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“Fundamental Fairness”: Finding a Civil Right to Counsel in International Human Rights Law

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“FUNDAMENTAL FAIRNESS”: FINDING A CIVIL RIGHT TO COUNSEL IN INTERNATIONAL HUMAN RIGHTS LAW

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*"All are equal before the law and are entitled without any discrimination to equal protection of the law."*¹

*"The issue is one of fundamental fairness."*²

INTRODUCTION

On August 31, 1978, Abby Gail Lassiter was escorted from a prison cell to stand alone before a district court judge.³ Opposite her, a Durham County Department of Social Services lawyer sought to take away her infant son.⁴ Seeing Ms. Lassiter unrepresented, the judge considered postponing the trial.⁵ However, he quickly concluded that she had "ample opportunity to seek and obtain counsel" beforehand, so that "her failure to do so [was] without just cause."⁶ The state proceeded with its case against her. When Ms. Lassiter's turn came for cross-examination, her ignorance of court procedure exasperated the judge, who frequently interrupted to scold her for making arguments rather than asking questions.⁷ She and her mother then testified under the judge's questioning, pleading to keep the family together.⁸ The court ruled against Ms. Lassiter, and her child became a ward of the state.⁹

On appeal, Ms. Lassiter argued that because she was indigent, the court's failure to appoint counsel violated her right to due process.¹⁰ North Carolina's Court of Appeals disagreed.¹¹ The Supreme Court of the United States granted certiorari to consider whether due process required appointed counsel for an indigent person facing termination of her parental rights.¹²

1. Universal Declaration of Human Rights art. 7.

2. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (Stevens, J., dissenting).

3. *Id.* at 21 (majority opinion).

4. *Id.* The child was in foster care at the time; the hearing was to terminate Ms. Lassiter's parental rights. *Id.*

5. *Id.* at 21.

6. *Id.* at 22.

7. *See id.* at 23. In a later memo, one of Justice Blackmun's clerks remarked upon the trial court's "undignified" treatment of Ms. Lassiter. Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1087 (2010).

8. *Lassiter*, 452 U.S. at 23.

9. *Id.* at 24.

10. *In re Lassiter*, 259 S.E.2d 336, 337 (N.C. Ct. App. 1979).

11. *Id.*

12. *Lassiter*, 452 U.S. at 24.

The Court asked whether the denial of counsel violated “fundamental fairness.”¹³ Ms. Lassiter faced every possible disadvantage: she was a poor woman of color, a single mother of five, uneducated, and a prisoner—in a formal adversarial proceeding against a government lawyer.¹⁴ She stood to lose a fundamental human right, her legal status as a mother.¹⁵ Yet, a 5-4 majority held that the proceedings had *not* been fundamentally unfair.¹⁶ Had a single Justice voted differently, *Lassiter* could have been for civil legal aid what *Gideon* was for criminal legal aid.¹⁷ Instead, the Supreme Court held that the Constitution required no civil right to counsel.¹⁸

Two years earlier, the European Court of Human Rights (“ECtHR”) heard a similar case but reached the opposite conclusion.¹⁹ Johanna Airey, an indigent Irish woman, sought a judicial order of separation from her abusive husband.²⁰ They had been living separately for years, but she needed the order to make him pay spousal support.²¹ The process involved complicated proceedings before the High Court.²² Ms. Airey, who had little formal education, tried unsuccessfully to navigate this system herself.²³ She attempted to hire a solicitor, but none would take her case because she could not pay.²⁴ At the time, Ireland was one of the few European countries to lack a civil legal aid system.²⁵ After struggling for years, Ms. Airey petitioned the European Court of Human Rights, claiming that the government’s failure to provide counsel

13. *Id.* at 24–25.

14. Justice Blackmun later wrote, “[O]ne need only examine the transcript in this case to perceive the utter helplessness and sense of loss sustained by the petitioner when she was forced to proceed without the assistance of counsel.” Hornstein, *supra* note 7, at 1077, 1086–87.

15. The North Carolina Court of Appeals recognized, “There is no question but that there is a fundamental right to family integrity protected by the U.S. Constitution. At issue is whether due process requires the State to appoint and pay counsel to represent indigents in this situation.” *In re Lassiter*, 259 S.E.2d at 337 (internal citations omitted).

16. *Lassiter*, 452 U.S. at 33.

17. *See infra* Section II(a).

18. *Lassiter*, 452 U.S. at 33.

19. *See Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 4 (1979).

20. *Id.* at 3. Divorce was still illegal in Ireland. *Id.* at 4.

21. *Id.* at 3.

22. *Id.* at 4.

23. *Id.* at 3–4.

24. *Id.*

25. *Id.* at 4; *see also* Earl Johnson, Jr., *Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201, 210 (2003).

violated her rights to a fair hearing and an effective remedy under the European Convention on Human Rights.²⁶ Article 6 of the Convention states, “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”²⁷ The Irish government claimed that it had met its obligation to provide a fair hearing by allowing her to access the courts.²⁸

The ECtHR considered fundamental fairness: could Ms. Airey effectively present her case to the High Court without counsel?²⁹ It answered “no.”³⁰ Reasoning that “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective,”³¹ the court held that states must provide counsel for an indigent person “when such assistance proves indispensable for an effective access to court.”³² *Airey* set binding precedent for all nations in the Council of Europe.³³

Ms. Airey’s case for appointed counsel was arguably not as strong as Ms. Lassiter’s. Airey was a plaintiff facing another private individual, with primarily property interests at stake. Lassiter, on the other hand, was defending herself against the government in a case to terminate her parental rights. Yet the European Court found a right to counsel while the Supreme Court of the United States did not. *Lassiter* set the United States on a different path than its international peers.³⁴

26. *Airey*, 32 Eur. Ct. H.R. (ser. A) at 5.

27. Eur. Conv. on H.R. art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221, as amended by protocol No. 11, 155 E.T.S. (1994) (effective Nov. 1, 1998) available at, <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyid=005> [<https://perma.cc/C399-ZU97>].

28. *Airey*, 32 Eur. Ct. H.R. (ser. A) at 6.

29. *Id.* at 10. “It must therefore be ascertained whether Mrs. 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.” *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 11. *Airey* required states to provide fair access to courts, not a legal aid system per se; the ECtHR noted that states could also meet their obligations in other ways, such as by simplifying procedure. *Id.* For a compelling argument that simplifying procedure is preferable to seeking a civil right to counsel, see Andrew C. Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, 56 U. RICH. L. REV. 1075, 1087–88 (2022).

33. Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step With the Rest of The Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 774 (2006).

34. *See id.* at 769–71.

Every other Western democracy now recognizes a right to counsel in at least some kinds of civil cases, typically those involving basic human rights.³⁵ The World Justice Project’s 2021 *Rule of Law Index* ranked the United States 126th of 139 countries for “People Can Access and Afford Civil Justice.”³⁶ Within its regional and income categories, the United States was dead last.³⁷ The United Nations and other international treaty bodies have urged the United States to improve access to justice by providing civil legal aid.³⁸ How did we fall behind, and what can we learn from the rest of the world?

