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A Right to Legal Aid: The ABA Model Access Act in International Perspective

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Abstract

For over two centuries America has failed to fulfill its revolutionary ideals of bringing equal justice to all. In August 2010 the American Bar Association moved to bring the nation closer to its ideals when it proposed the ABA Model Access Act. The Act would do what the Supreme Court of the United States has refused to do: it would recognize that legal aid in civil litigation is a matter of right and not of charity. The Act is a framework law and leaves many details to be filled in by enacting bodies and by the institutions eventually charged with implementing it.

The drafters of the Model Act were aware of foreign legal aid systems. In some European countries, such as in Germany and in France, legal aid in civil litigation has been a civil right for over a century and a half. This article examines the Model Act in light of that century and a half of experience in Germany. Based on that experience it points to many issues that the Model Act leaves open and identifies how German law resolves them.

Introduction

Equal justice under law is a credo of American law so firmly held that it is carved into the frieze above the main entrance to

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the building of the United States Supreme Court. Justice is not equal if it is denied to those who cannot afford to purchase it.2

In 1776 the founders of the American Republic declared that everyone “ought to have justice and right, freely without sale, fully without any denial…”3 They set a goal of liberty and justice—for all, not just in the United States, but around the world. Sixteen years later, in 1792, Joel Barlow, a confidant of Thomas Paine in London and in Paris, and soon American plenipotentiary to Algiers, Tunis and Tripoli, explained to European rulers that Americans sought courts “equally open to the poor as to the rich.”4 Barlow admonished them that for their states “to hinder [any man] from bringing [a lawsuit] that is just, is a crime of the state against him.”5 A century later in 1892 a poor American in Paris could count on access to French courts.6 Two centuries later, a poor


2 See, e.g., 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.” Plurality opinion by Black, J.) Americans pledge allegiance to their flag with the promise of “liberty and justice for all.”


4 JOEL BARLOW, ADVICE TO THE PRIVILEGED ORDERS: IN THE SEVERAL STATES OF EUROPE, RESULTING FROM THE NECESSITY AND PROPRIETY OF A GENERAL REVOLUTION IN THE PRINCIPLE OF GOVERNMENT, PART I, 133 (3rd ed., 1793, 1st ed. 1792). At the end of 1792 Barlow left London for Paris, where he had been made an honorary naturalized citizen of France. According to his biographer “during the last half of 1793 Barlow supplanted Thomas Paine as the leading Republican author writing in English.” RICHARD BUHL, JR., JOEL BARLOW: AMERICAN CITIZEN IN A REVOLUTIONARY WORLD 171 (2011).

5 BARLOW at 159.

6 D. Chauncey Brewer, The Status of Indigent Americans in French Courts, 26 Am. L. Rev. 540 (1892). See also Convention du 17 juillet 1905 relative à la
American in [your review’s home town] cannot count on getting a day in court. In the United States legal aid remains charity while throughout Europe it is a right.\footnote{See Raven Lidman, \textit{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. RIGHTS L. REV. 769 (2006). See also \textsc{European Commission for the Efficiency of Justice (CEPEJ), European Judicial Systems Edition 2010 (Data 2008) 49-82 (2010): Efficiency and Quality of Justice (2010); \textsc{Europäische Kommission, Leitfaden der Beratungs- und Prozeßkostenhilfe im Europäischen Wirtschaftsraum} (1996); \textsc{Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union – Final Report} 228-283 (Contract JLS/2006/C4/007-30-CE-0097604/00-36 for the Commission Européenne – DG for Justice, Freedom and Security, 2007) available at \url{https://e-justice.europa.eu/home.do}.} That would change in [your state] were it or the federal government to adopt the ABA Model Access Act that the American Bar Association ("ABA") proposed in 2010.\footnote{This is not the first time that the ABA has acted in the area, but there have not been many others. Although the ABA was founded in 1878, not until 1920 did it give legal aid any official attention. In 1921 its first committee report on the topic lamented that for forty years the ABA and legal aid societies “have existed side by side, without contact, without mutual recognition, and without joining hands.” \textit{Report of the Special Committee on Legal Aid Work}, 46 REPORTS OF THE AMERICAN BAR ASSOCIATION 493, 494 (1923). The Committee observed that “there is a direct responsibility both civic and professional, on members of the bar to see to it that no person with a righteous cause is unable to have his day in court because of his inability to pay for the services of counsel.” \textit{Id.} at 493. A few years later a successor committee proposed a legal aid act. \textit{See First Draft of a Poor Litigant’s Statute}, 49 REPORTS OF THE AMERICAN BAR ASSOCIATION 386 (1924), \textit{reprinted in Reginald Heber Smith and John S. Bradway with Preface by William Howard Taft, Growth of Legal Aid Work in the United States} 106 (1926). A second draft followed a dozen years later and was considered in the California legislature as recently as 1940. Two generations later, in 2006, the American Bar Association House of Delegates unanimously “RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.” Resolution 112A passed the August 7, 2006. In the wake of the worst recession in decades, in 2009 the United States Department of Justice created an “Access to Justice Initiative.” \url{http://www.justice.gov/atj/}. At least thirteen states have}
This article puts the ABA Model Access Act in international perspective. Part I summarizes the Act. It shows that the Act is deliberately incomplete and invites supplementation. Part II examines the legal aid in America as foreigners might view it and provides an historical explanation for the differences between foreign and American approaches. Part III summarizes the German system of litigation legal aid and shows ways in which German experiences might inform adoption and practical implementation of the Model Access Act. The Conclusion identifies issues that international perspective make plain.

I. Legal Aid under the ABA Model Access Act

The ABA Model Access Act is yet to be adopted by any jurisdiction. What will legal aid look like in jurisdictions that adopt it? Legal aid there could look like the present system; it could look different. Its visage depends on the choices made among those the Act presents. In any case, however, the provision and the funding of legal services in the United States generally will not change dramatically where the Model Act is adopted. Courts will operate as they presently do: there will be no new courts and no new civil procedures. Except for a few, clients will continue to be represented at their own expense by lawyers of their own choosing. Neither self-representation nor legal insurance will replace the present system. Legal aid will not expand to encompass counseling but will remain limited to litigation. What will change is that there will be a civil right to legal aid, at least in some cases. No longer

recently taken action to improve access to justice. See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS ET AL., REPORT TO THE HOUSE OF DELEGATES, R-105 REVISED, at 1-7 (August 2010). The Report proposed and the House of Delegates adopted the ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings. The principles embody “minimum, basic requirements” culled from a larger body of legal information that may be “overwhelming for lay persons to assimilate. Id. at 7. They are intended to serve as a “convenient tool for use by advocates working to implement the ABA’s existing civil right to counsel policy.” Id. at 8.

9 For examples, it will not use a system of legal insurance comparable to that being introduced for access to medical care; it will not create new courts where lawyers are not required.; and it will not provide lawyers as public expense to everyone. It is said that in England recent reforms in civil procedure were necessary to meet new demands for legal access present n part by EU requirements.

10 It does look with favor on those who would. See Section 3 Commentary at Lines 322-330.
will the poor depend on charity. Legislatures will commit to fund legal aid; they will create within the judicial system independent “State Access Boards” to create and administer the system of legal aid. In this Part I we sketch the basics and the basis of the Model Act.

The Model Act is not a complete system of legal aid; it is “a starting point to turn commitment into action” and “the means to introduce the concept and begin discussions ... that will lead to implementation of a statutory right to counsel.”\[11\] It presents legislators with choices. If adopted as written, it compels administrators to create implementing regulations and policies. Making those choices and creating those regulations and policies challenge legislators and administrators alike.

What should inform those choices? Members of the drafting committee, in particular, Justice Earl Johnson, Jr., found abroad ideas that fulfill home-grown ideals.\[12\] In recent years

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\[11\] REPORT at 6.
\[12\] One can only stand in awe of the devotion that Justice Johnson has dedicated to the rights of the needy. His inquiries into foreign examples are astonishing and too little recognized in the comparative law community. See generally Earl Johnson, Jr., Equality before the law and the social contract: When will the United States finally guarantee its people the equality before the law the social contract demands?, 37 FORDHAM URB. L.J. 157 (2010); 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(1) SEATTLE J. FOR SOCIAL JUSTICE 201, 205 (2003); Earl Johnson, Jr., Access to Justice, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (2001); Earl Johnson, Jr., Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies, 24 FORDHAM INT’L L.J. Supplement 83 (2000); Earl Johnson, Jr., The Right to Counsel in Civil Cases: An International Perspective, 19 LOY. L.A. L. REV. 341 (1985); Earl Johnson, Jr., Toward Equal Justice: Where the United States Stands Two Decades Later, 5 MD. J. CONTEMP. LEGAL ISSUES 199 (1994). In the 1970s Justice Johnson collaborated with two of the world’s most revered comparative law scholars, the late Professor Mauro Cappelletti, and Professor James Gordley, to produce, with the support of the Ford Foundation, the Italian Research Counsel and the Italian Ministry of Education, a worldwide survey of legal aid. See MAURO CAPPELLETTI, JAMES GORDLEY & EARL JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (TEXT AND MATERIALS) (1975); ACCESS TO JUSTICE (4 vols., M. Cappelletti ed., 1978). That survey informs Americans addressing the requirements of the ABA Model Access Act even today. Since it appeared in the 1970s, however, there have been major changes in the laws it studied. Countries have adjusted their laws to meet demands of the European Union, of the Council of Europe and of the European
American proponents of legal aid have pointed to foreign examples in formulating their own proposals. That is a good idea in any legislation. It is a particularly good idea when foreign systems are well-developed and ours is under-developed.

In this article we do that. We look at the legal aid system in litigation in Germany. In 1876 when German immigrants in New York City founded America’s first and to this day preeminent legal aid society, Germans in Bavaria, Baden, Hannover, Prussia and other German states had already had more than a generation of experience with functioning legal aid. In 1877 legal aid in Germany went national with adoption of a national Code of Civil Procedure. A century-and-a-third later Americans can only dream of that possibility. We examine the German alternative in Part III.
A. A Right to Legal Aid

Nation-wide adoption of the ABA Model Access Act would return the United States to its revolutionary ideals. Access to justice would be a matter of right and not of charity. Adoption would be recognition that the right to be heard in court should not be conditioned on paying court costs or attorney’s fees. It would parallel, albeit fifty years later, a similar legislative recognition in the twenty-fourth amendment to the United States Constitution that the right to be heard in elections should not be conditioned on ability to pay a poll tax. Today there is no such general right of access; for realization of most civil rights, people without adequate means must rely on charity.

1. Basis of the right

Charity, the drafters of the Model Act conclude, “has proven woefully inadequate.” Charity, they tell us, should not be the principal basis of legal aid. They quote U.S. Supreme Court Justice Wiley Rutlege, who said at the annual meeting of the America Bar Association: “Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion.”

German system of legal aid in litigation has been a routine part the nation’s system of civil justice since implementation of its Code of Civil Procedure of 1877. It is said to be “the archetype of the so-called judicare systems.” Rudolf B. Schlesigner, The German Alternative: A Legal Aid System of Equal Access to the Private Attorney, 10 CORNELL INT’L L. J. 213 (1977).


18 The courts have largely ignored the open courts clauses. They have recognized in the federal due process clauses rights of access only with respect to “fundamental constitutional rights.” See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 676 (7th ed. 2004) (“Where access to the judicial process is not essential to the exercise of fundamental constitutional rights the state will be free to allocate access to the judicial machinery on any system or classification which is not totally arbitrary.”).

19 REPORT at 9.

20 As quoted by REPORT at 9.
The Model Act would put legal aid in America on the basis of right. It declares that “[f]air and equal access to justice is a fundamental right in a democratic society.”\textsuperscript{21} The Model Act implies that legal aid in civil litigation is an essential element of the rule of law. Legal aid assures due process and equality under law. The drafters find an “impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.”\textsuperscript{22} The Model Act justifies its declaration of right with the argument that equal justice under law “forms the foundation of America’s social contract with all its citizens.”\textsuperscript{23} Elsewhere, one of the drafters, Justice Johnson, explains the social contract argument. In the social contract, he writes, individuals give up their natural right to self-help and bestow on the state a monopoly of force. In return they receive a promise of equal administration of justice. If administration of justice depends on a party’s wealth, justice is not equal, the social contract is broken, and the affected party ought not be condemned for resorting to self-help.\textsuperscript{24}

By statute the Model Act would realize what is known as “civil Gideon,” that is, a right to state assistance in civil cases. In \textit{Gideon v. Wainright}, 372 U.S. 375 (1963), the U.S. Supreme Court found a constitutional right to state-provided counsel in criminal cases. But in \textit{Lassiter v. Dept of Social Services of Durham County}, 425 U.S. 18 (1981), the Court denied a comparable or lesser constitutional right in civil cases. It found a right to counsel in civil cases only where personal liberty is at stake. The ABA Model Access would, in effect, overturn the effect of the \textit{Lassister} decision by creating a statutory right to legal aid in civil cases.

\textsuperscript{21} SECTION 1.C.
\textsuperscript{22} REPORT 9.
\textsuperscript{23} REPORT 9.
2. Scope of the right

The statutory right that the Model Act would create would not be comprehensive; it would be, the drafters say, a “beginning.” Section 3 sets out the “Right to Public Legal Services.” It provides a right to legal aid in litigation, and not a right to legal aid in counseling. It requires that parties to be assisted show need. That need is both financial and practical, i.e., it is their need that makes assistance necessary “to obtain fair and equal access to justice for the particular dispute or problem that person confronts.” Even in litigation, the Model Act provides a right only for certain types of legal claims, namely those that it calls claims for “basic human needs.” It gives that right only to individuals who qualify financially and whose claims have at least a possibility of success. It provides only a right to legal assistance of some kind, but not always a right to what it terms “full legal representation.” It leaves important aspects of the scope and terms of assistance unaddressed.

a) Only litigation aid

Members of the drafting committee considered extending a right to legal aid to counseling as well as to litigation. One published a draft “State Equal Justice Act” that jurisdictions considering the Model Act should consult. Modern jurisdictions abroad generally support counseling to some extent. On the other hand, commonly jurisdictions have followed a progression of legal aid where counseling follows litigation in support.

With respect to legal aid in litigation, the Model Act provides for aid largely without regard to forum. It makes public legal services available at state expense “in any adversarial proceeding in a state trial or appellate court, a state administrative proceeding, or an arbitration hearing ....” Notable for inclusion are arbitration hearings. Presumably meant are arbitration proceedings generally and not just hearings. Mediation may not be included since it is non-adversarial. Also excluded would be non-adversarial divorce and probate proceedings. The Commentary to Section 3 specifically notes that “adopting jurisdictions may wish to adjust the

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25 REPORT 9.
26 SECTION 3.A.
27 See Appendix to Johnson, Equality before the Law, supra note 24, at 222.
Model Act to provide some services outside of adversarial settings.” Notable for exclusion are adversarial proceedings in federal courts. The basis for this exclusion is not apparent from the draft act or its accompanying materials. Imaginable are grounds of additional expense, deference to the federal system, preference for states system, or a desire not to encourage federal public interest litigation.

