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Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law that the Social Contract Demands?

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Abstract

Most European and several countries elsewhere in the world have recognized a right to counsel in many or most civil cases for as long as decades or even centuries - and many of these countries are willing to spend, proportionately, anywhere from three to twelve times as much of their national income as the U.S. currently does on the provision of counsel to their lower income populations in civil cases. This Article examines how courts around the world have interpreted the constitutional provisions emanating from the theory that underpins the right to equality before the law and why these decisions are relevant to courts in the U.S. The Article then describes how nations that have the right as a matter of statutory or constitutional law have implemented it. This leads to discussion of a draft generic state statute that would apply some of the lessons learned from the foreign experience to the American context. Finally, the Article considers the likelihood that American jurisdictions will adopt the right and make the level of financial commitment that so many other nations already have made.

KEYWORDS: access to justice, civil law, comparative law

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Earl Johnson, Jr.[*]

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INTRODUCTION

My assignment in this symposium's dialogue about the potential of a right to counsel in civil cases in the United States is to supply a foreign perspective—to suggest what, if anything, the United States might have to

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learn from what has happened abroad as to this right. In one sense, it would be possible to merely provide a brief overview in a single sentence, and end the article. That sentence would read: *Most European and several countries elsewhere in the world have recognized a right to counsel in many or most civil cases for as long as decades or even centuries—and many of those countries are willing to spend, proportionately, anywhere from three to twelve times as much of their national income as the U.S. currently does on the provision of counsel to their lower income populations in civil cases.*

But while that sentence might be an adequate headline and for some readers perhaps a big surprise, it fails to supply the essential details that make the foreign experience so important in the United States. It does not suggest why American courts should pay attention to what has happened in constitutional law abroad. It also does not explain why American legislators should care about how their foreign compatriots have structured the right in their countries or the problems they face and how they have tried to address those problems. Finally, it does not suggest what an equal rights statute might look like if legislators tried to apply those lessons in the context of U.S. civil litigation.

I have been writing about foreign legal aid programs for over three decades, starting with a collaboration with Professors Mauro Cappelletti and James Gordley on the first book-length comparative study of civil legal aid as it evolved in Europe and North America.[1] Over the years, I have written another half dozen articles on the subject.[2] Thus, I don't approach this subject with a clean slate, and not everything in this Article will be brand new. Rather, what follows gathers together themes and information from prior writings and updates. In some instances, it amplifies both the information and the themes, then applies some of the lessons of the foreign experiences to the design of a draft statute that implements a right to equal justice, and therefore a right to counsel when one is needed to satisfy that guarantee.

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1. *See generally* MAURO CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975).

2. *See generally* Earl Johnson, Jr., *Access to Justice*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (2001); Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies,* 24 FORDHAM INT'L L.J. S83 (2000); Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective,* 19 LOY. L.A. L. REV. 341 (1985); Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199 (1994); Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2(1) SEATTLE J. FOR SOC. JUST. 201 (2003) [hereinafter Johnson, *Will Gideon's Trumpet Sound a New Melody?*].

This Article begins with a discussion of the theoretical underpinnings of a right to equality before the law in civil cases, and how that theory found its way into statutes and constitutional provisions in both Europe and the United States. This is followed by an examination of how courts on the two continents and elsewhere in the world have interpreted the constitutional provisions that emanated from this theory and why those decisions are relevant to courts in the United States. The Article then describes how nations that have the right as a matter of statutory or constitutional law have implemented it. This leads to discussion of a draft generic state statute that would apply some of the lessons learned from the foreign experience to the American context. Finally, the Article will consider the likelihood that American jurisdictions will adopt the right and make the level of financial commitment that so many other nations already have made.

I. EQUALITY BEFORE THE LAW AS A PRECEPT OF THE SOCIAL CONTRACT

In an article I wrote a few years ago, I argued that the right to counsel found in most European countries finds its basis in the social contract theory that emerged on that continent during the seventeenth and eighteenth centuries.[3] This remains the beginning point for this Article too: because social contract theory was so influential among the principal founders of the United States, it provides the foundation for the position that U.S. jurisdictions have reason to find the European experience persuasive when considering the prospect of a statutory and especially constitutional right to counsel in civil cases. Consequently, a shortened version of that earlier article seems in order.

As that earlier article pointed out, most European nations were ruled for centuries by kings and emperors, absolute monarchs many of whom claimed the source of their power descended from God, and consequently they possessed a divine right to govern the lesser mortals who populated their countries.[4] But then a group of brilliant political philosophers began to write about a brand new vision—what they called the social contract.[5] As men like Jean-Jacques Rousseau, Thomas Hobbes, and John Locke explained, a government's right to govern did not descend from God in heaven, but from the consent of the governed right here on earth. These philosophers argued that individual citizens surrendered their rights, including their right to settle disputes through the use of force, only in exchange for a

3. *See* Johnson, *Will Gideon's Trumpet Sound a New Melody?*, *supra* note 2, at 205.
4. *See id.* at 203.
5. *See id.*

sovereign's promise to provide all of those citizens justice, peace, and the possibility of a better life.[6] This fundamental notion came to be called the "social contract"—an agreement among a nation's individual citizens and between those citizens and that nation's government.[7]

One of the essential terms of that social contract is the guarantee of "equality before the law"—the principle or "precept" that citizens from different economic classes will stand equal in the courts or other forums the government provides for resolving disputes.[8] It is based on the notion that individuals would not give up their natural right to settle disputes through force unless the sovereign offered a peaceful alternative in which they have a fair chance to prevail if in the right, no matter whether they are rich, poor, or something in between.[9] Society, in turn, breaches this term of the social contract if its forums favor one class of citizens over those of another class—the rich over the poor, for example. Members of the disfavored class cannot be presumed to have agreed to submit to an unjust sovereign. Thus, the equal administration of justice among different economic classes is an essential underpinning of any society purportedly resting on the consent of the governed.

"Equality before the law" would have remained only a theoretical right in Europe, as it still is in the United States, except that during the nineteenth century, nation after nation on the European continent recognized that there was only one way to guarantee the parity among economic classes and adopted statutory rights to counsel in civil as well as criminal cases. France enacted a statutory civil right to counsel in 1851,[10] Italy em-

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6. *See id.*

7. As John Locke, perhaps the social contract thinker most influential with the founding fathers of our own nation, explained: "Political power, is that power which every man having in the state of nature has given up into the hands of the society . . . with this express or tacit trust, that it shall be employed for their good . . . *and to punish the breach of the law of Nature in others* . . . . And this power has its original only from *compact and agreement, and the mutual consent of those who make up the community*." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 65 (Robert Maynard Hutchins ed., William Benton 1952) (1690) (emphasis added).

8. "The safety of the People requireth further, from him or them that have the Sovereign Power, that *Justice be equally administered to all degrees of People;* that is, that as well the rich and mighty, as *poor and obscure persons, may be righted of the injuries done them;* so as the great may have no greater hope of impunity, when they do violence, dishonour, or any injury to the meaner sort, than when one of these does the like to one of them; For in this consisteth Equity; to which, as *being a precept of the law of nature, a sovereign is . . . subject* . . . ." THOMAS HOBBES, LEVIATHAN 184 (C.B. Macpherson ed., Penguin Books 1968) (1651) (emphasis added).

9. *Id.*

10. *See* CAPPELLETTI ET AL., *supra* note 1, at 19 n.57 (citing Law of Jan. 22, 1851, arts. 1-20 [1851] Bull. des Lois 93).

bodied that right in its procedural laws at the moment of its birth as a nation in 1865,[11] and Germany enacted a right to civil counsel when it became a nation in 1877.[12] The rest of Europe was not far behind. By the end of the nineteenth century or early in the twentieth century, most European nations had created statutory rights to counsel in civil cases.[13]

At the time they were first enacted, these statutory rights to counsel were virtually costless to the governments creating them. That was because they conscripted private lawyers to represent indigent litigants, requiring them to serve without compensation in return for the privilege of practicing law and earning fees from those clients who could afford to pay. (This was the system commonly used in the United States, too, but only in criminal cases. In those jurisdictions where criminal defendants had statutory or constitutional rights to counsel, the lawyers fulfilling those rights even in federal courts were expected to serve without compensation.[14]) In most European countries, it was well into the twentieth century before governments began paying for the right they had created, and some still do not.[15]

This social contract's basic precept of equality before the law found its way into the constitutions or basic laws of several European nations. These provisions guaranteed that all citizens were "equal before the law" or in all judicial proceedings had a right to a "fair trial."[16] Social contract theorists, especially John Locke, also influenced those men who were responsible for America's founding documents. Thomas Jefferson ranked Locke as one of the three greatest thinkers in history[17] and as one noted historian observed, "Locke was an intellectual godparent of James Madison, the 'Father of the Constitution.'"[18] Thus, it is no surprise that the Preamble to the U.S. Constitution sets forth "To Establish Justice" as one of the nation's four primary goals,[19] nor is it surprising, given the importance of the social contract,

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11. *See id.* at 19 n.59 (citing Law of Dec. 6, 1865, no. 2627, [1865] Racc. Uff. 2846).

12. *See id.* at 19 n.62 (citing Jan. 30, 1877, ZPO §§ 114-27 (C. H. Beck 1970)).

13. Many of these other historical statutory "right to counsel" provisions are set forth in CAPPELLETTI ET AL., *supra* note 1, at 16-27.

14. *See* U.S. Courts, History of the Defender Services for the U.S. Federal Courts, http://www.uscourts.gov/defenderservices/history.html (last visited Jan. 20, 2010).

15. *See generally* CAPPELLETTI ET AL., *supra* note 1, at 19-20.

16. *See* discussion *infra* Part II.

17. Letter from Thomas Jefferson to John Trumbull, American painter (Feb. 15, 1789), *available at* http://www.loc.gov/exhibits/treasures/trm033.html (ordering portraits of "the three greatest men that have ever lived," referring to John Locke, Francis Bacon, and Isaac Newton).

18. LEE CAMERON MCDONALD, WESTERN POLITICAL THEORY: THE MODERN AGE 111 (1962).

19. "We the People of the United States, in Order to . . . establish Justice . . . do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.

that the Bill of Rights guarantees all U.S. citizens "due process" in any judicial proceedings where their "life, liberty, or property" is at stake.[20] And, after the Civil War, the United States also added the analog of the "equality before the law" guarantee that many European countries had already adopted—that is, "equal protection of the laws." As the Supreme Court explained long ago:

> The *Fourteenth Amendment*, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the *equal protection of the laws," undoubtedly intended* . . . that *equal protection and security should be given to all* . . . that they should have *like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts* . . . .[21]

Given the comparable language in the constitutions on both continents, and the common source and concepts they embodied, one might have anticipated that courts on both sides of the Atlantic would interpret that language the same way. For the most part, however, this has not been the case.

II. CONSTITUTIONAL ENFORCEMENT OF EQUALITY BEFORE THE LAW

The Swiss Supreme Court was the first European court to confront the issue of whether the social contract's constitutional guarantees require the state to provide free attorneys to civil litigants who cannot afford to pay for their own.[22] The year was 1937, a full quarter-century before the U.S. Supreme Court decided *Gideon v. Wainwright*, granting indigent criminal defendants in this country a right to free counsel.[23] The Swiss federal constitution is one of those containing an express guarantee of equality before the law but with no mention of counsel, simply providing that "[a]ll Swiss are equal before the law."[24]

In the case before it, the Swiss Supreme Court concluded that poor people could not be equal before the law in the regular civil courts, unless

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20. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

21. Barbier v. Connolly, 113 U.S. 27, 31 (1885) (emphasis added).

22. *See* Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 5 (1967) (citing Tribunal Fédéral Suisse [TFS] [Highest Court in Switzerland] Oct. 8, 1937, 63 Arrêts du Tribunal Fédéral Suisse [ATF] I 209 (Switz.)).

23. 372 U.S. 335 (1963).

24. Bundesverfassung der Schweizerischen Eidgenossenschaft, Constitution fédérale de la Confédération suisse, [aBV], [aCst] [Constitution of 1874], May 29, 1874, AS 1 (1875), 1 RO, 1 (1875), art. 4 (Switz.), *translated in* CAPPELLETTI ET AL., *supra* note 1, at 705.

they had lawyers just like the rest of the citizenry.[25] The court reasoned the constitutional principle of equality before the law requires the Cantons to provide a free lawyer "in a civil matter where the handling of the trial demands knowledge of the law."[26] In subsequent decisions, the Swiss Supreme Court has explained and expanded the circumstances in which the governments of the Cantons (the rough equivalent of our state governments) must supply free lawyers to poor litigants appearing in their civil courts.[27] Meanwhile, it was not until 1972 that the Swiss Supreme Court mandated free counsel in *criminal* cases.[28]

The Swiss right to counsel decision proved to be an early precursor for similar rulings across Europe. In 1979, forty-two years after the Swiss Supreme Court's decision (and three decades ago) the European Court on Human Rights was called upon to decide whether that continent's relatively new convention guaranteeing citizens certain basic rights required signatory governments to provide free lawyers to indigent litigants in civil cases. This document, the "European Convention on Human Rights and Funda-

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25. *See* O'Brien, *supra* note 22, at 5.

26. *Id.*

27. In a 1952 decision, filed more than a decade before the U.S. Supreme Court decided *Gideon v. Wainwright*, the Swiss Supreme Court explained the expansion of right to counsel in civil cases that had already evolved in that country:

> This Court has consistently affirmed that a party who is unable to afford the costs of a lawsuit without jeopardizing the livelihood of himself and his family and whose case is not unfounded, is entitled under the provisions of Article 4 of the Constitution (principle of equality) to a right of judicial protection. This right means that the judge must consider his case, that the indigent litigant shall not be required to pay court costs in advance nor to post security for costs, and further that he is to be granted the assistance of a lawyer (without cost) in all cases where a lawyer is required for the *adequate* protection of his interests. This right of the indigent to judicial protection embraces every action to be taken during the proceeding of the first instance [trial court] . . . and this right extends also to challenges against the judgment of the first instance [appeals]. According to recent decisions of this Court, a case must be considered to have no probability of success only when the *probability of failure clearly prevails* or when the case must be considered capricious.

Bundesgericht [BGer] [Federal Court] July 9, 1952, 78 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 193 (Switz.), *translated in* CAPPELLETTI ET AL., *supra* note 1, at 704-06 (emphasis added).

28. The opinion declaring a right to counsel in civil cases also summarized the status of the right to counsel in criminal cases as of that time. "Cantonal legislation may prescribe that a lawyer will be provided an accused only in serious cases . . . ." O'Brien, *supra* note 22 at 5 (quoting Tribunal Fédéral Suisse [TFS] [Highest Court in Switzerland] Oct. 8, 1937, 63 Arrêts du Tribunal Fédéral Suisse [ATF] I 209 (Switz.)). But in 1972, the Swiss Supreme Court modified this rule, holding the Cantons must grant every indigent criminal defendant a lawyer, except where his case clearly lacked merit. *See* CAPPELLETTI ET AL., *supra* note 1, at 706 (citing Tribunal Fédéral Suisse [TFS] [Highest Court in Switzerland] Sept. 27, 1972, Arrêts du Tribunal Fédéral Suisse [ATF] I 340 (Switz.)).

mental Freedoms,"[29] does not contain a clause explicitly mentioning a right to counsel. Indeed, the only reference to civil litigation with potential relevance to the issue was found in Article Six of the Convention.[30] Consistent with a fundamental precept of the social contract, Article Six does guarantee *all* civil litigants a "fair hearing."[31] But if and when a "fair hearing" required governments to supply lawyers to litigants unable to afford their own remained a matter of interpretation and, thus, an open question to be decided by the European Court.[32]

For most European countries, this was largely an irrelevant question because they already provided free counsel either as a matter of statutory or constitutional right.[33] But Ireland was almost unique among European countries in having no legal aid program of any kind. So when an indigent wife named Mrs. Airey wanted to file a judicial separation suit against her husband, she could not get a lawyer. When she asked the trial court to appoint counsel, the judge refused, explaining Ireland did not provide free counsel to indigents in civil cases. The court instead invited Mrs. Airey to represent herself in that court. When Mrs. Airey appealed the denial of counsel to the Irish Supreme Court the result was the same, and she received the same explanation. She then appealed to the European Court of Human Rights, with a young Irish barrister and law professor, Mary Robinson, as her advocate before that court.[34]

Significantly, this was not a case where an individual citizen was opposed by her government in a civil case, for instance, because officials were trying to take something from her or had denied her some financial support or other substantive benefit to which she thought she was entitled. Rather, the issue here was the essence of equality before the law: a dispute between private citizens with different levels of economic resources, one of

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29. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

30. *Id.* at art. 6, § 1.

31. "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time." *Id.* The United Nations also has adopted a similar guarantee in civil cases, after echoing the social contract's precept of equality before the law. The relevant section reads: "All persons shall be *equal before the courts and tribunals*. In the determination of any criminal charge against him, or of his *rights and obligations in a suit at law*, everyone shall be entitled to *a fair* and public *hearing* by a competent, independent and impartial tribunal established by law." International Covenant on Civil and Political Rights art. 14, § 1, Dec. 16, 1966, 99 U.N.T.S. 171 (emphasis added).

32. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 29, at art. 6, § 3(c).

33. *See supra* notes 10-13 and accompanying text.

34. *See generally* Airey v. Ireland, 2 Eur. Ct. H.R. (ser. A) at 305 (1979).

whom could not afford to employ a lawyer, and the other who could and did. Moreover, Mrs. Airey was the plaintiff, who had brought the case, not a defendant who had been involuntarily dragged into court. Finally, the main relief she was seeking was monetary. At that time, Ireland did not allow divorce, so Mrs. Airey could not gain freedom to marry someone else, but only the right to live separately from her husband and to receive "separate maintenance" out of his earnings.[35] As a result, Mrs. Airey presented the European Court with what might be seen as the ultimate issue, one that an advocacy organization bent on establishing a right to counsel under the European Convention probably would have raised only after a succession of favorable decisions in intermediate situations. Airey was asking the court to establish a right to counsel for a plaintiff seeking essentially monetary relief in a case against another private person.

Nonetheless, in *Airey*, the European Court did not focus on these factors, but only whether any litigant could receive a fair hearing in the regular courts in such a case without the assistance of a lawyer. After examining that question from several angles, the judges concluded the answer was no, and that the fair hearing guarantee of the European Convention required member governments to provide free counsel to those unable to afford their own.[36] In the course of its opinion in *Airey*, the European Court first emphasized that a party's opportunity to be physically present in court was not access to justice in any real sense and certainly not enough to satisfy the requirements of a democratic society.

> The Convention is intended to guarantee . . . rights that are *practical and effective*. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society . . . .
>
> . . . .
>
> [T]he possibility to appear in person before the High Court does not provide the applicant with an *effective* right of access.[37]

The European Court went on to emphasize that governments have an affirmative duty to provide to their private citizens a level playing field when they oppose one another in the courts—even if that requires providing a free lawyer to the side that is unable to afford her own.

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35. It was not until a constitutional amendment passed by a slim margin in 1995 (the 15th Amendment) that Ireland became the last European nation to legalize divorce. Before that, people in failing marriages could only obtain judicial separations. *See* Anthony Tyler Barnes, *Ireland's Divorce Bill: Traditional Irish and International Norms of Equality and Bodily Integrity at Issue in a Domestic Abuse Context*, 31 VAND. J. TRANSNAT'L L. 643 (1998).

36. *Airey*, 2 Eur. Ct. H.R. (ser. A) at 305 (1979).

37. *Id.* at 314-15 (emphasis added).

> The [Irish] Government maintain that . . . in the present case there is no positive obstacle emanating from the State and no deliberate attempt by the State to impede access; the alleged lack of access to court stems not from any act on the part of the authorities but solely from Mrs. Airey's personal circumstances, a matter for which Ireland cannot be held responsible under the Convention. . . . [T]he Court does not agree . . . . In the first place, hindrance in fact can contravene the Convention just like a legal impediment. Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive, and "there is . . . no room to distinguish between acts and omissions." The obligation to secure an effective right of access to the courts falls into this category of duty.[38]

In holding that *effective* access in civil litigation required representation by counsel, the European Court discussed many of the same justifications that the U.S. Supreme Court went through in the landmark decision of *Gideon v. Wainright*.[39] The European Court mentioned the other side in most of these cases had elected to have lawyers, that most civil litigants who were on the same side of this type of case and could afford lawyers in fact employed them, and that the procedures and substantive legal rules were relatively complex.[40] The European Court went even further in justifying the need for counsel, referring to expert testimony by a lawyer experienced in representing clients in similar cases before the Irish courts who testified to the complexity of the procedures and the substantive law.[41]

This ruling now controls litigation for some forty-five nations across Europe, and in turn, the majority of the world's western industrial democracies. Although this case was decided over thirty years ago, the European Court of Human Rights recently made it clear the principle announced in *Airey v. Ireland* remains the governing law for member nations.

England has the most comprehensive and generously funded civil legal aid system in the world.[42] But it still denies counsel in a few types of cases, including the prosecution or defense of libel and defamation lawsuits.[43] Thus, when the McDonald's corporation sued two members of Greenpeace for participating in the preparation and distribution of some allegedly libelous pamphlets, the defendants were denied legal aid, despite being demon-

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38. *Id.* at 315-16 (citations omitted).

39. *Compare id*. at 314-15, *with* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

40. *Gideon*, 372 U.S. at 344.

41. *Airey*, 2 Eur. Ct. H.R. (ser. A) at 314-15.

42. *See infra* note 185 and accompanying table.

43. *See* Steel v. United Kingdom, 41 Eur. Ct. H.R. 22, 414 (2005) ("[L]egal aid was not available for defamation proceedings in the United Kingdom.").

strably poor.[44] What ensued was a legal proceeding that lasted over a decade with the McDonald's Corporation's expensive and skilled lawyers ted against the impoverished demonstrators struggling to represent themselves with only occasional pro bono help from a few lawyers. The result, as might be expected, was a judgment against the two defendants, awarding McDonald's 60,000 pounds in damages.[45]

Ultimately, that judgment and, in particular, the English government's denial of counsel to the demonstrators found its way to the European Court of Human Rights. In *Steel and Morris v. United Kingdom*,[46] the European Court found the failure to provide counsel to the indigent demonstrators denied them the "fair hearing" guaranteed by the European Convention on Human Rights.[47] Under the precedent established in *Airey v. Ireland*, the court reversed the judgment, not only reinforcing the fair hearing and "effective access to justice" dimensions of the *Airey* opinion,[48] but also introducing "equality of arms" between competing litigants as a governing principle:

> The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial. It is central to the concept of a fair trial, *in civil as in criminal proceedings*, that a litigant is not denied the opportunity to present his or her case *effectively* before the court (ibid.) and that *he or she is able to enjoy equality of arms with the opposing side.*[49]

The European Court then proceeded to explain how and why the appellants lacked effective access and did not enjoy equality of arms against McDonald's team of lawyers, even though they had limited legal assistance from pro bono counsel and the trial judge was helpful to them.

> It is not in dispute that they could not afford to pay for legal representation themselves, and that they would have fulfilled the financial criteria for the grant of legal aid. They received some help on the legal and procedural aspects of the case from barristers and solicitors acting pro bono . . . .
>
> The Government has laid emphasis on the considerable latitude afforded to the applicants by the judges of the domestic courts, both at first instance and on appeal, in recognition of the handicaps under which the ap-

44. *See id.*
45. *See id.*
46. *See id.*
47. *Id.*
48. *See* Airey v. Ireland, 2 Eur. Ct. H.R. (ser. A) at 305, 314-15 (1979).
49. *Steel*, 41 Eur. Ct. H.R. 22, 427 (emphasis added) (citations omitted).

> plicants laboured. However, the Court considers that, in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel. . . .
>
> . . . .
>
> In conclusion, therefore, the Court finds that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and *contributed to an unacceptable inequality of arms* with McDonald's. There has, therefore, been a violation of Art.6 (1).[50]

In this case, the European Court made an interesting and quite revealing choice of language—"equality of arms"—to describe what governments must provide in the judicial context. It underscores the social contract origins of the duty. In order to honor the promise of equality before the law, inducing individual citizens to surrender the natural right to use "arms" in forcibly resolving disputes with their neighbors, governments must guarantee that those citizens will enter the courtroom with the modern equivalent of the "arms" necessary to give them a fair chance in that arena, e.g., lawyers.

Also noteworthy is the way the European Court in *Steel and Morris* demonstrated how it would encourage governments to abide by the duty to provide counsel in the civil context. In criminal cases, governments face the reversal of criminal convictions unless they supply the defendants with counsel. But governments suffer no particular loss if a civil judgment gained by a represented party is reversed because the government failed to provide counsel to the indigent party. The European Court of Human Rights not only reversed the judgment against the two Greenpeace members in *Steel and Morris,* but also went a step further. It awarded the successful defendants over 80,000 Euros in damages and costs—to be paid, not by the McDonald's Corporation, but by the English government for its violation of the defendant's right to counsel under the European Convention.[51]

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50. *Id.* at 429-30 (emphasis added). Elsewhere in the opinion, the court makes it clear governments are not required to provide *absolute* equality of arms between parties, but rather *rough* equality. That is, for instance, if the affluent party has the highest-priced, most qualified lawyer in town, the government need not furnish the legal aid client with one possessing the same expertise. *See id.* at 427-28.

51. *Id.* at 439-40.

In 1981, two years after the European court decided *Airey*, the U.S. Supreme Court had the opportunity to interpret the U.S. Constitution's equivalent of the European Constitution's fair hearing mandate in civil cases—our Due Process clause. The case was *Lassiter v. Department of Social Services of Durham County*.[52] It presented what from nearly every perspective appeared to be a far more favorable fact situation for deciding the indigent litigant had a right to government-supplied counsel than Mrs. Airey presented the European Court two years earlier. In *Lassiter*, the opposing party was the government, not a private individual. The indigent was the defendant, not the plaintiff, and at stake was not money or other property, but whether an indigent mother would permanently lose her legal connection to her own child.[53] In other words, on the surface it was the ideal first case to bring before the nation's highest court on the civil right to counsel issue, rather than the ultimate case the facts of *Airey v. Ireland* brought to the European Court of Human Rights in 1979.

