Modernizing Due Process:
Approaches to Expanding Civil Access to Justice for Low-Income Litigants

I. Introduction

For far too many Americans, access to civil legal assistance is inaccessible, unaffordable, and simply out of reach. In what the Legal Services Corporation (LSC) calls the "justice gap," low-income litigants face substantial barriers to seeking and receiving civil legal assistance, and the vast majority of their legal needs go unaddressed.[1] Of the nearly fifty million Americans eligible for free legal assistance, a disproportionate share live in the South and in rural areas, and are more likely to be women and people of color.[2] To ensure that the ideals of due process and equal justice under the law are realized for low-income litigants, and to bolster the public's confidence in the legal system, it is imperative that justice gap disparities be addressed while also centering the needs of those most likely to be affected.

Access to justice disparities are not new. Before the US Supreme Court's landmark ruling in *Gideon v. Wainwright*, establishing the right to counsel in criminal proceedings, low-income criminal defendants faced similar challenges in accessing legal assistance.[3] The Court's reasoning in *Gideon* and its expansive interpretation of due process could provide a roadmap for establishing a civil right to counsel.[4] In the decades since *Gideon*, the legal community, policymakers, and citizens alike have grappled with whether a similar right to court-appointed counsel in civil proceedings, a "civil *Gideon*," is necessary to confront the civil justice gap or

[1] LEGAL SERVS. CORP., THE JUSTICE GAP REPORT: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 49 (Legal Servs. Corp. ed., 2022) [hereinafter LSC Report], https://justicegap.lsc.gov/the-report/; Mary Smith, *Legal Help for Civil Matters Shouldn't Be Reserved for the Rich*, BLOOMBERG L., (Jan. 11, 2024), https://news.bloomberglaw.com/us-law-week/legal-help-for-civil-matters-shouldnt-be-reserved-for-the-rich.
[2] LSC Report at 22-24.
[3] *See* Gideon v. Wainwright, 372 U.S. 335, 336-339 (1963); U.S. CONST. amend. VI.
[4] *See generally* Benjamin Barton, *Against Civil Gideon (and for Pro Se Court Reform),* 62 FLORIDA L. REV. 1228 (2010) (discussing reforms to the civil legal system to address the justice gap including civil *Gideon* and pro se reforms).

whether other approaches, such as self-representation reforms, are better suited to address these issues.[5]

This note offers solutions to address the justice gap that are rooted in notions of fundamental fairness—the hallmark of due process under the Fourteenth Amendment.[6] Part II examines the effects of inadequate legal representation on low-income communities and discusses the Supreme Court's access to counsel jurisprudence. Part III examines different approaches to reforming the civil legal system. Part IV argues in favor of a multi-pronged approach that (1) requires justice gap impact studies before federal, state, or local governments enact changes to rules of civil procedure or other policies that disproportionately affect low-income litigants, (2) establishes a statutory right to counsel in cases involving essential human needs, and (3) expands opportunities for self-representation.

II. Background

A. The Effects of Inadequate Legal Representation on Low-Income Communities

Inadequate civil legal representation for low-income Americans not only erodes confidence in the justice system and democratic institutions more broadly, it also affects the lives and livelihoods of low-income individuals.[7] Without adequate legal protection, low-income Americans face an increased risk of erroneous outcomes that could deprive them of essential public benefits, undermine their civil rights, and widen existing racial and class disparities.[8] In its 2022 report on the justice gap, LSC found that in 2021 more than one-third of low-income Americans experienced a civil legal problem that substantially impacted their lives and that

[5] *Id.*
[6] *See Gideon*, 372 U.S. at 339; U.S. CONST. amend. XIV.
[7] *See* LSC Report at 50.
[8] *Id.* at 22-24; Tonya L. Brito et al., *What We Know and Need to Know About Civil* Gideon*,* 67 S. CAROLINA L. REV. 223, 224 (2016) (discussing negative externalities of litigants losing cases).

problems relating to housing, employment, income maintenance, and family matters were among the most pressing.[9] Given the chronic underfunding of civil legal aid in the United States—which has resulted in fewer than three civil legal aid attorneys estimated for every ten thousand Americans living in poverty—even when low-income Americans seek legal help, they often do not receive all the help they need.[10] In addition to poorer outcomes, low-income Americans have less favorable perceptions of the justice system. LSC's report found that only 28 percent of low-income Americans believe they will be treated fairly in the civil legal system, and more than half doubt they could find and afford a lawyer if needed.[11]

These alarming statistics illustrate that the justice gap significantly affects low-income litigants, and that the enormity of these disparities will require bold, comprehensive reforms. Access to counsel safeguards were previously expanded by the Supreme Court, but has the Court continued to do so in civil matters? The next subsection explores the Court's jurisprudence in this area.