This Comment considers how international human rights law might support a civil right to counsel in the United States. Part II discusses right-to-counsel principles in U.S. law and the current state of civil legal aid. Part III examines how international and foreign law, particularly in Europe, has conceptualized and implemented a civil right to counsel. Finally, Part IV explores and evaluates several strategies for drawing upon international human rights law to secure such a right in the United States.

I. CIVIL LEGAL AID IN THE UNITED STATES

The justice gap in the United States is well documented.³⁹ The poor, and increasingly the middle class, cannot afford to access the justice system.⁴⁰ Existing legal aid resources are limited, and

35. *Id.* at 769–70. Lidman’s article contains a table illustrating civil legal aid in Council of Europe member states in 2006. *See id.* at 789–800.

36. *Civil Justice Sub-Factors for United States*, WJP RULE OF LAW INDEX (2021), <https://worldjusticeproject.org/rule-of-law-index/country/2021/United%20States/Civil%20Justice/> [https://perma.cc/6CU4-2496]. This factor “measures the accessibility and affordability of civil courts, including whether people are aware of available remedies; can access and afford legal advice and representation; and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers.” *Id.*

37. *Id.* WJP places the U.S. in the “EU, EFTA, and North America” region, where it ranks 31st of 31, and the “High Income” category, where it ranks 46th of 46.

38. *See* Lidman, *supra* note 33 at 783.

39. *See generally* LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (June 2017) [hereinafter THE JUSTICE GAP], <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [https://perma.cc/5ERQ-FD5S]; COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC ET AL.; ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES: RESPONSE TO THE PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (Aug. 2013) [hereinafter ACCESS TO JUSTICE], <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Access%20to%20Justice%20Shadow%20Report%20-%20Final%20%28small%20size%29.pdf> [https://perma.cc/GXR3-6WWG].

40. *See* THE JUSTICE GAP, *supra* note 39, at 6, 9.

federal funding restrictions prohibit legal aid offices from accepting certain kinds of cases (like impact litigation or class actions) and clients (especially undocumented immigrants and migrant workers).⁴¹

A. *The Incomplete Rise of the Right to Counsel*

The first legal aid societies arose in the United States in the mid-nineteenth century.⁴² They grew steadily but remained independent of the government and the courts.⁴³ The founding of the Office of Economic Opportunity Legal Services (“OEO”) in 1965 introduced federal funding, in partnership with local legal aid offices.⁴⁴ OEO was one initiative in President Johnson’s “War on Poverty,” which targeted systemic inequities.⁴⁵ Meanwhile, civil rights in the criminal legal system were being expanded for indigent defendants, leading up to *Gideon v. Wainwright* and the creation of the public defender system.⁴⁶

Gideon v. Wainwright held that due process requires states to provide counsel for indigent criminal defendants.⁴⁷ Before *Gideon*, the Sixth Amendment right to counsel had not yet been incorporated to the states.⁴⁸ Instead, the Court understood the Fourteenth Amendment’s due process clause to require “fundamental fairness” in a general sense.⁴⁹ Under the case-by-case test of *Betts v. Brady*, states were only required to appoint counsel for indigent defendants if special circumstances would make it fundamentally unfair to try them unrepresented.⁵⁰ In *Gideon*, the Supreme Court

41. See ACCESS TO JUSTICE, *supra* note 39, at 14–17.

42. See generally Alan Houseman & Linda E. Perle, *Securing Justice for All: A Brief History of Civil Legal Assistance in the United States*, CENTER FOR LAW AND SOCIAL POLICY (May 2018), <https://www.clasp.org/publications/report/brief/securing-equal-justice-all-brief-history-civil-legal-assistance-united-states/> [<https://perma.cc/5XMD-YTQS>].

43. *Id.* at 4, 7.

44. *Id.* at 8, 11.

45. *Id.* at 11–13.

46. See generally Corinna Barrett Lain, *Countermajoritarian Hero or Zero?: Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004) (discussing and problematizing the Warren Court’s role in the “criminal procedure revolution”).

47. 372 U.S. 335, 342 (1963). For the classic account, see ANTHONY LEWIS, *GIDEON’S TRUMPET: HOW ONE MAN, A POOR PRISONER, TOOK HIS CASE TO THE SUPREME COURT—AND CHANGED THE LAW OF THE UNITED STATES* (1964).

48. See Lain, *supra* note 46, at 1370.

49. *Betts v. Brady*, 316 U.S. 455, 461–62, 473 (1942).

50. *Id.* at 461–62.

granted certiorari to reconsider its holding in *Betts*.⁵¹ This time, it concluded that the right to counsel was categorically necessary for a fair trial, as “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁵² The majority reached this holding without abandoning the “fundamental fairness” approach to the Fourteenth Amendment; the Sixth Amendment provided evidence that the right to counsel was essential to due process, but the states’ obligation arose from fundamental fairness, not the Sixth Amendment itself.⁵³

Many hoped that a “civil *Gideon*” would expand the right to counsel to civil matters as well.⁵⁴ This would have been a logical result of the fundamental fairness approach. The Fifth and Fourteenth Amendments require due process before any deprivation of life, liberty, or property,” and an unrepresented person has no better chance of a fair trial when “haled into court” for a civil matter.⁵⁵ However, *Gideon*’s legacy would be limited to the Sixth Amendment right to counsel in “criminal prosecutions.”⁵⁶ Further, the Supreme Court soon began limiting its right-to-counsel doctrine, even in criminal cases.⁵⁷ By the time the Court heard *Lassiter v. Department of Social Services*, it was ready to draw a bright-line limit on a right to appointed counsel.⁵⁸

51. *Gideon*, 372 U.S. at 338.

52. *Id.* at 344.

53. *Id.* at 342.

We accept *Betts v. Brady*’s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights.

Id.

54. See Johnson, *supra* note 25, at 228.

55. *Gideon*, 372 U.S. at 343–44. The majority in *Betts v. Brady* acknowledged this:

To deduce from the due process clause a rule binding upon the States in this matter would be to impose upon them . . . a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. . . . [A]s the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner, logic would require the furnishing of counsel in civil cases involving property.

316 U.S. at 473.

56. U.S. CONST. amend. VI.

57. See Johnson, *supra* note 25, at 201–03, 216.

58. See Hornstein, *supra* note 7, at 1062.

Writing for the majority in *Lassiter*, Justice Stewart begins by defining due process in terms of “‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty.”⁵⁹ He describes the Court’s task accordingly: “Applying the Due Process Clause is therefore an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.”⁶⁰ He then determines that the Court’s precedents “speak with one voice about what ‘fundamental fairness’ has meant,” distilling from the *Gideon* line of cases “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.”⁶¹ This presumption against a per se right, which became *Lassiter*’s legacy, turned the Court’s reasoning in *Gideon* on its head.⁶²

Next, Justice Stewart “assess[es] the several interests” by applying the balancing test from *Mathews v. Eldridge*.⁶³ The *Mathews* test applies when a litigant in a civil case requests more procedural safeguards from the government.⁶⁴ It balances (1) the interests of the litigant, (2) the added cost to the state, and (3) the risk of erroneous deprivation.⁶⁵ By pivoting from *fundamental fairness* to the practical considerations of the *Mathews* test, the majority answers a different question than it initially asked—not *what is fair?* But *how much fairness does this particular litigant deserve?*⁶⁶

59. *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 24 (1981).