But, in another sense, it was the worst possible case to bring to any court on this issue. The petitioner was a convicted murderer who allegedly had not been in contact with her child for several years at the time the State sought to terminate her parental rights.[54] The State did not provide to Ms. Lassiter the assistance of counsel, and she did not request counsel as an indigent.[55] A lawyer opposed Ms. Lassiter in her case.[56] Furthermore, had the Supreme Court reversed the termination order and remanded for a hearing where the mother was represented by counsel, it is highly doubtful that the most skilled trial lawyer in America could have won her case. Only because a young lawyer was bent on taking this particular case to the nation's high court—against the pleas of experienced legal services' lawyers—did it come up for decision by the U.S. Supreme Court.[57]

In light of this unpromising factual context, it actually is rather surprising that four of the nine Justices nonetheless voted to reverse the termination decision on grounds that Ms. Lassiter had been denied her constitutional right to counsel.[58] The five Justices in the majority, however,

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52. 452 U.S. 18 (1981).

53. *Id.* at 20-24.

54. *Id.* at 20-21.

55. *Id*. at 21-22.

56. *Id.* at 29, 55.

57. Interview with Gregory Malhoit, Professor, North Carolina Central University School of Law (Jan. 5, 2010). Professor Malhoit was the Executive Director of East Central County Legal Services in Raleigh, North Carolina from 1971 to 1992.

58. It is not unlikely that the Court would have reached the opposite result as the majority of the 1981 Court did, had the *Lassiter* case been heard by the Supreme Court a few years earlier.

produced an opinion that has stood without challenge and denied counsel to millions of poor people for nearly three decades.[59] Not surprisingly for that era in Supreme Court jurisprudence, the opinion fails to even mention *Airey v. Ireland*.[60]

The majority opinion rested its rationale on a presumption it inferred, not from affirmative language in prior opinions declaring a right to counsel only in cases where physical liberty was at stake, but from the absence of language saying there was a right in cases where other interests were involved.

> The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation. . . .
>
> . . . .
>
> [W]e thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.[61]

The dissenters challenged both the presumption and its underlying generalization about the Court's precedents, but the majority moved on from this foundation and adopted the three-part test devised in *Mathews v. Eldridge* for a very different purpose,[62] as the appropriate approach in deciding whether due process demanded the appointment of counsel for indigents in cases not implicating physical freedom.

> The case of *Mathews v. Eldridge* propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.[63]

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59. For a comprehensive examination of state appellate cases on the right to counsel issue in the years after the *Lassiter* opinion was issued, see Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006). As Professor Pastore reports, virtually all of these subsequent opinions upheld denials of counsel to poor people, relying on *Lassiter* as a broad and nearly automatic prohibition against appointing counsel in civil cases.

60. This is something that would probably not happen in the present day given the interest in foreign decisions which several Justices on the current Court have recently expressed.

61. *Lassiter*, 452 U.S. at 26-27.

62. 424 U.S. 319, 335 (1976).

63. *Lassiter*, 452 U.S. at 27 (citation omitted).

While the dissenters agreed and also applied the *Eldridge* factors, they disagreed the "net weight" of those factors had to overcome a presumption *against* appointment of counsel in civil cases."[64] In weighing the *Eldridge* factors, the majority conceded the "private interest at stake," a parent's interest in "the companionship, care, custody, and management of his or her children" was "a commanding one."[65] The majority then pointed out the "government's interest" was two-fold. On the one hand, like the parent, it has an interest in an accurate and just determination of whether the child should remain tethered to the parent.[66] But, on the other hand, it also has a pecuniary interest in avoiding the cost of providing counsel to the parent and the cost of a delayed and perhaps longer proceeding. Significantly, the majority conceded that additional cost was not sufficient "to overcome private interests as important as those here . . . ."[67] Thus, it was the third *Eldridge* factor—the risk of error—that the majority found determinative in calculating the "net weight" to set on the scale with the presumption against appointed counsel.[68]

In *Lassiter,* the Court emphasized the relative informality of the proceeding, somehow discounted studies showing represented parents prevailed several times as frequently as unrepresented ones in North Carolina termination cases (as they did in some other jurisdictions), and also focused tightly on the particular factual circumstances of the case and the litigant.[69] Significantly, along the way, even the majority Justices highlighted circumstances that they felt might alter the equation enough to overcome the presumption. Finally, the majority refused to articulate any standards for deciding when counsel would be constitutionally required, but opted instead for a retroactive case-by-case evaluation of whether the absence of a lawyer denied due process in a particular case.[70]

The dissenters examined the same three *Eldridge* factors, reached a different balance, and also disputed the merits of the retroactive case-by-case approach that the *Gideon* case had rejected for criminal cases, and for much the same reasons.[71] Thus, by a one-vote margin, the U.S. Supreme Court put the United States on the other side of a vast gulf between our country and Europe on the issue of the right to counsel in civil cases.

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64. *Id.* at 42.
65. *Id.* at 27.
66. *Id.*
67. *Id.* at 28.
68. *Id.* at 27-28.
69. *Id.* at 33.
70. *Id.* at 28-34.
71. *Id.* at 42-52.

Only by focusing solely on the informality of the proceedings in the *Lassiter* case could one possibly reconcile that opinion with *Airey v. Ireland*. There simply is no way to reconcile the *Airey* opinion or its progeny with *Lassiter*'s presumption against a right to counsel in civil cases. As the *Lassiter* opinion and its progeny have made abundantly clear, a fair hearing is a fair hearing, and *effective* access to justice is *effective* access to justice—whether the proceeding involves physical liberty or some other vital interest.[72]

In the years since the *Airey* and *Lassiter* opinions were filed, two other nations—Canada and South Africa—have weighed in on the issue of a right to counsel in civil cases. In 1999, the Supreme Court of Canada found a constitutional right to counsel in the "fair hearing" guarantee in Canada's first written constitution, the relatively new "Charter of Rights and Freedoms." The Canadian case, *J.G. v. New Brunswick,*[73] arose in what would be called a dependency or neglect case in the United States. Rather than threatening the ultimate termination of parental rights as North Carolina did in Lassiter, the province of New Brunswick only sought to continue its custody of a mother's children for another six months. Nonetheless, after determining the temporary loss of custody of one's child qualified as a threat to the mother's "security of the person,"[74] Chief Justice Lamer proceeded to explain why the mother had a constitutional right to free counsel using language reminiscent of *Airey v. Ireland*.

> Section 7 guarantees every parent the right to a *fair hearing* when the state seeks to obtain custody of their children. . . .
>
> . . . .
>
> For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. *Effective* parental participation at the hearing

72. The European Court of Human Rights interpreted a clause that required "fair hearings" in cases involving a person's "civil rights and obligations" just as the U.S. Constitution guarantees "due process" in cases involving "life, liberty, or property"—not just those where some liberty interest is at stake. *See generally* Steel v. United Kingdom, 41 Eur. Ct. H.R. 22 (2005); Airey v. Ireland, 2 Eur. Ct. H.R. (ser. A) at 305 (1979). Nothing in the European Court's *Airey* or *Steel* decisions even hints at some presumption that "fair hearings" or "effective access to justice" or "equality of arms" are not ordinarily required in civil cases unless a litigant's "physical liberty" is at stake. Quite the contrary, in neither of those cases was the litigant's "physical liberty" involved in any way. The absence of a threat to physical liberty was not even mentioned—or presumably even considered relevant—in deciding that the indigent litigants were entitled to free counsel.

73. New Brunswick (Minister of Health and Cmty. Servs.) v. G.(J.), [1999] 3 S.C.R. 46 (Can.).

74. *Id.* at 61-62.

> is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. . . .
>
> . . . .
>
> *In the circumstances of this case*, the appellant's right to a fair hearing required that she be represented by counsel.[75]

Justice Lamer reached this conclusion by considering "the seriousness of the interests at stake, the complexity of the proceedings and the capacities of [J.G., the mother threatened with losing custody for another six months]."[76]

Then, in 2001, the Land Claims Court of South Africa reached this issue in the case of *Nkuzi v. The Government of the Republic of South Africa and The Legal Aid Board.*[77] This time, unlike *New Brunswick* or *Lassiter,* the dispute was not between a government and a private citizen but between two private parties. Moreover, purely property rights, not parental or other liberty-related interests, were at stake.

The Land Claims Court has jurisdiction over eviction actions between tenants or occupiers of land and those asserting ownership. Most of those tenants or occupiers are poor, uneducated blacks, while those bringing the eviction actions tend to be wealthy whites. It only took the court two sentences in a two-page opinion to capture the essence of the rationale for a right to counsel in civil cases. It wrote, "[t]here is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand."[78] Accordingly, the court declared that those

> whose security of tenure is threatened or has been infringed, have *a right to legal representation or legal aid at State expense* if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources. The State is under a duty to provide such legal representation or legal aid through mechanisms selected by it.[79]

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75. *Id.* at 55, 73, 75 (emphasis added).

76. *Id.* at 75.

77. 2002 SA 733 (LCC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZALCC/2001/31.pdf.

78. *Id.* at 5.

79. *Id.* (emphasis added). For a thorough account of the *Nkuzi* case including the background on the litigation that resulted in the court's opinion, along with an interesting analysis of its broader implications, see Jeremy Perelman, *The Way Ahead? Access-to-Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: The Nkuzi Case*, 41 STAN. J. INT'L L. 357 (2005). The litigation was brought by two public interest organizations, the Nkuzi Development Association, a South African NGO specializing in land reform issues, and the Legal Resource Center, a leading South African public interest law firm, which represented the NGO in the litigation. *Id.* at 357.

Neither the South African government nor the Legal Aid Board appealed the *Nkuzi* decision to a higher court and the ruling is being followed and enforced in all land eviction cases.[80] Of special relevance to the central theme of this Article, the lawyers presenting the *Nkuzi* case presented a sophisticated argument based on comparative and international human rights law, including *Airey* and *New Brunswick*. "They anchored their legal aid entitlement claim in comparative law, basing it on the right to a fair trial (as in *Airey* and *New Brunswick*) that complemented a constitutional right to security of land tenure."[81] Perhaps the United States, as one of the world's older democracies, might learn something from the willingness of one of its newer democracies, South Africa, to take into account constitutional developments elsewhere.

III. WHAT THE FOREIGN EXPERIENCE SUGGESTS ABOUT DEFINING THE SCOPE OF A "RIGHT TO EQUAL JUSTICE" IN CIVIL CASES

Whether it were to be established through a constitutional amendment or through legislation, the right to counsel in civil cases is likely to be quite different and more complex than the right in criminal prosecutions. As interpreted by the U.S. Supreme Court, the Constitution guarantees an absolute right to counsel in all criminal cases where there exists a threat of incarceration; that is, a right to representation by a full-fledged lawyer in all such cases.[82] This is a simple and straightforward, but expensive, right to enforce. In criminal cases, this right is easily justified, by both the seriousness of criminal penalties and the complexity of the criminal process. The Constitution not only guarantees counsel, but also dictates the essential elements of criminal procedure that make the assistance of counsel necessary to equal justice for criminal defendants. It is distinctly adversarial and features such elements as: jury trials; complex rules of evidence; constitutional rights against self-incrimination and illegally obtained evidence that must be raised or waived in the heat of the courtroom battle; ever more intricate and onerous sentencing schemes; and a dozen other guaranteed, or at least universal elements that make self-representation, or representation by anything less than a skilled lawyer, a foolish alternative.

In contrast, the civil—or, more accurately, the non-criminal—arena is far more diverse. There is no single model but rather a panoply of models (and potential models) for resolving disputes. The regular civil courts—the

80. Interview with Vidhu Vedalankar, Executive Dir. of S. Afr. Legal Aid Bd., in Cambridge, Mass. (June 15, 2003).

81. Perelman, *supra* note 79, at 395.

82. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (stating that "lawyers in criminal courts are necessities, not luxuries").

forums in which traditional contract, tort, and property litigation occurs—are often every bit as complex as the criminal courts, indeed sometimes more so. Hence, lawyers are as essential for civil litigants in these forums as they are for criminal defendants in criminal trials. As the European Court emphasized in both the *Airey* and *Steel and Morris* decisions, the assistance of a lawyer is essential to a fair hearing and to effective access to justice.[83] In such proceedings, any parties who face represented opponents without a lawyer of their own lack the "equality of arms" the European Court found essential in *Steel and Morris*.[84] Consequently, it seems reasonable to expect any right to equal justice in civil cases to be co-extensive with the right to counsel when low-income litigants appear in the traditional civil courts or any other forum where the procedures and/or substantive law approaches the complexity found in the criminal process.

In its *Airey* decision, the European Court of Human Rights also recognized the possibility that many civil disputes might be decided in forums and through processes in which the parties would have effective access to justice and enjoy fair hearings without being represented by lawyers.

> [W]hilst Article 6 (1) guarantees to litigants an effective right of access to the courts for the determination of their "civil rights and obligations," it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme—which Ireland now envisages in family law matters—constitutes one of those means but there are *others such as, for example, a simplification of procedure*. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his *effective right of access* to the courts in conditions not at variance with Article 6 (1).[85]

Thus, the European Court of Human Rights qualified its holding in *Airey*, requiring member governments to provide free counsel to indigent litigants in civil cases. The court mandated counsel only in cases where the procedures or the substantive law is sufficiently complex that the expertise of lawyers makes a substantial difference to the litigant's chances of success.[86] The holding left open the option for governments to offer forums where poor litigants could enjoy effective access to justice without legal counsel. Thus, what the European Court of Human Rights has announced for the signatory nations to the European Convention in *Airey* and *Steel and*

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83. *See* Steel v. United Kingdom, 41 Eur. Ct. H.R. 22, 427 (2005); Airey v. Ireland, 2 Eur. Ct. H.R. (ser. A) at 305, 314 (1979).

84. *See Steel*, 41 Eur. Ct. H.R. at 427.

85. *Airey*, 2 Eur. Ct. H.R. (ser. A) at 317 (emphasis added).

86. *Id.*

Morris is not a right to counsel as such, but more accurately, a right to equal justice—a fair hearing in which indigent parties enjoy "equality of arms" with their better-heeled adversaries, however that equality is achieved.

It appears reasonable to anticipate that an American court likewise would place parameters around any right to counsel based on either the due process or equal protection clauses. But if the judgment of whether a proceeding satisfies this right to equal justice is to be made retrospectively on a case-by-case basis, the right becomes virtually meaningless: low-income clients denied counsel would be forced to appeal that denial to the appellate courts in order to find out whether their particular circumstances meant they had been deprived of their constitutional right to equal justice. Only rarely would such an appellate challenge be feasible—primarily when a legal aid organization chose to allocate a portion of its limited resources to take that appeal for the indigent litigant. Consequently, as a practical matter, trial courts and other forums would be free to adopt their own interpretations of whether the constitutional right to justice required the provision of free counsel to indigents appearing in their proceedings.

Thus, if they are to guarantee truly effective access to low income civil litigants, appellate courts would not only have to recognize a right to equal justice, but also gradually establish definitive standards. Those standards would have to define when legal representation was required and when justice could be achieved without providing poor people with free counsel. In some instances, justice might be achieved by providing less expensive, non-lawyer advocates,[87] and in others, by designing forums that truly operate fairly without trained advocates of any kind.[88] In all likelihood, the latter would mean a shift from an adversarial model to an inquisitorial model of dispute resolution in those forums, in which the judge or other decision-

87. HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 21, 193, 201 (1998). This empirical study compared outcomes and perceptions in low-level administrative hearings where some parties were represented by lawyers and others by non-lawyer advocates. The author concluded non-lawyer advocates achieved equivalent or nearly equivalent results for their clients as did the lawyer advocates. The process used in the administrative proceedings he studied, however, was comparatively informal and the substantive law was comparatively straightforward and self-contained.

88. *See generally* Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. U. L. REV. 631 (1998). For an international survey that included alternative forums not requiring lawyers, see ACCESS TO JUSTICE: VOLUME II—PROMISING INSTITUTIONS (Mauro Cappelletti & John Weisner eds., 1979). For an analysis of innovative approaches derived from this survey, see Earl Johnson, Jr., *Thinking About Access: A Preliminary Typology of Possible Strategies*, *in* ACCESS TO JUSTICE: VOLUME III—EMERGING ISSUES AND PERSPECTIVES 5 (Mauro Cappelletti & Bryant G. Garth eds., 1979).

maker rather than the parties bore the primary responsibility for uncovering and presenting the facts, as well as identifying the relevant legal principles.

It may be tempting for appellate courts to draw such a test in broad strokes, for instance, to hold that counsel is required in all cases heard in "courts" but not in other forums. This approach disregards the reality that legal assistance may be required for *effective* access to justice even in forums other than the courts. Meanwhile, some forums labeled as courts, such as California's small claims courts, may be far fairer to unrepresented disputants than arbitration, most administrative bodies, and similar non-judicial tribunals.

A sounder approach would be to articulate an overarching standard accompanied by a presumption with any exceptions requiring verification by empirical testing. The overarching test? What the European Court stated so artfully: all disputants are entitled to *effective* access to the court or other dispute-resolving forum. The presumption? Virtually the opposite of the presumption the U.S. Supreme Court majority announced in *Lassiter v. Department of Social Services*—a presumption that *effective* access requires the government to supply free representation by a lawyer, or a non-lawyer representative where sufficient, to those who are unable to afford their own representation in all non-criminal cases.[89]

This presumption could only be overcome where a court can legitimately certify that the particular forum deciding the dispute can and does provide a fair and equal opportunity for justice to those who lack such representation. For obvious reasons, it would be virtually impossible to overcome this presumption in a dispute where the lawyer represented the other side. Likewise, it would be rare in cases where nearly everyone on the same side as the indigent disputant, who could afford representation, employs a lawyer or other paid representative. As the *Gideon* and *Airey* opinions emphasize, both of these factors furnish powerful empirical evidence supporting the need for representation.[90]

The more likely candidates for overcoming this presumption would be existing or future forums specifically designed to function without lawyers or other representation. In most instances, this means forums built around an inquisitorial rather than adversarial model of dispute resolution. The forum itself, rather than the disputants, would have to absorb the primary responsibility for uncovering the facts and legal principles critical to a proper

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89. *See* 452 U.S. 18, 25-28 (1981).

90. This factor was mentioned both by the European Court of Human Rights in civil proceedings and U.S. Supreme Court in criminal cases as strong evidence that indigent parties needed free counsel when opposing those represented parties. *See generally* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *Airey*, 2 Eur. Ct. H.R. (ser. A) at 305, 314-315.

decision. This might represent a difficult, but certainly not impossible transformation for a judicial system and legal profession historically committed to the adversarial model. California's creation several decades ago of small claims courts that bar lawyers or other professional representation offers some evidence that innovative forums might evolve, offering effective access to justice for disputants lacking representation.[91] Nonetheless, the difficulty of designing dispute resolution forums, capable of operating fairly and effectively without professional representation, is suggested by the fact that the California small claims system has found it necessary to begin employing a coterie of small claims court advisors. Although they do not represent litigants in the courtroom, these "advisors" do help litigants assemble the evidence that they will need and prepare litigants for their appearances before the small claims court judges.[92]

Except where forums exist or are created which truly offer disputants effective access to justice without representation by counsel, the right to equal justice in civil cases, as is true in all criminal cases, requires the provision of counsel to those unable to afford their own. Indeed, only the declaration of a guaranteed right to equal justice, and little short of that step, appears likely to supply a powerful enough incentive for governments to get serious about developing innovative forums calculated to afford unrepresented disputants fair and equal access to justice.[93]

On December 1, 2009, the European Community embraced something approaching the above formula when the Treaty of Lisbon finally came into force, enacting a series of major revisions to the Community's basic structure.[94] Included was a Charter of Fundamental Rights. This Charter in-

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91. "Except as permitted by this section, no attorney may take part in the conduct or defense of a small claims action." CAL. CIV. PROC. CODE § 116.530(a) (West 2003). The exceptions are for proceedings in which the attorney is a party or the law firm of which he is a member is a party. CAL. CIV. PROC. CODE § 116.530(b) (West 2003). Attorneys also can be witnesses or give advice to a party before or after the hearing, and the like. CAL. CIV. PROC. CODE § 116.530(c) (West 2003). The present jurisdictional limit of small claims courts in California is $ 5,000.

92. CAL. CIV. PROC. CODE § 116.260 (West 2003) ("In each county, individual assistance shall be made available to advise small claims litigants and potential litigants without charge . . . ."). *See also* CAL. CIV. PROC. CODE § 116.920(b) (West 2003) (stating that courts must also provide all small claims litigants notice these advisory services are available to assist them).

93. It may be essential to guarantee a right to a different resource, specifically, for the millions of disputants who cannot understand or speak English. For these people, there can be no equal justice—or justice of any kind—unless they have a right to an interpreter (or someone who can effectively communicate between them and the judge or other arbitrator deciding their case).

94. The European Community maintains a website that includes extensive treatment of the Treaty of Lisbon and the dramatic changes it makes to the Community's institutions and

cludes a provision that guarantees legal aid in civil cases while still allowing alternative strategies for delivering effective access to justice. Found in the Charter's section on "Justice," Article 47 reads as follows, with the legal aid guarantee appearing in the final sentence:

> *Article 47*
> Right to an effective remedy and to a fair trial
>
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid *shall be made available* to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[95]

One could imagine what it would mean if the United States adopted similar language as a guarantee of what lower income Americans would enjoy when they appeared in tribunals deciding their disputes and enforcing their rights. It could come from a court, no longer fearing it was imposing an obligation that would mandate the expense of providing lawyers where lower income people could enjoy truly effective access to justice through less costly approaches. After setting the standard governments had to satisfy, the court could leave it to the other branches to work out the details. Or alternatively, the guarantee could result from a legislative effort that not only articulated the goal but designed, tested, and installed the full range of institutions and services required to achieve *effective* access to justice. The Appendix, *infra*, presents a draft statute that attempts to demonstrate how a right similar to that which the European Community enacted in Article 47 might be implemented if it became law in an American jurisdiction.

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basic arrangements. *See* EUROPA – Treaty of Lisbon, http://europa.eu/lisbon_treaty/index_en.htm (last visited Feb. 1, 2010). Readers visiting this website can access everything from brief overviews of the changes the Treaty achieved to the full text of the Treaty, the Charter of Fundamental Rights, and all the other associated documents.

95. *See* Charter of Fundamental Rights of the European Union art. 47, Dec. 1, 2009, 2007 O.J. (c 303) (emphasis added), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF (emphasis supplied.). This provision of the Charter applies to both the Community institutions and within the member nations when Community laws are being enforced. The European Convention on Human Rights and Fundamental Freedoms as interpreted by *Airey v. Ireland* and its progeny continues to guarantee a similar right when domestic laws are involved. *See supra* note 94.

IV. WHAT FOREIGN EXPERIENCE SUGGESTS ABOUT THE DESIGN OF A SYSTEM IMPLEMENTING A RIGHT TO EQUAL JUSTICE

A. Eligibility Criteria

In defining the types of cases to which the right applies, and for which applicants can apply for services with a reasonable expectation of receiving legal aid, nearly all these countries use an "everything but" approach, in contrast to limiting the right to a list of specific types. In other words, the statutes list the exceptions, not the rule—with the legal aid program covering any and all case types not specifically excluded.[96] Among the case types commonly excluded are defamation, election disputes, and alienation of affections.[97] Significantly, research has not uncovered any country that

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96. *See, e.g.*, CAROLYN REGAN, INT'L LEGAL AID GROUP, NATIONAL REPORT: ENGLAND AND WALES 5 (2009), *available at* http://www.ilagconference.org/reports/England%20-%20CR_.pdf (distributed as part of the ILAG Conference: Delivering Legal Services Across Diverse Communities). In New Zealand, as is true in a number of countries, legal aid is "demand driven," with annual budgets only being estimates of what will be required to accommodate the cases actually granted legal aid in the coming year, and with supplemental appropriations required if predictions are exceeded. *See* INT'L LEGAL AID GROUP, NATIONAL REPORT: NEW ZEALAND 3 (2009) [hereinafter NATIONAL REPORT: NEW ZEALAND], *available at* http://www.ilagconference.org/reports/New_Zealand.pdf (distributed as part of the ILAG Conference: Delivering Legal Services Across Diverse Communities). In the Netherlands, the Netherlands Constitution as well as the European Convention on Human Rights and Fundamental Freedoms guarantees legal aid. Article 18 of the Dutch constitution provides: "(1) Everyone may be legally represented in legal and administrative proceedings. (2) Terms concerning the supply of legal aid to persons of limited means shall be laid down by Act of Parliament." Grondwet voor het Koninkrijk der Nederlanden [GW.] [Constitution] art. 7 (Neth.), *available at* http://www.minbzk.nl/english/@4800/the_Constitution_of; *see also* SUSANNE PETERS ET AL., INT'L LEGAL AID GROUP, NATIONAL REPORT: THE NETHERLANDS 2 n.3 (2009), *available at* http://www.ilagconference.org/reports/Netherlands.pdf (distributed as part of the ILAG Conference: Delivering Legal Services Across Diverse Communities).

For an excellent survey of key provisions in the legal aid statutes of European nations, see Raven Lidman, *Civil* Gideon *as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RTS. L. REV. 769 (2006), and especially the chart included therein.

97. Ireland excludes most real property, small claims, licensing, and group actions, as well as defamation and election contests. LEGAL AID BD., NATIONAL REPORT: IRELAND 4 (2009) [hereinafter NATIONAL REPORT: IRELAND], *available at* http://www.ilagconference.org/reports/Ireland.pdf (distributed as part of the ILAG Conference: Delivering Legal Services Across Diverse Communities). New Zealand does not exclude any categories of cases heard in the courts from potential coverage by the legal aid scheme, but does exclude some tribunals. *See* NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 9. The Netherlands appears to be one of the few nations that does not exclude any case types or official forums from coverage under its legal aid program. *See* PETERS ET AL., *supra* note 96. Quebec excludes defamation, election cases, breach of promise of marriage, or plaintiffs in alienation

excludes cases against government agencies from the right to counsel. It is common, however, to limit the statutory right to representation before the regular courts, and leave citizens to their own devices when appearing in administrative proceedings before tribunals, administrative courts, and the like,[98] although some may provide advice and assistance short of representation.[99]

This does not mean legal aid will be provided automatically to anyone with a case in the non-excluded case categories. All of the statutes impose some sort of "merits" test. That is, before the legal aid program will provide legal representation to a financially eligible applicant, the applicant's prospects for a successful prosecution or defense of the claim must pass some threshold. The height of that threshold varies and is expressed in different language among the different countries. Some phrase the test as a "reasonable probability of success,"[100] others as a "reasonable grounds for

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of affections cases. Legal Aid Act: Revised Statutes of Quebec, div. II, § 2, ch. A-14, cl. 4.8 (Can.), *available at* http://www.ccjm.qc.ca/pages/loi_eng.html.

