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Deconstructing the Right to Counsel

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Deconstructing the Right to Counsel

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Last year marked the fiftieth anniversary of *Gideon v. Wainwright*, the Supreme Court's landmark decision making the right to counsel in criminal cases applicable to the states.¹ While the occasion offered cause to celebrate, many commentators found good reason to lament the numerous ways in which *Gideon*'s promise has fallen short through its implementation. Among the many notes sounding in this discussion of *Gideon* were renewed calls to extend the right to counsel to the civil context, as researchers highlighted the many unmet legal needs of indigent civil litigants.²

Nearly one million low-income Americans are denied help from legal aid providers every year because of insufficient funding resources.³ With the number of Americans living in poverty on the rise since the economic downturn in 2008,⁴ the lack of legal resources for indigent civil litigants is alarming, particularly considering the significant likelihood of adverse outcomes for pro se litigants accessing the legal system.⁵ As Laura Abel has written, many of the legal problems facing low-income individuals concern “the most important aspects of their lives: custody of their children, the ability to remain in their long-term housing, compensation for work they have performed, and government benefits enabling them to put food on the table and obtain health care.”⁶

In the criminal context, the right to counsel is necessarily tethered to the Sixth Amendment. In previous work, I have highlighted the shortcomings of the Sixth Amendment with regard to structural indigent defense reform, some of which stem from its sole focus on the

* Assistant Professor, Georgia State University College of Law. Many thanks are due to my research assistant, Lindsay Anglin, whose contributions to this Issue Brief were invaluable. I am grateful also to my colleagues at Georgia State University College of Law and to participants in the Poverty Law Conference held last fall at American University Washington College of Law for helping me to think through some of the ideas presented here. My experience as a practitioner has been primarily in the realm of indigent criminal defense, but I am grateful to my husband and the many other lawyers who provide much needed assistance to poor civil litigants across this nation.

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² See, e.g., AM. BAR ASS'N, ABA TOOLKIT FOR A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS 4–7 (2010) (recognizing the acute justice gap between the civil legal needs and the available legal assistance for low-income Americans); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 18 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (concluding that “only a small fraction of the legal problems experienced by low-income people (less than one in five) are addressed with the assistance of a private attorney (pro bono or paid) or a legal aid lawyer”).

³ LEGAL SERVS. CORP., *supra* note 2, at 12.

⁴ AM. BAR ASS'N, ABA TOOLKIT, *supra* note 2, at ii (noting that the number of individuals in America living in poverty has increased from 49.6 million in 2005 to more than 63 million in 2011).

⁵ See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 46–66 (2010) (citing numerous studies finding represented litigants fare better in housing, family law, and small claims cases, among others).

⁶ Laura Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 *TEMP. POL. & CIV. RTS. L. REV.* 527, 527 (2006).

role of counsel.⁷ Not only does the exclusive focus on “counsel” mean that the right is vulnerable to nominal satisfaction,⁸ but a singular emphasis on attorney conduct and the effect of that conduct in a given case also limits the extent to which background forces bearing on that conduct—such as the deprivation of resources—remain within reach of judicial intervention. Nonetheless, there are many reasons why, limitations aside, counsel is specifically necessary in the adjudication of criminal cases.⁹ In the civil context, however, there is no parallel constitutional right,¹⁰ and thus a robust debate has emerged about how best to address the needs of indigent litigants filing or defending against civil claims who cannot effectively navigate the system without assistance.¹¹

Amidst this debate, described in greater detail below, several questions linger: How can we avoid the pitfalls experienced by the criminal right to counsel post-*Gideon*? And how do we decide which approach will best serve civil litigants in need of assistance, without purely resorting to an analysis of case outcomes?¹² An outcome-centric analysis ignores other important values at stake, including client satisfaction and reduction of client anxiety. Moreover, focusing purely on outcome (as does the Sixth Amendment analysis) raises the danger that external variables will distort the analysis of the means provided for assistance. For example, if the client has a particularly hard case to win on the facts and the analysis focuses only on outcome, the quality of the assistance provided may be rendered indeterminable or irrelevant.

This Issue Brief sets forth an organizational framework for evaluating the proposals emerging from the access to civil justice debate and for charting a path forward. It suggests that, rather than focusing on the formal requirement of counsel, embodied in a lawyer standing by the client’s side, we should distill the right down to its core elements, exploring the role counsel is intended to serve and why it is needed in civil as well as criminal cases. By deconstructing the right to counsel, which often serves as a proxy for these otherwise unarticulated values, we can create a framework for evaluating alternative proposals, expand the array of possibilities by

⁷ Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1205 (2013).

