

# Can a Little Representation Be a Dangerous Thing?

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*Access to justice interventions that provide a little representation, including nonlawyer representation and various forms of limited legal services, may be valuable solutions for low- and middle-income Americans. However, a thoughtful approach to improving access to justice efforts should recognize that a little representation may have risks. In particular, one potential risk of a little representation is that while it provides assistance with a discrete legal need in a specific moment, the nature of the assistance is incompatible with challenging the law. As a result, individual litigants do not have the benefit of legal challenges in their own cases, and our legal system develops devoid of law reform that reflects the needs of low- and middle-income litigants.*

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## INTRODUCTION

Disparate voices in research and theory suggest that access to justice interventions that are less than full representation may be helpful, but can also be harmful. This Article focuses on a particular consequence of this observation: interventions that are less than full representation may provide low- or middle-income Americans with assistance that serves a discrete need in a particular moment, but the nature of this assistance does not and cannot challenge the law. Thus, litigants do not have the benefit of legal challenges focused on either their own case or the larger legal system. Without these challenges, we limit the scope of law reform on behalf of low- and middle-income litigants.

Individuals accessing the civil justice system who receive less than full representation are getting a lesser form of legal assistance. As this form of assistance becomes more accepted and commonplace, serious consequences may arise for our civil justice system if low- and middle-income people do not have advocates who are challenging and reforming the law based on the problems their clients encounter. It may be that some legal assistance is better than none at all, but the consequences of institutionalizing this approach could fundamentally change our justice system. In such a system, we may give people some legal assistance to access justice, but justice is a moving target. If we deny a whole part of our society the ability to engage in setting that target, then they are not really accessing the justice system. Thus, while we must pursue all possible avenues to solve the civil access to justice crisis, we must also be aware that a little representation can be a dangerous thing for individuals and for our justice system.

Our exploration of the risks of a little representation means neither that full representation is without risk nor that less than full representation is not an appropriate access to justice intervention. Legal assistance of any kind is not monolithic. There are individuals with bad lawyers who might have been better off with no representation at all.<sup>1</sup> There are also individuals who receive unbundled legal services, lay advice, or self-help materials who benefit from that assistance. What we are saying, though, is that we cannot assume that any kind of assistance is always or completely helpful. And, if we are being thoughtful about how we provide civil legal assistance and intentional about how we allocate limited resources, we should understand where a little representation may have downsides for individual litigants and for our civil justice system.

We explore these ideas, beginning in Part I, by identifying the broad range of interventions that might qualify as “a little representation.” In Part II, we outline the contours of law reform activity and how it interacts with different types of representation, focusing on the challenges of nonlawyer representation. In Parts III and IV, we propose ways to integrate law reform activity into nonlawyer and limited legal assistance interventions, drawing on the medical concept of triage. We conclude with a call—in the face of the enormous challenges of our civil justice system—to embrace the challenge of making sure our legal services interventions contribute to systemic legal reform.

### I. A LITTLE REPRESENTATION CAN BE HELPFUL OR DANGEROUS

What is “a little representation” or “less than full representation”? It includes the access to justice interventions that address the “supply side” of civil litigation and that in some way involve assistance to a litigant in a court system.<sup>2</sup> These interventions capture a large spectrum of activity that includes self-help centers,<sup>3</sup> nonlawyer representation,<sup>4</sup> and unbundled legal services.<sup>5</sup> We exclude pro bono legal services from our discussion

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1. See HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998); see also Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

2. Benjamin H. Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1238–42 (2010); Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 760 (2015). Others continue ably to address the “demand side” of this equation. *Id.* at 787.

3. RICHARD ZORZA, NAT’L CTR. FOR STATE COURTS, *THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS* 12 (2002).

4. Barton, *supra* note 2; Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 85–86 (2010); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1806 (2001); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996).

5. There are also emerging versions of each of these interventions that use technology to provide the assistance. We do not classify these interventions as separate types as they largely track the

here, but note that others have raised similar concerns about law reform efforts by pro bono lawyers.<sup>6</sup>

For this Article, we refer to the people helping litigants as “representatives” for ease of expression. We recognize that this may be a technically inaccurate or oversimplified description of the relationship with the litigant. However, we also believe that even in the most restricted circumstances and despite what interpretation of ethical rules or contract law might conclude, individuals helping litigants are acting on their behalf in a capacity that is described by the word representative.

As we have discussed in other work, there have been a range of efforts to measure the interaction of full lawyer representation and case outcomes.<sup>7</sup> This body of research largely concludes that full representation helps clients.<sup>8</sup> As we have also noted, this outcome-focused research gives us only part of what we need to understand the role of lawyers for civil litigants who would not otherwise have a lawyer.<sup>9</sup> Recent research, including our own, is beginning to fill this gap. For example, one recent study concluded that generalist lawyers with stronger overall legal skills fared better in immigration cases than specialized, low-skilled lawyers.<sup>10</sup>

There is also some research measuring the interaction of case outcomes and less than full lawyer representation. A study of unbundled legal services in landlord-tenant matters found that such services reduced default by tenants but did not ultimately improve possession outcomes.<sup>11</sup> This study concluded that unbundled legal services may have increased litigant engagement with the process but did not ultimately lead to improvement in outcomes. Another study concluded, however, that

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existing interventions. See Stephanie Kimbro, *Using Technology to Unbundle in the Legal Services Community*, HARV. J.L. & TECH. (Occasional Paper Series) (2013).

6. Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 105 (2013).

7. Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. U.L. REV. 469 (2016) [hereinafter Shanahan, Carpenter & Mark, *Lawyers, Power, and Strategic Expertise*]; Anna E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, LAW & SOC. INQUIRY (forthcoming 2017) [hereinafter Carpenter, Mark & Shanahan, *Trial and Error*].

