In Pursuit of Meaningful Civil Representation: Advocacy Strategy Proposals for an Integrated Civil Gideon and Legal Empowerment Approach

Sophia T. Slater

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IN PURSUIT OF MEANINGFUL CIVIL REPRESENTATION: ADVOCACY STRATEGY PROPOSALS FOR AN INTEGRATED CIVIL GIDEON AND LEGAL EMPOWERMENT APPROACH

Sophia T. Slater*

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* J.D. Candidate, 2024, Fordham University School of Law; B.A., 2018, Vassar College. I would like to express my sincere thanks to Professor Martin Flaherty, Professor George Conk, and the speakers at the Fordham Urban Law Journal’s 2023 Cooper-Walsh Colloquium and 2024 Symposium for discussion and feedback on early portions of this Comment. I am also grateful to the editors and staffers of the Journal, particularly Amanda Trau, Paris Rogers, and Grace Osgood, for their careful edits. Last but not least, thank you to my friends, family, and O who have supported me in law school and in life, especially my parents and brother who spent their vacations editing this piece. I am grateful to be surrounded by such intelligent and passionate people. May we live to see flourishing legal empowerment models and a civil justice system that, together, meaningfully protect all litigants seeking their day in court.
INTRODUCTION

“If we had had representation at the beginning, the eviction probably would not have happened.”¹ Cristina Quiñones-Betancourt, a nonprofit attorney from the organization Mobilization for Justice, made this remark about a client who had been evicted after missing rent payments and was seeking to get back his apartment.² Although Quiñones-Betancourt had a legal argument that her client’s Section 8 housing voucher should have counted toward the outstanding rent, an evicted person with a nonprofit legal attorney bearing an unmanageable caseload has an uphill battle squaring off with a well-represented landlord.³ The Legal Aid Society’s Chief Attorney of the Civil Practice, Adriene Holder, said the mechanism of legal aid is “extremely successful” when implemented, but explained the organization is “still turning away thousands of people because of the lack of capacity.”⁴

This situation in housing court is just one consequence of the general lack of a right to counsel for civil cases in the United States, which is producing progressively more dire outcomes. The impact of this lack of civil counsel is particularly disparate for those facing financial and racial barriers to legal assistance.⁵ These barriers prevent people not only from accessing legal help, but in some cases from seeking that help in the first place to inadequate education about their legal rights, financial and logistical obstacles, or

². See id.
³. See id. (“While an estimated 90% of landlords nationwide are represented by an attorney in eviction proceedings, only about 10% of tenants are [represented].”).
⁴. Id.
structural inequities baked into the U.S. judicial system.  Although the U.S. federal government has sounded the alarm on certain aspects of this issue, progress towards civil justice will require a more radical overhaul of how lawyers conceptualize the legal practice at large.

Two predominant approaches have emerged to address this access to civil justice crisis. One is the civil Gideon approach, which calls for a right to counsel in all civil cases as a due process guarantee, based on the landmark Supreme Court case in Gideon v. Wainwright that conferred a right to counsel for indigent defendants in all felony cases. The other approach is the legal empowerment movement, which advocates for a democratization of legal knowledge that would empower non-lawyers to become informed advocates within their communities. In existing scholarship regarding the access to justice crisis, these two approaches are often discussed to the exclusion of the other. This siloed research has produced findings critical to the development of each approach but also deepened tension between them. This Comment, however, takes the position that civil justice advocates should be pursuing both avenues, and that both are necessary but neither is sufficient on its own to alleviate the civil access to justice crisis.

This Comment explores the issue of the lacking civil right to counsel in the United States, analyzing existing solutions and making corresponding proposals. Part I provides a brief factual background. Part II outlines the existing approaches to resolving the access to civil justice crisis, and Part III proposes advocacy solutions in the vein of the existing approaches based on other existing models that could be applicable.


8. See infra Section II.A.
9. See infra Section II.B.
10. See Emily S. Taylor Poppe, Institutional Design for Access to Justice, 11 U.C. Irvine L. Rev. 781, 789 (2021) (proposing institutional designs for access to justice, including greater transparency from courts and regulatory reform of the legal profession, and faulting the civil Gideon movement as it “prioritizes access to legal expertise over other means of achieving satisfactory outcomes”). See generally Margaret Y.K. Woo et al., Access to Civil Justice, 70 Am. J. Comp. L. 89 (2022) (analyzing the prospects of a civil Gideon — including federal and state legislative proposals, the federal Legal Services Corporation, government and market-based funding solutions, technological advancements, and pro bono services — but without mention of the legal empowerment movement).
11. See infra Part II.
I. FACTUAL BACKGROUND

This Part will provide a brief factual background. Section I.A discusses the access to civil justice crisis, presenting statistics on disparate provision of legal services and exploring some of the reasons for that disparity. Section I.B explores the lack of civil right to counsel in the United States.

A. The Access to Civil Justice Crisis

The access to civil justice crisis has been acute for years. In 2022, the Legal Services Corporation (LSC) analyzed the “justice gap among low-income” people in the United States, which LSC defines as “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”\(^\text{12}\) During that year, 74% of low-income people reported facing at least one civil legal problem, and of those people, 92–93% did not receive “any or enough legal help.”\(^\text{13}\) The LSC estimated that of the problems for which low-income people would approach the organization for legal help, 51% of those problems would receive “some kind” of help, and of that 44% would not receive enough help to fully address the issue.\(^\text{14}\)

A 2021 joint report from the Hague Institution for Innovation of Law and the Institute for the Advancement of the American Legal System painted a similar picture.\(^\text{15}\) That report emphasized that even where litigants accessed local and federal agencies or courts to try to resolve a legal problem, “the results for procedural justice and outcome justice are often lower compared to other sources of help.”\(^\text{16}\) Further, using only one method of help was frequently inadequate to comprehensively resolve people’s legal problems; on average, solving a legal problem requires 3.2 interventions, with approximately 2.5 interventions from a given source of help.\(^\text{17}\)

In addition to issues receiving help, low-income people often struggle to seek help in the first place. The LSC survey reported that low-income people sought legal help for only 25% of substantial civil legal problems; the top reasons for this were cost, being unsure or doubtful whether a lawyer could be helpful, and a belief that the legal system may not treat low-income people

\(^{12}\) THE JUSTICE GAP, supra note 5, at 7. For purposes of this report, low-income was designated as people in households making 125% or less of the Federal Poverty Level. THE JUSTICE GAP, supra note 5, at 7.

\(^{13}\) See THE JUSTICE GAP, supra note 5, at 18, 48.

\(^{14}\) THE JUSTICE GAP, supra note 5, at 71, 74.

\(^{15}\) See generally JUSTICE NEEDS, supra note 6.

\(^{16}\) See JUSTICE NEEDS, supra note 6, at 9.

\(^{17}\) JUSTICE NEEDS, supra note 6, at 10.
More “obviously” legal issues for which low-income people sought help at higher rates included issues surrounding child custody as well as wills and estates, which are paradigmatically “legal” and people are more likely to be aware that lawyers are involved in these areas. Housing, employment, and income maintenance, were less likely to be recognized as “legal.” Compounding this, economically and racially marginalized people are more likely to have had negative experiences with the criminal justice system and public institutions in general, discouraging them from seeking future help and making it more appealing to be self-sufficient rather than seek governmental protections.

Reasons for these disparities stem in part from the disproportionate impacts of the access to justice crisis. Households with a survivor of domestic violence, or who have faced eviction issues, experience higher rates of involvement in multiple civil legal problems at the same time. Demographics that are particularly vulnerable to insufficient legal assistance include: “lower income, women, multiracial and Black[,] younger and middle-aged, and those living in urban and rural” (but not suburban) areas. This vulnerability manifests not only in more contact with the legal system, but more negative results once a legal issue does arise. As these groups continue to be disproportionately impacted by systemic injustice, they are likely to continue to have negative institutional experiences and therefore be reluctant to seek legal help, resulting in a “vicious cycle of civil legal problems.”

