

**ACCESS TO JUSTICE IN
CIVIL CASES:
A NEWER AND YET
WIDER FOCUS**

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In 1978, over a third of a century ago, I delivered a speech in Tokyo to a meeting of Japanese lawyers, judges, and academics, an appearance arranged by Professor Takeshi Kojima. The speech was entitled, “Access to Justice: A New and Wider Focus,” and later published in Japan as a “Lecture” in the *COMPARATIVE LAW REVIEW*.² In this article, I propose to revisit the subject of that speech, but with the advantage of decades of further developments affecting the ultimate goal of truly effective and equal access to justice for everyone in society.

Thus, for the most part this article will feature developments not envisioned in that earlier era. Among them are the potential globalization of a constitutional right to equal justice including a lawyer when needed, out-of-court assistance for litigants who are unrepresented in court, authorizing independent paralegals to provide legal advice and limited assistance, and on-line dispute resolution as a substitute for in-person court proceedings.

Are we on the way to a globalization of constitutional values that includes a right to equal justice and a lawyer when needed to enjoy that right ?

Not anticipated in my 1978 speech was what happened quite suddenly a year later, a decision of the European Court on Human Rights, *Airey v. Ireland*.³ In that case, the Irish courts had denied an indigent mother’s request for free counsel⁴ when she sought a permanent separation order and financial support from her husband.⁵ She appealed that denial to the European Court on Human Rights. That Court interpreted the “fair hearing” guarantee of the European Convention on Human Rights and Fundamental Freedoms⁶ to require member governments to provide free lawyers to low income civil litigants when needed for those litigants to enjoy “effective access” to the courts. As the court explained:

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 [without a lawyer] before the [trial court] did not provide an effective right of access....The [Irish] government maintain that...the alleged lack of access to the court stems not from any act on the part of authorities but solely from Mrs. Airey’s [poverty]....The

Court does not agree...[H]indrance 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... The obligation to secure an effective right of access to the courts falls into this category of duty.”⁷

As a result of this 1979 opinion, the world had its first enforceable right to counsel in civil cases that transcended national boundaries, at least when counsel is essential for “effective access” to the court. The next year the Irish government created the nation’s first legal aid program, a nationwide network of offices staffed by salaried lawyers.

A quarter century later, in 2005, the European Court on Human Rights expanded the rationale for when poor people needed counsel to have the required “fair hearing.” In *Steel and Morris v. United Kingdom*⁸, the court held indigent civil litigants also are entitled to free counsel when needed to enjoy “equality of arms” with their opponents across the courtroom. That case arose when McDonald’s corporation sued two Green Peace members for libel based on their picketing of the company’s restaurants in London. McDonalds had counsel, but the Green Peace members could not afford one and asked the court to appoint a lawyer to represent them, a request that was denied because libel cases were one of the few types the English legal aid statute excluded from coverage. The European Court on Human Rights reversed the judgment McDonalds had won against the lawyerless defendants. It held indigent parties in a civil actions must have “*equality of arms*” with their opponents in order for their access to be truly effective.⁹ This meant the Green Peace members could enjoy “equality of arms” only if provided “competent and sustained representation by an experienced lawyer familiar with the case” and the field of law involved, in this instance the law of libel.¹⁰

While the right these opinions announced only extends to nations in the European community, home to roughly 400 million people, the requirement of a “fair hearing” in civil cases on which those decisions are based is also found in the United Nation’s Universal Declaration of Human Rights. Indeed the language of the European Convention is nearly identical to that in the UN Declaration.

Article 6(1) of the European Convention which the European Court on Human Rights interpreted to require governments to ensure effective access to the civil courts (and free counsel when needed to accomplish that goal) reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a *fair and public hearing* within a reasonable time.”¹¹

Meanwhile, Article 10 of the UN’s Universal Declaration of Human Rights, in turn, reads:

“Everyone is entitled in full equality to a *fair and public hearing* by an independent and impartial tribunal, *in the determination of his rights and obligations* and of any criminal charge against him.”¹²

Most of the language and the entire meaning are identical in these two international documents. At a minimum, the logic of the European Court’s opinions would seem persuasive in interpreting the UN Declaration if and when a nation decides to give effect to the Declaration’s “fair hearing” guarantee. Basic principles like “effective access to justice,” “equality before the law,” and “equality of arms” have a way—slowly ever so slowly—of eventually shaping reality to conform with these declared ideals.

Unfortunately for poor people in the United States, that nation’s Supreme Court has not construed its Constitution’s promise of “due process” and “equal protection of the laws” as generously as the European Court has the European Convention’s “fair hearing” guarantee. Two years after the European Court on Human Rights decided *Airey v. Ireland*, thus adding a continent-wide guarantee to the statutory rights to counsel already common in most European nations, a promising movement toward a right to counsel in the United States came to a sudden halt. During the prior decade, several state supreme courts had held low income litigants had a constitutional right to appointment of free counsel in certain categories of cases.¹³ But in 1981 the U.S. Supreme Court issued its opinion in *Lassiter v. Durham County*.¹⁴ By the narrowest of margins, 5-4, the Court held the Constitution’s “due process” guarantee did *not* include an *automatic* right to counsel even in the type of case before the justices, where the government sought termination of a mother’s parental rights.

The majority first declared there was a presumption against a right to counsel unless physical liberty was a stake. However, it was a presumption that could be overcome, depending on the balance among three factors—the significance of the private party’s interest in what was at stake, the government’s interest in not providing counsel to that party, and the risk of error if the private party is denied counsel. In *Lassiter* itself, the Supreme Court applied that balancing test—finding the private

party's interest in parenting her child strong and the government's interest in not paying for lawyers and shorter hearings significant but not overwhelming. But it was the third factor—the risk of error if the private party lacks a lawyer—that proved determinative. The majority found there was no risk of error if *Lassiter* was denied counsel in this particular case. Indeed they found there was no possibility a lawyer could have made a difference in the outcome of this case—given *Lassiter* was serving a 20-year sentence for murder and had not shown any interest in her child before or during her incarceration.¹⁵

In future cases, trial judges were to balance those same three factors and depending how that exercise turned out either appoint counsel or refuse to do so. This was to be a “case by case” approach as Chief Justice Burger emphasized in a concurring opinion that supplied the deciding vote against a right to automatic appointment of counsel in these cases.¹⁶ In practice, unfortunately, few trial courts have actually engaged in this balancing process and fewer still have appointed counsel after completing that task. Most have simply denied counsel—essentially treating the *Lassiter* court's presumption against a right to counsel when physical liberty is not at stake as if it were a conclusive not a rebuttable presumption.¹⁷

Meanwhile, after the U.S. Supreme Court denied an automatic right to counsel in civil cases, in two other countries national courts held civil litigants had a right to counsel in certain types of cases. In 1999, the Canadian Supreme Court ruled an impoverished mother had a right to counsel when the government sought to extend its custody of her children for an additional six months.¹⁸ In 2001, on another continent the South African Land Reform Court held poor people appearing before that court had a constitutional right to counsel, just as they would in a criminal case. The court reached that conclusion for a simple yet profound reason, a finding that “civil cases are as complex as criminal cases and the procedures are equally difficult.”¹⁹

