUATION: METHODS FOR STUDYING PROGRAMS AND POLICIES* (2d ed. 1998).

7. For the legal aid context specifically, see James W. Meeker & Richard Utman, *Notes on Methodological Issues Encountered During a Field Evaluation of a Pro Per Intervention*, (Nat'l Legal Aid & Defenders Ass'n/ AARP Evaluation Meeting, Working Paper) (Mar. 12, 2002) (on file with authors).

of the legal process as well as a list of groups of people whose work may be affected by the innovation. These are people whose cooperation with incumbents of the RBL is necessary if the RBL is either to gain legitimacy or to function as designed. For example, if an RBL will enter into eviction matters assisting tenants, landlords' attorneys' work will be affected and their interests in maintaining current standard operating practices may be threatened. The second component of context is the participants in the production and delivery of RBL services. These will include not only the incumbents of the RBL, but also the people and organizations who train, supervise and perhaps regulate them.

The final component is the work environment into which the RBL will enter—its norms and its standard operating processes. Some courts are orderly and quiet, with easily visible signage and legible rules about how to move through the legal process. Other courts are crowded and chaotic, likely making it more difficult for an outsider to discern where to go or what to do. Standard practice may be that cases are frequently resolved through settlements worked out in the courthouse hallways, where lay people face alone the attorneys representing their opponents.<sup>8</sup> Understanding these aspects of context is essential because this exercise uncovers sites where unintended consequences of the innovation, whether desirable or undesirable, may develop. This also helps to identify key stakeholders for the later analysis of sustainability.<sup>9</sup>

#### *I. Stage 1: Goals, Roles, and Context*

The first three steps in RBL design are: (1) identify the specific goals of the innovation; (2) describe the role as designed; and (3) map the contexts of service delivery and production. These three-initial steps document two sets of factors: the intentions of RBL designers in setting up the role and the status quo processes into which the RBL is or will be an intervention. For some evaluation projects, documentary evidence will be available which describes the RBL and its purposes. Such documents may include rules, website descriptions, committee minutes, and the like. A second valuable source of information about the role and its context comes from formal interviews with multiple key informants for each research site, who will include court administrators, practitioners, and those who designed and/or supervise or regulate the RBL. Information collected in Stage 1 will also be relevant to assessing appropriateness, efficacy, and sustainability.

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8. Mark H. Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in *THE POLITICS OF INFORMAL JUSTICE* 119–63 (1982).

9. See *infra* Part II.B.3.

## 2. *Stage 2: Appropriateness and Efficacy*

Once the goals for the innovation have been determined, the role has been fully documented, and the contexts of delivery and production have been mapped, the next task is to identify measures for the first two evaluation criteria: how well the RBL is meeting the challenges of *appropriateness* and *efficacy*. The design of existing RBLs varies greatly on a range of dimensions,<sup>10</sup> and one purpose of this framework is to identify classes of measures that will be available and comparable for all types RBLs.

### a. Appropriateness

The question of appropriateness concerns the extent to which the RBL program has created a discrete bundle of legal services that can *both* make a material difference in the conduct of justiciable events *and* be competently performed by staff who are not fully trained attorneys. The tasks in assessing appropriateness empirically involve:

(1) Identifying the tasks necessary to see the matter successfully through the legal process and noting where and how in those tasks the RBL can intervene. For example, if the RBL will provide document preparation assistance, what are the specific documents that must be produced (such as parenting plans, answer forms in an eviction action, petitions for the dissolution of marriage), how are the documents actually prepared (for example, on a computer, on a paper form), and what has to happen with those documents (such as filing, notarization, approval by a judge, and so on)?

(2) Identifying the specialized knowledge necessary to competently perform these tasks. Some of this necessary knowledge will emerge through the identification of the tasks. Other aspects of the required specialized knowledge can be gained from interviews with people who practice and work in the context into which the RBL will enter. One straightforward way to assess appropriateness is through interviews with practitioners who work in the contexts where the new role will be or has been deployed but who are *not* formally involved in the role's implementation or design. These practitioners serve as local experts for both the formal requirements of carrying out the role and informal aspects of how work is routinely conducted in courts and other legal settings.<sup>11</sup>

### b. Efficacy

Efficacy concerns how competently the role is performed and how it impacts the work of participants in the legal matters served. Most basically, efficacy reflects how well the RBL is able to achieve the goals foreseen for it in its design. However, through the course of the

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10. See *infra* Part III.

