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## Shrinking Gideon and Expanding Alternatives to Lawyers

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# Shrinking *Gideon* and Expanding Alternatives to Lawyers

Stephanos Bibas\*

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## I. Introduction

As *Gideon v. Wainwright*<sup>1</sup> turns fifty, it shows its age. One cannot exactly call *Gideon* a failure, as it has spread defense counsel to nearly all felony cases, as well as many misdemeanor cases.<sup>2</sup> But it has hardly been a ringing success. Caseloads keep

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1. 372 U.S. 335, 342–44 (1963) (holding that the Sixth Amendment requires states to appoint defense counsel for indigent criminal defendants). *But see* *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (establishing an actual-imprisonment limitation on the right to counsel).

2. *See* *Argersinger v. Hamlin*, 407 U.S. 25, 37–38 (1972) (extending *Gideon* to any offense that results in imprisonment). In one study, more than ninety-nine percent of state and federal inmates surveyed were represented by counsel on the offense for which they were imprisoned; two-thirds of federal inmates and more than four-fifths of state inmates had court-appointed counsel.

increasing far faster than budgets, spreading resources thinner and thinner. Underfunding and lack of support are chronic problems, stemming from political hostility or indifference to criminal defendants and the difficulty of guaranteeing funding sources, particularly ones that keep pace with steadily rising caseloads.<sup>3</sup>

As a result, many defendants may have lawyers in name only, meeting with them for only five minutes—perhaps in a holding cell right before a court hearing—before being told to plead guilty at the initial appearance or soon thereafter. In the typical case, lawyers do little or no independent investigation to ferret out the truth or challenge the prosecution’s version of events. Indeed, the defense may not even await the prosecution’s discovery before immediately compromising on a guilty plea.<sup>4</sup> That is Potemkin lawyering, a costly charade far removed from *Gideon*’s vision.

While in theory the Sixth Amendment requires that counsel be minimally effective,<sup>5</sup> in practice it does not. To avoid overturning convictions in droves, the Supreme Court has watered down the definition of effective assistance of counsel under the Sixth Amendment, so any “lawyer with a pulse will be deemed effective.”<sup>6</sup> As too many cases chase too few lawyers with too little funding, the inevitable result is chronic ineffectiveness.

The standard response of academics has been to lament this situation and to call for a new law or more aggressive litigation and constitutional challenges.<sup>7</sup> Lawyers, they urge, are essential

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CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES, NCJ 179023, at 1 (2000).

3. See NORMAN LEFSTEIN, AM. BAR ASS’N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12–19 (2011).

4. See Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 975–77 (2012).

5. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (interpreting the Sixth Amendment’s right to counsel to guarantee effective assistance of counsel, and setting forth a two-pronged test for reviewing counsel’s effectiveness).

6. Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS (1998)).

7. See, e.g., STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON*’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL

guardians of rights and the rule of law. At the same time, academics continue to favor expanding *Gideon*'s ambit to guarantee lawyers in any number of civil cases implicating fundamental interests, such as housing, employment, or child custody.<sup>8</sup>

The expansionist dream has proven to be an unattainable mirage. *Gideon*'s problems are deep, structural ones. We have been spreading resources too thin, in the process slighting the core cases such as capital and other serious felonies that are the most complex and need the most time and money. A perfunctory chat with a lawyer is little better than no lawyer at all.

Moreover, the expansionist dream treats the problem simply as one of poverty. But, particularly in civil cases, the problem of lawyering is a deeper one of complexity and confusion. Even middle-class Americans have very little access to legal help, particularly *ex ante*, compared with citizens in many other countries.<sup>9</sup> The American bar's monopoly is a stranglehold, preventing paralegals and other paraprofessionals from offering low-cost assistance with routine legal issues and transactions.<sup>10</sup> And complicated substantive, procedural, and evidentiary rules

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JUSTICE (2004) [hereinafter *GIDEON'S BROKEN PROMISE*]; NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, *JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* (2009) [hereinafter *JUSTICE DENIED*].

8. See AM. BAR ASS'N, ABA BASIC PRINCIPLES OF A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 1 (2012), [http://pabar.org/public/committees/lspublic/Resolutions/ABA%20Civil%20Gideon%20Basic%20Principles%20Report%20with%20Rec%205\\_21\\_10.pdf](http://pabar.org/public/committees/lspublic/Resolutions/ABA%20Civil%20Gideon%20Basic%20Principles%20Report%20with%20Rec%205_21_10.pdf) (advocating for the expansion of publicly funded counsel to include "low-income individuals . . . when basic human needs are at stake"); Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 530 (2006); Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1087 (2009); Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. SOC. JUST. 97, 97–98 (2010); Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1508–09 (2004); Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 Touro L. REV. 247, 275 (1997) (noting that courts and legislatures have become increasingly receptive to recognizing a right to counsel in child custody cases).

9. See *infra* notes 30–32 and accompanying text.

10. See *infra* note 28 and accompanying text.

make it very difficult for citizens of ordinary intelligence to navigate the system on their own. Our system, in short, is overengineered, making the law too complex and legal services too expensive for the middle class, let alone the poor.

Longer-term solutions need to move in the opposite direction. Rather than expanding *Gideon*'s ambitions and appetite to civil cases, we must shrink the universe of cases covered by *Gideon* to preserve its core. That would mean excluding nonjury misdemeanors and perhaps probationary sentences from its ambit, for example, and thinking harder up front about which cases need to be charged and pursued as felonies.

