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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

Hon. Earl Johnson, Jr.[1]

If the motto 'and justice for all' becomes 'and justice for those who can afford it,' we threaten the very underpinnings of our social contract.

Ronald George, Chief Justice of California
State of the Judiciary speech, September 2001

In an article published a quarter century ago, I wrote with a note of optimism:

> Some propositions are so elemental and some developments so long overdue that once implemented most Americans wonder how democratic society could have functioned any other way. Women's suffrage, the elimination of de jure racial discrimination and the right to counsel for indigent felony defendants are among these phenomena. . . . [Likewise] [a]t some point, Americans will look back and ask how concepts like "due process," "equal protection of the law" and "equal justice under law" were anything but hollow phrases, while our society still tolerated the denial of counsel to low-income civil litigants.[2]

As it turned out, in just the three years after that article was published, the highest courts on two continents had occasion to address the issue of a constitutional right to counsel in civil cases. Those courts reached very different conclusions, however.

Many readers are familiar with what happened on one of those continents—North America. In 1981, the United States Supreme Court's decision in *Lassiter v. Dep't of Soc. Services of N.C.* held that our

Constitution's guarantee of "due process" does not provide a right to counsel in civil cases, even when the government is taking away a mother's parental rights to her children.[3] Furthermore, the five–four opinion created a presumption against such a right in civil cases and fashioned a nearly impossible test for overcoming that presumption.[4]

But what happened on the other continent—Europe? Two years before *Lassiter*, in the case of *Airey v. Ireland*, the European Court of Human Rights (European Court) considered the same fundamental issue in the case of *Airey v. Ireland*.[5] The European Court reached the opposite conclusion, holding the European Convention on Human Rights and Fundamental Freedoms (European Convention) and its guarantee of a "fair hearing" in civil cases required the government to provide free counsel to indigent civil litigants, even though Ms. Airey's case "only" involved her marital status and right to financial support and other property rights.[6]

This leads to an obvious question: what is it about the U.S. Constitution that is so different from the European Convention? The U.S. Constitution guarantees American civil litigants due process.[7] Similarly, the European Convention guarantees European civil litigants a fair hearing.[8] What is in the language used in these two fundamental documents that might lead courts interpreting those words to reach very different answers to such a basic question? Is due process really something less than a fair hearing? Or, are the two terms merely different ways of expressing the same basic concept?

This question, in turn, leads back to that previously mentioned 1978 article on the right to counsel in civil cases and asks what might be learned by exploring the same fundamental question from a broader perspective—a perspective that takes into account what we share with other democracies and what we may have to learn from those nations on this issue. The following pages first explore the common source of the language expressing the essential ingredients of the process used to resolve civil disputes found in the constitutions of nearly every democratic nation on the face of the

Earth. The article then discusses how supreme courts in different jurisdictions have interpreted the constitutional language that emerged from this common source. Next, the article explains the difference between an absolute "right to counsel" in criminal cases and a "right to equal justice" in civil cases, and explores how the latter might be administered. Finally, the article inquires whether the developing global consensus on this issue may ever influence our own country's constitutional jurisprudence.

I. THE SOCIAL CONTRACT AND ITS "PRECEPT" THAT GOVERNMENT IS TO PROVIDE EQUAL JUSTICE TO ALL ECONOMIC CLASSES

The search for the source of the relevant constitutional language begins not on this continent or in this century, but in Europe in the seventeenth and eighteenth centuries. It was the intellectual ferment during those centuries that produced the theory so influential with the drafters of nearly all the constitutions found in the Western democracies—including our own. At that time, most European nations had been ruled for centuries by kings and emperors, absolute monarchs who claimed the source of their power descended from God, and consequently they possessed a divine right to govern the lesser mortals who populated their countries. Finally, many of those lesser mortals had had enough. All across Europe, thoughts of revolution—violent and political—were in the air. Still, the revolutionaries lacked a satisfactory rationale to counter the religious-based divine right theory.

Then a group of brilliant political philosophers began espousing one version or another of a brand new vision—the social contract. As men like Jean-Jacques Rousseau, Thomas Hobbes, and John Locke explained, a government's right to govern did not descend from God in his heavens, but from the consent of the governed right here on earth. These philosophers argued individual citizens surrendered their rights, including their right to settle disputes through the use of force, only in exchange for a sovereign's promise to provide all of those citizens justice, peace, and the possibility of

a better life. Although these philosophers tended to differ around the edges and in other areas about exactly what this promise entailed, they all subscribed to the fundamental notion of what they called the "social contract"—an agreement among a nation's individual citizens and between those citizens and that nation's government.

As John Locke, perhaps the social contract thinker most influential upon the founding fathers of our nation, explained:

> [P]olitical power is that power which every man having in the state of nature has given up into the hands of the society. . .with this express or tacit trust that it shall be employed for their good and the preservation of their property. . .as he thinks good . . .and to punish the breach of the law of nature in others. . . . [This power] can have no other end or measure when in the hands of the magistrate but to preserve the members of that society in their lives, liberties, and possessions. . . . And this power has its origins only from compact and agreement, and the mutual consent of those who make up the community.[9]

Other social contract theorists, like Rousseau and Hobbes, echoed Locke's words. For example, the following passage stresses one of the key obligations Hobbes believed the social contract imposed on the sovereign, e.g., any government.

> The safety of the People, requireth further, from him or them that have the Sovereign Power, that *Justice be equally administered to all degree of People*; that is, that as well the rich, and mighty, as *poor and obscure persons, may be righted of the injuries done them;* so as the great, may have no greater hope of impunity, when they doe violence, dishonour, or any Injury to the meaner sort, than when one of these, does the like to one of them; For in this consisteth Equity; to which, as *being a Precept of the Law of Nature, a Sovereign is. . . subject*. . .[10]

The import of these expressions of social contract theory is this fundamental precept: citizens would not give up their natural right to settle disputes through force unless the sovereign offered a peaceful alternative in

which they have a fair chance to prevail if in the right, no matter whether they are rich, poor, or something in between. Society, in turn, breaches this social contract if its forums favor one citizen over the other. The disfavored person cannot be presumed to have agreed to submit to an unjust sovereign.[11] Thus, the equal administration of justice among different economic classes is an essential underpinning of any society purportedly resting on the consent of the governed.[12]

Over the next hundred years, the social contract theories of these political philosophers and their revolutionary ideas swept across the European continent. During the 1800s, several emperors and kings either fell before the sway of the social contract, or bowed to its terms, thus transforming from absolute monarchs to constitutional monarchs. Even when these monarchs did not bow down, most found it necessary to abide by the core terms of the social contract. This included complying with what Thomas Hobbes termed a "Precept of the Law of Nature"—equal justice for the poor and the rich alike.[13]

Nation after nation actualized this Precept by adopting statutory rights to counsel in civil as well as criminal cases. It is true the English Parliament had anticipated the social contract by creating such a right in 1495, centuries before political theorists had conceived that theory.[14] But the social contract theory undoubtedly influenced the continental European countries as they followed suit in the nineteenth and early twentieth centuries. France enacted a statutory civil right to counsel in 1851,[15] Italy embodied that right in its procedural laws at the moment of its birth as a nation in 1865,[16] and Germany also enacted a right to civil counsel when it became a nation in 1877.[17] Most of the rest of Europe was not far behind.[18]

Notably, when first enacted, none of these statutes provided government funding for the legal representation they guaranteed. Rather, the government drafted private lawyers for this purpose, requiring them to serve without compensation in return for the privilege of practicing law and earning fees from those clients who could afford to pay. In most countries,

it was the twentieth century before governments began paying for the right they had created, and some still do not.[19]

II. THE SOCIAL CONTRACT YIELDS CONSTITUTIONAL GUARANTEES OF FAIR HEARINGS AND "EQUALITY BEFORE THE LAW" IN THOSE HEARINGS

This article is not concerned with statutory rights, except as evidence European governments accepted the social contract's mandate justice must be administered equally to the poor and the rich, and recognized this meant they had to provide free lawyers to those who could not afford one. Of more relevance is the fact this basic "precept" of the social contract also found its way into the constitutions or "basic laws" of several European nations. These documents were drafted by practical politicians, not social contract theorists. Yet, it would have been difficult for those politicians to be ignorant of that then prevalent political theory or its basic principles. As might be expected, therefore, these constitutions nearly always included guarantees all citizens were "equal before the law" or in all judicial proceedings they were guaranteed "fair trials."[20] All of this was a natural outgrowth of the social contract and one of its key precepts requiring the sovereign to provide equal justice to poor and rich alike.

