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## Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies

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# Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies

Justice Earl Johnson, Jr.

## Abstract

It is time—long past time—for the United States to join the growing international consensus that words like “due process,” “fair hearing,” “equal protection of the laws,” and “equality before the law,” all express a universal principle—a right to equal justice to be enjoyed by everyone. And, as the European Court on Human Rights pointed out, if this right is to be “practical and effective,” and not merely “theoretical or illusory,” then for those unable to afford counsel, the right to equal justice must include the right to a lawyer supplied by government. Why is this so important? As the European Ministers said in 1978, it is “an essential feature of any democratic society.” Indeed, without this right a nation’s poor people are less than full citizens and that nation is less than a true democracy. They cannot even enforce the other rights their votes may have won them in the legislatures. It is the failure of the United States’ past we did not recognize this obvious truth, so deeply embedded in our national ideals, long ago. It is the tragedy of the present we remain insular and smug about our nation’s superiority in all things related to “justice,” while millions of poor U.S. citizens are denied this precious right. It is the hope of the future the United States will finally open its eyes and embrace the “practical and effective” right to equal justice most Western democracies now guarantee. When that day comes—and it may come soon—millions of U.S. citizens will, for the first time, truly have their day in court.

The United States will never have adequate government funding of civil legal services unless, and until, there is an earth change in the nation’s understanding of what constitutes adequate funding of this fundamental government function. This conference is so important to the United States because it gives us a chance to look at some comparable industrial democracies and how they have treated the goal of equal access to justice for their lower income citizens. I have studied the subject of equal access to justice for the poor for almost three decades and am delighted it finally has begun to arouse some interest in the United States.

# EQUAL ACCESS TO JUSTICE: COMPARING ACCESS TO JUSTICE IN THE UNITED STATES AND OTHER INDUSTRIAL DEMOCRACIES

*Justice Earl Johnson, Jr.*

In 1997, Judge Robert Sweet of the U.S. District Court for the Southern District of New York delivered the Leslie H. Arps Memorial Lecture to the New York Bar Association. He asked and answered a fundamental question,

What then needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law? . . . To shorthand it, we need a civil *Gideon*,<sup>1</sup> that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system.<sup>2</sup>

There is some irony—and also an indication of the implications of U.S. citizens still lacking a right to counsel in civil cases—in the fact that in 1999 Judge Sweet's former law firm, where he spent his pre-bench career, earned over three times the entire budget of the Legal Services Corporation<sup>3</sup> ("LSC"). A

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1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. Robert W. Sweet, *Civil "Gideon" and justice in the Trial Court (The Rabbi's Beard)*, 42 THE RECORD 915, 924 (Dec. 1997).

3. *About Legal Services Corporation* (visited Jul. 29, 2000) <<http://www.lsc.gov>> (on file with the *Fordham International Law Journal*) [hereinafter *About LSC*]. Legal Services Corporation ("LSC") is a private, non-profit corporation established by Congress in 1974 to assure equal access to justice under the law for all U.S. citizens. An 11-member bipartisan Board of Directors appointed by the President and confirmed by the Senate heads it. LSC does not provide services directly. Rather, it provides grants to independent local programs chosen through a system of competition. In 1997, LSC funded 269 local programs. Local programs are independent entities, governed by Boards of Directors drawn from the local bar and client community. Programs may supplement their LSC grants with additional funds from state and local governments, Interest on Lawyer Trust Accounts ("IOLTA") programs, other federal agencies, bar associations, and other charitable organizations. They also involve private attorneys through volunteer *pro bono* work. LSC-funded programs do not handle criminal cases, nor do they accept fee-generating cases that private attorneys are willing to accept on a contingency basis. In addition, in 1996 a series of new limitations were placed upon activities in which LSC-funded programs may engage on behalf of their clients, even with non-LSC funds. Among them are prohibitions on class actions, challenges to welfare reform, collection of attorneys' fees, rulemaking, lobbying, litigation on behalf of prisoners, representa-

single law firm, which represents maybe a hundred or so corporate clients, earned US\$1,000,000,000 (one billion)<sup>4</sup> while the U.S. Federal government was only willing to spend US\$300,000,000 (300 million) on legal services for forty million poor U.S. citizens. Even adding in Interest on Lawyer Trust Accounts<sup>5</sup> ("IOLTA") and other federal, state, and local funding, the most recent LSC annual report found the U.S. federal, state, and local governments in total supplied less than US\$600,000,000 (600 million) for civil legal services.<sup>6</sup>

A half dozen law firms in the United States each took in more than the US\$600,000,000 (600 million) that the U.S. federal, state and local governments now spend on legal representation for the poor.<sup>7</sup> In 1998, another revealing comparison showed that the hundred largest law firms had combined revenues that exceeded US\$25,000,000,000 (twenty-five billion) while the LSC budget that year was under US\$300,000,000 (300 million)<sup>8</sup>—or just a bit over 1% of what those hundred corporate firms earned. The total U.S. government expenditures on civil legal services for the poor amounted to only 2% of what the hundred largest law firms took in.

I am not criticizing these law firms for being prosperous, but I am criticizing the U.S. government for being penurious. Even worse, the U.S. government is being penurious about what Reginald Heber Smith called the "cornerstone" of U.S. democracy—equal justice for all, irrespective of means.<sup>9</sup>

Before venturing beyond the shores of the United States, I would like to share a couple of other disturbing comparisons. At its peak in 1981, the LSC budget of US\$321,000,000 (321 million) represented 1.3% of the US\$23,700,000,000 (23.7 billion)

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tion in drug-related public housing evictions, and representation of certain categories of aliens.

4. Roger Parloff, *Skadden: A Flexible Firm Breaks the Billion Dollar Barrier*, AM. LAW. July 2000, at 88.

5. See *Phillips v. Washington Legal Foundation*, 94 F.3d 996 (5th Cir. 1998) (describing Interest On Lawyer Trust Accounts).

6. LEGAL SERVICES CORPORATION, 1999 ANNUAL REPORT [hereinafter LSC ANNUAL REPORT]. The LSC Annual Report reflects local legal service agencies received a combined total of US\$486,000,000 (486 million) in federal, state, local, and IOLTA funds in FY 1998. Including foundation grants and other private donations those agencies received a total of US\$561,000,000 (561 million) in that fiscal year.

7. Parloff, *supra* note 4.

8. LEGAL SERVICES CORPORATION, 1998 BUDGET.

9. REGINALD HERBER SMITH, *JUSTICE AND THE POOR* (1919).

that the people of the United States spent that year on lawyers.<sup>10</sup> Now, two decades later, the combined U.S. governmental expenditures on civil legal services for the poor—US\$600,000,000 (600 million)—represent only 0.5% of the more than US\$130,000,000,000 (130 billion) the people of the United States currently spend on lawyers.<sup>11</sup> This does not exactly demonstrate progress—from an inadequate 1.3% down to a dismal 0.5%. Indeed, it shows a precipitous 65% decline in the share of legal resources devoted to the poor in the United States over the past two decades.

Nonetheless, US\$600,000,000 (600 million) may sound like a lot of money to a U.S. audience and especially to legal services advocates accustomed to seeing civil legal services treated as a third class afterthought to the U.S. justice system rather than the essential and integral component it should be. But, US\$600,000,000 (600 million) is a vast improvement only in the sense a five-dollar bill seems like a fortune to a homeless beggar who has grown accustomed to dimes and quarters.

