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## Demand Side Reform in the Poor People's Court

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## Article

### Demand Side Reform in the Poor People's Court

JESSICA K. STEINBERG

*A crisis in civil justice has seized the lowest rungs of state court where the great majority of American justice is meted out. Nineteen million civil cases are filed each year in the so-called “poor people’s court,” and seventy to ninety-eight percent of those matters involve an unrepresented litigant who is typically low-income and often a member of a vulnerable population. This Article challenges the predominant scholarly view in favor of “supply side” remedies for improving access to justice—that is, remedies focused exclusively on supplying counsel to litigants, either through adoption of “civil Gideon,” a universal civil right to counsel, or through the provision of “unbundled,” or limited, legal services—arguing that such an approach is practically and conceptually unworkable. Courts and legislatures have rejected attempts to expand a civil right to counsel and initial data suggests that the delivery of limited legal services produces anemic, if any, improvements in substantive fairness for the unrepresented.*

*This Article sets forth a vision of “demand side” procedural and judicial reform as an alternative, or complementary, theory of civil justice. Demand side reform would charge courts, rather than parties, with the duty to advance cases and develop legally relevant narratives, thereby focusing on institutional change that would strengthen due process for the great majority of litigants in the American justice system. This proposal builds upon the Supreme Court’s recent holding in *Turner v. Rogers* that “alternative procedural safeguards” must be implemented to ensure due process for civil contemnors, and offers unrepresented litigants a viable mechanism for dispute resolution that—unlike the supply side approach—does not perpetuate court processes requiring party initiative and expertise.*



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# Demand Side Reform in the Poor People’s Court

JESSICA K. STEINBERG\*

## I. INTRODUCTION

Over the past several years, approximately nineteen million civil cases have been filed annually in the lowest rungs of state court.<sup>1</sup> These tribunals provide the only forum for most Americans to seek restraining orders, resolve divorce and custody matters, defend against evictions, prosecute wage theft, and fight debt collection. In the 1970s, nearly every litigant who brought or defended a matter in state court was represented by counsel.<sup>2</sup> Today, states report that in family law, domestic violence, landlord-tenant, and small claims matters, seventy to ninety-eight percent of cases involve at least one unrepresented litigant.<sup>3</sup> It is no exaggeration to assert that pro se litigation—primarily involving the indigent—now dominates the landscape of state courts.

The inability of most parties to obtain access to counsel profoundly influences our justice system.<sup>4</sup> The adversary system, as it has been understood in the United States since the 18th century, confines judges to a “neutral and passive” role, and requires parties to develop their own legal

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\* Associate Professor of Clinical Law, George Washington University Law School. For invaluable feedback on this Article, I would like to thank Phyllis Goldfarb, Juliet Brodie, Ann Shalleck, Ben Barton, Joe Tulman, Naomi Cahn, and Emily Suski. I am also thankful for the excellent comments I received from participants of workshops and conferences at Cornell Law School, New York University Law School, American University Washington College of Law, George Washington University Law School, the Southeastern Association of Law Schools New Scholars Colloquium, and the Mid-Atlantic Clinical Workshop. I am especially grateful to Madeleine MacNeil for providing outstanding research assistance.

<sup>1</sup> NAT’L CENTER FOR STATE CTS., <http://www.courtstatistics.org/Civil/20121Civil.aspx> (last visited Oct. 14, 2014). The National Center for State Courts notes that data collected on civil courts is both over-inclusive and under-inclusive, and is therefore an approximation. *State Court Caseload Statistics*, NAT’L CENTER FOR STATE CTS., <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> (last visited Sept. 16, 2014). In some states, data from certain counties and on certain civil case types were not collected; in other states, some traffic and criminal matters were counted in the civil data. *Id.*

<sup>2</sup> *See infra* Part II.

<sup>3</sup> *See infra* text accompanying notes 25–27. In this Article, I use the terms “unrepresented litigant,” “pro se litigant,” and “self-represented litigant,” interchangeably.

<sup>4</sup> Judges, scholars, advocates, and policy experts have all recognized that the growing number of pro se litigants has created a crisis in state courts. For example, former Chief Justice of the Supreme Court of California, Ronald M. George, referred to the unrepresented status of most litigants as “one of the greatest challenges . . . for the legal system in the forthcoming decade.” Jessica Garrison, *Aid is in Their Corner for Legal Fight*, L.A. TIMES, Dec. 28, 2006, at B1.

and factual claims within a highly complex procedural framework.<sup>5</sup> Although never made explicit, the system, in effect, depends upon the skill of an attorney to transform a party's grievance into a highly stylized set of allegations, evidence, and arguments, upon which a judge or jury can base a ruling.<sup>6</sup> Unrepresented parties face challenges at every step of the litigation, from properly filing and serving an action, to gathering and presenting admissible evidence to a judge.

It is well-documented that unrepresented litigants secure far fewer victories in court than their represented counterparts. Regardless of the subject matter of the litigation, pro se parties routinely flunk basic procedural entrance exams, which they must pass in order to reach a judge who will hear the merits of their case. Such procedural requirements include filing a pleading in the proper format, serving opponents with key legal documents, and scheduling necessary hearings with the court. Failure to clear procedural hurdles often results in negative case outcomes, most commonly a default judgment or dismissal of the action for want of prosecution.<sup>7</sup> Litigants who survive the initial stages of a legal proceeding find it nearly impossible to manage motion practice, discovery, legal research, and the evidentiary rules of admissibility. The literature is rife with empirical evidence that represented parties achieve favorable case outcomes anywhere from two to ten times more often than pro se litigants.<sup>8</sup> Such evidence makes clear that the American court system offers unequal access to justice—or perhaps more aptly stated, makes equal justice nearly unattainable.

The prevailing view among scholars and advocates is that “supply side”

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<sup>5</sup> See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2–5 (1984) (discussing the implications of having neutral, passive judges); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1976) (outlining the “defining features” of traditional civil adjudication); see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380–81 (1982) (discussing the traditionally adversarial nature of the U.S. adjudication system); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 302 (1989) (discussing the American adversarial system).

<sup>6</sup> See Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 649–51 (2006) (describing how the adversarial model “presupposes opponents with roughly equal incentives, information, resources, and capabilities” but that conditions like those are uncommon, and explaining that the “fairness of the adversary system” depends on equality in legal representation); see also Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999) (“An underlying assumption [of the adversary] system is that both sides will be represented by an attorney.”); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 119 (1974) (arguing that because the adversary system is party-driven and involves passive institutions that must be “mobilized by the claimant,” those with the knowledge or resources to surmount cost and procedural barriers will often come out ahead).

<sup>7</sup> See *infra*, Part II.B for a discussion of the impact of procedural barriers on case outcomes for pro se litigants.

<sup>8</sup> See *infra* Part II.C.1.

remedies will best improve access to justice.<sup>9</sup> That is, among poverty lawyers, scholars, courts, and the organized bar, the dominant belief is that supplying more lawyers will best address the problems of the unrepresented poor.<sup>10</sup> In one iteration of the supply side vision, proponents agitate for a right to counsel in civil cases—in other words a “civil Gideon”—to ensure representation for individuals whose basic human rights are at stake.<sup>11</sup> In a second iteration, supply side proponents promote “unbundled legal services,” a term that describes a spectrum of brief services offered to the unrepresented through legal aid offices. Through unbundling programs, large numbers of litigants receive basic legal information or discrete legal services from an attorney but then go on to perform all remaining aspects of their cases pro se. If civil Gideon is the lofty ideal, unbundling is her pragmatic step-sister. For many, the attainment of a full-fledged right to counsel is the utopian solution, with unbundled legal services functioning as the proper allocation of existing legal resources if new rights do not materialize and funding for lawyers remains static.

The supply side approach is rhetorically compelling and buoyed by substantial support; yet, it faces practical and conceptual challenges that are rarely probed. Despite ten years of near-constant litigation and legislative advocacy, civil Gideon advocates have scored very few victories at either the local or national level. Funding constraints, the sheer size of the pro se crisis, and the unfairness of line-drawing among classes of sympathetic litigants have all been cited as reasons for refusing to expand access to counsel.<sup>12</sup> In a particularly salient defeat, the Supreme Court recently held in *Turner v. Rogers*<sup>13</sup> that constitutional due process does not require appointment of counsel in civil contempt cases, even where the losing party faces a term of incarceration.<sup>14</sup>

By default, unbundling has become the primary mechanism for meeting the needs of the unrepresented. The broad distribution of lawyering resources may resonate as intuitively sound, but as a stand-alone strategy unbundling is not sufficiently effective to narrow the justice gap between rich and poor litigants. The model focuses on simple tasks, typically those that help litigants overcome initial procedural hurdles. It is not designed—and in fact is ill-suited—to address complex needs that arise during later stages of litigation. While studies touting the benefits of full representation

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<sup>9</sup> I acknowledge that “access to justice” is a flexible term with many different meanings. I use it in this Article in a broad sense to mean access to both procedural and substantive fairness.

<sup>10</sup> See *infra* Part II.C.4.

<sup>11</sup> The phrase “civil Gideon” derives from the Supreme Court case *Gideon v. Wainwright*, which held that the Sixth Amendment requires appointment of counsel for defendants in criminal matters. 372 U.S. 335, 344 (1963).

<sup>12</sup> See *infra* Part III.A.2.

<sup>13</sup> 131 S. Ct. 2507 (2011).

<sup>14</sup> *Id.* at 2516, 2520.



abound, initial data indicate that unbundling boosts recipients' *perception* of a fair legal process, but may not enhance actual fairness as measured by case results.<sup>15</sup>

This Article submits that a supply side approach operating alone will not radically alter the experiences or case outcomes of *pro se* litigants. As a complement, "demand side" reform is necessary in the courts. Demand side reform refers to an overhaul of the processes and rules that govern litigation so that they best serve the interests of the overwhelming majority of customers in the lower state courts—the unrepresented. Effective demand side reform would revise the procedural and evidentiary rules that commonly cause *pro se* litigants to stumble and require judges to develop facts that support established claims and defenses, thus enabling meaningful participation in the court system by those who appear without counsel. Fundamental changes to the way disputes are processed and decided in the poor people's courts are needed to bring the operation of the legal system into alignment with the capabilities of the litigants who use it.

This Article proceeds in five parts. Part II sets the scene. It documents the rise in *pro se* litigation, examines the reasons for its prominence, and explores its effects on judges and lawyers who are accustomed to operating within the traditional adversary system. It also explores the impact of *pro se* status on the litigants themselves, many of whom lack formal education, literacy, or English-language skills—let alone legal training—but must rely on their own skill in negotiating intricate court procedures to resolve matters of fundamental importance in their lives.

Part III evaluates supply side access to justice, supporting its aspirations but also identifying its limitations. Subpart III.A looks at the civil Gideon movement. This Subpart acknowledges and endorses the philosophical appeal of a right to counsel, but also examines its practical shortcomings—namely, a demonstrated lack of political will to create or fund expanded rights. It concludes that civil Gideon offers the promise of protecting the full panoply of procedural and substantive rights accorded to low-income litigants, but suffers from the limitation that its theoretical appeal has thus far eluded tangible implementation.

Subpart III.B assesses unbundled legal services programs which, in the absence of civil Gideon, have become the dominant on-the-ground response to serving the unrepresented poor. It describes the nature of such programs and chronicles their proliferation in legal aid agencies across the country. It raises questions, however, about the long-term efficacy of brief and discrete services, and suggests that unbundling primarily serves as a mechanism for accessing the courthouse, not for operating effectively within it. The model succeeds in helping litigants file papers and gain initial access to the justice system, but is far more difficult to apply with regard to complicated motions,

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<sup>15</sup> See *infra* Part III.B.2.b.

fact gathering, discovery, oral advocacy, and hearing preparation. While only preliminary and small-scale evaluations have been conducted, early data collection efforts tend to support the notion that, beyond the initiation of a case, the impact of limited lawyering is just what it purports to be—limited.<sup>16</sup>

Part IV makes the case for demand side reform in state court civil proceedings. This Part takes up the Supreme Court's recent decision in *Turner v. Rogers* as support for demand side access to justice. Although *Turner* refused to recognize a civil right to counsel, a majority of Justices held that “alternative procedural safeguards”—currently not found in many state courts—must be provided to ensure due process for the unrepresented in civil contempt cases.<sup>17</sup> Read expansively, *Turner* can be viewed as both a fresh directive to the lower state courts to overhaul their processes, as well as a repudiation of prior Supreme Court and appellate cases that have narrowed the meaning of due process for the unrepresented and fixed the judicial role as shallow and unresponsive to pro se litigation. Therefore, particularly now, the notion that the lower state courts can and should overhaul their adjudicatory systems should not be regarded as fringe or unattainable.

Further, I build on *Turner* by presenting a blueprint for comprehensive and practical demand side reform in the lower state courts. I envision a system in which standardized pleadings and court forms are mandatory, the court serves notice of the action on both parties and schedules all necessary case events, parties receive notice of the legal elements raised by their cases, disclosure of key documents is automatic, the rules of evidence emphasize weight rather than admissibility, and judges assume an active role in identifying legal theories and drawing out relevant testimony. The existing adversary system embraces a party-controlled process that, in the case of the poor people's courts, the parties are unable to control or harness. Demand side reform would charge courts, rather than litigants, with the duty to advance and manage cases, and develop legally relevant factual narratives—precisely the areas where the unrepresented struggle. True reform in the courts would reduce the need for litigant initiative and know-how at every stage of a proceeding and thus ease the challenge of proceeding without counsel, a likely reality for most unrepresented parties into the foreseeable future.

Last, Part V places demand side reform in the context of a larger access to justice agenda. A major advantage of demand side reform is that it buttresses the supply side remedies, making them less costly and more effective. Reforming procedure and evidentiary rules would decrease an attorney's expenditure of time on individual cases—as well as eliminate the

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<sup>16</sup> See *infra* Part III.B.4.

<sup>17</sup> *Turner*, 131 S. Ct. at 2520.

need for full representation in many cases—thereby reducing the price tag for jurisdictions philosophically committed to the ideals of civil Gideon but currently unable to afford it. In addition, demand side reform is a more efficient way to capture and sustain the procedural advances attributable to unbundling, which in turn would permit limited lawyering interventions to be re-directed toward tasks that only a lawyer can successfully accomplish. With implementation of such reform, providers of unbundled legal services could leverage their impact by shifting their focus away from procedural triage and towards fact development and strategic decision-making—two areas in which the unrepresented have massive unmet needs and where a lawyer’s expertise is truly necessary. Demand side reform stands on its own as an access to justice strategy, and also operates to support other efforts as part of a holistic agenda.

The provision of competent counsel to millions of unrepresented litigants is an appropriate response to the pro se crisis, but is politically and economically unlikely and perhaps even unfeasible. Unbundled legal services, and other types of limited legal information or assistance, might serve as effective gap-fillers, but are not intended to function as the predominant means for achieving access to justice. In fact, unbundled services provide but partial relief to pro se parties who go on to operate in procedurally complex systems they cannot understand or negotiate with fluency. The supply side approach tacitly approves of, or at least surrenders to, a court process that was created by lawyers and for lawyers—and remains dense with rules requiring party action and expertise—rather than challenging that formulation as one unable to offer unrepresented litigants a viable mechanism for dispute resolution. Demand side reform would attack the legal, procedural, and evidentiary impediments that scholars and researchers have commonly identified as proximate causes of unfavorable outcomes without requiring costly lawyers to do so. Demand side reform is supported by the Supreme Court, and could prime supply side access to justice efforts to achieve greater impact. It therefore warrants attention and development as a substantial part of the access to justice agenda.

## II. THE RISE AND IMPACT OF PRO SE LITIGATION

The vast majority of American justice is dispensed in the poor people’s courts.<sup>18</sup> In just the civil system alone, state trial courts handle nineteen million cases per year,<sup>19</sup> affecting an estimated thirty to forty million

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<sup>18</sup> Although it is indisputable that millions of Americans—probably most Americans—interface with the legal system without the assistance of counsel, philosophers and legal scholars often discount the experiences of unrepresented litigants in conceptualizing American justice. For example, David Luban states: “Lawyers are the primary administrators of the rule of law, the point of contact between citizens and their legal system.” DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 1 (2007).

<sup>19</sup> NAT’L. CENTER FOR STATE CTS., *supra* note 1.

litigants.<sup>20</sup> Many of these matters raise issues of critical importance to the parties involved, including physical safety, economic security, access to shelter, marital status, and the right to parent one's children. By contrast, a recent data set indicates that only 295,000 civil cases were filed in all federal district courts in a single year.<sup>21</sup> As a further illustration of the disparity, New York City's Housing Court adjudicates more cases annually than all federal district courts combined in the civil arena.<sup>22</sup> It is critical to understand the size and scope of the justice system at the state level—and to focus on the enormous volume of unrepresented parties utilizing its processes—as its unwieldiness, in some sense, pre-determines which efforts at reform are most likely to succeed.

#### A. *The Rise—and Rise Again—of Pro Se Litigants*

In some state systems, up to eighty or ninety percent of litigants appear unrepresented, many of whom square off against a represented opponent.<sup>23</sup>

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<sup>20</sup> Most cases involve two parties; therefore I estimate that thirty to forty million litigants are involved in the nineteen million civil cases filed in state courts each year. The figure is probably higher, as many cases involve more than a single party on each side. Pro se litigation also affects many millions more if one includes non-litigants affected by a civil case, such as non-named tenants who will be evicted along with the named party and minor children in a custody or domestic violence matter.

<sup>21</sup> *Judicial Caseload Indicators*, U.S. CTS. (2011), <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/statistics/FederalJudicialCaseloadStatistics/2011/front/IndicatorsMar11.pdf> (showing 294,336 civil cases were filed in U.S. district courts in 2011).

<sup>22</sup> In New York City, 300,000 eviction cases are filed each year. Rashida Abuwala & Donald J. Farole, *The Perceptions of Self-Represented Tenants in a Community-Based Housing Court*, 44 CT. REV. 56, 56 (2008). Notably, the budget allocations look quite different for state courts than for federal courts. In 2004, the budget for the federal judiciary was \$5.1 billion. *The Third Branch, FY 2004 Appropriations Finally OK'd; But Courts Still Face Fiscal Threat*, U.S. CTS. (2004), available at [http://www.uscourts.gov/news/TheThirdBranch/04-02-01/FY\\_2004\\_Appropriations\\_Finally\\_OK\\_d\\_But\\_Courts\\_Still\\_Face\\_Fiscal\\_Threat.aspx](http://www.uscourts.gov/news/TheThirdBranch/04-02-01/FY_2004_Appropriations_Finally_OK_d_But_Courts_Still_Face_Fiscal_Threat.aspx). For the fiscal year 2003–2004, the budget for the New York City Housing Court was \$31,668,418—less than one percent the size of the 2003 federal budget. N.Y. CNTY. LAWYERS' ASS'N., REPORT: THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? 21 (2005), available at [http://www.citylimits.org/images\\_pdfs/pdfs/HousingCourtReport.pdf](http://www.citylimits.org/images_pdfs/pdfs/HousingCourtReport.pdf).

<sup>23</sup> The data abounds with staggering statistics on the number of unrepresented parties handling their legal matters without the assistance of counsel. The following is a mere sample of the city- and state-wide data available: In Maine, from 2005 to 2008, seventy-five percent of family matters involved at least one pro se party and eighty percent of all litigants either pursuing or defending against protection from harassment orders appeared pro se. See John C. Sheldon, *Thinking Outside of the Box About Pro Se Litigation*, 23 ME. BAR J. 90, 91 (2008); Stacy O. Stitham, *A Study Concerning Maine's Present and Possible Future*, 9, n.20 (Apr. 25, 2005) (on file with the author). In 2010, California reported that more than ninety percent of tenants appear without counsel, see Mike Rosen, *Testing Civil Gideon*, CAL. LAW. (June 2012), <http://www.callawyer.com/clstory.cfm?eid=922767>, while a 1998 California study found that eighty-one percent of eviction cases had one unrepresented party and sixty-three percent of child support cases had two unrepresented parties, see Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 423 n.1 (2004). In New Hampshire, a 2004 report confirmed that one party is pro se in eighty-five percent of all civil cases filed in district court; in domestic relations cases almost seventy percent have one pro se party,

In landlord-tenant matters, for instance, it is typical for ninety percent of tenants to appear pro se while ninety percent of landlords appear with counsel.<sup>24</sup> A look at the raw numbers, in addition to percentages, truly underscores the scale of this problem. In Maryland, ninety-five percent of tenants—or 601,753 families—argue their cases alone.<sup>25</sup> In New York City, eighty-eight percent of tenants—or 264,000 families—fight to maintain their shelter without the assistance of counsel every year.<sup>26</sup> In Washington, D.C., ninety-seven percent of tenants—or 44,620 tenant families—defend eviction actions without a lawyer each year.<sup>27</sup> In Queens County, New York, eighty-four percent of foreclosure defendants—or 7,529 families—go without counsel.<sup>28</sup>

The problem is similarly severe in the family law arena. In Milwaukee, seventy percent of family law litigants—or 10,204 persons—resolve marital status, custody, and child support issues without counsel each year.<sup>29</sup> In Philadelphia, eighty-nine percent of child custody litigants—or 30,260 mothers and fathers—lack the assistance of counsel in emotionally charged proceedings that determine their parenting rights.<sup>30</sup> In Maryland, seventy-

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and in DV cases ninety-seven percent of cases have a pro se party. N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTED LITIGANTS IN N.H. COURTS 2 (2004), available at <http://www.courts.state.nh.us/supreme/docs/prosereport.pdf>. In Lake County, Illinois, both parties appeared pro se in just over eighty-three percent of domestic violence cases. See Beverly Balos, *Domestic Violence Matters: the Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 567 n.91 and accompanying text (2006) (citing Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 170 (2003)).

<sup>24</sup> For example, in New York City, eighty-eight percent of tenants are unrepresented while ninety-eight percent of landlords are represented. Abuwala & Farole, *supra* note 22, at 56. In 2005, in Washington, DC, just over ninety-three percent of plaintiffs in landlord and tenant cases were represented by counsel. See D.C. ACCESS TO JUSTICE COMM'N., JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA'S LOW-INCOME COMMUNITY (2008), available at <http://www.dccaccesstojustice.org/files/CivilLegalNeedsReport.pdf>.

<sup>25</sup> M.D. ACCESS TO JUSTICE COMM'N., IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN M.D. (2011), available at <http://mdcourts.gov/mdatjc/pdfs/ImplementingACivilRightToCounselInMD2011.pdf>.

<sup>26</sup> Abuwala & Farole, *supra* note 22, at 56.

<sup>27</sup> D.C. ACCESS TO JUSTICE COMM'N., *supra* note 24, at 8.

<sup>28</sup> MELANCA CLARK WITH MAGGIE BARRON, FORECLOSURES: A CRISIS IN REPRESENTATION 2 (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/Justice/Foreclosure%20Report/ForeclosuresReport.pdf>; NEW YORK STATE COMPTROLLER, FORECLOSURES IN N.Y.C., REPORT 13-201, at 2 (2011), available at <http://www.osc.state.ny.us/osdc/rpt13-2011.pdf>. MELANCA CLARK WITH MAGGIE BARRON, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, FORECLOSURES: A CRISIS IN REPRESENTATION 2 (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/Justice/Foreclosure%20Report/ForeclosuresReport.pdf>; N.Y. CITY PUBLIC INFORMATION OFFICE, OFFICE OF THE STATE COMPTROLLER, FORECLOSURES IN NEW YORK CITY (2011).

<sup>29</sup> *Judges' Views of Pro Se Litigants' Effect on Courts*, 40 CLEARINGHOUSE REV. J. L. & POL'Y. 228, 228 (2006).

