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# LEGAL SERVICES FOR ALL: IS THE PROFESSION READY?

*Jeanne Charn\**

*For decades, the organized bar has been an unwavering supporter of expanded access to legal assistance for everyone the market cannot serve. The bar shares a fundamental agreement with legal aid providers that only a massive infusion of resources, complemented by an army of pro bono attorneys can solve the access to justice problem in the United States. This two-pronged agenda has not succeeded. The United States continues to rank last among peer nations in access to legal advice and assistance. However, there have been substantial changes in the legal services landscape that point to a more complex and challenging agenda. Resources alone will not solve the access problem. Normative, structural, and institutional changes will be needed to produce a more robust, efficient, and generous delivery system in every state. These reforms will pose substantial challenges for all sectors of the bench and bar, but particularly for the lower trial courts, solo and small-firm practitioners, and attorneys in the staffed legal aid offices who have been at the core of the delivery system in the United States. If the legal profession is willing to grapple with these challenges, reinterpreting and in some instances reformulating both its ideals and its practices, the U.S. legal system may finally be able to assure access for all.*

## I. LEGAL SERVICES AND THE ORGANIZED BAR

For nearly a half century, the American Bar Association (“ABA”) has been steadfast in its support of the federal legal services program for the poor and vigilant in its protection of legal aid lawyers’ ability to represent their clients free from funder or board interference in individual cases.<sup>1</sup> Bar activism played a critical

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1. In the early years of the Office of Economic Opportunity (“OEO”) Legal Services Program, the ABA carefully, but clearly, situated the new program securely within the bar’s ethical structure through a series of formal and informal ethical opinions. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 324 (1970); ABA Comm. on Ethics and Prof’l Responsibility,

role in warding off threats to the federal legal services program during the Reagan administration and in the 1990s when the conservative Republican-led Congress came close to eliminating the program.<sup>2</sup> In addition to strong defense, in years of peril the ABA and many state and local bar associations went on the offensive, ramping up support for private bar pro bono and intensifying efforts to diversify the funding base for legal services for the poor.

Legal aid lawyers and their bar supporters share a fundamental agreement that lack of resources defines the access problem and that only a massive increase in funding, supplemented by an army of pro bono lawyers, will solve it. However, despite decades of intense and sophisticated advocacy, this straightforward, two-pronged agenda—more money and more pro bono—has neither generated the dollars nor increased pro bono sufficiently to substantially expand access. In 2009, the United States continued to rank last among peer nations in government support for legal aid.<sup>3</sup>

Undaunted, leaders of the bench and bar are forging ahead with renewed energy, confident that a significant expansion of civil legal assistance is possible. The bar-generated movement in support of a civil right to counsel, or “civil *Gideon*” exemplifies this energy and confidence. The ABA is on record in support of a civil right to counsel,<sup>4</sup> and many state bar associations have adopted similar resolutions.<sup>5</sup> In 2004 “civil *Gideon*” supporters founded the National

Informal Op. 1232 (1972); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1252 (1972); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

2. ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 29–33, 36–39 (2007).

3. Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83, 91–98 (2000).

4. ABA House of Delegates Resolution 112A (Aug. 7, 2006), <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. On August 7, 2006, the ABA House of Delegates unanimously approved a resolution urging

federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

*Id.*

5. National Coalition for a Civil Right to Counsel, [http://www.civilrighttocounsel.org/advocacy/legal\\_professional\\_involvement/](http://www.civilrighttocounsel.org/advocacy/legal_professional_involvement/) (last visited Apr. 4, 2009); see also Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1093, 1106–12 (2009).

Coalition for a Civil Right to Counsel<sup>6</sup> to coordinate litigation and legislative efforts. To date, there have been only a few court or legislative victories, but momentum has not abated.

The optimism evidenced by such a bold undertaking has a realistic grounding in major changes in the legal services landscape, the scope and implications of which we are just beginning to understand. These changes are not the result of top-down policy formulation and implementation. Rather, they have emerged bottom up as local actors have responded to the inadequate reach of federal efforts. Often, significant change has occurred as a by-product of strategies aimed at shoring up the core, government-funded legal services offices. Emerging from the new terrain are the outlines of a multi-pronged policy agenda that focuses on results achieved for clients, welcomes a multiplicity of service providers, challenges professional hegemony over service delivery, prioritizes structural changes aimed at achieving a genuine delivery system, and recognizes the need for skillful management to assure efficiency, quality, and smart targeting of resources.

This new, more complex policy agenda reflects continuities, but in many important respects, involves marked departures from past legal services politics and policies. It will challenge core ideals and practices of all sectors of the bench and bar. If the profession is willing to grapple with these challenges and to reinterpret and, in some instances, reformulate both its ideals and its practices, the United States may finally assure effective access to law for all those whom the market cannot serve.

In Part II below, I describe the changes that, taken together, constitute the new legal services landscape. In Part III, I argue that more resources alone will not solve the access problem, and set out an agenda for a more robust, efficient, and generous delivery system. Significant normative, structural, and institutional changes are needed, including but not limited to transparent policymaking and management, targeting of resources, greater accountability of providers to funders and policy makers, routine collection of data on system performance, and a rigorous and dispassionate program of research and assessment that focuses on consumer preferences and

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6. National Coalition for a Civil Right to Counsel, <http://www.civilrighttocounsel.org/> (last visited Apr. 4, 2009). While the private bar and state and local bar associations are important players, academics, legal aid, and public interest lawyers are also members of the coalition.

needs and on the costs and benefits of different approaches to service delivery. In Part IV, I describe the substantial challenges that these reforms will pose for all sectors of the bench and bar, but particularly for the lower trial courts, solo and small-firm practitioners, and attorneys in the staffed legal aid offices who have been at the core of the delivery system in the United States.

## II. THE NEW LEGAL SERVICES LANDSCAPE

The pioneers of the Office of Economic Opportunity (“OEO”) legal services and the founders of the Legal Services Corporation (“LSC”) might not recognize the legal services landscape today.<sup>7</sup> The most important changes that have occurred have (i) fundamentally altered the nature and terms of the access debate; (ii) achieved a significant increase in total resources; (iii) moved policy development and system building from the federal level to the states; (iv) stimulated an explosion of innovation in service delivery in state courts, the private bar, legal aid offices, and a few law school clinics; (v) institutionalized private bar pro bono; and (vi) brought new stakeholders to the table.

These are all positive changes, but they have created a civil legal aid landscape that is infinitely more complex, fragmented, and opaque than it was in 1974 when Congress created LSC. In the following sections, I describe the most prominent of these changes and offer a preliminary assessment of both the challenges and the opportunities they present.

### A. *The Reframed Access Debate*

The political controversy and polarization that have periodically threatened the federal legal services program<sup>8</sup> have waned, allowing space for innovation that avoids old debates and focuses sharply on practical solutions to the access problem. Since the middle of the

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7. An exception was Gary Bellow, who, very early in the OEO years, proposed a long-term agenda arguing for a multi-provider delivery system that would challenge fundamental beliefs and practices of the profession. Gary Bellow, *The Extension of Legal Services to the Poor: New Approaches to the Bar's Responsibility*, in *THE PATH OF THE LAW FROM 1967*, at 115 (Arthur Sutherland ed., 1968).

8. See Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later*, in *THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES* 9 (Francis Regan et al. eds., 1999); John Kilwein, *The Decline of the Legal Services Corporation: "It's Ideological, Stupid!"*, in *THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES* 41 (Francis Regan et al. eds., 1999).

1990s, when the federal LSC survived its greatest existential threat, albeit with onerous restrictions and a slashed budget, congressional support for LSC has been increasingly stable and bipartisan. The conservative Bush administration did not target LSC. In fact, during the Bush years, when Republicans controlled Congress, funding for LSC basic field programs increased.<sup>9</sup> In 2000, the LSC budget for basic field services was \$289 million.<sup>10</sup> By 2007, that budget had, in a period of fiscal challenge for domestic programs, increased to about \$331 million.<sup>11</sup>

In place of previous debates about the relevance of law to social, economic, and political change (central versus marginal and instrumental)<sup>12</sup> and the meaning of professionalism (issue neutral versus politically engaged), a consensus has emerged that individuals need advice and assistance to effectively navigate and secure benefits in an increasingly complex legal environment. Moreover, the access rationale, particularly in contrast to the explicitly redistributionist and social change goals of the 1960s “War on Poverty,”<sup>13</sup> is widely viewed as apolitical, an entailment of the nation’s commitment to equality under law.

While the apolitical nature of service to groups and individuals is debatable,<sup>14</sup> the potential for aggregate impact from strategically

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9. Funds for basic field service go directly to grantees who deliver service to needy clients. In addition, LSC’s budget includes funds for administration, technology initiatives, and LSC’s inspector general. See Legal Servs. Corp., Fiscal Year 2009 Budget Request, <http://www.lsc.gov/pdfs/budgetrequestfy2009.pdf>.

10. LEGAL SERVS. CORP., LSC APPROPRIATIONS FY2000–FY2007, <http://www.lsc.gov/pdfs/LSCAppropriations2000-2007.pdf>. Unless noted in the text, amounts are nominal dollars, not adjusted for inflation.

11. *Id.*

12. See generally James Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

13. Speaking to the National Conference of Bar Presidents, Clinton Bamberger, the first president of the Office of Economic Opportunity Legal Services Program, asserted:

We cannot be content with the creation of systems of rendering free assistance to all the people who need but cannot afford a lawyer’s advice. This program must contribute to the success of the War on Poverty. Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes . . . of poverty, . . . remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition.

Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337, 340 (1980).

14. See Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering* 31 HARV. C.R.-C.L. REV. 297 (1996) [hereinafter Bellow, *Steady Work*]; Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977)

targeted service to similarly situated clients seems to be understood as an appropriate dimension of access. In any case, client service strategies have seldom produced the intense controversy generated by law reform, class actions, legislative advocacy, and similar policy-focused activities of government-funded legal services lawyers.

