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Why Civil Gideon Won't Fix Family Law

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THE YALE LAW JOURNAL

REBECCA AVIEL

Why Civil *Gideon* Won't Fix Family Law

ABSTRACT. This Essay explains why we should hesitate before throwing full support behind a civil *Gideon* initiative for family law, regardless of how wholeheartedly we embrace the proposition that parental rights are as important as physical liberty. The comparable importance of these interests does not necessarily mean that custody disputes should have the same procedural character as criminal matters, as becomes evident upon exploring some of the social, emotional, and structural qualities that differentiate the two contexts. Enhancing access to justice in family law requires that we design custody dispute resolution systems that honor the constitutionally significant interests at stake while recognizing the truly unique posture in which separating parents litigate. To pursue civil *Gideon* as a stand-alone reform falls short of this challenge; it accepts the primacy of a lawyer-centric adversary system as the preferred means for resolving custody disputes in the face of growing evidence that this framework does more harm than good for most domestic relations litigants.

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As *Gideon v. Wainwright*[1] reaches its fiftieth anniversary, it continues to serve as the model for scholars, judges, and advocates who emphasize the need for more equitable access to counsel for civil litigants. The term "civil *Gideon*" now commonly serves as a shorthand for the idea that the right to appointed counsel for indigent criminal defendants recognized in *Gideon* should be extended to civil cases involving interests of a sufficient magnitude.[2]

Civil *Gideon* advocates build their case on the premise that the interests at stake in certain types of civil cases are as compelling and as constitutionally significant as the criminal defendant's interest in physical liberty. Child custody matters figure especially prominently in these discussions,[3] and this is readily understandable: that infringements on the parent-child relationship are

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

2. Debra Gardner, *Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 40 CLEARINGHOUSE REV. 167, 168 (2006); Steven D. Schwinn, *The Right to Counsel on Appeal: Civil* Douglas, 15 TEMP. POL. & CIV. RTS. L. REV. 603, 603 n.2 (2006) (defining civil *Gideon* as "the categorical, federal constitutional right to appointed counsel at civil trial, comparable to that same right in a criminal trial in *Gideon v. Wainwright*").

3. A noteworthy example is the resolution passed in 2006 by the American Bar Association, asserting a right to counsel in civil cases involving "shelter, sustenance, safety, health, and child custody," with child custody defined as "proceedings where the custody of a child is determined or the termination of parental rights is threatened." *ABA Resolution on Civil Right to Counsel,* 15 TEMP. POL. & CIV. RTS. L. REV. 507, 521-22 (2006). This resolution has been endorsed by a number of state and local bar associations, including those of Colorado, Connecticut, the District of Columbia, Maine, Massachusetts, Minnesota, New York, Washington, Boston, Chicago, New York City, Philadelphia, King County (Washington), and Los Angeles County. Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1067 n.9 (2009). For additional discussions of the importance of the interests at stake in child custody proceedings, see Roger C. Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670, 676 (1976), which notes that "[c]ivil litigation can result in far graver deprivations of liberty or prosperity than confinement in jail" and that the "loss of custody of children" presents "consequences of major importance"; Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 69 (2007), which notes that "the right to parent" is among the most important interests at stake in civil litigation; Michael S. Greco, *Court Access Should Not Be Rationed*, A.B.A. J., Dec. 2005, at 6, which offers child custody disputes as an example of the sort of "serious legal problem" requiring access to counsel; and Joan Grace Ritchey, *Limits on Justice: The United States' Failure To Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 338 (2001), which similarly asserts that the loss of child custody involves "consequences that can far outweigh short periods of deprivation of physical liberty." *See also infra* notes 10-12 and accompanying text.

profound invasions of liberty has been recognized again and again.[4] Even where the matter is a custody dispute between two parents, rather than a termination proceeding initiated by the state, the stakes are clearly high when litigants are battling over the time they will be allowed to spend with their children and the right to make significant parenting decisions concerning education, religion, health, and the like.[5]

Underlying the civil *Gideon* movement, however, is an assumption that because a parent's right to the care and custody of her children is as important as a criminal defendant's right to physical liberty, both contexts should reflect the same procedural character: full-dress adversary proceedings with robust and technical rules, where lawyers truly are necessary to fair and effective participation. The more we learn about custody disputes, however, the more it appears that this isn't what family law needs. Most litigants want proceedings that are shorter, simpler, cheaper, more personal, more collaborative, and less adversarial. These are procedural values that are—and should probably remain—foreign to criminal proceedings. While family law scholars and reformers have commented on the uncomfortable fit between the adversarial model and the special qualities of domestic-relations disputes,[6] these insights have been absent from the civil *Gideon* discourse.

