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## Lifting the “American Exceptionalism” Curtain: Options and Lessons from Abroad

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# Lifting the “American Exceptionalism” Curtain: Options and Lessons from Abroad

EARL JOHNSON JR.\*

*Contrary to its public rhetoric promising “justice for all” and “equal justice under law,” access to civil justice in the United States is “exceptional” only in a negative sense. The Rule of Law Index ranks our nation next to last among the world’s thirty-one “richest” countries. A major reason for this is that most of our fellow industrial democracies have a right to counsel in civil cases and invest from three times to ten times more than the United States on civil legal aid. Beyond these differences, the United States has much to learn from research and other developments in foreign countries. Studies in England about how poor and moderate income deal with their justiciable problems suggest that unmet “effective demand” for lawyer services is substantially less than unmet “legal needs” recorded in legal needs studies—because even with a right to counsel many people instead resolved their problems in other ways. A study in Canada found that those in the upper income quartile spent 167 times more than those in the bottom quartile resolving their legal problems, even though their problems often were less disruptive than those the bottom quartile confronted. A survey of past and present innovations covers the following: (1) Belgium’s problematic system that encourages individual lawyers to provide as much representation as they can while at the same time limiting what the government will pay out for the total amount of legal services rendered each year; (2) Dutch “lokets,” a nationwide network of offices where people can receive advice and brief assistance from a paralegal staff; (3) Dutch “Rechtwijzer 1.0 and 2.0,” online dispute assistance and online dispute resolution; (4) English “McKenzie friends” which allows nonlawyers to accompany unrepresented litigants to the courtroom and render limited assistance; and (5) partially subsidized lawyers for the lower middle classes and legal expense insurance for the middle classes found in several European countries.*

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## INTRODUCTION

As most if not all of the people in this audience know, when it comes to *access to justice* for low and moderate income people *in civil cases*, the United States is “exceptional” only in a negative sense. On that

measure, we rank thirtieth out of the thirty-one “richest” countries in the world. Only the United Arab Emirates is below us among those thirty-one countries. Indeed, out of the twenty countries in Europe and North America in that “richest nations” category, the United States is dead last. Furthermore, while ranking much higher on other aspects of the “rule of law,” as to *access* to civil justice specifically, the United States is only sixty-fifth out of 102 among all nations—rich, middle income, and poor—included in the World Justice Project’s “Rule of Law” index.<sup>1</sup>

One would never guess our nation’s civil justice system was in such disrepute if only reading our founding documents or most of the rhetoric that spills out from our politicians, and sometimes even judges and bar leaders who should know better. Our Constitution set out “to establish justice” as the number one goal for the new nation,<sup>2</sup> and then guaranteed all of our citizens “due process”<sup>3</sup> and later “equal protection of the laws.”<sup>4</sup> Meanwhile, Fourth of July and Law Day speeches frequently extoll our justice system as the best and fairest in the world. It is not popular in most quarters to criticize that system or compare it unfavorably with those in other countries—and hard to make people believe those comparisons could be true.

I was first exposed to legal aid systems in other countries in 1973, when Professor Mauro Cappelletti<sup>5</sup> asked me to come to Florence for the summer to work on a comparative legal aid book he and James Gordley had started writing.<sup>6</sup> Only a few years removed from directing America’s first federally funded legal aid program, the Legal Services Program of

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1. See WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2015 (2015). Each country was ranked on the factor of “Access to Civil Justice,” along with other attributes of its civil justice system, such as degree of corruption and interference by other branches of government, where the United States rated high, and discrimination, where we ranked rather low, but not as low as with respect to access. Because the 2015 edition of the Rule of Law Index did not include a chart or table comparing different countries with respect to access to civil justice, it was necessary to compile a list from the countries’ individual ratings as to this factor and compare those ratings to identify where the United States and other nations stood. Incidentally, among the thirty-one countries classified as “richest,” only the United Arab Emirates ranked lower than the United States on the relative level of access to civil justice, and all the European and North American (Canada) nations in that income category ranked above the United States.

2. “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” U.S. CONST. pmbl.

3. *Id.* amend. V.

4. *Id.* amend. XIV.

5. At that time and for many years before and after, the late Mauro Cappelletti held a joint appointment as a professor of comparative law at the University of Florence in Italy and Stanford University in the United States. He was also one of the world’s leading scholars on comparative procedural law.

6. This book was published in 1975 and reprinted in 1981 as MAURO CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1981).

the Office of Economic Opportunity (“OEO”), I arrived in Florence believing the United States was far ahead of the rest of the world in its commitment to providing equal justice to its poor people. After a few weeks into the summer, I lost my illusions and thus my bravado, finding out the United States was already being proportionately outspent by several European countries and that many poor people in other countries had a legally enforceable right to counsel in civil cases.

Over the next decades, I frequently took the temperature of legal aid programs in other countries, comparing them to the United States.<sup>7</sup> This was made easier when I joined the International Legal Aid Group (“ILAG”) in 1999 and began consistently attending their biennial conferences. Composed of scholars who specialize in research on legal aid and access to justice issues, ILAG invites representatives from national legal aid programs around the world to these biennial conferences for an exchange between researchers and policymakers. The policymakers learn about ongoing research that might be helpful in improving their programs while the researchers learn about new developments in these programs that might be worthy of research in the future. In this Article, I have made extensive use of the national reports that each national program prepares about recent developments in their country for conference attendees along with some research papers that were prepared for these ILAG conferences.

These national reports and further inquiries with the authors of these reports have made it possible to compile statistical comparisons. These comparisons reveal our nation’s investment in civil legal aid has fallen further and further behind many of the other nations in attendance at the ILAG conferences. Using data from 2012, the most recent year of these comparisons, Table I documents what American government would have to spend on civil legal aid to match the percentage of what these countries’ governments invest in civil legal aid.

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7. See Earl Johnson, Jr., *Justice, Access to: Legal Representation of the Poor*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8048–55 (Neil J. Smelser & Paul B. Baltes eds., 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. 883 (2000); Earl Johnson Jr., *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?*, 37 FORDHAM URB. L.J. 157 (2009) [hereinafter Johnson, *Equality Before the Law*]; 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 (2009); 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 SEATTLE J. FOR SOC. JUST. 201 (2003).

TABLE 1: U.S. PUBLIC EXPENDITURE ON CIVIL LEGAL AID IF IT INVESTED THE SAME PERCENTAGE OF ITS GDP IN CIVIL LEGAL AID (2012)<sup>8</sup>

England	\$11.1 billion <sup>9</sup>
Germany	\$2.5 billion
Hong Kong	\$3.3 billion
Ireland	\$3.0 billion
Netherlands	\$7.95 billion
Norway	\$6.5 billion
Ontario Canada	\$4.6 billion
Scotland	\$6.4 billion

The sole federal program dedicated to bringing equal justice to the 63 million Americans now eligible for its services has a budget of only \$385 million for fiscal year (“FY”) 2016. In a nation with a population of 317 million people, that is only a bit over one dollar per capita. (In the Netherlands, with a total population of only 17 million, the national government is willing to spend nearly that much—\$355 million—on civil legal aid for its lower income citizens, which is twenty-one dollars per capita.) If in calculating the U.S. investment, one adds in Interest on Lawyers Trust Accounts (“IOLTA”), state and local government funding, and some narrowly targeted federal funding from other agencies (competitive grants for domestic violence, seniors, and so on), total public funding of civil legal aid in the United States approaches \$1.1 billion. However, that still remains far short of what governments in other countries listed on Table 1 are willing to spend on this service that is so vital to obtain equal justice for the poor.

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8. The per capita expenditures on civil legal aid were calculated from data supplied in the national reports submitted to the 2013 ILAG conference. The per capita GDP figures, in turn, were taken from the *World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/> (last visited May 29, 2016), a publication of the U.S. government that reflects relative “purchasing power parity” GDP rather than mere “official exchange rate” GDP for the nations represented on the chart. A nation’s position on the chart was determined by civil legal aid’s per capita expenditure as a percentage of total per capita GDP in that nation. In the final step, those percentages were multiplied by the United States’ total GDP to determine what an equivalent percentage investment in civil legal aid in the United States would mean if our country matched those nations’ percentage investments in civil legal aid.

9. As will be discussed in Part II.A *infra* of this Article, since 2012 the English government has mounted a determined effort to reduce the English civil legal aid budget by approximately one-third which, if successful, would mean matching England would require a U.S. investment of “only” \$7.3 billion.

But one does not have to resort to foreign comparisons to realize America has underinvested in justice for its poorest citizens. If the United States devoted as much of its federal budget to the Legal Services Corporation (“LSC”) in 2015 as it did in FY 1981, LSC alone would have \$1.8 billion to distribute to its grantees<sup>10</sup> and if added to present levels of other public funding, the total American investment would be in the neighborhood of \$2.5 billion, thus tying with Germany at the bottom of the ladder. (Germany, it should be noted, is a civil law country and uses an inquisitorial approach which diminishes the role of lawyers in court proceedings.)

On another historical measure, if the LSC budget was the same percentage of the nation’s total expenditure on lawyers as it was in FY 1981, LSC’s budget would be \$3.28 billion—almost nine times more than what it was in FY 2015.<sup>11</sup> Also, coupled with existing levels of public funding from other sources, America’s total investment would be in the neighborhood of \$4 billion. This would place our country between Hong Kong and Ontario, Canada on the scale of comparative investments in civil legal aid. But alas, civil legal aid’s share of national expenditures on lawyers is only one-tenth of what it was in the early 1980s.

TABLE 2: LSC 2012 BUDGET IF LSC STILL HAD THE SAME SHARE OF THE NATION’S EXPENDITURES ON LAWYERS AS IT DID IN 1981

	<b>LSC Budget</b>	<b>Total Expenditures on Lawyers in 1981 and 2009 (Most Recent in 2012 Statistical Abstract)</b>	<b>LSC Budget as Percent of Total Expenditures on Lawyers</b>	<b>LSC Budget If the Same Percent of Total Expenditures on Lawyers as It Was in 1981</b>
<b>1981</b>	\$321 million	\$23 billion	1.4%	--
<b>2012</b>	\$348 million	\$234 billion	0.14%	\$3.28 billion

10. For the calculations supporting this statement, see 3 EARL JOHNSON, JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 873–78 (2014).

11. See *infra* Table 2.

Major funding cutbacks in the early 1980s and mid-1990s, aggravated by the ravages of inflation over the last three and a half decades, and a more than forty-three percent increase in the eligible poverty population since 1981<sup>12</sup>—in part attributable to rising income inequality—has produced a dramatic erosion in America’s national commitment to provide equal justice to the poor. All of this might lead one to ask two questions.

First, is the main reason we rank so low on access to justice in civil cases—at least compared to other industrial democracies—because we are willing to invest so little in civil legal aid? And second, is that same unwillingness to devote adequate resources to legal aid the main reason we are experimenting with so many cheaper substitutes for providing people with lawyers? In doing so, are we in danger of accepting “better than nothing” as a permanent replacement for *effective* access to justice, and thereby decreasing the chances of ever getting the adequate funding that would make true equal justice a reality?