⁸ *Id.* at 1202–03.

⁹ *E.g.*, Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (holding that the Sixth Amendment “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.”).

¹⁰ See Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011) (noting that “the Sixth Amendment does not govern civil cases”).

¹¹ See, e.g., AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 1, 3 (2006), available at <http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc> (advocating a categorical right to counsel in areas of “basic human need,” defined as shelter, sustenance, safety, health, and child custody); Thomas M. Burke, *A Civil Gideon? Let the Debate Begin*, 65 J. Mo. B. 5, 5–6 (2009); Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POLY REV. 31, 34–35 (2013) (describing the needs of indigent civil litigants and the resulting “push for an expanded civil right to counsel”); Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131, 132 (2009) (“Around the country, state and local bar associations, access to justice commissions, and local advocacy groups are working to expand the [civil] right to counsel in their jurisdictions.”).

¹² *Cf.*, e.g., Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 816 (2012) (suggesting that, in evaluating “procedural safeguards” post-*Turner*, courts should consider empirical data on (1) the process at issue in the case and (2) the outcomes of those cases where assistance was provided compared to those where it was not).

which this growing need can be met, and potentially lay the groundwork for a newly formulated, more substantive version of the right.

I. The “Civil Right-to-Counsel” Debate

As part of the aforementioned debate, practitioners, scholars and commentators have proposed many different solutions to address the needs of unrepresented civil litigants. For purposes of this piece, I have focused only on those aspects of the debate that apply to poor litigants bringing or defending against claims in areas of “basic human need”¹³—such as shelter, sustenance, safety, health, and child custody—and not civil claims across the board.

Some have argued for a civil right to counsel or “civil *Gideon*,” which would in many ways parallel the criminal right to counsel.¹⁴ Many within that group have argued that we can learn from *Gideon*’s failings to better implement the right in the civil context—for example, by implementing more stringent standards for representation and ensuring adequate funding.¹⁵ To that end, the American Bar Association has established principles to guide policymakers and others in the creation of the right to counsel for civil litigants encompassing, *inter alia*, appointed counsel with limited caseloads, adequate training and experience, and adequate compensation to ensure quality representation.¹⁶ Because the civil right to counsel is not tied to the Sixth Amendment, different scholars have proposed grounding the right in federal constitutional due process,¹⁷ federal equal protection law,¹⁸ state procedural due process,¹⁹ state statutory law,²⁰

¹³ See *supra* note 11.

¹⁴ See Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL’Y 1, 2 (2003) (arguing for an absolute right to counsel for indigent civil defendants, including the creation of a civil public defender’s office); *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1331 (1966) (applying the Court’s rationale for a criminal right to counsel to the civil context).

¹⁵ Abel, *supra* note 6, at 538–55.

¹⁶ AM. BAR ASS’N., ABA TOOLKIT, *supra* note 2, at 41–44.

¹⁷ Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2280–81 (2013). *Contra* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (holding that, despite the importance of the liberty interest at stake, the right to counsel is not constitutionally required in civil contempt proceedings, under a due process analysis).

¹⁸ See Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 699, 719–20 (2006) (asserting that the failure to assign counsel to tenants facing eviction implicates rights to equal treatment under federal and state statutory law because of its disparate impact on people of color). *But see* Joan Grace Ritchey, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 336–39 (2001) (noting the unlikelihood of the Supreme Court using equal protection doctrine as a basis for the civil right to counsel because of the Court’s refusal to establish the poor as a suspect class).

¹⁹ See, e.g., AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, *supra* note 11, at 8 (citing decisions in Maine, Oregon, Alaska and California, where state supreme courts found a state constitutional right to counsel in certain cases); Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 186–89 (2006).

²⁰ See, e.g., State ex rel. McQueen v. Cuyahoga Cnty. Court of Common Pleas, 135 Ohio St. 3d 291, 2013-Ohio-65, 986 N.E.2d 925, 930 (2013) (holding that indigent litigants have a statutory right to counsel under Ohio state law for reviews of court-imposed guardianships); Scherer, *supra* note 18, at 718–19 (discussing the civil legal contexts in which New York statutory law guarantees an absolute right to counsel, including certain family law and mental illness related proceedings).