The influence of the social contract did not end at the shores of the European continent. This fundamental concept and all that flowed from it also crossed the Atlantic Ocean to the restless English colonies on the eastern seaboard of North America. Although the American public is often told the Founding Fathers invented the ideas embodied in the Declaration of Independence and the U.S. Constitution, most historians credit the social contract philosophers, and especially John Locke, with many of those concepts.[21] Jefferson himself said that Locke was one of the three greatest men in all of history (the others being Francis Bacon and Isaac Newton),[22] and several of the most renowned passages in the Declaration are paraphrases of Locke's writings.[23] Perhaps even more significant for

present purposes, one noted historian observed, "Locke was an intellectual godparent of James Madison, the Father of the Constitution."[24] Similarly, a leading political scientist insisted, "Locke is *our* political philosopher. . .we can recognize in his work [among other key elements] our *insistence* on *the rule of law*. . ."[25]

Because social contract theory and the general precept that governments must dispense justice equally to the rich and the poor were so influential with those who drafted this nation's Constitution, it is no surprise that the Preamble to the U.S. Constitution sets forth "To Establish Justice" as one of the nation's four primary goals.[26] Nor is it surprising, given the importance of the social contract, that the Bill of Rights guarantees all U.S. citizens due process in any judicial proceedings where their "life, liberty, or property" is at stake.[27]

European constitutions may have phrased this guarantee in terms of a "fair hearing" while the Founding Fathers spoke of "due process," but it is difficult, if not impossible, to discern a difference. As Justice Oliver Wendell Holmes observed in one of his more self-evident pronouncements, "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a *fair trial*, with opportunity to be heard."[28]

After the Civil War, the United States also added the analog of another guarantee which many European countries had already adopted in order to implement the social contract. As mentioned earlier, some European constitutions guaranteed their citizens, including the poorest, "equality before the law." In the Fourteenth Amendment, the U.S. Constitution came to guarantee all citizens "equal protection of the laws." Where due process promises litigants—poor, rich and middle-class alike—that they will enjoy a fair hearing in the courts, the Equal Protection Clause promises those litigants they will have "like access" to court proceedings. That is, all litigants will stand on an equal footing and have an equal chance of prevailing if in the right. As the Supreme Court explained long ago:

> The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the *equal protection of the laws," undoubtedly intended*. . .that equal protection and security should be given to all. . .that they should have *like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts*. . . .[29]

Thus, the language of our Equal Protection Clause and the "equality before the law" clauses of some European constitutions may differ slightly in the words they use, but the import of these constitutional clauses remains identical. This is not surprising, considering the United States Constitution and these European constitutions share a common source—the social contract.

III. TWENTIETH CENTURY JUDICIAL INTERPRETATIONS OF CONSTITUTIONAL "FAIR HEARING" AND "EQUALITY" GUARANTEES ON THREE CONTINENTS

The social contract theory was born in the seventeenth and eighteenth centuries. Many nations embodied the basic fair hearing and equality before the law guarantees in their constitutions or basic laws in the nineteenth century. But it was the twentieth century before courts began interpreting the constitutional language and deciding if and when those clauses required governments to supply free lawyers to their lower income citizens. In the past sixty-six years, courts on three continents—Europe, North America, and Africa—have addressed this issue.

A. Europe

The Swiss Supreme Court was the first of the European courts to confront the issue whether the constitutional guarantees derived from the social contract require the state to provide free lawyers to litigants who cannot afford their own. The year was 1937, a full quarter-century before

the U.S. Supreme Court decided *Gideon v. Wainwright*[30] which granted criminal defendants in this country a right to free counsel. The Swiss case, however, did not involve a criminal defendant. Rather, it was an indigent civil litigant who stood before the court and asked the judges to appoint counsel to protect his legal rights.

Switzerland is especially instructive for the United States, because like our country, it is a union of sovereign geographical entities all operating under the legal umbrella of a federal constitution. In fact, Switzerland is a confederation in political terms, a looser union than our federal system. What we call states, Switzerland calls "cantons," and the Swiss Supreme Court tends to be reluctant to dictate to the governments of those cantons.

The cantons are subject to the federal constitution, however, and to the federal Supreme Court's interpretations of that constitution. The Swiss federal constitution is one of those containing a guarantee of equality before the law. It provides: "All Swiss are equal before the law."[31] In a case entitled simply, *Judgment of Oct. 8, 1937,* the Swiss Supreme Court concluded that poor people could not be equal before the law in the regular civil courts, unless they had lawyers just like the rest of the citizenry. The court reasoned the constitutional "principle of [equality] before the law" requires the cantons to provide a free lawyer "in a civil matter where the handling of the trial demands knowledge of the law."[32] In subsequent decisions the Swiss Supreme Court has explained and expanded the circumstances when cantonal governments must supply tax-funded lawyers to poor civil litigants.[33] In what would be considered an anomaly in this country, it was 1972 before the Swiss Supreme Court held criminal defendants had a similar constitutional right to free counsel.[34]

The high courts of other European nations have not been called upon to decide whether their constitutions (or basic laws) guarantee a right to counsel in civil cases—but for a simple reason. As discussed earlier, most of these nations have had statutory guarantees for decades or centuries.[35] The German Constitutional Court, however, did confront the issue at least

once. In its *Decision of June 17, 1953*, the German Constitutional Court made it clear that Germany's constitutional guarantee of a fair hearing in civil cases may require appointment of free counsel for poor people where the legal aid statute does not.[36]

The Swiss and German right to counsel decisions proved to be early precursors of a ruling with implications across the entire European continent.[37] In 1979, Ireland was almost unique among European countries in having no legal aid program of any kind. So when an indigent wife, Ms. Airey, wanted to file a judicial separation suit against her husband, she could not get a lawyer. When she asked the trial court to appoint counsel, the judge refused, explaining that Ireland did not provide free counsel to indigents in civil cases. The court instead invited Ms. Airey to represent herself in that court. When Ms. Airey appealed the denial of counsel to the Irish Supreme Court the result was the same, and she received the same explanation. However, Ms. Airey had one last place to go—the European Court of Human Rights, in effect the Supreme Court of Europe on questions of individual rights. (Ms. Airey also had the good fortune of being represented before the European Court of Human Rights by a former President of Ireland.)

The European Court of Human Rights interprets and enforces the European Convention on Human Rights and Fundamental Freedoms[38]—the equivalent of our Bill of Rights—which all members of the European Community and a number of other European countries have signed. At this point, forty-five nations are governed by this Convention and bound by the European Court of Human Right's interpretations of the Convention's provisions.[39]

The European Convention on Human Rights does not guarantee indigent civil litigants a right to free counsel in so many words. Nevertheless, consistent with a fundamental precept of the social contract, Article Six of the Convention does guarantee all civil litigants a fair hearing.[40] In *Airey,* the European Court asked whether a person could receive a fair hearing in

the regular courts without the assistance of a lawyer. After examining that question from several angles, the European Court concluded the answer was no, and held the fair hearing guarantee of the European Convention required the member governments to provide free counsel to those unable to afford their own.[41] In the course of its opinion in *Airey*, the European Court issued an unusually powerful statement about government's affirmative obligation to provide equal access to justice for low-income citizens:

> The Convention was intended to guarantee rights that were *practical and effective*, particularly in respect of the right of access to the courts, in view of its prominent place in a democratic society…. The possibility of appearing in person before the [trial court] did not provide an effective right of access.[42]
>
> The [Irish] Government maintain that. . .in the present case there is no positive obstacle emanating from the State and no deliberate attempt by the State to impede access: the alleged lack of access to the court stems not from any act on the part of authorities but solely from Mrs. Airey's personal circumstances, a matter for which Ireland cannot be held responsible under the Convention.
>
> [T]he Court does not agree. . . . In the first place, hindrance in fact can contravene the Convention just like a legal impediment. Furthermore, fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive, and 'there is. . .no room to distinguish between acts and omissions.' The obligation to secure an effective right of access to the courts falls into this category of duty.[43]

As will be explored in more detail within,[44] it is interesting to note that in deciding that *effective* access in civil cases requires representation by a lawyer, the European Court discussed many of the same factors to justify a right to counsel in civil cases as the U.S. Supreme Court had discussed in *Gideon v. Wainright* to justify a right to counsel in criminal cases in our country. The European Court mentioned that the other side in most of these cases had elected to have lawyers, that most civil litigants who were on the

same side but could afford lawyers in fact employed them, and that the procedures and substantive legal rules were relatively complex.[45] In ordinary civil litigation in the ordinary civil courts, the European Court held that governments must provide free lawyers to indigent civil litigants.[46] This ruling now controls litigation for some forty-five nations across the continent of Europe, comprising the majority of the World's western industrial democracies.