B. The Civil Right to Counsel (Or Lack Thereof)

The U.S. federal government does not guarantee a categorical right to state-funded representation in civil cases. The Sixth Amendment only

18. THE JUSTICE GAP, supra note 5, at 48–50. For the purposes of the report, “substantial” legal problems were those that respondents said affected them “very much” or “severely” rather than “moderately,” “slightly,” or “not at all.” THE JUSTICE GAP, supra note 5, at 37.
19. THE JUSTICE GAP, supra note 5, at 45.
20. See THE JUSTICE GAP, supra note 5, at 45.
22. See THE JUSTICE GAP, supra note 5, at 36.
23. See JUSTICE NEEDS, supra note 6, at 8.
24. Rebecca L. Sandefur, What We Know and Need to Know About the Legal Needs of the Public, 67 S.C. L. REV. 443, 443, 446–47 (2016) (“Populations that are vulnerable or disadvantaged often report higher rates of contact with civil justice situations, and greater incidence of negative consequences from these events.”).
25. See THE JUSTICE GAP, supra note 5, at 36.
confers the right to counsel to criminal defendants, implying that criminal defendants are “entitled to key procedural and substantive protections designed to give them a chance at a fair trial . . . when the weight of the government is pressed against them.”\textsuperscript{27} There is no corresponding protection for civil defendants. While individual states also generally do not provide for this as a categorical right, they may allow for certain types of civil representation through statute or court decision.\textsuperscript{28} State-level efforts do not fill the void of lacking federal regulation, which would ensure consistency and require that states devote substantial resources to this provision rather than relying on legal aid organizations or pro bono services.\textsuperscript{29} Indeed, the Supreme Court has not required procedural standardization of civil counsel provisions across states as long as they are materially in line with due process requirements, presumably out of concern for state sovereignty.\textsuperscript{30}

The Supreme Court has delineated certain conditions that would entitle a civil defendant to counsel, such as for juvenile delinquency proceedings.\textsuperscript{31} However, even for juvenile delinquency proceedings, this is not a categorical right but rather only for some phases of the proceeding, and even with a lawyer there is no guarantee regarding the quality or efficacy of the legal representation.\textsuperscript{32} Further, these Supreme Court decisions are judicial pronouncements subject to a changing Court composition rather than federal legislative entitlements, and since the 1980s, the Supreme Court has not found a categorical right to civil counsel.

\section*{II. EXISTING APPROACHES}

This Part will discuss the two primary approaches that advocates have put forth to address the access to civil justice crisis: (1) a civil right to counsel; and (2) legal empowerment. Sections II.A and II.B will discuss these

\begin{itemize}
\item \textsuperscript{29} \textit{See Cohen & Carroll, supra note 27} (discussing need for federal oversight of state-level efforts in the criminal right to counsel context).
\item \textsuperscript{30} \textit{See infra Section III.A} (discussing the civil \textit{Gideon} movement and state and local variations on civil counsel).
\item \textsuperscript{31} \textit{See In re Gault, 387 U.S. 1, 36–38} (1967); \textit{see also infra Section II.A} (discussing further jurisprudence preceding and succeeding \textit{Gault}).
\item \textsuperscript{32} \textit{See infra Section III.C} (discussing right to counsel in juvenile delinquency cases).
\end{itemize}
approaches in turn, seeking to understand their definition as well as the strengths and limitations of each.

A. The Civil Gideon Approach

The civil Gideon movement arose out of the Supreme Court’s holding in Gideon v. Wainwright, which held that indigent criminal defendants in all felony cases are Constitutionally entitled to counsel as a due process guarantee. Civil Gideon advocates argue that this expansion of the right to counsel to the felony context should also be applied to “pro se, low-income litigants in civil cases involving basic human needs.” According to such advocates, this expansion is not only warranted but necessary for “meaningful access to the courts.” This is not an arbitrary expansion; “[c]ivil cases can be as consequential, complex, and adversarial as criminal cases, implicating basic human needs such as housing, safety, health, and child custody.” The American Bar Association has also released materials that would seemingly indicate key legal industry stakeholders are taking this proposal seriously. Essentially, civil Gideon advocates take the position that if the right to counsel is afforded to criminal defendants due to the severity of criminal consequences, the severity of at least some civil consequences should also warrant the right to counsel to defendants in those cases.

Supreme Court jurisprudence on this issue is mixed. In 1967, the Gideon case was supported by the Supreme Court’s holding in In re Gault, which held that juveniles have a due process right to civil counsel for delinquency proceedings. However, just over a decade later in Vitek v. Jones, the Court softened this position, holding that prisoners facing involuntary transfer to a mental health facility had a due process right to “competent help” from a “qualified and independent advisor,” which was not necessarily full legal counsel. Around the same time, the Court in Lassiter v. Department of Social Services rejected an absolute right to counsel in claims to terminate parental rights, opting instead for a case-by-case balancing test of private, 


34. Tonya L. Brito et al., What We Know and Need to Know about Civil Gideon, 67 S.C. L. Rev. 223, 225 (2016).

35. Id.

36. Id. at 226.


38. 387 U.S. 1, 41 (1967).

That balancing test requires a determination of: (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) governmental interests “including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

The Court’s opting for a case-by-case balancing test rather than a categorical right is emblematic of its general reluctance to embrace a bright-line rule in this area.

In addition to analyzing the Mathews balancing test, Lassiter further imposed a new presumptive barrier that “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” This barrier came to issue in the 2011 case Turner v. Rogers, where the Court held that even though South Carolina had deficient procedures for nonsupport civil contempt hearings, an indigent noncustodial parent facing a potential civil incarceration was only required to receive “substitute procedural safeguards” that would confer “meaningful access to the courts.”

The ambiguity of this standard is a risk in that the basic required protection could be quite low, but conversely it allows for flexibility to assess each litigant’s situation on a case-by-case basis. It is unclear from Turner whether there would be a constitutional right to counsel were the matter more complex or only one party represented — neither of which was true in that case.

While the fate of this doctrine is still unclear and substantially undermined by many of the post-Gideon cases, it continues to be potentially viable from an advocacy perspective. The reality remains that many of these consequential civil cases are adjudicated and regulated through the courts, and non-lawyer assistance is not always comparable or adequate. Individual cities and states have recognized this in their local efforts to establish a right to counsel for particularly consequential types of civil cases, such as

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41. Mathews, 424 U.S. at 335.
42. Lassiter, 452 U.S. at 26–27.
43. Brito et al., supra note 34, at 228 (citing Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011)). In the child custody context of Turner, such “substitute procedural safeguards” were: “a formal notice informing the defendant that ability to pay was the central issue in the case; a form seeking information about the defendant’s ability to pay the child support owed; a hearing at which the defendant would be questioned about informed provided on the form; and a judicial finding on whether the defendant had the ability to pay the court-ordered support.” Id. (citing Turner, 131 S. Ct. at 2519).
44. See Brito et al., supra note 34, at 228.
housing. However, counsel is not always the panacea it is sometimes thought to be, and a bare right to counsel does not solve the problems of lawyer availability and lack of resources to support the lawyers who are available.

B. The Legal Empowerment Approach

The legal empowerment movement is one approach that has gained traction as a solution to the access to justice crisis. Now global in scope, the movement is a “rights-based methodology that democratizes law” in “many forms, from community paralegal programs, to community driven campaigns, popular education efforts, and community-driven litigation.”

One fundamental difference between the legal empowerment model and pro bono legal services or walk-in legal clinics is its embrace of “the notion that people who are not trained as lawyers can competently help people assess their rights and resolve their legal problems.”

This aspect has caused controversy and prompted objections that the movement constitutes the unauthorized practice of law (UPL), which is widely regulated and punished. A comment to the Model Rules of Professional Conduct explains that the definition of UPL “varies from one jurisdiction to another,” but ultimately, “limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”

In New York, the language is broad: “[p]ersons who are not licensed members of the Bar of the State of New York are prohibited

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46. See supra Section I.A; infra Section III.A.3 (discussing lawyer burnout).


