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ACCESS TO JUSTICE: ENSURING MEANINGFUL  
ACCESS TO COUNSEL IN CIVIL CASES

Columbia Law School Human Rights Clinic

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ACCESS TO JUSTICE: ENSURING MEANINGFUL  
ACCESS TO COUNSEL IN CIVIL CASES

Response to the Periodic Report of the United States to the  
United Nations Human Rights Committee

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## INTRODUCTION

Only a small fraction of the legal problems experienced by low-income and poor people living in the United States—less than one in five—are addressed with the assistance of legal representation.<sup>1</sup> Many who are low-income and poor in the United States cannot afford legal representation to protect their rights when facing a crisis such as eviction, foreclosure, domestic violence, workplace discrimination,

termination of subsistence income or medical assistance, and loss of child custody.<sup>2</sup> There is no federal constitutional right to counsel in civil cases,<sup>3</sup> and the primary mechanism for providing civil legal services to people who are poor and low-income is underfunded and severely restricted.<sup>4</sup> The result is a crisis in unmet civil legal needs that disproportionately harms racial minorities, women, and non-English speakers. Concerned with the United States' human rights record in this regard, the United Nations ("U.N.") Human Rights Committee has asked the United States to provide it with information on steps it has taken to improve legal representation in civil proceedings, in particular for litigants belonging to racial, ethnic, and national minorities,<sup>5</sup> and to improve legal representation for women victims of domestic violence.<sup>6</sup>

Many U.S. states have taken important steps to provide counsel in certain civil cases for people who are poor and low-income,<sup>6</sup> yet the rights and services established at the state level are patchwork. Owing to a variety of factors (one of the most substantial being funding limitations), there is great variability in the availability and delivery of civil legal assistance services, resulting in uneven dispersal of services both between and within states, such that access in some states to the full range of civil assistance depends on geography and luck.<sup>7</sup> Also, programs that look similar on their face may differ in their operation.<sup>8</sup>

2. See generally Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010).

3. The U.S. Supreme Court has found a right to counsel in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring counsel be appointed for indigent defendants in state court facing imprisonment due to felony charges); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (requiring counsel for indigent defendants in state court facing imprisonment due to misdemeanor charges). In fact, the Court has created a presumption against appointing counsel in any civil case where physical liberty is not in the balance. *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981) (finding no categorical right to counsel when termination of parental rights is at stake). And, it has refused to find a categorical right to counsel even in some civil cases where lengthy jail sentences are, in fact, imposed. *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (finding no categorical right to counsel for indigent contemnors facing jail time for failing to pay child support, at least where the plaintiff is neither the state nor represented by counsel).

4. Human Rights Comm., List of Issues in Relation to the Fourth Periodic Report of the United States of America, Adopted by the Committee at its 107th Session, Mar. 11-28, 2013, ¶ 8(e), U.N. Doc. CCPR/C/USA/Q/4 (Apr. 29, 2013).

5. *Id.* at ¶ 20.

6. See *infra* Part III.

7. Rebecca L. Sandefur, *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*, AM. BAR FOUND. 9-11 (Oct. 7, 2011), [http://www.americanbarfoundation.org/uploads/cms/documents/access\\_across\\_america\\_first\\_report\\_of\\_the\\_civil\\_justice\\_infrastructure\\_mapping\\_project.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf).

8. *Id.* at 12.

1. Documenting the Justice Gap in America: The Current Unmet Civil Needs of Low Income Americans. LEGAL SERVS. CORP. 1 (Sept. 2009), [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf) [hereinafter Documenting the Justice Gap].

The result is that significant and increasing numbers of litigants must navigate the court system without a lawyer because they are unable to afford legal representation.<sup>9</sup> A large percentage of people who are unrepresented in fact qualify for federal or state funded legal aid but do not receive it due to the limited resources for legal providers.<sup>10</sup>

Though more research in this area is needed,<sup>11</sup> studies indicate that lack of legal representation dramatically impairs the ability of low-income people to effectively navigate the court system and attain successful outcomes.<sup>12</sup> Represented parties enjoy statistically more favorable results in housing,<sup>13</sup> family law,<sup>14</sup> and small claims cases.<sup>15</sup> Those who are represented by an attorney before administrative agencies governing such vital issues as social security, unemployment, and immigration also have a higher success rate—in some cases up to

9. See *Documenting the Justice Gap*, *supra* note 1, at 1-2. For example, sixty percent of litigants in New York's family and housing courts reported that they could not afford counsel. Engler, *supra* note 2, at 41 n.15 (citing OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES: THE RESULTS OF TWO SURVEYS 1 (2005)). See also Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2027 (1999); *Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Courts*, N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION 2 (2004), <http://www.courts.state.nh.us/supreme/docs/proserreport.pdf> (“A sample of self-represented litigants in New Hampshire showed that most of them were in court on their own because they could not afford to hire or continue to pay a lawyer.”); *Report on Pro Se Litigation*, BOS. BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS 17 (1998), <http://www.bostonbar.org/prs/reports/unrepresented0898.pdf> (“Most of the unrepresented litigants [in the Boston Housing Court] reported that they wanted an attorney but felt they could not afford one.”).

