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## Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services

**ABSTRACT.** Recent empirical studies tested whether litigants with access to lawyers fared better than litigants with access only to advice or limited assistance. Two of the three studies produced null findings—the litigants with access to lawyers, the treatment group, fared no better than litigants without a lawyer. In this Essay, I propose that we celebrate these null findings. I do not doubt that expert lawyer assistance will be necessary in some, perhaps many, cases, but we should reduce procedural and other complexities wherever possible in order to facilitate self-help. We should measure improved access to legal services by the extent to which self-empowered consumers are able to resolve everyday legal problems on their own or with limited assistance. The flowering of “lawyer-lite” service innovations—services often preferred by consumers—suggests that the practical work of building consumer-centered and consumer-driven legal services delivery is not only possible, it is already underway.

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## ESSAY CONTENTS

INTRODUCTION	2208
I. LEGAL SERVICES IN THE UNITED STATES: FROM LAW REFORM TO RIGHT TO COUNSEL	2208
A. Legal Services, Law Reform, and Controversy: 1965 to 1980	2209
B. The Civil <i>Gideon</i> Movement	2211
C. The New Legal Services Landscape	2214
II. THE LIMITS OF THE CIVIL <i>GIDEON</i> MOVEMENT	2217
A. Supreme Court Jurisprudence	2217
B. Findings from Access-to-Justice Research	2220
1. The Added Value of Lawyer Representation	2220
2. Understanding the Consumer Perspective	2223
C. Lessons from the English Experience	2224
III. TOWARD CONSUMER-CENTERED, EVIDENCE-BASED LEGAL SERVICES	2226
A. Practical Problems with Civil <i>Gideon</i>	2227
B. Conceptual Problems with Civil <i>Gideon</i>	2229
C. An Alternative Approach: Evidence-Based, Self-Help-Centered Services	2232
CONCLUSION: CELEBRATING THE NULL FINDING	2233



## INTRODUCTION

Half a century ago, the Supreme Court held in *Gideon v. Wainwright*<sup>1</sup> that an indigent defendant in a criminal proceeding is entitled to counsel at state expense. No similar categorical right exists for a civil litigant, no matter how consequential the stakes. Among the wealthy market democracies, the United States is the only nation that does not guarantee access to a lawyer in civil matters. What explains our nation's outlier status? Should achieving a civil *Gideon* be the main policy goal of the access-to-justice movement in the United States? What is the current policy agenda of peer nations that have had an entitlement to counsel for decades?

In Part I, I describe how the origins of civil legal aid in the racial-justice and antipoverty struggles of the 1960s shaped early law-reform and systemic-change goals. When a conservative backlash threatened the existence of federally funded legal services, defenders of the program shifted to an access-to-justice rationale that produced many changes in the legal services landscape and, eventually, a civil *Gideon* movement. In Part II, I critically examine the civil *Gideon* idea in light of Supreme Court jurisprudence, empirical research findings, and the experience of peer nations. In Part III, I argue that civil *Gideon* is not an adequate policy response to unequal access to the legal system and propose continued reforms to enable self-help and "lawyer-lite" services. I also suggest that greatly expanded access to law and its remedies is best understood not as a normative issue, but as a public policy problem that will yield to the tools of public policy analysis and research.

### I. LEGAL SERVICES IN THE UNITED STATES: FROM LAW REFORM TO RIGHT TO COUNSEL

The founders of government-funded civil legal services in the United States were not interested in a right to counsel. They intentionally shaped the program to achieve substantive antipoverty goals rather than access goals. Over time, this policy choice produced fierce conservative opposition that led legal services advocates to reframe their movement in terms of access to justice. With federal funding stagnant and the civil *Gideon* movement producing few successes, courts and legal aid offices had to find ways to meet the needs of growing numbers of unrepresented claimants. They developed new service approaches that, of necessity, depended less on conventional, lawyer-centered representation. Over time these innovations produced a more complex legal

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1. 372 U.S. 335 (1963).



services landscape in which self-help and other lawyer-lite services have become commonplace.

*A. Legal Services, Law Reform, and Controversy: 1965 to 1980*

In 1965, two years after the Supreme Court decided *Gideon v. Wainwright*, government-funded legal services were established in the United States as part of the Johnson Administration’s War on Poverty.<sup>2</sup> The culture in the 1960s supported an overtly political agenda for “a new breed of lawyers . . . dedicated to using the law as an instrument of orderly and constructive social change.”<sup>3</sup> Washington leadership made law reform and test cases the strategic priority for the Office of Economic Opportunity (OEO) legal services lawyers, and it evaluated grantees based on the law-reform cases they pursued.<sup>4</sup> The first President of OEO Legal Services, Clinton Bamberger, announced to a national meeting of state bar presidents that the goal of the program was to “contribute to the War on Poverty” and “to marshal the forces of law and the strength of lawyers to combat the causes and effect of poverty.”<sup>5</sup> Ultimately, the goal of the program was to “remodel the system which generates the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition.”<sup>6</sup>

This policy choice faced strong opposition from leaders of the solo and small-firm bar who supported the English model of reimbursing private attorneys for services provided to eligible clients. This approach later came to be known as “judicare” for its similarity to the structure of the Medicare program in the United States.<sup>7</sup> The policymakers at OEO explicitly rejected the

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2. EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 39-49 (1974).

3. Alan Houseman & Linda Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, CTR. FOR LAW & SOC. POL’Y 5, <http://www.clasp.org/admin/site/publications/files/0158.pdf> (quoting Nicholas DeB. Katzenbach, Att’y Gen., Speech to U.S. Dep’t of Health, Educ. & Welfare Conference (June 1964)).

4. JOHNSON, *supra* note 2, at 132-33.

5. *Id.* at 120 (quoting Clinton Bamberger, Speech to the Nat’l Conference of Bar Presidents (Feb. 8, 1966)).

6. *Id.* (quoting Bamberger’s speech).

7. Jeanne Charn, *Foreword*, 7 HARV. L. & POL’Y REV. 1, 3 n.12 (2013) (discussing the origins of the term “judicare”); Alan Paterson, *Financing Legal Services: A Comparative Perspective*, in A READER ON RESOURCING CIVIL JUSTICE 237, 239 (Alan Paterson & Tamara Goriely eds., 1996).



English model.<sup>8</sup> In his speech to the state bar presidents, Bamberger went on to comment:

I do not believe that an "English System" which parcels out the legal problems of the poor to lawyers engaged not because they have a singular dedication to assist poor people but because they are members of a bar association . . . will ever provide the necessary concerted and thoughtful legal analysis and challenge which must occur if the OEO programs will be more than a chain of legal first-aid clinics.<sup>9</sup>

OEO leaders wanted a service delivery model that would advance the law-reform priority. They had no doubt that the optimal structure was full-time poverty law experts working in not-for-profit legal services offices in the neighborhoods where poor people lived. When the law-reform priority of OEO legal services generated hostility from conservatives, Congress created a new home for the program: the Legal Services Corporation (LSC). The change was intended, in part, to insulate the program from controversy and political influence.<sup>10</sup> This strategy succeeded for a short time. By the end of the Carter Administration in 1980, LSC was the main funder and national policy center of civil legal services. The salaried-staff model was firmly in place,<sup>11</sup> and LSC had programs in every state and territory. Congressional funding for legal services was at its peak, a level not exceeded since 1980.<sup>12</sup> That funding level supported "minimum access," which was defined as two attorneys for every ten thousand poor people.<sup>13</sup>

This high point did not last long. The Reagan Administration ushered in a concerted effort to abolish LSC.<sup>14</sup> Existential threats from conservative opponents continued through the end of the Reagan Administration, abated

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

9. JOHNSON, *supra* note 2, at 119-20.

10. John Kilwein, *The Decline of the Legal Services Corporation: 'It's Ideological, Stupid!'*, in *THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES* 41, 48 (Francis Regan et al. eds., 1999).

11. Houseman & Perle, *supra* note 3, at 24-25. The LSC Act mandated a study to determine if a *judicare* model could provide legal services effectively. The study, released in an intensely politicized environment, found that no alternative model was superior to the staffed model but that the *judicare* model could also be viable.