This Essay brings together these strands, asserting that we should hesitate before throwing full support behind a civil *Gideon* initiative for family law, regardless of how wholeheartedly we embrace the proposition that parental rights are as important as physical liberty. Civil *Gideon* discourse trades on the gravitas of constitutional criminal procedure but isn't sufficiently tailored to the unique qualities of family law.[7] These unique qualities challenge us to

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4. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65-67 (2000); Stanley v. Illinois, 405 U.S. 645, 650-52 (1972). However, in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Supreme Court held that a parent facing the involuntary termination of parental rights did not enjoy a categorical right to counsel similar to that of a criminal defendant; instead, due process dictated the application of a balancing test to determine whether counsel was required in that particular case.

5. As I will explain in Part II, I focus my attention in this Essay on private custody disputes between parents whose relationship is dissolving, as this is the area in which there has been much less progress in the provision of legal services for the indigent.

6. *See, e.g.*, Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal To Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

7. This is one way in which my challenge differs from that raised by Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010). While Barton's opposition to civil *Gideon* emphasizes the failures of *Gideon* itself, fearing that civil *Gideon* will look too much like the original, my critique emphasizes the ways in which family

design custody dispute resolution systems that honor the constitutionally significant interests at stake while recognizing the truly unique posture in which separating parents litigate, which is different from both the criminal context that gave rise to *Gideon* and the administrative law context from which the Court's civil due process precedents emerged. To pursue civil *Gideon* as a stand-alone reform falls short of this challenge. It accepts the primacy of a lawyer-centric adversary system as the preferred means for resolving family law disputes in the face of growing evidence that this framework does more harm than good for most domestic-relations litigants. Civil *Gideon* responds in an admirable and important way to the unfairness of litigating without a lawyer in a system where lawyers are indisputably necessary. But it doesn't challenge the necessity of lawyers or envision a world in which parents can resolve their disputes more quickly and more collaboratively than in lawyer-centered systems.

This Essay proceeds in three parts. In Part I, I demonstrate that the logic of the civil *Gideon* movement rests on the relatively unproblematic premise that the interests at stake in certain civil proceedings are as constitutionally profound and practically significant as the right to physical liberty. I further demonstrate, however, that in urging the necessity of appointed counsel, civil *Gideon* advocates assume the existence of highly formalized adversarial proceedings in which technical legal expertise is necessary. In Part II, I explain why this model is wrong for most family law cases. In Part III, I explore ways in which civil *Gideon* might fit into systemic family court reform. I argue that the quest for fairness and equality that animates the civil *Gideon* movement can be realized in a family court system that emphasizes simplicity, efficiency, and collaboration over formal adversarial procedure.

I. THE LOGIC OF CIVIL *GIDEON*

The central rhetorical strategy of civil *Gideon* advocates is to assert that people enmeshed in civil litigation, especially regarding "basic human needs," are battling over interests that are just as compelling as the physical liberty that is at stake for criminal defendants.[8]

Consider the following statement:

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law is fundamentally different from criminal proceedings, and thus requires an entirely different model of access to justice.

8. *See, e.g.*, Steven D. Schwinn, *Faces of Open Courts and the Civil Right to Counsel*, 37 U. BALT. L. REV. 21, 24 (2007) (observing that, in pursuing a civil *Gideon* strategy, "[l]itigants must try to elevate or equate their personal interests in their cases with the privileged interest in physical liberty").

> It is still "shocking" to our sense of justice that we would incarcerate a criminal who was tried and convicted without an attorney. But is there not yet another truth that must be acknowledged and addressed? Is it not just as shocking that we leave our poor and our most vulnerable to represent themselves in their battles for basic human needs: shelter, sustenance, safety, and health? Whether forced out of the home, terrified by an abuser, or denied government benefits without adequate representation, the poor are confined. The poor are denied due process. The poor do, indeed, suffer a loss of liberty. And in some cases, indeed in many cases, their loss is just as great if not greater had they been convicted of a crime and imprisoned.[9]

Or these two, which focus on the importance of child custody battles:

> It seems to me incontestable that the threatened loss of a child is an incomparably greater life shattering event than thirty days for shoplifting.[10]

> The loss of custody of one's child is a life-shattering event more profound than the prospect of thirty days in jail. The homelessness that may result from eviction could have consequences far more devastating for an entire family than a short jail term for one family member.[11]

All of these statements reflect the premise that certain civil interests are as profound as the physical liberty interest that is at stake in criminal proceedings. Especially with respect to a parent's interest in custody of her children, these assertions are persuasive.[12] While the Supreme Court's refusal to endorse this proposition in full is a constant source of frustration for scholars and

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9. Kathryn Grant Madigan, *Advocating for a Civil Right to Counsel in New York State*, 25 TOURO L. REV. 9, 14 (2009) (footnote omitted); *see also* Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association*, 25 TOURO L. REV. 31, 33 (2009) (noting that many "unmet legal needs concern issues of the utmost importance to people's lives, including housing, child custody, food, shelter, employment, and health"); Wade Henderson, *Keynote Address: The Evolution and Importance of Creating a Civil Right to Counsel*, 25 TOURO L. REV. 71, 77 (2009) (noting that people are unable to afford counsel for problems affecting "many of the most basic necessities of life and the most fundamental elements of people's lives").