and even in the court's inherent powers.²¹

Recognizing the inescapability of resource, funding, and perhaps political limitations, other commentators have suggested a number of alternatives to the creation of a full-fledged constitutional or statutory right.²² Deborah Rhode suggests a qualified right to aid in civil contexts, under which individuals would be entitled to aid of a reasonable cost and lawyers would only be used when they were the most cost-effective service providers.²³ Rhode also advocates for innovative delivery models, like online intake and form filing and unbundled, discrete legal services, in addition to pro se assistance, non-lawyer services, and court reform.²⁴ Russell Engler has proposed a three-prong “context-based” approach to the civil right to counsel that first requires judges, clerks, and other key players in the court system to assist unrepresented civil litigants in “preventing the forfeiture of rights due to the absence of counsel.”²⁵ Engler’s approach then advocates the creation—and evaluation—of less lawyer-intensive services and providers in less complex cases.²⁶ When the first two prongs are insufficient to meet civil litigants’ needs in particular cases, Engler supports the establishment of a civil right to counsel in those cases where a “substantial injustice” would result from the absence of counsel.²⁷

Others, taking what is perhaps a more cynical or more pragmatic view, have concluded that the establishment of a civil right to counsel is either unlikely or unwise.²⁸ At one extreme, Benjamin Barton argues against a “civil *Gideon*” and instead proposes pro se court reform that better prepares pro se litigants to appear in court, such as allowing clerks to give advice, creating form pleadings, providing greater transparency and clarity in court processes, and establishing online dispute resolution.²⁹ Building on Barton’s work, Jessica Steinberg advocates “demand side reform,” through which the rules currently governing courts would be modified to support

²¹ See *In re Smiley*, 330 N.E.2d 53, 55 (N.Y. 1975) (“Inherent in the courts and historically associated with the duty of the Bar to provide uncompensated services for the indigent has been the discretionary power of the courts to assign counsel in a proper case to represent private indigent litigants.”); *Caron v. Betit*, 300 A.2d 618, 619 (Vt. 1972) (finding that the court has inherent “power to require attorneys to serve and protect vital interests of uncounseled litigants where circumstances demand it”).

²² See, e.g., Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2232 (2013) (proposing a “pragmatic approach [to the civil right to counsel] that seeks to maximize self-help and similar ‘lawyer-less’ and ‘lawyer-lite’ services”); cf. Engler, *Turner v. Rogers*, *supra* note 11, at 42–43, 47 (advocating for a comprehensive access-to-justice strategy, including effective legal assistance short of full representation by counsel).

²³ Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 896 (2009).

²⁴ *Id.* at 897–902 (“Courts and legislatures need to modify current rules to permit greater assistance from competent nonlawyers.”).

²⁵ Russell Engler, *Towards a Context-Based Civil Right to Counsel Through “Access to Justice” Initiatives*, 40 CLEARINGHOUSE REV. 196, 198–200 (2006).

²⁶ *Id.* at 200–01.

²⁷ *Id.* at 201–02.

²⁸ See, e.g., Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106, 2109–10, 2112 (2013) (arguing that a civil right to counsel in the family law context ignores the nature of the proceedings at issue and incorrectly assumes the primacy of a formal, lawyer-centric adversary system as the preferred means for resolving custody and other family law disputes).

²⁹ Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1270–74 (2010).

unrepresented litigants' participation in the legal system.³⁰ Steinberg urges courts to dismantle the procedural, technical, and evidentiary rules that prevent pro se litigants from successfully resolving their claims.³¹

Yet others have proposed the formation of a new right—for example, an “access to justice” right.³² According to Deborah Perluss, “access to justice is a separate and independently enforceable right, substantive in form, personally applied, and distinguishable from the procedural rights and components of due process.”³³ Such a right would require courts to make an individualized determination of an unrepresented litigant’s “ability to meaningfully participate in the proceedings and functions of the court” and, if needed, to appoint counsel in the pursuit of justice.³⁴

As this cursory overview makes clear, there has been much debate about which approach would best alleviate the systemic gap in legal services for indigent litigants. Rather than propose a wholly new solution, which would be difficult given all of the work that has already been done in this area, I suggest that deconstructing the right to counsel into its various components can help to isolate the values driving the discussion and provide a framework for evaluating the merits of different approaches as they would operate in a particular context.

