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Recommended Citation

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).
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CIVIL GIDEON AS A HUMAN RIGHT: IS THE U.S. GOING TO JOIN STEP WITH THE REST OF THE DEVELOPED WORLD

by RAVEN LIDMAN*

INTRODUCTION

On August 7, 2006 the American Bar Association House of Delegate at their annual convention voted unanimously in favor of a Civil Gideon. The resolution reads:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.¹

ABA President Michael Greco made this the hallmark of his administration and succeeded in one year.² As he said after the vote, "This is historic, in the realm of an extraordinarily meaningful action by the ABA, expressing the principle that every poor American, like every wealthy American, should have access to a lawyer to protect the fundamental needs of human existence."³

This vote affirms the aspirations of many lawyers that the promise of *Gideon v. Wainwright*⁴ would apply in the civil courts as well. It particularly affirms the ceaseless efforts of Justice Earl Johnson⁵ to establish a right to a publicly provided

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1. 2006 Report to House of Delegates 1, available at <http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc> (last visited Dec. 11, 2006).

2. Micheal S. Greco, then President-Elect, American Bar Association, Speech at Fellows of the Alabama law Foundation Annual Dinner, Montgomery Alabama (Jan. 28, 2005) ("I believe that the time has come for us to recognize, finally, that a poor person whether facing either a serious criminal or civil matter, must have access to counsel if that person is to receive justice.").

3. See James Podgers, *A Civil Law Gideon*, August 8, 2006, available at <http://www.abanet.org/journal/daily/am8house.html>.

4. 372 U.S. 335 (1963) (requiring publicly paid lawyers for low income criminal defendants).

5. Justice Earl Johnson, Associate Justice of the California Court of Appeals, is one of the few who has passionately supported his arguments for a Civil Gideon by exploring the status of the right to free civil counsel for indigents under other legal systems. EARL JOHNSON ET AL., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (1975) [hereinafter *TOWARD EQUAL JUSTICE*]; Earl Johnson, *Thrown to the Lions: A Plea for a Constitutional Right to Counsel for Low-*

attorney in civil matters; a right which has an ancient lineage within the English legal system and is accepted in over fifty countries in the world.⁶

In 1963, the U. S. Supreme Court declared that indigent criminal defendants had the right to free counsel.⁷ This right, grounded in the 6th Amendment and applied to the states via the 14th Amendment, was required by notions of fundamental fairness, and to guarantee a fair trial.⁸ Many legal advocates for the poor hoped that parallel insights into and concerns about fundamental fairness for low-income civil litigants would lead to an extension of *Gideon v. Wainwright*.⁹

However, in 1981 the U.S. Supreme Court in *Lassiter v. Department of Social Services of Durham County, N.C.* left unfulfilled aspirations that it would declare a federal constitutional right to counsel in civil matters.¹⁰ A divided court, employing a pinched reading of due process analysis and prior precedents, determined there was a presumption against the right to counsel unless the loss of physical liberty was at stake.¹¹ The case involved the termination of parental rights, a situation hardly less serious than a one-day jail stint, and one considered to be a fundamental liberty interest.¹²

The 40th anniversary of *Gideon* has been a catalyst for a resurgence of interest in a Civil Gideon. Numerous articles have been published.¹³ At least five recent

Income Civil Litigants, BAR LEADER (Sept./Oct. 1976) [hereinafter *A Plea*]; Earl Johnson and Elizabeth Schwartz, *Beyond Payne: The Case for a Constitutional Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA L.A. L. REV. 249 (1978) [hereinafter *Beyond Payne*]; Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985) [hereinafter *International Perspective*]; Earl Johnson, *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES 199 (1994) [hereinafter *Two Decades Later*]; Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies*, 24 FORDHAM INT'L L.J. S83 (2000) [hereinafter *Comparing*]; Earl Johnson, *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201 (2003). See also Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998).

6. See the chart at end of this article distilling the scope of the right to civil counsel in 49 European states, Canada, and 8 other countries.

7. *Gideon*, 372 U.S. at 344 ("[A]ny person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

8. *Id.* at 339-40.

9. Johnson, *TOWARD EQUAL JUSTICE*, *supra* note 1; *A Plea*, *supra* note 1; *Beyond Payne*, *supra* note 1; Luther M. Swygert, *Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel*, 39 WASH. & LEE L. REV. 1267 (1982) (The author was Senior Judge at the United States Court of Appeals for the Seventh Circuit. This was probably one of the last articles written before *Lassiter* was decided.).

10. See *Lassiter v. Dep't of Soc. Serv. of Durham County, N.C.*, 452 U.S. 18 (1981) (holding that "[t]he Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceedings" and "[t]he decision whether due process calls for the appointment of counsel is to be answered in the first instance by the trial court, subject to appellate review").

11. *Id.* at 25.

12. *Id.* at 20-21.

13. Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491 (2003); 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 (2003); Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. FOR SOC. JUST. 609 (2004); James A.

state cases have raised the issue explicitly.¹⁴ And now the ABA has gone on the record in support of a civil right to counsel where basic needs are at stake.

This article will discuss the scope of services and rationale for such a right currently provided in the 49 European member countries in the Council of Europe (COE), Australia, Canada, India, New Zealand, Hong Kong, Japan, Zambia, South Africa, and Brazil.¹⁵ Frequent reference will be made to a chart in the appendix, which condenses extensive information about programs in each of these countries.

Our general conclusion regarding the foreign programs is that the right to a free lawyer in civil matters is a robust concept. Multiple rationales, such as, rule of law, preservation of other human rights, due process, foundational for democracy, peaceful dispute resolution, access to justice, equal protection, confidence in the judicial process, and social policy goals of poverty eradication, all lead to a similar result, publicly provided lawyers for indigents in civil matters.

Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. FOR SOC. JUST. 383 (2005); Robert B. Kershaw, *Access to Justice in Maryland — A Visionary's Model*, 37 MD. BAR J. 50 (2004); Rachel Kleinman, Comment, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507 (2004); Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. FOR SOC. JUST. 571 (2004); 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 (2001); Richard Zorza, *Some Reflections on Long-Term Lessons and Implications of the Access to Justice Technology Bill of Rights Process*, 79 WASH. L. REV. 389 (2004); John Nethercut, "This Issue Will Not Go Away": *Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REV. 381 (2004). See other articles in this volume 2006 Sparer Symposium, 2006 Edward V. Sparer Symposium, *Civil Gideon: Making the Case*, and in *Clearinghouse Review*. 40 CLEARINGHOUSE REVIEW 3-4, 2006, *A Right to A Lawyer? Momentum Grows: Debra Gardner, Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 167; Paul Marvy, *Thinking About a Civil Right to Counsel Since 1923*, 170; Clare Pastore, *The California Model Statute Task Force*, 176 [hereinafter *Model Statute*]; Paul Marvy, "To Promote Jurisprudential Understanding of the Law": *A Right to Counsel in Washington State*, 180 [hereinafter *Washington State*]; Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 186; Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 196; Wade Henderson and Jonathan M. Smith, *The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate*, 210; Steven D. Schwinn, *Sidestepping Lassiter on the Path to Civil Gideon: Civil Douglas*, 217; John F. Ebbott, *To Gideon via Griffith: The Experience in Wisconsin*, 223, [hereinafter *Wisconsin*]; Marcia Palof, *How to Start Advocating a right to Counsel in Civil Cases in Your State: A Look at Ohio*, 231; John Nethercut, *Maryland's Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond*, 238 [hereinafter *Maryland's Strategy*]; Laura Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 245; Laura Abel, *A right to counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 271; Gaylene Schellenberg, *Access to Justice in Canada: Canadian Bar Association Strategies to Make it Happen*, 281; Raven Lidman, *Civil Gideon: A Human Right Elsewhere in the World*, 288.

14. *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003) (see Marvy, *Washington State*, *supra* note 13); *In re Custody of Halls*, 126 Wash. App. 599 (Wash. Ct. App. 2005) (see Marvy, *Washington State*, *supra* note 13); *King v. King*, No. 57831-6-1 (Wash. Ct. App. oral argument in Spring 2007). See Wisconsin cases cited in Ebbott, *Wisconsin*, *supra* note 13. Each case raised claims under their respective constitutions.