49. See Ariadna M. Godreau-Aubert, Lawyering in Times of Peril: Legal Empowerment and the Relevance of the Legal Profession, 97 N.Y.U. L. REV. 1599, 1625–26 (2022) (“So-called unauthorized practice of law is perceived as a threat to the legal profession. Colleagues often characterize self-represented litigants as less intelligent, problematic, difficult, obstacles to agility, and nuisances in courts.”); see also Deborah L. Rhode & Lucy Buford Ricca, Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement, 82 FORDHAM L. REV. 2587, 2587–88 (2014).

50. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS’N 2019).
from engaging in the practice of law.” 51 Aside from the potentially problematic nature of discriminatory regulation in the legal profession, the Second Circuit has held that UPL limitations are constrained by the fundamental prohibition of the government’s “restraint on a citizen’s right to disseminate [their] views on important public issues.” 52

This Section explores how these competing interests manifest in the debate surrounding the legal empowerment movement. Section II.B.1 discusses an ongoing New York court case between a nonprofit seeking to train non-lawyers to provide legal help with debt collection proceedings and the New York State Attorney General. Section II.B.2 then traces the discriminatory history of professional regulation in legal practice, seeking to problematize the notion that extensive regulation of lawyering is a true solution to the access to justice crisis.

1. Upsolve, Inc. et al. v. James

The Upsolve, Inc. et al. v. James case in the Southern District of New York exemplifies the tension between efforts to support low-income, unrepresented litigants and New York’s prohibition on the unauthorized practice of law. 53 Plaintiffs are a nonprofit organization and affiliated non-lawyer individual who created a program to train non-lawyers to help low-income litigants with their one-page debt collection answer form. 54 Such information provided would be free and would not exceed assistance with the one-page form. 55 However, this action would constitute legal advice under New York law and violate the state’s prohibition on UPL. 56

To try to resolve this conflict, Upsolve sued the New York State Attorney General for a preliminary injunction on the Attorney General’s power to enforce the UPL rules against this program. 57 The court granted the preliminary injunction, holding that UPL rules were inapplicable since the plaintiffs’ program falls within First Amendment free speech, and therefore the UPL rules would have to be more narrowly tailored toward an important objective to infringe on such a fundamental right. 58 The court went on to

54. Id. at 103.
55. Id.
56. See id.
57. See id. at 103; see also N.Y. JUD. LAW §§ 476(a), 478, 484–85 (McKinney 2013) (addressing the unlawful practice of law).
58. See Upsolve, 604 F. Supp. 3d at 103.
note that the “balance of equities” favored plaintiffs because the program would address the problem of unanswered debt collection cases with an eye toward minimizing consumer or ethical harm, and the injunction as limited to this particular program would not threaten the “overall regulatory exclusivity of the legal profession.” 59 The New York Attorney General’s office has filed an interlocutory appeal to reverse the injunction, arguing that plaintiffs lack standing to sue, New York’s UPL statutes are likely to be upheld even under First Amendment scrutiny, and that a preliminary injunction is not in line with the public interest or equity.60

The legal advice that trained volunteers would provide under this program comprises both instructions on how to complete the form itself and also an evaluation of whether responding is advisable at all. Volunteers would rely on a training guide that instructs them in:

(1) determining whether the client could benefit from their advice; (2) confirming the limited scope of representation with the client; (3) advising the client whether it is in their best interest to answer the lawsuit against them; (4) advising the client on how to fill out the answer’s 24 checkboxes based on the client’s answers to a series of questions; and (5) advising the client on how and where to file and serve the answer themselves.61

Volunteers must adhere to the New York Rules of Professional Conduct and are obliged to refer clients to legal services organizations should the client’s needs exceed the scope contemplated by the training guide.62 Should the volunteers violate the training guide rules or related obligations, they are dismissed from the program and warned of the potential legal penalties under UPL rules or consumer-protection laws.63

The court’s attempt to assuage concerns about threats to the “overall regulatory exclusivity of the legal profession” speaks directly to the concerns expressed in opposition to a legal empowerment model.64 The plaintiffs in Upsolve, as well as many organizations advocating for similar democratization of legal help, are not attempting to operate fully outside of licensed legal practitioners.65 As the National Center for Access to Justice

59. See id. (explaining that the plaintiffs’ program is “carefully limited to out-of-court advice”).
60. See generally Brief for Appellant, Upsolve, Inc. v. James, 604 F. Supp. 3d 97 (S.D.N.Y. 2022) (No. 22-1345), ECF No. 62.
61. See Upsolve, 604 F. Supp. 3d at 104.
62. See id.
63. Id.
64. See id. at 103.
65. See Editorial Policy, UPSOLVE (2023), https://upsolve.org/editorial-policy/ [https://perma.cc/RUH6-CWP5] (last visited Mar. 2, 2023) (“Every article is written by a legal or financial professional and reviewed by a bankruptcy attorney before being published.”).
put it, “[w]e need to find a better balance, with new regulatory approaches that allow more help to obtain more help, while at the same time protecting people against unethical or incompetent providers.” But this argument begs the more fundamental question of whether the regulatory exclusivity of the legal profession continues to be a desirable goal. The following Section lays out the discriminatory practices that have historically stemmed from a desire for this regulatory exclusivity.

2. The Discriminatory Nature of Professional Regulation in the Practice of Law

As the court in Upsolve acknowledged, “[d]efining the ‘practice of law’ . . . is an elusive endeavor,” and efforts to do so have historically resulted in profoundly discriminatory regulations. The American Bar Association (ABA) was formed in the late 1800s to standardize the legal practice on a more scientific basis. In the early 1900s, the development of the modern law school and bar exam, including highly subjective character and fitness requirements, served as facially neutral mechanisms that enabled the exclusion of racial and ethnic minorities, immigrants, and women among others. It was also in this period that bar membership became mandatory, imposing additional financial burdens on aspiring lawyers, and the introduction of model rules of professional conduct cemented a narrow and exclusive view of what a proper lawyer was. Defining UPL in an extremely broad manner is yet another such exclusive practice. Imposing

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69. See id.
71. See Schultz, supra note 68.
these barriers on historically marginalized groups not only keeps them out of the legal profession but also prevents people of those identities from receiving legal services in an accessible and affordable way.73

Although the origins of professional regulation in the legal profession were either implicitly or explicitly exclusionary, even a regulatory effort with the best intentions may run a similar risk of institutionalizing the bias of the dominant group. The legal empowerment movement attempts to avoid this risk by emphasizing the importance of “democratizing” law rather than simply putting a different group in charge.74 This risk is also why government initiatives to provide lawyers for unrepresented defendants in certain types of proceedings do not make the legal empowerment movement moot. For example, New York City enacted Local Law 136 in 2017 to provide free legal representation for tenants in eviction proceedings before housing court with a household income at or below 200% of the Federal Poverty Guidelines.75 Such low-income defendants receive full representation, and those with a higher household income receive “brief legal assistance.”76 The city also provides legal services for tenants in administrative termination tenancy proceedings, not just those in housing court.77

While these are important and groundbreaking efforts, they would not solve the access to justice crisis even if adopted on a national scale, as there are inevitably fewer lawyers than tenants in need, especially in dense metropolitan areas such as New York City. The lawyers available are still products of an exclusionary legal system so they are unlikely to accurately reflect the diversity of the tenants.78 Keeping legal knowledge concentrated in a small, highly credentialed group of people is, in many ways, structurally oppositional to the democratization of knowledge that would be necessary to


73. See Schultz, supra note 68 (presenting data showing less diversity amongst attorneys results in less legal support for traditionally underrepresented populations).