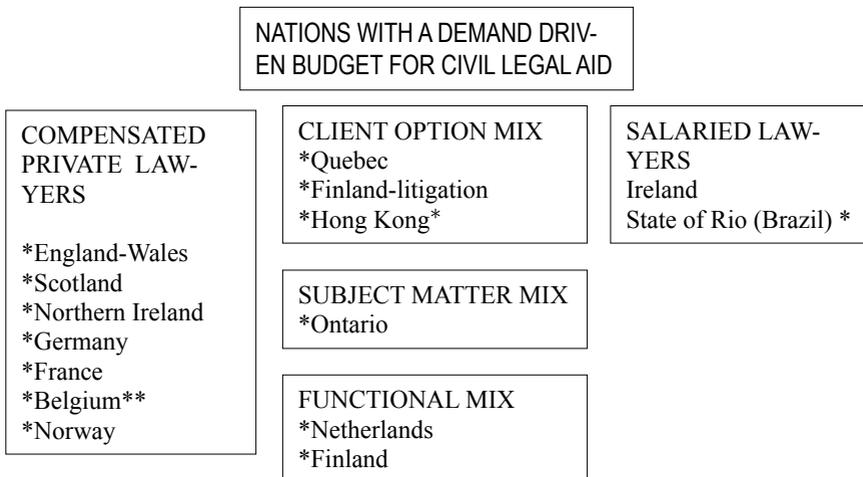
Returning to Europe, in 2009 the European Community took a step beyond the European Court's interpretation of the “fair hearing” guarantee in the European Convention on Human Rights and Fundamental Freedoms. That year the member nations ratified the Lisbon Treaty that included a new Charter of Fundamental Rights. Section 47 of the Charter includes an express guarantee: “Legal Aid *shall* be available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”²⁰

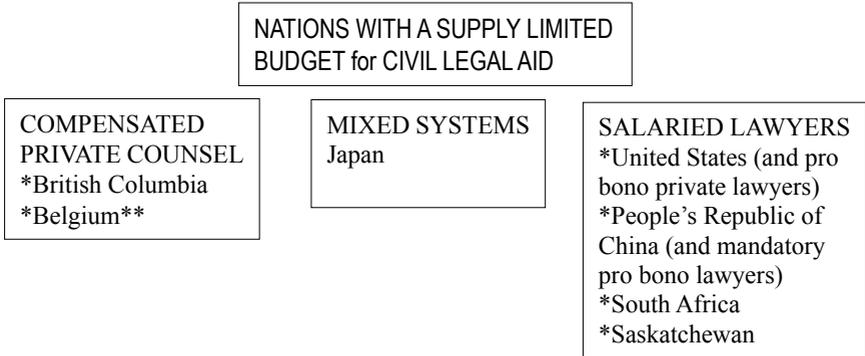
This language in the Charter of Fundamental Rights states both a guarantee

and a challenge for all European nations—a guarantee for low income citizens they will enjoy effective access to justice and a challenge to European governments that if they desire to avoid the cost of providing legal aid they must supply alternatives that meet the standard of giving poor people truly “effective access to justice.” It also represents a challenge for the European Court on Human Rights as well as the constitutional courts in member nations. Those judges must determine whether and when other ways of seeking to give poor people “effective access to justice” (including presumably “equality of arms”) actually satisfy that test and when they must be rejected as inadequate, thus requiring government to fund legal aid for the needy.

A Typology of Current Legal Aid Programs

Since my talk to members of the Japanese legal profession in 1978, legal aid in most countries has evolved through many stages, often termed “reforms” but not always positive ones. This paper will not attempt to trace the individual histories of each of those countries and how they arrived at their current arrangements. Instead, it will provide a snapshot of what exists today in a representative group of countries organized in a typology of different approaches those foreign systems embody. The chart below provides a broad overview of the typology.





The top level of the typology divides national legal aid programs into two broad families—“Demand Driven” and “Supply Limited.” Those two families could as well be termed “Rights-based” and “Fixed Resource” systems because the essential difference between the two is that the “Demand Driven” legal aid systems offer legal aid as a matter of right (at least to defined types of problems) coupled with an open-ended budget that will pay for as much legal services as required to satisfy the poverty population’s total demand for the services required to implement the right. The “Supply Limited” legal aid systems, on the other hand, appropriate a fixed sum of funding to provide a defined supply of legal services which will satisfy whatever demand for legal services that fixed sum is sufficient to supply. Obviously, one can imagine a “Supply Limited” or “Fixed Resource” system that was so well funded that it provided enough services to fully meet or even exceed effective demand. But that hasn’t happened yet—certainly not in the United States which is clearly a leading member of the “Supply Limited” family, in that nation’s case a “very limited supply.”

It is important to understand that “demand driven” systems do not purport to provide lawyers to resolve every “justiciable” problem that people might bring to the legal aid program. Instead they apply both a “merits” test²¹ and a “significance” test²² that must be satisfied before they will give the applicant a free lawyer (or a partially subsidized one, in the case of those above the poverty line). In most countries, applicants denied legal aid because of failing the “merits” or “significance” test can appeal that denial either to an administrative authority or to the courts, or to both. That ability is what makes it a true *right* to counsel.

It is equally important to notice the consequences flowing from the fact not

every “justiciable” problem will be found to have sufficient merit and/or significance to warrant a grant of legal aid. Even in nations with a comprehensive right to counsel, it is not accurate to equate the entire number of “legal needs” identified by legal needs studies that don’t get to a lawyer as “unmet needs.” To put it another way, the number of “legal needs” or “justiciable problems” reported by those studies do not equate with the “effective demand” for lawyer services, indeed overstate the “effective demand” or “unmet effective demand” for lawyers. As a result, those studies overstate the cost for meeting the “effective demand” for legal services and thus the cost of providing a right to counsel in civil cases. Moreover, to the degree some of that effective demand can be satisfied fully through lesser forms of assistance a “right to equal justice and a lawyer when needed” can be achieved at even lower cost.

Among “Demand Driven” legal aid systems, there are several main delivery systems, that is, ways of providing the legal services to meet that demand. On one side are countries that rely entirely or almost entirely on “Compensated Private Counsel” what we is often called “Judicare” (at least for litigation and other legal services reserved for licensed lawyers). On the other are those that rely primarily on “Salaried Staff Lawyers,” and in between are those employing a “Mixed Delivery System” which uses both private and salaried lawyers in some combination. Those “Mixed Delivery System” countries, in turn can be classified as “Client Option Mix,” “Subject Matter Mix,” or “Functional Mix.”

“Client Option Mix” systems allow clients to choose between compensated private lawyers and salaried lawyers to represent them with respect to the particular legal problem they are facing. (Thus, a given client could choose a compensated private lawyer for one case and a salaried staff lawyer for another.) Quebec province, Canada, is an example of this approach.