10. *Documenting the Justice Gap*, *supra* note 1, at 1-2.

11. Alan Houseman, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, CTR. FOR AM. PROGRESS 15 (June 2011), <http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/justice.pdf>; see also Sandefur, *supra* note 7, at 22 (“The last national survey of public civil legal need is almost 20 years old, and was a service project of the organized bar.”).

12. See *Documenting the Justice Gap*, *supra* note 1, at 2.

13. Engler, *supra* note 2, at 46-51; see also The Importance of Representation in Eviction Cases and Homelessness Prevention, BOS. BAR ASS’N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL 15 (Mar. 2012), <http://www.bostonbar.org/docs/default-document-library/bba-ctc-final-3-1-12.pdf> [hereinafter *The Importance of Representation*]; see generally D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 927 (2013).

14. Engler, *supra* note 2, at 51-55; see also Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. SOC. JUST. 139, 151-53 (2010).

15. Engler, *supra* note 2, at 55-58.

two or three times higher—than those who are unrepresented in comparable cases.<sup>16</sup>

Lack of access to civil counsel disparately impacts racial minorities, women, and other vulnerable groups. Racial minorities and women are overly represented among people who qualify for civil legal assistance.<sup>17</sup> State-level studies on access to justice indicate that such groups make up a disproportionate number of litigants without representation. In New York City family and housing courts, for example, the vast majority of litigants without representation are racial minorities.<sup>18</sup> Similarly, in Pennsylvania family courts, most low-income litigants, who include a disproportionate number of racial minorities and women, lack representation.<sup>19</sup> Further illustrating the intersection of race and gender, a California study found that about eighty-five percent of litigants appearing in family court without an attorney were women, and the majority of them were women of color.<sup>20</sup> The Committee on the Elimination of Racial Discrimination recognized this problem when it expressed concerns over the disparate impact that lack of counsel in civil cases has on racial and ethnic minorities in the United States.<sup>21</sup>

Lack of representation in civil cases is especially problematic for immigrants in removal proceedings. Although federal law provides that

16. *Id.* at 58-59; see also *Report and Recommendations*, N.H. CITIZENS COMM’N ON THE STATE COURTS 10-11 (June 2006), [http://www.courts.state.nh.us/press/2006/cc\\_report.pdf](http://www.courts.state.nh.us/press/2006/cc_report.pdf) (unrepresented individuals typically do an inadequate job of self-representation, resulting in compromised justice). One recent randomized study reached a different conclusion, finding that a particular clinic staffed by law students did not yield positive results. D. James Greiner & Cassandra Wolos Patanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2124 (2012). However, this study has been subject to critical scrutiny. See Symposium on What Difference Representation Makes, CONCURRING OPINIONS, <http://www.concurringopinions.com/archives/category/representation-symposium> (last visited Oct. 11, 2013).

17. See *Documenting the Justice Gap*, *supra* note 1, at 27; Alemanyehu Bishaw & Jessica Semega, *Income, Earnings, and Poverty Data from the 2007 American Community Survey*, U.S. CENSUS BUREAU 20 (Aug. 2008), <http://www.census.gov/prod/2008pubs/acs-09.pdf>.

18. *Self-Represented Litigants: Characteristics, Needs, Services (The Results of Two Surveys)*, OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES 3 (Dec. 2005), [http://www.nycourts.gov/reports/AJJI\\_SelRep06.pdf](http://www.nycourts.gov/reports/AJJI_SelRep06.pdf).

19. *Final Report*, PA. SUPREME COURT COMM. ON RACIAL AND GENDER BIAS IN THE JUSTICE SYS. 457 (2003), <http://www.pa-interbranchcommission.com/pdfs/FinalReport.pdf>.

20. *Final Report*, CAL. JUDICIAL COUNCIL ADVISORY COMM. ON RACIAL AND ETHNIC BIAS IN THE COURTS 13 (Jan. 1997), <http://www.courts.ca.gov/documents/rebias.pdf>.