74. See, e.g., Legal Empowerment, NAT’L CTR. ACCESS TO JUST., supra note 66 (“Democratizing the Law”); Legal Empowerment, N.Y.U. SCH. L. BERNSTEIN INST. FOR HUM. RTS., supra note 47 (defining legal empowerment as a “methodology that democratizes law and centers people in their own fight for justice”).

75. See N.Y. CITY DEP’T SOC. SERVS. OFF. CIV. JUST., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR FIVE OF IMPLEMENTATION IN NEW YORK CITY 2 (2022).

76. Id.

77. Id.

meet the legal needs of structurally marginalized populations that are more likely to be unrepresented.

III. PROPOSED ADVOCACY STRATEGIES

As laid out in Part II, legal empowerment and a civil right to counsel have strengths that would profoundly advance the fight to increase access to justice for litigants facing dire consequences in civil court. However, both approaches also have substantial drawbacks that cannot be ignored. Section III.A proposes a potential advocacy strategy for a legal representation approach based on the evolving Sixth Amendment sufficiently severe penalty standard. Section III.B proposes a strategy for a community-based legal empowerment approach based on a gun violence intervention program in the Bronx, New York.

A. Litigation Strategy for a Civil Right to Counsel Based on the Right to a Jury Trial for Deportable Offenses

The evolution of the Sixth Amendment right to a jury trial is an informative example of how the Supreme Court has come to analyze sufficiently severe penalties as weighing on Constitutional entitlements. The Court read an exception into the Sixth Amendment right to a jury trial for minor offenses without sufficiently severe direct penalties, which rendered non-citizens extremely vulnerable because even a minor offense is sufficient basis to deport them. In the 2010 case Padilla v. Kentucky, the Court held that deportation — a collateral offense in many criminal prosecutions of non-citizens — can properly be considered in the Sixth Amendment right to effective counsel analysis, although not a direct penalty, due to its severity as a penalty. Although this holding was in the context of the Sixth Amendment right to effective assistance of counsel, it has since been applied to the Sixth Amendment right to a jury. This blurring of the line between a direct and collateral offense in light of the severity of the outcome indicates the Court’s willingness to evaluate the practical implications of a conviction beyond just what is explicitly prescribed in the law. Although a civil Gideon entitlement would not pertain to the same right as in Padilla, it is possible that as the severity of deportation as an outcome swayed the Court’s right-

79. See Blanton v. City of N. Las Vegas, 489 U.S. 538, 541 (1989) (discussing how an offense’s “maximum authorized penalty” can help determine whether such offense is considered petty and consequently not protected by the Sixth Amendment right to a jury trial (quoting Baldwin v. New York, 399 U.S. 66, 68 (1970))).
to-effective-counsel analysis, the severity of eviction or losing custody could help sway the Court toward recognizing the necessity of a civil right to counsel.

This Section examines the impact of the sufficiently-severe-penalty standard, analyzing prominent cases that have interpreted the collateral consequence of deportation as sufficiently severe to warrant a jury trial for an otherwise petty offense. This Section then draws out aspects of this sufficiently-severe-penalty standard that may serve as a Sixth Amendment supplement to the Due Process Gideon argument for a civil right to counsel.

1. The Legal Standard of a Sufficiently Severe Penalty

The Supreme Court has established several exceptions to the Article III right to a jury trial. A criminal jury trial is not required for “petty” offenses. Historically, courts determined whether an offense was petty based on the subjective “moral stigma of an offense,” which proved to be an unwieldy standard. In an effort to create a more workable standard, the Supreme Court held in Baldwin v. New York that a court must analyze the severity of the potential penalty to determine whether an offense is petty, and an offense cannot be petty if the corresponding prison sentence would be longer than six months.

The test from Baldwin laid out the basic contours of the modern petty offense analysis. Under this test, courts are to examine the maximum penalty legislatively authorized, not what is actually imposed on a particular defendant, unless the legislature has not set a maximum penalty, in which case a court must look at the penalty actually imposed. Even if a defendant is on trial for multiple offenses that together — but not individually — would carry a maximum penalty of over six months, the collective penalty does not

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82. These exceptions are separate from the exception for impeachment cases, which is explicitly stated in the text of Article III. U.S. Const., art. III, § 2, cl. 3.
84. See John D. King, Juries, Democracy, and Petty Crime, 24 J. CON. L. 817, 826 (2022) (discussing inconsistent outcomes reached under the “moral stigma” approach).
85. See 399 U.S. 66, 68–69 (1970) (“In deciding whether an offense is `petty,’ we have sought objective criteria reflecting the seriousness with which society regards the offense, and we have found the most relevant such criteria in the severity of the maximum authorized penalty . . . . Applying these guidelines, we have held that a possible six-month penalty is short enough to permit classification of the offense as `petty[,]’”) (collecting cases)).
86. See id. at 70–71. This requirement was spelled out in Duncan, which predated Baldwin by some decades, and then reinforced in Baldwin and Blanton. See Duncan v. Louisiana, 391 U.S. 145, 161 (1968); Blanton v. City of N. Las Vegas, 489 U.S. 538, 543–44 (1989).
“transform the petty offense into a serious one, to which the jury trial right would apply.”87

While the Court has emphasized the primary importance of prison sentences as “objective indications” of seriousness,88 it has considered non-prison penalties that a legislature attaches to an offense.89 The Court held in Blanton v. City of North Las Vegas, Nev. that a defendant must show that non-prison statutory penalties, in combination with the maximum prison sentence, “are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious’ one.”90 Lower courts have also considered the length of a non-imprisonment penalty as supporting the seriousness of a crime.91 This analysis would typically exclude collateral consequences not explicitly contemplated by the legislature, such as fines or probationary periods.92

These holdings laid the groundwork for what has come to be known as the sufficiently-severe-penalty standard.93 The D.C. Court of Appeals has characterized the Blanton holding as a two-step test: (1) ascertain the penalties that could be imposed; (2) determine whether those penalties, “viewed together, are sufficiently severe to warrant a jury trial by comparison to the possibility of imprisonment for more than six months.”94

Importantly, this analysis applies even if a penalty applies to only a subset of defendants charged with a particular offense (e.g., deportation, which would only apply to non-citizen defendants, or prohibition of firearm possession due to domestic battery, which would only apply to gun

89. Blanton, 489 U.S. at 542 (“We thus examine ‘whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial.’” (quoting Duncan, 391 U.S. at 161)).
90. Id. at 543 (noting that offenses with potential sentences of six months imprisonment or less are not automatically categorized as petty but presumed petty).
91. See, e.g., United States v. Smith, 151 F. Supp. 2d 1316, 1317–18 (N.D. Okla. 2001) (finding a “lifetime prohibition on the possession of a firearm is a serious penalty” warranting a jury trial); Richter v. Fairbanks, 903 F.2d 1202, 1204 (8th Cir. 1990) (holding that a “15-year license revocation, considered together with the maximum six month prison term, is a severe enough penalty to indicate that the Nebraska legislature considers” the crime serious).
92. See, e.g., United States v. Chavez, 204 F.3d 1305, 1311 n.4, 1314 (11th Cir. 2000); see also United States v. Nachtigal, 507 U.S. 1, 5 (1993) (holding that “discretionary probation conditions . . . do not approximate the severe loss of liberty caused by imprisonment for more than six months”).
94. Bado, 186 A.3d at 1252.
owners). In this way, the sufficiently-severe-penalty standard is a case-by-case inquiry to ensure that an offense is truly petty before stripping defendants of their constitutional right to a jury.

2. Padilla v. Kentucky

In the 2010 case of Padilla v. Kentucky, the Supreme Court addressed the question of whether mandatory deportation was a collateral consequence rather than a direct penalty, and therefore outside the requirements of an attorney’s obligation to advise the defendants of consequences of a guilty plea under the Sixth Amendment guarantee of effective assistance of counsel. Defendant Jose Padilla was a lawful permanent resident who pled guilty to transporting marijuana in Kentucky on advice of his counsel, who did not inform him that deportation could result and conversely told him he “did not have to worry about immigration status since he had been in the country so long.” The Supreme Court of Kentucky ruled that Padilla did not have a claim for ineffective assistance of counsel on the basis that deportation is a collateral consequence, which is to say one not directly within the statutory sentencing authority of the trial court, and therefore his attorney did not have to inform Padilla that deportation could result from a guilty plea.