II. Deconstructing the Right to Counsel

Revealing the centrality of the lawyer’s role to the ethos of those engaged in this debate, it is telling that the discussion about access to civil justice for poor individuals is often referred to as a discussion about the civil right to counsel. Focusing on the provision of “counsel” alone is flawed, however, in that it myopically aims the debate at a tangible surrogate for greater ends from which effectiveness is not guaranteed and whose availability necessarily will be limited to those with the greatest need. Even those advocating for a civil right to counsel do not argue that it would or should apply in every civil proceeding; rather they have attempted to isolate the areas of greatest importance, in which counsel is most needed, or in which counsel may have the greatest impact.³⁵

In practice, the exclusive focus on counsel creates a binary solution set in which the tangible entity—counsel—is either provided or not (with relief often only available when counsel is not present at all)³⁶ and pits those faced with a systemic problem against one another

³⁰ Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. __ (forthcoming 2015) (manuscript at 49) (on file with author).

³¹ *Id.* at 49, 57–62.

³² Deborah Perluss, *Keeping the Eyes on the Prize: Visualizing the Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 719, 720 (2006); cf. Abel, *Turner v. Rogers*, *supra* note 12, at 822–23 (advocating for elaboration on the right to meaningful access to the courts that the Supreme Court established in *Turner*).

³³ Perluss, *supra* note 32, at 720.

³⁴ *Id.*

³⁵ See AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES, *supra* note 11, at 3 (supporting a categorical right to counsel in areas of “basic human need,” defined as shelter, sustenance, safety, health, and child custody).

³⁶ For example, in the context of civil claims regarding the deprivation of the criminal right to counsel (i.e., claims brought under 42 U.S.C. § 1983), those cases that have been most likely to gain traction are those alleging deprivation of resources leading to the complete denial of counsel, meaning that no lawyer is present at all. See, e.g., *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 899–900 (Mass. 2004) (addressing an attorney

in a zero-sum resource game. It also creates the danger of an all-too familiar scenario post-*Gideon* where the superficial appointment of counsel may suffice to remedy the alleged violation. At its worst, such nominal enforcement may create an appearance of legitimacy that frustrates access and is detrimental to or stagnates efforts for future reform.

A. Creating a Value-Based Framework

Rather than viewing the appointment of counsel as a panacea, I suggest that the salience of counsel serves as a proxy for other core values we assume will be satisfied by the appointment of a lawyer. The process of deconstructing the right to counsel thus begins with asking why representation by counsel is so important and what purposes it is intended to serve.³⁷ This Issue Brief suggests that four core values underlie the importance of counsel's role: access, fairness, efficiency, and legitimacy.³⁸

1. Access

Access, which is arguably counsel's most important responsibility, signifies the lawyer's knowledge of relevant law and procedure; her ability to maneuver through what can be a complicated legal system; her familiarity with relevant actors and institutions; and her role in translating the client's needs into legal claims and translating legal process into terms that the client can understand.³⁹ As one commentator noted, the rationale behind adopting a right to counsel for both civil and criminal litigants is essentially the same: ignorance of the law.⁴⁰ The Supreme Court highlighted the value of access in *Turner v. Rogers*, when it held that unrepresented litigants have a right to meaningful access to the courts,⁴¹ which one scholar has defined as the ability to identify the critical issues in one's case and present relevant evidence regarding those issues.⁴² For purposes of serving as an evaluation metric, "access" has both quantitative and qualitative components. The former refers to the number of potential clients who will be able to benefit from the proposed mechanism; the latter refers to the quality, or degree, of access afforded by the mechanism.

shortage caused by low compensation, which led to indigent defendants being without representation); *New York Cnty. Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 399–400 (N.Y. Sup. Ct. 2003) (addressing statutory fee caps on attorney compensation, which resulted in an insufficient number of available attorneys for indigent defendants).

³⁷ For a description of how the provision of counsel can address the needs of self-represented litigants, see John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know* (2002), available at http://lri.lsc.gov/sites/lsc.gov/files/LRI/pdf/02/020045_selfrep_litigants_whatweknow.pdf.

³⁸ Cf. Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1102 (2010) (revisiting *Lassiter*, and arguing that the *Mathews v. Eldridge* test should "be less formulaic and embrace a broader range of concerns that reflect fundamental values, such as equality, dignity, fairness, and the legitimacy of the process").

³⁹ James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. FOR SOC. JUST. 383, 389–90 (2005) (listing core competencies of litigants, all of which are compromised in pro se proceedings).

⁴⁰ Ritchey, *supra* note 18, at 336–39.

⁴¹ See *Turner v. Rogers*, 131 S. Ct. 2507, 2519–20 (2011). Notably, however, the Court ultimately held that, in some cases, non-legal assistance might be "constitutionally sufficient" and that there is no categorical right to counsel in civil contempt proceedings. *Id.*

⁴² Abel, *Turner v. Rogers*, *supra* note 12, at 808.