“Subject Matter Mix” systems allocate case types between compensated private counsel and salaried staff lawyers. Some categories are reserved for private lawyers and others allocated to salaried staff lawyers. Ontario province, Canada, for instance, assigns family law (and criminal) cases to the private bar but has set up 72 staff legal clinics around the province to handle poverty law cases (housing, government benefit, consumer, etc.), impact litigation, and community cases.

“Functional Mix” systems, in turn, assign salaried lawyers (and/or para-professionals) certain discrete tasks and other tasks to compensated private counsel. The Netherlands legal aid program has established a network of salaried offices which

provide all initial advice and up to one hour of assistance solving a problem, but if litigation is involved or more extensive out-of-court assistance is needed the client must be served by a compensated private counsel.

“DEMAND DRIVEN” LEGAL AID BUDGETS AND COST MANAGEMENT STRATEGIES

Any country that funds legal aid on a “demand driven” basis – that is, paying for all the services requested and rendered in a given year—places the financial risk on the government budget. If for any reason, effective demand exceeds the predicted levels, there will be a cost overrun and government will have to make up the difference. The United States avoids this problem, but in a draconian fashion, by providing a fixed appropriation sufficient to employ a certain number of staff lawyers, and then allowing the rest of the demand go unsatisfied—except for what might be met by charitably funded and pro bono programs. National programs that rely primarily on compensated private counsel have a more difficult problem even if they would like to hold legal aid expenditures to a certain set budget figure. Until the last fee bill is submitted by the last lawyer regarding his/her last legal aid case, it will be unknown how much will be required to be paid for the year. Educated guesses can be made at different stages and at some point the program could be instructed to begin turning away all clients for the year, because it appeared the cases already accepted were likely to require all the funding the government had authorized.

Either of the above approaches—limiting services to what a fixed number of salaried lawyers can provide or in a judicare program cutting off services when it appears the already-accepted cases will eat up a fixed appropriation—balances the budget on the backs of the poor. In either one, many if not most people needing legal aid will not get it—depending on how close that budget figure is to funding the full effective demand for legal aid.

Particularly since the world-wide recession, there has been pressure on legal aid programs in many countries with “demand-driven” legal aid budgets to reduce or if possible eliminate the cost overruns that frequently occurred and in some nations to reduce their annual budgets from what they had reached in the past. Notably, in many of those same countries, their annual legal aid expenditures had levelled off already because the annual expenditures on legal aid had reached the point they were meeting

the effective demand for their services. Expenditures might fluctuate up and down a bit from year to year, but remained in the same range.²³

Nonetheless, even in several countries where legal aid budgets had plateaued, the pressure to lower legal aid costs have persisted. In response to these pressures, nations have deployed a variety of strategies to lower costs—usually without imposing an artificial expenditure cap on their “demand-driven” system. Among these strategies are innovations that do or may seem attractive to those worried about access to justice in other countries.

One basic strategy has been to seek to lower the “per-unit” price of the legal services lawyers deliver. For example, several nations shifted from an “hourly fee for service” payment scheme to a “fixed fee” schedule because of concerns about the lawyers’ perceived incentive to overinvest when paid on an hourly fee basis.²⁴ In the same vein, England has limited the lawyers eligible to serve legal aid clients to those willing to sign a contract providing for fees substantially below the market rate. Furthermore, in 2013, the English government reduced legal aid’s fee schedule still further. Several nations have replaced *judicare* with salaried staff for some of their services—usually for certain categories of cases Ontario (family), New Zealand (criminal), Scotland (criminal) in high volume locations such as major cities.²⁵ Salaried staff offices offer two advantages—they appear to deliver the same service at less cost²⁶ and offer government a more predictable budget and natural incentives for those offices to ration their resources carefully.

A second strategy is to closely manage on-going litigation and terminate legal aid when it is no longer warranted. This approach resembles the “managed care” system that is followed in the health services industry in the United States and perhaps elsewhere. Managers who control the purse strings—usually working for insurance companies that fund health services—review applications for further treatment, and grant or deny those requests. In the legal services field, Scotland appears to have gone further than any other country. There, the legal aid administrators assess the merits of cases midstream and cut off future payments if what seemed promising at the outset no longer has decent prospects because of some development in the case.²⁷

A third basic strategy is to seek to lower costs by encouraging litigants to use less expensive dispute resolution mechanisms instead of full scale litigation. This is one of the likely effects if not purposes of *Rechtwijzer 1.0* and *Rechtwijzer 2.0*, the online programs the Netherlands introduced in recent years which will be discussed in

more detail later in this article.²⁸ The more cases that resolve themselves through these online programs the fewer will require court proceedings and the legal aid expense those proceedings entail. In 2013, the English government carried this strategy a step further by requiring all legal aid litigants in divorce cases to submit to mediation before going to court and only funding mediation not litigation except in divorce cases involving child abuse or domestic violence.²⁹

A fourth basic strategy and the least defensible is simply to remove whole categories of cases from the list of those for which legal aid will be granted—or conversely adding categories to the list of those for which legal aid will be denied. (Because most nations with rights to counsel in civil cases use an “everything is eligible except the following” approach, the latter is more likely than the first.) This the English did—in an assault on England’s formerly world leading legal aid program. Among the categories no longer covered by legal aid – employment, government benefits, housing—are those of most relevance to the poorest potential clients of legal aid. They are also categories where law suits often tested whether government and business were fair and lawful in their treatment of the poor.³⁰

All of the above strategies are aimed at making the services of lawyers less costly or less available as a way of reducing the financial burden on the public budget. In recent years, new approaches have emerged that seek to reduce the need for and role of lawyers in court proceedings and in the resolution of disputes in general. The two most significant are “self-help assistance” and “online dispute resolution,” which will be discussed below.

Self-help Assistance: out-of-court help for unrepresented litigants and its implications for the judicial system

Largely due to its grossly underfunded legal aid system, the United States has experienced a dramatic surge in unrepresented litigants, particularly in its family law courts, the past two decades. For instance, in California, a study revealed that in 67 to 80 percent of those cases, one or both sides appeared without lawyers.³¹ Nor is the phenomenon limited to family courts. Ninety percent of tenants are unrepresented in landlord-tenant courts, while nearly ninety percent of landlords have counsel.³²

Nor is the United States the only jurisdiction facing an onslaught of unrepresented litigants. Even before the recent cutbacks in civil legal aid the English

government has imposed, England had a goodly number of litigants appear without lawyers—some just above the eligibility level for legal aid and others who had applied but not yet received legal aid. Now under the recent legal aid “reforms,” English family courts are being flooded with unrepresented litigants, because legal aid is available in divorce cases only where abuse or violence is involved in the relationship. Furthermore, although I am unfamiliar with the situation in Japan, there is reason to suspect unrepresented litigants may be a common problem in other countries, too.