The Supreme Court reversed, holding that the severity of deportation as a collateral consequence, even though a civil rather than criminal sanction, warranted its inclusion in a Sixth Amendment right to effective assistance of counsel analysis. Although historically considered a “particularly severe ‘penalty,’” the Padilla court viewed deportation as “uniquely difficult to classify as either a direct or collateral consequence” and therefore properly treated as a sufficiently severe consequence to trigger a claim under the Sixth Amendment right to effective counsel.

To be clear, the Padilla holding was concerned with the right to effective assistance of counsel but did not actually rule on the underlying right to counsel, even though deportation is technically a civil consequence.

95. For a critique of this aspect of jury-trial right analysis, see generally Paul T. Crane, Incorporating Collateral Consequences into Criminal Procedure, 54 Wake Forest L. Rev. 1 (2019).
97. Id. at 359.
98. Id. at 364.
99. Id. at 366.
100. Id. at 365 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).
101. Id. at 366.
Further, the Sixth Amendment is concerned with criminal proceedings, not civil proceedings, and therefore in theory the “requirement for effectiveness [of counsel] should not be relevant to deportation proceedings,” although circuit courts have made this connection under a due process approach. And yet, over the protests of Justice Scalia, who argued in dissent that the Court should have engaged in a due process analysis, the majority in Padilla did not rely on due process principles in its holding, but rather laid the groundwork for what has come to be known as the sufficiently-severe-penalty standard. The following Sections analyze courts’ subsequent interpretations of this standard.

3. Right to a Jury Trial in Proceedings for Deportable Offenses

The cases of Bado v. United States and People v. Suazo both highlight the controversy over the right to a jury trial based on the severity of the potential penalty. In both cases, a foreign national without American citizenship was on trial for a criminal charge; a criminal proceeding usually triggers the right to a jury trial under the Sixth Amendment and Article III of the Constitution. However, both Jean-Baptiste Bado and Saylor Suazo faced charges carrying penalties of six-month imprisonment or shorter, which rendered those crimes presumptively petty because they fell below the severity threshold that triggers a constitutional right to jury trial under Supreme Court precedent. Although both men would be made vulnerable to deportation if convicted, deportation is considered a collateral civil consequence as opposed to a direct criminal penalty and therefore had historically not triggered a right to a jury trial despite the severity of deportation as a consequence. This lack of jury trial entitlement left non-citizens in an extraordinarily vulnerable position without one of the fundamental due process rights conferred by the Constitution. Despite this

103. Id.
104. Id.; see also Peter L. Markowitz, Deportation is Different, 13 U. PA. J. CONST. L. 1299, 1320 (2011).
105. See Padilla, 559 U.S. at 391–92 (Scalia, J., dissenting) (“Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of his claim (and if he has properly preserved it) the state court can address it on remand. But we should not smuggle the claim into the Sixth Amendment.”).
107. See generally Bado, 186 A.3d; Suazo, 32 N.Y.3d; U.S. CONST. amend. VI; U.S. CONST. art III, § 2, cl. 3.
predicament, both Bado and Suazo were granted jury trials for their otherwise minor offenses based on the severity of deportation as a consequence. The D.C. Court of Appeals and the New York Court of Appeals, respectively, relied extensively on the Supreme Court ruling in *Padilla* in articulating a sufficiently-severe-penalty standard.

**i. Bado v. United States**

In *Bado v. United States*, Jean-Baptiste Bado was convicted of misdemeanor sexual abuse of a minor after a bench trial. Bado had previously applied for asylum upon fleeing Burkina Faso, but his misdemeanor charge paused his asylum proceedings because if he were convicted, he would be barred from receiving the requested asylum and deported. His demand for a jury trial at the outset was denied, as the potential imprisonment would not have been longer than six months and therefore did not trigger the right to a jury trial. He was acquitted of two charges and convicted of one, requiring him to serve a 180-day sentence, pay a $50 fine, and register for ten years as a sex offender. Following this conviction, the government sought to deport Bado.

Bado appealed the conviction. The D.C. Court of Appeals reversed his conviction in a divided decision on the ground that Bado’s right to a jury trial had been violated. After granting the government’s petition for rehearing en banc, the Court of Appeals reversed and remanded the case “to permit appellant to have a trial free from structural error and to receive the ‘basic protection’ of a trial before a jury.” That court applied *Baldwin* as clarified by *Blanton*, which it called a “*Blanton* analysis,” to the facts of Bado’s case.

In applying a *Blanton* analysis, the D.C. Court of Appeals addressed whether the possibility of deportation rebuts the presumption that the offense was petty due to its relatively short prison sentence. That court analogized deportation to incarceration, stating that in its forced physical separation from established professional and community ties, deportation was similar

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110. See generally *Bado*, 186 A.3d; *Suazo*, 32 N.Y.3d.
111. *Bado*, 186 A.3d at 1246.
112. *Id.* at 1247.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281–82 (1993)).
119. *Id.* at 1250.
120. *Id.*
“in severity [to] the loss of liberty that a prison term entails.”

Looking also to Supreme Court cases on deportation, the Court of Appeals reasoned that the Court had “long recognized that deportation is a particularly severe ‘penalty’” comparable to “banishment.” Ultimately, the Court of Appeals reasoned that deportation was “so ‘onerous’ a penalty for conviction that it presents the ‘rare situation’” meriting a jury trial for an otherwise petty offense.

Much of the government’s case boiled down to whether considering deportation was proper under Blanton. The government argued that deportation was a “civil sanction” rather than a penalty for the offense in question, that it should not be considered here because it was authorized by federal rather than state legislation, that courts previously held deportation was not a punishment, and that it was a determination that D.C. courts were not “competent” to make. The D.C. Circuit Court rejected these arguments in turn.

First, it held that Blanton and other relevant cases did not distinguish between civil and criminal penalties that were to be considered, and in any case non-regulatory deportation was likely a criminal remedy as provided by the Immigration and Nationality Act (INA) as amended in 1996. The D.C. Court of Appeals further rejected the government’s contentions that the sentencing court lacked authority to order deportation, and that a non-citizen receiving a jury trial where a citizen would not presented an “anomaly.” Neither of these factors were made explicit in Blanton, the D.C. Court of Appeals reasoned, and therefore were outside the scope of the test that required a case-by-case analysis of the penalties a particular defendant faced. The court likened the differential penalty between citizens and non-citizens to that between a defendant who is facing a more severe offense for a repeat offense and one who has not committed a previous offense.