98. *See* NATIONAL REPORT: IRELAND, *supra* note 97. In Scotland, legal aid is not available before tribunals except those "listed in the Legal Aid (Scotland) Act 1986." COLIN LANCASTER, INT'L LEGAL AID GROUP, NATIONAL REPORT: SCOTLAND 103 (2007) [hereinafter NATIONAL REPORT: SCOTLAND] (distributed as part of the ILAG Conference: Legal Aid: A New Beginning?).

99. In Ireland, for example, while legal aid does not provide representation before any administrative tribunal except the Refugee Appeals Tribunal, it can give advice and assistance to those who are appearing before those tribunals. *See* NATIONAL REPORT: IRELAND, *supra* note 97.

100. In Germany, it is phrased as a "reasonable prospect of success." Zivilprozeβordnung [ZPO] [Civil Procedure Statute] § 117 (formerly § 114(1) and described in CAPPELLETTI ET AL., *supra* note 1, at 94). That formulation dates back to 1931 and represented a change from a more liberal standard that allowed legal aid unless the applicant's case was "without some prospect of success." CAPPELLETTI ET AL., *supra* note 1, at 94 n.32. A recent decision of the German Constitutional Court has liberalized the test somewhat, by declaring that legal aid cannot be denied if the prospects of success turn on a "difficult" question of law that has not yet been decided by the Supreme Court. *See* MATTIAS KILLIAN, INT'L LEGAL AID GROUP, GERMAN LEGAL AID BY THE SCRUFF OF ITS NECK—OR JUST IN A BAD QUARTER OF AN HOUR? 59, 61 (2005) (distributed as part of the ILAG Conference: Legal Aid in the Global Era) (This implies legal aid could not be denied on the basis that the applicant's case lacks merit because of a legal interpretation made by a lower court). In Hong Kong, the applicant must have a "reasonable prospect for success *or of deriving some tangible benefit*" as well as having a "reasonable grounds for bringing or defending" the action. INT'L LEGAL AID GROUP, NATIONAL REPORT: HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA 2 (2009) [hereinafter NATIONAL REPORT: HONG KONG], *available at* http://www.ilagconference.org/reports/Hong_Kong.pdf (emphasis added) (distributed as part of the ILAG Conference: Delivering Legal Services Across Diverse Communities); s*ee also* Quebec Legal Aid Act, div. II, § 2, cl. 4.11(1) (requiring denial or withdrawal of representation if the "applicant cannot establish the *probable existence* of his right") (emphasis added).

bringing or defending" the case,[101] and yet others will grant legal aid unless the applicant's case is "manifestly inadmissible or devoid of foundation."[102] It is not absolutely clear, however, whether these different formulations of the merits test make that much difference in determining whether a given applicant in a given country will be represented in a given case.[103]

Most nations also impose a "significance" test, again framed in different ways in different statutes.[104] Recognizing that rich people can afford to and sometimes do fight over what would be considered inconsequential in objective terms, governments obviously want to avoid squandering public resources on those sorts of disputes when they involve people financially eligible for legal aid. Some nations do so by merely excluding "trivial" cases.[105] Others require the applicant's pursuit of the case to pass a "rea-

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101. In Ireland, there must be "reasonable grounds for taking or defending" the proceedings. *See* NATIONAL REPORT: IRELAND, *supra* note 97, at 4.

102. *See supra* notes 25-28 and accompanying text for this formulation, which the Swiss Supreme Court declared is not just a statutory test, but a Constitutional as well (and thus is not subject to amendment). It has been suggested that in Brazil, the proper test to be applied by a civil Public Defender (a salaried lawyer representing both plaintiffs and defendants in civil cases) may be even lower than the "manifestly unreasonable" standard. "It is the Public Defender's obligation, even when there are limited chances of success, to propose suitable judicial measures. The Public Defender only will be excused from doing so when convinced of the impropriety of any measure or that the measures . . . may reveal that they are contrary to the interests of the party." CLEBER ALVES, INT'L LEGAL AID GROUP, NATIONAL REPORT: BRAZIL 10-11 (2009), *available at* http://www.ilagconference.org/reports/Brazil.pdf (distributed as part of the ILAG Conference: Delivering Legal Services Across Diverse Communities). This test is suggested in a legal aid system (the State of Rio) where all the services are delivered by salaried attorneys and there is no statute or regulation articulating any form of merits or significance test. In France, the merits test is satisfied if the applicant's case is not "manifestly inadmissible or devoid of substance." *See* European Comm'n, European Judicial Network in Civil and Commercial Matters - Legal Aid—France, http://www.ec.europa.eu/civiljustice/legal_aid/legal_aid_fra_en.htm (last visited Dec. 1, 2009). But this test apparently applies only to plaintiffs who are bringing suit against someone else and not to defendants who are defending against a lawsuit brought against them by another. In that instance, no merits test is required. *Id.*

103. It would be interesting to conduct some cross-country empirical research—or at least present hypothetical factual scenarios to those charged with making eligibility decisions in nations using different tests. This might reveal whether the same facts would result in grants of legal aid in countries using a more liberal-sounding formula but denials in countries using what appears to be stricter language. But no such research exists, to the best of my knowledge. It also would be interesting to study whether those making eligibility determinations are less liberal in their application of the "merits" (and/or "significance") test when budget pressures increase or, worse, a budget cap is imposed. In other words, are these tests a form of a "valve" that can be widened or narrowed to respond to the legal aid program's financial situation or the relative number of poor people applying for services at different times?

104. *See* discussion *supra* notes 100-03 and accompanying text.

105. In Brazil, rules governing the legal profession preclude representation by government-funded as well as privately-funded lawyers in "inconsistent or careless" (e.g., frivol-

sonableness" test in addition to means and merits tests,[106] or that the litigation costs are not "unreasonable in relation to the possible gain or loss."[107] England combines the merits and significance tests in a formula that asks whether a person of modest but sufficient means would employ counsel to prosecute or defend the case.[108]

All countries, of course, impose a financial means test. But in many of the European and common law countries, government-funded legal services are not confined to the poor. Instead, these programs provide free services to the poor and partially-subsidized services to those whose incomes put them above that level.[109] In the Netherlands, for instance, nearly half the population is eligible for some level of government-subsidized legal aid in civil cases.[110] Those programs that cover people above the poverty level have developed sliding scale eligibility criteria with the size of the government subsidy declining as the applicants' incomes increase. Those near the poverty line may receive a subsidy in the neighborhood of 80-90% of the

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ous) cases. *See* ALVES, *supra* note 102, at 10. Some legal aid statutes list specific case types considered too trivial to warrant public funded legal aid. Quebec, for instance, bars legal aid in "parking ticket" cases. Quebec Legal Aid Act, div. II, § 2, cl. 4.12.

106. In Scotland, for example, an applicant must satisfy a "reasonableness" test as well as financial eligibility and "probable cause" tests before receiving legal aid in civil cases. *See* LANCASTER, *supra* note 98, at 103.

107. Quebec Legal Aid Act, div. II, § 2, cl. 4.11(3). Quebec makes an exception to this cost-benefit limitation, however, where the "case or remedy threatens [the applicant's] livelihood or ability to provide for . . . essential needs . . . ." *Id.* Germany denies legal aid if a case, though having sufficient prospects for success, is deemed "capricious." That standard is interpreted to mean the case would not be brought by a middle-class person with the means to hire a lawyer. CAPPELLETTI ET AL., *supra* note 1, at 94, nn.32 & 35 (citing Zivilprozeβordnung [ZPO] [Civil Procedure Statute] § 114(1)). The Netherlands imposes both a merits and significance test. *See* PETERS ET AL., *supra* note 96, at 4.

108. SETON POLLOCK, LEGAL AID: THE FIRST 25 YEARS 40-41 (1975) ("[I]n most circumstances, the two tests are covered by a single, practical test: would the lawyers [on the local "area committee"] adjudicating upon the application for legal aid have advised a paying client of their own to pursue the matter? . . . The philosophy underlying this test is based on the principle that the person who has to proceed with the benefit of legal aid should be placed in a position neither better nor worse than that of a paying client.").

109. New Zealand requires repayment of some of the cost of legal aid—sometimes in installments—from those recipients with "disposable capital" and/or "gross income" above a certain level. *See* NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 9-11. Quebec province has two categories—"gratuitous legal aid" which is given completely free of charge to those below an income level defined by regulations, and "contributory legal aid" offered to those above that level but below a maximum income also set by regulation, and which requires them to contribute a portion of the cost of their representation. *See* Quebec Legal Aid Act, div. II, § 1, cls. 4.1-.2.

110. In 2007, "about 49% of the Dutch population [was] covered under the current Legal Aid Scheme." JAN VAN DIJK, INT'L LEGAL AID GROUP, NATIONAL FACTS—REPORT ON LEGAL AID IN THE NETHERLANDS 63 (2007) (distributed as part of the ILAG Conference: Legal Aid: A New Beginning?).

cost of the needed legal services while those at the upper end of the eligible population may only be entitled to a subsidy in the 10-20% range.[111] (Another way of characterizing these subsidies is to refer to the clients' share of the total cost as a co-payment, with the level of the required co-payment rising along with the clients' income.)

Several of the other nations also use a more refined means test than the flat *gross* income and assets schedule the Legal Services Corporation employs in the United States, with only family size affecting the eligibility levels.[112] These countries determine financial eligibility on the basis of the applicant's "disposable" income and assets—after determining for which of several possible deductions from gross income or assets the particular applicant qualifies.[113] As an example, some countries do not count a person's primary residence—unless its value exceeds a certain amount—in calculating an applicant's "disposable assets."[114] Some countries also deduct a "family allowance" or other common expenditures on necessities in calcu-

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111. For instance, in France, those in the income strata just above those eligible for completely free legal aid are entitled to an 85% government subsidy, while those near the maximum level for any legal aid assistance are only entitled to a 15% subsidy toward their total legal expenses. *See* European Comm'n, *supra* note 102. In New Zealand, the maximum repayment (what might be called a co-payment) for those just above the poverty line is much lower (roughly 3% of disposable capital and 5% of gross income) than those in the top strata of eligibility (roughly 25% of disposable capital and as much as 25% of gross income). *See* NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 10-11.

112. For the Legal Services Corporation's 2009 eligibility guidelines, see ALAN W. HOUSEMAN, INT'L LEGAL AID GROUP, NATIONAL REPORT: UNITED STATES 8 (2009) (distributed as part of the ILAG Conference: Delivering Legal Services Across Diverse Communities), *available at* http://www.ilagconference.org/reports/US%20-%20AH.pdf. The maximum permissible income is fixed at 125% of the federal poverty level. That federal poverty level, in turn, is established annually by the Department of Health and Human Services and determines eligibility for a number of federal programs. This income eligibility schedule applies uniformly across the country, but individual programs can set their own asset ceilings, which also must be satisfied if an applicant is to receive legal services. *Id.* at 8 n.16. In 2009, the maximum income level for a single person was $13,538, for a two-person family $18,213, and for a family of four it was $27,888, with further upward adjustments allowed for larger families. Local grantee agencies may not supply legal services to applicants whose incomes exceed the maximums on this national schedule, unless one of the narrow exceptions applies. Among these are situations where most of the family income is devoted to medical or nursing home expenses, or when the applicant is seeking to maintain government benefits. *Id.* at 8 (citing Regulations Relating to Public Welfare, 45 C.F.R. § 1611 (1998)).

113. New Zealand utilizes a hybrid eligibility system—a flat gross income component, such as the United States, combined with a "disposable capital" component, the latter allowing several permissible deductions. *See* NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 8-11.

114. New Zealand not only deducts equity in a home up to $48,000, but the value of a vehicle used for domestic purposes, household furniture, clothing, and tools of the trade, along with short-term contingent liabilities and unsecured debts. *See* NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 9.

lating an applicant's "disposable income," the only portion of his or her income which is deemed available to purchase legal services.[115]

B. Program Governance and Administrative Arrangements

Nations also differ in choosing the institution assigned responsibility for administering the legal aid system. Because the right to counsel in civil cases generally started with judges appointing lawyers to serve without compensation, in most countries the judicial system was in charge at the beginning. That is still true in Germany,[116] but most countries have shifted the administrative responsibility to some other body.

When England instituted its comprehensive legal aid scheme in 1950, the government initially put the legal profession in charge, allowing the Law Society (the national association of solicitors roughly equivalent to the American Bar Association) to administer the scheme.[117] Nearly four decades later, however, the English government decided the profession's national organization should not remain in charge of a program that dispensed government funds to individual members of that profession. It substituted an independent body, the Legal Aid Board,[118] and a dozen years later

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115. For instance, France excludes "family allowances and certain welfare benefits" in calculating whether an applicant's income exceeds the income eligibility limits. *See* European Comm'n, *supra* note 102.

In Germany, only "economically available income" is considered when determining financial eligibility for legal aid. That figure is determined after deducting from gross earnings "taxes, social security contributions, reasonable insurance premiums, work-related spendings, trade union membership fees, (reasonable costs for lodging, instalments [sic] for credits, maintenance payments, lump sums for the applicant, his/her wife/husband and for each child . . . ." KILIAN, *supra* note 100, at 60. In Ireland, the "disposable income" used to determine financial eligibility is net of "various allowances in respect of dependants, mortgage, tax, etc." MOILING RYAN, INT'L LEGAL AID GROUP, NATIONAL REPORT: IRELAND 60 (distributed as part of the ILAG Conference: Legal Aid: A New Beginning).

116. CAPPELLETTI ET AL., *supra* note 1, at 51.

117. "[I]t shall be the responsibility of the Law Society . . . to administer this Part of the Act [the civil legal aid scheme]." CAPPELLETTI, *supra* note 1, at 285 (citing Legal Aid Act, 1974, § 15(1)(Eng.)). For a thorough and insightful description of the English legal aid system for the first twenty-five years it was administered by the Law Society, see POLLOCK, *supra* note 108. Pollock was involved in the administration of the program from the outset and in charge for over a dozen years.

118. "In 1988, the government passed the Legal Aid Act 1988 which transferred the administration of legal aid from the Law Society to the newly created Legal Aid Board (LAB). In the past, the Law Society had wanted control over the administration of legal aid, but by 1986 it was somewhat relieved to be absolved of responsibility, given the amount of criticism it had received from its members." Frederick H. Zemans & Aneurin Thomas, *Can Community Clinics Survive? A Comparative Study of Law Centres in Australia, Ontario and England*, *in* THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 65, 80 (Francis Regan et al. eds., 1999).

created a new independent body, the Legal Services Commission,[119] to assume responsibility for the nation's legal aid system.

Many other jurisdictions, no matter where they started, have settled on independent organizations, public or quasi-public (not unlike our nation's Legal Services Corporation), as the best approach to administering a legal aid program.[120] Some nations, like ours, have a board of citizens chosen by the government that oversees the program and sets the basic policies.[121] In a few nations, also like ours, the national program makes grants to regional or local entities which deliver the services to the clients in their areas of the country.[122] In most, however, the national administration operates the entire program—itself employing the local administrative staffs and also any salaried lawyers used to deliver legal services to the client community.[123]

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119. "The Legal Services Commission has been responsible for commissioning legal aid services in England and Wales since 2000 [and is] set up as a non-departmental public body, sponsored by the Ministry of Justice." REGAN, *supra* note 96, at 1.

120. In Hong Kong, the independent body is the Legal Aid Services Council ("LASC"), with a board composed of eight members (half of them lawyers) and a chair who must be a non-lawyer, which oversees the Legal Aid Department, a part of the executive branch of government. The latter directly administers legal aid. *See* NATIONAL REPORT: HONG KONG, *supra* note 100, at 1.

In Ireland, immediately after the European Court of Human Rights decided *Airey v. Ireland*, *see supra* notes 37-42, 85 and accompanying text, the government created an "independent body, the Legal Aid Board . . . to administer the scheme . . . to make the services of solicitors and . . . barristers available to persons of modest means." *See* RYAN, *supra* note 115, at 1.

In New Zealand, the program is administered by "The Legal Services Agency," a Crown entity established by the Legal Service Act 2000 and governed by a board the Minister of Justice appoints. *See* NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 2.

In the Netherlands, legal aid is administered by a Legal Aid Board with one central and five regional offices and reports both to the Minister of Justice and Parliament regarding legal aid matters. *See* PETERS ET AL., *supra* note 96, at 1-2.

In Quebec, the program is administered by the twelve-member "Commission des Services Juridiques" headed by a full-time chair who can be a judge or lawyer and a full-time vice-chair who must be a lawyer, with the other commission members serving on a part-time basis. Quebec Legal Aid Act, div. III, §§ 1-18.

121. In England, "commissioners are appointed by the Secretary of State for Justice . . . and are responsible for [the legal aid program's] strategic direction and generally oversee [the program's] work." REGAN, *supra* note 96, at 1. In Quebec, the government chooses the legal aid program's twelve Commission members from "groups . . . who because of their activities are likely to contribute to the study and solution of the legal problems of the underprivileged" and in consultation with those groups. Quebec Legal Aid Act, div. III, § 12.

122. In Quebec, for instance, the national commission is charged with responsibility for establishing and then financing regional and local "legal aid centres" which administer and provide legal aid in their geographic areas. Quebec Legal Aid Act, div. IV, § 1, cl. 22(b)-(c).

123. Hong Kong, the Netherlands, and New Zealand are examples of jurisdictions where a headquarters office administers the entire program, although often with the assistance of regional offices which have varying degrees of autonomy. In Hong Kong, the Legal Aid

Often the independent legal aid entity—whether called a board, a commission, or something else—will interface with the government department which is in charge of the justice system. In many countries, the department involved will be the "ministry of justice" or carry some similar name. Often a small office within that ministry will have prime responsibility for general supervision of the legal aid program and its budget. It is that office to which the independent entity's agency reports and to which it makes its budget requests and comes for budget adjustments. It also is where the entity's board would take any proposed changes in the legal aid program's legislation or basic policies.[124]

Programs also differ as to who determines an applicant's eligibility to receive legal aid services. In Germany, it remains the judges.[125] In France, the judiciary has created legal aid bureaus attached to the courts.[126] These bureaus have committees composed of lawyers and bureaucrats from other government agencies who review applications.[127] When the Law Society

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Department administers both the salaried and judicare components of legal aid, but with oversight by the Legal Aid Services Council. *See* NATIONAL REPORT: HONG KONG, *supra* note 100, at 1. In the Netherlands, the Legal Aid Board "is entrusted with all matters concerning administration, supervision and expenditure" of legal aid in that country, but the Board carries out those responsibilities through a central office and five regional offices. PETERS ET AL., *supra* note 96, at 1. In New Zealand, the "Legal Services Agency" has responsibility for the administration of "legal aid and related schemes." In addition to the headquarters office, the Agency has twelve regional offices and two "Public Defence Service Offices." NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 2.

124. In New Zealand, the Minister of Justice retains considerable policy-making power over the Legal Services Agency that administers the legal aid program. The Agency is subject to any written directives the Minister issues, and the Minister and the Agency negotiate an annual Memorandum of Understanding that describes the outputs the Agency will deliver, the performance measures, and the Minister's expectations, along with a financial forecast. (Since legal aid is "demand driven" in New Zealand, that forecast may be exceeded, requiring a supplemental appropriation.) NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 2-3.

In Quebec, the Deputy Administer of Justice and the Deputy Minister of Employment and Social Solidarity, or their representatives, are non-voting members of the Commission's board. Quebec Legal Aid Act, div. III, cl. 12. The Commission also is required to send its budgetary estimates to the Minister of Justice and submit an annual financial report to that minister as well. *Id.* at div. IX, §§ 84, 87.

125. *See* CAPPELLETTI ET AL., *supra* note 1, at 50-53.

126. *Id.* at 43-44.

127. These "bureaus" are attached to the courts and composed of members representing the legal profession and the government. After the government began paying the lawyers representing those found eligible for representation by legal aid in 1972, the composition of the bureaus was changed to increase the proportion of government representatives. The reason "was a belief that the state should have closer supervision of the program now that state revenues [were] directly financing it." *See* CAPPELLETTI ET AL., *supra* note 1, at 44. *See id.* at 43-46 for a description of how these bureaus and the French legal aid system function.

ran England's legal aid system, those eligibility decisions were delegated to committees of local solicitors who applied the test of whether a person of means would litigate the case in question.[128] In England now, and most other nations also, salaried lawyers or administrators make the eligibility determinations.[129]

In most nations that have a rights-based legal aid system, applicants who are turned down have a right to appeal.[130] In some, it is only an internal administrative appeal.[131] But in others, an unsuccessful applicant also can appeal to, or at least receive review by, the judiciary,[132] thus allowing court decisions to occasionally redefine or at least affect the standards applied in

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These "bureaus" still make the eligibility determinations. *See* European Comm'n, *supra* note 102.

128. *See* POLLOCK, *supra* note 108, at 40-41. These "Local Committees" of solicitors were initially selected by the eleven "Area Committees," also solicitors, who were established by a committee of the Legal Aid Society's Council. *Id.* at 28. The Area Committees had full-time secretaries and the Local Committees were staffed by either full-time or part-time secretaries, but the committees themselves were composed of practicing solicitors. *Id.* An applicant denied legal aid by a Local Committee could appeal to the Area Committee. *Id.* at 54-55.

129. In Finland, for instance, salaried personnel at the State Legal Aid Offices decide whether legal aid is to be granted, even if the applicant originally went to a private law office that prepared an application and sent it to that state office—and even if that private lawyer will be supplying the representation if the application is accepted. MERJI MUILU, INT'L LEGAL AID GROUP, LEGAL AID IN FINLAND 47-48 (2007) (distributed as part of the ILAG Conference: Legal Aid: A New Beginning?).

In the Netherlands, personnel at the regional Legal Aid Boards grant or deny applications for legal aid in court and administrative hearing cases, while front-line advice and brief assistance are provided to anyone at "Law Counters" without requiring an approved application. *See* PETERS ET AL., *supra* note 96, at 4-6.

In Quebec, the "director general" of the appropriate "regional legal aid center" is charged with making the ultimate eligibility decision, although the application is made at the "local legal aid center" closest to the applicant. Quebec Legal Aid Act, div. VI, cls. 62-63.

130. In New Zealand, applicants denied service can first seek reconsideration by a Legal Services Agency staff member other than the one who first denied their requests. If that fails to produce results, applicants can appeal to the Legal Aid Review Panel, an independent body appointed by the NZ Attorney General and composed of lawyer and non-lawyer members that sit in panels of three considering only the paper record. In FY 2007/08 these panels reversed a third of the denials and returned 17% to the Agency for reconsideration. *See* NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 6-7.

131. In Quebec, for instance, applicants have thirty days to appeal a denial to a three member "Review Committee." The decisions of this Committee are final and cannot be appealed to the courts. Quebec Legal Aid Act, div. VI.2, cls. 74, 78-79.

132. In Finland, an applicant denied legal aid by a State Legal Aid Office can appeal directly to a court for a full review, and if the trial court denies relief, can appeal that decision to an appellate court. *See* MUILU, *supra* note 129, at 47. In New Zealand, either the applicant denied legal aid or the Legal Aid Agency may appeal to the High Court or the Court of Appeal from a decision of the Legal Aid Review Panel, *see supra* note 130, but only as to a question of law. Five such appeals were brought to the courts in FY 2007/08. *See* NATIONAL REPORT: NEW ZEALAND, *supra* note 96, at 7.

future eligibility determinations. A few countries permit government officials or opposing litigants to appeal a *grant* of legal aid.[133]

C. Delivery Systems

The United States has followed such a different path than most of the rest of the world with respect to civil legal aid, that it has had little exposure to the variety of delivery systems that have developed elsewhere in the world. Lacking a right to counsel, the United States has relied principally on a "fixed resource" approach in which we employ a limited number of salaried lawyers and ask them to serve as many poor people as they can, supplemented by pro bono services contributed by private attorneys.[134] The many poor people that salaried lawyers and the available pro bono lawyers are unable to serve, simply go without counsel. As described earlier, the pattern in European countries, on the other hand, generally started with a right to counsel implemented by appointing private lawyers to serve without compensation.[135] Thus, it was natural for the next stage to continue using those same private lawyers to provide the services but to pay them for their work on behalf of indigent clients.

There remain at least a few jurisdictions—most notably, France[136] and Germany[137]—that continue to rely exclusively on compensated private counsel to implement their statutory rights to counsel in civil cases; in Eng-

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133. In Quebec, for instance, "[e]very interested party in a dispute or a case may contest the financial eligibility" of a person granted legal aid in that case by filing an application with the three-member "Review Committee" that also hears appeals from applicants denied legal aid. The decisions of the Review Committee are final in these challenges to grants of legal aid, just as they are final in appeals from denials. Quebec Legal Aid Act, div. VI.2, cls. 75, 79.

134. For a recent concise but thorough description of the American system, see generally HOUSEMAN, *supra* note 112. Although the vast majority of civil legal aid in the United States is delivered through salaried staff programs supplemented by pro bono private attorneys, the Legal Services Corporation does fund a handful of "judicare" and mixed "judicare and staff" programs scattered across the country. *Id.*

135. *See supra* notes 125-29 and accompanying text.