8. D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2125 (2012); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 69–71 (2010).

9. Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 7; Shanahan, Carpenter & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 7.

10. Banks Miller et al., *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC’Y REV. 209, 210–11 (2015).

11. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 471 n.82 (2011).

unbundled legal assistance in evictions led to higher rates of tenants staying in their homes compared to litigants without assistance.<sup>12</sup>

Other relevant literature compares the outcomes and satisfaction rates for clients represented by either lawyers or nonlawyers. An older, hallmark study of representation found that specialist nonlawyers are more effective than generalist lawyers in certain circumstances.<sup>13</sup> Another study found nonlawyer representation more helpful than lawyer representation in employment mediation.<sup>14</sup> A study of nonlawyer representation in the United Kingdom found that clients were more satisfied with nonlawyers than lawyers, and nonlawyers were more successful than lawyers based on case outcomes and peer review.<sup>15</sup>

As with studies of full representation, it is also important to look at more than case outcomes to understand less than full representation, something we and others have done in previous work. A recent study of self-help resources in a domestic violence court identified several risks to these services.<sup>16</sup> One set of risks fell squarely within the legal matter: self-help staff influenced what relief litigants ultimately sought.<sup>17</sup> Another set of risks had implications outside the initially presented legal matter: self-help staff responded negatively to requests for help outside the narrow scope of defined services, imposed priorities in referrals for other services, and failed to suggest or provide economic remedies.<sup>18</sup>

Our own research contributes an additional insight: nonlawyer representatives do not, and perhaps cannot, participate in law reform efforts through case-focused challenges or system-focused challenges.<sup>19</sup> Our study is unusual because of its significant data set containing nonlawyer representatives. We capture the entire universe of unemployment cases in the District of Columbia—over 5000 cases—from 2011 to 2013 where nonlawyers represent sixty-one percent of employers. Our analysis concludes that nonlawyer representatives are effective at helping parties navigate common court procedures and basic substantive legal concepts.<sup>20</sup> Yet, our research also reveals that nonlawyers are not equipped to

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12. See D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 959 (2013).

13. Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 885 (2004) (arguing nonlawyers are as effective as lawyers); Kritzer, *supra* note 1.

14. Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 375–76 (2002).

15. Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 785 (2003).

16. Elizabeth L. MacDowell, *Domestic Violence and the Politics of Self-Help*, 22 WM. & MARY J. WOMEN & L. 203 (2016).

17. *Id.*

18. *Id.*

19. Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 7.

20. *Id.*

challenge judges on contested issues, advance novel legal claims, or advocate for law reform.<sup>21</sup>

Our qualitative research indicates that nonlawyer representatives do not engage in case- or system-focused challenges for several reasons. First, in contrast to the formalized legal and professional education of lawyers, nonlawyer representatives learn from their interactions with the judges in front of whom they appear and from opposing lawyers.<sup>22</sup> Second, nonlawyer representatives operate in a different system of norms, incentives, and power than lawyers do. Nonlawyer representatives in our study do not have the professional norms—including rules of professional conduct—that facilitate case- and system-focused challenges.<sup>23</sup> Furthermore, the nonlawyer representatives operate in a system of economic and professional incentives that discourages and perhaps even structurally prevents these types of challenges that lead to law reform.<sup>24</sup>

Thus, though there is much more research to do, we are left with the insight that less than full representation has advantages, but it also has risks for the litigants these interventions are designed to serve. One of the potential dangers of less than full representation is that representatives do not raise the challenges on the case or system level that ultimately result in law reform. This risk of less than full representation, and particularly nonlawyer representation, is especially pertinent to the development of and research concerning statewide nonlawyer programs, including Limited License Legal Technicians (“LLLTs”) in Washington and Court Navigators in New York.<sup>25</sup> We also address how this same risk may translate to other forms of less than full representation, and assess the potential danger for the individuals receiving a little representation and for our system as a whole.

## II. ACCESS TO JUSTICE INTERVENTIONS AND LAW REFORM ACTIVITIES

What do we mean by law reform? Generally, we mean activities that change the law in some way, ranging from the application of the law in a particular case to systemic changes with broad effects. This Article is concerned with representatives who undertake these activities, though

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Washington State recently created a program to license nonlawyers to practice law under limited circumstances with the express purpose of expanding access to justice. Richard Zorza, *Progress in Three States on Non-Lawyer Access Interventions*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Apr. 4, 2014), <http://accesstojustice.net/2014/04/04/progress-in-three-states-on-non-lawyer-access-innovations/>; see Rebecca L. Sandefur & Thomas M. Clarke, *Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA*, 67 HASTINGS L.J. 1467 (2016) (describing the U.S. Roles Beyond Lawyers research project focusing on Washington State and New York programs).

representatives are not the only actors who can “do” law reform.<sup>26</sup> Within this definition, we see two categories of activity—case-focused challenges and system-focused challenges—that lead to law reform.<sup>27</sup>

Case-focused challenges happen when a representative makes a choice in a particular case that challenges the judge in that proceeding to shape the law to fit the client’s needs. The activity itself may be a choice early in the case, such as to include a factual claim on a form pleading even though the facts are not the classic version of that claim. Or it may happen through direct interactions with a judge, such as evidentiary objections or motions, novel legal arguments of how the law applies to facts, or motions or other arguments that ask the judge to shape the law to fit a previously unanticipated circumstance. While this category of law reform activity is focused on the trial level of a case, it may also involve pursuing an appeal—set up by trial level choices—in the specific case. Wherever the challenge takes place, if successful, the law evolves as a result and thus law reform occurs.

