August 2013

ACCESS TO JUSTICE:

ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES

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

Endorsed By:
National Coalition for a Civil Right to Counsel
National Legal Aid & Defender Association
Maryland Legal Aid Bureau, Inc.
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ACKNOWLEDGEMENTS

This report was written by the Columbia Law School Human Rights Clinic, under the supervision of Risa Kaufman. The following students contributed to the research and drafting of the report: Scott Kelly, Michaela Wallin, Aliya Sanders, Mickey Hubbard, Ela Matthews, Sherry Gertler, Andrew Napier, David Lepard, and Ariana Sarfarazi. Significant contributions were made by John Pollock (National Coalition for the Civil Right to Counsel); Martha Davis (Northeastern University School of Law, Program on Human Rights and the Global Economy); Laura Abel (National Center for Access to Justice); and Reena Shah (Maryland Legal Aid Bureau, Human Rights Project).

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INTRODUCTION AND ISSUE SUMMARY

Legal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system. Yet, in the United States, millions of people who are poor or low-income are unable to obtain legal representation when facing a crisis such as eviction, foreclosure, domestic violence, workplace discrimination, termination of subsistence income or medical assistance, and loss of child custody. Indeed, 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. A categorical right to counsel in civil cases is not recognized under the federal Constitution. And federal programs to provide civil counsel are under-funded and severely restricted. The result is a crisis in unmet legal needs which disproportionately harms racial minorities, women and those living in poverty, and which particularly impacts those in immigration proceedings.

In ratifying the ICCPR, the United States committed itself to ensuring meaningful access to justice, including meaningful access to counsel in civil cases where the interests of justice so require. Article 14 guarantees procedural fairness. Article 2 establishes the right to an effective remedy. Article 26 reiterates the guarantee of non-discrimination. Through General Comment 32, the U.N. Human Rights Committee has interpreted these provisions to ensure the right to counsel in civil cases.

Other U.N. experts have similarly identified the importance of a right to counsel in civil cases, particularly in protecting the rights of racial minorities, low-income individuals, women, and migrants. The CERD Committee, in its 2008 review of the U.S., noted the disproportionate impact that the civil justice gap has on vulnerable communities in the United States and recommended that the U.S. allocate sufficient resources to ensure legal representation of racial, ethnic and national minorities, especially where basic human needs are at stake.

Recently, the U.N. Special Rapporteur on the Independence of Judges and Lawyers noted that "legal aid is an essential component of a fair and efficient justice system founded on the rule of law... it is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights." The Special Rapporteur emphasized that the right to free legal assistance applies in "any judicial or extrajudicial procedure aimed at determining rights and obligations" 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."

RELEVANT QUESTIONS IN COMMITTEE'S LIST OF ISSUES

In its List of Issues for the United States, the Human Rights Committee requested that the U.S.:

- provide information on steps taken to improve legal representation for civil proceedings, in particular for defendants belonging to racial, ethnic, and national minorities;
- clarify whether detained immigrants on a criminal charge are promptly informed of the charges against them, promptly brought before a judicial authority, and are given access to legal counsel and legal assistance; and
- provide information on steps taken to ensure legal representation for women victims of domestic violence.

U.S. GOVERNMENT RESPONSE

In its Fourth Periodic Report to the Human Rights Committee, the U.S. government concedes inequalities in its civil justice system, "in part because neither the U.S. Constitution nor federal statute provide a right to government-appointed counsel in civil cases when individuals are unable to afford it." The government identified several mechanisms it employs to mitigate the justice gap. Chief among those mentioned are the Legal Services Corporation, the Department of Justice's Access to Justice Initiative (ATJI), and the federal *in forma pauperis* statute. The government reiterates the importance of the ATJI in its response to the Committee's List of Issues. None of these measures, however, are sufficient to address the serious justice gap in the United States.