21. Comm. on the Elimination of Racial Discrimination, *Concluding Observations—United States of America*, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

defendants in immigration removal proceedings may not be denied the ability to be represented by retained counsel,<sup>22</sup> there is no statute directing the federal government to pay for such counsel in these cases, leaving many who cannot afford it without representation. Federal law also does not provide for counsel for unaccompanied immigrant children<sup>23</sup> and immigrants with serious mental disabilities.<sup>24</sup> A federal district court recently held that federal law requires the government to provide counsel for those with serious psychiatric disorders that render them incompetent to represent themselves in immigration proceedings.<sup>25</sup> Nevertheless, a staggering eighty-four percent of detained noncitizens in proceedings before immigration courts lack counsel.<sup>26</sup> In removal proceedings, representation can have a substantial impact on whether a person is able to remain in the country.<sup>27</sup> For example, one study in New York found that seventy-four percent of non-detained immigrants with counsel prevailed in their cases, compared to only thirteen percent of non-detained immigrants without counsel.<sup>28</sup>

The United States acknowledges the many inequalities that stem from the absence of a civil right to counsel.<sup>29</sup> Yet in its Fourth Periodic Report to the Human Rights Committee, the United States nevertheless contends that several federal mechanisms and initiatives, including the federal Legal Services Corporation, the Department of Justice's Access to Justice Initiative, and federal statutory fee waiver provisions, bring

22. 8 U.S.C. § 1229a(b)(4)(A) (2006).

23. See generally Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011).

24. See *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System*, HUMAN RIGHTS WATCH 42 (2010), [http://www.hrw.org/sites/default/files/reports/usdeportation0710webwcover\\_1\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usdeportation0710webwcover_1_0.pdf).

25. See Franco-Gonzalez v. Holder, No. 2:10-CV-02211 (C.D. Cal. April 23, 2013) (order granting permanent injunction), <http://www.aclu-sc.org/franco-injunction>.

26. See *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases*, AM. BAR ASS'N COMM'N ON IMMIGRATION 5-8 (Feb. 2010), [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report_authcheckdam.pdf); see also *Jailed Without Justice: Immigration Detention in the U.S.A.*, AMNESTY INT'L 30 (2008), <http://www.amnestyusa.org/pdfs/ailedWithoutJustice.pdf>.

27. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT, Apr. 2005, at 5, available at [http://www.migrationpolicy.org/insight/insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/insight_Kerwin.pdf).

28. See New York Immigrant Representation Study Report, *Assessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363-64 (2011).

29. Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, ¶ 301, U.N. Doc. CCPR/C/USA/4 (Dec. 30, 2011) [hereinafter Fourth Periodic Report].

the United States into compliance with its obligations to provide equal access to justice under article fourteen of the International Covenant on Civil and Political Rights ("ICCPR").<sup>30</sup> In its response to the committee's List of Issues, the United States reiterates the importance of the Access to Justice Initiative.<sup>31</sup> These federal mechanisms and initiatives, however, fall far short of addressing the civil justice gap in the United States and ensuring equality before the courts and fair trials, as required by article fourteen.

In order to meet its human rights obligations, the federal government must work toward the establishment of the right to counsel for indigent litigants in civil cases, especially where basic human needs are at stake. Direct steps the federal government should take include: supporting research into the impact of providing counsel in civil cases; fully funding the Legal Services Corporation and lifting restrictions that prevent legal services lawyers from providing necessary services; intensifying the Access to Justice Initiative's activities with respect to civil legal services and providing it with the necessary leadership and resources; and filing supportive amicus briefs when the right to counsel is litigated in federal and state courts. The federal government should also support and coordinate efforts to establish a civil right to counsel at the state level and introduce and support legislation to create a right to counsel in civil cases where liberty interests or fundamental needs are at stake, including in immigration proceedings.

#### I. THE UNITED STATES HAS AN INTERNATIONAL LEGAL OBLIGATION TO ENSURE MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES

In ratifying the ICCPR, the United States obligated itself to ensure meaningful access to justice, including meaningful access to counsel in civil cases where the interests of justice so require.<sup>32</sup>

30. *Id.* at ¶ 301-02.

31. Replies of the United States of America to the List of Issues from the United Nations Human Rights Committee Concerning the Fourth Periodic Report, ¶ 29, U.N. Doc. CCPR/C/USA/Q/4/Add.1 (July 5, 2013).

32. Both federal and state governments are internationally obligated to comply with the standards set forth in the ICCPR, with the federal government retaining ultimate responsibility for compliance. Article fifty of the ICCPR states that "[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." International Covenant on Civil and Political Rights, art. 50, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Under United States law, too, as a ratified treaty, the ICCPR is the "supreme law of the land," binding on all 50 states. U.S. CONST. art. VI, cl. 2. In ratifying the ICCPR, the United States pledged to "take the necessary steps" to ensure that the rights recognized in the treaty are given effect through state action. Nevertheless, the United States attached an understanding that "to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall

Article fourteen of the ICCPR guarantees procedural fairness, providing in relevant part that "all persons shall be equal before the courts and tribunals," and that "[i]n the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>33</sup>

Article two of the ICCPR establishes that each state is bound by the treaty to undertake "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."<sup>34</sup> Article twenty-six of the ICCPR reiterates the guarantee of non-discrimination.<sup>35</sup>

As articulated by the Human Rights Committee, these protections include the right to counsel in certain civil cases. General Comment thirty-two clarifies that article fourteen's guarantee of equality before the law encompasses access to the legal system, including access to counsel in civil cases:

Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice . . . . The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way . . . . States are encouraged to provide free legal aid in [non-criminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.<sup>36</sup>

The Human Rights Committee has, on numerous occasions, noted concern over states' failure to provide counsel in various types of civil cases. For example, in its Concluding Observations regarding the Czech Republic's compliance with the Covenant, the committee noted with concern that, in order to rectify the problem of discrimination in housing faced by the Roma, the Czech Republic should "provide legal aid for victims of discrimination."<sup>37</sup> In commenting on Sweden's

take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992).