I. *A HUMBLING JOURNEY: WHAT ONE AMERICAN LEARNED  
WHILE STUDYING EQUAL ACCESS TO JUSTICE IN  
OTHER WESTERN DEMOCRACIES*

The United States will never have adequate government funding of civil legal services unless, and until, there is an earth change in the nation's understanding of what constitutes adequate funding of this fundamental government function. This conference is so important to the United States because it gives us a chance to look at some comparable industrial democracies and how they have treated the goal of equal access to justice for their lower income citizens. I have studied the subject of equal access to justice for the poor for almost three decades and am delighted it finally has begun to arouse some interest in the United States.

In 1973, only a few years after completing my tenure as director of the Legal Services Program of the Office of Economic Opportunity ("OEO"), I first began researching civil legal ser-

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10. U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993 tbl. 1327 (116th ed. 1996).

11. U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 2000 tbl. 1301 (120th ed. 2000).

vices in other countries. While at OEO, I had seen the OEO Legal Services Program increase the U.S. investment in civil legal services for the poor by eightfold—from the US\$5,000,000 (five million) it had been for the entire United States under charitably financed legal aid to over US\$40,000,000 (forty million) in federal funding.<sup>12</sup>

I approached our research into other countries' legal services efforts with a typically chauvinistic attitude. Like most U.S. citizens, I assumed the United States had the most commitment to equal justice for its citizens of any nation in the world. After all, the U.S. national rhetoric is replete with guarantees the United States provides equal justice. The Pledge of Allegiance that U.S. children start reciting in kindergarten says the United States is a country "with . . . justice for all," not just for those who can afford lawyers. The U.S. Constitution purports to guarantee "due process" and "equal protection of the laws."<sup>13</sup> The entrance frieze of the U.S. Supreme Court building bears the promise of "Equal Justice Under Law," which appears constantly on television and other media. Given these constant reassurances about the U.S. commitment to equal justice, it is no surprise to find public opinion polls show four out of five U.S. citizens erroneously believe poor people already enjoy a constitutional right to free counsel if they are sued in a civil case, just as they would if prosecuted in a criminal case.<sup>14</sup>

While unlike most U.S. citizens, I knew there was no right to counsel in civil cases, I nevertheless assumed the United States was well ahead of other countries when it came to providing lawyers to those who could not afford their own. In some ways, my beliefs were confirmed. For the relative few poor U.S. citizens who could get legal representation in the United States, our research demonstrated this representation generally was cost-effec-

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12. By the way, that US\$40,000,000 (forty million) in 1967 dollars is the equivalent of about US\$120,000,000 (120 million) in current dollars.

13. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment says in part: "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." *Id.*

14. See ASSOCIATION OF TRIAL LAWYERS OF AMERICA, 1991-1992 DESK REFERENCE SUPPLEMENT: COMMEMORATING THE 200<sup>TH</sup> ANNIVERSARY OF THE SIGNING OF THE BILL OF RIGHTS (1991). This poll surveyed a national sample. A similar poll conducted that same year in California found 69% of Californians entertained the same erroneous belief that government guaranteed free lawyers for poor people in civil cases. *California State Legal Knowledge Poll*, 1 CALIF. LAW. 35 (1991).

tive and of high quality.<sup>15</sup>

But if the quality was high, the quantity was low compared to many industrial democracies. Let me begin with the legal guarantee, what we call the "right to counsel." While the United States has had a guaranteed right to counsel in criminal cases since 1963, when the U.S. Supreme Court decided *Gideon v. Wainwright*,<sup>16</sup> there is no such right for civil cases. No U.S. federal court has declared such a right as a matter of constitutional law. A constitutional right to counsel exists only in a few states' constitutions and, even in those states, in only a very narrow range of cases. The U.S. federal government, furthermore, has not created a statutory right to counsel in civil cases. At the U.S. state government level, a statutory right to counsel exists in only a few select states and only in limited categories generally revolving around the parent-child relationship.

For the most part, no poor U.S. citizen has a constitutional or statutory right to the assistance of counsel for civil litigation in either the U.S. Federal or state courts. This situation is all the more surprising since equal justice, and the programs necessary to implement it, occupy a unique status among the many social programs and other goals the U.S. government is asked to pursue. Admittedly, many of the others like health care, food stamps, social security, and the like, address more immediate physical needs. Equal justice, unlike these others, however, is at the essential core of the U.S. system of government itself. Equal justice can be found in the language of the U.S. constitution, the political philosophy underlying the U.S. constitution, and the common law legal tradition from which the U.S. legal system sprung.

When I began researching other legal aid systems in 1973, I was shocked to learn that, somehow, other nations also committed to democracy had recognized the critical importance of equal justice and assigned it a much higher priority. Frequently, these nations have given a different, broader interpretation to equivalent language found in their constitutions and other political documents. Furthermore, their legislatures have been more

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15. See MAURO CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 140-66 (1975).

16. 372 U.S. 335.

willing to enact legislation guaranteeing equal access to justice for their low-income citizens.

A rather abbreviated version of the right to equal justice came over to the United States from the United Kingdom along with the rest of the common law legal system. At the time the colonists were settling North America, this right already had existed under the English common law for several hundred years. In 1495 during the reign of Henry VII, the English Parliament enacted a statute guaranteeing free counsel and waiving all fees for indigent civil litigants in the common law courts.<sup>17</sup> Judicial decisions soon extended this right to the courts of equity also.<sup>18</sup> The "Statute of Henry VII"<sup>19</sup> created a right to free counsel for indigent English litigants and empowered the courts to appoint lawyers to provide the representation, without compensation. Many U.S. states imported this statute with its judicial elaborations, along with the rest of English common law, into their own common law when those states were first founded. Indeed over three-quarters of a century ago, the California Supreme Court used this five hundred-year old English statute as the legal basis for its decision creating *in forma pauperis* rights to waiver of court fees and costs when poor litigants seek access to the civil courts.<sup>20</sup>

Curiously, neither California courts nor the courts of other states with similar provisions incorporating the English common law recognized that the Statute of Henry VII provided for not only the waiver of fees and costs, but also provided for appointment of free legal counsel for those same poor civil litigants. Nonetheless, the existence of this right for some 500 years in the nation that is the source of so many of the principles on which the U.S. government is founded underscores the longstanding and fundamental nature of the claim that free counsel should be a matter of right for poor people in the United States. Significantly, this right predates by centuries many of the social and economic services, such as health care for the poor and old age and disability income security, which have recently become rights in the United States and most industrial democracies.

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17. Statute of Henry VII, 11 Hen. 7, ch. 12.

18. See, e.g. Oldfield v. Cobbett, 41 Eng. Rep. 765 (1845).

19. 11 Hen. 7, ch. 12.