Given its definition, it is clear how a lawyer can provide access, but access also may be met by non-lawyer alternatives. For example, many scholars have proposed pro se court reforms that would better prepare unrepresented litigants to appear in court by creating form pleadings, allowing clerks and other court personnel to give advice and answer questions, and providing greater transparency and clarity in court processes.⁴³ In fact, a number of courts, such as Maricopa County Superior Court in Arizona, already assist litigants in understanding court procedures by providing them with court-approved forms, sample pleadings, and clear instructions to follow.⁴⁴ Beyond forms, some scholars advocate for judges to take a more active role in their cases involving pro se litigants by, for example, explaining the judicial process, instructing litigants on procedural actions, asking questions to ensure pro se litigants understand the proceedings, and explaining the kinds of evidence that can and cannot be considered.⁴⁵ Outside of the courthouse, private companies (which I am not necessarily endorsing here) such as LegalZoom, Inc. offer online legal document preparation that “enables consumers to more easily navigate the legal system without any further assistance from a lawyer.”⁴⁶ While some of these alternatives may have drawbacks in specific legal contexts, under strict guidelines and oversight, they have potential in some cases to satisfy the value of “access” for non-represented litigants.

2. Fairness

Fairness exemplifies the lawyer’s role in an adversarial process where there is an opponent who is represented by counsel, or who is otherwise buttressed by the authority of the state, and who therefore possesses an advantage if the poor litigant remains pro se.⁴⁷ As one commentator recognized, cases where an unrepresented litigant faces a represented one “represent the ultimate breakdown of an adversary system that depends upon a rough equality between the parties in the quest for justice.”⁴⁸ Issues of fairness may also exist not only where the other side is represented by counsel, but where power imbalances exist due to the nature of the proceedings or the burden of proof that a defendant must meet.⁴⁹ For example, in civil contempt proceedings for nonpayment of child support, the proceedings may be unfair even where both parties are unrepresented because of the power imbalance between the parties and the heavy burden placed on the nonpaying parent to “show cause as to why he or she should not be held in contempt.”⁵⁰ Because power imbalances have such a negative effect on the fairness of the proceedings, some commentators propose the right to counsel be granted first, or at a minimum, to unrepresented parties in such cases.⁵¹

⁴³ See, e.g., Barton, *supra* note 29, at 1270–74; Richard Zorza, Turner v. Rogers: *The Implications for Access to Justice Strategies*, 95 JUDICATURE 255, 258 (2012).

⁴⁴ Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 209–10 (2014).

⁴⁵ Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 375–76 (2008).

⁴⁶ Cooper, *supra* note 44, at 210–11.

⁴⁷ See Flores v. Flores, 598 P.2d 893, 895 (Alaska 1979) (finding that fairness dictates that an unrepresented parent should be entitled to counsel in child custody proceedings where the other parent is represented by counsel).

⁴⁸ Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 711 (2006).

⁴⁹ See, e.g., *id.* at 711–13; John P. Gross, *The True Benefits of Counsel: Why “Do-It-Yourself” Lawyering Does Not Protect the Rights of the Indigent*, 43 N.M. L. REV. 1, 20–21 (2013).

⁵⁰ Gross, *supra* note 49, at 20–21.

⁵¹ Engler, *Shaping A Context-Based Civil Gideon*, *supra* note 48, at 711–13.

As with the value of access, it is obvious how representation by a lawyer—particularly where the opposing party is represented—might provide a balance of power and ensure the fairness of the proceedings.⁵² Non-lawyer alternatives can also level the playing field, particularly where they shift the proceeding to a non-adversarial format and avoid active litigation, which by its nature is adversarial.⁵³ One such alternative is online dispute resolution.⁵⁴ As one scholar notes, online arbitration, in addition to its convenience and cost savings, can protect parties from intimidating or threatening face-to-face encounters with their adversaries, particularly in situations of power disparity where individual consumers face a group of corporate attorneys.⁵⁵

Another example might be found in pro se court reforms,⁵⁶ which can come in many forms: courts designed solely for pro se litigants, the provision of limited advice by clerks and court personnel, form pleadings and manuals to assist pro se litigants in understanding court processes.⁵⁷ Or, as Jessica Steinberg suggests, courts might overhaul their procedural and evidentiary rules—and their conception of the judicial role—such that the system is more accessible to non-lawyers.⁵⁸ Under this paradigm, the resources of the court (and, less directly, the state) are no longer providing support solely to the opposing party, but also to the indigent claimant or defendant. In contrast to pure pro se representation, which leaves the system unaltered, pro se-oriented court reforms can reorient the system entirely such that the lawyer’s role is not as critical and any disadvantage to the pro se litigant is therefore minimal. An additional benefit of pro se court reform (satisfying not only fairness, but the other core values as well) is its ability to assist a larger number of pro se litigants at no cost to the litigants and little cost to the courts.⁵⁹