136. *See* CAPPELLETTI ET AL., *supra* note 1, at 44-46. In 1991, the 1972 legal aid legislations summarized in the Cappelletti book was replaced by a new Legal Aid Act (No. 91-647) and the Decree No. 91-1266 of 18 December 1991. It remains a pure judicare system, but there are some differences, including that applicants can now choose their own lawyers from the local bar, at least from those willing to take on legal aid clients, if they have a preference. If not, the local bureaus composed of lawyers and government officials will assign private lawyers to serve those they find eligible for legal aid. European Comm'n, *supra* note 102.

137. *See* KILLIAN, *supra* note 100, at 61 ("Fees for lawyers doing legal aid work are paid (in most cases with a discount) according to . . . scales of fees [set by the government].").

land, it remains the dominant, but far from exclusive system.[138] At the other extreme are a few—Ireland[139] and at least one Brazilian state,[140] for example—that rely almost entirely on a cadre of salaried lawyers to carry the entire load of satisfying a right to counsel in civil cases. (This is comparable to the approach used in many American jurisdictions in criminal cases—a right to counsel implemented through a cadre of salaried public defenders.) Furthermore, there remain a number of "fixed resource" systems, like the United States, which deploy salaried lawyers in offices around the country to handle as many cases as they can—among them South Africa[141] and most recently, the Peoples' Republic of China.[142] But systems that

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138. The Community Legal Service (CLS), the civil legal services arm of the Legal Services Commission:

> funds a variety of legal services, ranging from initial advice to full representation at court. Funding for such services is delivered through contracts with solicitors and not-for-profit agencies [usually using non-lawyer staffs and limited to advice and out-of-court work]. Individual providers conduct the legal aid merits and means test for applicants for [advice and assistance short of representation, and representation in emergency cases and a limited range of family cases in the lower courts] . . . . For other levels of service, the provider will apply on the applicants behalf to the relevant regional office, where Legal Services Commission staff will decide whether the application meets the criteria for CLS funding.

REGAN, *supra* note 96, at 40-41. As the English legal aid program has evolved, it has added to the basic judicare component: first, "community law centers" that use salaried lawyers who focus on "poverty law" cases and community-wide problems in their geographic areas; second, not-for-profit organizations that deliver advice and representation through non-lawyers; and more recently, Community Legal Advice Centers and Networks with staffs that provide legal advice in certain areas of the country. *See id.*

139. "Legal services are mainly provided by solicitors in the full-time employment of the [Legal Aid Board], working in Law Centres established by the Board." *See* RYAN, *supra* note 115, at 59.

140. For a description of the legal aid system in Rio de Janeiro, see ALVES, *supra* note 102.

141. As described in the Legal Aid Board's National Report:

> Since South Africa has moved from a primarily outsourced method of instructing private practitioners through the judicare system, to delivering legal aid by our salaried in-house lawyers placed at more than 62 Justice Centres countrywide, the result of this shift is that more than 85% of our legal aid service is provided by in-house staff. The remaining share of the service is done by private lawyers through our judicare system and co-operation agreements.

LEGAL AID BD., NATIONAL REPORT: SOUTH AFRICA 1 (2009), (distributed as part of the ILAG Conference: Delivering Effective Legal Aid Services Across Diverse Communities), *available at* http://www.ilagconference.org/reports/South%20Africa%20-%20JM.pdf. However, as the report indicates, the legal aid system in South Africa presently devotes most of its services to criminal cases. "For the 2007/08 [fiscal year] out of our total legal delivery system, we were able to provide . . . 10% [of its resources] for civil matters. We are intending to grow this service for the next three years to a target of 15%." *Id.* at 4.

142. *See generally* ZUO XIUMEI, INT'L LEGAL AID GROUP, NATIONAL REPORT: CHINA—LEGAL AID SYSTEM IN CHINA (2009) (distributed as part of the ILAG Conference: Delivering Effective Legal Aid Services Across Diverse Communities). Although the People's Re-

combine salaried and compensated private counsel to deliver civil legal aid appear to be the wave of the future in "rights based" civil legal aid systems.

Legal aid programs that use both salaried lawyers and judicare are usually called "mixed" delivery systems and are becoming more and more common in Europe and the common law countries.[143] But different countries tend to mix the two basic approaches in different ways. There are at least four basic types: the "safety valve" or "overflow" mixed system; the "client option" mixed system; the "subject matter" mixed system; and the "function-based" mixed system.[144]

The "safety valve" or "overflow" system is basically a staff attorney program that only uses compensated private counsel when client demand exceeds the capacity of the salaried staff offices.[145] In Ireland, for example, private lawyers only take on a limited number of cases when the salaried staff lawyers cannot handle all the applicants arriving at their offices in a timely fashion.[146] When the queue waiting to be served becomes too long at a legal aid office, the staff begins assigning cases to private lawyers from one of three panels.[147]

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public of China only started its legal aid program in 1997, it already has established more than 3000 legal aid centers staffed with over 4000 salaried lawyers, over 6000 other law graduates, and several thousand paraprofessional "legal aid workers." *Id.* at 7. In addition, the nation's 130,000 private lawyers are expected to provide mandatory pro bono legal assistance for the poor. *Id.* China's legal aid lawyers handle three times as many civil cases as they do criminal cases—in 2008, 418,419 civil cases, 124,217 criminal cases, and 4223 administrative cases. *Id.* at 6. The 4237 salaried legal aid lawyers, though augmented by so many non-lawyer resources, are only a drop in the bucket in a country of 1.3 billion people. They and the other professional and paraprofessional legal resources are focused almost entirely on cases involving the clients' earnings and other income, e.g., social insurance benefits, spousal or child maintenance payments, wage or salary claims, and worker's compensation. Yet China's poor receive a substantially larger share of that country's total legal resources than do America's poor people. Fully *three percent* of China's lawyers work as salaried lawyers in legal aid offices, which handle three times as many civil cases as criminal cases. In the U.S., only *two-thirds of a percent* of the legal profession is working in civil legal aid programs. *See infra* note 192. The U.S. would have to fund civil legal aid at over $5 billion a year to match China in this measure of a nation's commitment to providing equality before the law to its low income citizens.

143. *See* Earl Johnson, Jr., *Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV., 393, 403-06 (2009).

144. *See id.* at 402-06.

145. *See id.* at 402-03.

146. *See* NATIONAL REPORT: IRELAND, *supra* note 97, at 2.

147. The Irish Legal Aid Board has set up three panels of private solicitors—one panel for "divorce and separation cases," another for "family law matters at District (local) Court level," and a third for "cases before the Refugee Appeals Tribunal." However, these panels have a limited function. "The use of private practitioners is designed to improve access to legal aid services in situations where a law centre is *not in a position to provide a timely service*." *Id.* at 1-2 (emphasis added).

Quebec province is the oldest and now nearly the only example of a pure "client option" mixed system.[148] Created in 1973, the Quebec program combines a large province-wide network of offices staffed by salaried lawyers with a judicare program.[149] Although all applicants are expected to go through one of the salaried offices where their eligibility is determined, they have the option of requesting to be represented by either one of the office's salaried lawyers or by a private lawyer chosen from a roster of private lawyers interested in participating in the program.[150] Those private lawyers, in turn, are compensated by the government for the services they furnish to the clients who chose them.[151] Statistics reflect that clients are quite discriminating in making those choices—tending to choose salaried lawyers when they have cases involving government benefits, housing, and consumer issues, but electing to go to private lawyers more often in family law and criminal cases, the latter being the common grist of the private bar in the province.[152] In fiscal year 2007-08, 66% of the Quebec Legal Aid budget was expended on representation by salaried staff and 34% on representation by private attorneys.[153]

The "subject matter" mixed system is exemplified by another Canadian province—Ontario. That program started in the mid-1960s as a pure judicare system.[154] But in the 1970's the Ontario legislature created a province-wide network of "legal clinics" staffed by salaried lawyers.[155] Unlike Quebec, however, these lawyers were charged with handling primarily "poverty law" cases—those involving government benefits, housing, consumer law, and the like, along with local community-wide issues.[156] Fami-

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148. *See* CAPPELLETTI ET AL., *supra* note 1, at 614-17.

149. *See id.*

150. *See id.* at 617.

151. *See id.* at 584-628.

152. *See id.* at 614-17.

153. CANADIAN CTR. FOR JUSTICE STATISTICS, LEGAL AID IN CANADA: RESOURCES AND CASELOAD STATISTICS—2007-2008, at 37 tbl.9.1 (2009).

154. *See* Legal Aid Ontario, Historical Overview [hereinafter Legal Aid Ontario Historical Overview], http://legalaid.on.ca/en/about/historical_overview.asp (last visited Feb. 2, 2010). Legal Aid Ontario, the independent public corporation that administers both criminal and civil legal aid in that province, reports that approximately 4000 private lawyers participate in the "judicare" component of the mixed system. *See* Press Release, Legal Aid Ontario, Attorney General Announces Tariff Increase for Legal Aid Lawyers (July 18, 2007), *available at* http://www.legalaid.on.ca/en/news/newsarchive/0707-18_tariffincrease.asp. Some private attorneys also serve as "duty counsel," staffing courtrooms and providing advice and limited assistance to people who show up without counsel. Legal Aid Ontario, About Legal Aid Ontario, http://www.legalaid.on/ca/en/about/default.asp (last visited Feb. 2, 2010).

155. Legal Aid Ontario Historical Overview, *supra* note 154.

156. *See id*.

ly law and criminal law remained the exclusive province of the private bar.[157] So clients who have poverty law problems are expected to take those problems to a legal clinic and the salaried lawyers there will provide the representation. But when they have family law or criminal cases, Ontario residents are expected to look to compensated private counsel to handle the problem.[158] In recent times, the mix has become more complex with a few experimental pilot programs using salaried public defenders in some criminal courts and salaried lawyers also staffing some family courts.[159] But the basic pattern remains the same—a split between salaried staff and compensated private counsel based on the subject matter of the client's problem—hence the name "subject matter" mixed system.

The Netherlands recently changed its legal aid program to what is best characterized as a function-based mixed system. A few years ago, that country revamped its legal aid program and established an array of neighborhood "law counters" staffed with salaried lawyers and supervised paralegals.[160] Anyone with a problem he or she thinks has a legal dimension may come to one of these "law counters" where the staff will diagnose the applicant's problem—or often, set of problems.[161] The staff then will try to resolve the problem short of litigation—including sending letters, making telephone calls, drafting legal documents, and the like—if the services can be accomplished within a single "consultation hour."[162] But if litigation is

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157. *See id.* Private attorneys also represent clients before certain administrative tribunals and refugee boards.

158. *See id.*

159. *See* ANGELA LONGO & LYNN IDING, INT'L LEGAL AID GROUP, EXPANDING THE MIX: INTRODUCING STAFF SERVICES—A WORK IN PROGRESS 303 (2005) (distributed as part of the ILAG conference: Legal Aid in the Global Era).

160. "At present, the Legal Services Counters annually provide easily accessible, free legal services to over a half a million clients. The Counters are meant as a first step to receive legal aid and, if necessary, referral to a lawyer or mediator." PETERS ET AL., *supra* note 96, at 1.

161. *Id.* at 7.

162. There are now thirty of these Legal Services Counters spread evenly across the Netherlands, putting "every Dutch citizen . . . [within] . . . an approximately one hour journey by public transport." *Id.* Each has at least six legal advisors, some of whom can be paralegals. They are designed to "look more like a shop than an office. Inside is an open space with a waiting area and three desks" and behind that a "call centre," where further information can be found via e-mail or telephone, and private rooms for consultation. *Id.* The legal advisors rotate among the advice desks, the call centre, and the consultation rooms. "Sophisticated computer software, specifically designed for the Legal Services Counters" helps the staff "correctly and quickly answer any client's question." *Id.* In 2008, of 645,000 persons served at this counters, 376,000 were helped via the telephone, 149,000 at the advice counters, 87,000 required a "consultation hour," and 33,000 were helped via e-mail and the website. 37,000 were referred to lawyers and 13,000 to mediators for extended legal services, generally involving potential or actual litigation. *Id.* at 8-9.

necessary or becomes necessary later in the process, the client will be referred to a private lawyer, who will be compensated by the government for the representation he or she provides.[163] So there is a functional divide. Salaried staff members provide all the legal advice and brief assistance, while compensated private lawyers handle all the more intensive assistance and representation in litigation, but *only* those services which lower income people may require. At the same time, those eligible for legal aid (that is, about 40% of the Dutch population)[164] can go directly to a private lawyer, and if litigation or other extended services will be required, the lawyer can prepare an application to the Legal Aid Board.[165] Thus, the Legal Aid counters are not the only route to the services private lawyers supply, but they are the only source of legal advice and brief [one-hour maximum] assistance the government will fund.

To give an idea of how complex the mix between salaried lawyers and judicare can become, consider the legal aid program in Finland, which uses a combination of mixed systems.[166] That nation has established a nationwide network of legal aid offices staffed by salaried lawyers.[167] No matter how applicants enter the system, a legal aid office must determine their eligibility for government-funded services.[168] Similar to the "law counters"

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163. "[P]rivate lawyers and mediators provide subsidized legal aid in more complicated or time-consuming matters." *Id.* at 1. "In . . . relatively simple legal problems, private lawyers are allowed to charge a standard three-hours service fee, of which the client contributes only € 13.50 Euros [roughly $20] . . . . Whether or not a client is entitled to three-hour legal aid, depends on his monthly income." *Id.* at 3.

> If a problem is expected to take more than three hours, clients are entitled to legal aid only if they have been granted a so-called *legal aid certificate*. In order to obtain this, a . . . lawyer needs to make an application to the Legal Aid Board on behalf of his client [which the Board will assess] . . . in terms of the client's means and of the merits and significance of the problem. Since April 2005 it is also possible to apply for a *mediation certificate* . . . to call in help from an independent mediator, so as to settle an issue between himself and an [sic] another party.

Id. at 4. "As soon as a case is closed, the lawyer bills the Legal Aid Board for the services provided. The Board, however, does not pay an hourly rate but a fixed fee for different types of services . . . based on extensive analyses of legal aid cases from the past . . . correspond[ing] to an hourly rate of approximately € 107." *Id.* at 13-14.

164. *Id.* at 12.

165. "Private lawyers obtain legal aid cases in two ways: either one of the Legal Services Counters refers a client to a lawyer, or a client contacts a registered lawyer on his [or her] own accord." *Id.* at 13.

166. *See generally* MUILU, *supra* note 129.

167. "With a population of about 5.2 million, and an area of about 340,000 [square kilometers], Finland has 64 Legal Aid Offices, which are located mainly in municipalities with a district court. The Legal Aid Offices have 18 branch offices and about 100 branch clinics where clients are seen as required. . . . The total number of employees is just 460, of which half are lawyers . . . and the other half office staff." *Id.* at 48.

168. *Id.* at 51.

in the Netherlands, those offices diagnose the problem and are the exclusive source of advice and representation short of litigation.[169] Thus, there is a functional divide just as in the Netherlands. Unlike the Netherlands, however, when Finnish residents have problems requiring litigation, the case is not automatically referred out to a compensated private counsel; instead, as in Quebec, clients are given an option.[170] They can ask a salaried attorney to represent them in court, or they can choose to have a private lawyer take over at the litigation stage.[171] About 70% of the time clients elect private counsel, but in the rest they pick a salaried lawyer to handle their litigation.[172] So, Finland is a mix of mixed systems—the "function-based" and "client-option" systems.

Should the United States indeed begin moving in the direction of a right to equal justice in civil cases, it may be forced to contemplate some form of mixed system. Even with the anticipated development of forums where self-help assistance will be sufficient to provide low income litigants with effective access to justice when both sides lack counsel,[173] and those forums where lay advocates may be sufficient,[174] the residue of cases requiring lawyers in all likelihood will exceed the numbers that can be handled even by a greatly expanded cadre of salaried legal aid lawyers. Moreover, effectively implementing a *right* to equal justice requires a flexible resource, one that can expand and contract as demand increases or decreases from year to year. The upsurge in applicants arriving at America's legal services offices during the current economic downturn illustrates how quickly demand can overwhelm any fixed resource of salaried lawyers—in this instance, further overwhelming an already overwhelmed resource.[175]

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169. "In matters that are not to be brought before a court (e.g. advice or drawing up of a document . . .), legal aid is given only by [salaried lawyers working at a State Legal Aid Office]." *Id.* at 47. There are exceptions, however, if the office staff has a conflict, or is too busy, or lacks the specialized knowledge required for a particular legal problem. *Id.*

170. *See id.* at 51; PETERS ET AL., *supra* note 96, at 1.

171. "The recipient of legal aid has a choice of attorney in any court case." MUILU, *supra* note 129, at 51.

172. Salaried staff counsel represented in over 53,000 court cases and private lawyers represented in nearly 33,000 court cases. *See id.* at 50, 54, 57 (statistical figure calculated by author).

173. *See infra* note 242 and accompanying text.

174. *See infra* note 242 and accompanying text.

175. Elizabeth Stull, *New York's Empire State Counsel Working Overtime for Free*, DAILY RECORD (Rochester, N.Y.), Jan. 29, 2009, *available at* 2009 WLNR 7518194. Almost lost in this recent outcry about the upsurge in applicants appearing at legal services offices in the United States because of the current economic crisis is the fact that before the downturn, those offices already were having to turn away half of the eligible people with meritorious cases who sought their services. LEGAL SERVS. CORP., DAILY DOCUMENTING THE JUSTICE GAP IN AMERICA 8 (2005), *available at* http://www.lsc.gov/press/documents/LSC%

Thus, at a minimum, even if the bulk of a "rights based" program were to be composed of salaried lawyers, there would be a need for a compensated private counsel component to handle the "overflow" in years of higher than average demand. Moreover, some clients are likely to arrive presenting unusual legal problems with which salaried lawyers are unfamiliar yet within the specialty of some private lawyers. It would seem to be less expensive and more effective to send such cases to the specialist in private practice. But this represents the minimum need for a compensated private counsel component in a legal aid program which is based on a dominant, or at least sizeable, salaried staff component. The foreign experience suggests there also may be some potential political advantages in having the entire legal profession invested in the government-funded legal aid program—not just as a matter of professional principle or pride, but as a matter of self-interest.

In any event, many features found in one or the other of the foreign legal aid programs described above influenced the design of a statute recently drafted by a group in the United States. The next section of this Article provides an overview of that statute and the Appendix presents the full text.

V. DRAFTING A GENERIC STATE STATUTE IMPLEMENTING A RIGHT TO EQUAL JUSTICE WHICH DRAWS ON FOREIGN LAWS AND EXPERIENCES

Several years ago, the California Commission on Access to Justice embarked on a project to design a statute that could implement a "right to equal justice," including a guarantee of counsel when needed—a right that also could be characterized as a "right to equality before the law" or to "*effective* access to justice." The task force assigned this task was co-chaired by Professor Clare Pastore of the University of Southern California Law School, who had been a long-time legal services lawyer, and myself. The Commission authorized this endeavor not because it expected to introduce or seek passage of such a statute anytime soon. Rather, the purpose was to work through all the substantive and language issues involved in constructing a "rights based" system and to surface issues that also might arise in drafting less ambitious statutory proposals.

Because many other countries already have "rights-based" legal aid systems, we looked to the foreign models as well as some features, such as self-help assistance and lay advocate services, that have evolved in the United States and are more common here than elsewhere. That this proved

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20Justice%20Gap_FINAL_1001.pdf. The influx of the "new poor," those who have lost jobs, substantial income, or homes as the economy collapsed, have merely flooded those already over-extended legal services offices.

a difficult assignment, despite the existence of foreign models, is suggested by the fact that it took four years and hundreds of person-hours to complete the process and produce a final draft.

The right the draft statute sought to enforce was not an absolute right to counsel in all civil cases, but a right to *effective* access to justice through the level of assistance or representation appropriate to the type of case, nature of the forum, characteristics of the competing litigants, and other relevant circumstances. In the end, the task force produced two draft statutes. One, called the "State Equal Justice Act," would implement a "comprehensive" right to equal justice that covered all types of legal problems and services, including legal advice and assistance unrelated to litigation, with enumerated exceptions.[176] The other, called the "State Basic Access Act," was more limited in its scope, only providing a right in designated categories of "basic human needs"—essentially the same list as the American Bar Association ("ABA") included in its 2006 resolution urging governments to provide counsel as a matter of right.[177] This latter statute also is narrower in a different sense. Like the ABA resolution, it is confined to representation and assistance in courts and other adversarial proceedings such as administrative hearings.

The Appendix contains the full text of the more comprehensive version, the "State Equal Justice Act," while the other one, the "State Basic Access Act" can be found on the Internet.[178] For those who lack the time to read the full statute in the Appendix with its accompanying "Drafting Committee Commentaries" and explanatory "Notes," or who want a guide to its key provisions, the following overview should prove helpful.[179]

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176. CAL. COMM'N ON ACCESS TO JUSTICE, STATE EQUAL JUSTICE ACT 1 (2006), *available at* http://www.brennancenter.org/content/resource/state_equal_justice_act/.

177. "RESOLVED: That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving *shelter, sustenance, safety, health or child custody*, as determined by each jurisdiction." A.B.A. Task Force on Access to Civil Justice, *ABA Resolution: Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 507 (2006) (emphasis added). The resolution was accompanied by a lengthy report justifying and defining the scope of the right to counsel that the resolution proposed, including discussion of circumstances where many lower income litigants can reasonably expect to enjoy equal justice without lawyers.

178. CAL. COMM'N ON ACCESS TO JUSTICE, STATE BASIC ACCESS ACT (2008), *available at* http://www.brennancenter.org/content/resource/state_basic_access_act/.

179. Another overview of the draft statute, this one focusing on the issues confronted during the drafting process, rather than describing the individual sections of the final draft of the statute, is available in an article written by the Task Force's co-chair, Professor Clare Pastore. *See generally* Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. 176 (2006).

Before going further, however, it should be made clear that the Task Force did not consider this to be a "model statute," in the sense that this term is ordinarily used. That is, it does not purport to be *the* way the right to equality before the law should be implemented, but rather presents *a* way it *could* be done, along with suggesting some alternative approaches that others might prefer. Similar to a restaurant menu, for most elements included in the draft statute below there were an array of possible options. Ultimately we picked one from column "A" and another from column "B," etc. But the Task Force did not mean to suggest it was prescribing these choices as the only, or even necessarily the best ones, for a given state to implement. Rather the draft sets forth the Task Force's preferences, often only marginally preferred over other possible formulations or features. With that understanding about the role of the draft "State Equal Justice Act," the following paragraphs provide an overview while the Appendix contains the full text of the Act, along with its accompanying "Task Force Commentaries" and "Notes."

The draft statute begins with a series of legislative findings (sections 101-08), some of which are similar to those the California legislature adopted in a recently-enacted law, the "Sargent Shriver Civil Counsel Act."[180] This act establishes a pilot project to experiment with providing counsel as a matter of right in selected courthouses.

The draft statute then defines the levels of service the statute guarantees–starting at the top with "full legal representation" (section 202), "limited legal representation" (section 203), "legal advice" (section 204), and "legal assistance" (section 205), all provided by lawyers, followed by "non-lawyer representation" (section 206), and three levels of "self-help assistance—personal "one-on-one" guidance" (section 207.1), "computer-assisted or online self-help assistance" (section 207.2), and "community self-help assistance" which is general education, not individualized help (section 207.3). This section of the statute also defines, among other things, what is required to qualify as a "qualified non-lawyer advocate" (section 209), or a "qualified non-profit legal services organization" (section 210), a category which becomes relevant later in the statute, and finally, the State Equal Justice Authority ("SEJA"). The latter is the statewide body the Act establishes to administer the entire program and is mentioned in various places throughout the Act.

The next major section (section 300) sets forth the scope of the right and eligibility criteria for each level of service for which there is a right. Fi-

180. Assem. B. 590, 2009 Leg., Reg. Sess. (Cal. 2009) (*see infra* note 244 and accompanying text for a further explanation of this legislation and the "legislative findings" that are similar to provisions of the draft "generic" statutes the Commission task force prepared).

nancially eligible *plaintiffs* are entitled to full public legal representation "only if a reasonable person . . . with the financial means to employ counsel, would be likely to pursue the matter" (section 301.1); *defendants*, on the other hand, are entitled to such representation "unless they lack a reasonable possibility of achieving a favorable outcome" (section 301.2). Eligibility for representation on appeal is a second independent decision with appellants being eligible only if there is a "reasonable probability" of reversals, while respondents are eligible *unless* the trial court's decision was "clearly erroneous" and thus there is no "reasonable possibility the appellate court will affirm" (section 301.3).

But even if applicants satisfy the above criteria, full legal representation will still be denied if: (1) lawyers are barred from representing any parties in that court or forum (for instance, small claims courts in California and some other states) (301.4.1); (2) if legal representation is available through contingent fee lawyers or through an insurance policy, or otherwise at no cost to the applicant (301.4.2); (3) certain types of cases such as defamation, name change, disputes between business organizations, uncontested dissolution cases not involving children, etc. (301.4.3); (4) if limited legal representation is sufficient for fair and equal justice and the opposing party does not have full representation (301.4.4); or (5) if self-help assistance is sufficient for a fair and equal hearing because the dispute is being decided in a court or other forum that meets certain conditions, (e.g., uses an inquisitorial process, with procedures and legal issues so simple non-lawyers can represent themselves, *and* the opposing party is not represented *and* the applicant has the intellectual and language ability to represent himself/herself (301.4.5)).

"Limited legal representation" shall be provided in lieu of full legal representation when it is sufficient for fair and equal justice either alone or in combination with self-help assistance, but not in the forums or types of cases where full legal representation is barred (302).

"Legal advice" shall be available in person or through other means but only through non-profit legal services organizations or through lawyers those organizations certify and supervise, and not on issues related to an applicant's business enterprise (303).

"Legal assistance" shall be available for document preparation and in the pre-litigation phase of disputed matters if there is a reasonable possibility this will avoid litigation (304).

"Non-lawyer representation" through lay advocates supervised or certified by non-profit legal services organization shall be the level of service provided in cases heard by forums that permit this form of representation *and* if it is more economical than legal representation *and* the opposing par-

ty is not represented by a lawyer *and* self-help assistance is not a sufficient alternative (305).

"Self-help assistance" shall be available without regard to financial eligibility in designated forums and types of matters (306).