12. See *id.* at 38 (providing a table that depicts the change in LSC funding from 1980 to later grant years, which takes into account the time value of a dollar).

13. *Id.* at 24.

14. *Id.* at 29-33.



somewhat in the George H.W. Bush Administration,<sup>15</sup> and resumed in 1994 when Republicans gained control of the 104th Congress. That Congress enacted the most severe budget cuts and restrictions in the history of the program.<sup>16</sup> The persistent and fierce opposition from conservatives was rooted in their objection to the social-change and law-reform mission of legal services, which they considered political activities.<sup>17</sup> Many conservatives tolerated a legal services program that helped people with their everyday legal problems, but they vehemently opposed the class actions, legislative advocacy, and test cases aimed at producing systemic change.<sup>18</sup>

Legal aid lawyers, with the unwavering support of the American Bar Association, organized to save the program. They were ultimately successful, but the price was slashed LSC funding, a prohibition on class actions, and restrictions on the substantive claims and remedies that LSC lawyers could pursue for their clients.<sup>19</sup>

### B. *The Civil Gideon Movement*

The right-to-counsel movement, which had no traction in the first decades of government-funded legal services, gained supporters due to growing political opposition to the systemic-change goals of the early years. Legal-services advocates and advocacy groups responded with increasing enthusiasm to the "clarion call" of equal access to justice.<sup>20</sup> Organizing to support a right to counsel in civil matters provided a new focus that was, as I have noted

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15. *Id.* at 34-35.

16. *Id.* at 36-40.

17. See *Hidden Agendas: What Is Really Behind Attacks on Legal Services Lawyers?*, BRENNAN CENTER FOR JUST. 2 (2001), [http://brennan.3cdn.net/bfeb6d6f6d00e9bb57\\_grm6benzi.pdf](http://brennan.3cdn.net/bfeb6d6f6d00e9bb57_grm6benzi.pdf); *Left Out in the Cold: How Clients Are Affected by Restrictions on Their Legal Services Lawyers*, BRENNAN CENTER FOR JUST. 6 (2000), [http://brennan.3cdn.net/fd31c8d619df2eaa6b\\_kvmm6b0003.pdf](http://brennan.3cdn.net/fd31c8d619df2eaa6b_kvmm6b0003.pdf); *Restricting Legal Services: How Congress Left the Poor With Only Half a Lawyer*, BRENNAN CENTER FOR JUST. 2 (2000), [http://brennan.3cdn.net/3cbbcedd52806583b1\\_osm6blo8g.pdf](http://brennan.3cdn.net/3cbbcedd52806583b1_osm6blo8g.pdf). For examples of conservative attacks on LSC, see WASH. LEGAL FOUND., *LEGAL SERVICES CORPORATION: THE ROBBER BARONS OF THE POOR?* (1985); and Kenneth F. Boehm & Peter T. Flaherty, *Why the Legal Services Corporation Must Be Abolished*, HERITAGE FOUND. (Oct. 18, 1995), [http://thf\\_media.s3.amazonaws.com/1995/pdf/bg1057.pdf](http://thf_media.s3.amazonaws.com/1995/pdf/bg1057.pdf).

18. See Earl Johnson, Jr., *Justice and Reform: A Quarter-Century Later*, in *THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES*, *supra* note 10, at 9, 32-33; Houseman & Perle, *supra* note 3, at 29-37.

19. Kilwein, *supra* note 10, at 55-58; Houseman & Perle, *supra* note 3, at 36-39.

20. Richard Moorhead & Pascoe Pleasence, *Access to Justice After Universalism: Introduction*, 30 J.L. & SOC'Y 1, 1 (2003).



elsewhere, “widely viewed as apolitical, an entailment of the nation’s commitment to equality under law.”<sup>21</sup> A coalition of advocates and advocacy groups organized the National Coalition for a Civil Right to Counsel<sup>22</sup> to pursue legislative reform at the state level and litigate due process claims in federal and state courts.<sup>23</sup> The National Center for Access to Justice<sup>24</sup> describes itself as “the single academically affiliated nonpartisan law and policy organization dedicated exclusively to assuring access to our civil and criminal justice system.”<sup>25</sup> Its small staff pursues a wide range of policy advocacy—reports, articles, teaching, conferences—in pursuit of full access to the courts. Neither of these organized efforts existed until the late 1990s.

The civil *Gideon* rationale is familiar. The legal problems of everyday life are pervasive and consequential.<sup>26</sup> The increasing importance of law in people’s daily lives results from courts and legislatures creating an array of social-welfare entitlements and consumer and procedural protections that are meaningful only if people can claim and enforce them. The ABA<sup>27</sup> and a number of state bar associations<sup>28</sup> have staked out policy positions in support of a civil *Gideon*. The ABA supports a categorical right to counsel in areas of “basic human need,” defined as shelter, sustenance, safety, health, and child

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21. Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1025 (2009).
  22. See, e.g., *Leadership*, NAT’L COALITION FOR A CIVIL RIGHT TO COUNSEL, [http://www.civilrighttocounsel.org/about\\_the\\_coalition/leadership](http://www.civilrighttocounsel.org/about_the_coalition/leadership) (last visited Mar. 31, 2013).
  23. *Id.*; see also Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006) (surveying state law); Paul Marvy, *Advocacy for a Civil Right to Counsel: An Update*, 41 CLEARINGHOUSE REV. 644 (2008) (updating the 2006 survey).
  24. *Mission*, NAT’L CENTER FOR ACCESS TO JUST., <http://ncforaj.org/about-2/mission> (last visited Mar. 31, 2013).
  25. *Approach*, NAT’L CENTER FOR ACCESS TO JUST. (Nov. 1, 2012), <http://ncforaj.files.wordpress.com/2012/11/overview-of-ncaj-11-2-12.pdf>.
  26. See, e.g., Ab Currie, *The Legal Problems of Everyday Life*, in 12 ACCESS TO JUSTICE: SOCIOLOGY OF CRIME, LAW AND DEVIANCE 1, 1-2 (Rebecca L. Sandefur ed., 2009).
  27. ABA REPORT TO THE HOUSE OF DELEGATES 1 (2006), <http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc> [hereinafter ABA REPORT].
  28. The ABA report has been co-sponsored by, among others, the New York City Bar Association, King County Bar Association, New York County Lawyers’ Association, Philadelphia Bar Association, Washington State Bar Association, Boston Bar Association, Colorado Bar Association, Los Angeles County Bar Association, and the Bar Association of the District of Columbia. It is also supported by the Massachusetts Bar Association and, with caveats, by the Chicago Bar Association and the Chicago Bar Foundation. See *Bar Resolutions*, NAT’L COALITION FOR A CIVIL RIGHT TO COUNSEL, [http://civilrighttocounsel.org/resources/bar\\_resolutions](http://civilrighttocounsel.org/resources/bar_resolutions) (last visited Mar. 31, 2013).



custody. The ABA resolution specifies that "[t]he above categories are considered to involve interests so fundamental and important as to require governments to supply low-income persons with effective access to justice as a matter of right. There is a strong presumption this *mandates provision of lawyers in all such cases.*"<sup>29</sup> The right-to-counsel movement also encompasses less expansive approaches, such as a right to counsel in specific circumstances or a more complex, graduated approach that incorporates less lawyer-intensive services.<sup>30</sup>

However powerful and elegant the rationale, and despite the support of prestigious bar groups and well-regarded scholars, progress toward a civil *Gideon* has been slow. The allure of a civil *Gideon* is dimmed by the prospect of massive, open-ended costs and nagging doubts about the value that representation by a lawyer adds in many routine matters.<sup>31</sup> Although there have been some state legislative successes in narrowly defined circumstances,<sup>32</sup> the larger agenda is stalled.