Case-focused challenges also include those challenges that change the way a judge applies the law, even if that does not necessarily include a change to the rules, regulations, statutes, or precedent, as they exist. Case-focused challenges might change the law on the books or the law in practice. For example, an applicable statute has a two-pronged test, but a judge as a matter of practice applies only the first prong of the test and grants relief on that basis. In a particular case, a representative argues that the judge should apply both prongs of the test, which would benefit the representative’s client. If the judge makes this change to her behavior in the client’s case and in all subsequent cases, the law as written has not changed, but the law in practice has changed significantly.<sup>28</sup> We include this type of representative activity in our category of case-focused challenges.

System-focused challenges are when a representative engages in activities intended to change the law to fit a recurring problem or set of

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26. See *infra* notes 42–47; Bridgette Dunlap, *Anyone Can “Think Like a Lawyer”: How the Lawyers’ Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, 82 *FORDHAM L. REV.* 2817 (2014).

27. For a theoretical perspective on the tension between individual and systemic reform for poor people, see Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 *GEO. J. ON POVERTY L. & POL’Y* 473 (2015).

28. We see this example as an illustration of what Sandefur describes as lawyers making courts “follow their own rules.” See generally Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers’ Impact*, 80 *AM. SOC. REV.* 909 (2015) (arguing that lawyers’ greatest impact can be their use of relational expertise to help courts follow their own rules). In addition, law in practice is a wildly disparate experience in the American civil court system. Certainly law and procedure on the books vary widely among different subject matter areas and jurisdictions, and so do law and procedure in practice. This variation can fundamentally change the nature of law reform. For example, it is much more challenging—for any party or representative—to bring case-focused or system-focused challenges in cases where judges do not have to write opinions.

circumstances, but in a way that is broader than a specific case. This activity may include seeking out a client with a particular issue to pursue an appeal, legislative or regulatory advocacy, or advocacy with courts, judges, or clerks to change particular practices. System-focused challenges may be motivated by individual client circumstances, but broader law reform is a more explicit goal than in a case-focused challenge.

It is not our goal to use these categories of law reform activity as a way of assigning relative value to them or even to explore how law reform best happens. Rather, the distinction provides clarity regarding how less than full representation risks not performing either function. That being said, these two categories are consistent with the theoretical scholarship regarding how law reform happens and specifically whether law reform must grow out of individual representation or whether lawyers can or should perform law reform functions independently. Certainly, meaningful law reform can happen when lawyers focus only on system advocacy, and there are logistical and economic reasons why this makes sense.<sup>29</sup> But some argue that law reform cannot be effective unless it is connected to ongoing work to ensure that the reform takes hold.<sup>30</sup> A corollary view is that any civil representation of low-income individuals necessarily performs a law reform function by increasing access to process.<sup>31</sup>

#### A. LAW REFORM ACTIVITIES AND REPRESENTATIVE EXPERTISE

In previous work, we have discussed the types of expertise lawyers and other representatives offer their clients.<sup>32</sup> But what expertise does a representative need to engage in case-focused or system-focused challenges? How does this expertise translate to nonlawyers compared to lawyers?

Case-focused challenges would seem to be the most easily implemented form of law reform activity. Both theory and research suggest that lawyers and nonlawyers can engage in process.<sup>33</sup> It follows, then, that both lawyers and nonlawyers should be able to engage in these same procedural steps with an eye toward law reform. Our research, however, suggests that nonlawyers and lawyers engage in these activities in very different ways. Specifically, the nonlawyer representatives we studied obtained all of their training from the judges and lawyers with whom they work.<sup>34</sup> Thus, in contrast to lawyers, they had no source of

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29. Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 222–23 (1976).

30. *Id.* at 246–47.

31. *Id.* at 230.

32. Shanahan, Carpenter & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 7.

33. Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 7; Kritzer, *supra* note 1; Sandefur, *supra* note 28.

34. Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 7.



information or training that was independent of this context. Without this independent training, the nonlawyer representatives did not see their role in challenging the behavior of a judge in a particular case, nor did they have the background information or critical frameworks to do so. As a result, they were high-functioning participants in process but had no vantage point from which to challenge existing law or procedure.

This leads to the consequence that litigants represented by these nonlawyer representatives may have someone who helps them engage in a process that otherwise would be mystifying, but do not have a representative who asks the judge to modify, expand, or apply novel interpretations of the law. For example, a nonlawyer representative can explain to her client that the representative will have a chance to cross-examine an opposing witness and can conduct that cross-examination. But the nonlawyer representative is unlikely to be able to mount an argument to the judge that a certain line of questioning is admissible under a non-straightforward application of the law. Thus, from a law reform perspective, the case-focused challenge of the admissibility issue is never presented to the judge and the potential law reform never happens. This lost opportunity for reform could involve a ruling challenged on appeal, the judge changing her thinking or practice in future cases, or an advocate talking to other advocates about how to advance rule changes.

A related point is that sometimes law reform (and client advocacy) is best served by *not* presenting a case or a claim or evidence. Not all representatives or forms of representation have the strategic expertise to reach this conclusion.<sup>35</sup> Thus, this passive form of case-focused challenges may also be absent from the evolution of the law for litigants who have less than full representation.

System-focused challenges require a somewhat different type of expertise than case-focused challenges. Our research demonstrates that because nonlawyer representatives develop their expertise from the judges and lawyers with whom they work, these representatives lack a vantage point from which to even consider system-focused challenges.<sup>36</sup> By definition, a system-focused challenge requires an understanding of a case that is broader than any one legal or factual issue. Some highly experienced nonlawyer representatives may have accumulated this perspective as repeat players in a particular type of case. But these representatives likely lack a second important source of expertise: an understanding of broader principles of law, fairness, and procedure. In addition, nonlawyer representatives—in our data and in many other contexts—are not able to represent parties in subsequent appeals. As a

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35. Shanahan, Carpenter & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 7.

36. Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 7.

result, they do not have the perspective of how a procedural choice in one context may translate to another. Without this appreciation for the broader system in which a particular case operates, nonlawyer representatives are ill suited to engage in system-focused challenges.

We recognize that all representatives—of the same type or providing the same level of service—do not behave identically. Just as there are lawyers who may not raise case-focused or system-focused challenges, there are nonlawyers who may do so consistently. What we are saying is that as a structural matter, some types of representatives have the tools and incentives to raise these challenges, while others do not.

#### B. THE CONSEQUENCES OF THE ABSENCE OF CASE-FOCUSED AND SYSTEM-FOCUSED CHALLENGES

From an access to justice perspective, it is dangerous for both individuals and our legal system if case-focused and system-focused challenges are not occurring. At a basic level, it plainly contradicts the principles of equality and fairness that underlie our justice system if the law evolves in response to some individuals' experiences and not others—particularly where such outcomes are largely driven by inequality of income and access. From the perspective of solving the civil access to justice crisis, it seems like a concession to the larger crisis to give some individuals representation—when they would otherwise have none—yet be satisfied when this representation excludes them from the evolution of the law. To prevent a little representation from becoming dangerous, we must understand the broader risks of the absence of case-focused and system-focused challenges.

The most immediate risk of the absence of case-focused challenges is that litigants are getting second-class legal assistance. If less than full representation is provided to clients who would not otherwise have representation, then a failure to bring case-focused challenges means that these less-resourced clients are not receiving benefits in their particular cases that they would receive from a lawyer. It also potentially means that less-resourced clients are subject to law and procedure that is not evolving in the same way it would if lawyers were the representatives. This cumulative effect of small challenges to practice, doctrine, and rules that ultimately shape the law is hard to quantify. Yet, excluding a whole section of litigants from this process cannot be anything but dangerous for individual clients and our justice system.

Similarly, the absence of system-focused challenges means that less-resourced clients do not have the benefit of focused law reform. Plainly, these clients will not have the benefit of system-focused challenges—such as impact litigation, test cases, legislative and regulatory reform, media campaigns, executive action—that address their particular experiences. What is perhaps more dangerous is that these individuals' representatives do

not even recognize the need for system-focused challenges. Thus, opportunities for system-focused reform are not identified or understood in a way that could translate to challenges to improve the system, should representation be available.

The subject of our research, unemployment appeals in the District of Columbia, offers a case study of the consequences of nonlawyer representation and law reform efforts. This example is not a direct analogy to all access to justice interventions, as it involves nonlawyer representation for employers, who are the more resourced party in these disputes. Yet if the results we see are the consequences for a more powerful party in a dispute, we would be wise to be concerned about the consequences for a less powerful party experiencing an analogous type of representation in another context. As a result, we find our study a useful frame for questioning potential law reform consequences of less than full representation.

Unemployment cases are full evidentiary hearings with the worker (or claimant) on one side and the former employer on the other. A trial level administrative court handles these cases, with an appeal to the D.C. Court of Appeals. Every case receives a *de novo* evidentiary hearing, making the hearing the focal point of the process. Further, trial level judges in D.C. unemployment cases must produce written findings of law and fact, a requirement that likely makes these judges more attentive to appellate law.

There is a large proportion of nonlawyer representation on the employer side in these disputes.<sup>37</sup> As our research shows, these nonlawyers are trained almost entirely by the judges in front of whom they appear.<sup>38</sup> The nonlawyers rarely bring case-focused challenges. In fact, the economics of the nonlawyer representation industry are such that they actively discourage employers from pursuing appeals for cost reasons. Further, we did not identify an instance of a nonlawyer representative bringing a system-focused challenge.<sup>39</sup>

In addition, many of the cases where a lawyer represents the employer are ones where a human resources firm retains the lawyer as a contractor, but only for trial level representation. Like in unbundled legal services, the attorney has no involvement in the case as it develops and is simply handed the facts, conducts the hearing, and then disappears from view.

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37. For more detail, see Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 7.

38. *Id.*

39. To be precise, D.C. Court of Appeals rules effectively require attorney representation on appeal for employers, under the rule requiring corporate attorney representation. See D.C. Ct. App. R. 3(c)(2). Nonlawyer representatives in our data exclusively represent corporations. Our qualitative research did not reveal a single example of a nonlawyer representative suggesting an appeal be pursued, framing an appeal at the trial level, asking a human resources firm to bring a lawyer onto a case for purposes of appeal, or otherwise taking a step that would intentionally lead to an appeal.

In contrast, on the worker or claimant side, there is intentional activity at the appellate level. Several years ago, the Legal Aid Society of the District of Columbia prioritized law reform in unemployment law and, partnering with law clinics and other trial level representatives, identifies and litigates appeals in this area. Thus, there is an imbalance in appellate activity that can be seen as a consequence of less than full representation on the employer side of disputes.

Unsurprisingly, D.C. appellate unemployment law has become increasingly pro-worker. Employers are now operating in a legal system that is less advantageous for them than it was five to ten years ago.<sup>40</sup> While we cannot assert causation, it is notable that this evolution in the law has come from a system where employers have representatives who are not bringing case-focused challenges or system-focused challenges on their behalf, while workers do.