Especially in bench trials, there are other ways to simplify cases to make lawyers less necessary. In particular, civil procedure could learn from inquisitorial systems, in which judicial officers are more active and the parties and their lawyers need do less. Magistrates could lead investigations, discovery, and witness examinations, relying less on the parties to proactively frame and pursue their claims. Inquisitorial procedure sounds like a strange transplant from civil-law countries. But it already has parallels in administrative systems for claiming government benefits, in which claimants commonly pursue their claims without lawyers.<sup>11</sup>

There may also be ways to loosen the bar's stranglehold so that paralegals, social workers, and others can automate delivery of legal services for routine cases. That change would resemble what we see in health care, as nurse practitioners and physician assistants are providing care in routine medical cases.<sup>12</sup>

In short, *Gideon* can work in the real world only if lawyers drop their grandest ambitions for lawyerizing the world and instead step back to make lawyers less necessary in the first place. The goal should be to concentrate lawyers' efforts on providing quality legal services in the highest-stakes cases where they are needed most. Quality and support matter more than quantity alone.

Part II of this symposium Article identifies unavoidable resource constraints as *Gideon*'s Achilles' heel. Part III critiques the wishful thinking of scholars and activists who hope to provide

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11. See *infra* notes 56–60 and accompanying text.

12. See *infra* text accompanying note 71.

free legal services to all poor litigants in criminal and many civil cases. Not only is that dream politically and financially unattainable, but it also ignores the broader problem that legal services are too complex and expensive for middle-class Americans as well. The sustainable solution is not to expand an expensive entitlement, but to shrink the need, cost, and complexity of legal services in most cases.

Part IV then begins to sketch out three clusters of more realistic reforms. First, *Gideon* should apply only to the core of felony cases tried by juries. Second, civil and minor criminal cases should be simplified to make it easier for parties to try them pro se, with the help of inquisitorial judges. And third, paralegals and others could give pro se litigants lower-cost assistance if we relaxed the bar's monopoly on legal services. Such reforms, I conclude, would not only be simpler, cheaper, and more politically palatable, but also make the law more transparent and intelligible.

## II. Resource Constraints

There is not nearly enough money to appoint and support counsel for all indigent litigants. Others at this symposium have already covered these resource constraints in depth, so I will be brief. Appointed defense counsel are underpaid, undersupported, and overworked. They are often paid flat fees or low hourly rates subject to low caps. At a rate of, say, \$50 per hour subject to a \$1,000 cap, appointed counsel receives no compensation for investing more than twenty hours in taking a case to trial.<sup>13</sup> These rates are often below market rates and not adjusted for inflation. They hardly suffice to cover a law firm's basic overhead, including rent and secretaries, let alone compensate counsel at anything near market rates. Funding for experts, paralegals, and investigators is scant. Caseloads are staggering and increasing

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13. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 10–11 (1997) (“[A] typical appointed defense lawyer faces something like the following pay scale: \$30 or \$40 an hour for the first twenty to thirty hours, and zero thereafter.”).

far faster than the numbers of lawyers or the funding available for them.<sup>14</sup>

The low pay and poor working conditions discourage talented lawyers from taking on this work. Some will take it to accumulate marketable trial experience, but they will likely leave after a few years to cash in on that experience. Ideological or other commitments may keep other talented lawyers in the pool, but those who remain are likely to have fewer other options.

The only way that appointed lawyers can tread water or break even is to plead out most of their cases very quickly, earning a series of small fees. In the ordinary case, that means doing little or no investigation beyond reading the police report and charging instrument and possibly asking the prosecutor and the client for their versions of the facts.<sup>15</sup> Particularly when clients are incarcerated and difficult to visit, lawyers may have little time to meet with them until they are brought to court. Lawyers may thus meet their clients at arraignment and immediately urge them to plead guilty, a common strategy known as “meet ‘em and plead ‘em.”<sup>16</sup>

The problem is especially acute when the playing field is tilted in favor of the state. Criminal defense lawyers often face off against better-paid assistant district attorneys, who enjoy the support of police investigators and state forensic crime labs.<sup>17</sup> Greater pay and economies of scale allow assistant district attorneys to mature, gain experience, and specialize in subfields such as capital punishment, which exacerbate the inequality. Thus, defense lawyers are frequently outgunned.

Funding and resources are even more sparse in civil cases. Legal aid funding is far too scant to keep up with the many pressing civil cases, ranging from evictions of tenants to deportations of immigrants to terminations of parental rights. And while the bar provides pro bono services, they are not nearly

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14. See LEFSTEIN, *supra* note 3, at 12–19 (canvassing scholarly studies that highlight the problems of high and rising caseloads for appointed defense counsel).

15. See Barton & Bibas, *supra* note 4, at 975–77.

16. See GIDEON'S BROKEN PROMISE, *supra* note 7, at 16; Paul Marcus & Mary Sue Backus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1081–84 (2006).