There was a time not that long ago when the United States made a much stronger financial commitment to that fundamental goal. Today, other comparable industrial democracies find it possible to make far larger commitments. So the notion that our nation’s current paltry funding of civil legal aid is somehow an inevitable and permanent cap that we must accept and adjust to seems an unnecessary and premature surrender. Our failure thus far to reach the general public, thought leaders, and legislators with the message of how critically important civil legal aid is to the bedrock principles of “equal justice under law” that we espouse over the Supreme Court’s entrance and the “justice for all” that we proclaim in our pledge of allegiance is just that, a failure; and it is a failure of will as much as a failure of skill. Lawyers talk to each other and convince each other of this link. Also, more and more, judges are beginning to talk to each other and to lawyers about the urgent need to do something about this problem. However, for the most part, the important audiences are outside the legal profession, and it is those we must begin to reach and to persuade.

Furthermore, while it is true that cheaper ways of delivering justice will sometimes work in some circumstances, we should not create the false impression with legislators or the general public that fair and equal justice can always be done cheaply by substituting self-help assistance, paralegals, or online resources for lawyers. At the same time, there are many situations where fair and equal justice can be achieved without lawyers, or achieved in less costly ways. The trick is to identify those

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12. U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS, CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1983, at 8 tbl.2 (1985). In 2014, sixty-three million Americans were financially eligible for those services. LEGAL SERVS. CORP., 2014 ANNUAL REPORT 5 (2014).



situations, ensure the less costly approaches are truly effective, and limit those approaches to the cases where they are.

Many countries not only spend more generously on civil legal aid than the United States, but also organize their systems differently. Additionally, even those which have a guaranteed right to counsel in civil cases often offer other alternative routes for lower income people to enjoy effective access to justice. Thus, this Article will now go beyond comparing foreign investments in civil legal aid to provide:

(1) An overview of civil legal aid systems beginning with the birth of those programs in Europe followed by a sampling of systems in Asia, South America, and Africa.

(2) An exploration of relevant lessons to be gleaned from selected survey research in England and Canada.

(3) An examination of innovative approaches, some of them still in the pilot stage, in other jurisdictions which have potential for adoption in the United States.

## I. OVERVIEW OF FOREIGN CIVIL LEGAL AID SYSTEMS

This Article begins with a brief overview of civil legal aid systems, starting with the birth of those programs in Europe. It then goes on to discuss the rationale behind these systems.

### A. EUROPE—LEGAL AID'S BEGINNINGS AS A GOVERNMENT RESPONSIBILITY

To better understand the European legal aid pattern it is helpful to glance briefly at some European history. In 1848, a wave of revolutions swept across the continent seeking to replace the divine right of kings with the social contract and democracy.<sup>13</sup> Some of these revolutions succeeded initially, some failed entirely, and some were betrayed after first succeeding.

France was one of the latter, which deposed one monarch only to see another take office a few years later.<sup>14</sup> But in 1951, between monarchs, the French legislature enacted one of the core precepts of the social contract—equality before the law for all economic classes, which meant a right to counsel in civil cases for the many citizens unable to afford to

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13. See MIKE RAPPORT, 1848: YEAR OF REVOLUTION (2008).

14. On February 24, 1848, Louis-Phillippe abdicated the throne and fled to England. In November 1852, Louis-Napoleon's coup was confirmed. He was named Emperor of the French and crowned Napoleon III. At that point, "the revolutions of the mid-nineteenth century were well and truly over." RAPPORT, *supra* note 13, at 55–56, 398.

hire their own.<sup>15</sup> Meanwhile, the several revolutions in the German-speaking areas of Europe were aimed at creating a unified and democratic nation out of the assortment of duchies, principalities, and the like that were then governed by hereditary rulers.<sup>16</sup> While these revolutions failed or were reversed one by one over the next few years, they set the stage for the ultimate creation of a unified German nation thirty years later. Notably, the Basic Law of this new country included a provision guaranteeing a right to counsel for those too poor to afford their own.<sup>17</sup>

The French and German statutes set a pattern and soon nearly all European countries had enacted statutes creating rights to counsel in civil cases. One major exception was England, which had been ahead of the continent by several centuries in reining in its monarchs (for example, the Magna Charta). So in England it was 1495, not the mid-1800s, when Parliament passed a statute requiring the King's judges to appoint free counsel for pauper plaintiffs.<sup>18</sup> Switzerland came by its right to counsel via a different and later route—a 1937 decision of the nation's supreme court enforcing a constitutional provision that guaranteed “all Swiss are equal before the law.”<sup>19</sup> The court held that this principle applied to those too poor to hire a lawyer and required governments to provide them free lawyers.<sup>20</sup>

At this point, it is interesting to note that what happened in California with respect to criminal legal aid mirrors the European experience with civil legal aid. Poor people in California gained a statutory right to counsel in criminal cases in 1872,<sup>21</sup> just twenty years after France

15. Loi du 22 janvier 1851 [Law of January 22, 1851], BUREAU DE LA JURISPRUDENCE GENERALE [Bureau of Général Jurisprudence], 1906, arts. 1–20 (Fr.). For background of this statute and its relationship to the 1848 revolution in France, see CAPPELLETTI ET AL., *supra* note 6, at 18–19.

16. RAPPORT, *supra* note 13, at 57–64.

17. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], §§ 114–27 (Ger.); see CAPPELLETTI ET AL., *supra* note 6, at 19.

18. An Act to Admit Such Persons as Are Poor to Sue *in Forma Pauperis*, 1945, 11 Hen. 7, c. 12 (Eng.). The Act reads in pertinent part:

[T]he Justices . . . shall assign to the same poor person or persons, Counsels...and in likewise . . . attorney and attorneys . . . and all other officers requisite and necessary . . . for the speed of said suit . . . which shall do their duties without any rewards for their Counsel, help and business in the same.

*Id.*

19. Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 5 (1967) (referencing Tribunal fédérale [TF] Oct. 8, 1937, 63 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE (RECUEIL OFFICIEL) [AFT] I 209 (Switz.)).

20. *Id.*

21. See CAL. PENAL CODE § 987 (West 2016) (first enacted February 14, 1872). According to the history section appearing after the language of the section, this code section was a reenactment of section 271 of the Criminal Practice Act of 1851, but with the addition of a final sentence that read: “If the defendant is unable to employ counsel, the court must assign counsel to defend him.” Subsequent amendments to section 987 have elaborated on this provision, but the requirement that the court

and five years before Germany had created that right in civil cases.<sup>22</sup> In all three jurisdictions, those rights were implemented initially at no cost to the government by drafting lawyers to serve without compensation.<sup>23</sup> It required many decades before any of these three governments began paying the lawyers appointed to represent those who could not afford their services.<sup>24</sup> And it took still more decades for most of the European democracies to develop a variety of approaches to delivering on the statutory promise in their jurisdictions.<sup>25</sup> Meanwhile, the goal if not the reality of equal justice for the poor spread to nations on all six inhabited continents.

More recent but in a sense more profound are the constitutional (or at least quasi-constitutional) developments in Europe. In 1950, the European community adopted by treaty a Convention on Human Rights and Fundamental Freedoms.<sup>26</sup> These rights are enforced by the European Court on Human Rights.<sup>27</sup> Section 6(1) of the Convention guarantees citizens of the member nations the right to a “fair hearing” in civil as well as criminal cases. In 1979, the European Court held that a “fair hearing” required “effective access” to the courts and furthermore, that to enjoy “effective access” a litigant in the regular courts had to have

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appoint counsel to represent indigent defendants in California has remained intact since 1872 (incidentally ninety-one years before *Gideon*).

22. There is some irony in the fact that the year before the legacy of Germany's 1848 revolution resulted in a guaranteed right to counsel in civil cases for poor Germans that a refugee from the 1848 revolution led the far less ambitious effort to create the first legal aid office in his adopted country, the United States. That refugee was Edward Salomon who had joined nearly ten thousand of his fellow revolutionaries in fleeing to the United States, then rose to become the Governor of Wisconsin before moving to New York. Salomon chaired the committee that formed the German Legal Aid Society in New York in 1876. He then chaired the Society's board for the first fourteen years of its existence. That office gave the poor German-Americans in New York one lawyer to deal with as many of their problems as he had enough time to handle. See JOHNSON, *supra* note 10, at 3–7. Meanwhile, back in Germany, Count Bismarck was giving all the low-income Germans who stayed behind a right to legal representation for all their civil legal problems.

23. As to France and Germany, see CAPPELLETTI ET AL., *supra* note 6, at 19. For a discussion of the condemnation of this failure to compensate counsel appointed to represent the poor and the problems it creates, see *id.* at 21–27. As to California's failure to compensate appointed counsel in criminal cases, see discussion *infra* note 134.

24. As to Germany, see CAPPELLETTI ET AL., *supra* note 6, at 48–50. As to France, see *id.* at 44–46. Both of these statutes provided compensation for lawyers appointed to represent the poor in civil cases.

25. For a comprehensive catalog of right to counsel provisions in all European countries, and descriptions of those rights, 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. & C.R. L. REV. 769 (2006).

26. “In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time . . . .” Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.

27. The European Court on Human Rights has judges from the member nations who consider and rule on alleged violations of the Convention. The court's decisions are binding on member governments and it can order appropriate relief for individuals whose rights under the convention the judges find to have been violated.

a lawyer. Thus, member governments have to provide free lawyers to those who could not afford their own.<sup>28</sup> Then in 2005, the court held that to have a fair hearing, litigants must also have “equality of arms” with their opponents.<sup>29</sup> Thus, if the other side has a lawyer, as is especially common when individuals face institutional parties such as businesses, creditors, landlords, and government agencies, “equality of arms” would seem to require that government provide legal aid to eligible clients.

In 2009, the European community adopted, again by treaty, a new Charter of Fundamental Rights. Section 47(1) imports into the express language of that Charter the essence of the rights the European Court of Human Rights established through interpretations of the “fair and public hearing” guarantee in the Convention on Human Rights and Fundamental Freedoms.<sup>30</sup> That Charter provision guarantees “[l]egal 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.”<sup>31</sup>

#### B. LEGAL AID DEVELOPMENTS OUTSIDE EUROPE AND NORTH AMERICA

Most legal aid leaders looking for lessons abroad have focused on European countries and to a lesser extent, Canada. Often unknown or ignored are nations in Asia, South America, and Africa. In this Part, we briefly explore three substantial legal aid systems found on those continents: China, Brazil, and South Africa.

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28. “The Convention is intended to guarantee . . . rights that are practical and effective . . . [T]he possibility to appear in person before the High Court does not provide the applicant with an *effective* right of access.” *Airey v. Ir.*, 32 Eur. Ct. H.R. 314–15 (1979) (emphasis added). For a more thorough discussion of the *Airey* decision and its full rationale, see Johnson, *Equality Before the Law*, *supra* note 7, at 164–66.

29. “It is *central to the concept of a fair trial* . . . that a litigant is not denied the opportunity to present his or her case effectively before the court and *that he or she is able to enjoy equality of arms with the opposing side*.” *Steel v. U.K.*, 41 Eur. Ct. H.R. 427 (2005) (emphasis added). Notably, the court found that neither the trial court’s help for the unrepresented litigants nor some unbundled pro bono representation they received at several times during the proceedings afforded them the required “equality of arms.” For a more thorough discussion of the *Steel* decision and its rationale, see Johnson, *Equality Before the Law*, *supra* note 7, at 166–68.