The Legal Services Corporation, the chief delivery system for federal legal aid for low-income and poor people in the United States, has experienced crushing budget cuts and places onerous restrictions on how legal services providers can conduct their work. Congressional appropriations for LSC have steadily decreased over the past several years, from $420 million in 2010 to $341 million in 2013. As a result, since 2010, LSC has been forced to eliminate more than 1,000 staff positions and close more than 30 offices. LSC-funded programs have nowhere near the funding and resources necessary to respond to the need for services. LSC-funded organizations are also unable 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 types of activities they may engage in.

A positive new initiative with strong potential for addressing civil legal needs, the Department of Justice's Access to Justice Initiative nevertheless has institutional and resource constraints that prevent it from comprehensively addressing the dire need for civil legal services in the United States. Currently, the ATJI is operating at limited capacity without a permanent Senior Counselor and with insufficient staffing. The Initiative lacks the capacity to engage in its own research or analysis, to disseminate best practices, and to engage extensively in public education to raise awareness around the importance of civil and criminal legal assistance in the United States.

Finally, while the federal *in forma pauperis* statute affords federal courts the discretion to request an attorney to represent indigent litigants, courts rarely exercise this discretion, the statute provides no funding for this purpose, and the statute does not apply to state courts.

Efforts at the state and local level to address the justice gap are important, yet patchwork. State laws and jurisprudence provide for counsel in certain categories of civil cases, primarily those concerning certain family law matters, involuntary commitment, and medical treatment. In addition, many state bar associations and access to justice commissions have undertaken research on the impact, cost, and need for counsel in civil cases, organized lawyers to provide pro bono services, and fundraised for organizations providing civil legal representation. However, resources for these efforts vary substantially, and they are unable to comprehensively address the need for counsel in civil cases. In order to meet its ICCPR commitments, the federal government must support state and local efforts and uniformly improve meaningful access to counsel for low-income individuals.

RECOMMENDED QUESTIONS

We respectfully recommend that the Human Rights Committee ask the U.S. delegation to:

> Please provide information on measures the federal government is taking to address the civil justice gap, including measures to fully fund and ease restrictions on the federal Legal Services Corporation, improve and expand the Access to Justice Initiative, and establish a right to counsel in civil cases where basic human needs are at stake, including in immigration proceedings.

SUGGESTED RECOMMENDATIONS

To more effectively address the civil justice gap and meet its obligations under international law, the United States should take the following actions:

- support research to assess the immediate and long-term financial and other consequences for courts, court users, and communities when court users lack counsel in civil cases;
- fully fund the Legal Services Corporation at a level sufficient to meet the need for free or low cost legal assistance and lift restrictions that prevent legal services lawyers from providing the full array of necessary services;
- intensify the Access to Justice Initiative's activities with respect to civil legal services and provide it with necessary leadership, funding and other support to reach its full potential;
- file supportive amicus briefs in right-to-counsel litigation in federal and state courts;
- support and coordinate efforts on the state and local level to establish a civil right to counsel by: funding state access-to-justice initiatives; developing, evaluating, and disseminating "best practices" for state and local governments; and urging adoption of the ABA Model Access Act; and
- enact federal legislation to guarantee right to counsel in immigration proceedings and all civil cases in federal court where liberty interests or basic human needs are at stake.

INTRODUCTION

Civil Legal Services and the Justice Gap in America

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.[1] Many who are low-income and poor in the U.S. 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.[2] There is no federal constitutional right to counsel in civil cases,[3] and the primary mechanism for providing civil legal services to people who are poor and low-income is underfunded and severely restricted. The result is a crisis in unmet civil legal needs that disproportionately harms racial minorities, women, and non-English speakers. Concerned with the U.S.'s human rights record in this regard, the U.N. Human Rights Committee has asked the U.S. 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,[4] and to improve legal representation for women victims of domestic violence.[5]

Many U.S. states have taken important steps to provide counsel in certain civil cases for people who are poor and low-income,[6] 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

1 Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Needs of Low Income Americans*, 1 (Sept. 2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [hereinafter *Documenting the Justice Gap*].