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121. Id. (quoting Blanton v. City of N. Las Vegas, 489 U.S. 538, 542 (1989)).
122. Id. at 1251 (quoting Padilla v. Kentucky, 559 U.S. 356, 365, 373 (2010)). The court underscored this point, further stating that “[r]emoval that results from conviction erects a bar to entry into the United States, with all the grave consequences that preclusion entails: loss of our country’s constitutional protections, the ability to engage with its social institutions, and access to educational and economic opportunities.” Id.
123. Id. at 1251–52.
124. Id. at 1252.
125. Id.
126. Id. at 1253–54 (recognizing that the Supreme Court has “soundly rejected the notion that removal is merely a collateral consequence of criminal conviction, distinct from a criminal penalty” (citing Padilla, 559 U.S. at 364)).
127. Id. at 1255–56.
128. Id.
129. Id.
Second, the D.C. Court of Appeals held that the fact that deportation was the result of a federal statute did not preclude a court from taking it into account.\textsuperscript{130} Relying on \textit{Blanton}’s statement that considered penalties should be those “resulting from state action, e.g., those mandated by statute or regulation,” the court considered deportation as a penalty arising from a statute that was within Congress’ power to pass.\textsuperscript{131} Third, the D.C. Court of Appeals declined to apply cases cited by the government holding deportation not to be a “punishment,” as they were decided in the context of Constitutional rights other than the Sixth Amendment.\textsuperscript{132} Fourth, the court was unpersuaded by the government’s arguments that the court was unequipped to determine deportability, holding that inefficiencies in judicial economy do not outweigh the duty of the court to ensure a defendant is receiving their Constitutional protections.\textsuperscript{133}

\textit{ii. People v. Suazo}

A few months after the D.C. Circuit Court decided \textit{Bado}, the New York Court of Appeals reached a similar holding in \textit{People v. Suazo}.\textsuperscript{134} Saylor Suazo was a non-citizen charged with third-degree assault, second-degree unlawful imprisonment, criminal obstruction of breathing or blood circulation, child endangerment, menacing, and second-degree harassment.\textsuperscript{135} These charges were consolidated with a later contempt charge, after which the government reduced certain charges to class B misdemeanors, none of which would have a maximum sentence of longer than six months.\textsuperscript{136} With jury trial unavailable, Suazo continued to assert his right to a jury trial on the basis that he was a non-citizen now facing the risk of deportation if convicted, making these charges serious.\textsuperscript{137}

Suazo was convicted of most of the charged offenses, and the Appellate Division affirmed his conviction on the grounds that deportation was a collateral consequence that was not sufficient to entitle the defendant to a jury trial.\textsuperscript{138} As a matter of first impression, the New York Court of Appeals held that if a non-citizen can show that their charged crime could potentially

\textsuperscript{130} \textit{Id.} at 1257–58.
\textsuperscript{131} \textit{Id.} at 1257.
\textsuperscript{132} \textit{Id.} at 1259.
\textsuperscript{133} \textit{Id.} at 1260–61.
\textsuperscript{134} See generally 32 N.Y.3d 491 (N.Y. App. 2018).
\textsuperscript{135} \textit{Id.} at 494.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 494–95.
result in deportation, they are entitled to a Sixth Amendment right to a jury trial.\textsuperscript{139}

The Court of Appeals adopted Suazo’s position that deportation was a “sufficiently severe penalty to rebut the presumption that the crimes are petty.”\textsuperscript{140} That court considered the Supreme Court’s words in \textit{Padilla} that under the INA, should a non-citizen be convicted “removal is practically inevitable.”\textsuperscript{141} Citing \textit{Bado}, the \textit{Suazo} court drew a parallel between deportation and incarceration, especially with respect to the loss of liberty, and also emphasized the indefinite nature of deportation that could be more severe than a relatively short imprisonment.\textsuperscript{142} A recent New York case before the Court of Appeals also “recognized the profound significance of deportation as a consequence of a criminal conviction.”\textsuperscript{143}

In applying the \textit{Blanton} test as refined in \textit{Baldwin}, the New York Court of Appeals rejected the government’s argument that deportation was just a civil collateral consequence and therefore not a penalty for purposes of a Sixth Amendment analysis.\textsuperscript{144} That court explained deportation has punitive aspects that are similar to criminal penalties, and as it is “uniquely difficult to classify as either a direct or a collateral consequence,” it was not categorically exempted from a criminal Sixth Amendment analysis.\textsuperscript{145} As in \textit{Bado}, the court in \textit{Suazo} noted that the 1996 amendments to the INA made it much more likely that a non-citizen defendant is deported following a state law conviction, and that the deportation could be imposed flowing solely from a conviction with no intervening influences.\textsuperscript{146} The Court of Appeals’ analysis here suggests that in light of the severity of deportation as a consequence, a severe penalty inquiry need not be strictly constrained by the traditional domain of criminal penalties if doing so would undermine the purpose of the Sixth Amendment.

The Court of Appeals then analyzed the New York state law governing constraint of jury trials. New York Criminal Procedure Law 340.40 requires local criminal courts to conduct bench trials except for misdemeanors, where a defendant is entitled to a jury trial unless the maximum imprisonment is six months or less.\textsuperscript{147} However, the Court of Appeals held that to the extent

\begin{itemize}
  \item 139. \textit{Id.} at 508.
  \item 140. \textit{Id.} at 499.
  \item 141. \textit{Id.} (quoting \textit{Padilla} v. Kentucky, 559 U.S. 356, 363–64 (2010)).
  \item 142. \textit{Id.} at 500.
  \item 143. \textit{Id.} (citing People v. Peque, 22 N.Y.3d 168, 176 (2013)).
  \item 144. \textit{Id.} at 501.
  \item 145. \textit{Id.} (citing \textit{Peque}, 22 N.Y.3d at 190, 192).
  \item 146. \textit{Id.} at 502–04 (noting that in \textit{Padilla} the Supreme Court considered deportation as a sufficiently serious potential outcome that impacts of what defense counsel must inform their client).
  \item 147. \textit{N.Y. CRIM. PROC. LAW} § 340.40 (2022).
\end{itemize}
that it conflicts with the Supreme Court’s interpretation of federal law, the state law is curtailed.148 The Court of Appeals rejected the government’s federalism argument that it was impermissible to allow the federal legislature’s intent to affect the implementation of state legislation where the state legislature has not independently expressed a similar intent.149 This argument was not an issue, according to the majority, because a legislative body “authorized to attach a penalty to a state conviction has determined” deportation is warranted, even if it was not the same one that enacted the offense.150

4. Applications to a Civil Right to Counsel

These cases could complement *Gideon*’s due process holding to show that for criminal charges in the context of the Sixth Amendment, true consequences matter beyond what is simply statutorily prescribed. The findings in *Bado* and *Suazo* speak to the flexibility of the *Blanton* test and the durability of the *Padilla* court’s inclusion of deportation in Sixth Amendment analysis. As lower courts start to interpret the jurisprudence that led to *Padilla* and apply it to the civil consequence of deportation as related to criminal misdemeanor cases, the contours of the sufficiently-severe-penalty standard have begun to take shape. This standard can be incorporated into civil *Gideon* advocacy efforts to demonstrate that it is essential to consider the severity of consequences when determining whether a defendant’s Constitutional rights have been protected, and that the Supreme Court and lower courts have indeed endorsed this approach in multiple cases decades apart.

Should the Supreme Court face the issue of a civil right to counsel in the future, lawyers could argue that the severity of typical outcomes in many civil proceedings warrant a civil right to counsel. In 1893, the Supreme Court articulated the severity of deportation as a penalty in *Fong Yue Ting v. United States*, reasoning that “it needs no citation of authorities to support the proposition that deportation is punishment. Every one [sic] knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment.”151 Although a civil defendant will not necessarily be deported as a penalty of

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148. *Suazo*, 32 N.Y.3d at 498 (holding the New York law “exception providing for nonjury trials of certain misdemeanors in New York City does not serve to deny a defendant subject to that exception the opportunity to establish that the charged crimes are considered serious enough by society, based on the penalties associated therewith, to entitle the defendant to a jury trial as guaranteed by the Sixth Amendment”).

149. *Id.* at 504.

150. *Id.*

151. 149 U.S. 698, 740 (1893).
conviction, they run the distinct risk of losing their home, family, business, and property, among others. To say that not even the most severe of such consequences does not warrant a right to counsel, where that right is categorically granted to non-minor criminal convictions due to the severity of those crimes, is not only inhumane but incongruous with the spirit of the rights contained in the Sixth Amendment.  