30. Charter of Fundamental Rights of the European Union art. 47, 2007 O.J. (C 303) 1, 12.

31. *Id.* art. 47 (emphasis added). Article 7 of the Charter of Fundamental Rights of the European Union applies to litigation in the European Union’s own courts, such as the Court on Human Rights and Fundamental Freedoms, and also to litigation in member nations’ courts when community laws, not merely domestic laws, are involved. The European Convention on Human Rights and Fundamental Freedoms, including Article 6(1) and the cases interpreting that article, for example *Airey v. Ireland* and *Steel v. United Kingdom*, discussed above, continue to apply to other domestic litigation.

I. *People's Republic of China: A New Player in the Legal Aid World as Well as the Global Economy*

In 1997, the world's most populous country, which many Americans still call Communist China, had completed several years studying legal aid systems around the globe, just as it might research western manufacturing processes before starting its own. That year the People's Republic of China began creating a nationwide legal aid system, combining features from several other countries. It might be useful for the United States to see how a nation whose view was not narrowed by its own past legal aid history reviewed the full panoply of options available in the world in constructing its own system. European countries had started with private lawyers being assigned by judges to comply with statutory rights to counsel while the United States started with separate offices staffed with charitably funded salaried lawyers who served as many people as they could with the number of lawyers they employed. The evolution of legal aid on these two continents has been influenced by those historical patterns. The People's Republic of China, on the other hand, had no legal aid tradition and could cast its gaze around the world, which is what it did.

Once it started its program in 1997, the People's Republic of China went full force. As of 2015, China has already established a network of 3700 local legal aid organizations with 140,000 full-time staff, including lawyers, paralegals, and support staff. For comparison, in the United States, the Legal Services Corporation funds 134 programs which have 881 offices and a total of 10,000 staff members, including lawyers, paralegals, and other support staff.<sup>32</sup> In China, this salaried lawyer component is supplemented by 270,000 private practitioners who are subject to appointment in individual cases and 70,000 "grassroots legal service workers" (roughly equivalent to independent paralegals) in rural areas where no lawyers are available. This is in addition to services provided by various public interest organizations, social groups, and college legal clinics.<sup>33</sup> Thus, China has combined salaried lawyers (a U.S. specialty), mandatory pro bono services from private practitioners (an ancient European dish<sup>34</sup>), and independent paralegals (a rather new English flavor).

In 2014, government funding of legal aid from all levels of government totaled 1.7 billion yuan RMB (equaling \$270 million).<sup>35</sup>

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32. See LEGAL SERVS. CORP., *supra* note 12, at 6.

33. INT'L LEGAL AID GRP., NATIONAL REPORT—CHINA (2015).

34. The current policy is to encourage legal aid institutions to pay some compensation to private attorneys appointed to represent poor people, but it is unclear how broadly this policy is implemented at this time. *Id.*

35. LEGAL AID CTR. OF THE MINISTRY OF JUST., P.R. CHINA, LEGAL AID IN CHINA 2 (2015).

Unlike the United States where eighty percent of government spending on representation of the poor is devoted to indigent criminal defense, or even most European countries where there is close to an even split between criminal and civil legal aid, in China about eighty percent of legal aid work is on the civil side. In 2014, the legal aid program provided representation in 990,000 civil cases and 240,000 criminal cases, while some 6.8 million people visited, wrote, or called one legal aid institution or the other.<sup>36</sup>

The Chinese legal aid legislation identifies a specific list of civil law categories in which legal aid is to be available. These include government benefits, pensions, child and spousal support, wages, and civil rights. In addition, some provinces also provide legal aid in family law and personal injury cases.<sup>37</sup> There is not yet, at least, any right or guarantee that low-income people will be entitled to legal aid if they need help with a problem within one of these categories. But if the problem is outside these categories, legal aid will be unavailable at least under the government-funded system. As can be seen, however, the list covers many if not most categories that lower income people tend to experience in our country—and probably in China as well.

In recent years, Chinese legal aid administrators have become concerned about ensuring the quality of the services their lawyers supply. They enlisted the two law professors who designed and piloted the peer review quality assessment program in both England and Scotland to come to China. They are aiding in installing a similar program in that much larger nation.<sup>38</sup> With the professors' help, the Chinese legal aid program has started pilot peer review programs in several provinces.<sup>39</sup>

As in so many other areas, the People's Republic is not reluctant to borrow ideas and systems from other parts of the world and adapt them to their needs and priorities. At the same time, very recent developments suggest one of those fundamental concepts—independence from government interference—apparently has failed to gain acceptance in that country. It is reported that in late January 2016, the Chinese government closed the two-decades-old Women's Legal Counseling and Service Center in Beijing.<sup>40</sup> It is unclear at this time whether this is

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36. *Id.* at 2.

37. INT'L LEGAL AID GRP., *supra* note 33.

38. Those professors are Alan Paterson of Strathclyde University, Glasgow, and Avrom Sher of Bristol University.

39. INT'L LEGAL AID GRP., *supra* note 33.

40. Didi Kirsten Tatlow, *China Is Said to Force Closing of Women's Legal Aid Center*, N.Y. TIMES (Jan. 29, 2016), <http://www.nytimes.com/2016/01/30/world/asia/beijing-women-legal-aid-guo-jianmei.html>.

related in any way to recent crackdowns on activist lawyers who protested and otherwise challenged government actions.<sup>41</sup>

2. *Brazil: A Civil Right to Counsel Promised but Not Always Realized*

Brazil is a civil law country, but with a federal system and an American style constitution. Another salient feature of Brazilian courts is that, by law, they do not permit litigants to represent themselves. That is, only a lawyer can file a lawsuit or a defense to another's suit, or present a case before a judge. Thus, unless the government provides poor people with a lawyer, they have no recourse to the courts to enforce or protect their legal rights. This makes it even more important that since 1934, the Brazilian Constitution has contained an express provision conferring a right to free counsel on any citizens who cannot afford to pay for their own.<sup>42</sup>

Because Brazil is a federal system, the constitution leaves it to the state governments to implement that constitutional right in their respective state courts, as is also true for America's right to counsel in criminal cases. Although the situation is improving, especially in the last decade, many Brazilian states have not given this constitutional responsibility a high priority. In some, it is left to the judge presiding over a trial to appoint a private lawyer who seldom receives compensation for the representation she provides.<sup>43</sup> This reliance on drafting uncompensated private lawyers to fulfill the right to counsel is not that different from some American states in the criminal defense arena during the pre-*Gideon* era<sup>44</sup> or the federal courts from 1938 to 1963 before the enactment of the Criminal Justice Act.<sup>45</sup>

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41. See, e.g., Michael Forsythe, *China Is Said to Arrest 4 Human Rights Advocates*, N.Y. TIMES (Jan. 12, 2016), <http://www.nytimes.com/2016/01/13/world/asia/china-rights-lawyers-arrest.html>.

42. CLEBER FRANCISCO ALVES, INT'L LEGAL AID GRP., NATIONAL REPORT: LEGAL AID IN BRAZIL—RECENT DEVELOPMENTS AND PROSPECTS FOR THE FUTURE (2011).

43. *Id.*

44. See, e.g., *Lamont v. Solano Cty.*, 49 Cal. 158 (1874); *Rowe v. Yuba City*, 17 Cal. 61 (1860) (rejecting lawyers' claims they were entitled to have their fees paid out of public funds when appointed to represent indigent defendants in criminal cases); see also *Payne v. Super. Ct.*, 553 P.2d 565, 583 (Cal. 1976) (holding that if and whether counsel appointed to implement a right to counsel in civil cases should be compensated is a matter for the legislature, and that lawyers can be ordered to provide that representation without compensation because of their duty not to reject "the cause of the defenseless or the oppressed").

45. See *Criminal Justice Act: At 50 Years, A Landmark in the Right to Counsel*, U.S. CTS. (Aug. 20, 2014), <http://www.uscourts.gov/news/2014/08/20/criminal-justice-act-50-years-landmark-right-counsel>. As that article points out, in 1938 the Supreme Court held there was a constitutional right to counsel for indigent criminal defendants in the federal courts. *Johnson v. Zerbst*, 304 U.S. 458 (1938). But lawyers appointed to provide that representation were not paid for their services until passage of the Criminal Justice Act on August 7, 1964, some twenty-five years after the Supreme Court created the right to counsel and the legal profession's obligation to implement that right. 18 U.S.C. § 3006A (2016).

There are some exceptions to this discouraging picture, however. Most notably, the State of Rio de Janeiro has taken the constitutional right to counsel seriously. It has adopted the federal constitution's provision calling for creation of a cadre of salaried "Defensores Públicos" (public defenders) to serve poor people.<sup>46</sup> Despite the name, Brazilian public defenders represent in civil as well as criminal cases. Moreover, civil public defenders represent plaintiffs as well as defendants.<sup>47</sup> Each public defender is considered an independent lawyer and not an employee of a single law firm, and consequently two public defenders can appear against one another in a single case.<sup>48</sup>

Presently, Rio has a total of 805 public defenders out of a national total force of 5502 public defenders. Approximately two-thirds of those in Rio are civil defenders, which translates to approximately 520 civil public defenders in that state. Rio's legal aid budget is the equivalent of nearly \$183 million for a population of sixteen million people, of which approximately \$120 million is for civil legal aid (\$7.50 per capita or almost double the U.S. per capita civil legal aid investment).<sup>49</sup> In the city of Rio de Janeiro proper, civil defenders are stationed in regional offices scattered around the metropolitan area, generally two to an office. They work in shifts—morning and afternoon—assisted by one paralegal, a secretary, and six law students each shift. These students are fulfilling a 400-hour graduation requirement, but are receiving a monthly stipend equivalent to \$164 for their mandatory service.

Operating under the supervision of the on-duty public defender, the students screen applicants for eligibility, prepare draft pleadings in routine cases that require litigation, and otherwise serve clients. The public defender, in turn, reviews all the pleadings students prepared and corrects them, if necessary, before they are filed in court. Moreover, the student interns are trained to refer clients with nonroutine cases to the public defender who personally interviews and handles those clients.<sup>50</sup>

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46. ALVES, *supra* note 42.

47. *Id.*

48. *Id.*

49. E-mail from Professor Cleber Alves, Universidade Católica de Brasília, to author (Oct. 14, 2015) (on file with author). According to Professor Alves, the State of Rio has eight percent of the Brazilian population and twelve percent of its total national legal aid budget, which is approximately \$1.4 billion for a population of 200 million. Uncertain, however, is the split between civil and criminal legal aid in the overall national legal aid budget, although Professor Alves is of the opinion that civil public defenders are two-thirds of the total force in the rest of the country as well as in Rio. If the national pattern is the same as Rio, that would mean approximately \$930 million for civil legal aid and a per capita investment of \$4.65 at the national level. According to Professor Alves, these budget figures only include government support for the public defender system. They do not include any payments the courts might make out of the judicial budget to lawyers they appoint to represent indigent civil parties, or any other funding state or local governments may provide for civil legal aid services of any kind.