20. Martin v. Superior Court, 176 Cal. 289 (1919).



Most other Western European countries, like the United Kingdom, enacted a statutory right to counsel in civil cases over a century, or at least decades, ago. France enacted such a right in 1851; Germany in 1877; the Scandinavian countries and most other Northern European nations in the early 20<sup>th</sup> Century. Austria, Greece, Italy, and Spain enacted statutory rights to counsel in the late 19<sup>th</sup> or early 20<sup>th</sup> Century. In the 1960s and 1970s several members of the U.K. Commonwealth including Hong Kong, New Zealand, and some Australian states and Canadian provinces followed suit.<sup>21</sup>

Beyond the United Kingdom and the common law world, the interpretations U.S. courts have accorded constitutional due process and equal protection guarantees stand in sharp contrast to the treatment similar constitutional language has received at the hands of the high courts in several other industrial democratic civil law countries. In 1937, over sixty years ago and a quarter century before our own Supreme Court decided *Gideon v. Wainwright*,<sup>22</sup> a poor person asked the Supreme Court of Switzerland to rule whether indigent Swiss citizens have a right to free counsel in *civil* cases under that nation's Federal constitution.<sup>23</sup> The Swiss constitution contains a guarantee that, "All Swiss are equal before the law,"<sup>24</sup> which is similar to the U.S. constitution's guarantee that its citizens will enjoy "equal protection of the laws." In *Schefer gegen Appenzell A. Rh. Ragierungsrat*,<sup>25</sup> the Swiss Supreme Court concluded poor people could not be "equal before the law" in the regular courts unless they had lawyers just like the rest of the citizenry.<sup>26</sup> Consequently, it held the governments of the Swiss Cantons were required to provide free lawyers to indigent litigants in all civil cases requiring "knowledge of the law."<sup>27</sup>

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21. See CAPPELLETTI ET AL., *supra* note 15; Earl Johnson, Jr. *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985).

22. 372 U.S. 335 (1963).

23. *Schefer gegen Appenzell A. Rh. Ragierungsrat*, Judgment of Oct. 8, 1997, BGE 63 Ia 209 [hereinafter *Schefer*].

24. BV [Constitution] art. 4 (Switz.).

25. *Schefer*, BGE 63 I 209.

26. See Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 5 (1967) (providing partially translation and discussion of *Schefer*).

27. *Id.* Interestingly, it was 1972 before the Swiss Supreme Court extended this liberal right to counsel to criminal cases. See CAPPELLETTI ET AL., *supra* note 15, at 706.

Germany has a comprehensive statutory right to counsel in civil cases heard in the regular courts.<sup>28</sup> Nonetheless, the German Constitutional court also has made it clear that nation's constitutional guarantee of a "fair hearing" in civil cases may require appointment of free counsel for poor people where the legal aid statute does not.<sup>29</sup>

The Swiss and German right to counsel decisions pale in significance, however, compared to a 1979 decision of the European Court of Human Rights, called *Airey v. Ireland*.<sup>30</sup> This landmark opinion emerged from the case of an indigent Irish woman who sought judicial separation from her husband. Mrs. Airey lacked the resources to hire a lawyer to represent her in this proceeding. She asked the trial court to provide free counsel, but the judge turned her down. Mrs. Airey appealed this denial to the highest court in Ireland and lost. That result would have been the end of the matter in the United States, because the highest court in the land had spoken. Ireland, however, is a signatory to the European Convention on Human Rights and Fundamental Freedoms<sup>31</sup> (European Convention) so Mrs. Airey had recourse to a higher court and a higher law. In front of the European Court of Human Rights, she won.

The European Convention does not guarantee indigent litigants a right to free counsel in so many words. Article 6 of the European Convention, however, does guarantee all civil litigants a "fair hearing."<sup>32</sup> In the course of its opinion in *Airey*, the European Court of Human Rights issued an unusually powerful statement about government's affirmative obligation to provide equal access to justice for lower income citizens:

The Convention is intended to guarantee not rights that are

28. § 114 Bürgerliches Gesetzbuch [BGB] (F.R.G.) translated in CAPPELLETTI ET AL., *supra* note 15, at 387 (stating "A party who is unable to defray the costs of the litigation without jeopardy to the means necessary for his and his family's sustenance shall be granted legal aid upon application therefore.").

29. Decision of June 17, 1953 (No. 26), *Entscheidungen des Bundesverfassungsgerichts* [BverwGE] 2, 336 (1953).

30. 32 Eur. Ct. H.R. (ser. A) (1979).

31. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, E.T.S. No. 0005, entered into force Sep. 3, 1953 (visited Jul. 29, 2000) <<http://convention.coe.int>> (on file with the *Fordham International Law Journal*) [hereinafter European Convention].

32. *Id.* art. 6 §1. Article 6 guarantees that "[i]n 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.*

theoretical or illusory but rights that are practical and effective. This is particularly so of the right to access to the courts in view of the prominent place held in a democratic society by the right to a fair trial . . . . The court concludes . . . that the possibility to appear in person before the [trial court] does not provide the applicant with an effective right of access . . . . There has accordingly been a breach of Article 6 section 1.

The [Irish] Government maintain that . . . in the present case there is no positive obstacle emanating for the State and no deliberate attempt by the State to impede access; the alleged lack of access to the court stems not from any act on the part of 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, fulfillment 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.<sup>33</sup>

Contrast that language from the opinion of the European Court on Human Rights with what the U.S. Supreme Court said just two years later, in *Lassiter v. Department of Social Services*,<sup>34</sup> a 5-4 decision addressing the same issue of whether civil litigants have a constitutional right to counsel. The majority of the highest U.S. court wrote, "the Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we 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 . . . ."<sup>35</sup>

So the constitutional right to a "fair hearing" in Western Europe requires those governments to provide free counsel to poor

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33. *Airey*, 32 Eur. Ct. H.R. (ser. A).

34. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

35. *Id.*

people in civil cases. By contrast, the constitutional right to "due process" in the United States does not impose such a requirement. Somehow legal representation is essential to fundamental fairness in Western Europe but not in the United States.<sup>36</sup>

Were the United States a signatory to the European Convention, it would violate the "fair hearing" guarantee of that Convention since the United States fails to guarantee free counsel to poor people in civil cases. Most of the western industrial democracies outside the United States have signed the European Convention and are bound by *Airey v. Ireland*.<sup>37</sup> Thus, the poor people of nearly all the western industrial democracies enjoy a supra-national constitutional right to counsel in civil cases. To put it another way, poor U.S. citizens are nearly alone among the poor people of the western industrial world in not having this basic right of democratic citizenship. That thought seems rather sobering and, indeed, is a major embarrassment in a country which prides itself as the home of "Justice for All."

Turning from the legal entitlement to counsel to the level of government investment, it undoubtedly would come as a surprise to most U.S. citizens to learn where the United States ranks compared to many Western European and Commonwealth countries of the United Kingdom when it comes to public investment in civil legal services for those unable to afford counsel. When I first took a look at this question in 1974, I found the United States already was lagging behind the few industrial democracies from which we could acquire reliable budget information. The United Kingdom was already spending three times as much per capita on civil legal services as the United States, even after the dramatic increase brought about by the OEO Legal Services Program and the first U.S. federal funding of civil representation for the poor. Meanwhile in 1974, the Swedish legal aid program was spending four times as much and the brand new program in Quebec province, Canada was spending four-and-a-half times as much per capita as the United States was on civil legal services.

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36. Incredibly smart, these Americans. Even those with only a grade school or high school education learn enough about civil procedure, trial practice, and the substantive law to represent themselves in court, while Europeans need the help of lawyers to do the same.

37. *Airey*, 32 Eur. Ct. H.R. (ser. A). See European Convention, *supra* note 31 (listing 41 member states as signatories).