**b) Only basic human needs**

The Model Act recognizes a right to legal aid in cases in which “basic human needs ... are at stake.” It defines basic human needs to be “shelter, sustenance, safety, health and child custody.” Each of these five concepts it further defines. Although the listing of five needs seems intended to exclude needs not listed, the Commentary invites adopting jurisdictions “to make modifications, based on the unique circumstances applicable to their communities.” By implication the Commentary acknowledges that jurisdictions that do not modify the list will leave these parties without legal aid. Thus parties denied legal aid, the Commentary notes, would include those in cases concerning paternity and complete denial of child visitation rights. Other cases where parties would be denied legal aid, but which are not noted in the Commentary, include most contract cases (e.g., for sales of goods, for education), most tort cases (including liability claims for past personal injury), most property cases unrelated to shelter (e.g., condemnation of property not providing shelter), marital status cases not related to child custody, inheritance cases, taxation cases, and civil forfeitures. Classification of particular claims as concerning basic human needs practically invites debate and eventually litigation.

**B. The State Access Board**

The ABA Model Access Act establishes within the state judicial system an “independent State Access Board (the “Board”) that shall have responsibility for policy-making and overall administration” of the legal aid program. It directs that a majority of

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28 SECTION 3.A.
29 SECTION 2.B.
30 SECTION 2 COMMENTARY.
31 SECTION 4.A.
Board members shall be licensed to practice law in the state.\textsuperscript{32} It empowers the Board “to promulgate regulations and policies ...”\textsuperscript{33} The Board is to “[e]nsure that all eligible persons receive appropriate public legal services when needed ....”\textsuperscript{34} It is to administer the fund established to pay for legal aid.\textsuperscript{35} It is given many other administrative and informational responsibilities. In short, it has wide-ranging authority to create a unique system of legal aid.

Although the Model Act prescribes an independent board within the state’s judiciary system, the Commentary to Section 4 acknowledges that that may be too cumbersome or expensive for smaller states. It suggests that they consider assigning the Board’s responsibilities to an entirely independent entity, to the state bar association, to the state court system or to the executive branch.\textsuperscript{36}

Why did the drafters leave to a new State Access Board so much of the substance and so many of the terms of future access to courts? The drafters do not tell us, but we may guess the reasons. Perhaps, they could not agree among themselves on the details of a complete system. Perhaps they felt that the variations in judicial institutions among the several states, both with respect to specifics of organization and to capabilities of individual units, make providing a more fully-structured set of institutions and procedures practically impossible. Perhaps they had in mind protecting the prerogatives of existing institutions. Whatever may have been their reason, should states adopt the Act, almost certainly there will be variation among the systems of legal aid created by as many as fifty-one separate State Access Boards.

\textbf{C. Eligibility}

The ABA Model Access Act has two criteria for granting legal aid: need and case merit. It sketches these in general terms, but largely leaves their definition to the State Access Board just discussed.

1. \textbf{Need}

\textsuperscript{32} SECTION 4.B.
\textsuperscript{33} SECTION 4.D.
\textsuperscript{34} SECTION 4.E.i.
\textsuperscript{35} SECTION 4.E.iv.
\textsuperscript{36} REPORT at 10 (lines 421-427).
Applicants must establish their need for legal aid. The Model Act limits assistance to clients “who are unable to afford adequate legal assistance.” It leaves definition of what that amounts to, to the State Access Board.\(^{37}\) It provides scant instruction in measuring need. It anticipates that the principal variable will be annual income and the principal standard the federal poverty definition. Ordinarily aid should be granted, it says, where “household income falls at or below [125 percent] of the federal poverty level.” The Commentary to Section 3 explains that 125 percent income cap is “the minimum economic strate the Model Act seeks to target.” It suggests that implementing jurisdictions might consider a higher threshold, such as 150 percent, or a formula that takes into account other factors relevant to ability to pay, such as applicant’s assets, which make applicants more able to pay, or extraordinary ongoing expenses which make applicants less able to pay.

Not all applicants who meet the income standard will qualify for aid. The Model Act excludes from eligibility applicants in three classes of circumstances where aid is deemed not to be needed: (1) proceedings where lawyers are not allowed (e.g., in some states, small claims courts); (2) proceedings where applicants are already receiving legal representation through existing civil legal aid programs, contingent fee, insurance or class action representation; and (3) uncontested proceedings, unless there is a finding that the interests of justice require representation. It also excludes from “full public legal representation services,” under standards to be adopted by the Board, applicants in two other classes of circumstances where one of two lesser levels of aid—either “limited scope representation” or “self-help assistance”—is deemed sufficient to ensure that basic human needs are not jeopardized. If the other side in the dispute is represented by lawyer, the limitation to “limited scope representation” is not to apply.\(^{38}\)

2. Case merit

The Model Act authorizes full public legal representation only if the person seeking legal aid as plaintiff has “a reasonable possibility of achieving a successful outcome” or, if the person is

\(^{37}\) SECTION 3.D.

\(^{38}\) SECTION 3.B.iii.
seeking aid as defendant, has “a non-frivolous defense.” The Model Act is silent when limited scope representation is available in such cases where full public representation is denied.

The Model Act and the accompanying report do not elaborate what is meant by a “successful outcome.” Is a case successful if it results in a judgment against a person who cannot pay? Is it successful if the costs of proceeding exceed the money recovered? While the former can happen anywhere, the latter is peculiarly a problem in the United States. Here, each side bears his or her own lawyers’ fees: there is no general loser pays rule. Here the lawyers and not the court, determine how much time is invested in a case and, therefore, how high fees are. Fees sometimes exceed amounts at issue. The American system threatens every probable victory with a possibility of being a phryric victory: not enough money will be recovered to make pursuit of the right reasonable. If a person of sufficient means would throw the claim away because it is inadequate to justify the costs, should legal aid be available to someone who without resources who would like to pursue it at public expense? What about the other side of the high costs of litigation coin: is a case successful if it settles for nuisance value?

Neither the Model Act nor its accompanying Report explains why the Act provides assistance only for claims meeting minimal levels of merit. If a right to legal aid is to place the poor in near equivalence to that of the rich, shouldn’t the client be allowed to make the determination whether to pursue the claim? Nevertheless, such limitations on legal aid in litigation are common in modern legal aid systems. Three justifications are commonly given. The minimal merit requirement protects public funds by discouraging litigation with a low likelihood of success. It protects potential adverse parties by sparing them the burden of litigating frivolous claims, in situations where claims to reimbursement as the winning party are likely to unfulfilled when raised against people without means to pay such judgments. Finally, in systems that shift court costs, lawyers’ fees and other expenses to losing parties (which includes most systems), the merit requirement protects the less well-off party from liability for costs and fees of lost lawsuits. This is not a major concern in the United States, since legal fees usually are not shifted and costs are low, but it still is a predictable issue.

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39 SECTION 3.B.i.
3. Eligibility for appeals.

The ABA Model Act subjects appeals to a renewed application for aid which is subject to a different standard. If the assisted party won in the first instance, full assistance is available on appeal “unless there is no reasonable possibility that the appellate court will affirm the decision of the trial court ...” The idea is that the aided party should not be cheated of victory by lack of funds to defend it on appeal. That aid is not automatic in defense of an appeal suggests a lack of confidence in the decision of first instance. On the other hand, where it is the aided party who brings the appeal, the Act has two alternate requirements, one of which is more and the other of which is less stringent than the first instance standard of showing “a reasonable possibility of a successful outcome.” The more stringent standard requires a showing that there be “a reasonable \textit{probability of success} ....” That the standard is higher gives deference to the lower court decision and, in particular, to its finding of facts. A less stringent standard is available to lawyers who would like to use litigation to change the law. Then legal aid is to be granted “when there is a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.” This provision tracks the language of Rule 11(b)(2) of the Federal Rules of Civil Procedure (which relates to filing papers in first instance). It is likely to have a similar effect in encouraging litigation and diverting procedure from deciding cases according to law. It is sure to draw the objection of tort reform-oriented critics of legal aid.

D. Procedure

\footnote{SECTION 3.B.ii.}
\footnote{Appealing a case has long been a trick used to defeat less well-financed litigants by imposing costs they cannot meet.}
\footnote{SECTION 3.B.ii. Lest one think that the drafters did not really mean it, one need only note that they address this point first in the official Commentary (at page 7) to the entire section leaving for later discussion of matters addressed earlier in the section.}
\footnote{The Model Act does not include a parallel provision for granting aid in first instance based on a law-changing complaint.}
1. Who decides

The ABA Model Access Act directs the Board to “establish, certify, and retain specific organizations to make eligibility determinations.” Those determinations, the Act notes, include financial eligibility, minimal merit requirements and the scope of legal aid service to be provided. The Act places no limitations on the organizations selected. In particular, it does not require that those bodies that determine eligibility be independent of the providers of legal services. If the organizations engaged to make eligibility determinations themselves provide legal services, it is a sure bet that in short order they will be accused of approving applications to get the business or of declining applications to conserve resources.

The text of the Model Act does not say which kinds of organizations the Board should appoint to make eligibility determinations. The Commentary to Section 4 suggests that the legislature should be sure to authorize the Board to appoint local legal aid organizations, including both federally and state-funded organizations, as well as any self-help centers that the state court system certifies as qualified. The Act does not give criteria for choosing one form of organization over another or one specific such organization over another. The Act does not say how these different bodies should be assigned the tasks. In particular, should each be given exclusive competency for a specific geographic territory or for a specific subject matter area? Will applicants be required to apply only to a specific organization, or will they be permitted to choose which one they wish to have review their application? Will applicants be able to apply to more than one organization to maximize their chances of getting legal aid at a desired level? All of these questions will need to be answered either sooner when a state adopts the Model Act or later when the State Access Board gets underway.

The Model Act does not give the State Access Board and its designees exclusive authority to determine grants of legal aid. It also authorizes judges and other officers charged with conducting proceedings to make their own assessments whether unrepresented litigants require public legal representation for fair hearings. If they notify the Board that such representation is necessary, the Board,

\[^{46}\text{SECTION 4.E.ii.}\]
upon finding that the party concerned meets financial eligibility requirements and asserts a claim involving a basic human need, but without examining the merits of the case, is to provide counsel.\(^4\) The Act does not limit that reference by the judge or other officer. Presumably it may take place at any time in proceedings and without regard to prior determinations of non-eligibility.

2.  **Authorization of legal aid**

The Model Act provides limited instruction on how the authorized body is to make its determination. That instruction is the simple statement that “initial determinations of eligibility for services may be based on facial review of the application for assistance or the pleadings.”\(^5\) What it does not prescribe are important matters such as: (a) the content of the application; (b) who else (e.g., the State Access Board, the State Fund, the other party in the litigation, the court in the litigation), if anyone, is to receive notice of the application and is to be heard in the application; (c) whether an oral hearing is required; (d) whether the body authorized to decide is to assist the applicant with the application or to inquire into the application’s content and (e) what form the decision is to take (e.g., oral, written, with reasons).

The difficulties of making the determinations of need and of arguable case merit, even if subject to very generous standards, should not be understated. In discussing the eligibility requirements we have already considered some of those in general terms of the standards involved. Here we note some to the issues of application of those standards. With respect to need, what evidence must a party produce to show need. With respect to arguable case merit, what kind of showing must the applicant make? Must the applicant identify the claim, the facts that underlie and the evidence that will prove the claim? Or will an application which, if filed as a complaint, would withstand a motion to dismiss, be sufficient proof that the claim is arguable. That lower standard is typical of most states where notice pleading prevails. As minimal as notice pleading requirements are, is it not too much to expect that an applicant for legal aid will be able to identify and describe those for his application?

\(^4\) SECTION 4.C.
\(^5\) SECTION 3.B.i.
3. Withdrawal of legal aid

The Model Act anticipates that legal aid may be withdrawn, but does not explain when, under what circumstances and with what consequences. Along with advising applicants of the initial decision to grant aid, recipients are to be informed that “any initial finding of eligibility is subject to a further review after a full investigation of the case has been completed.” Yet the Act makes no provision for a full investigation. It says nothing more about modification or withdrawal of aid, i.e., what would trigger it, when it would be conducted, by whom or how, with what consequences.

4. Review of decisions denying legal aid

The Model Act directs that the State Access Board shall “establish and administer a system that timely considers and decides appeals by applicants found ineligible for legal representation at public expense, or from decisions to provide only limited scope representation.” It provides no further direction.

E. Legal Aid Provided

1. Only such aid as is needed

The ABA Model Access Act does not promise the same level of assistance in all cases. It provides only for assistance “as necessary for the person to obtain fair and equal access to justice.” Section 3.A. explicitly distinguishes two levels of assistance, which in Section 2 are further defined: “full legal representation” or “limited scope representation.” Intersitially it also seeks of “self-help assistance,” which it leaves undefined, but which is intended to help pro se litigants. Determination of what is sufficient is left to the decision of the administrators of the program based on criteria set forth in the Model Act and in implementing regulations and policies.

The Model Act leaves unanswered the extent of its coverage of the costs of litigation. It sets forth neither minimums nor maximums. Section 2.C defines “full legal representation” to be

49 *Id.*

50 SECTION 4.E.iii.

51 SECTION 3.A.
“the performance by a licensed legal professional of all legal services that may be involved,” but leaves unanswered whether that includes costs and expenses that are involved but that are not provided by a licensed legal professional. These include court costs for filing, serving and enforcing, lawyers’ expenses for travel, research printing and the like, expert witness fees, securities and bonds required to pursue litigation, and other miscellaneous costs. Legal aid advocates have long-noted that these expenses can easily defeat impecunious parties. A rich defendant can get rid of a bothersome suit by demanding that a poor plaintiff post a security required for costs. The spirit of the Model Act anticipates that the state will cover these expenses. The Act itself suggests that it does when it adds that the right to public legal services includes “translation or other incidental services essential to achieving this goal [of fair and equal access to justice].” Implementing jurisdictions can spell out what other costs are covered. When doing that they should also consider who should pay in the event that the aided party loses and the proceedings are subject to a loser-pays rule. While that may not seem too likely in the context of litigation, since two-way fee-shifting is rare and indigent parties are not likely to be the subject of a one-way fee shifting statute, in the context of arbitration it is entirely possible as more and more business enterprises include such requirements in their arbitration clauses.