<sup>30</sup> PHILA. BAR ASS'N., CHANCELLOR'S TASK FORCE ON CIVIL GIDEON, PRELIMINARY REPORT, FINDINGS AND RECOMMENDATIONS 29 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/11-09-03\\_Attachment.pdf](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/11-09-03_Attachment.pdf).

six percent of those seeking protective orders—or 16,471 domestic violence victims—are unrepresented.<sup>31</sup> In California, eighty percent of family law cases—affecting 362,137 people—involve at least one party proceeding pro se.<sup>32</sup>

These figures repeat themselves in every jurisdiction—whether urban, suburban, or rural—where data have been collected.<sup>33</sup> While a definitive national picture on pro se litigation is lacking, it is not improbable to estimate that two-thirds of all cases in American civil trial courts involve at least one unrepresented individual. In short, the magnitude of the pro se crisis is immense.

The rate of pro se litigation was not always so high. In the 1970s, unrepresented parties were an anomaly, appearing in fewer than ten to twenty percent of state trial court cases.<sup>34</sup> Even in the 1980s and 1990s, pro se rates were just beginning to rise.<sup>35</sup> It is just in the past decade that

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<sup>31</sup> See *Domestic Violence Monthly Summary Reporting*, MD. CTS. (2013), available at [http://www.jportal.mdcourts.gov/dv/DVCR\\_Statewide\\_2013\\_9.pdf](http://www.jportal.mdcourts.gov/dv/DVCR_Statewide_2013_9.pdf) (providing an average number of annual domestic violence filings, which were derived from monthly totals provided by the courts).

<sup>32</sup> See JUDICIAL COUNCIL OF CAL., 2011 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS xv (2011), available at <http://www.courts.ca.gov/documents/2011CourtStatisticsReport.pdf>; S.F., CAL., ADMIN. CODE art. 85, §§ 58.1–58.3 (2011) (amending S.F., CAL., ADMIN. CODE), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/committees/materials/rls111189tdr.pdf>.

<sup>33</sup> See, e.g., BOSTON BAR ASS'N. TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION 5 (1998), available at <http://www.bostonbar.org/prs/reports/unrepresented0898.pdf> (discussing statistics from several jurisdictions, for example: “statistics from Washington, D.C. and Des Moines, Iowa, indicat[e] that 88 percent and 53 percent respectively of litigants in domestic cases are pro se”; nearly three quarters of the domestic relations cases filed in one Washington county in 1991 involved at least one pro se party; and “the ABA found that in over 88 percent of the divorces filed in this country in 1990, at least one of the parties was pro se”); OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 1 (2005), available at [http://nycourts.gov/reports./AJJI\\_SelfRep\\_06.pdf](http://nycourts.gov/reports./AJJI_SelfRep_06.pdf) (finding that, according to an informal survey, approximately seventy-five percent of litigants are unrepresented in cases involving domestic violence, child custody, guardianship, visitation, support, and paternity).

<sup>34</sup> In a 1976 review of 2,500 divorce cases in two Connecticut trial courts, only two and a half percent of cases involved an unrepresented litigant. Deborah L. Rhode & Ralph C. Cavanagh, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 160 (1976). In California, during the same period, approximately twenty percent of petitioners seeking a dissolution of marriage were unrepresented. *Id.* at 110 n.25. At the time, this was considered an extraordinarily high figure. *Id.* at 160.

<sup>35</sup> In 1980, twenty-four percent of family law cases in Maricopa County, Arizona involved an unrepresented litigant. JONA GOLDSCHMIDT ET AL., AM. JUDICATURE SOC'Y, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND MANAGERS 9 (1998), available at [cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/106](http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/106). This number rose to forty-seven percent in 1985, and rose again to eighty-eight percent by 1990. *Id.* at 8–9. In 1994, twenty-eight percent of landlord-tenant cases in Chicago involved pro se parties. Nourit Zimerman & Tom. R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 478 n.11 (2010). In 1997, 2% of divorce complaints in a single Chicago courthouse were filed pro se. Margaret Davis, *A Legal Team of One: Pro Se Divorce in Cook County*, 18 PUB. INT. L. RPTR. 132, 133 (2013). In certain California counties, the percentage of pro se petitioners in family law cases “ranged from 39% to 62%” during the 1980s. Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 214–15 (1990).

reports began to surface documenting the “dramatic increase”<sup>36</sup> or “inexorably rising tide”<sup>37</sup> of unrepresented litigants. The Chief Justice of the California Supreme Court cited a thirty-five percent rise in the number of pro se litigants in 2009 alone.<sup>38</sup> And in three recent surveys, judges confirmed that pro se litigation continues to rise to this day, particularly driven by hot-button issues such as foreclosure, debt collection, and other matters related to the economic downturn.<sup>39</sup> It appears that huge numbers of unrepresented litigants are now a part of the permanent landscape in the lower state courts, with their increasing numbers making it harder and harder to address their needs through the provision of costly counsel.

### B. *The Root Causes of Pro Se Litigation*

The reasons for the spike in pro se litigation are only partially understood, but most studies that have examined the characteristics of unrepresented litigants conclude that poverty is the primary force driving individuals to represent themselves in court.<sup>40</sup> Even those not technically

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<sup>36</sup> N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, *supra* note 23, at 1.

<sup>37</sup> Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440 (2009).

<sup>38</sup> Dhyana Levey, *As Foreclosures Rise, Pro Pers Clog the Courts*, DAILY J. (May 22, 2009), [http://www.calegaladvocates.org/news/article.252824-As\\_Foreclosures\\_Rise\\_Pro\\_Pers\\_Clog\\_the\\_Courts](http://www.calegaladvocates.org/news/article.252824-As_Foreclosures_Rise_Pro_Pers_Clog_the_Courts).

<sup>39</sup> LINDA KLEIN, A.B.A. COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 2 (July 12, 2010), *available at* [http://www.abajournal.com/files/Coalition\\_for\\_Justice\\_Report\\_on\\_Survey.pdf](http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf) (indicating that judges have cited an increase in cases involving foreclosures, domestic relations, consumer issues, and other housing matters, all of which are related to economic conditions); CHRISTIE LOVELESS, INST. FOR COURT MGMT., EVALUATING PRO SE LITIGATION AT THE TARRANT COUNTY FAMILY LAW CENTER 36 (May 2012), *available at* <http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2012/Evaluating%20Pro%20Se%20Litigation.ashx> (reporting that in 2011, sixty percent of judges responding to a survey in Tarrant County, Texas, described a “significant” increase in the number of pro se litigants appearing before their courts); John T. Broderick Jr. & Ronald M. George, Op-Ed., *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010, at A21 (stating that in a recent study, “about half the judges who responded reported a greater number of pro se litigants as a result of the economic crisis”).

<sup>40</sup> Abuwala & Farole, *supra* note 22, at 57 (reporting that fifty-nine percent of pro se tenants surveyed said they were unemployed, received Section 8 rental assistance, or lived in public housing—all clear indicators of poverty); DAVID B. ROTTMAN, NAT’L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 19 (2005), *available at* [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf) (stating that sixty-nine percent of unrepresented litigants interviewed confirmed that the cost of an attorney either had or would prevent them from accessing the court system); LOVELESS, *supra* note 39, at 33 (reporting on a survey of sixty-nine pro se litigants in Tarrant County, Texas in which fifty-eight percent reported an annual income of less than \$24,000; twenty-one percent reported an income between \$24,001 and \$36,000; and twenty-one percent reported earning more than \$36,000 annually); N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, *supra* note 23, at 2 (“A sample of self represented litigants in New Hampshire showed that most of them were in court on their own because they could not afford to hire or continue to pay a lawyer.”). *But see* Drew A. Swank, Note, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378 (2005)

“poor” under federal guidelines often lack the financial means to hire an attorney.<sup>41</sup> For example, in California, the average family law attorney may charge an hourly rate of \$300 as well as require a \$5,000 retainer.<sup>42</sup> A minority of unrepresented litigants report that they choose to proceed pro se because they either distrust lawyers or they believe their cases are simple enough to handle without counsel.<sup>43</sup> Tiffany Buxton offers an interesting perspective on the rise of pro se litigation, attributing it to the transitory and diffuse nature of modern family and neighborhood relations, and the resulting consequence that people of limited means now rely less on community—and more on courts—for the resolution of disputes.<sup>44</sup>

Moreover, the rise in pro se litigation may be directly connected to the overall rise in caseloads in the lower state courts. From 1984 to 1997, domestic violence case numbers in state courts rose by seventy-seven percent nationally.<sup>45</sup> In the state of New York, consumer debt cases and foreclosures doubled in the ten years between 2001 and 2011.<sup>46</sup> In California, non-family law civil filings rose from 950,000 in 2005 to 1.27 million in 2009, an increase of one-third in just four years.<sup>47</sup> California has also experienced an increase in family law cases, which the Administrative Office of the Courts attributes to population growth, the expansion of rights for victims of domestic violence and same-sex couples, and the creation of new programs for collecting child support.<sup>48</sup>

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(arguing that most pro se litigants *choose* to self-represent, but basing this assertion on a single survey in which fifty percent of pro se litigants indicated they made \$30,000 or more per year).

<sup>41</sup> See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1785, 1788 (2001); see also Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, A.B.A. J. (July 22, 2010, 1:36 PM), [http://www.abajournal.com/news/article/middle-class\\_dilemma\\_cant\\_afford\\_lawyers\\_cant\\_qualify\\_for\\_legal\\_aid](http://www.abajournal.com/news/article/middle-class_dilemma_cant_afford_lawyers_cant_qualify_for_legal_aid) (stating that lawyers are too expensive for a lot of people, including those who earn “too much money to qualify for legal aid”).

<sup>42</sup> ELKINS FAMILY LAW TASK FORCE, JUDICIAL COUNCIL OF CAL., FINAL REPORT AND RECOMMENDATIONS APRIL 2010, at 10 (2010), available at <http://www.courts.ca.gov/documents/elkins-finalreport.pdf>.

<sup>43</sup> LOVELESS, *supra* note 39, at 33.

<sup>44</sup> Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 *CASE W. RES. J. INT'L L.* 103, 111 (2002).

<sup>45</sup> Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 *LAW & POL'Y* 125, 128 (2001) (citing David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, *NAT'L INST. JUST. J.*, July 1999, at 12, 18 n.5).

<sup>46</sup> Jonathan Lippman, *The State of the Judiciary 2011*, N.Y. STATE UNIFIED COURT SYSTEM 1, (Feb. 15, 2011), <http://www.nycourts.gov/admin/stateofjudiciary/SOJ-2011.pdf>

<sup>47</sup> Chris Belloli, *Trial Court Caseload Increases to Over 10 Million Filings*, JUDICIAL COUNCIL OF CAL. 2 (2010), [www.courts.ca.gov/documents/datapoints10.pdf](http://www.courts.ca.gov/documents/datapoints10.pdf).

<sup>48</sup> ELKINS FAMILY LAW TASK FORCE, *supra* note 42, at 8; see also MINN. JUDICIAL BRANCH, 2004 ANNUAL REPORT 19 (2004), available at [http://www.mncourts.gov/documents/0/Public/Court\\_Information\\_Office/MJB\\_annual-report\\_2004\\_web.pdf](http://www.mncourts.gov/documents/0/Public/Court_Information_Office/MJB_annual-report_2004_web.pdf) (noting that from 1995–2004, Minnesota filings were up by twenty-three percent in family law cases and sixteen percent in civil cases generally); compare ARIZ. JUDICIAL BRANCH, ANNUAL CASE ACTIVITY—NARRATIVE SUMMARY 1 (1999), available at <http://www.azcourts.gov/LinkClick.aspx?fileticket=OmPq00fiDxM%3d&tabid=1090&mid=3729>, with ARIZ. JUDICIAL BRANCH, COURT ANNUAL CASE ACTIVITY—NARRATIVE



The status of most unrepresented litigants as low-income—and, in many cases, as members of historically marginalized groups—is of central importance in identifying appropriate responses. If litigants reported self-representation as a meaningful choice, offering benefits such as empowerment and direct dealings with adversaries, one might determine that the pro se phenomenon indicates a healthy justice system permissive of different types of participation. Of much greater concern, however, is the implication that litigants may self-represent out of sheer necessity, and that financial standing alone may dictate their experiences in court and the outcomes of their legal disputes. On this rendering, reforms that reduce the impact of poverty in accessing justice and counterbalance the lack of available counsel are indicated.<sup>49</sup>

### C. Experiences and Outcomes for Unrepresented Litigants

#### 1. Procedural Challenges

Litigants who proceed pro se must navigate complex, and often counter-intuitive, procedures to prosecute or defend a legal matter.<sup>50</sup> At the front end of a case, litigants must, among other things, articulate cognizable claims or defenses, complete pleadings in the proper format, serve the opposing party, prepare a proof of service, and file all proper documents with the court clerk. Once a complaint or answer has been successfully filed, a pro se party must schedule the proper hearings, interpret court notices, handle motions, propound and respond to discovery requests, and manage settlement talks—often with an opponent’s attorney.<sup>51</sup>

The pro se litigant who makes it to trial must contend with the rules of evidence, examine and cross-examine witnesses, and maintain proper courtroom demeanor. Those fortunate enough to win at trial must draft their

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SUMMARY 1 (2012), available at [http://www.azcourts.gov/Portals/39/2012DR/SW\\_CaseActivity.pdf](http://www.azcourts.gov/Portals/39/2012DR/SW_CaseActivity.pdf) (showing an approximate fifty percent increase in civil filings between 1999 and 2012 in Arizona).

<sup>49</sup> The notion that financial status should not dictate the outcome of legal disputes traces its roots to colonial times when United States courts opted to adopt the English tradition of waiving or modifying court fees for paupers. See SIDNEY L. MOORE, JR., INST. FOR RESEARCH ON POVERTY SPECIAL REPORT: RELIEF OF INDIGENTS FROM FINANCIAL BARRIERS TO EQUAL JUSTICE IN AMERICAN CIVIL COURTS 3 (1971).

<sup>50</sup> Numerous scholars have described the convoluted odyssey experienced by pro se parties in the state court system. See Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 661–62 (2006) (describing the ways in which the judicial system silences pro se litigants); Engler, *And Justice for All*, *supra* note 6, at 1988–89 (describing the challenges pro se parties face in dealing with lawyers and judges); Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 CT. REV. 8, 11–12 (2003) (describing the complicated logistics of bringing a legal claim).

<sup>51</sup> At a conference convened to improve New York City’s Housing Court, participants noted that many unrepresented tenants “sign stipulations of settlement, no matter how unbalanced,” because they fear the “daunting formality of a trial.” N.Y. CNTY. LAWYERS’ ASS’N, *supra* note 22, at 13.

own written orders—under very particularized rules—for the judge to sign.<sup>52</sup> Failure to do so means the judgment is not final and is thus unenforceable.<sup>53</sup> Even with a signed judgment in hand, the pro se litigant must pursue enforcement of the judgment without the court's assistance. Enforcement is sometimes the thorniest part of litigation, requiring knowledge of specialized procedures to haul the losing opponent back into court, identify non-judgment-proof assets and income, and work with the sheriff's office, the county recorder's office, and other private and governmental entities to secure owed payments.<sup>54</sup> It is no surprise that unrepresented litigants feel nervous, bewildered, and emotionally overwhelmed in charting their course through the court system.

Take Ronnie J., who tried for a dozen years to overturn a judgment of paternity, despite genetic testing and admissions by the mother that conclusively established he was not the father.<sup>55</sup> The record is replete with procedural missteps that Ronnie took in his capacity as a pro se litigant. He was unable to properly re-open the case following a finding of paternity that occurred while he was incarcerated. He submitted inadequate affidavits. And he failed repeatedly to provide the court with proper forms of proof.<sup>56</sup> It was not until he got a lawyer that the paternity judgment was finally overturned.<sup>57</sup>

Courts are well aware that unrepresented parties face grave difficulties in presenting their cases. Of nearly one thousand state-level trial judges surveyed by the American Bar Association in 2010, ninety-four percent stated that unrepresented parties fail to “present necessary evidence”; eighty-nine percent said they suffer from “procedural errors”; eighty-five percent said they fail to effectively examine witnesses; and eighty-one percent noted they are unable to object to improper evidence offered by an opponent.<sup>58</sup> Two additional large-scale surveys of trial judges in the lower state courts yielded similar reports. In a 2005 survey of more than 200 trial judges in Indiana, eighty-eight percent remarked that procedural errors committed by

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<sup>52</sup> Hannaford-Agor, *supra* note 50, at 13.

<sup>53</sup> See, e.g., FRIEND OF THE COURT BUREAU, FRIEND OF THE COURT HANDBOOK 7 (2013) available at [http://courts.mi.gov/administration/scao/resources/documents/publications/manuals/focb/focb\\_hbk.pdf](http://courts.mi.gov/administration/scao/resources/documents/publications/manuals/focb/focb_hbk.pdf). In a 2004 to 2005 study in Fresno, California, not a single pro se litigant was successful in submitting a written judgment for court review without requiring its return due to incomplete or incorrect information. JOHN GREACEN, JUDICIAL COUNCIL OF CAL., THE BENEFITS AND COSTS OF PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS: RESULTS FROM LIMITED DATA GATHERING CONDUCTED BY SIX TRIAL COURTS IN CALIFORNIA'S SAN JOAQUIN VALLEY FINAL REPORT 6 (2009), available at [http://www.courts.ca.gov/partners/documents/Greacen\\_benefit\\_cost\\_final\\_report.pdf](http://www.courts.ca.gov/partners/documents/Greacen_benefit_cost_final_report.pdf).

<sup>54</sup> Hannaford-Agor, *supra* note 50, at 13. In this Author's observation, enforcement actions are so difficult and complex that many legal services agencies refuse to take them on.

<sup>55</sup> *Shanee Y. v. Ronnie J.*, 677 N.W.2d 684, 687 (Wis. Ct. App. 2004). See Hon. Mary E. Triggiano & John F. Ebbott, *Gideon's New Trumpet*, WIS. LAW., June 2009, at 5 for further discussion of this case.

<sup>56</sup> *Id.* at 687–88.

<sup>57</sup> *Id.* at 691.

<sup>58</sup> KLEIN, *supra* note 39, at 4.

unrepresented litigants are “problematic,” and several judges commented generally that the unrepresented “do not understand the rules of evidence,” are unable to “follow procedures,” and are “set[] . . . up to fail.”<sup>59</sup> Even as far back as 1998, a geographically diverse sample of more than one hundred trial judges reported that the unrepresented struggle greatly to comply with procedural rules and present evidence to the tribunal.<sup>60</sup> These judges expressed concern that the increasing number of pro se litigants presents a “severe threat to the judicial process” and could lead to “frustrated persons resolving their disagreements outside the process.”<sup>61</sup>

## 2. Expressive Challenges

To add to the procedural complexities, litigants face great difficulty telling their stories to a judge. Even in courts where pro se litigants are the rule rather than the exception, judges and other court players routinely disregard the narrative-style testimony of unrepresented litigants.<sup>62</sup> A seminal study conducted in Baltimore’s housing court discusses the systemic silencing of unrepresented tenants, who are primarily female and black, and who are often denied even a basic opportunity to present their side of the case.<sup>63</sup> The study’s author notes that judges typically reject the way pro se litigants speak—through narrative—and automatically deem their stories legally irrelevant.<sup>64</sup>

## 3. Unfavorable Case Outcomes

Unsurprisingly, pro se litigants face far less favorable case outcomes than represented parties in civil court proceedings.<sup>65</sup> In both the housing and family law realm, numerous studies have compared the case results of represented and unrepresented litigants. In the housing arena, research has focused on whether the tenant retains possession of the unit, whether the tenant makes a payment to the landlord pursuant to the litigation, and if the tenant agrees to move, how long she is permitted to stay in the unit.<sup>66</sup> Most

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<sup>59</sup> Ryan C. Munden, *Access to Justice: Pro Se Litigation in Indiana*, AM. JUDICATURE SOC’Y (2005).

<sup>60</sup> See GOLDSCHMIDT ET AL., *supra* note 35, at 53.

<sup>61</sup> *Id.* at 52.

<sup>62</sup> William M. O’Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC’Y REV. 661, 696–98 (1985).

<sup>63</sup> Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 535 (1992).

<sup>64</sup> *Id.* at 578.

<sup>65</sup> This Article only covers civil pro se litigation. It is possible that self-representation in the criminal context results in different substantive outcomes. See Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 428 (2007) (suggesting that felony defendants in federal courts might not be prejudiced by refusing counsel).

<sup>66</sup> Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 481 (2011).

studies conclude that tenants are anywhere from two to ten times more likely to prevail in their cases with the assistance of an attorney.<sup>67</sup> In family law cases, studies have tracked the effect of counsel on maintaining custody of minor children and obtaining a protective order in cases involving domestic violence.<sup>68</sup> The studies report that represented mothers are nearly twice as likely to be awarded custody of their children<sup>69</sup> and two and a half times more likely to receive a requested protective order.<sup>70</sup> In a study of Indiana trial court judges who interact with pro se litigants daily, twenty-eight percent conceded that the unrepresented “receive substandard justice.”<sup>71</sup>

Even when pro se litigants “win,” they often fail to secure comprehensive relief, or they sacrifice important rights that represented parties would have been able to protect. Bruce Boyer raises the case of *Frase v. Barnhart*<sup>72</sup> as a potent example.<sup>73</sup> In that case, Deborah Frase placed her son with the Barnharts, acquaintances of her mother, while she served an

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<sup>67</sup> See D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 919–20, 927 (2013) (reporting on the results of a randomized study in a Massachusetts District Court in which represented tenants retained possession of their homes twice as often as tenants who received limited attorney assistance); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 423, 427 (2001) (finding that, in a randomized study in New York’s Housing Court, unrepresented tenants were more than twice as likely to have final eviction orders entered against them in court); Steinberg, *supra* note 66, at 483 (reporting on the results of a study which found that represented tenants were nearly four times more likely to retain possession of their homes than unrepresented tenants); *see also generally* REBECCA HALL, *EVICITION PREVENTION AS HOMELESSNESS PREVENTION: THE NEED FOR ACCESS TO LEGAL REPRESENTATION FOR LOW-INCOME TENANTS* (1991) (reporting on a study out of the University of California at Berkeley, Boalt School of Law that tenants with counsel were ten times more likely to prevail in court than their unrepresented counterparts). For a comprehensive series of reports and studies that have examined the plight of pro se litigants in New York City’s Housing Court, see Baldacci, *supra* note 50, at 660 n.3. Note that one significant study reached the conclusion that represented tenants did not obtain more favorable outcomes in court than unrepresented tenants. D. James Greiner, et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court*, available at <http://ssrn.com/abstract=1880078> (discussed more fully, *infra*, in Section III.B.3)

<sup>68</sup> See THE WOMEN’S LAW CTR. OF MD., INC., *FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND* 48, A-18 (2006), available at <http://www.wlcmd.org/wp-content/uploads/2013/06/Families-in-Transition.pdf> (examining the custody outcomes for parties with and without representation); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL’Y & L. 499, 511–12 (2003) (examining the effect of representation on protective orders).

<sup>69</sup> See THE WOMEN’S LAW CTR. OF MD., INC., *supra* note 68, at 48.

<sup>70</sup> See Murphy, *supra* note 68, at 511–12 (“In the small sample of women who had an attorney, most (83%) were successful in getting the protective order while only 32% of women without an attorney got the order.”).

<sup>71</sup> Munden, *supra* note 59, at 8.

<sup>72</sup> 840 A.2d 114 (Md. 2003).