15. Much of the information on the foreign law systems was compiled by my research assistants, Manal Boulos and Denise Fowley. Additionally, about 70 partners, associates, paralegals and interns at 11 law firms provided pro bono assistance by collecting information for a survey on approximately 80 countries. The data from the survey, including, scope, delivery systems and financing are on file with the author.

The scope of the legal services is quite comprehensive with respect to representation of individuals in most areas of substantive civil law. Lawyers are provided for litigation at the trial and appellate level. A sizeable majority extend coverage to representation at administrative hearings.¹⁶ It appears that law reform activities such as advocacy for changes in statutes and rules, representation of low-income community groups, class actions, and community development are not part of many programs.

With respect to the cases, the statutes almost all provide some type of merits test, varying from merely stating a claim to likelihood of success. There is also often mention of a cost/benefit type of analysis. With respect to client eligibility most countries have some kind of sliding needs scale, making the services more widely available and lessening the burden on the middle class.¹⁷

In the COE, there is extensive protection of foreigners.¹⁸ It is unremarkable that a low-income Italian would have rights to legal assistance in Sweden for a landlord-tenant lawsuit.¹⁹ But it is not only lawful residents within and from other COE member countries who have access to a free lawyer; immigrants from outside of Europe also have access to free lawyers when dealing with immigration issues, particularly asylum.²⁰

Twenty-three countries from the former Soviet Union have been admitted to the COE since 1990.²¹ All but four have some type of program for free lawyers, but do not yet afford the full range of civil representation provided by the other members.²² In the COE countries with older programs, as well as Canada, Australia, and New Zealand, public funding, however it is calculated, (budgeted amount per poor person, per capita, or as a percentage of gross national product, etc.) far exceeds the spending in the U.S.²³

The article will briefly explore the kinds of arguments which can be raised in domestic courts regarding foreign and international law. On the whole, such authority is merely persuasive. However, informing the court of the extent of such a right to free civil representation for indigents may encourage judges and legislatures to be more receptive.

It is appropriate that after twenty-five years, *Lassiter* be reexamined. In 1981, 33 states provided a right to counsel in termination of parental rights cases, and

16. Johnson, *International Perspective*, *supra* note 1; *Infra* the chart at the end of this article.

17. *Id.*

18. Human Rights Commissioner — presentation of reports on Italy and Iceland, Dec. 14, 2005, http://www.coe.int/T/E/Com/Press/News/2005/20051214_commissioner.asp (last visited Oct. 24, 2006); Walter Schwimmer, *Human Rights Safeguard Apply Equally to Immigrants*, Sept. 15, 2003, <http://www.coe.int/NewsSearch/Default.asp?p=nwz&id=3021&lmLanguage=1> (last visited Oct. 24, 2006).

19. On the Council of Europe and European Union websites there are pages devoted to accessing counsel abroad and in cross border disputes. See <http://www.coe.int/DefaultEN.asp> (last visited Oct. 24, 2006); <http://europa.eu> (last visited Oct. 24, 2006).

20. http://www.coe.int/T/E/Com/Files/PA-Sessions/Sept-2003/20030930_news_migrant.asp#TopOfPage (last visited Oct. 24, 2006).

21. See http://europa.eu/abc/history/index_en.htm (last visited Oct. 24, 2006).

22. Symposium, *Constitutional "Refolution" In The Ex-Communist World: The Rule of Law*, 12 AM. U. J. INT'L L. & POL'Y 45 (1997).

23. See Council of Europe, *infra* note 56 (providing replies to questionnaire on legal aid — how to benefit from it). It is beyond the scope of this article to explore the costs or structures of the programs.

since then the number has increased to 40.²⁴ State courts and legislatures may provide the best opportunity to put the ABA resolution into practice. But there are some signs that the U.S. Supreme Court is itself aware of the status of certain important rights under International and foreign law. Between 2002 and 2005, the Supreme Court reversed at least three cases decided in the 1980s after *Lassiter*. Each reversal has favored more expansive individual rights. For example in 2006 in *Roper v. Simmons*, the Supreme Court prohibited the death penalty for minors.²⁵ In *Lawrence v. Texas*, the Court decriminalized private consensual homosexual sex.²⁶ In *Adkins v. Virginia*, the Supreme Court barred the execution of mentally ill defendants.²⁷

I. THE RIGHT TO A CIVIL ATTORNEY IN INTERNATIONAL AND FOREIGN LAW

A. At Least 49 Countries In Europe Are Required To Provide Free Civil Lawyers To Indigents

1. Reclaiming our own history: England has had a statute providing a right to a free civil lawyer for indigents for more than 500 years

England has a more than five-century tradition of providing free lawyers for indigent people in at least some civil matters. The statute provided, in pertinent part:

[T]he Justices . . . *shall* assign to the same poor person or persons, Counsel learned by their discretions which shall give their Counsels nothing taking for the same, and in likewise the same Justices *shall* appoint attorney and attorneys for the same poor person and persons and all other officers requisite and necessary to be had for the speed of the said suits to be had and made which shall do their duties without any rewards for their Counsels, help and business in the same.²⁸

24. See Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363, 367 (2005); Pastore, *Life After Lassiter*, *supra* note 13.

25. *Roper v. Simmons*, 543 U.S. 551, 574 (2005), overruling *Stanford v. Ky.*, 492 U.S. 361 (1989).

26. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986).

27. *Adkins v. Virginia*, 536 U.S. 304, 318 (2002), overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989).

28. An Act to Admit Such Persons as Are Poor to Sue in Forma Paupis, 11 Hen. 7, c. 12 (1494), reprinted in 2 Statutes of the Realm 578 (1993) (spelling modernized) (emphasis added). There are indications from the Ninth Century onward that the English courts provided free publicly paid counsel on a sporadic basis. See Swygert, *supra* note 5, at 1270; John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 365-66 (1923) (finding to “acce[pt] the maxim under Henry III (1216-1272) that the poor need not pay for their writs” and that “common law court had inherent power to entertain gratuitously the plains of the needy”).

One rationale for the original statute was to inspire confidence in the King's courts and to encourage people to use them.²⁹ The passage of the statute was, essentially, the move away from the religious courts to a development of a secular judicial branch of government.

Since then the right has been expanded to include civil defendants, non-litigation transactions, and advice.³⁰ The statutory system has been modified over the years, but the English legal aid system has continuously provided indigent parties with a right to counsel in civil cases.³¹

The history is not widely known. Many US states at their formation adopted constitutional or statutory provisions preserving their residents' rights under English Common Law.³² Three of seven Maryland Supreme Court justices found that history was determinative in concluding that a Maryland petitioner was entitled to free civil counsel in a family law matter.³³ The appellant advanced a right to court-appointed civil counsel founded in part on the incorporation of English rights into Maryland law at statehood.³⁴ Article 5 of the Maryland Declaration of Rights guarantees to Maryland's inhabitants the rights provided by the body of English statutory and common law as it existed on July 4, 1776.³⁵ One of the rights the colonists brought with them was the guarantee of free civil counsel for indigent parties expressed in the Tudor statute 11 Hen. and its common law equivalents.³⁶

2. Since 1979, all members of the Council of Europe must provide free civil lawyers as a human right

The year 1979 was a watershed. The European Court of Human Rights declared that ensuring a fair hearing in civil matters member states could be required to provide publicly paid counsel for low-income litigants.³⁷ All members

29. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 134 (2d ed. 1979); Swygert, *supra* note 5, at 1271; Maguire, *supra* note 3.

30. *See, e.g.*, Wait v. Farthing, 84 Eng. Rep. 237, (K.B. 1668); 1 George William Sanders, Orders of the High Court of Chancery 122, 243, 296 (London, A. Maxwell & Son 1845).

31. The statute was repealed by the Statute Law Revision and Civil Procedure Act, 46 & 47 Vict. c. 49 (1883). The act replaced 11 Hen. 7, c. 12 with a system of legal aid, administered by the rules of court, which provided for the appointment of counsel. *See* SETON POLLOCK, LEGAL AID — THE FIRST 25 YEARS 12 (1975). A new system of legal assistance was created by statute in 1929. Joan Mahoney, *Symposium: Legal Services: Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223, 226 (1998).

32. *See, e.g.*, James W. Ely, Jr., The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 CONST. COMMENT. 315, 322 (Summer 1999) ("The colonists in the seventeenth century looked to Magna Carta as a protection of their liberties.").