The Model Act also does not, even in general terms, limit how much time and money are spent in individual cases receiving assistance. In cases where there is no legal aid, parties themselves decide. They can demand much or no discovery. They can engage many or no experts. They can make many or no motions. All of these decisions lie largely in the hands of the parties and their lawyers. There is little court control. Parties faced with demands from the other side may choose to settle their cases rather than litigate their cases fully. How much of “full legal representation” is enough? While ordinarily we think of the little litigant being overwhelmed by the giant corporation, how will the public react when publically-assisted litigants make litigation demands that private litigants cannot meet?

2. Only in the form of services in kind for free

52 SECTION 3.A.
The Model Act does not prescribe who the legal professionals are that are to provide legal aid. It leaves that decision to the State Access Board. The Board is to manage these services in “a manner that is effective and cost-efficient, and that ensures recipients fair and equal access to justice.” The Commentary to Section 4 allows that how that is to be accomplished “may vary from state to state depending on the resources available in the community.” The Model Act, according to the Commentary to Section 4, would permit the Board “to contract with local non-profit legal aid organizations or with private attorneys, or both, as it deems appropriate ....” Although the Act nowhere explicitly states so, it seems to anticipate that services will be provided through bulk arrangements, i.e., through legal aid organizations and contract attorneys engaged for multiple representations, to be assigned to applicants. It is loosely enough drafted, however, to permit creation of mechanisms that would allow case-by-case arrangements that would permit applicants to choose their own lawyers.

The ABA Model Access Act anticipates that parties determined to be qualified for legal aid will receive that aid without obligation to repay it even if successful in the lawsuit.

### F. Funding of Legal Aid

The ABA Model Access Act establishes a State Access Fund to be administered by the State Access Board. It provides almost no details. The Commentary explains: “Because of varying financial conditions in implementing jurisdictions, no attempt is made in this Section to identify possible revenue sources. Implementing jurisdictions may consider using any available source of revenues, ut shall ensure that current financial support to existing legal aid providers is not reduced ....”

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53 SECTION 4.E.i.
54 Other proposed statutes have imposed such a requirement.
55 SECTION 5.A.
56 SECTION 4.E.iv.
II. American legal aid in foreign perspective

A. How we look to others

To place the ABA Model Access Act and American legal aid in general in comparative perspective, we offer a dialogue between an American common lawyer and a European civil lawyer. This has been a technique comparative law scholars have used to underscore diverse solutions. 57

When an American lawyer tells a European lawyer that there is no right to legal aid in the United States, he is likely to get much the same response as he might get if he told her, we imprison people for debt: polite consternation.

European Surely, you must be kidding. This is the 21st century, not the 18th.
American No. It’s true.

**NO RIGHT IN THE UNITED STATES TO LEGAL AID**

European You don’t have anything like Article 47(3) of the Charter of Fundamental Rights of the European Union? It states: “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.” 58
American Nope.
European Don’t you have a guarantee of a right to a fair trial? Article 6 of our European Human Rights Convention—now sixty years old and applicable from the from Siberia to Spain—provides that “[i]n the determination of his civil rights and obligations ..., everyone is entitled to a fair and public

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58 2010/C 83/02, OFFICIAL JOURNAL OF THE EUROPEAN UNION C 83/389 (March 30, 2010).
It’s not a big leap to say legal aid must be provided when necessary to a fair hearing.\(^59\) It’s not a big leap to say legal aid must be provided when necessary to a fair hearing.

**American**

Oh, yes. *Day in court* is what the public talks about. Lawyers call it due process. We guarantee due process. Everyone gets to have a lawyer.

**European**

OK. Everyone gets a lawyer, even if he can’t afford one?

**American**

Oh. No. Somebody has to pay the lawyer. If you can’t pay, maybe a friend will.

**European**

I guess common law countries don’t get it. In 1979 the European Court of Human Rights had to tell Ireland that that it must provide legal aid in civil cases.\(^60\)

**American**

We get it. Our Supreme Court has held that the state must provide legal aid in a civil case where the defendant’s custody is at stake.

**European**

Huh? You mean wind up in prison? We are not talking criminal cases.

**American**

Yes. Custody can occur: prison or perhaps an asylum. If custody is not at stake, there is no right to counsel. But there is a right to defend yourself *pro se*. I hear that in some places, like in Germany, you must have a lawyer.

**European**

That’s right. In Germany, if the case involves more than €5,000. you have to have a lawyer. It makes proceedings run more smoothly and protects parties’ rights.

**American**

And if you cannot afford a lawyer, you lose?

**European**

No. You can pick your own lawyer and get legal aid to pay the lawyer.

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**LEGAL AID AS PILLAR OF THE RULE OF LAW**

**American**

That’s practically socialism, or at least some of my “tea party” friends would say so. We Americans don’t go for the “social” market economy that you Europeans like so much.

**European**

Are you kidding? Legal aid in litigation is more than just social help. Many places without social market economies have legal aid for litigation. Why France and Germany had litigation aid a century before they had social market economies. Litigation aid is a pillar of the rule of law. It is about your right to be heard. i.e., what you Americans call your ‘day in court.’ Without legal aid, many people cannot be heard.

**American**

What do you mean?

**European**

Because we have civil procedure, we prohibit self-help. If you think you are right, if the other party does not freely

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\(^{59}\) Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, 213 U.N.T.S. 222. at art. 6, § 3(c).

concede that, you go to court. You don't go over to his house and beat him up until he pays. That's what civilized society is all about.

American  OK. We have courts for just that purpose, too. The aggrieved go there.

European  And if they have no money?

American  They could have a problem.

European  Doesn't that mean you have one law for the rich and another for the poor. What became of equal justice under law? 61

APOLOGIES FOR THE AMERICAN SYSTEM

American  It’s not such a big problem. Litigation is only part of the law. It protects against the government. If the government were to try to take away my right to free speech, you can be sure that I would get help from the American Civil Liberties Union or someone like that. Were the government to try to take down my advertising billboard, somebody like the American Enterprise Institute would help me. In either case, the news media, on the left or on the right, would bring my case to the attention of the country. I do not worry. My rights are protected.

European  What if it’s not a political issue or particularly interesting for the media?

American  It’s still not a big problem. If the claim is small—under $5000—I can go to small claims court without a lawyer. If it is strong and big—over $100,000, or better over $1 million—I can get a “plaintiff’s lawyer” who will represent me without charge and will take the fee from winnings. If it is a claim that many people have, I can get a “class action” lawyer to take the case for all of us.

European  And if the claim is not small enough for small claims court and not big enough for a contingent fee and not repetitive enough for class action, are you out of luck?

American  By no means. I can ask a legal aid society or a law school clinic to help me out.

European  Will they help you?

American  Honestly?—probably not. They have more pressing matters. They help first people with basic human needs, like their jobs, or their homes or their family rights.

European  Then you have lost your day-in-court, and with it, your case, haven't you?

61 C.F., REGINALD HEBER SMITH, JUSTICE AND THE POOR 29 (3rd ed., 1924) (then our bills of right might just as well read: “Every subject who can furnish a bond for fifteen or seventy-five dollars ought to obtain justice freely, completely, and without delay; to all others the courts are closed.”).
American: No. I can still represent myself.

European: OK. But you are lawyer and a well-educated person at that. Fine help a right of self-representation is for anyone else. Do you mean to tell me that in your adversary system, where the judge is passive, someone without a lawyer has a chance against someone with a good lawyer?

American, conceding: Of course not. In the United States we say—only partly in jest—that the party with the better lawyer out to win. Chances for someone without lawyer are not good. But we are working on making help available so people can represent themselves better. That is a part of the ABA Model Access Act. Moreover, if the Act is adopted, if the case involves a “basic human need,” then the litigant will get not just assistance in self-representation, but full representation.

European, voicing amazement: So if I get cancer and I can’t afford a surgeon and a hospital, you would teach me how to operate on myself at home? You would give me a surgeon and an operating room only if it is a life-threatening condition?"

American, indignant: Now come on: let’s not go off the deep end. Law is not like health. We all know that there are a lot of legal rights that you can’t enforce in court. Lawsuits are expensive matters: most people cannot afford them for most matters. Think of most cases as cosmetic surgery. Do you really need a court to decide the case?

European, exasperated: So some rights are not really rights to be enforced? So some people should not go to court to get their rights?

American, angry: Get real. No legal system is perfect. Ours is about as good as they get. We Americans are all legal realists: just because some rights are not worth enforcing, does not mean our legal system is a failure. How is it any different for you?

ROUTINENESS OF LEGAL AID

European, lecturing: This is what makes the American fuss about legal aid perplexing to us Europeans. A right to legal aid in litigation is nothing new: the original six member states of the European Union have had it for well over a century. The aristocratic regime bestowed it; we did not need a social market economy to get it. The other forty-one member states of the Council of Europe—I won’t name names, but not all are known for their records for supporting human rights or social rights—they all have legal aid for litigation. Legal aid is nothing new or extraordinary; it is routine. Some five to ten percent of cases have legal aid. How can you get along without a right to litigation aid?

American: We do.

European: Look. Doesn’t the United States pay attention to its own
international agreements? The International Declaration of Human Rights in Article 10 provides that “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.” That’s the declaration that Eleanor Roosevelt sponsored. Each year your Department of State reports on how well other countries have lived up to it. It may be time for you to do some self-reporting.

American: Maybe we should.

European: The United States led the world in realizing rights. What happened? When I read your declarations of rights, when I read Barlow on the administration of justice, I feel at home. I feel we share values. But when I hear you talk about how things work—or do not work—in the United States, I shake my head in disbelief. What is the explanation?”

American: We just happen to have on our faculty someone who knows about about comparative law in historical perspective. I will ask him to give an explanation. He tells me, in brief the reason is that in the United States the private bar controls the civil justice system. Legal aid is not high in its list of priorities.

B. Why we are where we are: an historical explanation
There is an obvious historical explanation why there is universal legal aid in Germany and not in the United States. It is not

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62 At 636. The lawyer, ironically, is the great reformer, David Dudley Field, Jr. Field drew Nast’s wrath for representing ‘Boss’ Tweed and Tamany Hall.
that Germans are more generous or more socially oriented than are Americans. It is not that German civil procedure is less costly than is American procedure (although it is). It is that German civil justice is the product of government ministers while American civil justice is the product of private lawyers. The former responded to the needs of the public generally; the latter answered the calls of their principals with a mind to their own needs. German civil justice is to American civil justice, as a public transit system is to a fleet of private taxis. German civil justice is there for all; American civil justice is there for a few. There is no cynicism in this observation of reality. America has not wanted for ideals, but for means and the political will to put those ideals into practice.

What we call legal aid was, at the turn of the nineteenth century, in some respects more similar between the United States and Germany than it is today. Then much dispute resolution was conducted without lawyers and without close attention to formal legal texts. Parties represented themselves; lawyers and legal aid in many cases were not used. Those courts that did apply formal rules through formal procedures offered the very poor the possibility of exemption from court costs and appointment of lawyers to represent them for free. In the common law countries this charity was known as proceeding in forma pauperis.

The nineteenth century brought terrific growth in commerce and industry in both countries. Local economies became national. Rural societies became urban mass societies. Collections of states became nations. Need for law and legal services grew exponentially. Responses were similar, but results were different. Particularly this was true for legal aid.

In Germany, the government has the leading role in providing courts. The government also has responsibility for maintaining a well-functioning society. Such a society is furthered by an effective rule-of-law that delivers a modicum of social justice. The government has control of tax revenues; it has power and authority to direct those payments to protect the poor.

In the United States, on the other hand, lawyers and judges are largely responsible for the courts. They do not have responsibility for society as a whole; they do have responsibility for deciding disputes of people before them. Judges and lawyers do not have control of tax revenues. Judges cannot without great controversy direct the government to spend public funds to pay lawyers’ fees. Judges, who in the common law tradition come from the
practicing bar, cannot without resistance from their former colleagues, direct them to represent the poor for free. It is not an unfounded hypothesis that these institutional differences lead to different results. While legal representation in Germany approaches the universal, in the United States it is a less-than-all-encompassing mix of contingent fee (lawyer interest), charitable (pro bono and privately and to some extent publically funded legal aid societies), and self-representation.

1. United States

When the great transformations in commerce and industry occurred in the United States, private lawyers tended to their principals and their own needs and not to the needs of others. Only some states adopted in forma pauperis proceedings; some of those that did showed Dickensonian solicitude to applicants.

New York was an early adopter in 1802. In an 1828 decision its chancellor ruled that “the court must be convinced that the party is really an object of charity before it will grant him this privilege.” The chancellor made clear that judicial sympathies lay on the side of the judges and lawyers who would be called upon to render services to applicants for free: “Applications of this kind are not to be encouraged in this state, where every healthy and Industrious citizen can earn sufficient to support himself, and also to enable him to pay the moderate fees of the officers of this court.”

To make matters worse for applications, although the New York statute did not require it, the courts followed the English practice and required that applicants be destitute: they could be worth no more than five pounds sterling, excluding only their wearing apparel and the subject of the controversy.

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65 Chap. XC. An ACT for the Amendment of Law, and the better Advancement of Justice, passed March 30th, 1801, 1 LAWS OF THE STATE OF NEW YORK (1802).
67 1 JOHN DUNLAP, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF NEW YORK IN CIVIL ACTIONS, TOGETHER WITH THE PROCEEDINGS IN ERROR 35 (1821). The New Jersey Supreme Court opined that “five pounds sterling may
revised statutes the New York legislature wrote English practice into New York law in American currency at twenty dollars and generously allowed exclusion of not only applicant’s wearing apparel, but that of applicant’s family as well “furniture necessary for them.”68 The statute further required that the applicant of a counselor of the court that he had examined the application and found a good claim. 69 If that was not enough to discourage applicants, the courts determined to interpret the statute strictly against them. 70 Thus they denied \textit{in forma pauperis} status to defendants, appellants and appellees, as well as to plaintiffs who brought slander and other “vexatious” actions. 71 In most cases, on the ground of abuse prevention, they assigned to the case a lawyer other than the one who prepared the applicant’s application. 72 Small wonder that in 1885 \textit{in forma pauperis} was described as an “almost forgotten practice.”73

Yet that is all that the legal system had to offer litigants in need. Even the law reformers ignored them. The great reformer, David Dudley Field, Jr., had no provision for them in his famous New York Code of Civil Procedure of 1848. He left the \textit{in forma pauperis} proceedings in the Revised Statutes unchanged and unincorporated into his code.74 He did find room to satisfy the lawyers’

\footnotesize

be too small sum, but there should be some limit.” Sears v. Tindall, 3 Green (N.J.) 399, 403 (1836) (2nd ed., John Linn 1876).

68 2 N.Y. REV. STAT. 445 [check] (1830).