B. North America

Closer to home and just four years ago, the Supreme Court of Canada, in a case closely paralleling the facts of *Lassiter*, found a constitutional right to counsel in the fair hearing requirement of Canada's first written constitution, the relatively new "Charter of Rights and Freedoms."[47]

Like *Lassiter,* the Canadian case, *J.G. v. New Brunswick,*[48] arose when the government sought to deprive a mother of her children. In the Canadian case, however, the province of New Brunswick only sought to continue its custody over the children for another six months. Had the government tried to permanently deprive the mother of her parental rights—the stakes involved in *Lassiter*—the New Brunswick legal aid law would have guaranteed the woman free counsel. Furthermore, even in a temporary deprivation case like this, most other Canadian provinces would have entitled the mother to legal aid as a matter of statutory law. But New Brunswick, which has one of the least generously funded legal aid programs in Canada,[49] denied free counsel to poor mothers where they only stood to lose custody temporarily.

The Canadian Supreme Court ultimately held the New Brunswick government was constitutionally required to supply indigent parents with free counsel whenever it proposed to assume or maintain custody of their children—permanently or temporarily.[50] Chief Justice Lamer authored the principal opinion and first had to address a threshold issue not presented by the due process clause of the U.S. Constitution. While our constitution

specifically confers its procedural protections on a person's "life, liberty, and property," the relevant provision of the Canadian Charter only extends to life, liberty, and "security of the person."

Does the temporary loss of custody of one's child fit any of these categories in the Canadian Charter of Rights? Chief Justice Lamer answered in the following terms:

> [T]he right to security of the person protects 'both the physical and psychological integrity of the individual'. . .[51]
>
> For a restriction of security of the person to be made out. . .the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility.[52]. . . [D]irect state interference with the parent-child relationship. . .is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as 'unfit' when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.[53]

Chief Justice Lamer then turned to the critical issue: what does the Charter guarantee when the state files a custody application?

> Section 7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children.[54]. . . For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child.[55] [The statutory scheme] allows parents to be present at and participate in the hearing, with or without counsel, hear all the evidence and cross-examine witnesses, and present evidence and make other representations to the court. However, it does not provide for the payment of legal fees incurred by parents with respect to an application by [the state].[56] In the circumstances of

> this case, the appellant's right to a fair hearing required that she be represented by counsel.[57]

Larmer reached this conclusion by considering the following factors: "the seriousness of the interests at stake, the complexity of the proceedings and the capacities of [J.G.]."[58]

So, the Supreme Court of Canada, the only other common law country on our own continent, has joined the highest court on the European continent in finding that poor people cannot get a constitutionally guaranteed fair hearing in the regular courts unless represented by a lawyer. True, the Canadian Supreme Court has yet to confront this issue in the context of cases involving property rights. Yet, it is significant that the Canadian court in 1999 found a right to counsel when a personal right, lesser than the right involved in the U.S. Supreme Court's 1981 decision in *Lassiter*, was at stake.

C. Africa

It is not only democracies in Europe and North America that are beginning to join this global consensus. In 2001, on the continent of Africa, one of the world's newest democracies, South Africa, reached this issue in the case of *Nkuzi v. The Government of the Republic of South Africa and The Legal Aid Board.* [59] This time, the issue was not heard by the nation's Supreme Court, but by the Land Claims Court of South Africa. And in this case, unlike *J.G. v. New Brunswick*, purely property rights were at stake.

The Land Claims Court has jurisdiction over eviction actions between tenants or occupiers of land and those asserting ownership. Most of those tenants or occupiers are poor, uneducated blacks, while those bringing the eviction actions tend to be wealthy whites. In an action filed by the Legal Resource Centre, a South African public interest law firm, the tenants sought a declaration requiring the appointment of free counsel in land eviction cases where the litigant could not afford counsel, as well as a requirement that the judge advise those litigants they possessed this right.

Perhaps because it is such a new democracy, South Africa's court was humble enough to look far beyond its own borders and precedents for guidance. The brief the tenants' counsel filed was unusually sophisticated and informed the judges about nearly all the judicial decisions and reasoning from Europe and North America discussed in this article.

The opinion itself was relatively brief, but two sentences from those two pages were enough for the Land Claims Court of South Africa to capture the essence of the rationale for a right to counsel in civil cases. It found that "There is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand."[60] Accordingly, the court declared:

> The persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act, Act 62 of 1997 and the Land Reform (Labour Tenants) Act, Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have *a right to legal representation or legal aid at State expense* if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources. . . .
>
> . . .The State is under a duty to provide such legal representation or legal aid through mechanisms selected by it.[61]

Significantly, neither the South African government nor the Legal Aid Board appealed the *Nkuzi* decision to a higher court. Consequently, the ruling is being followed and enforced in all land eviction cases.[62] Thus, the globalization of this constitutional value continues apace with five decisions, on three continents, in the sixty-six years since the Swiss Supreme Court first declared its constitutional guarantee of equality before the law mandated appointment of free counsel for indigent civil litigants. Five decisions, covering hundreds of millions of people on this planet, all have reached the same conclusion. No western court, outside the borders of the United States, has been willing to find that an indigent civil litigant can

obtain a fair hearing or equal treatment in the regular courts unless represented by a lawyer.

Before considering whether these foreign decisions may ever have any relevance in the United States, it is important to recognize the precise nature of the right they have declared. It is a different and more complex right than the one our Supreme Court's *Gideon* decision conferred on criminal defendants. Thus, if *Gideon*'s trumpet is to sound for civil cases, it will play a different and more complicated melody.

IV. A "RIGHT TO COUNSEL" IN SOME CIVIL PROCEEDINGS IS NOT THE SAME AS A "RIGHT TO EQUAL JUSTICE" IN ALL CIVIL PROCEEDINGS

As interpreted by the U.S. Supreme Court in criminal cases, the Constitution guarantees an absolute right to counsel; that is, to representation by a full-fledged lawyer in all cases.[63] This is a simple and straightforward, although quite expensive, right to enforce. In criminal cases, this right is easily justified, not only by the seriousness of criminal penalties, but also by the complexity of the criminal process. The Constitution not only guarantees counsel, but also dictates the essential elements of criminal procedure that make the assistance of counsel essential to equal justice for criminal defendants.

In its broad outlines, the American criminal process represents a single standard method of deciding guilt and innocence. The model is distinctly adversarial. It features such elements as: jury trials; complex rules of evidence; constitutional rights against self-incrimination and illegally obtained evidence that must be raised or waived in the heat of the courtroom battle; ever more intricate and onerous sentencing schemes; and a dozen other guaranteed, or at least universal elements that make self-representation, or representation by anything less than a skilled lawyer, a foolish alternative.

In contrast, the civil—or, more accurately, the non-criminal—arena is far more diverse. There is no single model—but rather a panoply of models (and potential models) for resolving disputes. The regular civil courts, the forums in which traditional contract, tort, and property litigation occur, are every bit as complex as the criminal courts, indeed often more so. Hence, lawyers are as essential for civil litigants in these forums as they are for criminal defendants in criminal trials. As the European Court emphasized, in these proceedings the assistance of a lawyer is essential to a fair hearing and to effective access to justice.[64] Consequently, it seems reasonable to expect any right to equal justice in civil cases to be co-extensive with the right to counsel when appearing in the regular civil court.

What should be the rule, however, in the many civil forums where lawyers arguably are not essential for disputants to get a fair chance? At one extreme, some states actually bar lawyers from representing litigants in small claims courts.[65] Rich, poor and middle-class alike must present their own cases. Presumably, there are also other forums, including some officially called "courts," that are or could be designed to afford non-lawyers equal justice without the assistance of counsel.[66]

In a less renowned section of its *Airey* decision, the European Court recognized this possibility:

> [W]hilst Article 6 para. 1 guarantees to litigants an effective right of access to the courts for the determination of their 'civil rights and obligations,' it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme—which Ireland now envisages in family law matters—constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 (1).[67]

Thus, the European Court of Human Rights qualified its holding, requiring member governments to provide free counsel to indigent litigants in civil cases. The Court mandated counsel only in cases where the procedures or the substantive law is sufficiently complex that the expertise of lawyers makes a substantial difference to the litigant's chances of success. The holding left open the option for governments to offer forums where poor litigants could enjoy effective access to justice without legal counsel. Thus, what the European Court of Human Rights announced for the signatory nations to the European Convention was not a right to counsel as such, but more accurately a right to equal justice in civil cases.