17. See GIDEON'S BROKEN PROMISE, *supra* note 7, at 13–14.

enough. Thus, the Legal Services Corporation has estimated that existing legal services are meeting less than one-fifth of poor people's legal needs.<sup>18</sup> The result is severe rationing, meaning that claimants receive only brief advice, must wait on long waiting lists, or receive no help at all.<sup>19</sup>

Indigent defense is not politically popular, so voters and politicians are loath to raise taxes to support it. Rather, funds often come from ad hoc sources, such as traffic tickets (for criminal defense) or the interest on lawyers' trust accounts (IOLTA, for civil legal aid).<sup>20</sup> These sources are not tied to rising caseloads, expenses, or inflation, so they fail to keep pace and often run out. Particularly because caseloads keep rising, indigent defense funding often proves insufficient.

### *III. Wishful Thinking and Failed Reforms*

The standard academic response to this sorry state of affairs is to say that there ought to be a law. More specifically, scholars and bar associations call for more lawyers, more funding, more paralegals, more investigators, more experts—more of everything. For nearly half a century, activists have pushed to extend *Gideon* further, both to minor criminal cases and to civil cases.<sup>21</sup> And as the promise of effective assistance gave way to the reality of underfunding, activists have pursued both legislation and litigation, raising constitutional challenges to the lack of resources.<sup>22</sup> Leaders of the bar have likewise called on lawyers to contribute more of their time to pro bono work.

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18. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 3 (2009), [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).

19. See DEBORAH L. RHODE, ACCESS TO JUSTICE 13–14 (2004).

20. See Rodger Citron, (Un)Luckey v. Miller: *The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 481, 498 (1991); Hugh M. Collins, *Major Improvements to the Law: Indigent Defense, Juvenile Justice Reforms and More*, 56 L.A. B.J. 268, 271 (2008) (discussing Louisiana's IOLTA program).

21. See Louis S. Rulli, *On The Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J. L. & POL'Y 683, 685–86 (2011).

22. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J.



These laments and jeremiads have failed to effect meaningful reform. Most such challenges have failed, as courts view the separation of powers as barring interference in legislative funding decisions.<sup>23</sup> Moreover, the Supreme Court has rejected efforts to extend the Sixth Amendment right to criminal defense counsel into the civil arena.<sup>24</sup> Occasionally a court will declare indigent defense funding inadequate and order more funds or even halt prosecutions for a time, spurring lawmakers to react.<sup>25</sup> But such funding increases are usually one-shot responses that fail to keep pace with inflation and caseloads. Any gains are temporary and soon erode.

The root causes of the problem resist easy treatment. First, of course, it is politically unpopular to spend money on providing free lawyers, particularly to criminal defendants.<sup>26</sup> That political dynamic is difficult if not impossible to fix. Second, the price of

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LEGIS. 487, 489 (2010) (“Congress can and should pass legislation reinforcing the constitutional right to counsel in order to break the stalemate that has plagued indigent defense reform.”); *see also* JUSTICE DENIED, *supra* note 7, at 103, 147 (discussing the use of litigation and legislation); *Recent Legislation: Access to Justice—Civil Right to Counsel—California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties—Act of Oct. 11, 2009, ch. 457 (codified in scattered sections of Cal. Bus. & Prof. Code and Cal. Gov’t Code)*, 123 HARV. L. REV. 1532, 1532–39 (2010) (discussing legislation providing for a civil right to counsel in California and other jurisdictions in certain prescribed circumstances).

23. *See, e.g., In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1136 (Fla. 1990) (“[I]t is not the function of this Court to decide what constitutes adequate funding [for public defenders] and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function.”); *In re Smiley*, 330 N.E.2d 53, 56 (N.Y. 1975) (“The appropriation and provision of authority for the expenditure of public funds [for appointment of counsel] is a legislative and not a judicial function, both in the Nation and in the State.”); *In re Enrique R.*, 126 A.D.2d 169, 175 (N.Y. App. Div. 1987) (“[The authority of the court] does not extend to direct that such legal services be provided out of public funds in the absence of statutory authorization for such expenditure.”).

24. *See Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (holding that “the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent defendant who is subject to a child support order, even if that individual faces incarceration . . . .”); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26–27 (1981) (indicating that the right to counsel applies only when the defendant may lose his “physical liberty”).

25. *See, e.g., State v. Citizen*, 898 So. 2d 325, 327 (La. 2005); *State v. Peart*, 621 So. 2d 780, 789 (La. 1993); *State v. Lynch*, 796 P.2d 1150, 1164 (Okla. 1990).

26. *See Citron, supra* note 20, at 498.

legal professionals is too high because the supply of those who can afford to do low-paying work is low. Becoming a lawyer requires three years of law school plus cramming for and passing a bar exam. Law school tuitions are horrifically expensive, leaving graduates deep in debt and in need of high earnings to repay their loans.<sup>27</sup>

Moreover, the organized bar holds a monopoly on providing legal services. Statutes forbid unauthorized practice of law by those who have not been licensed as lawyers.<sup>28</sup> Courts interpret those bans expansively, to reach many services that in other countries are provided by paralegals, notaries, and similar paraprofessionals, such as routine wills, divorces, and child-custody disputes.<sup>29</sup> The bar's cartel keeps prices high.