33. ICCPR, *supra* note 32, at art. 14.

34. *Id.* at art. 2(3)(a).

35. *Id.* at art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.")

36. Human Rights Comm., *General Comment No. 32: Article 14, Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶¶ 9-10, U.N. Doc. CCRP/C/32 (Aug. 23, 2007).

37. Human Rights Comm., *Concluding Observations—Czech Republic*, ¶ 16, U.N. Doc. CCRP/C/CZE/CO/2 (Aug. 9, 2007).

treatment of its indigenous Sámi population, the committee recommended that the government provide adequate legal aid to Sámi villages in land rights disputes.<sup>38</sup> Commenting on restrictions on trade unions by the government in Chile, the committee recommended that the government make legal aid available to workers in order for their complaints to be heard successfully.<sup>39</sup> The committee has made similar recommendations with regard to treatment of asylum-seekers by the governments in Switzerland and El Salvador.<sup>40</sup> And the committee recommended that the government of Serbia provide for free legal assistance "in any case where the interests of justice so requires."<sup>41</sup> Similarly, the committee has found that a state's failure to provide counsel in contentious civil cases violates its obligations under the Covenant.<sup>42</sup>

Numerous U.N. special rapporteurs and independent experts have likewise emphasized the importance of ensuring access to counsel in civil cases, particularly where counsel is necessary to secure basic human needs. For example, the Special Rapporteur on Adequate Housing has noted that legal remedies are an important procedural protection against forced evictions but that such remedies are only effective where provision is made for the supply of civil legal aid.<sup>43</sup> Similarly, special rapporteurs have noted that civil counsel can play a significant role in vindicating and protecting the rights of racial

38. Human Rights Comm., *Concluding Observations—Sweden*, ¶ 21, U.N. Doc. CCRP/C/SWE/CO/6 (May 7, 2009).

39. Human Rights Comm., *Concluding Observations—Chile*, ¶ 14, U.N. Doc. CCRP/C/CHL/CO/5 (May 18, 2007).

40. With regard to Switzerland, the committee recommended that "[t]he State party should review its legislation in order to grant free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary." Human Rights Comm., *Concluding Observations—Switzerland*, ¶ 18, U.N. Doc. CCRP/C/CHE/CO/3 (Nov. 3, 2009). With regard to El Salvador, the Committee recommended that the government "ensure that persons subject to deportation proceedings benefit from an effective right to be heard, to have an adequate defence and to request that their case be reviewed by a competent authority." Human Rights Comm., *Concluding Observations—El Salvador*, ¶ 17, U.N. Doc. CCRP/C/SLV/CO/6 (Nov. 18, 2010).

41. Human Rights Comm., *Concluding Observations—Serbia*, ¶ 18, U.N. Doc. CCRP/C/SRB/CO/2 (May 20, 2011).

42. Kennedy v. Trinidad & Tobago, Communication No. 845/1998, ¶ 7.10, U.N. Doc. CCRP/C/67/D/845/1998 (2002) (finding a violation of article fourteen when no legal aid was made available to the petitioner before his claim before the constitutional court); Currie v. Jamaica, Communication No. 377/1989, ¶ 13.4, U.N. Doc. CCRP/C/50/D/377/1989 (1994) (finding that when a petitioner does not have the financial means to afford counsel and the interests of justice require it, the state should provide legal assistance).

43. Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, ¶ 69, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012).

minorities,<sup>44</sup> women,<sup>45</sup> and migrants.<sup>46</sup> As these experts note, meaningful access to civil counsel is a lynchpin to many other rights. As the Special Rapporteur on Extreme Poverty recently commented in the context of people living in poverty,

[L]ack of legal aid for civil matters can seriously prejudice the rights and interests of persons . . . for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions.<sup>47</sup>

Most recently, the Special Rapporteur on the Independence of Judges and Lawyers noted in her March 2013 report to the General Assembly that “[l]egal aid is an essential component of a fair and efficient justice system founded on the rule of law,” and that “[i]t is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights,”<sup>48</sup> including the right to a fair trial, the right to an effective remedy, the right to liberty and security of person, the right to equality before the courts and tribunals, and the right to counsel.<sup>49</sup> The special rapporteur emphasized that the right to free

44. Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶¶ 10, 35, U.N. Doc. A/HRC/18/44 (July 21, 2011).

