Designing Just Solutions at Scale: Lawyerless Legal Services and Evidence-Based Regulation

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ABSTRACT: Around the world, billions of people lack access to justice, often because they cannot access help in resolving their justice issues. An important reason for this is that many access models rely centrally on lawyers, and such models simply cannot scale. Some jurisdictions allow lawyerless legal services. We offer a new framework for understanding lawyerless legal services that breaks away from lawyer-centric logic. Inspired by experiments in reregulating the practice of law in the United States, we propose a paradigm shift: just solutions. A just solutions framework has two distinct characteristics: it is evidence-based and it is outcome-focused. We draw on experience from other lawyerless models to imagine what a just solutions framework could look like in practice, including a growing body of evidence on legal needs and effective services, as well as scalable funding innovations. Freed from the lawyer-centric paradigm, a just solutions framework is closer to people's actual needs and, unlike the lawyer-centric model, has the potential to scale to meet them.

KEYWORDS: Legal services; access to justice; unbundling; regulatory reform; evidence-based policy and practice.

INTRODUCTION

Around the world, jurisdictions differ in what activities are reserved to lawyers, with some giving lawyers control over most of the practice of law and others reserving only rights of appearance (TERRY, 2013). In the United States, most of the practice of law is reserved to licensed lawyers. This means that, with a few exceptions, only lawyers can give legal advice,

only lawyers can substantively assist people in filling out legal forms, and only lawyers can advocate in many formal hearings.

Many U.S. states now permit lawyers to offer what are termed "unbundled" or "limited scope" legal services (MOSTEN, 2001). In these service arrangements, lawyers contract with clients to offer piecemeal representation. For example, a lawyer and client might agree that the lawyer will only give the client legal advice but will not provide other legal services, such as drafting and filing legal documents. Or a lawyer and client might agree that the lawyer will help the client to file a document or prepare for a negotiation but will not represent the client in court. As an access to justice solution, unbundling is lawyer-centric but accepts that at least for certain types of activities, something less than full representation can serve the needs of the public.

Building on this logic, a number of U.S. states are also experimenting with licensing paralegals to engage in the limited independent practice of law, restricting the specific activities in which they can participate, the forums (if any) in which they can appear, and the areas of law in which they can work (*e.g.*, DUPONT, 2018). Similar to the regulation of lawyers, most of the work of regulating legal services delivery by these new kinds of providers occurs on the front end, in the form of licensing requirements such as formal educational credentials, examinations, and character and fitness reviews (RHODE, 2018). Independent paralegal programs are typically designed to replicate the training, credentialing, and oversight of lawyers, but limit what these workers can do. These formal paralegal models are also lawyer-centric, but accept that at least for certain types of activities, something less than a fully licensed lawyer can serve the needs of the public. So far, in the US context neither unbundled legal services from lawyers nor legal services from independent paralegals have been successful at scaling to meet the needs of the people, who experience an estimated 100 to 150 million new civil justice problems each year (SANDEFUR; TEUFEL, 2021).

Very recently, North American legal services regulators have been experimenting with models that stand the lawyer-centric model on its head. These regulatory schemes permit a much greater variety in how and by whom or what legal services can be delivered than is possible in the lawyer-centric paradigm, because they are outcome-based, focused on the results of legal services rather than the form of their delivery. By centering regulation around *what* is delivered rather than how or by whom, these schemes create space to redesign legal services around the attainment of

specific outcomes, giving service providers tremendous scope to be creative in implementing ways to do so. The predominant existing form of this permissive paradigm is legal services regulatory sandboxes, rare examples of truly evidence-based legal services regulation (CHAMBLISS, 2019). In these sandboxes, providers – who may be entities of many different types, including potentially organizations that involve no lawyers at all – can apply to have selective parts of the traditional lawyer-centric rules relaxed, freeing them to deliver legal services through different kinds of personnel, or even through computer programs. Attainment of regulatory objectives, such as consumer protection or access to justice, is assessed empirically, by measuring the impact of the services themselves. Service providers are not required to look like any specific kind of organization or profession, but rather to create certain specific, measurable results.

This paradigm shift represents a fundamental break from existing orthodoxy. This break allows for the design of what we call "just solutions". Just solutions are evidence-based and outcome-focused. Freed from the lawyer-centric paradigm, a just solutions framework is closer to people's actual needs and, unlike the lawyer-centric models, has the potential to scale to meet them.