In the space that has opened up as ideological conflicts have abated, conceptions of the access problem in the United States are beginning to change. This process is further along in peer nations. In England, Wales, Scotland, Canada, and the Scandinavian countries, for example, extensive entitlements to legal assistance have produced fiscal crises that, in turn, have caused both delivery-system restructuring and a rethinking of the normative basis of claims on public funds to guarantee access.<sup>15</sup> As British scholars and researchers Richard Moorhead and Pascoe Pleasence cogently argue,

The idea of equal application of law has a rich pedigree and equal access to justice has been a clarion call for progressive lawyers and legal pressure groups alike. . . . Yet, in spite of this, the 'equal access for all' agenda has come under increasing strain. . . . There are differences between those who advocate minimal rights to ensure some level of access and those who claim equality should be absolute. There are also questions over the utility of rights of access to justice, centred upon the ability of lawyers and legal processes to deliver substantial benefits to the poor. Inequalities are economic, social, and political and the capacity of legal aid programmes to redress them is limited.<sup>16</sup>

In nations that guarantee assistance in a wide range of matters to over 40 percent of their populace, cost escalation has reinforced

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[hereinafter Bellow, *Turning Solutions into Problems*]; Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, in *THE POLITICS OF INFORMAL JUSTICE* 119 (Richard L. Abel ed., 1982); Jeanne Charn, *Preventing Foreclosure: Acting Locally, Investing in Enforcement, Playing for Outcomes*, paper presented at Legal Services Research Centre International Research Conference, Cambridge University (2004) (unpublished manuscript) (on file with author).

15. See John Flood & Avis Whyte, *What's Wrong with Legal Aid? Lessons from Outside the U.K.*, 25 *CIV. JUST. Q.* 80 (2006).

16. Richard Moorhead & Pascoe Pleasence, *Introduction to After Universalism: Re-Engineering Access to Justice*, 30 *J.L. & SOC. (SPECIAL ISSUE)* 1 (2003).

theoretical challenge.<sup>17</sup> Efforts to control rising costs have produced challenges to professional hegemony over service delivery and have given rise to doubts about claims that law and legal services are different in character or of greater significance than entitlements to healthcare, education, or affordable housing. Moorhead and Pleasence offer the following observation by Andrew Sanders in the context of criminal defense services: “Fairness and democracy in criminal justice cannot be pursued unconditionally otherwise there would be insufficient resources to do the same for other public services. The idea that ‘you can’t put a price on justice’ has never been true. We can, we do, and we should.”<sup>18</sup>

If entitlement to criminal defense, with its powerful historical, jurisprudential, and constitutional underpinnings, is simply one among several vitally important domestic priorities in the modern welfare state, access to civil legal assistance has, at best, no greater claim than—and in a thoughtful policy process, might be prioritized below—healthcare, education, housing, or living-wage jobs. It is likely that we have arrived at a point where support for expanded access to civil legal services turns less on appeals to timeless norms and more on credible evidence that legal advice and assistance produce direct, cost-effective benefits in critical areas of social, economic, and personal well-being.

In the United States, normative formulations and rights language are common in what is often termed the access to justice movement. For example, the renewed vigor of the civil right to counsel movement draws on the rich pedigree of the principles of equality under law and equal access to justice to which Moorhead and Pleasence refer. Upon closer examination, it is clear that the rights language is an expression of an aspiration, a measure of commitment to significantly expanding access. It is the beginning, not the end, of the conversation. There is growing recognition that implementation issues cannot be solved by appeals to equality under law. As Laura Abel points out in this volume, recent successful right to counsel efforts have been enacted by legislatures, not mandated by courts.<sup>19</sup> Moreover, she reports that legislatures have been motivated by

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17. *Id.* at 2.

18. *Id.* at 2–3.

19. Abel, *supra* note 5, at 1090–1109.

concerns that, without counsel, matters of great moment might be incorrectly decided.<sup>20</sup> Consistent with this outcome-driven perspective, proposals for implementing a right to counsel are deeply pragmatic and instrumental. Most supporters advocate guaranteed access to appropriate assistance, which might but does not necessarily entail access to attorney services.<sup>21</sup>

The access to justice debate now focuses on realities that, while not always explicit, are nevertheless obvious. Among these realities, three are paramount. First, because legal needs are highly elastic, resources will never be adequate to meet every court, agency, or transactional problem experienced by the poor and middle-income people. While present resources are woefully inadequate and dramatic increases in funding are needed, at some point, resource constraints are unavoidable. Access to legal advice and assistance ought to be understood as one among many important domestic priorities that must, of necessity, compete for an appropriate share of federal, state, and local funds.

Second, because resources will always be relatively constrained, public policies must guide resource targeting and rationing. Only some services will be provided at public expense, and guarantees of service may be available only where the cost of providing the service is proportionate to the benefit the consumer is likely to receive.

Third, resource-targeting decisions should be based on credible evidence of benefits to clients as a result of legal (as compared to other helping) interventions. Therefore, research and independently verifiable data validating a positive impact will be needed to sustain adequate funding levels, periodically reassess and reorder service priorities, and gauge overall system performance.

The federal legal services program, increasingly based on this revised understanding of the nature of the access problem, is secure and likely to grow over time.<sup>22</sup> A federal presence is critical because

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20. Abel, *supra* note 5, at 1110–14.

21. Robert J. Derocher, *Access to Justice: Is Civil Gideon a Piece of the Puzzle?*, B. LEADER, July–Aug. 2008, at 11, 15 (“[M]oney is hard to come by . . . Perhaps there is a way we can provide people access to the courts without using a lawyer.” (quoting Edward McIntyre, Mass. Bar President)).

22. Ironically, the restrictions imposed by conservatives hostile to government-funded lawyers for the poor may have assured a long-term federal role. See, e.g., John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 108–12 (2000). John McKay was president of LSC from 1997 to 2001. Biography of John McKay, U.S. Attorney for the Western District of Washington, <http://www.usdoj.gov/usao/waw/>

federal resources can assure (i) a base level of funding in every state and territory; (ii) identification and dissemination of best practices; (iii) development of a common database and modes of data analysis; (iv) opportunities for economies of scale in purchasing (e.g., hardware, software, and research aids); and (v) development of an independent and rigorous program of research and policy analysis to document consumer preferences and identify the most cost- and outcome-effective approaches to the delivery of legal services.

Among the bench and bar, there is considerable optimism that the new administration, in partnership with the Democratic Congress, will bring energy, vision, leadership, and increased funding. However, it is unlikely that the Obama administration or Congress will, or should, revert to 1960s conceptions of legal aid. While there is both an opportunity and a need to reaffirm the core ideals of access to law and its benefits, the challenge will be to reconsider the federal role in a legal services delivery system that is increasingly state-based and state-funded,<sup>23</sup> and to adapt to new, systemic imperatives. These imperatives will be data-driven, focused pragmatically on services that produce goods for clients, mindful of costs, and vigilant about both quality *and* efficiency in service delivery.

### *B. A Larger, More Diverse Resource Base*

During the years when political opponents threatened to eliminate the federal legal services program,<sup>24</sup> legal services providers and their bar supporters dedicated themselves to diversifying financial support by seeking funds at state and local levels<sup>25</sup> and from federal sources other than LSC.<sup>26</sup> Their skill and diligence produced results, and funding from sources other than LSC has increased dramatically. At the end of the Reagan administration in 1988, non-LSC funding for legal services was approximately \$130

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about/mckay\_bio.html (last visited Apr. 4, 2009). The title of his article evokes rights, but the content of his "new vision" is distinctly eclectic and pragmatic.

23. See *infra* Parts II.B, II.C.

24. Johnson, *supra* note 8, at 21–36.

25. ALAN W. HOUSEMAN, CENTER FOR LAW AND SOCIAL POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007 12 (2007), available at [http://www.clasp.org/publications/civil\\_legal\\_aid\\_2007.pdf](http://www.clasp.org/publications/civil_legal_aid_2007.pdf).

26. For example, federal programs such as the Violence Against Women Act, Older Americans Act, and Americans with Disabilities Act all fund legal services for their targeted populations.

million.<sup>27</sup> By the end of the Clinton administration, it had reached \$337 million,<sup>28</sup> and by 2007, non-LSC funding had ballooned to more than \$753 million,<sup>29</sup> double the LSC budget and about two-thirds of the \$1 billion or so available in 2007 for civil legal assistance for the poor.<sup>30</sup> Although three decades of inflation and budget cuts have eroded the inflation-adjusted value of the 2007 LSC budget to less than half its 1981 high-water mark,<sup>31</sup> non-LSC funding increases have more than offset LSC budget declines and have grown ahead of inflation.<sup>32</sup> While LSC remains the largest single funder of civil legal assistance in the United States,<sup>33</sup> the locus of financial support has shifted decisively to governments and philanthropic sources at the state and local levels.<sup>34</sup>

Total dollars for civil legal assistance in 2007 were at least \$1.09 billion,<sup>35</sup> nearly 30 percent greater in real (inflation-adjusted) dollars than in 1981, the previous high funding point and widely accepted benchmark for comparing more recent funding levels.<sup>36</sup> The \$1.09 billion includes LSC funds, non-LSC federal funds, state and local funds, as well as funding from IOLTA, foundations, private bar

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27. HOUSEMAN, *supra* note 25, at 13.

28. CARMEN SOLOMON-FEARS, CRS REPORT FOR CONGRESS: LEGAL SERVICES CORPORATION: BASIC FACTS AND CURRENT STATUS CRS-6 (2003), available at [https://www.policyarchive.org/bitstream/handle/10207/261/95-178\\_2003519.pdf?sequence=5](https://www.policyarchive.org/bitstream/handle/10207/261/95-178_2003519.pdf?sequence=5).

29. See WILLIAM J. KROUSE, ET AL., CRS REPORT FOR CONGRESS: COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES: FY2008 APPROPRIATIONS CRS-33 (2007), available at <http://www.fas.org/sgp/crs/misc/RL34092.pdf>.

30. HOUSEMAN, *supra* note 25, at 1–2. There are no authoritative figures for non-LSC funding. The ABA Standing Committee on Legal Aid and Indigent Defendants gathers information, but details are not publicly available. American Bar Association, Standing Committee on Legal Aid & Indigent Defendants, <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/resourcedevelopmentmainpage.html> (last visited Apr. 4, 2009). Non-LSC funding includes some federal funds, but the growth in non-LSC funds has been primarily from state legislatures via Interest on Lawyers Trust Accounts (“IOLTA”) and other programs, local government, law firms, and other charitable giving. HOUSEMAN, *supra* note 25, at 2.

