

## PASSPORT FOR CIVIL GIDEON: EUROPEAN PERSPECTIVES ON THE CIVIL RIGHT TO COUNSEL

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“Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”

–Justice Lewis Powell<sup>1</sup>

In the back of a New Haven courtroom, a mother quietly cried to herself.<sup>2</sup> Too ashamed to give her name to the reporter, she said was unemployed, owed over \$2,000 in child support, and had “no idea” how to represent herself.<sup>3</sup> The father of her children had an attorney with polished shoes and a briefcase full of documents.<sup>4</sup> Like many women,<sup>5</sup> however, the mother could not afford one.<sup>6</sup> She had applied for legal aid, but because states are not required to provide attorneys to civil litigants, and because most legal aid organizations are desperate for cash, she was denied help.<sup>7</sup> “I don’t know what my rights are[,]” she told the journalist, “[w]hen someone else has an attorney, they know all the ins and outs and I don’t.”<sup>8</sup>

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<sup>1</sup> ABA Task Force on Access to Civil Justice et al., Rept. to the House of Delegates, 2 (2006), available at <http://abanet.org/legalservices/sclaid/downloads/06A112.pdf>.

<sup>2</sup> Avi Salzman, *Going it Alone in Divorce Court*, N.Y. TIMES, Sept. 11, 2005, available at <http://www.nytimes.com/2005/09/11/nyregion/nyregionspecial2/11ctdivorce.html?scp=1&sq=going%20it%20alone%20in%20divorce%20court&st=cse>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Legal Servs. Corp., What is the Legal Services Corporation?, <http://www.lsc.gov/about/lsc.php> (last visited Apr. 12, 2009) (describing how three out of four legal aid clients are women).

<sup>6</sup> Avi Salzman, *Going it Alone in Divorce Court*, N.Y. TIMES, Sept. 11, 2005, available at <http://www.nytimes.com/2005/09/11/nyregion/nyregionspecial2/11ctdivorce.html?scp=1&sq=going%20it%20alone%20in%20divorce%20court&st=cse>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Sadly, had this mother been born in a different country, she might not have had to face the courtroom alone. Unlike the United States where only indigent criminal defendants receive government-appointed attorneys,<sup>9</sup> most European countries recognize that the right to civil counsel is fundamental.<sup>10</sup> In doing so, these countries must spend more money on legal services for the poor and they must provide civil lawyers to indigent citizens. As a result, 29% of the population in the United Kingdom qualifies for legal aid assistance,<sup>11</sup> compared to only 16% of Americans.<sup>12</sup> In Sweden, 97% of the population has access to legal help through legal insurance plans.<sup>13</sup>

This report critiques the United States' approach to legal aid and the civil right to counsel in light of European systems. Part I of this report gives an overview of the right to counsel and legal services within the United States and shows that there is a continued need to expand those services and recognize a civil right to counsel. Part II looks at European approaches to providing

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<sup>9</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the U.S. Constitution guaranteed counsel for poor criminal defendants).

<sup>10</sup> At least forty-seven European countries recognize the right as members of the European Council. See, e.g., Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 771 (2006) (listing countries that recognize a civil right to counsel in some form).

<sup>11</sup> See Jon Robins, *Legal Aid in 21st-Century Britain*, THE GUARDIAN, Mar. 12, 2009, available at <http://www.guardian.co.uk/money/2009/mar/11/legal-aid-justice-gap>.

<sup>12</sup> There are approximately forty-nine million low-income persons with income levels at 125% of the poverty line or lower which is the income required to receive legal aid. U.S. CENSUS BUREAU, PEOPLE BELOW POVERTY LEVEL AND BELOW 125 PERCENT OF POVERTY LEVEL BY RACE AND HISPANIC ORIGIN: 1980 TO 2005, available at <http://www.americanfactfinder.biz/compendia/statab/2008/tables/08s0689.pdf>. The population of the United States is approximately 304,000,000. CIA, *The World Fact Book*, The United States, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Apr. 13, 2009).

<sup>13</sup> C.M.C. VAN ZEELAND AND J.M. BARENDRECHT, CTR. FOR LIABILITY LAW, LEGAL AID SYSTEMS COMPARED: A COMPARATIVE RESEARCH INTO THREE LEGAL AID SYSTEMS (2003), available at <http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf>.

civil counsel to indigent parties, and specifically focuses on the legal aid scheme in England and legal insurance in Sweden. Part III argues that the United States should recognize the right to civil counsel and expand services to lower-income litigants by using other countries as models. This report concludes that the United States must increase funding for legal services and expand access to justice initiatives. By doing so, Americans like the New Haven mother mentioned above will finally receive “equal justice under the law.”

## **I. THE RIGHT TO COUNSEL IN THE UNITED STATES**

The right to counsel in the United States accords with many Americans’ beliefs about justice—that is, that justice should not only be available for people wealthy enough to afford it.<sup>14</sup> Every child in the U.S. pledges allegiance to a country that provides “liberty and justice for all.” Lady Justice has her eyes blindfolded. The Statue of Liberty wants the world’s tired and poor. And the Constitution declares that states cannot deprive any person of “life, liberty, or property” without due process of law, nor deny any citizen “equal protection of the laws.”<sup>15</sup> The Supreme Court, however, has only recognized a right to counsel for criminal cases. As a result, indigent parties have to rely on a “charity system” for civil legal services.<sup>16</sup> *Pro bono* lawyers, self-help centers, and legal aid societies attempt to fill in the discrepancies left by a market-based legal system. But with inadequate funding and strict eligibility requirements, this charity system continually struggles to meet its demand and leaves many poor citizens alone in a legal labyrinth.

### **A. Supreme Court Decisions: A Right to Counsel in Criminal, But Not Civil Matters**

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<sup>14</sup> *E.g.*, Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. POL’Y 1, 3 (2003) (“Seventy-nine Percent of Americans believed the Constitution guaranteed a lawyer to those who could not afford one.”); *see also* Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. S83, S86 (2004).

<sup>15</sup> U.S. CONST. amend. XIV.

<sup>16</sup> *E.g.* Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. S83, S101 (2004).

In *Gideon v. Wainwright*,<sup>17</sup> the Supreme Court unanimously found that the Sixth Amendment guaranteed “assistance of counsel” to any person facing state criminal charges who could not otherwise afford a lawyer.<sup>18</sup> Writing the opinion in 1963, Justice Black noted that a person “haled into court, . . . too poor to hire a lawyer[, could not] be assured a fair trial unless counsel is provided for him.” This was an “obvious truth” for Justice Black. The rules of evidence, the complexity of common law, and confusing court procedures puzzle “[e]ven the intelligent and educated layman.”<sup>19</sup> From the founding of this nation, Justice Black wrote, U.S. laws “have laid great emphasis on procedural and substantive safeguards designed to assure fair trials[.]”<sup>20</sup> Absent an attorney at a criminal hearing, the right to a fair trial becomes endangered. Despite precedent that claimed otherwise,<sup>21</sup> not providing counsel to indigent criminal defendants thus violated the Sixth Amendment of the Constitution, incorporated to the states through the Fourteenth Amendment.<sup>22</sup>

The promise of “justice for all” was thus starting to be realized. *Gideon* expanded public defender systems, and a year after the case, President Lyndon Johnson announced his “War on Poverty.” Seeking to diminish the devastation of a nineteen-percent national poverty rate, President Johnson created vast government programs to help the poor. This was the first time the federal government gave money to legal aid.<sup>23</sup> Volunteers in Service to America, for example, recruited lawyers for underserved areas. In 1974, Congress created the Legal Services

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<sup>17</sup> 372 U.S. 335 (1963).

<sup>18</sup> *Id.* at 341–44.

<sup>19</sup> *Id.* at 344.

<sup>20</sup> *Id.* at 344.

<sup>21</sup> *Id.* at 339. (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

<sup>22</sup> *Id.* at 341–44.

<sup>23</sup> ABA Task Force on Access to Civil Justice et al., Rept. to the House of Delegates, 2 (2006), available at <http://abanet.org/legalservices/sclaid/downloads/06A112.pdf>, 4 (“It was not until 1965 that government funding first became available for civil legal aid as part of the War on Poverty.”).

Corporation to give grants to legal aid centers across the U.S. For many poverty activists, it seemed that a civil version of *Gideon v. Wainwright* might well be on its way.

In 1981, however, this hope abated. In *Lassiter v. Dept. of Soc. Servs.*,<sup>24</sup> the Supreme Court determined that the Due Process Clause of the Fourteenth Amendment did not require states to provide counsel to a mother facing the termination of her parental rights. The Court found that there was only a “presumption” of a right to counsel when the losing litigant was deprived of “physical liberty.”<sup>25</sup> When physical liberty of the litigant was not threatened, the question of whether a litigant’s due process rights were violated depended on factors set forth in *Mathews v. Eldridge*.<sup>26</sup> That is, a court should consider the litigant’s interest, the government’s interest, and the risk of an erroneous decision in absence of the claimed right—which in this case was assistance of counsel.<sup>27</sup> Weighing those factors, the Court found that *Lassiter*’s due process rights were not violated when the state did not provide her counsel even though she clearly failed to grasp how to establish her defenses and cross-examine witnesses.<sup>28</sup>

After *Lassiter*, courts have largely engaged in a case-by-case analysis of whether due process requires appointed counsel.<sup>29</sup> When a litigant asks for a lawyer as part of his due process rights,<sup>30</sup> states have flatly rejected his claims if his “physical liberty [was] not at stake,”<sup>31</sup> or if

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<sup>24</sup> 452 U.S. 18 (1981).

<sup>25</sup> *Id.* at 26–27.

<sup>26</sup> 424 U.S. 319, 335 (1976).

<sup>27</sup> *Lassiter*, 452 U.S. at 27.

<sup>28</sup> *Id.* at 56 n.22 (Blackmun, J., dissenting).

<sup>29</sup> See, e.g., Clare Pastor, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARING HOUSE REV. 186 (2006).

<sup>30</sup> This of course gets into the conundrum of having a litigant have to realize they have due process rights. E.g., Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. POL’Y 1, 8 (2003).

<sup>31</sup> Clare Pastor, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARING HOUSE REV. 163, 187 (2006); see, e.g., *Hughen v. Highland Estates*, 49 P.3d 1238 (Idaho 2002); *Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn. Ct. App. 1988).

having counsel would somehow not make a “determinative difference” in the case’s outcome.<sup>32</sup>

In fact, since 1981, only a few states have gone against *Lassiter*. Alaska found that its state constitution guaranteed counsel in private parental-rights termination actions.<sup>33</sup> Pennsylvania, Connecticut, North Carolina, and Tennessee have also found similar ways to skirt the Supreme Court’s opinion—at least in regards to parental-termination matters.<sup>34</sup> The right to civil counsel thus remains elusive in the U.S., and the poor must look to non-governmental sources for help.

### **B. The Charity System: Legal Aid Societies, *Pro bono* services, Pro se Clients, and Contingency Fees**

Without a constitutional right to counsel in civil cases, the U.S. relies on local legal aid organizations, *pro bono* attorneys, *pro se* help centers, and contingency fee arrangements to assist indigent persons who need an attorney. Each of these services has significant disadvantages, however, and even when they are counted together, the legal services available to lower-income Americans still fail to meet the demand.

#### **1. Legal Aid: The Legal Services Corporation, Eligibility and Budget**

Congress established the Legal Services Corporation (“LSC”) in 1974 under the Economic Opportunity Act. The non-profit’s mission is to “promote equal access to justice . . . and to provide high quality civil legal assistance to low-income persons.”<sup>35</sup> By giving grants to various organizations, the LSC allows local legal aid societies to address the needs of the poorest of the poor, but they are routinely underfunded and overburdened.

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<sup>32</sup> See, e.g., Clare Pastor, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARING HOUSE REV. 163, 186 (2006); see also *In re H.K.*, 204 WL 2667135, \*1 (Cal. Ct. App. 2004).

<sup>33</sup> Clare Pastor, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARING HOUSE REV. 163, 188 (2006); *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991).

<sup>34</sup> See, e.g., Clare Pastor, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARING HOUSE REV. 163, 188–89 (2006).

<sup>35</sup> Legal Servs. Corp., Mission Statement, <http://www.lsc.gov/about/mission.php> (last visited Apr. 12, 2009).

The LSC's national board oversees general grant implementation for legal aid societies and engages in grant-making policies.<sup>36</sup> According to its website, the Corporation routinely gives away 95% of its multimillion dollar budget<sup>37</sup> to 137 organizations in 923 offices.<sup>38</sup> Although the recipient organizations do not solely rely on LSC grants for their funding, they must follow LSC guidelines.<sup>39</sup> LSC-funded organizations, for example, cannot engage in impact litigation, such as class actions, and they must screen potential clients to determine that they meet strict eligibility requirements.<sup>40</sup>

Legal aid societies help indigent clients in designated areas with their housing, family, and consumer needs, among other things.<sup>41</sup> Closing nearly one million cases a year, these organizations help “the most vulnerable among us[.]”<sup>42</sup> Their clients encompass all races, ages, and ethnicities, although poverty impacts minorities at a far greater rate.<sup>43</sup>

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<sup>36</sup> The LSC board is made up of eleven bipartisan persons who are appointed by the President and subject to Senate confirmation. Members' terms are for three years. Legal Servs. Corp., What is the Legal Services Corporation?, <http://www.lsc.gov/about/lsc.php> (last visited Apr. 12, 2009).