Those prices pose difficulties not only for poor litigants, but also for the vast majority of middle-class people. In America, corporations hire the bulk of lawyers' time. Middle-class individuals consume a much smaller share of legal services than their compatriots in other countries—only a few hours per person per year.<sup>30</sup> That scarcity affects not only litigation of problems ex post, but also seeking advice ex ante when considering a possible contract, property division, or custody arrangement.<sup>31</sup> Thus, as Gillian Hadfield has argued, scholars' exclusive focus on indigent representation has obscured the broader problem: laws are too

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27. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 107–12 (2012).

28. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2581–87 (1999).

29. See *Ohio State Bar Ass'n v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, 858 N.E.2d 372, 375 (Ohio 2006) (holding that the licensing and regulation of lawyers has been left exclusively to the states, and that states have broad powers to regulate professions); see also *Indiana ex rel. Ind. State Bar Ass'n v. Diaz*, 838 N.E.2d 433, 443 (Ind. 2005) (discussing the unauthorized practice of law in Indiana by a notary). *But see Cleveland Bar Ass'n v. CompManagement, Inc.*, 857 N.E.2d 95, 126 (Ohio 2006) (establishing the right of nonlawyer respondent to provide services in workers' compensation cases).

30. See Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 139–46 (2009) (offering empirical evidence that middle-class Americans do not receive the same amount of legal services as do those in other countries).

31. See *id.* at 146 (noting that the average household receives “less than an hour's worth of legal advice or assistance in dealing with the points at which their everyday lives intersect with the legal system”).

complex and legal services are too expensive for ordinary people to plan their lives and respond to crises.<sup>32</sup> That reality stands in sharp contrast to our self-image as a nation that lives by the rule of law. And there is no solving this much larger problem through a huge new middle-class legal entitlement, particularly given the country's current financial straits. Neither litigation nor largesse is promising as a way forward.

#### *IV. Realistic Reforms*

A more sustainable approach is to restructure the nature of and market for legal services to make them less necessary and less expensive in the first place. First, courts could shrink *Gideon* to its core of felony cases involving prison sentences to concentrate resources there instead of spreading them too thin.<sup>33</sup> Second, courts and legislatures could simplify procedures, adding more inquisitorial aspects to pretrial and trial procedures to make lawyers less necessary.<sup>34</sup> And third, legislatures could relax the organized bar's monopoly, allowing paraprofessionals and self-help assistance to reduce the need for lawyers.<sup>35</sup> A grand bargain to save *Gideon*, in short, would mean shrinking its broad ambitions in order to concentrate and preserve its core values.

##### *A. Putting Gideon on a Sustainable Diet*

The right to appointed counsel originated in capital cases, in *Powell v. Alabama*.<sup>36</sup> *Gideon* extended *Powell* to felonies; *Argersinger v. Hamlin*<sup>37</sup> then extended *Gideon* to misdemeanors, at least those resulting in "actual imprisonment"; and *Alabama*

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32. *Id.* at 131–33.

33. *See infra* Part IV.A.

34. *See infra* Part IV.B.

35. *See infra* Part IV.C.

36. 287 U.S. 45, 73 (1932).

37. 407 U.S. 25 (1972).

*v. Shelton*,<sup>38</sup> in turn, extended *Argersinger* to suspended sentences.<sup>39</sup> That triple extension is at least one too many.

While courts can announce Sixth Amendment rights in ringing tones, they can hardly make those rights meaningful. Scholars have largely ignored the inevitable resource constraints and tradeoffs. In advocating for more counsel here, there, and everywhere, they have failed to confront the problem of scarcity, to see that appointing lawyers here, there, and everywhere will inevitably spread resources too thin, leaving lawyers too harried to be effective.<sup>40</sup>

In a world of scarcity, the government must do triage. And in that triage, the many simple cases should drop out of the system to save time and money for the smaller number of complex ones. Evidence at least suggests that appointing lawyers does not make a discernible difference in misdemeanor cases.<sup>41</sup> Careful empirical scholars, in a randomized, controlled study, have found no evidence that appointing lawyers makes a difference in simple civil cases such as unemployment appeals.<sup>42</sup> If lawyers do matter somewhat in these cases, the effects must be too subtle to be easily detectable.

What those cases have in common is that they are jury-free. In simple, nonjury proceedings, parties can often articulate their assets, employment, and needs themselves, or judges can help them to do so on their own.<sup>43</sup> Lawyers may be helpful, but they

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38. 535 U.S. 654, 658 (2002).

39. See *Gideon v. Wainwright*, 372 U.S. at 341–45 (1963); *Argersinger*, 407 U.S. at 37–38; *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (limiting the extension of *Gideon* to misdemeanors that could result in actual imprisonment); *Shelton*, 535 U.S. at 658.

40. See Barton & Bibas, *supra* note 4, at 990–91 (discussing the problems created by the paucity of resources for indigent defense counsel).

41. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 490–93 tbls.2, 3, 4, 5 & 6, 496 (2007). Even in felony cases, there is some evidence that pro se defendants fare at least as well as represented ones. See *Indiana v. Edwards*, 544 U.S. 164, 178 (2008) (citing study). This evidence, however, may be complicated by the selection effects due to the types of persons who choose to represent themselves.

42. 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, 2143–44, 2149–53 (2012).