<sup>73</sup> Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 636 (2006).

eight-week jail sentence for possession of marijuana.<sup>74</sup> Ms. Frase collected her son upon her release, but the Barnharts then hit her with a lawsuit seeking to recover custody of the child.<sup>75</sup> Ms. Frase represented herself in the proceedings and, by Boyer's account, the hearing was a disaster.<sup>76</sup> Ms. Frase failed to raise objections to inadmissible and prejudicial evidence, failed to challenge the characterization of the Barnharts as "good Samaritans," failed to develop factual or legal defenses, and, most detrimentally, failed to discover a conflict of interest that may have biased the hearing examiner against her.<sup>77</sup> While at the end of the hearing Ms. Frase was awarded custody, her rights were severely compromised. To secure custody, Ms. Frase had to agree to live in a family support center, permit visitation between her son and the Barnharts, and remain under the supervision of the court and the Department of Social Services.<sup>78</sup> It was not until she appealed, with the assistance of pro bono counsel, that Ms. Frase's full custodial rights were restored.<sup>79</sup> Thus, even in a case where the law was clearly on the side of the unrepresented party,<sup>80</sup> Ms. Frase's utter lack of comprehension concerning her role in the legal proceeding was severely prejudicial to the preservation of fundamental privacy and parenting rights.

#### 4. *Impact on Particularly Vulnerable Populations*

None of the above takes into account the characteristics of litigants who are at a particular disadvantage as pro se parties. Tenants with mental disabilities, victims of domestic violence, overwhelmed single mothers, non-English speakers, and the mentally ill flood the courts and exacerbate the inadequacy of self-representation. Some courts have insufficient processes to determine the competence of a mentally ill or mentally disabled litigant.<sup>81</sup> Many courts contribute to the intimidation of unrepresented domestic violence victims by failing to adhere to the national "best practice" of staggering the exits of the victim and the alleged abuser.<sup>82</sup> And most courts do not provide ample interpretation services for non-English-

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<sup>74</sup> *Frase*, 840 A.2d at 116; *see also* Boyer, *supra* note 73, at 636.

<sup>75</sup> *Frase*, 840 A.2d at 116; *see also* Boyer, *supra* note 73, at 636.

<sup>76</sup> *Frase*, 840 A.2d 116–17; *see also* Boyer, *supra* note 73, at 636–37 (arguing that by representing herself, Ms. Frase's case was "badly compromised").

<sup>77</sup> *Frase*, 840 A.2d at 118–19, 129; *see also* Boyer, *supra* note 73, at 636–37.

<sup>78</sup> *Frase*, 840 A.2d at 117–19.

<sup>79</sup> *Id.* at 127, 129; *see also* Boyer, *supra* note 73, at 637.

<sup>80</sup> *Frase*, 840 A.2d at 129.

<sup>81</sup> *See* Quail v. Mun. Ct. for L.A., 217 Cal. Rptr. 361, 364 (Cal. Ct. App. 1985) (Johnson, J., concurring in part and dissenting in part) (criticizing the court's failure to recognize or address an unrepresented tenant's mental disability).

<sup>82</sup> *See* LAURIE DUKER & JUDY WHITON, PROTECTING VICTIMS OF DOMESTIC VIOLENCE IN MONTGOMERY COUNTY: CHALLENGES AND OPPORTUNITIES WITH PROTECTIVE AND PEACE ORDERS 7, 17–20, [http://www.markwynn.com/wp-content/uploads/New\\_study\\_lapses\\_in\\_restraining\\_order\\_process\\_leave\\_domestic\\_violence\\_victims\\_unnecessarily\\_at\\_risk1.pdf](http://www.markwynn.com/wp-content/uploads/New_study_lapses_in_restraining_order_process_leave_domestic_violence_victims_unnecessarily_at_risk1.pdf) (last visited Oct. 15, 2014).

speaking litigants, often requiring the parties to rely on family members to interpret testimony and rulings.<sup>83</sup> Thus, the impact of the pro se crisis transcends even the losses of individual litigants and calls into question basic access to the courts for huge groups of vulnerable citizens.

A study conducted by the RAND Corporation measured the effect of pro se litigation on perceived fairness of the court process<sup>84</sup> and found that frustrations felt by the unrepresented translated into lower rates of satisfaction with the legal system—an important dimension of the pro se problem that may indicate loss of public confidence in the courts.<sup>85</sup>

Based on the quantitative and qualitative data, it is hard to disagree with Gene Nichol's declaration that massive numbers of poor, unrepresented litigants have been effectively excluded from the justice system, and that "[n]o non-cynical vision of due process of law" can be squared with that fact.<sup>86</sup> In an adversary system that pre-supposes the presence of lawyers to develop the factual and legal substance of a case, and to skillfully manage—even to exploit—the rules of procedure to benefit the litigant and advance her position, it is difficult to conclude that the unrepresented have equal access to a fair outcome.

### III. SUPPLY SIDE ACCESS TO JUSTICE

Pro se litigation has prompted a national dialogue on how best to ensure access to the courts, provide a meaningful opportunity to be heard, safeguard the rights of low-income litigants, and protect the legitimacy of the adversary system.<sup>87</sup> Most states have now convened formal access to justice

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<sup>83</sup> See JUDICIAL COUNCIL OF CAL., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCHGUIDE FOR JUDICIAL OFFICERS 1-8 (2007) [*hereinafter* CALIFORNIA BENCHGUIDE], available at [http://www.courts.ca.gov/documents/benchguide\\_self\\_rep\\_litigants.pdf](http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf) (explaining that there is no legal right to an interpreter in most civil cases so limited-English-speaking litigants must either appear without an attorney or translator, or rely on family members or friends for a translation); CHARLES P. KINDREGAN, JR. & PATRICIA A. KINDREGAN, *PRO SE LITIGANTS: THE CHALLENGE OF THE FUTURE* 67 (1995) available at <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/prosefinalreport.pdf> (reporting a need for qualified court interpreters and encouraging the Pro Se Coordinator to respond to the language needs of pro se litigants).

<sup>84</sup> Jane W. Adler, et al., *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program*, RAND CORP. 72 (1983), [www.rand.org/content/dam/rand\\_pubs/reports/2007/R3071.pdf](http://www.rand.org/content/dam/rand_pubs/reports/2007/R3071.pdf) (findings of study indicate that pro se litigants were more likely "to believe that they had been treated unfairly" in comparison to represented litigants); see also Zimerman & Tyler, *supra* note 35, at 496 (discussing the Rand study).

<sup>85</sup> Adler, *supra* note 84, at 72; see also Zimerman & Tyler, *supra* note 35, at 496-97 ("[U]nrepresented litigants generally felt less fairly treated.").

<sup>86</sup> Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 332 (2010).

<sup>87</sup> See Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 367-68 nn.2-4 (2008) (listing a variety of national and regional conferences, publications, and websites geared toward helping the various players in the legal system adjust to the prevalence of pro se litigation).

commissions tasked with crafting solutions to the pro se crisis. Currently, twenty-nine formal commissions exist—all but seven formed in the past decade.<sup>88</sup> In addition, task forces<sup>89</sup> and regular conferences<sup>90</sup> have been convened to develop local and national strategies.

These efforts have identified two principal pathways toward access to justice, both focused on increasing the presence of lawyers. First, and above all else, advocates want a protected right to lawyers in the poor people's courts—a civil Gideon entitlement—that attaches to certain litigants in certain types of cases. Second, advocates favor the provision of unbundled legal services—or limited assistance—to the unrepresented poor.<sup>91</sup> Lawyers perform a range of tasks under the rubric of unbundled legal services, including help with forms, the provision of simple advice, and entering one-time court appearances.<sup>92</sup> Unbundling services are typically applied at the outset of a case and assist litigants in lodging claims or defenses with the court.<sup>93</sup> For most, unbundling is a second choice strategy, representing a method of distributing available legal help in a rational manner.

The supply side approach is premised on a tiered logic, in which rights to full representation are vigorously pursued and leftover resources are spread across the remainder of unrepresented litigants in the form of discrete assistance. However, civil Gideon rights have faced regular rejection by courts and legislatures, and as a result, unbundled legal services—the “next-

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<sup>88</sup> REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 31, 33, 37, 39, 41, 47, 51, 53, 57, 59, 65, 69, 71, 73, 77, 79, 83, 87, 89, 93, 95, 97, 103, 111, 115, 117, 127, 129, 131 (Oct. 7, 2011), available at [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); D. Michael Dale, A.L. BURRUSS INST. OF PUB. SERV. & RES., CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA 1 (2009), available at [http://www.georgiacourts.org/files/legalneeds\\_report\\_2010%20final%20with%20addendum.pdf](http://www.georgiacourts.org/files/legalneeds_report_2010%20final%20with%20addendum.pdf); *About the Foundation*, ILL. EQUAL JUST. FOUND., <http://iejf.org/about/> (last visited Sept. 26, 2014); *Access to Justice Commission*, W. VA. JUDICIARY, available at <http://www.courts.wv.gov/court-administration/access-to-justice.html>.

<sup>89</sup> See, e.g., Tuohey III, et al., A.B.A. SECTION OF LITIGATION, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 1 (2003) [*Hereinafter* HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE], available at <https://apps.americanbar.org/litigation/taskforces/modest/report.pdf>.

<sup>90</sup> See Engler, *Ethics in Transition*, *supra* note 87, at 367 n.2.

<sup>91</sup> Nearly every jurisdiction that has considered the pro se crisis has adopted a vision of access to justice relying heavily on implementation of one or both of the supply side pathways. See, e.g., OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, EXPANDING ACCESS TO JUSTICE IN NEW YORK STATE: A TEN-YEAR REPORT PREPARED BY THE OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES 4–6, 8–19 (2009), [*hereinafter* EXPANDING ACCESS] available at <http://www.nycourts.gov/ip/nya2j/pdfs/TenYearReport2009.pdf>; MD. ACCESS TO JUSTICE COMM'N., MARYLAND ACCESS TO JUSTICE COMMISSION: ANNUAL REPORT 2010 3–6 (2010), available at <http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/013000/013809/unrestricted/20110635e.pdf>.

<sup>92</sup> EXPANDING ACCESS, *supra* note 91, at 17–18.

<sup>93</sup> *Id.* at 17.

best” alternative—have been elevated to the de facto leading position in responding to the pro se crisis. Unbundling helps individuals prepare pleadings, and fosters a feel-good mindset among pro se litigants; however, it is incomplete as a comprehensive access to justice strategy due to the limits of the model in assisting with complex aspects of litigation and improving substantive case outcomes. As such, the supply side approach must broaden its horizons.

### A. *Civil Gideon*

Advocacy around a civil right to counsel is now in its second renaissance. The first phase of advocacy began in 1963 when the Supreme Court held in *Gideon v. Wainwright*<sup>94</sup> that counsel must be appointed at public expense for indigent litigants in criminal cases.<sup>95</sup> Shortly after the decision in *Gideon*, advocates reasoned that certain deprivations in the civil context were “so great that a quasi-criminal level of protection was appropriate;” as a result, they argued that government-funded counsel should be available for some classes of civil litigants.<sup>96</sup> Alas, initial efforts ended in 1981 when the Court held in *Lassiter v. Department of Social Services*<sup>97</sup> that the Due Process Clause of the Fourteenth Amendment does not require the appointment of counsel for litigants facing termination of parental rights.<sup>98</sup> *Lassiter* was viewed by many as a massive setback for civil Gideon, and as a result, very little activity occurred on the civil right to counsel front between 1981 and 2000.<sup>99</sup> However, at the turn of the millennium, as celebration of *Gideon*’s 40th anniversary collided with the pro se explosion, a second round of civil Gideon advocacy surged. Now, some say, support for civil Gideon has never been stronger.<sup>100</sup>

#### 1. *Modern Day Support for Civil Gideon*

The civil Gideon cause has been taken up by scholars,<sup>101</sup> prominent legal

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<sup>94</sup> 372 U.S. 335 (1963).

<sup>95</sup> *Id.* at 344–45.

<sup>96</sup> Benjamin H. Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1238–42 (2010).

<sup>97</sup> 452 U.S. 18 (1981).

<sup>98</sup> *Id.* at 31–34. In fact, the Court noted a presumption *against* counsel when loss of physical liberty is not at issue, and directed courts to instead employ the *Mathews v. Eldridge* balancing test to determine the need for counsel on a case-by-case basis. *Id.* at 31.

<sup>99</sup> See, e.g., Sarah Dina Moore Alba, Comment, *Searching for the “Civil Gideon”: Procedural Due Process and the Juvenile Right to Counsel in Termination Proceedings*, 13 U. PA. J. CONST. L. 1079, 1079 (2011) (characterizing the *Lassiter* decision as a “setback . . . toward a civil right to counsel”).

<sup>100</sup> Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL’Y REV. 31, 35–37 (2013).

<sup>101</sup> See, e.g., Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 235–38, 270–71 (2009); Stephen Loffredo & Don Friedman, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L.



services advocates,<sup>102</sup> access to justice commissions,<sup>103</sup> the American Bar Association,<sup>104</sup> and several well-known judges.<sup>105</sup> Even those who vocally support other access to justice strategies, such as court reform, unbundled legal services, and changes to the judicial role, are often candid that these efforts are merely imperfect substitutes for appointment of counsel.<sup>106</sup>

There is no singular conception of civil Gideon, but there is broad consensus on what it is not. Civil Gideon does not contemplate appointment of counsel for all indigent litigants in all civil cases. Instead, supporters seek a guarantee of counsel where the deprivation of critical rights is at stake. Most commonly invoked are the right to be free from domestic abuse, the right to remain housed, and the right to parent one's children. Appointment of counsel is particularly important where the case is complex, the opponent is represented, or the litigant does not have the capacity to effectively self-represent.<sup>107</sup>

There is no question that lawyers—lots of them—might solve the pro se crisis.<sup>108</sup> A full-fledged, well-funded right to counsel in civil cases, even in a small subset of very important civil cases, would restore the adversary system to its intended function, maximally protect the rights of both parties, and preserve the impartiality of the decision-maker. From a rhetorical

REV. 273, 316–23, 340 (2009); Mary Helen McNeal, *Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONT. L. REV. 81, 83 (2005); Nichol, *supra* note 86, at 332; Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 384 (2007).

<sup>102</sup> See, e.g., Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 703–04, 714 (2006) (arguing that New York City residents who face eviction proceedings should have a right to counsel).

<sup>103</sup> See, e.g., MD. ACCESS TO JUSTICE COMM'N, *supra* note 91, at 8.

<sup>104</sup> See Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 969 n.4 (2004) (A "quick and non-scientific survey of the American Bar Association President's column in the ABA Journal from 1992 through 2001 identified at least twenty-five columns highlighting pro bono or legal services to the poor in contrast to only one suggesting changes in the courts to make them more accessible to parties without lawyers.").

<sup>105</sup> See, e.g., Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341, 342–49, 361 (1985); Jonathan Lippman, *Speed at Law Day 2010: Law in the 21st Century: Enduring Traditions, Emerging Challenges*, Law Day 2010 Speech 3 (May 3, 2010), available at [http://www.nycourts.gov/whats\\_new/pdf/Law%20Day%202010.pdf](http://www.nycourts.gov/whats_new/pdf/Law%20Day%202010.pdf).

<sup>106</sup> Baldacci, *supra* note 50, at 669; Engler, *Ethics in Transition*, *supra* note 87, at 396.

<sup>107</sup> In fact, some commentators argue that the push for a civil right to counsel should, at present, be limited to cases implicating some—or even just one—of these factors. E.g., Russell Engler, *Shaping a Context-Based Civil Gideon From the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 711–12 (2006).

<sup>108</sup> In fact, in some cases, full representation by an attorney is the only way to protect *all* of the litigant's rights. In foreclosures, for example, lawyers can do more than raise basic defenses to the foreclosure action itself. They might also assist the homeowner in renegotiating his loan with the bank and help the homeowner avail himself of bankruptcy proceedings to protect his assets. See CLARK WITH BARRON, *supra* note 28, at 17–25 (explaining the six ways lawyers protect families in foreclosure and the difference they make in the outcomes).

standpoint, it is hard to argue with civil Gideon. And almost nobody does.<sup>109</sup>

If victory was measured in paper, civil Gideon could claim it in hand. Propped up by increasingly sophisticated data on the plight of pro se litigants, the movement has attracted broad-based support. In a display of tremendous commitment, the American Bar Association House of Delegates adopted a resolution in 2006 calling for “counsel as a matter of right at public expense” in cases involving basic human needs, such as “shelter, sustenance, safety, health or child custody.”<sup>110</sup> In 2010, the ABA followed up its 2006 resolution with a set of comprehensive principles further fleshing out the contours of a civil right to counsel.<sup>111</sup> State and local bar associations and access to justice commissions have also been quite active on the right to counsel front.<sup>112</sup> In 2008, California’s Commission on Access to Justice developed a Model Act to serve as an example for state-level civil Gideon legislation.<sup>113</sup> Maryland’s Access to Justice Commission investigated the costs of implementing a civil right to counsel and published a comprehensive report on implementing civil Gideon in the State of Maryland.<sup>114</sup> The Chief Judge of New York, Jonathan Lippman,<sup>115</sup> and the former Chief Judge, Judith Kaye,<sup>116</sup> have delivered eloquent speeches fervently supporting increased access to free legal services. A former Associate Justice of the California Court of Appeals, Earl Johnson, has done the same.<sup>117</sup> In general,

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<sup>109</sup> *But see* Barton, *supra* note 96, at 1253, 1255, 1272 (calling civil Gideon a “backward looking solution” and arguing that a civil right to counsel is unlikely to receive enough financial support to succeed, just as the constitutional mandate in criminal cases has been under-funded).

<sup>110</sup> ABA, REPORT TO THE HOUSE OF DELEGATES: 112A, at 1 (2006), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf).

<sup>111</sup> ABA, REPORT TO THE HOUSE OF DELEGATES: 105 (REVISED) (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_105\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf).

<sup>112</sup> *See State Bar Signs on to Letter to Obama, McCain*, MONT. LAW., Nov. 2008, at 11, 30 (reporting that all 50 bar associations sent a letter to then-presidential candidate Barack Obama in support of a federal civil Gideon statute); *Resolution Calling for the Provision of Legal Counsel for Indigent Persons in Civil Matters Where Basic Human Needs Are at Stake*, PHILA. BAR ASS’N (2009), [http://www.philadelphiabar.org/page/RESOLUTION\\_CALLING\\_FOR\\_THE\\_PROVISION\\_OF](http://www.philadelphiabar.org/page/RESOLUTION_CALLING_FOR_THE_PROVISION_OF); BOS. BAR ASS’N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON’S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 1–3 (2008), available at [http://www.bostonbar.org/prs/nr\\_0809/GideonsNewTrumpet.pdf](http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf) (reporting the efforts of the Boston Bar Association’s Task Force on Expanding a Civil Right to Counsel and highlighting the bar association’s efforts to test the impact of representation).

<sup>113</sup> *See State Basic Access Act*, BRENNAN CENTER, § 301.3.5 (2008), <http://www.brennancenter.org/sites/default/files/legacy/Justice/State%20Basic%20Access%20Act%20Feb%2008.pdf>.

<sup>114</sup> MD. ACCESS TO JUSTICE COMM’N, *supra* note 91, at 4–8.

<sup>115</sup> Lippman, *supra* note 105, at 2–3.

<sup>116</sup> JUDITH S. KAYE, THE STATE OF THE JUDICIARY 17–18 (2007), available at <http://courts.state.ny.us/admin/stateofjudiciary/soj2007.pdf>.

<sup>117</sup> Johnson, *supra* note 105, at 355–57, 360.

trial judges favor the expansion of legal representation for all parties.<sup>118</sup>

A number of commentators have also looked to foreign systems and international sources of authority to make the case for a right to counsel.<sup>119</sup> There is good reason to make the comparison to foreign jurisdictions. In a recent survey comparing twelve countries on markers of civil access to justice, the United States ranked second to last when compared to other nations in North America and Western Europe,<sup>120</sup> and twentieth out of twenty-three high-income countries worldwide—beating out only Croatia, Poland, and Italy—due in large part to the lack of access to legal counsel.<sup>121</sup>

## 2. *The Practical Impediments*

Despite overwhelming support for the ideals of civil Gideon, practical impediments abound. First, enactments of new rights have been scarce. If the previous ten years are any guide, courts and legislatures<sup>122</sup> are simply unwilling to expand the right to counsel in any significant way.<sup>123</sup> Second, funding for existing legal services has plummeted.<sup>124</sup> As such, even our current—and grossly inadequate—commitment to legal representation for the poor is at risk, raising questions as to whether additional funds to support new rights will ever be apportioned. In light of these challenges, civil Gideon, a critical element in the supply side vision of access to justice, has stagnated.

### a. Enactment of New Rights—The Road to Nowhere

#### i. The Courts

The courts have proved a disappointing battleground in the fight to expand a civil right to counsel. In 2011, in *Turner v. Rogers*, the Supreme

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<sup>118</sup> See KLEIN, *supra* note 39, at 2, 14–15 (“Judges think that the best solution [to an inefficient court system] is to find ways to get more people representation when they appear in court.”).

<sup>119</sup> See, e.g., Buxton, *supra* note 44, at 125–26; Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. ST. J. INT’L L. 601, 605–06 (2009); Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 771 (2006).

<sup>120</sup> MARK DAVID AGRAST ET AL., WORLD JUSTICE PROJECT, RULE OF LAW INDEX 24, 103 (2011), available at <http://worldjusticeproject.org/rule-of-law-index>.

<sup>121</sup> See *id.* at 21.

<sup>122</sup> Interestingly, almost all activity on the civil right to counsel front has taken place in the courts and in the legislatures. Very few efforts to corral the private bar into serving mandatory pro bono hours have taken hold. There are some exceptions—for example, Florida requires mandatory pro bono. But the requirement in Florida is capped at twenty hours per year and few other states have taken similar action. Omar J. Arcia, *Objections, Difficulties, and Alternatives: Mandatory Pro Bono Legal Services in Florida*, 22 FLA. ST. U. L. REV. 771, 774 (1995).

<sup>123</sup> Notably, Deborah Rhode made the same observation ten years ago, suggesting that not much has changed in at least the past two decades. DEBORAH L. RHODE, ACCESS TO JUSTICE 103–04, 145–46 (2004).

<sup>124</sup> LEGAL SERVS. CORP., FISCAL YEAR 2014 BUDGET REQUEST 3 (2014), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC\\_FY2014\\_Budget%20Request\\_FINrev\\_6.5.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC_FY2014_Budget%20Request_FINrev_6.5.pdf).

Court took up the question of the right to an attorney in civil contempt proceedings—specifically, where an indigent father faced twelve months in jail for failure to pay child support.<sup>125</sup> The majority of jurisdictions already guaranteed counsel in civil contempt hearings,<sup>126</sup> and the Court previously held in *Lassiter v. Department of Social Services* that the threat of incarceration is a critical element in the right to counsel analysis.<sup>127</sup> Thus, *Turner* presented the first opportunity since *Lassiter* to make a small but significant step toward expanded national recognition for a right to counsel, and to do so in a manner that did not require the Supreme Court to depart from existing jurisprudence. Yet, the Court held that a civil contemnor has no constitutional right to an attorney under the Due Process Clause.<sup>128</sup> In its decision, the Court detailed the inadequacy of *Turner's* civil contempt hearing and openly declared it constitutionally deficient.<sup>129</sup> But despite the Court's findings on the unconstitutionality of the proceeding, not a single Justice believed that appointment of counsel was the appropriate remedy.<sup>130</sup>

State courts have been actively engaged in the matter of a civil right to counsel as well, with equally unfavorable results. Since the civil Gideon revival in 2003, several compelling “test” cases brought in state courts have foundered or failed to bring about the desired result. Some courts have ducked the issue, finding a procedural loophole that allowed them a pass on the right to counsel question.<sup>131</sup> For example, in *Frase v. Barnhart*,<sup>132</sup> Maryland's high court declined to rule on the right to counsel in a child custody case because the unrepresented mother had won her substantive claim.<sup>133</sup> And as John Ebbott discusses, the Wisconsin Supreme Court used

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<sup>125</sup> *Turner v. Rogers*, 131 S. Ct. 2507 2512–13 (2011).