As already shown in the cases of *Bado* and *Suazo*, the sufficiently-severe-penalty standard lends itself to applications beyond just its original context of the right to effective assistance of counsel and is in line with multiple states’ policy goals. *Gideon* addresses the prospective right to counsel when two conditions — indigent defendant and felony charge — are met. *Padilla* addresses the retrospective right to effective assistance of counsel when deportation is a collateral consequence due to its severity as a penalty. *Padilla* and *Gideon* together underscore the crucial importance of guaranteeing meaningful protections to structurally disadvantaged defendants if courts are to fulfill their Constitutional mandates. In civil cases regarding basic human needs, the necessary conditions for both cases are present: the defendants are generally low-income or otherwise unable to afford private counsel, and the consequences of losing one’s home, children, or money, among others, are almost invariably devastating. Both of these holdings bolster the case for an expansion of the right to counsel for civil cases, and as *Padilla*’s application to jury trials for deportable offenses continues to wind its way through the lower courts, there is hope that the sufficiently-severe-penalty standard will only continue to be entrenched and expanded to multiple applications. As evidenced in *Bado* and *Suazo*, *Padilla* and the sufficiently-severe-penalty standard have the potential to provide fresh Sixth Amendment support to the Due Process civil *Gideon* argument and should be incorporated as part of the ongoing advocacy for a civil right to counsel.

**B. Gun Violence Intervention Program as a Model for Legal Empowerment Initiatives**

On the legal empowerment side, UPL laws and the sustainability concerns of existing organizations pose significant barriers to legal democratization efforts. One model that legal empowerment organizations could learn from is the Stand Up to Violence (SUV) program out of the Jacobin Medical

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152. See U.S. CONST. amend. VI (addressing defendant entitlements as to the jury, venue, charges, confrontation of witnesses).
Center in the Bronx, New York, a New York State preventative program to address the epidemic of gun violence and expand services to support victims of violent trauma. This Section describes how the SUV program works before identifying aspects thereof that may be applicable to developing a legal empowerment initiative.

1. The Jacobi Medical Center’s SUV Program

Established in 2014, SUV is the Bronx iteration of the New York State SNUG Outreach program which is aimed at reducing gun violence involvement among youth through local, community-based interventions. SNUG directly engages individuals in a community causing violence, as well as those impacted, through street outreach workers who live in the target communities. SUV maintained this model of having outreach workers as well as street violence disrupters — frequently referred to as “credible messengers” — licensed social workers, pediatricians, and local clergy community liaisons on its staff. All programs supported by the state under the SNUG umbrella require 40 hours of training for new staff and 32 hours of management training for new supervisors. SUV has been widely viewed as a success, contributing in its first eight years to a 55% decrease in gunshot wounds in the areas where it is operational compared to surrounding precincts.

The credible messengers that SUV deploys are typically people from the community who have previous involvement in violent crime in the area and therefore have firsthand knowledge of what community members are facing. These “violence interrupters” are tasked with intervening in acute


158. Id.

159. Id.; *Stand Up to Violence (SUV)*, supra note 156.


conflict, such as preempting a retaliatory shooting, and outreach workers work on violence prevention through education and mentorship.\textsuperscript{163} This dual approach allows the program to be both proactive and reactive, flexible enough to respond to evolving crises while also attempting to mitigate the conditions that are producing the violence in the first place. The presence of credible messengers is crucial to the program’s success. As SUV Director of Outreach Pastor Jay Gooding put it, at-risk youth will look up to the credible messengers as people who have “been there, done that.”\textsuperscript{164} These messengers are not only credible to community members causing violence, but also to those impacted by violence who need assistance navigating that trauma.

A unique aspect of SUV compared to other SNUG programs is that it operates out of a hospital, therefore increasing its capacity to provide both medical and social care.\textsuperscript{165} Within the hospital, four supervisors and one hospital responder from SUV are designated to treat violent trauma patients.\textsuperscript{166} Outside of the hospital, 15 outreach and social workers are dedicated to support and intervention services, in line with the violence disrupters described above, seeking to intervene in immediate crises and provide the medical team with additional background about how a violent injury occurred so the doctors can better treat the patients.\textsuperscript{167} This intervention work is in addition to the mental health and mentorship support that is already provided.\textsuperscript{168}

The project, however, is not complete. Dr. Noe Romo, who was Chief Resident at Jacobi Medical Center, stressed that gun violence was still the leading cause of death in children ages 1–24, and the “environmental impact” of this violence was massively detrimental to community members.\textsuperscript{169} This perspective underscores the importance of including preventative educational measures and other interventions that substantively mitigate the underlying causes of the violence in addition to dealing with the injuries arising from violent trauma as they occur. Dr. Romo said that doctors “need to start thinking outside of the box.”\textsuperscript{170} By the time a patient is in a hospital, the violence has occurred and the impact of that violence will reverberate

\begin{footnotesize}
\textsuperscript{163} See id.
\textsuperscript{164} See id.
\textsuperscript{166} See id.
\textsuperscript{167} See id.
\textsuperscript{168} See id.
\textsuperscript{169} See id.
\textsuperscript{170} See id.
\end{footnotesize}
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throughout the community, likely for the lifetimes of many people, and possibly engendering further violence.

2. Applications to a Legal Empowerment Initiative

Aspects of the SUV model directly speak to gaps that currently exist within proposed regulatory reform in the legal empowerment movement. Dr. Rebecca Sandefur’s research suggests that certain non-lawyer models that do not charge fees, and therefore have not been attacked by the ABA or local law enforcement, may be viable options. However, given the New York Attorney General’s vehement opposition and appeal in Upsolve, it seems increasingly unlikely that such operational models will remain immune forever. Dr. Sandefur highlights regulatory reform as a viable solution to the problem of lack of funding, advocating for a free-market “legal services ecology” that would be targeted to demonstrated community needs, timely to resolve such needs, communicated through trustworthy channels, and transparent so community members can make informed choices. This ecology would operate on the free market based on fees collected for services, and would support communities in pursuing the justice they have identified as most pressing.

A legal empowerment initiative based on SUV would fulfill almost all these goals, even if states do not implement regulatory reform. It would expand legal services providers to adequately trained and supervised volunteers within the local community and allow for flexibility in implementation to reflect the particular needs of a given population. One of the key benefits of SUV is its close partnership with a hospital, which provides extensive institutional support and medical expertise, that allows medical professionals to lend their expertise to this crucial endeavor without having to manage all aspects of it. This localized expertise will also increase an organization’s ability to identify and evaluate pressing local community needs. The identity of the most helpful institutional partner may be

171. There are initiatives elsewhere in the world that have been providing the kind of non-lawyer legal assistance contemplated by the legal empowerment movement. See, e.g., Learn More About Citizens Advice, CITIZENS ADVICE, https://www.citizensadvice.org.uk/about-us/ [https://perma.cc/D62N-U3E9] (last visited Mar. 3, 2024) (England, Northern Ireland, Scotland, Wales); Chapman, supra note 48, at 183–85 (surveying other countries’ legal empowerment initiatives). Although beyond the scope of this Comment’s focus on domestic advocacy models, such initiatives are important and there is much to learn from them in the development of a comparable model in the United States.
173. Id.
174. Id.
community-dependent, but it should be an institution with lawyers and resources who can in turn determine how best to deploy the volunteers. Such an institution could be a legal aid provider or a for-profit law firm, with lawyers who can supervise non-lawyer volunteers’ activities. The doctors at Jacobi Medical Center are not training SUV staff to perform surgery in the field; rather, they are teaching volunteers what information is most useful to gather, how they can effectively intervene to at least mitigate if not avoid injury, and strategies to target different people involved in community violence based on scientific evidence.

An SUV-based model diverges from Dr. Sandefur’s free-market proposal in several key aspects: it would be predominantly funded by state and local governments, and administered locally rather than through private organizations. Public governmental entities are subject to higher reporting and transparency requirements than private companies, and advocates should push for a government commitment to sponsoring this kind of program. Administering these programs locally will allow flexibility to best reflect the communities’ needs, as seen in the unique aspects of SUV compared to other SNUG programs, and make the legal help the most effective. This will also allow for better identification of credible messengers who can spread preventative education and serve as reliable sources of information so community members can better identify legitimate sources of legal support and will be more likely to seek that help.