11. See Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909 (2015).

evaluation project, unintended benefits and costs of the RBL may also emerge. Which elements of efficacy are of greatest interest in any specific evaluation project will depend, in part, on who is paying for the service. As Table 1 above illustrates, many of these programs are not paid for by client fees, but operate with substantial subsidies from the organized bar, from court systems, or from charitable funders. Other programs, by contrast, may receive some subsidy but are also substantially supported by fees paid by the end users of the services, who are members of the lay public. These different stakeholders often will have different goals for the program. Courts, for example, may be particularly interested in reducing the burdens placed on their work by unrepresented litigants. Litigants, for example, may be particularly interested in receiving what they perceive to be good service and good outcomes from their matters.

Across RBL programs, two common elements of efficacy are competence and use, and we discuss each in turn below. The first element is competence, reflected in work product (such as legal documents, legal advice and information) of satisfactory quality. This element measures achievement of the widely shared RBL goal of consumer protection. Readily available measures of competence include produced documents, the quality of which can be assessed by competent auditors such as attorneys who practice in the court. These assessments should be “blind”; that is, auditors should not know who produced the document. Documents can be assessed for their accuracy and correctness, and assessments of documents produced by RBLs may be compared with those produced by unassisted litigants and by attorneys.<sup>12</sup>

Another valuable measure of competence includes observation of the interpersonal work of RBL incumbents to assess its quality and conformity to the RBLs’ powers and limits. This assessment should be guided by clear protocols describing what RBLs may and may not do, as well as what the RBL should do to further the interests of her client. Valuable measures of competence also include interviews with other parties to matters involving RBLs to gain their assessment of the effectiveness of the RBLs’ work in participating in the matter in an appropriate and competent way. These parties should be experts (that is, not members of the lay public), and include attorneys, judges, court staff, and paralegals participating in matters involving RBLs. These interviews should be guided by standard protocols. Information gained will be useful in assessing competence, and may also provide information about legitimacy that is relevant for the issue of sustainability.<sup>13</sup> In analyzing these interviews, it will be important to remember that informants’ own

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12. See Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 *LAW & SOC’Y REV.* 765, 765–808 (2003).

13. See *infra* Part II.B.3.

interests shape their perspectives on these innovations and will be reflected in their assessments of competence and legitimacy.

A second common element of efficacy is use, which will be reflected in the rates at which people receive assistance or resolution. This element is a measure of the widely shared RBL goal of expanding access to justice. Depending on the specific goals of the innovation, use might be measured by, for example, time trends in the proportion of relevant documents produced with evidence of RBL assistance; this is a straightforward measure of the extent to which people use the RBLs' services.

In addition, specific programs may have other efficacy goals for the RBL. Common goals include:

(1) *Reducing the burdens placed on courts by litigants who appear without lawyer representation.* Widely available measures of this impact include: (a) the number of appearances involved in matters where litigants receive assistance from RBLs, in comparison with matters in which litigants receive assistance from attorneys and in which litigants receive no discernible assistance; and, (b) the time elapsed from filing to decision for a given matter for cases involving RBLs, or attorneys or unassisted litigants.

Additional measures, seldom collected, could include trends over time in the number of contacts between clerks and unrepresented litigants. If the RBL is effective at reducing burdens on courts, one means through which this might occur would be a decline in the number of these contacts as clerk contact is replaced by RBL contact. Another measure could include trends in the average amount of time court clerks spend with each member of the public answering questions. Similarly, we might anticipate that this would decline if the RBLs are effective at achieving the goal of reducing the burden placed on courts. These two measures might be collected in a very precise way, for example, by measuring specific contacts and their duration, or less precisely, by surveying court staff at different points in the implementation of the program to capture their subjective sense of whether their work has changed in this respect.

(2) *Procedural justice.* is widely regarded as an important outcome of the functioning of court and justice processes. When people perceive that the decision process that led to an outcome was fair, incorporated their participation, treated them with respect, and was managed by an impartial adjudicator, they experience procedural justice.<sup>14</sup> Procedural justice is of interest to courts and the legal system not only because it reflects elements of customer satisfaction with court experiences, but also because it has been linked to the legitimacy of the legal system and its agents as well as to compliance with the results of

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14. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 230-40 (Melvin J. Lerner ed., 1988); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 345-46 (2008).

court processes, such as judgments.<sup>15</sup> Procedural justice is conventionally assessed by surveying participants in a matter and asking questions about their perceptions of fairness, neutrality, treatment with respect and the like.<sup>16</sup> Standard measures exist for these experiences, and should be used by researchers studying these roles. The use of standard measures ensures that findings produced from the evaluations are comparable with the broad procedural justice literature.