UNBUNDLING UNBUNDLING

In the US context, full representation by a licensed lawyer includes a "bundle" of legal services: "(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court". (MOSTEN, 1994). "Unbundling" is the paring off of some of these services to create forms of limited representation. In practice, the most common unbundled services are the spectrum of activities that lead to the provision of competent legal advice and drafting legal documents. Producing these limited legal services might require the provider to engage in research, fact finding, discovery, and other tasks. Unbundled representation, whether in negotiations or in court, is less common, although this varies depending on the area of law and type of legal advocacy required. Much of the scholarly attention to unbundling has explored issues of legal ethics (see, for example, that reviewed in Jennings and Greiner 2012 and Steinberg 2011). Our approach is different. From the perspective of a just solutions framework, the relevant questions about unbundling are 1) is its practice evidence-based; 2) does it lead to just outcomes, and 3) can it scale.

Research suggests that the impact of unbundling on substantive case outcomes, at least in the legal aid context where it has been studied, is uneven. US civil legal aid providers, long faced with starkly inadequate resources to serve the populations eligible for their service, have long engaged in the provision of unbundled legal services, in the hopes of giving more clients at least some kind of assistance with their justice issues (STEINBERG, 2011). Though this practice is widespread, empirical research into it is scarce, as is so often the case with questions about civil justice in the US and most other parts of the world. A study of eviction cases in one Northern California court compared the case outcomes of unrepresented and unassisted tenants to the case outcomes of tenants who received one or both of two types of "unbundled assistance": help drafting a pleading in response to the landlord's demand of eviction for nonpayment of rent, and assistance in negotiating with the landlord before trial. The study found that the unbundled assistance provided "initial access to the justice system... by preventing default judgments and helping... unrepresented [tenants] formulate valid defenses" (STEINBERG, 2011: 457). However, though there were some impacts on process, there was little evidence of effect on outcomes: clients of the unbundled services "did not secure more actual relief... than unassisted [unrepresented] tenants in the same jurisdiction achieved without ever consulting a lawyer" (STEINBERG, 2011: 457). In Massachusetts, a randomized controlled trial study of unbundled assistance, also in eviction cases, compared the experiences of tenants receiving full representation from a legal aid lawyer to those receiving unbundled assistance from the same provider. Clients who were offered full representation were about twice as likely to retain possession of their apartment as those who received limited assistance in the form of information about the eviction process and help completing legal forms. Clients with full representation also received payments or rent waivers worth 6.7 times more than clients of limited, "unbundled" assistance (GREINER; PATTANAYAK; HENNESSY, 2013).

A critical need in civil access to justice are programs and interventions that can significantly scale to meet widespread need. In the US regulatory environment, where for the most part only lawyers can provide legal advice and representation (and nonlawyer legal assistance is in many instances actually criminalized), allowing lawyers to unbundle their services is arguably more scalable than not. However, the lawyer-centricity of unbundling necessarily limits potential scale beyond an already finite pool of lawyers,

which despite nearly quadrupling over the last 50 years, has done little to increase in access to justice (Hadfield and Heine 2016). Unbundling is an example of an access to justice solution that, because of its lawyer-centricity and innate inability to support clients throughout the process, likely fails our tests: it may not lead to just, evidence-based outcomes, and it has not proven its ability to meaningfully scale to address the access to justice crisis.

LAWYERLESS LEGAL SERVICES

While uncommon in the United States, legal services delivery models that do not rely on lawyers providing services are not new, and the research evidence from other jurisdictions indicates clearly that lawyerless legal services can be effective and safe for consumers. The evidence-base also shows that these models have the potential to scale up to serve many more people and problems than has been possible for services designed under the lawyer-centric paradigm.

One body of research explores lawyerless advocacy. In the United States and England, scholars have studied this activity in administrative tribunals of various kinds, such as hearings to adjudicate disputes about social welfare benefits and employment, and in tax and immigration courts. The consistent finding across this research is that specialization and experience, rather than formal legal training, are the critical factors in ensuring effective representation in routine matters that come before these fora (GENN; GENN, 1989; KRITZER, 1998; see, generally, SANDEFUR, 2020).

Another body of research investigates lawyerless legal advice. Advice is provided as a matter of course as part of lawyerless advocacy. In many countries, it is also available as a discrete service from a range of different kinds of providers, either as formally authorized or currently unregulated activity. For example, the United Kingdom has a well-established national network of Citizens Advice offices staffed by trained volunteers who provide advice and information about a range of legal issues of everyday life, including benefits, employment, family, debt, housing, health, and immigration (CITIZENS ADVICE, 2022). England permits in-court advice in the form of people acting as what are called "McKenzie Friends", who can accompany litigants into court to "provide moral support", "take notes", "help with case papers", and "give advice on any aspect of the conduct of the case" (PRACTICE GUIDANCE, 2020).