43. See *id.* at 2174–75 (offering these as two of three plausible explanations for the study's empirical findings that lawyers made no difference, but

are not essential across the board to prevent fundamental unfairness.<sup>44</sup> Jury trials, by contrast, typically involve more complex rules of procedure and evidence, including motions in limine, jury selection, sidebar conferences, and stricter application of the rules of evidence. And jury trials correlate with the most serious cases: crimes for which a defendant may serve more than six months' imprisonment.<sup>45</sup>

By contrast, the same researchers who studied unemployment appeals have found that lawyers do improve their clients' outcomes in summary eviction proceedings.<sup>46</sup> That may be because the legal-aid provider selected cases that could benefit from representation, the governing laws are complex, the facts require investigation, the proceedings are aggressively adversarial with little judicial involvement, and the other side is almost always represented by counsel.<sup>47</sup> Thus, there is far more for lawyers to do in those cases and far less judicial involvement to level the playing field.

In doing triage, battlefield doctors focus on the cases where they can make a difference, leaving aside those whose mild injuries do not urgently call for professional help. The same logic applies here. Where a defendant faces charges that can result in a felony record and serious prison time, he needs a lawyer to negotiate a plea bargain and credibly threaten to go to a jury trial. Where the stakes are lower and the procedures are simpler, we must find simpler, cheaper alternatives to giving everyone a lawyer. One could envision a grand bargain, in which legal services were deeper but more focused, with a narrower but more rigorously policed mandate. That approach could concentrate funding and manpower on felony and the most serious

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cautioning that the third possible explanation was a selection effect).

44. See *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011) (finding that the critical question in child-support cases, the defendant's ability to pay, can be so "sufficiently straightforward" that pro se litigants can adequately address it, given adequate procedures).

45. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970) ("[W]e have concluded that no offense can be deemed petty for purposes of the right to trial by jury where imprisonment for more than six months is authorized.").

46. 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, 926–31 (2013).

47. See *id.* at 924, 937–45.

misdemeanor cases, while offering the alternatives below for other cases. And it would counteract the temptation to lower ineffective-assistance standards to accommodate the realities of mass indigent defense.

There certainly is room to debate where to draw the line. One could extend the Sixth Amendment right to counsel only as far as the Sixth Amendment right to a jury, which covers all felonies and the most serious misdemeanors. Jury trials necessitate jury instructions, sidebar conferences, other formal motions, and stricter enforcement of the rules of evidence, making lawyers especially important. Or one could limit the right to all felonies, given the stigma and consequences associated with a criminal record. But some misdemeanors carry grave, nearly automatic collateral consequences such as deportation, sex-offender confinement or registration, or loss of a job or child custody. Functionally, it is fairer to view these automatic consequences as part of the effective punishment and to provide defense lawyers accordingly, given the high stakes. At a minimum, then, the automatic right to appointed counsel should not apply to misdemeanors tried without juries that do not carry those most serious collateral consequences. But that reform ought to go hand in hand with the procedural simplification and alternatives to lawyers discussed below.

There are alternatives to an automatic, across-the-board right to counsel. Courts, for example, could apply their inherent authority to appoint counsel in cases with particular needs for lawyers. That should not be an ad hoc inquiry: *Gideon* overruled the special-circumstances test of *Betts v. Brady*<sup>48</sup> because it was unworkable.<sup>49</sup> But court appointment could turn on various categories of defendants who especially need counsel, such as those who are juveniles, mentally ill, mentally retarded, or unable to speak English. Or legal aid societies could have a pot of funding sufficient to represent a fraction of all misdemeanor defendants and do triage themselves based on each case's merit,

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48. 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 225 (1963).

49. *Compare Betts*, 316 U.S. at 462–64 (rejecting a categorical right to appointed counsel “whatever the circumstances”), *with Gideon*, 372 U.S. at 343–45 (*overruling Betts* and recognizing a categorical Sixth Amendment right to appointed counsel).

complexity, stakes, and need for counsel to make a difference.<sup>50</sup> Indeed, that is what legal aid offices already do in civil cases.<sup>51</sup> That would concentrate funds on the most needy and meritorious cases in the pool, instead of spreading them too thin.

It is also worth thinking about the dynamic effects of moving the right-to-counsel line. Giving prosecutors leeway to pursue minor convictions informally, in exchange for not seeking felony convictions or serious collateral consequences, would encourage lesser dispositions. Of course, there is always the risk that prosecutors will threaten heavier sentences to induce defendants to waive their trial and counsel rights. But the incentive to stack charges already exists, and initially filing the heavier charge would trigger appointment of defense counsel and hence adversarial pushback. My hope is that prosecutors might more carefully screen their minor-case dockets, evaluating which defendants most need felony records and major collateral consequences even at the price of longer, more formal, adversarial proceedings.

### *B. Facilitating Pro Se Litigation*

A meaningful alternative to providing lawyers would be to simplify smaller cases, which would make it easier for pro se litigants to navigate them on their own. Some steps are obvious. Courts need to do a far better job of translating their forms and instructions into plain English and posting them on court websites. They could easily streamline rules of evidence and procedure, obviating the cumbersome hoops through which law students learn to jump. Why, for example, must litigants mark,

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50. Indeed, several prominent supporters of a civil right to counsel, including a past president of the American Bar Association, have embraced letting service providers do triage on the merits as an alternative to across-the-board rights to counsel. See John Pollock & Michael S. Greco, Response, *It's Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40, 51–52 (2012), available at <http://www.pennumbra.com/responses/11-2012/Pollock-Greco.pdf>.