60. *Id.* at 24–25.

61. *Id.* at 26–27.

62. *See Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963).

63. *Lassiter*, 452 U.S. at 25, 27.

64. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

65. *Id.*

66. Justice Stevens makes this point in his dissent:

Without so stating explicitly, the Court appears to treat this case as though it merely involved the deprivation of an interest in property that is less worthy of protection than a person’s liberty. The analysis employed in *Mathews v. Eldridge*, 424 U.S. 319, in which the Court balanced the costs and benefits of different procedural mechanisms for allocating a finite quantity of material resources among competing claimants, is an appropriate method of determining what process is due in property cases. . . . In my opinion the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and

Unfortunately, *Lassiter* presented “bad facts.”⁶⁷ Ms. Lassiter was serving a twenty-five to forty-year prison term for second-degree murder.⁶⁸ The record showed that she had not attempted to visit her son while he was in foster care, failed to attend an earlier hearing, and never asked for appointed counsel before the hearing.⁶⁹ An upstart lawyer brought this appeal against the advice of the local legal aid leadership, who would have waited for a more promising test case.⁷⁰ Chief Justice Burger objected to granting certiorari, finding *Lassiter* “a ‘bad case to open the counsel door.’”⁷¹ The Court also feared the policy consequences of further extending the right to counsel without providing a limiting principle.⁷² The majority wanted a bright-line limit, and they chose loss of physical liberty.⁷³

Though *Lassiter* is often cited to say there is no right to counsel in civil cases, the actual holding was more modest. The Court refused to extend a categorical right to counsel but maintained that due process might require the provision of counsel in some civil cases.⁷⁴ Each case was to be evaluated by the trial court using the

defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases.

Lassiter, 452 U.S. at 59–60 (Stevens, J. dissenting).

67. For an insightful historical analysis based on the personal papers of Justices Blackmun and Powell, see Hornstein, *supra* note 11, at 1062, 1072. Hornstein argues that the majority’s perception of Ms. Lassiter as the “undeserving poor” and policy concerns about line-drawing on a per se right to counsel “were more determinative than precedent in the Court’s internal deliberative process.” *Id.* at 1062.

68. *Lassiter*, 452 U.S. at 20.

69. *Id.* at 20–23. However, the record accepted the government’s version of the facts. Ms. Lassiter and her mother described the events differently. *See id.* at 52–54 (Blackmun, J., dissenting).

70. “Only because a young lawyer was bent on taking this particular case to the nation’s high court—against the pleas of experienced legal services’ lawyers—did it come up for decision by the U.S. Supreme Court.” Earl Johnson, Jr., *Equality Before the Law and the Social Contract*, 37 FORDHAM URB. L.J. 157, 169 (2010) (citing a personal interview with law professor Gregory Malhoit, who was the Executive Director of East Central County Legal Services in Raleigh, NC, from 1971 to 1992).

71. Hornstein, *supra* note 7, at 1079 (quoting Conference Notes of Justice Harry A. Blackmun, *Lassiter v. Dep’t of Soc. Servs.*, 79-4623 in Papers of Justice Harry A. Blackmun (Manuscripts Division, Library of Congress, Washington D.C., box 331, folder 1)).

72. In his notes, Justice Powell acknowledged that “deprivation of parental rights is a serious matter—more severe than many criminal penalties” but reasoned, “If we reverse, what principle will prevent a vast extension of [the] right to counsel?” Hornstein, *supra* note 7, at 1089 (quoting Bench Memorandum from Peter Byrne, Law Clerk, to Mr. Justice Powell (Feb 20, 1980 in Conference Notes of Justice Louis F. Powell, *Lassiter v. Dep’t of Soc Servs.*, 79-6423 (1981) in Papers of Justice Louis F. Powell (Washington and Lee University School of Law, box 223))).

73. *Lassiter*, 452 U.S. at 26–27.

74. *Id.* at 31–32.

balancing test of *Mathews v. Eldridge*: the strength of the individual's interest, the strength of the government's interest, and the risk of erroneous deprivation.⁷⁵ The *Lassiter* opinion reads in a disjointed way; the Court's logic seems to be pointing towards a ruling in Ms. Lassiter's favor, then veers away at the end.

The first group of dissenters (Justices Blackmun, Marshall, and Brennan) agree with the majority's decision to apply the *Mathews* test but reach the opposite conclusion: "The Court's analysis is markedly similar to mine Yet, rather than follow this balancing process to its logical conclusion, the Court abruptly pulls back and announces that a defendant parent must await a case-by-case determination of his or her need for counsel."⁷⁶

Justice Stevens, on the other hand, objects that the *Mathews* test is inappropriate.⁷⁷ He contends fundamental fairness requires civil counsel when such an important right is at stake.⁷⁸ Stevens's dissent favors extending *Gideon* to at least some civil cases, including termination of parental rights.⁷⁹ This logic aligns with international human rights law's affirmation of human dignity.⁸⁰

B. *Forward Progress*

Although *Lassiter* hobbled the civil legal aid movement by denying a constitutional foundation, progress has continued.⁸¹

In 2006, the American Bar Association unanimously adopted a resolution urging all jurisdictions to provide civil legal aid "as a matter of right" in adversarial proceedings "where basic human needs are at stake."⁸² It followed with a Model Access Act to imple-

75. *Id.* at 24–25.

76. *Id.* at 48–49 (Blackmun, J., dissenting).

77. *Id.* at 59–60 (Stevens, J., dissenting).

78. *Id.*

79. *See id.*

80. *See, e.g.*, Universal Declaration of Human Rights, Art. 7. "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.*

81. *See generally* Stan Keillor, James H. Cohen & Marcy Changwasha, *The Inevitable, If Untrumpeted, March Toward "Civil Gideon,"* 64 SYRACUSE L. REV. 469 (2014).

82. ABA Report to the House of Delegates, 112A, 1 (2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_s_sclaid_06A112A.athcheckdam.pdf [<https://perma.cc/X82T-XM4W>].

Resolved. That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where

ment the resolution.⁸³ While no jurisdiction has yet recognized such a broad right extending to all cases involving basic human needs, states are steadily increasing the right to counsel.⁸⁴ All states now recognize a civil right to counsel in at least some kinds of cases, including termination hearings like the one in *Lassiter*.⁸⁵ Some have done so by statute, while in others the courts have interpreted the federal and/or state constitution to require it, under due process and/or equal protection.⁸⁶ The federal statute for proceedings *in forma pauperis* includes a provision giving a judge discretion to appoint counsel for an indigent person, though this is rarely used.⁸⁷

President Obama instituted the Legal Aid Interagency Roundtable (“LAIR”), which was making some progress.⁸⁸ LAIR went dormant during the Trump era but has been revived under President Biden.⁸⁹ One of its stated missions is to “assist the United States with implementation of Goal 16 of the United Nation’s 2030 Agenda for Sustainable Development to promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels.”⁹⁰

These positive steps are encouraging, but fundamental fairness requires that civil counsel be acknowledged as a *right*.⁹¹ Otherwise,

basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody as determined by each jurisdiction.