The other foreign decisions discussed above are likewise compatible with a constitutional right to equal justice, but not an absolute right to counsel in all civil cases. As in *Airey*, all of these constitutional decisions involved proceedings in the regular civil courts, and thus did not directly consider whether government was required to provide free counsel to indigents in other forums that resolve civil disputes. All the decisions contained language suggesting, or at least implying, the right to counsel would not apply in forums where proceedings were so simple that a disputant had a fair chance for justice without a lawyer's knowledge and expertise. For example, the Swiss Supreme Court specifically limited their citizens' right to counsel to cases where "the handling of the trial demands knowledge of the law."[68] The Canadian Supreme Court went to considerable length to establish that assistance of counsel was essential to a fair hearing in forums (in this instance the regular civil courts) where the government seeks to justify retaining custody of a parent's child.[69] Finally, the South African Land Reform Court found the land eviction proceedings before it to be no different in complexity from a criminal trial, and consequently no less demanding of legal counsel if litigants are to have the fair hearing that South Africa's constitutional mandates.[70]

In one sense, the possibility of satisfying this constitutional imperative, short of declaring an absolute right to counsel in civil cases, could make it

easier for an appellate court to recognize such a right. After all, in doing so, the courts would not be mandating government pay for a lawyer in each and every civil dispute involving an indigent on one side or the other. Instead, they would be limiting the mandate to cases and forums where disputants cannot obtain a fair hearing unless assisted by a lawyer. Moreover, if the legislative branch considered it too expensive to pay for lawyers in certain categories of disputes, it could reserve the option of devising forums where people could get a fair hearing and enjoy effective access without the help of a lawyer.

Yet, in another sense, this possibility complicates the articulation, and certainly the administration, of such a right. If the judgment of whether a proceeding satisfies this right to equal justice is to be made retrospectively on a case-by-case basis, the right becomes virtually meaningless. Low-income clients denied counsel would be forced to appeal that denial to the appellate courts to learn whether their particular circumstances meant they had been deprived of their constitutional right to equal justice. Only rarely would such an appellate challenge be feasible—primarily when a legal aid organization chose to allocate a portion of its limited resources to take that appeal for the indigent litigant. Consequently, as a practical matter, trial courts and other forums would be free to adopt their own interpretations of whether the constitutional right to justice required the provision of free counsel to indigents appearing in their proceedings.

Thus, if they are to guarantee truly effective access to low income civil litigants, appellate courts would not only have to recognize a right to equal justice, but also over time establish definitive standards. Those standards would have to define when legal representation was required and when justice could be achieved without providing poor people with free counsel. In some instances, justice might be achieved by providing less expensive, non-lawyer advocates,[71] and in others, by designing forums that truly operate fairly without trained advocates of any kind.[72] In all likelihood, the latter would mean a shift from an adversarial model to an inquisitorial

model of dispute resolution in those forums, in which the judge or other decision-maker rather than the parties bore the primary responsibility for uncovering and presenting the facts, as well as identifying the relevant legal principles.

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

Another, perhaps more sound, approach would be to articulate an over-arching standard accompanied by a presumption and verified by empirical testing. The overarching test? What the European Court stated so artfully: all disputants are entitled to effective access to the court or other dispute-resolving forum. The presumption? Virtually the opposite of the presumption the U.S. Supreme Court majority announced in *Lassiter*: a presumption that effective access requires the government to supply free representation by a lawyer, or a non-lawyer representative where sufficient, to those who are unable to afford their own representation in all non-criminal cases.

This presumption could only be overcome where a court can legitimately certify the particular forum deciding the dispute can and does provide a fair and equal opportunity for justice to those who lack such representation. For obvious reasons, it would be virtually impossible to overcome this presumption in a dispute where the other side was represented.[73] Likewise, it would be rare in cases where nearly everyone on the same side as the indigent disputant, who could afford representation, employs a lawyer or other paid representative. As the *Gideon* and *Airey* opinions emphasize,[74]

both of these factors furnish powerful empirical evidence supporting the need for representation.

The more likely candidates for overcoming this presumption would be existing or future forums specifically designed to function without lawyers or other representation. In most instances, this would mean forums built around an inquisitorial rather than adversarial model of dispute resolution. The forum itself, rather than the disputants, would have to absorb the primary responsibility for uncovering the facts and legal principles critical to a proper decision. This might represent a difficult, but certainly not impossible, transformation for a judicial system and legal profession historically committed to the adversarial model. California's creation several decades ago of small claims courts that bar lawyers or other professional representation offers some evidence innovative forums might evolve that could offer effective access to justice for disputants lacking representation. Nonetheless, the difficulty of designing dispute resolution forums capable of operating fairly and effectively without professional representation is suggested by the fact the California small claims system has found it necessary to begin employing a coterie of small claims court advisors. Although they do not represent litigants in the courtroom, these "advisors" do help litigants assemble the evidence that they will need and prepare litigants for their appearances before the small claims court judges.[75]

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

Europe appears on the verge of incorporating something approaching the above formula in the text of its new constitution. That is, a formula guaranteeing legal aid in civil cases while allowing alternative strategies for delivering *effective* access to justice. The European community currently is in the process of considering the adoption of a true continent-wide "Constitution," not just a series of "Conventions" among sovereign nations as they have had until now.[76] Section 47 of Article II of the draft constitution provides: "Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."[77]

This constitutional guarantee essentially places into the body of the European Constitution itself the European Court of Human Rights' interpretation of the European Convention's fair hearing provision. In *Airey*, that court held the Convention's fair hearing guarantee meant indigent civil litigants were to have *effective* access to justice, along with everyone else. Furthermore, this required governments to provide free lawyers when their services were needed to provide that effective access. Shortly, it appears, the European continent will complete the final step in the evolution of this right to equal justice from an abstract precept of the social contract to a guaranteed practical and effective right fixed in the immutable language of a constitutional provision.

This examination of foreign jurisprudence and constitutional drafting brings the discussion to the next question: does any of this make a difference for our country? Will the United States, or any U.S. jurisdiction, ever recognize this fundamental guarantee as a constitutional right in civil cases?

V. THE U.S. SUPREME COURT AND FOREIGN CONSTITUTIONAL DECISIONS

Will there come a time when the issue our Supreme Court addressed in *Lassiter* is no longer framed solely by the precedents and constitutional

values generated within our borders? When, if ever, will U.S. courts acknowledge the broad global consensus about the meaning of fundamental concepts like fair hearing, due process, equality before the law, and equal protection of the laws? When, if ever, will the U.S. Supreme Court begin looking at the decisions of high courts of other nations and how those courts have interpreted constitutional concepts and language also found in our own constitution?

Based on past experience, the possibility our courts would ever refer to foreign court decisions interpreting similar constitutional concepts seemed remote just a few years ago. After all, the U.S. Supreme Court decided *Lassiter* in 1981 without even mentioning the contrary decision of the European Court of Human Rights in *Airey*. This despite the fact that *Airey* was filed two years earlier and declared a much broader right to counsel in civil cases covering a population even larger than the United States. Indeed, until recently, one would struggle to find any U.S. Supreme Court opinions in the past two centuries deciding a constitutional issue that even bothered to mention the high court opinions of other countries and how they construed those nations' constitutions.[78]

Three years ago, however, some light suddenly flickered at the end of the tunnel. At an international conference the World Bank sponsored in June 2000, two U.S. Supreme Court justices spoke in terms suggesting that they, at least, saw value in examining foreign court opinions. In her speech to this assemblage of judges and lawyers from all over the world, Justice Sandra Day O'Connor urged the audience:

"I would like to see. . .opinions of high courts around the globe, written, interpreted in several languages and put on Web sites so that the world can see what you're doing."[79] One would reasonably assume Justice O'Connor was expressing not just an idle curiosity in seeing what other nation's courts are doing, but an interest in considering those opinions when deciding cases before our Supreme Court.

An even more significant prediction of things to come, as it turned out, was Justice Anthony Kennedy's comment at that same conference. Justice Kennedy implicitly promised to pay attention to relevant decisions of the European Court of Human Rights, if only the judges of that court would write fully reasoned opinions. In his speech, Justice Kennedy called on that court to "begin writing decisions which have the capacity and the power to inspire and persuade."[80] This comment seemed to suggest Justice Kennedy could find opinions of the European Court of Human Rights to qualify as persuasive authority in analyzing constitutional issues, if only those opinions satisfied his test.

That these "off the bench" speeches delivered by Justices Kennedy and O'Connor might prove to be precursors of things to come in the Supreme Court's "on the bench" jurisprudence was confirmed in one of the Court's landmark opinions delivered near the end of the 2002–2003 term. Justice Kennedy's opinion for a six-justice majority in *Lawrence v. Texas*[81] held it unconstitutional for states to criminalize homosexual sodomy. The opinion relied heavily on foreign decisions, and in particular, decisions of the European Court of Human Rights.