When both sides are unrepresented, as they often are in family law cases between poor people, it is easier to contemplate how and why justice can be delivered without lawyers. In the United States, it has led some jurisdictions to encourage a departure from our traditional adversary system. In that adversary model, the judge (or sometimes a jury) is expected to remain not just neutral but largely inactive during the trial. That system relies entirely on the parties to investigate the facts and produce the evidence to prove those facts, as well as researching the applicable law, then to present that law and admissible evidence supporting the factual allegations to the neutral decision-maker in a coherent, and ideally a concise package. Adding to the need for the specialized expertise of the lawyer is the need to limit the evidence the decision-maker hears to that which contributes to a rational decision—not one based on passion, prejudice or speculation—limitations enforced through a rather complex set of evidentiary rules that exclude inadmissible evidence from consideration by the decision maker. Because so much responsibility is assigned to the parties, the adversary system assumes those parties will have lawyers, indeed counts on that level of knowledge and skill to carry out these essential often extensive duties.

As a consequence, when parties appear without lawyers—even if both lack that counsel—a judge adhering to the adversarial model faces a daunting task and the parties a confounding, near impossible situation. Some have likened it to an untrained person attempting to perform brain surgery—or its equivalent. A trial judge or a jury that sits back and expects the unrepresented parties to present a coherent case of admissible evidence establishing all the determinative facts the law requires will, almost always, be disappointed. If a decision is to be made, it often must be based on assumptions and speculations grounded on bits and pieces of evidence the parties tender in disjointed presentations.

Recognizing this combination of unrepresented disputants and an adversarial dispute resolution system is completely unworkable and inherently incapable of

producing fair and correct decisions, over the past two decades the United States has seen the growth of a “self-help” assistance movement. The aim is to give unrepresented litigants enough help and advice outside the courtroom that they can perform their required tasks adequately before and inside the courtroom. This typically begins with direct help in preparing the written pleadings that initiate the court action and frame the plaintiff’s claims and the defendant’s defenses. That help can take the form of one-on-one personal assistance by lawyers—or more often paralegals supervised by lawyers—or through computer programs that ask the litigants plain language questions and use the answers to generate a properly composed legal pleading. In a contested case that must be decided by a judge or jury, however, submitting a legally sufficient pleading is maybe ten percent of what an adversarial system expects a litigant to do. Most self-help assistance programs seek to provide some sort of advice—for instance, videos of what a court proceeding looks like and what and how litigants are expected to present their cases.

Most of those involved in the “self-help assistance” movement recognize that something more than they can supply is required if the parties they are helping are to receive fair and correct decisions in the courts. They have urged American courts to adopt an activist inquisitorial model when deciding cases between unrepresented parties—asking the questions that will elicit the relevant evidence, etc. (Having visited a Japanese trial court a few years ago, I have the sense this already is the model used in your country, even when the parties are represented by counsel.) The question remains whether that goes far enough, given so many key tasks lawyers perform for litigants typically take place before the court appearance—for instance, researching the applicable law and especially investigating the facts and locating the admissible evidence to prove those facts. Nonetheless, in relatively simple cases where most of the determinative evidence is in the recollections of and can be elicited through the testimony of the two competing litigants, as it frequently is, unrepresented parties can often get justice with the assistance of a “self-help assistance” program coupled with an inquisitorial judge.

Even when the combination of “self-help assistance” outside the court and an inquisitorial judge inside the courtroom delivers effective access to justice, another question remains. Anecdotal evidence and at least one study suggest that litigants without lawyers can be bad for court efficiency. A study of unrepresented litigants in English trial courts found unrepresented litigants took more time, required more

hearings, made more errors and more serious errors than those with lawyers. They also appealed more frequently and with less meritorious claims.³³

Logic and experience both suggest that unrepresented parties generally also are less likely to settle without the necessity of a trial than lawyers do. They lack the knowledge of the law and the probability of various outcomes that lawyers bring to the table and thus feel less confident when asked to agree to something less than total victory when exchanging offers and counteroffers. At a hearing before the Wisconsin Supreme Court which I attended in 2011, a trial judge testified about the need to provide counsel to indigent litigants in civil cases. He contrasted his experience in the years before the court gave litigants a right to counsel in a certain category of cases with what happened when the litigants gained that right in those cases. A calendar that would take most of the day and squeeze out other court business when parents were unrepresented could be completed in a few minutes when they had lawyers. That was because the lawyers settled the vast majority of the cases and the judge just had to review and approve those settlements rather than having to hold full scale hearings in every case.³⁴

To the best of my knowledge, we still await a definitive study comparing the overall costs—judicial costs as well as costs of providing counsel—between two basic models. That is, would the overall cost to the government be greater or less if it provided both sides in family law disputes between poor people with lawyers or if it only paid for self-help assistance and expected the parties to represent themselves in court. The experience of the Wisconsin trial judge suggests the cost of paying counsel might be offset by the savings in judicial costs and the absence of “self-help assistance” expenses. It seems worth a careful, well-constructed empirical study of the two models.

Once the inquiry moves beyond family law and other disputes between poor people and to their interactions with litigants who can afford lawyers, however, it becomes a far different and difficult world for the “self-help assistance” plus activist-inquisitorial judge model. It is the world poor people must enter for millions of disputes every year in the United States (and maybe in Japan as well)—as tenants, debtors, consumers, government benefit recipients, and a variety of other common situations. There they often face institutional litigants—businesses, banks, landlords, government agencies, etc.—all of them well-staffed with lawyers. When they reach the courtroom those lawyers will invoke evidentiary rules and complex procedures

unfamiliar to unrepresented litigants. Even if they try to compensate for the latter's lack of knowledge and skill, judges face a difficult if not impossible task doing so while also maintaining the appearance and reality of neutrality.

Two sophisticated studies cast doubt on the efficacy of “self-help” assistance when the opposing parties are represented by lawyers. The first was published in 2001³⁵ and evaluated the outcomes of eviction cases heard in New York City's housing courts—cases where nearly all landlords had lawyers and almost no tenants did. The cases were pre-screened to identify those where the tenants had a potentially meritorious defense. In a completely random manner, lawyers were assigned to represent the tenants in half of those meritorious cases, while the rest were left to represent themselves. When the results came in, those tenants who were represented by lawyers were three times more likely to win a favorable outcome than those who only received out-of-court assistance. A more recent study in Boston, in 2013,³⁶ also used a randomized methodology, which is considered the “gold standard” for evaluation research. It compared a group of tenants represented by lawyers in court to another “control group” who only received out of court assistance from lawyers and represented themselves at the court hearing. Again those who were represented by lawyers in court fared three times better than those who only had help from lawyers outside the court.³⁷ These sophisticated studies add credibility to other research over the years that has found legal representation during court proceedings improves the chances of success by anywhere from 17% to 1,380%—research compiled and analyzed in 2010.³⁸

Whatever else might be said, it is difficult to argue poor people enjoy equal justice when they are denied the help that would provide them a three-times better chance of winning than they have with what they are given—some modest help outside and before they enter the courtroom. The only virtue of the latter being that it is cheaper and thus a lesser burden on the public budget. Indeed yet another study found that indigent parties who received self-help assistance from a court-based program fared no better than those who appeared in court without the benefit of that help. Their pleadings may have looked better than those prepared without help, but the outcomes in the hearings were the same.³⁹ Thus, while self-help assistance may be sufficient where both sides are unrepresented, it is questionable whether it is an adequate substitute for legal aid when the other side is represented by counsel.