The next section (400) concerns "financial eligibility" and requires the SEJA to establish the standards, including a schedule of co-payments for clients whose incomes are sufficient to make partial payments, with the maximum income eligible for service topping off at 300% of the federal poverty level (except for self-help assistance which may have no income limit or top out at 500%, but above 250% requires a 50% of cost co-payment (404)). The SEJA is instructed to make annual adjustments in eligibility standards and co-payment levels (405).

Section 500 covers the delivery system. The services of lawyers and non-lawyer advocates are to be provided through a "subject matter mixed system" utilizing both salaried lawyers and compensated private counsel. Non-profit legal services organizations employing salaried lawyers and when appropriate, non-lawyer advocates, shall be essentially the exclusive providers in government benefit, eviction, domestic abuse, dependency (called neglect in some jurisdictions), consumer (except in sub-categories where a private market for legal services exists), employment (except in sub-categories where a private market for legal services exists), and other categories the SEJA determines can be handled more efficiently yet effectively through salaried attorneys than by compensated private counsel. But within all these categories of cases, compensated private counsel will be employed in cases of conflict, or where the case requires expertise the salaried lawyers do not possess, or when no reasonably accessible salaried office exists, or if the salaried office has reached capacity and needs to send its overflow elsewhere (501).

Compensated private counsel, on the other hand, are essentially the exclusive providers of services in ordinary tort, contract, or property cases (except those within the special categories defined in 501); ordinary family law issues such as dissolution, child custody and support, domestic abuse and dependency proceeding (except those within the subset defined in 501), and any other categories in which the SEJA finds private lawyers can provide more efficient yet still effective representation (502).

The next section (600) describes the eligibility determination process. The SEJA is authorized to establish detailed criteria and to delegate responsibility for individual eligibility determinations to non-profit legal services organizations, state court self-help centers, judges, or special offices the SEJA chooses to establish (601-602). Those denied service can appeal to a

three-member appellate committee composed of independent administrative law judges (603).

The final section (700) describes SEJA itself, the body charged with administering the Act. It is to have a nine or ten-member board with members chosen by the Chief Justice, the state bar, the governor, the state legislature, and the Attorney General (but only in a state where that official is elected and not appointed by the governor) (701). The SEJA board selects the SEJA President who in turn selects and supervises the remaining staff (702). The SEJA has overall responsibility for establishing, implementing, and enforcing policies guaranteeing all eligible people the level of advice, assistance, and representation needed to provide them fair and equal justice in the matters in which they are involved (703). Included is the duty of ensuring clients served through the Act "receive the same independent, confidential, competent, and otherwise ethical representation as those persons who can afford to pay for legal representation" (703.8). The SEJA also is instructed to conduct studies assessing the need and demand for legal services, the sufficiency of the services provided, and the like (703.7).[181]

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181. In addition to this summary version of the State Equal Justice Act, some readers may be interested in learning about the process the task force used in drafting the statute. We began by reviewing and discussing at length a number of legal aid statutes from countries that had "rights-based" systems, but used different approaches to organizing, administering, and delivering the services. This helped the members define the issues and the processes that the draft statute would have to address as well as identifying some solutions other societies had devised. Different task force members then took responsibility for drafting one of the more difficult provisions—the "merits" test in the eligibility section, for instance, or the basic delivery system section. These rough drafts were submitted to the other task force members and after discussion usually sent back for redrafting.

When that short list of critical issues had been resolved, we determined one person should produce a first draft of the entire statute, including the many sections that had not been subjected to intensive study before, in order to avoid a patchwork of styles and minimize inconsistencies and conflicts among provisions. I volunteered to undertake that task. This first draft, in turn, was circulated to the full task force for review, comment, and modification. By the time this internal "review and revise" phase of the process was completed nearly a year later, some provisions of the statute were in their sixth draft.

Finally, the task force felt comfortable enough with the product to send it out for a confidential review by a half-dozen reviewers in other parts of the country. The task force chose these individuals because of their knowledge and expertise as well as their interest in some sort of comprehensive legal services delivery system. They included Debra Gardner of Maryland's Public Justice Center, who also chairs the National Coalition for a Civil Right to Counsel, Debi Perluss of the Northwest Justice Center in Seattle, who also is very active in the National Coalition, Richard Zorza, co-director of the Bellow-Sachs Access to Justice Project at Harvard Law School, Professor Russell Engler of New England College of Law and author of a number of articles related to access to justice, Laura Abel of the Brennan Center who is heavily involved in the National Coalition and also has written several articles in the field, and Andy Scherer, long-time Executive Director of Legal Services of New York City, one of the nation's largest legal-aid programs, and an active proponent of expanding the right to counsel in civil cases. All of these reviewers sent extensive and insightful com-

This draft State Equal Justice Act may draw quite heavily on foreign experiences, but it is designed to operate within an American context, which has some unique aspects that affect a number of provisions. Merely as an example, the United States is almost unique in having a "contingent fee" system that affords representation to parties, irrespective of income, in personal injury and many other tort cases where victims experience substantial compensable injuries.[182] There is neither motive nor a reason to provide government-funded lawyers in such cases. Thus, as readers will find, this draft statute excludes these cases from coverage, even though in many other countries legal aid would be the only possible source of representation for low-income people in those same cases. The United States also is almost unique in not having a "loser pays" fee-shifting arrangement, which is a complication other nations' legal aid statutes must address but which this draft statute did not have to consider.

As emphasized repeatedly in the "Notes" accompanying the draft statute's provisions, the task force made choices throughout—many of them close calls among equally attractive alternatives. It would be quite possible to assemble a different mix of key features—the scope of services provided, eligibility standards, delivery system, administrative arrangements,

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ments and recommendations for changes. The final draft found in the Appendix incorporates many, but not all, of those recommended changes. Thus, these outside experts should not be held responsible for any perceived deficiencies in that final draft.

182. Several years ago, England adopted a "conditional fee" system that, after a recent expansion, applies to all non-family law cases. This system theoretically offers poor people, as well as others, access to the courts without government-funded legal aid in many categories of cases, but especially those where a substantial financial award is at stake. It is built on England's traditional "loser pays" fee-shifting arrangement. Under this "conditional fee" system, English lawyers may agree to represent a client on a "no win, no fee" basis—that is, when cases are lost, the clients are not required to pay their lawyers any fee. When the cases are won, however, the lawyers not only recover their fees from the losing parties, but also an "uplift" equal to all or some percentage of their regular fees—thus potentially doubling the fee they recover for winning the case. To protect clients against the risk they will have to pay the other sides' fees should they lose, they may purchase insurance that will cover those costs. If they succeed in the litigation, they may recover those insurance premiums from the losing side, while their lawyers are recovering their fees, plus an "uplift." This is only a brief outline of the "conditional fee" system as it has developed in England, which has gone through several revisions since it began on an experimental basis in the early 1990s. It was institutionalized in the Access to Justice Act, 1999, when most damage actions other than "medical negligence" were removed from legal aid with the expectation that access to justice could be achieved through this new fee-shifting system. For an excellent overview of the "conditional fee" system in England, as well as several other countries that have adopted this approach, see a thoughtful study conducted by the Hong Kong Law Reform Commission while deciding whether to recommend a similar system for that jurisdiction. CONDITIONAL FEES SUBCOMM., THE LAW REFORM COMM'N OF HONG KONG, CONSULTATION PAPER: CONDITIONAL FEES, *available at* http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj1024cb2-122-5e.pdf.

and the like—that would implement the right to equal justice in ways many readers might find preferable to this particular configuration. But however a statutory right to equality before the law is designed, or a court's declaration of a constitutional right is implemented, society's willingness to provide adequate funding will determine whether the right is truly effective. Thus, we now turn to the issue of cost.

VI. WHAT FOREIGN—AND DOMESTIC—EXPERIENCE SUGGEST ABOUT THE COST OF IMPLEMENTING A RIGHT TO EQUAL JUSTICE

Almost always, the first and often only objection raised when someone mentions the possibility of the United States implementing a right to equality before the law is: it will cost too much and American taxpayers will never support that amount of funding.[183] Often this is followed by the argument that we do not even adequately fund healthcare. This last comment carries the clear implication that we shouldn't invest more public funds in making the justice system fair for lower income Americans until we have taken care of all their needs for health care.

What this specie of objection raises are really only questions of political will (or willingness), comparative cost, and societal priorities. We will first explore them in the light of what some other comparable industrial democracies have been willing to spend on civil legal aid. Then we will turn to what the United States itself has been willing to do in the past as well as what it might cost to provide equal justice to the poor compared to what we already spend on health care for that population.

A. Comparative Expenditures on Civil Legal Aid

If democratic societies have an *inherent* unwillingness to support the investment of significant resources in programs providing equal justice to lower income citizens, one would expect public investments in those programs to be minimal in all democratic societies, not just the United States. But the statistics reflect something very different. Several comparable industrial democracies, most but not all in Europe, invest anywhere from three times to twelve times as much of their nation's income on civil legal aid as does the United States. These comparisons are reflected in Table 1.

183. *See, e.g.*, TED FRANK, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, THE TROUBLE WITH THE CIVIL GIDEON MOVEMENT 1 (2008), *available at* http://www.aei.org/docLib/20080807_23374LOAugustg.pdf.

Table 1. Comparative Public Expenditures On Civil Legal Aid (2004)[184]

Nation	Total Public Civil Legal Aid Investment[185]	Population[186]	Public Civil Legal Aid Investment Per Capita	Gross Domestic Product (Per Purchasing Power) Per Capita[187]	Public Civil Legal Aid Investment as Percentage of GDP (in thousandths of a percent)
United States	$800 million[188]	295 million	$2.70	$40,100	.0067 % (less than 7 thousandths of a percent)
Ireland	$26.9 million	4.0 million	$6.72	$31,900	.019 % (19 thousandths of a percent)
Germany	$520 million	82.4 million	$6.44	$28,700	.022 % (22 thousanths of a percent)
Finland	$35.6 million	5.2 million	$6.84	$29,000	.024 % (24 thousandths of a percent)
Canada	$257 million	32.8 million	$7.83	$31,500	.025 % (25 thousandths of a percent)

184. Expenditures compiled by author from information gathered from the 2005 ILAG Conference.

185. The civil legal aid expenditure figures of each country are from the "National Reports" prepared by national legal aid administrators or academics from those countries, and submitted to the 2005 Conference of the International Legal Aid Group, Killarney, Ire., June 2005.

186. The population figures were obtained from U.S. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: COMPARATIVE PUBLIC EXPENDITURES ON CIVIL LEGAL AID (2005).

187. *Id.* The per capita GDP figures reflect "Purchasing Power Parity" GDP, not "official exchange rate" GDP.

188. As with all nations, this figure does not include private sources such as foundation grants, private donations, etc., but does include all public funding—Legal Services Corporation ("LSC"), Interest on Lawyers' Trust Accounts ("IOLTA"), state government, local and non-LSC federal funding.

New Zealand	$30 million	4.0 million	$7.50	$23,200	.032 % (32 thousandths of a percent)
Scotland	$72.5 million	5.08 million	$14.50	$29,600 (for U.K.)	.049 % (49 thousandths of a perecnt)
Netherlands	$300 million	16.4 million	$18.29	$26.900	.068 % (68 thousanths of a per cent)
England	$1.63 billion (excluding immigration)	53 million	$30.75 (excluding immigration)	$29,600 (for U.K.)	.103 % (103 thousandths, or 1 tenth of a percent)

With the exception of England,[189] the expenditure statistics were compiled from "national reports" prepared by legal aid administrators, or in some cases, academics from the nations included on the table and submitted for the 2005 biennial conference of the International Legal Aid Group.[190] The expenditure figures include only *public* funding and *not private* sources of funding, whether those private funds were derived from client contributions, court awarded fees, foundation grants, or private donations. Most of the data are from calendar or fiscal year 2004. But there is no reason to expect any substantial changes since then in the comparative standings of the nine nations included on the table.

189. The English figures were derived from the Legal Services Commission's Annual Report for England and Wales. LEGAL SERVS. COMM'N, ANNUAL REPORT 2004/05, *available at* http://www.official-documents.gov.uk/document/hc0506/hc01/0167/0167.pdf.

190. *See* EARL JOHNSON, JR., INT'L LEGAL AID GROUP, KEY FEATURES OF FIFTEEN NATIONAL LEGAL AID PROGRAMS 157-71 (2005) (distributed as part of the ILAG Conference: Legal Aid in the Global Era) (summarizing in chart form the essential elements and statistical data gleaned from the National Reports included in the book produced from that conference's proceedings). Exchange rates used to convert from local currency to U.S. dollars were those in effect on June 30, 2004. At that point, a Euro = $1.25, a Canadian dollar = $0.83, a New Zealand dollar = $0.72, a Hong Kong dollar = $0.13, and a British pound = $1.81. Per capita GDP figures for each country are from the World Fact Book (2004) and were based on the "Purchasing Power Parity" ("PPP") GDP which is corrected for the relative purchasing power of the nation's currency. The Legal Services Commission received government grants totaling 905 million British pounds, which on June 30, 2004, at the prevailing exchange rate of $1.81 to the pound, was the equivalent of $1.63 billion.

As the above table makes quite apparent, in no country, even the most generous, is the investment in civil legal aid anything but a tiny, virtually miniscule portion of the nation's GDP. At one end, the United States investment in civil legal aid was only seven *thousandths* of a percent of our GDP in 2004. At the high end, England's was slightly over one-*tenth* of a percent of that nation's GDP. To put it another way, the U.S. was at *seven* thousandths and England at *one hundred-and-three* thousandths of a percent of their respective national GDPs—making England more than fourteen times more generous than the U.S. in its commitment to providing equality before the law for its lower income people. Yet England's investment seems negligible compared to the nation's ability to pay and also compared to the fundamental nature of the national promise of "justice for all" that expenditure fulfills.

Another revealing comparison among the same nine countries is presented on the next table. It is based on the $11.75 trillion GDP the World Fact book reported the United States earned that year, and shows what the U.S. *public* expenditure on civil legal aid would be if this country invested as much of its GDP for that purpose as these other eight nations did in 2004.

Table 2. U.S. Expenditures on Civil Legal Aid if it Invested the Same Percentage of its GDP in Civil Legal Aid as These Nations (2004)

Ireland	Germany	Finland	Canada	New Zealand	Scotland	Netherlands	England & Wales
$2.2 billion	$2.6 billion	$2.8 billion	$2.9 billion	$3.75 billion	$5.75 billion	$8.0 billion	$12.1 billion

Note: For England, the public investment figure does not include expenditures on immigration cases.

In addition to comparative per-GDP statistics, other revealing comparisons focus on the justice system itself. Unfortunately, the statistics are difficult to obtain and thus only a few two-nation snapshots are available at this point. But those limited snapshots are rather dramatic. A decade ago in England, the government's investment in civil legal aid represented 12% of that nation's total spending on lawyers by all individuals, businesses, governments and other possible clients,[191] while in the United States civil

191. MIKE HOPE, U.K. DEP'T FOR CONSTITUTIONAL AFFAIRS, EXPENDITURE ON LEGAL SERVICES (1997), http://www.dca.gov.uk/research/1997/997esfr.htm. While this information is now a dozen years old, there is no reason to expect any dramatic change in the ratio of legal aid-funded legal work to overall expenditures on lawyers since that time.

legal aid received less than a half a percent (.5%) of our nation's total expenditures on lawyers. [192]

Another revealing measure compares nations in how they allocate the publicly-funded resources they commit to the dispute resolution function. The table below portrays a nation's willingness to expend resources on civil legal aid compared to its willingness to expend resources on the courts. The data used to calculate the percentages for the European countries reflected on the table come from a recently published report "European Judicial Systems" prepared by the European Commission for the Efficiency of Justice and published by the Council of Europe.[193] Because the "European Judicial Systems" report only supplied a combined figure for civil and criminal legal aid, it was not sufficient by itself as a source for comparisons of investments on the judicial and civil legal aid components of the justice system. Thus, the only nations included on the table were ones for which data was available from other sources regarding the level of civil legal aid funding (independent of funding on defense of the criminal accused).[194]

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192. In 2004, an estimated $209 billion was spent on the services of lawyers in the United States, most in the form of legal fees paid to private law firms by individuals, businesses, governments, and other entities. In 2006 an estimated $236 billion was spent on such services, an increase of over 12% from 2004. U.S. CENSUS BUREAU, 2009 STATISTICAL ABSTRACT OF THE UNITED STATES, at tbl.1247. In the meantime, expenditures on civil legal aid from all sources, public and private, totaled roughly $1 billion in those years, less than a .5% of total expenditures on lawyers. Whether that 5% estimate held true amidst the economic downturn in 2009 warrants some discussion, although precise statistics are not available at this time. The deep downturn the U.S. economy suffered in 2009 clearly affected private law firms adversely, undoubtedly reducing the total national expenditures on lawyers that year by an unknown, but likely significant, amount. Meanwhile, financial support for civil legal aid also has been impacted, primarily because of a sharp decline in interest rates, greatly reducing the revenues generated by IOLTA (Interest on Lawyers' Trust Accounts). IOLTA is second only to Legal Services Corporation grants as a source of income for civil legal aid programs and supplied scores of millions of dollars less in 2009 than it did in 2008. Depending on how much total expenditures on lawyers declined relative to what was a likely reduction in financial support for civil legal aid, the latter may have received slightly more or somewhat less than the half a percent (.5%) it did in the earlier years for which statistics are already available. But that it remained close to that ratio seems a safe statement.

193. "Public budget allocated to courts, legal aid and public prosecution in 2006, in [Euros]." EUROPEAN COMM'N FOR THE EFFICIENCY OF JUSTICE, EUROPEAN JUDICIAL SYSTEMS: EDITION 2008 (DATA 2006): EFFICIENCY AND QUALITY OF JUSTICE, 20-21 tbl.2 (2008).

194. The civil legal aid expenditure figures used to calculate the percentage comparison with the judicial budgets are the same as reflected on Table 1, *supra*. The judicial expenditure figures were then converted to U.S. dollars, to make the comparison possible. The figures are for 2004 while the court expenditure figures, as noted, are for 2006. However, it is unlikely a significant change occurred in civil legal aid expenditures in any of these countries between 2004 and 2006, especially an increase or decrease so large that it would distort the comparison with judicial expenditures in that same country.

Table 3. Comparison Between Civil Legal Aid Expenditures as Percentage of Judicial Expenditures in Selected Nations[195]

Nation	Civil Legal Aid Budget as Percent of Judicial Budget	U.S. Civil Legal Aid Expenditures if They Were the Same Percentage of U.S. Judicial Expenditures as This Nation's Civil Legal Aid Expenditures are of its Judicial Expenditures
Finland	13.6%	$2 billion
Netherlands	27.0%	$4 billion
Ireland	35%	$5.25 billion
Northern Ireland	37%	$5.5 billion
Scotland	63%	$9.4 billion
England & Wales	79%	$12 billion
United States	7.5%	$1 billion

An adversary system such as the United States uses depends on the private parties rather than the judges to discover the relevant facts and the operative legal principles then present them to a neutral fact finder (judge or jury). In contrast, an inquisitorial system expects the judges to play a major role, independently and actively discovering the facts and applicable law as well as deciding the case. Thus, one would expect a nation using an adversarial system to devote more funds proportionately to subsidizing private parties who could not afford to perform these vital functions on their own than does a nation using an inquisitorial approach where the publicly-funded judiciary is doing more of this hard work.

With the exception of the United States (which uses an adversary system) this expectation is confirmed by the limited number of nations included on the above table. In Finland, which uses a system that is fairly close to a pure inquisitorial approach, the civil legal aid budget is only 13.6% as large as the judicial budget. The Netherlands use a system which has elements of both the inquisitorial and adversarial systems and its civil legal aid budget is 27% as large as its judicial budget. But in those countries using a classic adversarial system the civil legal aid budget ranges from 35% to 79% the size of the judicial budget. The United States is the

195. EUROPEAN COMM'N FOR THE EFFICIENCY OF JUSTICE, *supra* note 193.

outlier—indeed on the outer fringes—only spending an estimated 7.5% as much on civil legal aid as it does on the judicial system.[196]

This is not to suggest this disparity is attributable in any sense to overly generous funding of the judiciary in the United States. To the contrary, state and local courts are notoriously underfunded in this country, as confirmed by research disclosed by the National Center for States Courts.[197] What the statistics on Table 3 do demonstrate, however, is that, compared to similar industrial democracies, and especially our fellow common law countries, civil legal aid is even worse off than the courts in the United States.

But one does not have to look to other countries for revealing (some might say embarrassing) comparisons. Our own past can do the same. If this nation merely matched what it had been willing to do thirty-nine years ago, we would be a long way toward being able to fund a right to equal justice in this country.

In fiscal year (FY) 1981, the Legal Services Corporation's ("LSC") budget reached its high point—in real terms—$321 million.[198] This was the realization of the interim, so-called "minimum access" goal of one legal services lawyer for every 5,000 indigents.[199] At that time, the LSC Board

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196. Unfortunately, no agency compiles precise nation expenditure figures for state courts in the United States. In many states, the courts are funded by a combination of state, county, and sometimes municipal governments, thus complicating the problem of aggregating budget or expenditure data. But recently, the National Center for State Courts had occasion to produce an estimate of total expenditures by the nation's state courts. Reflecting the admittedly imprecise nature of the estimate, the Center concluded combined state court expenditures ranged somewhere between $11 billion and $13 billion. Interview with Gregory Hurley, Knowledge Mgmt. Analyst, Nat'l Ctr. for State Courts (Aug. 28, 2009). To this should be added the $5.8 billion expended by the Federal Judicial Branch U.S. CENSUS BUREAU, 2008 STATISTICAL ABSTRACT OF THE UNITED STATES tbl.458, because many civil legal aid agencies provide representation in federal as well as state courts. Combining the federal court expenditures and the National Center for State Courts' ("NCSC") estimate of state court expenditures, it is possible to safely estimate that total judicial expenditures easily exceed $15 billion in the United States, the figure used on Table 3, *supra*.

197. *See supra* note 196.

198. *See* HOUSEMAN, *supra* note 112, at 16.

199. The goal was phrased as "two lawyers for every 10,000 poor people." *Id.* at 16. This equals one lawyer for every 5000 indigents. But that "two lawyers for every 10,000 poor people" formula (rather than expressing it as one lawyer for every 5000 indigents) probably is explained by what occurred a decade earlier. When drafting the "Guidelines for the OEO [Office of Economic Opportunity] Legal Services Program" in 1965, "we wanted to insure there were no one lawyer offices and set a minimum of two lawyers for each neighborhood office we would be willing to fund and that no such office should be expected to serve an area with more than 10,000 poor people." (The author was Deputy Director of the OEO Legal Services Program at the time and personally participated in the drafting of those Guidelines, including the section setting out the *two lawyers for 10,000 poor people* provision.) *Id.*

viewed this as only a first step toward "full access" or at least "adequate access" for the poor.[200] But the next year the new President, Ronald Reagan, "zero-budgeted" the LSC in the budget his administration submitted to Congress, as part of his effort to eliminate the program entirely.[201] The outcome of the legislative struggle that ensued was a one-third reduction in the LSC budget—and since then, although there have been some ups and downs over the years, LSC's appropriation has never approached the 1981 level in inflation-adjusted dollars.[202]

Since the 1981 LSC budget was enacted, thirty-eight years of inflation have drained the dollar of more than 60% of its value. That 1981 LSC budget only amounted to a tiny percent of the total federal government budget.[203] Yet even that tiny percent of the federal budget represented

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200. This "minimum access" goal was never viewed as an ultimate goal for the size of the LSC budget or of the legal services program in the United States. Indeed, at that time there already existed a number of local legal services programs that had a significantly larger budget and a much higher number of lawyers per 10,000 indigents in the geographic areas they served, without being able to represent all the applicants who arrived at their offices.

201. *Reagan Proposals Detail Further Trims in Budget*, N.Y. TIMES, Mar. 11, 1981, at B5. Although Reagan did not succeed in eliminating the Legal Services Corporation, the compromise with Congress did result in a drastic reduction in the LSC budget—from $321 million to $241 million. Reagan also zero-budgeted the LSC each year for the rest of his term in office, but each time Congress nevertheless funded the Corporation, usually increasing the budget slightly. *See* HOUSEMAN, *supra* note 112, at 16.

202. Alan Houseman's paper for ILAG's 2009 conference contains a chart reflecting those ups and downs. As that chart reveals, whether trending slowly upward or twice precipitously downward over the years, the LSC budget has never come near to equaling the 1981 "minimum access" figure of $321 million in inflation-adjusted dollars, much of the time hovering around half that level, where it remains in 2009. *See* HOUSEMAN, *supra* note 112, at 16. That revenue loss is compounded by the fact that the number of people eligible for LSC-funded legal services has increased by 25% between 1980 and the present—from 40.7 million to nearly 51 million (50.876 million) in 2007. U.S. CENSUS BUREAU, 1980 STATISTICAL ABSTRACT OF THE UNITED STATES tbl.689; U.S. Census Bureau, Historical Poverty Tables – People tbl.6, [hereinafter Historical Poverty] *available at* http://www.census.gov/hhes/www/poverty/histpov/perindex.html (follow "Table 6: People Below 125 Percent of Poverty Level and the Near Poor" hyperlink). Thus, LSC funding per eligible person has shrunk in real terms by some 70% since 1981. During late 2008 and into 2009, the population under 125% of the poverty level undoubtedly has increased by several million "new poor" because of the economic downturn and associated job losses, further aggravating the long-term reduction in LSC funding per eligible person.

203. In 1981, federal outlays totaled slightly over $678 billion and the LSC budget was $321 million. Office of Mgmt. & Budget, Historical Tables: Budget of the United States Government: Fiscal Year 2009 26 tbl.1.3, *available at* www.gpoaccess.gov/usbudget/fy09/pdf/hist.pdf. The original proposed federal outlays for the 2009 fiscal year budget totaled slightly over $3.1 trillion dollars—over 4.5 times the 1981 federal expenditure. *Id.* If the LSC budget were as large a percentage of the FY 2009 federal budget as it was in 1981, it would have reached $1.45 billion in current dollars in FY 2009, instead of lagging behind at only a few million more than it was in 1981.