33. Frase, 379 Md. at 102, 840 A.2d 114 (The appellant prevailed on the underlying claim. The majority did not reach the Civil Gideon issue).

34. *Id.*

35. "That the colonists carried with them the rights of Englishmen, when they crossed the Atlantic, is one of the axioms of our constitutional history." Bernard C. Steiner, *The Adoption of English Law in Maryland*, 8 Yale L.J. 353, 353 (1899). *See also* Maryland v. Buchanan, 5 H. & J. 317, 355 (1821) (stating "[t]hat our ancestors did bring with them the laws of the mother country, so far at least as they were applicable to their situation, and the condition of an infant colony, cannot be seriously questioned").

36. *Id.*

37. Airey v. Ireland, 2 Eur.H.R.Rep. 305 (1979-1980).

of the COE were required to provide free civil lawyers in some circumstances as a matter of international human rights law.³⁸

One of the primary purposes of the COE, founded in 1949, is the defense of human rights, parliamentary democracy and the rule of law.³⁹ Forty-nine countries are members of the COE.⁴⁰ As such, they are signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).⁴¹ Article 6 para. 1 (Art. 6(1)) of the European Convention reads, in part, as follows: "In the determination of his *civil rights and obligations* or of any criminal charge against him, everyone is entitled to a *fair* and public *hearing* within a reasonable time by an independent and impartial tribunal established by law."⁴²

The European Court of Human Rights (hereinafter "ECtHR") is the body which interprets the European Convention.⁴³ In 1979, in *Airey v. Ireland*, the ECtHR determined that the right to a fair hearing, under Art 6(1), required effective access to the court.⁴⁴ The court interpreted effective access to mean representation by an attorney, or a proceeding simple enough that a lay person could handle it without a lawyer.⁴⁵ The court stated:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.⁴⁶

38. *Id.*

39. Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I. Statute of the Council of Europe (ETS 1) Chapter II, Article 3, 1949. See also COE home page, http://www.coe.int/T/E/Com/about_coe/ (last visited Oct. 20, 2006).

40. Council of Europe, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited Oct. 20, 2006) (lists 46 member states with dates of ratification). The United Kingdom comprised of four countries, England, North Ireland, Scotland, and Wales, is considered one member; hence the difference between 46 member states and 49 countries in the COE.

41. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 222, 228.

42. *Id.* (emphasis added). It is to be noted that there is an explicit language in art. 6 ¶ 3(c), requiring free lawyers in criminal cases.

43. Convention for the Protection of Human Rights and Fundamental Freedoms, Sec. 2, art. 19, Nov. 4, 1950, 213 U.N.T.S. 222, 228. (The Court was established to "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights It shall function on a permanent basis.").

44. *Airey v. Ireland*, 2 Eur.H.R.Rep. 305, ¶ 14 (1979-80). In *Airey*, the plaintiff, Mrs. Airey, was seeking a separation from her husband but was unable to do so because she could not afford an attorney. *Id.* at ¶ 24. One of her arguments was that the government violated her right under Art. 6(1) since her right of access to the court was effectively denied and she could not get a fair hearing without an attorney. *Id.* at ¶ 13. Ireland argued that it did not violate Art 6(1) because it did not affirmatively bar or place an obstacle in the way of the plaintiff's access to the court, and because the plaintiff could have proceeded without the assistance of lawyer. *Id.* at ¶ 24. [Ireland had signed the treaty with an explicit reservation against providing broader free legal aid. Reservation contained in the instrument of ratification.].

45. *Id.* at ¶¶ 24-25.

46. *Id.*

Each country was still free to choose the means of achieving the right to a fair hearing.⁴⁷ For example, it might simplify the judicial procedures.⁴⁸ It was only when the assistance of a lawyer was indispensable for effective access to the courts that the government was under a legal obligation to guarantee this right of counsel.⁴⁹

This article will discuss salient ECtHR post-*Airey* cases in Section III, *infra*. In general, the cases have set broad parameters protecting the right of access to the courts in a meaningful manner for low-income and vulnerable individuals.⁵⁰ For example, the court in *Airey* did not create any test for which kinds of cases would require free counsel; there was no list of factors such as loss of liberty, parental rights to children, life necessities, etc.⁵¹

The post-*Airey* jurisprudence of the ECtHR on Article 6(1) has been reasonably sparse. One hypothesis is that the court was reflecting the views of many of its member countries. In 1979, two-thirds of the member countries at that time already had requirements, some dating back centuries, to provide the poor with free civil lawyers: Austria-1781; Belgium-1994; Denmark-1969; England-1495; France-1851; Germany-1877; Iceland-1976; Italy-1865; Norway-1915 (perhaps as early as the 1600's); Portugal-1899; Spain-1835; Sweden-1919; Switzerland-1937; The Netherlands-1957.⁵² States which were not members at the time, but which had a right prior to 1979 include Monaco-1932; Poland-1964; Slovak Republic-1963; Russia-1917; Ukraine-1978. In most of the countries the right is provided by statute. Italy, Spain, Portugal and the Netherlands had constitutional provisions explicitly providing a right to free civil counsel for the poor.⁵³

Very few appellate judicial opinions explicated the basis for the right. In 1937, Switzerland's Supreme Court grounded such a right in an "equal protection"

47. *Id.*

48. *Id.*

49. *Id.*

50. A more detailed description of these cases can be found in Michael J. Beloff & Murray Hunt, *The Green Paper On Legal Aid And International Human Rights Law*, 1996 EUR. HUM. RTS. L. REV. 1, 5-17, and Francis G. Jacobs, *The Right of Access to a Court in European Law*, 10 INTERRIGHTS BULL. 53, 55 (1996).

51. See *Airey*, at ¶ 25. This is to be distinguished from the *Lassiter* test (loss of liberty), or state courts' rationales which have expanded the right to Parental Termination Proceedings (loss of parental rights). Some United States authors recognize the limits of United States jurisprudence in this area and argue for a context-based right. See Andrew Scherer, *The Importance of Collaborating to Secure a Civil Right to Counsel*, (unpublished paper presented at Partners in Justice: A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar, May 9, 2005). See also Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 Clearinghouse Rev. 3-4 (July-Aug. 2006); Kleinman, *supra* note 14 (Evictions); Bindra & Ben - Cohen, *supra* note 14 (Civil defendants); Abel & Reise, *supra* note 14; and Eleanor Acer, et al., *No Deportation Without Representation: The Right to Appointed Counsel in the Immigration Context*, IMMIGRATION BRIEFINGS, 1 (Oct. 2005) (Immigration matters).

52. The dates signify the earliest date the right to a free civil lawyer is mentioned in the law of that country. These dates are mostly taken from Johnson, *International Perspective*, *supra* note 1, at 342-49. But also from other sources that are mentioned in, *infra*, note 56.

53. Lua Kamál Yuille, *No One's Perfect (Not Even Close): Reevaluating Access To Justice In United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863 (2004).

analysis.⁵⁴ It stated: "All citizens whether poor or rich should have access to the court."⁵⁵ In 1973, the German Constitutional Court based such a right on an access to justice rationale.⁵⁶

II. SCOPE OF THE RIGHT TO PUBLICLY PROVIDED CIVIL COUNSEL: PATTERNS THAT ARISE REGARDING THE STANDARDS

A. Initial Observations On Comparing Legal Systems

The COE member states⁵⁷ include 3 major legal traditions — common law,

54. Johnson, *International Perspective*, *supra* note 1, at 347.

55. Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 5 (citing judgment of October 8, Arrêts du Tribunal Federal 63, 1, 209 (Swits)).

56. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 17, 1953, 26 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 2, 336 (F.R.G.).