<sup>126</sup> See *Price v. Turner*, 691 S.E.2d 470, 472 n.2 (S.C. 2010) (“We recognize that in holding a civil contemnor is not entitled to appointment of counsel before being incarcerated we are adopting the minority position.”), *vacated sub nom. Turner*, 131 S. Ct. at 2520.

<sup>127</sup> See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981) (“[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”).

<sup>128</sup> *Turner*, 131 S. Ct. at 2520.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* One might argue that *Turner* is an especially devastating blow for the civil Gideon movement precisely because the Court recognized the constitutional inadequacy of *Turner's* hearing but, nonetheless, refused to appoint counsel. *Id.*

<sup>131</sup> See, e.g., *Donaldson v. State*, 548 N.Y.S.2d 676, 678–79 (N.Y. App. Div. 1989) (holding that the court lacked jurisdiction to entertain an action seeking declaratory judgment).

<sup>132</sup> 840 A.2d 114 (Md. 2003).

<sup>133</sup> *Id.* at 115. Several scholars put stock in the significance of the strongly worded concurrence in *Frase*, *id.* at 131 (Cathell, J., concurring), written by three justices on Maryland's highest court who urged a right to counsel in contested child custody cases. *Id.* at 138. For example, Laura K. Abel noted the passion of the judges' concurring opinion, which “testified to the importance of the issue.” Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 529 (2006). However, the Maryland Court of Appeals put the substantive issue to rest just three years later in *Touzeau v. Deffinbaugh*, finding that no right to counsel attaches in child custody cases. 907 A.2d 807, 820–21 (Md. 2006).

a similar strategy in *Kelly v. Warpinski*,<sup>134</sup> denying, without explanation, the petitioners' request for original jurisdiction on the right to counsel question despite support for the petitioners from an impressive array of amici, including eleven judges.

Other courts have shown more courage—at least reaching the merits of the right to counsel issue—although declining to find that any such right exists. Brenda King's story is illustrative. Long the primary caretaker for her three children, Ms. King became embroiled in a bitter custody battle with her ex-husband, in which he was represented by counsel and she was pro se. Her case was not remarkably complex, yet it illustrates in crystal-clear fashion the unfairness in the adversary system of pitting an unrepresented party against a represented one. Ms. King, who has a ninth grade education, failed to subpoena witnesses who had provided favorable declarations, failed to object to severely prejudicial hearsay evidence purporting to prove that her children came to school hungry while under her care, failed to utilize discovery procedures to obtain documentation of Mr. King's anger management evaluation, and was unable to effectively rebut the allegation that she suffered from attention deficit disorder that affected her parenting ability. As a result, she lost physical custody of her children. Still, in *King v. King*,<sup>135</sup> in a sterile 8 to 1 majority opinion containing none of these facts, the Washington Supreme Court held that the state constitution does not guarantee counsel in any child custody case.<sup>136</sup>

To be sure, constitutional guarantees of counsel do exist at the state level. However, since the 1970s, they have been largely confined to three basic case categories—parental rights, including termination, paternity, and

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<sup>134</sup> John F. Ebbott, *To Gideon Via Griffin: The Experience in Wisconsin*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 223, 224–25 (2006) (explaining that the court declined to take jurisdiction in *Kelly*, No. 04-2999-0A (Wis. Sup. Ct. filed Nov. 2004), despite the very sympathetic circumstances of two mothers who were unrepresented during their child custody proceedings—one of whom was concerned that the father was abusing their children). In an unpublished decision, the Wisconsin Court of Appeals eventually reached the merits of the right to counsel issue, finding that counsel is not guaranteed in child custody cases. *In re Paternity of K.J.P.*, 298 Wis. 2d 549 (Wis. Ct. App. 2006).

<sup>135</sup> 174 P.3d 659 (Wash. 2007) (en banc).

<sup>136</sup> *Id.* at 661, 669. Numerous recent cases have followed the example of *King*. In a 2011 case in the Washington Supreme Court, the court found no right to appointed counsel in truancy proceedings. *Bellevue Sch. Dist. v. E.S.*, 257 P.3d 570, 580 (Wash. 2011) (en banc). In 2013, a New Jersey Court of Appeals rejected a guarantee of counsel in domestic violence proceedings. *D.N. v. K.M.*, 61 A.3d 150, 157 (N.J. Super. Ct. App. Div. 2013). Attempts to secure civil Gideon rights in the lower federal courts since 2005 have failed as well, with the claims typically dismissed by the courts in summary fashion. *See In re Mesaba Aviation, Inc.*, 418 B.R. 756, 763 (B.A.P. 8th Cir. 2009) (holding that the appellant had no right to counsel in a bankruptcy appeal); *Patterson v. Dialysis*, No. 09-2131-JAR-GLR, 2009 WL 902406, at \*1 (D. Kan. Mar. 31, 2009) (declining to appoint counsel to a plaintiff claiming employment discrimination); *Blatch v. Hernandez*, 360 F. Supp. 2d 595, 615 (S.D.N.Y. 2005) (declining to adopt a right to counsel for mentally disabled tenants facing eviction from public housing); *Stewart v. Tex. Dep't of Criminal Justice*, No. 07-11-0410-CV, 2011 WL 5572195 (Tex. App. Nov. 16, 2011) (finding no right to counsel in civil rights cases absent exceptional circumstances).

abuse and neglect issues; cases implicating liberty interests, such as involuntary confinement, conservatorship, or guardianship; and civil contempt cases, which raise the specter of incarceration.<sup>137</sup> Most states that have a right to counsel within these case categories adopted that right decades ago, with only minor updates or modifications in recent years.<sup>138</sup> A diligent search of cases since the *Lassiter* decision in 1981 revealed only a handful of instances in which state courts have recognized a right to counsel outside these categories.<sup>139</sup>

Even with the reluctance of courts to create categorical rights, trial judges have the option of relying on their inherent authority to appoint counsel in specific cases where they deem it particularly necessary.<sup>140</sup> Yet, this power is rarely exercised. The *Lassiter* Court urged a case-by-case analysis of the need for counsel in particular matters,<sup>141</sup> but courts have typically declined to engage this analysis, with the result that counsel is rarely appointed for the indigent in individual cases.<sup>142</sup>

Trial courts have even refused to appoint counsel where the issue is raised and the litigant presents with obvious competence issues. Gary Blasi describes the case of Mr. Quail, a mentally disabled California tenant who lived in substandard conditions.<sup>143</sup> When he withheld rent to force his landlord to make repairs, as was his right, he was evicted.<sup>144</sup> Mr. Quail pleaded with the court for a lawyer and demonstrated his incompetence to act as his own representative through his “lengthy, rambling, disjointed,

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<sup>137</sup> See generally A.B.A. STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, CIVIL RIGHT TO COUNSEL, [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/civil\\_right\\_to\\_counsel.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/civil_right_to_counsel.html) (last visited Dec. 2, 2014) (compiling state laws governing the right to counsel in civil cases).

<sup>138</sup> *Id.*

<sup>139</sup> See e.g. *In re T.W.*, 551 So. 2d 1186, 1189, 1196 (Fla. 1989) (recognizing a right to counsel for juveniles seeking judicial bypass of the requirement to obtain parental consent before having an abortion); *In re D.L.*, 937 N.E.2d 1042, 1043, 1047 (Ohio Ct. App. 2010) (finding a right to counsel for juveniles defending against a protection order brought by another juvenile; *J.L. v. G.D.*, 29 A.3d 752, 753, 757 (N.J. Super. Ct. Ch. Div. 2010) (finding an entitlement to counsel where a juvenile is prosecuting a civil protection order against an adult represented by privately retained counsel). Together, these cases suggest that, if there is any trend toward favorable decisions on the right to counsel, it involves the rights of juveniles.

<sup>140</sup> See *In re Parole of Hill*, 827 N.W.2d 407, 420 (Mich. Ct. App. 2012) (holding that a circuit court has discretion to appoint counsel for indigent inmates responding to an appeal of a Parole Board decision).

<sup>141</sup> See *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 31–32 (1981) (holding that the decision of whether due process requires the appointment of counsel for indigent parents in termination proceedings should be made by the trial court).

<sup>142</sup> Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1076 (2009) (noting that, although trial judges have inherent powers to appoint counsel for indigent litigants, they rarely exercise that power).

<sup>143</sup> Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 916 (2009) (citing *Quail v. Mun. Ct.*, 217 Cal. Rptr. 361 (Cal. Ct. App. 1985)).

<sup>144</sup> *Id.*

confusing handwritten series of petitions.”<sup>145</sup> But still, the court declined to appoint counsel.<sup>146</sup> In fact, if not for Justice Johnson’s dissent, it would not even be clear that the case raised a right to counsel issue,<sup>147</sup> as the majority opinion did not mention it, even in cursory fashion, nor did it detail any of the facts relevant to Mr. Quail’s capacity.<sup>148</sup>

## ii. Legislatures

Legislatures have not been more hospitable towards a civil right to counsel than courts. In the past ten years, there have been several well-publicized attempts to secure counsel in a narrow subcategory of cases for a narrow subset of the affected population and, still, most of those efforts have failed.<sup>149</sup>

There are a number of representative examples. In New York, two bills to provide a right to representation—one introduced in New York City in

<sup>145</sup> *Id.* (quoting *Quail*, 217 Cal. Rptr. at 364 (Johnson, J., concurring in part and dissenting in part)).

<sup>146</sup> *Quail*, 217 Cal. Rptr. at 362–63.

<sup>147</sup> Blasi, *supra* note 143, at 917 (citing *Quail*, 217 Cal. Rptr. at 364–75 (Johnson, J., concurring and dissenting)).

<sup>148</sup> *Quail*, 217 Cal. Rptr. at 361–63. Paul Marvy recounts a similar case in Washington State. A rural city brought an action against an elderly, mentally compromised man, to seize and demolish his property. Paul Marvy, “*To Promote Jurisprudential Understanding of the Law*”: *The Civil Right to Counsel in Washington State*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 180, 181–82 (2006). Proceeding pro se, the man lost the suit on summary judgment, although he had good legal defenses. *Id.* Advocates in Washington took his case up, arguing to the trial court that counsel should have been granted. *Id.* The trial court denied that request, and an appellate court reviewing the matter declared the case moot when the appellant died mid-appeal. *Id.*

<sup>149</sup> The media has hailed several recent initiatives as creating a right to counsel when in fact they do not. For example, following the enactment in 2009 of California Assembly Bill 590, which commits funding to the development of several pilot projects to test the impact of legal representation on case outcomes, the *Wall Street Journal* inaccurately reported that California now guarantees counsel to indigent litigants in many types of civil actions. Tamara Audi, “*Civil Gideon*” *Trumpets Legal Discord*, WALL ST. J., Oct. 27, 2009, at A3. For the Bill, see Sargent Shriver Civil Counsel Act, Assemb., 590, 2009 Assemb., Reg. Sess. (Cal. 2009), available at [leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0551-0600/ab\\_590\\_bill\\_20091011\\_chaptered.html](http://leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.html). This bill was codified as CAL. GOV’T CODE § 68651 (West 2011). A similar mischaracterization followed the passage of a San Francisco ordinance that pledged a commitment to the *ideals* of civil Gideon but committed almost no public funds to advancing those ideals. See S.F., CAL., ADMIN. CODE art. 58, §§ 58.1–58.3 (2011), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/committees/materials/rls111189tdr.pdf> (declaring an intent to work with the Courts, the Bar Association of San Francisco, and interested persons toward the “eventual goal” of establishing a right to counsel, but limiting the funding for Pilot Program coordination to the cost of a single staff person). The press mistakenly announced that the city ordinance made San Francisco the first city in the nation to create a guaranteed right to civil counsel. Rosen, *supra* note 23. The same phenomenon took hold following an announcement made by New York State Chief Judge Jonathan Lippman that additional funding for foreclosure defense would be available in certain New York counties. LIPPMAN, STATE OF THE JUDICIARY 8 (2011), available at <http://www.nycourts.gov/admin/stateofjudiciary/SOJ-2011.pdf>. The *New York Times* reported on the expansion of resources for foreclosure attorneys by announcing that procedures aimed at assuring representation for all homeowners facing foreclosure “will be put in place in Queens and Orange Counties in the next few weeks and across the state by the end of the year”). David Streitfeld, *New York Courts Vow Legal Aid in Housing*, N.Y. TIMES, Feb. 16, 2011, at B1.

2009 for seniors facing evictions and foreclosure,<sup>150</sup> and one introduced in the state legislature in February 2011 to benefit all homeowners in foreclosure proceedings<sup>151</sup>—both stalled in committee.<sup>152</sup> In Texas, a bill introduced in 2005 to guarantee counsel in appeals of eviction actions met a similar fate.<sup>153</sup> In a particularly disappointing defeat, the Wisconsin Supreme Court denied a petition containing 1,300 signatures<sup>154</sup> that sought to establish a court rule requiring appointment of counsel where a judge determines it necessary to protect basic human needs.<sup>155</sup> Very few legislative successes were identified, and, typically, the achievements were modest. In one example, a forty-year old New York statute providing for appointment of counsel in child custody cases in family courts was expanded to cover similar cases in general jurisdiction courts.<sup>156</sup> In a second example, an old Alaska law providing for counsel in child custody matters where the opponent is represented by state-funded counsel was broadened in 2007 to cover cases in which the opponent is represented by private counsel.<sup>157</sup>

#### b. Fading Funding for Existing Legal Services

One indication that full-blown civil Gideon rights are unlikely to materialize lies in the woeful underfunding of existing legal services. The Legal Services Corporation, which Congress established in 1974 to provide publicly subsidized civil legal assistance to the poor,<sup>158</sup> receives less than half the funding it received in 1981.<sup>159</sup> In the current state of affairs, there is only one Legal Aid lawyer for every 6,415 individuals eligible for federally

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<sup>150</sup> N.Y. CITY COUNCIL, Int. No. 90, 2010 (N.Y. 2013), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=652625&GUID=1BAE21F9-D76F-4333-AA71-D3490D617DD7&Options=&Search=>.

<sup>151</sup> S. 3261, 2011–12 Assemb., Reg. Sess. (N.Y. 2011), available at [www.assembly.state.ny.us/leg/?sh=printbill&bn=S03261&term=2011](http://www.assembly.state.ny.us/leg/?sh=printbill&bn=S03261&term=2011).

<sup>152</sup> *Details on Int 0090-2010*, N.Y. CITY COUNCIL, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=652625&GUID=1BAE21F9-D76F-4333-AA71D3490D617DD7&Options=&Search=> (last visited Oct. 27, 2014); N.Y. STATE ASSEMB., [http://assembly.state.ny.us/leg/?default\\_fld=&bn=S03261&term=2011&Summary=Y&Actions=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=S03261&term=2011&Summary=Y&Actions=Y) (last visited Oct. 27, 2014).

<sup>153</sup> H.B. 2124, 79th Leg., Reg. Sess. (Tex. 2005), available at <http://www.legis.state.tx.us/tlodocs/79R/billtext/pdf/HB02124I.pdf#navpanes=0>.

<sup>154</sup> Bruce Vielmetti, *Supreme Court Urged to Back Court-Appointed Attorneys in Some Civil Cases*, MILWAUKEE J. SENTINEL, Oct. 5, 2011.

<sup>155</sup> John F. Ebbott, *An Open Letter to the Courts of Wisconsin*, LEGAL ACTION OF WIS. (Jan. 24, 2012), <http://www.legalaction.org/data/cms/Right%20to%20Counsel%20Open%20Letter%20to%20Courts.pdf>.

<sup>156</sup> Compare N.Y. JUDICIARY LAW § 35(8) (McKinney 2010), with N.Y. JUDICIARY LAW § 35(7) (effective Jan. 1, 2004–Aug. 15, 2006).

<sup>157</sup> ALASKA STAT. § 44.21.410(a)(4) (2012).

<sup>158</sup> Legal Services Corporation Act, 42 U.S.C. § 2996(b) (1976).

<sup>159</sup> While Congressional appropriations appear static from year to year, funding has dropped forty-nine percent in inflation-adjusted dollars over the past thirty years. *Funding History*, LEGAL SERVICES CORP. (2009), <http://www.lsc.gov/congress/funding/funding-history>.



funded aid.<sup>160</sup> Ironically, or perhaps tellingly, the decline in civil legal services for indigent families has occurred at a time of unprecedented growth in the overall number of lawyers licensed to practice.<sup>161</sup>

While states have rallied to supplement funding for Legal Aid attorneys, earmarked funds typically derive from the interest on lawyers' trust accounts, and are therefore vulnerable to economic volatility.<sup>162</sup> Starting in 2008, the recession wiped out nearly two-thirds of state resources, forcing many legal services agencies to slash their staffs.<sup>163</sup> The Civil Access to Justice Act Bill,<sup>164</sup> introduced by the Obama administration in 2009 to stabilize funding for legal services and lift restrictions on the types of cases federally funded entities can take, went nowhere and received almost no public attention.<sup>165</sup> Although the struggle over year-to-year appropriations for legal services is typically not discussed in the articles, speeches, and conferences calling for expanded civil Gideon rights, the diminishing financial commitment to our current legal aid infrastructure must figure into any realistic assessment of whether significant progress can be made on the right to counsel front.

### 3. *The Disconnect Between Rhetoric and Reality*

Despite amassing strong support, little progress has been made toward establishing a civil right to counsel—certainly not in the sweeping way that would be necessary to fundamentally alter the unbalanced and unfair nature

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<sup>160</sup> *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans: Overview*, LEGAL SERVICES CORP. (2009), 1, [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

<sup>161</sup> See Thomas D. Morgan, *The Changing Face of Legal Education: Its Impact on What It Means to Be a Lawyer*, 45 AKRON L. REV. 811, 813 (2012) (noting that the American bar has grown more rapidly over the last forty years “than in any comparable-length period in history”).

<sup>162</sup> See Terry Carter, *IOLTA Programs Find New Funding to Support Legal Services*, A.B.A. J. (Mar. 1, 2013, 1:29 AM), [http://www.abajournal.com/magazine/article/iolta\\_programs\\_find\\_new\\_funding\\_to\\_support\\_legal\\_services/](http://www.abajournal.com/magazine/article/iolta_programs_find_new_funding_to_support_legal_services/) (“When the Federal Reserve announced in December 2008 that it was lowering the interest rate to virtually zero, it had the effect of nearly zeroing out a mainstay in funding civil legal services for the poor: interest on lawyers’ trust accounts, aka IOLTA.”).

<sup>163</sup> Prior to 2008, IOLTA funding for legal services programs was at \$371 million. *Id.* But after the Federal Reserve dropped the interest rate in 2008, following the economic collapse, IOLTA funds dropped to \$93.2 million by 2011. *Id.* See also I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 222 (2013) (reporting that Connecticut’s IOLTA funds dropped from \$20.7 million in 2007 to \$1.7 in 2013—a ninety-two percent decline—and, further, that Legal Services Corporation-funded agencies laid off 1,226 lawyers and staff in 2011); Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid Groups*, N.Y. TIMES, Jan. 19, 2009, at A12 (explaining that many legal aid groups were expecting cutbacks of twenty percent).

<sup>164</sup> Civil Access to Justice Act of 2009, S. 718, 111th Cong. (2009).

<sup>165</sup> *S.718 (111th): Civil Access to Justice Act of 2009*, GOVTRACK, <http://www.govtrack.us/congress/bills/111/s718> (last visited Sept. 17, 2014) (listing the status of the bill as “[d]ied (Referred to Committee) in a previous session of Congress” and “was not enacted”).

of dispute resolution for most users of the poor people's courts.<sup>166</sup> With the movement unable to score even small victories at the local level, the landscape appears unlikely to change in the near future.

The primary reason is financial. The cost of a civil right to counsel would be immense. In a low-ball estimate, if twenty percent of the unrepresented users of state courts were eligible for assistance and we required Legal Aid lawyers to accept one hundred cases per year and paid them \$50,000 plus modest benefits, the price would be nearly \$3 billion—and that does not include overhead or litigation costs.<sup>167</sup> Certainly, in an era where \$300 million dollars in annual funding is difficult to maintain, the federal government has shown no inclination to fund such a right. Although courts theoretically should be immune to such pedestrian concerns, Deborah Rhode surmises that courts' general reluctance to extend the right to legal assistance stems from just this financial consideration.<sup>168</sup> The courts do not want to mandate a right to counsel when legislatures have repeatedly refused to fund one.<sup>169</sup>

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<sup>166</sup> Other scholars and advocates have drawn similar conclusions. *See, e.g.*, Blasi, *supra* note 143, at 918 (pointing out that even a significant expansion of counsel for a particularly disadvantaged portion of the population would still leave most ordinary poor people left out in the cold).

<sup>167</sup> The calculations performed by the Maryland Access to Justice Commission, *supra* note 91, support an even higher national cost estimate. If the Commission is correct that the cost of a civil right to counsel in Maryland, which boasts under two percent of the United States population, would be approximately \$107 million dollars per year, then extending that right to the rest of the country would cost nearly \$5.4 billion per year. *But see* A.B.A., RECOMMENDATION 112A & REPORT, *supra* note 110, at 14. The ABA has a different way of estimating the costs. In the report accompanying its 2006 resolution in support of a civil right to counsel, the ABA estimates that, currently, the United States provides on average less than \$20 of civil legal aid per eligible poor person and meets twenty percent of the current need. *Id.* Based on these figures, the ABA suggests that the full need would be met if the United States raised the average to \$100 per eligible person. *Id.* The FY2012 federal appropriation for legal aid was \$348 million. *Background and Funding*, LEGAL SERVICES CORP. (2013), <https://mspbwatcharchive.files.wordpress.com/2013/10/legal-services-corporation-background-and-funding-aug-29-2013.pdf>. Quintupling that figure, in accordance with the ABA's formula, would bring the total cost of a civil right to counsel to about \$1.7 billion.

<sup>168</sup> RHODE, *supra* note 123, at 9–10.

<sup>169</sup> Some advocates have attacked the economic hurdle head on, attempting to prove that the costs of *not* providing counsel match or exceed the costs of providing it. A financial analysis firm, commissioned by the Texas Access to Justice Commission, found that every dollar invested into legal services boosts the local economy, translating into \$7.42 in spending. *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential*, THE PERRYMAN GROUP 3 (Feb. 2009), <http://www.texasatj.org/files/file/Perryman%20Report.pdf>. Andrew Scherer has made a similar case in eviction proceedings, showing that, in New York City, 1,439 recently evicted families were admitted into the emergency shelter system, costing the city an estimated \$39 million. Scherer, *supra* note 102, at 708–09. Although it is difficult to prove that a lawyer could have saved many—or any—of these particular individuals from eventual homelessness, the data on attorney outcomes indicate that some families would have escaped this fate, at an enormous cost savings to the city. *See* N.Y. CNTY. LAWYERS' ASS'N, *supra* note 22, at 24 (estimating that if lawyers could prevent just ten percent of the evictions in New York City each year, it could save the City roughly \$75 million in homeless shelter costs). If further developed evidence that legal services results in cost savings to local governments might be the most effective path toward overcoming resistance to civil Gideon.