B. The Supreme Court's Access to Counsel Jurisprudence

Gideon marked a seismic shift in constitutional law and particularly in due process jurisprudence. Prior to *Gideon*, the Supreme Court's holding in *Betts v. Brady* concluded that the refusal of a state to appoint counsel for an indigent criminal defendant did not necessarily violate the Due Process Clause of the Fourteenth Amendment, instead asserting that the "denial [of due process] is to be tested by an appraisal of the totality of facts in a given case."[12] In *Gideon*, however, the Court recognized that the Sixth Amendment's right to assistance of counsel in all criminal prosecutions was "so fundamental and essential to a fair trial" and thus due process, that

[9] LSC Report at 37.
[10] *Id.* at 47; Smith, *supra* note 1, ¶ 4.
[11] LSC Report at 50-51.
[12] *Gideon*, 372 U.S. at 339.

it "must be made obligatory upon the [s]tates [through] the Fourteenth Amendment."[13] Writing for the majority, Justice Powell acknowledged that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[14] The majority also noted that *Brady* represented "an abrupt break" from the Court's previous precedents, wherein the Court had recognized the Sixth Amendment's assistance of counsel guarantee as a "safeguard" that was "necessary to [e]nsure fundamental human rights of life and liberty."[15] In remedying an issue that had so pervasively affected the criminal justice system, the Court finally gave teeth to the right to counsel—relieving defendants of the burden of affording counsel and instead placing this burden on government institutions.[16]

A few years later in *In re Gault*, the Court clarified that the need to protect a defendant's personal freedom is foundational to the right to counsel, even in non-criminal cases.[17] In *Gault*, the Court similarly held that due process requires assistance of counsel for juveniles facing delinquency proceedings given that the outcome of such a proceeding could lead to a juvenile's "commitment to an institution in which the juvenile's freedom is curtailed."[18]

Gideon and *Gault*, both products of the Court's so-called "Due Process Revolution," had the potential to usher in a new era of court-appointed counsel.[19] However, by 1978, the Court's appetite for categorical requirements for access to counsel had all but evaporated, and it later began to question its previous view that the potential loss of a defendant's liberty triggers a right to counsel.[20]

---

[13] *Id.* at 340; *see* U.S. CONST. amends. VI, XIV.
[14] *Gideon*, 372 U.S. at 344.
[15] *Id.* at 343; *see* U.S. CONST. amend. VI.
[16] *See Gideon*, 372 U.S. at 345.
[17] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981).
[18] *Id.*
[19] *See* Barton, *supra* note 4, at 1232.
[20] *See* Vitek v. Jones, 445 U.S. 480, 496 (1978); Turner v. Rogers, 564 U.S. 431, 439 (2011).

In *Vitek v. Jones*, the Court addressed whether the Due Process Clause entitles a prisoner convicted and incarcerated in state court to certain procedural protections, including notice, an adversarial hearing, and the provision of counsel before being transferred involuntarily to a state mental hospital for treatment.[21] Noting that a "grievous loss" had occurred given that involuntary commitment is qualitatively different from the punishment usually mete on a prisoner, a divided Court held that procedural safeguards were necessary under the Due Process Clause but stopped short of requiring legal representation.[22] Instead, the Court articulated that the "minimum procedures" of written notice, a hearing, an opportunity to be heard and present witnesses, an independent decision-maker, and a written explanation by the factfinder satisfied due process.[23] Although Justice White, writing for the majority, observed that "[a] prisoner thought to be suffering from a mental disease or defect requiring involuntary treatment probably has an even *greater* need for legal assistance," the Court nevertheless declined to require legal representation (emphasis added).[24]

In subsequent cases, the Court continued to reject arguments for rights to counsel and emphasized the importance of substitute procedural safeguards.[25] In *Lassiter v. Department of Social Services*, the Court addressed whether an indigent mother facing potential termination of her parental rights by the state is entitled to counsel under the Due Process Clause.[26] In *Turner v. Rogers*, the Court reviewed whether the Due Process Clause requires the appointment of counsel for an indigent individual facing a civil contempt proceeding for failure to pay child support.[27] Despite its findings that the provision of counsel would be beneficial for both litigants, the Court