Within the broader access-to-justice community, an alternative view supports a policy that would create an entitlement not to a lawyer but to legal assistance appropriate to a claimant's circumstances and need. Conventional, expert attorney representation would be available, but only when evidence showed that less intensive assistance could not be effective. In sharp contrast to the strong *Gideon* position adopted by the ABA, this functionalist, pragmatic approach envisions a civil legal services delivery system that: (1) privileges self-help and similar "lawyer-less" and "lawyer-lite" services; (2) encourages innovation in legal services delivery; and (3) requires a robust empirical research program to comparatively assess different modes of assistance and to gain in-depth understandings of consumer needs and preferences.<sup>33</sup>

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29. ABA REPORT, *supra* note 27, at 13 (emphasis added). The ABA resolution recognizes narrow exceptions for "trivial" matters and the possibility that carefully structured "informal" processes might be sufficient to assure a fair hearing in some instances. *Id.* at 13-14.
30. For thoughtful advocacy of this approach, see Russell Engler, *Towards a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006); and Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31 (2013).
31. See Moorhead & Pleasence, *supra* note 20, at 2-3, 8.
32. Abel & Rettig, *supra* note 23.
33. Jeanne Charn & Richard Zorza, *Civil Legal Services for All Americans*, BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVS. PROJECT (2005), <http://www.garybellow.org/Text.pdf>.



### C. The New Legal Services Landscape

At the same time that the ABA and access-to-justice advocates were fighting to save LSC, they were also pursuing alternatives. They successfully cultivated new sources of funding, developed new modes of service delivery, and brought powerful new stakeholders into the access-to-justice camp.<sup>34</sup> Viewed as a whole, these changes transformed civil legal services from a Washington-based, LSC-centered, congressionally funded program to a decentralized operation lacking a policy or management center and predominantly funded by state and local sources. While the causes of this dramatic transformation are complex, the changes are unmistakable and their implications for expanded access in general, and the civil *Gideon* movement in particular, are great.

*A larger, more diverse resource base.* In 1980, total funding for civil legal aid was about \$338 million, of which \$300 million—nearly ninety percent—came from LSC. Over the next three decades, funding changed dramatically, as set out in Table 1.

**Table 1.**<sup>35</sup>

#### FUNDING FOR CIVIL LEGAL AID

	LSC \$	NON-LSC \$	TOTAL \$
1980	300 million	28 million	328 million
2009	390 million	910 million	1,300 million

This remarkable shift was a result of stagnant congressional appropriations for LSC from 1980 to 2009. If Congress had done nothing other than adjust its 1980 appropriation for inflation, LSC's budget in 2009 would have been \$752,938,299, not the \$390 million it received.<sup>36</sup> As LSC's funding was declining by half in real dollars, non-LSC funding increased twenty-four fold over its 1980 level, more than making up for the loss of LSC funds. However,

34. Charn, *supra* note 21, at 1029-43; Charn & Zorza, *supra* note 33; Houseman & Perle, *supra* note 3, at 41-46.

35. Alan W. Houseman, *National Report: The United States: Civil Legal Aid in the United States: An Update for 2009*, INT'L LEGAL AID GROUP 15 (2009), [http://www.ilagnet.org/conf\\_2009/reports/US%20-%20AH.pdf](http://www.ilagnet.org/conf_2009/reports/US%20-%20AH.pdf).

36. Alan W. Houseman, *Civil Legal Aid in the United States: An Update for 2011*, INT'L LEGAL AID GROUP 17 (Apr. 2011), [http://www.ilagnet.org/jscripits/tiny\\_mce/plugins/filemanager/files/Helsinki\\_2011/national\\_reports/USA\\_National\\_Report\\_ILAG\\_2011.pdf](http://www.ilagnet.org/jscripits/tiny_mce/plugins/filemanager/files/Helsinki_2011/national_reports/USA_National_Report_ILAG_2011.pdf).



while total dollars increased, the funding base became more diverse and decentralized, hindering efforts to deploy resources strategically and generating growing disparities among states. To date, these problems have not been well documented and have received little attention in policy discussions.

*Service innovations flourish.* Beginning in the 1980s and accelerating in the 1990s, legal aid lawyers, state court judges and administrators, and the solo and small-firm bar had to confront rapidly growing numbers of litigants without lawyers. They responded with an explosion of innovation in self-help and less-than-full-service assistance that increased consumer choice and facilitated access. While the impetus for many of these innovations was to provide a stopgap until traditional lawyer services could be expanded, court-based self-help,<sup>37</sup> unbundled legal services, hot lines, online services, and similar “lawyer-lite” innovations have become permanent features of the new legal services landscape.<sup>38</sup>

*State courts become stakeholders.* The judges and court administrators who led reforms that make courts more self-help friendly have become major stakeholders and influential partners in national access-to-justice policy making. The Self-Represented Litigation Network<sup>39</sup> (SRLN) is a coalition of state access-to-justice organizations and state court judges, administrators, and self-help center directors promoting self-help-friendly courts. SRLN does this by conducting research and producing bench guides, best practices materials, and curricula for training administrative staff, clerks, and judges.

*The rise of institutionalized pro bono.* Pro bono is not new, but what was once a local, informal activity is now an institutionalized presence in legal services, the bar, and the nation’s law schools.<sup>40</sup> The ABA has a Standing Committee on Pro Bono and Public Service<sup>41</sup> and the Pro Bono Institute, founded in 1996 and supported by major law firms and corporate partners, is the institutional

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37. Richard Zorza, *The Self-Help Friendly Court: Designed from the Ground Up To Work for People Without Lawyers*, NAT’L CENTER FOR ST. CTS. (2002), [http://lri.lsc.gov/sites/default/files/LRI/pdf/03/030111\\_selfhelpct.pdf](http://lri.lsc.gov/sites/default/files/LRI/pdf/03/030111_selfhelpct.pdf).
38. Charn, *supra* note 7; Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012), <http://yalelawjournal.org/2012/07/30/selbin-charn-alfieri&wizner.html>.
39. SELF-REPRESENTED LITIGATION NETWORK, <http://www.srln.org> (last visited Mar. 31, 2013).
40. In certain law schools, pro bono service is a J.D. requirement. New York State, in fact, requires bar applicants to complete fifty hours of pro bono as a requirement of admission. See Jonathan Lippman, *New York’s Template To Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL’Y REV. 13 (2013).
41. *Standing Committee on Pro Bono & Public Service*, A.B.A., [http://www.americanbar.org/groups/probono\\_public\\_service.html](http://www.americanbar.org/groups/probono_public_service.html) (last visited Mar. 31, 2013).



center and leading authority on all aspects of pro bono services in the United States.<sup>42</sup> While we know very little about the output of pro bono hours annually, the significance of pro bono has led astute commentators to claim, plausibly, that in the United States, “legal services for poor and other marginalized clients are provided through a hybrid public-private system built on three pillars: governmental support, institutional philanthropy, and private lawyer charity. . . . This tripartite relationship affects not just how much access to justice exists, but what type and who gets it.”<sup>43</sup>

This insight is on target, but the pillar metaphor may suggest more structure and coordination than actually exists.<sup>44</sup> Researchers at the American Bar Foundation recently undertook the “first-ever state-by-state portrait of the services available” in which they attempted to accurately and transparently identify the location and order of magnitude of funds available for civil legal services.<sup>45</sup> The study found considerable diversity and creativity at the local level, but fragmentation and inequality within and among states. Particularly troubling is the study’s finding that “geography is destiny: the services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need, but rather by where they happen to live.”<sup>46</sup> This unfortunate situation results from the fact that “[l]ittle coordination exists for civil legal assistance, and existing mechanisms of coordination often have powers only of exhortation and consultation.”<sup>47</sup>

Crucial decisions about service and case-taking priorities (who gets legal help and who does not), types of services offered (referral, information, advice, representation), and expectations about productivity (efficiency and cost-effectiveness) are typically made by local legal services programs. The result is: growing resource disparities among states,<sup>48</sup> no capacity to scale up promising

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42. *About Us*, PRO BONO INST., <http://www.probonoinst.org/about-us> (last visited Mar. 31, 2013).