TABLE 1. COMPARATIVE GOVERNMENT EXPENDITURES ON CIVIL LEGAL SERVICES IN 1974 (in 1974 U.S. Dollars) (United Kingdom, Sweden, Quebec Province (Canada), and United States)<sup>38</sup>

	Total Government spending on civil legal services (US\$ million)	Population (millions)	Per capita government spending on civil legal services	Total U.S. budget required to match the per capita spending (US\$ million)
United Kingdom	52.5	45	1.07	230
Sweden	10	8	1.20	280
Quebec Province, Canada	8	6	1.25	300
United States	75	230	.34	

A year later, the U.S. Congress created the LSC to take over the civil legal services structure the OEO Legal Services Program had started.<sup>39</sup> By 1981, the budget the LSC inherited had expanded by almost five fold—to US\$321,000,000 (321 million). In that year, for the first and only time the United States nearly closed the gap in per capita funding with the United Kingdom and several other comparable industrial democracies. Since 1981, however, that gap has grown each and every year. In most Northern European and U.K. Commonwealth countries, including Canada, government spending on civil legal services grew steadily—in a few, exponentially—during the final two decades of the 20<sup>th</sup> Century. Many are spending five to ten times as much on civil legal services in 2000 as they did in 1980.

By contrast, U.S government funding was cut sharply in 1982 and has never recovered. Twenty years later, the LSC budget still has not returned to the US\$321,000,000 (321 million) level of 1981 even in current dollars. In real terms, the present LSC budget is less than half what it was twenty years ago. As mentioned earlier, according to the latest LSC annual report, even adding in IOLTA and other federal and state funding, combined government expenditures on civil legal services in the United States only totaled US\$536,000,000 (536 million) in 1998 and the combined government expenditure probably remains

38. CAPPELLETTI ET AL., *supra* note 15, at 234.

39. See *About LSC*, *supra* note 3.

under US\$600,000,000 (600 million) in 2000.<sup>40</sup>

Roughly a quarter century after the comparisons I first made between legal services expenditures in the United States and other countries, here are the current facts—after a downward drift in this country and substantial to dramatic expansion elsewhere. Table 2 compares the same four countries as I compared in 1974.

*TABLE 2. COMPARATIVE GOVERNMENT EXPENDITURES ON CIVIL LEGAL SERVICES IN 1990s (United Kingdom, Sweden, Quebec Province (Canada), and United States)*

	Total Gov't. spending on civil legal services (US\$ million)	Population (millions)	Per capita gov't. spending on civil legal services (US\$)	Total U.S. budget required to match this nation's per capita spending (US\$ billion)
England & Wales	1,340	5.3	26.00	1.7
Sweden	59	9	6.55	1.7
Quebec Province, Canada	52	7	7.40	2.0
United States	600	270	2.25	0.6

Going beyond per capita expenditures on civil legal services, the chart below compares the United States with several other industrial democracies—from Europe, North America, and Oceania—using a yet more telling measure, relative commitment to equal access to justice for all. Since these jurisdictions vary so widely in population size and per capita income, the nations are ranked by the proportionate share of their Gross National Product (“GNP”) they devote to this fundamental government function. In all cases, the statistics reflect total governmental expenditures on civil legal services for some annual period in the 1990s—the most current year for which I have been able to obtain this data for the nation involved. With the exception of France (1994) and Germany (1996), the expenditure data is for 1998 or 1999. In most instances the national government is responsible for the entire public investment. But in Australia, Canada, and the United States, the figures represent the combined

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40. See LSC ANNUAL REPORT, *supra* note 6.

**TABLE 3. COMPARATIVE CIVIL LEGAL SERVICES INVESTMENTS<sup>41</sup>** (*Nations ranked by relative share of GNP invested in publicly-funded civil legal services—lowest to highest*)

Nation (or political subdivision of nation, e.g., province state)	Total Government Investment in Civil Legal Services (US\$ million)	Per Capita Civil Legal Services Investment (US\$)	Civil Legal Services Investment Per US\$10,000 of GNP (US\$)	Total U.S. Civil Legal Services Investment, If U.S. Invested As Much of Its GNP As This Nation in Civil Legal Services (US\$ billion)	How Many Times Greater Is This Nation's Civil Legal Services Investment Than The U.S. Investment (% of GNP)
United States (includes federal, state, local gov'ts, & IOLTA expenditures) (FY 1998)	\$600 (pop. = 270 million)	\$2.25	\$0.70	\$0.6	Not available
Germany (1996)	\$390 (pop. = 80 million)	\$4.86	\$1.90	\$1.6	2.5
France (1994)	\$270 (pop. = 59 million)	\$4.50	\$1.90	\$1.6	2.5
Australia (FY 1998-99)	Not available	Not available	Each province has its own program	Not available	Not available
New South Wales	\$31 (pop. = 6 million)	\$5.12	\$2.75	\$2.3	4
Canada (FY 1998-99)	Not available	Not available	Each province has its own program	Not available	Not available
Quebec	\$52 (pop. = 7.3 million)	\$7.07	\$3.50	\$3.0	5
Ontario	\$82 (pop. = 11.5 million)	\$7.06	\$3.60	\$3.0	5
British Columbia	\$32 (pop. = 4 million)	\$7.80	\$4.00	\$3.5	6
Netherlands (1998)	\$150 (pop. = 15.5 million)	\$9.70	\$4.20	\$3.5	6
New Zealand (FY 1998-99)	\$27 (pop. = 3.8 million)	\$7.10	\$5.10	\$4.25	7
England (1999)	\$2,000 \$1,350 (pop. = 53 million)	\$39.00 \$26.00	Gross=\$17.00 Net=\$12.00	\$14.2 \$10.1	23.5 17

SOURCES OF LEGAL AID EXPENDITURE DATA: AUSTRALIA—LEGAL AID COMMISSION OF NEW SOUTH WALES, Financial Overview, Program Expenditure Chart, in ANNUAL REPORT 1999. CANADA—Canadian Centre for Justice Statistics, Table 5—Legal Aid Expenditures by Object, Legal Aid in Canada: Resource and Caseload Data Tables, in LEGAL AID SURVEY 1998-99, Catalogue No. 85F0028 (2000). ENGLAND—LORD CHANCELLOR'S DEPARTMENT, Table 10.7—Legal Aid Expenditures: Receipts and Payments, 1999 JUDICIAL STATISTICS – ENGLAND AND WALES FOR THE YEAR 1999, Catalog No. CM4786 (2000). FRANCE—NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, *France Beefs Up On Legal Aid*, in LEGAL PLAN LETTER (Jan. 15, 1995) (using projected figures for 1994). GERMANY—Gerhard Danneman, *Access to Justice: an Anglo-German Comparison*, tbl. 5, 2 EUROPEAN PUBLIC LAW 271 (1996). NETHERLANDS—Peter van den Biggelaar, *Legal Aid in the Netherlands*, in LEGAL AID in the New Millennium 74 (using statistics for 1998). NEW ZEALAND—LEGAL AID BOARD, Appendix 1: Overview of Legal Aid Costs and Recoveries, in ANNUAL REPORT FOR YEAR ENDING JUNE 30, 1999, 33 (1999). UNITED STATES—LEGAL SERVICES CORPORATION, ANNUAL REPORT 1999 (2000). SOURCES OF GNP AND PER CAPITA GNP: WORLD BANK, 2000 WORLD DEVELOPMENT INDICATORS AND WORLD DEVELOPMENT INDICATORS DATABASE (2000). EXCHANGE RATES: Chart uses exchange rates in effect in year of legal aid expenditure, e.g., 1996 exchange rate for Germany and 1999 exchange rate for England, etc. . .