[21] *Vitek*, 445 U.S. at 482-83; *see* U.S. CONST. amend. XIV.
[22] *Vitek*, 445 U.S. at 492-93.
[23] *Id.* at 494.
[24] *Id.* at 496-97.
[25] *See Lassiter*, 452 U.S. at 31-32; *Turner*, 564 U.S. at 447-48.
[26] *Lassiter*, 452 U.S. at 24; *see* U.S. CONST. amend. XIV.
[27] *Turner*, 564 U.S. at 436-37; *see* U.S. CONST. amend. XIV.

nonetheless declined to require legal representation.[28] In *Lassiter*, the Court held that trial courts, on a case-by-case basis and subject to appellate review, should assess whether due process requires legal representation.[29] In *Turner*, the Court explained that a litigant's ability to pay child support could easily be assessed without the provision of counsel, and held that "substitute procedural safeguards" would be sufficient to protect a defendant's due process rights.[30]

As the aforementioned cases reveal, the Court has declined to recognize a civil *Gideon* outside of juvenile proceedings.[31] Thus, unlike in the past, the Court will likely not drive justice system reforms. However, the Court's rationale that substitute procedural safeguards can satisfy due process provides a new avenue for policymakers at the state, local, and federal levels to reimagine the civil legal system, including the role of attorneys, and enhance procedural safeguards to ensure that the due process rights of low-income litigants are protected.[32] The following section reviews different approaches to achieving civil legal reforms.

III. Analysis

Reforms to the civil legal system largely fall into two categories: those that expand access to counsel and those that increase opportunities for self-representation. While no jurisdiction has succeeded in eliminating the justice gap, the approaches offered below shed light on best practices that can modernize the civil legal system and create fairer procedures and outcomes. The approaches are analyzed by considering their impact on low-income litigants' due process rights, their feasibility and efficacy, and their alignment with the goals and values of the areas of law they seek to address.

[28] *Lassiter*, 452 U.S. at 29, 31-32; *Turner*, 564 U.S. at 442-443.
[29] *Lassiter*, 452 U.S. at 32.
[30] *Turner*, 564 U.S. at 444 (quoting Mathews v. Eldrige, 424 U.S. 335 (1976)).
[31] *See Vitek*, 445 U.S. at 496-97; *Lassiter*, 452 U.S. at 31-32; *Turner*, 564 U.S. at 447.
[32] *See Turner*, 564 U.S. at 447.

A. The Civil *Gideon* Approach

Proponents of civil *Gideon* assert that legal representation can improve the accuracy of outcomes, increase court efficiency, save federal and state dollars by avoiding the negative externalities of erroneous deprivations of essential benefits, and increase the public's faith in the administration of justice.[33] However, opponents argue that civil *Gideon* is prohibitively expensive, ineffective due to low funding and high caseloads for current legal aid attorneys, and inappropriate in certain kinds of disputes.[34] Is civil *Gideon* a viable solution? Numerous states agree that it is.

Although some states have rejected expansions to civil counsel through constitutional interpretation, many jurisdictions have established a civil right to counsel by statute or ordinance, and usually for proceedings that implicate essential human needs.[35] Tennessee, for example, enacted a statute that guarantees access to counsel for low-income individuals facing termination of parental rights or proceedings related to abuse, dependency, or neglect, and Montana and Colorado have passed similar statutes.[36] Washington has adopted a statute that guarantees access to counsel for low-income tenants facing unlawful detainer proceedings.[37] Other states, such as California, have rolled out pilot programs that adopt a more comprehensive approach by focusing on a variety of issues, including housing, domestic violence, restraining orders, elder

[33] Brito et al., *supra* note 8, at 224.
[34] Barton, *supra* note 4, at 1228, 1232.
[35] Brito et al., *supra* note 8, at 228; *see* Frase v. Barnhart, 379 Md. 100, 138 (Md. 2003) (Cathell, J., concurring) (noting that "The very same reason that a poor person without a lawyer cannot get a fair trial in a criminal case, applies equally in a civil case," especially in child custody disputes); Touzeau v. Deffinbaugh, 394 Md. 654, 665 (Md. 2006) (4-3 decision) (upholding a lower court decision denying a continuance for a parent in custodial dispute to have counsel present).
[36] Brito et al., *supra* note 8, at 233; *see* Tenn. Code Ann. § 37-1-126 (2023).
[37] *See* Wash. Rev. Code Ann. § 59.18.640 (2023).

abuse, guardianship and probate conservatorship, and child custody.[38] These examples reveal that civil *Gideon* approaches are politically feasible, but are they effective?