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

44. See Laura Abel, *Designing Access: Using Institutional Design To Improve Decisionmaking About the Distribution of Free Civil Legal Aid*, 7 HARV. L. & POL’Y REV 61 (2013).

45. Rebecca L. Sandefur & Aaron C. Smyth, *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*, AM. BAR FOUND., at v (Oct. 7, 2011), [http://www.americanbarfoundation.org/uploads/cms/documents/access\\_across\\_america\\_first\\_report\\_of\\_the\\_civil\\_justice\\_infrastructure\\_mapping\\_project.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf).

46. *Id.*

47. *Id.*

48. Houseman, *supra* note 35, at 12.



innovations, a lack of consumer knowledge about service options, and inadequate data to gauge provider quality and productivity.<sup>49</sup> The fragmentation of funding and services has also generated daunting challenges of coordination and management and exposed the dearth of knowledge about the operations and outcomes of the much more complex civil legal services landscape that exists today. It is against this background that policies aimed at greatly expanding access to civil legal advice and assistance must be critically assessed.

## II. THE LIMITS OF THE CIVIL *GIDEON* MOVEMENT

In this section, I examine the right-to-civil-counsel movement from three perspectives, each of which exposes practical as well as conceptual problems. I begin in Section II.A with the June 2011 decision of the Supreme Court in *Turner v. Rogers*,<sup>50</sup> the first civil right-to-counsel case to reach the Court in thirty years. I then consider in Section II.B the implications of empirical research findings that challenge fundamental premises underlying civil *Gideon*. In Section II.C., I turn to the experience of the English legal aid system that has had a civil right to counsel for sixty years but is now pursuing policies that increase advice and other modes of informal and less lawyer-centric services.

### A. Supreme Court Jurisprudence

The prospect of the Supreme Court recognizing a categorical right to counsel in civil cases is remote. In 1981, the Supreme Court found no right to counsel for an indigent mother facing termination of her parental rights.<sup>51</sup> Thirty years later, in *Turner*, the Court had another opportunity to address the issue of a civil right to counsel. Again, the Court found no categorical right, all but closing the door on prospects for a strong constitutional civil *Gideon*. However, the *Turner* majority did find the Fourteenth Amendment’s guarantee of due process both relevant and actionable.

The crux of *Turner* was whether a low-income father, facing jail in a civil contempt proceeding for failure to pay child support, was entitled to the appointment of counsel at state expense. Under the law of South Carolina,

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49. See WAYNE MOORE, DELIVERING LEGAL SERVICES TO LOW-INCOME PEOPLE (2011). Moore worked for years at AARP Legal Counsel for the Elderly and is an expert on legal services delivery systems.

50. 131 S. Ct. 2507 (2011).

51. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).



where the case arose, the father's inability to pay was a defense to civil contempt. Because risk of incarceration has been a deciding factor in criminal and juvenile right-to-counsel cases, Turner's counsel believed they had a strong claim. Their confidence was bolstered by the fact that a substantial majority of the circuits and state courts of last resort that had addressed this issue had found a right to counsel.<sup>52</sup> The Supreme Court held that the defendant's due process rights had been violated, but a unanimous court refused to find a categorical right to counsel. Instead, the five-Justice majority held that the due process rights of the defendant could have been protected by "substitute procedural safeguards" that would have ensured "a fundamentally fair determination" of the important issues in the case.<sup>53</sup> While not mandating particular safeguards, the Court offered the following as examples that would have met due process requirements:

- (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding;
- (2) the use of a form (or the equivalent) to elicit relevant financial information;
- (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.*, those triggered by his responses on the form); and
- (4) an express finding by the court that the defendant has the ability to pay.<sup>54</sup>

Justice Breyer, writing for the majority, identified a number of practical considerations that influenced the Court's decision to look to procedural safeguards in lieu of requiring counsel. I see in the Court's reasoning at least four salient considerations.

First, the crucial issue in the case, Turner's ability to pay, involved straightforward factual issues and no technical issues of law.<sup>55</sup> A debtor aware of this should have been able to represent himself. Ironically, if the trial court had appointed counsel, Turner's ability to pay would have been established prior to meeting his lawyer, when he completed the typical form required to

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52. See *Price v. Turner*, 691 S.E.2d 470, 472 n.2 (2010) (compiling cases on point and finding that twenty courts addressed the right-to-counsel issue in the context of civil contempt; four federal appeals courts, one federal district court, and eleven state courts of last resort found a right to appointed counsel). While the case was pending in the lower courts, Rebecca Price changed her name to Rebecca Rogers.

53. *Turner*, 131 S. Ct. at 2511-12.

54. *Id.* at 2519.

55. *Id.* at 2519.



determine that he was indigent.<sup>56</sup>

Second, the Court was loath to create an asymmetry of representation. Turner’s opponent was not the state but the mother of his children, and she was also poor and unrepresented. Appointment of counsel only for Turner but not for Rogers might have made the proceeding less, not more, fair and increased the risk of an erroneous result.<sup>57</sup>

Third, not only was Rogers poor and without counsel, but, as the custodial parent, she sought support for the parties’ children. The Court noted that the needs of such families played an “important role” in its analysis. The concern of the majority was that introducing an attorney for the defaulting parent could result in formality or delay that “would unduly slow payment to those immediately in need.”<sup>58</sup> As scholars involved in the case have pointed out, decades earlier the Court “had noted Judge Friendly’s wise caution about lawyers’ costs: ‘Within the limits of professional propriety, causing delay and sowing confusion not only are [the lawyer’s] right but may be his duty.’”<sup>59</sup> The Court may have been concerned that a lawyer for Turner might, by delay or formality, wear down the unrepresented Ms. Rogers and so defeat substantive justice with the result that poor children would suffer.

Fourth, in light of the above factors and the availability of substitute procedural safeguards, the Court was reluctant to require states “to provide indigents with counsel in every proceeding of the kind before us.”<sup>60</sup> Many thousands of child-support arrears matters come before state courts every day, in every jurisdiction. Perhaps with this in mind, the Court was unwilling to find a categorical right to counsel that would have imposed a substantial unfunded mandate on the state courts.

The Court’s decision deeply disappointed civil *Gideon* advocates,<sup>61</sup> but pragmatists read *Turner* as constitutionalizing court-based self-help and celebrated the ruling. It is clear post-*Turner* that any state court without explicit “procedural safeguards” in place for defendants in civil-contempt hearings would be inviting due process challenges. The Self-Represented

56. This irony was not lost on the Court. *See id.* at 2519-20.

57. *Id.*

58. *Id.*

59. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 983 (2012) (alteration in original) (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 325 (1985)). Bibas was counsel of record for Rogers in the Supreme Court, and Barton submitted an amicus brief supporting Rogers.

60. *Turner*, 131 S. Ct. at 2518.

61. *See The Turner Symposium*, CONCURRING OPINIONS, <http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers> (last visited Feb. 8, 2013).



Litigation Network promptly set out to articulate guidance for achieving compliance with *Turner* in nonsupport proceedings.<sup>62</sup> As proponents of increased assistance for self-helpers in lieu of a civil *Gideon* assert:

Properly handled, pro se court processes can be cheaper *and* fairer. Extraordinarily, the Court noted that appointing counsel in pro se civil cases could make the proceedings “less fair overall!” . . . Though that observation is a matter of common sense, the Court’s prior case law had consistently praised lawyers’ role in guaranteeing just procedures. *Turner*’s changed tune reflects a more mature, more nuanced view of lawyers and the complexity inherent in the adversarial system. If *Turner* helps to spur new pro se court processes that are simpler and fairer, everyone will benefit.<sup>63</sup>

The *Turner* decision and the realist views expressed above expose some of the practical and conceptual problems inherent in the civil *Gideon* idea.

### *B. Findings from Access-to-Justice Research*

A bedrock assumption of the civil *Gideon* movement is that clients fare substantially better when they are represented by able counsel. A corollary belief is that the crisis in access to legal services is entirely a supply-side problem. If providers had sufficient resources, low-income people would flock to legal aid offices to get help. Empirical access-to-justice research challenges both of these core understandings.