However, cost is not the only obstacle. At present, the civil Gideon movement is lacking support from the broader public. It is hard to conjure up the name of a single prominent non-lawyer who believes a right to counsel is a public priority.<sup>170</sup> Outside the echo chamber, the non-self-interested portion of the population is not demanding “more lawyers” to help solve the problems of the poor.<sup>171</sup> Low-income Americans are lacking jobs, education, and health care. Benjamin Barton has pointed out that, in the current era, it is not unreasonable to assume that funding for poverty programs is zero-sum<sup>172</sup> and that appropriations for additional legal services will draw funds away from forward-looking solutions like cash assistance, affordable housing programs, subsidized health care, and more generous unemployment insurance.<sup>173</sup> Further, as legendary advocates for the poor Gary Bellow and Jeanne Kettleson (now Charn) argued in the 1970s, funding an army of lawyers to shore up rights after those rights have been violated would require “the development of a bulging class of professional advocates,” at “extravagant” cost which, in their view, was “not a very attractive or promising social vision.”<sup>174</sup>

Finally, the Supreme Court in *Turner* added a third reason for the refusal to grant counsel—the need to consider unfairness to the unrepresented opponent.<sup>175</sup> In *Turner*, the alleged contemnor was brought to court by the unrepresented (and poor) mother of his child.<sup>176</sup> Alluding to the immensity of the pro se problem, the Court noted its discomfort with assigning counsel to the party accused of failing to pay child support when the individual harmed by the lack of payment was also unrepresented.<sup>177</sup> There are now so many people in need of counsel that determining who among them should receive a lawyer, and how such rights would affect other equally disadvantaged litigants, sent the Court racing for the bottom.

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<sup>170</sup> RHODE, *supra* note 123, at 81 (“What Americans want is more justice, not necessarily more lawyering”).

<sup>171</sup> Russell Engler is one of the few commentators recognizing the need to tackle civil Gideon from an organizing perspective; yet he limits his analysis to changing the hearts and minds of those within the legal system, such as judges and attorney generals, rather than examining how the movement might capture the attention of the public at large. *See* Engler, *Shaping a Context-Based Civil Gideon*, *supra* note 107, at 704.

<sup>172</sup> *See* Barton, *supra* note 96, at 1269 (As Professor Barton puts it: “[f]rom an indigent person’s point of view, which would you rather have: a hearing or right to the benefit itself?”).

<sup>173</sup> *Id.* (“[P]aying for the layers of due process that now ‘protect’ the poor from losing various benefits may actually lower the absolute amount of those benefits.”).

<sup>174</sup> Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity & Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 380 (1978). Bellow and Kettleson estimated that to provide services just to the very poor would require “[a] tenfold increase in the existing public interest bar,” and that to provide all Americans with the same quality of legal services that the rich currently enjoy would require a tenfold increase in the size of the *entire* bar.” *Id.*

<sup>175</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

Civil Gideon is an appropriate response to the pro se crisis and is heavily favored by scholars and advocates as the fairest solution. Yet, a confluence of factors has stonewalled its progress in the forums with the power to realize its vision—the courts and the legislatures. Obstacles include the enormous extent of the need, the substantial attendant costs, and the heightened unfairness that would result if counsel were provided to one class of litigants while equally sympathetic opponents remained unrepresented. Further, while attorneys are eager to guarantee a right to counsel, the broader public has not identified a dearth of lawyers as a public priority for the poor. As a result, political bodies are unlikely to enlarge rights that have been static for decades. Compounding dim projections regarding the development of new civil Gideon rights, some jurisdictions have experienced a virtual freefall in funding for *existing* civil legal services in recent years, and by any measure the overall national financial commitment to free legal assistance is declining.<sup>178</sup> Civil Gideon is attractive in theory, but is, and is likely to remain, a rhetorical device—useful for calling attention to the plight of the unrepresented, but not a practical means for overcoming the many challenges pro se litigants face in the justice system.

### B. *Unbundled Legal Services*

While civil Gideon is the subject of most high-level discussion on access to justice, its near-uniform defeat in all state and national forums has quietly deputized unbundling as the leading strategy for assisting the unrepresented in the poor people's courts.

Attorneys engaged in traditional representation utilize all available legal tools (the “full bundle,”) to advance a client's case—relying, in particular, on discovery, motion practice, and negotiation to increase the odds of a good case outcome.<sup>179</sup> By contrast, those who “unbundle” perform just one or two legal tasks on behalf of the recipient, with the litigant handling all of the remaining case-related matters pro se.<sup>180</sup> In a typical unbundled services arrangement, a lawyer might interview a pro se litigant, “ghostwrite” basic documents—often a pleading—for the litigant to sign,<sup>181</sup> or, less commonly,

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<sup>178</sup> See LEGAL SERVICES CORPS., *supra* note 124, at 3.

<sup>179</sup> See Forrest Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422–23 (1994) (describing the full bundle of legal services as: “(1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court”).

<sup>180</sup> See *id.* at 423 (“Unbundling these various services means that the client can be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly.”).

<sup>181</sup> Ghostwriting refers to a common form of unbundled practice where the attorney drafts a pleading but does not indicate on the face of the pleading that he assisted in drafting it; instead the pro se litigant signs the pleading and preserves, to all observers, his pro se status. See Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 276 (2010).

enter a limited appearance in court on behalf of the litigant to assist with a simple task, such as seeking a continuance.<sup>182</sup> Often, an attorney-client relationship is not formed, and an unrepresented litigant might be asked to sign a document affirming the non-existence of such a relationship before services are rendered.<sup>183</sup> Unbundling is premised on the theory that pro se litigants can competently, or adequately, represent themselves if they are armed with a measure of targeted behind-the-scenes education or assistance at a particular moment in the litigation.<sup>184</sup>

### 1. *A Growing Form of Practice*

Unbundling is the byproduct of extreme scarcity in lawyering resources for the poor. Only twenty percent of the legal needs of the low-income community are met by existing legal services, and legal aid agencies report that they turn away half of all people who seek their assistance.<sup>185</sup> In order to make legal services more readily available to indigent clients,<sup>186</sup> providers have established hotlines, group workshops, walk-in advice clinics, and other delivery mechanisms,<sup>187</sup> all aimed at assisting dozens, or even scores, of clients in a single day. Most unbundling services assist litigants at the beginning stages of a lawsuit.<sup>188</sup> In particular, providers often devote the bulk of their assistance toward identifying claims and defenses that unrepresented litigants can then record in their pleadings.<sup>189</sup>

Unbundling is a modern day approach to the distribution of scarce attorney resources for the poor, but in recent years, a heavily dominant one.

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<sup>182</sup> See Steinberg, *supra* note 66, at 461 (providing an overview of unbundled legal services and the various forms it can take).

<sup>183</sup> This Author has provided unbundled legal services through legal clinics where such practices are the norm.

<sup>184</sup> See Steinberg, *supra* note 66, at 461.

<sup>185</sup> See A.B.A. SECTION OF LITIG., AM. BAR ASS'N MODEL ACCESS ACT, RECOMMENDATION 104 (REVISED) 6 (August 2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_104\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf).

<sup>186</sup> See MASS. SUPREME JUDICIAL COURT STEERING COMM. ON SELF-REPRESENTED LITIGANTS, ADDRESSING THE NEEDS OF SELF-REPRESENTED LITIGANTS IN OUR COURTS: FINAL REPORT AND RECOMMENDATIONS 12 (2008), available at <http://www.mass.gov/courts/docs/sjc/docs/self-rep-final-report.pdf>.

<sup>187</sup> See HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, *supra* note 89, at 17.

<sup>188</sup> *Id.* at 24–25, 29 (explaining that lawyers often provide services at the beginning of litigation, such as conducting an “initial interview,” providing “client preventive advice,” and preparing “pleadings in divorce”); Stephanie Kimbro, *Using Technology to Unbundle in the Legal Services Community*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES 1, 6 (2013), <http://jolt.law.harvard.edu/symposium/articles/Kimbros-UsingTechnologytoUnbundleLegalServices.pdf> (describing how lawyers will provide unbundled services at the beginning of litigation such as document drafting and legal form preparation).

<sup>189</sup> See HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, *supra* note 89, at 41–42 (2003) (discussing how Forrest Mosten, “the father of limited legal assistance,” along with other unbundled service providers, spent much of their time “teach[ing] clients how to evaluate the strengths and weaknesses of their cases [and] prepare and file pleadings”).

Historically, social justice theory favored full representation of clients, with a small cadre of legal services attorneys coordinating and aggregating their representation so as to maximize impact and effect large-scale change.<sup>190</sup> The restrictions placed on Legal Services Corporation lawyers in 1996, however, curtailed much of this impact work, resulting in a larger focus on individual cases and basic enforcement of existing laws, as well as a shift away from concentrated representation for a few fortunate clients in favor of very diluted attorney assistance for all or most clients in need.<sup>191</sup>

The provision of unbundled legal services is widely supported, most significantly by courts and practitioners, but also by scholars who have helped shape trends in access to justice.<sup>192</sup> In fact, unbundling is now the primary system for the delivery of legal services to the poor.<sup>193</sup> The Legal Services Corporation reported in 2008 that federally funded agencies handle eighty-eight percent of their cases through the provision of simple advice

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<sup>190</sup> See Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 300–02 (1996) (“[T]he legal work was done in service to both individuals and larger, more collectively oriented goals. . . [and was] focused on deep-seated, structural, and cultural change.”).

<sup>191</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-50 to -59 (enumerating newly enacted restrictions upon the Legal Services Corporation).

<sup>192</sup> See Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573, 1574 (2002) (“[P]ro se assistance projects offer the best current prospect for helping the poor effectively use the [legal] system.”); see also Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1111–12 (2002) (describing how proponents believe that unbundling leads to increased access and more efficient justice); Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617, 2618 (1999) (recommending two types of unbundled services to increase access to justice for the poor); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 419 (2004) (“A further set of strategies for enhancing access to justice involves increasing lawyers’ capacity to provide cost-effective services to individuals of modest means. One such strategy is unbundling legal services.”); John C. Rothermich, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2691 (1999) (explaining how unbundled legal services provide greater access to the poor); Bradley A. Vauter, *Access to Justice—Unbundling: Filling the Gap*, 79 MICH. B.J. 1688, 1689 (2000) (discussing a change to Michigan’s practice rules so that unbundled services were easier for attorneys to provide, as well as the various benefits of unbundled services to the clients and the legal system); Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 160 (2011) (enumerating states’ contributions to furthering access to justice by promoting unbundled services); A.B.A. SECTION OF LITIG., *supra* note 185, at 12 (discussing the importance of unbundled services because generally “[a] partially-represented litigant is more effective than a wholly unrepresented litigant”).

<sup>193</sup> See Greiner et al., *supra* note 67, at 911–13 (stating that almost every state in the nation has at least one legal aid or assistance program that explicitly offers unbundled legal assistance”); McNeal, *Having One Oar or Being Without a Boat*, *supra* note 192, at 2617 n.1 (“[L]imited legal assistance models are increasingly the predominant method of delivering legal services to the poor.”).

and only twelve percent through representation in court.<sup>194</sup> In 2012, only three percent of Legal Services Corporation clients received “extensive services,” and twelve percent were represented through the issuance of a court decision, while the remainder received some form of unbundling.<sup>195</sup> In an oft-cited passage, Deborah Rhode characterizes modern day legal services for the poor as waiting in line, getting a brief service, or fending for yourself.<sup>196</sup> No doubt, many providers feel compelled to expand their capacity to serve low-income communities by offering brief assistance to all, rather than full representation to a select few.

Unbundling was once the subject of fierce ethical attack, but has now become a part of the mainstream provision of legal services.<sup>197</sup> In 2002, in acknowledgement of the growing popularity of the model, the American Bar Association amended Model Rule 1.2(c) to expressly permit unbundling, stating that a lawyer may “limit the scope of the representation if the limitation is reasonable . . . and the client gives informed consent.”<sup>198</sup> Since then, forty-one states have recognized—and even promoted—unbundling as a necessary and legitimate form of legal practice.<sup>199</sup>

## 2. Identifiable Successes

Very little formal evaluation of unbundling has been conducted despite the ubiquity of the services and the substantial proportion of access to justice funds allocated to support the model. Yet, even without much hard data, it

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<sup>194</sup> See LEGAL SERVS. CORP., 2008 ANNUAL REPORT: SERVING THE MOST VULNERABLE AMONG US (2008), available at [www.lsc.gov/pdfs/LSC\\_2008\\_Annual\\_Report.pdf](http://www.lsc.gov/pdfs/LSC_2008_Annual_Report.pdf) (reporting that federal legal services agencies handled 535,783 cases with advice only and 74,672 by way of court action).

<sup>195</sup> LEGAL SERVS. CORP., 2012 FACT BOOK 16–17 (2013), available at [http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012\\_Fact%20Book\\_FINALforWEB.pdf](http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012_Fact%20Book_FINALforWEB.pdf).

<sup>196</sup> RHODE, *supra* note 123, at 13.

<sup>197</sup> Until recently, most courts condemned ghostwriting on the basis that it inappropriately induces the court to construe pleadings liberally and shields attorneys from accountability for bringing frivolous actions. See *Duran v. Carris*, 238 F.3d 1268, 1271–72 (10th Cir. 2001) (per curiam) (determining that ghostwriting “constitutes a misrepresentation to [the] court by litigant and attorney”); *Ricotta v. California*, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998) (holding that the ghostwriting was improper, but not enough to hold the attorney in contempt); *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077 (E.D. Va. 1997) (finding ghostwriting to be improper); *Johnson v. Bd. of Cnty. Comm’rs*, 868 F. Supp. 1226, 1231 (D. Colo. 1994) (admonishing ghostwriting for causing unjust results and serving as a “deliberate evasion” of an attorney’s professional responsibilities). In addition, scholars raised questions about the compatibility of unbundled legal services with the duties of competence, diligence, and zeal. See McNeal, *Having One Oar or Being Without a Boat*, *supra* note 192, at 2639–41 (discussing how to measure legal competence and degree of care in the context of limited legal assistance). For an overview of the ethical critiques of unbundling, see Russell Engler, *Approaching Ethical Issues Involving Unrepresented Litigants*, 43 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 377 (2009).

<sup>198</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2013).

<sup>199</sup> *Court Rules*, A.B.A. [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/prose\\_unbundling\\_resource\\_center/court\\_rules.html](http://www.americanbar.org/groups/delivery_legal_services/resources/prose_unbundling_resource_center/court_rules.html) (last visited Sept. 22, 2014) (a comprehensive listing of all unbundling statutes and ethical rules is maintained by the American Bar Association).

is possible to attribute certain identifiable successes to unbundled legal services programs. First, the model helps litigants overcome discrete procedural hurdles to initiate or defend against a claim in court.<sup>200</sup> Second, it enhances the perception of fairness within the justice system for unrepresented court users.<sup>201</sup>

a. Opening the Courthouse Door—At Least A Crack

Unbundled services excel at helping the unrepresented gain initial access to the legal system. This is evident simply by examining the types of services rendered. Take an eviction case, for example. A tenant is served with eviction papers and is overwhelmed by his looming legal case. In many jurisdictions, the tenant can visit an unbundled legal services clinic and receive assistance from a lawyer who helps him identify and record his defenses in a ghostwritten pleading, as well as serve the document on his landlord.<sup>202</sup> Once the tenant responds to the eviction suit, no further help is rendered. But the assistance has had an impact—it has helped the tenant enter an appearance in the case, raise legitimate defenses, and preserve his right to contest the eviction.

This sort of initial access—propping open the courthouse door just enough to assist a litigant in preserving his rights—is provided across a wide range of case types. Child custody cases provide another useful example. Assume an unrepresented litigant who finds herself embroiled in a protracted custody battle and struggling to prepare for an upcoming custody modification hearing. She takes advantage of unbundled legal services to ensure that all required documentation is in order—financial records, proof that court-ordered treatment was completed, and mental health evaluations. When the “readiness review” reveals a deficiency in her paperwork, an attorney enters a one-time appearance in court to request a continuance of her scheduled hearing so that she can adequately prepare. Here, as in the eviction context, the unbundling program helps a pro se litigant clear initial procedural hurdles so that she is able to present her case to a judge on the merits.

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<sup>200</sup> See Steinberg, *supra* note 66, at 457.

<sup>201</sup> Some have touted cost savings to the courts as another major benefit of unbundled legal services. See CALIFORNIA BENCHGUIDE, *supra* note 83, at 5-8 (noting that pro se assistance saves “valuable courtroom time and reduces the number of continuances because of procedural defects”). While “docket control” is certainly important for judges and court clerks, who find themselves overwhelmed by the sheer number of pro se cases they must manage, efficiency is often at odds with fairness and cannot be considered a core access to justice goal; thus, the cost savings benefit of unbundled assistance is not considered in this Article. See Brescia, *supra* note 101, at 234-35 (noting that a group of experts in New York expressed misgivings about the unbundled approach due to concerns that lawyers providing brief assistance serve the interests of docket control rather than those of their client).

<sup>202</sup> See Steinberg, *supra* note 66, at 477.



### b. Enhancing the Perception of Fairness

Pro se litigants who are asked to rate the unbundled assistance they have received routinely give such assistance high marks, and note their belief that the services have helped them achieve a superior experience in court. Michael Millemann, for example, describes a project undertaken by clinical students at the University of Maryland in 1997 in which unbundled services were provided to clients seeking divorce, child support, and child custody.<sup>203</sup> More than eighty percent of the clients who participated in the program reported satisfaction with the services they received.<sup>204</sup> In a second example, a 2008 evaluation of a lawyer-for-the-day program in a New York housing court found that one hundred percent of assisted litigants believed they had a fairer experience in court due to the unbundled services they received.<sup>205</sup>

Surveys evaluating client satisfaction and perception have been critiqued on the basis that they tell us more about the bedside manner of the provider than the quality of the service. Other critiques have asserted that the results of such surveys are likely inflated by the impulse of clients to provide a socially desirable response, especially when the surveys are administered immediately after services have been rendered.<sup>206</sup>

Even according these critiques credence, the provision of unbundled legal services appears to provide a perceived benefit to some, if not most, recipients.<sup>207</sup> A perception of fairness is not necessarily linked to actual fairness, but some political theorists believe that the way a litigant perceives the justice system is the single most important indicator of the system's effectiveness and viability.<sup>208</sup> A client's perception of fairness and inclusion can be critical to the healthy operation of courts—it builds public confidence in the legal system, enhances acceptance of legal processes, and promotes willing compliance with judicial decisions.<sup>209</sup>

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<sup>203</sup> Michael Millemann et al., *Rethinking the Full-Service Legal Representation Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV. 1178, 1178 (1997).

<sup>204</sup> *Id.* at 1186.

<sup>205</sup> OFFICE OF THE ADMINISTRATIVE JUDGE OF THE CIVIL COURT OF THE CITY OF NEW YORK, VOLUNTEER LAWYER FOR A DAY PROJECT REPORT: A TEST OF UNBUNDLED LEGAL SERVICES IN THE NEW YORK CITY HOUSING COURT 33 (2008), available at [http://www.nycourts.gov/COURTS/nyc/housing/pdfs/vlfdreport\\_0208.pdf](http://www.nycourts.gov/COURTS/nyc/housing/pdfs/vlfdreport_0208.pdf).

<sup>206</sup> These critiques have been lobbed both by survey administrators and other commentators. See Cantrell, *supra* note 192, at 1583 (suggesting that survey results are skewed by the “halo” effect of clients feeling good about having representation in general); see also Abuwala & Farole, *supra* note 22, at 58 (“These percentages, which may appear high at first glance, are likely due in part to some survey respondents’ inclination to provide socially desirable responses . . .”).

<sup>207</sup> See, e.g., OFFICE OF THE ADMINISTRATIVE JUDGE OF THE CIVIL COURT OF THE CITY OF NEW YORK, *supra* note 205, at 33.

<sup>208</sup> See, e.g., Zimmerman & Tyler, *supra* note 35, at 483.

<sup>209</sup> *Id.*

### 3. *The Limits of Unbundled Legal Services*

The benefits of unbundling are not insubstantial—it provides greater access to the courthouse, produces satisfied clients, and promotes the perception of a fair process. Yet, the model must also be evaluated by its impact on substantive outcomes, and here unbundling comes up short. To be sure, inadequate legal protections and structural biases within the justice system may be the dominant force preventing tenants, domestic violence victims, and other indigent litigants from attaining the precise relief they seek. But we know from decades of research that full attorney representation can often mitigate many of the most adverse outcomes that unrepresented low-income litigants face and we should expect recipients of partial attorney assistance to fare better as well, commensurate with the lawyering resources invested in their cases.<sup>210</sup> As a baseline, those who receive unbundled assistance should, at the very least, marginally and consistently outperform litigants who receive no legal assistance and whose dismal case outcomes are discussed in Part II of this Article.<sup>211</sup> The delivery of unbundled legal services cannot suffice as the flagship access to justice program in the lower state courts unless it translates into some tangible improvement in the result a pro se litigant can expect.<sup>212</sup>

Implicit in the ascendancy of the unbundling model is the assumption that unbundling does in fact advance substantive justice.<sup>213</sup> The assumption is reasonable, but in practice has rarely been tested, and in the few studies that have been conducted, it has typically not borne out. In fact, initial evaluation calls into question whether either of two presumed benefits of unbundled legal services in fact materialize: first, that it improves case outcomes for recipients, and second, that it improves the capacity of a pro se litigant to effectively present her case to a decision-maker.

Two empirical studies have tested the impact of unbundled assistance as

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<sup>210</sup> For example, an attorney representing a tenant might not be able to win possession of the contested unit, but the representation is still successful if the attorney can negotiate two months for the tenant to move out, rather than subjecting the tenant to forcible removal from the home five days after the judgment is entered (which is the law in many jurisdictions). *See, e.g.*, CAL. CIV. CODE § 715.010(2) (West 2007) (providing that where a court issues a writ of possession of real property in favor of a landlord, the evicted tenant has five days to voluntarily leave the property before a sheriff may forcibly remove the tenant).

<sup>211</sup> *See supra* Part II.(C).(3) (reviewing empirical studies which indicate that, in housing and family court, unrepresented pro se litigants regularly experience less favorable substantive outcomes than litigants represented by counsel).

<sup>212</sup> *See* Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865, 872 (2004) (arguing that access to “outcomes” is the appropriate measure upon which to evaluate an access to justice intervention and not access to a “feeling as though one has had justice”) (internal quotation marks omitted).

<sup>213</sup> *Cf.* A.B.A. SECTION OF LITIG., *supra* note 185, at 12 (positing that “in the great majority of situations some legal help is better than none.”).

compared to no assistance on case outcomes.<sup>214</sup> In a study I conducted in San Mateo County, California in 2009, approximately one hundred tenants who received ghostwriting and one-time negotiation assistance fared no better on any substantive case outcome measure than approximately three hundred control tenants who received no assistance.<sup>215</sup> Interestingly, in this study, the litigants who obtained unbundled services raised legally cognizable defenses in ninety-seven percent of cases, whereas those who received no assistance were successful in raising a legitimate defense in only fifty-nine percent of cases.<sup>216</sup> However, the identification of legitimate defenses—an essential feature of unbundled legal services—failed to impact substantive outcomes.<sup>217</sup> The quality of the defenses raised in the responsive pleading to an eviction suit did not affect the rate at which tenants retained possession of their homes, the number of days during which they were able to maintain possession, or the amount of disputed rent money they agreed to pay their landlords.<sup>218</sup> This finding implies that litigants may be unable to successfully navigate later stages of the litigation process, or overcome structural bias within the courts, even with the benefit of well-crafted pleadings.