31. HOUSEMAN, *supra* note 25, at 12; see also Legal Servs. Corp., LSC’s Budget, LSC Appropriations FY 2000–FY 2007, available at <http://www.lsc.gov/pdfs/LSCAppropriations2000-2007.pdf>. In nominal dollars, the high water mark for total LSC funding was \$400 million in FY 1995. HOUSEMAN, *supra* note 25, at 12. However, taking into account inflation since FY 1981, total LSC dollars in 2007 were worth about half of FY 1981 dollars. *Id.*

32. HOUSEMAN, *supra* note 25, at 11–12.

33. *Id.* at 2.

34. *Id.* at 11–15.

35. *Id.* at 11.

36. *Id.* at 12 (explaining that the inflation-adjusted LSC appropriation in 1981 was \$331 million).

donations, and miscellaneous sources.<sup>37</sup> The total *does not* include the value of pro bono assistance, court-funded assistance centers, or funds for back-up centers such as the National Consumer Law Center or the National Housing Law Center, which were funded by LSC at one time, but are now funded from other sources.<sup>38</sup>

It is difficult to quantify the total value of the resources available for civil legal services, but the value is, conservatively, tens of millions more than the \$1.09 billion figure. The increase in resources has been greater than the growth in the population eligible for legal services—people whose income is at or below 125 percent of the poverty line.<sup>39</sup> The result is that funding per eligible person, nationwide, has actually grown from \$20.42 per capita in 1981 to \$20.98 per capita in 2007, an increase of just under 3 percent.

A much larger and more diverse funding base is an important achievement that will improve delivery-system reach and stability if resources are well coordinated and effectively deployed. It is also a strong indicator that state and local actors place a high value on wider availability of legal advice. However, resource diversity adds complexity that poses many challenges for policy makers, funders and providers. For example, the push to diversify funding has resulted in significant resource disparity among states. In 2009, per capita funding ran a gamut from \$12.21 per eligible person on the low end to an eye-popping \$124.90 per eligible person at the highest end.<sup>40</sup> As a result, states that have been the most successful in fundraising have resources on a par with the most generously funded legal aid programs in the world, while states with the lowest funding levels have lost significant ground, in inflation-adjusted dollars, since 1981.

Adding to the complexity of gauging state-by-state disparities, the costs of providing legal services also vary greatly. In more rural states, where per capita legal services resources tend to be lower, both salaries (or hourly rates) and overhead costs (e.g., office space,

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37. *Id.* at 11.

38. *Id.*

39. Some non-LSC, state, and local programs have higher eligibility limits, though IOLTA-funded programs often have the same eligibility criteria as LSC.

40. ALAN W. HOUSEMAN, NATIONAL REPORT: UNITED STATES, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009 12, <http://www.ilagconference.org/reports/US%20-%20AH.pdf> (last visited Aug. 5, 2009). The data to back up the cost per capita ranges is not addressed in Houseman's report, but his results are consistent with data that is publicly available.

clerical, and administrative costs) are likely to be lower, which would mean that available funds would buy more service than in high-cost areas. In general, too little attention has been paid to developing federal as well as state and local policies to reduce disparities. Such an effort will require much better data, not only on available dollars, but also on diverse markets for law services. Once state-by-state disparities are better understood, policy makers will be in a position not only to incentivize local resource development but also to develop federal policies that take into account the different capacities of states to generate cash resources.

Another challenge rooted in major changes in the legal services funding environment is how little we know about the relationship between increased funding and increases in the number of people assisted. Given the certainty among supporters of wider access that lack of resources lies at the heart of the access problem, this is puzzling. For example, if new funds are targeted towards salary improvement, professional development, or an upgrade in program infrastructure, the pay-off in service increases might not materialize in the short run. Also, costs per case may differ based on the area of substantive law, whether or not a case goes to trial or hearing, or whether in other ways a particular client matter is more complex than the typical case. At present, there is no data relevant to these issues. We do know from data that is routinely collected by LSC that nearly three-quarters of all completed matters involve advice, referral, or limited assistance, leaving about a quarter or fewer matters in which clients receive extended service.

Efforts to expand resources for civil legal assistance will require reliable estimates of the cost of increasing access. The fact that a few states have garnered substantial resources offers an opportunity to better understand the relationship between significant fund infusions and the number of clients served, particularly the number of clients who receive extended service. Studying these states might yield valuable information on this important issue. We may find that more dollars alone do not translate directly into more service. Staffing patterns, skill in managing cases, service protocols, timelines for moving cases, readily available investigative and expert resources, and incentives for both high quality and high productivity may all play an important role in translating new resources into more

service. These issues have received little attention and discussion<sup>41</sup> but must be better understood in order to price full access.

### C. State-Based Delivery Systems

As legal aid providers and their bar supporters began to build an alternative funding base at the state and local levels, states increasingly became the locus for developing legal services policies and service delivery experiments.<sup>42</sup> The National Legal Aid and Defender Association (“NLADA”), which represents the organized legal services field offices, the ABA, and LSC, are all on record in support of state-based delivery systems.<sup>43</sup>

In the 1990s, state courts began to play a more active role in increasing access,<sup>44</sup> which accelerated the movement toward state-based delivery systems. State courts have played a critical role in establishing—usually by court order or rule and with the imprimatur of the chief justice of the state court system—statewide access to justice commissions.<sup>45</sup> These commissions now exist in twenty-nine states, while several more states are in the process of establishing commissions.<sup>46</sup> Some are recent and others have a decade or more of experience. An infrastructure has emerged within the ABA, NLADA, and LSC to support and encourage the development of access to justice commissions.<sup>47</sup> The goals of these commissions are to increase resources, including pro bono, promote statewide planning, and encourage deployment of resources in ways that maximize the service provided.<sup>48</sup>

Building legal services delivery systems at the state level is a positive development. It is unlikely that a one-size-fits-all, federally driven program can meet the needs of all states and regions given

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41. *But see* Jeanne Charn, *Time for a System Wide Quality Agenda*, MGMT. INFO. EXCHANGE J., Summer 2004; Jeanne Charn & Randi Youells, *A Question of Quality*, EQUAL JUST. MAG., Winter 2004, available at <http://ejm.lsc.gov/Winter2004/quality2/htm>.

42. The term “states” includes the fifty states and all U.S. territories.

43. HOUSEMAN, *supra* note 25, at 23–25; HOUSEMAN, *supra* note 40, at 35–36.

44. *See infra* Part II.D.

45. *Id.*

46. Karla Gray & Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions*, 47 No. 3 JUDGES J. 33, 33 (2008).

47. *See* Standing Committee on Pro Bono & Public Service and the Center for Pro Bono, American Bar Association, *Access to Justice Commissions* (Oct. 19, 2006).

48. *Id.*; HOUSEMAN, *supra* note 25, at 23–25; HOUSEMAN, *supra* note 40, at 35–36.

variations in demographics, economics, structure of the bar, status of the substantive law, and other factors that uniquely characterize particular states and regions of the country. A state focus provides the flexibility to adapt to local conditions and will allow states that have gone furthest in mobilizing and coordinating resources to be in a position to pioneer the building of genuine delivery systems. Because states will not proceed in lockstep, those that are more advanced will function as laboratories, not only for innovation but also for the rigorous assessment of differing service approaches and overall system performance.

The challenges are as great as the opportunities for breakthroughs. To date, no state has a genuine delivery system, although in the state of Washington, pioneering efforts to substantially coordinate civil legal services resources have been under way for over a decade. No state commission has authority over all or even most of the resources. While the more effective state commissions are able to bring all players to the table and urge a transparent and cooperative process among the diverse array of providers and funders, building a collaborative and open process is slow going in most states. Providers, particularly the leaders of the salaried legal services offices, often resist relinquishing even marginal autonomy over service priorities and modes of operation. Strong leadership from the bench and bar will be essential to overcome parochial interests, build trust, and improve coordination and planning to assure the most effective use of all resources.

#### *D. Innovations in Service Delivery*

The last fifteen years have seen an explosion of innovation from state courts, the private bar, and legal services providers. The driver of this creativity has been tireless local efforts to find new resources and new approaches to helping people who would otherwise be forced to navigate the legal system alone. Change has been powered by solo practitioners and small firms looking for new ways to attract clients and meet their needs; by legal aid lawyers, swamped with requests for help, experimenting with new ways to offer at least some assistance; and by lower trial court judges and administrators, overwhelmed by parties without lawyers, finding ways to assist rather than discourage self-represented litigants. In all of these

efforts, it is difficult to overstate the role that technology has played and will continue to play in spurring innovation.<sup>49</sup>

Of crucial importance, the bench and bar have been willing to accommodate changes that are evolving on the ground by modifying the profession's normative structures.<sup>50</sup> As the pace of innovation grows, the bench and bar will continue to be challenged to re-examine core norms and practices and to make more dramatic changes.

### 1. Private Bar Innovations

The solo and small-firm bar is the main legal resource for middle-income people and serves two to three times more poor people than the not-for-profit, government-funded legal services offices.<sup>51</sup> Forty years ago, resistance and even hostility to government-funded legal aid was the norm in this sector of the bar.<sup>52</sup> In the intervening years, experience has persuaded most solo and small-firm lawyers that legal aid does not draw from their client base. Rather it helps those whom the market cannot serve. As a result, not only has resistance declined, but many solo and small-firm lawyers are now strong supporters of subsidized legal services.

These lawyers practice in challenging, highly competitive markets.<sup>53</sup> Their efficiency and effectiveness in meeting the needs of low- and middle-income clients is critically important to the access agenda because subsidies are not needed when the market can provide good quality, affordable service. Fortunately, service innovations that attract new clients, increase client choice, and control costs are flourishing. Examples include a lawyer who offers "will parties" modeled after Tupperware parties, with price per

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49. See generally Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117 (2009).

50. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 6.5 (2002). ABA Model Rule 6.5 was added to relax the rule requiring checks for conflicts of interest for attorneys volunteering for court-annexed or not-for-profit brief advice programs. See *id.* cmt. 1.