57. Information on the legal systems of the COE member countries can be found in articles and books cited elsewhere in this article. The most detailed and most recent information comes from thorough questionnaires answered by each country on COE and European Union websites, and conference papers collected at the International Legal Aid Group, Open Society and Public Interest Law Initiative websites. Council of Europe, Legal Aid — How to Benefit From It, http://www.coe.int/t/e/legal_affairs/legal_cooperation/operation_of_justice/access_to_justice_and_legal_aid/List%20of%20replies.asp#TopOfPage (last visited Oct. 20, 2006) [hereinafter Council of Europe] (providing replies to questionnaire from 36 countries: Austria, Azerbaijan, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, Georgia, Germany, Greece, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Macedonia, Turkey, and the United Kingdom's England, Wales, North Ireland, and Scotland); European Union, Legal Assistance, Legal Aid, <http://europa.eu.int/youreurope> (last visited Oct. 20, 2006) (providing a list of all 26 member countries); European Commission, European Justice Network, Legal Aid-General Information, http://ec.europa.eu/civiljustice/legal_aid/legal_aid_gen_en.htm (last visited Oct. 20, 2006) (providing information on 26 member countries); Public Interest Law Initiative, Background materials — 2nd European Forum on Access to Justice, <http://www.pili.org/2005r/2005r/index.php?option=content&task=view&id=176> (last visited Oct. 20, 2006) (presenting New Developments in Legal Aid in Central and Eastern Europe and updates since the first Forum on Access to Justice held in December 2002, compiled by Open Society Justice Initiative and Public Interest Law Initiative, Second Forum on Access to Justice, 2005); International Legal Aid Group, National Reports, <http://www.ptools.com/clientside/show/ILAG/pages/nationalreports.html> (hereinafter International Legal Aid Group) (last visited Oct. 20, 2006) (supplying reports presented at Killarney Conference, 2005 covering Belgium, Canada, Finland, The Netherlands, New Zealand, Australia, Germany, Ireland, Hong Kong, Scotland, South Africa, USA, and Brazil); International Legal Aid Group, Conference Papers, <http://www.ptools.com/clientside/show/ILAG/pages/papers.html> (last visited Oct. 20, 2006) (supplying papers presented at Killarney Conference, 2005, covering Germany, England, South Africa, Wales, Australia, Scotland, The Netherlands, Canada, USA, New Zealand, and Turkey); International Legal Aid Group, Conference Papers 2003, <http://www.ilagnet.org/papers.htm> (last visited Oct. 20, 2006) (last visited Oct. 20, 2006) (supplying papers and reports presented at Harvard Conference, 2003, covering Scotland, Ontario, Ireland, Germany, Sweden, Canada, England, Wales, The Netherlands, Belgium, Finland, Norway, New Zealand, North Ireland, and South Africa). See also THE TRANSFORMATION OF LEGAL AID, COMPARATIVE AND HISTORICAL STUDIES (Francis Regan et al. eds., 2000); <http://freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?edition=7&ccrpage=31&ccrcountry=109> (last visited Oct. 14, 2006); <http://www.un-az.org/UNDP/DOC/constitution.php> (last visited Oct. 14, 2006); Georgiana Iorgulescu & Nicoleta Popescu, LEGAL AID DEVELOPMENTS: COUNTRY UP-

civil code law, and Soviet law.⁵⁸ They each have lawyers, judges, and courts. However, these commonly used terms, while capturing certain similarities, also obscure significant differences.⁵⁹ The unitary role of lawyer in the United States is divided into solicitor and barrister in the British system and into lawyer and notary in the civil code tradition. The constitutional role of the judiciary as the final arbiter of what is the law is much more circumscribed in the civil code tradition. Case law itself is only one source of authority, and civil code courts themselves look as often to scholarly works as to judicial opinions.⁶⁰

One consequence of this is that in the civil law systems, the courts are not viewed as a primary venue for law reform. They provide a forum to resolve individual disputes. Public interest litigation challenging government practices is less common. Class actions are rare, although there are procedural options for some collective parties. The Chart in Appendix A includes only comments on class actions when they are specifically mentioned.⁶¹ A corollary to a more circumscribed role of the courts is that law reform advocacy primarily occurs before the legislative and executive rule-making bodies. These are not contested hearings requiring lawyers. The Chart notes explicit provisions for such advocacy.⁶²

This article does not address a comparison of the overall costs of the programs. There are clearly countries in the chart, which have a right that is scarcely applied.⁶³ The former Soviet states comprise the vast majority of these countries.⁶⁴ The first to join COE was Hungary in November 1990.⁶⁵ Four of

DATE ON ROMANIA 1 (2005), http://www.pili.org/2005r/dmdocuments/RomaniaUpdate_PopescuIorgulescu.pdf; <http://www.constitution.ru/en/10003000-01.htm> (last visited Oct. 13, 2006); Answer to Revised Scheme for Evaluating Judicial Systems, San Marino (2004), <http://www.coe.int/t/dgl/legalcooperation/cepej/evaluation/2006/San%20Marino.PDF>; Mihaela Ancelin, LEGAL AID DEVELOPMENTS: COUNTRY UP-DATE ON SLOVENIA (February 2005), http://www.pili.org/2005r/dmdocuments/SloveniaUpdate_Ancelin.doc; http://www.kmu.gov.ua/control/en/publish/printable_article?art_id=235436 (last visited Oct. 14, 2006); Const. art. 39A, amended by the Constitution (Forty-second Amendment) Act, 1976; U.S. Department of State, Country Reports on Human Rights Practices 2000: Japan (February 23, 2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/709.htm>; U.S. Department of State, Country Reports on Human Rights Practices 2000: Brazil (February 23, 2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/724.htm> (last visited Oct. 20, 2006); Legal Services Society Act, Fact Sheet (June 2005), http://www.lss.bc.ca/assets/newsroom/fact_sheets/LSS_Act_amendments.pdf (last visited Oct. 20, 2006); DEPARTMENT OF JUSTICE CANADA, A STUDY ON LEGAL AID AND OFFICIAL LANGUAGES IN CANADA 49, (May 2002), <http://www.canada-justice.ca/en/ps/rs/rep/2003/r03lars-1/r03lars-1.pdf> (last visited Oct. 20, 2006) [hereinafter CANADA LEGAL AID STUDY].

58. Soviet law essentially built a totalitarian superstructure on the civil law tradition. See Johnson, *International Perspective*, *supra* note 1, at 344.

59. See Fritz Moses, *International Legal Practice*, 4 FORDHAM L. REV. 244 (1935).

60. J. H. MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, EAST ASIA passim* (1994).

61. *Infra* the chart at the end of this article (specifically Ireland).

62. See *infra* Norway portion of the chart at the end of this article.

63. For example, Romania appears to provide representation in Administrative Hearing, but authors indicate that in practice this is not operational. See Council of Europe, *supra* note 56.

64. *Infra* the chart at the end of this article (distilling the former Soviet states stance on legal aid).

65. *Id.*

them, Albania, Bosnia/Herzegovina, Georgia, and Moldova, do not appear at this point to have any program for civil legal assistance.⁶⁶ However, those who have looked at the costs of the existing programs indicate that many spend substantially more than the US.⁶⁷

B. Expansive Coverage of Substantive Areas of Law

In approximately two-thirds of the COE countries, the right to counsel covers a wide spectrum of civil matters. These include family law, housing, consumer and debt cases, personal injury claims, public benefits, employment and labor law.⁶⁸ Where countries indicate social security coverage, this term often refers to a variety of social programs from welfare to pensions.⁶⁹

Approximately fifteen countries use language suggesting coverage of all civil disputes. Some limit the scope by identifying specific exclusions, rather than listing extensive inclusions. Typical exclusions are “assigned claims” and “small claims.” These are so common that they are not included in the chart. Other frequently mentioned exclusions are matters involving the running of a business or profession and defamation.⁷⁰

As pointed out above, the ECtHR has not spelled out the substantive scope of Article 6(1).⁷¹ In general, it has held the convention “does not in itself guarantee any particular content for the ‘rights and obligations’ in the substantive law of the Contracting States.”⁷² However, the ECtHR has not always been able to disentangle procedural barriers from lack of a domestic substantive right, nor private law rights from public law rights.⁷³ For example, various countries have doctrines of sovereign immunity.⁷⁴ But in 2000, the ECtHR held that immunity for certain police functions is a violation of access to the courts,⁷⁵ thereby permitting a person to sue whom the police had not protected.

66. *Id.* (noting whether nations have programs for civil legal assistance).