Numerous social science studies have analyzed the effects of legal representation on outcomes for litigants, and the results reveal that representation can greatly improve outcomes in some types of proceedings but not in others.[39] In cases involving housing, unemployment claims, disability benefits, asylum claims, employment discrimination, and family law issues, litigants with representation are more likely to prevail.[40] Conversely, representation may have a minimal or even negative effect in juvenile proceedings.[41]

While case outcomes are an important indicator for the effectiveness of the civil *Gideon* approach, it is also important to consider other benefits that representation can confer, including a greater understanding of the proceedings and of one's rights. Lawyers do not simply provide legal assistance, they manage cases, respond to the court, prepare witnesses and documents, and assist their clients with making difficult choices. For low-income litigants who may not have the time or resources to expend preparing for court, these benefits are crucial. Additionally, the Court's reasoning in *Gideon* suggests that these benefits are arguably most important because they are fundamental to fairness as they afford a litigant a meaningful opportunity to be heard and vigorously assert their rights.[42]

Although civil *Gideon* offers many benefits it also has limitations. In child custody cases advocates have cautioned against simply providing counsel to both parents for fear that it will make the process more adversarial by restricting direct communication between parents and

[38] Brito et al., *supra* note 8*,* at 234-35.
[39] Emily S. Taylor Poppe & Jeffrey J. Rachlinkski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885-924 (2016) (discussing numerous studies revealing the effects of representation on various kinds of civil proceedings).
[40] *Id.* at 904-924
[41] *Id*. at 889-95.
[42] *See Gideon*, 372 U.S. at 344-45.

undermining efforts for reconciliation.[43] There are also concerns that civil *Gideon* may go underutilized in jurisdictions where it is available due to litigants' lack of awareness of such programs or the inaccessibility of counsel.[44] The costs of expanding civil *Gideon* can also serve as a barrier to its widespread adoption; the LSC projects that such an endeavor would cost nearly $1.6 billion.[45] However, states like Connecticut have considered approaches that would offset these costs by allocating dollars recouped through state enforcement actions and punitive damages awards to organizations that provide civil legal services.[46]

B. The Self-Representation Approach

Recognizing the fiscal hurdles and political realities of the current landscape, proponents of the self-representation approach assert that it offers substantial benefits to low-income litigants without the exorbitant costs of civil *Gideon*.[47] Given that numerous psychological studies have shown that when a litigant does not feel heard in a legal process they perceive the entire process as unfair, those in favor of self-representation reforms assert that greater direct involvement by litigants would likely lead to greater satisfaction with the outcome.[48] Has the self-representation approach taken hold in states and cities? In practice it appears that jurisdictions have been slow to adopt such reforms.[49]

State court judges have largely been at the forefront of self-representation efforts.[50] In 2002, the Chief Justice of the California Supreme Court, in collaboration with the National

[43] Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2108, 2117 (2013).
[44] Brito et al., *supra* note 8, at 239.
[45] *Id.*
[46] REPORT OF THE TASK FORCE TO IMPROVE ACCESS TO LEGAL COUNSEL IN CIVIL MATTERS TO THE CONN. GEN. ASSEMBLY JUDICIARY COMM., at 21 (2016), [hereinafter Conn. Task Force Report] https://cdn.ymaws.com/members.ctbar.org/resource/resmgr/Civil_Gideon_Task_Force/Final_Report.pdf.
[47] Barton, *supra* note 4, at 1228, 1232.
[48] *Id.* at 1262.
[49] *See* Barton, *supra* note 4, at 1270-72.
[50] *Id.*

Center for State Courts, released a document discussing California's efforts to expand opportunities for self-representation for litigants through tools like accessible self-help websites.[51] Similarly, in 2005, the American Judicature Society published a guide highlighting different ways that state court judges could use their authority and managerial role to assist unrepresented litigants by simplifying court procedures, appropriately training court staff, and providing accommodations for litigants.[52] Modernizing the civil legal system will require building on these successes and offering more up-to-date technological solutions that expand resources and assistance to litigants.

Self-representation reforms alone, while empowering for some litigants, will likely not meaningfully address justice gap disparities.[53] Courts, like other governmental entities, are inevitably subject to institutional inertia and are therefore difficult to change. State supreme courts, legislatures, and the legal community will likely need to work together to enact changes in court rules, rules of civil procedure, and statutory law. Self-representation will not be effective for all low-income litigants, especially those who lack the time, resources, and skills to effectively represent themselves.