Online Dispute Resolution: At the Technological Frontier

Just as the European Court's *Airey v Ireland* decision creating a continent-wide right to counsel in civil cases was not in sight when I gave my speech in 1978, so were most of the technological developments that have opened up new avenues for giving low income people some level of access to justice. Even something as basic and low-tech as telephone hotlines were just beginning to make their appearance. But they did become common in the decades since and have grown in sophistication. Indeed one of the best I know of is the one I observed in operation at a legal aid center in Tokyo in 2011. Then with the development of the Internet came websites providing information about the law, court forms, and guidance to unrepresented litigants. Document assembly software made it possible to program kiosks where litigants could respond to a series of plain language questions which the kiosk could use to generate a legal document, often a pleading that could be filed in court.⁴⁰ More recently, users can access such software on the Internet and again end up with a court pleading or other legal document.

In the past two or three years, the Netherlands legal aid program has carried the technology a big step further, however. In collaboration with a Dutch university and Modria, a company that developed an online system for resolving customer complaints with sellers on eBay, the Dutch Legal Aid Board has developed an online dispute resolution system. The Dutch program first began with an interactive online problem analysis system for certain types of cases. This innovation was motivated in part by a desire to divert more cases away from high-cost court resolution of these cases with the related need for government-funded legal aid for many litigants. Called *Rechtwijzer 1.0* (“Roadmap to Justice”) this online system has been in operation for a few years and includes modules for divorce, consumer, and debt problems. Through a sequence of interactive exchanges participants are guided through a process that makes it possible for them to understand their dispute and possible avenues to its resolution. This is designed to place the disputants in a position to resolve the dispute themselves through off-line in person negotiations.⁴¹ *Rechtwijzer 1.0* has been evaluated and received favorable grades from users⁴² but achieved only limited success in resolving disputes without involving the justice system or legal aid resources.

Recently, the Dutch Legal Aid Board introduced a more sophisticated version,

Rechtwijzer 2.0, limited to divorce thus far. This software allows divorcing couples not only to analyze the dispute online and thus prepare for in-person negotiations with each other party, but to resolve the dispute entirely online. It offers online mediation and even online third party resolution if online two-party negotiation fails.⁴³ Again as a possible by-product, it has the potential to reduce or eliminate judicial and legal aid costs, at least to the extent a significant number of divorcing couples achieve that result online and without resorting to the courts and representation by lawyers the Board funds. At the same time, the Board sought to make that online system pay for itself by charging people an initial fee and additional fees for optional services they elect to use—such as an online mediator or online decision maker. Rechtwijzer 2.0 also charges for an independent review as to the fairness and soundness of any resolution the parties achieve.⁴⁴ As a result, it does not appear to be a system for the truly poor, but rather for those above the poverty line yet still eligible for partially subsidized legal aid—those above the bottom ten or fifteen percent of the income scale up to the forty percent level. And indeed, roughly forty percent of those who have signed up to use Rechtwijzer 2.0 so far have been legal aid eligible.⁴⁵

Rechtwijzer 2.0 only began accepting disputants in early 2015 when the program designers allowed a limited number of people to proceed through the process in order to study the results and make refinements. Then on November 23, 2015, Rechtwijzer 2.0 launched publicly.⁴⁶ As of that date, statistics revealed that during the pre-launch test period, 395 couples had decided to try out Rechtwijzer 2.0 and 128 of those had finalized their divorces. In 147 cases, the parties had at least begun negotiations while one side was still waiting for a response from the other spouse in seventy-nine cases. As of that time, in only two cases had the couple elected to use an online mediator and in only one had they submitted the case for an online third party decision. On the other hand, thirty-eight couples had chosen to have a third party independently review their agreement to ensure it was fair and lawful.⁴⁷ As a result of the preliminary evaluation of the program, this independent evaluation step will be mandatory in the future.⁴⁸

Rechtwijzer 2.0 was scheduled to expand to debt and landlord-tenant cases in 2016, both of which typically pit poor people against institutional parties and their lawyers—businesses, banks, or other creditors, and apartment building owners or other large landlords. These disputes pose different problems than family law disputes between people who almost always come from the same economic class and also have

a long standing personal relationship. As a result, these new experiments warrant close attention by those interested in considering the viability of online dispute resolution as an alternative to the traditional judicial system for resolving these quite different categories of disputes.

Still in development are two online dispute resolution efforts now in a testing phase in British Columbia, Canada. The first is MyLawBC, which the British Columbia legal aid organization is creating based largely on Rechtwijzer 1.0. It already has gone through two waves of user tests, and was released publicly in January, 2016. MyLawBC is starting with four modules—domestic violence, divorce, wills and related documents, and foreclosures. Like Rechtwijzer 1.0, it guides the user in an interactive online conversation to information, options, possible sources of assistance, and the like that will help address the particular problem the user is experiencing. The end result is a plan of action the user can print out and follow as a guide in solving his or her specific problem. The divorce module does offer the opportunity for an online negotiation with a spouse, but that is as close as it comes to embracing the Rechtwijzer 2.0 process. So it remains more of an online analysis and self-help assistance tool than an online *dispute resolution system*.⁴⁹

The second British Columbia excursion into the online dispute resolution world is called the Civil Resolution Tribunal (CRT) and is operated by the BC court system.⁵⁰ At this point, it is confined to small claims and “strata” cases. (“Strata” cases involve litigation between what would be termed condominium associations and owners in the United States and many other countries.) Unlike MyLawBC, the Civil Resolution Tribunal provides a comprehensive interactive online dispute resolution process. Litigants are provided information and guidance, enter their arguments and evidence, and interact with the opposing party, all “from the comfort of their living room, at a time when it is convenient, 24 hours a day, 7 days a week.” If the parties are unable to negotiate a settlement, they can interact with an online mediator. And, if that fails they can submit the case for an online adjudication. Litigants are allowed to have the help of a trusted friend or relative, or even a lawyer, in preparing their entries into the system, although they are strongly encouraged to participate personally and actively in the process.

Adjudicated decisions are binding in all “strata” cases although a losing party can seek leave to appeal to the BC Supreme Court. In small claims cases, however, either litigant is entitled to an in-person trial before the Provincial Small Claims Court

if dissatisfied with the online decision. If not appealed, the online decision is filed with the Provincial court and becomes a final, enforceable judgment of that court.