45. See Human Rights Council, *Special Rapporteur on Violence Against Women, Its Causes and Consequences, Annual Report to Comm. on Human Rights: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶ 83, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (“States must ensure that quality physical and psychological health services and legal assistance are provided to victims of violence.”); Human Rights Council, *Special Rapporteur on Violence Against Women, Its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective*, ¶ 90, U.N. Doc. E/CN.4/2003/75 (Jan. 6, 2003) (“States should establish, strengthen or facilitate support services to respond to the needs of actual and potential victims, including . . . legal aid . . .”).

46. See Human Rights Council, *Special Rapporteur on the Human Rights of Migrants, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 46, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008); see also Human Rights Council, *Special Rapporteur on the Human Rights of Migrants, Specific Groups and Individuals—Migrant Workers*, ¶ 24, U.N. Doc. E/CN.4/2003/85 (Dec. 30, 2002) (“When the migrant must take the initiative for such [administrative] review, lack of awareness of the right to appeal and lack of access to free legal counsel can prevent the migrant from exercising his/her right in practice.”).

47. See Human Rights Council, *Special Rapporteur on Extreme Poverty and Human Rights, Extreme Poverty and Human Rights: Note by the Secretary General*, ¶ 62, U.N. Doc. A/67/78 (Aug. 9, 2012).

48. Human Rights Council, *Special Rapporteur on the Independence of Judges and Lawyers, Report of the Special Rapporteur on the Independence of Judges and Lawyers*, Human Rights Council, ¶ 20, U.N. Doc. A/HRC/23/43 (Mar. 15, 2013).

49. *Id.* at ¶ 28.

legal assistance applies in “any judicial or extrajudicial procedure aimed at determining rights and obligations”<sup>50</sup> and that “the notion of beneficiaries of legal aid should be extended to any person who comes into contact with the law and does not have the means to pay for counsel.”<sup>51</sup>

The Committee on Elimination of Racial Discrimination (“CERD”) has taken particular notice of the United States’ failure to provide counsel in civil cases. During its 2008 review of the United States, CERD expressed concern that the lack of civil counsel for persons living in poverty disproportionately and negatively affects racial minorities in the United States<sup>52</sup> and recommended that the United States “allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake.”<sup>53</sup>

The United States’ failure to ensure meaningful access to counsel in civil cases is out of step with international consensus, as well. In particular, the European Court of Human Rights (ECtHR) and the Inter-American Commission on Human Rights have both articulated states’ obligations to provide counsel in civil cases. In 1979, the ECtHR ruled in *Airey v. Ireland* that the right to fair trial may demand that a state provide free legal assistance to those unable to obtain it when that assistance is necessary to provide effective access to the court.<sup>54</sup> The ECtHR later expanded on this holding, emphasizing the principle that the law requires countries within the Council of Europe to provide free legal assistance as a human right.<sup>55</sup>

The Charter of the Organization of American States, of which the United States is a member, contains explicit support of the civil right to

50. *Id.* at ¶ 27.

51. *Id.* at ¶ 35.

52. Comm. on the Elimination of Racial Discrimination, *Concluding Observations—United States of America*, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

53. *Id.*

54. 2 Eur. Ct. H.R. 305, ¶ 26 (1979) (“[T]he right to fair trial may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.”).

55. See Steel & Morris v. United Kingdom, 22 Eur. Ct. H.R. 403 (2005); see also Martha F. Davis, *Comment to Petition 10-08, PROGRAM ON HUMAN RIGHTS & GLOBAL ECON.: NORTHEASTERN UNIV. SCH. OF LAW* 6 (Sept. 12, 2011), <http://www.wtcourts.gov/supreme/docs/1008commentdige.pdf>.

counsel, stating a goal to “dedicate every effort” to “[a]dequate provision for all persons to have due legal aid in order to secure their rights.”<sup>56</sup> The Inter-American Commission on Human Rights has reinforced this view, noting that states can be obligated to provide free civil legal services to those without means in order to prevent a violation of their right to fair trial and judicial protection.<sup>57</sup>

## II. THE U.S. GOVERNMENT FAILS TO MEET ITS INTERNATIONAL OBLIGATIONS

In its report to the Human Rights Committee, the United States acknowledges the inequities that exist within the justice system for individuals who are unable to afford civil representation, conceding that “neither the U.S. Constitution nor federal statutes provide a right to government-appointed counsel in civil cases.”<sup>58</sup> The report goes on to discuss a number of federal initiatives designed to mitigate the lack of a civil right to legal representation and that close the justice gap for people who are low income and poor. The primary federal initiatives and mechanisms the report mentions for addressing these inequities are the Legal Services Corporation, the Access to Justice Initiative, and the *in forma pauperis* statute. While the United States report touts these provisions to enhance access to justice, they fail to adequately respond to the justice gap, and particularly its disparate impact on minorities and women.