Lawyerless legal services are also common in other parts of the world. For example, in Ontario, Canada community legal workers have been active since the 1970's, and in 2007 the Law Society of Ontario formally recognized independent paralegals, of whom it currently licenses nearly 10,000. (NAMATI, 2019). In South Africa, community paralegals and community advice offices have been part of the social and political landscape, including the struggle against Apartheid, since at least the 1930s. (See, generally, DUGARD; DRAGE, 2013). Other countries in Africa, Asia, and Europe have both informally recognized paralegals and formally recognized them, often in their legal aid regulations, with varying levels of independence and scope. Research and evidence of the impacts of these efforts is emerging, but still nascent.

The most rigorous assessments of lawyerless legal advice come from England and Wales, and involve expert audit of actual work product. These studies find that specialist advisors can be as effective as, and sometimes more effective than, fully-qualified attorneys in assisting people with their civil justice issues (LEGAL SERVICES CONSUMER PANEL, 2011; MOORHEAD *et al.*, 2001).

While there is strong evidence that lawyerless legal services produce just outcomes, that they are as or more effective than lawyers, and that they have the potential to scale, there is also evidence that overly cumbersome credentialing requirements, largely designed absent evidence of consumer or other harm, create barriers to access and scale. For example, in 2015 the US state of Washington launched a new licensed independent paralegal occupation, regulated, as are lawyers, by the State Bar. Becoming a Limited License Legal Technician (LLLT) required a paralegal degree, two courses in a law school, thousands of hours of supervised practice (not required of Washington attorneys), multiple bar examinations, and the purchase of malpractice insurance (also, ironically, not required of Washington attorneys). A bottleneck in the available required law school courses meant that only a few dozen people could take them each year (CLARKE; SANDEFUR, 2017). Across the entire state, the occupation never had more than 40 incumbents total, and the program was sunset by the state Supreme Court in 2020. Other states have followed Washington's lead in developing similar programs, with similar failure to scale: across the entire United States, with its nearly 330 million people, perhaps 70 *total* such credentialed workers are providing legal services (SANDEFUR; DENNE, 2022). Such a tiny labor force can hardly be making appreciable progress on responding

to America's crisis of civil access to justice. Paraprofessional licensing holds promise in that it presents an opportunity to design legal services to meet the needs of low and moderate-income people in the United States, but it also runs the risk of replicating the same economic and regulatory constraints as lawyer licensing. To truly meet the access to justice gap, regulation designed based on actual evidence about effectiveness and scaling is critical. One manifestation of this type of regulation is legal services regulatory sandboxes.

EVIDENCE-BASED REGULATION

The world's first and, presently, only fully operative legal services regulatory sandbox is in the U.S. state of Utah. Ontario has begun limited operations, while the Canadian provinces of Alberta and British Columbia are still in development. Other jurisdictions considering launching legal services regulatory sandboxes are the U.S. states of California and Michigan. Utah's sandbox is designed to achieve consumer protection while expanding access to justice (THE UTAH WORKING GROUP ON REGULATORY REFORM, 2019). Implemented as the Office of Legal Services Innovation within the Utah Supreme Court, the regulator's work is organized around achieving the principal regulatory objective, "ensur[ing] consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services" (OFFICE OF LEGAL SERVICES INNOVATION, 2021: 3).

In practice, Utah's sandbox works to achieve this objective by assessing applicants' risk of harming consumers and monitoring the impact of admitted entities' work on consumers. The targeted harms are negative outcomes for users of sandbox services: "achiev[ing] an inaccurate or inappropriate legal result", "fail[ing] to exercise legal rights through ignorance or bad advice", and "purchas[ing] an unnecessary or inappropriate legal service" (OFFICE OF LEGAL SERVICES INNOVATION, 2021: 3). Upon application, each entity's risk of exposing consumers to the three harms is assessed, and the entity is classified on a scale from low to high risk to consumers. In practice, the risk classification still relies on proximity to lawyers: as lawyers become less involved in the ownership and control of legal services-producing entities or in the production of legal services, the Office's assessment of potential risk rises (OFFICE OF LEGAL SERVICES INNOVATION, 2021: 7).

The level of potential risk assessed affects the frequency and intensity with which approved entities must submit data on consumer experience to the regulator. Lower risk entities are required to submit fewer facts (*e.g.*, number of services delivered, receipts, consumer complaints) on a quarterly

basis, while higher risk entities must report on a monthly basis and offer more information, including legal and financial outcomes received by clients in the matters served. Higher risk entities, which are currently largely defined by their proximity to lawyers, are also required to subject a selection of work project to review by independent experts employed by the Office for that purpose (OFFICE OF LEGAL SERVICES INNOVATION, 2021: 10-13).