(3) *Improving litigant understanding.* One goal of RBL programs may be to increase litigants' understanding of what happens in their cases and what are next steps required of them by the court process, such as returning to the courthouse at a later date for a hearing or filing a form they have completed. Litigant surveys can assess litigants' understanding of the processes in which they are involved. Litigants may be asked for their own perception of their understanding, or their knowledge could be assessed directly, such as through a brief quiz.

(4) *Participation.* One goal of RBL programs may be to increase the rates at which parties participate in the formal processes involved in the matters in which they are implicated. This is arguably an expansion of access to justice. Unrepresented litigants sometimes enter legal matters as the result of the other party's instigation (for example, tenants in evictions, consumer debtors in collection actions, homeowners facing foreclosure). Rates of default can be very high in these actions, and reducing these rates may be a goal of RBL programs. Research demonstrates that among the clear impacts of assistance to litigants is simply supporting them in actually showing up for scheduled hearings.<sup>17</sup> Decreases in default rates could be used as a measure of increased participation. These might be measured by comparing ultimate default rates among RBL-assisted cases and cases in which people appear unrepresented or by examining trends in default rates in the RBLs case type overall, comparing the rates before and after the implementation of the RBL.

(5) *Changing litigant outcomes.* Finally, one goal of RBL programs may be to change the profile of outcomes for the matters into which the RBL is an intervention. Sometimes explicitly stated in program goals, and at other times implicit, is the belief that if currently unrepresented litigants received even limited assistance they would frequently achieve outcomes more favorable to their interests than they currently do.<sup>18</sup> What change one might expect depends on the nature of the matter and might take the form of better settlements (from one side's perspective) or agreements reached more quickly or slowly.

For matters like foreclosure, eviction, and consumer debt collection, a better outcome for the assisted litigant could mean a more

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15. See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

16. *Id.*

17. Erik Larson, *Case Characteristics and Defendant Tenant Default in a Housing Court*, 3 J. EMPIRICAL LEGAL STUD. 121, 127 (2006).

18. See Meeker & Utman, *supra* note 7.

favorable settlement—such as, a reduction in the debt or more time to vacate the apartment or forgiveness of arrears in exchange for swift exit from the premises—or the resolution of the matter in a settlement that does not get reported to credit bureaus and other rating agencies—as opposed to an unfavorable judgment that would be.<sup>19</sup> For matters like divorce, a better outcome for the assisted litigant could mean agreements that are more durable, in that they result in more stable compliance by both parties, or it could mean an agreement that includes more of what a litigant wanted at the commencement of the matter.

### c. Standards of Comparison

The goals of the intervention will typically signal what are the appropriate benchmarks or standards of comparison. Sometimes the RBLs' work will be best measured in comparison to an absolute standard (such as, correctness), while in other instances it will be necessary to compare the RBLs' work to alternative providers. RBLs are most often designed as interventions into processes where many people currently obtain neither representation from fully qualified attorneys nor any other form of assistance. Thus, the most common comparison is likely to be the experience of a litigant assisted by an RBL with that of a layperson who receives no assistance, though comparing the work of RBLs to the results produced by other kinds of providers may also be informative.

A related issue is “efficacious for whom?” A model of assistance that works well for some populations may be ineffective for other populations, who may require more services or more intensive services. Determining which populations can effectively use what an RBL has to offer can be an important product of the evaluation exercise.

### 3. Stage 3: Sustainability

Once an appropriate and efficacious model of providing assistance has been established, the challenge is continuing its work and taking it to scale. The final stage in RBL evaluations is thus an analysis of sustainability, which focuses on the elements of legitimacy and perceived value.

For an RBL model to be sustainable both over time and when a pilot project is taken to a larger scale, the services must be produced by personnel managed through durable models of training, supervision, and regulation that ensure the consistent delivery of services of adequate quality. The means of funding the production and delivery of services

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19. See, e.g., D. James Greiner et al., *Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 946 (2013).

must be durable, whether the source is public funds, bar subsidy, charity or philanthropy, client fees, or some combination of these.

Sustainability further requires not only maintaining material efficacy, but also creating legitimacy. Stakeholders, who include the public and organized legal profession as well as individual litigants, courts, and funders, must accept and employ the new roles as means of delivering services.