A study conducted in 2001 by UCLA researchers produced similar results.<sup>219</sup> The UCLA study examined an unbundled legal services program in the Los Angeles area providing one-time information and advice to civil litigants.<sup>220</sup> Researchers compared the settlement agreements reached by fifty assisted tenants to the settlement agreements of fifty unassisted tenants and detected no difference in substantive outcomes.<sup>221</sup> The authors did attribute a seven percent decline in the default rate to the advent of the unbundled legal services program, bolstering the notion that unbundling promotes access to the justice system.<sup>222</sup> However, even a decrease in the default rate may not improve substantive outcomes in the aggregate. The

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<sup>214</sup> It is important to note that neither the San Mateo nor the UCLA study controlled for the merit of the case in their experimental designs. In both studies, any party who sought unbundled services received them. Therefore, it is possible that the results may be partially attributable to a litigant selection effect.

<sup>215</sup> Steinberg, *supra* note 66, at 474–78, 482–90 (“Recipients of unbundled aid fared no better than their unassisted counterparts on either possession or monetary outcomes. They lost their homes just as often, faced just as few days to move out, and made payments to their landlords with the same frequency, and in similar amounts.”).

<sup>216</sup> *Id.* at 494.

<sup>217</sup> *See id.* at 495.

<sup>218</sup> *Id.*

<sup>219</sup> The Empirical Research Group, *Evaluation of the Van Nuys Legal Self-Help Center Final Report*, UCLA SCH. OF L. 3 (2001) (“Center visitors fare no better (and no worse) in [eviction] cases than the general population. They settle their cases on terms similar to non-Center defendants, and are just as likely to persevere through trial as defendants who are self-motivated to go to court.”).

<sup>220</sup> *See id.* at 7.

<sup>221</sup> *See id.* at 12–13.

<sup>222</sup> *Cf. id.* at 10–11.

San Mateo study looked closely at case outcomes for defaulting tenants and found, counter-intuitively, that tenants who survived default did not necessarily achieve superior results. The non-defaulting tenants retained possession of their units in sixteen percent of cases—whereas no defaulting tenant retained possession—but, as a group, the non-defaulting tenants were subject to significantly higher judgments for damages and litigation costs than the defaulting tenants.<sup>223</sup> There is no obvious explanation for this phenomenon, but it is possible landlords were more motivated to pursue judgments for damages against tenants who elected to fight their evictions in court. These findings undermine the theory of access on which the unbundling model is premised. The most widely acknowledged benefit of unbundling—that it helps individuals lodge their claims and defenses with the court—may not only fall short in improving outcomes, but could harm litigants in unforeseen and unintended ways.

Moreover, at least some researchers and court personnel who have observed recipients of unbundled assistance in court, report that the recipients are unable to present their cases to a judge in adequate fashion. Such observations have been made even where the litigants themselves perceived the unbundled assistance to have prepared them to perform well. In a study of unbundled advice provided by attorneys in a community-based housing court in Harlem, researchers who observed assisted tenants in court recounted that forty-seven percent appeared unable to understand the proceedings.<sup>224</sup> This finding underscores the hazard of relying on litigant perception alone in evaluating the efficacy of unbundled services, as eighty-three percent of the assisted tenants in this study said they “agreed” or “strongly agreed” that they felt prepared for their court appearance after receiving the unbundled services.<sup>225</sup>

Additionally, in the UCLA study, tenants who received unbundled assistance with their eviction cases received low marks from judges on their readiness for court proceedings.<sup>226</sup> The judges noted that assisted litigants were very poorly prepared for court, often filed or brought the wrong documents, and were unclear about the relief they sought.<sup>227</sup> Barbara Bezdek offers a possible explanation for why unbundled assistance may not translate into higher-performing litigants. She explains that, in speaking with dozens

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<sup>223</sup> See Steinberg, *supra* note 66, at 493 (“[T]enants in the non-defaulting group were *far more likely to agree or be ordered to pay their landlords significant sums of money.*”).

<sup>224</sup> Abuwala & Farole, *supra* note 22, at 58.

<sup>225</sup> *Id.*

<sup>226</sup> See The Empirical Research Group, *supra* note 219, at 14 (“[Judges] believed that the unrepresented litigants they identified as having been assisted by the Center . . . were very unprepared for the trial process.”).

<sup>227</sup> *Id.* at 10; see also Baldacci, *supra* note 50, at 664 (discussing his own experience providing litigants with detailed advice and, sometimes, ghostwriting assistance with pleadings, and then watching them flounder in court).

of tenants who received pro se counseling prior to their court dates in housing court, many credited the unbundled assistance with helping them formulate legally cognizable defenses, but ultimately declined to follow the advice in court due to a sense that the outcomes were predetermined and their voices were powerless to alter the existing power structure.<sup>228</sup>

Even case law provides some examples of the limited impact of unbundled services. In *Elkins v. Superior Court*<sup>229</sup> an unrepresented husband involved in a marital dissolution case lost his property claims by ostensible default because he failed to properly authenticate thirty-four out of thirty-six of his exhibits.<sup>230</sup> The procedural blunder was committed despite the fact that Mr. Elkins had received the benefit of counsel at the outset of his case.<sup>231</sup> In *King v. King* the unrepresented mother who badly fumbled her child custody matter had visited an advice clinic prior to litigating her case.<sup>232</sup>

Not all the news is bad. A randomized trial conducted by James Greiner and his colleagues in 2012 provides some evidence that unbundled legal services may produce a substantive return.<sup>233</sup> The Boston-area study used a set of litigants who received unbundled services as a control group to evaluate the impact of full representation.<sup>234</sup> In a significant finding, the unbundled group achieved case outcomes similar to those achieved by fully represented litigants.<sup>235</sup>

While this study indicates that the model, at least in some forms, can approximate the value of full legal representation, three caveats must be noted. First, despite the full representation and unbundled labels, the level of assistance did not differ dramatically between the treatment and control groups, as the treatment group received fairly light full-representation—with little use of motion practice, discovery, or jury demands—while the unbundled group received robust limited assistance.<sup>236</sup> Second, the outcomes achieved by the unbundled and fully represented groups were not

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<sup>228</sup> See Bezdek, *supra* note 63, at 591.

<sup>229</sup> 163 P.3d 160 (Cal. 2007).

<sup>230</sup> *Id.* at 163, 175, 178.

<sup>231</sup> See ELKINS FAMILY LAW TASK FORCE, *supra* note 42, at 10.

<sup>232</sup> See *King v. King*, 174 P.3d 659, 673 (Wash. 2007) (en banc) (Madsenen, J., dissenting).

<sup>233</sup> D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* 1–6 (working paper No. 1880078 2012), available at <http://ssrn.com/abstract=1880078>.

<sup>234</sup> See *id.* at 2 (“[The control group received] limited, or ‘unbundled,’ legal assistance if/when the occupant faced eviction litigation. The unbundled assistance consisted of court-hearing-day-only representation in hallway settlement negotiations and mediation sessions (but not in court appearances or in filing motions) through a lawyer for the day . . . program.”).

<sup>235</sup> See *id.* at 5–6 (“We find no statistically significant evidence that the Provider’s offer of a traditional attorney-client relationship, as compared to . . . the Provider’s [lawyer for the day] program, had a large (or any) effect on the likelihood that the occupant would retain possession; on the financial consequences of the dispute; on the judicial involvement in or attention to litigation cases; or on any other outcome.”).

<sup>236</sup> See *id.* at 12, 37–38.

compared to a third group receiving no assistance, so it is unclear whether either set of litigants performed substantially better than those who received no legal assistance at all. And last, a companion study set in a different Boston-area courthouse, and conducted by the same researchers, similarly compared fully represented litigants to a group who received unbundled services and found that the fully represented group far outperformed the unbundled group on every outcome measure.<sup>237</sup> Notably, in the second trial, the fully represented group received far more sophisticated representation than the unbundled group.<sup>238</sup> Still, these studies provide an important reminder that further experimentation and evaluation regarding different forms of limited assistance in different contexts is required before any firm conclusions are drawn about the impact of the assistance on substantive fairness.

#### 4. *An Incomplete Remedy*

Unbundling is an admittedly appealing solution to the pro se crisis. It costs far less than a right to counsel, provides services to multitudes of clients who could not otherwise access them, and has some markings of success: providers are opening the court house doors, clients are satisfied with the services they receive, and litigants perceive the services to increase the fairness of court processes. Yet, on key measures of efficacy—an improvement in substantive results and performance in court—early data indicate that limited assistance may not reliably lead to better outcomes.<sup>239</sup>

It may be fair to theorize that unbundling promotes access but not

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<sup>237</sup> Greiner, et al., *supra* note 67, at 908–09, 925–37 (finding that approximately two-thirds of unbundled services recipients did not retain actual possession of the rented property, while approximately one-third of fully represented occupants did not retain actual possession of the rented property; that unbundled services recipients saved an average of less than two months or rent, while fully-represented occupants saved an average of over three-quarters of a year's rent; and that the median judgment entered against unbundled services recipients was \$617, while the median judgment entered against fully-represented occupants was \$0).

<sup>238</sup> *Cf. id.* at 941 (discussing how the attorneys of fully represented clients employed a “confrontational and assertive” litigation style consisting of “frequent use of jury trial demands,” “frequent motions to compel responses to discovery,” aggressive requests for preliminary relief, thorough and exhaustive trial preparation, and demands for settlement).

<sup>239</sup> Interestingly, some providers and commentators acknowledged the limited efficacy of unbundled legal services, but nonetheless heavily promote them. In an example of the type of paradoxical thinking that sometimes accompanies discussions of limited assistance, the New Hampshire Supreme Court Task Force on Self-Representation reported on research conducted by legal services agencies finding that tenants who received advice or an educational pamphlet were often unsuccessful in asserting defenses, presenting evidence, or making legal arguments that might have changed the outcome. N.H. SUPREME CT. TASK FORCE ON SELF-REPRESENTATION, *supra* note 23, at 9. In the same report, however, the Task Force then encouraged the New Hampshire Supreme Court to amend current ethical rules to permit and regulate limited representation on the stated assumption that its availability would lead to better-prepared litigants. *Id.* at 9, 11–12.

justice.<sup>240</sup> By design, unbundled legal services focus on helping litigants overcome initial procedural hurdles—filing the right documents, serving them on the proper individuals, scheduling the necessary case events with the court.<sup>241</sup> There is no promise of assistance in more advanced stages of the litigation, and in fact, none is provided.<sup>242</sup> In reviewing the literature on these types of programs, no example was found of an unbundled legal services program providing substantial assistance to pro se litigants in gathering evidence, speaking to witnesses, responding to interrogatories, defending depositions, conducting legal research, arguing motions, or preparing for trial.<sup>243</sup>

In a recent study, a professor at the University of Utah evaluated an unbundled family law advice clinic in Salt Lake City run by two legal aid agencies and staffed by volunteer lawyers and students.<sup>244</sup> The study looked at client satisfaction with a range of services provided, both immediately following the provision of services, and again several months after the services were provided.<sup>245</sup> Notably, at the time services were rendered, clients were highly satisfied with basic services, such as receiving forms, referrals, information, and instruction on what to do in their case.<sup>246</sup> However, at the follow-up interview months later, client satisfaction with

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<sup>240</sup> See *supra* Part III.(B).(2).(a). In a stronger statement about the downfalls of limited legal assistance, Gary Bellow warned in 1977 that “[a] massive expansion of minimal, routinized legal assistance throughout the low-income areas of the country . . . [could be conceived of as a] potentially . . . powerful system of social control,” with lawyers becoming “purveyors of acquiescence and resignation among the people that they are seeking to help.” Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 64 NLADA BRIEFCASE 34–35 (Aug. 1977), available at <http://www.law.harvard.edu/academics/clinical/bellow-sacks/Templates/Solutions.pdf>. At the time, Bellow was concerned that selective efforts at law reform might inadvertently sideline the problems of most low-income litigants. See *id.* at 5–7. However, the critique could be applied even in greater measure today with regards to the delivery of unbundled services to nearly all low-income litigants.

<sup>241</sup> See *supra* Part III.B.1.

<sup>242</sup> See *id.*

<sup>243</sup> Complex services are most likely not provided because it is simply too time-consuming to offer them. Alyse Bertenthal, who performed ethnographic research at a self-help appellate clinic in Los Angeles, notes that, on average, requests for an extension of time took half an hour for an attorney to complete, while only slightly more complicated matters, such as creating an index for a brief or assisting with a declaration, took more than two hours. See ALYSE BERTENTHAL, AN APPEALING PRACTICE: ON LEGAL FORMS, WRITING ACTS, AND MAKING LAW 13 (work-in-progress, on file with author). At such a rate, any unbundled services provider offering assistance with truly difficult aspects of legal practice would spend the entire day with just a single client. *Id.*

<sup>244</sup> Linda F. Smith & Barry Stratford, *DIY in Family Law: A Case Study of a Brief Advice Clinic for Pro Se Litigants*, 14 J.L. & FAM. STUD. 167, 180 (2012).

<sup>245</sup> See *id.* at 196, 198.

<sup>246</sup> *Id.* at 196 (reporting that 84.8% of clients found “[p]roviding a form or referring to a form on the web” to be “[v]ery [h]elpful,” that 84.6% of clients found “[r]eferral to legal aid/legal service agencies” to be “[v]ery [h]elpful,” and that 83.9% of clients found “[g]iving particular instruction about HOW to do something” to be “[v]ery [h]elpful”).

every type of unbundled service declined substantially.<sup>247</sup> The authors concluded that it is likely not enough to provide clients with web-based pleadings and sample forms; rather, in many cases, more direct and individualized assistance is needed.<sup>248</sup> Substantive case outcomes were not tracked in the Salt Lake City study, and thus their correlation to satisfaction rates is unknown. However, a plausible explanation for the decline in satisfaction over time—and one embraced by the study's authors—is that, as their cases progressed and became more complex, clients ultimately discovered that certain unbundled services were less helpful than they initially imagined.

Even supporters of unbundled legal services concede that the delivery model may be a mismatch for the tremendous complexity of many average, everyday proceedings.<sup>249</sup> In a striking example of the labyrinthine processes erected by courts in supposedly simple matters, and the difficulty of designing unbundled services to effectively assist pro se litigants, Connecticut's "Do It Yourself Divorce Guide" occupies fifty-five pages in order to describe for unrepresented parties the procedures they must follow to obtain an uncontested divorce.<sup>250</sup> In Connecticut a litigant must file a minimum of fifteen motions, papers, or formal requests with the court to obtain a divorce in which the husband and wife agree on everything, including division of property and custody arrangements.<sup>251</sup> The Guide represents a laudable effort to be comprehensive, but the resulting product highlights the procedural density of a legal matter often cited as among the simplest to navigate.<sup>252</sup> One short encounter with an attorney is unlikely to propel an unrepresented divorce-seeker through this procedural morass.

Lawyers who provide unbundled services are also at a distinct disadvantage in delivering effective services. It is simply impossible for limited assistance programs to perform difficult and time-consuming lawyering tasks when functioning on a brief services model and aiming to serve all clients in need. This is particularly so when a significant investment

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<sup>247</sup> *Id.* at 198 (reporting that 58.2% of clients found "[p]roviding a form or referring to a form on the web" to be "[v]ery [h]elpful," that 15.2% of clients found "[r]eferral to legal aid/legal service agencies" to be "[v]ery [h]elpful," and that 67.5% of clients found "[g]iving particular instruction about HOW to do something" to be "[v]ery [h]elpful").

<sup>248</sup> *Id.* at 199.

<sup>249</sup> See Scherer, *supra* note 102, at 711–12 ("Pro se advice and materials, pro bono efforts, more understandable laws, targeted advocacy efforts by public interest attorneys, more efficient court procedures, technology, and limited assistance . . . all can help, but fail to make enough of a difference." (internal citations omitted)).

<sup>250</sup> See JUDICIAL BRANCH, *See Do It Yourself Divorce Guide*, STATE OF CONNECTICUT JUDICIAL BRANCH, DO IT YOURSELF DIVORCE GUIDE 6 (2012), available at <http://www.jud.ct.gov/publications/fm179.pdf>.

<sup>251</sup> See *id.* at 37–40 (outlining the multitude of forms that plaintiffs and defendants must fill out).

<sup>252</sup> See Millemann, *supra* note 203, at 5 (describing uncontested divorces as "[m]echanical" legal matters involving little discretion).



of time is required just to ensure that pro se litigants are sending the right documents to the right parties. Further, within the unbundling framework, lawyers typically meet with clients just a single time and have to make on-the-spot decisions about how to advise an individual, or complete his paperwork, based solely on information provided by the client in a short interview and without the benefit of independent investigation, or in many cases, even corroborating documentation. Inadvertently, a lawyer may commit a client to a specific factual detail—the date a marriage dissolved or the content of a phone message—which turns out to be erroneous or against the weight of evidence, thus compromising a successful case resolution.

Moreover, legal aid lawyers work with individuals who lack education and often suffer from disabilities, mental health issues, and a history of substance abuse, making it difficult for those litigants to leverage a small amount of assistance into big case-related gains.<sup>253</sup> In California, courts have discovered that, even with express instruction on how to request a hearing, “many or even most” pro se litigants fail to schedule the proper hearings to advance their case matters.<sup>254</sup> While this sounds like a failure of follow-through on the part of the litigant, scheduling a hearing can actually be a difficult, non-obvious process—especially for litigants with special needs—requiring access to specific forms, knowledge of the type of hearing required, preparation of a written request filed with the correct office, and notification to the opponent of the date of the hearing. That litigants unintentionally allow their cases to languish because they are unsure what affirmative steps to take next, despite having received direction from an attorney, at least suggests that limited lawyering cannot aspire to be more than a partial remedy for the challenges facing the unrepresented poor.

#### IV. DEMAND SIDE ACCESS TO JUSTICE REFORM

This Part introduces “demand side” reform of the courts as an alternative, or complementary, theory of access to justice, one that improves fairness and due process for the unrepresented without an increase in the presence of attorneys.<sup>255</sup> Sluggish progress on a civil right to counsel and emerging data on the limited impact of unbundled legal services suggest that attorney-driven solutions for strengthening civil justice in the poor people’s courts have faltered. Demand side reform would restructure the rules of court and the roles of judges to support pro se participation in the legal system. Revision of procedural and evidentiary rules and active interrogation by judges could offer pro se litigants a functional substitute for

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<sup>253</sup> D.C. ACCESS TO JUSTICE COMM’N, *supra* note 24, at 25–27.

<sup>254</sup> CALIFORNIA BENCHGUIDE, *supra* note 83, at 5-5.

<sup>255</sup> The “demand side” label is borrowed from the language of economics but is not meant to be understood in precisely the same terms. The idea behind demand side access to justice is that we should focus on institutional reform rather than supplying counsel, and should ensure that court processes demand less from the majority of litigants who use them.

attorney assistance. While reform of court processes will never be as effective as providing individual representation in every case, the impact could nevertheless be significant. At the very least, this sort of reform would expand advocacy beyond the supply side feedback loop, within which access to justice advocates have ping-ponged for over a decade between the illusive pursuit of a fully funded right to counsel and the dilution of attorney resources to the point of limited efficacy.<sup>256</sup>

The essence of the demand side approach, and the key element that distinguishes it from other theories of access to justice, is that it does not rely on supplying attorneys or legal assistance to upgrade the abilities of litigants.<sup>257</sup> Instead, it focuses on dismantling barriers put in place by procedural and evidentiary rules, and by narrow conceptions of the judicial role, so that pro se parties can compete more effectively within the court system. Under traditional adversarial principles, parties have the duty to advance and manage their cases, and are penalized heavily for failure to complete basic tasks, such as filing and serving pleadings, scheduling necessary case events, gathering evidence, or presenting cognizable claims to a judge.<sup>258</sup> Effective reform would remove many of the barriers facing unrepresented parties at every key stage of a proceeding, with a focus on eliminating technical barriers to litigation as well as requiring judges to elicit from litigants as much legally relevant information as possible. The creation of formal and specific rules that govern litigation in majority pro se courts is necessary to effectuate the suggested reforms.

A particularly compelling reason to engage in demand side reform is that the Supreme Court recently endorsed it. As discussed, *supra*, in Part I, the Supreme Court examined a categorical right to counsel for civil contemnors in *Turner v. Rogers* in 2011. *Turner* was watched closely, as advocates believed that contempt litigation, in which a losing defendant faces incarceration, provided a close analog to criminal matters, and

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<sup>256</sup> The ideas in Part IV build on the work of Benjamin Barton, who has argued persuasively for pro se court reform in lieu of a civil right to counsel. See Barton, *supra* note 96, at 1227–28. I build on Professor Barton's work both by offering a more comprehensive framework for pursuing pro se court reform, and also in suggesting that court reform efforts move away from unbundled services and other forms of self-help for the unrepresented and focus instead on the development of new procedural rules that require courts and judges to facilitate and develop pro se cases. This Part also builds on the work of Russell Engler, who has been a vocal proponent of increased judicial activism in the poor people's courts; however, I depart from Professor Engler in arguing for rules that govern judicial conduct rather than increasing judicial discretion to manage pro se cases. See Engler, *And Justice for All*, *supra* note 6, at 2028–29.

<sup>257</sup> In an alternative usage of the “demand side” label, Catherine Albiston and Rebecca Sandefur recently referred to public demand for legal services—or for other means to resolve their potentially justiciable issues—as “demand side” access to justice. Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117.

<sup>258</sup> See *infra*, Part IV.(B) (discussing proposals for changing procedural and evidentiary rules and some of the consequences of not implementing reforms).

therefore, was a viable opportunity to expand the right to a state-appointed attorney in civil matters. The Court unanimously rejected a guarantee of counsel, greatly disappointing civil Gideon proponents.<sup>259</sup> However, in an unanticipated twist, the Court adopted a new due process standard, one set forth by the Solicitor General as *amicus curiae*, requiring that trial courts implement “substitute procedural safeguards” for unrepresented parties.<sup>260</sup> The Court then deemed the *Turner* hearing unconstitutional for failure to provide those safeguards.<sup>261</sup>

*Turner* marks an evolution in the Court’s thinking on access to justice and takes three steps that, together, support the implementation of demand side reform both theoretically and practically. First, the finding of constitutional deficiency regarding Mr. Turner’s hearing is significant. It makes clear that the Court is willing to recognize the due process challenges of *pro se* litigation and to support access to justice reform of *some* kind in at least *some* cases.<sup>262</sup> Second, the Court eschewed civil Gideon as the remedy, and instead adopted the view that trial courts must change their *own* rules and practices to make themselves constitutionally accessible when lawyers are not available to assist.<sup>263</sup> The Court exceeded its jurisdiction to stake out this position, signaling a new and proactive approach to addressing access to justice from the ground up, without the involvement of lawyers. Last, the decision dissolves some of the jurisprudential barriers that have historically been cited as limiting opportunities to reform the trial courts. The Court subtly enlarges the right of access to the courts and sanctions active judging—both important dimensions of demand side reform—even if it does so without acknowledging this effect. Using *Turner* as a launching pad, it is possible to craft a demand side reform agenda that can be applied beyond civil contempt to increase access to justice across diverse litigants and case types.

#### A. *Turner v. Rogers*—A Launching Pad for Demand Side Access to Justice

Michael Turner’s story reads like the stories of other unrepresented parties. He failed to pay a weekly child support debt of \$51.73 and was held in contempt on five occasions.<sup>264</sup> Following a six-month jail sentence, he faced a sixth contempt charge and twelve months of incarceration.<sup>265</sup> At his hearing, Mr. Turner was asked if he had anything to say.<sup>266</sup> Presumably

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<sup>259</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011).