### III. NONLAWYER REPRESENTATIVES CAN PARTICIPATE IN CASE-FOCUSED AND SYSTEM-FOCUSED CHALLENGES

If less than full representation can be dangerous because of the failure to bring case-focused and system-focused challenges, does this mean that only full legal representation is good enough? In our world of limited resources, we think not.<sup>41</sup> We do, however, think that access to justice interventions should be designed and implemented with these potential dangers in mind.

First, we are not wading into, but do acknowledge, the important debate about how legal change occurs and whether it should be the product of lawyers or communities. Of course, in part, this conversation grows out of the restrictions on funding from the Legal Services Corporation<sup>42</sup> and the corresponding decline in express law reform work by legal aid lawyers. Many have argued (with varying degrees of self-interest) that lawyers are well suited and necessary for law reform.<sup>43</sup> And others believe “law reform is much too serious a matter to be entrusted to lawyers.”<sup>44</sup> David Super has

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40. See Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 7.

41. Others disagree. See Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 *FORDHAM L. REV.* 2761 (2014).

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

43. Kathryn Abrams, *Lawyers and Social Change Lawbreaking: Confronting a Plural Bar*, 52 *U. PITT. L. REV.* 753, 763–66 (1991) (reporting qualitative interviews with lawyers engaged in systemic advocacy and their range of views about the legitimacy of the legal system); Bruce H. Kobayashi & Larry E. Ribstein, *Law as Product and Byproduct*, 9 *J.L. ECON. & POL'Y* 521, 539 (2013) (“Lawyers play an important role in state law drafting apart from their role in litigation. . . . Lawyers’ work as law drafters is a byproduct of their other professional activity.”); Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 *MO. L. REV.* 299, 327 (2004) (arguing that licensing of lawyers de facto creates law reform role).

44. John Burrows, *Academics and Law Reform*, 25 *N.Z. U.L.R.* 667, 669 (2013) (attributing this phrase to Lord Wilberforce); see also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA L. REV.* 443 (2001); Charles Elsesser, *Community Lawyering—The*

made a more nuanced argument, drawing on the history of reform in Medicaid, food stamps and similar programs.<sup>45</sup> Super posits that the typical tools used by lawyers—litigation and occasionally explicit legislative reform—are not as well suited to reform in this administrative context.<sup>46</sup> He argues that the ideal advocacy effort involves claimants and related community organizers, nonlawyer actors with system-specific expertise, working with lawyers.<sup>47</sup> For purposes of this Article, we acknowledge the importance of the debate and contend only that, to the extent representation is necessarily intertwined with law reform, we need to be conscious of how access to justice interventions interact with law reform activities.

As discussions about expanding nonlawyer practice continue in academic and policy circles, we must ask: do we accept that nonlawyers are not law reformers and do not provide traditional legal advocacy? Do we accept that they instead serve a narrower role and purpose in our justice system? In what contexts would this narrower role be acceptable? How do we identify and track those areas of law or civil justice contexts where law reform or individual lawyer advocacy is needed? Do we create new or different roles for lawyers in supervising nonlawyers? Or is there a way to train nonlawyers such that they are able to engage in law reform or traditional legal advocacy? How would such training be different from that currently required for lawyers?

Answering these questions requires a depth of thought and empirical research that is beyond this Article, but we do have some initial views of how to address these important issues. First, we are not saying that nonlawyers cannot do law reform. However, we are saying that we cannot assume that law reform is happening for clients who are the recipients of less than full legal assistance, and that our access to justice interventions must be designed in a way that supports law reform. Put more bluntly, we are faced with a civil access to justice crisis, and we should not let the perfect be the enemy of the good. Individual Americans need help in court, and something may still be better than nothing. But if we are creating interventions that are less than full representation, we should design interventions that mitigate the danger that poor Americans do not get the benefit of law reform.

We also acknowledge that market pressures and specifically the power of the bar are necessary parts of this conversation. More specifically, the bar's resistance to the expansion of activities by nonlawyers will always

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*Role of Lawyers in the Social Justice Movement*, 14 *LOY. J. PUB. INT. L.* 375 (2013); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 *OHIO N.U. L. REV.* 455 (1994).

45. David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 *YALE L.J.* 815, 876–77 (2004).

46. *Id.* at 889–91.

47. *Id.*

be a barrier to change.<sup>48</sup> However, we also think the ideas we advance here have two practical advantages for the bar. First, the problem we discuss concerns litigants who are not currently being served by lawyers because their cases are not particularly profitable. Second, the system we describe here as a vehicle for law reform activities has the potential to expand opportunities for lawyers, leading to expansion rather than contraction of the legal market.

We suggest that less than full representation can be a vehicle for case-focused challenges with proper training and that less than full representation can enable system-focused challenges as part of a triage system of legal assistance. To illustrate these ideas, we use the example of the burgeoning movement for LLLT.<sup>49</sup> The LLLT movement is developing in different ways in different states, but the common characteristics are a statewide revision of legal practice rules to allow nonlawyers with special training and certification to perform certain tasks on behalf of clients in limited areas of law.<sup>50</sup> Depending on the state, this ranges from completing pleadings and forms to appearing in certain types of court proceedings. Washington has already implemented its program, while other states are in more preliminary stages of formation.

#### A. TRAINING AND EXPECTATIONS FOR CASE-FOCUSED CHALLENGES

Based on the finding that nonlawyer representatives engage in procedure, we suggest that nonlawyers can be part of case-focused challenges. To begin with, nonlawyer representatives facilitate the deceptively simple but often very powerful fact of a party appearing at a hearing.<sup>51</sup> Additionally, with the elements of existing or proposed programs that can facilitate case-focused challenges, LLLTs can more closely serve the needs of litigants, individually or in concert with attorneys. Many LLLT programs or proposed programs are already creating systems that could allow LLLTs to participate in case-focused

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48. See Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 *FORDHAM L. REV.* 3067 (2014); Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 *FORDHAM L. REV.* 2611 (2014).