<sup>37</sup> Legal Servs. Corp., LSC's Budget, <http://www.lsc.gov/about/budget.php> (last visited Apr. 12, 2009).

<sup>38</sup> Legal Servs. Corp., What is the Legal Services Corporation?, <http://www.lsc.gov/about/lsc.php> (last visited Apr. 12, 2009).

<sup>39</sup> *Id.* (“Federal funds represent nearly 42 percent of the total funding that LSC grantees receive nationwide.”).

<sup>40</sup> ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL'Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 11 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>41</sup> Legal Servs. Corp., What is the Legal Services Corporation?, <http://www.lsc.gov/about/lsc.php> (last visited Apr. 12, 2009).

<sup>42</sup> *Id.*

<sup>43</sup> *See, e.g.*, Wade Henderson & Jonathan M. Smith, *The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate*, 40 CLEARING HOUSE REV. 163, 213. The gender of legal aid clients, however, is less diverse: three out of four legal aid clients are women. Legal Servs. Corp., What is the Legal Services Corporation?, <http://www.lsc.gov/about/lsc.php> (last visited Apr. 12, 2009).

To qualify for assistance, a client’s annual income must fall below 125% of the Federal Poverty Guideline.<sup>44</sup>The graph below details the income levels necessary to qualify for legal aid in 2009.<sup>45</sup>A family of four, for example, must make less than \$28,000 a year.<sup>46</sup>As of 2005, nearly thirty-seven million Americans had an income that fell below the poverty line.<sup>47</sup>Forty-nine million Americans had an income level at or below 125% of poverty guidelines.<sup>48</sup>

1.....	\$13,538
2.....	\$18,213
3.....	\$22,888
4.....	\$27,563
5.....	\$32,238
6.....	\$36,913
7.....	\$41,588
8.....	\$46,263
*For each additional member of the Household in excess of 8, add \$4,675.	

Although the LSC claims that it is able to help more than a million people each year, a national report released by the LSC found that for every person given legal assistance, one needy person was turned away.<sup>50</sup>Collecting data from LSC grantees, the report tallied the number of

<sup>44</sup> ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL’Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 8 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *Id.*

<sup>47</sup> U.S. CENSUS BUREAU, PEOPLE BELOW POVERTY LEVEL AND BELOW 125 PERCENT OF POVERTY LEVEL BY RACE AND HISPANIC ORIGIN: 1980 TO 2005, *available at* <http://www.americanfactfinder.biz/compendia/statab/2008/tables/08s0689.pdf>.

<sup>48</sup> *Id.*

<sup>49</sup> ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL’Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 8 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>50</sup> LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 5 (2007), *available at* <http://www.lsc.gov/justicegap.pdf>.



cases organizations had to turn away because of insufficient resources.<sup>51</sup> The report was implacably thorough: It disregarded persons whose cases lacked legal merit or who were statutorily ineligible for aid.<sup>52</sup> It also left out cases referred to other organizations, as well as cases that were picked up by *pro bono* attorneys.<sup>53</sup> In the end, the report found that more than one-million cases were rejected each year by legal aid organizations simply because they lacked money.<sup>54</sup>

One of the reasons for this is because of tight budgets legal aid lawyers must work for very little pay, and this ultimately strains the organizations' ability to provide services.<sup>55</sup> With soaring prices for law school, and few loan repayments options, hiring and retaining legal aid attorneys is difficult. The starting salaries for private bar lawyers can be triple the starting salary of a legal aid attorney. It is no wonder, therefore, that the number of private attorneys providing civil legal services is more than ten times the number of public interest attorneys.<sup>56</sup> This means that throughout the U.S., there is only *one* legal aid lawyer for every 6,861 persons in potential need.<sup>57</sup>

Thus, the "major problem" in providing access to legal aid in the U.S. is "the lack of programs with sufficient funding to provide the legal advice, brief service, and extended representation necessary to meet the legal needs of low-income persons."<sup>58</sup> The LSC, after all,

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<sup>51</sup> *Id.* at 5–7.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 5 (2007), *available at* <http://www.lsc.gov/justicegap.pdf>.

<sup>56</sup> *Id.* at 15.

<sup>57</sup> *Id.*

<sup>58</sup> ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL'Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 13 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

only provides 42% of a legal aid organization's funding<sup>59</sup>—the rest must come from state support, IOLTA accounts,<sup>60</sup> or private donations.<sup>61</sup> And although the LSC is attempting to increase its budget by 20% each year, House and Senate committees recommend that its budget be cut by eighty-one million dollars.<sup>62</sup>

## **2. *Pro Bono* Services: Private Bar Volunteers and Eager Law Students**

Acting as a supplement to legal aid, private lawyers, and in some cases law students, may volunteer to take on cases for lower-income clients. Out of the 906,507 legal aid cases in 2007, 64,494 were closed by *pro bono* attorneys.<sup>63</sup> While the exact number of clients helped through *pro bono* attorneys is unknown, *The American Lawyer* estimated that in 2005, 93,175 lawyers in the nation's top 200 law firms provided 3,335,375 hours of work.<sup>64</sup>

Both the LSC and the American Bar Association (“ABA”) encourages *pro bono* work. The LSC earmarks part of its grants for programs that incorporate *pro bono* attorneys.<sup>65</sup> Because of this, LSC-funded organizations must spend roughly 12% of their grant on “private attorney

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<sup>59</sup> Legal Servs. Corp., What is the Legal Services Corporation?, <http://www.lsc.gov/about/lsc.php> (last visited Apr. 12, 2009).

<sup>60</sup> IOLTA accounts receive the interest from client's trust accounts at private firms. This interest then gets funneled into state bar association funds for low-income clients. For more information, see ABA, IOLTA Overview, <http://www.abanet.org/legalservices/iolta/ioltback.html> (last visited Apr. 20, 2009).

<sup>61</sup> *E.g.*, ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL'Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 2 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>62</sup> *Id.* at 13 (“The FY 2009 funding request from LSC was \$471,362,000 and the funding request for FY 2010 will be \$485,100,000. Nevertheless, the House and Senate Appropriations Committees both recommended \$390 million for FY 2009.”).

<sup>63</sup> ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL'Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 26 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>64</sup> *Id.*

<sup>65</sup> *See, e.g., id.*

involvement.”<sup>66</sup> The ABA similarly promotes *pro bono* work by equating it with ethical duty. Model Rule of Professional Responsibility 6.1 states that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.” Accordingly, lawyers “should aspire to render at least fifty hours” to *pro bono* activities a year.<sup>67</sup> Although these hours are not mandatory, some states have imposed mandatory reporting of *pro bono* hours.<sup>68</sup>

Law students also provide voluntary legal services to low-income clients.<sup>69</sup> Law school clinics may have special relationship with local legal aid providers and many schools give service awards to graduates who participated in *pro bono* work. In total, there are 900 law school programs that help legal aid services in some fashion.<sup>70</sup>

While *pro bono* work undoubtedly benefits legal aid providers, it by no means perfects the system. There are simply not enough available attorneys to meet the demand for free civil counsel. With strict billing requirements to fulfill, private attorneys either have no time to volunteer, or when they do have time, they rush through the cases. *Pro bono* work is often needed in legal areas in which private attorneys are unfamiliar. This in turn lengthens the time spent on the cases, slowing services for clients whose needs are often immediate. Even if every private attorney could find fifty hours a year to dedicate to *pro bono* work, this “would not

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<sup>66</sup> *Id.*

<sup>67</sup> MODEL RULE OF PROF’L CONDUCT R. 6.1.

<sup>68</sup> As of the beginning of 2009, Florida, Illinois, Maryland, Mississippi and Nevada have mandatory annual reporting. Arizona, Georgia, Hawaii, Kentucky, Louisiana, Missouri, Montana, New Mexico, Texas, Utah, and Washington all have voluntary reporting laws. ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL’Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 27 (2009), available at <http://www.ilgaconference.org/reports.htm>.

<sup>69</sup> See, e.g., Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863, 905 (2004).

<sup>70</sup> ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL’Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 2 n.1 (2009), available at <http://www.ilgaconference.org/reports.htm>.

account for even a thirty-percent drop in funding to LSC[,]”meaning that *pro bono* work cannot redress the legal services disparity alone.<sup>71</sup>

### 3. Help for *Pro Se* Clients

Legal aid organizations are also “devoting substantial time and resources” to assist people representing themselves *pro se*.<sup>72</sup> Legal Programs throughout the country run self-help centers and legal hotlines that provide information about the law and the legal process.<sup>73</sup> Clients are given the opportunity to talk with a lawyer, seek brief legal advice, and obtain referrals.<sup>74</sup> The internet has been particularly helpful to *pro se* litigants. Court forms, such as divorce petitions and wills, are widely available on the web.<sup>75</sup>

Courts, however, can have a less-than enthusiastic view of *pro se* litigants.<sup>76</sup> With limited time, judges “struggle with issues of preserving judicial neutrality . . . and achieving an outcome that is understood” by the parties.<sup>77</sup> In 2004, a group of judges filed an amicus brief with the Wisconsin Supreme Court arguing that *pro se* litigants “[r]epresent a significant and growing

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<sup>71</sup> Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. POL’Y 1, 6 n.25 (2003).

<sup>72</sup> ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL’Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009 31 (2009), available at <http://www.ilgaconference.org/reports.htm>.

<sup>73</sup> See, e.g., Homeline, <http://www.homelinemn.org/foreclosure.html> (last visited Apr. 13 2009) (providing information on hotline legal aid services for homeowners and tenants).

<sup>74</sup> *Id.*

<sup>75</sup> E.g., *id.*

<sup>76</sup> E.g., Jonathan D. Glater, *In a Downturn, More Act as Their Own Lawyers*, N.Y. TIMES, Apr. 9, 2005, available at <http://www.nytimes.com/2009/04/10/business/10lawyer.html?scp=1&sq=represent%20themselves&st=cse>; see generally Russel Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367.

<sup>77</sup> ABA Task Force on Access to Civil Justice et al., Rept. to the House of Delegates, 10 (2006), available at <http://abanet.org/legalservices/sclaid/downloads/06A112.pdf>.

burden on a judicial system which is not well-equipped to deal with them.”<sup>78</sup> The judges had “experienced first hand the burden caused by self-represented litigants”<sup>79</sup> and asked the Court to take “original jurisdiction and rule” that the “state constitution confer[] a right to appointed counsel in civil cases.”<sup>80</sup> The Court, however, did not take the case.<sup>81</sup>

For many judges and attorneys, *pro se* parties are the reason there should be a civil right to counsel. As Justice Black noted in *Gideon*, navigating through the legal system can befuddle even educated people.<sup>82</sup> Courts simply cannot give *pro se* clients all the help they might need in a case. Furthermore, while self-help centers and hotlines assist the *pro se* clients with initial problems or filling-out forms, once they are in court, *pro se* clients are by themselves.

### 3. Contingency Fees and Public Interest Law Firms

Aside from charity, underprivileged Americans may have private avenues for obtaining legal assistance. Contingency fee arrangements, which are forbidden in many European countries, allow people to hire a lawyer without paying money upfront.<sup>83</sup> Once the case is closed—through settlement or a victory at trial—attorneys collect a percentage of the client’s winnings. Supporters of contingency fees call them the “poor man’s key to the

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<sup>78</sup> Shriver Ctr., *Judge’s View of Pro Se Litigants’ Effect on Courts*, 40 CLEARINGHOUSE REV. 163, 228. A Copy of the brief is at: <http://www.povertylaw.org/poverty-law-library/case/55800/55816>.

<sup>79</sup> Brief for Judges Carl Ashley, Thomas P. Donegan, Christopher R. Foley, Mark A. Frankel, Michael D. Guolee, Michael Malmstadt, Patricia D. McMahon, Marshall B. Murray, Richard J. Sankovitz, Mary E. Triggiano, and Joseph R. Wall as Amicus Curiae Supporting Plaintiff, *Kelly v. Warpinski*, (No. 04-2999-OA), available at <http://www.povertylaw.org/poverty-law-library/case/55800/55816>.

<sup>80</sup> Shriver Ctr., *Judge’s View of Pro Se Litigants’ Effect on Courts*, 40 CLEARINGHOUSE REV. 163, 228.

<sup>81</sup> Research on Westlaw for plaintiffs’ names “Pam Kelly” and “Crystal Dimick” did not produce any case results as of April 12, 2009.