In its *Lawrence v. Texas* decision, the Supreme Court had to deal with *Bowers v. Hardwick,*[82] an opinion it rendered only seventeen years earlier upholding the constitutionality of state anti-sodomy laws. Justice Kennedy found it persuasive that several years before *Bowers* was decided the European Court of Human Rights had already found anti-homosexual sex laws to be invalid under the European Convention. As the *Lawrence* majority explained:

> Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched,

> and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981) & ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.[83]

Later in the *Lawrence* opinion, the Supreme Court emphasized that its previous *Bowers* opinion had adopted a distinctly minority view among western democracies on the constitutionality of laws banning homosexual conduct.

> [To] the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. *See P. G. & J. H. v. United Kingdom*, App. No. 00044787/98, & ¶ 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. *See* Brief for Mary Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[84]

Admittedly, this sudden interest in foreign constitutional decisions, and especially those coming from the European Court, is not popular with some of the present Supreme Court Justices. However, a clear majority of six justices signed Justice Kennedy's opinion in *Lawrence*, in contrast to Justice Scalia's dissent, which only garnered three votes. In that dissent, Scalia rebuked the majority for paying any attention whatsoever to what

courts in the rest of the western democracies may have decided on a similar constitutional question. He stated:

> Constitutional entitlements do not spring into existence. . .as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," *ante*, at 16, but rather rejected the claimed right to sodomy on the ground that such a right was not 'deeply rooted in *this Nation's* history and tradition,' 478 U.S. at 193-94 (emphasis added). *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a 'wider civilization,' *see id.* at 196. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court. . .should not impose foreign moods, fads, or fashions on Americans.' *Foster* v. *Florida*, 537 U.S. 990, 154 L. Ed. 2d 359, 123 S. Ct. 470, n. (2002) (THOMAS, J., concurring in denial of certiorari).[85]

Not long after the Supreme Court issued the *Lawrence* opinion, another Justice voiced strong personal support—and hinted at broader support within the Supreme Court—for a global approach to constitutional adjudication. On August 4, 2003, Justice Ruth Bader Ginsburg told the American Constitution Society:

> Our island or lone-ranger mentality is beginning to change. . . [Supreme Court Justices] are becoming more open to comparative and international law perspectives. . . . While you are the American Constitution Society, your perspective on constitutional law should encompass the world. We are the losers if we do not both share our experiences with and learn from others.[86]

In his speech to the World Bank conference in 2000, Justice Kennedy had expressed some skepticism about the "capacity and power" of the decisions the European Court produced to "inspire and persuade." By 2003, however, he overcame that reluctance and found persuasive power in *Dudgeon v. United Kingdom* and its progeny.[87] Yet even accepting Justice Kennedy's

initial challenge to the European Court to write opinions "with the capacity to inspire and persuade," *Airey v. Ireland* appears to meet that challenge.

This article already presented some of the reasoning and policy considerations supporting the *Airey* opinion. To further capture the flavor of the opinion, however, it is useful to examine the European Court's explanation for why counsel is so essential to any litigant, rich or poor, in the regular courts. In particular, note how the *Airey* opinion stresses many of the same reasons the U.S. Supreme Court recited in *Gideon v. Wainwright* to support the right to counsel in criminal cases.

After pointing out the absurdity of considering whether *in*effective access to the courtroom could possibly satisfy the constitutional requirement of a fair hearing, the European Court turned to the critical question of whether effective access in civil cases requires representation by a lawyer. In proposing this inquiry, the court stated: "It must therefore be ascertained whether Ms. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily."[88]

The court went on to note:

> It seems certain to the court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court's opinion to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the [Irish] Government, the judge affords to parties acting in person. . . .
>
> . . .A specialist in Irish family law. . .regards the High Court as the least accessible court … by reason of the fact that 'the procedure for instituting proceedings. . .is complex.'. . .
>
> Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined.

> . . .[It is] most improbable that a person in Mrs. Airey's position. . . can effectively present his or her own case. This view is corroborated [by the fact] that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer.[89]

In conclusion, the court took all of the above considerations into account when it stated that "the possibility to appear in person before the High Court does not provide the applicant with an effective right of access."[90]

Compare now the rationale of the *Airey* decision with that found in *Gideon* and their relative "capacity to persuade and inspire." Just as the European Court of Human Rights did when it considered an unrepresented litigant's prospects in civil court, the U.S. Supreme Court in *Gideon* justified its declaration of the constitutional right to counsel in criminal cases by stressing the fact that most people of means hire lawyers when facing trial in the criminal courts.[91] And, like the *Airey* court, the *Gideon* court utilized the judges' own familiarity with what is required to find and present evidence in a courtroom to draw the conclusion a lawyer's assistance was necessary for the defendant to have an effective defense.[92] But, the *Airey* court actually went further than the U.S. Supreme Court in justifying the need for counsel in civil cases. The European Court also considered expert testimony, demonstrating that the law and procedure were so complex a layperson could not represent him or herself "properly and satisfactorily."[93]

Because the *Gideon* opinion is fairly typical of the "capacity and the power to inspire and to persuade" found in U.S. Supreme Court opinions, and the depth and quality of the analysis in *Gideon* and *Airey* are so similar, it appears difficult to discount *Airey* on that score. When, as in *Airey*, a decision of the European Court satisfies Justice Kennedy's test and addresses common constitutional language or comparable constitutional concepts, that foreign decision would seem to merit serious consideration by the U.S. Supreme Court.

Indeed, there appears to be more reason to pay attention to *Airey* when attempting to divine the meaning of the U.S. Constitution's due process and equal protection clauses as applied to an indigent civil litigant's right to counsel than to consider the European Court's stance on homosexual sexual conduct. For reasons explored earlier,[94] the text of our constitution and the European Convention interpreted in *Airey* derive from the same fundamental concept—a key element of the social contract theory both documents implement.

Once the U. S. Supreme Court, or a state supreme court, acknowledges that it should pay attention to how foreign courts construe constitutional values we share in common, it will be difficult to ignore the growing global consensus among jurisdictions with written constitutions, that one of the core constitutional values is a right to equal justice. Moreover, it will be equally difficult to ignore the consequence this right to equal justice that embraces a right to counsel, at the very least in cases tried in the regular courts. The Swiss Supreme Court, German Supreme Court, European Court, Canadian Supreme Court, and South Africa's Land Claims Court have all reached this same conclusion. These courts saw no alternative but to require government to provide free counsel to poor civil litigants, if the government were to satisfy the constitutional guarantee of a fair hearing or equality before the law for those too poor to afford their own lawyers—at least in those cases where the substantive or procedural law is sufficiently complex as to require a lawyer's services for a fair and equal chance at justice.

VI. THE SOCIAL CONTRACT, THE AMERICAN PUBLIC, AND AMERICA'S POOR

The evolving global consensus in support of a guaranteed right to equal justice also appears to be shared by the American public. Polls suggest four in five Americans believe, erroneously of course, that poor people already have a guaranteed right to counsel when sued in the civil courts, just as they

do when prosecuted in the criminal courts.[95] Clearly, ordinary Americans have a very different interpretation of the due process and equal protection guarantees of the U.S. Constitution than do the nation's judges. It is not difficult to understand why. From kindergarten on, Americans raise their right hands and pledge allegiance to a nation promising "justice for all." The constitution they study in school guarantees them that no one can be deprived of "property" as well as "life" or "liberty" without due process of law. That same constitution also promises they shall enjoy "equal protection of the laws." Several times a week, they see the image of the U.S. Supreme Court building on their television screens or in the pages of their newspapers or magazines. Featured prominently in that image, they see the promise of "Equal Justice Under Law" chiseled in marble over the entrance of this grand temple of our judicial system.

Could it be the citizens of this country are born, or at least raised, with an implicit understanding of the social contract and what it must mean for their rights and those of their fellow Americans? That regular citizens, perhaps better than lawyers, judges, or law professors, comprehend the terms of the social contract they tacitly agree to as members of this democratic society? Is it possible most of them could not comprehend why anyone would consent to join a society that would deny them equal justice if they were, or became, poor? Are they realistic enough to know no one has a fair chance for justice in a typical courtroom unless that person has a lawyer at her side? Certainly, if the answer to the question is yes it would explain why so many of our citizens hold the erroneous view that Americans already enjoy a constitutional right to counsel in civil cases if they are too poor to employ her own.

Nevertheless, under our system of government, judges, not the general public, interpret constitutions. Constitutional rights are declared by Supreme Courts—the U.S. Supreme Court for the entire country and state supreme courts for the individual states—and not by the supreme courts of Europe, Canada, or any other nation. Therefore, the American people, and

especially America's poor, can only wait and see if their expectations will be realized by the only authority equipped to do so.