IV. Solution: Justice Gap Impact Studies, Civil *Gideon*, and Self-Representation

In light of the advantages and disadvantages of the civil *Gideon* and self-representation approaches, eliminating justice gap disparities will require a multi-faceted approach that is politically and fiscally feasible but also robust enough to make a significant impact. For these reasons, jurisdictions should (1) require justice gap impact studies before enacting or modifying policies that disproportionately affect the procedural or substantive rights of low-income

[51] *Id.* at 1271.
[52] *Id.* at 1270.
[53] *See* Brito et al., *supra* note 8, at 224-25.

litigants, (2) establish a statutory right to counsel in cases involving essential human needs, and (3) expand opportunities for self-representation in civil proceedings.

Congress should enact legislation that requires justice gap impact studies before federal, state, or local governments enact or modify policies that disproportionately affect low-income litigants. Such an approach would allow jurisdictions to consider the effects that their proposals will have on communities whose voices are often underrepresented in decision-making processes. It would also provide a useful point of entry for civil legal advocacy groups and low-income Americans to force a dialogue that may shift priorities and funding toward addressing the justice gap. Congress could also go a step further by providing additional federal dollars to jurisdictions that have made progress in reducing the justice gap. One weakness of this approach is that it does not directly lead to civil legal reforms as states and municipalities would have the autonomy to decide whether to enact reforms, and some jurisdictions may push back by arguing that this requirement is heavy-handed.

Modernizing the civil legal system and protecting the due process rights of low-income litigants will also require statutory reforms to both access to counsel and opportunities for self-representation.[54] States should aim for a more comprehensive approach like the one offered by California, that includes both access to counsel pilot initiatives and state court procedural reforms.[55] These approaches will ensure that low-income Americans, especially those haled into court by the state, have an equal playing field to defend their rights. These approaches also align with notions of fundamental fairness inherent in due process. In implementing civil *Gideon*, states should adopt the cost-offsetting approach considered by Connecticut, and use dollars

[54] *See* Barton, *supra* note 4, at 1228; Brito et al., *supra* note 8, at 228-233.
[55] *See* Brito et al., *supra* note 8, at 234-35.

recouped through state enforcement actions and punitive damages awards to fund these efforts.[56] Additionally, jurisdictions should convene state and local bar associations, low-income litigants, and state court judges to craft reforms that effectively utilize technology and streamline procedures so that litigants may represent themselves.[57] These approaches may be weakened by ineffective implementation or a lack of buy-in from litigants.[58] For these reasons, it is imperative that communities be involved in the process and educated about their substantive and procedural rights.

V. Conclusion

Eliminating justice gap disparities will require the legal community, policymakers, and citizens to reimagine the civil legal system and the role of attorneys. Despite some defeats at the US Supreme Court, efforts to overhaul and modernize the civil legal system and enhance due process protections for low-income litigants have remained at the forefront.[59] Conservative and progressive states alike have undertaken efforts to reduce justice gap disparities and their efforts demonstrate that while there is no one-size-fits-all approach to meaningfully expanding access to justice, there are strategies that are feasible and effective.[60] These approaches also highlight that statutory reforms and budgetary investments, rather than constitutional interpretation, will be critical for establishing a level playing field for low-income litigants.[61] In the years ahead, state, local, and federal leaders should consider adopting justice gap impact studies, expanding access

[56] *See* Conn. Task Force Report at 21.
[57] *See* Barton, *supra* note 4, at 1270-71.
[58] *See Vitek*, 445 U.S. at 496-97; *Lassiter*, 452 U.S. at 31-32; *Turner*, 564 U.S. at 447; Barton, *supra* at 1228; Brito et al., *supra* note 8, at 228-233..
[59] *See* Brito et al., *supra* note 8, at 233; Tenn. Code Ann. § 37-1-126; Wash. Rev. Code Ann. § 59.18.640.
[60] *See* Brito et al., *supra* note 8, at 228-233; Poppe & Rachlinkski, *supra* at 885-924.
[61] *See* Brito et al., *supra* note 8, at 228-233; *Frase*, 379 Md. at 138; *Touzeau*, 394 Md. at 665.

to counsel, and increasing opportunities for self-representation to ensure that litigants of all backgrounds are afforded robust due process protections.[62]

[62] *See Vitek*, 445 U.S. at 496-97; *Lassiter*, 452 U.S. at 31-32; *Turner*, 564 U.S. at 447; Barton, *supra* note 4, at 1228; Brito et al., *supra* note 8, at 228-233; U.S. CONST. amend. XIV.