69 Id.

70 2 ALEXANDER MANSFIELD BURRILL, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW-YORK WITH AN APPENDIX OF PRACTICAL FORMS 105 (2nd ed. 1846); 1 AUSTIN ABBOTT, THE PRINCIPLES AND FORMS OF PRACTICE IN CIVIL ACTION IN COURTS OF RECORD UNDER THE CODE OF PROCEDURE 569 (1887).

71 BURRILL, supra note 70 (citing cases). The United States Supreme Court similarly construed strictly the federal statute and held that it gave neither right to proceed on appeal \textit{in forma pauperis} not the authority for the court to grant the status. Bradford v. Southern Railway Co., 195 U.S. 243 (1904). More recently, the Supreme Court of Indiana, relying on an open courts clause in the state’s constitution, “felt constrained to give a liberal construction to our statutes in favor of the pauper.” Campbell v. Criterion Group, 605 N.E.2d 150, 155 (1992).


73 I.T. Williams, Cheap Justice [Letter], 31 ALBANY L.J. 199 (1885).

74 Not until 1879 did they come into the code as part of the reform that Field dreaded, the Throop code. That extended allowed that defendants might be granted \textit{in forma pauperis} status.
urgent wish for repeal of all laws “establishing or regulating” lawyers’ fees.\textsuperscript{75}

The American Bar Association was founded in 1878 with law reform intentions; it was more than forty years after its founding that it first paid attention to legal aid.\textsuperscript{76} With the support of the ABA, in 1893, another of America’s great law reform bodies was formed, the National Conference of Commissioners of Uniform State Laws. Among its more than 100 proposed uniform laws and model acts, none is directed toward the civil litigation needs of the poor.\textsuperscript{77} The American Judicature Society was founded in 1913, but has yet to propose legislation that would provide within the system for legal aid. The American Law Institute was founded in 1923, but it was 2009 before a representative of a legal aid society addressed it. None of its model acts provide for poor litigants in civil litigation.

In the first third of the twentieth century the bar campaigned vigorously for a new system of civil procedure. In 1938 the bar got it: the Federal Rules of Civil Procedure. A central feature of the campaign was that the courts—which really means the lawyers—and not the legislature should be responsible for the rules under which the courts operate. That wish was realized: the federal rules are written by the lawyers, approved by the United States Supreme Court, and take effect unless Congress objection. In the drafting of the federal rule and in their frequent revisions, that they might include provision for legal representation for the poor seems never to have been discussed.

In fact, the ABA Proposed Model Access Act is only the second substantial national legislative effort to reform the law to address the needs of the needy in civil litigation. Once before, the ABA was involved in a proposal for a legislative solution to providing access to civil justice to the poor. In 1924 an ABA committee published a Draft Poor Litigant’s Statute. It revised that in the 1930s.

Advocates for the poor have sought to persuade courts to recognize a right to legal aid based on federal and state constitutional guarantees of due process and open courts, but have had little success. Concerns that costs of litigation might prevent a party

\textsuperscript{76} It did seek to improve civil process generally.
\textsuperscript{77} In 1970 it did issue a Model Public Defender Act for use in criminal justice.
from realizing rights have been brushed aside. The law provides
the rich and the poor with civil justice on the same terms. “The in-
equality consists in the unequal financial ability of the parties to
avail themselves of the benefit of the law.”78

The principal advance in the law for poor litigants in ad-
justing the law to meet their needs came in the development of
small claims courts. These courts did and do provide a forum for
poor people who cannot afford lawyers or high court costs. Yet
they pose problems of their own. Not all poor people are equally
able to represent themselves without help. Their limited jurisdic-
tion limits the benefits they can bestow.

While law did not change to help the poor, practice did
somewhat through innovative ways to fund poor litigants. In the
United States these have principally taken the form of legal aid so-
cieties and contingent fee representation.

The most important development for poor litigants in the
nineteenth century was not legislation created with almost no in-
volve ment of the legal establishment. It was private individuals of
foreign birth, not lawyers, not judges, not government officials,
that in 1876 founded in New York City America’s first legal aid
society with the decidedly foreign name, Der Deutsche Rechts-
schütz Verein. The Verein, long under the name of the Legal Aid
Society, remains to this day America’s leading provider of legal
services to the poor. The history of legal aid is well documented.79

In the 1960s federal funding became a feature of legal aid and has
resulted in high levels of controversy surrounding it.80

78 Eckrich v. St. Louis Transportation Co., 176 Mo. 621, 652 (1903)
79 For 1876 through to the 1960s, see EMERY A. BROWNELL, LEGAL AID IN THE
UNITED STATES (1951); Stephen K. Huber, Thou Shalt Not Ration Justice: A
History and Bibliography of Legal Aid in America, 44 GEO. WASH. L. REV. 754
1976; LEGAL AID WORK (John S. Bradway & Reginald Heber Smith, eds., THE
ANNALS vol. 124, March, 1926); HARRISON TWEED, THE LEGAL AID SOCIETY
NEW YORK CITY 1876 – 1951 (1954); JOHN MACARTHUR MAGUIRE, THE
LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY
1876-1926 (1928).
80 See Alan W. Houseman, Legal Aid History, in POVERTY LAW MANUAL FOR
law-library/research-guides/poverty-law-manual/index.html; EARL JOHNSON,
SERVICES PROGRAM (1974, reissued with new material, 1978); SUSAN E. LAW-
RENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME
COURT DECISION MAKING (1990); LEGAL SERVICES FOR THE POOR: TIME FOR
Lawyers themselves worked out arrangements with poor clients to represent some of them on contingent fees. Contingent fee representation was, and is, controversial.\textsuperscript{81}

Both legal aid societies and contingent fee representation exist outside the civil justice system as such. They are mechanism that help litigants fund their own lawsuits, but are not changes in the system that acknowledge those difficulties. Neither can be a complete solution to providing access to courts: both force the dis-advantaged to rely on charity that is necessarily circumscribed. Legal aid agencies are limited in the funds that they have to pay the costs the courts impose and the expenses necessarily incident to litigation. Contingent fee lawyers can be expected to accept representation only of those cases that they deem likely to produce for them a profit. That profit is not measured in the realizing rights of clients. It necessarily is absent when the poor are defendants and not plaintiffs.

2. Germany

In Germany state authorities had charge of administration of the courts and of admission of lawyers to practice. Early in the nineteenth century they responded to popular calls for rule of law based legal systems. Many of them recognized that the rule of law requires equal access to justice. They could see that their own institutional interest in better government, they could structure the legal system accordingly. They made legal aid an integral part of the system of civil justice. They included legal aid in the codes of civil procedure that they fashioned to deal with the popular demands for rule of law. They they required that lawyers, as a condition for practice, provide legal services for free to needy litigants.

The present system is a product of those nineteenth century developments. Twentieth century developments worked to strengthen the incorporation of the system of legal aid as a routine part of civil justice. First, early in the century, the system changed

\textsuperscript{81} Compare EDWIN COUNTRYMAN, THE ETHICS OF COMPENSATION FOR PROFESSIONAL SERVICES: AN ADDRESS BEFORE THE ALBANY LAW SCHOOL AND AN ANSWER TO HOSTILE CRITIQUES (1882) with LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA (2011). See generally, Peter Karsten, Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940, 47 DePaul L. Rev. 231 (1997).
to compensate the lawyers of their work. Second, late in the century the system changed to make it universally available when needed, whether for counseling or for litigation, whether for the indigent or for someone faced with an individual case that cannot be handled. Although the system has yet to achieve the ideal perfectly, it has fully anchored legal aid as a right incident to the functioning of the rule of law.

Until 1871 Germany consisted of many independent states. Following the French Revolution the larger and the more progressive states introduced codes of civil procedure that moved away from older written procedures to newer oral hearings. These codes recognized a new relationship of government and citizen different from the old relationship of ruler and subject. These codes moved legal aid—which was already well known—from the basis of solicitude for the poor to recognition of citizens’ rights in states based on the rule of law.  

When in 1877 the legislature of a united Germany adopted a code of civil procedure for the whole country, legal aid for poor citizens was a well-established principle hardly subject to debate. So well accepted was the idea already in the nineteenth century that the report explaining the 1877 Code of Civil Procedures justifies the principle in a single paragraph consisting of a single sentence: “The exemption of indigent litigants from costs [which include lawyers’ fees] follows from the necessity of equal protection under law for poor and rich.”

The Report continues in the next paragraph to note that while France did not provide such assistance by statute until 1851, it had been old and general law throughout the German states before that. That principle has since then never been seriously challenged. Already in 1884 it was embraced by the Imperial Supreme Court in one of its first decisions after the Code’s adoption and the Court’s foundation.

Since 1879 there have been three principal changes in the German system of litigation legal aid. All three relate to issues of

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82 See NICOLÒ TROCKER, EMPFEHLEN SICH IM INTERESSE EINER EFFEKТИВЕRN РЕЧТСВЕРВИКЛНИХ FÜR ALLE BÜRGER ÄNDERUNGEN DES SYSTEMS DES КОСТЕН- UND ГЕБУРЕНРЕЧТС?, GUTACHTEN B FÜR DEN 51. DEUTSCHEN JURISTENTAG B7 (1976).
83 1 HAHN, DIE GESAMTEN MATERIALIEN ZUR CIVILPROZEBORDNUNG UND DEM EINFÜHRUNGSGESETZ ZU DERSELBEN VOM 30. JANUAR 1877. AUF VERANLASSUNG DES KAISERLICHEN REICHS-JUSTIZAMTES 206 (1880) (“Die Befreiung armer Prozeßpartien von de Kosten folgt aus der Nothwendigkeit gleichen Rechtschutzes für Arm und Reich.”).
implementation and none to the scope of the right to legal assistance. In 1919, coincident with the general impoverishment of the country, the system went from a mandatory pro bono system, where lawyers were appointed to represent the impoverished without charge, to a system of state-funded representation. In 1929, in yet another time of economic depression, eligibility requirements were tightened. In 1980, assistance was renamed Litigation Legal Aid (Prozesskostenhilfe, abbreviated PKH), from its former name of Pauper’s Law (Armenrecht), financial eligibility requirements were standardized, co-payments were introduced, and the system was made comprehensive through adoption of a law providing for help in counseling (Beratungshilfe, abbreviated BerH). While technical requirements and funding levels are recurrent issues of political debate, commitment to a functioning system seems historically never to have been in serious question. Today, legal aid assistance is a routine part of German civil procedure generally. A significant percentage of all litigants (four to eight percent, depending upon the court) receives litigation legal aid. In family law matters the percentage of litigation legal aid recipients approaches fifty per cent. As we shall see, litigation legal aid is routine. Just as at the end of process, judgments are enforced, at the beginning of process eligibility for legal aid is determined.

In 1954 the Federal Constitutional Court recognized the right as a principle of constitutional rank shortly after the adoption of the 1949 constitution (Basic Law) and the establishment of the court.

84 Such a system of appointment existed in some American states, but was never regularized. Appointment of lawyers for representation was discouraged. [Citations.] It was not adopted in David Dudley Field’s famous code of Civil Procedure of 1848 or in other state codes of procedure. Known as proceedings in forma pauperis, it continues to exist, but more for relief from court fees than for financing of involuntary free representation.

85 See Hans Hinrich Schroeder-Hohenwarth, Das Armenrecht in der Bundesrepublik und seine Reform unter besonderer Berücksichtigung wirtschaftlicher und rechtsvergleichender Aspekte 15-16 (1976), citing to RGZ 4, 417 and BVerfGE 124 respectively. Even the Nazi Dictatorship, despite its many perversions of the legal system, only tightened up requirements for aid; it did not challenge the principle. See id. at 14-15. Refugees from Nazi Germany who reached America were bewildered that the Nazi regime provided legal protection that their American refuge did not. See Albert A. Ehrenzweig, Reimbursement of Counsel Fees in the Great Society: In sorrow and in anger—and in hope, 54 CAL. L. REV. 792 (1966).
The Constitutional Court rests its finding the statutory right to legal assistance to be of constitutional rank on the constitutional guarantee of equal protection (Article 3(1)) and the guarantee of the rule of law (Article 20(3)) with the goal being the assurance that the needy and the well-off have equal realization of rights. In particular cases the Court can rely on the guarantee of human dignity (Article 1), the guarantee of the family (Article 6), the guarantee of access to courts (Article 19(4)), and the right to be heard (Article 103(1)).

In many German court proceedings parties are permitted to participate only by counsel. In these cases the rule-of-law argument is practically irrefutable, for to deny impoverished parties counsel is to deny them participation in the case completely.

Support for legal aid is also found in the social state principle (Article 20(1)). Some commentators discourage emphasizing the social welfare side of legal aid. They see in such a orientation a danger of tolerating too great a limitation on financial support. They prefer emphasis on the rule-of-law as the more secure protection. The reworking of the law in 1980 supports the view of legal aid as an essential element of the rule-of-law. The name of assistance was changed from the “poor law” (Armenrecht) to “litigation expense aid” (Prozesskostenhilfe). Eligibility requirements were incorporated in a table that sets specific levels of aid based on funds available making the grant more automatic. At the same time new provisions increasing legal aid for counseling, i.e., non-litigation, were adopted.

3. Right for all or Charity for some

It is easy to think of universal access to justice as a social or moral issue: legal aid is society’s largesse to the poor. Universal access, however, is more important than that. It is an essential element of the rule of law. The rule of law anticipates that people will follow the rules that society prescribes for them. To maintain peace the rule of law generally gives the public authority a monopoly of force. Individuals are not permitted to take law into their own hands to apply the law to others. Self-help is generally prohibited.

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86 Fischer, Münchner Kommentar, § 114 I 1.
87 See id.
88 Id. at 710, margin no. 9.
89 See id. at § 114 I 2.
90 Reinhard Bork in 2 Steink/Jonas Kommentar zur Zivilprozessordnung, vor § 114, p. 709, margin no. 8 (22nd ed. 2004).
If self-help is to be prohibited, however, since not everyone will apply to him or self, and since people may disagree about what the law requires, courts exist to resolve disputes about what the law requires. Societies that do not provide access to courts must, of necessity, rely more heavily on coercion and less on voluntary compliance to assure people follow the law or, when challenging others, do not engage in self-help, than do societies where access to courts can be taken for granted. So seen it is apparent that court access has importance beyond deciding individual controversies. While few cases come to court, implementation of rules depends on an expectation that the rules will be applied. If they are not, they may be ignored with impunity.