1.4% of what the nation's citizens, corporations, and other entities spent on lawyers that year.[204] What does this all mean?

- What the federal government was willing to allocate to the Legal Services Corporation in 1981 would amount to $752 million in 2008—after adjusting for inflation—not just the $390 million appropriated that year.[205]

- Because the numbers of people eligible for LSC-funded legal services grew by 25% between 1981 and the present—from 40.8 million to 51 million[206]—in order to restore the LSC funding per poor person to the level it was in 1981 would have required an LSC appropriation of $941 million in FY 2009 not the $390 million Congress appropriated for that fiscal year.

- If the federal government was willing to devote the same percentage of the federal budget to the LSC in FY 2009 as it did in FY 1981, the LSC budget would have been $1.45 billion that year not $390 million.[207]

- In 1981, the federal government, through the LSC budget, was willing to provide the nearly 20% of the nation's people who are poor with a modest 1.4 percent of the nation's legal resources. Because the nation's expenditures on lawyers soared from $23 billion in 1981 to $236 billion in 2006,[208] if the government would have been willing to give poor people that same 1.4% of the nation's legal resources in FY 2009, the LSC budget would have been over $3.3 billion that year rather than only $390 million.[209]

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204. U.S. CENSUS BUREAU, 1982-83 STATISTICAL ABSTRACT OF THE UNITED STATES 800, *available at* http://www2.census.gov/prod2/statcomp/documents/1982_83-01.pdf

205. *See* HOUSEMAN, *supra* note 112, at 16.

206. *See* statistics from 2009 STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 192, and Historical Poverty, *supra* note 202.

207. The Legal Services Corporation received .047% of the U.S. Government's total $678 billion outlays in FY 1981. If LSC received that same .047% of the U.S. Government's $3.1 trillion outlays in FY 2009, the Corporation's budget would be $1.45 billion.

208. *See* statistics from 2009 STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 192.

209. $321 million is 1.4% of $23 billion but $390 million is only .18% (eighteen hundredths of a percent) of $236 billion, while 1.4% of that $236 billion would be $3.3 billion.

Admittedly, no matter which of the prior governmental commitments to civil legal aid the federal government might agree to restore, the United States would still remain short of the average proportional civil legal aid investment for the eight other comparable industrial democracies reported on Table 2, that is, over $4 billion.[210] But at least our country would match some of the countries at the lower end of the scale and be much closer to Scotland and the Netherlands, and within sight of England. Indeed, if the LSC budget were somehow to return the poor to the 1.4% of legal resources reached in 1981, our nation would be within striking distance of the appropriation needed to fund a right to equal justice. This is especially true if we were to implement that right through the sort of cost-effective model outlined in Part VI, *supra* (and presented in more detail in the Appendix), that properly integrated self-help assistance, lay advocates, limited legal representation, and full legal representation.

Thus, whether measured by either our own historical commitments or by our standing among other industrial democracies, the United States as a whole, and the federal government in particular, continue to demonstrate something less than tepid support for that fundamental precept of the social contract—equality before the law. Some would ask whether our nation's support for other values of importance to the poor isn't equally tepid. Whether that is true and, if so, what that says about what society should spend on equal justice is the subject of the next section.

B. Expenditures on Civil Legal Aid Compared with Other Public Expenditures Benefiting the Poor

In order to make some relevant comparisons, the starting point is the share of total legal resources civil legal aid organizations have to serve the population eligible for their services. Recall, at the present time, that share is only one-half of one percent.[211] This miniscule share of legal resources is expected to serve over fifty million people—one sixth of the nation's total population.[212] Those fifty million, in fact, represent the minimum who need civil legal aid—those who are under 125% of the federal poverty line and thus eligible for LSC-funded legal services. But many of the non-LSC funded legal aid programs have decided another strata of people are unable to afford counsel and drawn the line at 200% of the poverty line.[213] Applying this standard, over ninety million Americans—nearly a third of the

210. *See* Table 2, *supra*.
211. *See supra* note 192 and accompanying text.
212. *See supra* note 202.
213. *See* 45 C.F.R. § 1611 (2009).

population—would be eligible for civil legal aid.[214] This means that at the current time civil legal aid is funded at an average of $20 a year per eligible poor person assuming the fifty million figure represents the total population needing their services and a bit over $10 per poor person if the more realistic estimate of those unable to afford counsel in most legal problems they face is ninety million.

Another relevant statistic for comparison purposes is the roughly one billion dollars from all sources which the U.S. currently invests in civil legal aid. Contrast that with the $323 billion annual national government expenditure on the Medicaid program in FY 2006.[215] Medicaid, unlike civil legal aid, is presently a "rights based" program. That is, if an applicant is financially eligible and has a health problem covered by the program he or she is legally entitled to government-paid health services that address that problem. At this point, the United States spends on justice for the poor less than a third of a percent (.33%) of what it spends on health care for the poor. Another way of expressing the stark difference, and one that makes it easier to comprehend, is that the Medicaid budget provides over $4,500 per eligible patient,[216] while civil legal aid only has $20 per eligible client.

On another and more relevant scale of comparison, the combined federal-state Medicaid program expenditure of $323 billion in 2006 amounted to fully 15% of the nation's total public and private spending on health care that year, which amounted to slightly over $2.1 trillion.[217] (The total spending statistic includes all the private health insurance premiums Americans or their employers pay, their personal co-payments and non-insured payments to providers, as well as Medicare, Medicaid and other govern-

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214. As of 2006, the Census Bureau estimated 91,091,199 people in the United States had incomes below 200% of the poverty level. U.S. CENSUS BUREAU, POVERTY STATUS IN THE PAST 12 MONTHS (2006), *available at* http://factfinder.census.gov/servlet/STTable?_bm=y&-qr_name=ACS_2006_EST_G00_S1701&-geo_id=01000US&-ds_name=ACS_2006_EST_G00_&-_lang=en&-redoLog=false&-CONTEXT=st.

215. U.S. CENSUS BUREAU, 2006 STATISTICAL ABSTRACT OF THE UNITED STATES: PUBLIC EXPENDITURES FOR HEALTH SERVICES AND SUPPLIES 97 tbl.128. In addition to Medicaid, this figure includes most other miscellaneous health expenditures on the poor, but not contributions to Medicare made on behalf of poor people, nor expenditures Medicare may make for health services to elderly poor people.

216. Statehealthfacts.org, United States: Medicaid Payments per Enrollee, FY 2006, http://www.statehealthfacts.org/profileind.jsp?ind=183&cat=1&rgn=1 (last visited Feb. 28, 2010).

217. In 2006, combined private and public expenditures on health care totaled $2.106 trillion. *See* 2006 STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 215, at 95 tbl.124. National Health Expenditures from 1960 to 2017. The $323 billion federal and state governments allocated to health care for the poor in 2006 represented 15.33% of the combined health expenditures from all sources, public and private, for all Americans during that year.

ment health programs.) Thus, poor people are receiving *fifteen percent* of the nation's health care expenditures, but only a *half of a percent* of its expenditures on "legal care."

The lesson of these statistics is not that civil legal aid should be funded at or near the level of Medicaid. Rather, it is to highlight two points. First, poor people get a far larger share of the nation's health care resources than they do its legal resources. And second, the nation's investment in civil legal aid could be increased rather dramatically without making a dent in the funds devoted to Medicare. A 500% increase in funding for civil legal aid, for instance, would only represent a little over 1% of the Medicaid budget. So it makes little sense to say the United States is unable to afford to give its low income population the resources needed to afford them equality before the law until it fully funds their health care. Foregoing adequate funding for civil legal aid adds nothing meaningful to the resources available for health care—and also would not be meaningful in relation to the nation's investments in education or public welfare.[218]

VII. IF AND WHEN AND WHY IT HASN'T HAPPENED ALREADY

In 1919, Elihu Root, one of the most venerated lawyers and public servants in American history, wrote the Foreword to Reginald Heber Smith's landmark book, *Justice and the Poor*.[219] In that foreword, Root observed:

> New projects are continually suggested for improving the condition of the poor by the aid of government, and as to many of them there is a debatable question whether they come within the proper province of government . . . . No one, however, doubts that it is the proper function of government to secure justice. In a broad sense that is the chief thing for which government is organized. Nor can any one question that the highest obligation of government is to secure justice for those who, because they are poor and weak and friendless, find it hard to maintain their own rights.[220]

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218. In 2004, state and municipal governments spent $655 billion on education and $335 billion on public welfare. *See* U.S. CENSUS BUREAU, 2009 STATISTICAL ABSTRACT OF THE UNITED STATES 265 tbl.417.

219. Elihu Root, *Foreword* to REGINALD HEBER SMITH, JUSTICE AND THE POOR, at ix (1919). Smith's book was the first to expose the problems faced in America's legal system. It also proved influential in persuading the ABA to adopt the expansion and improvement of legal aid as one of its primary missions in 1920. *See* EARL JOHNSON, JR., JUSTICE AND REFORM 5-8 (1974).

220. Root, *supra* note 219. At the time Elihu Root wrote this foreward to Smith's book, he was a renowned and revered figure in the bar and in the nation. In the last decade of the nineteenth century and the first decades of the twentieth century, he served as Secretary of War and later Secretary of State, a Senator from New York, President of the ABA, almost became a Republican candidate for U.S. President, and was awarded the 1912 Nobel Peace Prize. In between his stints in public service, he was one of the most successful and sought-

Root wrote this passage several decades before our federal government created social security, Medicare, Medicaid, welfare, and like programs for improving the condition of the poor and sometimes other disadvantaged Americans. Given his own record during the Progressive Era, it seems doubtful Root would now object to those initiatives. But he most certainly would be disappointed, if not befuddled, by the comparatively low priority accorded what he saw as the "highest obligation of government," that is, to secure justice for the poor.[221]

As Root recognized, the rationale for government investing in civil legal aid is different and reposes at a more fundamental level than is true for social programs such as Medicare, Medicaid, and welfare. As explored earlier in this Article, equality before the law is at the core of the social contract just as peacefully resolving disputes between citizens, including between citizens of different economic and social classes is, as Root wrote, the "chief reason," but obviously not the only purpose, for government itself.[222]

The primacy of the dispute resolution function and the necessity that it be performed justly has been recognized by the United States Supreme Court in *Boddie v. Connecticut*.

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. . . . Without [the] guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within [those] bounds can we hope to maintain an ordered society that is also just.[223]

In a very real sense, a citizen's right to equality before the law in civil cases is as important as his or her right to vote in a democratic society—and as critical to full participation as a citizen in that democracy. Without the ability to effectively litigate in court, citizens are in no position to enforce the substantive rights their votes may have allowed them to gain. For those lacking counsel, the law does not exist as a practical matter—at least

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after lawyers in New York and the nation. YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 467-68 (2009).

221. *Id.*

222. *See supra* notes 7-8.

223. Boddie v. Connecticut, 401 U.S. 371, 374-75 (1971).

as a benefit and not just a threat—and their right to vote gains them little. They can be sued and lose as defendants despite laws favoring their position that they have no way of knowing about or being capable of asserting. Conversely, they have no way of effectively enforcing legal protections they possess under the law by bringing a lawsuit they have any prospect of winning. For all these reasons, equality before the law and the right to counsel when needed for that equality is an inherent element of citizenship—and civil legal aid thus is more than a social program but an inherent and essential term of the social contract. Indeed, without that equality before the law, poor people are far less than full citizens in our democracy.

California Chief Justice Ron George recognized this fundamental truth when he warned the state legislature in 2001, "If justice for all becomes justice only for those who can afford it, we threaten the very underpinnings of our social contract."[224] Unfortunately, of course, we are already violating the social contract because we are not providing justice for all, but justice only for those who can afford it or, who are lucky enough to find a legal aid lawyer or a pro bono lawyer with enough time to take on their cases. That, as we know, is a distinct minority of the nation's lower income people.

And so, one might ask, as Elihu Root certainly would, why has civil legal aid lagged behind so many social programs in the government's funding priorities? Part of the reason is probably historical as well as a product of our distance from the European continent. We simply missed out on that continent's nation-by-nation translation of social contract principles into statutes conferring a right to counsel in civil cases. Indeed, in most of those countries, government guaranteed poor people free lawyers in the courts before they gave them health care or welfare or other purely social benefits. Had this country been on or near the European continent, it might well have been caught up in the movement to create statutory rights to counsel in civil cases as it spread from nation to nation. But distance from Europe may not be the only explanation. Americans also may be guilty of a bit of chauvinism about the virtues of our justice system, much of it deserved, which would tend to discourage any serious attention to what was happening in Europe. Then, once legal aid started here in 1876 as a charitable, not a governmental, responsibility, the pattern was set—a fixed resource of salaried lawyers working in special offices dedicated solely to serving the poor and funded as private charities.

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224. Ronald M. George, Chief Justice, Cal. Supreme Court, State of the Judiciary Address (Sept. 8, 2001).

The national legal aid movement backed by the ABA began in 1920[225] and from the start favored private charity as its source of financial support.[226] Indeed, in the 1950s those in charge of the legal aid movement strongly opposed a proposal for federal funding of civil legal aid in the United States.[227] This proposal emanated from a number of lawyers and the National Lawyers Guild who were inspired by England's new comprehensive government-funded legal aid program.[228] Coming at the height of the McCarthy era, this initiative provoked an outcry against government funding of civil legal aid from bar leaders and legal aid proponents alike. SMU law school dean and former ABA president Robert Storey wrote in the ABA Journal that "the greatest threat aside from the undermining influences of Communist infiltration, is the propaganda and campaign for a federal subsidy to finance a nationwide plan for legal aid and low-cost legal service."[229] The ABA Standing Committee on Legal Aid and Indigent Defendants issued a report trumpeting charitably-funded legal aid societies as the "American way" to deliver justice to the poor[230] and the President of the National Legal Aid and Defender urged they were the primary bulwark against "socialization of the legal profession."[231]

It took the nation's brief "War on Poverty" to awaken the federal government to the plight of the poor in our courts and the rest of our legal system—and to turn the organized bar from an opponent to a supporter of government funding of civil legal aid.[232] With that came the Office of

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225. *See* JOHNSON, *supra* note 219, at 6-8.

226. *Id.* at 14-19. Municipally-funded civil legal aid organizations were fairly common in the early decades of the twentieth century, but the trend was definitely downward until nearly none remained by mid-century. Then, when some began urging the U.S. to emulate England's new comprehensive government-funded legal aid program in the early 1950s, it provoked a cry against "socialism" of the legal profession, and privately funded legal aid societies were touted as the "American way to meet the need" and as the prime buffer against socialization of the profession. *Id.* at 18-19.

227. *Id.* at 19.

228. *Id.* at 18.

229. Robert Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100, 101 (1951).

230. EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 18 (1978).

231. Orison S. Marden, *Legal Aid, The Private Lawyer and the Community*, 20 TENN. L. REV. 757, 761 (1949). Ironically, when Marden became ABA President in the mid-1960s, he proved to be a staunch supporter of the federally-funded OEO Legal Services Program, showing what a difference a decade can make.

232. On February 7, 1965, through the skill and determination of then ABA President Lewis Powell and his leadership team, the ABA House of Delegates unanimously authorized the Association to "cooperate with the Office of Economic Opportunity . . . in the development and implementation of programs for expanding availability of legal services to indigents and persons of low income . . . ." JOHNSON, *supra* note 219, at 63.

Economic Opportunity ("OEO") Legal Services Program and the first federal funding of civil legal aid.[233] There is no reason to rehearse the many ups and downs of that program and its successor, the Legal Services Corporation. An earlier section of this paper documented how far behind we remain in our commitment to equal justice for the poor—whether measured against other comparable industrial democracies or our own federal government's earlier willingness to invest in civil legal aid, or our nation's investment in another major social program for the poor, Medicaid.[234]

Although the organized bar is owed many thanks for its strong support of the OEO Legal Services Program and the Legal Services Corporation over the years, the legal profession and those supporting civil legal aid also bear considerable responsibility for the continued low priority accorded equality before the law in the nation's funding decisions. Viewing and hearing our public rhetoric, one would think our nation already provides justice for all, including the poor. We chisel equal justice under law over the entrance to the U.S. Supreme Court building, a guarantee seen repeatedly on television, our constitution purports to offer all citizens, irrespective of income, "due process"[235] and "equal protection of the laws,"[236] and our "Law Day" and "July 4th" speeches tend to praise our legal system rather than criticize it for its failure to provide equality before the law to lower income Americans. Now, the ABA is in the midst of a multi-million dollar campaign to promote the "Rule of Law" around the world,[237] imply-

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233. It took until September of 1965 to find a director for that program who was acceptable to both Shriver and the ABA, and also willing to take on the responsibility. That person was E. Clinton Bamberger, a young partner in Baltimore's largest law firm. It was the Spring of 1966 before a significant number of grants had been made to either enlarge and improve existing legal aid societies or to start new local legal services agencies. *Id.* at 64-102.

234. *See supra* Part VI.A-B.

235. U.S. CONST. amend. V.

236. U.S. CONST. amend. XIV, §1.

237. As explained in the introduction to the large section devoted to this program on the ABA's main website:

> The ABA Rule of Law Initiative is a public service project of the American Bar Association dedicated to promoting rule of law around the world. The ABA Rule of Law Initiative believes that rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today, including poverty, economic stagnation, and conflict.

See A.B.A., Rule of Law Initiative, http://www.abanet.org/rol/ (last visited Nov. 15, 2009). William Neukom, the ABA President during 2006-07, launched this "Rule of Law Initiative" as his signature program and it remains as a continuing project of the Association. Although it has several aspects, the most visible element of the Initiative so far was a "World Justice Forum" in Vienna, Austria during July 2008. This conference brought together more than 450 governmental and non-governmental leaders from eighty-three nations, including Asia and the Pacific, Africa, the Middle East, Europe, Latin America, and North America.

ing to many that all of our nation's citizens fully enjoy the benefits of such a legal regime already. Even the stories about legal aid that occasionally pop up in our nation's newspapers usually feature the success stories—the poor people legal aid lawyers managed to save from a difficult legal problem, not what happens to the far greater number those lawyers lack the time to help.

This was brought home to me recently at a conference on "The Justice Gap and the Right to Counsel" sponsored by the San Francisco Bar Association in October 2008. The moderator was the former long-time publisher of San Francisco's daily newspaper. He listened to a series of panelists describing how few resources the U.S. allocates to civil legal aid, how far we are behind other countries, the statistics about unmet need, and from a legal aid lawyer telling of the pain she experienced in having to turn away the majority of the applicants who came to her office. Finally, this sophisticated and knowledgeable journalist shook his head and told the audience he had no idea about any of this. He had assumed poor people had all the civil legal aid they needed. Small wonder, given what the American public, educated or not, are told about justice in this country, from childhood on reciting a pledge of allegiance that emphasizes two values this country represents—liberty and justice for all.

The San Francisco publisher felt only mildly relieved about his own ignorance on this subject when told that public opinion polls have revealed nearly 70% of Californians[238] and nearly 80% of the American public think poor people already have a right to counsel in civil cases just as they do in criminal prosecutions.[239]

If we want to raise the priority of civil legal aid to the status it deserves among the panoply of programs meriting public funding, we will have to level with the American public, the nation's legislators and other officials, its journalists, and other opinion makers. Our justice system has a secret—one we can no longer afford to conceal or fail to mention. We do not provide the promised justice for all. Indeed, to be fully honest, we probably don't provide justice at all to the majority of the people in the bottom one-third of the nation's population—especially when, as often happens, they have a dispute with a higher income person or entity. Also, we have to

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Edited versions of the papers prepared for the conference were published recently as WORLD JUSTICE FORUM, GLOBAL PERSPECTIVES ON THE RULE OF LAW (R. L. Nelson, J. Heckman & L. Cabatingan eds., 2009).

238. *See* Cal. State Bar, *Bar Survey Reveals Widespread Legal Illiteracy*, CAL. LAW., June 1991, at 68, 69.

239. *See* poll results reported in ASS'N OF TRIAL LAWYERS, 1991-1992 DESK REFERENCE SUPPLEMENT: COMMEMORATING THE 200TH ANNIVERSARY OF THE SIGNING OF THE BILL OF RIGHTS (1991).

admit that when it comes to equality before the law we are not guaranteeing fair hearings to the poor as many other comparable democracies do. Nor have we demonstrated nearly the financial commitment to equality before the law as have several other comparable industrial democracies. We also have to tell the tragic stories of what happens to the many poor people whom legal aid lawyers cannot represent because of the present lack of adequate resources.

On the positive side, supporters can emphasize this nation can fund a right to equal justice for a small fraction of the cost of many social programs already provided to the poor.[240] They also can promise to achieve equality before the law in a cost-effective way, where possible by revamping our justice system in ways that allow disputants from the same economic class to resolve many of their disputes with self-help assistance rather than requiring representation by lawyers.[241]

In this time of economic collapse, it may not be reasonable to expect an immediate infusion of government funding for civil legal aid no matter how powerful a case is made at this point. But that does not mean those convinced of the importance of equality before the law should hold up on efforts to build that case and spread the message, actually messages, out to the general public, the legislatures, and beyond. It usually takes a long time to overturn public misconceptions, especially comforting ones, such as the widely-held assumption America indeed already provides justice for all. Likewise, it takes an even longer time to build an understanding of the critical importance of equality before the law in a democratic society and the urgency of ending our present failure to make that a reality for our lower income people.

For too many years, the *right* to equality before the law, and to counsel when needed, has been nothing but a long-term dream in this country—and even then shared by relatively few people. Only recently has that dream transformed into a goal shared by a broad coalition of legal services law-

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240. *See supra* notes 208, 217-218 and accompanying text.

241. For a recent article outlining in greater depth the possible ingredients of a cost-effective system for delivering justice to lower income Americans, see Johnson, *supra* note 143, at 410-21. Those ingredients include (1) aggregate remedies, such as class actions and legislative reforms, for common claims; (2) self-help assistance to unrepresented litigants coupled with forums using an inquisitorial rather than adversarial approach; (3) lay advocates in administrative proceedings; (4) technology—both present and future—deployed to lower the cost of and improve the availability of access to justice; and (5) an effective "triage" system matching problem with solution, that is, that matches each client and his or her problem with the level of advice, assistance, or representation needed to deliver fair and equal justice in the forum that will decide the case.

yers, academics, private law firms, and even some judges.[242] It now is time this goal becomes a movement and begins expanding beyond the legal profession. Frankly, it will not be a movement for the short-winded. But what could be more satisfying for any lawyer or judge—or any American for that matter—than to help make "justice for all" a reality in this country and not just a motto we mouth when holding hand over heart and reciting our Pledge of Allegiance.

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242. Beginning in 2001, some public interest lawyers and pro bono lawyers in local law firms decided it was time to bring a case to the Maryland Court of Appeals raising the right to counsel issue under the common law and the state constitution. Meanwhile, in the state of Washington, a committee of the Washington Access to Justice Board was researching the jurisprudence of a civil right to counsel under the Washington constitution. Lawyers participating in these two efforts put on a panel discussion at the November 2003 National Legal Aid & Defender Association ("NLADA") meeting. At the end of the session, they invited attendees to sign up if they were interested in pursuing the issue. Thus was born a "National Coalition for the Right to Counsel in Civil Cases." The Coalition now has some 150 members from thirty states—legal services lawyers, law professors, private law firm lawyers, and others. *See* TASK FORCE ON ACCESS TO CIVIL JUSTICE, AM. BAR ASS'N, REPORT SUPPORTING ABA RESOLUTION FOR CIVIL RIGHT TO COUNSEL 10-12 (2006). Five organizations have formed a "support group" supplying ongoing research, strategic planning, and coordination activities for the loose-knit coalition. This support group includes the Brennan Center for Justice at New York University School of Law, the Public Justice Center in Baltimore, the Northwest Justice Center in Seattle, the Shriver Center on Law and Poverty in Chicago, and the ABA Standing Committee on Legal Aid and Indigent Defendants. This "support group" has a website reporting recent developments in this field.

APPENDIX

STATE EQUAL JUSTICE ACT

[NOTE: This is a draft of a generic state statute implementing a comprehensive "right to equal justice" but not an automatic right to counsel. As drafted, it is comprehensive in several senses. First, it provides a full range of legal services in the civil arena—including legal advice, assistance with preparation of documents, and appropriate levels of representation before non-judicial as well as judicial forums. Second, it is comprehensive in the sense that it covers any and all categories of non-criminal cases and legal problems that require some level of advice, assistance, or representation. Third, it is comprehensive in using a full range of types and levels of law-related services to implement the right to equal justice as to different types of cases, forums, and clients—including self-help assistance, lay advocates, and limited legal representation as well as full legal representation. Finally, it is comprehensive in the sense that it extends the right to equal justice not only to the poor but to the lower middle class as well.

It, of course, is possible to contemplate narrowing the statute and the right it implements as to any of the above dimensions. It also is possible to conceive alternatives to the policy choices reflected in other parts of the statute, such as the design of the system proposed for delivering the legal services provided and the mechanisms and procedures established for administering the right. In addition to the "DRAFTING COMMITTEE'S COMMENTARY" at the end of each major section of the statute that clarify some of the statute's terms, there also are "NOTES" in boldface. The latter describe in general terms some of the alternative formulations that were considered and which some readers might find worthy of writing up as full-blown draft provisions. Inasmuch as this draft statute is very much a work in progress, such drafts are most welcome—along with any more general comments and suggestions. Please e-mail any drafts or other input to Clare Pastore at cpastore@law.usc.edu.][243]

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243. Clare Pastore is now a Professor of Law at the University of Southern California and her preferred e-mail address is clare.pastore@law.usc.edu. Many of the "legislative findings" contained in this draft "State Equal Justice Act" and its companion "State Basic Access Act" have been adopted by the California legislature as its own "legislative findings" in the recently-enacted Sargent Shriver Civil Counsel Act, Assem. B. 590, 2009 Leg., Reg. Sess. (Cal. 2009). This legislation was signed into law by Governor Arnold Schwarzenegger on October 12, 2009. It authorizes and provides funding for a series of pilot projects

100. LEGISLATIVE FINDINGS.

The Legislature finds and declares:

101. Access to justice is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and responsibilities in any society governed by the rule of law. It also is essential to the public's confidence in the legal system and its ability to reach just decisions. Recognizing its responsibilities in a democratic society, the State government assumes the duty to guarantee this right to all its citizens.