67. John Flood & Avis White, *Report on Costs of Legal Aid in Other Countries*, page 5 (2004) (On file with the author and can be accessed at <http://johnflood.com>) (comparing per capita expenditures on civil legal services in the 1990's: US-\$2.25; Germany-\$4.86; France-\$4.50; Quebec-\$7.07; Ontario-\$7.06; British Columbia-\$7.80; Netherlands-\$9.70 New Zealand-\$7.10; and England-\$39.00); *Key Features of Fifteen National Legal Aid Program*, (2005) (On file with the author) (providing a summary of reports submitted to International Legal Aid Group conference.- comparing expenditure per \$10,000 GDP: US-\$.80; Canada-\$2.80; Finland-\$2.35; Germany-\$2.25; Hong Kong-\$3.30; Ireland-\$2.35; Netherlands-\$6.90; New Zealand-\$3.25; North Ireland-\$7.00; and Scotland-\$6.30). *See also* Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies*, *supra* note 1.

68. *See* Johnson, *International Perspective*, *supra* note 1.

69. *Infra* the chart at the end of this article.

70. *Id.*

71. Andrew le Sueur, *Access to Justice Rights in the United Kingdom*, 5 EUR. H.R.L.REP. 457-75 (2000).

72. *Id.* at 463.

73. Jeremy McBride, *Access to Justice under International Human Rights Treaties*, 5 PARKER SCH. J. E. EUR. L. 3, 6 (1998).

74. *See* http://www.kmu.gov.ua/control/en/publish/printable_article?art_id=235436 (last visited Oct. 20, 2006); <http://www.constitution.ru/en/10003000-01.htm> (last visited Oct. 20, 2006).

75. *Osman v. United Kingdom*, 29 E.C.H.R. 245 (2000). *See* McBride, *supra* note 70, at 19; le Sueur, *supra* note 68, at 466.

In 1993, the COE adopted a recommendation to facilitate effective access to the courts for the very poor, encouraging member states to extend "legal aid or any other form of assistance to all judicial instances (civil, criminal, commercial, administrative, social, etc.) and to all proceedings, contentious or non-contentious, irrespective of the capacity in which the persons concerned act."⁷⁶ The language does not require specific substantive coverage, but it implies coverage for all fact-finding hearings regardless of the label as administrative, civil, or commercial.

With respect to exclusions, defamation is nearly universal. The ECtHR had sustained that domestic policy of exclusion, concluding that injury to reputation is not so fundamental as to require human rights protection.⁷⁷ However, in 2005 the European Court found in favor of right to counsel for defamation defendants who were engaged in the longest legal trial in English history, *Steel and Morris v. United Kingdom*.⁷⁸ The case has come to be known as "McLibel," because the plaintiff, McDonald Corporation, brought suit against two individuals.⁷⁹ Here the court looked beyond the label of defamation to the fairness of the underlying procedure.⁸⁰ The court determined that the case was factually, legally, and procedurally complex, and that lack of a lawyer familiar with the case throughout made the procedure unfair. The court stated:

[F]inally, the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonalds (see paragraph 16 above) was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness, despite the best efforts of the judges at first instance and on appeal.⁸¹

The impact of this opinion has yet to be felt. It may provide the basis for free civil counsel when the opposing party is represented to reduce unfairness where there is inequality of arms.

C. Types of Legal Services

Litigation and advice are universally available. However, only fifteen countries include mediation in their available services.⁸² This may be due to mediation recently being adopted in some countries, and in others, it may not be a procedure typically involving lawyers.⁸³ A largely overlapping group of fifteen countries provides lawyers for transactional matters.⁸⁴ This may reflect the fact

76. Recommendation No. R (93) 1, adopted by the Committee of Ministers of the council of Europe (Jan. 8, 1993).

77. *Munro v. the United Kingdom*, App. No. 10594/83, 52 Eur. Comm'n. H.R. Dec. & Rep. 158 (1987) (See especially ¶ 54).

78. *Steel and Morris v. United Kingdom*, 22 E.Ct. H.R. 403 (2005).

79. *Id.*

80. *Id.* at 404.

81. *Id.* at 430.

82. *Infra* the chart at the end of this article, which addresses which nations provide mediation.

83. Johnson, *International Perspective*, *supra* note 1.

84. *Infra* the chart at the end of this article, addressing which nations provide transactional aid.

that most of the European countries are based on the civil code systems. In those systems, notary publics play a much wider role than they do in the United States. As such, they are often the professionals consulted with respect to transactions.⁸⁵

Enforcement of judgments is widely provided. It may be considered as a necessary adjunct to litigation.

Free legal advice is included in the programs of every country. By and large, the advice can cover substantive law areas not included for litigation.⁸⁶ Many programs support paralegals in the advice stage. Some countries make free legal advice available to all without regard to financial eligibility.⁸⁷

D. The Fora

In all countries with the right, lawyers are provided for the original fact-finding hearings in the courts. Almost all provide free counsel for appeals. However, eligibility usually must be re-determined at each stage. Two-thirds of the countries extend coverage to hearings in the administrative tribunals.⁸⁸

E. Merits Tests

Most of the countries discussed here have some standard for determining if the case has merit. This test does not involve a mini-hearing on the merits; rather it is a determination made by the body that will appoint the free counsel.⁸⁹ A common standard is similar to a *prima facie* showing and does not involve the weighing of evidence regarding each claim.⁹⁰ However, an equal number of states have some requirement in which the applicant must demonstrate that they are likely to succeed.⁹¹

The continuing viability of the “likelihood of success” test may be in question. In *Aerts v. Belgium*, the ECtHR reversed a determination by Belgium that the claim was not “well-founded.”⁹² The court held:

[I]n civil cases Belgian law requires representation by counsel before the Court of Cassation. It was not for the Legal Aid Board to assess the proposed appeal’s prospects of success; it was for the Court of Cassation to determine the issue. By refusing the application on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the

85. I have found very little mention of funding for notaries.

86. *Infra* the chart at this end of the article.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Aerts v. Belgium*, 29 Eur. Ct. H.R. 50 (2000). See also, Symposium, *An Overview Of Civil Legal Services Delivery Models, Eleventh Annual Philip D. Reed Memorial Issue, Partnerships Across Borders: A Global Forum On Access To Justice*, 24 FORDHAM INT’L L.J. S225 (2000) (Comments by Pascal Domeau-Josette, Secretary of the European Court of Human Rights on potential impact of *Aerts* on numerous French cases which are rejected by legal aid body for lack of merit).

very essence of Mr. Aerts's right to a tribunal. There has accordingly been a breach of Article 6 § 1.⁹³

F. Need

In all instances where it exists, the right to a free lawyer arose in response to the financial needs of the applicants. Most countries provide the services completely for free if the person has very modest income and resources.⁹⁴ It is also not uncommon to have a sliding scale or a tiered system.⁹⁵ If their income exceeds the limit for a free lawyer, the applicants must contribute something toward the fees of counsel or the costs of the case. Very rarely, there is a minimum contribution. In general, however, this has been rejected as a barrier to the poorest. Generally it is individuals who are eligible for free legal services.⁹⁶ Yet, six countries also cover non-profit and charitable organizations if they are low-income.⁹⁷ (In the chart these are indicated by NGO.) Also, at least two countries include private corporations/companies.⁹⁸

Costs of litigation such as for court filings, witnesses, expert expenses, service of process, and discovery are often treated differently from lawyer fees.⁹⁹ Not all countries waive costs for those entitled to free lawyers. Most systems have some mechanism to ameliorate these expenses for low-income applicants.¹⁰⁰

A more significant barrier for many litigants, low-income or otherwise, is that about half of the countries have what is called "loser pay."¹⁰¹ That means that prevailing parties will be awarded judgment on the substance and all of their lawyer fees and other costs. Not all "loser pay" countries impose the full burden on low-income losers. Some provide that if the litigant is publicly funded then the winner's cost will also be paid publicly. Others leave it up to the discretion of the court.¹⁰²

Two other factors affecting fees and costs are worth noting. Contingency fee arrangements are uncommon in Europe and are only now being tried out in some countries.¹⁰³ In a very few countries, such as Germany, litigation expense insurance (LEI) is widely available.¹⁰⁴ This is taken into consideration when services are sought.¹⁰⁵

93. *Aerts v. Belgium*, 29 Eur. Ct. H.R. at 60.

94. *Infra* the chart at end of this article. In some countries such as the Netherlands the financial standard is high enough that it applies to approximately 40 percent of the population.