#### *1. The Added Value of Lawyer Representation*

Social-science researchers have undertaken a multi-year program of random controlled trials testing whether lawyer services improve outcomes for clients. This rigorous method provides the best evidence of the difference that access to an attorney makes for legal outcomes. The results of the first three random trials were circulated within months of the *Turner* decision, and this coincidence magnified interest in both the study results and in the *Turner* case. I leave aside issues of research design and method and report only the bottom-line results of the studies and comment on their implications for efforts to expand access to legal services.

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62. See Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, JUDGES’ J., Fall 2011, at 16.

63. Barton & Bibas, *supra* note 59, at 971 (footnote omitted).



*Unemployment insurance (UI) claimants.* The first study involved applicants for unemployment insurance appealing the denial of their application or defending preliminary approval against an employer challenge.<sup>64</sup> The study found that access to representation did not correlate with favorable outcomes. However, representation did lengthen the time it took to reach a resolution and thus delayed successful claimants’ receipt of benefits by an average of two weeks. The study’s sample size was not large enough to investigate whether traits of claimants (age, language ability, education level) or case characteristics (length of employment, strength or novelty of claim, complexity of proof) might correlate with a greater (or lesser) need for lawyer assistance, but further trials could shed light on these important issues.

*Tenants defending eviction.* The results of the second and third studies were circulated several months after the *Turner* decision. One study involved legal aid lawyers representing tenants in a Massachusetts district court,<sup>65</sup> and the other study involved legal aid lawyers representing tenants in a county housing court.<sup>66</sup> In the housing court study, access to lawyer assistance had no effect on outcomes.<sup>67</sup> In the district court study, however, tenants with access to lawyer assistance fared substantially better than those who were randomly assigned to information and self-help.<sup>68</sup> Different legal aid programs provided representation in the district court and housing court, but the study was not designed to explore differences in approach to eviction defense or in quality of representation, though such crucial issues could, and should, be accounted for in further studies.

*Implications for the right to counsel.* At a minimum, the results of the studies challenge the bar’s deeply held belief that lawyers always add value. Reaction to the UI study in the access-to-justice community was intense and often negative.<sup>69</sup> A Concurring Opinions online symposium discussing the study’s

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64. 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 (2012).
65. D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Philip Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013).
66. D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (Sept. 1, 2012) (unpublished manuscript), <http://ssrn.com/abstract=1880078>.
67. *Id.*
68. Greiner et al., *supra* note 65.
69. Selbin et al., *supra* note 38, at 48–51 (discussing the negative response to the UI study).



implications for access to justice included research enthusiasts and skeptics.<sup>70</sup> However, regardless of the early reactions to the three unprecedented studies, the research does provide some rigorous evidence that self-representation can be successful, at least in some settings, some of the time. Thus, the studies undercut the civil *Gideon* premise that attorneys are essential to good outcomes. The substantial advantage for represented tenants documented in the district court study suggests, on the other hand, that empirical evidence can also support a right-to-counsel claim. Further studies would test the strength of these results and confirm or cloud these early findings. A larger sample size would permit evaluation of subgroups to see if certain characteristics of clients or of claims impact outcomes. More detailed information of this sort would aid in targeting resources where they would have the most impact.

The results of these preliminary studies should be read with caution, however. For example, UI hearing agencies may function differently in other states or regions.<sup>71</sup> Fortunately, the choice for legal services policymakers is not binary: to provide or withdraw counsel where it “doesn’t make a difference.” In the new legal services landscape, intermediate choices are available. Many jurisdictions allow limited appearances by attorneys; one recognizes certified legal technicians;<sup>72</sup> pro bono “lawyers of the day” may be available to give brief advice (which would have benefited Michael Turner); and online advice and assistance are increasingly available, as are much lower cost virtual law practices. Possible sources and modes of assistance are rapidly expanding. What is lacking is, first, the empirical evidence that would support confident advice to claimants about what assistance would best meet their needs, and second, the coordination and planning that would assure that the right assistance is readily available to those who need it.<sup>73</sup>

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70. *Symposium: What Difference Representation*, CONCURRING OPINIONS, <http://www.concurringopinions.com/archives/category/representation-symposium> (last visited Mar. 31, 2013) (collecting about twenty reactions to the UI study by various authors).

71. Enrique S. Pumar & Faith Mullen, *The Plural of Anecdote Is Not Data: Teaching Law Students Basic Survey Methodology To Improve Access to Justice in Unemployment Insurance Appeals*, 16 UDC/DCSL L. REV. 17, 42 (2012) (finding a “substantial need” for pro bono legal assistance at UI hearings).

72. The Washington Supreme Court adopted a rule, effective September 2012, establishing Limited Licensed Legal Technicians (LLLTs). WASH. ADMISSION TO PRACTICE R. 28. The LLLTs are authorized to assist parties in types of cases to be specified by the LLLT Board. *Id.*

73. Abel, *supra* note 44.



## 2. Understanding the Consumer Perspective

The conventional wisdom that cost is the main barrier to people seeking legal representation<sup>74</sup> is challenged by over a decade of survey research that explores how potential consumers of legal services respond to "justiciable events"—meaning problems that have "legal aspects, legal consequences, and (potentially) legal solutions" but "may never be understood or treated as a legal problem."<sup>75</sup> Evidence is accumulating that justiciable problems are both consequential and prevalent, but not often taken to lawyers.<sup>76</sup>

Rebecca Sandefur has compared the findings of the English and Welsh Civil and Social Justice Survey<sup>77</sup> with the findings of a similar national survey in the United States.<sup>78</sup> Focusing on housing and personal financial problems, she found that in both countries, people confirmed the widespread existence of justiciable problems. Further, they reported that most problems were never taken to lawyers and that cost was not the main barrier to seeking legal help.<sup>79</sup>

However, Americans behaved quite differently than their English counterparts in important respects. One in four Americans "lumped" their problems, meaning they did nothing.<sup>80</sup> Many of those who did take action went to a lawyer.<sup>81</sup> In the United Kingdom, only five percent did nothing.<sup>82</sup> Of those who took action, ten percent sought legal advice while thirty-seven percent (nearly four times as many) sought advice from informal "institutions

74. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1981) (positing that a multistage process results in only a small fraction of potential claims ever reaching a lawyer or a legal institution).

75. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 951 n.5 (2009) (citing HAZEL GENN ET AL., WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 12 (1999)).

76. Herbert M. Kritzer, *To Lawyer or Not To Lawyer: Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 896 fig.12, 897 fig.13, 898 fig.14 (2008) (reviewing legal-needs studies conducted in Australia, Canada, Japan, the Netherlands, New Zealand, the United States, England, and Wales).

77. PASCOE PLEASENCE, *CAUSES OF ACTION: CIVIL LAW AND SOCIAL JUSTICE* (2d ed. 2006).

78. Consortium on Legal Needs & the Pub., *Legal Needs and Civil Justice: A Survey of Americans*, A.B.A. (1994), [http://www.americanbar.org/content/dam/aba/migrated/legal\\_services/downloads/sclaid/legalneedstudy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legal_services/downloads/sclaid/legalneedstudy.authcheckdam.pdf).

79. Sandefur, *supra* note 75, at 952-53.

80. *Id.* at 970.

81. *Id.*

82. *Id.* at 971.



of remedy," such as the Citizens Advice Bureau or local councils,<sup>83</sup> even though they were *entitled* to consult a solicitor. The research also shows that everyday problems cluster and compound and that people report negative consequences from the strain of nagging, unresolved civil-justice problems.<sup>84</sup>

The stunning lesson from this now-substantial body of research is this: if we want to increase access to legal services, we cannot think only about more lawyers. The United Kingdom continues to guarantee access to lawyers,<sup>85</sup> but policymakers have made a major commitment to advice services because when "a delivery system offers consumers many choices in addition to . . . lawyer services, consumers are both more likely to seek help . . . and less likely to seek lawyer services."<sup>86</sup> That is, when people have a choice between lawyers and readily available, informal advice-givers, we have a lot of evidence that many prefer the informal advisors to lawyers, at least in the first instance. Advice services reach people who would not go to a law office and may reach them when limited assistance can avert the need for more intensive, expert, and costly intervention.