102. The adversary system of justice used in this State and elsewhere in the United States inevitably allocates to the parties the primary responsibility for discovering the relevant evidence, finding the relevant legal principles and presenting them to a neutral judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a legally-trained professional.

103. Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the State government has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.

104. It is recognized that many of those living in this State cannot afford to pay for the services of lawyers when needed for them to enjoy fair and equal access to justice. In order for them to enjoy this essential right of participants in a democracy, and to protect their right to liberty and property, the State government accepts its responsibility to provide them with lawyers at public expense. Other residents cannot afford the full cost of needed lawyer services and the State government accepts its responsibility to provide a partial public subsidy so these people can exercise their right to fair and equal access to justice.

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providing counsel as a matter of right in certain categories of civil cases in a few courts to be selected through a competitive process. The pilots will commence operating on July 1, 2011, and funding continues through June 30, 2017. The pertinent findings in the California legislation are found in sub-sections (h)-(n) of Section 1 of the Act. *See infra* note 244. Other concepts from the two draft "generic statutes," such as a "merits test" and a "significance test," also are important elements in the new California law.

105. While in many cases decided in the State's adversary system of civil justice the parties cannot gain fair and equal access to justice unless they are advised and represented by lawyers, there are some forums in which it may be possible for most parties to have fair and equal access if they have the benefit of representation by qualified non-lawyer advocates and other forums where parties can represent themselves if they receive self-help assistance. In those cases where non-lawyer advocates or self-help assistance will be sufficient for that purpose, the State government has a responsibility to ensure such representation or assistance is also available to all, irrespective of their economic means.

106. The State government has an interest in supplying publicly-funded legal representation and non-lawyer advocates or self-help advice and assistance, when the latter is sufficient, in a cost-effective manner by ensuring the level and type of service provided is the lowest-cost type of service consistent with providing fair and equal access to justice. Several factors can affect the determination of when representation by an attorney is needed for fair and equal access to justice and when other forms of assistance will suffice. These factors include the complexity of the substantive law, the complexity of the forum's procedures and process, the individual's education, sophistication and English language ability, and the presence of counsel on the opposing side of the dispute. The State government recognizes the importance of establishing mechanisms and criteria that will ensure appropriate levels and types of publicly-funded advice and assistance are provided, including representation by lawyers when appropriate, to guarantee fair, equal, and cost-effective access to justice to those unable to afford counsel.

107. If those advised, assisted, or represented by publicly-funded lawyers are to have fair and equal access to justice those lawyers must be as independent, ethical, and loyal to their clients as those serving clients who can afford to pay for counsel.

108. The services provided for in this Act shall be funded by the appropriations provided in this Act and are not intended to and shall not supplant existing legal services resources from any other source. The services provided for in this Act do not entitle any person to receive services from a particular legal services provider, nor do they override the local or national priorities of existing legal services programs. The services provided for in this Act are likewise not intended to undermine any existing pilot programs or other efforts to simplify court procedures or provide assistance to pro se

litigants. Furthermore, nothing in this Act shall be construed to prohibit the provision of full legal representation or other appropriate services funded by another source in those cases or circumstances in which there is not an entitlement to the services funded under this Act.

DRAFTING COMMITTEE'S COMMENTARY:

The findings and declarations in section 100 et seq. express the legislature's intent in enacting this remedial statute and are expected to guide the courts and the State Equal Justice Agency in their interpretation of the remaining provisions of the statute.[244]

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244. Below appear several legislative findings the California Legislature included in Section 1 of the Sargent Shriver Civil Counsel Act it enacted recently as part of Assem. B. 590, 2009 Leg., Reg. Sess. (Cal. 2009), explained *supra* note 180 and accompanying text. As readers will note, these sections incorporate the same concepts and sometimes adopt the same language as the "generic statutes" produced by a task force of the California Commission on Access to Justice—some of those findings appearing in the draft "State Equal Justice Act" found in this appendix and the others in the draft "Basic Access Act" which is located on the Internet.

(h) Equal access to justice without regard to income is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and responsibilities in any society governed by the rule of law. It also is essential to the public's confidence in the legal system and its ability to reach just decisions.

(i) The adversarial system of justice relied upon in the United States inevitably allocates to the parties the primary responsibility for discovering the relevant evidence, finding the relevant legal principles, and presenting them to a neutral judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a legally trained professional. The absence of representation not only disadvantages parties, it has a negative effect on the functioning of the judicial system. When parties lack legal counsel, courts must cope with the need to provide guidance and assistance to ensure that the matter is properly administered and the parties receive a fair trial or hearing. Those efforts, however, deplete scarce court resources and negatively affect the court's ability to function as intended, including causing erroneous and incomplete pleadings, inaccurate information, unproductive court appearances, improper defaults, unnecessary continuances, delays in proceedings for all court users, and other problems that can ultimately subvert the administration of justice.

(j) Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.

(k) Many of those living in this state cannot afford to pay for the services of lawyers when needed for them to enjoy fair and equal access to justice. In some cases, justice is not achievable if one side is unrepresented because the parties cannot afford the cost of representation. The guarantees of due process and equal protection as well as the common law that serves as the rule of decision in California courts underscore the need to provide legal representation in critical civil matters when parties cannot afford the cost of retaining a lawyer. In order for those who are unable to afford representation to exercise this essential right of participants in a democracy, to protect their rights to liberty and property, and to the pursuit of basic human needs, the state has a responsibility to provide legal counsel without cost. In many cases decided in the state's adversarial system of civil justice the parties can-

200. **DEFINITIONS.** For purposes of this statute only, the following definitions apply:

201. "Public legal services" includes full legal representation, limited legal representation, non-lawyer representation, legal advice, legal assistance, personal self-help assistance, and computer-assisted and online self-help assistance as defined in sections 207.1-207.3 below.

202. "Full legal representation" is the performance by a licensed legal professional of all activities (such as investigation of facts, research of law, preparation of pleadings, negotiations, appearance at pre-trial, trial, and post-trial proceedings, preparation of appellate briefs and appearance at appellate oral arguments) that may be involved in representing a party in a court or other tribunal in which by law or uniform practice parties may not be represented by anyone other than licensed members of the legal profession.

203. "Limited legal representation" is the performance by a licensed legal professional of one or more but not all of the tasks involved in advocating a party's position before a tribunal in which by law or tradition any represen-

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not gain fair and equal access to justice unless they are advised and represented by lawyers. In other cases, there are some forums in which it may be possible for most parties to have fair and equal access if they have the benefit of representation by qualified nonlawyer advocates, and other forums where parties can represent themselves if they receive self-help assistance.

(*l*) The state has an interest in providing publicly funded legal representation and nonlawyer advocates or self-help advice and assistance, when the latter is sufficient, and doing so in a cost-effective manner by ensuring the level and type of service provided is the lowest cost type of service consistent with providing fair and equal access to justice. Several factors can affect the determination of when representation by an attorney is needed for fair and equal access to justice and when other forms of assistance will suffice. These factors include the complexity of the substantive law, the complexity of the forum's procedures and process, the individual's education, sophistication, and English language ability, and the presence of counsel on the opposing side of the dispute.

(m) If those advised, assisted, or represented by publicly funded lawyers are to have fair and equal access to justice, those lawyers must be as independent, ethical, and loyal to their clients as those serving clients who can afford to pay for counsel.

(n) The services provided for in Section 5 of this act are not intended to, and shall not, supplant legal services resources from any other source. This act does not entitle any person to receive services from a particular legal services provider, nor shall this act override the local or national priorities of existing legal services programs. The services provided for in Section 5 of this act are likewise not intended to undermine any existing pilot programs or other efforts to simplify court procedures or provide assistance to unrepresented litigants. Furthermore, nothing in this act shall be construed to prohibit the provision of full legal representation or other appropriate services funded by another source.

tation other than self-representation must be provided by members of the bar. This limited legal representation must comply with established rules permitting the legal professional to so limit the legal representation provided, and shall be confined to cases and circumstances in which such limited representation is sufficient to afford the applicant fair and equal access to justice consistent with criteria set forth in section 302 below. Depending on circumstances, this form of assistance may or may not be coupled with self-help assistance as defined in section 207.

204. "Legal advice" is individualized advice provided by a licensed legal professional about the law and its implications for a person and that person's conduct, transactions, and the like, but not involving the preparation of any documents or any contacts with other persons.

205. "Legal assistance" is assistance provided by a licensed legal professional in the preparation of legal documents such as contracts, wills, etc. in undisputed matters or in pre-litigation activities in disputed matters, such as preparing correspondence or otherwise contacting an adverse party.

206. "Non-lawyer representation" is representation by qualified non-lawyer advocates in tribunals in which representation by such advocates is permitted and in which, in the particular circumstances of the case, the State Equal Justice Authority or its delegated agent or designee considers such representation sufficient to afford the applicant fair and equal access to justice.

207. "Self-help assistance" is assistance short of representation before a court or other forum which is provided to parties who are representing themselves in such forums. It may consist of one or more of the following forms of assistance:

> **207.1** "Personal self-help assistance" is "one-on-one" guidance provided by lawyers or lawyer-trained and supervised non-lawyer staff to persons in the preparation of required court documents, familiarization with procedures and practices in the court or other tribunal, and other assistance short of appearing before the court or other tribunal as an advocate for that person.
>
> **207.2** "Computer-assisted or online self-help assistance" is provided electronically to parties enabling unrepresented persons to fill out required court forms, and providing guidance in properly

and effectively representing oneself in the court or other tribunal through specially designed computer programs available at kiosks, on computers, or on the Internet. This assistance may be general or individualized.

207.3 "Community self-help assistance" is general education not specific to an individual, provided through classes, on the Internet, or otherwise, about how to prepare court forms or other legal documents, or about how to properly and fair and equally represent oneself in court or other tribunal, or other relevant legal topics. It may or may not be coupled with personal, computer-assisted, or online self-help assistance.

208. "Licensed legal professional" is a member of the State Bar, a certified law student participating in a supervised clinical program, or a member of the bar of another jurisdiction who is legally permitted to appear and represent the particular client in the particular proceeding in the court or other forum which is hearing that matter.

209. "Qualified non-lawyer advocate" is a person trained and certified to represent parties before certain forums, often administrative bodies, and which the State Equal Justice Authority or its designee finds qualified to provide fair and equal justice to such parties in proceedings before those forums.

210. "Qualified non-profit legal services organization" is a non-profit corporation or law school clinic which has the primary purpose of benefiting those unable to afford counsel and that employs licensed legal professionals, qualified non-lawyer advocates, and/or uses pro-bono licensed legal professionals and pro bono qualified non-lawyer advocates for the purpose of delivering appropriate public legal services to persons who cannot afford to pay for their own counsel and which the State Equal Justice Authority determines qualifies as an organization suitable to discharge the functions this statute allocates to such organizations. Any such organization which the federal Legal Services Corporation has deemed qualified to receive funding support from the Corporation is automatically considered a qualified non-profit legal services organization for purposes of this statute.

211. "State Equal Justice Authority" is the statewide body responsible for administering State's public legal services program. It is authorized to implement the statute by enacting regulations pursuant to the state Adminis-

trative Procedures Act, Gov. Code ____ et seq. The regulations shall provide, inter alia, for delegation of eligibility decisions to designated public or non-profit bodies as described in section 700 et seq.

300. RIGHT TO PUBLIC LEGAL SERVICES.
Subject to the exceptions and conditions specified in sections 301-306 below, appropriate public legal services shall be available to any financially eligible person [or group]. Depending on circumstances described in these sections, appropriate public legal services may consist of full legal representation, limited legal representation, non-lawyer representation, legal advice, legal assistance, self-help assistance, or other advice or assistance as needed for the person [or group] to enjoy fair and equal access to justice for the particular dispute or problem that person [or group] confronts. The standards for "financial eligibility" are defined in section 400 et seq.

301. Full Public Legal Representation
In the courts or any other forum in this state where by law or established practice parties can only appear pro se or be represented by licensed members of the legal profession, public legal services shall consist of full legal representation as defined in section 202 above, provided under the following conditions and with the following exceptions:

> **301.1** Full public legal representation services shall be available to a plaintiff only if a reasonable person in the plaintiff's position, with the financial means to employ counsel, would be likely to pursue the matter in light of the costs and potential benefits. In making that determination it shall be presumed that a reasonable person would be likely to pursue matters involving any of the following: the sole housing for the plaintiff or plaintiff's family; the maintenance of plaintiff's present employment or occupation; the plaintiff's current right or future right to income maintenance, health benefits, and other substantial benefits from the federal, state, or local government; custody and/or parental rights to children; and protection from domestic violence. This list shall not be considered exhaustive and the State Equal Justice Authority or its designees shall apply the general criteria to applications for legal representation which do not fall within any of the above presumptive categories.
>
> **301.2** Except in exceptional circumstances, full public legal representation services shall be available to financially eligible defen-

dants when they are defendants in a court or other forum defined in section 202 above unless they lack a reasonable possibility of achieving a favorable outcome.

301.3 Eligibility for full public legal representation services in an initial proceeding is limited to that proceeding. Eligibility for full public legal representation in the appellate courts is a new and different determination after the proceedings in a trial court or other forum conclude. If the financially eligible applicant is an appellant or petitioner rather than a respondent or real party-in-interest, except in extraordinary circumstances, full legal representation services shall be available only if there is a reasonable probability of success on appeal. If the financially eligible applicant is a respondent or real party-in-interest, however, except in extraordinary circumstances full legal representation services shall be available, unless the trial court decision is clearly erroneous and thus, there is no reasonable possibility the appellate court will affirm the decision of the superior court or other forum which the opposing party is challenging in the appellate court.

301.4 Full public legal representation services shall not be available to an applicant in the following circumstances:

301.4.1 In proceedings in any court or other forum where parties are not allowed to be represented by licensed legal professionals. However, this does not preclude a financially eligible person from receiving self-help assistance in such proceedings, nor does it preclude the provision of full legal representation services if the opposing party in such a forum appeals a decision of that forum which was favorable to the applicant, to a forum where licensed legal professionals are permitted to provide representation, and that opposing party is represented by a licensed legal professional in that appeal.

301.4.2 If legal representation is available to the applicant in the particular case through the services of a lawyer who provides such representation on a contingent fee basis, or as the result of the provisions of an insurance policy, or for some other reason is willing to provide such representation at no cost to the applicant or at a cost that is substantially

the same as any co-payment the applicant would be expected to pay if provided counsel at public expense under this statute.

301.4.3 Except in extraordinary circumstances, in the following lawsuits: plaintiffs in libel, slander, or defamation actions; actions seeking a name change; uncontested marriage dissolution cases not involving children or disputes over property, support, or other significant issues [assuming state involved has no-fault divorce system]; disputes between business enterprises; and other categories of disputes that the State Equal Justice Authority determines by regulation to be so insignificant that they do not warrant public legal services or that are uncontested and so simple that public legal services are unnecessary to have fair and equal access to justice.

301.4.4 If under standards established by the State Equal Justice Authority, and under the circumstances of the particular matter, the Authority deems a certain type and level of limited legal representation is sufficient to provide fair and equal access to justice and such limited public legal representation is provided. It shall be presumed limited legal representation is insufficient in actions before courts or other forums in which representation can only be provided by licensed legal professionals if the opposing party has full legal representation by such a professional.

301.4.5 In designated courts or other forums the State Equal Justice Authority evaluates and certifies after public hearings that:

(a) these courts or forums: (1) operate in an inquisitorial rather than adversarial manner, with a judicial officer actively developing the facts and the law; (2) follow relaxed rules of evidence; and (3) follow procedural rules and adjudicate legal issues so simple that non-lawyers can represent themselves before the court or other forum and still enjoy fair and equal access to justice; and

(b) in the particular matter to be decided by such designated courts or other forums (1) the opposing party is not represented by a licensed legal professional; and (2) the particular applicant possesses the intelligence, knowledge, language skills (or assistance), and other attributes ordinarily required to represent oneself and still enjoy effective fair and equal access to justice.

Nothing shall preclude the State Equal Justice Authority from funding self-help assistance in such cases before the designated courts or other forums even though the SEJA certifies full legal representation is not required and such assistance shall be offered to the applicant unless the SEJA further certifies the applicant can receive fair and equal access to justice in the particular case without any such assistance.

302. Limited Legal Representation

Limited legal representation, as defined in section 203, shall be available to financially eligible individuals [or groups] where the limited service provided is required because self-help assistance alone would prove inadequate and where such limited legal representation is sufficient in itself or in combination with self-help assistance to provide the applicant with effective access to justice in the specific case in the specific forum. In matters before those courts or other forums in which representation can only be provided by licensed legal professionals, however, limited legal representation can only be substituted for full representation when permitted by sections 301.2 through 301.4 above, nor shall it be available in the matters excluded under section 301.4.3.

303. Legal Advice

Legal advice as defined in section 204 above, shall be available to financially eligible individuals [and groups] on an individualized basis, and may be provided in person, by telephone or other communication device, or by computer or other interactive device. [Such advice shall be provided only through qualified non-profit legal services organizations, as defined in section 210, or through lawyers certified and supervised by such organizations.] Legal advice shall not be available for issues related to an applicant's business enterprise, or for other issues related to the classes of problems excluded under section 301.4.3.

304. **Legal Assistance**

Legal assistance, as defined in section 205, shall be available to financially eligible individuals [and groups] when required for the proper preparation of significant legal documents in undisputed matters or for the review and possible revision of such documents generated through computer programs or other self-help assistance. It also shall be available in the pre-litigation phase of disputed matters in which there is a reasonable possibility such services may avoid a proceeding in court or other forum, whether that proceeding would be filed by or against the applicant.

305. **Non-lawyer Representation**

Non-lawyer representation, as defined in section 206, shall be available from qualified non-lawyer advocates to financially eligible individuals [and groups] in proceedings in forums which permit non-lawyer representation of parties and in which: (1) the criteria for full legal representation set forth in 301.1, 301.2 or 301.3 are satisfied; (2) non-lawyer representation is more economical than full legal representation; (3) the opposing party is not represented by a licensed legal professional; (4) the non-lawyer advocate works under the supervision of attorneys in a non-profit legal services organization or has been certified by a non-profit legal services organization or by an official body the SEJA designates to possess adequate training, knowledge, and skill to provide appropriate representation in that forum; and (5) the forum and the circumstances do not fit the exception defined in section 301.4.1 or 301.4.5 [in which self-help assistance is sufficient to afford parties fair and equal access to justice.]. This section is not intended to and does not supersede existing state law governing non-attorneys or paralegals.

306. **Self-help Assistance**

Self-help assistance, as defined in section 207, shall be available to all persons without regard to financial eligibility in those forums and categories of disputes or problems the SEJA [or the state court system] designates and through the means the SEJA [or the state court system] provides.

DRAFTING COMMITTEE'S COMMENTARY:

This section defines the scope of the right to different forms of representation, advice and assistance funded under this Act which are to be available to financially eligible applicants. Depending on the circumstances, an applicant may be entitled to full legal representation or limited legal representation by a lawyer in disputed matters, or to legal advice or non-

litigation assistance from a lawyer, or to representation by a qualified non-lawyer advocate, or to self-help assistance. While there are several categories of cases or circumstances in which representation or other services will not be available from licensed legal professionals or qualified non-lawyer advocates under this Act, as declared by the Legislature in section 108, this will not prohibit the provision of such services by other lawyers who are not funded under this Act in those cases and circumstances. For example, pro bono attorneys or those legal aid lawyers, whose funding does not come from the state government funds specifically appropriated under this Act, would be able to provide full legal representation to litigants in those cases.

Full legal representation in litigation before courts and other adversary forums is the most expensive of the services provided as a matter of right under this Act. Consequently, much of section 300 is devoted to defining the parameters of the right to this level of service.

First, full legal representation is not available under any circumstances:

(1) ***In forums (such as small claims courts in California) in which lawyers are prohibited*** *[sub-section 301.4.1].*

(2) ***In certain categories of cases such as those that are deemed trivial, undisputed, or otherwise to not justify representation*** *[sub-section 301.4.3]. These categories must either be defined as such in the Act or subsequently so defined by the SEJA based on empirical data and after appropriate proceedings.*

(3) ***In cases in which lawyers are willing to represent the applicant without government funding because of other sources of financial support*** *[sub-section 301.4.2]. This includes services available because of the prospect of a contingent fee, the duty to defend under a liability insurance policy or the provisions of a prepaid legal insurance policy, or for some other reason—which could include the prospect of a statutory or contractual court-awarded fee, a class action recovery, or on a pro bono basis. To deny government-paid counsel on this basis, however, the availability of counsel must be real, not merely theoretical. Thus, merely because the case is one in which a contingent fee might be available or where conceivably it might be aggregated with other similar cases in a class action lawsuit does not necessarily mean there is no right to receive full legal representation under the Act. Rather, in order to deny service, a contingent fee lawyer would have to indicate a willingness to provide representation to*

the applicant in the particular case or there would have to be a lawyer who has expressed a willingness to bring this case or include this case in a class action lawsuit where a fee would be available to that lawyer, if successful.

(4) ***In cases in which other, less expensive forms of representation or assistance are sufficient to provide fair and equal access to justice.*** *These less expensive forms of representation and assistance are either limited legal representation (sometimes called unbundled legal services) by lawyers, representation by qualified non-lawyer advocates, or self-help assistance. Where these less expensive forms of representation or assistance are deemed sufficient, however, there is a right to receive that representation or assistance just as there is a right to receive full legal representation when that is what is sufficient.*

As to limited legal representation, the SEJA or its designees must make the determination this level of assistance (usually in combination with self-help assistance) is sufficient and full-legal representation is not needed on a case-by-case basis [subsection 302]. An important caveat is that limited legal representation cannot be deemed sufficient if the opposing party enjoys full legal representation, except in unusual circumstances.

As to representation by non-lawyer advocates, this is confined to forums in which non-lawyer advocates lawfully and traditionally provide the representation, and to cases heard in those forums in which the other side is not represented by a lawyer [subsection 305].

As to self-help assistance, several criteria must be satisfied. First, the court or other forum must be tailored in a way that is calculated to make self-representation sufficient—such as a judge or hearing officer who actively finds the applicable legal principles and develops the facts, uses simplified procedures, and the like. Second, the case itself must be relatively simple so a non-lawyer can be reasonably expected to comprehend and present it, at least with appropriate self-help assistance. Third, the applicant must possess personal characteristics (such as intelligence, mental stability, and English language facility) sufficient to represent himself or herself [subsection 306]. Supplying an interpreter, however, ordinarily will compensate for lack of English language facility if a foreign-speaking applicant possesses the other required characteristics.

Second, full legal representation is available in the remaining cases only when the following criteria are satisfied:

If the applicant's legal problem requires initiation of a lawsuit as a plaintiff, the applicant will receive full legal representation if a person who had personal resources sufficient to pursue that litigation would do so *[subsection 301.1]. In making this assessment, the hypothetical client would consider the value of what is at stake, the likelihood of success in the lawsuit, and the estimated cost of achieving success. The rationale for requiring applicants to satisfy this test before providing them with government funding is that a new lawsuit, no matter how it is financed, imposes costs on the judicial system and on the opposing party. This test seeks to mimic the economic considerations that constrain prospective plaintiffs who can afford to employ their own lawyers when they are contemplating the possibility of filing a lawsuit. There is an important qualification, however, affecting one element of the equation—the value of what is at stake. Recognizing that the monetary value of many matters of great consequence to lower-income people is lower than the cost of the legal representation required to properly litigate those issues, the Act creates a presumption that any rational person would employ a lawyer to pursue those cases if there was any reasonable possibility of a favorable outcome. This adjustment is necessary both because the cost of legal representation is so high and because, by definition, the absolute economic value of many essentials on which lower-income people survive is relatively low. The wages they earn or the welfare benefits they receive, the apartment rents they pay, the personal property they own, etc., often are less than the cost of the legal representation required to preserve those vital interests should they be threatened. Yet, it is fundamentally unfair to deprive them of the opportunity to secure those basic human needs merely because of the high cost of legal representation. Subsection 301.1 lists some of those high priority concerns, but also allows the SEJA to add others.*

If the applicant is a defendant, he or she is entitled to full legal representation unless there is no reasonable possibility that representation will result in a favorable outcome *[subsection 301.2]. The test for defendants is different from that for plaintiffs in that the amount at stake is not part of the equation. This is because the opposing party has decided the stakes are substantial enough to warrant employment of a lawyer and is the party responsible for imposing costs on the judicial system as well as seeking to use that system to deprive the low-income party of something he or she would otherwise retain. It is fundamentally unfair to deny lower-income people legal representation and thus, condemn them to lose the property or other interests they formerly possessed to a better-funded party merely because the costs of justice might outweigh the financial value of the dispute. Therefore, the applicant is to be provided full legal representation unless the applicant lacks a reasonable possibility of achieving a favorable out-*

come. Obviously, a favorable outcome can be something less than a defense verdict, so long as it is substantially better than the likely result if the applicant were not represented.