VII. CONCLUSION

This article began with a quote from the Chief Justice of California, Ronald George. In his annual "State of the Judiciary" speech delivered to the California legislature, Chief Justice George warned, "If the motto 'and justice for all' becomes 'and justice for those who can afford it,' we threaten the very underpinnings of our social contract." In a very real sense, this article has been an explanation of why this is so. It has explored the intimate and historical connection between "justice for all" (including and especially poor people) and the "social contract." Deny the first and you definitely and profoundly breach the other. The article has also traced the link between the social contract and the fundamental concepts embodied in the due process and equal protection provisions of our constitution, and has revealed how other societies based on the social contract have interpreted those same concepts to require effective access to justice (including free lawyers where needed) for all their citizens.

Unfortunately, for many of this nation's lower income people—those who cannot be served with the limited resources currently devoted to providing them representation—the "If" in Justice George's warning is really a "Because." That is, "*Because* the motto 'and justice for all' *already is* 'and justice for those who can afford it,'" we *already* "threaten the very underpinnings of our social contract."[96] Because of this reality, the social contract has been breached and many unfortunate millions are destined to be denied justice in America's courts.[97]

Thus, the subject of this article is something more than an academic exercise, one inquiring whether a right to equal justice is a part of the social contract, whether the constitutional due process and equal protection guarantees of the U.S. Constitution implement that right to equal justice, and whether that right to equal justice would require free counsel for

indigent litigants in many civil cases. Instead, the subject of this article has real consequences for real people. For without the effective access to justice such a right would guarantee, poor people in this country today too often unjustly lose their housing, their possessions, their livelihood, their children, and nearly everything else that makes life worth living.

Whether America finally joins the growing consensus among western democracies and declares that neither our own social contract nor our constitution can continue to tolerate such daily injustices—that question only time and our nation's courts will answer.

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[1] Justice, California Court of Appeal; former Professor of Law, University of Southern California and Senior Research Associate, USC Social Science Research Institute.

[2] Earl Johnson, Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOY. L.A. L. REV. 249, 249–50 (1978).

[3] Lassiter v. Dep't of Soc. Services of N.C., 452 U.S. 18, 31–32 (1981). The facts of *Lassiter* could scarcely have been less favorable for the Supreme Court to declare that due process required appointment of counsel in civil cases. The petitioner was a convicted murderess serving a lengthy prison sentence, who allegedly had not been in contact with her child for several years when the state sought to terminate her parental rights. The state afforded the petitioner the right to appointed counsel in the hearing where it initially sought to take custody of her child. However, the state denied her the same right when it sought to terminate the mother's parental rights. Moreover, the termination proceedings were informal enough that social workers rather than lawyers sometimes represented the state, although a lawyer opposed Ms. Lassiter in her case. Despite these circumstances, four of the nine justices were prepared to reverse and remand for a trial at which the petitioner would have the assistance of counsel.

[4] The majority opinion first justified and announced this presumption:

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

Id. at 25–26. (The dissenters challenged both the presumption and its underlying generalization about the Court's precedents. *Id.* at 40–42.)

The majority then adopted the three-part test, devised in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), as the appropriate approach in deciding whether due process demanded the appointment of counsel for indigents in cases not implicating physical freedom. *Lassiter*, 452 U.S. at 27. The *Mathews* case,

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

Id. (The dissenters agreed and applied the *Eldridge* factors, but disagreed that the "net weight" of those factors had to overcome a presumption *against* appointment of counsel in civil cases. *Id.* at 42.)

In weighing the *Eldridge* factors, the majority conceded the "private interest at stake," a parent's interest in "the companionship, care, custody, and management of his or her children" was "a commanding one." *Id.* at 27. The majority then pointed out the "government's interest" was two-fold. *See id.* at 27–28. On the one hand, like the parent, it has an interest in an accurate and just determination of whether the child should remain tethered to the parent. *Id.* But, on the other hand, it has a pecuniary interest in avoiding the cost of providing counsel to the parent and the cost of a delayed and perhaps longer proceeding. *Id.* at 28. Significantly, the majority conceded that additional cost was not sufficient "to overcome private interests as important as those here . . ." *Id.* Thus, it was the third *Eldridge* factor—the risk of error—that the majority found determinative in calculating the "net weight" to set on the scale with the presumption against appointed counsel. In *Lassiter,* the Court emphasized the relative informality of the proceeding, somehow discounted studies showing represented parents prevailed several times as frequently as unrepresented ones in North Carolina termination cases (as they did in some other jurisdictions), and also focused tightly on the particular factual circumstances of the case and the litigant. Significantly, along the way, even the majority justices highlighted circumstances that they felt might alter the equation enough to overcome the presumption. *See id.* at 28–32. Finally, the majority refused to articulate any standards for deciding when counsel would be constitutionally required, but opted instead for a retroactive case-by-case evaluation of whether the absence of a lawyer denied due process in a particular case. *Id.* at 32. (The dissenters examined the same three factors, reached a different balance, and also disputed the merits of the retroactive case-by-case approach that the *Gideon* case had rejected for criminal cases, and for much the same reasons.) *See id.* at 42–52.

[5] *See* Airey v. Ireland, 2 Eur. Ct. H.R. (ser. A) 305, 309 (1979). The facts and holding of this opinion are discussed in some depth at § III(A), pp. 208-12, and § V, pp. 222-24, *infra*.

[6] *Id*.

[7] U.S. CONST. amend. V.

[8] "In the determination of his civil rights and obligations. . .everyone is entitled to a fair and public hearing . . ." Convention for the Protection for Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, para. 1, 213 U.N.T.S. 222.

[9] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 97–98 (Thomas P. Peardon ed., 1952) (emphasis supplied).

[10] THOMAS HOBBES, LEVIATHAN 385 (C.B. Macpherson ed., Penguin Books 1968) (1651) (emphasis supplied).

[11] As one modern synthesis of Locke's SECOND TREATISE ON GOVERNMENT explains:

> Locke sees that, when men have multiplied and land has become scarce, rules are needed beyond those which the moral law or the law of nature supplies. But the origin of government is traced not to this economic necessity, but to another cause. The moral law is always valid, but it is not always kept. *In the state of nature all men equally have the right to punish transgressors: civil society originates when, for the better administration of the law, men agree to delegate this function to certain officers. Thus government is instituted by a "social contract"*; its powers are limited, and they involve reciprocal obligations; moreover, they can be modified or *rescinded by the authority which conferred them.*

Internet Encyclopedia of Philosophy, *available at* http://www.utm.edu/research/iep/l/locke.htm (last visited Nov. 8, 2003) (emphasis supplied). The people who signed the social contract are those who delegated the power to the officers (e.g., the courts) in the form of authority. Furthermore, the signers of the social contract retain the right to rescind the authority if the courts do not provide a fair process.

[12] Political philosopher John Rawls, a modern exponent of social contract theory, would use a somewhat modified model to explore this issue. His basic approach is to employ a hypothetical double-blind experiment where it is assumed no one knows whether they are going to be rich, poor, or somewhere in between (or what other advantages, such as intelligence or health, they will possess). *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971). Rawls terms this "The Veil of Ignorance." Then, he asks what social and political arrangements a group of rational people would agree to before they know the hand they would be dealt.

Rawls has not applied this approach to the specific issue considered in this article—whether society should supply those who lack sufficient economic means with the lawyers (or other resources) required to have a fair chance in the courts or other dispute resolution forums. Properly framed, however, it is difficult to imagine that the question would yield anything but an affirmative response from Rawls' hypothetical group of people who would not know where they would rank on the income scale. Realistically as well as hypothetically, how many people would want to risk entering a courtoom in which they would face near certain defeat because the other side could afford a lawyer and they could not?

Rawls on the other hand, has applied his theoretical approach to a somewhat related issue, the relative equality of income distribution within a society. In this analysis, he concluded a group of people unaware of where they would stand on the income scale would opt for a substantially more equitable distribution of income than is found currently in the United States. According to Rawls, is that a rational group of people making this decision behind a "veil of ignorance" would only tolerate inequality to the degree the resulting increase in productivity enhanced the size of the share the lowest income strata received. *Id.* at 136–42. If this is true, a fortiori, this same hypothetical group would only accept a dispute resolution system where that same low income strata had a fair chance of prevailing if in the right.

[13] Internet Encyclopedia of Philosophy, *supra* note 11.