51. True, the funding levels for Legal Services Corporation may well be too low, and the fraction of cases they can cover may be too small. But that is hardly a reason to go to the other extreme and to try to expand the fraction to 100%. Rather, it supports trying to strike a balance somewhere in the middle.

identify, authenticate, and only then offer exhibits into evidence? Why apply the hearsay rules in all their abstruseness, particularly to civil cases not covered by the Sixth Amendment Confrontation Clause, when so many other countries do not? Many of these rules of procedure and evidence were developed at least in part as mechanisms to allow judges to control juries. That reason ceases to apply in bench trials, so the rules could be curtailed there as well.

A more ambitious reform would be to recast minor cases from an adversarial to an inquisitorial model.<sup>52</sup> To oversimplify, the classic adversarial model depends on the parties' lawyers to proactively frame the issues, investigate, conduct discovery, interview and present witnesses, and the like. The classic inquisitorial model, historically associated with civil-law countries, empowers a judicial officer, an investigating magistrate, to proactively frame the issues, investigate a case, and question witnesses.<sup>53</sup> The parties can thus be much more passive, suggesting leads and lines of inquiry but not themselves recruiting and questioning the witnesses.<sup>54</sup> Because a neutral judge proactively does much more of the work, a lawyer is far less necessary. Likewise, law enforcement officers could be called upon to document their work far more carefully and neutrally, to minimize the need for the parties to investigate and challenge

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52. While the Sixth Amendment requires adversarial procedures such as jury trials and partisan defense counsel in major criminal cases, the Court has not demanded the same procedures in trials of petty offenses. *See, e.g.*, *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (limiting the Sixth Amendment right to appointed counsel to criminal cases that result in “actual imprisonment”); *Duncan v. Louisiana*, 391 U.S. 145, 158–62 (1968) (extending the Sixth Amendment right to jury trial to the states but recognizing an exception for petty offenses).

53. *See* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1635–37 (2009). These ideal types have been blurred in practice, as countries on each side of the divide have borrowed from the other. Thus, it is no longer strictly accurate to equate civil-law countries with inquisitorial systems, although many still fall toward that end of what is now a spectrum. *See id.* at 1639–40.

54. *See* JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 1033–34 (1994) (describing the role of the German judge in civil procedure); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985) (discussing the differences in the roles of judges and lawyers in the German and American legal systems).



live witnesses. Less adversarial investigations might even build better and more accurate records, free of the distorting effects of partisan witness interviews and the perverse incentives to avoid generating documents that could be used for cross-examination.<sup>55</sup>

Inquisitorialism may sound like an exotic, foreign import, but it already has taken root in a number of civil contexts, such as unemployment-compensation appeals and Social Security disability claims. “Virtually all mass justice systems have decided that they are unable to function effectively without the active-adjudicator investigation, informal rules of evidence and procedure, and presiding officer control of issue definition and development that characterize an inquisitorial or examinational approach.”<sup>56</sup> Procedures are often informal and nonadversarial, claimants for government benefits are typically unrepresented, and administrative law judges (ALJs) must help claimants develop the facts as well as adjudicate based on the evidence presented.<sup>57</sup>

In a Social Security disability case, for example, the ALJ “acts as an examiner charged with developing the facts.”<sup>58</sup> ALJs must take active roles in developing documentary and testimonial evidence before and at hearings.<sup>59</sup> Hearing officer staffers must determine the issues, determine what additional documentary evidence is needed, and prepare exhibits, interpreters, and expert and lay witnesses as necessary. That may involve seeking evidence directly from treating physicians or other sources, by subpoena if necessary, or hiring medical or vocational experts. The ALJ will admit relevant exhibits without being bound by the rules of evidence, and may question witnesses or allow them to

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55. I am grateful to Brandon Garrett for this insightful point.

56. Jerry L. Mashaw, *Unemployment Compensation: Continuity, Change, and the Prospects for Reform*, 29 U. MICH. J.L. REFORM 1, 16 (1995–1996) (noting that mass administrative courts also “promote speed and professionalism in claims administration”).

57. See Jerry L. Mashaw, *Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 780–83 (1974) (highlighting the salient features of administrative-law proceedings that differ from adversarial proceedings).

58. *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

59. See *id.* (noting the active role of the ALJ in the investigative and fact-finding processes).

narrate their testimony.<sup>60</sup> Likewise, in unemployment compensation appeals in Massachusetts, ALJs collect relevant documents and question witnesses.<sup>61</sup>

Another American analogue is the small-claims court, where lawyers are not only unnecessary but in many places forbidden, in order to keep procedures simple and level the playing field for pro se litigants on both sides.<sup>62</sup> Excluding lawyers keeps proceedings streamlined and simple, while admitting them breeds formality and complexity and tilts the playing field against pro se litigants.<sup>63</sup> Small-claims courts often dispense with formal rules of procedure and evidence, making it far easier for parties to represent themselves. Judges may act as active inquisitors, directing questioning and assisting the parties in gathering and admitting evidence.<sup>64</sup> In Iowa, for instance, the small-claims judge “swears in the parties and their witnesses and examines them.”<sup>65</sup>

Of course, European inquisitorial systems depend in part on careful selection and training of judges as part of a careerist civil service. That model is not easy to transplant into elected

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60. See SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION & REVIEW, HALLEX: HEARINGS, APPEALS AND LITIGATION LAW MANUAL I-2-1-5, I-2-5-14 to -78, I-2-6-56 to -74 (2009) [http://www.socialsecurity.gov/OP\\_Home/hallex/hallex.html](http://www.socialsecurity.gov/OP_Home/hallex/hallex.html) (last visited Apr. 2, 2012) (on file with the Washington and Lee Law Review).