Id.

83. ABA Model Access Act 104 (Revised) (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sclaid_104_revised_final_aug_2010.pdf [<https://perma.cc/BJ2Q-93AR>].

84. See ACCESS TO JUSTICE, *supra* note 39, at 21–26 *Status Map*,; NAT’L COAL. FOR A CIVIL RIGHT TO COUNS., (2022), <http://civilrighttocounsel.org/map> [<https://perma.cc/3FY5-8WBE>].

85. See ACCESS TO JUSTICE, *supra* note 39, at 21; Nat’l Coal. For a Civ. Right to Couns., *supra* note 84.

86. See ACCESS TO JUSTICE, *supra* note 39, at 21.

87. 28 U.S.C. § 1915(e)(1) (“The court may request an attorney to represent any person unable to afford counsel.”); see also ACCESS TO JUSTICE, *supra* note 39, at 19.

88. Memorandum for the Heads of the Executive Departments and Agencies on the Establishment of the White House Legal Aid Interagency Roundtable (Sept. 24, 2015).

89. *Interagency Legal Aid Roundtable Revived*, FEDWEEK (May 24, 2021), <https://www.fedweek.com/federal-managers-daily-report/interagency-legal-aid-roundtable-revived/> [<https://perma.cc/9P33-H8BX>].

90. Memorandum on Restoring the Department of Justice’s Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable § 3(b)(iv) (May 18, 2021).

91. See Keillor et al., *supra* note 81, at 471.

indigent people's ability to access the courts for basic needs will be subject to resource shortages and the vicissitudes of party politics. More importantly, affirming the right recognizes the equal dignity of all people.⁹² Providing due process to everyone is fairness, not charity.⁹³

II. THE RIGHT TO CIVIL COUNSEL IN INTERNATIONAL AND FOREIGN LAW

In most of the Western world—including the forty-eight members of the Council of Europe, Canada, Australia, New Zealand, Brazil, Madagascar, South Africa, and Russia—civil legal aid is recognized as a right.⁹⁴

Even before *Airey*, most Western European countries had historically provided at least some civil legal aid, often by constitutional or statutory right.⁹⁵ English law included pro bono civil representation since at least 1494.⁹⁶ One theory of legal history suggests that the colonists retained this common law right at the founding of the United States.⁹⁷ France created a civil right to counsel by statute in 1851, Italy in 1865, and Germany in 1877.⁹⁸ In these early statutes, courts appointed lawyers to represent indigent litigants without compensation, as part of their professional duty.⁹⁹ By the 1970s, many countries modernized their legal aid schemes

92. Cf. UDHR Art. 7.

93. See *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”).

94. *International Perspective on Right to Counsel in Civil Cases*, NAT'L COAL. FOR A CIVIL RIGHT TO COUNS. (2022), http://civilrighttocounsel.org/about/international_perspective#:~:text=International%20Perspective%20on%20Right%20to%20Counsel%20in%20Civil%20Cases&text=To%20give%20one%20example%3A%20Canada,civil%20counsel%20for%20the%20indigent [https://perma.cc/89NQ-BLT4]. See generally Lidman, *supra* note 33, at 775; Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later*, in *THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES* 9, 10 (Regan et al. eds., 1999).

95. See Lidman, *supra* note 33, at 776.

96. “[The] Justices . . . shall assign to the same poor person or persons, Counsel learned by their discretions which shall give their Counsels nothing taking for the same . . .” *Id.* at 773 (quoting An Act to Admit Such Persons as Are Poor to Sue in Forma Paupis, 11 Hen. 7, c. 12); see also *id.* at n. 28 (“There are indications from the Ninth Century onward that the English courts provided free publicly paid counsel on a sporadic basis.”).

97. *Id.* at 774. While the historical theory of a retained right to counsel seems unlikely, Lidman's research could support an originalist-friendly argument that the original public meaning of “due process” included a civil right to counsel for the poor.

98. Johnson, *supra* note 25, at 205.

99. *Id.* at 205.

to include government compensation for lawyers representing indigent clients.¹⁰⁰

Around the same time, the United States was also expanding civil legal aid, with the founding of the Legal Services Corporation (“LSC”) in 1965.¹⁰¹ A crucial difference, however, was that unlike the American model, the European reforms made legal aid a matter of *right*; everyone eligible was entitled to services provided by the government.¹⁰² In the United States, legal aid operated outside the courts, with resources too limited to accommodate everyone who qualified.¹⁰³ These differing legal cultures may partly explain why *Airey* found a right to counsel while *Lassiter* did not.

A. *International Treaties Ratified by The United States*

No treaty ratified by the United States explicitly requires a civil right to counsel. However, international human rights bodies have identified a right to counsel under broader rights such as equality, fairness, and access to justice.¹⁰⁴

1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (“UDHR”), created at the birth of the United Nations (“UN”), was “the first international instrument in which rights to be accorded to all peoples were articulated.”¹⁰⁵ It is the foundation of most other international human rights law.¹⁰⁶ After the Second World War, brilliant minds from the UN came together to create something new, a milestone of human achievement and international cooperation.¹⁰⁷ While the

100. See Mauro Cappelletti & Bryant Garth, From ‘Access to Justice: The Worldwide Movement to Make Rights Effective’, in *A READER ON RESOURCING CIVIL JUSTICE* 91, 96–97 (A. A. Patterson & T. Goriely eds., 1996).

101. *Id.* at 96; see also E. Clinton Bamberger, Jr., *The Legal Services Program of the Office of Economic Opportunity*, 41 NOTRE DAME LAW. 847 (1966) (an essay by LSC’s first executive director, celebrating LSC’s promising future in the War on Poverty).

102. Cappelletti & Garth, *supra* note 100, at 97.

103. *Id.* at 100–02.

104. See Martha F. Davis, *In the Interests of Justice*, 25 *TOURO L. REV.* 147, 149–50 (2009).

105. RHONA K. M. SMITH, *INTERNATIONAL HUMAN RIGHTS LAW* 60 (9th ed., 2020).

106. *Id.*

107. For a detailed discussion of the drafting process, see MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

UDHR is not a treaty, the United States and other signatories have committed to pursuing its ideals.¹⁰⁸

UDHR Article 7 provides: “All are equal before the law and are entitled without any discrimination to equal protection of the law.”¹⁰⁹ Article 8 affirms that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹¹⁰ Article 10 states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations”¹¹¹ These principles of equality and fairness form the foundation of more specific UN treaties like the International Covenant on Civil and Political Rights (“ICCPR”).

2. International Covenant on Civil and Political Rights

The clearest international treaty obligating the United States to provide a civil right to counsel is the ICCPR, overseen by the UN’s Human Rights Council (“HRC”). Article 14 declares:

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.¹¹²

The two central elements of ICCPR 14(1), equality before the courts and a fair hearing, resemble our own Equal Protection and Due Process Clauses.¹¹³ Ironically, the draft language proposed by the United States originally included an express right to civil legal counsel.¹¹⁴ The final document, however, explicitly mentions a right to counsel in criminal cases only, like the United States Sixth Amendment.¹¹⁵

108. SMITH, *supra* note 105, at 60.

109. Universal Declaration of Human Rights art. 7.

110. Universal Declaration of Human Rights art. 8.

111. Universal Declaration of Human Rights art. 10.

112. G.A. Res. 2200 A (XXI), International Covenant on Civil and Political Rights, art. 14 ¶ 1 (Dec. 16, 1966).

113. *See id.*; *see also* U.S. CONST. amend. V, XIV.