<sup>260</sup> *Id.* at 2512, 2519.

<sup>261</sup> *Id.* at 2520.

<sup>262</sup> *Id.* at 2512.

<sup>263</sup> *Id.* at 2520.

<sup>264</sup> *Id.* at 2513.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

unaware that he could defend against jail time by demonstrating that he had no ability to pay the arrearage, he responded that he had been “on dope,” and then had broken his back, but was now off drugs and hoped that the judge would give him another chance.<sup>267</sup> The judge gave Mr. Turner’s opponent—the mother of his child—an opportunity to speak and then promptly entered an order holding Mr. Turner in willful contempt of the child support order, sending him to jail for a year.<sup>268</sup> The judge made no finding on Mr. Turner’s ability to satisfy the child support debt.<sup>269</sup>

Mr. Turner had the burden of proof in the contempt action and the trial judge violated no known rule in failing to help him meet it. Yet, the Court was disturbed that an obvious affirmative defense existed and that no inquiry was held to determine whether Mr. Turner could avail himself of its protection.<sup>270</sup> Though Mr. Turner asserted that a right to counsel was in order, the Court instead went with the middle ground approach proposed by the Solicitor General as amicus for the United States, requiring that “alternative procedural safeguards” be instituted to protect the rights of the unrepresented under the Due Process Clause.<sup>271</sup> These safeguards include, non-exclusively: (1) notice to the defendant that “ability to pay” is a key issue in the case, (2) the use of a form (or 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 triggered by his responses on the form, and (4) an express finding of fact that the defendant has the ability to pay.<sup>272</sup> Concluding that Mr. Turner’s hearing lacked these safeguards, the Court found the hearing unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment.<sup>273</sup>

The Court took an important step toward acknowledging and addressing unequal access to justice for the unrepresented poor in declaring Mr. Turner’s hearing constitutionally infirm. The finding is significant, in part, because it is uncommon. The Justices have rarely been willing to label any civil hearing involving the unrepresented as violative of due process—possibly out of a fear that such a labeling would presumptively confer a civil right to counsel.<sup>274</sup> The condemnation of the *Turner* hearing is especially notable, however, because Mr. Turner’s hearing is not a unique example of an egregious hearing in front of an egregious judge. Despite clear markers

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 2512–13.

<sup>271</sup> *Id.* at 2521.

<sup>272</sup> *Id.* at 2519.

<sup>273</sup> *Id.* at 2020.

<sup>274</sup> See Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805, 810 (2012) (speculating that in earlier cases the Court drew limits in defining due process in part because it believed that only a right to counsel could satisfy a broader right).

of unfairness—the defendant spoke 169 words<sup>275</sup> and the judge neglected to make a clear factual finding on the sole available defense—the hearing is, at essence, an example of a routine case, handled by a judge in a routine manner. It is illustrative of the sorts of hurried, slapdash pro se hearings that play out in courthouses across the country on a daily basis. In striking down Mr. Turner’s hearing, the Court took aim, whether intentionally or not, at the constitutional validity of the whole enterprise of pro se litigation, which operates writ large in much the same way depicted in *Turner v. Rogers*. The Court’s findings, of course, arose in a case where physical liberty was at stake, but it is possible to imagine a similar finding in a case matter such as termination of parental rights, where the Court has previously recognized the fundamental nature of the private interest.<sup>276</sup> At the very least, the finding of constitutional inadequacy in a pro se case such as *Turner* provides leverage for encouraging trial courts to re-examine and reform their procedures to avoid due process challenge.

The Court did not use an existing standard to analyze the *Turner* hearing, but instead seized the opportunity presented by the case to set forth new baseline requirements for access to justice. The Court’s vision was expressed in the form of four alternative procedural safeguards proposed by the Solicitor General, which together, place the onus on the court to advise civil contemnors of an available affirmative defense, solicit factual information to support that defense, resolve questions regarding the defense through in-court examination of the defendant, and make a finding *in every case* on whether the legal elements of the defense have been satisfied. Scholarly reaction to *Turner*’s alternative procedural safeguards has ranged from lukewarm to downright cold, with some commentators asserting that the safeguards are too weak and limited to produce any impact.<sup>277</sup> Peter Edelman decried the alternative measures proposed as woefully insufficient to level the playing field and wondered aloud whether the Justices “get it” when it comes to pro se litigation.<sup>278</sup> Even supporters of the outcome in *Turner* have labeled the safeguards as “minimal” with the potential to “ossify” over time to the disadvantage of the unrepresented.<sup>279</sup> But the *Turner* prescription can be read expansively as well. Indeed, procedural reform, evidentiary reform, and quasi-inquisitorial judging are all elements of the *Turner* safeguards.

In contempt cases, trial courts must now notify defendants of a key

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<sup>275</sup> Brief for The Constitution Project as Amicus Curiae Supporting Petitioner at 8, *Turner*, 131 S. Ct. 2507 (2011) (No. 10-10).

<sup>276</sup> See *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981).

<sup>277</sup> See CONCURRING OPINIONS, <http://www.concurringopinions.com/?s=turner+v.+rogers> (last visited Sept. 19, 2014) (providing a range of scholarly reaction from an online symposium held in the wake of *Turner*., most of it critical of the decision).

<sup>278</sup> Peter Edelman, *Does the Supreme Court Get it in Turner?*, CONCURRING OPINIONS (June 27, 2011), [www.concurringopinions.com/archives/2011/06/does-the-supreme-court-get-it-in-turner.html](http://www.concurringopinions.com/archives/2011/06/does-the-supreme-court-get-it-in-turner.html).

<sup>279</sup> Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 989 (2012).

defense, seek out facts to support that defense, and question the litigant in open court to resolve inconsistencies, doubts, and concerns regarding the facts provided by various sources in relation to the defense. On this reading, the Court has embraced every critical aspect of demand side reform. The safeguards call on trial courts to end the passive practice of permitting litigants to waive important rights, and to require court actors to institute more sophisticated efforts that assist the unrepresented in preserving and advancing the merits of their cases. Importantly, the Court makes these actions mandatory and does not rely on the initiative of the litigant to seek a lawyer's assistance or the unlimited discretion of judges to determine what the "specific dictates of due process" might be in any particular case.<sup>280</sup> The safeguards do not address all issues arising in pro se cases—far from it—but they take a few steps toward reducing the need for unrepresented litigants to have lawyers, or to independently possess either substantive knowledge of the law or proficiency in procedural matters.

Two aspects of the Court's decision emphasize its commitment to demand side reform in lieu of supply side access to justice. First, the Court exceeded its jurisdiction in adopting and applying the alternative procedural safeguards in *Turner*, revealing a new activist approach to spurring reform of court procedures. The Court's jurisdiction in *Turner* was limited to the categorical right to counsel question and did not involve constitutional questions as to the sufficiency of Mr. Turner's hearing on other due process grounds.<sup>281</sup> The Court could have—and according to the dissent *should* have—declined to find a right to counsel and ended its analysis there.<sup>282</sup> Instead, the majority chose to take a proactive stand on access to justice and crafted a framework that places the responsibility directly on courts and judges, rather than lawyers, to improve due process. Second, the *Turner* Court's unanimous rejection of a right to counsel constitutes fairly plain evidence that none of the Justices are receptive to the idea of civil Gideon, at least not in most run-of-the-mill pro se cases.<sup>283</sup> The Court is firmly focused on institutional action that can be taken to ameliorate unfair and inaccurate decision-making processes.

The Court's opinion has an impact even beyond the demand side requirements it imposes in civil contempt cases. In understated ways, the Court's decision alters the landscape of existing jurisprudence affecting pro se cases, thus paving the way for demand side reform that was previously believed to be ethically, or at least culturally, off-limits. Laura Abel, of the National Center for Access to Justice at Fordham Law School, makes the

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<sup>280</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011).

<sup>281</sup> See Petition for Writ of Certiorari at i, *Turner v. Price*, 387 S.C. 142 (2010) (No. 10-10).

<sup>282</sup> *Turner*, 131 S. Ct. at 2020–21 (Thomas, J., dissenting).

<sup>283</sup> The Court did leave open the question of whether counsel might be indicated where a contemnor is opposed by a represented government entity. See *id.* at 2520.

insightful observation that the procedural safeguards required by *Turner* support an enlarged definition of the right of access to the courts.<sup>284</sup> In 1996, in *Lewis v. Casey*,<sup>285</sup> the Court defined the right of access as simply the right to bring a claim and not the right to affirmative assistance in developing that claim.<sup>286</sup> In the context of denying prisoners a free-standing right to access a law library, Justice Scalia, writing for the majority, explained that the State must leave open the courthouse door, but is not responsible for helping litigants “discover grievances” or “litigate [them] effectively once in court.”<sup>287</sup> The *Turner* Court did not address the right of access pointedly, or even reference *Lewis*. But the decision implies that, at least in certain cases, initial access to the courthouse door is no longer sufficient. Rather, a new constitutional floor requires courts to assist the unrepresented in accessing a fair proceeding *beyond* the filing of court papers. This interpretation, while limited by context, could ultimately have far-reaching implications for demand side access to justice advocacy across a range of case matters going forward.

*Turner* creates a platform for reshaping the judicial role in pro se proceedings as well. The Court’s third procedural safeguard requires that an unrepresented party be questioned on the evidence he puts forward.<sup>288</sup> The opinion does not name the judge as the person responsible for the questioning, but it is unclear what other court actor would be available to play this role. This requirement, although not fully fleshed out by the *Turner* Court, may foreshadow the imposition of an affirmative duty on trial judges to aid a litigant in telling his story. In the bulk of state appellate cases, pro se litigants who have claimed an entitlement to more judicial assistance in prosecuting their cases have failed to obtain relief.<sup>289</sup> Many appellate courts reason that the duty of impartiality requires judges to treat represented and unrepresented parties alike, with no special advantage accruing to the pro se litigant.<sup>290</sup> Certainly, no court has required judges to draw out relevant testimony, seek substantiating evidence, or otherwise immerse themselves in fact-development. In fact, it is likely that a judge who engages in these activities would be considered “un-neutral” and in violation of the ethical

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<sup>284</sup> See Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, *supra* note 274.

<sup>285</sup> 518 U.S. 343 (1996).

<sup>286</sup> *Id.* at 354, 360.

<sup>287</sup> *Id.* at 354–55.

<sup>288</sup> *Turner*, 131 S. Ct. at 2519.

<sup>289</sup> See, e.g., *Wilkerson v. Ekelem*, No. M2002-00841-COA-R3CV, 2004 WL 578600; *In re Marriage of Fitzgerald*, 629 N.W.2d 115 (Minn. Ct. App. 2001).

<sup>290</sup> See, e.g., *Wilkerson*, 2004 WL 578600, at \*2 (“[T]rial courts should not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.”); *In re Marriage of Fitzgerald*, 629 N.W.2d at 119 (“Although some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules.”).

canon requiring impartiality.<sup>291</sup> Even in Alaska, one of the more lenient states on pro se issues,<sup>292</sup> a judge has absolutely no duty to question an unrepresented party on factual issues. At most, the judge must take steps to help the pro se party complete a procedural step he has already tried, but failed, to accomplish.<sup>293</sup> Under pre-*Turner* case law, the judge responsible for Mr. Turner's case conceived of his role appropriately, if not properly: he provided each party an opportunity to deliver a narrative, but stopped short of injecting himself into the adversarial proceeding.<sup>294</sup> In other words, he took measures to preserve his impartiality and opted against risky active judging that an appellate court may have viewed askance. The *Turner* decision changes the risk calculation for judges who preside over pro se hearings. The third procedural safeguard wobbles tentatively toward an obligation of active judging, and may offer protection from ethical challenge for judges who *choose* to actively engage parties, even in the absence of an affirmative duty. *Turner* takes a step toward actualizing the prevailing view of judicial ethics scholars, who have long made the case that active judging can be compatible with judicial impartiality.<sup>295</sup> In sum, *Turner* should be read as a fairly hearty embrace of demand side access to justice. The decision concedes that due process must be fortified for unrepresented parties, but takes a sharp turn away from supply side remedies as the appropriate response. The Court adopts demand side—or at least demand side “lite”—reforms that lay the groundwork for broadening the right of access to the courts and re-defining the role of the trial judge. Importing the *Turner* approach into a range of case matters, and expanding upon it, could be hugely impactful on the rights and opportunities of the unrepresented poor.

#### B. A Comprehensive Framework for Demand Side Reform—Building on Turner

*Turner* offers important constitutional support for procedural and judicial reform, but its reforms are limited and its holding applies only to

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<sup>291</sup> One can only speculate as to how an appellate court would regard fact development by a trial judge since the actions of judges who take such steps are rarely subject to review. Typically, the case law arises in the context of an aggrieved pro se litigant who insists that *too little* assistance was provided. In cases where judges go further to assist the pro se litigant, unsuccessful opponents have rarely appealed on the basis that *too much* judicial assistance was offered. *But see* *Oko v. Rogers*, 466 N.E.2d 658, 660 (Ill. App. Ct. 1984) (“The [represented] plaintiff contends that she was denied a fair trial because: (1) the trial court attempted to assist the [pro se] defendant in presenting his case . . .”).

<sup>292</sup> “Since deciding *Breck v. Ulmer* in 1987, the Alaska Supreme Court has held the pleadings of some pro se litigants to a less stringent standard than represented parties, even finding in some cases an affirmative duty of the trial court to explain to pro se litigants the technical points of procedure.” Mark Andrews, *Duties of the Judicial System to the Pro Se Litigant*, 30 ALASKA L. REV. 189, 190 (2013).

<sup>293</sup> *See* *Bauman v. State, Div. of Family & Youth Servs.*, 768 P.2d 1097, 1099 (Alaska 1989).

<sup>294</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2513 (2011).

<sup>295</sup> *See* Engler, *And Justice for All*, *supra* note 6, at 2028 (“[T]he call for judges to provide vigorous assistance to unrepresented litigants is consistent with the need for impartiality.”).



civil contempt cases.<sup>296</sup> Building on *Turner*, this Part offers a more comprehensive framework for demand side reform that both deepens and broadens the Supreme Court's procedural safeguards.<sup>297</sup> The overarching goal of demand side reform is to enhance the accessibility of legal processes by vesting courts and judges, rather than parties, with the responsibility to frame legal issues, elicit facts, and advance the litigation across all case types in which the great majority of litigants are pro se. Paula Hannaford-Agor of the National Center for State Courts argues that when "operator errors" become typical and pervasive in courts, we should think of them instead as "system errors" requiring systemic solutions.<sup>298</sup> As detailed exhaustively in Part II, *supra*, nearly every aspect of the adjudicatory process in state court civil proceedings is impenetrable to a layperson, resulting in frequent operator errors with devastating consequences. Supply side access to justice attempts to address these issues by correcting operator errors, one by one, through provision of counsel. Instead, I have rebranded common operator errors as system errors to illuminate three features of the litigation process that are ripe for reform: the rules of procedure, the rules of evidence, and the judicial role. As will be shown, formal rule change in each of these areas is necessary to effectuate demand side reform consistently and to create uniform processes in the lower state courts.

### 1. *Procedural Reform*

The rules of procedure typically govern a party's ability to gain initial access to the legal system, gather evidence within her opponent's control, and enforce judicial orders. Unrepresented parties are likely to default on any one of a number of procedural obligations they must fulfill in order to have their cases fully heard or to avail themselves of a remedy ordered by the court. Examples of common procedural operator errors include a failure to complete a pleading,<sup>299</sup> a failure to file the correct pleading in court,<sup>300</sup> a failure to serve documents on an opponent,<sup>301</sup> a failure to schedule necessary

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<sup>296</sup> See *Turner*, 131 S. Ct. at 2512–20.

<sup>297</sup> This Section represents my preliminary thoughts on procedural, evidentiary, and judicial reforms that might be implemented in the lower state courts. Space does not permit a full exploration of these proposals, nor does it permit careful consideration of the many implementation details that would need to be worked out, such as whether these recommendations work differently in contexts involving one unrepresented party versus two.

<sup>298</sup> Hannaford-Agor, *supra* note 50, at 14.

<sup>299</sup> See KINDREGAN & KINDREGAN, *supra* note 83, at 13 (noting that one of the problems presented by the pro se challenge is pro se litigants' "inability to fill out [court] forms completely and correctly").

<sup>300</sup> See *id.* at 68 ("Pro se litigants often file the wrong pleading . . .").

<sup>301</sup> See CALIFORNIA BENCHGUIDE, *supra* note 83, at 1-5 (noting that the process of serving the opposing party is often a "major obstacle to self-represented litigants").

hearings,<sup>302</sup> a failure to engage in discovery,<sup>303</sup> and a failure to finalize and enforce court judgments.<sup>304</sup>

Most procedural rules in lower state court civil proceedings require party action and initiative, which is a particular problem for pro se litigants who are often not aware that the rules exist and have difficulty taking proactive measures to comply with them. In an attempt to avert operator errors that lead to the premature conclusion of a case, unbundled legal services programs have worked to make litigants aware of procedural rules, and to provide basic instruction on the steps parties must take to keep their matters afloat. A more systemic and comprehensive solution, however, would foist compliance with procedural rules on the courts rather than the parties.

Nearly every procedural rule can be modified to reduce the need for litigant mastery of the technical process. Pleadings should be standardized and available in check-the-box format. As *Turner* suggests, worksheets that solicit relevant factual information should be attached to both complaints and answers to facilitate the presentation of cognizable claims and defenses.<sup>305</sup> Basic oral pleadings should be permitted, particularly those that raise common issues, such as “I did not do the things alleged in this restraining order petition” (factual denial) or “I cannot make it to my hearing next Tuesday” (continuance).<sup>306</sup> Courts should handle service of process and, for most cases, effectuate it through U.S. mail, rather than requiring

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<sup>302</sup> See *id.* at 5-5 (“Courts have found that, even with explicit instructions on the need to request a court hearing and how to do so, many or even most self-represented litigants fail to schedule the hearings needed to complete their cases.”).

<sup>303</sup> See KINDREGAN & KINDREGAN, *supra* note 83, at 15 (noting that one of the problems presented by the pro se challenge is pro se litigants’ “[f]ailure to comply with discovery”).

<sup>304</sup> Hannaford-Agor, *supra* note 50, at 14–15 (“[There is] a large proportion of cases that seem to languish indefinitely because litigants do not know how to move to the next stage of the litigation process after they have filed the initial pleadings. Ultimately, many of these cases are missed for failure to prosecute. . . .”).

<sup>305</sup> The one true demand side reform adopted by many jurisdictions is the development of simplified check-the-box pleadings that elicit from litigants basic facts to support claims and defenses relevant to certain types of actions. See, e.g., *Family Division, Petition for Direct Placement Adoption, PCA 301a*, STATE OF MICH. JUDICIAL CIRCUIT, available at <http://courts.mi.gov/Administration/SCAO/Forms/courtforms/adoptions/pca301a.pdf>. The creation of simplified pleadings is an important first step. However, mandating the use of such pleadings by represented and unrepresented parties alike would be a more substantial reform. Represented parties would no longer have the option to craft complicated pleadings chock full of legal jargon with the effect of overwhelming the unrepresented opponent. At present, most jurisdictions do not mandate the use of standardized pleadings in the lower rungs of the state courts. California is a notable exception.

<sup>306</sup> Oral pleadings are already permitted in some administrative systems in the United States. Not every pleading can be handled orally but many can. A welfare recipient facing termination of public benefits in the District of Columbia is permitted to call the Office of Administrative Hearings and orally indicate her desire to contest the termination. D.C. MUN. REGS. tit. 1, § 2971.5(b) (2010). The clerk must then complete the paperwork necessary to preserve and process the appeal, and schedule it for a hearing. See *id.* §§ 2971.1, 2971.9 (noting that a hearing can be requested in person or over the phone and that a written summary shall be completed); see also COLO. CODE REGS. § 3.850.14 (2012) (noting that a request by a welfare recipient in Colorado for a hearing may be made orally).

parties to complete personal service.<sup>307</sup> Discovery should be mandatory and automatic, requiring the parties to exchange key documents—such as a list of income and assets in a marital dissolution case<sup>308</sup>—at the outset of the litigation.<sup>309</sup> Courts should schedule all hearings and notify parties when further case action is required, relieving parties of the need to determine whether their legal matters have been finalized.<sup>310</sup> Courts should draft and issue final orders consistent with judicial rulings so that parties do not struggle to translate a judge’s intent into writing.<sup>311</sup> And last, courts should initiate enforcement of judgments by, for example, questioning a judgment-debtor about basic income and assets at the time judgment is rendered and

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<sup>307</sup> Personal service is an unnecessary relic of the past, originally required because the Postal Service was not reliable. Hannaford-Agor, *supra* note 50, at 14. This is no longer a problem and procedures should be adapted to reflect the reality of modern times. *Id.* Further, affidavits affirming personal service are often not reliable. In New York City, Judge Fern Fisher implemented a new court rule in debt collection proceedings requiring the plaintiff-creditor to provide the court with the summons and complaint in an envelope containing the defendant’s name and address, rather than serving it personally. *Administrative Judge Fern A. Fisher Announces New Measures to Assist Debtors in Civil Court*, PROBONO.NET (Oct. 15, 2014), [http://www.probono.net/fellows/news/article.218908-Administrative\\_Judge\\_Fern\\_A\\_Fisher\\_Announces\\_New\\_Measures\\_to\\_Assist\\_Debtors](http://www.probono.net/fellows/news/article.218908-Administrative_Judge_Fern_A_Fisher_Announces_New_Measures_to_Assist_Debtors). Under the new rule, the court mails the complaint, and if it is returned with the addressee unknown, the court will not enter a default judgment. *See* N.Y.C. UNIF. CIV. R. § 208.6(h) (McKinney 2014). N.Y. STATE LAW § 208/6(h) (McKinney 2014). Court statistics show that this rule has already had an impact on consumer credit actions with a significant increase in answers filed by debtors. *Id.* As a result of this rule, the default rate dropped dramatically between 2007 and 2012. *See* UNIFORM CIV. RULES FOR THE N.Y. CITY CIV. CT. R. 208.6(h) (2008), available at <http://www.nycourts.gov/rules/trialcourts/208.shtml#06> (Judge Fisher related details regarding the drop in default rate at the American Association of Law Schools Annual Meeting in 2012 as a panelist in a program entitled “*The Debt Crisis and the National Response: Big Changes or Tinkering at the Edges.*”).

<sup>308</sup> Courts should also serve as information conduits that connect pro se litigants to relevant government agencies to facilitate the transfer of necessary documents. City building inspectors and local police departments are two obvious examples. A tenant should have easy access to a list of building code violations. A domestic violence victim should have easy access to recordings of 911 calls she placed to report the alleged abuse.

<sup>309</sup> Some lower state courts prohibit discovery in an effort to reduce costs and level the playing field for unrepresented litigants. In New York City’s Housing Court, for example, no formal discovery is available. N.Y. CNTY. LAWYERS’ ASS’N, *supra* note 22, at 26. This is a race-to-the-bottom approach that subverts access to material information rather than facilitating it.