### C. Lessons from the English Experience

As noted in Part I, the policy choices of the founders of the English legal aid system differed from policy choices made in the United States. The Legal Advice and Assistance Act of 1949 guarantees counsel, at public expense, in a wide array of cases.<sup>87</sup> People who need legal aid go to a solicitor of their choice, and if court proceedings are needed, the solicitor provides the service and bills the government.<sup>88</sup> Low-income people pay nothing, but higher-income people are required to contribute to the cost of assistance.

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83. *Id.*

84. Currie, *supra* note 26; Pascoe Pleasence et al., *Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 67 (Pascoe Pleasence, Alexy Buck & Nigel J. Balmer eds., 2007); Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS, *supra*, at 112.

85. See *infra* Section II.C.

86. Charn, *supra* note 21, at 1054.

87. Legal Aid and Advice Act, 13 Geo. 6, c. 51 (1949) (U.K.). The 1949 Act was rewritten and its provisions consolidated in the Legal Aid Act, 1974, c. 4 (U.K.). See *The History of Legal Aid*, SAVE LEGAL AID, <http://www.savelegalaid.co.uk/history.html> (last visited Mar. 31, 2013).

88. The solicitor gets prior approval from legal aid authorities to provide service. See Russell Wallman, *Legal Services in England*, in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM 194, 195 (Douglas J. Besharov ed., 1990).



The English system was and is generous, and therefore it is expensive. Eligibility limits are much higher than in the United States, and every eligible person who requests help gets it. Legal Aid is popular with the public, despite the high price, and no political party has advocated abolishing the program. Crises in legal services in England arise due to rising costs.<sup>89</sup> Cost-control efforts have led to lowering of eligibility from eighty percent of the population in 1949 to less than fifty percent by 2009.<sup>90</sup> However, the English system continues to be widely available.<sup>91</sup> The contrast with legal aid in the United States is stark. Legal aid in the states serves only the very poor, the fee-for-service bar plays a negligible role, budgets are capped, and most people who request help are turned away due to lack of resources.

While the guarantee of access to a solicitor remains a mainstay of legal aid in the United Kingdom, significant additions have been introduced over the past two decades. Based on the justiciable-problem research described in Section II.B,<sup>92</sup> legal aid policymakers have substantially expanded informal advice services,<sup>93</sup> thereby reducing the number of people who take no action when confronted with justiciable problems.<sup>94</sup> Policymakers have also funded staffed offices to supplement private bar delivery, instituted "duty solicitor" roles for in-court limited assistance, and funded online and hotline information and advice services. The most far-reaching reform may be legislation that encourages market innovations and the expansion of market options by permitting private capital investments in legal service businesses.<sup>95</sup>

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89. Tamara Goriely & Alan Paterson, *Introduction: Resourcing Civil Justice*, in A READER ON RESOURCING CIVIL JUSTICE, *supra* note 7, at 1, 1; Legal Action Group, *The Current Position*, in A READER ON RESOURCING CIVIL JUSTICE, *supra* note 7, at 264; Paterson, *supra* note 7, at 237.
90. Paterson, *supra* note 7, at 237 n.96. For a concise description of the reforms of the past two decades and current eligibility criteria, see *Legal Aid Since 2000*, SAVE LEGAL AID, <http://www.savelegalaid.co.uk/legalaidbeforelaspo.html> (last visited Mar. 31, 2013).
91. At present, the eligible percentage of the English population is more than twice as large as the eligible percentage of the U.S. population.
92. The Legal Services Research Centre, a component of the Legal Services Commission, has pioneered empirical research on legal services delivery. *Legal Services Research Centre*, JUSTICE, <http://www.justice.gov.uk/about/lsrc> (last visited Mar. 31, 2013).
93. See Gary Bellow, *Legal Services in Comparative Perspective*, 5 MD. J. CONTEMP. LEGAL ISSUES 371, 375 (1994) (arguing for adoption in the United States of Canadian and European models of front-end advice services).
94. PLEASENCE, *supra* note 77, at 129 (reporting a reduction from twenty percent to ten percent in the number of people who took no action when confronted with a justiciable problem).
95. Vanessa Rakel, Paul Anderson & Jonathan Edwards, *Tesco Law: The Big Bang in the UK Legal Industry* (2011) (unpublished manuscript on file with author); *Why Choose Us*, CO-OPERATIVE LEGAL SERVS., <http://www.co-operative.coop/legalservices/why-choose-us> (last visited Mar. 31, 2013).



The bottom line is that English policymakers now advocate a diverse, mixed-model delivery system that encourages self-help and offers less lawyer-centric services. Legal aid in England and Wales has had a right to counsel for more than fifty years, but policy makers have found that a diverse delivery system is preferred by consumers, reaches more people, and plays a role in constraining costs. Scotland, Ireland, the Netherlands, the Scandinavian nations, Canada, Australia, and New Zealand—all countries with right-to-counsel legal aid programs similar to the English model—are also developing complex mixed-model delivery systems that emphasize readily available, informal advice services.<sup>96</sup>

The legal landscape that policymakers in England and Wales (and many other countries) are pursuing has much in common with the complex, mixed-model landscape that has emerged from the bottom up as a result of local innovation and activism in the United States. From quite different starting points, the paths of the United States's and other countries' legal aid programs are converging around common policy goals and challenges.

### III. TOWARD CONSUMER-CENTERED, EVIDENCE-BASED LEGAL SERVICES

The discussion above has problematized the case for a broad, categorical civil *Gideon* along the lines advocated in the ABA model resolution. Empirical research has shown that many consumers prefer alternatives to lawyers and that lawyers sometimes add cost, complexity, and delay without improving results. Remarkably, the Supreme Court has acknowledged this plain reality and held that the due process rights of parties who cannot afford a lawyer can be secured by safeguards short of appointed counsel. Decades of experience with court reforms that make it easier for parties to self-represent have demonstrated that these approaches work well in some, perhaps many, circumstances. Peer nations that have had an entitlement to lawyer assistance for decades are investing heavily in informal advice services and reaching people who would never have sought out lawyers.

More fundamentally, the right-to-counsel movement, rooted as it is in the assumption that conventional attorney service is the optimal response to legal needs, does not take account of what we have learned about the actual—not

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96. See the International Legal Aid Group (ILAG) website for biannual conference papers that report on developments in participating countries and share an impressive body of empirical research on all aspects of legal services delivery issues; the complex, mixed-model approach is evident. INT'L LEGAL AID GROUP, <http://www.ilagnet.org> (last visited Mar. 31, 2013).



assumed—preferences of consumers or the remarkable service variety that now characterizes both subsidized and market-delivered legal services. Legal aid offices and the solo and small-firm private bar have produced service innovations that meet legal needs in new ways and that allow lawyers and clients to work out a mix of advice, representation, and self-help.<sup>97</sup> The pace of service innovation is accelerating, not abating, and it is inconceivable that it will be turned back in favor of conventional, costly, start-to-finish lawyer representation.

There are other reasons—both practical and conceptual—to be skeptical about making civil *Gideon* the policy engine for substantially expanding access to civil legal assistance.

#### A. Practical Problems with Civil *Gideon*

Practical problems, particularly those related to cost, pose the greatest obstacle to right-to-counsel strategies. The commentary in the ABA resolution suggests one-hundred dollars per eligible poor person as a back-of-the-envelope figure for “full need,” sixty dollars for a narrower guarantee, and a bottom-line cost three to five times greater than present funding from all sources.<sup>98</sup> It is difficult to imagine any state or the federal government committing to a new, open-ended entitlement at these levels, particularly when it is likely that these estimates are far too low. A leading attorney and economist, testifying at a hearing called by the Chief Judge of New York State, pointed out that twenty-five million dollars would

buy 1 million low-income households about seven and a half minutes of legal help at \$200 an hour. Indeed, the entire budget for New York state courts this year—\$2.3 billion—would buy these 3 million low-income people only seven and a half hours of attorney assistance with each of their legal problems.<sup>99</sup>

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97. The ABA Standing Committee on Delivery of Legal Services promotes and disseminates service innovations. *Standing Committee on the Delivery of Legal Services*, A.B.A., [http://www.americanbar.org/groups/delivery\\_legal\\_services.html](http://www.americanbar.org/groups/delivery_legal_services.html) (last visited Mar. 31, 2013). The ABA eLawyering Task Force supports and reports on cutting edge technology centered services. *Law Practice Management Section: eLawyering Task Force*, A.B.A., <http://apps.americanbar.org/dch/committee.cfm?com=EP024500> (last visited Mar. 31, 2013).