American courts have not recognized a legal right to legal aid. That they have refused to in the context of litigation is remarkable. They accept that people have rights that they are unable to realize or even defend in court. Rights that cannot be realized or protected are practically not rights at all. Yet central to the rule of law is a state monopoly of force. Law prohibits self-help, but only with the understanding that the state provides opportunity to enforce those rights. The rule of law requires that those without means be as able to enforce their rights as anyone. Not to provide legal aid risks that those denied their rights will resort to self-help. To provide legal aid, Justice Johnson reminds us, fulfills the social compact on which society rests. Continental legal systems of the nineteenth century long before the social states of the late twentieth century.

III. German legal aid’s lessons for America

Adoption and implementation of the ABA Model Access Act presents an opportunity rare in contemporary comparative law: writing on an empty legislative slate. Today American legal aid is a matter of private charity and public appropriation. It has no legal form. Tomorrow, wherever the ABA Model Access Act is adopted,
legal aid will be a matter of right. Although radical change is unlikely, neither statutes or precedents, nor the Model Act itself, much refine legal aid’s future configuration.

Common objections that frustrate comparative learning generally are not tenable in comparative study of legal aid. On the one hand, the underlying values are the same: access to justice and equal protection under law. On the other hand, there are no existing legal structures that rule out learning from and applying foreign experiences. Legislatures can do what they like, subject only to accommodations necessary to incorporate legal aid into the overall legal system or changes in the overall system necessary to permit that. Foreign experiences can alert us to the issues that our future legal aid system will encounter as it moves from charity to right. German experiences can be our canary in the coal mine.

As we have seen, although the proposed ABA Model Access Act is unencumbered by law, it is based on contemporary legal aid practice. Already in the 1970s American jurists identified a number of key differences between legal aid in Germany and in America that persist to this day. In Germany, legal aid is a matter of right. It is integrated into the legal system as whole: it is delivered through private lawyers and not through staff lawyers of legal aid organizations. It is not subject to a budget line: it is to a substantial extent self-funding. It provides the poor with opportunities to resolve disputes comparable to those available to the rich; it has none of the “missionary effort” or the “social engineering” sometimes found in American legal aid. In short, it provides routine and non-controversial legal care.

In the 1960s and 1970s these differences were becoming more pronounced even as expanding access to justice became a priority in both lands. The task of legal aid in Germany was, and is, to assure everyone—rich and poor alike—the same access to justice. The vehicle used was the “independent service” of the private lawyer; the watchword was “equality.” In the United States the

94 There are substantial political and economic constraints most important of which are lawyers and judges.
96 See James Gordley, The Meaning of Equal Access to Legal Services, 10 CORNELL INT’L L.J 220 (1977) (arguing that legal aid has these two different tasks, emphasized differently in different jurisdictions).
task of legal aid was to educate the poor about law and to provide the poor with services tailored to their needs. The vehicle used was the staff attorney of a legal aid organization; the watchword was “flexibility.” The two systems were—comparative lawyers say—diverging in their approaches to legal aid. In Germany in the 1970s legal aid was subject of lively criticism for not attaining its long-state goal of equal access to justice for all. From that discussion emerged in 1980 a major overhaul of the legal aid system, which nonetheless maintained most key features of the old law. It took effect January 1, 1981. The 1980 reform, as we will call it, integrated legal aid even more thoroughly in the general legal system. It added counseling for the poor to existing litigation aid. It extended availability of litigation aid to everyone who needs assistance in a particular case.

In this Part III we consider in summary form German legal aid law and make comparisons to past, present and possible future American practices under the ABA Model Access Act.

A. “The law is there for everybody”

German authorities present legal aid to the public as an ordinary part of the legal system that is essential in realization of the principle of equal justice under law. A booklet of the Ministry of

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99 As is typical of much German legislation, analytical, comparative and historical studies of legal aid preceeded the 1980 legislation. See, e.g., Gottfried Baumgärtel, Gleich ZUGANG ZUM RECHT FÜR ALLE (1976); Stefan Franke, ZUR REFORM DES ARMENRECHTS (1980); Hans Hinrich Schroeder-Hohenwarth, DAS ARMENRECHT IN DER BUNDESREPUBLIK UND SEINE REFORM UNDER BESONERER BERÜCKSICHTIGUNG WIRTSCHAFTLICHER UND RECHTSVERGLEICHENDER ASPERTE (1976); Feeke Meents, DAS ARMENRECHT IM SOZIALEN RECHTSSTAAT DES GRUNDGESETZES (1975); nicolo Trocker, EMPFEHLEN SICH IM INTERESSE EINER EFFECTIVEN RECHTSVERWIRKLICHUNG FÜR ALLE BÜRGER ÄNDERUNGEN DES SYSTEM DES KOSTEN- UND GEBHÜRENRECHTS?, GUTACHTEN B FÜR DEN 51. DEUTSCHEN JURISTENTAG B 7 (1976).

100 See generally Bernhard Meier, HAT SICH DIE PROZEßKOSTENHILFENNOVELLE BEWAHRT? (1987).

101 This is the title of a brochure JUSTIZMINISTERIUM DES LANDES NORDRHEIN-WESTFALEN, DAS RECHTS IST FÜR ALLE DA (2005), https://services.nordrheinwestfalendirekt.de/broschuerenservice/download/105/DasRechtistfueralleda.pdf as well as the title of a heading in the brochure referenced in the following note.
Justice of the state of North Rhine Westphalia explains matter-of-factly: “The law is there for everybody. All people are equal before the law. Article 3 of our constitution says so. Therefore no one should be forced by financial considerations to give up enforcement of her rights. Legal aid is there for both counseling and litigation to accomplish this.”

Legal aid is routine in Germany. It is available to everyone in need. It is a feature of many cases. For example, in one recent year, in the ordinary courts of first instance, one or more parties sought legal aid in seven to nine percent of cases. In family law matters legal aid involvement approached exceeded forty percent of cases. Greater usage was a goal of 1980 reform that extended legal aid from litigation to counseling and made it available to to all people in need of assistance and not just to the very poor.

In Germany legal aid is integrated into the general system of legal representation. Recipients are not limited to using a “poor man’s lawyer.” When a person consults a lawyer for the first time, if there is indication of need, the lawyer is obligated to mention legal aid. If legal aid is indicated, in the ordinary course the


103 PETER GOTTWALD, ZIVILPROZESSRECHT BEGRÜNDET VON KARL-HEINZ SCHWAB 464-465 (17th ed. 2010). The figures are for 2007, where it was seven percent in the courts of limited jurisdiction (Amtsgerichte) and nine percent in the courts of general jurisdiction (Landgerichte). Only in the latter courts is there an obligation to use a lawyer. An earlier edition of the same text reported that in 1971, before the reforms, five percent of plaintiffs in the Amtsgerichte and seven percent of plaintiffs in the Landgerichte received legal aid. KARL HEINZ SCHWAB, ZIVILPROZESSRECHT BEGRÜNDET VON LEO ROSENBERG 459 (12th ed. 1977).


lawyer files application for legal aid on behalf of the client and indicates that the lawyer is the person’s choice as lawyer.\(^{107}\) The application is made to the court where the lawsuit is to be brought; commonly the lawyer bases the application on a draft complaint. If legal aid is granted, the lawyer represents the person under the terms of the legal aid law.\(^{108}\) If legal aid is denied, lawyer and disappointed applicant must decide whether to go ahead with the lawsuit without legal aid. Until the 1980 reform took effect, a different lawyer might be appointed to represent the successful applicant. In practice, one seldom was.\(^{109}\)

Litigation aid is available in all German court proceedings. The Code of Civil Procedure sets the standards even for courts not governed by that code. Legal aid is thus available in the constitutional courts, the administrative courts, the labor law courts, the social courts, the patent court and the tax courts.\(^{110}\) Legal aid is not, however, available in arbitration or mediation proceedings. These proceedings take place outside the court system.\(^{111}\) In this respect, the ABA Model Act, is progressive; by making legal aid available in arbitration, recognizes the contemporary importance of alternative dispute resolution.

Although the ABA Model Access Act expands availability of legal aid, its adoption would not make the United States into a place where “the law is there for everybody.” It has no provision for aid for counseling. Even for litigation aid, the Model Act anticipates aiding only those at or near the federal poverty income threshold; it does not anticipate aiding those who, while not destitute, require assistance to realize their rights. It thus has the same

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\(^{107}\) SCHNEIDER, supra note 106, at 188-190. Lawyers are not required to take clients under legal aid, but most do. Parties who wish to have legal aid authorized before visiting a lawyer may do so. They go to the clerk’s office of the local court of limited jurisdiction (the Amtsgericht). They can give their applications orally to the clerk, who records it. Section 117(1). The clerk assists those parties who need help in making application.

\(^{108}\) § 121(1) ZPO. For simple matters where €5000 or less is at stake, a lawyer may not be needed. But if one is, the court must appoint the applicant’s choice. § 121(2) ZPO.

\(^{109}\) Schlesinger, supra note 97, at 214.

\(^{110}\) KALTHOENER ET AL. 4, 9-10; SCHOREIT/GROß § 114, 12-125. There are separate provisions for criminal defendants. Non-defendant participants in criminal cases may be entitled to legal aid.

\(^{111}\) KALTHOENER ET AL. 6; SCHOREIT/GROß § 114, at 124 margin no. 14. Where arbitration or mediation are conducted by the courts themselves, then legal aid is available.
“paupers’ law” approach that the German reform of a generation ago rejected. Even for the the impoverished, the Model Act anticipates aiding only applicatants who require assistance to realize “basic human needs;” it does not anticipate aiding assistance to those who have other needs. The Model Act does not take a position on federal limitations on legal aid and thus is presumably subject to them. These limitations exclude from legal aid particular classes of people, e.g., foreigners and prisoners, and particular classes of claims, e.g., abortion. All of these are covered under general German law. German law even covers legal rights of legal persons who, by definition, do not have any basic human needs. While political and economic realities stand in the way of a more complete and systematic coverage, those need to be overcome. Even if one were not troubled about the obstacles they create to realizing equal protection of the law, they should be recognized for the inefficiencies that they will create. Not only to they present opportunities for litigation when individual decisions are made on applications, they will introduce many uncertainties into individuals making their own decisions. An early advocate of a legal statute in America cautioned against the dangers of incomplete legislation.

B. German system of costs: loser pay + costs & fees are scheduled

To understand the system of German legal aid well, one needs to know something of the general German system of costs, fees and expenses in litigation. Two aspects of the general system are particularly relevant: (1) costs, fees and expenses in litigation are ordinarily shifted to the losing side; (2) the costs, fees and expenses shifted are determined and limited by statutory tables.

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112 In the Code of 1877 foreigners had a right to legal aid only if their home states would extend legal aid to Germans.
113 A particularly infamous inmate, Magnus Gäfgen, whose crime resembled that in the famous American Leopold-Loeb murder case, was held entitled to legal aid to seek compensation for the conditions of his arrest and interrogation. Bundesverfassungsgericht (Federal Constitutional Court) Decision of 19 February 2008, BVerfG, 1 BvR 1807/07
114 § 116.
Many American jurists see loser pay systems as inamicable to access to justice. German law does not shield legal aid recipients from shifting to the loser the winners’ costs, fees and expenses. If legal aid recipients lose their case, they must pay the other side for these. The litigation risks that the loser pay rule imposes are sufficient to discourage even well-off potential plaintiffs from suit. Proposals that legal aid should cover that litigation risk, however, have not been adopted. Those risks are not as high as they as an American might be expect. While litigants and their lawyers are free to agree on whatever fees they might like, winning parties can not recover more than the costs, fees and expenses provided by statute. Most lawyers in most litigation work for statutory fees.

By American measures, costs, fees and and expenses are modest. Because they are largely predetermined by statute, they are kept proportionate to amounts in dispute and are predictable with a fair degree of accuracy. Their modest level and the general supervisory role of judges in German proceedings assures that most cases are not over-lawyered or over-investigated. As a result the total of all costs, fees and expenses for both sides in Germany may be considerably less than for one side in the United States. That affects not only the litigation risk for the legal aid recipient, but also the costs to the state in financing the system of civil justice.

C. Eligibility

Although legal aid is routine in Germany, courts do not inquire whether a party is entitled to legal aid. It is up to each party wishing legal aid to apply for it. Not every party qualifies. Qualified are only parties who establish need and arguable case merit. While precise measures of these requirements have changed over time, both go back to the Code of Civil Procedure of 1877. Both criteria in general terms are found in the ABA Model Access Act. They may have been part of the inspiration of the Model Act criteria.

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115 They overlook that the American practice that each party bears its own expenses, when coupled with party control of process, means that one party can render any victory pyrrhic.
116 Gottwald, 477, margin no. 73.
1. Need

The need criterion for granting legal aid in its general formulation has enjoyed remarkable stability. The contemporary criterion has been in effect for 30 years; it was adopted by the 1980 Reform Law. Its predecessor had been in effect for over 100 years; it was part of the original Code of Civil Procedure of 1877. As compared to law that went before them, both tests reflect the shift from seeing at legal aid as charity to seeing it as an essential element of legal process and a legal right for the applicant. 117 Most informative for future American law may be that both statutes moved in the same direction. Both expanded the circle of potential legal aid recipients by making the criterion more dependent on individual circumstances of applicants. While individualizing the criterion for eligibility, both statutes made standards more objective and increased the role of neutral judges in applying them. Both increased the responsibility of recipients to contribute to their own aid.

The eighteenth century law provided help only to the pitiable insolvent (the miserabiles). 118 Applicants received legal aid upon presentation of a certificate of a local authority certifying poverty and their own oath of the same. If their petitions were accepted they were freed of all obligations for costs, lawyers’ fees and other expenses. Perhaps because of the drastic fee consequences for bench and bar, numbers were held down. In the nineteenth century the modern codes of civil procedure moved away from nineteenth century practices and toward the rules of the Code of Civil Procedure of 1877.

The Code of 1877 provided for aid if the applicant was “unable to defray the costs of the litigation without jeopardy to the means necessary for his and his family’s sustenance ....” 119 The applicant was required to present to the court a written certificate of the appropriate public authority which expressly certified the applicant’s inability to pay the costs of the litigation on the basis of

117 See generally Mauro Cappelletti, The Emergence of a Modern Theme, in CAPPHELLETTI ET AL., TOWARD EQUAL JUSTICE, supra note 12, at 3.
118 TROCKER, supra note 84, at B9. This paralleled the practice of English courts of the day that applicants for process in pauperis could have no more than £5 worth of possession exclusive of the clothes they were wearing.
119 Section 114 ZPO old version , translated in CAPPHELLETTI ET AL., TOWARD EQUAL JUSTICE, supra note 12, at 387. At pages 387-392 there is a nearly complete English translation of the relevant provisions of the Code of Civil Procedure as in force in 1975, i.e., just before the adoption of the 1980 Reform Law.
the party’s profession and the taxes the party paid. The court, upon being convinced that the application was well-founded, then ordered provisional relief from payment of costs, lawyers’ fees and expenses. However, the applicant was required to repay the amounts from which he was provisionally exempted as soon as he could do so without jeopardizing family sustenance.\footnote{Section 125 ZPO old version, translated in \textit{Cappelletti \textit{et al.}, Toward Equal Justice}, supra note 12, at 391.} As we discussed above, starting in 1919 the state began to pay lawyers fees for representation.