49. The LLLT movement is one of what may be many versions of legal post-professionalism. See Herbert M. Kritzer, *The Future Role of “Law Workers”: Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 *ARIZ. L. REV.* 917, 917–18 (2002) (defining the phenomenon of post-professionalism as when the profession has lost exclusivity, there is an increased segmentation due to increased specialized knowledge, and the growth of technology has led to an increased access to information resources).

50. The LLLT movement necessarily implicates questions of what constitutes the practice of law and state unauthorized practice of law rules. For purposes of this Article, we take as a premise that nonlawyer representation falls within the bounds of these statutes and we use as examples those states that have already amended these statutes. However, the insights of this Article are relevant to debates about what should be included or excluded in the Unauthorized Practice of Law statutes.

51. Carpenter, Mark & Shanahan, *Trial and Error*, *supra* note 7.

challenges, including: (1) specialized training that enables the identification of opportunities for challenges; (2) an ethical code or code of conduct that makes case-focused challenges an explicit responsibility of the LLLT; and (3) interaction with attorneys that facilitates case-focused challenges.

The existing LLLT program in Washington<sup>52</sup> and the Court Navigator and related proposed programs in New York<sup>53</sup> have formal curricular requirements. In Washington, this includes an associate's degree, forty-five credits of core training in basic legal concepts and practices, fifteen credits of family law courses, and a licensing exam.<sup>54</sup> One avenue for enabling LLLTs to participate in case-focused challenges is to include the building blocks of this activity in the LLLT curriculum. It is not clear whether, for example, the core training courses in Washington's LLLT program includes explicit discussion of how law develops, and how issues for development or expansion of the law may present themselves in a particular case. This type of education could also easily be integrated into core or continuing education courses and would give LLLTs both the skills needed to participate in law reform and a conception of the professional role that embraces case-focused challenges.

LLLТ programs also contain experiential learning opportunities, whether through apprenticeship (Washington) or LLLTs working directly with attorneys in legal services organizations (New York). Learning to identify and pursue case-focused challenges should be integrated into these experiential learning opportunities. Some of this may be incidental—as LLLTs work with attorneys, they see case-focused challenges happening—but it also should be intentional. If LLLTs have a curricular framework that explicitly establishes identifying case-focused challenges as an expectation, and an experiential framework that allows them to identify when they can pursue a challenge and when they need to bring in a lawyer, there will be a functional system of law reform in a limited access to justice intervention. Again, this experiential learning would capture both skill development and establishing a professional role that engages in law reform functions.

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52. Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 611–12 (2014); Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75, 91 (2013).

53. See e.g., Legislative Bill Drafting Comm. 09073-01-5, Program in the Use of Housing Court Advocates and Consumer Court Advocates, § 855 (2015); Memorandum in Support of OCA 2015-21 from A. Gail Prudenti, Chief Admin. Judge, N.Y. State Unified Court Sys. (on file with author); N.Y. CITY BAR COMM. ON PROF'L RESPONSIBILITY, NARROWING THE "JUSTICE GAP": ROLES FOR NONLAWYER PRACTITIONERS (2013).

54. There is the option to waive the degree and core training requirements with ten years of practice as a licensed paralegal. See *Legal Technician Education and Application Process*, WASH. ST. B. ASS'N, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/Legal-Technician-Education-and-Application-Process> (last visited May 29, 2016).

Some have suggested that LLLTs should have a code of conduct similar to the rules of professional responsibility that apply to lawyers.<sup>55</sup> Professional responsibility standards for LLLTs are another way to facilitate case-focused challenges as part of this access to justice intervention. The source of lawyers' obligation to raise case-focused challenges is a combination of the duty of zealous representation and the definition of frivolous claims that includes modifications and extensions of the law.<sup>56</sup> A code of conduct for LLLTs could include a similar combination of rules, or a rule about the scope of LLLTs' activity and conduct that explicitly includes case-focused challenges. Training for LLLTs could track these norms with explicit professional responsibility education about how zealous representation necessarily includes advancing legal challenges and novel arguments.

The last component of existing LLLT programs that can be used to enable case-focused challenges is interaction between LLLTs and attorneys.<sup>57</sup> A more formal conception of this interaction is discussed below in the context of system-focused challenges, but from the perspective of case-focused challenges, existing LLLT programs present both opportunities and difficulties.

In Washington, LLLTs operate outside legal organizations and can perform some activities without attorney oversight. These include obtaining facts, informing litigants of procedures, providing state-created self-help materials, obtaining, reviewing, and explaining documents and evidence from opposing parties, and completing and explaining state-created forms.<sup>58</sup> LLLTs in Washington can perform additional activities with attorney oversight including legal research, letter writing, drafting pleadings, and speaking with the opposing party about discovery.<sup>59</sup> This system of oversight provides opportunities in that it has already created an expectation that LLLTs will interact with attorneys. It is challenging, though, because it has created a category of activity where LLLTs can operate without attorney interaction.

While the activities an LLLT can perform on her own may be more ministerial than others, they provide plenty of opportunities for case-focused challenges. This means that LLLTs need to at least be able to identify these opportunities, and potentially also be able to act to implement the challenge. For example, imagine a housing court that does

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55. Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 *FORDHAM URB. L. J.* 1250, 1303–04 (2014).

56. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3, r. 3.1 (AM. BAR ASS'N 2015).