114. Davis, *supra* note 104, at 59. The drafters would not necessarily have understood this right to include *state-funded* counsel, however.

115. U.S. CONST. amend. VI; G.A. Res. 2200, *supra* note 112, art. 14 ¶ 3(d). The ICCPR explicitly requires member states to provide counsel for criminal defendants “in any case

Still, the broader rights to equality and fairness implicitly require a right to counsel in at least some civil cases. For example, in *Currie v. Jamaica*, the HRC held that Jamaica’s failure to supply legal aid to a prisoner bringing a constitutional claim violated Article 14’s guarantee of a fair hearing, as well as Article 2’s requirement that states provide available and “effective remed[ies]” for violations of fundamental rights.¹¹⁶

The UN Human Rights Committee has clarified in General Comment 32 that Article 14 may require civil legal aid:

The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.¹¹⁷

This Comment replaced General Comment 13 (1984), which admonished, “[i]n general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law [i.e., to civil suits].”¹¹⁸ General Comment 13 was issued only three years after the ruling in *Lassiter*, perhaps as an implicit rebuke.¹¹⁹

The 2013 report from the Special Rapporteur on the independence of judges and lawyers explicitly states that ICCPR 14(1) obli-

where the interests of justice so require,” including free legal assistance for a defendant who does not have the means to pay. G.A. Res. 2200, *supra* note 112, art. 14 ¶ 3(d). Though the Sixth Amendment right to state-funded counsel is implicit, rather than explicit, it is a broader right than the ICCPR’s, extending to “all criminal prosecutions,” not only those “where the interests of justice so require.” See *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (rejecting the “special circumstances” criterion in *Betts v. Brady*, 316 U.S. 455 (1942)).

116. *Currie v. Jamaica*, Communication 377/1989, Hum. Rts. Comm., ¶ 13.4, (March 29, 1994); G.A. Res. 2200, *supra* note 112, art. 2 ¶ 3(a), art. 14, ¶ 1.

117. Hum. Rts. Comm., General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶ 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

118. See *id.* at ¶ 1; U.S. Secretariat, Int’l Hum. Rts. Instruments, Note by the Secretariat, General Comment No. 13, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

119. See *Davis*, *supra* note 104, at n. 53 (“The timing of this General Comment suggests that the U.S. Supreme Court’s 1981 decision in *Lassiter* may have generated some concern that participating nations would begin to back away from extending broad due process protections, including the right to counsel in civil proceedings.”); see also *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).

gates states to provide civil legal aid to those who cannot afford it.¹²⁰ The Special Rapporteur explained:

Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy.¹²¹

She clarified that “existing human rights treat[ies]” obligate member states to provide legal assistance in both criminal and civil cases—“to any person who comes into contact with the law and does not have the means to pay for counsel.”¹²² She then sternly reminded noncompliant states that they were required to meet their treaty obligations by guaranteeing a right to counsel “in national legal systems at the highest possible level, possibly in the Constitution.”¹²³

Periodic reports that nations submit to the HRC include their legal aid systems as evidence of compliance with Article 14.¹²⁴ The United States’ Fourth Periodic Report defends the overall fairness of the justice system but admits: “Inequalities remain . . . in part because neither the U.S. Constitution nor federal statutes provide a right to government-appointed counsel in civil cases when individuals are unable to afford it.”¹²⁵ However, the report quickly assures the HRC that “the equal protection components of state and federal constitutions have helped address economic barriers to some degree.”¹²⁶ It then cites two narrow Supreme Court holdings, *Boddie v. Connecticut* and *N.L.B. v. S.L.J.*, while passing over *Lasiter*.¹²⁷ The United States goes on to defend its human rights record by pointing to the federal *in forma pauperis* statute (28 U.S.C.

120. Gabriela Knaul (Special Rapporteur on the Independence of Judges and Lawyers), *Rep. on the Independence of Judges and Lawyers*, ¶¶ 35, 37, U.N. Doc. A/HRC/23/43 (2013).

121. *Id.* at ¶ 20.

122. *Id.* at ¶ 35.

123. *Id.* at ¶¶ 44, 51.

124. G.A. Res. 2200, *supra* note 112, at art. 40, ¶ 1; *see also* U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Fourth Periodic Report of the U.S. to the U.N.’s Commission on Human Rights Concerning the International Covenant on Civil and Political Rights (2011), <https://2009-2017.state.gov/j/drl/rls/179781.htm> [<https://perma.cc/DA4P-C2PX>].

125. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *supra* note 124, at ¶ 301.

126. *Id.*

127. *Id.*

§ 1915),¹²⁸ fee-shifting statutes for prevailing civil rights plaintiffs, and the continuing existence of LSC as a funding source.¹²⁹ However, a shadow report by Columbia Law School and many others contradicted this sunny picture, highlighting the justice gap and finding the state’s efforts wanting.¹³⁰

Other UN treaties, such as the Convention to End Racial Discrimination (“CERD”), also obligate member nations to provide legal aid when necessary to assure that people can vindicate their civil rights by access to the justice system. The CERD Committee has issued several recommendations that specifically include civil legal aid. For example, General Recommendation 31 indicates that to improve minorities’ ability to sue for racial discrimination states should “[g]rant[] victims effective judicial cooperation and legal aid, including the assistance of counsel and an interpreter free of charge.”¹³¹ In its 2008 report on United States compliance, the CERD Committee noted “with concern the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities.”¹³² It recommended that the United States “allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs—such as housing, health care, or child custody—are at stake.”¹³³

The United States also has obligations as a member of the Organization of American States (“OAS”). The OAS Charter and the

128. This statute allows courts to waive fees and costs for litigants who qualify as indigent. It also gives judges discretion to appoint counsel free of charge, though such appointments are relatively uncommon. See *ACCESS TO JUSTICE*, *supra* note 39, at 19–20.

129. Human Rights Comm., Fourth Periodic Rep. of the U.S., ¶ 302, U.N. Doc. CCPR/C/USA/4 (May 22, 2012).

130. *ACCESS TO JUSTICE*, *supra* note 39, at 2–3.

131. See Davis, *supra* note 104, at 170 (quoting Rep. of the Comm. on the Elimination of Racial Discrimination on Its Sixty-Sixth and Sixty-Seventh Sessions, ch. IX § C(17)(b), U.N. Doc. A/60/18 (2005)).

132. *Id.* at 172–73 (quoting Int’l. Convention on the Elimination of all Forms of Racial Discrimination, Rep. of Comm. on the Elimination of Racial Discrimination on Its Seventy-Second Session, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008)).

133. *Id.* at 173 (quoting Int’l. Convention on the Elimination of all Forms of Racial Discrimination, Rep. of Comm. on the Elimination of Racial Discrimination on Its Seventy-Second Session, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008)). Legislation allocating legal aid based on racial categories would be facially unconstitutional under Equal Protection (14th Amendment), so the response would need to be a general expansion of legal aid to all indigent people.