### A. The Legal Services Corporation Is Underfunded and Restricted

In its report to the Human Rights Committee, the United States highlights the Legal Services Corporation (“LSC”) as a key component in its efforts to improve civil litigants’ abilities to access equal justice.<sup>59</sup> LSC was created by Congress in 1974 as an independent nonprofit corporation to promote equal access to justice and provide grants for civil legal assistance to low-income Americans.<sup>60</sup> The federal legislation authorizing LSC noted that Congress was acting in response to its finding that “there is a need to provide equal access to the system

of justice in our Nation” and that “there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel.”<sup>61</sup> Congress also emphasized its desire that LSC be independent, that the lawyers in the program “have full freedom to protect the best interests of their clients,” and that the United States would continue to give “the program the support it needs in order to become a permanent and vital part of the American system of justice.”<sup>62</sup> Yet, due to chronic underfunding and a barrage of restrictions, LSC has fallen short of its initial promise.

### 1. LSC Is Severely Underfunded

Over the past several years, LSC has been hit with massive cuts to its congressional appropriations, ninety percent of which it distributes to 134 independent civil legal aid programs.<sup>63</sup> Congressional appropriations for LSC have steadily decreased over the past several years, from \$420 million in 2010 to \$341 million in 2013.<sup>64</sup> While these numbers are stark, they do not accurately illustrate the real scope of the federal government’s decreasing support for LSC. Accounting for inflation and measured in 2012 dollars, the appropriations for LSC in 2013 are approximately forty percent of what they were at the height of LSC funding in 1979.<sup>65</sup> These decreases are of particular concern as they come at a time of economic crisis, when more and more Americans are falling below federal poverty guidelines and are in more need of civil legal services than ever before.<sup>66</sup> Legal services providers report being flooded with a huge increase in clients seeking legal assistance for

61. Legal Services Corporation Act, 42 U.S.C. § 2996(1)-(2) (2006).

62. *Id.* § 2996(6); see also Special Message from Richard M. Nixon, President of the United States, to the Congress Proposing Establishment of a Legal Services Corporation (May 5, 1971), available at <http://www.presidency.ucsb.edu/ws/?pid=2998>.

63. *Fact Sheet on the Legal Services Corporation*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/what-is-lsc> [hereinafter *LSC Fact Sheet*] (last visited Oct. 9, 2013).

64. *LSC Funding*, LEGAL SERVS. CORP., <http://www.lsc.gov/congress/lsc-funding> [hereinafter *LSC Funding*] (last visited Oct. 9, 2013). In September 2012, Congress allocated \$350 million to LSC for fiscal year 2013. *Id.* This was eventually reduced to \$341 million due to sequestration in late March 2013. *Id.*

65. 2012 *Fact Book*, LEGAL SERVS. CORP. 3 (Jul. 2013), [http://www.lsc.gov/sites/lsc/files/LSC/lscgov4/AnnualReports/2012%20Book\\_FINAL%20WEB.pdf](http://www.lsc.gov/sites/lsc/files/LSC/lscgov4/AnnualReports/2012%20Book_FINAL%20WEB.pdf) [hereinafter *LSC Fact Book 2012*].

66. *Civil Legal Services: Low-Income Clients Have Nowhere to Turn Amid the Economic Crisis*, BRENNAN CR. FOR JUSTICE 1, [http://brennan.3cdn.net/cds4847d1c163a02a\\_exm655va.pdf](http://brennan.3cdn.net/cds4847d1c163a02a_exm655va.pdf) [hereinafter *Civil Legal Services*] (last updated June 25, 2010).

56. Charter of the Organization of American States, art. 45, Dec. 13, 1951, 1609 U.N.T.S. 119.

57. Inter-American Commission on Human Rights, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, ¶ 6, OEA/Ser.L/V/II.129 Doc. 4 (Sept. 7, 2007).

58. Fourth Periodic Report, *supra* note 29, at ¶ 301.

59. *Id.* at ¶ 302.

60. See Legal Servs. Corp., History: Founding of LSC, <http://www.lsc.gov/about/what-is-lsc/history>.



more severe legal problems.<sup>67</sup>

The recession has also affected LSC grantees' non-federal sources of funding, leaving devastating holes in the budgets of LSC-funded organizations.<sup>68</sup> Interest on Lawyer Trust Account ("IOLTA") programs are the largest national source of civil legal funding after LSC grants, amounting to thirteen percent of funding for LSC-funded organizations in 2008 and serving as an even more critical source for programs that do not receive LSC funds.<sup>69</sup> The economic recession resulted in a massive decline in interest rates and a consequent decrease in revenues that IOLTA uses to fund legal services organizations. From 2007 to 2009, IOLTA revenues decreased seventy-five percent, from \$371 million to just \$92 million.<sup>70</sup>