The formulation of the Code of Civil Procedure of today was adopted in the 1980 Reform. It provides that a party\footnote{Other persons involved in the case who are not formally parties may be entitled to legal aid under another law governing legal aid for counseling. Bork in \textit{Stein/Jonas} § 114 II 2. a), 716-717, margin nos. 3-4.} has a right to legal aid if “according to her personal and economic circumstances she can not meet the costs of the litigation or only in part or in installments.”\footnote{\textsection 114 ZPO (“die nach ihren persönlichen und wirtschaftlichen Verhältnissen die Kosten der Prozeßführung nicht, nur zum Teil oder nur in Raten aufbringen kann …”}\textsuperscript{122} The costs referred to are the party’s own upfront expenses in prosecuting the action, i.e., court costs, lawyer’s fees and expenses of taking testimony (e.g., advances for experts and other witnesses).\footnote{\textit{Fischer, in Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz} \textsection 115 ZPO margin no. 56 (Hans-Joachim Musielak, ed., 7th ed., 2009)} Costs not include expenses that the party might have to pay, e.g., enforcing a judgment, taking or contesting an appeal, or paying the costs, fees and expenses of the other side should the assisted party lose the case.

As a result of these changes, legal aid is available to the public at large. Poverty is not required. Eligibility depends on the difficulty of this applicant funding this particular case. Many people of low-to-middle incomes qualify for legal aid and even people of high incomes who have high value claims or many personal expenses do too.

Today applicants present financial information directly to the court. Successful applicants are relieved permanently of obligations to pay costs, lawyer’s fees and other expenses, but are obligated immediately to make the first of forty-eight monthly co-payments. The size of the co-payments depends on the ability of the person assisted to pay and not on the costs, lawyer’s fees and
expenses of the lawsuit involved. The court, relying on designated
data submitted by applicants, determine how much money appli-
cants have available to fund a lawsuits they bring. For applicants
that they find have no ability to fund the lawsuit, the court extends
legal aid without copayments. For applicant with ability to fund a
lawsuit, the court, relying on a statutory table, directs applicant to
make monthly payments. Recipients are obligated to make month-
ly payment until they have paid all costs, fees and expenses or until
they have made forty-eight payments. The state absorbs costs,
lawyers’ fees and expenses not covered by the forty-eight pay-
ments.

The monthly payment system brings more predictability
and consistency to legal aid decisions than had existed before. It
regularizes determination of need. In most instances there is no
need to apply an indefinite standard. It also moderates the conse-
quences of eligibility decisions. Errors in decisions do not have the
dire consequence of precluding participation altogether, but only
the result of higher monthly payments.

The monthly payment system makes many grants of legal
aid self-funding. Better off recipients pay in full for the assistance
they receive. More recipients can be assisted with the same funds.
Less well off recipients, including those making monthly pay-
ments, are still better off than they were under the old system, for
under the old system, once the lawsuit concluded, they were re-
quired to repay all of the aid as soon as a court found that they
were financially able to do so. Thanks to this and other measures,
today lawyers rightly tell potential clients that legal aid is “not just
for the poor.”

They now no longer call legal aid, “Paupers’ Law” (Armenrecht), but “Litigation Expense Assistance” (Prozess-
kostenhilfe).

2. Arguable case merit

The review of the merits of claim protects the state treasury
and the court from having to fund and conduct a lawsuit with little
chance of success. It protects the potential opponent from having
to conduct a lawsuit where the other side has diminished concern

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124 See, e.g., G. Kaß, “Prozeßkostenhilfe—nicht nur etwas für die 'Arme,'”
125 Cf. Jörg Rahmeda, Vom Armenrecht zur Prozeßkostenhilfe, 1979 JURISTI-
SCHE RUNDSCHAU [JR] 492.
for costs.\textsuperscript{126} It also, however, saves applicants from their own misjudgments. As we have noted, in Germany a loser pays rule prevails. Review prevents at least some foolish lawsuits.\textsuperscript{127}

At first blush, such a review might seem to contradict the constitutional premise that the the poor should have the same access to courts as the prosperous. The rich are allowed to bring pointless lawsuits. Should not also the less well-off? The constitutional command does not, however, go so far. Poor and rich do not have to be treated exactly the same; it is enough that all are on the same plane.\textsuperscript{128} The court’s review for prospects of success in effect puts the less well-off on the same plane as wealthy litigants who “reasonably” take into account process risks.\textsuperscript{129}

The arguable merit criterion has had nearly as much stability as the need criterion; in one respect, longevity, it has had more. Today’s formulation survived the comprehensive 1980 Reform Law without change.\textsuperscript{130} Since 1933 it has directed that legal aid is to be granted if “the intended action or defense offers a sufficient prospect of success and does not appear to be capricious.”\textsuperscript{131} The courts have generously construed this formulation in favor of applicants. It does not require that applicants show probability of success.\textsuperscript{132} It is satisfied if they raise claims or defenses that are reasonably “arguable” (\textit{vertretbar}).\textsuperscript{133} Reviews are summary; they are not to place excessive demands on the showing.\textsuperscript{134} The original standard of the Code of Civil Procedure was more generous still.

\hspace{1em} \begin{itemize}
\item\textsuperscript{126} Bork in Stein/Jonas at 724, margin no. 21.
\item\textsuperscript{127} \textit{Cf.} Klaus Dresenkamp, \textit{Prozeßkostenhilfe in 1, Münchener Kommentar zur Zivilprozessordnung} 2, 6 margin no. 13 (2nd ed., Gerhard Lüke & Peter Wax(eds.), 2008) (noting that review should keep in mind that losers are saddled with costs).
\item\textsuperscript{128} \textit{See} Peter Philippi, \textit{Prozeßkostenhilfe und Grundgesetz, in Zivilprozeß und Praxis: Das Verfahrensrecht als Grundlage juristischeer Tätigkeit, Festschrift für Egon Schneider zur Vollendung des 70. Lebensjahre 267, 268 (1997) (“weitgehende Angleichung”).
\item\textsuperscript{129} Kalthoener at 147, margin no. 427 (with citations to decisions of the Federal Constitutional Court).
\item\textsuperscript{130} The Reform Law did delete the example of capricious previously included in § 114.
\item\textsuperscript{131} Section 114 ZPO
\item\textsuperscript{132} Bork, 2 STEIN/JONAS § 114, 724 at margin no. 22; Kalthoener 147 at margin no. 409.
\item\textsuperscript{133} Bork, 2 STEIN/JONAS § 114, 724 at margin no. 22. The standard is reminiscent of language in Rule 11 of the Federal Rules of Civil Procedure.
\item\textsuperscript{134} Kalthoener 148, margin no. 410.
\end{itemize}
An application for legal aid was to be granted if “the anticipated action or defense does not appear to be capricious or hopeless.”\textsuperscript{135}

From time-to-time critics have challenged the case merit criterion. They would make it more restrictive in the interest of cost-savings. Although these proposals are sometimes given the garb of measures to guard against abuse of legal aid, cost-savings are their motivation. Relevant legislative materials confirm that, as if the timing during periods of economic downturn did not suggest it. Usually on the side of less strict controls or their complete absence are the justice establishment, i.e., the ministries of justice and the judges that they employ. The judges get to show their views both while legislation is under consideration and then after when it is implemented.

Applicants need not show proof of probability of success. The decision granting legal aid makes legal process available; it should not substitute for it.\textsuperscript{136} The rule that shifts costs to the loser continues to function as the principal deterrent of frivolous cases.

Courts in reviewing application are not to use their review to decide the case.\textsuperscript{137} If the claim is dependent on resolution of a disputed question of law, the court should authorize legal aid so that the applicant can present the issue fully.\textsuperscript{138} It is constitutionally impermissible for the court to decide that question in the application. Similarly, if the claim is dependent on the admissible testimony, then the court should authorize aid.\textsuperscript{139}

A generous application of the standard is practically compelled if the constitutional guarantee of a right to be heard is to be safe-guarded. In German ordinary courts of first instance of general jurisdiction (the \textit{Landgerichte}), representation by lawyers is compulsory. To deny legal aid in those courts can be tantamount to denying the right to be heard.\textsuperscript{140}

\textsuperscript{135} Section 114 as in force until 1929 (“wenn die beabsichtigte Rechtsverfolgung oder Rechtsverteidigung nicht mutwillig oder aussichtlos erscheint”) [author’s translation].

\textsuperscript{136} Bork, 2 \textsc{stein/jonas} § 114, 725 at margin no. 22.

\textsuperscript{137} ,Die Prüfung der Erfolgsaussicht darf nicht dazu führen, daß der eigentliche Rechtsstreit in das Bewilligungs verfahren vorverlagert wird. Taking evidence of witness and experts is foreclosed. 118 II ZPO. Klaus Dresenkamp, \textit{Prozeßkostenhilfe in 1, Münchener Kommentar zur Zivilprozessordnung} 2, 6 margin no. 914 (2nd ed., Gerhard Lüke & Peter Wax eds., 2008)

\textsuperscript{138} See \textsc{kalthoener} 148-49, margin nos. 411-12.

\textsuperscript{139} See \textsc{kalthoener} 149-50, margin nos. 413-14.

\textsuperscript{140} Cf. \textsc{kalthoener} 148, margin no. 409.
Success refers to legal success in asserting the claim. Whether a claim is practically worth bringing is not factor under review of the claim’s prospects for success. (It may be a factor under capriciousness, which we discuss in the next subsection.) Thus, the determination of prospects for success is unaffected by a finding that judgment could not be enforced.

German courts have a considerably easier time reviewing legal aid applications for prospects of success than would American courts. German pleadings are fuller than are American pleadings and are automatically reviewed by the courts. In many, perhaps most cases, the application is made by a lawyer who often includes a draft complaint or answer. German pleading are required to set out the facts of the case in detail and to identify the evidence that proof of the complaints will rely on (pleadings must be substantiated). As part of their ordinary work, courts review complaints before they have them served.

In the past the requirement of review has been a focal point of efforts to limit legal aid usually, it seems, in the interest of costs. In these disputes the legislature or the government has sought to hold down costs through tighter legal requirements. The legal establishment of justice ministry officials and judges, on the other hand, has preferred no or less stringent requirements. Thus the original proposal would not have imposed these requirements, but have extended aid to all indigent. In the parliamentary first reading the Reichsjustizkommission added “not capricious or completely hopeless” (nicht mutwillig oder völlig aussichtslos). The Reichstag in the second reading deleted “completely.”141 In 1931 in the depth of the Great Depression the requirement was briefly changed by emergency decree to require a showing that the claim appeared to be successful. Although the Reich Ministry of Justice advocated for return to the original language of 1877, the presently language requiring a “sufficient likelihood of success” (hinreichende Aussicht) was adopted.142

The courts have given the requirement of a “sufficient likelihood of success” a generous interpretation and have not relied on it to restrict granting legal aid.143 Their interpretation has followed

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141 Hahn Mat II, 554+986. RG interpretation did not follow. JAMES GOLDSCHMITT, DIE PROZEB ALS RECHTLSAGE, 293-294 n. 1512 (1925).
143 Id. at 14-15. Schroeder-Hohenwarth comments that a description of the system would be incomplete without reference to case law.
that of the *Reichsgericht* in its generous interpretation of the original 1877 provision that legal aid was to be authorized unless the hopelessness of the case was “klar auf der Hand” from the facts or law relied on.\textsuperscript{144} All that “sufficient” requires is that from a legal standpoint, the legal position is “presentable” (*vertretbar*) and from a factual point evidence could be taken that would prove the necessary facts.\textsuperscript{145} This means that if the law is unsettled, then legal aid is to be allowed.\textsuperscript{146} The determination allowing legal aid is not to substitute for the principal proceeding.

A generous interpretation of the requirement is practically constitutionally compelled.\textsuperscript{147} Many German court proceedings require attorney representation, denial of legal aid is tantamount to denial of participation in the proceedings. A generous interpretation of the provision is called for if the rule-of-law is to be upheld. The principal purpose of the requirement is to preclude parties from asserting frivolous claims and defenses using legal aid.\textsuperscript{148}

Finally § 114 requires that the claim not appear to be asserted “capriciously” (*mutwillig*). The principal test of capriciousness under the section is whether a person who did not require legal aid would bring it.\textsuperscript{149} For example, a claim is brought in bad faith if it is brought for the full amount, when the debtor would voluntarily pay all but a part.\textsuperscript{150} Legal aid, it is said, is not intended to allow needy persons to bring lawsuits that well-off people would not bring.\textsuperscript{151}

3. Eligibility for appeals

\textsuperscript{144} *Id.* at 15 citing RGZE 4, 417.

\textsuperscript{145} Bork in STEIN/JONAS, § 114, p. 724-725, margin no. 22; GOTTWALD, *supra* note ***, at § 87 III. 2., page 470, margin no. 32.

\textsuperscript{146} Bork in STEIN/JONAS, § 114, p. 726, margin no. 25; GOTTWALD, *supra* note ***, at § 87 III. 2., page 470, margin no. 32.


\textsuperscript{148} [Citation]

\textsuperscript{149} It was explicitly so defined in the law as it stood in 1980. Fischer, *supra* note ***, at § 114, p. 512, margin no. 30 (citing also the legislative history and BVerfG 2009 FamRZ191, 192.

\textsuperscript{150} GOTTWALD, *supra* note ***, at § 87 III. 3., page 470, margin no. 34.

\textsuperscript{151} Fischer, *supra* note ***, at § 114, p. 512, margin no. 30.
Each court determines eligibility for its own proceedings. If a party appeals a case, the party must make separate application for legal aid for the appeal.\textsuperscript{152}

\section*{D. Procedure}

The ABA Model Access Act has little to say about procedure for granting legal aid. It directs the State Access Board to “establish, certify and retain specific organizations to make eligibility determinations” and to “establish a system that timely considers and decides appeals by applicants found ineligible ...”\textsuperscript{153} In its silence on these questions, the Model Act might be seen to endorse and place under state supervision the existing procedures of legal aid organizations. Such an approach might not meet with public acceptance.