41. National Equal Justice Library, *International Legal Aid Collections* (visited Oct. 15, 2000) <<http://www.equaljusticeupdate.org>> (on file with the *Fordham International Law Journal*). The chart on the website is updated periodically, as more recent statistical data becomes available. Readers interested remaining current on these statistical comparisons should visit the website, which also contains information about

expenditures of all levels of government—national, state, and local—which contribute funds to civil legal services for lower income people.

As can be seen, other industrial democracies invest from 2.5 times as much of their GNP as the United States (France and Germany) to seventeen times as much (England) to provide access to justice for their lower income population. To illustrate what this means in concrete terms, the chart sets forth how much United States governments—federal, state, and local—would have to invest in civil legal services for the poor to match the current investment in such services by these other industrial democracies. We would have to raise our present combined public investment of approximately US\$600,000,000 (600 million) to US\$1,600,000,000 (1.6 billion) if we were to match France and Germany, despite the fact the courts in both of these countries use an inquisitorial process which is less dependent on lawyers. To match the three major Canadian provinces federal, state, and local governments in the United States would have to combine to invest something over US\$3,000,000,000 (three billion) a year in civil legal services, to match the Netherlands US\$3,500,000,000 (3.5 billion), or to match New Zealand US\$4,250,000,000 (4.25 billion). Finally, if the United States were to demonstrate as great a financial commitment to equal access to justice as England our federal, state, and local governments would be investing over US\$10,000,000,000 (ten billion) a year on civil legal services for our nation's lower income population.

Other comparisons are even more striking. At this point, government-paid legal aid fees represent more than 12% of the total gross income earned by English solicitors—virtually all of it for advice and representation in civil cases.<sup>42</sup> (Over half of barristers' income also comes from government-paid legal aid fees, but much of this is for criminal cases.) To place this statistic in context, 12% of the annual earnings of American lawyers would exceed US\$16,000,000,000 (sixteen billion) at the present time.

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the legal aid programs of a number of countries, judicial decisions from different nations affecting equal access to justice, and lists of publications held in the National Equal Justice Library related to legal aid developments in other parts of the world.

42. Mike Hope, *Expenditure on Legal Services*, Lord Chancellor's Department, Research Secretariat (visited Oct. 15, 2000) <<http://www.open.gov.uk/research/1997/1997es.htm>> (on file with the *Fordham International Law Journal*).



(In 1997, gross revenues of U.S. law firms totaled US\$133,000,000,000 (133 billion),<sup>43</sup> and have been on a steep upward incline for two decades.<sup>44</sup>) Thus if the United States were to devote as large a percentage of its total societal expenditures on lawyers as England does to government-paid legal civil legal services for lower income people, this nation's governments would be spending well in excess of US\$16,000,000,000 (sixteen billion) a year on those services.

Meanwhile if the United States maintained the same ratio as England between public expenditures on the courts and expenditures on services required to effectively access those courts, we would be spending over US\$23,000,000,000 (twenty-three billion) a year on civil legal services for lower income U.S. citizens. That is, in 1999 the English government spent £535,000,000 (535 million) (US\$882,000,000 (882 million)) on its court system<sup>45</sup> and £820,000,000 (820 million) (US\$1,350,000,000 (1.35 billion)) on civil legal services for lower income people seeking to access that court system.<sup>46</sup>

Where does the United States stand? Accurate national expenditure figures are hard to come by for America's complex array of federal, state, county, and municipal courts. So I use the nation's largest state, California, as representative. In this state, with a population two-thirds the size of England, combined federal and state expenditures on civil legal services hover around US\$ 70,000,000 (seventy million). Meantime, California's judicial budget, now funded almost entirely by the state government,

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43. U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1999 tbl. 1301 (119th ed. 1999).

44. *Id.* In 1990, law firm gross receipts were US\$97,600,000,000 (97.6 billion). Five years later in 1995, that figure had grown to US\$116,000,000,000 (116 billion), a year later in 1996 to US\$124,700,000,000 (124.7 billion). *Id.* At this pace, law firm gross receipts may well exceed US\$150,000,000,000 (150 billion) in 2000, while the LSC budget lags at US\$300,000,000 (300 million) and total government expenditures on civil legal services for the poor linger in the US\$600,000,000 (600 million) range. *Id.*

45. LORD HIGH CHANCELLOR, THE COURT SERVICE ANNUAL REPORT 1998-1999, 40 (The Stationery Office, 1999).

46. LORD CHANCELLOR'S DEPARTMENT, Table 10.7—Legal Aid Expenditures: Receipts and Payments, 1999 JUDICIAL STATISTICS – ENGLAND AND WALES FOR THE YEAR 1999, Catalog No. CM4786 (2000). This is the *net* governmental expenditure on civil legal services exclusive of private funds such as required contributions from clients and parties who lose to legally-aided clients. *Id.* The gross expenditure on civil legal services for lower income Englishmen is £1,275,000,000 (1.275 billion) (US\$2,000,000,000 (two billion)). *Id.*

is US\$2,300,000,000 (2.3 billion). Where the Quebec civil legal services budget is over 60% the size of the province's judicial budget and the U.K civil legal services budget is 154% the size of its judicial budget, in California the civil legal services budget is only 3% the size of the state's judicial budget.

Thus, to the extent California is representative of U.S. jurisdictions, governments in this nation are spending 3% as much on civil legal services as they are on their court systems. Meanwhile, England is spending 154% as much on these services so essential to equal access as it does on its courts. Thus, to match England on this measure, U.S. governments would have to invest over US\$23,000,000,000 (twenty-three billion) a year on civil legal services for the poor.

While England, once again, is far ahead of any other country in its financial commitment to equal access to justice, it appears other countries also may maintain a very different ratio between legal aid funding and court funding than we do in the U.S. Thus far, I have only been able to obtain reliable statistics about court funding from one other jurisdiction—Quebec Province, Canada. But that province invests over 60% as much on civil legal services for the poor as it does on its courts, compared once again to that 3% figure in the U.S. If the U.S. spent 60% as much on civil legal services as it does on the courts, combined government expenditures on those services would exceed US\$9,000,000,000 (nine billion).

At this point I should hasten to add I am not proposing the United States raise its annual public investment in civil legal services for the poor to twenty-three billion or sixteen billion or even nine billion dollars. I am, however, suggesting our current level of investment is absurdly low. In this vital area of equal access to justice, we are truly an "underdeveloped country."

## *II. JUSTICE IN "TRIAGE" IS NOT EQUAL JUSTICE—WHAT THE LACK OF A RIGHT TO COUNSEL AND ADEQUATE FUNDING HAVE MEANT FOR POOR PEOPLE IN THE UNITED STATES*

The vast disparity in legal services funding puts the United States and England at opposite ends of a very wide spectrum. The disparity also means the two countries are at very different

steps on the road toward a society which truly offers all its citizens equal justice and thus face very different problems. To borrow a health services analogy, the United States is in a "triage" situation—indeed one of "extreme triage"—trying to pick the relative few poor people to which its limited legal service resource will be able to offer a free lawyer. On the other hand, England, and to a lesser extent some of the other countries reflected on the above chart, is facing the problem of "cost containment"—what the health care industry in this country might call the move from fee for service to "managed care." For England, the issue is how to keep costs down while continuing to give all its citizens the right to equal justice the nation seeks to guarantee.