The British Columbia CRT goes one step beyond Rechtwijzer 2.0 in one important respect. CRT already is mandatory for “strata” cases and as early as sometime in 2017 is slated to become mandatory for small claims cases, too. The reason? As the CRT administration admits, “we are learning that voluntary dispute resolution programs show low uptake and as a result do not improve access to justice or reduce costs.” Thus, when the years of testing and improving the CRT process are completed, the Provincial court intends to amend the rules and make the online dispute resolution program mandatory. Apparently the option to obtain a regular trial in the Provincial Small Claims Court, if dissatisfied with the online decision, will remain intact. Meanwhile, at this point, there is no plan for the Dutch Legal Aid Board to convert Rechtwijzer 2.0 from an entirely voluntary to a mandatory system.

A few issues remain that warrant close observation of BC’s Civil Resolution Tribunal when it comes into full operation as the primary means of deciding small claims disputes.

First, *the mandatory nature of the system*. Would a voluntary dispute resolution system that truly improves access to justice and reduces costs for litigants have a “slow uptake.” Or, would it tend to attract litigants in droves for those very reasons. Perhaps CRT is having a slow uptake as a voluntary program because it fails on one of those scores. Yet it is equally likely that it is so new and unfamiliar that it has not had time to gain a following.

Another possibility is that the percentage of people who are comfortable with using the Internet for something this complex and important—with up to \$10,000 at stake—is smaller than what the designers expect. It is one thing to say that seventy percent or more of the public use a computer, tablet, or smart phone and often do so to access the Internet; it is quite another to conclude most of those feel they could effectively use the CRT process to navigate to a satisfactory resolution of their legal problems. And then, there are the rest—those who don’t access the Internet at all. One expert in the technology of dispute resolution estimates that from 20 to 40 percent of the population in industrial democracies like British Columbia are unable or unwilling to use the Internet—with many of those in the lower income groups.⁵¹ If the online system is mandatory and the only way of accessing justice when one has a problem within the jurisdiction of the small claims court, what happens to access for those who

are not online capable? Conceivably, CRT could end up enhancing access to justice for the majority, yet completely cut off access for the rest, most of whom are likely to be poor.

Second, *the role of lawyers in the CRT process*. Since lawyers apparently are allowed to assist litigants in using the CRT process, it is entirely possible if not probable that most businesses, landlords, credit companies, and the like will use lawyers to present their side in CRT's evidence gathering, negotiating, and adjudication phases. Customers, tenants, debtors, and the like will, for the most part, be on their own—sometimes possibly assisted by a trusted friend or relative. Lawyers will bring knowledge and expertise to their first CRT case that very few lay people possess. By the fifth or tenth or fiftieth time navigating the CRT process, those lawyers probably will have learned the system's tendencies and mastered how to best use the system to gain an advantage over those who lack the help of a lawyer. Because of those advantages, California and a number of American jurisdictions ban lawyers from small claims court—with the sole exception that they can appear if they are a party in the dispute, a litigant not a litigator. Similar advantages may apply when lawyers help one side in an online CRT proceeding and raise a concern that requires close examination as this approach is fully implemented.

Third, and this is a problem for most online dispute resolution systems, *how does the adjudicator determine credibility without confronting the witnesses in person?* It is a difficult enough problem when the only witnesses are the two parties—a he or she said-I said situation. In the CRT process, one party will have entered in his or her version and the other party will have entered his or her version. What does the adjudicator have available on which to decide which party is telling the truth, if they are offering different stories of what happened? The problem becomes even more difficult when third party witnesses are involved—witnesses who presumably are not sitting at the computer entering their version of what happened, but whose version is being recounted by one of the parties. This constitutes rank hearsay whether the party is accurate or not in entering that story on the computer. Not that there are not potential technological work arounds—such as, interactive video where the parties and witnesses testify “in person” to the adjudicator with the adjudicator engaging in cross-examination. But with such work arounds, the complexity and cost of the process increases and the convenience decreases.

None of this is intended to suggest British Columbia should abandon its

online Civil Resolution Tribunal. To the contrary, like *Rechtwijzer 2.0*, it is a venture other countries such as Japan and the United States should welcome and study closely. These are merely some of the questions one would hope experience with the system will answer. The CRT—or an improved version of it—is an invaluable testing ground for what online dispute resolution can and cannot do efficiently and fairly in delivering truly “effective access to justice” to lower income people.

THE NEED FOR CARE IN ADOPTING DRASTIC CHANGES IN DISPUTE RESOLUTION

This completes our survey of some of the newer approaches that have emerged over the past couple of decades in one country or the other—and sometimes internationally—seeking to improve access to justice in civil disputes. Some, such as the globalization of constitutional values merely make the traditional legal system operate as promised, that is, guaranteeing disputants effective access and equality of arms. Others still use the regular courts but modify the process by abandoning legal representation of both parties in favor of offering one side or both only “self-help assistance,” coupled at least ideally with active judicial responsibility for fact-finding. At the frontier, some are experimenting with replacing in-person proceedings in the regular courts entirely, substituting “on-line dispute resolution,” where disputants confront each other on the internet instead of in the courtroom.

The more drastic the departure from the historic model of judges, and lawyers, and courtrooms, it seems to me, the more important it is to carefully study and appraise the many impacts of the proposed alternative. A hard lesson was learned when arbitration, which seemed a promising voluntary pro-access alternative in the 1970s became a mandatory anti-access alternative as early as the 1990s. Institutional parties began inserting “compulsory arbitration” clauses in all their agreements with individuals, thus denying them recourse to the courts in disputes with banks, merchants, employers, etc.⁵² Thus, when it comes to something as vital to a nation and its people as equal justice for all, newness does not guarantee either fairness nor suitability. Experiment yes. But evaluate empirically, and with care. Voluntary alternatives that disputants are free to elect are one thing; mandated replacements for the regular courts are quite another.

Which brings us to the main motive which appears to be behind most of the

approaches discussed earlier—reducing the government’s cost of delivering justice to its citizens. That issue is the subject of the next and final section of this essay.

WHAT PRICE EQUAL JUSTICE —AND ARE WE WILLING TO PAY THAT PRICE?

In the past few years many of those committed to helping the poor (and the host of other people close to that level) seemingly have concluded their governments will never provide the funding required to give them a lawyer in every case where that level of help is needed to give them effective access to justice. This has given rise to a wide panoply of cheaper alternatives to lawyers as ways to offer—or at least seek to offer – this huge population some level of help in negotiating the justice system. Without knowing for certain, I suspect many of those alternatives are among those discussed in this article—things like self-help assistance centers, unbundled legal representation, document assembly software, and online dispute resolution.

As “better than nothing” while true equal justice is out of reach, I have no quarrel with most of these substitutes for lawyers, although I have reservations about some even in the short run. Nor do I doubt there are many cases where equal justice can be achieved without lawyers—generally limited to disputes between people from the same economic class when neither can afford a lawyer and with a court willing and able to play an active inquisitorial role when those unrepresented litigants appear before them. But lesser forms of help seldom suffice in disputes between low or moderate income individuals and adversaries who have lawyers, whether wealthy individuals but more commonly institutional parties—businesses, banks, landlords, government agencies, etc.