95. Council of Europe, *supra* note 56.

96. *Id.*

97. These include Estonia, Greece, Italy, Poland, Slovenia, and Spain.

98. *Infra* the chart at end of this article.

99. Council of Europe, *supra* note 56.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*; see also *infra* the chart at end of this article.

105. Council of Europe, *supra* note 56. Sweden, the country with reputedly the most extensive program, has been looking into LEI as a cost cutting measure. And a few other countries, notably in the UK, are investigating the possibilities, although most do not have insurers willing to offer LEI.

Financial need may not be the sole determinant for a right to a free lawyer. For example, in France, Finland, Greece, Poland, and Belgium, the aged, disabled, veterans and people on social security are automatically eligible for free counsel.¹⁰⁶ Aliens seeking asylum are often provided free attorneys.¹⁰⁷ In some countries such as France, Denmark, and Iceland, financial eligibility is waived if the issue is of significant public interest.¹⁰⁸

III. RAISING ISSUES OF INTERNATIONAL AND FOREIGN LAW IN STATE AND FEDERAL COURTS IN THE UNITED STATES

International law is comprised of treaties and customary international law. Over one hundred years ago, the United States Supreme Court acknowledged that it had a duty to enforce established rules of international law.¹⁰⁹ In his majority opinion, Justice Grey wrote: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."¹¹⁰ The Supremacy Clause of the US Constitution states that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the contrary notwithstanding.¹¹¹

Thus both federal and state courts have a responsibility to interpret and follow treaties.¹¹²

The United States is not bound by the *Airey* decision since it is not a signatory to the European Convention. The United States is a signatory to the International Covenant on Civil and Political Rights (ICCPR)¹¹³ and The Universal Declaration on Human Rights (UDHR).¹¹⁴ Both have provisions very similar to Article 6(1) of

106. Social security is often the term applied to what we would refer to as welfare, food stamps, Medicaid or other needs-based programs.

107. For example, see Belgium, Greece, Hungary, Ireland, Norway, and Spain, *infra* in the chart at the end of this article.

108. See *infra* the chart at end of this article.

109. *The Paquette Habana*, 175 U.S. 677, 700 (1900).

110. *Id.*

111. US CONST. art. VI, § 2.

112. See JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES: TRENDS AND PROSPECTS* (Carolina Academic Press 1996) (Exploring various types of incorporations of international law into U.S. domestic legal processes, and the trends in use and prospects, as well as means of resolving unavoidable clashes between types of international law and domestic law.).

113. Office of the United Nations Commissioner of Human Rights, International Covenant on Civil and Political Rights (last modified Sept. 19, 2006), <http://www.ohchr.org/english/countries/ratification/4.htm>.

114. United Nations, Universal Declaration of Human Rights, (visited Oct. 15, 2006), <http://www.un.org/Overview/rights.html>. The Declaration was adopted on December 10, 1948 by General Assembly resolution 217 A (III), United Nations, Hundred and Eighty-Third Plenary Meeting,

the European Convention.¹¹⁵ However, the United Nations Human Rights Committee which interprets each of these treaties has not required the provision of free civil counsel to indigents.¹¹⁶

The U.S. is a member of the Organization of American States (OAS) the Charter of which contains an explicit to free civil counsel:

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms *Adequate provision for all persons to have due legal aid in order to secure their rights.*¹¹⁷

Likewise, the appropriate bodies to interpret the Charter, The InterAmerican Commission of Human Rights and the InterAmerican Court of Human Rights have not extended the right to counsel to most civil cases.¹¹⁸ But in an advisory opinion the InterAmerican Court did require civil counsel for migrant workers to be able to assert workplace rights.¹¹⁹

In *Paquette*, Justice Gray also wrote:

For this purpose, where there is no treaty, and no controlling executive or legislative act or juridical decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.¹²⁰

Continuation of the discussion of the draft universal declaration of human rights. <http://www.un.org/Depts/dhl/landmark/pdf/a-pv183.pdf>.

115. *Id.* Article 10 of the UDHR states, “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” (emphasis added). ICCPR Art. 14 (1) states: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law.” (emphasis added).

116. *Id.*

117. Organization of American States, Charter of the Organization of American States Art. 41 (Washington D.C., Nov. 1997) (emphasis added).

118. The International Center for Criminal Law Reform and Criminal Justice Policy, The Responsibility of States to Provide Legal Aid (Mar., 1999), <http://www.icclr.law.ubc.ca/Publications/Reports/beijing.pdf> (argues that “[t]his reference to legal aid in securing rights covers both civil and criminal law matters as it relates to effective recourse to ensure all human rights”).

119. InterAmerican Court of Human Rights, Advisory Opinion OC-18/03 (September 17, 2003) ¶¶ 107, 108, 121.

120. *The Paquette Habana*, 175 U.S. 677, 700 (1900).

Customary international law, in addition to treaties, makes up the majority of international law rules.¹²¹ There are two components to customary international law: 1) it results from a general and consistent practice of states, and 2) it is followed by them from a sense of legal obligation:

The requirement of international consensus is of paramount importance, for it is that consensus which evinces the willingness of nations to be bound by the particular legal principle [V]iolations of current customary international law, are characterized by universal consensus in the international community as to their binding status and their content. That is, they are *universal, definable, and obligatory international norms*.¹²²

Modern scholars are divided as to the status of customary international law in federal courts. Some argue that customary international law has the status of federal common law.¹²³ Other commentators argue that customary international law is not federal common law because it “is not a rule of decision for any courts without statutory authorization but that it can be part of the common law of the states to the extent that individual states choose to incorporate it.”¹²⁴

The debate regarding customary international law and the existence of federal common law was given new life in the recent case of *Sosa v. Machain*.¹²⁵ That case dealt with the Alien Torts Statute (ATS).¹²⁶ The court determined that “the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations.”¹²⁷ But required “any claim based on the present-day law of nations to rest on a norm of international character accepted by the

121. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 101, 102 (1987).

122. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D.Cal. 1988).

123. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 cmt. d, 115 cmt. e (1987).

124. Julian G Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 267 (2001). See generally Curtis A. Bradley, *The Status Of Customary International Law In U.S. Courts — Before And After Erie*, 26 DENV. J. INT'L L. & POL'Y 807 (1998); Curtis Bradley and Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique Of The Modern Position*, 110 HARV. L. REV. 815 (1997); Gordon A. Christenson, *Customary International Human Rights Law In Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225 (1995/1996); Joan Fitzpatrick, *The Relevance Of Customary International Norms To The Death Penalty In The United States*, 25 GA. J. INT'L & COMP. L. 165 (1995/1996); F. Giba-Matthews, *Customary International Law Acts As Federal Common Law In U.S. Courts*, 20 FORDHAM INT'L L. J. 1839 (1997); Louis Henkin, *International Law As Law In The United States*, 82 MICH. L. REV. 1555 (1984); Jack L. Goldsmith and Eric A. Posner, *A Theory Of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Harold Hongju Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Harold Hongju Koh, *Commentary: Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Jordan J. Paust, *Customary International Law And Human Rights Treaties Are Law Of The United States*, 20 MICH. J. INT'L L. 3301 (1999).

125. 542 U.S. 692 (2004).

126. 28 U.S.C.A. § 1350 (West 2006).

127. *Sosa*, 542 U.S. at 721.

civilized world and defined with the specificity comparable to the features of the 18th century paradigms we have recognized.”¹²⁸

It is unlikely that arguments made to domestic courts will succeed under international law. Without definitive rulings by international bodies responsible for treaty interpretation and without near universal adoption of a right to free civil counsel under customary international law, United States courts will probably find that the right is not required by international law.