10. Stephen H. Sachs, *Seeking a Right to Appointed Counsel in Civil Cases in Maryland*, 37 U. BALT. L. REV. 5, 14 (2007).

11. Gardner, *supra* note 3, at 73 (footnote omitted).

12. *See, e.g.*, Barton, *supra* note 7, at 1241 ("Outside of imprisonment, the right to parent one's children is perhaps the strongest constitutional liberty interest.").

advocates,[13] even the Court's own case law provides ample support for the notion that this is one of the most venerated liberty interests recognized in constitutional law.[14]

The problem that I want to illuminate is the assumption that the procedural values that accompany civil proceedings should therefore be the same: full-dress, judge- and lawyer-centered adversary proceedings with the kind of intricate and technical rules that necessitate legal expertise. Much of the civil *Gideon* discourse reflects such an assumption. *Gideon* itself, of course, was predicated on the Court's observation that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[15] Civil *Gideon* advocates assert that "*Gideon*'s recognition that the lack of counsel distorts the adversary process is no less true in the civil context, at least in cases that implicate fundamental rights or basic human needs."[16] The conclusion that lawyers are necessary to vindicate basic fairness concerns in civil litigation is often predicated upon the nature of adversarial process.[17] One civil *Gideon* advocate, for example, summarizes research showing that parties with lawyers are far more likely to file motions, request discovery, and receive continuances, thereby using the "procedural mechanisms that are key to success in civil litigation."[18] This result is hardly surprising, but it should inspire some inquiry into whether more motions, discovery, and continuances are in fact what most family law litigants need, a question I take up in the next Part.

First, I want to explore in more depth the fact that civil *Gideon* advocates assume—maybe even endorse—the existence of highly formalized adversarial proceedings in the cases involving the most pressing human concerns. This expectation is traceable to the *Mathews v. Eldridge* test the Supreme Court applies in civil due process cases, which examines the private interest at stake,

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13. *See, e.g.*, Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After* Lassiter v. North Carolina, 15 FAM. L.Q. 205, 221 (1981) ("*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child.").

14. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65-67 (2000).

15. 372 U.S. 335, 344 (1963).

16. Gardner, *supra* note 3, at 72-73.

17. *See, e.g.*, Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1508 (2004) ("The correct functioning of the adversarial process itself relies on the assumption that both sides are coming to the process with equal legal resources."); Sachs, *supra* note 10, at 16 (emphasizing the role of lawyers in "mak[ing] the adversary system work").

18. See Gardner, *supra* note 3, at 71.

the risk of erroneous deprivation and the extent to which additional procedures might reduce that risk, and the government's interest in adhering to its chosen set of procedures.[19] This creates an explicit correlation between the seriousness of the private interest involved and the likelihood that a particular procedure is constitutionally required. While the refrain that due process is a "flexible" concept has become quite familiar,[20] this is generally taken to mean that the intricacy and formality of the procedures required rise and fall with the weight of the interests at stake.[21]

While the *Mathews v. Eldridge* test instructs that the private interest be weighed against two other factors, we nonetheless intuitively expect adjudicative procedures to become more elaborate as the interests at stake become more profound.[22] The Supreme Court has contributed to this dynamic

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19. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

20. Morrisey v. Brewer, 408 U.S. 471, 481 (1972); *see* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 36 (1976) (noting that the "Court had often emphasized the flexibility of its approach to due process and the necessity of evaluating each claim virtually on its own facts"); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456 (1986) ("The Supreme Court has continued to adhere to its long-standing position that the content of due process is extremely flexible, and not susceptible to precise definition.").

21. *See* Redish & Marshall, *supra* note 20, at 471 ("Once the Court's balance became explicit, litigants began to stress the importance of their substantive interests, while the government urged the innocuousness of its deprivations.").