In reviewing on appeal scores of cases where unrepresented parties struggled against those with lawyers, all of them foundered at one stage or the other, many of them losing cases they would have won if only they had a lawyer. My own observations from the appellate bench only echo what a group of retired trial judges from the state of Washington wrote about their own experiences in the judicial trenches. “Without assistance from attorneys, pro se litigants frequently fail to present critical facts and legal authorities that judges need to make correct and just rulings. Pro se litigants also frequently fail to object to inadmissible testimony or documents and to correct erroneous legal arguments. This makes it difficult for judges to fulfill

the purpose of our judicial system—to make correct and just rulings.”⁵³ I also heard similar testimony from several Wisconsin trial judges during a rule-making hearing before that state’s Supreme Court in 2011. They expressed worries whether their decisions were correct and thus just when one side lacked counsel and the other was represented.

Fine, some might say. Even conceding the playing field could only be leveled completely when a jurisdiction supplies lawyers for all those who can’t afford their own when facing a party who had one, that will never happen. Most governments will never commit enough resources to legal aid in civil cases to make that vision a reality. So let’s focus all our time and energy on some cheaper alternatives that at least tilt the playing field a bit more toward an even balance.

It is one thing to deploy those cheaper alternatives while trying mightily to persuade a society to put its money where its mouth is when proclaiming their nation provides “justice for all.” But should those cheaper alternatives be looked upon as the ultimate goal, the complete solution, the full realization of equal justice for all in any nation? Surely not in those many situations when they don’t provide an adequate substitute for what a lawyer could accomplish.

I see reason to question the major premise—that governments in the U.S. or Japan or any of a number of other countries that invest little in civil legal aid will never meet their obligation to provide enough legal aid to ensure equal justice for their lower income citizens. Why do I see hope? Because so many other countries have done so much more. The chart below reflects the percentage of a nation’s GDP these representative democracies invested in civil legal aid in 2012.

COMPARATIVE PUBLIC INVESTMENTS IN CIVIL LEGAL AID –
PER CAPITA AND AS PERCENT OF A NATION'S GROSS DOMESTIC PRODUCT
(DATA FROM 2012)⁵⁴

NATION	PER CAPITA CIVIL LEGAL AID INVESTMENT (in U.S. dollars)	PER CAPITA GDP (in U.S. dollars)	CIVIL LEGAL AID INVESTMENT AS PERCENTAGE OF GDP (in thousandths of a percent)
ENGLAND AND WALES	\$26.30	\$37,500 (for United Kingdom)	70 thousandths
NETHERLANDS	\$21.32	\$42,900	50 thousandths
NORWAY	\$22.90	\$55,900	41 thousandths
SCOTLAND	\$15.00	\$37,500 (for United Kingdom)	40 thousandths
ONTARIO	\$10.13	\$46,500	29 thousandths
HONG KONG	\$11.20	\$52,300	21 thousandths
IRELAND	\$8.36	\$42,600	19 thousandths
UNITED STATES	\$3.31	\$50,200	Less than 7 thousandths
JAPAN	\$1.40	\$35,651	Less than 4 thousandths

As can be seen, Japan and the U.S. are at the bottom—investing less than 4 thousandths and 7 thousandths of a percent of their GDP, respectively, in civil legal aid. So Japan was only spending less than a seventeenth as much of its GDP in civil legal aid as England and Wales, less than a twelfth as much as the Netherlands, a tenth as much as Norway and Scotland, a seventh as much as Ontario province, Canada, and a fifth as much as Hong Kong and a bit more than a fifth as much as Ireland. The United States was not that much better. Even counting all the governmental sources of support for civil legal aid, including state and local as well as federal funding, the U.S. was spending only a tenth as much as England and Wales, a seventh as much as the Netherlands, a little bit better than a sixth as much as Norway and Scotland, a quarter as much as Ontario, and a third as much as Hong Kong and Ireland.

What these comparisons tell us is that many societies Japan and the U.S. consider their brothers and sisters, sharing common democratic values, have deemed it important to those values to invest far more in civil legal aid than we have. And they have done so with investments at levels any nation can afford—measured in thousandths of a percent of GDP not full percents or tenths or even hundredths of a nation's total income. A modest—essentially insignificant—price to pay for the equal justice democracy demands and our political rhetoric promises. Yet when it comes

to public expenditures, both of our nations seem to treat justice as a luxury not a keystone in the very foundation of any democracy.

As Thomas Jefferson—a true “Philosopher-President”—once wrote, “The most sacred of the duties of government is to do equal and impartial justice to all its citizens.”⁵⁵ When it comes to the millions of our citizens unable to afford counsel, surely that sacred duty is worth a bigger slice of a nation’s GDP than either Japan or the U.S. has been spending thus far. In part because so many other nations have seen the wisdom of that course of action and been able to prove they could and would do so, I have confidence that both our nations can follow that path and make the investments in civil legal aid needed to bring “equal and impartial justice” to the poor. In my view, it is a serious mistake for those committed to that goal to throw up their hands and say government will never make those investments, so let’s turn to cheaper alternatives as the ultimate solution. After all, no one said that equal justice would be cheap; a government’s “most sacred duties” seldom are.

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- 1 Justice, California Court of Appeal (Retired), Visiting Scholar, University of Southern California and Western Center on Law and Poverty.
- 2 See, Earl Johnson, Jr., *Access to Justice: A New and Wider Focus*, 23 *COMPARATIVE LAW REVIEW* 87-107 (1979).
- 3 *Airey v. Ireland*, 2 eur. Ct. H.R. (Ser. A) 305 (1979).
- 4 At that time, Ireland was one of the few countries in Europe that did not have a statutory right to counsel for indigent civil litigants and indeed lacked a legal aid program of any kind.
- 5 At that time, Ireland did not allow couples to divorce legally, but they could obtain orders allowing them to live separately and one spouse (usually the husband) could be compelled to provide financial support for the other spouse (usually the wife) and any minor children.
- 6 Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms guarantees civil litigants, as well as criminal defendants “a fair and public hearing.”
- 7 *Airey v. Ireland*, 2 eur. Ct. H.R. (Ser. A) 305. 315-16 (1979).
- 8 *Steel and Morris v. United Kingdom*, 41 *EHRR* 22 414 (2005).
- 9 “It is central to the concept of a fair trial, in civil as in criminal cases, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.” *Id.* at 427 (emphasis supplied).
- 10 *Id.* at 429-30 (emphasis supplied).
- 11 Article 6(1), EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. Cite to UN Declaration and European Convention
- 12 Article 10, UNIVERSAL DECLARATION OF HUMAN RIGHTS. Nearly identical language likewise is found in the American Convention on Human Rights which has been ratified by most South American countries, along with Mexico, but notably not by Canada nor the United States.
- 13 See, e.g., *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973); *State v Jamison*, 444 P.2d 15 (Ore. 1968); *Flores v Flores*, 598 P.2d 893 (Ak. 1979); *Sales v Cortez*, 593 P.2d 226 (Cal.1979) cert. den. 444 U.S. 900 (Cal 1979); *Payne v Superior Court*, 17 Cal.3d 908 (1976).