<sup>82</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>83</sup> See, e.g., Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 782 (2006).

courthouse.”<sup>84</sup>Critics, however, note that attorneys cannot set up such a fee structure for family cases—an area in which most lower-income clients have problems.<sup>85</sup> Lawyers working on contingency fees might also “vigilantly avoid unpromising cases[.]” because they want big returns.<sup>86</sup> With attorneys acting as gatekeepers, contingency fee arrangements fail to adequately supplement legal services’ insufficiencies. While “meritless claims [are] more likely [to] be kept out of courts[.]”<sup>87</sup> claims with “important legal implications[,] but limited pecuniary prospects” will also be shut out.<sup>88</sup> One study notes, in fact, that case-acceptance rates for contingency-fee attorneys can be as low as eight percent.<sup>89</sup>

### **C. The Continued Need for Civil *Gideon***

With all these services—legal aid, *pro bono* work, *pro se* help, and even contingency fees—there is still a dire need for legal services for poor people in the United States. An oft-cited statistic claims that only 20% of lower-income people have their legal needs addressed.<sup>90</sup> Because of this, attorneys, judges, and well-known organizations have revived the call for a “civil *Gideon*.”

#### **1. Unmet Need and the Inadequate Funding of Legal Services for the Poor**

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<sup>84</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT’L L. 863, 895 (2004).

<sup>85</sup> See, e.g., *id.*; see also MODEL RULE OF PROF’L CONDUCT R. 1.5(d).

<sup>86</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT’L L. 863, 895 (2004) (quoting Virginia Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT’L L. & BUS. 272, 324–26 (1999)).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (quoting Virginia Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT’L L. & BUS. 272, 324–26 (1999)).

<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. POL’Y 1, 3 (2003); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 13 (2007), available at <http://www.lsc.gov/justicegap.pdf>.

The LSC estimates that low-income persons run into legal problems multiple times a year.<sup>91</sup> If low-income persons are defined as people with income levels at 125% of the poverty line or lower, then there are over forty-nine million Americans with manifold legal needs.<sup>92</sup> According to the LSC, “only a very small percentage of the civil legal problems experienced by low-income people . . . are addressed with the assistance of either a private (pro bono or paid) or a legal aid lawyer.”<sup>93</sup> The LSC and ABA estimate that between 70 to 90% of “legal needs of the poor go unaddressed” despite all available assistance programs.<sup>94</sup> This is particularly troublesome considering that the “legal problems . . . poor families experience often relate to the very basics of life[.]”<sup>95</sup> In fact, family matters and housing issues represent the majority of cases legal aid handles each year.<sup>96</sup>

Perhaps one reason for this disparity is that the U.S. spends little money on legal resources for the poor as compared with other developed nations. The ABA documents that “[a]t the lower end[,] Germany and Finland invest over three times as much of their [GDP] as the United States” on civil legal aid programs; “[a]t the upper end, England spends [twelve] times as

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<sup>91</sup> *Id.* at 17 n.21.

<sup>92</sup> U.S. CENSUS BUREAU, PEOPLE BELOW POVERTY LEVEL AND BELOW 125 PERCENT OF POVERTY LEVEL BY RACE AND HISPANIC ORIGIN: 1980 TO 2005, *available at* <http://www.americanfactfinder.biz/compendia/statab/2008/tables/08s0689.pdf>.

<sup>93</sup> LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 4 (2007), *available at* <http://www.lsc.gov/justicegap.pdf>.

<sup>94</sup> Russel Engler, *Toward a Context-Based Civil Right to Counsel Through “Access to Justice” Initiatives*, 40 CLEARINGHOUSE REV. 163, 197 (2006) (citing LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA (2007), *available at* <http://www.lsc.gov/justicegap.pdf>).

<sup>95</sup> Wade Henderson and Honathan M. Smtih, *The right to Counsel and Civil Rights: An Opportunity to Broaden the Debate*, 40 CLEARINGHOUSE REV. 210, 212 (2006).

<sup>96</sup> Legal Servs. Corp., What is the Legal Services Corporation?, <http://www.lsc.gov/about/lsc.php> (last visited Apr. 12, 2009) (noting that 38% of cases are family and 25% are housing).

much of its GDP as the U.S. does to provide civil legal aid to its citizens.”<sup>97</sup>In 2009, for example, the LSC budget for the United States was \$390,000,000<sup>98</sup> which amounts to less than \$1 per person.<sup>99</sup>Brittan, on the other hand, spends £38, or \$51, per person on legal aid in that same year.<sup>100</sup>

Worse still, the U.S. has actually decreased “its commitment to legal services” by more than 50% over the last twenty-five years.<sup>101</sup> In 1981, the LSC received \$321 million for funding. In 1999, it received 300 million, but in order to meet the 1981 level and adjust for inflation, the LSC should have received \$600 million.<sup>102</sup>

For the last twenty years, “there has been a radical shift in funding from LSC and federal sources to a far more diversified funding base” that includes state funding and private bar donation.<sup>103</sup> As noted, the LSC only provides part of the funding for legal services for the poor. Legal aid funding in 2008, for example, totaled \$1,179,499,253, but only \$ 311,042,253 of that

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<sup>97</sup> ABA Task Force on Access to Civil Justice et al., Rept. to the House of Delegates, 4 n.4 (2006), available at <http://abanet.org/legalservices/sclaid/downloads/06A112.pdf>.

<sup>98</sup> websites under “press release.” The population of the United States is approximately 304,000,000. CIA, The World Fact Book, The United States, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Apr. 13, 2009).

<sup>99</sup> Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. POL’Y 1, 33 (2003).

<sup>100</sup> Note that this is for both criminal and civil cases. CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 3 (2009), available at <http://www.ilgaconference.org/reports.htm>.

<sup>101</sup> ABA Task Force on Access to Civil Justice et al., Rept. to the House of Delegates, 12 (2006), available at <http://abanet.org/legalservices/sclaid/downloads/06A112.pdf>.

<sup>102</sup> Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. POL’Y 1, 4 (2003).

<sup>103</sup> ALAN W. HOUSEMAN, CTR. FOR L. & SOC. POL’Y, NATIONAL REPORT: UNITED STATES: CIVIL LEGAL AID IN THE UNITED STATES, AN UPDATE FOR 2009,17(2009), available at <http://www.ilgaconference.org/reports.htm>.



was through the LSC.<sup>104</sup> Organizations thus rely on insecure funding sources, such as donations and foundations, and low-income citizens receive different levels of access to help depending on how much money their state allocates for services. While the LSC spent \$8.92 per low-income person in 2008,<sup>105</sup> because of all other funding, the amount of money spent per low-income person in each state varied from \$10 per person to nearly \$100 dollars.<sup>106</sup> This disparity is concerning and the meager fiscal support for legal aid services has led the ABA to conclude that “as of today[,] . . . only a fortunate few of those unable to afford counsel enjoy effective access to justice[.]” The civil right to counsel, it argues, must be seriously considered again.

## **2. American Bar Association Resolution and State Pilot Programs**

On August 7, 2006, the ABA resolved that federal and state governments should provide counsel to persons who cannot afford lawyers in “categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health[,] or child custody.”<sup>107</sup> It declared, in fact, that despite what the Supreme Court said in *Lassiter*, legal counsel was “a matter of right[.]”<sup>108</sup> The ABA argues that “when important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access[.]”<sup>109</sup> Meaningful access means that a litigant receives

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<sup>104</sup> *Id.* at 15. \$211,706,000 of the funding came from state governments, \$169,761,500 from IOLTA accounts; \$169,761,500 from foundations; \$59,609,500 from private donations; and \$237,055,000 of funding came from “other public funding[.]” *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> For a list of state expenditures, see *id.* at 15.

<sup>107</sup> ABA Task Force on Access to Civil Justice et al., Rept. to the House of Delegates, 1 (2006), available at <http://abanet.org/legal services/sclaid/downloads/06A112.pdf>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 3. (noting that the ABA had argued this in a prior amicus brief).

“affirmative [legal] assistance so that he may participate in the proceedings” if he would effectively be unable to do so without assistance.<sup>110</sup>

Along this line, state bar associations formed “civil *Gideon*” taskforces. In 2004, California formed an Access to Justice Commission and drafted a model statute providing a right to civil counsel.<sup>111</sup> Massachusetts also enacted a taskforce and in 2009, the state initiated pilot programs that sought to expand access to the courts.<sup>112</sup> Changing legal services at home, however, would be greatly benefited by looking at legal aid systems in other nations. While perhaps no country is perfect, many other countries recognize the right to civil counsel and provide comprehensive legal services to their citizens.<sup>113</sup>

## II. EUROPEAN PERSPECTIVES ON THE CIVIL RIGHT TO COUNSEL

At least forty-seven European countries, Australia, Canada, India, New Zealand, Hong Kong, Japan, Zambia, South Africa, and Brazil recognize a right to civil counsel in some form.<sup>114</sup> Europe appears to have some of the most advanced systems of providing legal services to their citizens. While each country has its own unique system, European approaches have an important similarity: the right to civil counsel is extensive and fundamental. Looking first at European Council members, then specifically at the United Kingdom and Sweden, this section provides an overview of ideas that might help augment legal services in the United States.

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<sup>110</sup> *Id.*

<sup>111</sup> See generally Clare Pastore, *the California Model Statute Task Force*, Clare Pastor, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARING HOUSE REV. 176, 176 (2006).

<sup>112</sup> See BOSTON BAR ASSOCIATION TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON’S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 25 (2008), available at [http://www.bostonbar.org/prs/nr\\_0809/GideonsNewTrumpet.pdf](http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf).

<sup>113</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863(2004).

<sup>114</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 771 (2006).

### **A. The Council of Europe and Europe in General: The Right to a Fair Hearing Means the Right to Counsel**

There are currently forty-seven members of the Council of Europe.<sup>115</sup> The Council was founded in 1949 for the “primary purpose” of defending human rights and democracy.<sup>116</sup> A year later, members of the Council signed the European Convention on Human Rights and established the European Court of Human Rights (“European Court”) to review and monitor countries’ compliance with the Convention.<sup>117</sup> In 1979—two years before Abby Gail Lassiter fought in the U.S. Supreme Court for her right to an attorney—the European Court determined that the Convention’s right “to a fair and public hearing”<sup>118</sup> required its signatories to provide “effective access to the court.”<sup>119</sup>

In *Airey v. Ireland*,<sup>120</sup> Johanna Airey wanted to divorce her husband but she lacked the money for an attorney. Airey asked the court to provide her with counsel,<sup>121</sup> but when the judge refused, Airey appealed the decision to a higher court in Ireland and lost again.<sup>122</sup> Because Ireland was a signatory to the European Convention, however, Airey sought relief in the European Court of Human Rights.<sup>123</sup> The Court ruled in Airey’s favor, noting that access to the courts has a “prominent place” in democracy and the right to a “fair hearing” was especially

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<sup>115</sup> Council of Europe, About the Council of Europe, [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/) (last visited Apr. 13, 2009).

<sup>116</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 7769, 775 (2006).

<sup>117</sup> See, e.g., *id.*

<sup>118</sup> *Airey v. Ireland*, 2 Eur. H.R. Rep. 305, P14 (1979–80).

<sup>119</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 775 (2006).

<sup>120</sup> 2 Eur. H.R. Rep. 305, P14.

<sup>121</sup> See, e.g., *id.* at 775–76; Justice 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. S90–91 (2004).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

important.<sup>124</sup> The opinion found that the European Convention on Human Rights was “intended to guarantee” rights that were not “theoretical or illusory[,] but rights that [were] practical and effective[.]”<sup>125</sup> The mere opportunity to “appear in person” before a court did not provide an applicant with “effective right of access” to the courts.<sup>126</sup> Accordingly, Ireland had violated Article 6, section 1 of the Convention by not providing counsel to Airey.<sup>127</sup>

While the European Court determined that a “fair hearing” under the Convention required that governments appoint counsel to poor people, the Court let the signatories decide the appropriate “means of achieving the right to a fair hearing.”<sup>128</sup> Because the Convention did not “in itself guarantee any particular content for the ‘rights and obligations’ in the substantive law of the Contracting States,” countries could choose the scope of the right for themselves.<sup>129</sup> In the end, the European Court only required that “when the assistance of a lawyer was indispensable for effective access to the courts” signatories would have “a legal obligation to guarantee [a] right of counsel.”<sup>130</sup> Because of this, each member state has its own system of providing counsel to indigent citizens.

The decision of the European Court in *Airey* is notably opposite of the U.S. Supreme Court’s conclusion in *Lassiter*.<sup>131</sup> Under the Convention for Human Rights, Europeans’ right to

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<sup>124</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 775 (2006).

<sup>125</sup> *Id.*; see also Justice 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. S90–91 (2004).

<sup>126</sup> *Id.*

<sup>127</sup> *E.g.*, Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 775 (2006).

<sup>128</sup> *Id.* at 779.

<sup>129</sup> *Id.* (quoting Andrew le Sueur, *Access to Justice Rights in the United Kingdom*, 5 EUR. H.R.L.REP, 463 (2000)).

<sup>130</sup> *Id.* at 775.