50. E-mail from Professor Cleber Francisco Alves to author (Dec. 8, 2015) (on file with author).



Thus far this process resembles self-help assistance in the United States with the client ending up with a properly filled out pleading that can be filed in court. Once the pleading arrives at court, however, a new set of public defenders takes over to represent the client at the litigation stage. About eighty civil defenders are housed in a large building adjacent to Rio's main courthouse and another eighty in regional courthouses elsewhere in the Rio area. Each defender is placed in a different courtroom and is responsible for the legal aid cases assigned to that judge. Brazil is a civil law country and litigation is paper heavy and oral hearing light, which makes it easier for a single lawyer to effectively manage a heavy caseload.<sup>51</sup> If both sides are legal aid eligible, another public defender will represent one of the parties. If a party appeals the trial court decision, yet another set of public defenders is attached to the appellate court and available to represent low-income appellants or respondents. The public defenders serving in trial or appellate courts are helped by paralegals, secretaries, and law student interns, just as are those working in the regional intake offices.<sup>52</sup> In total, Rio's public defenders are supported by a complement of over 1900 law student interns and over 1200 employees—paralegals, secretaries, and administrators.<sup>53</sup>

The Rio legal aid program also has specialized offices staffed with experienced civil public defenders to provide expertise and strategic legal representation in certain areas—consumer law, senior citizen issues, and the like.<sup>54</sup> These offices resemble the “back-up” or “support” centers the OEO Legal Services Program and the Legal Services Corporation funded before Congress eliminated federal financing for them in 1995. Many of the U.S. back-up centers survive today, but with outside funding from foundations, court awarded fees, and private donations.<sup>55</sup> But the existence of similar centers in the Brazilian legal aid program is evidence of the program's commitment to making the substantive law fair as well as accessible to the nation's poor.

As suggested earlier, the Rio program is not typical of legal aid in Brazil. Its budget represents twelve percent of total expenditures on legal aid in Brazil, while the population of the State of Rio is only eight percent of the nation's population. But there has been considerable

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51. I spent two days visiting the Rio legal aid program, so I had an opportunity to observe the offices and Civil Public Defenders in operation, interview several of them, and sit in at a trial.

52. ALVES, *supra* note 42.

53. E-mail from Professor Cleber Francisco Alves, *supra* note 50.

54. *Id.* I had the opportunity to visit one of these specialized offices and interview the lawyer heading that office. During that visit, he accepted calls from public defenders in regional and court offices and gave them advice about issues they were facing.

55. See JOHNSON, *supra* note 10, at 771–75.

expansion elsewhere in the country, in some places dramatic, during the past decade.<sup>56</sup>

The Rio program is notable for how it has tried and in large measure succeeded in providing its low-income population a “Demand Driven” level of service—that is, all the legal services the low-income population seeks—through a “Supply Limited” system composed of a fixed number of lawyers, augmented with a fixed number of paraprofessionals and law student interns. It has accomplished this difficult task through what some might call a “mass production” or “assembly line” model, but perhaps more accurately and less pejoratively described as “well organized” to efficiently use some 520 civil legal aid lawyers.

When I visited a Rio regional intake office several years ago, clients began lining up in the early morning hours, long before the office opened its doors. The first shift of lawyers and law students processed all the clients who arrived before a certain time; the rest had to wait for the second shift.<sup>57</sup> Thus, to the extent there is rationing of the Rio program’s civil legal services it appeared it probably would be “rationing by attrition,” as some people simply dropped out from the line before they could be served. But since my visit, the Rio legal aid system has established a “call-in” center that receives about 60,000 calls a month, staffed by paralegals and interns, and which sets up appointments for prospective clients. Then in 2015, Rio added a website where people can schedule appointments online.<sup>58</sup> So the long lines I observed during my visit and any resulting “rationing by attrition” appears to be a thing of the past.

Another unique feature of the system is the heavy reliance on services from law students, especially in the frontline intake offices. At the office I visited, the staff on duty at the time consisted of one public defender and four law students (now six students), each of the students working at a computer station, interviewing clients, and drafting pleadings and other legal documents to be reviewed by the lawyer. The 400 hours each of the thousands of law students in Rio are required to serve at legal aid offices, and the service design that maximizes their contribution to the offices’ production, means the program has a valuable and relatively inexpensive adjunct to their paid staff. These students are essentially the equivalent of several million dollars in additional government funding of civil legal aid in the State of Rio.

Those 400 hours of mandatory service are in addition to any services those law students might render as part of the clinical programs many of

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56. ALVES, *supra* note 42; E-mail from Professor Cleber Francisco Alves, *supra* note 50.

57. I visited one of these regional intake offices at midday, interviewed the public defender managing the office, talked with some of the law students, and also observed the process for over an hour. This description is based largely on information gleaned from that visit.

58. E-mail from Professor Cleber Francisco Alves, *supra* note 50.

the law schools in Rio provide for their students. The difference is that the law school clinics focus on giving the students an educational experience in the practice of law; the mandatory 400 hours is focused on service for the clients, including repetitive grunt work, essentially serving as paralegals.<sup>59</sup> That level of commitment to public service as a requirement for receipt of a law degree places the fifty hours New York recently approved into a new perspective.

3. *South Africa: Government-Employed Lawyers in “Justice Centers”*

Like the United States, poor people in South Africa enjoy a legally enforceable right to counsel in criminal cases but not as a general rule in civil cases. There is one narrow but important category of civil case where they do enjoy an absolute right to counsel, and there is at least a conditional right in all civil cases. The absolute right applies in land reform litigation because of an unchallenged decision of the Land Reform Court based on the South African Constitution.<sup>60</sup> The conditional right arises from a 1996 decision of the Constitutional Court, *Bernstein v. Bester*, holding counsel must be provided in a civil case if needed to provide the poor person effective participation or equality of arms.<sup>61</sup> Apparently there has been little enforcement of this holding nor has there been subsequent litigation clarifying its meaning. Nonetheless, the South African legal aid program considers there is a constitutional imperative to provide counsel only where “substantial injustice” would occur.<sup>62</sup> As a consequence, for the most part, low-income South Africans only receive as much service in civil litigation as a small number of lawyers can supply.

South Africa organizes its criminal and civil legal aid differently than the United States. Instead of completely separate systems, offices, and funding sources for criminal and civil legal aid, the South African national government finances and operates a unified program throughout the country.<sup>63</sup> At present, the South African legal aid program consists of sixty-four Justice Centers and sixty-four Satellite offices staffed by 1992

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59. Interviews with Cleber Francisco Alves and law students during visit to Rio legal aid offices (Apr. 24–26, 2006).

60. *Nkuzi Dev. Ass’n v. Republic of S. Africa* 2001 SA 1 (LCC) (S. Afr.). The Land Claims Court found, “There 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.” *Id.* at 5. Hence, poor people appearing before that court “have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result.” *Id.*

61. *Bernstein v. Bester* 1996 (2) SA 751 (CC) (S. Afr.).

62. VIDHU VEDELANKAR & PATRICK HUNDERMARK, COUNTRY REPORT: LEGAL AID SOUTH AFRICA 6 (2015).

63. *Id.* at 12.

salaried lawyers, 192 paralegals, and 613 support personnel.<sup>64</sup> Each center houses a large criminal defense unit and a much smaller civil unit.<sup>65</sup> Unlike the United States, where public defenders generally are county or state employees (depending on the jurisdiction), and legal services lawyers are employees of local nonprofit organizations, all staff of the Justice Centers and Satellite offices are employees of the national government. In addition to the network of Justice Centers, the program includes an “Impact Litigation” unit housed at the program’s headquarters that focuses on litigation that can establish new legal principles or otherwise benefit large numbers of poor people.<sup>66</sup> The salaried program also is augmented by a small “Judicare” program that handles roughly five percent of the program’s total caseload<sup>67</sup> and gives grants to a few public interest law firms for special projects.<sup>68</sup>

Statistics reveal the effect of the clear right to counsel in criminal cases and the much softer right in civil cases. During the latest fiscal year (2014–15) the Justice Centers provided representation in 373,979 criminal cases (eighty-nine percent of total caseload) and only 47,548 civil cases (eleven percent of total caseload).<sup>69</sup> The program’s total budget for the year was over 1.5 billion Rand (over \$131 million) for a per capita expenditure of \$2.43.<sup>70</sup> Notably, the program’s leadership has announced the expansion of civil legal aid is a high priority for the future.<sup>71</sup>

## II. FOREIGN “LEGAL NEEDS” STUDIES EXPOSE MORE THAN UNMET NEED

Fourteen nations, in addition to the United States, have conducted a total of at least twenty-six national “legal needs” studies. Those nations include Australia, Bulgaria, Canada, England, Hong Kong, Japan, Moldova, the Netherlands, New Zealand, Northern Ireland, Scotland, Slovakia, Taiwan, and Ukraine.<sup>72</sup> Many have collected data from far larger samples, proportionately and often even absolutely, than the only

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64. *Id.* at 11–12.

65. *Id.* at 13–14.

66. “The unit seeks to achieve maximum benefits for a group of people by focusing on constitutional precedent setting cases, test cases and class actions.” *Id.* at 10.

67. This “Judicare” program is a residue of the legal aid system that existed during the Apartheid era of South African history, soon replaced by the salaried lawyers of the Justice Centers as the principal delivery system for legal aid, both criminal and civil. *See id.* at 14. On a visit to South Africa in 1975, I observed this former system in operation and met with some private lawyers who occasionally received appointments to represent poor people and were paid by the government to do so.

68. *Id.* at 14.

69. *Id.* at 22.

70. *Id.* at 12.

71. *See id.*

72. PASCOE PLEASANCE & NIGEL J. BALMER, HOW PEOPLE RESOLVE ‘LEGAL’ PROBLEMS: A REPORT TO THE LEGAL SERVICES BOARD 7 (2014).

American national study which the ABA conducted over twenty years ago. While the U.S. study was based on 3087 interviewees for a population of 280 million at that time, Australia interviewed 20,716 respondents in a country of less than twenty million, and one of England's several studies based its findings on 10,587 interviews for its population of 55 million, while one of Canada's three surveys interviewed 7002 for its population of less than 35 million.<sup>73</sup> Some nations also have polled more frequently—England polls once a year combined with a more thorough survey every three years. And several have asked interviewees more detailed and sophisticated questions than the ABA study did, especially when probing what people do about the problems they experience.

The model for most foreign “legal needs” studies was published in 1999, six years after the ABA's national survey in the United States. It was the “Paths to Justice” study in England designed by Hazel Genn,<sup>74</sup> later to be named a Dame Commander of the British Empire for this research and her other work as a social scientist. Dame Genn's study emphasized what the interviewees did about the “justiciable” problems they identified as much as it emphasized the frequency and nature of those problems. Among other things, this survey exposed how problems often “cascaded” with one unresolved problem triggering additional “justiciable” problems—for instance, a family breakdown triggering debt and/or housing issues, or vice versa.

The “Paths to Justice” study supplied the basic format for similar surveys not only in England but also in several other countries. While there might be something for Americans to learn from all of these studies, special lessons can be gained from two of them—first, the most recent English Civil and Social Justice Panel Surveys taken in 2010 and 2012 by the Legal Services Research Centre, and second, a Canadian national survey completed in 2010. Both of these included sophisticated analysis of the extensive data collected through interviews.

A. ENGLISH 2010 AND 2012 SURVEYS—HOW LOW AND MODERATE INCOME PEOPLE RESPOND TO THEIR LEGAL PROBLEMS WHEN THEY HAVE A RIGHT TO SUBSIDIZED LEGAL SERVICES

The English study is notable for several reasons. First, this survey was taken through in-person—not just telephone—interviews, while the same Legal Services Research Centre conducted smaller and simpler annual services by telephone. This survey also had a longitudinal dimension; that is, the Centre conducted follow-up interviews eighteen months later with the original set of 2010 interviewees. This allowed the study to report on how problems identified in 2010 had been resolved or

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73. *Id.* at 8.

74. HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999).

not resolved by 2012, and the consequences of those results. The Canadian study is equally interesting but for a different reason. It is virtually unique in surveying all income levels, not just low and moderate households, about their personal (non-business) problems, including how much they spent trying to resolve those problems.

Among the many interesting findings of the 2010 and 2012 English surveys are:

(1) A “U-shape” on the graph reflecting the correlation between interviewees’ income and use of lawyers for most legal problems, undoubtedly influenced by the generous quantity of legal aid still available in England in those years. That is, low-income people eligible for legal aid were more likely to use lawyers to resolve their legal problems than those in the income strata just above them, but less likely than those a bit further up the scale and far, far less than those in the middle and upper middle levels. Indeed, the graph of lawyer usage resembles a “check mark” more than a “U.”<sup>75</sup> Given the relative paucity of legal aid resources in the United States,<sup>76</sup> it is doubtful legal aid would be available to enough of the people eligible for those services in our country to produce a similar “U” (or “check mark”) shaped configuration of lawyer usage.

(2) Thirty-two percent of interviewees reported experiencing one or more problems in the previous eighteen months, but forty-three percent of the repeat interviewees in the 2012 survey reported at least one problem during the previous three years. Combining the two waves of interviewees the most common problem type was consumer (17.5% of problems reported) with neighborhood conflicts (12.7%), employment (12.2%), money (10.2%), debt (9.2%), welfare benefits (7.5%), and rented housing (6.6%), not far behind. (Other than “neighborhood conflicts” these are the grist of a “poverty law” practice in the United States and elsewhere.) Divorce (3.7%), relationship breakdown (3.3%), domestic violence (2.2%), and care proceedings (0.5%), which form the traditional realm of a family law practice are less common.<sup>77</sup>

(3) When it came to the perceived severity of the problems experienced, however, the tables were almost completely turned, with care proceedings (39.1 on a scale of fifty points), relationship breakdown (34.0), and domestic violence (32.8) topping the list and divorce (28.3) also high in the rankings. Meanwhile, consumer (19.9) and money problems (24.0) are at the bottom, with rented housing (27.6), debt (27.4), and welfare benefits (26.5) clustered just below the median. These are the overall rankings, however, and are different when the interviewees are classified by age, family status, or whether they receive welfare benefits (defined as any source of government supplied income including unemployment insurance, social security, and so on, not just welfare payments). As might be expected, those receiving welfare benefits reported a higher prevalence of twelve of the

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75. See PLEASANCE & BALMER, *supra* note 72, at 13.

76. See *supra* Tables I & 2 and accompanying text.

77. *Id.* at 18–19.

fifteen categories and found problems with issues such as rented housing, money, debt, and welfare benefits more severe than did the overall sample.<sup>78</sup>

(4) Not unexpectedly, the perceived severity of a problem affected what people did when confronted with that problem. Overall, interviewees reported doing nothing with 11.3% of their less severe and 14.6% of their more severe problems—perhaps because they felt less capable of doing anything about the more severe ones. This explanation is reinforced by the fact that if they decided to do something about a problem without any help, they did so almost half the time (49.3%) when it was a less severe problem, but only a little over a third the time (37.6%) when they saw it as severe. They were willing to settle with informal advice about the same whether it was serious or severe, but they went to the advice sector (Citizens Advice Bureaus and the like) almost twice as frequently (5.5% versus 2.9%) and to a law firm more than twice as frequently (7.9% versus 3.3%) when they saw the problem as more rather than less severe.<sup>79</sup>

(5) When problems finally concluded, nearly twice as many severe problems ended with a decision by a court or other third party (12.9% versus 6.7%) than less severe ones, while much larger but nearly equal percentages (44.3% for less severe and 40.1% for more severe) managed to resolve their problems through a settlement. It should be noted that a good percentage of those settlements probably happened during the course of litigation in the courts. In the United States, at least, the vast majority of cases filed in court are settled before the court has to make a dispositive decision.

(6) The nature, duration, and the perceived seriousness of the problem—along with some other factors—influence whether and what a person will do about solving a given problem. Among those other factors is whether persons characterized an issue as “legal,” which tended to lead them to consult a lawyer, as also when the problem was seen as “criminal,” while they tended to do nothing if they looked at the situation as just “bad luck.” Those who perceived that they understood their legal rights steered away from consulting lawyers and toward handling problems themselves, or consulting lawyers only after getting advice from family, friends, and so on rather than formal advice agencies. Divorce was the problem type most likely to draw people to law firms, which makes sense since court action is required to obtain that form of relief.<sup>80</sup>

(7) An analysis of problems that had been resolved as of the time of the 2012 survey revealed not only the ultimate result, but also revealed what the respondents actually did in attempting to resolve the problem and the reasons they did what they did. Seven percent of those who had not obtained advice regretted that, with another 1.6% unsure whether it was a good choice not to. A quarter of those who decided against consulting a lawyer said it was because of the perceived cost, and nearly all who went to another advice agency

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78. *Id.* at 20–24.

79. *Id.* at 25.

80. *Id.* at 27–57.

instead of a lawyer said cost was the primary reason. Among those who did go to lawyers, one of the main reasons given was to “level the playing field” when the other side had a lawyer.<sup>81</sup>

(8) Perhaps the most significant policy recommendation to emerge from the study was to strengthen the general advice sector. “[A]s people’s recourse to the broader advice sector is relatively uninfluenced by whether or not problems are characterized as legal, it facilitates access to legal services for those who do not see the legal dimensions of the justiciable problems they encounter.”<sup>82</sup> Having personnel in the broader advice sector identify people’s problems as legal and referring them to a lawyer only makes a difference if lawyers are available to those people at their income level either because of legal aid or, for those above legal aid eligibility, because those services can be obtained for a price that makes sense in cost-benefit terms. In England, at the time of these surveys, legal aid was available for most of the problem areas included in those surveys for as many financially eligible people who had meritorious cases as the broad advice sector might choose to refer. This would not be true in the United States, where legal aid offices already have to turn away over half the people who seek their services despite the absence of a comprehensive general advice sector as existed in England, led by its vast network of “Citizens Advice Centers.” In the United States, more referrals would only mean more rejections.

These 2010 and 2012 surveys were conducted before England’s conservative government made drastic cuts in the legal aid services available in family, debt, employment, government benefit, and several other kinds of cases of special relevance to the poor.<sup>83</sup> Citizens Advice Centers, which are the major broad advice agencies, also are losing much of their funding.<sup>84</sup> So it is reasonable to anticipate there would be significant differences in what lower income interviewees reported doing when confronted with these everyday personal “justiciable” problems today than they did in 2012. Undoubtedly, far less use of lawyers and other official advice sources and more often going it alone or relying on informal advice from family, friends, ministers, and so on. But it is highly unlikely these assumptions will be confirmed by a survey—because the first thing the Cameron government did was “kill the messenger.” Even before instituting the cuts in services, it abolished the Legal Services Research Centre that, among other work, conducted all the “legal needs” studies, the annual telephone surveys and the every-three-year in-person interviews discussed here.

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81. *Id.* at 58–68.

82. *Id.* at 101.

83. INT’L LEGAL AID GRP., NATIONAL REPORT – ENGLAND AND WALES (2015).

84. Morag McDermont, *Access to Justice, Advice Agencies, and the Impact of Funding*, INT’L LEGAL AID GRP. (2015), <http://www.internationallegalaidgroup.org/images/edinburgh2015/conferencepapers/accesstojustice.pdf>.



B. INDIVIDUAL AND PUBLIC COSTS OF EVERYDAY LEGAL PROBLEMS—2010  
CANADIAN SURVEY

In my view, the Canadian study was most revealing when analyzing how much people at the different income levels were able and willing to invest in resolving their personal “justiciable” problems. Unlike most “legal needs and response” studies that only survey low and moderate income people, Canada interviewed people from all income strata—from poor to rich. The interviewees were divided into quartiles—not quintiles—of annual income. The differences were stark. For the bottom quartile, the mean expenditure attempting to resolve the personal problems they reported was \$444 (including transportation, child care, and so on as well as legal fees and other advisors). For the top quartile, the mean expenditure was over \$50,000. The next lowest quartile was \$746, and the second from the top was \$17,812.<sup>85</sup>

These were the average expenditures for the first problem respondents experienced during the report period. Many also faced a second problem or even more. What respondents at different economic levels spent on their second problems shows an even wider disparity between the top and bottom income earners—\$112 for those in the bottom quartile who probably could not afford to spend as much on a second problem than they did on the first compared to over \$180,000 the top quartile invested in their second problem of the season. (No data was collected as to the third and later problems.) The second to the bottom quartile spent about as much on the second problems as they did on the first, \$758, while the second from the top spent considerably less on their second problems, \$3573.<sup>86</sup> Because the median and mode investments often deviated substantially from the mean, the chart below is worthy of study. Yet, all the disparities in expenditure levels across the four quartiles remain exceptionally wide no matter which statistical measure one chooses.

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85. Ab Currie, *Individual and Public Costs of Everyday Legal Problems*, INT’L LEGAL AID GRP. (2015), [http://www.internationallegalaidgroup.org/images/edinburgh2015/other\\_papers/individual\\_and\\_public\\_costs.pdf](http://www.internationallegalaidgroup.org/images/edinburgh2015/other_papers/individual_and_public_costs.pdf).

86. *Id.*

TABLE 3: WHAT PEOPLE FROM DIFFERENT INCOME STRATA SPENT ADDRESSING THEIR PERSONAL JUSTICIABLE PROBLEMS

	<b>Problem One</b>	<b>Problem Two</b>
<b>First Quartile (lowest)</b>	Range—\$50–\$500 Mean—\$444 Median—\$150 Mode—\$200	Range—\$50–\$200 Mean—\$112 Median—\$110 Mode—\$100
<b>Second Quartile</b>	Range—\$350–1400 Mean—\$746 Median—\$750 Mode—\$1000	Range—\$250–\$1500 Mean—\$758 Median—\$750 Mode—\$500
<b>Third Quartile</b>	Range—\$1500–\$5200 Mean—\$17,812 Median—\$2600 Mode—\$5000	Range—\$1700–\$6000 Mean—\$3573 Median—\$3000 Mode—\$5000
<b>Fourth Quartile (highest income level)</b>	Range—\$6000–\$1,000,000 Mean—\$50,609 Median—\$25,000 Mode—\$20,000	Range—\$7000–\$1,000,000 Mean—\$180,131 Median—\$30,000 Mode—\$50,000

The fact those in the upper quartile are willing to spend so much to resolve or attempt to resolve their personal “justiciable” problems compared to those with lesser financial resources is some indication of how important those problems are viewed. When it comes to spending money to help solve their personal “justiciable” problems, those who have, do; those who do not, cannot—and hence do not.