Legitimacy is the shared belief that something is correct, acceptable, and worthy of recognition as such. In social science, legitimacy is often linked with the concept of authority.<sup>20</sup> In the case of RBL programs, acceptance would involve wide acknowledgement that RBLs have the authority to do the specific work that they do.<sup>21</sup> Legitimacy is fundamentally subjective, hinging on the degree to which the participants to a legal matter and other stakeholders believe that a specific means of conducting work is a correct and acceptable way of doing so. Legitimacy may be assessed by surveys or interviews with other participants in the matters targeted for RBL intervention. Legitimacy may also be assessed behaviorally, by observing how participants treat the RBL in observed interactions or by reviewing complaints made to regulators or to court staff about RBLs and comparing them to complaints made about attorneys.

A second requirement for sustainability is perceived value. All key stakeholders must perceive some value in the program. Here, we understand value as the net benefit that results from the comparison of costs and benefits. Typically, three kinds of stakeholders must perceive value: (1) the persons working in the RBL; (2) the litigants using the services provided by the RBL; and (3) the funders of the RBL program. To date, the funder has usually been either a court, a bar association, or a philanthropic organization. Value must be determined separately for each stakeholder role, and all stakeholder roles must perceive positive value for the program to be sustainable.

For the people working in the role, the net benefits must be attractive enough to motivate initial and continuing participation. At a minimum, the economic rewards of working in the role must exceed those provided by alternative uses of that work time, and must also exceed the costs of training and participation enough to be worth the trouble. Not all RBLs are paid roles. Relevant economic benefits may be present benefits (for example, in the form of pay) or anticipated future benefits (for example, in the form of experience that might be valued by

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20. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 31–38 (Guenther Roth & Claus Wittich eds., 1978); see ABBOTT, *supra* note 3.

21. Elizabeth H. Gorman & Rebecca L. Sandefur, “Golden Age,” *Quiescence, and Revival: How the Sociology of Professions Became the Study of Knowledge-Based Work*, 38 *WORK & OCCUPATIONS* 275, 281 (2011).



a future employer or training program). Economic benefits will also often not be the only determining factor, since other characteristics of the role, such as the ability to work part-time or to be self-employed, may be equally important. Some key data to collect for assessment of value for role participants include the amount of revenue collected, the cost of training (both initial and ongoing), and the cost of operating the business.

For litigants, the value proposition balances the perceived cost of alternative service providers, such as lawyers, with the perceived value of the services provided by the RBL. The cost of existing alternative providers, such as attorneys, can be determined from average fee rates charged by role participants for standard types of legal services. The perceived values of the service provided by the RBL is a subjective evaluation that depends on a number of influences including, but not limited to, quality of services that a litigant believes she receives and the litigant's procedural justice experiences. The perception of value is shaped within the context of the actual existing alternatives the litigant faces. In the contexts where these programs operate, the litigant may be making choices between a highly limited range of options: lawyers, the RBL, and no assistance whatsoever. It may not be straightforward to determine what kinds of providers litigants believe are viable sources of assistance for legal matters, as we now know that many potential litigants utilize informal and nonlawyer sources of advice for legal problems.<sup>22</sup>

For funders, the stakeholder must also perceive net benefits for the program to be sustainable. If there is no subsidy of any kind for the program, it is market-based and the usual forces of supply and demand will determine the fate of the program. When programs are subsidized to a significant extent, perceptions of value to funders are critical. Funders of different types are likely to perceive different bundles of costs and benefits.

If the funder is a court or court system, perceived value may include benefits to courts such as reduced clerk time supporting litigants and reduced judge time to dispose of cases. Benefits may also include increased confidence in and support for the courts on the part of the public, such as through litigants' improved experiences of procedural justice.

If the funder is a bar association, it is less clear how perceived net benefit is defined or determined. One challenge to the legitimacy of RBL programs could be a perception that there exists a conflict of interest between helping litigants at lower cost than what lawyers would charge for the same services and protecting the demand for legal services

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22. REBECCA L. SANDEFUR, AM. B. FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (2014).

provided by traditional lawyers. This challenge raises issues of both short-term perception and longer-term material impact. To the extent that the consumer demand served by the RBLs does not reduce demand for legal services provided by lawyers, this may dampen the perception of negative impact on the market for legal services. To the extent that the RBLs' work serves to increase demand for legal services from lawyers—whether by making litigants more knowledgeable about the legal process and utility of lawyers, or by creating relationships of referral between RBLs and the traditional bar—the traditional profession may perceive value because the work of the new role actually results in some additional new business. If the program is seen to reduce demand for traditional legal services from attorneys, then there may be a perceived net cost of the program to the funder's constituency, the bar. This may then make sustainability problematic.