<sup>131</sup> *Compare Lassiter v. Dept. of Soc. Servs*, 452 U.S. 18 (1981), with *Airey v. Ireland*, 2 Eur. H.R. Rep. 305, P14 (1979–80).

a “fair hearing” requires assistance of counsel, but under the U.S. Constitution, due process does not. This incongruent reasoning was not based in differential history or textual analysis. Rather, the decision reached in *Lassiter* has confused scholars and has even led the Honorable Earl Johnson to brashly conclude that “[s]omehow legal representation is essential to fundamental fairness in Western Europe but not in the United States.”<sup>132</sup> In fact, many countries in Europe had recognized the right to civil counsel well before the European Court announced its decision.

### **B. General European Approaches: The Right and the Eligibility Requirements**

Europe has a much more fundamental concept of the right to civil counsel than the U.S. government. Prior to *Airey*, many European Council countries had already recognized the right to civil attorneys. Italy, Portugal, Spain, and Switzerland, for example, all provide lawyers to indigent citizens in their constitutions.<sup>133</sup> Other countries like England and France have had a statutory right to counsel for several decades, even centuries before the European Court’s decision.<sup>134</sup>

Compiling data of European Council countries in 2006, Raven Lidman, a clinical professor at Seattle University of Law, found that the right to attorney representation “covers a wide spectrum of civil matters” in two-thirds of the European Council countries.<sup>135</sup> While

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<sup>132</sup> Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. S83, S91–92 (2004).

<sup>133</sup> For a list of the countries, see Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863, 879–81 (2004); see also Hon. Earl Johnson, Jr., *Access to Justice: 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. SOC. JUST. 201, 205 (2004).

<sup>134</sup> France enacted its first scheme in 1851. *Id.* England has recognized some form of the right for at least five hundred years. See, e.g., *id.*; Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769 (2006).

<sup>135</sup> *Id.* at 779.

“fifteen countries use language” that suggests the right covers “all civil disputes,” she notes that matters involving family law, housing, consumer, employment, immigration, and public benefits are usually covered in all countries.<sup>136</sup> To be “covered” means that the government gives a lawyer to a qualifying litigant “for the original fact-finding hearing” and for most appeals so long as the litigant’s eligibility is “re-determined at each stage.”<sup>137</sup>

Similar to the U.S.’s legal aid system, European Council countries have parameters that determine who may receive legal aid and who should be denied. Countries first engage in income-level tests, although some citizens, such as veterans, may receive legal aid regardless of their salary.<sup>138</sup> Once financial eligibility is determined, most countries will then judge the merits of the potential client’s case.<sup>139</sup> Therefore, even if they are poor, clients can still be denied legal aid if their case does not appear to have some level of likelihood of prevailing.<sup>140</sup>

A more “significant barrier for many litigants” is the “loser pays all” philosophy that exists in about half of the Council countries.<sup>141</sup> In these countries, winners of a lawsuit are awarded “all of their lawyer fees and other costs.”<sup>142</sup> Some governments bear this burden for the losing party if he is indigent, but other governments, such as Sweden, put the burden on the litigant, no matter how empty his pockets.<sup>143</sup>

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<sup>136</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 772, 779 (2006).

<sup>137</sup> *Id.* at 780

<sup>138</sup> *Id.* at 783 (“France, Finland, Greece, Poland, and Belgium, the aged, disabled, veterans and people on social security are automatically eligible for free counsel.”). France, Denmark, and Iceland, also waive income eligibility if “the issue is of significant public interest.” *Id.*

<sup>139</sup> *Id.* at 781.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 782.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

European legal aid is not confined to specific offices or organizations as in the U.S., and European governments usually do not employ specific legal aid attorneys.<sup>144</sup> England contracts with organizations that may also provide private services to non-low-income clients, for example. And Germany compensates private attorneys for legal services to which they are appointed.<sup>145</sup>

American alternatives to legal aid such as pro bono work, pro se help centers, and contingency fee arrangements are almost nonexistent in Europe.<sup>146</sup> This does not mean, however, that Europeans falling outside the reach of legal aid schemes are necessarily “left to fend for themselves.”<sup>147</sup> First, organizations similar to the American Bar Association and public-interest firms, seek to “increase access to justice” throughout Europe.<sup>148</sup> Legal insurance, used in Sweden and Germany, also tries to provide cheap access to legal help.<sup>149</sup> Finally, legal costs in Europe might not be as exorbitant as in the U.S.<sup>150</sup> Germany, for example, actually caps fees that lawyers may collect.<sup>151</sup> German legislators and bar associations determine “fee schedules”

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<sup>144</sup> Joan Grace Ritchey, Note, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 335 (2001).

<sup>145</sup> *Id.*

<sup>146</sup> Contingency fees are starting to be used in England. See, e.g., Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863, 910 (2004).

<sup>147</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863, 908 (2004).

<sup>148</sup> *Id.* (“In the Netherlands, for example, law shops (staffed with law students), citizens’ advice bureaus (staffed with lawyer and non-lawyer volunteers), and trade unions increase access to justice for many Dutch citizens[.]”); see also *id.* at 909 (listing several organizations fomenting social justice).

<sup>149</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 787 (2006). (“In a very few countries, such as Germany, litigation expense insurance (LEI) is widely available.”).

<sup>150</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863, 909 (2004).

<sup>151</sup> *Id.*

for all types of legal work—from research to representation—and charging more than the fee schedule permits is illegal.<sup>152</sup>

In sum, Europeans enjoy a right to civil attorneys that indigent litigants in the U.S. do not. Because the right to counsel is fundamental in Europe, poorer Europeans have greater access to justice than Americans. Whether such a system would ever be feasible in the U.S. requires examining specific countries and policies. England and Wales, for example, have a statutory scheme that is comprehensive. And Sweden relies heavily on private legal aid insurance to ensure that its citizens can access legal help when needed.

### **1. A Closer Look at the United Kingdom’s Legal Aid Schemes**

Often hailed as “the most advanced [system] in the world[,]” legal aid in the U.K., specifically England and Wales, is considered a part of the welfare state that is necessary for a just society.<sup>153</sup> Because the scheme is extremely inclusive—covering approximately 29% of the population—it is also expensive. With a two billion pound budget, the government fears that the system may be unsustainable.

#### **a) History of the Right**

As an embarrassment to the U.S., England has provided civil attorneys to indigent litigants for more than five centuries.<sup>154</sup> A 1495 statute, known as the Statute of Henry VII,<sup>155</sup> required that “Justices . . . assign to . . . [a] poor person or persons, Counsel . . . and in likewise

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 881.

<sup>154</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 773 (2006); Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. S83, S88 (2004).

<sup>155</sup> *Id.*



the same Justices shall appoint attorney and attorneys for the same poor person and persons.”<sup>156</sup>

This statute waived all fees for the indigent persons in common law courts and eventually in courts of equity.<sup>157</sup> According to one scholar, “one rationale” for the statute “was to inspire confidence” and “encourage people” to seek judicial remedy in the courts which had recently turned secular.<sup>158</sup> Many new American states in fact “imported this statute . . . into their own common law” during the nation’s founding. Interestingly, the statute provided California with the “legal basis for . . . creating in forma pauperis[,]” or the right to waive court fees for indigent litigants.<sup>159</sup>

Today, the English legal aid system is an impressive statutory scheme.<sup>160</sup> Starting with the Legal Aid and Advice Act of 1949,<sup>161</sup> Brittan “formed the foundation” of the modern system, “which included all of the necessary powers to implement a comprehensive legal aid scheme.”<sup>162</sup> With its aim to continually improve justice,<sup>163</sup> the scheme evolved over the decades<sup>164</sup> and is

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<sup>156</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 773 (2006). Recall that England has both solicitors and barristers. Solicitors are attorneys who deal with every aspect of the case aside from the in court proceedings. Barristers are lawyers engaged in advocacy within the courts.

<sup>157</sup> Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. S83, S88 (2004)(discussing how the extension to courts of equity was because of “judicial decisions[.]”).

<sup>158</sup> Raven Lidman, *Civil Gideon As a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 774 (2006).

<sup>159</sup> Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham Int’l L.J. S83, S88 (2004).

<sup>160</sup> Joan Grace Ritchey, Note, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 333 (2001).

<sup>161</sup> Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51 (Eng.).

<sup>162</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863, 881 (2004).

<sup>163</sup> *Id.* (discussing how the systems have “maintained the basic goal to ‘modernize justice’ by improving access for poor citizens.” (quoting Legal Servs. Comm’n, Legal Services Commission Annual Report 2001/02 (2002), available at [http://www.legalservices.gov.uk/about\\_us/annual\\_report/lsc\\_annual\\_report\\_2001-02.pdf](http://www.legalservices.gov.uk/about_us/annual_report/lsc_annual_report_2001-02.pdf))).

now outlined in the Access to Justice Act of 1999.<sup>165</sup> The scheme sets up “an extremely thorough system of legal services” which includes criminal and civil services.<sup>166</sup> The Legal Services Commission is responsible for overseeing, evaluating, and implementing the legal aid scheme.<sup>167</sup>

## **b) How the System Works**

As detailed below, the legal aid system in England operates by contracting private organizations to do public service work. Providers then bill the government at fixed rates and impose strict eligibility requirements on the clients and cases they take.

### **(1) Legal Services Committee: The Governing Body**

The Legal Services Commission (“the Commission”)<sup>168</sup> is a “non-departmental public body[.]” covering England and Wales.<sup>169</sup> Operating under the Ministry of Justice,<sup>170</sup> the Secretary

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<sup>164</sup> Subsequent legislation included: the Legal Aid Act of 1960, which increased “financial limits;” the Legal Aid Act of 1964, which provided “costs to successful opponents paid from the Legal Aid Fund;” the Legal Aid and Assistance Act of 1972, which ““correct[ed] a serious imbalance in the Scheme;”” and the Legal Aid Act of 1988. Joan Grace Ritchey, Note, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 333 n.144 (2001). (citing SETON POLLOCK, THE ENGLISH LEGAL AID SYSTEM, IN TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 343, 344 (Vincenzo Varano ed., 1975); see also C.M.C. VAN ZEELAND AND J.M. BARENDRECHT, CTR. FOR LIABILITY LAW, LEGAL AID SYSTEMS COMPARED: A COMPARATIVE RESEARCH INTO THREE LEGAL AID SYSTEMS 4 (2003), available at <http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf> (mentioning the Legal Aid Act of 1988).

<sup>165</sup> Access to Justice Act, 1999, c. 22 (Eng.).

<sup>166</sup> Joan Grace Ritchey, Note, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 333 (2001).

<sup>167</sup> Legal Servs. Corp., All About the LSC, [http://www.legalservices.gov.uk/aboutus/all\\_about\\_lsc.asp](http://www.legalservices.gov.uk/aboutus/all_about_lsc.asp) (last visited Apr. 13, 2009).

<sup>168</sup> The acronym the Legal Services Commission actually uses is “LSC,” but to save the reader from confusing the Legal Services Corporation (“LSC”) in the U.S. with the Legal Services Commission in England and Whales, the author chooses to use “Commission.”

<sup>169</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 1 (2009), available at <http://www.ilgaconference.org/reports.htm>.

of State for Justice appoints commissioners and is the person ultimately accountable to Parliament for the Commission's actions.<sup>171</sup> The Commission works in "partnerships" with local agencies and attorneys. To receive funding, however, the agencies must earn the Commission's "Quality Mark."<sup>172</sup>

The Commission contracts with firms, non-profit advice agencies, and commercial organizations that are qualified to meet the Commission's need.<sup>173</sup> After estimating the number of cases certain geographical areas will likely have in a given time frame, the Commission runs "bid rounds" for contracts.<sup>174</sup> Bidding is an open invitation to organizations, with applications "to tender" available on the internet.<sup>175</sup> Once accepted, contracts usually begin within twelve weeks, although less time is preferred.<sup>176</sup> Firms track their hours on the Commission's software system and they are usually paid according to fixed fees, which will be describe more below.<sup>177</sup>

To ensure that only the best providers receive contracts—and to guard against firms solely seeking government handouts—the Commission scrutinizes the quality of attorneys and

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<sup>170</sup> Legal Servs. Corp., All About the LSC, [http://www.legalservices.gov.uk/aboutus/all\\_about\\_lsc.asp](http://www.legalservices.gov.uk/aboutus/all_about_lsc.asp) (last visited Apr. 13, 2009).

<sup>171</sup> Legal Servs. Comm'n, What is Legal Aid?, [http://www.legalservices.gov.uk/public/what\\_legal\\_aid.asp](http://www.legalservices.gov.uk/public/what_legal_aid.asp) (last visited Apr. 13, 2009).

<sup>172</sup> C.M.C. VAN ZEELAND AND J.M. BARENDRECHT, CTR. FOR LIABILITY LAW, LEGAL AID SYSTEMS COMPARED: A COMPARATIVE RESEARCH INTO THREE LEGAL AID SYSTEMS 4 (2003), *available at* <http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf>.

<sup>173</sup> *E.g.*, Legal Servs. Comm'n, Tenders, [tendering/civil\\_bid\\_rounds.asp](http://www.legalservices.gov.uk/public/civil_bid_rounds.asp) (last visited Apr. 13, 2009).

<sup>174</sup> *Id.*

<sup>175</sup> *E.g., id.* (describing "e-tenders").