51. See ROY W. REESE ET AL., LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (ABA 1994).

52. EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974).

53. See generally CAROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS (1996).

simple will decreasing as attendees increase.<sup>54</sup> A solo practitioner in North Carolina operates a virtual law office.<sup>55</sup> She provides mainly transactional services to households and small businesses entirely online.<sup>56</sup> The Legal Grind advertises “coffee, counsel & community” on its Web site.<sup>57</sup> Customers can enjoy premium coffee or tea along with legal advice du jour.<sup>58</sup> Lawyers with expertise in over twenty areas of personal legal services and more than ten areas of interest to small businesses are available at scheduled hours at the coffee shop.<sup>59</sup> Legal Grind operates as a licensed lawyer referral service, and its founders are considering franchising the concept.<sup>60</sup>

More broad-based changes are under way as well. Discrete task representation, also known as “unbundled legal services,” has gained a great deal of attention, including attention in bar ethics opinions, where the trend is clearly in the direction of acceptance and accommodation. Discrete task representation breaks down lawyer services into tasks that a client can purchase à la carte.<sup>61</sup> Services may be provided at a fixed price or at hourly rates. This flexibility gives clients a great deal of control over costs and greater knowledge about what they are purchasing. Both attorneys and clients report high satisfaction with services provided on these terms.<sup>62</sup>

Collaborative lawyers seek to save clients money and emotional turmoil by offering clients the opportunity to commit up front to solve disputes through negotiation, mediation, or other interest-

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54. Willparties.com, Home-Based Will-Signing Parties, <http://www.willparties.com> (last visited Apr. 4, 2009).

55. Kimbro Legal Services, <https://www.kimbrolaw.com/index.phtml> (last visited Apr. 4, 2009).

56. *Id.*

57. Legal Grind, <http://www.legalgrind.com> (last visited Apr. 4, 2009).

58. *Id.*

59. *Id.*

60. Bob Pool, *Coffee and a Living Will Please; Law: Bar Association Will Honor the Legal Grind Coffeehouse for Its Novel Approach to Offering Legal Advice with a Cup of Java*, L.A. TIMES, Feb. 17, 2001, at B5.

61. FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERY LEGAL SERVICES À LA CARTE (2000). Lawyers have always tailored service to what clients can afford. Unbundled legal service is distinct in its explicit à la carte pricing specified in contracts with clients. *See id.* at 4.

62. *See* SelfHelpSupport.org, <http://www.selfhelpsupport.org> (last visited Apr. 4, 2009). The Web site requires registration, at no cost, but is widely available to practitioners, academics, and researchers.

based, non-adversarial means.<sup>63</sup> Clients who choose collaborative lawyers typically agree that litigation is off the table and that if they are unable to reach a resolution, the collaborative lawyer cannot represent either party in subsequent litigation. Family law disputes are particularly amenable to collaborative lawyering, but firms are experimenting with the approach in employment cases and some transactional matters. The ABA supports collaborative lawyering and has addressed its particular features in light of its model ethics rules.<sup>64</sup>

The ABA Standing Committee on Delivery of Legal Services focuses on private bar innovations that serve low- and middle-income people.<sup>65</sup> The Committee has posted on its Web site an intriguing catalogue of innovative and niche practices, as well as guides, reports, and best practices for hotlines, self-help services, and many other novel approaches to providing legal advice and assistance.<sup>66</sup> The Committee's annual Louis M. Brown Award for Legal Access honors the most creative service innovations.<sup>67</sup> The honorees described on the Committee's Web site<sup>68</sup> are indicative of the breadth of innovation under way in the private sector.

Innovators are less imbued with traditional modes of providing service and, as a result, are more consumer-friendly and open to services that are less dependent on lawyers, such as unbundled service. Whether by intent or necessity, these innovators challenge professional norms and traditional understandings of what it means to practice law or for a client to "have a lawyer."

It is critical for the private bar to continue to attract consumers and to drive down costs of quality assistance. In a full-access delivery system, the private bar should provide as much service as possible before we turn to publicly subsidized assistance. We should

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63. *E.g.*, Boston Law Collaborative L.L.C., <http://www.bostonlawcollaborative.com/blc/index.html> (last visited Apr. 4, 2009).

64. PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2d ed. 2008).

65. Standing Committee on the Delivery of Legal Services: Latest Developments, <http://www.abanet.org/legalservices/delivery/> (last visited Apr. 4, 2009).

66. *Id.*

67. Standing Committee on the Delivery of Legal Services: Louis M. Brown Award for Legal Access, <http://www.abanet.org/legalservices/delivery/brown.html> (last visited Apr. 4, 2009).

68. *Id.*

take the point at which the market cannot offer good quality, affordable service as the definition of the place where full or partial government subsidies are necessary to assure access.

## 2. Technology as a Driver of Innovation

A full exploration of technology as a driver of innovation requires a book, not a few paragraphs in an article. However, Ronald W. Staudt's article<sup>69</sup> in this volume is a good place to start. He references Richard Susskind's expansive work on the impact of technology on the practice of law.<sup>70</sup> Technology is already playing an important role in assisting self-represented parties. LSC operates a highly successful competitive grant program that incentivizes technology-heavy innovation.<sup>71</sup> The solo and small-firm bar is increasingly incorporating technology that achieves efficiencies and enables service innovations.

The ABA Standing Committee on Delivery of Legal Services has held a series of public hearings, available on the Committee's Web site, on innovative uses of technology in service delivery to low- and middle-income people.<sup>72</sup> Innovators include an array of not-for-profits as well as private bar providers.<sup>73</sup> The projects presented at the hearings include those already in operation, those that are feasible but not yet beyond the testing phase, and ambitious concepts still in the development stage.<sup>74</sup> The range and creativity of the innovations described in these hearings are enormous and point to the unlimited potential of technology to drive down the costs of service, support providers, and offer services directly to consumers.<sup>75</sup>

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69. Staudt, *supra* note 49.

70. See generally RICHARD SUSSKIND, *TRANSFORMING THE LAW: ESSAYS ON TECHNOLOGY, JUSTICE, AND THE LEGAL MARKETPLACE* (Oxford Univ. Press 2000).

71. See Legal Servs. Corp., Technology Initiative Grants Program, <http://tig.lsc.gov/> (last visited Apr. 4, 2009).

72. Delivery of Legal Services Through Technology, <http://www.abanet.org/legalservices/delivery/techhearings.html> (last visited Apr. 4, 2009). Video records of the hearings are available at this Web site.

73. See *id.*

74. *Id.*

75. *Id.*

### 3. Court Innovations

A revolution is under way in state trial courts dealing with housing, consumer, family, and similar everyday problems of low- and middle-income households. These courts have huge volumes of unrepresented litigants. Prior practice was to urge unrepresented parties to “get a lawyer.” In the past decade, however, lower trial courts in state after state have fundamentally altered their processes, staffing, and self-conceptions to facilitate and, in many instances, welcome litigants without lawyers.<sup>76</sup> Courts have developed and funded self-help centers to aid unrepresented parties, hired or recruited pro bono “lawyers of the day” to offer on-site advice to people appearing without counsel, simplified forms and posted them on court Web sites, and changed calendars to better accommodate the schedules of people who work.<sup>77</sup>

In many states, broad-based reforms are now under way to improve access, including reengineering court procedures, maximizing use of technology, and creating a national, bench-led project aimed at preparing judges for effective management of courts in which most litigants do not have conventional full-service legal representation. These remarkable changes in the trial courts’ functioning and self-perception greatly benefit litigants who do not have attorneys. They also benefit clients who are represented. Streamlined forms and procedures reduce complexity and thus the time and cost of legal representation.<sup>78</sup>

As efficient, consumer-friendly, court-based, and court-supported self-help centers expand, they are likely to draw more middle-income users who will opt to self-represent or, more likely, will purchase lawyer assistance on a discrete-task basis. Thus, the private bar’s unbundled legal services innovations will prosper concurrently with court reforms that welcome prepared, self-represented parties.

Court leaders recognize that many clients require more extensive representation, and as a result they have become strong supporters of funding for increased access to expert services and of expanded opportunities for limited lawyer assistance. The courts have also

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76. See SUSSKIND *supra* note 70.

77. *Id.*

78. *Id.*

been eager to evaluate their self-help programs. Some courts have hired outside experts and routinely survey users. To date, user responses have been overwhelmingly positive.<sup>79</sup> In all of these respects, state courts have become important new stakeholders, driving innovation and urging greater coordination among both not-for-profit and private bar providers. Moreover, state courts bring new resources, as well as prestige and credibility to the access to justice agenda.

#### 4. Legal Services Innovations

Many LSC grantees and other not-for-profits have embraced hotlines and other sources of limited assistance. For example, LSC has initiated and sustained a competitive Technology Initiative Grants program that fosters new uses of technology in service delivery.<sup>80</sup> Impressive inventories of service innovations are available on the Web sites of LSC, NLADA, and the ABA Standing Committee on Legal Aid and Indigent Defendants.

The Legal Aid Society of Orange County (“LASOC”) is one of the most innovative providers of legal services in the country.<sup>81</sup> The program’s Web site identifies an array of services that include “a hotline intake system, self-help clinics, workshops, on-line court forms,” and in-depth representation.<sup>82</sup> Client eligibility is determined via the program hotline, the main access point for those seeking help. In addition, the program offers services that do not require eligibility screening, including a “Small Claims Advisory Program, Legal Resolutions, and LASOC’s Lawyer Referral Service.”<sup>83</sup>

The LASOC has full-time computer programmers on staff to update its highly effective I-CAN! online forms and Earned Income Tax Credit (“EITC”) electronic filing software that allows users anywhere in the country to file for the EITC while at the same time

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79. John Greacen, Framing the Issues for the Summit on the Future of Self-Represented Litigation (2005) (unpublished manuscript) (on file with author).

80. See Legal Servs. Corp., Technology Initiative Grants Program, <http://tig.lsc.gov/> (last visited Apr. 4, 2009).

81. Legal Aid Society of Orange County, <http://www.lasoc.com/> (last visited Apr. 4, 2009).

82. *Id.*

83. *Id.*

filing their state and federal income tax returns.<sup>84</sup> LASOC innovations are disseminated by LSC and have been adopted by many legal services providers.

The pace of service delivery innovation is accelerating in the United States. In contrast to the best-funded programs in the world where policy makers and funders are pushing new approaches out to service providers,<sup>85</sup> in the United States, the private bar, the courts, staffed legal aid offices, and a few law school clinics<sup>86</sup> are driving change. The relative scarcity of resources in the United States is one factor that compels providers to innovate. Of greater significance, the multiplicity of funders has produced a policy, research, and planning vacuum. Many providers have stepped into this void and done their best in light of their immediate circumstances. While local creativity is a boon, in the absence of effective systemic coordination at both the state and national levels, widespread adoption of promising approaches is slow, rigorous assessment is rare, and programmatic and resource disparities among states are likely to grow.