If the funder is a philanthropic organization, the program must be seen as a better investment than alternative uses of the same philanthropic resources. The population of philanthropies has a wide range of interests. Such organizations may be particularly interested in service to specific populations, such as veterans or immigrants, or in supporting programs that are perceived to achieve particular goals, such as preventing homelessness or preserving the stock of low-income housing.

Though often passive stakeholders, members of the public may nonetheless incur potentially significant net costs or benefits. If the RBL program is subsidized by public money generated by the tax dollars of members of the public, and the program proves to be ineffective or unsustainable, then there is a significant opportunity cost, since those funds could be used for other, more effective programs. If the program is both effective and sustainable, it presumably resolves cases in ways that benefit not only the litigants directly, but also society as a whole through a reduction in related costs such as homelessness, petty crime, and perceived improvements in the rule of law. While such social costs can be more difficult to quantify, it is possible to estimate them and they can become sizable in the aggregate.

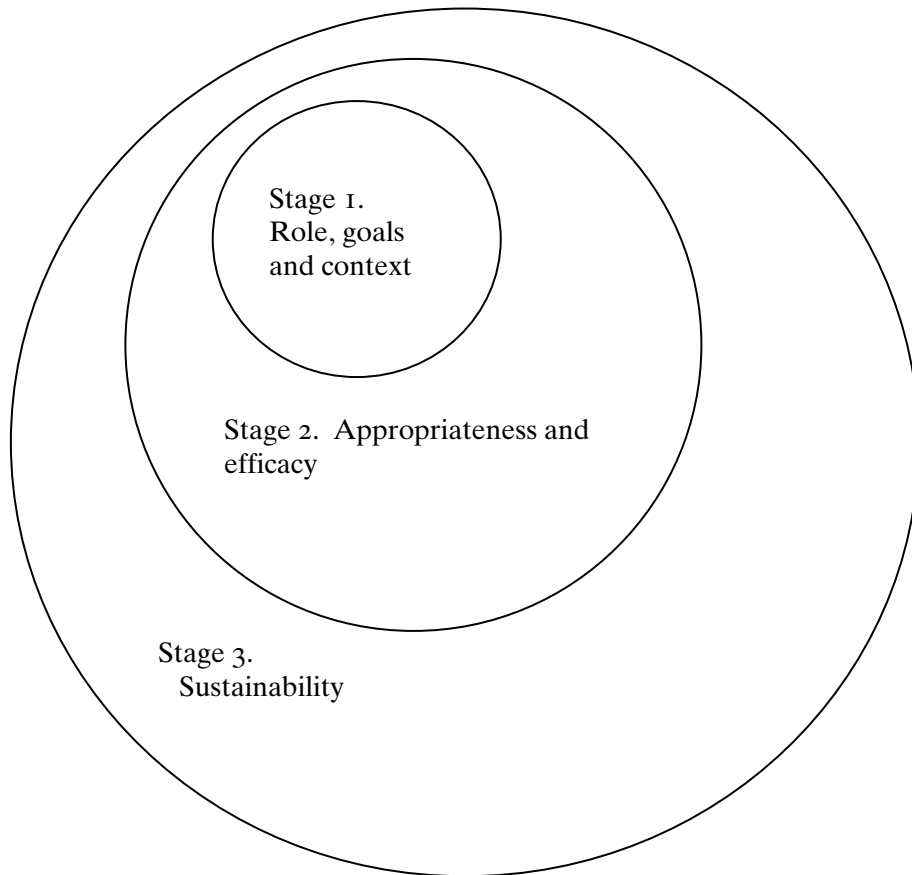
Most of these costs and benefits are unknown at the time new roles and programs are being designed and some may not be knowable until the program has operated for some time. Nevertheless, it is very useful to estimate key costs and benefits as well as possible initially, to get a sense of what the probabilities of success will be. This exercise can help identify program characteristics that may cause a program to become unsustainable or, conversely, be essential to long-run success.

A particularly useful form of this exercise is a kind of sensitivity analysis. Although most RBL programs will start as limited pilot projects, sponsors will want to scale up programs perceived to be

successful in order to satisfy more of the unmet demand for civil legal services. Scaling up programs can reveal program design weaknesses that are not initially apparent. For example, funding subsidies that cannot be maintained or scaled up will limit success. Training strategies that cannot be scaled up at a viable cost will also put programs in jeopardy. Finally, possible shifts in demand for legal services from traditional lawyers to the new role may become large enough to threaten support from the bar. One can imagine other scaling problems, so the exercise can be illuminating.