Different criteria also apply when deciding whether there is a right to full legal representation at the appellate stage *[subsection 301.3]. For applicants asking to appeal the trial court's decision against them, the right attaches only if there is a reasonable probability of obtaining a reversal or partial reversal of the trial court decision. On the other hand, applicants who prevailed at the trial level are entitled to full legal representation unless the trial court's decision was clearly erroneous and thus, there is no reasonable possibility the applicant's position will be sustained on appeal. This distinction is based on the reality that there is a comparatively low rate of reversal on appeal and also that the party appealing from the trial court decision, whether initially a plaintiff or a defendant, imposes additional costs on the judicial system than the party resisting the appeal and thus, a higher threshold is warranted before providing full legal representation as a matter of right. Conversely, applicants who gained a favorable decision in the trial court should not be forced to surrender that victory simply because they lack the financial resources to respond to the other party's appeal of that favorable decision—unless the trial court's decision was clearly erroneous. In any event, consistent with the legislative intent expressed in section 108, nothing prevents lawyers funded from a different source or acting on a pro bono basis from providing appellate representation to an applicant who is denied representation as a matter of right under the above standards.*

Limited legal representation [section 302, 301.4.4] and non-lawyer representation [section 305] are provided in lieu of full legal representation only in circumstances where they are sufficient to afford litigants fair and equal justice in the court or other forum in which these forms of public legal service are to be provided. *Except in unusual circumstances, neither is deemed sufficient if the opposing party in the particular case has full legal representation. Furthermore, non-lawyer representation is deemed sufficient only in forums where officially permitted and where by tradition most parties are represented by non-lawyer advocates rather than by lawyers.*

Legal Advice [section 303] and Legal Assistance [section 304] are provided by lawyers in undisputed matters or in potential disputes before adversarial proceedings have commenced. *Legal advice is to be provided in the most cost-effective manner possible, including by telephone, over the Internet, or by computer program or printed materials, and should only be*

supplied on a personalized basis when required. To ensure adherence with these standards, legal advice as a matter of right shall only be available through non-profit legal aid organizations, or lawyers certified and supervised by such organizations. Furthermore, legal advice and legal assistance are not available in certain categories of matters—generally those excluded from full legal representation in courts and other forums.

[NOTE: There are several alternative ways of reconfiguring the right defined in sections 300 et seq.–most of which would narrow its scope. One possibility would be to limit the right to court proceedings—eliminating sections 303 (legal advice), 304 (legal assistance), and 305 (non-lawyer representation) entirely, and also removing references to other forums in sections 301 and 302. Another possibility would be to limit the right to those situations where full or limited representation by a lawyer was appropriate and not provide a right to self-help assistance–leaving the decision whether to provide that level of service to the discretion of the courts or other potential suppliers of same. Another would be to limit the right to certain categories of cases—essentially turning the "presumptive" categories of legal problems listed in section 301.1 (or a shorter or longer or different list) into the "exclusive" categories to which the right attached. (This approach would raise some other problems not addressed in this draft "comprehensive" statute, such as ensuring the categories enjoying the status of a right did not absorb all the legal resources devoted to representation of the poor.) Still another possibility would be to extend the right to all categories of problems, but only for defendants, not plaintiffs. (This again raises problems not addressed in this draft "comprehensive" statute, such as the many plaintiffs with urgent needs (e.g., domestic abuse victims, etc.) who would be denied a right to equal justice under such a definition of the right.)]

400. FINANCIAL ELIGIBILITY.

401. The State Equal Justice Authority ("SEJA") shall establish financial eligibility standards which must be satisfied in order to receive full public legal representation or other forms of public legal services. The SEJA also shall establish a schedule of co-payments for applicants with income-asset levels sufficient to make partial payments for the services they are to receive. No co-payments shall be required for those applicants whose incomes are at or below the federal poverty level. With rare exceptions limited to unusual circumstances, applicants with incomes above 300 percent of the official federal poverty level shall be ineligible for full or partially

subsidized public legal services [OR possible alternative add the following clause: *with the exception of self-help assistance*].

402. The SEJA shall construct and publish a matrix of financial eligibility and co-payment levels that takes into account the following factors regarding the financial circumstances of an applicant for services: (1) current income; (2) current assets, taking into account reasonable exemptions for necessities of life, assets essential to potential earning and homeownership; (3) family size and relationships with dependents; and (4) other economic factors relevant to the applicant's ability to pay attorney fees and other litigation expenses. In setting eligibility and co-payment levels, the SEJA shall not take into account the income or resources of persons who are not financially responsible for the individual seeking legal assistance.

403. The SEJA may establish and publish categorical financial eligibility rules for persons whose sole income is derived from public assistance. The SEJA may also establish special matrices of financial eligibility and co-payment levels for different types of public legal services. The SEJA may also establish different matrices for different regions of the state, taking into account significant differences in cost-of-living, the cost of public legal services, and other economic circumstances.

404. The SEJA shall establish a special matrix of financial eligibility standards and co-payment levels for self-help assistance services. Such services may be provided to any applicants [at any income level OR whose incomes are no more than 500 percent of the poverty level], but at or above 250 percent of the poverty level they shall be charged 50 percent of the estimated costs of such services.

405. The SEJA shall adjust financial eligibility and co-payment levels annually to ensure they fully account for changes in the cost of living and other inflationary factors. The SEJA also may allow those making the eligibility determinations in individual cases to exercise some limited measure of flexibility in applying these standards in order to account for unusual circumstances, but the SEJA shall review such cases retroactively to ensure there are no abuses.

406. The SEJA shall establish financial eligibility standards for groups composed principally of financially eligible individuals, and for non-membership groups whose purpose is to benefit financially eligible indi-

viduals, which groups are of insufficient size to afford to pay counsel and otherwise lack the resources to do so.

DRAFTING COMMITTEE'S COMMENTARY:

The legislature recognizes the impracticality of adopting rigid financial eligibility standards as part of the statute. Instead, this statute only defines the general criteria to be applied and delegates to the SEJA the task of establishing standards consistent with those criteria, and revising the standards on a periodic basis. These standards are to be expressed in matrices which shall guide those making individual eligibility decisions (as explained in section 403). The statutory criteria embody several principles:

> *(1) Those individuals in the lowest eligibility strata, roughly corresponding to the federal poverty level, shall not be required to make any co-payments for any public legal services. Those above that line shall make co-payments in an amount commensurate with their income and assets.*
>
> *(2) Different eligibility standards (including co-payment levels) shall be set for different geographic areas to the extent there are substantial differences in the cost of living, cost of legal services, and other relevant factors. Different eligibility standards (including co-payment levels) shall be set for different forms of public legal services to the extent there are substantial differences in the cost of those services.*
>
> *(3) A group in contrast to an individual or family may be eligible for public legal services only if composed principally of financially eligible persons, or if it is a non-membership organization committed principally to benefiting financially eligible persons, and only then if the group lacks the resources to employ legal counsel.*

[NOTE: This particular draft statute envisions the provision of government subsidized services not just to what society considers poor people, but to others whose personal resources are insufficient to afford the full cost of legal services when confronting more serious legal problems. Accordingly, it requires the SEJA to establish and administer schedules imposing co-payments on a sliding scale basis determined by what it is reasonable to expect persons at different income levels to contribute to the cost of the legal assistance provided. Other basic pol-

icy alternatives exist. One would be to limit the right solely to those at and below the current federal eligibility level for legal services—that is, 125 percent of the federal poverty guideline and with no co-payments. Such an approach would simplify the administration of the right considerably. However, there are political, humanitarian, and equal justice reasons for extending the coverage of the right to the income strata somewhat above the poverty line. Studies show that the "near poor", and even the middle classes, can't afford lawyers for many or at least some of their legal problems. Indeed, many European and commonwealth countries extend the right well up into the middle classes—with half and sometimes more of the population eligible for some level of government-subsidized legal services.

In this draft, groups as well as individuals can be financially eligible to be entitled to representation. In order to be financially eligible, the definition in section 406 requires the group to be "principally composed" of financially eligible individuals. Other possible alternative formulations include a requirement the group be "entirely" or "predominantly" composed of such financially eligible individuals. Or, if the primary need is confined to groups of poor people–not of individuals in the income strata above the poverty level who are entitled to receive partial subsidies—the language could be changed to require the group to be composed "principally of individuals in the lowest eligibility category or categories." (Obviously, the question whether the statute should confer a right to equal justice on groups or should cover groups at all is also an open question.)]

500. THE PROVISION OF PROFESSIONAL SERVICES.

Professional services include the services of licensed legal professionals (as defined in section 208, performing the functions defined in sections 201-205), and the services of non-lawyer advocates in forums in which the services of the latter are permitted and deemed sufficient pursuant to section 206. Professional services can be provided through salaried staff attorneys or salaried non-lawyer advocates employed by qualified non-profit legal services organizations, as defined in section 210, or by private attorneys [*or private qualified non-lawyer advocates*].

It is the purpose and intent of the following sections to provide these services in a manner that is both efficient and guarantees recipients fair and equal access to justice. To this end, professional services shall be provided through salaried staff attorneys and salaried non-lawyer advocates em-

ployed by qualified non-profit legal services organization in those categories of cases in which the services of such attorneys and advocates ordinarily best serve the goals of efficient and effective access to justice. Professional services shall be provided through private lawyers [*and private non-lawyer advocates*] in those categories of cases in which it is deemed the services of such attorneys [*and non-lawyer advocates*] ordinarily best serve the goals of efficient and effective access to justice. Section 501 designates some of the categories of cases initially allocated to salaried staff attorneys and salaried non-lawyer advocates employed by non-profit legal services organizations, while section 502 designates some of the categories of cases initially allocated to private attorneys [*and private non-lawyer advocates*]. The State Equal Justice Authority is authorized to add additional categories of cases to either list on the basis of experience or empirical research and after public hearings, as well as to establish procedures for both salaried staff attorneys and private attorneys to provide services in the remaining categories of cases.

501. Provision of professional services through salaried lawyers and salaried non-lawyer advocates employed by non-profit legal services organizations

(1) Subject to the exceptions described below, professional services shall be supplied exclusively by salaried staff attorneys or, as appropriate, salaried non-lawyer advocates employed by non-profit legal aid organizations in the following categories of cases in which the applicant is entitled to services, pursuant to section 301:

> (a) Cases involving client's eligibility, benefit levels, and other issues regarding government income maintenance, welfare, unemployment compensation, means-tested disability benefits, or health benefit programs.
>
> (b) Cases involving a client tenant's eviction from, or the condition of, private or public residential housing that the client occupies.
>
> (c) Cases involving protection from domestic abuse in courts or geographic areas where the volume of such cases makes it substantially more economic to provide effective representation through salaried attorneys than by private lawyers.

(d) Cases involving the representation of parents or children in dependency [sometimes called neglect] cases in courts or geographic areas where the volume of such cases makes it substantially more economic to provide effective representation through salaried attorneys than by private lawyers.

(e) Subject to regulations established by the SEJA to exclude cases for which a private market exists, cases involving goods or services a client purchased.

(f) Subject to regulations established by the SEJA to exclude cases for which a private market exists, cases involving the continuation of a client's employment.

(g) Any other categories of cases in which the SEJA determines, that salaried attorneys or salaried non-lawyer advocates can provide more efficient yet still effective access to justice to the clients to be served. Such determinations shall be made on an experimental basis, and for a limited period, and after public hearings at which all interested groups shall have an opportunity to appear and express their views and shall be in effect for no longer than 3 years, unless the SEJA extends such authority by regulation following the expiration of the experimental period.

(2) Exceptions within designated categories.

In the following specific circumstances, services in categories ordinarily to be provided by salaried staff attorneys or salaried non-lawyer advocates may be provided instead by a private attorney [or private non-lawyer advocate]:

(a) When the applicant requests services in a case in which the non-profit legal aid organization already is representing a party with an adverse interest and it is not feasible, economic, or convenient to the applicant to refer that applicant to a different legal aid organization.

(b) When the applicant requests services in a case in which, because of its unusual nature, the case requires specific expertise not possessed or economically acquired by salaried staff employed by the legal aid organization, and it is not feasible, economic, or con-

venient to the applicant to refer that applicant to a different legal aid organization possessing the required expertise.

(c) When no non-profit legal aid organization is located in, or serves, or is reasonably accessible to the geographic area in which the applicant resides, and one or more private attorneys is available to that client and willing to provide the desired service.

(d) When the legal aid organization has insufficient staff to provide effective access to justice to the applicant while still providing such access to clients it already has undertaken to represent.

502. Provision of professional legal services through private attorneys and [and private qualified non-lawyer advocates]

(1) Subject to the exceptions described below, professional services shall be supplied primarily by private attorneys [*or, as appropriate, private qualified non-lawyer advocates*] in the following categories of cases in which the applicant is entitled to services pursuant to sections 301-305:

(a) Cases involving ordinary tort, contract, or property claims that do not fall within any of the specialized categories defined in section 501 above.

(b) Cases involving dissolution, child custody, child and spousal support, and other ordinary family law issues that do not fall within any of the specialized categories defined in section 501 above.

(c) Cases involving protection from domestic abuse or dependency proceedings which do not satisfy the criteria set forth in section 501 above.

(d) Any other categories of cases in which the SEJA determines that private attorneys [*or private non-lawyer advocates*] can provide more efficient yet still effective, fair and equal access to justice to the clients to be served. Such determinations shall be made on the basis of experience or empirical research and after public hearings at which all interested groups shall have an opportunity to appear and express their views.

DRAFTING COMMITTEE'S COMMENTARY:

With respect to public legal services to be provided by licensed legal professionals and non-lawyer advocates, these sections assign certain defined categories of cases to salaried lawyers employed by non-profit legal aid organizations (except in certain defined circumstances), and assign other defined categories of cases to private attorneys. The SEJA is authorized to add other categories of cases to the lists assigned to either salaried or private attorneys. Either type of lawyer may provide services in yet other categories of cases. The guiding standard for any allocations the SEJA authorizes is that the preferred source of legal representation be not only the most economical but also an effective provider of the service involved. Effectiveness, in turn, means the provider is proven to supply represented parties fair and equal access to justice.

[NOTE: The sections above implement one of several possible delivery systems—a "subject matter mixed system." This system delivers legal services through a combination of salaried staff lawyers (the primary delivery model presently used by American legal aid organizations) and compensated private lawyers (often called judicare). A "subject matter mixed system" allocates some categories of cases and legal problems to be handled by salaried lawyers and other categories to be handled by compensated private counsel.

Another possible form of "mixed system" that might be considered as a worthy substitute is the "client option mixed system." This system combines a network of salaried staff offices alongside a judicare system. Each applicant is given a choice whether a salaried attorney or a compensated private attorney will handle the particular problem he or she is experiencing. (In some nations using this model, and if there is a substantial difference in cost between salaried and private counsel with respect to a given category of legal problem, the legal aid administrators are allowed to deny the option of choosing private counsel, when budgetary constraints dictate.) Examples of national legal aid programs using a client option mixed system include Quebec Province and Finland (the latter as to litigation in the courts only, but not legal advice and non-litigation assistance which are the exclusive province of salaried staff lawyers.)

Another possible form of "mixed system" might be called an "overflow mixed system", but is primarily a salaried staff lawyer program with the compensated private lawyer component limited to handling those

cases the salaried lawyers cannot handle in a timely and effective way. Ireland is an example of such a mixed system. (In some, if not many jurisdictions in the U.S., criminal defense systems provide most of their representation through salaried public defenders, but use compensated appointed counsel for the overflow of cases those salaried lawyers can't handle, as well as for conflict and like situations.)

There also remain the options of a pure compensated private attorney system or a pure salaried staff attorney system, either employed directly by the government (similar to public defender offices utilized to provide indigent defense in criminal cases), or by a non-profit organization as is common in the civil field. However, it is difficult to imagine how a right to equal justice can be implemented effectively with a completely fixed resource unable to accommodate an overflow of applicants for those services. As to a pure compensated private attorney system, most nations of which we are aware which started with such a system, have found it worthwhile, if not necessary, to introduce a salaried staff attorney component. Moreover, all such nations of which we are aware have found it difficult, if not impossible, to control the costs of a pure judicare system.

The "subject matter mixed system" was chosen primarily because it appears to offer the most economical approach to providing effective access to justice—allocating those categories of legal problems to salaried lawyers which they can handle both most efficiently and effectively, and to compensated private counsel those categories which they can handle most efficiently and effectively. Whether the draft statute has accurately identified the categories each type of attorney can best supply will determine whether it succeeds in the objective of providing effective access to justice in the most cost-efficient manner. Any state contemplating the use of a subject matter mixed system would be well advised to consider this question anew, taking account of local conditions.]

600. ELIGIBILITY DETERMINATION PROCESS.

601. Irrespective of which provider is to supply the services, the SEJA may allow applications for public legal services to be granted only by specific entities it certifies from among the following: (1) non-profit legal services organizations; (2) self-help centers operated by State courts; (3) members of the State judiciary; or (4) special eligibility determination offices the SEJA may establish. Before granting an application, the above organiza-

tions and individuals shall consider and apply criteria the SEJA promulgates, which implement the provisions of sections 300 et seq. and 502 et seq. of this Act. Pursuant to section 502, private lawyers and private non-lawyer advocates may provide services in many circumstances, but they may not make the eligibility determinations in those or any other cases. In no case shall a judge who participates in an eligibility determination handle any aspect of the case as a judicial officer.

602. The SEJA shall establish procedures for the organizations delegated to make eligibility determinations which ensure those decisions are made both accurately and in a timely fashion, and take account of the financial eligibility standards promulgated pursuant to sections 401 et seq. and the other criteria promulgated pursuant to sections 301 et seq. These organizations shall maintain the relevant records reflecting the financial and other data used in finding applicants eligible or ineligible, and these records shall be available for audit by the SEJA under procedures which maintain the confidentiality of information protected by the lawyer-client privilege.

603. Applicants who are denied service shall be informed that they may lodge an appeal within fifteen days of the denial, which shall be heard in a timely fashion by a three-member appellate committee composed of independent administrative law judges. By majority vote, this independent committee shall be authorized to reverse the denial and order the SEJA to provide the requested public legal service or to provide another form of public legal service to the applicant.

604. The SEJA shall, by regulation, establish procedures for emergency, provisional eligibility determinations by private providers.

DRAFTING COMMITTEE'S COMMENTARY:

This section funnels the determination whether persons are eligible for public legal services to a selected set of decision makers, which either already have experience with this process (such as qualified non-profit legal aid organizations), or which the SEJA certifies have become qualified to do so. The SEJA may not designate private attorneys or law firms as qualified to certify persons eligible for public legal services except on a provisional basis in emergency situations and consistent with criteria the SEJA defines in regulations. Once a person is deemed to be eligible, the organization that made the determination shall refer that person to the appropriate type

of public legal service (as defined in sections 300 et seq.) and the appropriate provider.

This section allows an applicant who is denied service an opportunity for a prompt administrative review of that denial. This review is performed by an independent panel consisting of three administrative law judges. If the panel finds the SEJA or its designee erred in denying the requested service, it is empowered to order the SEJA to provide that service or, if appropriate, a different form of service. Thus, for instance, if the applicant only requests full legal representation and the appeal panel determines the decision to deny this level of service was appropriate but that limited legal representation was both sufficient and justified, it may order the SEJA to provide that lesser degree of service to the applicant.

[NOTE: Although this first draft uses a "subject matter mixed system," it does not allow private attorneys to determine if applicants meet the financial, merits, and significance tests defined in sections 300 et seq. and 400 et seq. above. There are at least two reasons. First, these determinations involve expertise and procedures unfamiliar to private lawyers and law firms. Second, there is a potential conflict since a positive eligibility determination will inure to the direct financial benefit of the lawyer or law firm making that decision. (Notably, nearly all foreign legal aid programs that use private attorneys to provide government-paid representation nevertheless assign the eligibility determination decisions to public offices.)

Other possible formulations might assign all these eligibility determinations to special offices created by the SEJA or using Internet technology it might be feasible to channel the needed information from a variety of input locations (even possibly private attorneys and law firms) to a centralized eligibility determination office maintained by the SEJA.]

700. STATE EQUAL JUSTICE AUTHORITY.

Responsibility for policy-making and overall administration of the program defined in this chapter, and which has the purpose of guaranteeing people in the State their rights to fair and equal access to justice, reposes in an independent public body, the State Equal Justice Authority.

701. Composition, Terms, and Compensation of State Equal Justice Authority Board of Directors

The SEJA shall be governed by a board of directors with nine members selected as follows:

> (1) Two members who shall be members of the State Bar selected by the Chief Justice, and at least one of whom shall have experience representing low-income people;
>
> (2) Two members who shall be members of the State Bar selected by the State Bar, at least one of whom shall be a full-time salaried attorney employed by a qualified non-profit legal services organization;
>
> (3) Three members selected by the Governor, at least one of whom shall be a member of the State Bar, and at least one of whom shall be a person eligible to receive full legal representation under the statute;
>
> (4) One member selected by the [lower house] of the State legislature;
>
> (5) One member selected by the [upper house] of the State legislature;
>
> (6) [In states with an elected Attorney General:] One member selected by the Attorney General.

Board members shall serve staggered three-year terms, which can be renewed for a maximum of one additional term. After the initial board is selected, all members shall participate in a draw to determine which three members shall have initial one-year terms, which three shall have initial two-year terms, and which members shall have initial three-year terms. The members of the Board shall elect one of their number to serve as the Chair of the SEJA, and another of their members as Vice-Chair. Board members shall be compensated at the rate of $200 a day for their preparation for and attendance at board meetings and board committee meetings, and shall be reimbursed for all legitimate expenses attendant to discharging their responsibilities as board members.

702. Staff of the State Equal Justice Authority

The Board of Directors of the SEJA shall select a person to serve as the President of the Authority who shall be an ex officio, non-voting member of the Board. The President of the Board shall be the SEJA's chief executive officer and this shall be a full-time staff position compensated at the same salary as an Associate Justice of the State Court of Appeal, but the benefits shall be defined by the Board of Directors. Under the direction of the Board of Directors, the President shall exercise all the powers and discharge all the responsibilities this Chapter confers on the SEJA. Based on recommendations from the President, the Board shall create and define other staff positions, but the President shall select the persons who occupy these positions. The Board of Directors shall establish the compensation and benefit levels for these other positions, but in doing so shall establish categories consistent with comparable positions in the executive and judicial branches of the State government and in no event may compensate any other staff member at a level exceeding the salary of a State trial judge.

703. Functions of the State Equal Justice Authority

The SEJA shall have overall responsibility for the administration of the public legal services funded by the State Equal Justice Act. The Authority is empowered to enact regulations pursuant to the Administrative Procedures Act. The SEJA also is empowered to delegate eligibility determinations in individual cases as well as other applications of its regulations and basic policies to designated organizations.

The State Equal Justice Authority shall:

> (1) Ensure all eligible persons residing in the State receive appropriate public legal services when needed. In determining what level of services are appropriate, the SEJA shall ensure those services are sufficient to afford the client fair and equal access to justice while also taking account of the relative cost of those services.
>
> (2) Ensure there is a comprehensive network of qualified nonprofit legal services organizations reasonably accessible to applicants in all geographic areas of the State in which substantial populations of financially eligible persons reside. To the extent legal services organizations, funded by the federal Legal Services Corporation or those deemed qualified to receive funding from the

State IOLTA program, provide services in or near the geographic area to be covered, the SEJA shall give priority to funding expansion of those organizations rather than creating or encouraging the creation of new legal aid organizations.

(3) Identify and certify specific organizations to which it delegates the authority to make eligibility determinations pursuant to section 600. Legal services organizations funded by the federal Legal Services Corporation, those funded under the State IOLTA, and any self-help centers the State court system certifies as qualified are automatically considered certified to perform this function.

(4) Supplement the funding provided to non-profit legal services organizations by the Legal Services Corporation, IOLTA, the Equal Access Fund, and other government sources, to the extent required to ensure these organizations can fulfill their responsibility to provide cost-effective legal representation in all the cases allocated to them pursuant to section 501.

(5) Identify and contract with private lawyers and private law firms willing and able to provide any or all of the types of public legal services defined in sections 202-207, on terms that ensure both that the services will be sufficient to provide clients fair and equal access to justice and that they will be provided at reasonable cost. In performing this function, the SEJA is authorized to negotiate contracts based on hourly-fee rates, per-service rates, or per-case rates, but not on a capitation basis.

(6) Through its own staff, contracts with media firms, and other means, the SEJA shall inform the general public, especially population groups and geographic areas with large numbers of financially eligible persons, about their legal rights and responsibilities and the availability of public legal services should they experience a problem that might be addressed through one of the public legal services defined in section 201.

(7) Directly and through contracts with organizations and individuals possessing appropriate expertise in evaluation, social science, and empirical research, the SEJA shall conduct studies which, among other subjects, assess the need and demand for public legal services, the sufficiency of different levels of public legal services

to provide fair and equal access to justice in various circumstances, the effectiveness of those services in positively impacting people's lives and legal situations, the quality and cost-effectiveness of different providers of public legal services, and address other relevant issues.

(8) Ensure clients served by public legal services funded through the State Equal Justice Act receive the same independent, confidential, competent, and otherwise ethical representation as those persons who can afford to pay for legal representation, and as is guaranteed to all clients by the code of ethics applicable to licensed legal professionals.

(9) Ensure those served who are not clients receive competent, timely, and accurate information and assistance.

(10) Prepare and submit an annual report to the Governor, the Legislature, and the Judicial Council. Among other subjects, this report shall include: (1) a summary of the SEJA's activities for the year and the results of any special studies or evaluations the SEJA conducted or commissioned during the year; (2) the current status of the combined federal-state-local government effort to provide State residents full and fair access to justice in non-criminal matters; (3) quantitative and qualitative data about costs, the quantity and quality and other relevant performance measures regarding public legal services of different types provided during the year; and (4) recommendations for changes in the SEJA legislation and other State statutes, court rules, or other policies which would improve the quality or reduce the cost of public legal services required to guarantee all residents of State their right to fair and equal access to justice in non-criminal matters.

DRAFTING COMMITTEE'S COMMENTARY:

These sections establish an independent body charged with responsibility for administering the public legal services system as well as for discharging the broader responsibility to constantly study and make recommendations for changes to the legal system which would enhance access to justice for all residents of this State. To accomplish its administrative responsibilities, the SEJA is authorized to establish policies and set standards, to designate those entitled to perform various functions, to delegate

certain of its functions (including eligibility determinations), and to employ consultants. Before promulgating regulations it must adhere to the processes, including public hearings, required by the State Administrative Procedures Act.

[NOTE: This draft creates an independent body to administer the SEJA. The board of this independent body is selected by different governmental bodies, the judiciary, and the legal profession.

Alternative possible arrangements include administration by the state bar association or by the court system or as a separate part of the executive branch. Notably, most nations with advanced legal aid programs—including the United States—have chosen to establish some form of independent or semi-independent board to administer their legal aid systems. Smaller states, however, may find it too cumbersome or expensive to set up a free-standing independent body to administer their legal aid system.]