Admittedly, the financial stakes in many of the problems faced by those in the upper quartile will be higher—often much higher—than those confronting the three lower income strata. But the financial cost of properly resolving those problems, at least in the formal legal system, is likely to be much closer for high-income and low-income litigants than the financial stakes they stand to gain or lose. So the cost-benefit (really the cost-financial stakes) ratio will encourage those in the upper-quartile level to invest more—indeed a lot more—in addressing their personal “justiciable” problems. This despite the consequences of not successfully resolving their personal “justiciable” problems may well be much worse for those below the upper quartile—and especially those in the bottom quartile. Seldom do upper-quartile people face possible homelessness, or loss of their entire income, or the like in a given case, as those in the bottom quartile, and sometimes the bottom two quartiles, often do.

This underscores the plain but often ignored truth that the financial stakes are not a proper measure of the real stakes involved in the personal

“justiciable” problems people face. But the financial stakes do influence how much different economic classes can afford to invest in seeking to resolve those problems. If somehow those in the lower quartiles had the financial resources to address their problems that matched the real consequences they faced, it seems reasonable to suspect they too would be spending those resources at a level comparable to the upper quartile. But they do not have the resources needed to litigate or otherwise adequately address those problems—unless they are provided legal aid or otherwise have access to legal resources to address personal “justiciable” problems that does not come out of their own pockets.

### III. INNOVATIONS RESPONDING TO PERCEIVED LEGAL NEEDS AND FINANCIAL CONSTRAINTS

Financial pressures, legal needs and response surveys, and other considerations have motivated some nations to develop interesting and sometimes successful approaches not seen in the United States. Following are some that appear worthy of more detailed examination.

#### A. BELGIUM: BALANCING THE LEGAL AID BUDGET ON THE BACKS OF THE LAWYERS

Belgium has developed a unique way of combining a “Demand Driven” legal aid service with a fixed cap on legal aid expenditures. Some countries, such as the United States, balance the legal aid budget on the backs of the needy by capping the available legal services (and thus the budget) at less than what would be needed to satisfy effective demand for those services. Other countries, such as the Netherlands, Scotland, Ireland, Hong Kong, among many, balance the legal aid budget on the backs of the taxpayer, by meeting the full effective demand and adding whatever additional funding might be needed when the projected budget is exceeded. Belgium, however, has found a way to balance its legal aid budget on the backs of the lawyers. In effect, it is the lawyers providing the representation, rather than the clients or the taxpayers, who bear the risk the legislature has failed to budget enough to pay for all the services poor people will need during the year.

First, the government decides on an appropriation of a certain sum that will fund all legal aid services that will be delivered that fiscal year. Those services are provided by private lawyers who will be compensated out of that fixed pool of money. Over forty percent of Belgium’s lawyers sign up to participate in that legal aid program. When a lawyer supplies services to an eligible client she is awarded a certain number of “points” depending on the nature of the service provided. Those points are added to both the numerator and the denominator of a formula—that is, to the number of annual “points” that lawyer is accumulating and to the total number of annual “points” all participating lawyers are accumulating. At

the end of the year, each lawyer is entitled to her share—her personal points divided by the total points—of the pool of money appropriated for legal aid that year.

To put it another way, the value of a “point” is determined by the total Euros in the legal aid pool, divided by the total number of “points” all the participating lawyers have accumulated. Each lawyer is entitled to the number of points she accumulated from the services she rendered, multiplied by the Euro value of a point for that year.<sup>87</sup> Whichever way it is calculated, each participating lawyer has an incentive to work as hard as possible for eligible legal aid clients in order to maximize his or her number of annual “points” while at the same time hoping other lawyers are not doing the same so the denominator remains relatively low and thus her points are worth more.

This system might be ingenious, but that does not mean it is a stroke of genius in the sense of producing quality legal services for legal aid clients. Unless the pool government appropriates is large enough to result in a reasonable “point” value, good lawyers are unlikely to participate in the program because it takes them away from much higher paid work for clients able to pay their own fees. This tends to consign the poor to the least qualified lawyers. Moreover, since a lawyer earns the same number of points for a given legal action, whether she does a good job or a poor one, or spends a few minutes or several days accomplishing the task—there is an incentive to underinvest in cases. As a result, the Belgian legal profession is constantly lobbying the government to appropriate more money to the legal aid pool in order to ensure the “point” value is reasonably high—sometimes with success and sometimes not. During the period from 2003–04 to 2012–13, the point value has ranged from a low of 21.08 Euros to a high of 26.9 Euros (reached in 2008–09 and again in 2010–11). In the most recent year, 2012–13 it stood at 25.76 Euros.<sup>88</sup> In 2012–13, Belgian lawyers handled 220,238 cases for a total government expenditure of 77.9 million Euros (approximately \$100 million at the time).<sup>89</sup> This means lawyers earned an average fee of 354 Euros (approximately \$454) per case that fiscal year.

Most Belgian legal aid experts are not enthusiastic about their country’s unique legal aid system. They express concerns that the compensation level lawyers can anticipate receiving is so low that only young, inexperienced lawyers not able to obtain jobs with established law firms are willing to take legal aid cases. And even those lawyers only

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87. STEVEN GIBENS & BERNARD HUBEAU, INT’L LEGAL AID GRP., NATIONAL REPORT—BELGIUM (2015).

88. *Id.*

89. *Id.*

accept legal aid clients when they are unable to attract higher paying clients.<sup>90</sup>

On the other hand, unlike several other countries that rely on compensated private lawyers to deliver the legal services their systems require, Belgium has not evaluated the quality of those services or the lawyers involved in legal aid delivery. So there is no way to objectively measure whether the quality of legal aid low-income Belgians receive is significantly worse than what poor English, Scots, Dutch, Norwegian, Finnish, and so on enjoy.

#### B. DUTCH LOKETS—EARLY TRIAGE AND ASSISTANCE

Driven in part by the findings of legal needs surveys reporting many people needed help with problems they did not recognize were “justiciable,” and also needed to get to that help early before the problems worsened or “cascaded,” the Netherlands developed a government-funded system of offices to which citizens can take a problem and receive or be routed to the type and level of service they need. The advice and assistance is completely free to any person eligible for legal aid. Called “lokets” (loosely translated as “Legal Services Counters”), they are spread throughout the country so that no citizen has to travel more than an hour by public transport to reach the nearest office. But the offices also can be accessed by telephone or e-mail. Legal Services Counters are designed to resemble welcoming stores instead of forbidding law offices—featuring open space, counters, computer stations, and at the back small “consultation” cubicles. Walk-ins are allowed, although potential users are encouraged to make appointments in order to avoid long wait times.<sup>91</sup>

The Legal Services Counters are staffed primarily with legal advisors, many of whom are graduates of a bachelor-level degree program specifically designed to train students for work at the Counters or possess a higher educational degree.<sup>92</sup> The offices perform a triage function, and also provide legal advice, brief assistance (ninety minutes or less), and referrals to nonlegal resources as well as to legal aid or mediation. That brief assistance might include drafting a simple legal document, or contacting a store or creditor about a consumer-related problem, and the like.<sup>93</sup> But if litigation is required or already underway, and if financially eligible, “customers” are referred to a private lawyer or, when appropriate, to a mediator who is participating in the legal aid

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90. This impression is based on conversations with Belgian academics and others at ILAG conferences over the years.

91. INT’L LEGAL AID GRP., LEGAL AID IN THE NETHERLANDS (2015).

92. *Id.*

93. *Id.*

program. Almost half the Dutch legal profession has signed up for the program.

Those lawyers are paid according to a “fixed fee” schedule which is based on research about the average hours required for different types of cases—with some flexibility for unusually complex cases when cleared with the legal aid administration.<sup>94</sup> Except for the very poor, clients are expected to contribute a copayment, the size of which increases with the client’s income. In addition to full-fledged litigation assignments, lawyers can receive authorizations for three hours of assistance with problems not involving litigation but that could not be resolved in the allowed ninety minutes of help at a legal services counter.<sup>95</sup> To encourage people with problems to have those problems diagnosed and triaged at the Legal Services Counters before consulting a lawyer, they are given a discount on their required copayments for the services lawyers provide them.<sup>96</sup> Thus, between the legal services counters and the compensated private lawyers, Dutch low and moderate income citizens have access to a full range of services and early triage to match problem to solution.<sup>97</sup>

During 2014, the Legal Services Counters were contacted for “first level” advice and assistance more than 700,000 times: 375,000 times by telephone, 276,000 times in person, and 35,000 times by e-mail. Legal Services Counters staff held a “consultation hour” with clients 48,500 times and contacted the other party in 3500 cases.<sup>98</sup> The most common inquiries related to labor/employment (20%), family (20%), and contract/consumer (16%) issues. Only four percent involved potential criminal cases.<sup>99</sup> Meanwhile, compensated private lawyers supplied “second level” legal aid in 421,000 cases of which twenty-nine percent were criminal and twenty-two percent family. Only three percent were labor/employment and six percent contract/consumer even though these two case types ranked near the top of the inquiries received by Legal Services Counters.<sup>100</sup> (In a sense, this tracks the results of the English survey discussed above, where interviewees reported confronting

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94. INT’L LEGAL AID GRP., *supra* note 91, at 14.

95. *Id.*

96. It is expected this incentive will be abolished in the near future and the discount extended to all clients. E-mail from Peter van de Biggelaar, Chairman, Dutch Legal Aid Board, to author (Nov. 27, 2015).

97. Finland has a legal aid system that resembles the Netherlands, but with some different twists. First, its network of offices is staffed primarily by lawyers with only a small coterie of paraprofessionals. Second, while those offices provide all the legal advice and assistance not related to litigation (with no time limit on the help provided) its staff lawyers also handle some of the litigation, both civil and criminal. Each client involved in litigation is given the choice between a salaried staff lawyer or a compensated private counsel, and about a third of them choose staff from one of the centers. See INT’L LEGAL AID GRP., *LEGAL AID IN FINLAND* (2015).

98. *LEGAL AID IN THE NETHERLANDS*, *supra* note 91, at 7 tbl.2.

99. *Id.* at 7 fig.3.

100. *Id.* at 12 tbl.6.

consumer problems more often than any other category, yet taking few of those to lawyers.<sup>101</sup>)

Remembering the Netherlands has a total population of only seventeen million, these figures might seem unusually large. In the United States, with its 317 million people, the Legal Services Corporation reports its grantees serve less than a million clients each year—and most of those only receive advice and brief assistance.<sup>102</sup> True, thirty-six percent of the Dutch population is eligible for legal aid, with a personal contribution that rises as the client's income level increases. Yet eighty-four percent of those using legal aid are in the bottom income strata, below the poverty line, where the personal contribution can be waived for “have-nots.”<sup>103</sup>

### C. DUTCH ONLINE DISPUTE ANALYSIS AND ONLINE DISPUTE RESOLUTION—RECHTWIJZER 1.0 AND 2.0

Side by side with the Legal Services Counters, the Dutch Legal Aid Board has recently introduced an interactive online problem analysis system for certain types of cases. This innovation is motivated primarily by a desire to provide disputants with an alternative for analyzing their problem without going to a lawyer, an alternative that allows them greater control, to set their own pace, and typically at a lower cost.<sup>104</sup> As a likely byproduct, this alternative may well divert cases away from high cost court resolution of the dispute and the related need for government funded legal aid. Called *Rechtwijzer 1.0* (“Pathway to Justice”) this online system has been in operation for a few years and includes modules for divorce, consumer, and debt problems. Through a sequence of interactive exchanges, participants are guided through a process that makes it possible for them to understand their dispute and possible avenues to its resolution. This is designed to place the disputants in a position to resolve the dispute themselves through in-person negotiation.<sup>105</sup> *Rechtwijzer 1.0* has been evaluated and received favorable grades from users<sup>106</sup> but achieved only limited success in resolving disputes without involving the justice system or legal aid resources.