Evaluation activities are designed in three concentric stages, each of which provides more information and is also likely to be more expensive to complete. Figure 2, below, represents this graphically.

FIGURE 2: CONCENTRIC STAGES OF EVALUATION



### III. ROLES BEYOND LAWYERS PROGRAM DESIGN: KEY CHARACTERISTICS

Many different RBL models could, at least potentially, achieve the dual goals of consumer protection and access to justice through ensuring appropriateness, efficacy, and sustainability. As jurisdictions think about how best to meet the public's needs in the provision of legal services and procedural assistance, the wide range of possible strategies for doing so is arresting. This moment is a time for extensive but responsible experimentation as the legal community explores the possibilities and looks for viable solutions. Given the wide-open nature of the situation and the lack of research-based information on what works, it can be challenging to focus on which types of program characteristics really matter.

All programs for RBLs must balance increased access with consumer protection. In doing so, they must be designed to be appropriate, efficacious, and sustainable. These goals necessarily involve making careful tradeoffs that seek to simultaneously maximize all of the goals—an impossible task. Successful programs will probably use a “satisficing” strategy where each goal is achieved “well enough.” When there is no obvious optimal strategy, program design becomes the context for critical decisions in the absence of clear guidance. Going forward, it will be very helpful to simply be able to classify the programs according to meaningful dimensions, so that effective and successful programs can be described and replicated elsewhere.

One useful strategy is to group possible program design features by program goals. That connects program design directly to program success, making rigorous evaluation easier. Following that strategy, the following program classification features are proposed, discussed below, and associated with major design goals.

#### A. ROLE DEFINITION (RESTRICTED SERVICE VS. NEW LEGAL ROLES)

Role definition can either start with a traditional lawyer’s role and pare it down to create a new role beyond lawyers, or the role can be created from scratch. Some jurisdictions view RBLs as professionals who are authorized to perform a subset of the services traditionally performed by attorneys. This is the model, for example, taken by the Limited License Legal Technician program in Washington State.<sup>23</sup> Programs designed according to this view are therefore directly based on modified versions of bar rules and policies.

A contrasting approach treats RBLs more like nurse practitioners, a new medical role that is defined and used as a unique resource. Just as nurse practitioners were not designed as “limited doctors,” neither are new legal roles understood as limited lawyers. The distinction is key, since it influences a number of other program design decisions. For example, treating the role as new to the system allows program designers to start fresh on training, regulation, and quality control. The essence of this distinction is that the new role is designed from the ground up as a new conception.

#### B. TRAINING

This is another key program design characteristic. The two obvious starting points are paralegal training programs and law schools. One can choose either option or a combination. One can also design a completely

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23. *Limited License Legal Tech Program*, WASH. ST. B. ASS’N, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> (last visited May 29, 2016).

new training program. The possibilities are broad, with implications for all three of the design goals.

C. SERVICE SCOPE (FACTS VS. ADVICE)

The short-hand description of this characteristic is a bit simplistic, but it captures a key decision point about RBLs. Restricting the RBL to assistance around facts (such as forms or processes) makes the role more like an existing paralegal, unless there is no requirement for supervision by a lawyer.<sup>24</sup> Allowing the role to perform some legal services that involve advice, either in or out of the courtroom, requires judgment calls and negotiating skills that are closer to what a lawyer does. Of course, there is a broad and fuzzy area around what constitutes giving advice.

D. PRACTICE LOCATION SCOPE (IN COURT VS. OUT OF COURT)

This program characteristic is related to, but separate from, the ability to explain facts versus giving advice. The features may or may not overlap. Even with RBLs who are designed to provide no in-court assistance, a judge may always call on an RBL who happens to be in the courtroom watching her client's case. One should not underestimate the bond formed by a discussion before a courtroom hearing that can result in better support to the litigant in the hearing, even if direct verbal participation is not allowed.

E. REGULATION STRATEGY (REGULATED VS. UNREGULATED)

To date, most RBL programs have opted for some kind of formal regulation. In theory, one could allow the role to be regulated informally by customer behavior, but that would not directly support the goal of consumer protection. Another informal approach would be for suitable organizations to provide supervisory oversight, either on-site or not, without more formal regulatory machinery.

It is unlikely that states will opt in the near term for totally unregulated strategy, but there are some examples in existence. New firms like Legal Zoom<sup>25</sup> and Rocket Lawyer<sup>26</sup> offer what are essentially legal services and are regulated only by the market. Indeed, this situation is what places the bar in opposition to their operation in many states. There are also some countries that have established similar new roles with little or no formal regulation.