American Declaration on the Rights and Duties of Man, which the United States has ratified, commit states to take affirmative steps to provide access to justice. Article 45 of the Charter urges states to work towards “[a]dequate provision for all persons to have due legal aid in order to secure their rights.”¹³⁴ The American Declaration includes a similar right: “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”¹³⁵ Though these are aspirational documents, not binding treaties, signatories are expected to pursue their ideals in good faith.¹³⁶

B. *Other International and Foreign Law*

Nonbinding sources of international human rights law provide persuasive authority on the meaning of “fundamental fairness.” Other nations’ policies may also serve as examples. Two particularly instructive precedents are the ECtHR’s jurisprudence on the European Convention on Human Rights (“ECHR”) and the Canadian Supreme Court’s interpretation of its due process equivalent.

The ECHR guarantees the right to a fair trial in language nearly identical to the ICCPR’s: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹³⁷ The ECtHR’s clear explication of “fair hearing” in Article 6 is strong persuasive authority for the interpretation of the same phrase in Article 14 of the ICCPR. *Airey* and other ECHR cases are thus instructive on international community’s understanding of fundamental fairness before the courts.¹³⁸

The ECtHR’s rulings are binding for the countries in the Council of Europe (“CoE”). The European Union’s Charter of Fundamental

134. Organization of American States Charter art. 45, § i.

135. Organization of American States, American Declaration on the Rights and Duties of Man art. 18, 1948.

136. The United States has signed but not ratified the implementing treaty, the American Convention on Human Rights. Sarah Paoletti, *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context: Deriving Support from International Law for the Right to Counsel in Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 651, 656–57, n. 44 (2006).

137. European Convention on Human Rights art. 6 § 1, Sept. 21, 1970–Aug. 1, 2021.

138. See Paoletti, *supra* note 136 at 653–54.

Rights, Article 47, includes a legal aid provision corresponding to ECHR Article 6.¹³⁹ The right in *Airey* is not a right to a lawyer per se, but a right to a “fair hearing.” Signatories are free to implement that fairness in a variety of ways,¹⁴⁰ including simplification of procedure to make the courts accessible to non-lawyers.¹⁴¹ Where procedures and legal issues are not overly complicated and the litigant understands the system, appointed counsel may not be necessary.¹⁴² This is more likely in civil law countries, whose inquisitorial trial model relies less on lawyers’ roles than the common law adversarial model.¹⁴³ Most CoE legal aid policies include a merits test and a requirement for demonstrating financial need.¹⁴⁴ Their scope tends to be fairly broad, including family law, housing, consumer law, debt, personal injury, employment, public assistance, and more.¹⁴⁵

The Supreme Court of Canada reached a similar result in *G.J. v. New Brunswick*.¹⁴⁶ The Canadian Charter of Rights and Freedoms includes “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹⁴⁷ Under facts similar to those in *Lassiter*, that Court held that the “principles of fundamental justice” required the state to provide counsel for an indigent mother faced with losing custody of her child for six months.¹⁴⁸

III. STRATEGIES FOR DRAWING SUPPORT FROM INTERNATIONAL LAW

There are a variety of ways international law might help advocates in the United States work towards a civil right to counsel.¹⁴⁹

139. E.U. AGENCY FOR FUND. RIGHTS & COUNCIL OF EUR., HANDBOOK ON EUROPEAN LAW RELATING TO ACCESS TO JUSTICE 57–58, 61 (2016).

140. *Id.* at 58.

141. See Lidman, *supra* note 30, at 776.

142. *Id.*

143. *Id.* at 778.

144. For an overview, see HANDBOOK ON EUROPEAN LAW RELATING TO ACCESS TO JUSTICE, *supra* note 139, at 57–72.

145. See Lidman, *supra* note 30, at 779.

146. *G.J. v. New Brunswick*, [1999] 3 S.C.R. 46, para. 2 (Can.).

147. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

148. *G.J. v. New Brunswick*, [1999] 3 S.C.R. 46, para. 91 (Can.).

149. For other suggestions, see Zachary Zarnow, Comment, *Obligation Ignored: Why International Law Requires the United States to Provide Adequate Civil Legal Aid, What the*

Drawing upon international law is difficult, though, for several reasons. First, treaties that are not self-executing are not the law of the land until Congress enacts the necessary legislation.¹⁵⁰ Second, the United States Supreme Court has generally rejected using international and foreign law to interpret our Constitution.¹⁵¹ Third, the United States sometimes simply fails to acknowledge or honor treaty obligations.¹⁵² Nevertheless, some combination of these strategies may have potential.

A. *Compliance with Binding Treaties*

Even though international law requires the United States government to provide counsel,¹⁵³ litigants cannot rely directly on the ICCPR because it is not a self-executing treaty.¹⁵⁴ Congress must first pass enacting legislation.¹⁵⁵ That will require convincing enough members of Congress: (1) that our treaty obligations include a civil right to counsel, and (2) that the United States should honor those obligations. As discussed in Part III, the ICCPR does not include an explicit right to counsel. Instead, international treaty bodies have interpreted that requirement from the right to a fair hearing. Realistically, if Congress can pretend that there is no obligation it is unlikely to act, absent voter pressure. Even increasingly direct statements from the HRC and UN rapporteurs have not worked so far.¹⁵⁶ On the other hand, efforts like the White

United States is Doing Instead, and How Legal Empowerment Can Help, 20 AM. U.J. GENDER SOC. POL'Y & L. 273 (2011).

150. See, e.g., Hum. Rts. Council, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: [Universal Periodic Review]: United States of America, ¶¶ 10–13, U.N. Doc. A/HRC/WG.6/36/USA/1 (Aug. 13, 2020).

151. See Harvard Law School, *The 2020 Scalia Lecture | Mary Ann Glendon: Who Needs Foreign Law?*, YOUTUBE (Feb. 25, 2020), https://www.youtube.com/watch?v=ghkNzJSPkqM&ab_channel=HarvardLawSchool [<https://perma.cc/ZPZ2-PUPV>].

152. See Hum. Rts. Council, *supra* note 150 at ¶ 10 (“No state, organization, or tribunal, including the committees that monitor implementation of treaties, has any authority to impose, change, or expand through interpretation any treaty obligation to which the United States is a party.”).

153. See *supra* Part III.

154. Compare Edward Re, *International Judicial Tribunals and the Courts of the Americas*, 40 ST. LOUIS L.J. 1091 (1996) (arguing that international customary law is binding in U.S. courts), with Antonin Scalia, *Commentary*, 40 ST. LOUIS L.J. 1119 (1996) (arguing that Re is mistaken).

155. See Lidman, *supra* note 30, at 783–87.

156. See ACCESS TO JUSTICE, *supra* note 39, at 1–3.

House LAIR show movement towards greater participation, at least by the Executive.¹⁵⁷

A statutory right to civil counsel in compliance with the ICCPR would be an excellent outcome, second only to constitutional amendment or Supreme Court precedent.¹⁵⁸ A federal statute enacted under a treaty obligation can bind the states even where Congress could not do so otherwise.¹⁵⁹ If the law is enacted within a human rights framework, it will affirm equal dignity instead of appearing to be government charity. Such legislation would also be a positive step for the United States to take towards global cooperation.