22. I think this explains some of the criticism of cases like *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), and *Turner v. Rogers*, 131 S. Ct. 2507 (2011). *See, e.g.*, Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 970 & n.16 (2012) (characterizing the response to *Turner*'s right-to-counsel holding as largely condemnatory); 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, 36 LOY. U. CHI. L.J. 363 (2005). In *Lassiter*, the Supreme Court rejected a claim that appointed counsel was constitutionally required in parental termination proceedings; in *Turner*, it arrived at the same result with respect to a child-support contempt proceeding initiated by an unrepresented custodial parent even though the obligor was subject to civil imprisonment for his failure to pay. In both cases, the Supreme Court acknowledged the strength of the private interests at stake—parental rights and physical liberty, respectively—and then took pains to explain why the government had strong countervailing interests and why additional procedures would not materially affect the risk of erroneous deprivation. If one accepts the majority's factual premises (which are not unassailable, it must be noted), these cases could be justified as facially reasonable applications of the *Mathews* test, which explicitly engages three distinct factors rather than treating the private interest as dispositive. Nonetheless, given the gravity of the private interests involved, the results of *Lassiter* and *Turner* are jarring: they reveal the startling strength of the other two factors and run counter to our intuition that the weight of the private interest should drive the due process calculus.

with its treatment of criminal matters in which physical liberty is threatened; these serve as the gold standard for proceedings in which the intricacy and formality of the governing procedures reflect the seriousness of the interests at stake.[23]

To accept a departure from the procedures that characterize the criminal model is thus understandably seen as an inescapable departure *downward*, as an acknowledgement that the rights at stake in less elaborate proceedings have an inferior status. In the world of due process, it is an article of faith that more process is better—if not from the standpoint of overall social utility, then at least from the perspective of the individual whose interests are at issue. For all the differences among them, due process cases invariably come to the Court with the individual on the cusp of losing a vital interest asserting that a particular procedure is constitutionally necessary.[24] Against this backdrop, it is unsurprising that our jurisprudential culture assumes that procedure is protective, such that the individual in question would naturally want more of it. To support additional procedural intricacy is to stand on the side of individual rights.

Within this framework, custody cases would be obvious candidates for adversarial proceedings that necessitate the technical expertise of a lawyer because, as everyone generally recognizes, the private interest at stake is among the weightiest. But as I will detail in the next Part, the bulk of family law cases challenge the idea that more procedure is always better for individual litigants.

II. WHY THIS MODEL IS WRONG FOR FAMILY LAW

To see why this is so, we have to first divide custody cases into three categories: custody disputes between parents whose relationship is dissolving; state-initiated proceedings in which the state is seeking to obtain custody of an

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23. *See, e.g.*, *Lassiter*, 452 U.S. at 25 (noting that "an indigent's right to appointed counsel . . . has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation" and emphasizing that "it is the defendant's interest in personal freedom" that drives that result); *see also id.* at 42 & n.8 (Blackmun, J., dissenting) (charging the majority with "emphasizing the value of physical liberty to the exclusion of all other fundamental interests" and "opting for the insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel"). Interestingly, *Gideon* itself didn't rely on an analysis of the seriousness of the interest at stake, but rather stressed fundamental fairness. As retrofitted by *Lassiter*, however, the procedural protections associated with criminal trials are justified by the potential loss of the most constitutionally significant liberty interest.

24. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970). *Gideon*, *Mathews*, *Lassiter*, and *Turner* also fit this description.

abused or neglected child or to terminate parental rights altogether; and disputes between a parent and a third party who, for whatever reason, asserts some sort of custodial right to the child in question. I am focused here on the first category, because these cases are far and away the most numerous, and because most states provide a right to counsel for cases in the second category.[25] The third category is admittedly problematic, in that parents are often defending against allegations that they are unfit to regain custody of children they have voluntarily and informally placed in the temporary care of others.[26] For purposes of this Essay, I will assume that cases in this category should be treated like cases in the second, with equivalent rights to appointed counsel. But that still leaves us with the lion's share of cases in which custody of a child is at issue: private custody disputes between two people both recognized as the child's parent. This is a singular posture in law for which comparisons to criminal prosecutions are simply inapt. The procedural model that characterizes criminal prosecutions transfers poorly to family law, as I will elaborate in this Part.

At first blush, the social, emotional, and structural differences between custody disputes and criminal prosecutions seem too intuitive to warrant much discussion. But it is worth exploring some of these differences so that we can critically assess the assumption that the procedures used to resolve these respective matters should be similar. First, the litigants on either side of a private custody dispute are similarly situated with regards to the interests at stake: they are each legally recognized as parents, with all the rights and responsibilities that recognition entails, and each one stands to lose time with his or her children and authority over their upbringing.[27] But they aren't losing these precious rights to the state, or to a third party; neither parent in a private custody dispute occupies the sort of defensive posture that can be analogized to that of a criminal defendant. In private custody disputes it is more apt to say that the parenting time and authority the two parents used to enjoy as an undifferentiated whole[28] must now be parceled out between them. The litigants are engaged in the dissolution of an intact family unit that is presumed

25. *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 245-46 (2006); Boyer, *supra* note 22, at 367-68.