<sup>176</sup> LEGAL SERVS. COMM'N, EAST REGIONAL SERVS. OFFICES, INVITATION TO TENDER TO DELIVER LEGALLY FUNDED SERVICES 10 (2007), *available at* [http://www.legalservices.gov.uk/docs/civil\\_contracting/East\\_Midlands\\_Information\\_for\\_Applicants\\_110708.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/East_Midlands_Information_for_Applicants_110708.pdf).

<sup>177</sup> *E.g.*, LEGAL SERVS. COMM'N, PROVIDER TRAINING PACK (2007), *available at* [http://www.legalservices.gov.uk/docs/civil\\_contracting/ProviderTrainingPack270907v1.3.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/ProviderTrainingPack270907v1.3.pdf).

agencies. Its “Quality Mark” campaign evaluates all potential and existing providers.<sup>178</sup> If the provider passes the Commission’s standards, a “Quality Mark” logo identifies the organization as being competent to give information, general help, or specialized help.<sup>179</sup> When an organization has a contract, the Commission sends surveys to their clients at random.<sup>180</sup> And agencies have to be prepared for “mystery customers” who secretly evaluate their services.<sup>181</sup> Under the terms of their contracts, agencies must “effectively monitor” their own compliance with the contracts and take “prompt and effective corrective action” if there is any failure.<sup>182</sup> This continual measure of an organization’s excellence also includes peer review.<sup>183</sup>

The Commission also supports access to justice efforts. Upholding its mission to “protect . . . basic rights” and promote fair hearings,<sup>184</sup> it recently awarded more than three million pounds to organizations to “help train young legal aid solicitors.”<sup>185</sup> The Commission also has its own legal advice helpline.<sup>186</sup> And its policy division, the Legal Services Research Centre, has worked on legal aid reform, civil legal services development, and goal monitoring.<sup>187</sup> The Centre is currently researching users’ perspectives on the criminal justice system, the

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<sup>178</sup> Legal Servs. Comm’n, Quality Mark, [http://www.legalservices.gov.uk/civil/how/quality\\_mark.asp](http://www.legalservices.gov.uk/civil/how/quality_mark.asp) (last visited Apr. 13, 2009).

<sup>179</sup> *Id.*

<sup>180</sup> LEGAL SERVS. COMM’N, UNIFIED CONTRACT STANDARD TERMS (2007), *available at* [http://www.legalservices.gov.uk/docs/civil\\_contracting/080701StandardTerms.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/080701StandardTerms.pdf).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Legal Servs. Comm’n How Peer Review Works, [http://www.legalservices.gov.uk/criminal/contracting/how\\_peer\\_review\\_works.asp](http://www.legalservices.gov.uk/criminal/contracting/how_peer_review_works.asp) (last visited Apr. 13, 2009).

<sup>184</sup> Legal Servs. Comm’n, Press Release, *150 Trainees Set to Join the Next Generation of Legal Aid Solicitors*, Oct. 21, 2008, *available at* [http://www.legalservices.gov.uk/aboutus/press\\_releases\\_8903.asp](http://www.legalservices.gov.uk/aboutus/press_releases_8903.asp).

<sup>185</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 6 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>186</sup> *Id.* at 2. The hotline received 300,000 calls last year. *Id.*

<sup>187</sup> Legal Servs. Reseach Ctr., Welcome Page, <http://www.lsrc.org.uk/index2.htm#about> (last visited Apr. 13, 2009).

effectiveness of legal advice centers, and pilot projects for “‘hard-to-reach’ . . . financially and socially excluded groups.”<sup>188</sup>

## (2) Services Provided

Community Legal Services (“CLS”) is the civil side of the Commission and it takes on about half of all providers’ matters.<sup>189</sup> CLS offers legal help in family, “social welfare” (debt, employment, housing, and welfare benefits), immigration and asylum, and mental health law.<sup>190</sup> Legal help can cover initial advice, investigation, and court assistance,<sup>191</sup> and there might be other levels of help in different areas of law. People needing help with family disputes, for example, first seek simple advice and are then channeled into mediation-type services.<sup>192</sup> The LSC does not usually fund personal injury or defamation claims, although alternative legal aid avenues such as contingency fee arrangements may be available for low-income litigations;<sup>193</sup> and the Commission may also decide to take the case if it represents public interest. In total, the CLS has helped more 250,000 people with family law issues, 125,000 with housing,

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<sup>188</sup> Legal Servs. Research Ctr., Projects, <http://www.lsrc.org.uk/projects.htm#Diversity> (last visited Apr. 13, 2009).

<sup>189</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 4 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>190</sup> Legal Servs. Comm’n, Civil Areas of Work, [http://www.legalservices.gov.uk/civil/civil\\_areas\\_work.asp](http://www.legalservices.gov.uk/civil/civil_areas_work.asp) (last visited Apr. 13, 2009).

<sup>191</sup> Council of Europe—Legal Aid—How to Benefit from it—England and Wales, [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/operation\\_of\\_justice/access\\_to\\_justice\\_and\\_legal\\_aid/England%20and%20Wales%20-%20legal%20aid%20paper.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/operation_of_justice/access_to_justice_and_legal_aid/England%20and%20Wales%20-%20legal%20aid%20paper.asp) (last visited Apr. 13, 2009).

<sup>192</sup> C.M.C. VAN ZEELAND AND J.M. BARENDRECHT, CTR. FOR LIABILITY LAW, LEGAL AID SYSTEMS COMPARED: A COMPARATIVE RESEARCH INTO THREE LEGAL AID SYSTEMS 4 (2003), *available at*

<http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf>.

<sup>193</sup> *Id.*

90,000 with debts, 90, 000 with welfare benefits, and 18,000 with domestic violence over the last year alone.<sup>194</sup>

### (3 )Getting Aid: Means, Merits and a Cost-Based Analysis

According to the Ministry of Justice, 29% of the entire English population qualifies for services under the legal aid scheme.<sup>195</sup> Eligibility for legal aid is based on income, merit, and a cost-benefit analysis. Each applicant “is considered on an individual basis[,]” but many clients are asked to contribute money to their own legal costs.<sup>196</sup> This is mostly likely because England “provides services to members of the population who are well above the poverty level[.]”<sup>197</sup>

Currently, completely free assistance is available to persons having a monthly disposable income below £300, or approximately \$444, and disposable capital worth less than £3000, or \$4,439.<sup>198</sup> Certain categories of legal assistance such as “cases concerning mental health issues [and] legal representation [of] detained persons”<sup>199</sup> do not require the recipient meet the strict financial eligibility criteria.<sup>200</sup> The graph below shows qualifying yearly incomes.<sup>201</sup>

Dependent Children in Household and Income Level Necessary	
0- 4.....	£31,884(\$47,175.24)
5.....	£34,548 (\$51,116.86)
6.....	£37,212 (\$55,058.49)

<sup>194</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 2 (2009), available at <http://www.ilgaconference.org/reports.htm>.

<sup>195</sup> See Jon Robins, *Legal Aid in 21st-Century Brittan*, THE GUARDIAN, Mar. 12, 2009, available at <http://www.guardian.co.uk/money/2009/mar/11/legal-aid-justice-gap>.

<sup>196</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 5 (2009), available at <http://www.ilgaconference.org/reports.htm>.

<sup>197</sup> Joan Grace Ritchey, Note, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 334 (2001).

<sup>198</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 7 (2009), available at <http://www.ilgaconference.org/reports.htm>.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> The Graph is taken from LEGAL SERVS. COMM’N, 2F LSC MANUAL 1, available at <http://calculator.communitylegaladvice.org.uk/ecalc/guidance.asp>.

7.....	£39,876 (\$59,000.12)
8.....	£42,540 (\$62,941.747)
*For each additional member of the Household in excess of 8, add £222 per month, £2.664 a year. <sup>202</sup>	

As noted, some legal aid recipients may have to contribute to their legal services.<sup>203</sup> For representations in family proceedings, for example, if a client’s gross income is between £315 and £733 per month, he will be liable for a portion of fees over £311.<sup>204</sup> Moreover, clients who receive money or property from their cases have to pay back some portion of their winnings. In this sense, a CLS brochures notes to clients, the money the Commission spends on legal costs “act[s] as a loan” that the client will “have to repay[.]”<sup>205</sup>The chart below gives an idea of the amount of money clients might owe if their disposable income is above three-hundred pounds.<sup>206</sup>

Monthly disposable income	Monthly contribution
£316 to £465	Quarter of income in excess of £311
£466 to £616	£38.50 + third of income in excess of £465

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<sup>202</sup> LEGAL SERVS. COMM’N, 2F LSC MANUAL 1, available at <http://calculator.communitylegaladvice.org.uk/ecalc/guidance.asp>.

<sup>203</sup> *Id*; see also LEGAL SERVS. COMM’N, PAYING FOR YOUR LEGAL AID 3 (2007), available at [http://www.legalservices.gov.uk/docs/cls\\_main/Paying\\_for\\_your\\_Legal\\_Aid.pdf](http://www.legalservices.gov.uk/docs/cls_main/Paying_for_your_Legal_Aid.pdf).

<sup>204</sup> The Funding Code : Decision Making Guidance, [http://www.legalservices.gov.uk/docs/cls\\_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples\(Sections1-14\)Sept07.pdf](http://www.legalservices.gov.uk/docs/cls_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples(Sections1-14)Sept07.pdf).

<sup>205</sup> LEGAL SERVS. COMM’N, PAYING FOR YOUR LEGAL AID 2 (2007), available at [http://www.legalservices.gov.uk/docs/cls\\_main/Paying\\_for\\_your\\_Legal\\_Aid.pdf](http://www.legalservices.gov.uk/docs/cls_main/Paying_for_your_Legal_Aid.pdf).

<sup>206</sup> LEGAL SERVS. COMM’N, 2F LSC MANUAL 1, available at <http://calculator.communitylegaladvice.org.uk/ecalc/guidance.asp>.

£617 to £733	£88.85 + half of income in excess of £616
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The charge for litigation gains is known as the “statutory charge”<sup>207</sup> and it is generally equivalent to the total gains in a case minus solicitor’s fees.<sup>208</sup> The fees can be assessed for fairness and accuracy and may be delayed (with interest) if it is reasonable to do so.<sup>209</sup> A client is otherwise obliged to pay his bill either in full or based on monthly installments.<sup>210</sup> If the client won property, the CLS will put a “charge,” or a lien, on the property until the debt is paid off or the property is sold.<sup>211</sup>

In addition to financial eligibility, a potential client’s case must have a “likelihood of . . . obtaining a successful outcome” at the end of the matter assuming the case will end at a trial or final hearing (meaning the likelihood of settlement is irrelevant).<sup>212</sup> Except for a limited number of family and mental health cases, legal aid applicants need to pass this “objective test” before a CLS provider gives legal advice.<sup>213</sup> Although most cases will be taken at least for initial advice giving if they show a 50% likelihood of success,<sup>214</sup> the Funding Code details six levels of

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<sup>207</sup> LEGAL SERVS. COMM’N, PAYING FOR YOUR LEGAL AID 3 (2007), *available at* [http://www.legalservices.gov.uk/docs/cls\\_main/Paying\\_for\\_your\\_Legal\\_Aid.pdf](http://www.legalservices.gov.uk/docs/cls_main/Paying_for_your_Legal_Aid.pdf).

<sup>208</sup> *Id.* at 4.

<sup>209</sup> *Id.* at 4–5.

<sup>210</sup> *Id.* at 5.

<sup>211</sup> *Id.*

<sup>212</sup> LEGAL SERVS. COMM’N, FUNDING CODE: DECISION MAKING GUIDANCE 33 (2007), *available at* [http://www.legalservices.gov.uk/docs/cls\\_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples\(Sections1-14\)Sept07.pdf](http://www.legalservices.gov.uk/docs/cls_main/FundingCodeDecisionMakingGuidanceGeneralPrinciples(Sections1-14)Sept07.pdf).

<sup>213</sup> *Id.* at 34.

<sup>214</sup> *Id.* at 35.



“prospects of success.”<sup>215</sup> These levels are important because some areas of law or types of cases might require a higher level of “prospects for success,” and it helps providers engage in the third eligibility hurdle: a cost-based analysis of taking the case.

Thus, imagining an attorney with the case file in front of her, the prospects-of-success levels she might fit the case into are as follows:

- (1) A Very Good Chance—defined as an “80% chance or more of obtaining a successful outcome;”<sup>216</sup>
- (2) A Good Chance – or a 60% to 80% chance of winning;<sup>217</sup>
- (3) A Moderate Chance—which is “50%–60%” odds;<sup>218</sup>
- (4) Borderline—“where the prospects of success are not poor,” but “it is not possible to say [whether] the prospects . . . are better than 50%” due to disputes in fact, law or evidence;<sup>219</sup>
- (5) A Poor Chance –it is “clearly less” than a 50% chance that the claim will fail.<sup>220</sup>

The sixth level of the prospect-of-success test is the “Unclear” category.<sup>221</sup> In this instance, the case “cannot be put into any of the above categories because further investigation is needed.”<sup>222</sup> Cases only belong to the “Unclear” category if there are “specific steps” a provider can take that will allow her to make a “reasonable estimate” of the strength of a case.<sup>223</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 36.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 35.