3. Efficiency

The value of efficiency encompasses the idea that representation by lawyers, with their legal knowledge and procedural expertise, should result in expedient and cost-effective resolutions of civil claims. According to the Model Access Act promulgated by the American Bar Association, providing a right to counsel for indigent litigants will “result in greater judicial

⁵² Aviel, *supra* note 28, at 2122–23.

⁵³ There are many contexts in which an adversarial format may not be desirable or the most effective means for resolving the parties’ claims. Rebecca Aviel contends that “civil *Gideon*” advocates often ignore the nature of the proceedings at issue and incorrectly assume the primacy of a formal, lawyer-centric adversary system as the preferred means for resolving custody and other family law disputes. Aviel, *supra* note 28, at 2109–10, 2112; *see also id.* at 2122–23 (explaining that in the majority of cases, lawyers can undertake a joint representation of the couple to offer guidance and advice, explain the process to the clients, draft agreements, and partner with therapists, financial advisors, and other professionals to ensure “access to legal advice in a posture that steers clear of the adversarial paradigm that so many families wish to avoid”).

⁵⁴ *See* Barton, *supra* note 29, at 1273–74.

⁵⁵ Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 203–04 (2010).

⁵⁶ *See, e.g.*, Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 987–89 (2012).

⁵⁷ Barton, *supra* note 29, at 1270–74.

⁵⁸ Steinberg, *supra* note 30, at 57–67.

⁵⁹ *See* Barton, *supra* note 29, at 1270–74.

efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants.”⁶⁰ Moreover, assistance from counsel may safeguard the accuracy of the proceedings, which in turn promotes efficiency by rendering the need for appellate review unnecessary.⁶¹

In 2009, the California legislature passed the Sargent Shriver Civil Counsel Act, which established a model program guaranteeing the right to counsel in critical areas of civil law, with the stated goal of increasing efficiency in a court system bogged down by pro se litigants.⁶² Whether the program does in fact increase efficiency and result in cost savings for taxpayers remains to be seen, as it will not be evaluated until 2016; the program nonetheless demonstrates how counsel may satisfy the need for efficiency.

On the other hand, some commentators contend—and the Supreme Court has agreed⁶³—that providing counsel can hinder efficiency, where counsel introduces a “degree of formality” into the proceedings that causes delay.⁶⁴ Thus, substitute mechanisms, such as online intake, telephone hotlines, self-help informational websites, and other technological improvements for legal aid programs, may—at least in some contexts—be a preferable means to achieve efficiency.⁶⁵ For example, since 2000, the Legal Services Corporation has sponsored a Technology Initiative Grants Program to fund technological innovations by existing legal aid providers, including creating websites, developing online intake systems, building mobile applications, and automating legal forms and documents.⁶⁶ In addition to improving access to legal services and increasing the number of individuals who may benefit, use of technology in this manner can provide pro se litigants with the resources to resolve their disputes more efficiently.

4. Legitimacy

Legitimacy represents the idea that requiring counsel, and all of the formality that accompanies counsel’s appointment, provides adequate recognition to what is at stake in a given proceeding and fosters confidence in the process through which legal claims are resolved.⁶⁷ As one scholar has argued, the right to counsel serves not only to protect the rights of individual defendants in individual trials, but also to protect the integrity of the development of the law by

⁶⁰ AM. BAR ASS’N., ABA TOOLKIT, *supra* note 2, at 12, § 1.F; *see also* Daniel C.W. Lang, Note, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 WIDENER L. REV. 289, 309 (2011).

⁶¹ Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 74 (2007).

⁶² Brian Brophy, *A Civil Right to Counsel Through the States Using California’s Efficiency Project As A Model Toward A Civil Gideon*, 8 HASTINGS RACE & POVERTY L. J. 39, 57–59 (2011).

⁶³ *Turner v. Rogers*, 131 S.Ct. 2510, 2511 (2011).

⁶⁴ Gross, *supra* note 49, at 20–21 (noting that “lawyers have the ability to make what should be ‘straightforward’ determinations needlessly complex”).

⁶⁵ Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 162–63 (2011).