These funding decreases leave gaping holes in the budgets for civil legal services that affect the number of cases they pursue and the resources they provide. Due to funding reductions since 2010, LSC has been forced to eliminate more than 1000 staff positions and more than thirty offices.<sup>71</sup>

As a result, LSC and its grantees have been unable to meet current demands for their civil legal services. Programs funded by LSC provide legal assistance to more than 2.3 million people, seventy percent of whom are women.<sup>72</sup> However, nearly one in five Americans meets the federal poverty guidelines that qualify them for civil legal assistance by LSC, a population that now numbers over 60.4 million, which is a 3.6 million increase from 2010 to 2011.<sup>73</sup> This number is expected to increase to 66.6 million in 2013, an increase of 35.1% since 2005.<sup>74</sup> A disproportionately high number of individuals that meet the federal

67. *Id.*

68. *Id.* at 2.

69. *Id.*

70. *Id.*

71. John G. Levi, Bd. Chairman, Legal Servs. Corp., Remarks at the 2013 White House Forum on Increasing Access to Justice (Apr. 16, 2013), available at <http://www.lsc.gov/board-directors/chairmans-page/statements/lsc-chairman-john-levi-remarks-2013-white-house-forum>.

72. *LSC Fact Sheet*, *supra* note 63.

73. Press Release, Legal Servs. Corp., Statement by John G. Levi, Chairman, Board of Directors, on New Federal Poverty Data (Sept. 13, 2011) [Berenaher Levi Press Release], available at <http://www.lsc.gov/media/press-releases/statement-john-g-levi-chairman-board-directors-new-federal-poverty-data>.

74. Conference of Chief Justices and Court Administrators, *Resolution I in Support of Continued Federal Funding for the Legal Services Corporation*, ABA 2 (2012), [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2012/05/national\\_meetingofstateaccessjusticechairs/scland\\_at\\_funding\\_lsc\\_authcheckedam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/05/national_meetingofstateaccessjusticechairs/scland_at_funding_lsc_authcheckedam.pdf).

poverty guidelines are racial minorities and women.<sup>75</sup> Further, in 2008, an estimated 25.3 million of those eligible for LSC funding (almost half of those eligible) faced a civil legal problem.<sup>76</sup>

LSC-funded programs have nowhere near the funding and resources necessary to respond to this need.<sup>77</sup> According to the LSC's 2009 report *Documenting the Justice Gap in America*, "for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources."<sup>78</sup> This means that LSC-funded organizations are forced to reject nearly one million cases because they lack the funding to handle them.<sup>79</sup> According to LSC's report, "state legal needs studies conducted from 2000 to 2009 generally indicate that less than one in five low-income persons get the legal assistance they need."<sup>80</sup>

These numbers may underestimate the problem. Moreover, the last accurate measurement of LSC's ability to address the justice gap was conducted in 2009, before the economic recession pushed an ever-growing number of Americans below the federal poverty line.<sup>81</sup>

## 2. LSC Grantees Are Unduly Restricted

LSC-funded organizations are also constrained in their ability to meet the legal needs of low-income and poor clients because of restrictive federal rules governing who may receive their legal services and the kinds of legal services they may provide.

LSC bases its eligible population on the federal poverty level threshold as established by the federal poverty guidelines and, thus, serves clients who are at or below 125% of the poverty line, which for a family of four in 2013 amounted to an income of \$29,438 a year.<sup>82</sup> While these income thresholds limit the number of individuals qualified

75. See CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012 13-16 (2013), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf>.

76. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 58 (2010); Sandefur, *supra* note 7, at 2 (stating that more recent studies among low income populations in specific states or communities have often found even higher rates of the incidence).

77. Levi Press Release, *supra* note 73.

78. *Documenting the Justice Gap*, *supra* note 1, at 1.

79. *Id.* at 9.

80. *Id.* at 3.

81. *Civil Legal Services*, *supra* note 66, at 1.

82. Income Level for Individuals Eligible for Legal Assistance, 77 Fed. Reg. 4909-01, 4909 (Feb. 1, 2012) (to be codified at 45 C.F.R. pt. 1611), *LSC Fact Sheet*, *supra* note 63.

to receive legal assistance, federal provisions further restrict the eligible population for LSC-funded organizations. One such restriction prohibits the use of any funds to represent the vast majority of undocumented and other categories of immigrants.<sup>83</sup> There are some narrow exceptions to this prohibition. For instance, LSC-funded organizations may represent immigrants who are lawful permanent residents, who are married to, the parent of, or the unmarried minor child of a U.S. citizen, or who have been granted a certain recognized status.<sup>84</sup> The Trafficking Victims Protection Act and the reauthorization of the Violence Against Women Act also permit organizations to use non-LSC funding to represent undocumented individuals who have been battered or subjected to extreme cruelty by a spouse or parent, as well as undocumented individuals whose children have been battered or subjected to extreme cruelty.<sup>85</sup> However this representation must be "directly related to the prevention of, or obtaining relief from, the battery or cruelty."<sup>86</sup>