57. We do not mean to suggest that attorney oversight is the only way to ensure case-focused challenges. In fact, we are still working to understand if and how oversight of nonlawyer representatives improves representation in other contexts. *See* ANDREW I. SCHOENHOLTZ ET AL., *LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY* 184–88 (2014).

58. Crossland & Littlewood, *supra* note 52.

59. *Id.*



not as a matter of course allow admission of videos as evidence of unsafe conditions, and an LLLT has a client who has a video of an extreme insect infestation. That LLLT should view her role as finding a way to ensure that the judge sees this compelling video, even if this means challenging the court's typical practice. Only with this conception of her role can the LLLT identify this case-focused challenge in the first place. The LLLT should also have the training to have the conceptual framework to think about how the rules and underlying principles of evidence support the reliability and admission of the video. Finally, the LLLT should have the relationship and resources to work with an attorney to develop her advocacy in support of admitting the video, which is a classic case-focused challenge. If LLLTs are not prepared or enabled to identify or pursue these challenges, litigants will lose the benefit of this type of law reform activity. Thus, though perhaps attorney oversight is not required in all LLLT activities, the LLLT program should include a system that supports the flow of information between LLLTs and attorneys about opportunities for case-focused challenges. One structure for this type of interaction is discussed in the next Part.

#### B. TRIAGE STRUCTURE FOR SYSTEM-FOCUSED CHALLENGES

While we conclude that nonlawyers—using LLLTs as the example—can perform some law reform activities, we also believe that lawyers are a necessary part of law reform. Thus, while we suggest in the preceding Part that there are potential paths for LLLTs to be integrated into case-focused challenges, we also offer that system-focused challenges must necessarily involve both LLLTs and lawyers.

We find the medical concept of the triage pyramid a helpful framework for understanding how LLLTs and lawyers can work together to ensure that system-focused challenges are a consistent part of access to justice interventions.<sup>60</sup> Put generally, a triage pyramid is a sensitive and specific system of sorting and prioritizing individuals' needs to provide limited services most efficiently.<sup>61</sup> Translated to legal services, a triage system involves clients with different needs entering at different points in the process, different service providers, and different services provided on different timelines. When operating effectively, a triage system maximizes outcomes for clients.<sup>62</sup>

A legal triage system has advantages for both individual client representation and law reform activities.<sup>63</sup> As it applies to law reform

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60. See Iain Robertson-Steel, *Evolution of Triage Systems*, 23 EMERGENCY MED. J. 154, 154–55 (2006).

61. *Id.*

62. *Id.*

63. We use the triage concept in this Article as a frame for our observations and suggestions about law reform activity by LLLTs. We hope to explore the concept of the legal triage pyramid as it applies generally to access to justice interventions more fully in a separate article, and thus use it only

activities, the triage concept describes how to incorporate less than full representation interventions in system-focused challenges. Using LLLTs as an example, fluid interaction between LLLTs and attorneys could enable efficient and effective system-focused challenges. For example, LLLTs will interact with a high volume of litigants in narrow subject matter areas. As a result, they are likely to see their clients face recurring problems. Some of these problems may be ripe for system-focused challenges, while some may not, but we can develop a triage system that identifies potential law reform opportunities.

Such a system would involve attorneys who work with LLLTs monitoring these opportunities and based on analysis of which problems are most harmful, or which problems are likely to yield successful results, or some combination of factors. With curricular and experiential training and professional expectations, as discussed for case-focused challenges above, LLLTs can perform this bottom-up triage function.

This bottom-up approach to identifying system-focused challenges already happens in practice, and our argument is that these incidental paths to reform should be an intentional part of access to justice interventions. As just one example, after Hurricane Katrina, paralegals and caseworkers played a significant role in helping displaced individuals obtain FEMA funds for housing. At a particular stage in the bureaucratic process, FEMA began sending rejection notices with only a computer code as explanation.<sup>64</sup> The nonlawyers assisting applicants saw this recurring problem and contacted lawyers at Public Citizen, an organization focused on systemic litigation, which filed a successful federal suit for injunctive relief that forced FEMA to provide substantive explanations for denials and ultimately led FEMA to reverse a significant number of denials of benefits.<sup>65</sup>

System-focused challenges may also require a reverse process where attorneys identify themes or potential system-focused challenges and LLLTs work to verify or support these potential challenges. For example, an attorney working in multiple legal areas may have the perspective from one area of law—for example, problems with service of process in consumer debt cases—that suggests a need for increased

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as shorthand in this discussion. For different conceptions of how medical concepts apply to the law, see Ben Barton, *A Comparison Between the American Markets for Medical and Legal Services*, 67 HASTINGS L.J. 1331 (2016); Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79 (2015).

64. See *Ass'n of Cmty. Orgs. for Reform Now v. FEMA*, 463 F. Supp. 2d 26 (D.D.C. 2006).

65. *Id.* It is also important to note, though not the focus of this discussion, that there are circumstances where lawyers are not the most effective actors for creating system change. See Super, *supra* note 45. A few of the many examples of community organizing and other forms of collective action for system change are the Restaurant Opportunities Centers and Equal Rights Center. RESTAURANT OPPORTUNITIES CTRS., [www.rocunited.org](http://www.rocunited.org) (last visited May 29, 2016); EQUAL RTS. CTR., [www.equalrightscenter.org](http://www.equalrightscenter.org) (last visited May 29, 2016).

awareness of similar problems in other areas of law—for example, service of process in mortgage foreclosure cases. In this situation, it would be advantageous to have a fluid triage pyramid where an attorney can learn from LLLTs where the service of process problem presents a potential system-focused challenge. If so, the LLLTs can then collect information to support a related system-focused challenge, and use this information to inform case-focused challenges.