To illustrate what I mean by the United States being forced to engage in "triage," let me take you to my home county of Los Angeles, California. It is the most populous U.S. county with over 10,000,000 (ten million) people and almost 2,000,000 (two million) of those are poor in the sense they are *financially* eligible for civil legal services. Los Angeles County has over 40,000 lawyers, yet there are fewer than a hundred government-funded legal services lawyers to meet the legal needs of that 2,000,000 (two million) poor people.

By analogy, the dimensions of the problems legal services lawyers face is similar to expecting a hundred doctors to take care of all the health care needs of two million people. Imagine what you would do if handed the assignment of putting together a health care program with only a hundred doctors to somehow make this population of two million healthier. It is likely you would emphasize "public health" measures such as mass vaccinations calculated to reduce deadly diseases dramatically across the entire population and focus other resources on the treatment of life-threatening conditions like heart disease and cancer, before worrying about patients with colds and backaches. By so doing, you would produce the most improvement in death rates and overall health in that population group, as opposed to randomly treating whatever complaints might be brought to your tiny health service by the one in ten or one in twenty sick people your handful of doctors might be able to see.

For similar reasons, when we can only put a hundred lawyers in a community with two million poor people, it makes sense to try the rough equivalent of a "public health" approach. A class action or a favorable legislative change is like a mass inoc-

ulation program against a disease that infects thousands every year because it can improve the lives of thousands at a comparatively minimal cost. For example, if thousands of poor people in the community are being evicted in retaliation for reporting housing code violations to the authorities, the logical course of action is to seek legislation that would ban retaliatory evictions or perhaps a class action aimed at achieving the same goal. A favorable appellate precedent can do the same, but is also often similar to treatment of heart disease or cancer because it tends to address the most serious legal conditions the poor experience. In essence, the absence of a legally enforceable right to counsel and the resultant shortage of resources virtually compels U.S. legal services programs to practice "triage" and makes it most sensible to emphasize measures like appellate litigation, class actions, and legislative advocacy.

Unfortunately, in large part because U.S. legal services lawyers were so effective with these "triage" strategies over the years, the U.S. Congress has deprived them of some of their most effective measures for improving the "public legal health" of the poor. Because of restrictions the U.S. Congress imposed in 1995, the U.S. federal government refuses to allow the local legal services agencies to use class actions and legislative advocacy to address community-wide problems. Think of the outcry if the government said public funds could not be used to vaccinate the poor against polio or tuberculosis, or doctors paid through Medicaid could no longer treat heart disease or cancer among the poor. Yet this is the functional equivalent of what the 1995 amendments to the Legal Services Corporation Act have done to legal services for the poor.<sup>47</sup>

Part of an ongoing struggle in the United States is to restore the ability of U.S. legal services to effectively practice the "triage" that the miniscule supply of legal services resources has elevated to a necessity. Taking the problems of poor people one client at a time simply is not a viable strategy when you only have enough lawyers to help a small percentage of those clients.

Despite the current state of civil legal services in the United States, the nation has high quality lawyers delivering high quality legal representation to the poor in this country—the relative few they can with present resource, that is. I continue to be amazed

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47. Legal Services Corporation Act, 42 U.S.C.A. § 2996 (1995).

by the dedication, imagination, and professionalism of so many legal services lawyers in the United States, including those who appear before the California appellate courts. In addition, they have become experienced practitioners of "triage." In that sense, they have much to offer emerging democracies and developing countries that lack legal resources or resources in general.

In a few U.S. cities, like New York, civil legal services agencies also benefit from the generosity of the local bar, foundations, and other private charities, which augment the government funding. To the extent justice depends on charity, however, it is destined to be unequal. To illustrate, because of an unusual concentration of private funding, the diverse array of legal services agencies that serve San Francisco's 100,000 poor people have four times the resources per poor person as do those serving the two million poor people in Los Angeles county. If the United States had public funding at the level San Francisco does largely through private charity, the United States would be a lot closer to some of the Western European and U.K. Commonwealth countries that I have discussed this evening. Unfortunately, the United States does not come even close to the level of funding found in San Francisco.

Even assuming the United States increased the national investment by ten fold or so and thus approached meeting the full civil legal needs of the poor, a judicially enforceable right would still be essential. The LSC and similar programs must be counted for what they are—a form of legislative charity. Like other forms of charity, this variety can be withdrawn or modified by the benefactor at any time.

The experience of legislative charity for legal services in the United States over the past two decades has not been encouraging. Time and again, the American Bar Association and state and local bar associations have been forced to rally in support of the LSC program when it appeared the LSC program might be abolished or subjected to some untenable exclusions and limitations on the services it could provide. Unfortunately, the organized bar and other allies of equal justice were not able to defeat the 1995 restriction described earlier. As a consequence, the present Legal Services Corporation Act contains many serious limitations on which kinds of poor people can be served and what kinds of services lawyers can give to those they do represent.

The existing restrictions in the Legal Services Corporation Act are enough in themselves to establish an urgent need for a judicially protected right. Beyond that need, however, is the threat the U.S. Congress might enact even more punitive limitations or abolish the program entirely. These possibilities will haunt the LSC and forty million U.S. citizens for so long as the existence of civil representation for the poor continues to depend upon the charitable impulses of both U.S. legislative bodies.

### III. A POSSIBLE GLOBALIZATION OF CONSTITUTIONAL VALUES AND ITS IMPLICATIONS FOR EQUAL ACCESS TO JUSTICE IN THE UNITED STATES

Returning to Judge Sweet's call for a civil *Gideon*<sup>48</sup> in the United States, I will not attempt to repeat his careful dissection of the U.S. Supreme Court opinion in *Lassiter v. Department of Social Services*,<sup>49</sup> which looms as the main obstacle to the creation of a right to counsel in civil cases in this country. I will only quote his conclusion: "Because of the vital interest held by the government in a just outcome, and the extremely high risk of injustice where adequate counsel is not available, I propose that a right to counsel should arise whenever access to the justice system is warranted."<sup>50</sup>

With a clever *jiu-jitsu* move, Judge Sweet turns the *Lassiter* majority's rationale against their conclusion. He says to the Supreme Court, in essence, "Apply the *Lassiter* three-part test. Please. But apply it honestly—the words of that test as they would be understood by almost anyone in this society, lawyer or layperson. And apply it to the typical case in the civil courts. If you do, you will find a constitutional right to counsel in civil cases."

I am a state court judge, and will leave it to federal judges to fight it out over the meaning of this Supreme Court opinion. I will not ask whether *Lassiter* was rightly decided under the United States' existing constitutional jurisprudence. Instead I will ask a different, some might say more "global" question. Will

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48. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

49. 452 U.S. 18 (1981).