- 14 *Lassiter v Department of Social Services of Durham County*, 452 U.S. 18 (1981).
- 15 *Lassiter v Department of Social Services of Durham County*, 452 U.S. 18 INSERT cite to majority and minority views on chances lawyer could make a difference.
- 16 *Id.* at 34-35.
- 17 Pastore, *Life After Lassiter: An Overview of State Court Right-to-Counsel Decisions*, Clearinghouse Review Journal of Law and Policy 186 (July-August 2006).
- 18 *New Brunswick v. G. (J.)*, 3 SCR 46 (1999).
- 19 *Nkuzi v The Government of the Republic of South Africa and the Legal Aid Board*, LCC10/01 (Land Claims Court, S.Afr. 2001).
- 20 Charter of Fundamental Rights of the European Union, Article 47, December 1, 2009, 2007 O.J. (c.303).
- 21 These “merits” tests vary from country to country. Some frame it as “a reasonable possibility of success,” others as a “well-founded” claim or defense, others that case is not “manifestly inadmissible or devoid of foundation,” and still others that it be a case that a person of sufficient but modest means would hire a lawyer to bring or defend. France imposes a “merits” test on plaintiffs but not on defendants. See Earl Johnson, Jr., *Equality Before the Law and the Social Contract*, 37 Fordham U.L.J. 157, 181-82 (2010).
- 22 This means what is at stake for the litigant must be of sufficient importance to justify expending government funds on a lawyer to seek to resolve the problem. See, *id.*, at 182-83.
- 23 National Reports-England and Wales, ILAG 2011, ILAG 2013, ILAG 2015; National Reports-Scotland, ILAG 2011, ILAG 2013, ILAG 2015; National Reports-Netherlands, ILAG 2013, ILAG 2015.
- 24 National Report-Ontario 2011, 2013, 2015; National Report-New Zealand, ILAG 2011; National Report-Scotland, ILAG 2015.t
- 25 National Report;-Scotland, ILAG 2015.
- 26 National Report-Northern Ireland, ILAG 2015.
- 27 Colin Lancaster and Neil Rennick, “Recent Developments in Scotland: What Lessons for the Wider World?” ILAG 2015 Conference Papers.
- 28 See, pages 19-20, *infra*.
- 29 England and Wales-National Report, ILAG 2015. There is some question whether the failure to fund litigation in divorce cases that don’t involve abuse or violence will survive review by the European Court on Human Rights. After all, the landmark case before the European Court (*Airey v. Ireland*, 2 Eur. Ct. H.R. (ser A) 305 (1979) that held “effective access” required a lawyer was a family law case not a domestic violence or child abuse case and not even a divorce case but a wife seeking a permanent order of separate maintenance.
- 30 These also are the kinds of cases Governor and then President Reagan tried to bar American legal services lawyers from litigating. See, Earl Johnson Jr., *TO ESTABLISH JUSTICE FOR ALL: THE HISTORY OF CIVIL LEGAL AID IN THE UNITED STATES*, Vol. 2, Chapters 21-24.
- 31 Task Force on Self-Represented Litigants, *Statewide Action Plan for Serving Self-Represented Litigants* (San Francisco: California Judicial Council, 2004).
- 32 Engler, *Connecting Self-representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 Urban Law Journal 37, 66-72 (2010)..
- 33 Moorhead and Sefton, “Litigants in Person: Unrepresented Litigants in First Instance Proceedings,” 2011 ILAG (International Legal Aid Group) Conference Papers.
- 34 This hearing which took most of a full day was held to consider a proposed rule change that would have required appointment of counsel in any civil case if and when a trial judge determined certain criteria were satisfied. The Supreme Court ultimately rejected the proposal, but did suggest the legislature fund a pilot program.
- 35 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 and Society Review 419 (2001).
- 36 Greiner, et. al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 Harvard Law Review 901 (2013).
- 37 *Id.* at 907-910, 920-32.

- 38 Sandefur, *Impact of Counsel: An Analysis of Empirical Evidence*, 9 Seattle Journal of Social Justice 51 (2010).
- 39 Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 Georgetown Journal of Poverty Law and Policy 453, 482-95 (2011).
- 40 One of the first of these kiosk-based programs was called “I-CAN! It was developed by the Orange County Legal Aid Society. The Society began developing the software late in the 1990s and launched the program in 1999, opening kiosks at several locations, including the courthouse. This innovation is described in Earl Johnson, *supra* note 30, at Vol. 3, 809-12.
- 41 National Report-Netherlands, ILAG 2015.
- 42 Esmee A. Bickel, Marian A. J. van Dijk, and Ellen Giebels, *Online Legal Advice and Conflict Support: A Dutch Experience* (March 2015) ILAG Conference papers, 2015 .
- 43 National Report-Netherlands, ILAG 2015 and Email from Peter van de Biggelaar, Chair of the Dutch Legal Aid Board, December 2015.
- 44 National Report-Netherlands, ILAG 2015.
- 45 Email from Peter van de Biggelaar, Chair of the Dutch Legal Aid Board, December, 2015.
- 46 Email from Peter van de Biggelaar, Chair of the Dutch Legal Aid Board, December, 2015.
- 47 Email from Peter van de Biggelaar, Chair of the Dutch Legal Aid Board, December, 2015.
- 48 Email from Peter van de Biggelaar, Chair of the Dutch Legal Aid Board, December, 2015.
- 49 This description is based on MyLawBC’s own website—www.MyLawBC.com and an Email from Mark Benton, Executive Director of the British Columbia Legal Services Society.
- 50 The following description of the British Columbia Civil Resolutions Tribunal is based on the system’s own website—www.civil.resolutionbc.ca, last visited December 3, 2015.
- 51 Smith and Patterson, “Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution,” 2013 ILAG Conference Papers, at pgs. 15-22. ,
- 52 See, e.g. Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash.U.L.Rev. 531 (2014). For a discussion of compulsory arbitration in a book published in Japan, see, Earl Johnson, Jr. “National Report on American Law,” in *The International Symposium on Civil Justice in the Era of Globalization* (Tokyo: Shinzan, 1993) 218-19.
- 53 Brief of Retired Judges as Amicus Curiae, *King v. King*, 174 P.3d 659 (Washington, 2007).
- 54 With the exception of the data about Japan, the sources of the data for this chart can be found in Vol. 3, Earl Johnson, Jr., *supra* note 30, at 920, and sources cited therein.
- 55 Thomas Jefferson, note in Destuit de Tracy, “Political Economy” 1816.

Widening the conversation. Improving Access to Civil Justice - Wider community consultation (PDF, 152 KB). The Rules Committee wishes to ensure that the voices of all court users are heard in deciding how to improve access to civil justice. Every civil case should be heard in a way that keeps the costs of coming to court proportionate to the nature and value of the issues in dispute. Since the costs of bringing some cases currently outweigh their ability to provide potential remedies, the ways in which cases are heard may need to change. For example, the parties in a case might need to demonstrate why justice would require a more time-consuming and expensive procedure than alternative procedures available to them. Why are we consulting?