98. ABA REPORT, *supra* note 27, at 14.

99. Gillian K. Hadfield, Summary of Testimony: Task Force To Expand Civil Access to Legal Services in New York (Oct. 1, 2012), <http://sbmblog.typepad.com/files/hadfield-testimony-october-2012-final-2-1.pdf>.



In addition to these daunting figures, implementing a right to counsel will generate upward cost pressures and other practical problems.

*Escalating income eligibility.* Eligibility for appointed counsel will escalate because the income needed to hire a private attorney is much higher than 125% of poverty, the limit for most LSC-funded assistance. If civil *Gideon* is limited to the very poor, the asymmetry of representation noted in *Turner* will arise whenever an eligible party is opposed by a near-poor, ineligible party. Either eligibility levels must escalate to solve the asymmetry problem—thus increasing costs—or dissatisfaction with the program due to perceived and actual unfairness will erode support.

*Court and crisis centered services.* The case for civil *Gideon* is strongest where people of limited means face crises that are both consequential and have legally complex dimensions. However, prioritizing funding for crisis intervention in complex legal cases is likely to draw resources into court and away from advice and transactional assistance that might have prevented or ameliorated the crisis in the first place. For example, assistance with debt problems may prevent a foreclosure, but imminent foreclosure may be the point at which legal help becomes available under civil *Gideon*. Thus, even a narrowly defined, well-funded right to counsel for specific, legally complex matters would be an inadequate policy. Additional resources will be needed for early intervention services to prevent crises and to respond to the sea of legal problems of everyday life that, while not necessarily complex, are consequential.<sup>100</sup>

*Quality at risk.* An ABA-type right to counsel that includes a strong presumption in favor of lawyer services in most cases is likely to result in “a Pyrrhic victory: lawyer-for-a-day programs that provide counsel in name only.”<sup>101</sup> The formalism inherent in the civil *Gideon* concept is likely to lead to formalistic compliance. If caseloads are too high, compensation too low, or attorneys lack experience and training, quality will suffer. These problems plague the public defender system<sup>102</sup> and are likely to present major practical problems for a civil *Gideon*.

*One size fits all.* While a problem of “under-lawyering” will jeopardize quality when an inexperienced or limited-assistance attorney is appointed on a complex case, civil *Gideon* will also produce problems of “over-lawyering.” If a mandate requires lawyers to provide assistance that could be provided by

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100. Ab Currie, *The Legal Problems of Everyday Life*, in ACCESS TO JUSTICE 1 (Rebecca L. Sandefur ed., 2009).

101. Barton & Bibas, *supra* note 59, at 994.

102. For a discussion of the problems with the quality of appointed counsel in criminal matters, see Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013); and Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482 (2013).



information services, a self-help center, easy-to-use forms, or lay advisors, the client will have been “over-served” because a high-cost resource will have been used when a lower-cost alternative would function as well or better. *Turner* recognizes this dilemma, and the Court’s unmistakable imperative is to direct the access-to-justice movement toward building ladders of assistance—from information to limited advice to the appointment of a lawyer (of appropriate experience) for part or all of a proceeding. In a post-*Turner* world, a volunteer law student or pro bono lawyer of the day, appropriately situated in a larger system, becomes an asset, not a symbol of nominal compliance but substantive failure.<sup>103</sup>

### *B. Conceptual Problems with Civil Gideon*

In addition to multiple practical problems, the right-to-counsel movement rests on conceptions that do not hold up to empirical or critical scrutiny.

*Legal needs are complex and not lawyer-centered.* Civil *Gideon* proponents tend to understand legal needs in lawyer-focused terms. As discussed in Part II, a substantial body of survey research shows that, contrary to lawyers’ assumptions, lay people often prefer informal advice services even when attorney assistance is available. A consumer-driven and responsive legal services system requires that we institutionalize routine justiciable-problem survey research to stay abreast of the preferences, needs, and perceptions of the public. The research also suggests that informal advice services—far from being a second-best alternative to lawyers<sup>104</sup>—are essential to reach people who would not seek help from a law office.

*Lawyers are not always the optimal response to legal needs.* The ABA’s proposed “strong presumption” that lawyers should be the default option in a wide array of cases<sup>105</sup> does not take into account relevant factors such as the complexity, strength, or novelty of the legal claims; the capacities and preferences of the claimant; or the training, knowledge, and experience of the attorney. When these factors are considered, it is not surprising that empirical research shows that access to lawyers does not always add value. Rather than ask how we get lawyers for everyone, we should ask how we can test our best judgments about

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103. Charn & Zorza, *supra* note 33 (proposing a mixed-model delivery system with a “pyramid” of services from information and self-help at the base to expert lawyer services at the apex).

104. Peter Edelman, *When Second Best Is the Best We Can Do: Improving the Odds for Pro Se Litigants*, in CTR. FOR AM. PROGRESS, CLOSING THE JUSTICE GAP: HOW INNOVATION AND EVIDENCE CAN BRING LEGAL SERVICES TO MORE AMERICANS 39 (June 2011), [http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose\\_all.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/prose_all.pdf).

105. ABA REPORT, *supra* note 27, at 13.



when lawyers make a difference and about whether advice, limited assistance, self-help, or some other approach is the best option to meet a particular need. A legal services delivery system designed to respond to the latter question would require routine data collection and analysis as well as rigorous evaluation of different modes of legal assistance. It would require an evidentiary basis for comparing the costs and benefits of different modes of service.

*Lawyers may be a poor choice to meet some important legal needs.* Rebecca Aviel makes a powerful case that adversarial lawyers are a poor choice for separated or divorcing parents, particularly those resolving differences involving their children.<sup>106</sup> Although care and custody of children is of paramount importance—and so fits the significance prerequisite for civil *Gideon*—Aviel cites empirical evidence that parents want proceedings that are “shorter, simpler, cheaper, more personal, more collaborative and less adversarial,” and growing evidence that “a lawyer-centric adversary system . . . does more harm than good for most domestic relations litigants.”<sup>107</sup>

My forty-five years of experience in legal aid work leads me to similar conclusions. Like Aviel, rather than guaranteeing all parties an adversarial attorney, I would pursue court reforms based on transparency (no hard-ball discovery tactics), collaborative problem solving (no “winners” and “losers”), and self-help. Parties might benefit from having an advisor who could but need not be an attorney, but the governing norms would be fairness, safety, informality, mutuality, and the realities of children’s needs and developmental age. These changes are likely to produce the shorter, cheaper, more personal results that people desire and are more likely to empower parties to adapt to changing circumstances on their own, whether by seeking a trusted third-party advisor or by returning pro se to a problem-solving court.

The lawyer-centric, adversary model may be uniquely disadvantageous for resolving intrafamily disagreements. However, even if this were the only area in which nonadversarial modes ought to be the norm, institutional change in family law is of great practical importance because family troubles draw the most requests for help from legal services providers. Over the six-year period from 2006 to 2011, LSC data shows the following: total matters closed varied in a narrow range from a low of 889,155 in 2008 to a high of 932,406 in 2010. In all six years, family matters exceeded 300,000—over a third of total case closings and the single largest case type. In each year, more than two-thirds of these family matters involved divorce, separation, child custody, or

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106. Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106 (2013).

107. *Id.* at 2109–10.



visitation.<sup>108</sup> If non-adversarial self-help assistance was widely and conveniently available for this huge swath of cases, access might be dramatically and cost-effectively increased.