Still, foreign law, whether it drives from international instruments, or from independent adoption by particular countries can have persuasive power.¹²⁹ Our federal law is full of instances where courts have overruled past decisions based on an “evolution of fundamental principles.”¹³⁰ One such example is *Gideon* itself. It is a long-standing principle of our Supreme Court to interpret fundamental rights based on contemporary standards of the time.¹³¹ For example, recently the United States Supreme Court revisited the issue of whether the execution of a mentally retarded criminal was prohibited by the Eighth Amendment of the Federal Constitution, despite having already decided the issue in a previous case.¹³² In its analysis, the Court looked at the number of states that recently prohibited the execution of retarded persons.¹³³ It held that in light of “evolving standards of decency,” the Constitution placed a “substantive restriction on the State’s power to take the life of a retarded person.”¹³⁴

What constitutes contemporary community standards and norms can also be ascertained from international and comparative law. This point has been amply demonstrated by three very recent Supreme Court decisions: *Roper v. Simmons*¹³⁵ (holding that the death penalty for offenders under the age of eighteen violated the Eighth Amendment), *Lawrence v. Texas*¹³⁶ (holding that a statute which made criminal certain sexual conduct by homosexuals violates the Due Process Clause), and *Grutter v. Bollinger*¹³⁷ (holding that the law school’s consideration of race and ethnicity in its admissions decisions was lawful because law school had a compelling interest in attaining a diverse student body and admissions program was narrowly tailored and thus did not violate the Equal Protection Clause).

128. *Id.* at 725.

129. Hans Linde, *Comments, Symposium On International Human Rights Law In State Courts*, 18 INT’L LAW. 77, 78 (1984) (explaining that “[i]t is potentially a powerful argument to say to a court that a right which is guaranteed by an American constitutional provision, state or federal, surely does not fall short of a standard adopted by other civilized nations”). Justice Linde of the Oregon Supreme Court wrote the opinion in the case of *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981) (holding that cross-gender prison searches in correctional facilities violated the Oregon Constitution. Throughout the opinion, Judge Linde makes reference to the United Nations Charter, the UDHR, the ICCPR and other international instruments. *Id.* at *passim*).

130. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

131. See, e.g., *Weems v. United States*, 217 U.S. 349 (1910) (holding that what is considered cruel and unusual is to be interpreted by contemporary standards of what constitutes cruel and unusual).

132. *Atkins v. Virginia*, 536 U.S. 304 (2002).

133. *Id.* at 314-17.

134. *Id.* at 321.

135. 543 U.S. 551 (2005).

136. 539 U.S. 558 (2003).

137. 539 U.S. 306 (2003).

In *Roper*, the majority spent considerable time addressing the state of the law throughout the world regarding execution of juveniles.¹³⁸ Although the court was clear that even near unanimous rejection of execution of juveniles elsewhere is not controlling on the court's interpretation of the Eighth Amendment, it took note that its opinions on this issue had "referred to the laws of other countries and to international authorities as instructive."¹³⁹ Justice O'Connor wrote a separate dissent primarily to reject Justice Scalia's dissent in which he argued that foreign and international law had no place in U.S. jurisprudence.¹⁴⁰ Thus, six justices of the court opened the door to arguments bolstered by comparative and international law.

In *Lawrence*, the court based its decision to overrule the relatively recently decided case of *Bowers v. Hardwick*,¹⁴¹ which had held that there is no fundamental right to engage in sodomy by homosexuals, by concluding that the real fundamental right involved is one of privacy.¹⁴² In its opinion, the Supreme Court cites decisions by the European Court of Human Rights¹⁴³ and the law of other nations,¹⁴⁴ all of which protect the right of homosexual adults to engage in intimate consensual conduct, in order to demonstrate the widespread adoption of such a right.

In *Grutter*, Justice Ginsburg's concurring opinion noted that the Court's observations that race-conscious programs must end once their goal is achieved, "accords with the international understanding of the office of affirmative action."¹⁴⁵ Justice Ginsburg, along with Justice Breyer, thought it was important that our law was in accord with international law.¹⁴⁶

CONCLUSION

Elsewhere in the world countries have developed, as a matter of their own domestic law, a right to a free civil lawyer for low-income persons. Council of Europe members are bound by decisions of the European Court on Human Rights, which the European Convention requires them to develop as a matter of

138. *Roper*, 543 U.S. at 574-76.

139. *Id.* at 575.

140. *Id.* at 587-608.

141. 478 U.S. 186 (1986).

142. *Lawrence*, 539 U.S. 558.

143. *Id.* at 576 (citing *Dudgeon v. United Kingdom*, 149 E.C.H.R. (1981), *P.G. & J.H. v. United Kingdom*, App. No. 44787/98, & ¶ 56 (E.C.H.R., Sept. 25, 2001), *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993), *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988)).

144. *Id.* at 576-77.

145. *Grutter*, 539 U.S. at 344 (Ginsburg, J. concurring) (citing the The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994); *see also* State Dept., Treaties in Force 422-423 (June 1996), for its endorsement of "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G.A. Res. 2106, 20 U.N. GAOR Res. Supp. (No. 14) 47, U.N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Id.*

146. *Id.*

international human rights law. In the United States, policy makers, advocates, legislators and judges need to become educated about this progress. Not only have these countries put in place the right, but they have also fully articulated standards with respect to the range of the substantive cases, types of legal services, the various fora, and standards of indigence.

Recent United States Supreme Court jurisprudence has looked to foreign and international law in cases in which the Court has extended constitutional protections. In this global age ideas as well as goods and people cross borders. This country, founded on the rule of law and the centrality of resolution of disputes through the courts, has much to learn from the old world.

APPENDIX A:

Country Specific Information On The Scope Of The Right to Free Lawyers for Low-Income People In Civil Matters All of the dates referenced can be found in Johnson, *International Perspective*, *supra* note 1, or in the text of *supra* note 57.

KEY**Country**

LP – Loser Pay

Basis of Right

C - Constitution

J - Judicial Opinion

O - Executive order

S - Statute

Lawyer Services

A - Advice

L - Litigation

M -Mediation

T - Transactions

Scope of right

All - All civil and Administrative

All Civil - All civil, no Administrative

Broad - Most civil with listed exclusions, see Fora if administrative matters are included.

Types of Fora

TC - Trial Court

AH - Administrative Hearings

App - Appeals

Merits Tests

C/B - Cost/benefits, often phrased as a reasonable person with resources would pay a lawyer to pursue

Reasonable Basis - Reasonable grounds for taking, defending, continuing

Need

Yes - Means there is an income standard for eligibility

SS – Sliding Scale

NGO – Non-Governmental Organizations: includes non-profits, charitable organizations.

No Need

Advice - Advice free to all

Public Interest - If matter of public interest

Prin. - Principle

Ess. - Essential to Applicant

Country	Basis of Right	Scope of Right				Client Qualifications		
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need
COUNCIL OF EUROPE								
Albania								
Andorra	C 1993							
Armenia LP – Yes	S. 2004	Alimony, personal injury to breadwinner	All others	A, L, M	TC, AH App	Case by case	Case by case	
Austria	1781	All civil		A, L	TC, App	Not manifestly unfounded, in good faith	Yes SS	
Azerbaijan LP – No	C 1995	All	None	A, L	TC, AH App		Yes SS	
Belgium LP - Yes	C 1994	All	None	A, L, M, T	TC, AH App	Apparently well-founded claim	Yes SS	Asylum Disab'y minors
Bosnia/Herzegovina								
Bulgaria	C 2000	Family, Emp't Pensions, Patent, Social Welfare	Property disputes	A, L	TC, AH App		Yes	Disab'y

Country	Basis of Right	Scope of Right					Client Qualifications		
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need	
Czech Republic LP - Yes	Charter 1991	All civil		A, L, M, T	TC, AH App	Likelihood of success not capricious	Yes SS	Case by case	
Cyprus LP - Yes		Human rights, family.		A, L	TC App		Yes		
Denmark	Leg. 1969	Broad	Def., Bus.,	A, L	TC	Fair chance of winning Reasonable cause	Yes LEI	public interest, Principle, Essential to person.	
Estonia LP - Yes	Leg. 2004	Broad	Def., Bus. IP	A, L, T	TC, AH App	Possibility of winning is clearly unlikely	Yes SS NGO	Equality of power, Complexity	
Finland		Estate, Emp't, LL/T, Social Security, Consumer, Wages, Family	Agreed divorce. Taxation	A, L, M, T	TC, AH App	C/B	Yes SS	Victims of DV &, sexual offense	
France LP - Yes	S 1851	All + enforce	None	A, L, M, T	TC, AH App	Not manifestly inadmissible	Yes SS	Matter of worthy interest, Veteran pensions, Imm., Minors	