On the other hand, several court navigator programs do operate with relatively informal regulation. Supervisors from the court or legal

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24. See Quality Control discussion *infra* Part III.I.

25. LEGALZOOM, <https://www.legalzoom.com/> (last visited May 29, 2016).

26. ROCKET LAWYER, <https://www.rocketlawyer.com/> (last visited May 29, 2016).

aid non-profits perform training and ensure quality of service and competence.

#### F. ROLE PAYMENT (MARKET VS. VOLUNTEER)

This is a design feature that will clearly distinguish most programs. Some jurisdictions opt for a form of volunteer staffing, using pro bono lawyers, law school interns, or other unpaid staffing resources. This is the model, for example, followed by the Access to Justice Navigators program in New York City.<sup>27</sup> In contrast, other programs establish the RBL as a professional paid role, where the staffers expect to get paid and make a living. This is the model followed by the Limited License Legal Technician program.<sup>28</sup> The medical analogy is roughly between a candy striper and a physician's assistant or a nurse practitioner.

One possible approach that blurs the distinction between payment and nonpayment is the use of salaried staff to perform volunteer work not part of their regular job and also not separately or distinctly reimbursed. A version of this kind of staff use is a current part of some RBL programs, where supervision and coordination of RBLs is an activity added to a court staff member's role without any additional compensation or reduction in other duties.

#### G. ROLE FORMALITY (FORMAL VS. AD HOC)

Formal RBLs come with everything one might expect from that approach: regulation, training, quality control, and many other oversight features. More informal and ad hoc approaches are looser in design. Some navigator programs might function like this. So far, most programs have opted for formality.

#### H. HOST

This characteristic is related to the regulation feature. If regulated, one must decide who will regulate. Some options so far identified include the courts (usually the state supreme court), the courts delegated to the state bar association, and the state department of licensing. The hosting organization need not be the same as the regulating organization (for example, where the court regulates and the bar hosts).

#### I. QUALITY CONTROL

This is a broad area that covers a number of important design characteristics, including supervision of the RBLs, ethics policies,

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27. ACCESS TO JUSTICE: N.Y. STATE COURTS, COURT NAVIGATOR PROGRAM TRAINING (Feb. 10, 2016), [http://courts.state.ny.us/courts/nyc/SSI/Misc/160210\\_CourtNavTraining.pdf](http://courts.state.ny.us/courts/nyc/SSI/Misc/160210_CourtNavTraining.pdf).

28. See Meeker & Utman, *supra* note 7.

conduct processes, and other related features such as certification of training programs. This decision is related to the characteristic of limited practice lawyers versus new roles. If one models after lawyers, then the starting point is how quality control processes operate for the bar. If it is a new role, the quality control processes may be designed from scratch without regard for how it is done for lawyers. If one opts for this latter approach, then the differences between quality control approaches for doctors and nurse practitioners might be instructive.

#### J. MARKETING MODE

For RBL programs to be effective, litigants must have some way of discovering them and be able to use them. Approaches may vary widely. Some programs are found only within the physical courthouse. Others are identified on websites. Yet others may involve traditional advertising in at least a limited form.

#### K. ROLE PERMANENCY (CAREER VS. TEMPORARY)

This decision is related to the ones about formality and use of the market. Creating a career track definitely affects the sustainability of the program for better or for worse. Use of a constant stream of temporary staffers, as with pro bono or intern programs, affects other design decisions like quality control and training.

#### L. FUNDING STRATEGY (SUBSIDY VS. MARKET)

Most programs to date have started with some form of subsidy from the court or the bar. One can imagine a program that is purely market based from the beginning. Nurse practitioners have always operated this way. This strategy would require very careful attention to the business case when designing the program.

Each of these program design decisions is listed below the appropriate program goal below. Note that some program characteristics occur under multiple goals, illustrating the extent to which programs are making tradeoffs among the desired goals. Even from the brief discussions of possible program characteristics above, it is clear that decisions for some program features will tend to naturally group together, since they collectively form a logical and consistent approach to program design. It is not yet clear which subset of the proposed features constitutes this kind of fundamental design choice.

#### M. PROGRAM DESIGN DECISIONS

Table 2 below presents the various program design decisions affiliated with the different program goals. Note that some program features should be evaluated in more than one way.