⁶⁶ *TIG’s Impact*, LSC TECHNOLOGY INITIATIVE GRANTS, <http://tig.lsc.gov/about-us/tigs-impact> (last visited July 1, 2014).

⁶⁷ *See, e.g.*, Hornstein, *supra* note 38, at 1104 (providing counsel to those unable to afford counsel “preserves their human dignity and, therefore, the legitimacy of the judicial process and the rule of law”).

ensuring that the legal principles that result are the product of a legitimate adversarial process.⁶⁸ Legitimacy is ultimately about our perception of how the system operates: How is the system perceived both by clients and by outsiders? Do we believe that the system is designed such that “justice”—which encompasses notions of truth and accuracy—will result?

In making judgments about the legitimacy of the judicial process, we must adapt to a less formalized notion of legitimacy: if the goal is for clients to have more confidence in and feel better about the system, it is not necessarily clear that providing a lawyer in a suit will suffice, although it may be one means toward that end. Relying on findings from several empirical studies comparing the success and experience of unrepresented litigants to represented ones, Jean Sternlight asserts that “attorneys can help empower clients to stand up for themselves, and to express their own perspectives.”⁶⁹ Even in simpler cases, Sternlight finds that many clients will not feel comfortable representing themselves and that having an attorney provides clients with emotional support in addition to legal expertise.⁷⁰

In a study of alternatives to full representation by counsel, however, researchers compiled data on clinics, self-help centers, and hotlines, including data on client satisfaction with the assistance received, and most reported high levels of client satisfaction.⁷¹ For example, the Van Nuys Legal Self-Help Center in Los Angeles reported that center-assisted clients in both family and housing cases felt a “high level of satisfaction and reduction in confusion and anxiety.”⁷² This is particularly noteworthy given the difference in outcomes achieved by litigants in these two areas: while center-assisted clients in family cases fared better than unassisted litigants, those in housing cases achieved outcomes indistinguishable from unassisted litigants.⁷³ Legitimacy, then, is dependent not just upon outcomes, but also on how litigants feel about their interaction with the justice system and the assistance they receive—whether through representation by counsel or alternative means.

III. Post-Deconstruction: Looking Forward

Utilizing the above-described framework can achieve several worthwhile aims. First, it can serve as a guide to prioritize and evaluate the effectiveness of various policy proposals, including those proffered as “substitute procedural safeguards” under *Turner v. Rogers*.⁷⁴ For example, provision mechanisms might be evaluated using a four-prong test: (1) whether the method for providing assistance ensures that the party is able to effectively articulate and make informed decisions regarding her claims or defenses; (2) whether the resolution process provides

⁶⁸ Nancy Leong, *Gideon’s Law-Protective Function*, 122 YALE L.J. 2460, 2462 (2013).

⁶⁹ Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 404 (2010).

⁷⁰ *Id.*

⁷¹ Engler, *Connecting Self-Representation*, *supra* note 5, at 68–72.

⁷² *Id.* at 70.

⁷³ *Id.*

⁷⁴ *Turner* held that there is no categorical right to counsel in civil contempt proceedings (for failure to pay child support); due process can be satisfied instead by “substitute procedural safeguards.” *Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011); *see Zorza, Turner v. Rogers*, *supra* note 43, at 258 (asserting that *Turner’s* focus on procedural substitutes for counsel will bring attention to neutral court-based services, including informational centers, informational materials, and neutral assistance from court staff).

one party with an unfair advantage over the other(s); (3) whether the mechanism renders more efficient resolution of claims; and (4) whether the process for resolving claims provides adequate recognition of the rights at stake and for an adequate remedy.

Second, by eschewing the notion that the appointment of counsel is the only adequate solution, the framework encourages a larger range of possible mechanisms for the resolution of legal claims—some of which may provide assistance for larger numbers of possible litigants, or help avoid litigation altogether. At the same time, it can help make the case that counsel is in fact necessary for an individual litigant—i.e., because counsel is the only means by which the core values can be satisfied in a given case. Ultimately, it provides a broader and more flexible basis for reform.

In some cases, for example, non-counsel alternatives, such as pro se court reform, may satisfy the core values more effectively than the appointment of a lawyer.⁷⁵ Pro se court reforms that allow individuals to interface directly with the courts in a clear and streamlined manner—with the support of court or other non-lawyer personnel—can provide similar qualitative access in the context of less complex claims and much greater quantitative access than individual legal representation. Technological innovations also have the capacity to reach a broader audience and to increase the efficiency of dispute resolution. Moreover, to the extent that such reforms require the parties to a dispute to interface through the same technology, they contribute to fairness by placing all parties on equal footing and removing some of the atmospheric and other less tangible advantages that are characteristic of formal legal representation. Depending on the nature of the relationship between the party and her counsel—particularly in light of the often overburdened and underresourced position of legal services attorneys—it may be that individuals benefiting from pro se court reform leave their experience with a sense that the system is designed to provide them with an effective means of resolving their claims in a just and fair manner rather than the impression that they have been dealt a weak hand in a system that is otherwise impenetrable to the legally unindoctrinated.