Recently, the Dutch Legal Aid Board introduced a more sophisticated version, *Rechtwijzer 2.0*, limited to divorce thus far. This software allows divorcing couples not only to analyze the dispute online and thus prepare for in-person negotiations with each other party, but also to resolve the dispute entirely online. It offers online mediation and

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101. *See supra* Part II.A.

102. LEGAL SERVS. CORP., *supra* note 12.

103. INT'L LEGAL AID GRP., *supra* note 91, at 11.

104. E-mail from Peter van de Biggelaar, *supra* note 96.

105. INT'L LEGAL AID GRP., *supra* note 91.

106. ESMÉE A. BICKEL ET AL., *ONLINE LEGAL ADVICE AND CONFLICT SUPPORT: A DUTCH EXPERIENCE* (2015).

even online third party resolution if online two-party negotiation fails.<sup>107</sup> Again as a possible byproduct, it has the potential to reduce or eliminate judicial and legal aid costs, at least to the extent a significant number of divorcing couples achieve that result online and without resorting to the courts and representation by lawyers the Board funds. At the same time, the Board sought to make that online system pay for itself by charging people an initial fee and additional fees for optional services they elect to use—such as an online mediator or online decisionmaker. Rechtwijzer 2.0 also charges for an independent review as to the fairness and soundness of any resolution the parties achieve.<sup>108</sup> As a result, it does not appear to be a system for the truly poor, but rather for those above the poverty line yet still eligible for partially subsidized legal aid—those above the bottom ten or fifteen percent of the income scale up to the forty percent level. And indeed, roughly forty percent of those who have signed up to use Rechtwijzer 2.0 so far have been legal aid eligible.<sup>109</sup>

Rechtwijzer 2.0 only began accepting disputants in early 2015 when the program designers allowed a limited number of people to proceed through the process in order to study the results and make refinements. Then on November 23, 2015, Rechtwijzer 2.0 launched publicly.<sup>110</sup> As of that date, statistics revealed that during the pre-launch test period, 395 couples had decided to try out Rechtwijzer 2.0 and 128 of those had finalized their divorces. In 147 cases, the parties had at least begun negotiations while one side was still waiting for a response from the other spouse in seventy-nine cases. As of that time, in only two cases had the couple elected to use an online mediator and in only one had they submitted the case for an online third party decision. On the other hand, thirty-eight couples had chosen to have a third party independently review their agreement to ensure it was fair and lawful.<sup>111</sup> As a result of the preliminary evaluation of the program, this independent evaluation step will be mandatory in the future.<sup>112</sup>

Rechtwijzer 2.0 is scheduled to expand to debt and landlord-tenant cases in 2016, both of which typically pit poor people against institutional parties and their lawyers—businesses, banks, and other creditors or apartment building owners or other large landlords. These disputes pose different problems than family law disputes between people who almost always come from the same economic class and also have a long standing personal relationship. As a result, these new experiments warrant close attention by those interested in considering the viability of online dispute

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107. INT'L LEGAL AID GRP., *supra* note 91; E-mail from Peter van de Biggelaar, *supra* note 96.

108. INT'L LEGAL AID GRP., *supra* note 91.

109. E-mail from Peter van de Biggelaar, *supra* note 96.

110. *Id.*

111. *Id.*

112. *Id.*



resolution as an alternative to the traditional judicial system for resolving these quite different categories of disputes.

Online dispute analysis as in *Rechtwijzer 1.0* and even online dispute resolution as in *Rechtwijzer 2.0* are in advanced stages of development in British Columbia. The BC Legal Services Society completed two waves of testing of its online analysis program called “MyLaw BC”<sup>113</sup> during January 2016. The end product of the interactive exchange between client and the software is a “what to do” list the client can print out and move ahead with resolution of the problem. Meanwhile the BC Court system has been testing and refining a full-scale dispute resolution system named the “Civil Resolutions Tribunal” for small claims cases. That system produces third party decisions of cases the parties fail to resolve between themselves and is slated to become mandatory in 2017. The only safety valve is that a party dissatisfied with the online decision can obtain an “in-person” hearing of the case.<sup>114</sup> The mandatory nature of the online process distinguishes this approach from *Rechtwijzer 2.0* and raises unique issues.

D. ENGLAND: MCKENZIE FRIENDS—“COURT NAVIGATORS” UNDER A DIFFERENT NAME

Ever since the 1970 Court of Appeal decision in *McKenzie v. McKenzie*,<sup>115</sup> most courts in England have long allowed unrepresented litigants to be accompanied by relatives, friends, or other nonlawyers when they appear before the judge without a lawyer to represent them. Whoever they are, these people are usually referred to as “McKenzie Friends.” While most often they are true friends (or relatives) an unrepresented litigant can bring anyone, including a “McKenzie Friend” who receives a fee. Some nonprofit organizations provide trained “McKenzie Friends” for people who do not have their own. Similar to the “court navigators” pilot project in New York City, these McKenzie Friends are not allowed to advocate for the unrepresented litigant, but to lead them around the courthouse, stand with them in the courtroom, answer any questions the judge may choose to address to them, and explain to the litigant what questions to ask of witnesses and arguments to make. A study that examined McKenzie Friends among other features of litigation involving unrepresented litigants reported English judges are divided in their attitude toward McKenzie Friends.<sup>116</sup> Some constrain the role McKenzie Friends can play within the courtroom, while others find

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113. See MyLawBC, <http://www.mylawbc.com> (last visited May 29, 2016).

114. A full description of the BC Civil Resolution Tribunal can be found on the system’s own website. CIVIL RESOLUTION TRIBUNAL, <https://www.civilresolutionbc.ca> (last visited May 29, 2016).

115. *McKenzie v. McKenzie* [1971] 2 AC 33 (appeal taken from Eng.).

116. See RICHARD MOORHEAD & MARK SEFTON, *LITIGANTS IN PERSON: UNREPRESENTED LITIGANTS IN FIRST INSTANCE PROCEEDINGS* (2011).

them helpful to a degree. Typical was the response quoted in a recent government report on unrepresented litigants: “It is better than having nothing for people.”<sup>117</sup> In any event, it appears that few unrepresented litigants actually bring along a McKenzie Friend when appearing in court.<sup>118</sup>

Whatever else might be said, having a McKenzie Friend does not provide one “equality of arms” when facing a litigant who is represented by a lawyer. Thus, McKenzie Friends in England might be suspect under Europe’s new Charter of Fundamental Rights of 2009 and the earlier 2005 *Steel v. United Kingdom* decision emphasizing the need for equality of arms, neither of which existed at the time of the study discussed here nor certainly of the original 1970 decision authorizing McKenzie Friends.<sup>119</sup>

#### E. GERMANY: OLD SCHOOL LEGAL AID SYSTEM FOR THE POOR AND LEGAL INSURANCE FOR THOSE ABOVE THAT LEVEL

Unlike most European countries, the German legal aid system has not changed that much since it started as one of the first on the continent in 1877.<sup>120</sup> It remains with the process most continental countries used at the beginning and is commonly found in American states for criminal and the few civil categories in which counsel is available as a matter of right. The system is administered by the judiciary with individual judges appointing private lawyers to represent low-income litigants in cases before them.<sup>121</sup> But while the German legal aid program has not changed much in the litigation context, it has added a substantial out-of-court advice program, made necessary by a Constitutional Court decision holding poor people had a constitutional right to free legal advice as well as representation in court.<sup>122</sup>

Thus, other than the fact it has managed to sustain a right to counsel in civil cases for almost 140 years, Germany has little new to teach the United States about constructing a legal aid system. It does, however, have perhaps the largest, most developed legal insurance scheme in the world. As many as forty-five percent of German households have had

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117. CIVIL JUSTICE COUNCIL, ACCESS TO JUSTICE FOR LITIGANTS IN PERSON (OR SELF-REPRESENTED LITIGANTS): A REPORT AND SERIES OF RECOMMENDATIONS TO THE LORD CHANCELLOR AND TO THE LORD CHIEF JUSTICE 55 (2011).

118. “Our analysis . . . showed very little incidence of . . . assistance by way of McKenzie Friends in family cases and only marginally more in civil cases.” MOORHEAD & SEFTON, *supra* note 116, at 248.

119. Charter of Fundamental Rights of the European Union, *supra* note 30, art. 47; *Steel v. U.K.*, 41 Eur. Ct. H.R. 22, 414, 427 (2005).

120. See CAPPELLETTI ET AL., *supra* note 6.

121. MATTHIAS KILIAN, LEGAL AID IN GERMANY (2011).

122. *Id.*

legal expense insurance (“LEI”).<sup>123</sup> In 1999, premium income on these policies approached 2.8 billion Euros, which would be the equivalent of 4.3 billion in 2015 dollars, and eight times as much as the German legal aid budget that year,<sup>124</sup> even though that budget was proportionately nearly three times the legal aid expenditures in the United States. This general pattern has continued since.

Far more comprehensive than the typical legal insurance policy available in the United States, German policy holders are entitled to representation as plaintiffs as well as defendants in a full range of litigation,<sup>125</sup> as well as advice about the problem that gave rise to the need for legal services (but not general advice about the law).<sup>126</sup> The policies cover most of the cost of representation, advice, or other assistance provided under the policy, as opposed to typical American legal insurance which only offers some level of free legal advice often over the telephone and a purported discount in hourly fees for lawyers employed to handle litigation or other substantial work.<sup>127</sup>

In Germany, in a typical year legal expense insurance has twenty-five million policies in force and earns more premium income than either fire or household insurance. In a single year, legal expense insurance funded approximately 3.6 million cases and paid out 1.5 billion Euros in legal fees and a half billion Euros in court fees. This represented an average of 15,000 Euros per lawyer and twenty-five percent of all fees German lawyers earned that year.<sup>128</sup> Of the more than three million cases legal expense insurance funded, several of the more common case types were those legal needs studies have identified as the core “poverty law” problems moderate income people also often face—contract/property law (19%), employment (15%), landlord-tenant (13.3%), and social security (2.7%). Tort cases were 22%, in part because Germany bars contingent fees, while family law only represented 3.7% of cases legal expense insurance funded, because family law cases are not covered by most LEI policies.<sup>129</sup>

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123. MATTHIAS KILIAN & FRANCES REGAN, “LEGAL EXPENSES INSURANCE AND LEGAL AID—TWO SIDES OF THE SAME COIN?” THE EXPERIENCE FROM GERMANY AND SWEDEN 6 (2003).

124. *Id.*

125. Prospective plaintiffs must pass a “merits” test which most evidently do because eighty to eighty-five percent of applications are approved. *Id.* at 7. When they do pass that test, insurance covers not only their own legal fees but also the risk of having to pay their opponents reasonable legal fees if they lose (as they would if without legal insurance and paying for their lawyer out of their own pocket). But if they win, the other side instead of their insurance company will in effect be paying their legal fees. Legal expense insurance also covers any court costs the insured would ordinarily be required to pay. *Id.*

126. *Id.* at 10.

127. *Id.* at 4–5.