[14] In Forma Pauperis Act, II Hen. VII, c. 12 (1495), *translated in* John Macarthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 373 (1923).
[15] MAURO CAPPELLETTI, JAMES GORDLEY & EARL JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 19 n.57 (1975) (citing Law of Jan. 22, 1851, Arts. 1-20 (1851), Bull. Des Lois 93).
[16] *Id.* at 19 n.59 (citing Law of Dec. 6, 1865, no. 2627, [1865] Rac. Uff. 2846).
[17] *Id*. at 19 n.62 (citing ZIVILPROZESSORDNUNG of Jan. 30, 1877 §§ 114-27 (1877).
[18] Many of these historical statutory "right to counsel" provisions are set forth in CAPPELLETTI ET AL., *supra* note 15.
[19] *See generally* CAPPELLETTI ET AL., *supra* note 15, at 19-20.
[20] *See* pp. 210-15, *supra*, for examples of these constitutional provisions.
[21] *See* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (1922).
[22] Letter from Thomas Jefferson to the American painter John Trumbull, in 1789, ordering portraits of "the three greatest men that have ever lived," referring to John Locke, Francis Bacon, and Isaac Newton, *available at* http://www.loc.gov/ exhibits/treasures/ trm033.html (last visited Nov. 8, 2003).
[23] For example, Locke wrote: "In this state of nature all men are equal in the sense that they are endowed with certain natural, or inalienable rights which no other individual may justifiably infringe," *available at* http://home.uchicago.edu/~ejv/jefferson.html (last visited Nov. 8, 2003). Jefferson produced an admittedly more eloquent version of the same fundamental notion in the Declaration of Independence. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) *available at* http://www.archives.gov/national_archives_ experience/declaration. html (last visited Nov. 17, 2003). Likewise, in the latter document, Locke's "life, liberty, and property" became "life, liberty, and the pursuit of happiness."
[24] LEE CAMERON MCDONALD, WESTERN POLITICAL THEORY: THE MODERN AGE 111 (1962).
[25] POLITICAL WRITINGS OF JOHN LOCKE 7–8 (David Wooton ed., Mentor 1993) (quoting Professor Nathan Tarcov) (second emphasis added).
[26] "We the People of the United States, in Order to . . . establish Justice . . . do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.
[27] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.
[28] Frank v. Mangum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) (emphasis supplied).
[29] Barbier v. Connolly, 113 U.S. 27, 31 (1885) (emphasis supplied).
[30] Gideon v. Wainwright, 372 U.S. 335, 339 (1963).
[31] CONST. OF THE SWISS FEDERATION, art. IV, *translated in* CAPPELLETTI ET AL., *supra* note 15, at 705.
[32] Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 5 (1967) (quoting Judgment of October 8, 1937, Arrêts du Tribunal Fédéral [ATF] 63, I, 209 (Switz.)).
[33] The Swiss Supreme Court wrote:

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

Bundesgericht (Federal Tribunal), Decision No. 27 of July 9, 1952, Entscheidungen des Schweizerischen Bundesgerichtes, Amtliche Sammlung, VOL. 78, PT. 1, pp. 193-196 (1952), *translated in* CAPPELLETTI ET AL., *supra* note 15, at 704-06 (emphasis added).

[34] The opinion declaring a right to counsel in civil cases also summarized the status of the right to counsel in criminal cases. "Cantonal legislation may prescribe that an accused will be provided a lawyer only in serious cases . . ." Schefer-Heer contre Conseil d'Etat d'Appenzell Rhodes-Extérieures, 8 Oct. 1937, Arrêts du Tribunal Fédéral, 63, I, 209. O'Brien, *supra* note 32, at 5. In 1972, the Swiss Supreme Court modified this rule, holding the cantons must grant every indigent criminal defendant a lawyer, except where his case clearly lacked merit. *"X" gegen Obergericht des Kantons Luzern*, 27 Sept. 1972, I. 340. CAPPELLETTI ET AL., *supra* note 15, at 706.

[35] *See* notes 14–18, *supra*, and accompanying text.

[36] Decision of June 17, 1953 (No. 26), Entscheidungen des Bundesverfassungsgerichts vol. 2, at 336–41 (1953). English translation of this opinion appears in CAPPELLETTI, ET. AL, *supra* note 15, at 700.

[37] *Airey*, 2 Eur. Ct. H.R. (ser. A) 305.

[38] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 8.

[39] *See* note 83, *infra*, and accompanying text.

[40] "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." Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 8.

It is interesting to note this language is very similar to the equivalent provision in the United Nations Declaration of Human Rights. That section reads: "*All persons shall be equal before the courts and tribunals*. In the determination of any criminal charge against him, or *of his rights and obligations in a suit at law*, everyone shall be entitled to a *fair* and public *hearing* by a competent, independent and impartial tribunal established by law." International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14 § 1, 220A U.N.T.S. 21 (emphasis supplied).

[41] *Airey*, 2 Eur. Ct. H.R. (ser. A) 305.
[42] *Airey*, 2 Eur. Ct. H.R. (ser. A) at 305 (emphasis supplied).
[43] *Id.* at 315–16.
[44] *See* pp. 218-23, *infra*.
[45] *See Airey*, 2 Eur. Ct. H.R. (ser. A) at 315.
[46] *See Airey*, 2 Eur. Ct. H.R. (ser. A) at 305.
[47] Canada adopted this Charter, similar in purpose and scope to the U.S. "Bill of Rights" amendments to the U.S. Constitution, in 1982. *See generally* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).
[48] *See* New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 177 D.L.R. (4th) 124, 131.
[49] In 1998–1999, New Brunswick expended less than $2.00 per capita on civil legal services for lower income people, compared to $7.06 in Ontario and $7.80 in British Columbia. *Legal Aid Expenditures by Object, Legal Aid in Canada*, CANADIAN CENTRE FOR JUSTICE STATISTICS (1998–99), *compiled in* RESOURCE AND CASELOAD DATA TABLES LEGAL AID SURVEY TABLE 5 at 85F0028 (2000).
[50] *See* New Brunswick v. G.(J.), 177 D.L.R. (4th) at 126.
[51] *Id.* at 146.
[52] *Id.* at 147.
[53] *Id.* at 148.
[54] *Id.* at 146.
[55] *Id.* at 151.
[56] *Id.*
[57] *Id.*
[58] *Id.* In a separate concurring opinion, Justice L'Heureux-Dubé found an additional provision of the Charter supported the right to counsel in this case.

> [T]his case also implicates issues of equality, guaranteed by s. 15 of the Charter. These equality interests should be considered in interpreting the scope and content of the rights guaranteed by s. 7. . . . This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings . . . Issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people and the disabled. . . . Thus, it is important to ensure that the analysis [of s. 7] takes into account the principles and purposes of the equality guarantee in promoting equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s.15.

Id. at 164–65.
[59] Nkuzi Development Association v. The Government of the Republic of South Africa, LCC 10/01 (Land Claims Ct. S. Afr. 2001), *available at* http://wwwserver.law.wits.ac.za/lcc/ (last visited Nov. 13, 2003) (on file with the *Seattle Journal for Social Justice*).
[60] *Id.* at 5.

[61] *Id.* (emphasis supplied).
[62] Interview with Executive Director, Vidhu Vedalankar, of South African Legal Aid Board, in Cambridge, Massachusetts (June 15, 2003).
[63] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (stating that "lawyers in criminal courts are necessities, not luxuries").
[64] *See Airey*, 2 Eur. Ct. H.R. (ser. A) at 315.
[65] "Except as permitted by this section, no attorney may take part in the conduct or defense of a small claims action." CAL. CIV. PROC. CODE § 116.530(a) (2003). [The exceptions are for proceedings in which the attorney is a party or the law firm of which he is a member is a party [CAL. CIV. PROC. CODE § 116.530(b) (2003)]. Attorneys also can be witnesses or give advice to a party before or after the hearing, and the like [CAL. CIV. PROC. CODE § 116.530(c) (2003)]. The present jurisdictional limit of small claims courts in California is now $5,000.
[66] It may be essential to guarantee a right to a different resource, however, for the millions of disputants who cannot understand or speak the English language. For these people, there can be no equal justice—or justice of any kind—unless they have a right to an interpreter [or someone who can effectively communicate between them and the judge or other dispute resolver deciding their case].
[67] *Airey*, 2 Eur. Ct. H.R. (ser. A) at 317 (emphasis supplied).
[68] O'Brien, *supra* note 32, at 5.
[69] *See* pp. 213-15, *supra.*
[70] *See* pp. 215-17, *supra.*
[71] HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998). This empirical study compared outcomes and perceptions in low-level administrative hearings where some parties were represented by lawyers and others by non-lawyer advocates. The author concluded non-lawyer advocates achieved equivalent or nearly equivalent results for their clients as did the lawyer advocates. He did emphasize, however, the process used in the administrative proceedings he studied was comparatively informal and the substantive law was comparatively straightforward and self-contained.
[72] Some of the possibilities are surveyed in Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. U. L. REV. 631 (1998). For an international survey that included alternative forums not requiring lawyers, *see* ACCESS TO JUSTICE: VOLUME II – PROMISING INSTITUTIONS (Mauro Cappelletti & John Weisner eds., 1979). For an analysis of innovative approaches derived from this survey, *see* Earl Johnson, Jr., *Thinking About Access: A Preliminary Typology of Possible Strategies*, *in* ACCESS TO JUSTICE: VOLUME III – EMERGING ISSUES AND PERSPECTIVES 5-168 (Mauro Cappelletti & Bryant G. Garth eds., 1979).
[73] A number of empirical studies of various courts and legal problems have included the effect of legal representation (and its absence) among the variables analyzed. In most of these forums, one side—creditor, landlord, etc.—was represented by counsel nearly all the time while the other side—debtor, tenant, etc.—was rarely represented. All of these studies tended to confirm the hypothesis the latter had a much better chance of prevailing when they did have legal counsel than when they did not.