Federal restrictions also prohibit LSC-funded organizations from representing incarcerated individuals in any civil litigation or administrative challenges to the conditions of incarceration.<sup>87</sup> An LSC-funded organization may not be involved in any litigation involving abortion or defend someone in public housing eviction cases if the person threatened with eviction has been charged or convicted with a drug crime related to the sale, distribution, or manufacture of a controlled substance, and the public agency asserts that this drug charge or conviction threatens the health or safety of other tenants or employees.<sup>88</sup>

83. Restrictions on Legal Assistance to Aliens, 45 C.F.R. §§ 1626.1, 1626.5 (2012); see also Alan W. Houseman & Linda E. Perle, *What Can and Cannot Be Done: Representation of Clients by LSC-Funded Programs*, CTR. FOR LAW & SOC. POL'Y 5 (Jan. 22, 2009), <http://www.clasp.org/admin/site/publications/files/0524.docx>.

84. 45 C.F.R. § 1626.5; Houseman & Perle, *supra* note 83, at 2 (describing eligibility for representation for aliens who have been granted asylum, refugee status, conditional entrant status, withholding of deportation, or status as H-2A non-immigrant temporary agricultural workers).

85. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 § 104(a)(1)(C).

86. 45 C.F.R. § 1626.4(2).

87. See Restrictions on Legal Assistance with Respect to Criminal Proceedings, 45 C.F.R. § 1613; Restrictions on Actions Collaterally Attacking Criminal Convictions, 45 C.F.R. § 1615; Representation of Prisoners, 45 C.F.R. § 1637; see also Houseman & Perle, *supra* note 83, at 5.

88. Restriction on Assisted Suicide, Euthanasia, and Mercy Killing, 45 C.F.R. § 1643; Restriction on Representation in Certain Eviction Proceedings, 45 C.F.R. § 1633; see also Houseman & Perle, *supra* note 83, at 5-6.

When civil legal services organizations accept federal funding from LSC, they also face a number of restrictions on the type of legal work and advocacy they may perform. LSC grantees may not engage in the political process through advocacy or representation before legislative bodies on pending or proposed legislation; nor may they represent clients or client interests in front of administrative agencies that direct rulemaking.<sup>89</sup> Federal restrictions forbid conducting or participating in grass roots lobbying<sup>90</sup> and prohibit LSC-funded groups from establishing "training programs to advocate particular public policies or political activities or to train people to engage in restricted activities."<sup>91</sup> LSC-funded organizations "cannot initiate, participate, or engage in class actions."<sup>92</sup> This restriction impedes the efficiency of LSC-funded attorneys: They cannot represent large numbers of people in a single action, but must instead bring many different cases regarding the same wrong.

The LSC appropriations legislation further restricts and limits the activities of LSC grantees by extending the federal restrictions to all the grantees' activities, even those fully financed with non-LSC funding.<sup>93</sup> This provision has been called the "poison pill restriction" due to the impediments it places on the legal tools and activities available to organizations that take a single dollar of LSC funding.<sup>94</sup> For example, in Maryland, where LSC funding accounts for only 16% of total funding, restrictions nonetheless impact 100% of the practice.<sup>95</sup> According to a 2009 report, nationwide, this restriction annually inhibits

89. Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612; see also Houseman & Perle, *supra* note 83, at 3-4 (also describing the one exception where, if approached by a government body with the request, an LSC-funded organization may use non-LSC funds "to respond to a written request for information or testimony" regarding legislation or rulemaking, and may "participate in a public comment in a rulemaking proceeding").

90. 45 C.F.R. § 1612; see also Houseman & Perle, *supra* note 83, at 4.

91. Houseman & Perle, *supra* note 83, at 6; see also 45 C.F.R. § 1612.

92. Houseman & Perle, *supra* note 83, at 4; see also Class Actions, 45 C.F.R. § 1617. It is worth noting that the United States, in its Report to the Human Rights Committee, champions class-actions as a way in which legal representation has been made more affordable for indigent defendants. Fourth Periodic Report, *supra* note 29, at ¶ 301 ("The [Supreme] Court has thus recognized a right for groups to 'unite to assert their legal rights as effectively and economically as practicable.'")

93. Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 45 C.F.R. § 1610; see also Houseman & Perle, *supra* note 83, at 4.

94. *FY 2011 Appropriations Process for Civil Legal Services*, BRENNAN CTR. FOR JUSTICE (Mar. 1, 2011), <http://www.brennancenter.org/analysis/fy-2011-appropriations-process-civil-legal-services> [hereinafter *FY 2011 Appropriations Process*].

95. See 2012 Annual Report, MD. LEGAL AID 16 (May 2013), <http://www.mdlab.org/LAB%20docs/2012-annual-report.pdf>.