128. *Id.* at 6–7.

129. *Id.* at 6–7, 10–11.

One of the keys to the success of legal insurance in Germany is that it has become ingrained in the society as an expense one incurs year in and year out, and not something you sign up for just when you either have an urgent need for a lawyer or anticipate such a need in the near future. How that tradition developed in Germany is worth further study. Why? Because to my mind at least the real difference between the availability of medical services and legal services for the middle class in the United States is not the health profession's use of "physician's assistants," "nurse practitioners," and the like, nor the fact non-doctors can own health care organizations, or any of a number of other touted "reforms" the legal profession is urged to contemplate. Instead it is the nearly universal availability in the United States of insurance to cover expenses entailed in accessing health care and the near absence of the same to cover the cost of access to justice. In both instances, of course, we are talking about access for middle-income people and above, not the poor who need fully subsidized legal services, or even lower middle-income people who need partially subsidized legal services. In other words, it is subsidies Medicaid and other programs now supply in the health care field under the Affordable Care Act.

F. PARTIALLY SUBSIDIZED LEGAL SERVICES FOR THE MIDDLE CLASSES—  
A COMMON EUROPEAN PRACTICE

Many of the innovations being considered in the United States are targeted at the middle classes more than the poor. For the most part, they seek to lower the cost of justice in one way or another in order to make it possible for those in the middle classes to afford to purchase the means of accessing justice. Ordinarily this means finding some substitute for full representation by full-fledged lawyers—substituting out-of-court advice and assistance from paralegals, or limited lawyer assistance at critical junctures in the proceedings, or nonlawyer advocates, or online legal information and assistance, or like reforms. Whether any of these provide effective access to justice and especially whether they provide equality of arms when the other side has full legal representation is very much open to question.

In any event, several European countries have addressed the problem of bringing justice to the middle classes in very different ways. As pointed out above, some nations, such as Germany, rely on the wide adoption of legal expense insurance by those with incomes above the poverty threshold. This alternative has been discussed already. But in others, it is seen as a government obligation to use tax money to ensure the middle classes have access to lawyers and thus to justice. While they provide completely free lawyers to the bottom strata who are deemed unable to afford any contribution to the cost of a lawyer, these countries partially subsidize legal fees for those above that line on a sliding scale.

That subsidy can be seen as a diminishing payment from the government as clients rise higher on the income ladder. Or alternatively it can be viewed as a system requiring escalating copayments as clients come from higher income strata.

This is not a recent innovation, but it was a change from prior practices when these nations shifted from the original model of judges appointing lawyers for poor people to more sophisticated programs in the 1970s and 1980s. When these new legal aid programs first started, several governments provided full or partially subsidized legal aid to as many as seventy or eighty percent of the population.<sup>130</sup> Even now, despite substantial cutbacks in funding and the narrowing of eligibility standards, it is not uncommon for forty percent or more of a nation's population to remain eligible for some government assistance with their legal bills.<sup>131</sup>

Once one accepts the principle that the government has an obligation to ensure that all its citizens, not just the poor, have effective access to justice, it appears to make sense for the government to provide a financial subsidy to those above the poverty line that is sufficient to ensure they can effectively access the system. After acknowledging the critical importance of legal representation in an adversary system,<sup>132</sup> the California legislature found:

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 these cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.<sup>133</sup>

But some would ask how could the process used to resolve disputes in American courts be so expensive that middle class people cannot afford effective access without government providing them a subsidy? The common answer is because lawyers charge exorbitant fees. So, let us get people who are willing to do the same work for less money. Or let us get the judges to do the work lawyers are expected to do. Or let us come up with a host of other suggestions as to how to cheapen the process for the litigants so a government subsidy is not needed.

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130. In Sweden, for instance, from 1973 to 1997, eighty-five percent of the population was entitled to fully or partially subsidized legal aid, depending on the legal costs involved. This was before the government switched to a nationwide legal insurance scheme to provide legal representation to those above the poverty line. KILIAN & REGAN, *supra* note 123.

131. INT'L LEGAL AID GRP., *supra* note 91; INT'L LEGAL AID GRP., *supra* note 83.

132. See Sargent Shriver Civil Counsel Act, A.B. 590, 2009 Assemb., Reg. Sess., § 1, subsec. i (Cal. 2009) ("The adversarial system of justice relied on 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.").

133. Cal. A.B. 590, § 1, subsec. j.

But what if what is required to properly perform the functions the government has asked parties to carry out is inherently so complicated in many if not most cases that the average person is unable to perform those tasks herself and also unable to afford the legitimate cost of someone else who is capable of doing so. Ours purports to be a nation of laws not men. Those laws typically set out a set of criteria—sometimes called ultimate facts—that must be proven to establish a claim or a defense. Finding out what those ultimate facts are in a given case, gathering the evidence that will prove them, and then organizing and presenting that evidence to the judge requires knowledge and expertise most laypeople do not possess. It is relatively easy for someone, a paralegal for instance, or a computer for that matter, to ask some questions and generate a document that states a claim or a defense—usually called a complaint or an answer. But that is the bare beginning of the process and the easiest to perform or to commodify. It is quite a different matter requiring far more knowledge and expertise to find and assemble the *admissible* evidence—witnesses, documents, and so on—to prove the elements of the claim or defense set forth in that complaint or defense. And even more talent and knowledge and experience is required to present that evidence in court and then test the admissibility of an opponent's evidence through objections and its credibility through cross-examination.

So is it unreasonable for the government to provide subsidized legal representation to lower middle class and even middle class people? Nations that have done so have viewed providing justice in private litigation to be a public good, ensuring the laws and policies they enacted are enjoyed by the people they were intended to protect. And, as a public good it is treated as a public responsibility. And the responsibility is not just to provide the arena for the contest to take place—the courtroom and the judge to decide who won—but also the resources the parties need for them to have a chance to produce a correct and just result. When one side already has those resources but the other does not, in these countries it is the government's responsibility to provide the other side a subsidy sufficient for them to employ a lawyer in order to even the odds, that is, to guarantee the equality of arms so essential to equal access to justice and thereby a fair hearing.

To me at least that appears a better way of providing equal justice to the lower middle and middle classes than asking them to take on a lawyer in the courtroom with no one at their side except possibly a friend or relative or some other “McKenzie Friend” (or the equivalent) who is no match for a trained lawyer even if allowed to speak. When neither side can afford a lawyer, it is possible to conjure a range of options that often but not always can offer equal justice to both sides without either having counsel. But subsidized access for the middle classes might be

essential in many cases when they face well-heeled adversaries who have counsel as they often do. In addition to making sense in access to justice terms, extending government subsidized legal aid to those above the poverty level has political benefits, too. The more voters who have a personal stake in an adequately funded legal aid program the broader the base of political support for that program.

#### CONCLUSION

After this whirlwind but necessarily selective worldwide tour of legal aid, its alternatives, and some related research, different people obviously will draw different conclusions. So this is only one person's view of what we might learn from certain access to justice endeavors abroad.

First, it is possible our government will finally accept the responsibility to deliver on the promise of justice for all by appropriating the comparatively small amount of funding necessary to do so. This is in large part because other nations have found it feasible as well as critically important to do so.

Second, it appears important if a nation is to have a cost-effective delivery system that it has an easily accessible first-line resource that performs triage, offers legal advice, solves problems that can be handled without lawyers, and refers those that need lawyers to the right legal aid office or lawyer. It is equally important that any referrals are accurate in order to avoid "referral fatigue."<sup>134</sup> The Dutch network of "legal aid counters" appears to be a promising model, and especially promising if those offices are open to people without regard to their income, as is true of "Citizens Advice Bureaus" which perform a similar "first line" function in the United Kingdom. The Dutch offices, on the other hand, have the advantage of being part of a unified national system and fully integrated with the legal aid part of that system—in contrast to the locally funded and managed "Citizens Advice Bureaus."

Third, different low-income populations access services through different means—Internet for some, cell phones for others, telephones for still others, and old fashioned in-person meetings for many. Thus, a legal aid system should not limit access to one of those methods of communication, but offer alternative pathways for those seeking its services. Once again, the Dutch first-line legal services offices offer an example of multiple entry points for those desiring to access the services

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<sup>134</sup> "Referral fatigue" represents the fall off that occurs as people trudge from one erroneous referral agency to another, soon giving up. It was documented and quantified by the English legal aid study. See INT'L LEGAL AID GRP., *supra* note 83.

offered at those offices and the referrals it is in a position to make rather than relying on a single mandatory call-in or online program.<sup>135</sup>

Fourth, in the same vein, it is important when offering alternative ways of resolving disputes—mediation, arbitration, online dispute resolution and so on—that they be voluntary options and not replacements for the courts. *Rechtwijzer 1.0* and especially *Rechtwijzer 2.0*, for instance, show promise as alternative ways for some people to resolve certain disputes online or at least by themselves with online assistance. And, to the extent these alternatives succeed, these will be disputes that do not have to be litigated in the courts. This is all good. But the Dutch are careful to allow participants in these online dispute resolution programs to opt out and take their dispute to the court system, including receiving legal aid to litigate the case, if financially eligible. If an alternative is a good way of resolving certain kinds of disputes, it will attract a large number of disputants without compelling people to use it and be of help both to its users and those who instead choose the courts. But alternative dispute resolution, online or off, if compulsory, appears to be a denial of equal access to justice rather than a means of achieving same.

We now stand on the cusp of what could be a historic moment for effective access to justice in the United States. For the past few years, momentum has been building in the legal profession and the courts to put access to justice for all at the top of the agenda. Just recently, the Conference of Chief Justices and the Conference of State Court Administrators passed a unanimous resolution endorsing the concept and the goal of “100 percent access to *effective* assistance for essential civil legal needs.” The resolution further urged its members “to provide leadership in achieving that goal and to work with their Access to Justice Commission or other such entities to develop a strategic plan with realistic and measurable outcomes.”<sup>136</sup>

Properly implemented, this resolution could fuel a movement that brings America into a new era where anything short of equal justice for all will not be tolerated. But it will take more than the judiciary and the legal profession to accomplish that mission. Why? Because it will require an infusion of tax money if low and moderate income Americans are to have truly “effective assistance” and not just “some assistance” in the courts and administrative forums, especially when facing “well-counseled” adversaries.<sup>137</sup> That means “equal justice for all” must become important to

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135. Under the English government’s recent legal aid “reforms” citizens seeking legal aid must contact the program through a single national calling center. INT’L LEGAL AID GRP., *supra* note 83.

136. NAT’L CTR. FOR STATE COURTS, CONFERENCE OF CHIEF JUSTICES, CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION 5: REAFFIRMING THE COMMITMENT TO MEANINGFUL ACCESS TO JUSTICE FOR ALL (2015) (emphasis added).

137. For an example of a statute that might implement a right similar to that contained in the European Community’s recently adopted Charter of Fundamental Rights that guarantees, “Legal aid



the general public, thought leaders, and legislators, just as it is to many of those in this audience already.

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shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice," and thus provide truly "effective assistance" to all, see Johnson, *Equality Before the Law*, *supra* note 7, at 179. This draft statute not only guarantees a lawyer when needed, but also guarantees lesser levels of representation and assistance in the circumstances where they are capable of achieving truly effective access to justice. The statute also provides partially subsidized assistance for working class and lower middle class people, along with free services for the poor.