TABLE 2: PROGRAM DESIGN DECISIONS

Appropriateness	Effectiveness	Sustainability
<ul style="list-style-type: none"> <li>• Role Definition</li> <li>• Service Scope</li> <li>• Practice Location Scope</li> <li>• Regulation Strategy</li> <li>• Host</li> <li>• Quality Control</li> </ul>	<ul style="list-style-type: none"> <li>• Role Definition</li> <li>• Training</li> <li>• Practice Location Scope</li> <li>• Marketing Mode</li> <li>• Role Formality</li> <li>• Host</li> <li>• Quality Control</li> <li>• Role Permanency</li> </ul>	<ul style="list-style-type: none"> <li>• Role Payment</li> <li>• Training</li> <li>• Marketing Mode</li> <li>• Role Formality</li> <li>• Host</li> <li>• Quality Control</li> <li>• Role Permanency</li> <li>• Funding Strategy</li> </ul>

### CONCLUSION

This paper has presented two frameworks for understanding the functioning and impacts of roles beyond lawyers: new roles for individuals who are now authorized to provide certain specific services traditionally supplied only by lawyers.

In the United States today, access to justice is experiencing a renaissance.<sup>29</sup> The developments appear in many arenas. For example, the U.S. Department of Justice now hosts an Access to Justice Initiative, founded in 2010 to “help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.”<sup>30</sup>

The National Science Foundation, a principal federal funder of basic science research, released a “Dear Colleague” letter calling specifically for research proposals investigating fundamental questions in the study of civil justice.<sup>31</sup> The Legal Services Corporation,<sup>32</sup> the central federal funder of civil legal aid for the indigent, has announced a goal of “100% Access”: the provision of “some form of effective assistance to 100[%] of persons otherwise unable to afford an attorney for dealing with essential civil legal needs.”<sup>33</sup> Key to this vision is services provided through a wide

29. Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 102.

30. *Office for Access to Justice*, U.S. DEP’T JUST., <http://www.justice.gov/atj> (last visited May 29, 2016).

31. See Letter from Myron Gutmann, Assistant Dir., Nat’l Sci. Found., to Colleagues on Stimulating Research Related to the Use and Functioning of the Civil Justice System (Mar. 15, 2013) (on file with authors).

32. LEGAL SERVS. CORP., <http://www.lsc.gov/> (last visited May 29, 2016).

33. James J. Sandman, President, Legal Servs. Corp., Rethinking Access to Justice, Address at Hawaii Access to Justice Conference (June 20, 2014) (transcript on file with authors).

range of means in addition to those from traditional full-service attorneys.

These high-level developments are paralleled on the ground. Courts, bar associations, legal aid providers, and law school clinics experiment with new services and models of service delivery. Some of these leverage available information technologies<sup>34</sup> while others employ new ways of using human resources, including the work of nonlawyers.<sup>35</sup> Complementing providers' activity, a new stream of empirical research investigates it, producing basic science as well as knowledge relevant for policy and practice. A growing body of studies includes comparative metrics for justice system performance, such as the World Justice Project<sup>36</sup> and the U.S.-focused Justice Index;<sup>37</sup> randomized controlled trials of the impact of legal information, advice, and advocacy;<sup>38</sup> observational studies of legal services production and delivery both in the United States and in international perspective;<sup>39</sup> and, meta-analysis, or systematic synthesis of research literature.<sup>40</sup> A central element of this movement is the mutually enriching engagement of research and practice. In that spirit, the authors present these preliminary frameworks for understanding established and emerging RBLs.

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34. See, e.g., *Technology Initiative Grant Program*, LEGAL SERVS. CORP., <http://tig.lsc.gov/2013-tig-project-descriptions> (last visited May 29, 2015).

35. See, e.g., Elizabeth Chambliss, *Law School Training for Licensed Legal Technicians? Implications for the Consumer Market*, 65 S.C. L. REV. 579, 592 (2014); Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 613 (2014); Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259, 1271 (2014).

36. Juan Carlos Botero & Alejandro Ponce, *Measuring the Rule of Law*, in THE WORLD JUSTICE PROJECT—WORKING PAPER SERIES (2011).

37. *Findings*, JUST. INDEX, <http://www.justiceindex.org/> (last visited May 29, 2015).

38. 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, 2127 (2012); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Courts: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 422 (2001).

39. See, e.g., MAURITS BARENDRECHT ET AL., HILL INNOVATING JUSTICE, TOWARD BASIC JUSTICE CARE FOR EVERYONE: CHALLENGES AND PROMISING APPROACHES (2012); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006); Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Non-legal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, (2009); Jessica Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453 (2011).

40. Sandefur, *supra* note 11.

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