<sup>223</sup> *Id.* at 36.

Cost-benefit criteria also are “fundamental to the code[.]”<sup>224</sup> In each case, not only must providers judge a client’s finances and the case’s merits, but they must also consider “whether the gain of the proceeding “justifies the likely costs[.]”<sup>225</sup> The Funding Code thus divides cases into three different types of claims: quantifiable, non-quantifiable, and public interest.<sup>226</sup>For quantifiable claims, where the claim is “primarily a claim for damages by the client[.]”<sup>227</sup> funding will only be given if the case satisfies “specific [and] strict damages-to-costs ratios[.]” which vary according to the client’s prospects of success discussed above.<sup>228</sup> For unquantifiable claims, the cost-benefit test is whether the benefits will justify the likely costs of representation, “such that a reasonable private paying client would be prepared to litigate[.]” Finally, providers should only fund public interest claims if “the likely benefits of the proceedings . . . justify the likely costs[.]”<sup>229</sup>The six levels of “prospects of success” mentioned above weigh heavily into the benefits part of this analysis: the more likely it is that a client will win, the more benefit the organization, the court system, and the government will gain.

Aside from these impersonal restraints, a provider may nonetheless give services to someone if the case is of “overwhelming importance” to the client. “Overwhelming importance”

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<sup>224</sup> *Id.* at 37.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 37 –38.

<sup>227</sup> *Id.* (“The following will not generally be treated as quantifiable claims: (a) claims which include both quantifiable and non-quantifiable elements, except where the damages claim is clearly the dominant purpose of the proceedings;(b) cases which are of overwhelming importance to the client . . . (c) where the client is a defendant or third party in the proceedings; (d) cases arising from the death of a loved one[.]”).

<sup>228</sup> *Id.* at 35. (“Where the Criteria for quantifiable claims under the General Funding Code apply, the funding decision follows automatically once the figures for costs and for damages have been determined[.] The minimum cost benefit ratios in the General Funding Code are as follows: (a) if prospects of success are very good (80% or more) likely damages must exceed likely costs; (b) if prospects of success are good (60%–80%), likely damages must exceed likely costs by a ratio of 2:1; (c) if prospects of success are moderate (50%–60%), likely damages must exceed likely costs by a ratio of 4:1.”).

<sup>229</sup> *Id.* at 37; 46.

means that a case has importance to the client “beyond the monetary value (if any) of the claim[.]” This includes cases where concerns of life, liberty or physical safety of the client or his family are at issue.<sup>230</sup> Thus, even if the client only has a “Borderline” likelihood of success where the costs of representing him will outweigh its benefits, she may still receive legal aid.<sup>231</sup>

As discussed, under lenient financial eligibility requirements which allow some higher-income earners to contribute to their legal fees, many people qualify for legal aid in England. Having merit eligibility and cost-based analysis significantly limits the amount of people receiving legal aid. Because of the costs of the program on the tax payer, decreasing the amount of legal aid given away each year may be a good thing.

### **c) Costs of Legal Aid in the U.K.**

To put it bluntly, “the English legal aid system is expensive.”<sup>232</sup> Costing tax payers two billion pounds a year for both criminal and civil sectors,<sup>233</sup> England spends more money on legal aid than any other country in the world.<sup>234</sup> Comparatively, while Germany spent €4 per citizen on legal services in 2003, and Sweden spent €10, Brittan paid €34 per person for legal aid.<sup>235</sup> With this hefty contribution, the Legal Services Commission was only able to help about two million

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<sup>230</sup> *Id.* at 42.

<sup>231</sup> *Id.*

<sup>232</sup> C.M.C. VAN ZEELAND AND J.M. BARENDRECHT, CTR. FOR LIABILITY LAW, LEGAL AID SYSTEMS COMPARED: A COMPARATIVE RESEARCH INTO THREE LEGAL AID SYSTEMS 4 (2003), available at <http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf>.

<sup>233</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 1 (2009), available at <http://www.ilgaconference.org/reports.htm>.

<sup>234</sup> See Jon Robins, *Legal Aid in 21st-Century Brittan*, THE GUARDIAN, Mar. 12, 2009, available at <http://www.guardian.co.uk/money/2009/mar/11/legal-aid-justice-gap>.

<sup>235</sup> C.M.C. VAN ZEELAND AND J.M. BARENDRECHT, CTR. FOR LIABILITY LAW, LEGAL AID SYSTEMS COMPARED: A COMPARATIVE RESEARCH INTO THREE LEGAL AID SYSTEMS 5 (2003), available at <http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf>.

people with their legal problems,<sup>236</sup> whereas the U.S. spent \$390,000,000, or 2.2 billion dollars less, and was able to help a million people.<sup>237</sup>

The Government and the Commission have expressed that they want a system that “is fair to clients, fair to the taxpayer, and fair to practitioners.”<sup>238</sup> But it has found that the two-billion-pound system is simply “unsustainable,”<sup>239</sup> and has acknowledged that it is in “everyone’s interests to have a justice system that operates efficiently, quickly and proportionately.”<sup>240</sup> Thus, the Commission set out to decrease its budget by at least thirty-million pounds by 2011.<sup>241</sup>

To achieve this, the Commission moved to fixed fees which were briefly discussed above. According to the Commission, using fixed fees encourages cost effectiveness and quality assurance. Solicitors may no longer drag their feet to increase pay, but they will be forced to work efficiently. Combating the argument that “one size does not fit all[,]” the Commission works with local providers and non-profit organizations to “get the design and timing of each fee scheme right.”<sup>242</sup> The Commission also provides a way to escape the scheme in exceptional cases.

Finally, the Commission hopes to cut spending administratively and through case management. First, a “simplified bill processing” will move most of the Commission’s business toward electronic efficiency, giving contractors more flexibility and spending less time on

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<sup>236</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 1 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>237</sup> £2,000,000,000 is approximately \$2,931,000,000.

<sup>238</sup> LEGAL SERVS. COMM’N, LEGAL AID REFORM: THE WAY AHEAD 6 (2006) *available at* [http://www.legalservices.gov.uk/docs/consultations/DCA\\_Legal\\_Aid\\_Reform\\_the\\_Way\\_Ahead\\_Cm\\_6993.pdf](http://www.legalservices.gov.uk/docs/consultations/DCA_Legal_Aid_Reform_the_Way_Ahead_Cm_6993.pdf).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 7.

<sup>241</sup> *Id.* at 42. The reduction of thirty million will account for 2011 prices. *Id.*

<sup>242</sup> *Id.* at 8.

administrative billing.<sup>243</sup> Second, CLS is looking at ways to increase case efficiency. Providers working with family disputes, for example, now encourage clients to use mediation services.<sup>244</sup>

Even with these new initiatives, however, the amount of money spent on legal services in the U.K. still might not be fathomable to U.S. taxpayers. The U.K. has a population of only sixty-one million people.<sup>245</sup> To meet their level of spending—that is, the level of spending they seek to achieve with these budget initiatives<sup>246</sup>—the U.S. would have to spend over 14 billion dollars each year on legal services<sup>247</sup>—that is more than 13.9 billion than the U.S.’s 2009 budget for the U.S. Legal Services Corporation.<sup>248</sup> Because the Commission pays for both criminal and civil services, these numbers are misleading. The Commission estimates that it spends approximately 40% of its budget on civil law services.<sup>249</sup> Thus, the LSC would have to spend 5.6 billion, or \$5,210,000 million more than its 2009 budget, to meet the level of spending the U.K. spends on civil legal services.

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<sup>243</sup> *Id.* at 42.

<sup>244</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 7 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

<sup>245</sup> CIA, The World Fact Book, The United Kingdom, <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> (last visited Apr. 13, 2009).

<sup>246</sup> They want to decrease their budget by thirty million, adjust for 2011 prices. This will be an imperfect calculation, since the author cannot predict the prices for that year. Currently, the calculation would be: £2, 000,000,000 – £30,000,000= £1,997,000,000 or \$2,887,525,742.22

<sup>247</sup> £2, 000,000,000 – £30,000,000= £1,997,000,000 or \$2,887,525,742.22. The population of the United States is approximately 304,000,000. CIA, The World Fact Book, The United States, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Apr. 13, 2009). The U.K. has a population of 61, 000, 000. CIA, The World Fact Book, The United Kingdom, <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> (last visited Apr. 13, 2009). The amount of money the U.K. thus wants to spent per person per year is £32, or approximately \$47. Thus, \$47.00 x 304,000,000= \$14,288,000,000.

<sup>248</sup> The LSC’s budget for 2009 is \$390,000,000. Legal Servs. Corp., Press Release, LSC Receives \$40 Million Increase for FY 2009, March 11, 2009, *available at* [http://www.lsc.gov/press/pressrelease\\_detail\\_2009\\_T248\\_R8.php](http://www.lsc.gov/press/pressrelease_detail_2009_T248_R8.php).

<sup>249</sup> CAROLYN REAGAN, NATIONAL REPORT ENGLAND AND WALES 4 (2009), *available at* <http://www.ilgaconference.org/reports.htm>.

## 2. Sweden's Experiment: Trading Legal Aid for Legal Insurance

Sweden is often considered the pinnacle of the welfare state: it has forms of national healthcare, nationalized banks, and until recently, a type of nationalized legal aid system. In the last ten years, however, Sweden shifted its legal aid system to one that relies less on public legal aid and more on private legal insurance. While this has reduced the cost of legal aid on the taxpayer, it may leave some citizens without legal recourse.

### a) History of Legal Aid and Legal Insurance in Sweden

The Legal Aid Authority of Sweden notes that legal representation is “a fundamental right.”<sup>250</sup> While criminal assistance of counsel is constitutionally mandated, in 1919, Swedish legislatures created a right to civil counsel and required that the government compensate government-appointed attorneys.<sup>251</sup> Concerned that legal aid inadequately addressed the needs of many Swedes, however, labor unions in the 1960s fought for “legal insurance” policies which would “fill in the gaps [of] the legal aid scheme[.]” and help middle class people who did not qualify for legal aid at that time.<sup>252</sup> Within ten years of this, the public legal aid scheme, or Rättshjälpsagen, 1972:429, expanded to offer help to “most of the population” for “most legal problems[.]”<sup>253</sup> Thus, having both legal aid and legal insurance policies, Sweden briefly achieved the most “generous and comprehensive” legal aid system in the world.<sup>254</sup>

Subsequent to a recession in the 1980s, however, Sweden began to cut back on its social

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<sup>250</sup> RÄTTSHJÄLPSMYNDIGHETEN, LEGAL AID IN SWEDEN 3 (2007), available at

[http://www.domstol.se/Publikationer/Informationsmaterial/Legal\\_aid\\_in\\_Sweden.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/Legal_aid_in_Sweden.pdf).

<sup>251</sup> Joan Grace Ritchey, Note, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 332 n.126 (2001).

<sup>252</sup> MATTHIAS KILIAN AND FRANCIS REAGAN, LEGAL EXPENSES INSURANCE AND LEGAL AID—TWO SIDES OF THE SAME COIN? THE EXPERIENCES FROM GERMANY & SWEDEN 14 (2009), available at <http://www.ilganet.org/conference/ilag2003.htm>.

<sup>253</sup> *Id.* at 14.

<sup>254</sup> *Id.*

welfare programs.<sup>255</sup> Legal aid was hit in the 1990s, significantly trimming what was near-universal coverage and “redesigning” its scheme to focus on “private protection[.]”<sup>256</sup> Cuts included “more restrictive eligibility requirements” for legal aid,<sup>257</sup> limiting funds for only the “deserving poor[.]”<sup>258</sup> Applicants also “had to demonstrate” that they sought (and paid for) legal advice for their problem before seeking legal aid.<sup>259</sup> And legal aid would no longer be available for family disputes, including divorce.<sup>260</sup> All Swedes instead had to engage in “cooperation talks” as a form of mediation, though this service is free for everyone.<sup>261</sup> The most notable change, however, was that Swedes “were henceforth required” to use legal insurance for their civil disputes.<sup>262</sup>

#### **b) The State of Legal Aid**

Currently, only the lowest-earning 20% of the population is eligible for some form of legal aid, but the eligibility requirements for receiving funding are cumbersome.<sup>263</sup> First, each applicant must get at least one-hour’s worth of legal advice at their own expense.<sup>264</sup> Clients pay

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 14–15.

<sup>257</sup> Francis Reagan, *The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance*, 30 J.L. & SOC’Y 49, 53 (2003).

<sup>258</sup> MATTHIAS KILIAN AND FRANCIS REAGAN, LEGAL EXPENSES INSURANCE AND LEGAL AID—TWO SIDES OF THE SAME COIN? THE EXPERIENCES FROM GERMANY & SWEDEN 15 (2009), available at <http://www.ilganet.org/conference/ilag2003.htm>.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*; see also C.M.C. VAN ZEELAND AND J.M. BARENDRECHT, CTR. FOR LIABILITY LAW, LEGAL AID SYSTEMS COMPARED: A COMPARATIVE RESEARCH INTO THREE LEGAL AID SYSTEMS 2 (2003), available at <http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf>.