The Office monitors these data and publishes a monthly Activity Report with information about the activities of admitted entities, including an assessment of evidence that each entity's work is causing any of the three consumer harms. The Office works with complaint thresholds that reflect the state of social scientific knowledge about the frequency with which fully-qualified lawyers make material errors in the preparation of legal work. The general finding of this literature is that lawyers produce unacceptable work in around 20-25% of cases reviewed (LEGAL SERVICES CONSUMER PANEL, 2011: Table 7; MOORHEAD *et al.*, 2001; see also SHERR; PATERSON, 2007). The Office has only recently begun to conduct harm audits of higher risk entities' work product, so the most readily available data to assess harm currently come from consumer complaints. So far, across over 20,000 services, the Office has received a total of five complaints related to these harms, all of which have been investigated and the entities involved have been judged to have satisfactorily responded to both the affected consumer and the regulator (OFFICE OF LEGAL SERVICES INNOVATION, 2022: 6).

Outcome-focused models of regulation, such as regulatory sandboxes, offer incredible potential to design and assess the impact of radically new kinds of service delivery on access to justice. While still lawyer-centric in the sense that assumptions of risk are largely made based on the relative involvement of licensed attorneys, unlike unbundling these models of regulation are focused on the substantive results of legal services, just as access to justice is itself a substantive outcome (SANDEFUR, 2019). In principle in a sandbox, the only limit on how legal services may be produced and delivered is the regulator's assessment that a given model of doing so presents too great a risk to consumers to allow it to be tested in an environment that regularly monitors its impacts. In theory, if the evidence collected through the work of regulation shows that lawyer-centricity is not a meaningful indicator of risk to consumers, the regulators' assumptions about risk will evolve. Importantly, even with its lawyer-centric bias, the model does not prevent lawyerless legal services so long as they do not cause consumer harm.

While lawyerless legal services may sound like an unexplored frontier, existing practice in the U.S. and around the world offers insights into what these services could look like under regulatory regimes that are evidence-based and outcome-focused. In many jurisdictions, lawyerless legal services flourish as unregulated activity, while in others carveouts from lawyers' monopoly over the practice of law authorize other kinds of providers to give legal advice and represent people in negotiations and formal legal proceedings.

DESIGNING JUST SOLUTIONS AT SCALE

One of the greatest challenges to imagining more promising futures for access to justice in the United States is the entrenched, monopolistic constraint on alternatives to existing orthodoxy. This makes proposing just, evidence-based solutions that have the potential to scale all the more challenging. It is difficult to study things that cannot exist, and are in many cases criminalized. Even now, the potential for such experimentation is very limited.

However, we do have some basis of evidence that should guide the design of just solutions. First, we know more than ever about people's legal needs and how they experience the law. Extensive survey research, conducted around the world, has documented public experience with civil justice issues and institutions (PLEASENCE, 2016; SANDEFUR, 2015; WORLD JUSTICE PROJECT, 2019). This research shows us that civil legal issues are common and widespread, and that they often fall in core areas of life: housing, livelihood, family, money. People often do not see the legal aspects of their justice issues, thinking of them in other ways, such as problems to be solved. As they work to solve them, people reach to a range of sources, including religious leaders, community organizations, co-workers, neighbors, and family and friends. Empowering those who are currently acting as first-responders for justice issues to provide meaningful help is a promising route for scaling up assistance to meet the needs of the majority of people who currently receive no help at all.

Second, we also benefit from a growing body of evidence that gives guidance about what kinds of solutions might work for people facing civil justice issues. Across a range of studies, conducted in a variety of contexts, we see that effective, accessible assistance for civil justice issues has four qualities: these delivery models are targeted, timely, trustworthy, and transparent. They are targeted in the sense that the help offered is specific to

people's actual needs. They are timely in the sense that they appear when people recognize that they have a problem. They are trustworthy in the sense that help comes from sources people believe are "responsible and working in their good interests" (SANDEFUR, 2015: 723; PLEASENCE *et al.*, 2014). They are transparent about choices, options and decision points, and about the costs of each. Human-centered, participatory design approaches can help us to design just solutions with greater fidelity to these principles (HAGAN, 2021; BURNETT; SOBOLL, 2021).