Historically, American legal aid organizations have had free discretion in deciding which cases to take. They can pick and choose the cases that they handle. Their private status and limited resources practically compel them to do that. Those persons they turn down can hardly be heard to complain for they are supplicants for charity. When legal aid becomes their right, however, supplicants will become applicants. They will be claiming government benefits in a judicial forum.\textsuperscript{154} We may suppose that they will expect of that determination of rights more formality, more transparency and more accountability than they have heretofore received. We may likewise suppose that others will come forward to voice their interests in the decisions, namely opposing parties in the litigations and those concerned about public expenditures.

If the procedure for determining eligibility becomes more formal, however, there is danger that decisions granting legal aid will become more time-consuming and more expensive than when they lay in the discretion of private legal aid organizations. These issues challenge legal proceedings generally, but especially determinations of legal aid. Decisions of legal aid eligibility have no function other than to facilitate decision of cases where resources are less than plentiful. If they are to be useful, they need be made quickly and inexpensively.

\textsuperscript{152} § 119(1) ZPO.

\textsuperscript{153} SECTION 4.E. ii. and iii. respectively.

\textsuperscript{154} Cf. Gordley, \textit{supra} note 96, at 222 (contrasting the two approaches and identifying the judicial forum approach with the German).
In the design of procedures for granting legal aid, German experiences can inform the American discussion. They can help identify potential pressure points and pinpoint possible relief. German legal aid has had more than a century of experience in making legal decisions granting or denying legal aid; we have had none. German legal aid has confronted problems that we will only now meet.

1. Who decides

The ABA Model Act does not identify who will decide whether legal aid is granted. Should it be the court that decides the case, the lawyer that provides legal aid, the State Access Board that oversees the provision and payment of the legal aid, or an independent body? Only an independent body is without interest in what that decision is. All three of the other potential deciders are affected by the decisions they make: they will have more or less to do depending upon how they decide. Moreover, in the case of the court and lawyer, their decision may also affect how they conduct the case subsequently.

The German approach since the Code of Civil Procedure of 1877 has consistently been that the court itself should decide whether legal aid is to be authorized. When the 1877 code was in preparation the drafters gave consideration to assigning the task to an independent body along the lines of the bureau d’assistance in France. They rejected that possibility because, although they did not see the decision as itself part of the legal process, they saw it as too close to the administration of justice to entrust to a lesser authority whose decisions might not receive popular confidence. Accordingly, they directed it to the courts. They acknowledged that there would be a problem of prejudicing the later case, were one of the criteria for the decision authorizing aid the arguable merits of the case. This was one reason, they explained, why they did not include such a test in their draft of the law. As we have

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155 The drafters also considered assigning the task to the state prosecuting attorney, as some of the newer codes had done. They rejected that route as inconsistent with the decision to exclude state prosecuting attorneys from nearly all matters of civil justice. ENTWURF EINER DEUTSCHEN CIVILPROZEBORDNUNG NEBST BEGRÜNDUNG: IM KÖNIGLICHEN PREußISCHEN JUSTIZ-MINISTERIUM bearbeitet 289 (1871).

156 Id., Trocker, supra note @, at B11.
seen, however, the legislature added such a test of eligibility creating the very danger that drafters of the law foresaw.

Apparently in practice the problem of possible prejudice was not as great as the drafters of the 1877 code had feared. In 1961 a commission established to review the Code of Civil Procedure for its reforms revisited the issue. It recommended making no changes. The commission identified the danger of prejudice and identified two possible approaches to dealing with it: (1) establishing an independent authority to decide the issue, as had been considered in the 1870s; and (2) in the event that the reviewing judge denied the application for legal aid, assigning the case to a different judge for further consideration. The majority of the commission, however, thought that change was not necessary and would not improve matters. Experience had shown, the commission reported, that judges deciding applications for legal aid did not lose their objectivity in the further conduct of the case. This objectivity, moreover, would be enhanced, the commission reported, if its proposal to exclude taking witness testimony as part of the authorization procedure were followed. Assigning the decision to an authority independent of the court would create problems of its own, the commission reported. It would make the procedure as a whole less rational, since it would introduce a second decision making body in the case that would have to deal with the same set of facts. The lawsuit as a whole would take longer. Moreover, the commission opined, the independent body would not be in a strong position to decide the issue accurately and authoritatively. As a result parties disappointed by adverse decisions on legal aid would be more likely to pursue their actions anyway.¹⁵⁷

The possibility that the providers of legal aid would themselves make the decision does not seem to have been seriously in discussion in Germany. That is hardly surprising if one bears in mind the central role of private attorneys in providing legal aid. In the legal aid system of the 1870s that prevailed for fifty years, the lawyers were not compensated for their work. One might then have easily expected that they would turn every application down.¹⁵⁸

¹⁵⁷ BERICHT DER KOMMISSION ZUR VORBEREITUNG EINER REFORM DER ZIVILGERICHTSBARKEIT. HERAUSGEGEBEN VOM BUNDESJUSTIZMINISTERIUM 270-271 (1961). The Commission noted that the issue of a judge deciding twice in the same manner as possibly prejudicing the case also arises when a case is remanded by a higher court to the court of first instance.

¹⁵⁸ This would seem to be more-or-less how the system stopped functioning in the United States. See text at notes @ to @, supra.
Once they started being paid for their legal aid work, then one might expect that they would accept every claim. In either case, however, there would be a resulting administrative risk. The disappointed applicant for aid would keep visiting lawyers until a cooperating lawyer was found. By assigning the task to the court where the lawsuit is to be brought, only one authority decides. There is no legal-aid shopping.

The issues that the drafters of the Code of Civil Procedure of 1877 faced, and which were considered again in anticipation of the 1980 Reform are real issues in implementing the ABA Model Access Act. German experiences do not point unambiguously to one solution for the United States. As we shall consider shortly, some of the efficiencies obtained in entrusting the court with the decision are not present in American civil justice as presently structures. At the same time, the objections to involving an independent body—or perhaps the projected State Access Board—seem less severe particularly if review is standardized and summary. On the other hand, the absence of German consideration of the possibility is no ground for comfort in turning the decision over to legal aid providers.  

2. How deciders decide

The drafters did not include a review of the arguable merits of the case as one of the criteria of eligThey acknowledged that giving that decision to the courts would create a danger of prejudice in the subsequent proceedings if the court had to decide the arguable merits of the case and reported that for as part of the decision authorizing legal aid. enjoy the same level of confidence as that of the courts. The drafters therefore assigned the decision to the court did not report whether they considered the possibility of the legal aid provider deciding,

The application proceeding is between the applicant and the state. It is separate from the litigation, but is conducted by the judge in the litigation. It is a simplified proceeding. The party seeking legal aid, even in a court that requires attorney representation, need not use an attorney. The examination of the application

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159 Would this create a legal problem that parallels the practice of the physician determining what care the patient needs that will then be paid for by a third party?
is to be summary;\textsuperscript{160} there is no hearing. The proceeding is to be expedited.\textsuperscript{161}

The judge who is eventually to decide the case determines the application for legal aid. In the past there have been proposals that someone else should decide the application. Grounds for these proposals include relieving the judge of this extra work and avoiding prejudicing the judge’s later conduct of the case. They have not been accepted. There are efficiencies in having the judge, who will conduct the case, decide the application for legal aid. This is especially so in Germany, where the first task of a judge assigned a case is to review the complaint for sufficiency. That review parallels the review for granting legal aid.

Review by the judge can create administrative issues. Since proof of merit is commonly made through submission of a draft complaint, all concerned must be careful that a draft complaint is not treated as if it were the actual complaint. In Germany the courts are responsible for serving complaints. Potential mistakes are principally two: serving a complaint that is not yet in final form and serving a complaint that the plaintiff does not intend to bring if the application for legal aid is turned down. Review by the judge also raises tactical issues. German lawyers have found that they can test the strength of their case with the judge by first filing for legal aid.\textsuperscript{162} There is no cost risk associated with denial of a application for aid. American lawyers might worry that the application for legal aid would disclose too much of their case too soon. This issue is not raised in the literature consulted.

3. Authorization of legal aid—the application

The party need not even make the application in writing, but may make it orally to a court clerk, who then records it.\textsuperscript{163} The application is to include a statement of the matter in dispute, the expected proof, and a personal statement of income and property of the party seeking assistance with appropriate documentation.\textsuperscript{164}

\textsuperscript{160} SCHOREIT/GROß §114, at 128, margin no. 36;
\textsuperscript{161} GOTTWALD § 87, at 474, margin no. 49; SCHOREIT/GROß §114, at 128, margin no. 36;
\textsuperscript{162} Klaus Dresenkamp, \textit{Prozeßkostenhilfe in 1, MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG} 2, 4 margin no. 5 (2nd ed., Gerhard Lüke & Peter Wax(eds.), 2008).
\textsuperscript{163} § 117(1).
\textsuperscript{164} § 117(1) & (2).
The former is to show the arguable merit of the lawsuit; the latter is to show the personal need of the applicant.

\[ \text{a) Need} \]

Even with prescribed forms and court clerk assistance in filling them out, applying for legal aid can be challenging. The two-page financial form looks sort of like American federal tax form 1040 and can create similar problems. The leading legal aid textbook for practitioners devotes ten pages to explaining entering income, fourteen pages to subtractions from income and five pages to applying the table to the result.\textsuperscript{165} And that does not yet take into account applicants’ assets. It is no wonder that the authorities welcome lawyers filling out the forms for prospective legal aid clients. Where a lawyer makes the application for the applicant, typically the lawyer establishes the merit of the case using a complaint drafted for eventual filing.\textsuperscript{166}

In the routine case the applicant presents a completed two page official form “Declaration of personal and financial circumstances”\textsuperscript{167} with supporting documentation. The form sets out applicant’s income, assets and expenses.\textsuperscript{168} The information provided

\textsuperscript{165} KALTHOENER \textit{et al.} 74-84, 84-98, and 98-103.
\textsuperscript{166} GOTTWALD § 87, at 473, margin no. 43; SCHOREIT/GRÖSS §117, at 188-189, margin no. 6.
\textsuperscript{167} Erklärung über die persönlichen und wirtschaftlichen Verhältnisse. The Code of Procedure authorizes the Federal Ministry of Justice to issue such forms for use in all states. § 117(c) ZPO. The forms adopted require approval of the upper house of the legislature (where states are represented). Use of issued forms is mandatory, § 177(d) ZPO.
\textsuperscript{168} The form is available at the common website for the state and federal ministries of justice, Justizportal des Bundes und der Länder, http://www.justiz.de/index.php, under Formulare, first listing, Anlage zum Antrag auf Bewilligung der Prozesskostenhilfe. The form requires:

(a) Applicant’s name, address, occupation, personal information and the name of the legal representative.

(b) Declaration whether legal insurance or other person (e.g., labor union) covers the costs.

(c) Whether the applicant receives support from parent, separated or divorced spouse, or other person.

(d) Applicant’s dependents and the incomes of dependents.

(e) Gross income of applicant and spouse in seven categories (employment, self-employment, rental, stock, social payments for children, social payment for housing, and other).
determines how much money the applicant has available to meet litigation expenses. A table prescribed in the law determines how much of available resources the applicant must devote monthly to the lawsuit. If the amount available is below €15 monthly, then the applicant pays nothing and is entitled to legal aid. If the amount available is above €15 monthly, an applicant is ineligible for legal aid if the payments from that amount and from savings in four months would cover the projected costs, fees and expenses. So long as the available amount is below €750, the required payments are in the range of about 30 to 40%. Above an available amount of €750, the required payment is €300 plus the entire amount available above €750. The courts are said to apply these provisions generously to the benefit of applicants.\footnote{169}

Court costs and attorney’s fees are readily projected once one has determined the amount in dispute (Streitwert). While determining the amount in dispute is not without difficulties, rules-of-thumb help facilitate that determination. In any event, however, because legal aid in principle is extended as an advance and not as an outright grant, the exact amount of expenses to be incurred rarely determines the decision to authorize legal aid. A truing up occur later when the precise costs and attorneys’ fees are set in a final judgment.

The Federal Ministry of Justice is authorized to issue, and has issued, regulations and forms to simplify the application.\footnote{170}

4. Procedure

The court is to consider the application in an expedited proceeding. The court can require that the applicant provide support for factual claims. The court is actively to inquire into the likelihood of success and the possibility of bad faith, but that inquiry is not to become the action itself. Normally the court does not hold a hearing and no witnesses are called. Disputed issues of fact and

\begin{itemize}
\item[(f)] Deductions of applicant and spouse for taxes, social insurance, other insurance and business expenses.
\item[(g)] Statement or property in five categories (real estate, building fund, bank accounts, vehicles and other).
\item[(h)] Residence size and expenses, including rent or mortgage payments and heating costs.
\item[(i)] Other payment expenses.
\item[(j)] Special burdens (e.g., physical disability expenses).
\end{itemize}

\footnote{169} Kalthöener at 71.

\footnote{170} § 117(3).
law are reserved for the regular proceedings. The court decides the case without an oral hearing. If the decision denies the application, it requires a written justification.

5. The other side’s opportunity to be heard

Strictly speaking the application for legal aid is a matter between applicant and the state, but no reasonable person would deny that the other party to the lawsuit has in interest in the outcome of that decision. If legal aid is granted, the recipient will be enabled better to conduct the lawsuit. There is risk that the very legal aid that the state provides to assure that the recipient is not disadvantaged (“equality of arms” -- Waffengleichheit), gives the recipient an advantage. For as long as German law has recognized the need to provide equality of arms, German jurists have worried that legal aid will disadvantage the other side. To fend off such a result, the legal aid law gives the other side opportunity to be heard on the granting of legal aid.

The other side does not become a party to the application proceeding and is not served with the applicant’s application. The other side is, however, informed of the application, is provided with a copy of that portion of the application related to the claim, and is given opportunity to take a position on whether the underlying claim has a sufficient prospect for success and is not made capriciously. On privacy grounds, the other side is not given a copy

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171 This paragraph follows GOTTWALD § 87, p. 474-475, margin nos. 49-53.
172 § 127(1) ZPO.
173 1828 article Linde. While there is a loser pays system, so losing poor litigant required to pay costs and fees, since that plaintiff has no money, winner won’t be able to collect. Unfair for parties with week claims. 1931 draft proposal noting that unfairness and that frequently weak claims got aid, proposed giving court authority to inquire into the assertions of the claim. ENTWURF EINER ZIVILPROZEBORDNUNG 29-30, 298 (Reichsjustizministerium 1931
174 It takes other steps to maintain equality. E.g., waiving court costs.
of the needs-side of the application and is not permitted to comment on applicant’s need for assistance.\textsuperscript{175}

E. Effect of authorizing legal aid

The authorization of legal aid changes existing legal relationships and creates new ones among aid recipients, courts, aid-providing lawyers and opposing parties. These obligations can be imposed by general law, by the authorization decision or by contract. Issues that may arise include:

- Is the aid recipient entitled to a lawyer? If so, which lawyer? What is the scope of the lawyer’s representation?
- What obligations, if any, does the aid recipient have for court costs, lawyers’ fees and additional expenses? If already paid, are they to be paid back? If already incurred, but not yet paid, who is responsible for them? If not yet incurred, who is responsible for them?
- If costs, lawyers’ fees or other expenditures are shifted as result of the lawsuit (from loser to winner), who is responsible for paying those or is entitled to them?
- Has the legal aid recipient assumed other obligations?
- Can any of these obligations be altered in the future and, if so, by whom?