61. Greiner & Pattanayak, *supra* note 42, at 2174.

62. See generally Bruce J. Graham & John R. Snortum, *Small Claims Court*, 60 JUDICATURE 260 (1977); Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339 (1976); Eric H. Steele, *The Historical Context of Small Claims Courts*, 6 LAW & SOC. INQUIRY 293 (1981).

63. See STEVEN WELLER & JOHN C. RUHNKA, PRACTICAL OBSERVATIONS ON THE SMALL CLAIMS COURT 20–21 (1979); see also *Turner v. Rogers*, 131 S. Ct. 2507, 2519 (2011) (making the same point about family court); Barton & Bibas, *supra* note 4, at 983–84 (same).

64. See WELLER & RUHNKA, *supra* note 63, at 20–21 (noting that small-claims courts proceed informally because the “ideal of self-representation in small claims court can be met only if the rules of a formal civil trial are relaxed”). Thus, experts recommend that judges in small-claims court direct the questioning, grant continuances to permit further evidence-gathering, leave court to view outside evidence, and receive evidence telephonically from certain missing witnesses, and that lawyers not be permitted to question witnesses or raise objections. *Id.* at 21–25.

65. Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 463 (1996).

American judiciaries run by adversarial lawyers. But states could still pursue it, much as they have professionalized many administrative agencies, creating civil services and training programs. The adversarial mindset may be difficult to change, but it is not impossible. One key change would be to ban or severely restrict lawyers in these disputes and perhaps substitute paraprofessionals, as the next section suggests.

*C. Loosening Lawyers' Monopoly: Permitting Paraprofessional Practice*

The American organized bar is exceptional in the degree to which it operates as a cartel, restricting the provision of even routine legal services by nonlawyers. Most other countries allow paraprofessionals, ranging from notaries to paralegals to court clerks, to provide a range of services. In five central European countries, for example, notaries handle real estate transactions and registries, security interests, corporate transactions from formation through liquidation, marital property contracts and arrangements, same-sex civil unions, uncontested divorces, probate and intestacy proceedings, consumer financial services, and alternative dispute resolution. In some cases, consumers may choose whether to hire a lawyer or a notary for the same type of transaction.<sup>66</sup> In Germany, notaries handle real estate conveyances, mortgages, incorporations, wills, estate and tax planning, powers of attorney, and important contracts.<sup>67</sup> Japan has many kinds of legal professionals besides lawyers authorized to litigate in court, including patent attorneys, administrative law specialists, judicial scriveners, tax attorneys, social insurance and labor specialists, and in-house transactional lawyers. Not all of these professionals need to hold the equivalent of J.D.s.<sup>68</sup>

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66. See Ninel Jasmine, *Notaries in Europe: A Comparison Based on Selected Countries*, in 26 NOTARIES IN EUROPE—GROWING FIELDS OF COMPETENCE 33–45 (2007).

67. See PETER L. MURRAY & ROLF STÜRNER, *THE CIVIL LAW NOTARY—NEUTRAL LAWYER FOR THE SITUATION: A COMPARATIVE STUDY ON PREVENTATIVE JUSTICE IN MODERN SOCIETIES* 29–30 (2010) (discussing the multifaceted functions that notaries perform in Germany, many of which fall within the exclusive prerogative of lawyers in the United States).

68. See Kenneth L. Port, *The Spirit of Japanese Law*, 1 WASH. U. GLOBAL

In handling transactions, civil-law notaries serve not as partisan representatives of one side. Rather, they are neutral, impartial, independent professionals who effectuate transactions in keeping with all the parties' intents and understandings.<sup>69</sup> The use of a single nonlawyer professional, whose fee may be proportioned to the value of the transaction, holds down costs and levels the playing field for poor, ignorant consumers. By contrast, the American expectation that each side hire its own lawyer favors rich, repeat players such as financial institutions with in-house counsel.<sup>70</sup> Thus, the American bar's monopoly makes it harder and more expensive for poor and middle-class Americans to get help *ex ante* in structuring and understanding transactions. As a result, poor and middle-class Americans often go unrepresented and neglect advance planning, leading to larger messes when crises do erupt.

In medicine, where lives are at stake, we let nurse practitioners, midwives, paramedics, and urgent care clinics provide certain routine services but refer more complex matters to doctors. Indeed, many women who could afford obstetricians choose to hire midwives instead. They trust these paraprofessional specialists to triage and refer the fraction of complicated births to hospitals while conducting routine deliveries themselves more simply, cheaply, and informally.<sup>71</sup> So too the law could let paralegals, social workers, and court clerks assist and advise litigants in routine criminal and civil cases, as well as those contemplating routine wills, divorces, contracts, corporations, and the like. Help lines and chat rooms could automate the delivery of these services. Websites like legalzoom.com and rocketlawyer.com, which already draft routine wills, leases, loans, contracts, articles of incorporation, and the

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STUD. L. REV. 573, 577–78 (2002) (reviewing JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* (1998)) (implying that only those who litigate before a court and in-house transactional attorneys need to hold the equivalent of J.D.s).