In other cases, such as housing cases involving landlord-tenant disputes, counsel may be the best means available to meet the need at issue. In one study of evictions in New Haven, Connecticut, researchers found that represented tenants were more than three times as likely to avoid eviction as were unrepresented tenants.⁷⁶ Similarly, a study of New York’s Housing Court discovered that only sixteen percent of represented tenants default versus twenty-eight percent of unrepresented tenants, and represented tenants are far less likely to have an order of eviction entered against them compared to unrepresented tenants.⁷⁷ Non-counsel alternatives may not fare as well in this context. For example, in compiling data from numerous studies of legal aid housing clinics, Russell Engler found that clinic-assisted tenants fared little better than unrepresented ones.⁷⁸ Although clinic-assisted tenants felt that they had been granted adequate

⁷⁵ Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1291 (2013) (arguing that to “shrink the need, cost, and complexity of legal services in most cases” would “not only be simpler, cheaper, and more politically palatable, but also make the law more transparent and intelligible”).

⁷⁶ Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385, 413 (1995).

⁷⁷ Carroll Seron, et. al, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of A Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 427–29 (2001).

⁷⁸ Engler, *Connecting Self-Representation*, *supra* note 5, at 69–70.

recognition of the rights they had at stake (thereby achieving legitimacy), the clinic assistance was “largely ineffective unless paired with assistance in court.”⁷⁹ One scholar argues that all non-counsel alternatives in the housing context—including pro se court reform, form pleadings, technological improvements, and limited assistance—can help pro se tenants but cannot satisfy the need for full representation by counsel because they fail to guarantee fair and impartial adjudication.⁸⁰ In such cases, then, counsel may be required to ensure that all four core values of the framework are satisfied.

Third, the value framework has potential to better inform and foster more constructive dialogue among policymakers about the best way to accomplish shared goals on a system-wide level, rather than devolving into a war over specific entities, fought in terms of numbers and dollars. When the only currency for reform is lawyers, there is little room for negotiation or creativity. However, when the menu for reform includes many options, there is more reason to have a constructive conversation about which would be the best fit and why. This framework could serve as a basis for such a discussion. Seeking a sound basis for future policy decisions, many commentators have called for increased data collection to evaluate the effectiveness of various mechanisms providing an alternative to full representation by counsel; this framework could also be used to develop metrics to analyze such data.

Last, to the extent that we wish to remain within the rights-based paradigm but to think outside the narrow confines of a right to counsel, this framework provides a substantive foundation for what a right of access to justice might entail and what sorts of mechanisms could provide a remedy for violation of the right.

IV. Conclusion

The need for access to civil justice is growing, and resources available to serve that need are scarce. The articulation of the value-based framework described herein is not intended to undermine efforts to extend the right to counsel, particularly where it is the best or only effective solution to satisfy that need. Recognizing, however, that resources are limited, and that representation by a lawyer may sometimes be an imperfect solution, it is meant to both broaden and organize the debate about how to best secure access to justice for low-income individuals with civil legal needs.

The ability to approach the issue with a more open mind will allow those invested in reform to take advantage of trends not only in legal practice, but also in legal education. In light of the increased emphasis on clinics and experiential learning at law schools, the emergence of incubator-style post-graduate practice programs, the suggestion of an apprenticeship model for third-year law students, and an increased focus on non-J.D. programs, a tool is needed to evaluate how and when different models for providing civil legal assistance will be most appropriate or effective. Achieving positive outcomes for litigants cannot serve as the only metric by which to evaluate proposed alternatives, and we should be wary of solutions that are vulnerable to nominal satisfaction. As I suggest here, we might instead look for guidance to the values served by effective legal representation: access, fairness, efficiency, and legitimacy. By

⁷⁹ *Id.* at 67.

⁸⁰ Scherer, *supra* note 18, at 732.

straying from the formal right to counsel and instead isolating its core elements, which may be met by other means, we gain additional flexibility and the potential not only to reach more in need, but also to achieve greater effectiveness in ensuring access to justice for all.