*Access has systemic dynamics as well as individual dimensions.* The main goal of the civil *Gideon* movement is to guarantee representation for each individual client. This individual focus can lead to a skewed vision—thinking about each client, lawyer, and case in isolation. However, there are important systemic dimensions to the provision of counsel. Multiple related cases can be strategically focused to influence the behavior of agencies,<sup>109</sup> creditors,<sup>110</sup> landlords, and other local actors.<sup>111</sup> This kind of strategy involves bringing case after case raising similar issues. Advice, self-help, and lay advocates, as well as lawyers, can all play a role. Eventually, after behavior has shifted, limited-assistance services may be sufficient to police the changed patterns of operation. Thus, the need for lawyer-intensive service is not constant. It will vary depending on such factors as the strategic behavior of consumers, claimants, and their advocates; the effectiveness of public enforcement (such as inspections or deterrent fines and penalties); better training of agency representatives and adjudicators; the quality of agency- or court-based self-help services; and the availability of affordable services from the private bar.

*High-level attorney expertise can leverage teams of less expert providers.* Another systemic dimension is the possibility of leveraging high-level and high-cost attorney expertise with teams of less experienced lawyers, law students, lay advocates, and unbundled or self-help services. The point is that every complex or consequential legal problem does not require an attorney, per the civil *Gideon* vision. For nearly three decades, I directed a clinical center at Harvard Law School with a staff heavily weighted to lay advocates, students, and novice attorneys. In each area of practice, experienced attorneys and paralegals (who can appear before many administrative agencies) worked with fellows one to five years out of law school and as many as eighty law students per semester,

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108. *LSC Fact Book*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/lsc-fact-books> (last visited Mar. 29, 2013) (providing annual data reports for 2006–2011 that include tables for “Eligible Cases Closed by Case Type and Reason for Closure”).

109. See Gary Bellow, *Steady Work: A Practitioner’s Reflections on Critical Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996) (discussing welfare, labor, and police misconduct strategies).

110. Mary Spector, *From Representation to Research and Back Again: Reflections on Developing an Empirical Project*, 16 UDC/DCSL L. REV. 55 (2012) (discussing abusive collection practices).

111. Mark. H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 119, 128–35, 148–56 (Richard L. Abel ed., 1982) (discussing landlord-tenant litigation); Jeanne Charn, *Preventing Foreclosure: Thinking Locally, Investing in Enforcement, Playing for Outcomes* (2004) (unpublished manuscript on file with author).



allocated among the substantive practice units. The few expert lawyers and paralegals were sufficient to support less experienced advocates who handled the mass of routine matters but who could call in an expert for novel issues or when an opponent refused settlement on favorable terms.<sup>112</sup>

*C. An Alternative Approach: Evidence-Based, Self-Help-Centered Services*

Earlier in this Essay, I proposed a policy alternative to civil *Gideon* that seeks to take advantage of *Turner's* "once-in-a-generation opportunity . . . to move beyond 1963 solutions to 2012 court problems. . . . Rather than looking backward to *Gideon*, *Turner* invites forward-looking, flexible pro se alternatives."<sup>113</sup> In contrast to the lawyer focus of *Gideon*, I propose a pragmatic approach that (1) seeks to maximize self-help and similar "lawyer-less" and "lawyer-lite" services; (2) encourages continued innovation in legal services delivery; and (3) relies on robust empirical research to comparatively assess different modes of assistance, gain in-depth understandings of consumer needs and preferences, and develop a body of evidence about what works best for whom in what circumstances. The dramatically changed legal services landscape reflects progress in moving toward these goals, but many challenges remain.

First, we must encourage continued innovation and experimentation in legal services delivery. As self-help proponents note: "The danger is that *Turner's* minimal suggestions will ossify. . . . [T]he Supreme Court's suggestions in practice often become not only a constitutional floor, but also a ceiling. Instead of falling into this pitfall and abandoning experimentation, lower courts should use *Turner* as a spur to further innovation."<sup>114</sup> With colleagues, I have supported efforts to catalyze experimentation through a program of competitive grants.<sup>115</sup> The Legal Services Corporation's Technology Initiative Grant program is a good model for such an effort. We have also proposed that appropriately situated law school clinics incorporate legal services delivery innovation and research as a component of their core mission.<sup>116</sup> The Self-Represented Litigation Network is another low-budget,

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112. See generally Jeanne Charn, *Service and Learning: Reflections on Three Decades of the Lawyering Process at Harvard Law School*, 10 CLINICAL L. REV. 75 (2003).

113. Barton & Bibas, *supra*, note 59, at 988-89.

114. *Id.* at 989.

115. Jeffrey Selbin, Josh Rosenthal & Jeanne Charn, *Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low- and Moderate-Income Americans*, in CTR. FOR AM. PROGRESS, *supra* note 104, at 51, 53-54, 58-61 (2011).

116. Jeanne Charn & Jeffrey Selbin, *The Clinic Lab Office*, 2013 WIS. L. REV. 146.



big-return model that continues to spur innovation and has the capacity through its court network to scale up best practices.

A second critical challenge is to develop integrated systems with authority to strategically target resources, maximize self-help and lawyer-lite services, assure prompt access to lawyers when consumers need more intensive help, and scale up proven service approaches. This will require rebalancing legal services policy making away from local programs and towards authoritative state or regional policy making centers.

A third challenge is to develop a sustained empirical research capacity that will provide the evidence base for legal services delivery policies.<sup>117</sup> A coalition that includes researchers, clinicians, bench and bar leaders, and legal services funders and providers has embarked on this effort and is making progress.<sup>118</sup> The turn to evidence-based policy will also challenge the bench, bar, legal aid providers, and funders to engage research results that challenge long-held views and to relax or change practices and rules that hinder new service approaches that have proven effective.

A fourth challenge is to reframe the access-to-justice problem in ways that capture the energy and creativity that continue to fuel the revolutionary changes in the lower trial courts, the flowering of service innovations in the legal services and small-firm private bar, and the recent drive to better understand the public's views and preferences when dealing with law-related problems. The most basic recasting of the access problem is the shift away from a lawyer-centered perspective focused mainly on lawyer availability to a consumer perspective that emphasizes reforming court and administrative practices, simplifying procedures, and generally making it easier for people to self-represent or achieve their goals with limited advice or representation.

#### CONCLUSION: CELEBRATING THE NULL FINDING

I count myself among the advocates of consumer-centered, self-help services who cheered *Turner's* holding and celebrated the null findings—that claimants fared as well on their own as with lawyer assistance—in the random controlled trials. Self-help, properly supported, is consumer centered and driven. It suggests that courts and agencies have found ways to encourage and facilitate self-representation. Claimants may gain confidence in adjudicatory institutions and be more willing to assert rights enacted for their benefit. Low-

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117. Selbin et al., *supra* note 115, at 58-67 (noting recommendations for an evidence-based legal services system).

118. Charn & Selbin, *supra* note 116, at 160-61.



and middle-income claimants will have many options for assistance and can make choices that fit their needs and preferences.

While I do not doubt that skilled lawyers will be needed due to inherent legal complexity, if swaths of problems can be resolved effectively with less or even no lawyer input, then lawyer services can be triaged where we have evidence that they *are* needed and will make a difference. We must keep in mind that access to courts and lawyers is not identical to access to justice. Courts and lawyers play an important role but the complexities and obscurities of the legal system can inhibit as well as advance goals of fairness and equity. The ideal of an informed and self-empowered public effectively pursuing their legal entitlements in institutions that welcome them also has great appeal but will not fit every circumstance. Which point along the spectrum from expert lawyers to advice for self-helpers best meets the needs of individual consumers is best addressed by review of data, empirical research, consumer surveys and cost-benefit analysis – the tools of public policy analysis. Normative issues remain (should society subsidize claims worth less than the costs of service) but policy tools advance debates about the marginal case by documenting potential second and third order effects of success on primary claims. Evidence based strategies offer promise of more generous, effective and consumer centered access to the legal system.



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