These obligation can be determined by law, by the decision authorizing aid, or by contract. The ABA Model Access Act addresses directly variations in the extent of legal assistance provided, but leaves most of these other issues unresolved or assigns them to later resolution to the State Access Board by regulations,

\footnote{\textsuperscript{175} Good idea to set a deadline for comments. Not really Gegner, for not affect by granting or denial. “Die Stellungnahme des Antraggegners dient im Rahmen des rechtlichen Gehörs nur der Prüfung der hinreichtende Erfolgsaussichte ...: deshalb und weil ihm auch nichts angeht, darf ihm die Erklärung des Antragstellers nach § 117 ZPO nicht zur Kenntnis gebracht werden.” Klaus Dresenkamp, \textit{Prozeßkostenhilfe in 1, MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG} 2, 5 margin no. 9 (2nd ed., Gerhard Lüke & Peter Wax(eds.), 2008)}
policies, decisions or contract. It leave unclear what role aid recipients, aid-providing lawyers or process opponents will have. The German law, on the other hand, spells out the consequences of the decision authorizing legal aid either by providing a resolution itself of by prescribing the mechanism for resolution of the issue.

1. Consequences for applicants and their lawyers

In cases where lawyer representation is mandatory (mostly cases in the courts of general jurisdiction, Landgerichte, where the jurisdictional minimum is €5000), the court automatically appoints a lawyer of the party’s choosing. In cases where lawyer representation is not mandatory, if the applicant requests a lawyer, the court will appoint a lawyer of the party’s choosing either, if the circumstances of the case (i.e., complexity of claims, abilitites of applicant) make a lawyer necessary or if the opposing party is represented by a lawyer. The former serves the interest of justice; the latter assures the “equality of arms” between the disputing parties. As a result of the appointment, the lawyer is obligated to represent the party under the terms of professional law.

The authorization of legal aid transfers the aided party’s obligations for future court costs, lawyers’ fees and other expenses to the state treasury and for past such debts to the extent that they have not already been paid. The aided party is also excused from providing security for subsequent costs. The appointed lawyer is prohibited from making claims for fees against the aided party.

Expenses are determined in the litigation. They include the travel costs of the aided party in attending court.

The authorization of legal aid does not affect the obligation of the aided party to reimburse the victorious opposing party for court costs, legal fees or other expenses. In the event that the aided party is victorious, the aided party’s lawyer—unlike in non-legal aid cases—may seek the lawyer’s fees directly from the los-

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176 § 121(1) ZPO.
177 § 121(2) ZPO.
178 See GOTTWALD at 475-476, margin nos. 60-63.
179 § 122(1) ZPO.
180 GOTTWALD 475, margin no. 59.
181 § 123 ZPO.
ing party. The victorious aided-party’s claim is not, however, lost.

In the interest of quality of arms, if the aided party is not required to make monthly payments, the opposing party is freed of the obligation to post security.

IV. Conclusions

A. Summary of the ABA Model Access Act

The ABA Model Access Act sets a positive direction. It is broadly drafted so as to allow an implementing jurisdiction interested in implementing it to take a variety of steps. It has the feeling of a law written by legal aid organizations to provide for expanding their operations with state approval and funding.

Three overall comments, certainly well known to the drafters, but perhaps not to legislators considering the draft law or to administrators charged with carrying such a law out, are

1. Long overdue move from charity to right

The ABA Model Access Act is an admirable acknowledgment that legal aid should be by right and not as charity. It is a long overdue recognition that access to justice is an essential element of the rule of law.

2. Highly political

Adoption and implementation of the ABA Model Access Act, were it to occur, is likely to be highly political. We should ask ourselves why fulfilling our most basic ideals—of open courts and equal justice under law—should be politically controversial. We should look for ways that minimize the political content of adoption and implementation of the Model Act or of a better alternative.

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182 § 126(1) ZPO. In the American system, if the legal aid lawyer has received federal funding, the lawyer is prohibiting from seeking fees from the opposing party.

183 SCHOREIT ET AL., supra note **, at 271 margin no. 7 (with further references).
3. Learning from foreign law

In considering access to justice we would do well to learn from foreign legal systems. In foreign law we see less ideals that are different from our own than we see ideals that are our own better implemented. The drafters of the ABA Model Access Act learned from foreign law. In the flexibility they have allowed in adoption and implementation of their handiwork, they practically invite all concerned to look at foreign law and practice. Learning from foreign systems does not require that we adopt any foreign law or practice. It does require that think hard about our own system and about what is admirable in it and what is not. In the first instance, comparative study serves to spot issues. It is up to us how we resolve those issues. We need not make any changes.

With respect to our consideration of foreign law in access to justice in America, I divide my suggestions for foreign learning into three types: (a) issues that should be addressed in adopting or implementing the Model Access Act that do not require changes in the concept of the proposal; (b) issues that should be addressed that might require changes in the underlying concept of legal aid as presently administered in the United States (i.e., the legal aid society model); and (c) broader access to justice issues that should be addressed more broadly than as part of a legal aid regime.

B. Lessons no change in concept

The devil is in the detail. Access to justice is not exempt from that maxim. The Model Access Act leaves open many details. An international perspective alerts us to some of them. People charged with drafting the adopting law, regulations and policies will soon encounter them. We pose here just eight as questions:

1. How should need be measured?

Should the measure of need be overall poverty or individual need in the particular case?

2. Should case merit be measured? If so, how?

Should there be examination of a case’s merit? Should determination of likelihood of success take into account only the le-
gal right vindicated, or the practical consequence of the case after all costs of litigation are included? How should that consideration be made when law is uncertain or when parties seek to clarify or change the law?

3. **Who should authorize legal aid?**

Who should decide whether to authorize legal aid in an individual case: a provider, a court or an independent body? Should authority to decide be exclusive in one provider, court or independent body, or should there be a choice of deciders?

4. **What procedures should deciders follow?**

What procedures should deciders follow? Should they be comprehensive or summary? Written or oral? Should decisions be justified in writing? Should they be appealable?

5. **Should opposing parties be considered?**

Should authorization procedures give opposing parties opportunity to be heard? If legal aid is granted, how, if at all, should its effect on the fairness of proceedings for opposing parties be taken into account?

6. **What representation is allowed?**

What limits, if any, should be placed on the representation of aided parties? How are distinctions between full legal representation and some other, more limited representation, to be implemented?

7. **How should awards be allocated?**

When legal aid recipients win their cases, should they be entitled to the entire award, both for the underlying claim and for costs and legal fees? If not, should the legal aid provider, the State or the State Access Fund have claims? When legal aid recipients lose their cases, are they liable for the entire award, both for the underlying claim and for costs and legal fees?
8. Should aid recipients participate in funding?

Should legal aid recipients contribute to financing legal aid? If so, when and how? Should they make co-payments? Should legal aid be a gift or a loan?

C. Ideas that require change in concept of ABA Model Act

We have just addressed details that should be addressed in adopting and implementing the ABA Model Access Act or in rejecting and substituting an alternative measure. While these “details” are very important, their resolution would not require extensive changes in the proposed law.

Now we identify issues arising from an international perspective which should be considered, but that do call into question some of the basic assumptions of the law.

1. Should legal aid be limited to basic human needs?

Should legal aid be limited to basic human needs? In their willingness to see expansion of that classification the drafters hint that they might have preferred no such limitation. Jurisprudentially, it is at least uncomfortable to classify rights as of one type worthy of enforcement assistance and another not so worthy. Normally we leave in each person’s own discretion which rights to enforce. Practically, a distinction between basic human needs and other needs, is likely to create a line difficult to draw and productive of problems in implementation. They were constrained by the scope of the 2006 ABA Resolution. Legislators considering adoption will not be so constrained, although they will be subject to the political limitations that led to the constraint on the drafters.

2. State variations—cross border issues

The ABA Model Access Act is a framework law which leaves a great deal of flexibility available in its adoption and implementation. Would it work better as a uniform law or as a federal
statute? If it is left in its present form, what steps can be taken to make practice more uniform (e.g., national forms)? What measures can be undertaken to facilitate legal aid in cross-state border cases?

3. Legal aid outside or inside the system?

The ABA Model Access act *sub silentio* assumes the prevailing American structure of legal aid, where legal aid providers are legal aid agencies independent of legal practice generally. Should legal aid be incorporated into the legal system through a cost and lawyers’ fee system that would allow all lawyers to participate? If not, should limitations on legal aid practice be lifted?

D. Ideas that require changes in the Legal System

So far, in this conclusion, we have limited consideration to issues that need be addressed, but that do not require venturing far outside the realm of legal aid as is known or has been known in the United States. Common objections to comparative learning do not apply here. The use of comparative example is legislative, so the issue of appropriateness to the proceeding does not arise. The use of comparative example is to fulfill American ideals, so does not run counter to them.

1. German Advantages in Civil Justice that Facilitate German Legal Aid

There is yet another common objection to learning from foreign example: existing institutions could not accommodate them. Rudolf B. Schlesigner, one of America’s most distinguished proponents of learning from foreign experiences in general and in legal aid particular, a generation ago that “many features of the German judicare scheme could not be duplicated here without some fairly radical changes in our legal system.”\(^{184}\) He pointed to three features of the German system of civil justice that facilitate the German system of legal aid and that limit its emulation here: (1) the administrative resources of the courts; (2) the more active

\(^{184}\) At 216.
role of judges in finding and applying law; and (3) the loser-pays system of litigation.\textsuperscript{185}

We can expand on the German advantages identified by Schlesinger:

\begin{itemize}
  \item[a)] \textit{German civil procedure is less expensive because judges moderate the time invested in individual cases.}
  
  In German proceedings judges work with parties to identify material issues in dispute. They authorize taking evidence only with respect to those issues. American legal aid proposals must deal with lawyer control of case investment, i.e., how much time is spent and, therefore, with the level of costs and expenses of individual cases.

  \item[b)] \textit{German civil procedure provides an already-made system of cost and fees which makes costs and fees predictable, proportionate and reimbursable.}
  
  The German legal aid system rests on a well-developed system of statutorily-determined costs and fees. While parties may agree otherwise, the benchmark fee is based on the amount in dispute and on the stage in proceedings that a case reaches. The system makes costs and fees predictable beforehand and proportionate to amounts in dispute. An American legal aid system must deal
\end{itemize}

\textsuperscript{185} Schlesinger was a proponent of comparative learning and of the German form of legal aid. Others, who are less favorably inclined toward universal legal aid, find more reasons to dismiss foreign learning from consideration. Two critics have brought most of these objections together concisely to explain, not only why Americans should not learn from foreign experiences, but why they should give up on the universal access goal of civil Gideon. We quote them:

\begin{quote}
[Foreign systems have] limitations on contingent fee litigation; restrictions on legal advertising, barratry, and maintenance; mandatory fee-shifting against unsuccessful plaintiffs; heavier reliance on lay magistrates; discretionary powers in courts to deny rights of suit or legal aid certificates; severe limits on punitive and other damages; highly limited use of juries in civil cases; the reservation to public authorities of the right to sue for employment discrimination, environmental impairment or antitrust violation; and much smaller court systems and more elaborated systems of administrative law.'
\end{quote}

with unpredictable expenses and the possibility that fees equal or exceed amounts in controversy.

The German system imposes costs and expenses of both sides on the loser. The loser-pays system works to assure that there are no “throw-away rights,” i.e., rights where the cost of vindicating them equals or exceeds their economic benefit. An American legal aid system must take into account that vindicating rights may not be economically rational.

A loser pays system has other benefits for a legal aid system. These include: (i) it makes the system to an extent self-funding, since losers pay the costs and expenses of victorious legal aid recipients, and aid amounts to nothing more than a temporary advance; (ii) it discourages potential legal aid recipients from making frivolous or exorbitant claims since legal aid recipients remain liable for the costs and expenses of their victorious opponents;\(^{186}\) and (iii) it reduces the advantage that parties receiving legal aid may have over parties who receive no aid.\(^{187}\)

c) German courts are better staffed and more consistently trained

On a per capita or on a per lawyer basis, Germany has one of the most numerous judiciaries in the world. Approximately there are 22,000 judges for about 145,000 lawyers and 81 million people. The United States, in contrast has about 30,000 judges for about 1.1 million lawyers and 302 million people. German judges are uniformly trained to be judges and are selected based on merit. Even the lowest courts, where jurisdiction is limited to €5,000 (about $6500), well-staffed with professional judges.

d) German legal aid law is national and uniform law

Although Germany is a federal state (within the federal European Union), it has only a single legal aid law and a single legal advice law. The former is incorporated into the federal Code of Civil Procedure. Although all courts of first instance with one exception are state courts, the rules for legal aid are the same

\(^{186}\) ZPO § 123.

\(^{187}\) This was early a concern of the legal-aid system in Germany. See, e.g., S.P. Gans, Über Armen-Recht im Prozesse, 1 Zeitschrift für die Civil- und Criminal-Rechtpflege im Königreich Hannover 26, 29 (1826); Linde, Beitrag zur Lehre über das Armenrecht im Prozesse, 1 Zeitschrift für Civilrecht und Prozeß 57, 74 (1828).
throughout the country. This simplifies their formulation, application and public appreciation.

2. Legal Aid’s Call to Action: Access to Justice for All

That generation exactly coincides with my life in practice, for Schlesinger, my teacher, delivered those remarks in my last year in law school. That was a moment of relative satisfaction with the American system of civil justice. That moment soon passed. Already in 197@ Judge Marvin Frankel published is controversial challenge Partisan Justice. Scores of books have followed in its wake. No reasonable person can deny that American civil justice fails in its stated mission of Rule 1 of the Federal Rules of Procedure.

It is time to make those radical changes in American civil justice. Of the three advantages that Schlesigner pointed out, the one—greater administrative capability of courts—is imaginable and doable with resources and will. The other two—the role of the judge and the fee shifting—are more difficult to address.

The present American practice that combines no fee-shifting with lawyer control of litigation, not only precludes access to justice for the poor, it precludes access to justice for almost everyone.

Legal aid is the canary in the coal mine, the dog in the minefield. Legal aid cannot achieve our goals until civil justice can. Let us hope that debating the future of legal aid will contribute to a better future for civil justice generally.