B. *Guidance for Legislation*

Congress and the state legislatures can look to international and foreign law as guidance when crafting new policies. The *Lassiter* court even suggested that creating a statutory right to civil counsel might be wise public policy, if not constitutionally mandatory.¹⁶⁰ Decades of legal aid programs in other countries provide a rich source of sociological and economic data. At the very least, the experience of similar common law countries demonstrates that a civil right to counsel can work in practice. Advocates can point to UN materials as well as treaties to rally support and pressure elected representatives.¹⁶¹

157. See *id.* at 17–18.

158. Cf. Gabriela Knaul (Special Rapporteur on the Independence of Judges and Lawyers), *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶ 51, U.N. Doc. A/HRC/23/43 (Mar. 15, 2013) (“Since access to legal aid constitutes an essential procedural guarantee for the effective exercise of a number of human rights, the right to legal aid must be legally guaranteed in national legal systems at the highest possible level, possibly in the Constitution.”).

159. See, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that under the Supremacy Clause, a federal statute enforcing a treaty with Canada pre-empted a state law allowing the hunting of migratory birds). If Congress were simply to pass a statute with no treaty, federalism’s anti-commandeering doctrine might also restrict the right to counsel to federal court or require the federal government to create a system of legal aid independent of state governments. This was the problem with criminal legal aid before *Gideon*.

160. *Lassiter v. Dep’t. of Soc. Servs.*, 452 U.S. 18, 33–34 (1981).

161. See, for example, the Mission Statement of the Poor People’s Economic Human Rights Campaign, which appeals to the UDHR: “The Poor People’s Economic Human Rights Campaign is committed to unite the poor across color lines as the leadership base for a broad movement to abolish poverty. We work to accomplish this through advancing economic human rights as named in the Universal Declaration of Human Rights, such as the rights to food, housing, health, education, communication and a living wage job.” Paoletti, *supra* note 136, at n.1.

The weakness of such legislative advocacy is that a statute can be changed once a new party takes power. Recent United States history shows that both treaty compliance and government assistance are vulnerable to political shifts.¹⁶² Yet, once a statute gives people benefits, it can be hard to take back.¹⁶³

State legislative trends may also carry weight with the Supreme Court.¹⁶⁴ For example, in *Gideon*, the Court noted that more and more states were recognizing a right to counsel for indigent criminal defendants.¹⁶⁵ A right first recognized by statute may ultimately become constitutional law.¹⁶⁶

C. *Persuasive Authority for Constitutional Interpretation*

The similar language and values between international human rights treaties and the United States Constitution invite conversation between the texts.¹⁶⁷ The majority in *Lassiter* opined: “For all its consequence, ‘due process’ has never been, and perhaps can never be, precisely defined. . . . [T]he phrase expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can

162. Consider, for example, former president Donald Trump’s withdrawal from the Paris accord, cuts to LSC, and halt on LAIR. See Matt McGrath, *Climate Change: US Formally Withdraws from Paris Agreement*, BBC (Nov. 4, 2020), <https://www.bbc.com/news/science-environment-54797743> [<https://perma.cc/EAC8-Z27L>]; Deborah L. Rhode, *Legal Services Corporation: One of the Worst Cuts in Trump’s Budget*, STAN. L. SCH. BLOGS: LEGAL AGGREGATE (May 31, 2017), <https://law.stanford.edu/2017/05/31/six-of-the-worst-cuts-in-trumps-budget/> [<https://perma.cc/K2E9-A4XU>]; *Interagency Legal Aid Roundtable Revived*, FEDWEEK: FEDERAL MANAGER’S DAILY REPORT (May 24, 2021), <https://www.fedweek.com/federal-managers-daily-report/interagency-legal-aid-roundtable-revived/> [<https://perma.cc/L8EC-X7BB>].

163. Republicans discovered this when trying to repeal the Affordable Care Act. See John E. McDonough, *Republicans Have Stopped Trying to Kill Obamacare. Here’s What They’re Planning Instead*, POLITICO (Apr. 26, 2022), <https://www.politico.com/news/magazine/2022/04/26/gop-obamacare-aca-health-care-00027585> [<https://perma.cc/47G6-NNG6>].

164. See generally Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards”*, 57 UCLA L. REV. 365 (2009) (discussing the Court’s historical use of a majoritarian approach in evolving constitutional doctrines).

165. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

166. Cf. *Obergefell v. Hodges*, 576 U.S. 644, 662, 681, 685 (2015) (acknowledging that states have enacted legislation granting the right to same-sex marriage and holding that same-sex marriage is a constitutional right).

167. See Ruth Bader Ginsburg, Lecture, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 1 (2003) (“National, multinational, and international human rights charters and tribunals today play a key part in a world with increasingly porous borders. . . . We are the losers if we do not both share our experience with, and learn from others.”).

be as opaque as its importance is lofty.”¹⁶⁸ Fairness is a universal human ideal, not a concept unique to American law.

While the Supreme Court has maintained that international and foreign law is not binding authority for constitutional interpretation,¹⁶⁹ several Justices have regarded it as potentially instructive.¹⁷⁰ Justices Kennedy,¹⁷¹ O’Connor,¹⁷² Breyer,¹⁷³ and Ginsburg¹⁷⁴ famously commended the use of transnational law as persuasive authority.¹⁷⁵ Even former Chief Justice Rehnquist once remarked, “[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their

168. *Lassiter v. Dep’t. of Soc. Servs.*, 452 U.S. 18, 24 (1981).

169. *Id.* at 523 (Justice Breyer: “I realize full well that the decisions of foreign courts do not bind American courts. Of course they do not.”); see also Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 521 (transcript of moderated discussion hosted by American University on Jan. 13, 2005) (Justice Scalia: “I do not use foreign law in the interpretation of the United States Constitution.”).

170. See Rebecca Lefler, Comment, *A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia*, 11 S. CAL. INTERDISC. L.J. 165, 173–74 (2001).

171. See *Graham v. Florida*, 560 U.S. 48, 82 (2010) (Kennedy, J., writing for the majority) (“The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”)

172. See Sandra Day O’Connor, Keynote Address, 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002) (“There has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes. While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.”)

173. See *A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, *supra* n. 169, at 523 (Justice Breyer: “But those [foreign] cases sometimes involve a human being working as a judge concerned with a legal problem, often similar to problems that arise here, which problem involves the application of a legal text, often similar to the text of our own Constitution, seeking to protect certain basic human rights, often similar to the rights that our own Constitution seeks to protect. . . . If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something.”).

174. See Ginsburg, *supra* note 167, at 1; see also *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (noting that the Court’s holding “accords with the international understanding of the office of affirmative action,” with citations to *The International Convention on the Elimination of All Forms of Racial Discrimination* and *Convention on the Elimination of All Forms of Discrimination against Women*).