The challenge for the United States is to continue to support a culture of bottom-up creativity and innovation, and at the same time to develop a capacity to rigorously assess innovation, promote widespread adoption of validated approaches, and provide big-picture guidance.

### *E. Institutionalized Pro Bono*

Private bar pro bono has achieved a strong presence and effective infrastructure over the last two decades. The Pro Bono Institute is the leading coordinator, innovator, and authority on pro bono activities in the country.<sup>87</sup> Pro bono has added substantial service resources and increased large-firm participation in the

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84. *Id.*; see also EITC, <http://www.lasoc.com/ContentDetail.aspx?Id=39&ContentTypeId=1&CategoryId=9> (last visited Apr. 4, 2009).

85. See, e.g., policy and research papers presented at bi-annual International Legal Aid Group conferences, <http://www.ilagconference.org/index.php>; <http://www.ua.ac.be/main.aspx?c=.ILAG2007&n=39301>.

86. See, e.g., The WilmerHale Legal Services Center at Harvard Law School, <http://www.law.harvard.edu/academics/clinical/lsc/>; The East Bay Community Law Center affiliated with Boalt Hall Law School, University of California at Berkeley, <http://www.ebclc.org/index.php>.

87. See Pro Bono Institute, <http://www.probonoinst.org/> (last visited Apr. 4, 2009).

delivery of legal services, thereby deepening its support for the broader access to justice agenda. Solo practitioners and small- and medium-sized firms continue to be pro bono mainstays because the practices of these lawyers overlap significantly with the personal and small-business legal services needs of low- and middle-income consumers. A recent ABA study reports that 73 percent of the free legal services provided by bar members were to people of limited means or to organizations that serve clients of limited means.<sup>88</sup> There is no doubt that pro bono services by American lawyers meet the needs of tens of thousands of clients who would otherwise go without legal advice and assistance.

However, pro bono is a complex phenomenon that is neither cost-free nor well-understood.<sup>89</sup> On the cost side, big- and small-firm lawyers depend on intermediaries to connect clients who need help with lawyers willing to donate their time.<sup>90</sup> The public often pays for this infrastructure.<sup>91</sup> Corporate firms have come to be the face of pro bono, but lawyers from giant corporate firms often have little experience relevant to the needs of low- and middle-income people. They require training, practice guides, and sometimes, supervision by experienced advocates. Again, these needs are often met with public or charitable funds.

In terms of understanding the pro bono phenomenon in the United States, we know something about the rates of attorney participation from periodic surveys and self-reporting,<sup>92</sup> but we know very little about the substantive cases undertaken, completion times, outcomes for clients, and infrastructure costs per case. Also, we often do not deal with the stratified dimensions of pro bono. While corporate lawyers may have become the face of pro bono, the solo and small-firm bar continues to be the major source of pro bono. Each sector faces unique challenges.

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88. THE ABA STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE, SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS (2009), available at <http://www.abanet.org/legalservices/probono/report2.pdf> [hereinafter SUPPORTING JUSTICE II].

89. See Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono* in 12 ACCESS TO JUSTICE: SOCIOLOGY OF CRIME, LAW AND DEVIANCE 145 (Rebecca L. Sandefur ed., 2009); Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 80–81 (2007).

90. See Sandefur, *supra* note 89, at 84–85.

91. See *id.* at 83.

92. Five states mandate reporting of pro bono hours, and eleven states have voluntary reporting systems. HOUSEMAN, *supra* note 25, at 19.

The challenge for the corporate bar is to mesh big-firm interests in pro bono with gaps in service, and for firms to shoulder more of the costs of pro bono. The challenge for the solo and small-firm bar is to find ways to match its directly relevant expertise to consumers whose needs are not reached by the salaried offices. Reduced-fee services, known as “low bono” services, also deserve greater recognition as a valuable contribution to the access agenda. For both corporate firms and the solo and small-firm bar, we must attend to maximizing the service provided by pro bono attorneys. This will require recognizing and harnessing not only the altruism but the self-interest of the private bar.

The ABA study concludes that careful attention to incentives makes a difference in the rates of pro bono participation.<sup>93</sup> For example, continuing legal education credits, training and professional development via pro bono, lawyer choice of cases, employer support for pro bono, and ease of access to appropriate cases are all cited by attorneys as important to their willingness to take on pro bono clients.<sup>94</sup> All of these considerations suggest opportunities to increase private bar pro bono but also point to challenges in maximizing the contribution of pro bono to the access deficit.

#### *F. New Stakeholders*

The access to justice agenda in the United States has enlisted new stakeholders, many of whom bring resources, prestige, and energy. They also bring complexity of needs and interests that strain underdeveloped policymaking and fragmented funding and management at the state and national levels.

The challenge is to maintain a vibrant, self-driven provider sector while developing true delivery systems with evidence-based management that is focused laserlike on maximizing quality and productivity. In Part III, I turn to the challenges of building just such an effective, efficient, and creative legal services delivery system in every state.

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93. SUPPORTING JUSTICE II, *supra* note 88, at 19–20.

94. *Id.*

### III. THE EMERGING MIXED-MODEL DELIVERY SYSTEM: STRUCTURAL AND PRACTICAL CHALLENGES

The U.S. civil legal services landscape today is immensely more complex and varied than the salaried poverty lawyer model that uniquely characterized legal aid in the United States for twenty-five years from its founding in 1965 until the early 1990s.<sup>95</sup> Legal services in the United States today have many providers and funders and multiple approaches to service delivery. We can see in the remarkable changes that have occurred in the past two decades the outline of a more complex, mixed-model delivery system—a system that has the potential to be more flexible, nimble, efficient, and effective.<sup>96</sup>

As I have emphasized above, funders have not mandated the evolution of legal services in the United States from the salaried, poverty lawyer, not-for-profit legal aid model to the emerging complex, mixed-model approach. Change has been driven from the bottom up by the strategic behavior of local actors. The efforts of local actors were not coordinated when they began, but as it became clear that something was happening, loose networks and collaborations emerged. For example, the Self-Represented Litigation Network (“SRLN”) that supports court-based self-help centers operates on a shoestring with one part-time staff person, organizational support from the National Center for State Courts, and working committees that meet by conference call. Nevertheless, the SRLN planned and carried out a two-and-a-half-day event at Harvard Law School in November 2007 focused on judicial education for managing hearings in which one or both parties appeared without counsel.

A similar coalition has grown up supporting state-based legal services delivery systems. A third loose coalition presses the civil

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95. The more generous and better-funded legal aid programs in peer nations have relied on contracts with the private bar—the Judicare approach—as their primary delivery mode. See Tamara Goriely & Alan Paterson, *Introduction to A READER ON RESOURCING CIVIL JUSTICE* 1,1 (Alan Paterson & Tamara Goriely eds., 1996); Alan Paterson, *Financing Legal Services: A Comparative Perspective*, in *A READER ON RESOURCING CIVIL JUSTICE* 237 (Alan Paterson & Tamara Goriely eds., 1996). One or two Canadian provinces opted for the staffed model, but Judicare systems have dominated the government-funded legal aid programs in Europe and in English common law jurisdictions. *Id.* at 253.

96. The United States has developed, de facto, the basic elements of the complex, mixed-model delivery system—multiple providers that legal aid policy makers in England, Scotland, Canada, Scandinavia, and other countries are pursuing.

right to counsel agenda. The Pro Bono Institute and the ABA Standing Committee on Pro Bono and Public Service promote and nurture pro bono. The ABA plays an important role in all of these initiatives under the umbrella of the ABA Division of Legal Services, home to a dozen or so staff members and eleven committees, commissions, and subcommittees, eight of which are permanent ABA standing committees.

The explosion of innovation by the private bar has occurred parallel to, and has cross-pollinated, changes in the not-for-profit legal services sector. The private bar efforts are often closely connected to court-led access depending on local needs, structures, and bar politics and turf issues. Discrete task representation and state court self-help centers have obvious connections and have developed many cross-relationships and synergies.

However, there is no civil legal services delivery system in the United States—in the sense of a coordinated effort—to which clients have easy access and where they can learn about available legal and non-legal options and quickly locate a source of advice and assistance appropriate for their needs. Available services are fragmented and inward looking. Often, there are tensions and sometimes sharp disagreements among providers. While there is a great deal of innovation, dissemination is slow, and widespread adoption depends on the willingness of autonomous providers. There is little critical examination of either new or established service modes, with the exception of court-based programs, some of which have research staff or contract for independent, outside assessment.

The law review literature focuses on the ethics of new service models but seldom on their efficiency or effectiveness in getting results for clients.<sup>97</sup> There is no clear entry point for those seeking help and no menu of the many options and niche practices that are available. Referrals from legal aid offices are often based on out-of-date information resulting in referral fatigue on the part of consumers. We have had a nearly exclusive focus on the very poor at the expense of middle-income people who also cannot afford traditional market-rate lawyer services. We have paid little attention

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97. Notable exceptions are articles in *THE LAW AND SOCIETY REVIEW*, *THE JOURNAL OF EMPIRICAL LEGAL STUDIES*, and *12 ACCESS TO JUSTICE: SOCIOLOGY OF CRIME, LAW AND DEVIANCE* (Rebecca L. Sandefur ed., 2009).

to the private bar as an important provider of access, aside from its pro bono contributions, even though, as mentioned above, solo and small-firm lawyers provide all of the service available to middle-income clients and three or four times more service to the poor than government-funded legal aid offices.<sup>98</sup>

Given these realities, it is obvious that resources alone will not produce a more productive system driven by client preferences and needs. The challenge for the legal profession and for everyone who values broad access to law is to bring multiple stakeholders and funders to the table and knit together the new and the old into a more robust and effective system that is capable of producing convincing evidence of benefit for those who are served, as well as efficiency and cost-effectiveness in service delivery for those who are providing the services. Without better coordination and baseline information as well as a plausible basis for pricing full access, it will not be possible to persuade funders to provide the resources required to achieve it.

As part of our work through the Bellow-Sacks Access to Civil Legal Services Project at Harvard Law School (“Bellow-Sacks Project”), my colleague, Richard Zorza, and I, have published a white paper, *Civil Legal Assistance for All Americans*, (“Bellow-Sacks white paper”) suggesting a basic architecture for the kind of delivery system needed in America in the twenty-first century.<sup>99</sup> The proposal draws on years of investigation and study and three decades of experience at a large Harvard Law School clinical service and learning center in a low-income Boston neighborhood (“Harvard clinical center”). Because the Harvard clinical center has been primarily funded by the law school, staff have had great freedom to experiment with approaches to service delivery and to assist people with incomes at or up to 300 percent of the poverty line.<sup>100</sup>

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98. See REESE ET AL., *supra* note 51.