50. Sweet, *supra* note 2, at 927.

there come a time when the issue addressed in *Lassiter* is no longer framed solely by the precedents and constitutional values generated by the U.S. Supreme Court, but also takes account of a broader global consensus about the meaning of fundamental concepts like a "fair hearing" or "due process," "equality before the law" or "equal protection of the laws?" In other words, when, if ever, will the U.S. Supreme Court begin looking at the decisions of the high courts of other nations and how they have interpreted constitutional concepts—and indeed language—also found in our constitution?

For some, this may seem an impossibility. And based on past experience it does seem pretty remote. After all, the U.S. Supreme Court managed to decide *Lassiter* in 1981 without even mentioning the contrary decision of the European Court on Human Rights in *Airey v. Ireland*, an opinion filed two years earlier and declaring a much broader right to counsel in civil cases covering a population even larger than the United States. One likewise would struggle to find any U.S. Supreme Court opinion over the past two centuries deciding any constitutional issue which even bothered to discuss the high court opinions of other countries interpreting those nations' constitutions.

Yet just this year, some light appeared flickering at the end of the tunnel. At an international conference the World Bank sponsored in June, 2000, two justices of the U.S. Supreme Court spoke in terms suggesting they, at least, saw value in supreme courts of different nations and jurisdictions looking at each others' opinions. In her speech to this assemblage of judges and lawyers from all over the world, Justice Sandra Day O'Connor urged: "I would like to see written opinions of high courts around the globe, written, interpreted in several languages and put on Web sites so that the world can see what you're doing."<sup>51</sup> One would reasonably assume the "world" expected to see—and presumably consider—these foreign high court opinions, many of them translated from another language, includes Justice O'Connor and the other members of the U.S. Supreme Court.

Of possibly even greater significance, Justice Arthur Kennedy implicitly promised to pay attention to relevant decisions of the European Court on Human Rights, if only the judges of that

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51. *Supreme Court Justices Promote Rule of Law in Other Countries*, ASSOCIATED PRESS, June 6, 2000.

court would begin writing opinions that were fully reasoned. In his speech, Justice Kennedy called on that court to "begin writing decisions which have the capacity and the power to inspire and persuade."<sup>52</sup> Once again, presumably Justice Kennedy and his colleagues are among those who could be inspired or at least persuaded by opinions of the European Court on Human Rights which satisfied his test.

I have not had occasion to study other decisions of the European Court on Human Rights enough to know whether Justice Kennedy's criticism of that Court's typical work product is correct. Perhaps there is a tendency, as there is in some of our own state courts, to announce the result but only provide a shallow rationale justifying that result. But if this is the general pattern in the European Court on Human Rights, then its opinion in *Airey v. Ireland* is a notable exception. I already have quoted some of the highlights from that opinion, presenting some of the reasoning and policy considerations supporting its decision. To further capture the flavor of the opinion, however, let us examine its explanation for why counsel is so essential to any litigant, rich or poor, in the regular courts—an explanation which stresses many of the same reasons the U.S. Supreme Court recited in *Gideon v. Wainwright* to support the right to counsel in criminal cases.

After pointing out the absurdity of considering ineffective access to the courtroom satisfies the constitutional requirement of a "fair hearing,"<sup>53</sup> the European Court turned to the critical question—whether effective access in civil cases requires representation by a lawyer.

It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

It seems certain to the court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court's opinion to suppose that, in litigation of this nature, the applicant could effectively conduct her

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52. *Id.* Interestingly, in this same speech Justice Kennedy praised legal aid programs for the poor as providing a "necessary safety valve for the stability of government." *Id.*

53. See language in text quoted at footnote, *supra* Fn32.



own case, despite the assistance which, as was stressed by the [Irish] Government, the judge affords to parties acting in person.

A specialist in Irish family law . . . regards the High Court as the least accessible court . . . by reason of the fact that 'the procedure for instituting proceedings . . . is complex' . . .

Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined.

[It is] most improbable that a person in Mrs. Airey's position . . . can effectively present his or her own case. This view is corroborated [by the fact] that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer.

The court concludes from the foregoing the possibility to appear in person before the High Court does not provide the applicant with an effective right of access.<sup>54</sup>

As the European Court on Human Rights observed about civil litigation, the U.S. Supreme Court in *Gideon* justified its declaration of a constitutional right to counsel in criminal cases by stressing the fact most people of means hire lawyers when facing trial in the criminal courts<sup>55</sup> and that the other side in such litigation usually has counsel.<sup>56</sup> And like the *Airey* court, the *Gideon* court utilized the judges' own familiarity with what is required to find and present evidence in a courtroom to draw the conclusion a lawyer's assistance was necessary if the defendant were to have an effective defense.<sup>57</sup> But the *Airey* court actually

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54. *Airey v. Ireland*, Eur. Court H.R., Judgment of Oct. 1979, Series A No. 32, 12-14.

55. "[T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses." *Gideon v. Wainwright*, 372 U.S. at 344.

56. "Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."

57. *Id.*

[R]eason and reflection, require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . The right to be heard would be, in many cases,

went further than the U.S. Supreme Court in justifying the need for counsel in civil cases. It also considered expert testimony demonstrating the substantive law and procedure were so complex a layperson could not represent herself "properly and satisfactorily."

Since *Gideon* is fairly typical of the "capacity and the power to inspire and to persuade" found in U.S. Supreme Court opinions, it appears difficult to discount *Airey v. Ireland* on that score. When, as in *Airey*, a decision of the European Court on Human Rights—or any national supreme court—satisfies Justice Kennedy's test and addresses common constitutional language or comparable constitutional concepts, I submit it deserves serious consideration by the U.S. Supreme Court.

Once the U.S. Supreme Court accepts the notion it should pay some attention to how the supreme courts of other nations and continents have construed constitutional values we share in common, it will be difficult to deny the growing "global" consensus among jurisdictions with written constitutions that one of those core constitutional values is a right to counsel in civil cases. We have already discussed the Swiss<sup>58</sup> and German Supreme Courts<sup>59</sup>, along with the *Airey* decision<sup>60</sup> of the European Court on Human Rights. These courts saw no alternative but to require governments to provide free counsel to indigent civil litigants if they were to satisfy the constitutional guarantee of a "fair hearing" or "equality before the law" for those too poor to afford their own lawyers. Then just last year and closer to home, the Supreme Court of Canada, in a case closely paralleling the facts of *Lassiter*, also found a constitutional right to counsel in the

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of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

*Id.* at 344-345.

58. See *supra* text accompanying note 25.

59. See *supra* text accompanying note 28.

60. See *supra* text accompanying note 33.

"fair hearing" requirement of that nation's first written constitution, the rather new "Charter of Rights and Freedoms."<sup>61</sup>

Like *Lassiter*, the Canadian case, *J.G. v. New Brunswick*,<sup>62</sup> arose when the government sought to deprive a mother of her children. In the Canadian case, however, the province of New Brunswick only sought to continue its custody over the children for another six months. Had the government tried to permanently deprive the mother of her parental rights—the stakes involved in *Lassiter*—the New Brunswick legal aid law would have provided the woman with free counsel. Furthermore, even in a temporary deprivation case like this, in most other Canadian provinces the mother would have been entitled to legal aid as a matter of statutory law. But New Brunswick, one of the least generously funded legal aid programs in Canada,<sup>63</sup> denied free counsel to poor mothers where they only stood to lose custody for another six months.