<sup>263</sup> Francis Reagan, *The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance*, 30 J.L. & SOC’Y 49, 54 (2003).

<sup>264</sup> See, e.g., *id.*; RÄTTSHJÄLPSMYNDIGHETEN, LEGAL AID IN SWEDEN 4 (2007), available at [http://www.domstol.se/Publikationer/Informationsmaterial/Legal\\_aid\\_in\\_Sweden.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/Legal_aid_in_Sweden.pdf).

fixed fees directly to providers and they can only have the fee reduced “if there are special reasons,” such as if the client makes below SEK 75,000 (\$44,384) annually or if the client is a minor child and has no income.<sup>265</sup> Legal advice typically costs SEK 1,250 (\$148), and it lasts up to two hours.<sup>266</sup> Afterwards, clients are only entitled to legal aid if the advisor determines that the client needs further legal assistance.<sup>267</sup>

Second, a person must use their legal insurance policy.<sup>268</sup> Since most legal insurance policies fall under home or car insurance, many people will not qualify for legal assistance. If someone does not have insurance, moreover, “this does not mean that [he] will be automatically entitled to legal aid.”<sup>269</sup> As the Legal Aid Authority’s brochure warns: “You cannot therefore decide not to take out home insurance and instead rely on being granted legal aid.”<sup>270</sup> Because legal insurance is so widely available,<sup>271</sup> an applicant who does not have a “‘valid reason’ to be uninsured” will not receive legal aid.<sup>272</sup>

Finally, applicants must pass both means and merits tests to be eligible for legal aid. A person must have a disposable income of less than SEK 260,000, or \$30,772.87, a year to qualify for any form of assistance.<sup>273</sup> Their case must also have some likelihood of prevailing, or being

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<sup>265</sup> *Id.* But note that if a minor child has income, they have to pay. *Id.*

<sup>266</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863, 891–892 (2004).

<sup>267</sup> *Id.* at 892.

<sup>268</sup> RÄTTSHJÄLPSMYNDIGHETEN, LEGAL AID IN SWEDEN 3 (2007), available at [http://www.domstol.se/Publikationer/Informationsmaterial/Legal\\_aid\\_in\\_Sweden.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/Legal_aid_in_Sweden.pdf).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* (“Legal protection is automatically included in virtually all Swedish home and contents, home, and residential and leisure home insurances and in comprehensive insurance of boats and comprehensive/partial motor car insurance.”).

<sup>272</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM J. TRANSNAT’L L. 863, 892 (2004).

<sup>273</sup> RÄTTSHJÄLPSMYNDIGHETEN, LEGAL AID IN SWEDEN 6 (2007), available at [http://www.domstol.se/Publikationer/Informationsmaterial/Legal\\_aid\\_in\\_Sweden.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/Legal_aid_in_Sweden.pdf). (“In



significant to the applicant.<sup>274</sup> While this merits test appears to be more lenient than other countries, recall that the case must receive a stamp of approval—given without an apparent legal test—by a one-hour legal advice giver.<sup>275</sup>

Once someone actually qualifies for legal aid, clients can receive legal help in general civil aid (excluding family disputes) and administrative aid.<sup>276</sup> The state will only pay for 100 hours of work, however, which includes investigation.<sup>277</sup> The cost of the investigation cannot exceed SEK 10,000 or \$1,183.57. And legal aid will not cover “the standard fee shifting rule, requiring the loser to pay the winner’s legal costs.”<sup>278</sup>

As in England, most recipients of legal aid must also contribute toward their legal expenses once the case has ended.<sup>279</sup> Charges depend on the client’s income and vary from 2% to 40% of the total case costs.<sup>280</sup> But the “basic idea” is that recipients of legal assistance “should

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simple terms your disposable gross income is the total of your assets and your wealth minus liabilities and support commitments”).

<sup>274</sup> Legal Aid and Advice in Sweden, [www.thelundian.com/legalaidinsweden.pdf](http://www.thelundian.com/legalaidinsweden.pdf) (last visited Apr. 13, 2009).

<sup>275</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT’L L. 863, 891(2004).

<sup>276</sup> *Id.* at 890; Legal Aid and Advice in Sweden, [www.thelundian.com/legalaidinsweden.pdf](http://www.thelundian.com/legalaidinsweden.pdf) (last visited Apr. 13, 2009).

<sup>277</sup> Council of Europe, Legal Aid—How to Benefit From It—Sweden, [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/operation\\_of\\_justice/access\\_to\\_justice\\_and\\_legal\\_aid/Sweden%20-%20legal%20aid%20paper2.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/operation_of_justice/access_to_justice_and_legal_aid/Sweden%20-%20legal%20aid%20paper2.asp) (last visited Apr. 13, 2009).

<sup>278</sup> Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT’L L. 863, 891(2004).

<sup>279</sup> RÄTTSHJÄLPSMYNDIGHETEN, LEGAL AID IN SWEDEN 7 (2007), available at [http://www.domstol.se/Publikationer/Informationsmaterial/Legal\\_aid\\_in\\_Sweden.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/Legal_aid_in_Sweden.pdf).

<sup>280</sup> Council of Europe, Legal Aid—How to Benefit From It—Sweden, [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/operation\\_of\\_justice/access\\_to\\_justice\\_and\\_legal\\_aid/Sweden%20-%20legal%20aid%20paper2.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/operation_of_justice/access_to_justice_and_legal_aid/Sweden%20-%20legal%20aid%20paper2.asp) (last visited Apr. 13, 2009).

contribute to the cost” of the aid “to the extent [they] can afford.”<sup>281</sup> There are thus, no government handouts.

In sum, legal aid in Sweden appears to have gone from being one of the most expansive systems, to being very restrictive. What is required of clients to receive aid, and what is given once they qualify, reflects a policy that is designed to control costs.<sup>282</sup> Since this has left many Swedes without legal aid, however, the government has looked back at the legal insurance policies once fought for by labor unions.

### c) Legal Insurance: How It Works and Whether It Does

While other countries have various forms of legal insurance,<sup>283</sup> Sweden relies on the policies as a supplement to legal aid. As of today, 97% of the Swedish population has legal insurance.<sup>284</sup> Bundled together with “more traditional forms of insurance such as personal liability insurance, car insurance[,] or household insurance[,]”<sup>285</sup> Swedes pay a “small premium,” or sometimes no additional premium, to cover costs arising from various legal disputes.<sup>286</sup>

In order to receive legal coverage many insurance policies require holders to have purchased the insurance before the disputed event.<sup>287</sup> Some insurance providers even require clients to “have had . . . insurance for at least two years in order to be able to make use of the

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<sup>281</sup> Rättshjälpsmyndigheten, *Legal Aid in Sweden 2* (2007), available at [http://www.domstol.se/Publikationer/Informationsmaterial/Legal\\_aid\\_in\\_Sweden.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/Legal_aid_in_Sweden.pdf).

<sup>282</sup> Lua Kamál Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 892 (2004).

<sup>283</sup> Germany, for example, has legal insurance as well. For a discussion of German legal expense insurance, see MATTHIAS KILIAN AND FRANCIS REAGAN, *LEGAL EXPENSES INSURANCE AND LEGAL AID—TWO SIDES OF THE SAME COIN? THE EXPERIENCES FROM GERMANY & SWEDEN 5* (2009), available at <http://www.ilganet.org/conference/ilag2003.htm>.

<sup>284</sup> *Id.* at 1.

<sup>285</sup> *Id.* at 4.

<sup>286</sup> *Id.*

<sup>287</sup> RÄTTSHJÄLPSPMYNDIGHETEN, *LEGAL AID IN SWEDEN 3* (2007), available at [http://www.domstol.se/Publikationer/Informationsmaterial/Legal\\_aid\\_in\\_Sweden.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/Legal_aid_in_Sweden.pdf).

legal protection[.]”<sup>288</sup>Not all legal issues are covered either. Most notably, legal insurance excludes divorce cases.<sup>289</sup>

If a policy holder needs legal help, companies typically require that clients pay a €10, or \$143, upfront fee for services in addition to a 20% contribution “towards the estimated cost of the case[.]”<sup>290</sup>Like traditional insurance, companies cap litigation expenses at roughly €1,007, or \$14,357, per year.<sup>291</sup> Although there is no data, these costs and limits might dissuade many holders from ever seeking help.

Considering Sweden’s cost-cutting goals, however, legal insurance has an outstanding performance: from 1994 to 2000, government expenditures were reduced by nearly 50%.<sup>292</sup>Nonetheless, drastic budget cuts might hurt access to justice. Legal insurance is naturally “limited in the protection it offers[.]”<sup>293</sup> And those who need it most, low-income or marginalized citizens, “are the least likely to purchase such insurance.”<sup>294</sup>

With premiums on expensive items (cars, houses, and boats), and additional charges once a legal dispute arises, legal insurance is simply insufficient as a legal aid replacement. While

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*; see also Francis Reagan, *The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance*, 30 J.L. & SOC’Y 49, 51 (2003). As mentioned above, however, this is because Sweden has pushed family disputes out of the courts and into social welfare agencies with programs such as a “cooperation talks.” See, e.g., C.M.C. VAN ZEELAND AND J.M. BARENDRECHT, CTR. FOR LIABILITY LAW, LEGAL AID SYSTEMS COMPARED: A COMPARATIVE RESEARCH INTO THREE LEGAL AID SYSTEMS 2 (2003), available at <http://www.tilburguniversity.nl/faculties/law/research/tisco/publications/reports/legal-aid-systems.pdf>.

<sup>290</sup> Francis Reagan, *The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance*, 30 J.L. & SOC’Y 49, 56 (2003).

<sup>291</sup> *Id.*

<sup>292</sup> MATTHIAS KILIAN AND FRANCIS REAGAN, LEGAL EXPENSES INSURANCE AND LEGAL AID—TWO SIDES OF THE SAME COIN? THE EXPERIENCES FROM GERMANY & SWEDEN (2009), available at <http://www.ilganet.org/conference/ilag2003.htm> (noting that expenditures went from “from €9.7 million in 1994/95 to €20.7 million in 2000”).

<sup>293</sup> *Id.* at 20.

<sup>294</sup> *Id.*

97% of Swedes have some form of legal insurance, 3% of the population are at the whim of the restrictive legal aid system detailed above.

Moreover, the legal insurance system does not appear to be user friendly. Policy holders must scramble through fine-print insurance forms. And as with any type of insurance, issues of contract law and insurance law can arise. Non-disclosure and fraud can have a devastating impact disadvantaged citizens.<sup>295</sup> And attorneys “must constantly” contemplate their duties to the client and the insurer.<sup>296</sup>

Finally, because many low-income people need simple advice, Sweden’s private-public system fails.<sup>297</sup> Legal aid requires applicants to pay for initial advice, and neither it nor insurance covers the costs. As a result, “there appears to be a significant number of ‘missing cases’ that would previously have gone to court” but are now unreported.<sup>298</sup> Although the Swedish Bar Association has responded to this problem by establishing a *pro bono* scheme, “Bar members have had difficulty in maintaining the scheme in some parts of the country and . . . the number of people receiving assistance has declined as a result[.]”<sup>299</sup> Thus, there is still a justice gap needing to be filled in Sweden.

Compared to the United States, however, Sweden, England, and other European countries have made great accomplishments in assuring their citizens receive legal help no matter their income. By recognizing the right to civil counsel as fundamental, and by securing some sort of

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<sup>295</sup> MATTHIAS KILIAN AND FRANCIS REAGAN, LEGAL EXPENSES INSURANCE AND LEGAL AID—TWO SIDES OF THE SAME COIN? THE EXPERIENCES FROM GERMANY & SWEDEN 4 (2009), available at <http://www.ilganet.org/conference/ilag2003.htm>.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 20 (“Instead what most people most often need assistance with is the commonly occurring non-litigious legal problems of every day life.”).

<sup>298</sup> Francis Reagan, *The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance*, 30 J.L. & SOC’Y 49, 51 (2003).

<sup>299</sup> *Id.* at 64.

funding scheme (be it private or public), other countries offer examples that the U.S. might do well to follow.

### **III. STEALING GOOD IDEAS: USING OTHER COUNTRIES' MODELS TO PILOT U.S. PROGRAMS**

No government has achieved the perfect legal aid model: The United Kingdom's statutory scheme, for example, may be comprehensive, but it is costly. And while Sweden's reliance on private legal aid insurance covers many of its citizens, it may compromise the neediest of cases. But regardless of their downfalls, other countries offer good ideas for equal justice initiatives. This report argues that the United States should recognize the right to civil counsel. In doing so, the U.S. must increase funding to legal aid services and expand access to justice programs. Using the U.K.'s method of contracting with private firms for public work, and by encouraging greater use of legal insurance programs, or prepaid legal service plans, the United States can minimize the justice gap.