26. *See, e.g.*, Frase v. Barnhart, 840 A.2d 114, 115 (Md. 2003).

27. The custody hearing itself may reveal that one parent is in fact the primary caretaker, for whom the loss of custody would be more emotionally devastating. But at the threshold of the proceeding, neither parent enjoys a legal posture that is superior to the other.

28. The concept of an undifferentiated whole represents the state's perspective vis-à-vis intact families; it does not, of course, capture the day-to-day parenting realities of any particular family.

to operate in the best interests of its constituent members and thus assumed to function best with minimal interference. The role of the custody hearing is to move the family from a privately determined allocation of rights and responsibilities to a state-mandated allocation of rights and responsibilities.

It is difficult to overstate how different this is from a criminal proceeding, in which the defendant is fighting against the state for his freedom, the state is fighting to exercise its authority to punish, and the two litigants represent the opposite poles of power, authority, and institutional strength.[29] The more we dwell on the comparison, the more it seems odd to expect that the adversarial model that characterizes criminal proceedings, with cross-examination, rules of evidence, jury instructions, and the lawyers necessary to navigate these technically difficult waters, would be appropriate for the allocation of rights and responsibilities between a child's two parents.

If all this seems at once rather obvious and a bit abstract, consider that the majority of private custody disputes will result in orders that require extensive cooperation between the parties, whether they pertain to day-to-day logistics of transporting children from one parent's household to the other or to joint parental decisionmaking about education or medical treatment.[30] And even where this is not the case—for example, in those cases where one parent will be the primary residential custodian and will be awarded exclusive decisionmaking authority—children benefit from a process that arrives at this result smoothly and expeditiously.[31] In custody disputes there is thus an enormous premium on resolving the matter swiftly and with minimal amounts of acrimony and hostility—both to reduce a child's exposure to these toxic displays and to preserve the conditions necessary for successful postdivorce parenting. If we accept only this fairly intuitive premise, the adversarial model immediately loses ground as an appropriate mechanism for resolving most private custody disputes.

This is repeatedly confirmed by a growing body of research, much of it conducted by legislative and judicial officials tasked with reforming their states'

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29. *See* Nancy Leong, Gideon*'s Law-Protective Function*, 122 YALE L.J. 2460, 2476-78(2013).

30. Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 365 (2009) (noting a "commitment to shared parenting" that "is reflected not only in the increasingly common statutory preference for postdivorce custody arrangements that facilitate close and continuing contact with both parents, but also in the parenting arrangements actually produced").

31. *See, e.g.*, *id.* at 363 ("[S]ocial science suggests that children's adjustment to divorce and separation depends significantly on their parents' behavior during and after the separation process: the higher the levels of parental conflict to which children are exposed, the more negative the effects of family dissolution.").

family court systems.[32] A discussion paper prepared by a Colorado judicial committee argues that the traditional adversarial process "may cause irreparable damage to family relationships, which are necessarily linked for many years in the future."[33] Among the four overarching principles proposed by the committee to guide family court reform was "timely, efficient and less adversarial processes."[34]

This body of research reveals that the individuals whom the system is designed to serve repeatedly express dissatisfaction with an adversarial approach to divorce and custody cases. As summed up by one state's task force on family court reform, it appears that "[t]he public is disgusted with the adversarial model of managing divorce."[35] Another report posits that "the public dissatisfaction with judicial management of family matters probably relates in part to the fact that we are using a tool—the adversarial system—that was neither designed nor intended for dealing with sensitive family relations."[36]

In one survey of parents represented by counsel, seventy-one percent felt that the legal process exacerbated feelings of anger and hostility that existed at the outset.[37] What is particularly interesting for our purposes is that attorney representation was directly implicated in this intensification. The researchers found that

> [t]he role of the attorneys was perceived as contributing to parental rivalry and conflict by creating and encouraging less communication between parents. . . . Parents expressed, "It is hard to co-parent when

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32. For a history of research and reform efforts in one state, see Pamela A. Gagel, Inst. for the Advancement of the Am. Legal Sys., Changing Cultures, Changing Rules: A Colorado Case Study (Jan. 5, 2007) (unpublished manuscript) (on file with author).

33. Court Improvement Comm., *Colorado Courts' Recommendations for Family Cases: An Analysis and Recommendation for Cases Involving Families*, COLO. JUD. BRANCH 12 (May 2001), http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Standing_Committee_on_Family_Issues/recommendations_1.pdf.

34. *Id.* at 2.

35. OR. TASK FORCE ON FAMILY LAW, FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 5 (1997).

36. Stephen J. Harhai, Families and Courts: A Roadmap to a More Effective Partnership 3 (July 15, 1994) (unpublished report) (on file with author). This is the report of the proceedings of the Family Law University, a conference held in May and June 1994 that included over 140 individuals concerned with the direction of family law in Colorado.

37. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 298 (1999).

> you are not speaking to each other," and are "going through attorneys only." Even parents who felt that their spouses were generally acceptable people iterated that he or she became a "monster" during the legal conflict. Their relationships became more normalized when the parents felt they took more of the process into their own hands and out of the lawyers'.[38]

What is perhaps most remarkable is that for some litigants with the resources to choose, lawyers in private custody disputes are neither luxuries nor necessities[39] but rather liabilities. In one study of unrepresented divorce litigants, more than twenty percent said they could afford a lawyer.[40] Similarly, after the state of Oregon held public hearings on the divorce system, the task force reported that "[m]any pro se litigants can afford lawyers" but do not engage their services because "[t]hey fear getting sucked into a vortex of conflict."[41] Numerous words of caution are in order. First, this observation obviously lacks the precision that would allow us to arrive at rigorous conclusions regarding the number of pro se litigants who proceed without counsel by choice. Second, the fact that many pro se litigants voluntarily forego the assistance of counsel does nothing, of course, to ameliorate the plight of those litigants who want the assistance of counsel but cannot afford it.[42] Lastly, we can quarrel with the assumption that lawyers necessarily create and intensify conflict—certainly, we can and should envision a world in which the counseling, negotiating, and drafting skills deployed by talented family law specialists could reduce rather than exacerbate conflict. But this finding does something interesting nonetheless: it reveals the concern that whatever lawyers bring to the table in divorce disputes, it is the wrong thing—the very thing families are seeking to avoid.

Why might this be? Why would the assistance of counsel be seen as a hindrance, a route to more conflict and less cooperation? The answer may lie in the ways in which "thinking like a lawyer" is divergent from "thinking like a

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38. *Id.*

39. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (asserting that "lawyers in criminal courts are necessities, not luxuries").

40. Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L.Q. 407, 411 (1994).

41. Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L.Q. 95, 103 (1998) (citing OR. TASK FORCE ON FAMILY LAW, A STATUS REPORT 6-7 (1996)).

42. This is made even more obvious by reference to the criminal context, where it would be outlandish to suggest that the fact that some criminal defendants choose to waive counsel somehow calls into question the imperative to provide counsel for those indigent defendants who do want to be represented.

parent." Even a rudimentary exploration of what it might mean to think like a lawyer is well beyond the scope of this Essay, and it is even more foolish to suggest that there is any sort of consensus regarding what it means to be or think like a parent. Nonetheless, consider the definitions offered by Dr. Robert Emery, a clinical psychologist and director of the Center for Children, Families, and the Law at the University of Virginia, who suggests that thinking "like a parent" rather than like a lawyer means "taking the long view" and pursuing arrangements that parents "truly think will be best for their children" regardless of what they might be entitled to under the governing legal standard.[43] Using this definition, we can readily see how even minimum standards of professional competence can operate in tension with thinking like a parent. Emery describes a scenario in which the divorcing parents of a three-month-old infant might both be amenable to an arrangement in which the child initially resides solely with his nursing mother.[44] The father will have regular daytime contact with the baby, with the understanding that overnight visits will begin once the child reaches twelve to eighteen months of age, and will increase gradually from there toward equally shared parenting time once the child reaches school age. The proposal has much to recommend it: aside from the significant virtue that the parents agree, it also keeps both parents meaningfully involved while avoiding the concerns that attend moving very young children back and forth from one home to another. Yet, as Emery notes, "good lawyers will raise cautions (as they should under current laws)."[45] The partisan advocacy that characterizes the assistance of counsel in an adversarial system can create a coordination problem, preventing parents from realizing the mutual gains of a cooperative approach to resolving custody disputes.[46]

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43. ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 121-22 (2d ed. 2012).

44. *Id.*

45. *Id.* at 122. Emery explains that the mother's lawyer should advise her that, as a nursing mother, she could very well obtain sole physical custody without any commitment to increase the father's time with the child as the child grows older. The father's lawyer would be obliged to inform his client about the difficulties in enforcing the provisions regarding future increases in parenting time.