99. JEANNE CHARN & RICHARD ZORZA, BELLOW-SACKS ACCESS TO LEGAL SERVS. PROJECT, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS (2005), available at <http://www.courtinfo.ca.gov/programs/equalaccess/documents/selfrep07/SystemChange/bellow-sacks.pdf>. The goal of the Bellow-Sacks Project is to investigate the range of service delivery efforts in the United States and to develop and disseminate policy positions relevant to expanding access to civil legal services. The Project has hosted seminars on specific topics and brought together bench and bar leaders to discuss and develop policy positions on any aspect of legal services delivery.

100. See Jeanne Charn, *Service and Learning: Reflections on Three Decades of the Lawyering Process at Harvard Law School*, 10 CLIN. L. REV. 501 (2003). The Harvard clinical center was

The Bellow-Sacks white paper builds on the current legal services environment and proposes a complex, mixed-model delivery system that incorporates and coordinates the full panoply of services and funders that have emerged, encourages further innovation, and incentivizes wide adoption of validated approaches.<sup>101</sup> In what follows, I describe key features of this new legal services delivery system, some of which are already in place, though connective structures are still weak or entirely absent.

In line with “civil *Gideon*” proponents, the Bellow-Sacks white paper would guarantee access to legal advice and assistance, though not always access to an attorney. Legal services delivery systems should be built at the state level, but federal support will continue to be critical to assure access for the poor and to build state infrastructure. As a reformed system approaches scale and offers service to all who need help, dynamics may emerge that would moderate the price tag and improve the effectiveness of a much larger and more generous delivery system.

#### *A. The Scope and Nature of an Access Guarantee*

The time has come to guarantee access to legal advice and assistance to individuals, associations, not-for-profits, and small businesses on matters of importance impacting family, livelihood and assets, housing, education, health, personal safety, and community economic development. Services should be available for both affirmative and defensive claims, for agency practice, and for transactional, planning, outreach, early intervention, and preventive law services.

Access to the most cost-effective advice and assistance appropriate to meet client needs would be guaranteed. This means that for some matters, traditional lawyer service would be the appropriate choice. However, in many instances, information and in-court advice from “lawyers for the day,” unbundled legal assistance, or advice from trained lay specialists would produce excellent results

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co-founded by the author and Harvard Law Professor Gary Bellow. The author directed the Center for twenty-seven years from its founding in 1979 until 2006.

101. The mixed-model approach, advocated by the Bellow-Sacks Project, has been advocated by legal services and bar leaders. See McKay, *supra* note 22; see also James L. Baillie, *The Role of the Private Bar in a Model System for the Delivery of Legal Services*, 26 *HAMLIN J. PUB. L. & POL'Y* 195, 196 (2005).

for clients. For example, a middle-income couple seeking a divorce, with no children and straightforward property division issues, might prefer to have attorneys handle the paperwork and appear in court on preliminary and final hearings. However, subsidized services might be limited to information from a court-based self-help center, access to document software, and a small amount of time for document review and advice by a law student or recently admitted attorney.

As this example illustrates, even when attorney services are needed, clients have choices. “Attorney” is an ambiguous term. For example, a lawyer two months past bar admission may have less skill and knowledge than an experienced lay advocate in social security disability hearings. Well-supervised law students in their third or fourth semester of clinical work may be more proficient than a recent bar admittee with no clinical or similar experience directly representing clients. A highly skilled attorney with ten or fifteen years of experience may be required for novel or complex matters—whether litigation, agency work, or transactional services—but would not be a cost-effective option for matters resolvable within well-established parameters.

A guarantee of the sort we propose will require an examination of cost and quality trade-offs among different modes of service delivery. These assessments must be done with expertise, care, and ultimately, empirical validation. Thus, a reformed legal services delivery system will require independent and objective research similar to the research that is under way in legal services programs in peer nations. An outstanding example is the Legal Services Research Centre affiliated with the Legal Services Commission in England and Wales.<sup>102</sup>

Effective access to legal assistance is a multi-class and multi-income level problem. Therefore, financial eligibility levels for subsidized legal services should be much higher than they are at present. As eligibility limits rise, clients should bear some of the costs of service through a system of co-payments. Higher-income people might need a small subsidy to assure access and would pay 80 or 90 percent of the costs, while lower-income people would have smaller co-payments and larger subsidies. Very poor people might

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102. See Legal Servs, Research Centre, <http://www.lsrc.org.uk/index2.htm> (last visited Apr. 4, 2009).

make nominal contributions or receive assistance entirely free of charge. While there are many possible approaches to defining financial eligibility and co-responsibility for obtaining legal help, a system that guarantees help to those who have incomes up to 125 percent above the poverty line but offers nothing to those whose incomes are at 150 or 200 percent of the poverty line, or even higher—who also cannot afford the legal assistance they need—is neither defensible nor functional.

Finally, because it will not be feasible to subsidize legal assistance for every problem that might be brought to law, a guarantee of assistance should be limited to coverage that is tailored to the public's needs and preferences ascertained through detailed periodic surveys.<sup>103</sup> Coverage should extend to matters likely to protect and enhance household income and assets, assure opportunity to earn a livelihood, develop human capital (education and training), promote stability in family relations, secure stable housing, and aid and protect children. While broad priorities might be set at the federal level, specific priorities are best set at the state level through a process that is transparent and justifies coverage priorities in light of the demographics and socioeconomic characteristics of the population eligible for assistance.

### *B. State-Based and Managed Delivery Systems*

Legal services delivery systems should be built at the state level in response to each state's unique demographic and economic circumstances. As discussed in Part II, the move to state-based and managed delivery systems is already under way. Management functions at the state level should include local needs analysis, the planning, budgeting, training, and prioritizing of service, assurance of a strong technology infrastructure, data collection and analysis, and policy and legislative advocacy. State delivery systems should offer services from a variety of providers, including lawyers at

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103. See, e.g., PASCOE PLEASANCE, *CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE* (2d ed. 2006). U.K. legal services researchers have developed a state-of-the-art periodic survey of the entire British population to identify the incidence of justiciable problems and responses to those problems. The survey is continuous. See *id.* In the United States there is no locus for research detailing the consumer perspective, with the notable exception of the work of Rebecca Sandefur. Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS* 112 (Pascoe Pleasance et al. eds., 2007).

various experience levels, law students, lay advocates, court-based centers, hotlines, the Web, and smart software.

A critical component of a reformed legal aid system is the existence of easily accessible entry points or gateways to legal assistance. Providers would be linked online, and people with legal questions or problems could access the delivery system via the Internet, by telephone, or by dropping in at storefronts conveniently located in community centers, community health centers, or even shopping malls. Entry points should be well branded so that people will recognize and have confidence in the source of information and assistance.<sup>104</sup> The primary functions of the gateways to the system would be to provide simple information to clients, assess their problems, and direct them to the appropriate services.

Full access will require assurance that client needs are met by the most cost-effective service provider consistent with high-quality results.<sup>105</sup> The study of outcome and cost data will aid in matching typical legal needs with the most appropriate service. This will require data, analysis, and research that, though absent in the United States, are considered essential in the more generous entitlement programs in peer nations. State-based delivery systems would collect and analyze data on operations in order to maintain the most advantageous allocation of resources and services, respond quickly to crises and natural disasters, and assure the transparency and legitimacy of the delivery system.

Finally, as discussed above, in addition to its central role in legal services for the poor through LSC, the federal government should aid the process of building the infrastructure needed for a well-coordinated and well-managed delivery system in every state. This might involve taking advantage of economies of scale in purchasing goods and services; disseminating information on cutting-edge technologies; funding pilot programs to develop new modes of service; developing a cadre of excellent management, budget, and similar consultants to aid states as they build their delivery systems; assuming primary responsibility for policy-relevant research including development of data guidelines; developing and implementing survey methodologies to assure sophisticated

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104. CHARN & ZORZA, *supra* note 99.

105. *Id.*

knowledge of the needs and preferences of potential consumers of legal assistance; and assuring that states without the capacity for significant fundraising are able to obtain basic services on a par with states that have greater local fundraising capacities.

### *C. Dynamics of a Diverse-Provider Delivery System*

As each state develops a diverse-provider delivery system, dynamics are likely to emerge that will aid system performance and may lead to decreases in per-unit costs of service. These dynamics play out around a rich continuum of services, simplification of court forms and processes, solo and small firms striving for efficiency, and training, research, and development functions that salaried legal aid offices might undertake.

#### 1. Centralized Assessment and Referral

A fully developed, complex, mixed-model delivery system will have a full continuum of services that runs from simple advice and information to expert lawyer representation in complex or novel matters. A main goal of the system is to match the right level of service to the consumer need at hand, and a measure of its effectiveness is the ability to do so.

The existence of a full continuum of service would allow for prompt rerouting to a more appropriate provider when a client's issue turns out to be more (or less) complex than the original assessment. As data accumulates on what types of services are required to meet needs frequently presented, resources can be reallocated in line with patterns of actual use. Regular surveys of client satisfaction with services provided would also be a basis for ongoing adjustments to the available service mix. Routine monitoring and repositioning of resources will aid in cost-effectiveness by directing funds where they are most needed.

#### 2. Court Simplification

Experience to date suggests that simplification of processes and forms is well under way in courts with the most advanced self-help centers and programs. That is, once a court system turns the corner and begins to affirmatively accommodate self-represented parties, this first-level change drives further change. For example, in many jurisdictions, child-support orders are set by formula for most

households. Once income is verified, the order follows. Changes of this sort reduce the cost of representation and also increase the attractiveness and feasibility of self-representation. Small investments in plain-language forms and materials, coupled with straightforward processes, can lead to a high volume of good quality outcomes at a low cost per case. This frees up legal assistance resources for more complex matters.