Scaling any innovation or set of innovations is difficult. To scale access to justice requires two components: 1) solutions that are scalable, and 2) the actual scaling of those solutions. The potential for scale requires eliminating unnecessary barriers and burdens on those who can be trained and supported to help, or technology that can be designed to help, people with their legal problems, which is the primary focus of this article. The second requirement is less politically fraught but is potentially more challenging. Scaling solutions requires sustainable funding that can meaningfully grow with the demand for services.

In the United States, civil legal aid funding has depended largely on five sources of funding: federal government grants from the Legal Services Corporation (LSC), state-based grants from Interest on Lawyers Trust Accounts (IOLTA), state and local bar and charitable foundation grants, cy pres awards from class action lawsuits, and private donations. Recently, the innovative Justice in Government Project has worked to connect to executive branch government funding already available in existing ministries (in the US called "departments"), such as those for education, health, housing, and labor (see The Justice in Government Project Toolkit). These are potential sources of funding for legal services that could be spent on just solutions that have the potential to scale. As currently allocated, however, these efforts have not proven sufficient to meet the access to justice crisis.

Because it is often difficult to scale with grant-based funding alone, some legal services providers have experimented with innovative funding models, such as through earned income and outcomes-based financing. In both models, the more an organization can meet client needs, the more likely it is to earn revenue to support growth and scale. Not all of these attempts have proven successful, but some have. For example, in the US's nonprofit justice tech community, both Upsolve and Pro Bono Net have significant earned income as well as grant-based revenue to serve their missions (for example, according to Pro Bono Net's Annual Report for

2017-2018, nearly half of its revenue was earned revenue in 2018). Providers that rely principally on people, rather than technology, to deliver services have also developed new funding models. For example, the Los Angeles, California-based Eviction Defense Network charges a nominal fee for some services, which supplements grants and other contributions. Even more promising: building on evidence about how legal services can affect health care expenditures, the Children's Law Center in DC has an outcomes-based contract with a local health insurer that provides direct funding to support legal services interventions that prevent costly health outcomes (WASHINGTON BUSINESS JOURNAL, 2019). Under this agreement, the insurer pays the legal provider about half of what it averages in cost avoidance. A report by Social Finance, an impact finance and advisory nonprofit, showed broader potential for Social Impact Bonds (SIB) or "pay for success" in the legal aid context, particularly for eviction defense and medical legal partnerships (SOCIAL FINANCE, 2019). Social impact bonds (or "pay for success") use evidence of impact and cost savings to a government or organization to attract impact investors to fund nonprofits to scale-up their services; if the nonprofit is successful and the entity saves money, they pay the investors back alongside an agreed upon return in exchange for taking the upfront risk. If the nonprofit is not successful in achieving its outcomes, the government or organization – called the outcome payor – is not required to pay the investors back. Conducting cost-benefit analyses for legal services presents some challenges (PRESCOTT, 2010), but has shown that providing legal services can substantially reduce costs such as for healthcare and homelessness services (*e.g.*, ABEL; VIGNOLA, 2010; STOUT RISIUS ROSS, 2018; TEUFEL *et al.*, 2012).

CONCLUSION

More than two thirds of the world's population – over 5 billion people – live outside the protection of the law and lack meaningful access to justice (TASK FORCE ON JUSTICE, 2019). An important reason for this is that, around the world, people are locked out of their own legal systems. In countries that aspire to be democracies, this state of affairs is jarringly paradoxical. In democracies, ordinary people elect representatives to write laws that are meant to order fundamental facts of life: making a living, having a place to live, getting care when ill, caring for the people who are dependent on them. Yet, the same people who elect those representatives and pay taxes for the administration of those laws are often locked out of their use.

The track record achieved when we consistently design solutions on the basis of proximity to lawyers is clear: Guiding activity through protectionist regulation fails to achieve meaningful access to justice for all. A growing body of research offers insights into how to design legal systems and legal services so that they are accessible to the people to whom they are supposed to be accountable (*e.g.*, HIIL, 2018; PLEASENCE *et al.*, 2014). This work offers many fertile ideas. In its diversity resides a core research finding: what we are doing now is a robust and fundamental failure. Relying on lawyer-centric models of access to justice simply does not work because it is unfit for the purpose of giving people across diverse communities access to their own law. Our proposal is to stop trying to do yet more that does not work, and instead try something that could: democractize the law by changing the way we regulate its practice.

The practice of law should be regulated to focus on *evidence* and *outcomes,* both for people and for communities. The goal of regulation should be not who provides services, or who trains providers, or how services are provided, or who can make money from them, but rather the substantive outcome of access to justice: resolving legal issues lawfully and achieving just solutions.

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