46. See Harhai, *supra* note 36, at 3 ("In the traditional adversarial system the attorneys manage the case. Each pursues the objectives of the client and uses all available means to do so. If the parties never want to see each other after it's over, so be it. An excellent attorney may recognize that the larger objectives of the client may be served by reducing the conflict and preserving the relationship, but the system itself does little to support such an approach. In family litigation an attorney who works hard to reduce conflict may be perceived as 'soft' by the client and urged to take a more aggressive stand, or replaced. An attorney-client team that does choose the conciliatory approach is generally at the mercy of a vicious opponent because the system neither rewards the peacemaker nor punishes the warmonger."). For an

This is a painfully glancing treatment of the fact that the adversarial model fits poorly with most pressing goals of family court, but the truth is that this disconnect is not news to scholars and reformers who study private custody disputes.[47] In fact, as others have noted, some family courts have already been experiencing a "paradigm shift" away from a "law-oriented and judge-focused adversary model" toward "a more collaborative, interdisciplinary, and forward-looking family dispute resolution regime."[48] The question is how the paradigm shift taking place in divorce and custody resolution interacts with the fairness concerns that animate the civil *Gideon* movement, directing it toward an agenda of equal access to counsel regardless of wealth. In the next Part, I briefly sketch how these two strands might be woven together. In doing so, I draw on a rich existing literature of family court innovation, without attempting to do it justice or purporting to offer a comprehensive vision for reform. Instead, I highlight a few principles that have the potential to unite the goals of equalizing access to justice with the movement toward simpler and more collaborative custody proceedings.

III. FITTING CIVIL *GIDEON* INTO SYSTEMIC FAMILY LAW REFORM

As scholars and lawmakers have recognized, one of the most important attributes of an improved family court system is the capacity to treat different types of cases differently.[49] Not all custody cases are amenable to swift,

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interview-based empirical account of the efforts of practicing family law attorneys to grapple with the tension between vigorous advocacy and the long-term interests of their clients, see LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 18-36, 110-32 (2001). *See also* AUSTIN SARAT & WILLIAM L.F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 53-58 (1995) (examining the efforts of divorce lawyers to shape their clients' expectations about reasonable demands and realistic outcomes).

47. See *supra* note 6.

48. Singer, *supra* note 30, at 363 (noting that a primary component of the paradigm shift is "a profound skepticism about the value of traditional adversary procedures" and that "[a]n overriding theme of recent divorce reform efforts is that adversary processes are ill suited for resolving disputes involving children").

49. *See generally* Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 397 (2000) (describing the need to "triage" high-conflict cases "early in their judicial life cycle without burdening the great percentage of reasonably cooperative divorcing parents with unduly intrusive state intervention"); Elkins Family Law Task Force, *Final Report and Recommendations*, JUD. COUNCIL OF CAL. 20 (Apr. 2010), http://www.courts.ca.gov/documents/elkins-finalreport.pdf (criticizing the uniform treatment of family law cases that present very different concerns).

cooperative resolution,[50] however much this might be desirable and achievable for most families.[51] In certain cases—those involving, for example, allegations of partner violence, child abuse, or substantial imbalance in economic power—it would be procedurally unjust to subject the parties to a process that is swift, supposedly collaborative, and outside the orbit of close judicial supervision.[52] For these cases, an adversarial posture is appropriate, and the assistance of a partisan advocate is necessary.[53] That is why a critical reform element for family court is a triage system, sometimes described as differentiated case management, which distinguishes between those cases that require litigation and those that do not, and does so early enough in the process to recognize the gains that come from such a sorting.[54] Offering various procedural tracks that are tailored to the complexity and level of conflict in a particular case is a reform that should come before the categorical provision of lawyers to all individuals engaged in a custody dispute—not only because it is, arguably, a higher priority, but also because such differentiation has the potential to delineate more meaningfully what lawyers in different types of custody cases should be doing.

It is easy enough to envision the role of lawyers for cases that will be litigated—they will be deploying the "procedural mechanisms that are key to

50. *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2035 (1999) (observing that mediation involving unrepresented parties may be inappropriate where significant power imbalances exist).

51. By one estimate, between ten and fifteen percent of divorces "can be characterized as high conflict." Jo-Anne M. Stoltz & Tara Ney, *Resistance to Visitation: Rethinking Parental and Child Alienation*, 40 FAM. CT. REV. 220 (2002).

52. See, for example, the facts of *King v. King*, 174 P.3d 659 (Wash. 2007). During the marriage, the husband worked outside the home while the wife was the primary caretaker of the couple's three children. Nonetheless, when the husband petitioned for dissolution, he sought to become the primary residential custodian. He was represented by private counsel at the custody trial, while the wife, who had not completed high school, proceeded pro se after numerous unsuccessful attempts to obtain pro bono or court-appointed counsel.

53. *See* 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, 121-22 (2011) (urging that power dynamics between the parties be used as a factor for assessing when the assistance of counsel is necessary).

54. The idea is rooted in Maurice Rosenberg's concept of the "multidoor courthouse," which "fits the forum to the fuss." Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, NEGOTIATION J., Jan. 1994, at 49, 67.

success in civil litigation"[55]—but what about the others? What is the role of lawyers in the eighty-five to ninety percent of cases that are not characterized by excessive conflict and that can and should be resolved by simple, cheap, and cooperative procedures? For these cases—again, the lion's share—lawyers have an important role to play, but one that is potentially very different from the partisan advocacy that prevails in the adversarial model and that continues to characterize the civil *Gideon* discourse.