<sup>310</sup> Many pro se cases fail to advance because unrepresented litigants are unaware that parties have the burden not just to initiate the litigation but to ensure it progresses through various stages. *See* Greacen Associates, LLC, *Developing Effective Practices in Family Caseflow Management*, ADMINISTRATIVE OFFICE OF THE COURTS CENTER FOR FAMILIES, CHILDREN & THE COURTS 25 (2005), [http://www.courts.ca.gov/partners/documents/FL\\_Caseflow\\_Mgmt\\_Manual.pdf](http://www.courts.ca.gov/partners/documents/FL_Caseflow_Mgmt_Manual.pdf) (providing reasons litigants are unable to complete their cases). In San Diego, a study that sought to explain why unrepresented litigants had left their divorce cases unresolved found that sixty percent either did not know there was anything else they needed to do or did not know what step to take next. *Id.*

<sup>311</sup> Party-initiated procedures are especially problematic following the resolution of a case. Winning parties often leave court without an order and do not know how to prepare a final written order for the judge’s signature, or even that it is a requirement to do so. CALIFORNIA BENCHGUIDE, *supra* note 83, at 1-7. As a result, the court’s decision is rendered effectively unenforceable, as a final judgment is never issued and the court’s minute order may be insufficiently detailed. In one California court, as many as one-third of all family law cases prepared for archiving lacked a final judgment. *Id.* at 1-8.

providing that information to the judgment-creditor.<sup>312</sup>

Navigating the thorny thicket of pre-trial and post-trial litigation has always been seen as the exclusive province of lawyers, but it does not have to be so. In courts where lawyers do not appear, simply requiring the court to complete certain procedural steps, and making others automatic or self-executing, would dissolve some of the operator errors currently seen as unavoidable byproducts of pro se litigation.

## 2. Evidentiary Reform

The rules of evidence control fact development in the courtroom and are an essential tool for ensuring that a decision-maker has access to all relevant and reliable information in a case. Pro se litigants typically commit evidentiary operator errors in one of two ways: they attempt to introduce documents or testimony that is inadmissible in court, or they do not object to irrelevant or prejudicial evidence introduced by their opponent.<sup>313</sup> As a result of these errors, the evidence upon which judicial fact-finding is based can be distorted, with the perverse result of obscuring the truth rather than illuminating it. Good evidence might be excluded from a proceeding if an unrepresented party is unable to properly authenticate it, while untrustworthy evidence might become part of the record simply because a pro se party did not raise a timely objection.<sup>314</sup>

While many types of systemic reforms might be imagined, a tribunal aiming for maximum pro se accessibility should admit all non-privileged evidence.<sup>315</sup> Rather than ruling on admissibility, a judge should scrutinize all available evidence, assign it the proper *weight*, and make clear and transparent findings as to its probative value.<sup>316</sup> For example, a written

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<sup>312</sup> An example of this already exists in a Colorado jurisdiction. There, a judge requires judgment-debtors to complete a set of interrogatories regarding place of employment, bank account information, and existing assets prior to leaving the courtroom, and then provides that information to the judgment-creditor. Hannaford-Agor, *supra* note 50, at 15.

<sup>313</sup> See CYNTHIA GRAY, AM. JUDICATURE SOC'Y & STATE JUSTICE INST., REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS 36–37 (2005) (discussing ways in which evidentiary rules operate to frustrate justice). For an example of the first type of operator error, John Sheldon offers this observation from his trial practice in Maine: "In a protection from abuse case, the *pro se* plaintiff has prepared a statement about the abusive incident to read to the court, because she knows she is too scared of the defendant to testify in front of him from memory alone." Peter L. Murray & John C. Sheldon, *Should the Rules of Evidence Be Modified for Civil Non-Jury Trials?*, 17 ME. B.J. 30, 33 (2002). The defendant's attorney successfully objects to her reading the statement because it does not qualify under the recorded recollection exception to the hearsay rule. *Id.*

<sup>314</sup> See, e.g., *Elkins v. Superior Court*, 163 P.3d 160, 161 (Cal. 2007) for an example of a case in which evidentiary rulings served to distort the ruling.

<sup>315</sup> See Murray & Sheldon, *supra* note 313, at 35–36 (discussing proposals to abolish the rules of admissibility in bench trials).

<sup>316</sup> Judges in administrative tribunals are often required by rule to make clear written findings as to the weight of all evidence, and if they fail to do so, the final judgment is subject to reversal. In trial courts, the same obligation often does not exist. See *id.* at 34 ("[R]eversals for evidentiary errors in civil cases

witness statement should not be excluded from an evidentiary hearing, but examined and considered, and made part of the record, with the judge making a clear finding on its particular relevance and reliability.<sup>317</sup> In a habitability case, a letter from a neighbor confirming that a rodent infestation exists, especially if the neighbor lives in the same building and has the same landlord, might be given substantial weight. In assessing the evidence, the judge might note that the neighbor is acting against his own interests in making a public statement against his landlord, and thus is likely motivated by a desire to obtain repairs for a problem that truly exists.<sup>318</sup> Conversely, in a child custody case, a printout of web history demonstrating that the defendant-father viewed photos of guns two months ago would be given lesser weight. The judge might reason that, in a case where no violence is alleged, the printout is not especially probative of the plaintiff's assertion that defendant is a poor father.<sup>319</sup>

The court is well equipped to do the hard work of determining whether and to what extent each piece of evidence lends support to a party's case. A focus on weight would preserve the values of the rules of evidence, which dictate that only reliable and relevant information be relied upon in the decision-making process.<sup>320</sup> At the same time, it would free unrepresented litigants to introduce any evidence of their choosing and relieve them of having to object to an opponent's evidence. The tenant in the above example could offer her neighbor's letter; she would not have to sacrifice her only opportunity to substantiate her testimony. Additionally, the defendant in the child custody case would not have to object to the gun printout as prejudicial in order to exclude it, as the judge would engage this analysis *sua sponte*.

There is no substitute for a lawyer's assistance in the gathering and presentation of evidence, but currently thousands of hearings take place every day without the participation of lawyers, and very few alternatives to

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are rare, and reversals of non-jury civil decisions for error in admission or exclusion of evidence are virtually unheard of.”).

<sup>317</sup> The rules of evidence have long been discarded in small claims proceedings, and the wisdom of doing so has been vigorously defended by courts. The California Court of Appeals opined that, in a small claims case involving “inexperienced pro se litigants, it is better to err on the side of admitting an ore-heap of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence.” *Houghtaling v. Sup. Ct.*, 21 Cal. Rptr. 2d 855, 859–60 (1993).

<sup>318</sup> Of course, the neighbor might have written the letter in reaction to unrelated grievances he holds against the landlord, and if the landlord raises this possibility, the weight accorded the letter would be reduced. In addition, the weight accorded the letter will never be the same as the weight accorded live testimony. However, even some weight could make the difference in a hearing where the judge has to make a close call.

<sup>319</sup> Further, the judge would have to consider any one of a number of innocent explanations the defendant might offer for viewing the guns online, which could also limit the weight accorded the evidence.

<sup>320</sup> See *Murray & Sheldon*, *supra* note 313, at 35–36 (discussing the need to maintain relevancy and reliability of evidence during the trial process in general).

the evidentiary rules of admissibility are being pursued.<sup>321</sup> Jury trials are rare in the poor people's courts, but evidentiary hearings at which a judge presides are common, which makes reform of existing practices a pressing concern. Demand side reform of the rules of evidence can remediate some of the challenges pro se parties face in crafting an evidentiary record that provides an accurate accounting of events. As a secondary benefit, requiring judges to make more explicit findings on the weight accorded particular forms of evidence would increase the transparency of judicial fact-finding and, possibly, boost public trust in the court system. Evidence would not be included or excluded based on procedural technicalities but weighed based on its inherent value to the case.

### 3. Reform of the Judicial Role

Unrepresented parties face substantial challenges conveying their stories and communicating the value and significance of their evidence. When asked to testify, they will often deliver a narrative that is unorganized and insufficient to serve as the basis for requested legal relief. Even a patient, well-intentioned judge who permits the pro se litigant to tell his whole story will typically receive a version of events that excludes legally relevant details.<sup>322</sup> The failure to put forward facts to support an available claim or defense is a frequently cited operator error—and perhaps the number one reason offered for the need to create a civil right to counsel.

A systemic demand side approach to this issue would require judges in the lower state courts to assume more of the work of developing a case—an approach *Turner* has taken steps toward embracing.<sup>323</sup> The traditional conception of a judge as an arbiter who passively receives evidence and argument, refrains from interfering with a party's presentation of a case, and renders an impartial decision, does not translate to a court system where the vast majority of litigants may not have raised available claims or defenses,

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<sup>321</sup> Notably, this past year, Alaska contemplated removal of the evidentiary rules of admissibility in domestic violence cases, and advocates in the survivor community strongly objected. The discussion among advocates, which took place over a national listserv, reflected a general sentiment that pro se victims would lose significant due process protections if they were unable to object to irrelevant or prejudicial evidence brought forward by a polished, or well-prepared, abusers. See email thread from Litigate-DV, a national listserv for domestic violence lawyers (on file with author). The advocates did not acknowledge, however, that the rules of evidence are not entirely protective of the unrepresented, who often do not know how to exercise their rights to object to improper evidence. In the current regime, the unrepresented are *both* unable to get their evidence before the judge, *and also* unable to object to evidence improperly introduced by an opponent. By eliminating the rules of admissibility, at least pro se domestic violence victims would be able to advance their medical records and police reports into the record.

<sup>322</sup> William O'Barr and John Conley conducted linguistic and ethnographic research in small claims courts and found that even simplified procedures must be paired with active judicial questioning in order for a litigant to recount her narrative in legally adequate terms. See O'Barr & Conley, *supra* note 62, at 670–71.

<sup>323</sup> See *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011).

are not familiar with the legal elements of the claims and defenses they *have* raised, and do not know how to communicate legally relevant facts.<sup>324</sup> A “traditional” judge in the poor people’s court cannot engage in good decision-making, as that judge will rely on the parties to bring forward the relevant facts and law, and will often simply dispose of case matters through continuances, cursory dismissals, or judgments that punish the party unable to marshal persuasive factual and legal information on her own.

To effectively adjudicate disputes, judges should be active, frame legal issues, and question parties and witnesses in order to develop legal claims.<sup>325</sup> As others have noted, active judicial questioning does not compromise impartiality if it is deployed in the same manner in every case.<sup>326</sup> For instance, a judge might follow a “script” in a domestic violence case that takes the plaintiff through all alleged incidents of harassment or abuse, solicits from the plaintiff specific corroborating evidence such as text messages or voicemails, and then repeats that process with the defendant. This approach is not fully inquisitorial, as it does not envision a judge embarking on independent investigation or inquiry, but simply relies on the judge to use her own knowledge and expertise—knowledge and expertise the party is lacking—to draw out relevant testimony.<sup>327</sup> Active judging is sanctioned in small claims and administrative tribunals, but is not regulated, required, or practiced uniformly in those forums.<sup>328</sup> In order for a judge to perform the distinctly judicial functions of making findings of fact and

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<sup>324</sup> In fact, the traditional conception of a trial judge as passive and uninvolved with the facts is outdated in other contexts as well. As early as 1982, Judith Reznik described the emerging system of “managerial judges” in the federal courts who were assuming an active role in pre-trial litigation, often engaging heavily in the facts of the case well before being called upon to render decisions at trial. See Judith Reznik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

<sup>325</sup> Much has been written about the relative advantages of active or inquisitorial judging. This Article cannot do justice to the rich body of literature on this topic nor undertake a full examination of the costs and benefits of imposing such a system in the lower state courts. For discussion and analysis of inquisitorial systems, see generally Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

<sup>326</sup> See Zorza, *supra* note 23, at 434.

<sup>327</sup> A few scholars have argued for more active judging in majority pro se courts. Proposals range from encouraging judges to make better use of authority that they already have to assist the unrepresented to those advocating for more judicial involvement in pro se cases than is currently authorized—or culturally tolerated—in most courtrooms. See GRAY, *supra* note 313, at 34 (encouraging judges in the lower state courts to ask neutral or clarifying questions when necessary); Baldacci, *supra* note 50, at 674 (stating that judges should freely ask questions of unrepresented parties and their witnesses to instill confidence of impartiality); Engler, *And Justice for All*, *supra* note 6, at 2028–29 (arguing that judges should assist pro se litigants in identifying all potential claims and defenses); Goldschmidt, *supra* note 119, at 622 (arguing that judges should provide the parties with a list of legal elements).

<sup>328</sup> See Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC’Y REV. 339, 353 (1976) (noting that judges in small claims courts are authorized to actively develop facts, but in practice rarely use their discretion to do so, and seem to have difficulty shedding the passivity of their traditional role).

analyzing facts in light of the law, active judging should be a requirement in every case.

#### 4. Implementation—*The Need for Formal Rules to Effectuate Demand Side Reform*

The proposal for demand side reform should not be confused with a call for “informalism” or the *relaxation* of rules.<sup>329</sup> Rather, reform should be implemented through the development of formal rules that attempt to reduce the frequency of the most common operator errors committed in the poor people’s courts. These reformulated rules should account for the actual abilities of most unrepresented litigants and should require the courts—the body with knowledge and resources—to take all action possible to initiate, develop, and bring a case to resolution.

Proponents of informalism have historically argued that formal rules of litigation are not appropriate in tribunals where most litigants are unrepresented, and that flexible rules—or even the abolition of rules—are preferable as a means of providing courts and judges with maximum discretion in handling pro se matters.<sup>330</sup> Informalism, as a theory of access, influenced those that drafted the rules governing many small claims and administrative tribunals. As a result, these tribunals are overwhelmingly informal sites of adjudication, where rules are minimal, and the application of those rules to individual cases is guided by custom and improvisation.<sup>331</sup> Proponents of these systems presumed that rudimentary and informal rules were the trustworthy companions of the pro se litigant, in that they offered judges leeway to devise non-traditional procedures for meeting the needs of particularized cases without binding them to formal and rigid rules of access.<sup>332</sup>

The demand side reform contemplated herein arises from a divergent presumption, namely that informal litigation processes, brought to life

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<sup>329</sup> Some scholars suggest that informal rules, such as those employed in many small claims courts, should be imported into other areas of the civil justice system. See Engler, *And Justice for All*, *supra* note 6, at 2016–17. However, small claims rules are often vague and discretionary, simply advising judges, in the example of Massachusetts, to “conduct the trial in such order and form and with such methods of proof as it deems best suited to discover the facts and do justice to the case.” MASS. UNIF. R. SMALL CLAIMS 7(G), available at <http://www.lawlib.state.ma.us/source/mass/rules/tc/small7.html>. While such rules may *permit* judges to formally structure court processes to best assist pro se litigants in drawing out facts and gaining access to important evidence, information, and case management services, they do not necessarily *require* formal processes or provide for a uniform structure that judges must abide by in all hearings.

<sup>330</sup> Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 *FORDHAM URB. L.J.* 343, 347 (1993); Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 *LAW & SOC’Y REV.* 219, 221–22 (1975).

<sup>331</sup> Yngvesson & Hennessey, *supra* note 330, at 223 (describing the procedures in small claims as left to the discretion of judges).

<sup>332</sup> Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 *A.B.A. RES. J.* 293, 323–24, 333–34.



through the exercise of judicial discretion, do not serve the interests of pro se litigants or the courts. Informal processes are typically sketched out through the promulgation of barebones rules that provide little to no direction to judges as to how hearings should be conducted. As an example, a small claims statute in Massachusetts advises a judge to “conduct the trial in such order and form and with such methods of proof as it deems best suited to discover the facts and do justice to the case.”<sup>333</sup>

An informal rule regime, such as the one in Massachusetts, offers no conceptual or practical guidance to judges on how to fulfill the dictates of due process in working with pro se litigants. On the issue of gathering testimony, one judge might order an unrepresented party to present his legal claim through narrative, while another might take over all questioning of parties and witnesses. On the matter of evidentiary admissibility, one judge might choose to exclude hearsay evidence, while another might choose to accord it great weight. A single judge, on a single day, handling a single docket, may use all of these techniques at random, and with no discernable connection to the needs of a particular matter. The process by which evidence is gathered and cases adjudicated should not be dictated by judicial “gut” or preference, but by rules that reflect best practices for ensuring litigants a full and fair opportunity to be heard.

To effectuate demand side reform, the best and most accessible practices in state courts, small claims courts, and administrative courts should be codified, so that judges and court personnel have a clear roadmap for meeting the needs of pro se litigants. Adoption of common-sense rules that judges can enforce in every case would foster uniformity and consistent decision-making in the poor people’s courts—traits prized at the appellate level but often overlooked in the lowest rungs of the court system.

#### V. TOWARD A HOLISTIC ACCESS TO JUSTICE AGENDA

Demand side reform should be seen as the missing component of an integrated access to justice agenda, and not as a substitute for existing efforts. The implementation of demand side reform would *boost* supply side efforts to expand lawyering services for the poor, rather than compete with such efforts, and would combine with the supply side initiatives to create a holistic access to justice agenda. Demand side reform strengthens the supply side pathways in two ways. First, court-controlled procedure and active judging would reduce the need for counsel in certain cases and decrease the cost of funding it in others, with the effect of lowering the price tag to implement civil Gideon rights. Second, by streamlining the procedural and evidentiary intricacies of litigation, demand side reform allows providers of unbundled legal services to leverage their impact by shifting their focus

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<sup>333</sup> See MASS. UNIF. R. SMALL CLAIMS 7(G), available at <http://www.lawlib.state.ma.us/source/mass/rules/tc/small7.html>.

away from procedural triage, which has traditionally depleted their resources, and towards assistance with substantive challenges—such as counseling and evidence gathering—that cannot be addressed by the courts effectively.

Demand side reform is likely to reduce the need for counsel in many cases and make a lawyer's assistance less costly in others. Recent empirical research supports the proposition that lawyers are not necessary where procedures are more accessible and judges actively question on substantive issues.<sup>334</sup> Harvard researchers who sought to test the impact of attorney representation in administrative unemployment compensation proceedings found that access to counsel did not impact outcomes. The researchers speculated that this unexpected finding—contrary to findings in the lower state courts—might be due, in part, to judicial fact development, simple procedures, and the automatic availability of key evidence, such as the employee's personnel file, in advance of the hearing.<sup>335</sup> Several scholars questioned the validity or generalizability of these findings as they pertained to the impact of counsel, but few concentrated on the transformative potential of this study—that if attorneys are less needed in certain types of adjudicatory systems, perhaps this should galvanize efforts to reform the courts.<sup>336</sup>

California's Commission on Access to Justice has also suggested that the type of forum in which a litigant appears should have a role in dictating whether counsel is appointed. In creating a Model Act to serve as draft legislation for a right to counsel, the Commission indicated that attorney representation should not be publicly funded in cases where a judge is active and procedural and evidentiary rules are simplified—as long as the opponent is also unrepresented, the pro se litigant is competent, and self-help is available.<sup>337</sup> The Model Act recognizes the need to narrow the case categories in which counsel is deemed essential.

Legislatures and courts will find a right to counsel more politically and

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<sup>334</sup> See 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, 2124, 2136 (2012) (describing the unemployment compensation hearing process in Massachusetts as a “tempestuous . . . marriage” of inquisitorial and adversarial styles of judging” (internal citations omitted)). The Administrative Law Judge begins by explaining the purpose of the proceeding, clarifying who is appealing, and whether the case was a quit case or a discharge case. *Id.* at 2136. The Judge then reviews the documents the claims adjuster had previously gathered and asks questions of the parties, after which she allows each party to narrate additional facts and provides the opposing party with an opportunity to cross-examine. *Id.* All evidence is admitted if reasonably authenticated. *Id.* In other words, the hearing operates in the context of simple procedural and evidentiary rules and with an active judge. *Id.*

<sup>335</sup> *Id.* at 2134–36, 2174.

<sup>336</sup> A Concurring Opinions Symposium held in March 2011 encapsulates the scholarly reaction to Greiner's study. Symposium, *What Difference Representation*, CONCURRING OPINIONS (Mar. 29, 2011), <http://www.concurringopinions.com/archives/category/representation-symposium>.

<sup>337</sup> State Basic Access Act, BRENNAN CENTER § 301.3.5 (2008), <http://www.brennancenter.org/sites/default/files/legacy/Justice/State%20Basic%20Access%20Act%20Feb%2008.pdf>.

economically palatable if demand side reform drives many or most cases into the exempt-from-representation column. Moreover, attorneys operating in a simplified proceeding will have the capacity to take on more work. Onerous evidentiary and discovery processes squander attorney time that could be re-directed toward fact development and witness preparation. Legal services providers would be able to accept more cases—and litigate them more fully—where less time must be invested in accessing critical documents and managing the litigation, and more is left to focus on counseling, negotiations, and oral argument.

As for strengthening the effect of unbundled legal services, demand side reform would remove many of the procedural obstructions that commonly trip up pro se litigants, freeing providers of unbundled services to offer substantive assistance rather than merely technical help. Currently, most unbundling resources are poured into helping pro se litigants traverse complex procedural terrain and initiate their claims. Demand side reform is capable of remedying the procedural issues that often make courts difficult to access and navigate. With basic reforms, such as notice to parties of all possible claims and defenses, forms that elicit relevant factual detail, and court-initiated service of process, providers might shift the focus of unbundled assistance to post-pleading issues, such as counseling and evidence-gathering.

Counseling is a service lawyers are uniquely qualified to provide. Many litigants do not understand what sort of remedy a court process will offer, or even whether their problem is best solved through litigation. For example, a tenant who wants repairs to her substandard unit may not realize that filing suit will entitle her only to damages and not injunctive relief. Further, litigants may not know how to weigh a settlement offer against the risks of trial or whether the offer is fair and reasonable. For instance, a disabled litigant living on Social Security Insurance may not know she is judgment-proof, which may change her risk calculation when deciding whether to defend against a debt collection suit in court.

Moreover, litigants need help thinking through credible witnesses or documents to support the factual accounts they have proffered in their pleadings. For example, a litigant may not know that a properly labeled, or official, document reflecting a mental health condition is more persuasive to a court than a handwritten note which contains the same information but has no obvious source or author. Even with limited time, an attorney can review a litigant's pleading and brainstorm the type of evidence that will be needed to lend support to the claim.

In offering assistance with counseling and evidence-gathering, unbundling might fill a distinctive niche, accomplishing two things that procedural reform and an active judge cannot—helping litigants make good strategic decisions about how to resolve their disputes and preparing litigants to present persuasive support for their claims and defenses. In doing so, the

impact of limited assistance would be more profoundly felt, and is more likely to translate into improvements in substantive outcomes.

## VI. CONCLUSION

While it is easy to agree that merit, not money, should dictate success in a legal matter, it has been far more difficult to transform that aspiration into reality. Policy solutions have almost exclusively focused on supplying the unrepresented with more lawyers—either full representation in the ideal or limited representation as an alternative. Yet, a right to counsel is a cost-prohibitive and difficult undertaking that courts and legislatures have shown extreme resistance to granting, perhaps because the demand for lawyers is too large to possibly meet. Further, unbundled legal services, which have moved to the forefront as the most-often-implemented access to justice strategy, largely focus on simple procedural tasks that arise in the initial stages of litigation. Unbundling is highly beneficial for preserving claims and defenses but less so for long-range improvements in case outcomes or substantive justice.

Surprisingly, little attention has been paid to demand side reform—to advocating for or effectuating changes in the rules that structure the litigation processes and govern how factual information is elicited and processed in resolving the disputes of the unrepresented poor. Demand side reform is favored by the Supreme Court and would provide structural support to supply side access to justice by reducing the need for counsel in many cases and enabling limited assistance providers to shift their focus to the substantive needs of litigants in more complex stages of their cases. The size and scale of the pro se crisis, as well as the complexity of the legal system in which the unrepresented operate, render civil Gideon too costly and unbundled legal services too ineffectual for the supply side approach to improve access to justice singlehandedly. As such, demand side reform should become a co-equal, if not primary, focus of access to justice efforts on par with the drive to expand legal assistance.