Bankruptcy cases: During the period covered by a study of Chapter 13 bankruptcy cases only 2 percent of unrepresented debtors succeeded in obtaining a discharge of their debts, compared with 27 percent of represented debtors. (The success ratio for unrepresented debtors could have risen to a maximum of 12 percent assuming all those with cases still pending at the conclusion of the study obtained discharge, while as many as 82 percent of represented debtors might have achieved their goal, under the same assumption.) Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2070 n. 299 (1999) (reporting the results of an unpublished study by Gary Klein & Maggie Spade, *Self-representation in the Bankruptcy Court: The Massachusetts Experience 1* (Nat'l Consumer Law Ctr., 1996). This same study indicated virtually all creditors who were on the other side of the case from the pro se debtors had legal representation.

Family law cases: A 1992 study of 16 urban jurisdictions revealed only one side was represented by counsel in fully 53 percent of divorce cases, while both sides were represented in 28 percent and neither side was represented in 18 percent. John A. Goerdt, *Divorce Courts: Case Management, Case Characteristics, and the Pace of Litigation in 16 Urban Jurisdictions* (Nat'l Ctr. for State Courts, 1992). Comparative outcome statistics were unavailable; moreover, in a substantial percentage of cases both sides wanted the same result. But a related study did report that, overall, 72 percent of pro se petitioners would proceed pro se again, while only 36 percent of pro se respondents who faced petitioners represented by counsel said they would proceed on a pro se basis if required to litigate again in family court. American Bar Association Standing Committee on the Delivery of Legal Services, *Responding to the Needs of the Self-Represented Divorce Litigant* 11 (ABA, 1994) (reporting on results of an earlier committee sponsored study, *Self-Representation in Divorce Cases* (ABA, 1992)). This same result is reported in a revised version of the latter study published as Bruce D. Sales, et al., *Is Self-Representation A Reasonable Alternative to Attorney Representation in Divorce Cases*, 37 ST. LOUIS U. L. J. 553, 593 (1995).

Small Claims Courts [which permit legal representation]: In a study of the Iowa Small Claims Courts, represented defendants were four times more likely to win than unrepresented defendants [13 percent to 3 percent] and represented plaintiffs were significantly more likely to win than unrepresented plaintiffs [93 percent to 86 percent]. Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 511 (1990). The majority of plaintiffs were businesses seeking to collect debts and landlords seeking to collect rent. They won most of the time, and nearly all the time when the debtors or tenants lacked legal representation.

Housing courts: New York's housing courts theoretically provide a simplified forum more hospitable to unrepresented litigants—landlords or tenants—than the traditional landlord-tenant courts they replaced. However, a recent randomized study reveals lawyers still make a great difference in a tenant's chances before these courts. "For example, only 22% of represented tenants had final judgments against them, compared with 51% of tenants without legal representation. Similarly large advantages for tenants with an attorney also were found in eviction orders and stipulations requiring the landlord

to provide rent abatements or repairs." Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001).

[74] *See* pp. 228-29, *infra*, for language from these opinions stressing the presence of counsel on the other side, or the fact most similarly situated litigants who possessed means employed lawyers, furnished strong evidence that indigent litigants likewise required counsel in the proceedings those courts were considering.

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

[76] *See* Velida Pearce, *New European Constitution—What Does It Really Say?* 57 INT'L. B. NEWS 3 (Sept. 2003) for a discussion of the proposed constitution and the process for its adoption. According to this article, the document is scheduled to be signed during May 2004.

[77] Draft EUR. CONST. pt. II, tit. IV, art. II, § 47 (emphasis supplied).

[78] As recently as 1998, an author was able to observe the U.S. Supreme Court "has never referred to any decisions of the European Court [of Human Rights] or [the European] Commission of Human Rights," at least in a majority opinion. Claire L'Heureuse-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 38 (1998). For a thorough review of the Supreme Court's past reluctance to consider foreign judicial decisions and a prescient prediction this would change within the next five years, see Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417 (2000).

[79] Laurie Asseo, *Three members of Supreme Court Promote Rule of Law in Other Countries*, ASSOCIATED PRESS NEWSWIRES, June 6, 2000.

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

[81] *See* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

[82] Bowers v. Hardwick, 478 U.S. 186, 195–96 (1986).

[83] *Lawrence*, 123 S. Ct. at 2481.

[84] *Id.* at 2474.

[85] *Id*. at 2494–95, (Scalia, J. dissenting).

[86] Gina Holland, *Ginsburg Backs More Global View for America's Judicial Decisions*, L.A. DAILY JOURNAL, Aug. 5, 2003, at 4.

[87] *See* discussion *supra* pp. 224-26.

[88] *Airey*, 2 Eur. Ct. H.R. (ser. A) at 314–15.

[89] *Id.* at 315.

[90] *Id.*

[91] *Gideon,* 372 U.S. at 344.

[92] *Id.*

[93] *See Airey*, 2 Eur. Ct. H.R. (ser. A) at 315.

[94] *See* discussion at § I, *supra*.

[95] Two polls, conducted in 1991, probed the respondents' understanding of their constitutional rights. One was sponsored by the California Bar Association [CALIFORNIA STATE BAR REPORT, *Bar Survey Reveals Widespread Legal Illiteracy*, 11 CAL. LAWYER 68, 69 (1991)] and the other by a national conference commemorating the 200th anniversary of the adoption of the Bill of Rights [ASSOCIATION OF TRIAL LAWYERS OF AMERICA, 1991-1992 DESK REFERENCE SUPPLEMENT: COMMEMORATING THE 200TH ANNIVERSARY OF THE SIGNING OF THE BILL OF RIGHTS (Karen D. Horsley et al. eds., 1991)]. Both polls included a form of the question, whether, if the respondent were poor and sued in a civil court, would they would have a right to free counsel. Sixty-nine percent of Californians and 79 percent of citizens in the national survey responded, erroneously, yes, to that hypothetical. In both polls, this question elicited the highest rate of erroneous responses about the rights that our constitution guarantees.

[96] To his great credit, Chief Justice George has done far more than any other judicial leader in California history to narrow that breach in the social contract. He was largely responsible for passage of a law creating the first state government funding of civil legal services in California, the "Equal Access Fund." He set up a statewide network of "family facilitators" to assist unrepresented litigants in family court cases and several innovative self-help center experiments. In the past year, under Justice George's leadership, the court system's website opened a huge self-help section containing some 900 pages of content. Recently, it added a Spanish language section that duplicates all the contents of the English language site. Chief Justice George also has taken several steps to encourage expanded pro bono services from the private bar.

These initiatives, as well as others, are described in a report the California Commission on Access to Justice published in late 2002. As this report also documents, however, despite all of Justice George's efforts and those of many others, for the majority of lower income residents California still remains a state with justice not for them, but only "for those who can afford it." *See* CALIFORNIA COMMISSION ON ACCESS TO JUSTICE, *The Path to Equal Justice: A Five Year Status Report on Access to Justice in California* (Oct. 2002), *available at* http://www.calbar.ca.gov/state/calbar/calbar_home.jsp (last visited Nov. 13, 2003).

[97] Studies document that 70 to 80 percent of impoverished people with problems requiring legal assistance are unable to find a lawyer. For instance, a recent California status report found 72 percent of California's impoverished with legal problems could not be served. *Id.* at 29–30. This should not be a surprise, given the fact that on average, each legal services lawyer serves a population of nearly 10,000 low-income people—while the ratio for the rest of Californians is one lawyer for every 245 people. *Id.* at 31. Of the total public and private funds Californians spend on lawyers, less than a half percent goes to provide civil legal aid to the nearly 20 percent of residents who are eligible for such services. *Id.* at 34. And total expenditures on civil legal aid for the more than 6.4 million low-income people in California, are less than a quarter of the annual gross income of a *single* corporate law firm headquartered in that state that serves a relative handful of business clients each year. *Id.*