Lawyers in these cases are necessary to provide guidance and advice—counseling the separating parents on the governing legal frameworks, eliciting the parents' respective goals and positions, and explaining how the court is likely to rule in the absence of parental agreement. Lawyers are needed to draft comprehensive and finely crafted agreements that anticipate and minimize the issues that can wreak havoc after the decree has been issued. Moreover, lawyers must work alongside therapists, financial advisors, parent educators, and other professionals who can help the family with a successful transition to postdivorce parenting. Those who support a civil *Gideon* initiative for family law must grapple with the possibility that, in a number of these cases, *one lawyer might suffice*—a lawyer who can serve the couple's mutual interests in a swift, cheap, collaborative dissolution.[56] Civil *Gideon* advocates who have grown accustomed to invoking the notion of equally armed adversaries must recognize that in these cases, the parties are better conceived of as *joint clients*.

This concept has some significant challenges, to be sure. Most importantly, it requires sensitive, sophisticated, and individualized mechanisms for obtaining informed consent; lawyers must then be highly attuned to the possible emergence of conflicts of interest that might require withdrawal.[57] But for all its difficulties, the idea should be on the table, not only to reduce the cost

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55. *See supra* note 18 and accompanying text; *see also King*, 174 P.3d at 674-76 (Madsen, J., dissenting) (describing in detail a pro se litigant's struggle to navigate a custody trial, including her inability to differentiate between offering testimony, examining witnesses, and making arguments to the court).

56. Engaging one lawyer to advance the limited set of joint interests shared by a divorcing couple is one form of limited-scope representation contemplated in Rule 1.2(c) of the Model Rules of Professional Conduct. Where reasonable and with the client's informed consent, the rule permits a form of practice that has come to be known as unbundled legal services, in which lawyers "offer clients a menu of services instead of the traditional full service package." Statewide Family Law Advisory Comm., Or. Judicial Dep't, *Oregon's Integrated Family Court of the Future,* 40 FAM. CT. REV. 474, 484 (2002). For more on the importance of unbundling to family law litigants, see Special Issue, *Unbundled Legal Services and Unrepresented Family Court Litigants*, 40 FAM. CT. REV. 5 (2002).

57. In future work, I will explore in detail the ethical challenges that attend such a model and evaluate whether they can be overcome in some meaningful subset of cases.

of divorce and custody disputes—thus making a civil *Gideon* initiative more realistic—but also to offer access to legal advice in a posture that steers clear of the adversarial paradigm that so many families wish to avoid. Providing this kind of representation to those who cannot pay for it advances a concept of fairness that exists independently of the adversarial paradigm and in fact is much more expansive. It recognizes that clients engage with the legal system not merely as atomistic individuals battling against adversaries, but as members of a family unit who, even in dissolution, share common goals. It contemplates access to legal expertise as a mechanism for preventing and reducing family conflict, rather than assuming that custody battles must entail the vigorous procedural maneuvers that only lawyers can provide.

CONCLUSION

Civil *Gideon* advocates are at their most persuasive when emphasizing the profound importance of the interests at stake in certain areas of civil litigation. For many civil *Gideon* advocates, a particularly enduring frustration is the Supreme Court's inability to recognize the importance of parental rights as compared to a loss of physical liberty. On this point, I offer no dispute and think that none is warranted.

But a full assessment of civil *Gideon* proposals requires more than just evaluating the *strength* of the interests at stake; it requires sensitivity to the *nature* of the proceedings. The fact that custody of one's children is as important as anything else we can imagine does not mean that a dispute between two parents is equivalent or even analogous to criminal proceedings—or that it should be. In fact, the research summarized above suggests that significant numbers of family court litigants would prefer a system that looked *much less* like the traditional adversary process than it currently does. That is why simply reasoning analogically from physical liberty to parental rights does not tell us whether the procedural values associated with criminal proceedings should transfer to private custody disputes. As I have attempted to outline in this Essay, there are reasons to think that private custody proceedings should be designed according to different procedural values: simplicity, efficiency, collaboration, and avoidance of adversarial conflict. A system that honors the preferences of most of its litigants for these values can be consistent with the demands of due process.

That is not to say that there is no role for lawyers in a family court system reformed with these values in mind. On the contrary, these reforms will lead us to a productive vantage point from which to introduce more lawyers into the system—as counselors, negotiators, and drafters for most parties, or litigators in the few cases for which that is appropriate. And these services should

certainly be accessible to all, regardless of ability to pay. But until we redesign the family court system to better serve the families who need its help, simply adding lawyers won't fix it.