I will pass over the rather convoluted procedural history of the case, irrelevant for our purposes, and report the Canadian Supreme Court ultimately held the New Brunswick government was constitutionally required to supply indigent mothers with free counsel whenever it proposed to assume or maintain custody of their children—permanently or temporarily. As the principal opinion, authored by the Chief Justice Lamer, explains: "The protection of Section 7 of the Canadian Charter of Rights and Freedoms is not restricted to purely criminal or penal matters. The right to security of the person protects both the physical and psychological integrity of the individual from state actions. . . ."

Chief Justice Lamer then turned to the critical issue: what

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61. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). Canada adopted this Charter, similar in purpose and scope to the "Bill of Rights" amendments to the U.S. Constitution, in 1982.

62. [1999] N.B.R.2d 305 (Can.).

63. CANADIAN CENTRE FOR JUSTICE STATISTICS, Table 5-Legal Aid Expenditures by Object, Legal Aid in Canada: Resource and Caseload Data Tables, in LEGAL AID SURVEY 1998-99, Catalogue No. 85F0028 (2000). New Brunswick expends less than \$ 2.00 per capita on civil legal services for lower income people, compared to \$7.06 per capita in Ontario and \$7.80 in British Columbia. *Id.* In 1996, the population of New Brunswick was 738,135. Of this, 375,200 (50.8%) were women and 362,935 (49.2%) were men. In comparison with the previous census of 1991, the total population of the province was 723,900, thus the growth was 2.0%. *Id.*

does the Charter guarantee when the state files a custody application?

Section 7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children. . . . A fair hearing requires that the parent has the opportunity to present her or his case effectively. Effective participation enhances the judge's ability to make an accurate determination. Here, the statutory scheme allows a parent to present evidence, cross-examine witnesses, and make representations but does not provide funds for an indigent parent to retain counsel. In the circumstances of this case, taking into account the seriousness of the interests at stake, the complexity of the proceedings and the capacities of J.G., the right to a fair hearing required the government to provide counsel.<sup>64</sup>

*J.G. v. New Brunswick*, like the constitutional right to counsel cases issued by the Swiss and German Supreme Courts, and *Airey v. Ireland* from the European Court on Human Rights, seems to spring from a fundamental precept underlying language found in every written constitution on the face of the earth. I know of no constitution—or equivalent legally enforceable "bill of rights" or "declaration of rights" or "charter of rights" or "convention of

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64. *J.G. v. New Brunswick* [1999] N.B.R.2d 305 (Can.) (emphasis added). Significantly, Section 7 of the Canadian Charter of Rights and Freedoms is narrower than the equivalent due process clause of the U.S. Constitution in two respects. First, Section 7 only purports to protect life, liberty, and "security of the person" while the due process clause includes "property" along with life and liberty as interests to enjoy procedural protections. Second, Section 7 does not mention the entitlement to a "fair hearing" specifically, but instead provides Canadians have "the right not to be deprived [of life, liberty, or security of the person] except in accordance with the principles of fundamental justice." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §7.

In a separate, concurring opinion, Justice L'Heureux-Dube found an additional provision of the Charter supported the right to counsel in this case.

This case also implicates issues of equality guaranteed by s. 15 of the Charter which should be considered in interpreting the scope and content of the rights guaranteed by s. 7. . . . Child protection proceedings disproportionately affect women and especially single mothers. . . . Issues of fairness in child protection hearings have particular importance for members of disadvantaged and vulnerable groups, particularly visible minorities, aboriginal people and the disabled. Thus, it is important to ensure that the analysis of s. 7 in this case takes into account the principles and purposes of the equality guarantee in promoting equal benefit of the law and ensuring that the law responds to disadvantaged individuals and groups whose protection is at the heart of s.15.

[1999] N.B.R.2d 305 (Can.) (L'Heureux-Dube, J., concurring).

rights”—that doesn’t guarantee litigants a “fair hearing” or “equality” among citizens when enforcing their legal rights in the civil courts. Often these constitutional documents guarantee both a fair hearing and equality before the courts. Moreover, at this point the high courts of industrial democracies containing over 500 million people have determined poor people cannot have a fair hearing or equality in the civil courts unless government supplies them with counsel.

What is this fundamental precept that finds expression in every written constitution and now seems to be emerging as a global constitutional value?

This international conference highlights the fact that the highest courts of other jurisdictions—Germany, Switzerland, and all of Western Europe—have found a right to counsel in civil litigation for the poor in the same constitutional language that somehow has proved insufficient in the United States. More importantly, the right to counsel these Western European courts declared flowed naturally from a fundamental precept shared by all democracies, including the United States. This precept is found in the political theory of the social contract, which was so influential with the men who wrote the Declaration of Independence, the U.S. Constitution, and created the U.S. system of government. At the very core of this theory is the understanding no citizen would give up the natural right to settle disputes through force unless the sovereign offers a peaceful alternative in which that person has a fair chance to prevail if in the right. Society, in turn, breaches this social contract when they favor one citizen over the other because its forums require a lawyer that one citizen cannot afford. The disfavored person cannot be presumed to have agreed to submit to an unjust sovereign. Thus, equal justice is the essential underpinning of the entire society, not just Western European or U.K. Commonwealth societies, but any that purports to be rest on the consent of the governed.

The case for the right to counsel in civil cases is universal and transcends borders, continents, and national constitutions. This theory found modern expression in a Resolution the Committee of Ministers of the Council of Europe<sup>65</sup> passed in 1978, a

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65. LEGAL AFFAIRS, COUNCIL OF EUROPE, LEGAL AID AND ADVICE: RESOLUTION 78(8) ADOPTED BY THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON 2 MARCH 1978 AND EXPLANATORY MEMORANDUM, 5-6.

year before the European Court on Human Rights decided *Airey v. Ireland*. The Ministers declared in part:

Considering that the right of access to justice and to a fair hearing, as guaranteed under Article 6 of the European Convention on Human Rights, is an essential feature of any democratic society; . . .

[T]he provision of legal aid should no longer be regarded as a charity to indigent persons but as an obligation of the community as a whole; . . .

No one should be prevented by economic obstacles from pursuing or defending his right before any court determining civil, commercial, administrative, social or physical matters.<sup>66</sup>

It is time—long past time—for the United States to join the growing international consensus that words like “due process,” “fair hearing,” “equal protection of the laws,” and “equality before the law,” all express a universal principle—a right to equal justice to be enjoyed by everyone. And, as the European Court on Human Rights pointed out, if this right is to be “practical and effective,” and not merely “theoretical or illusory,” then for those unable to afford counsel, the right to equal justice must include the right to a lawyer supplied by government.

Why is this so important? As the European Ministers said in 1978, it is “an essential feature of any democratic society.” Indeed, without this right a nation’s poor people are less than full citizens and that nation is less than a true democracy. They cannot even enforce the other rights their votes may have won them in the legislatures.

It is the failure of the United States’ past we did not recognize this obvious truth, so deeply embedded in our national ideals, long ago. It is the tragedy of the present we remain insular and smug about our nation’s superiority in all things related to “justice,” while millions of poor U.S. citizens are denied this precious right. It is the hope of the future the United States will finally open its eyes and embrace the “practical and effective” right to equal justice most Western democracies now guarantee. When that day comes—and it may come soon—millions of U.S. citizens will, for the first time, truly have their day in court.

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66. *Id.*