A variation on this theme is making sure some actor in the system sees the start to finish experiences of clients in particular cases. The absence of a representative with a full view might lead to missed opportunities for system-focused challenges, especially in systems where LLLTs are active in one part of a case (usually the fact development and pleading stages) and attorneys are active in a different part of the case (usually the hearing and appeal stages). This suggests that attorneys or LLLTs or some combination thereof should either have periodic involvement in all stages of cases or should have some kind of briefing or oversight role that allows for a broader view of client experiences.

The emerging state nonlawyer advocate programs provide different constructs for this type of triage system. The proposed New York program houses nonlawyer advocates in the offices of legal service providers. This structure would make a triage system for system-focused challenges easier to implement based on proximity as well as shared mission. However, the New York program and the legal services providers where nonlawyer advocates will be housed are focused on low-income litigants.

The Washington program allows LLLTs to operate with significant independence and not formally associated with a law office, a choice that results from the program's focus on middle-income litigants. As shown by the example of nonlawyer representation for employers in District of Columbia unemployment appeals, middle-income litigants face the same risks regarding the absence of law reform activity. Thus, the Washington system may require more formal mechanisms to ensure that system-focused challenges are being identified and pursued. This could involve panels of LLLTs and lawyers in subject matter areas to monitor and pursue such challenges. Technology, specifically case reporting and tracking mechanisms, may facilitate the process of identifying and supporting system-focused challenges among disparate service providers.<sup>66</sup>

#### IV. A LITTLE REPRESENTATION, BEYOND NONLAWYER REPRESENTATIVES

Though our research addresses nonlawyer representatives, we can extrapolate versions of this same problem for other forms of limited legal assistance. In interventions where representatives participate in only one part of the process, such as unbundled legal services or self-help centers,

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66. Kimbro, *supra* note 5.

the representative may have expertise in one part of the process but not others. Thus, the representative either cannot assist with other parts of the process or does not understand the consequences of a choice in one part of a case for another part of this case.

For example, a client goes to an unbundled legal services desk for help with seeking a domestic violence protective order. The representative asks the client some questions and concludes that, because the client is in a same-sex relationship with the person against whom she seeks a protective order, she does not qualify under that state's domestic violence protective order law, which is written in opposite-sex language. The representative instead advises the client to seek a civil restraining order—which raises the client's burden of proof. Never having conducted a hearing in these cases (and never having even observed a hearing) the representative does not know that, on an individual basis, some judges grant domestic violence protective orders to same-sex couples. This lack of expertise certainly hurts this particular client's case. But perhaps more importantly for this discussion, it also eliminates a potential case-focused challenge which, if the claim were included and the client represented at the hearing, could have been the foundation for broader challenges about the applicability of the domestic violence statute to same-sex couples, a challenge that may have contributed to the evolution of the law. This challenge may have helped the client, and also would have held the potential for broader change for litigants with limited resources who struggle to obtain this relief.

We can theorize how our research regarding nonlawyer representatives also translates to other forms of less than full representation and system-focused challenges. Returning to the representative who is providing the unbundled service of filing requests for domestic violence protective orders, that representative helps individual litigants raise their claims, but does not see the process beyond that stage. As a result, the representative does not have the vantage point to identify whether litigants are regularly requesting protective orders against same-sex partners and being denied—which would suggest the need for one set of systemic challenges—or are regularly requesting relief and receiving it—which would suggest a different approach to law reform that formalized the informal practice. Without this perspective, it is harder for these litigants to access a systemic challenge through litigation or regulatory or legislative advocacy.

Our same core recommendations about nonlawyer representatives—training, ethical obligations, and a law reform-focused pyramid—can also facilitate case-focused and system-focused challenges in other forms of less than full representation. The rules of professional conduct in many states have only recently allowed for unbundled legal services, and conversation continues about the usefulness of this intervention. As our

professional norms evolve, we should consider how to incorporate identification (if not pursuit) of case-focused challenges in unbundled services. Similarly, professional responsibility training for lawyers generally could incorporate a duty to identify potential law reform activity. In addition, specific training for attorneys providing unbundled services could include training systems for identifying (and either pursuing or referring) case-focused and system-focused challenges.

Finally, the concept of a triage pyramid applies to a variety of forms of less than full representation and may be a key strategy to ensure low-income litigants do not fall prey to the danger of being excluded from law reform activity. Just as LLLTs can be valuable participants in identifying law reform challenges, attorneys at self-help centers or providing unbundled legal services can funnel such challenges to attorneys focused on law reform. Returning to our example, if the representative providing unbundled assistance with restraining orders was part of a formal collaboration with lawyers who are immersed in domestic violence advocacy, those lawyers could alert the representative to potential issues for law reform including the state's opposite-sex statutory language. And the unbundled representative could identify or report the frequency with which litigants sought relief against same sex-partners, allowing the immersed lawyers to pursue appropriate case-focused or system-focused challenges.

#### CONCLUSION

When it reduced and restricted funding for the Legal Services Corporation and its grantees, Congress decided, "legal aid alone and not legal aid and law reform will be available to the poor."<sup>67</sup> Admittedly, we continue to struggle to even provide direct legal services to litigants who need them. Though we struggle with limited resources to solve the civil access to justice crisis, we must not forget that shaping the law is an important part of access to justice. We need to make sure our access to justice interventions match the systemic nature of poverty, and this necessarily includes the case-focused and system-focused challenges that result in law reform. Without law reform, we place the very clients we hope to help access the justice system in danger of living in a system that does not correspond to their needs.

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67. William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 264 (1998).

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