Legal Hand in New York City is a legal empowerment organization already operating in a similar vein. Present in the Crown Heights, Jamaica, and Tremont neighborhoods of New York, this program recruits volunteers from the local community to “provide free legal information and referrals . . . including help with navigating the social services system, completing online legal forms, and drafting form letters.” These volunteers are supervised by a legal services attorney at each storefront

175. While this proposal raises questions of how to regulate the behavior of non-lawyer volunteers, particularly with respect to client privileges, the ABA has long contemplated the involvement of non-lawyers in legal practice when supervised by lawyers. See MODEL RULES OF PROF. CONDUCT R. 5.3 cmt. 3 (AM. BAR ASS’N 2000) (“A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client . . . . When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. The extent of this obligation will depend upon the circumstances.”). This proposal would not exceed the case-by-case obligations that the ABA describes here.

176. See supra Section IV.C.1.

177. See Sternberg Greene, supra note 21, at 1314–16 (describing importance of taking community attitudes and experiences into consideration when crafting policy).

location to “train and assist volunteers.” The Center for Justice Innovation, an independent nonprofit founded by the New York State Unified Court System, runs Legal Hand along with the Unified Court System, the Legal Aid Society, Legal Services NYC, and New York Legal Assistance Group. This model achieves many of the objectives advanced in this Section, particularly as to recruitment of local volunteers as credible messengers and supervision by an attorney. However, the volunteers themselves cannot offer legal advice and there is only one supervising attorney, “leaving people to figure out what kind of problem they have and make choices between different possible responses on their own.”

Further, while Legal Hand is supported in part by the state government-funded Unified Court System and is in partnership with other New York-area legal assistance groups, a single-digit number of attorneys across Legal Hand offices is insufficient in light of the staggering community need and legal aid attorney burnout. The lack of resources and constraints stemming from UPL prohibitions result in incomplete help being delivered to communities that are often systemically deprived of access to adequate legal representation.

The examples of Legal Hand and Upsolve underscore how crucial it is to have a holistic program that has adequate attorney support and is sustainably funded by local governments. In the case of the Upsolve company, while the legal advice is largely confined to filling out a one-page debt collection form, non-lawyers are also evaluating aspects such as whether it is in the client’s best interest to answer the lawsuit, which is not always an easy answer even for licensed lawyers. It is also unclear whether the lawyers who review Upsolve resources are easily accessible or can otherwise advise on issues, undercutting the organization’s transparency. Better bifurcating the evaluative aspects from the non-evaluative aspects and incorporating an institutional partnership that is based locally will likely lead to an optimal outcome of adequately regulated legal practice that confers targeted and

179. See id.
180. See id.
182. See Legal Hand, supra note 178.
183. See, e.g., Max Rivlin-Nader, ‘Every Lawyer in My Unit is Drowning’: New York Civil Attorneys Strike After Eight Months Without a Contract, HELL GATE (Feb. 21, 2023, 6:16 PM), https://hellgatenyc.com/ny-civil-attorneys-on-strike [https://perma.cc/CU7S-5GR6] (“Attorneys with New York Legal Assistance Group, which provides civil legal representation to thousands of New Yorkers navigating the government’s arcane courts systems, are striking as they see workloads increase with no commensurate raises.”).
timely benefits to community members in need. The most compelling argument for an SUV-based model is that the program has worked for over a decade to tremendous results, and has the local institutional knowledge to craft strategies for implementation. As SUV helped Jacobi Medical Center doctors have fewer and less severe gunshot cases, a similarly designed legal empowerment organization could help produce fewer and less severe civil court cases through responsible and ethical outsourcing of legal-adjacent services.

C. Why Both Approaches Must be Implemented Together

Neither the civil Gideon approach nor the legal empowerment approach on its own is sufficient to resolve the current access to justice crisis. The history of the right to civil counsel in juvenile delinquency cases is just one example of the inadequacy of a single solution. In the 1967 case of In re Gault, the Supreme Court held that in a juvenile delinquency case “which may result in commitment to an institution in which the juvenile’s freedom is curtailed,” the juvenile had a right to counsel they retained or appointed to them if indigent.185 This right has since been reflected in state statutes across the country, and yet even decades after In re Gault children were not routinely receiving “zealous, client-directed” representation.186 In some cases, child defendants may waive their right to counsel due to misconceptions about their legal prospects pro se and the severity of alleged crimes, or even pressure from courts or family members to proceed unrepresented.187 Other times, poor children fall outside the technical definition of indigency and are forced to seek counsel their families may not be able to afford or easily access.188 The institutional and societal barriers to acquiring a lawyer do not disappear simply because the Court has granted a right to counsel.

Even with counsel, juvenile defendants can continue to face substantial obstacles. A right to counsel is not a right to quality counsel, and problems affecting the caliber of representation include untenable caseloads, insufficient training and resources, and low salaries.189 Further, especially in the case of children, there may be a presumption that lawyers know better than their clients and therefore can act as “best-interests advisors rather than

185. 387 U.S. 1, 41 (1967). The Court reached this conclusion under a Due Process Clause analysis rather than a Sixth Amendment right-to-counsel analysis. See generally id.
187. Id. at 104–05.
188. Id. at 106.
189. Id. at 107.
as zealous advocates for their clients’ express preferences.”190  Lastly, as In re Gault only guaranteed counsel for phases of a proceeding that could “result in commitment to an institution,”191 a lack of representation in other phases can leave a juvenile defendant with inadequate representation while still technically complying with the law.192

As demonstrated in the example of the right to civil counsel in juvenile delinquency cases, with or without counsel defendants often face substantial difficulties in a legal proceeding. Lawyers have a technical and specialized skillset that is undoubtedly invaluable in courts, especially for advising clients of their rights, explaining the charges they are facing, and crafting a cohesive legal strategy from the initial appearance through discovery and trial. These advantages result not simply from a lawyer having a higher-education degree or learning the relevant law, but also through previous practical experience that cannot easily be conferred on a non-lawyer. On the other hand, the mere presence of qualified counsel does not negate the structural and personal obstacles that a disadvantaged defendant may face. If a client does not know their rights or have other avenues to understand their legal predicament, they are at the mercy of a lawyer’s hopefully good intentions and ethical practices.

Both approaches are necessary to solve this issue. A legal empowerment movement that includes preventative educational measures will allow structurally disadvantaged people to be more aware of their legal rights and obligations, ideally avoiding an adversarial civil legal interaction in the first place. Should a civil legal situation arise, a civil right to counsel would substantially improve a defendant’s chances of prevailing in regulatory or court proceedings as they will benefit from the lawyer’s skillset and experience. In tandem, legal empowerment would enable defendants to better assess their options, more accurately determine whether they need a lawyer, and if so, better advocate for themselves as clients. Rather than evaluating the efficacy of each against the other, these two approaches should be viewed as a combined symbiotic system that will best ameliorate structurally disadvantaged populations’ civil legal marginalization.

CONCLUSION

Neither a purely legal representation approach nor a purely legal empowerment approach is sufficient to fully address the civil access to

190. Id.
191. 387 U.S. at 41.
192. Hunt Federle, supra note 186, at 106–07 (“[L]awyers are seldom appointed to represent children at initial proceedings or detention hearings. Moreover, there is considerable evidence that attorneys for children fail to investigate or file pretrial motions and provide little or no assistance during or after the dispositional hearings.” (citations omitted)).
justice crisis that the United States is facing, and both approaches have room for development from their current iterations. Ultimately, the United States must draw on stakeholders in all these sectors to create a cohesive legal representation scheme that meets communities’ needs in a sustainable manner. This scheme will require accepting the premise that a legal system that only serves the few is, in fact, not a functioning legal system within the meaning of the Constitution. Legal practitioners and policymakers cannot ignore the problems or the models within the country that are already successful. Even one more person losing their home, family, or money without adequate representation is one too many. Structurally disadvantaged populations must not continue to be collateral damage in our civil legal system.