### 3. Solo and Small-Firm Efficiencies

A critical component in a mixed-model delivery system is a solo and small-firm bar that is invested in maximizing the use of technology and other approaches to providing better service at lower costs. There will be less need for subsidized service to the extent that the market can produce affordable service. Also, private bar availability on a Judicare basis will be needed to handle unexpected or rapid upturns in demand. Staffing not-for-profit legal aid offices at levels sufficient to meet occasional periods of high demand would waste resources during periods of typical or low demand. Thus, the private bar will play a key role in cost-effective management of demand fluctuations and avoidance of long waitlists in times of overload.

### 4. Salaried Offices as Centers for Research and Training

In addition to core service functions, larger, salaried legal aid offices<sup>106</sup> could become centers for developing and testing innovations that will improve productivity, lower costs per case, and assure high-quality service. This work could involve developing not only new modes of service, but also novel substantive claims that, once established, could be delivered by the private bar.<sup>107</sup> Such a

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106. Large law school clinical service centers are ideal sites for research and training. Clinic staff are expert mentors of novice practitioners, and most law schools are part of universities with large research and scholarship capacities. Clinicians are often expected or encouraged to undertake research and scholarship, though only a few are involved in empirical work relevant to legal services. However, the Association of American Law Schools clinical section's Bellow Scholar program is promoting such work. See *supra* note 86; Charn, *supra* note 100, at 535-40; Jeanne Charn & Jeff Selbin, *Legal Aid, Law School Clinics and the Opportunity for Joint Gain*, MGMT. INFO. EXCHANGE J., Winter 2007, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1126444#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126444#).

107. In the 1980s, the solo and small-firm bar in Boston that litigated childhood lead poisoning cases did not have the resources to tackle novel claims for children with elevated lead levels that fell below the then current medical definition of "poisoning." However, staff at Harvard's Legal Services Center, which was directed by the author from its founding in 1979

research and development role would require transparent operation and receptivity to independent evaluation and research.<sup>108</sup> The information and data gained from such efforts would be critical to the cost-effective operation of delivery systems.

Also, salaried legal aid offices, with state-of-the-art case management and document assembly programs, strong service protocols, and resources to support high-quality practice might also function as lawyer incubators. That is, these legal aid offices can launch trained and competent solo and small-firm practitioners to serve low- and middle-income clients at affordable market rates or on a fully or partially subsidized basis.

#### *D. Dynamics of Scale: Shedding the Culture of Scarcity*

Scarce resources and the experience of existential crises that, though averted, led to periodic drastic funding cuts have produced cautious, risk-averse dynamics within the core, salaried legal services bar. Problems with productivity, quality, and efficiency tend to be explained exclusively in terms of scarcity, although the causes of such difficulties are much more complex.<sup>109</sup> The focus on the lack of resources generates pressure to direct all new funding to old programs, thus reducing the capacity to innovate.

However, as new resources begin to relieve scarcity, new providers are likely to gain full partnership with core, salaried offices. As a well-managed system begins to take shape and service reaches scale (access for all who are eligible and seek help), positive dynamics may emerge that can improve quality at the same or even reduced cost.

### 1. Learning from Consumer Preferences

One critique of a guarantee to access is that lawsuits and costs will increase exponentially. If everyone has a lawyer at little or no

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until 2006, took on development of these claims. The Center's staff identified leading experts, developed pleadings and discovery, and achieved significant settlements in several cases. Once the service protocol had been defined and claims had been validated with outcomes attractive to private lawyers, the Center referred all future cases to the private bar.

108. Charn & Selbin, *supra* note 106.

109. Charn, *supra* note 41; Charn & Youells, *supra* note 41. For a comprehensive discussion of these difficulties, see Bellow, *Turning Solutions into Problems*, *supra* note 14; Jeanne Charn, *Quality Assurance at the Provider Level: Integrating Law Office Approaches with Funder Needs* (Mar. 20, 2002) (unpublished manuscript, presented at the Legal Services Research Centre International Research Conference) (on file with author).

cost, everyone will aggressively litigate most of the time. However, empirical research does not bear out a preference by low- and middle-income people for litigation.<sup>110</sup> When given choices, they often prefer non-legal and informal resolutions and, perhaps too often, take no action at all. They lump it.

Intriguingly, Rebecca Sandefur's research in this volume suggests that if, as is the case in the United Kingdom, a delivery system offers consumers many choices in addition to an entitlement to lawyer services, consumers are both more likely to seek help (and less likely to lump problems) and less likely to seek lawyer services. In the United States, which has no access guarantee, assists fewer than 20 percent of those who seek help,<sup>111</sup> and offers fewer service options, consumers are more likely to lump problems than in the United Kingdom and more likely to turn to lawyers for assistance.<sup>112</sup>

As described in Part II, the United States is generating a lot of innovation in service delivery modes. However, weak management of the resource base at the state level contributes to a patchwork delivery system that may offer many choices in a few areas, very few in others, and nothing to most consumers who seek or need help. As we build stronger state systems, we should offer an array of service choices for consumers and pay close attention to their preferences. Based on the best research to date, we may find that as state after state reaches scale, problems may be solved without an exponential increase in litigation.

## 2. Settlements Are More Likely Than Trials

If access is dramatically expanded in the United States, it is likely that defaults will decline and affirmative claims will increase because people will have access to legal help.<sup>113</sup> However, the rate of trials per claim asserted is unlikely to increase and might decrease.

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110. See PLEASENCE, *supra* note 103; Sandefur, *supra* note 103.

111. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 4 (2007), available at <http://www.lsc.gov/justicegap.pdf>.

112. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 966-72 (2009).

113. Most countries with entitlements to legal assistance screen affirmative claims for merit. The United States might consider a similar approach.

If capable litigators benchmark, state by state,<sup>114</sup> outcomes for various types of claims, the vast majority of cases will settle within the benchmarked range.

Such a process occurred in the housing practice at the Harvard clinical center.<sup>115</sup> Center Attorneys invested heavily in a number of cases that pushed the limits of existing law to achieve good outcomes for tenants and homeowners. They rejected typical settlement offers, tried more cases, and began to achieve improved outcomes that, over time, became the settlement norm. At that point, client cases reverted to the usual pattern of pretrial settlement but within new parameters that were more favorable to tenants and homeowners.

A similar dynamic could emerge in many areas of practice in a full-service delivery system. As scale is reached, consumers armed with advice and limited assistance but backed up by the ability to litigate, if necessary, will be able to negotiate favorable outcomes.<sup>116</sup> Rates of trial per claim asserted should not increase and might decrease as counterparties make strategic adjustments to universal access.

### 3. Prevention and Early Intervention May Reduce Costs

An entitlement to representation will produce confidence in consumers that service will be available when needed. Also, service gateways will offer easy access to information and advice. Information, education, and other outreach efforts may successfully avert many problems, while getting help to people in the early stages of a potential problem spiral may avoid more extensive and costly crisis intervention at a later time. Widely and easily available information and advice can also provide early warnings of market or systemic problems. For example, if advocates had been available to low- and middle-income homeowners in the past decade, bad loan products might have been revealed earlier, rejected by consumers, and reported to regulators, thus curtailing seller-side excesses before they resulted in systemic abuses.

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114. State law governs many areas relevant to the everyday legal needs of low- and middle-income people (landlord and tenant, family, many consumer issues), so benchmarking must be done state by state.

115. Charn, *supra* note 14.

116. See *supra* note 14 for examples of efforts to achieve second-order effects from litigation (i.e., benefits for people not directly represented). See also Bellow, *Steady Work*, *supra* note 14.

#### 4. Technology Drives Costs Down

Technology will play a major role in preventive and early-intervention services. In some instances, technology can drive the costs of marginal use to nearly zero and so provide access at minimal or no cost. Legal information and simple forms, with instructions for completion, are already widely available online. Many technology-heavy services can be offered to the public without incurring the costs of eligibility determination.

While information and other online resources should be targeted to low- and middle-income consumers, higher-income people might also benefit from these services. Thus, a side benefit of making technology-based services widely available could be a broadening of interest in and support for public investments in access to justice.

#### 5. Front-Loading Services May Improve Quality and Save Costs

In contrast to low-cost preventive and early intervention strategies, some matters may benefit from front-loading intensive services. For example, there is evidence from studies in other countries that early, full-resource investment in complex family matters (e.g., cases involving violence, at-risk children, alcohol or other substance abuse) led to earlier resolutions and greater compliance. Better results were produced at lower costs in comparison to similar cases where legal assistance increased as crises escalated.<sup>117</sup>

A full-service delivery system with effective data analysis and outcome monitoring would be likely to identify areas where front-loaded services could improve both outcome quality and cost-effectiveness.

#### 6. Client Co-Payments Increase Resources

Co-payments from clients bring resources that are not subject to legislative fluctuations. At Harvard's clinical center, income from modest client co-payments and routine assertion of statutory attorneys' fees claims against opposing parties generated 10 to 15

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117. Rosemary Hunter, *Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law*, 30 J.L. & Soc'y 156, 163-76 (2003).

percent of the program's annual resources.<sup>118</sup> LSC grantees are presently restricted from seeking attorneys' fees even when authorized by statute,<sup>119</sup> but this policy should be reconsidered. In a much larger system that serves many more people, it is conceivable that consumer co-payments and cost reimbursements might account for 10 to 20 percent of program resources.

#### IV. CAN THE LEGAL PROFESSION MEET THE CHALLENGES?

The organized bench and bar's long-standing commitment to the goal of universal access is unlikely to be realized absent a cost-effective, well-managed, state-based, mixed-model system of the sort described in Part III. That model will challenge the core values and practices of the bar in three main areas: its identity and guild interests, its ethical ideals and norms, and its pursuit of autonomy and independence. Below, I outline the nature of these challenges and gauge the bar's likely response.

##### *A. The Bench and Bar's Guild and Identity Interests*

All sectors of the bar will experience tensions between their guild interests and their commitment to assuring practical and effective universal access. The solo and small-firm bar will be challenged by new modes of service that decrease and, in some instances, eliminate lawyer involvement. This threatens the bar's interest in maintaining its monopoly and sources of revenue. However, in a full-service system, the solo and small-firm bar will be offered new opportunities—referral of clients whose needs match their expertise and Judicare contracts to serve fully or partially subsidized clients. These lawyers may find that, in a reformed legal aid system, they spend less time getting clients and more time providing income-generating service to clients who need their help.

The corporate bar has embraced pro bono for reasons of professional satisfaction and idealism, but also because it meets

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118. During the author's twenty-seven year tenure as director of Harvard Law School's main clinical center, client co-payments, cost reimbursements, and pursuit of statutorily authorized attorneys' fees resulted in annual six-figure revenues, occasionally exceeding \$200,000.