69. See MURRAY & STÜRNER, *supra* note 67, at 30 (“When a notary is called upon to authenticate a transaction, the notary is not representing a client . . . in the way a lawyer would. . . . The notary’s duty is not directed toward any particular participant, it rather extends to all of them.”).

70. See *id.* at 209 (noting the inherent income bias in the American system in favor of the rich).

71. I am grateful to Robin Steinberg for this point.

like, could do more. Do-it-yourself seminars, webinars, and manuals could provide simple forms and clear explanations, allowing average litigants to pursue cookie-cutter claims such as simple divorces.

Just as medical services are trying to emphasize preventive care to head off expensive emergency-room visits down the road, a broader approach to legal services could emphasize proactive planning of marital, child custody, immigration, employment, estate, and potentially even criminal matters. Indeed, several public defenders' offices, such as Neighborhood Defender Services of Harlem and the Bronx Defenders, already seek to take a more proactive, preventive approach, emphasizing investigation and early resolution of cases.<sup>72</sup> Neighborhood Defender Services uses a team approach, delegating tasks to nonlawyers, such as having investigators handle some communication with clients.<sup>73</sup> That flexibility makes it easier and cheaper to represent those of modest means.

In America, too often we act as if providing more lawyers is an end in itself. It is not; it is simply a means of ensuring better informed and fairer outcomes. Bringing down the price of legal help from a luxury good to a commodity can only promote planning, advice, and dispute resolution. That requires increasing the supply and lowering the cost of supply, by allowing more nonlawyer professionals to enter the field without first spending three years and six figures to acquire a full-fledged J.D. Specialist professionals need not acquire that breadth of knowledge if they do not plan to be jacks of all trades. Perhaps law schools and colleges could develop shorter paraprofessional training, akin to paralegal courses, to prepare people to handle unemployment compensation, disability claims, uncontested divorces, estate planning, and similar specialized tracks. Night programs, distance learning, accelerated courses, and other innovations beyond traditional legal education (which ABA accreditation rules currently forbid) could further push down the cost and thus increase the supply of paraprofessional specialists.<sup>74</sup> It makes no

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72. See generally U.S. Dep't of Justice, Nat'l Inst. of Justice, *Public Defenders in the Neighborhood: A Harlem Law Office Stresses Teamwork, Early Investigation* (Mar. 2007), <https://www.ncirs.gov/pdffiles/163061.pdf>.

73. See *id.* at 2.

74. See AM. BAR ASS'N, 2012–2013 ABA STANDARDS & RULES OF PROCEDURE

sense to require that legal representation always meet a Cadillac-level standard that few can afford or receive for free. It would be far better to offer serviceable scooters to everyone for run-of-the-mill cases, reserving the few appointed lawyers for those cases of unusual complexity.

### V. Conclusion

American justice is tied in a Gordian knot. In elaborating *Gideon*, the Supreme Court has extended the Sixth Amendment right to counsel far beyond the core of felony jury trials to the much larger universe of misdemeanors even without jury trials or immediate imprisonment. But that abstract right collides with the political economy of indigent defense. The Court can announce such a broad right, but it can hardly ensure that the political branches will fund it. Thus, *Gideon* and its progeny rest on no stable foundation. Legislatures chronically underfund indigent defense and legal aid, relying on a hodgepodge of income streams such as court costs and traffic tickets that do not keep pace with rising caseloads. Courts are loath to order more funding, recognizing the limits of the judicial role under the separation of powers. And rather than embracing procedural reforms, bar associations argue only for more lawyers. At best, they exhort their members to offer pro bono assistance to plug the yawning void. This state of affairs is even harder to repair in the current economic climate, as lawyers' incomes and employment have stagnated or sagged, making meaningful reform even more contentious.

The state of affairs is so bad that it may indeed be a good time for reform. Pro se caseloads continue to climb, and judges lack enough lawyers to appoint to these cases and funds with which to compensate them. Moreover, in rejecting a new civil-*Gideon* right, the Supreme Court in *Turner v. Rogers*<sup>75</sup> simultaneously prodded states to pursue pro se court reform as a cheaper and sometimes fairer alternative.<sup>76</sup> Though legislatures

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FOR APPROVAL OF LAW SCHOOLS STANDARD 301-08 (2012); TAMANAHA, *supra* note 27, at 11-27, 173, 176-77.

75. 131 S. Ct. 2507 (2011).

76. *Id.* at 2519-20.

and bar authorities may not pursue reform from the top down, changes are bubbling from the bottom up, as websites and publishers offer assistance to litigants who otherwise would have none. There may be no one sword to slice the Gordian knot, but perhaps a number of mice to nibble away at its strands.<sup>77</sup> The question is whether courts and legislatures will try in vain to squelch these reforms, at the behest of the organized bar, or instead bow to and embrace the reality of the situation. We may be able to appoint fewer lawyers, giving each one the time and resources he needs to mount a serious felony defense, yet have more justice in the realms where lawyers are less necessary.

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77. Cf. EDGAR ALLAN POE, *THE PIT AND THE PENDULUM* (1850).