Country	Basis of Right	Scope of Right				Client Qualifications			
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need	
Georgia	No Civil								
Germany LP - Yes	S 1877	Broad	Taxation, Bankruptcy	A, L	TC, AH App	Likelihood of success	Yes SS LEI		
Greece	S 2004	All	None	A, L, M, T	TC, AH App	Balance of probabilities	Yes SS NGO	Disability, Unem-ployed, Refugees, Ethnic minorities	
Hungary LP - Yes	O 2003	Broad	Bus., Bank loans, Customs, Const'l complaints	A, L, M, N	TC, AH App	None	Yes SS	Homeless, Asylum	
Iceland LP - Yes	C 1976				Extensive list	Sufficient grounds, Important public policy	yes	Police misconduct, Paternity	
Ireland LP - Yes	CL 1979	Broad	Defamation, Land disputes, Conveyance, Class actions, Election petitions, Test cases.	A, L	TC, App,	C/B, Likely to succeed	Yes SS minimum contribution	Asylum	
Italy	C 1947, S 1923 1865	Broad	Assigned claims	L	TC, A, AH	Not manifestly groundless	Yes NGO	Parental rights, Deportation	

Country	Basis of Right	Scope of Right				Client Qualifications			
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need	
Latvia	S			A, L, T	TC, AH App		Yes	Age, Disability	
Liechtenstein LP - No	S 1994	Broad + enforce	Car acc., Bus. Professional activities	L	TC, App	Not frivolous, nor w/o prospect of success	Yes SS		
Lithuania	S 2000	All	None	A, L, M, T	TC, AH App		Yes SS		
Luxembourg	S 1995	All	None	A, L, M, T	TC, AH App	C/B, unlikely to succeed	Yes		
Macedonia LP - Yes		All	None	L	TC, App		Yes SS		
Malta LP - Yes	S	All	None	L	TC, AH App	Reasonable grounds	yes		
Moldava LP Yes	No civil								
Monaco LP - Yes	O 1932	All	none	L, M, N, T	TC, AH, App		Yes		
Netherlands LP - Yes	S 1957 Con.	Broad	Matters of business or professions	A, L, M, N, T	TC, AH App	C/B, Manifestly unfounded	Yes SS		

Country	Basis of Right	Scope of Right				Client Qualifications		
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need
Norway	S 1980 CL 1600's (Earl Johnson 1915)	All inc'g rule-making or legislative advocacy	Matters of business or professions, Real estate, Property damage, Consumer	A, L, M, N, T	TC, AH	Likelihood of success. C/B	Yes SS	Imm., Involuntary medical treatment custody
Poland LP -Yes	S 1964	All, incl'g enforcement't	None listed	L	TC, AH App.	Facts merit legal aid	Yes, SS NGO	Age, Disability
Portugal	1899 Johnson			L	TC, AH App		Yes SS Corps	
Romania LP -No	S	Broad	Def.	A, L, M, N, T	TC, AH App.		Yes	
Russia LP -No	C 1917	(Check list) Broad	Bus.	A, L,	TC, AH App		Yes	Age, Emp't, Disability, Political repressionAlimony, WWII vets
San Marino LP -No	2000			A, L, M, N, T	TC, AH App		Yes FF Company	
Serbia/Montenegro LP -No	Con, 1990/02	All civil	none	A, L, T	TC, App	C/B	Yes SS	

Country	Basis of Right	Scope of Right					Client Qualifications		
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need	
Slovak Republic LP -No	S 1963	All + enforce	None	A, L,	TC, AH	Not manifestly unreason'ble, Importance of claim	Yes SS	Minors, Alimony	
Slovenia LP -Yes	S 2001	Broad	Def., Maintenance Debts Property damage	A, L,	TC, AH App.	C/B, Likely to succeed. Well founded Reasons	Yes SS NGO	Advice, Exceptional costs	
Spain	S 1885 (1835 oldest Johnson	All Incl'g enforcement't		A, L, T	TC, AH App	Likelihood of success,	Yes SS NGO	If other party repre-sented	
Sweden LP-Yes	1919 Capalitti	Broad	Defamation Most family	A, L, M, T	TC, AH App		YES SS LEI	Minors	
Switzerland LP -Yes	J 1937	All Civil	None	L	TC, App	C/B, No hope of favorable outcome	Yes		
Turkey	S 2001	All		L	TC, AH App	Likely to prevail	Yes		
Ukraine LP -Yes	C 1978	Broad	Def., bus. Small claims	A, L	TC, AH App	No	Yes	Extensive list	

Country	Basis of Right	Scope of Right					Client Qualifications		
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need	
United Kingdom England LP-Yes	1495	Broad (AH only for Imm. and Emp't)	Def., Pl, Bus., Wills, Boundary disputes,	A, L	TC App	C/B, Reasonable prospect of success, Wide public interest	Yes SS	Import to applicant, Unable to proceed w/o funding	
North Ireland LP – Yes		Broad (Only Land tribunals)	Defamation, Elections	A, L	TC, App	Reasonable grounds		Minors	
Scotland LP – Yes		Broad (Only Land & Emp't tribunals)	Defamation, Elections, Simple divorce	A, L	TC, App	C/B, Plausible case	Yes SS		
Wales	Same as England								

Country	Basis of Right	Scope of Right					Client Qualifications		
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No Need	
Australia LP-Yes	Common-wealth 1977	Broad	Def., Bus., landlord disputes wills estates	A, L, M	TC, AH App	Reason-able prospect of success, C/B	Yes SS	Family Age, disability veterans	
Hong Kong LP-No		Family, L/T, emp't, estates, commercial property, PI, debts bankruptcy	Foreign law, some commercial	A, L, M	TC App	Reasonable grounds, substantial legal question	Yes SS	Breach of bill of rights, inconsistent with internat'l law	
India	C1976	Broad	Def., elections, proceedings against state	A, L, M, T	TC, AH App	pfc	Yes	Women, children caste or tribe members, human trafficking, disaster victims, disability	
Japan LP-No	Leg. 2000	Broad	Def	A, L, M, T	TC, AH,	Likelihood of success	Yes, but may require later reimbursement	none	

Country	Basis of Right	Scope of Right					Client Qualifications	
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No Need
New Zealand LP-Yes	S 1969, S 2000	All family Includes class actions	Divorce wills, education, immigration, companies*	A, L	TC, AH App	Pfc, likelihood of success C/B	Yes SS	minors, mental disability
S. Africa	Leg. 1969	Family, labor, landless rts to land	Def., bus.liquidation of corp, estate	A, L, M	TC, AH App	Reasonable prospect of success, C/B	Yes	minors
Zambia	S 2003	All	none	A, L	TC, App	none	Yes SS	
Brazil	C							

CANADA

Province/ Territory	Basis of Right	Scope of Right				Client Qualifications		
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need
British Columbia LP-No	S 1979	Mental Health, prison, limited family, imm.	Everything no on list	A,L	TC,AH, App	12(b)(6).	Yes SS	none
Manitoba	S 1987	Some family law, income security	Claim for lump sum of money damages,	A,L	TC, AH App	Likelihood of success, C/B	Yes SS	none
New Brunswick LP-No	S 1971	Family law	Property, administrative matters, most other civil aid		T, App	Reasonable in the circumstances	Yes SS	none
Northwest Territories	1997	Broad	Will, simple divorce		T	Urgency, C/B	Presume d eligibilit y for all, SS	none
Newfoundland and Labrador LP-No	Policy 1968, S 1975		Def, alienation of affection, elections	A,L	TC App	Likelihood of success C/B	Yes SS	
Nova Scotia	S 1989		Immigration			Urgency	Yes SS	none

Province/ Territory	Basis of Right	Scope of Right					Client Qualifications		
		Covered	Excluded	Lawyer Services	Fora	Merits Test	Need	No need	
Nunavut	S 1988	Some civil, family	none				Presumpt ion of eligibilit y		
Ontario	S 1998						Sliding scale		
Prince Edward Island	policy	Not sure if right					Sliding scale	none	
Quebec LP-No	S 1972	Family, Soc Sec, Unempl't Workers comp	All others	A, L	TC, AH	Necessary and needed aid	Yes SS	none	
Saskatchewan		Family				Professional merit		none	
Yukon	S 1986	Family matters	All others	A, L	TC App	Chance o success, C/B	Yes SS		