119. See LAURA ABEL, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, LSC RESTRICTION FACT SHEET #3: THE RESTRICTION BARRING LEGAL SERVICES CORPORATION-FUNDED LAWYERS FROM CLAIMING ATTORNEYS' FEE AWARDS (2003), [http://www.brennan-center.org/content/resource/lsc\\_restriction\\_fact\\_sheet\\_3\\_the\\_restriction\\_barring\\_legal\\_services\\_corpora/](http://www.brennan-center.org/content/resource/lsc_restriction_fact_sheet_3_the_restriction_barring_legal_services_corpora/).

many firm needs such as training, recruitment and retention, positive public relations, and use of slack time in various departments.<sup>120</sup> However, a full-access delivery system will challenge big firms to take on cases based more on delivery system needs and less on the preferences of firm attorneys. Firms should also absorb most of the infrastructure costs of training their lawyers for pro bono work and linking them to pro bono clients.<sup>121</sup>

The legal services bar will be asked to cede some autonomy in case selection and modes of service, to accept new providers as co-equal partners, and to redefine their distinct contributions to the larger delivery system. Like the solo and small-firm bar, salaried legal aid lawyers should focus on matters that require their extensive professional training and expertise, and leave to lay advocates, and self-help and limited-assistance centers all matters that these service resources can handle appropriately.

Traditionally, courts have been passive, depending on lawyers to frame issues and move cases. Courts have viewed judges' time as their most precious resource and protected it at the expense of attorney and client time. As courts have become more proactive in the face of many parties appearing without representation, judges, clerks, and court administrators have had to redefine their roles and identities. They have begun to attend to the time constraints of litigants and their representatives. Many courts are successfully meeting this challenge by simplifying procedures, forms, and language wherever appropriate and, in the process, ceding some of the mystique of the black-robed judge on the high bench. Some courts have gone so far as to break with conventional norms of adversariness by endorsing discrete task representation and collaborative, problem-solving lawyering.

The bench and bar have struggled and will continue to struggle when their guild interests collide with the profession's aspirations and ideals. Tensions and, in some instances, resistance will no doubt continue as the pace of change accelerates. But I have great

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120. See Sandefur, *supra* note 89.

121. Because firms benefit in widely publicized rankings (e.g., in AMERICAN LAWYER) based in part on pro bono hours, firms seek to maximize pro bono and tend to look for cases based on associates' and partners' preferences. The result is a sampling approach that requires maximum infrastructure support as compared to a specialization or focused strategy where the firm can develop and maintain expertise.

confidence that the bench and bar will, as they have to date, adapt and continue to lead efforts to create a legal services delivery system that truly serves all Americans.

*B. The Bench and Bar's Ethical Ideals and Norms*

A mixed-model delivery system will require reevaluation and reformulation of some of the profession's formal ethical norms and ideals. This review and revision is under way, and although some jurisdictions have resisted change, the trend is clearly in the direction of careful modifications of ethical norms and procedural rules, and standardization of pleadings and other documents.

I do not address the complexity of the issues debated or the details of the growing number of ethics rules and opinions relevant to the expansion of access. There is an ample literature in law reviews, in bar journals, and on ABA and state bar Web sites. I do, however, offer some examples of revisions that have occurred to date.

The ABA has modified its Model Rules of Professional Conduct to relax traditional conflict norms and procedures for attorneys participating in court-annexed or not-for-profit hotline services and brief assistance.<sup>122</sup> Many states have issued opinions or adopted rules that directly address the ethical issues raised by discrete task representation. While some ethics opinions and rules are more restrictive, many support private bar provision of unbundled legal services.<sup>123</sup> The New York City Bar recently issued a formal ethics opinion encouraging affirmative communication by an attorney dealing with an unrepresented opposing party.<sup>124</sup> Even though the unrepresented party's interests are adverse to the interests of the attorney's client, the attorney may not only urge consultation with an attorney, but also may inform the unrepresented opposing party of

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122. See MODEL RULES OF PROF'L CONDUCT R. 6.5 (2009) (adopted in substance by many states).

123. See *id.* R. 1.2(c) & cmts. 6 & 7 (2009) (generally accepting limited representation). Additionally, SelfHelp.org hosts an archive of articles and news identifying hundreds of bench and bar ethical rules, opinions, and programs supporting innovative services for low- and middle-income clients. See SelfHelpSupport.org, <http://www.selfhelpsupport.org/news/archive> (last visited Apr. 4, 2009).

124. Ethical Duties Concerning Self-Represented Persons, The Ass'n of the Bar of the City of N.Y.: Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-2 (2009), <http://www.abcny.org/Ethics/eth2009-2.htm>.

particular issues on which to seek advice and of specific self-help resources that may be available.<sup>125</sup>

Lively debate will continue, and there will be sharp disagreements on particular issues, but the bench and bar have demonstrated an impressive capacity to deliberately and thoughtfully adapt the profession's normative structures and rules in order to facilitate new approaches to expanding access.

### *C. Professional Autonomy and Independence*

The critical need for data and information, research comparing different modes of service, and effective management of providers and the delivery system as a whole will result in unprecedented scrutiny of legal aid offices, pro bono providers, and the solo and small-firm lawyers who provide market rate and "low bono" service. Scrutiny will include case-handling practices, case-taking criteria, outcomes for clients, and routine surveys of client satisfaction.

All lawyers jealously guard their autonomy and independence. Therefore, challenges to these core values will be the most difficult for the bar to meet. A highly regarded practicing attorney and ethicist, writing in the context of the early-1990s' debates on multi-disciplinary practice ("MDP"), passionately asserted the fundamental value and necessity of the bar's autonomy and independence as follows:

In the rush for lawyers to become part of the great MDP movement . . . we have forgotten entirely what it means to be a lawyer.

We are not just another set of service providers . . . .  
We are not just another kiosk at a one-stop shopping center for financial services.

We are officers of the court. . . .

We have responsibilities to improve the civil justice system, to seek improvements in the law, to provide pro bono service to those who cannot afford lawyers, to race to the defense of judges, to enhance the organized bar, to be responsible citizens of our communities.

*Indeed, we are a priesthood.*<sup>126</sup>

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125. *Id.*

It will be difficult for the many judges and lawyers who share this lofty view to hold themselves accountable to managers—some of whom may not be lawyers—for their productivity, their case-handling choices, and the outcomes they achieve for their clients. A high priesthood is not managed or subject to metrics that purport to gauge quality and productivity.

I find these views inconsistent with the reality of the everyday legal troubles experienced by ordinary people, community enterprises, and small businesses. My experience over nearly forty years as a lawyer serving low- and middle-income clients, and as director of a law school clinical center with as many as twenty professionals and sixty or more law student interns, leads me to a different conclusion. In the increasingly complex world of twenty-first-century law practice, I have found qualitative and quantitative studies of the areas in which I have worked not only possible, but essential to achieving efficiency, productivity, and consistently high-quality work for clients. I have found that many professionals find it exciting as well as efficacious to practice with relentless self-scrutiny, always looking for ways to serve clients better and more cost-effectively. To the extent that advocates for low- and middle-income people seek aggregate impact beyond—and through—the clients they immediately serve, I have found it essential to engage in forthright, rigorous, and objective assessments of the extent to which we are achieving these goals. Socio-legal studies elucidate the complex interweaving of legal norms and processes with the social, economic, and personal context in which our clients' problems arise. These studies make explicit what fully engaged practitioners know—or think they know—about how and what they accomplish through their practice.<sup>127</sup>

In this sense, the unprecedented scrutiny that I believe is essential to building and maintaining a first-rate, full-access legal services delivery system need not evoke images of bureaucratic rigidity or “bean counting.” Goals should be results-driven; assessments can have strong collegial and peer dimensions and be

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126. Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1103–04 (2000) (emphasis added).

127. David Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in EVERYDAY PRACTICE AND TROUBLE CASES 60, 68–69 (Austin Sarat ed., 1998).

rigorous and objective. Core professional ideals include an abiding commitment to clear-eyed self-scrutiny, continuous learning, and frank exchange. It is these features of professional culture, after all, that justify the autonomy and independence the public accords to our profession. Viewed in this way, institutionalized scrutiny should be welcomed, not resisted.

In imagining the policy makers, managers, and providers who would constitute a legal services system that would smartly, efficiently, and empathically reach all those who not only cannot afford but have little confidence in legal help, I would paraphrase a thoughtful political commentator's aspirations for the Obama administration:

Walking into the [Legal Services Policy Center] of my dreams will be like walking into the Gates Foundation. The people there will be ostentatiously pragmatic and data-driven. They'll hunt good ideas like venture capitalists.

They'll have no faith in all-powerful bureaucrats issuing edicts from the center. Instead, they'll use that language of decentralized networks, bottom-up reform, and scalable innovation [to advance policies that empower these networks].<sup>128</sup>

I find this aspiration both incredibly appealing and consistent with the highest professional ideals. Genuine autonomy and independence are essential in a system in which accountability is internalized at all levels and program leaders and policy makers assume that good ideas and innovation will flow from the bottom up more often than from the top down. This vision may conflict with a more individualistic understanding of professional autonomy and independence. However, the reality is that most lawyers are partners in or employees of organizations consisting of many lawyers, and solo practice is both less viable and less enjoyable in the absence of loose networks of colleagues with similar or complementary expertise.

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128. David Brooks, *Change I Can Believe In*, N.Y. TIMES, Nov. 7, 2008, at A35 ("Walking into the Obama White House of my dreams will be like walking into the Gates Foundation. The people there will be ostentatiously pragmatic and data-driven. They'll hunt good ideas like venture capitalists. They'll have no faith in all-powerful bureaucrats issuing edicts from the center. Instead, they'll use that language of decentralized networks, bottom-up reform and scalable innovation.").

Achieving universal access to law will require that all sectors of the bar collaborate within a system of interconnections and relationships that will have strong dimensions of top-down accountability and scrutiny. However, the success of the effort will depend on the judgment, ideas, and creativity of self-actuating providers who understand themselves to be empowered to experiment, invent, and push their best ideas upward and outward into the larger delivery system.

It is my hope that the profession is ready and willing to meet this challenge. Whatever the debate and uncertainty that progress will inevitably entail, it is my belief that the profession will continue to lead and will succeed in achieving effective access to civil legal services for all Americans.