#### **A. Recognizing the Right**

First, *Lassiter v. Dept. of Soc. Servs.* should be overturned.<sup>300</sup> Almost thirty years have passed since Ms. Lassiter muddled cross-examination of the state's witnesses and requested the help of an attorney.<sup>301</sup> At that time, no mention of international approaches to the right to civil counsel was mentioned, even though the European Court of Human Rights had recognized the right in *Airey v. Ireland* two years earlier.<sup>302</sup> Since that time, however, some members of the Supreme Court have recognized the importance of other countries' practices.<sup>303</sup> Justice

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<sup>300</sup> 452 U.S. 18 (1981).

<sup>301</sup> *Id.* at 56 n.22 (Blackmun, J., dissenting).

<sup>302</sup> 2 Eur. H.R. Rep. 305, P14 (1979–80).

<sup>303</sup> See, e.g., Hon. Earl Johnson, Jr., *Access to Justice: 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. SOC. JUST. 201, 223–25 (2004).

Ginsberg, for example, recently asked an audience of law students: “Why shouldn’t we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article written by a professor?”<sup>304</sup> Justice Kennedy’s opinion in *Lawrence v. Texas*, moreover, demonstrates that the Court is willing to overturn precedent based on international norms.<sup>305</sup> Writing for a six-person majority, Kennedy “found it persuasive”<sup>306</sup> that the European Court of Human Rights had determined that anti-sodomy laws violated the European Convention of Human Rights *several years* before the U.S. Supreme Court initially came to the opposite conclusion under *Bowers v. Hardwick*.<sup>307</sup> Using the fact that the U.S. was a minority among many established democracies in regards to sodomy laws, the Supreme Court overruled *Bowers*. Applying this reasoning to *Lassiter*, because the U.S. is woefully behind many other countries in recognizing the right to civil counsel, the Court should overrule the case. It is simply a violation of a person’s due process rights to deny them an opportunity to a fair trial via a competent attorney.

Without waiting for the courts, however, legislatures can work on passing laws that provide low-income persons with more meaningful access to the courts. To do this, legislatures can look at other countries’ systems for practical guidance. The California Access to Justice Commission (“CAJC”), for example, studied foreign jurisdictions in order to create two model

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<sup>304</sup> Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court and Vice Versa*, N.Y. TIMES, Apr. 11, 2009; see also Hon. Earl Johnson, Jr., *Access to Justice: 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. SOC. JUST. 201, 224 (2004) (noting that Justice O’Connor has also expressed interest in international law as a basis for decisions).

<sup>305</sup> 539 U.S. 558 (2003).

<sup>306</sup> Hon. Earl Johnson, Jr., *Access to Justice: 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. SOC. JUST. 201, 224 (2004).

<sup>307</sup> *Id.* at 224–25.

statutes that would provide civil counsel to poor people.<sup>308</sup> Observing other countries, the CAJC first noted that foreign statute schemes gave “a full subsidy to the poor and sliding scale subsidies for the near poor, lower middle class,” and perhaps even middle class people.<sup>309</sup> The CAJC also observed that most countries engaged in merits test in order to save resources for cases that were the most deserving.<sup>310</sup>

Thus, in 2006, the CAJC drafted the twenty-nine page “State Equal Justice Act,” which provided for a broad, comprehensive right to civil counsel.<sup>311</sup> The model act guarantees full representation for financially qualifying persons (judged by a sliding scale), whose cases have merits in the sense that a reasonable person in the plaintiff’s position, with the financial means to employ counsel, would be likely to pursue the matter in light of the costs and potential benefits” of the case.<sup>312</sup> In 2008, moreover, the CAJC recognized the potential difficulty in passing such expansive legislation and it drafted an alternative “State Basic Needs Act.”<sup>313</sup> Similar to the ABA resolution, the Basic Needs Act requires states to provide assistance of civil counsel where “certain high priority needs are at stake” such as shelter, food, safety and child custody.<sup>314</sup>

States therefore have two ready-made model statutes that they can rely on to advance local justice initiatives without waiting for the Supreme Court to overturn bad case law. By looking abroad, as the CAJC did, states can further learn how to practically implement new programs, but they must start with the adequate funding.

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<sup>308</sup> Clare Pastor, *Life After Lassiter: The California Model Statute Task Force*, 40 CLEARING HOUSE REV. 163, 176–77 (2006).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> State Equal Justice Act, *available at* [http://www.brennancenter.org/page/-/d/download\\_file\\_38656.pdf](http://www.brennancenter.org/page/-/d/download_file_38656.pdf).

<sup>312</sup> *Id.* at § 301.1.

<sup>313</sup> State Basic Needs Act, *available at* [http://brennan.3cdn.net/c8d7c0be3acc133d7a\\_s8m6ii3y0.pdf](http://brennan.3cdn.net/c8d7c0be3acc133d7a_s8m6ii3y0.pdf).

<sup>314</sup> *Id.* at § 205.

## B. Increasing Funding and Expanding Resources

Regardless of how the right to civil counsel is recognized—via the courts or the legislatures— one thing is clear: in order to achieve equal justice under the law, low-income litigants must have access to counsel. As a part of recognizing a right to civil counsel, funding for civil legal aid services must be increased. While the spending levels of the United Kingdom might make some Congress people uncomfortable (particularly during a recession), relying on the whim of a market-based charity system to supplement legal aid simply fails to protect people’s due process rights to a fair trial.<sup>315</sup> Aside from the social cost, however, it turns out that *not* providing assistance of counsel to low-income people is a much greater burden on the state.

In early 2009, a financial analyst firm, the Perryman Group, studied the economic impact of legal aid in Texas.<sup>316</sup> The firm noted in its report that “[t]he proper functioning of a free society and an efficient economy require the availability of a fair and balanced legal system to adjudicate legitimate disputes and preserve individual rights.”<sup>317</sup> But with legal assistance being simply unaffordable for many Americans, the firm determined that economy was actually threatened by insufficient legal services.<sup>318</sup> Worker productivity, for example, is in jeopardy when people have to take time off for legal problems,<sup>319</sup> and because courts can be backlogged with pro se litigants, businesses that are consumed in litigation are also hurt.<sup>320</sup> Unaffordable legal fees

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<sup>315</sup> See, e.g., *supra* Part I.B.

<sup>316</sup> THE PERRYMAN GROUP, THE IMPACT OF LEGAL AID SERVICES ON ECONOMIC ACTIVITY IN TEXAS: AN ANALYSIS OF CURRENT EFFORTS AND EXPANSION POTENTIAL (2009), available at <http://www.texasatj.org/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf>.

<sup>317</sup> *Id.* at 1.

<sup>318</sup> *Id.* at 3.

<sup>319</sup> *Id.* at 1–2.

<sup>320</sup> E.g., Jonathan D. Glater, *In a Downturn, More Act as Their Own Lawyers*, N.Y. TIMES, Apr. 9, 2005, available at <http://www.nytimes.com/2009/04/10/business/10lawyer.html?scp=1&sq=represent%20themselv>



can also throw many more people into poverty. And because lower-income parties usually have multiple legal issues involving basic human needs, the state is further burdened when poorer people do not receive representation where the state may ultimately have to step in anyway (such as with housing or family disputes).<sup>321</sup>

In fact, quite the opposite of being a drain on society, legal aid actually benefits the economy. In its study, the Perryman Group concluded that for “every direct dollar” Texas spent on indigent civil legal services, the state’s economy gained “\$7.42 in total spending, \$3.56 in output (gross product), and \$2.20 in personal income.”<sup>322</sup> Astoundingly, this meant that Texas earned “approximately \$30.5 million in yearly fiscal revenues” from legal aid spending, “which [was] well above their approximately \$4.8 million in contributions.”<sup>323</sup>

As the ABA has noted, moreover, the U.S. does not have to increase its spending on legal services to unsustainable levels. In its Resolution, the ABA states that “devoting even as much as \$60 to \$100 per eligible poor person in order to give them meaningful access to justice in their most urgent cases appears to be a minimal and justifiable investment.”<sup>324</sup> The U.S. currently spends \$8 federal dollars per financially eligible person, however.<sup>325</sup> Because “increas[ing]

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es&st=cse.; see generally Russel Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367.

<sup>321</sup> E.g., THE PERRYMAN GROUP, *THE IMPACT OF LEGAL AID SERVICES ON ECONOMIC ACTIVITY IN TEXAS: AN ANALYSIS OF CURRENT EFFORTS AND EXPANSION POTENTIAL 1–3* (2009), available at <http://www.texasatj.org/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf>.

<sup>322</sup> *Id.* at 3.

<sup>323</sup> *Id.* at 3.

<sup>324</sup> ABA Task Force on Access to Civil Justice et al., *Rept. to the House of Delegates*, 15 (2006), available at <http://abanet.org/legalservices/sclaid/downloads/06A112.pdf>.

<sup>325</sup> This number is not exact due to old census data. Nonetheless, the LSC’s budget for 2009 is \$390,000,000. Legal Servs. Corp., *Press Release, LSC Receives \$40 Million Increase for FY 2009*, March 11, 2009, available at [http://www.lsc.gov/press/pressrelease\\_detail\\_2009\\_T248\\_R8.php](http://www.lsc.gov/press/pressrelease_detail_2009_T248_R8.php). As of 2005, there are approximately forty-nine million low-income persons with income levels at 125% of the poverty line or lower which is the income required to receive legal aid. U.S. CENSUS BUREAU, PEOPLE

funding (and, thus, assistance)” will mean “further gains in business activity” for the state, the U.S. should be willing to invest in legal services the way it would for any other aspect of the economy.<sup>326</sup>

### **C. Transforming the Charity System through Pilot Programs**

Once armed with appropriate funding, the U.S. must implement a more inclusive legal aid system. Both the United Kingdom and Sweden offer approaches that the U.S. could try through pilot programming. The contracting system of the United Kingdom—where private firms team sign up for public contracts—is one way to increase the amount of legal aid providers quickly. England seems to prefer this system because it uses the efficiency of private firms to complete public work, and it provides for old-fashioned market competition which helps ensure that lower-income clients receive high-quality legal services.<sup>327</sup>

Sweden’s use of legal insurance also offers possibilities.<sup>328</sup> Although it is doubtful the U.S. could require legal insurance to the extent that Sweden does (because the U.S. is a much larger country with a far bigger population of marginalized persons), the U.S. could encourage a greater use of legal insurance or prepaid legal service programs for middle class persons as a way to keep them from falling into poverty on account of legal expenses. While Sweden’s legal insurance has problems with providing simple or initial advice, prepaid legal service programs—where consumers buy legal help packages almost the way they would cell phone contracts—

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BELOW POVERTY LEVEL AND BELOW 125 PERCENT OF POVERTY LEVEL BY RACE AND HISPANIC ORIGIN: 1980 TO 2005, *available at*

<http://www.americanfactfinder.biz/compendia/statab/2008/tables/08s0689.pdf>.

<sup>326</sup> THE PERRYMAN GROUP, THE IMPACT OF LEGAL AID SERVICES ON ECONOMIC ACTIVITY IN TEXAS: AN ANALYSIS OF CURRENT EFFORTS AND EXPANSION POTENTIAL 3 (2009), *available at* <http://www.texasatj.org/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf>.

<sup>327</sup> *See, e.g., supra* Part II.B.1.

<sup>328</sup> *See, e.g., supra* Part II.B.2.

actually focus on it.<sup>329</sup> Plans include services for phone consultations and drafting documents, and such services can be available through an individual's work.<sup>330</sup>

In sum, the United States is not isolated in this world. This country is one of the wealthiest on the planet yet its legal aid system might be likened to services in underdeveloped countries.<sup>331</sup> The U.S. should recognize that its indigent citizens have due process rights to civil counsel. In doing so, funds must be made available to secure legal aid services, which will in turn benefit the economy. Finally, by using other countries' approaches to legal aid, the U.S. can increase access to justice initiatives.

### CONCLUSION

Too many years have passed since the United State's Supreme Court decided that a young mother, poor and confused, was not entitled to a government-appointed lawyer under the Due Process Clause. In keeping with the rest of the world, however, it is time that low-income clients are afforded more meaningful access to justice. By borrowing good ideas from other countries, the U.S. can achieve a civil version of *Gideon v. Wainwright*.<sup>332</sup> At minimum, the U.S. must increase funds for legal aid programming and states should initiate pilot and research programs which have already been tried in other countries, in order to determine which avenues of legal services would provide greater access to courts and best suit Americans. In this fashion—and in recalling the New Haven mother at the beginning of this report—no person will be left alone crying in the courtroom.

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<sup>329</sup> For a thorough discussion of legal insurance as compared with legal service plans, see MATTHIAS KILIAN AND FRANCIS REAGAN, LEGAL EXPENSES INSURANCE AND LEGAL AID—TWO SIDES OF THE SAME COIN? THE EXPERIENCES FROM GERMANY & SWEDEN 5 (2009), available at <http://www.ilganet.org/conference/ilag2003.htm>.

<sup>330</sup> *E.g., id.*

<sup>331</sup> *Cf.* Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT'L L.J.* S83, S97–98 (2004).

<sup>332</sup> 372 U.S. 335 (1963).