175. For an excellent discussion of the Court’s use of international law in death penalty cases, see James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L. J. 1215, 1246–50 (2015).

own deliberative process.”¹⁷⁶ Though a few staunch originalists have insisted that foreign law has no role at all,¹⁷⁷ they too have occasionally looked abroad when it suited them.¹⁷⁸

One empirical study posits that Supreme Court Justices, whether liberal or conservative, are most likely to reference transnational law when overturning precedent, exercising judicial review, or taking a controversial position.¹⁷⁹ The same study found that the Court usually only considers law from countries similar to the United States.¹⁸⁰ The nations recognizing a civil right to counsel include the common law countries most similar to the United States, so the potential for judicial borrowing is high.¹⁸¹ The broad potential of “due process” invites continual reflection:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. . . . As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹⁸²

In that “search for greater freedom,” international views of fundamental fairness can provide valuable input.¹⁸³

176. See Ginsburg, *supra* note 167, at 2. *But see* *Atkins v. Virginia*, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (“I write separately, however, to call attention to the defects in the Court’s decision to place weight on foreign laws The Court’s suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism.”).

177. See, e.g., Justice Scalia’s majority opinion in *Stanford v. Kentucky*, 492 U.S. 361, 370, n.1 (1989) (“We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici (accepted by the dissent) that the sentencing practices of other countries are relevant.”) (overturned by *Roper v. Simmons*, 543 U.S. 551 (2005)).

178. See Ryan C. Black, Ryan J. Owens, Daniel E. Walters & Jennifer L. Brookhart, *Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court’s Use of Transnational Law to Interpret Domestic Doctrine*, 103 *GEO. L.J.* 1, 23–24 (2014) (noting Rehnquist’s citation of foreign law in *Glucksberg* and in a *Casey* dissent that Scalia and Thomas joined). Also note Justice Alito’s reference to foreign law in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

179. Black et al., *supra* note 178, at 43.

180. *Id.*

181. See *Civil Justice Sub-Factors for United States*, *supra* note 36.

182. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

183. Note Justice O’Connor’s response to Scalia’s dissent in *Roper v. Simmons*:

But this Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in

A civil right to counsel draws upon both procedural and substantive due process, as the right to a fair trial both serves to secure other rights and is “a right in itself.”¹⁸⁴ Substantive due process jurisprudence recognizes implicit fundamental rights by considering *history and tradition*.¹⁸⁵ International human rights law has been part of our own heritage at least since the end of the Second World War. After all, the United States was a leader in founding the United Nations, drafting the UDHR, and joining treaties like the ICCPR.¹⁸⁶ Further, in our increasingly globalized society, international norms are absorbed into the American zeitgeist.¹⁸⁷ International human rights law may therefore be regarded as part of our own history and tradition for implied rights under substantive due process. However, present-day advocates should not rely heavily on substantive due process, at least until the composition of the Supreme Court changes.¹⁸⁸ The Court has long been reluctant to recognize any additional implied fundamental rights,¹⁸⁹ and *Dobbs* suggests that the present 6-3 conservative majority may chip away at rights currently recognized.¹⁹⁰ The firmest constitutional footing for a civil right to counsel is under procedural due process. The procedural due process argument returns to the question raised in

the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.

543 U.S. 551, 605 (2005).

184. U.N. GAOR, 23rd Sess., 43rd mtg. at 5, Gabriela Knaut (Special Rapporteur on the Independence of Judges and Lawyers), ¶ 20, U.N. Doc. A/HRC/23/43 (Mar. 15, 2013).

185. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 487–488, 501 (1965).

186. See generally GLENDON, *supra* note 107 (discussing Eleanor Roosevelt’s role in drafting the Universal Declaration of Human Rights).

187. Cf. Gibson & Lain, *supra* note 175, at 1252–64 (discussing the impact of international norms on U.S. views of the death penalty).

188. Cf. Ginsburg, *supra* note 167, at 4 (“Jurists identified as today’s originalists adhere to the view that a comparative perspective, though useful in the framing of our Constitution, is inappropriate to its interpretation. Partisans of that view sometimes carry the day in our courts. I anticipate, however, that they will speak increasingly in dissent.”). Unfortunately, Justice Ginsburg’s 2003 prediction has proved incorrect.

189. See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

190. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247–48 (2022). The Court’s majority claims its opinion affects only abortion rights. *Id.* at 2277–78. However, in his concurrence, Justice Thomas declares open season on other rights. *Id.* at 2300–01 (Thomas, J., concurring) (“As I have previously explained, ‘substantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution.’ . . . For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

Lassiter: what is fundamental fairness? Such a universal human question invites international dialogue.

The Court has sometimes consulted international norms as reference points for “the evolving standards of decency that mark the progress of a maturing society.”¹⁹¹ International opprobrium played an especially large role in the Court’s Eighth Amendment cases, which found that the death penalty was “cruel and unusual punishment” when imposed on juveniles or the mentally impaired.¹⁹² The Supreme Court also looked to foreign law as evidence of changing societal mores in *Lawrence v. Texas*, which held that criminal laws against homosexual sodomy violated the Fourteenth Amendment.¹⁹³ In *Washington v. Glucksberg*, the Court weighed the criminalization of assisted suicide in other countries as evidence that history and tradition recognized no “right to die.”¹⁹⁴ Even in *Dobbs*, both the majority and the dissent sought to align themselves with international consensus.¹⁹⁵

In these cases, and others, the Supreme Court has essentially polled other countries, just as it has sometimes tallied states.¹⁹⁶ Where most of our global peers acknowledge a right, the Court can find “respected and significant confirmation” for recognizing that right in the United States.¹⁹⁷ Now that a civil right to counsel has growing support among the states, the ABA, and the American

191. *Trop v. Dulles* 356 U.S. 86, 101 (1958).

192. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”); *Atkins v. Virginia*, 536 U.S. 304, 316, n. 21 (2002) (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally [impaired] offenders is overwhelmingly disapproved.”).

193. 539 U.S. 558, 576–77 (2003) (“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 right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”).

194. 521 U.S. 702, 710, n. 8 (1997) (“[A] blanket prohibition on assisted suicide . . . is the norm among western democracies.”) (quoting *Rodriguez v. British Columbia (Attorney General)*, 107 D. L. R. (4th) 342, 404 (Can. 1993)).

195. *Compare Dobbs*, 142 S. Ct. at 2243, n. 15, with *Glucksberg*, 521 U.S. at 2340–41 (Breyer, J., dissenting).

196. See *Lain*, *supra* note 164, at 368 (arguing that the Supreme Court routinely determines whether a constitutional protection exists based on whether a majority of states recognize it); see also Note, *State Law as “Other Law”: Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670 (2007) (comparing and contrasting the Supreme Court’s use of foreign law with its use of state law).

197. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).

people,¹⁹⁸ international human rights law provides powerful confirmation.¹⁹⁹

CONCLUSION

Defining fundamental fairness is a daunting task. However, when the *Lassiter* Court cast about for “any relevant precedent,”²⁰⁰ it ignored other nations’ wisdom. International human rights law obligates the United States to provide legal aid, offers examples for legislation, and provides persuasive authority for finding a civil right to counsel in our own Constitution. It is time to join the rest of the world by recognizing that providing civil representation is a matter of fundamental fairness.

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198. See *supra* Section II.b.

199. See Paoletti, *supra* note 136, at 653.

200. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981).

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