2 Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 Fordham Urb. L.J. 37, 40-41 n.7 (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. Hamelin*, 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. Dep't 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*, ¶ 8(e), U.N. Doc. CCPR/C/USA/Q/4 (April 29, 2013).

5 *Id.* at ¶ 20.

6 *See* Part III, *infra*.

civil assistance depends on geography and luck.[7] And, programs that look similar on their face may differ in their operation.[8]

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.[9] 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.[10]

Though more research in this area is needed,[11] 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.[12] Represented parties enjoy statistically more favorable results in housing,[13] family law,[14] and small claims cases.[15] 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 two or three times higher—than those who are unrepresented in comparable cases.[16]

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7 Rebecca Sandefur, *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*, American Bar Foundation, 9-11 (October 7, 2011), http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf.

8 *Id.* at 12.

9 *See Documenting the Justice Gap, supra* note 1, at 1-2. For example, 60 percent of litigants in New York's family and housing courts reported that they could not afford counsel. Engler, *supra* note 2, at 41 (citing Office of the Deputy Chief Administrative 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); New Hampshire Supreme Court Task Force on Self-Representation, *Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Courts*, 2 (2004), http://www.ajs.org/prose/pdfs/ NH%20report.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"); Boston Bar Association Task Force on Unrepresented Litigants, *Report on Pro Se Litigation*, Boston Bar Association, 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*, Center for American Progress, 15 (June 2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/justice.pdf (noting that the most recent national survey of civil legal need took place in 1994 as a service project of the American Bar Association Consortium on Legal Services and the Public). *See also* Sandefur, *supra* note 7, at 22. .

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

13 Engler, *supra* note 2, at 46-51. *See also Boston Bar Association Task Force on the Civil Right to Counsel, The Importance of Representation in Eviction Cases and Homelessness Prevention (March 2012),* http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf. *See generally D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future, 126 Harv. L. Rev. 901 (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), *available at* http://www.law.seattleu.edu/Documents/sjsj/2010fall/Abel.pdf.

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

16 *Id.* at *58-59. See also* New Hampshire Citizens Commission on the State Courts, *Report and Recommendations*, 11 (June 1, 2006), 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

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.[17] 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.[18] Similarly, in Pennsylvania family courts, most low-income litigants, who include a disproportionate number of racial minorities and women, lack representation.[19] Further illustrating the intersection of race and gender, a California study found that about 85 percent of litigants appearing in family court without an attorney were women, and the majority of them were women of color.[20] 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.[21]

Lack of representation in civil cases is especially problematic for immigrants in removal proceedings. Although federal law provides that defendants in immigration removal proceedings may not be denied the ability to be represented by retained counsel, there is no statute directing the federal government to pay for such counsel in these cases, leaving many who cannot afford it without representation.[22] Federal law also does not provide for counsel for unaccompanied immigrant children[23] and immigrants with serious mental disabilities.[24] 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.[25] Nevertheless, a staggering 84 percent of detained noncitizens

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law students did not yield positive results. James Greiner & Cassandra Wolos Pattanayak, *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 Aug. 6, 2013).

17 *See Documenting the Justice Gap*, *supra* note 1, at 27; Alemayehu 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 Office of the Deputy Chief Administrative Judge for Justice Initiatives, *Self-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys*, 3 (2005), http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf.

19 Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, *Final Report,* 457 (2003), http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

20 California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts, *Final Report*, 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).

22 8 U.S.C. § 1229a(b)(4)(A) (2011).

23 *See* 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* Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, 42 (2010), http://www.hrw.org/sites/default/files/reports/usdeportation0710webwcover_1_0.pdf.

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

in proceedings before immigration courts lack counsel.[26] In removal proceedings, representation can have a substantial impact on whether a person is able to remain in the country.[27] For example, one study in New York found that 74 percent of non-detained immigrants with counsel prevailed in their cases, compared to only 13 percent of non-detained immigrants without counsel.[28]

The United States acknowledges the many inequalities that stem from the absence of a civil right to counsel.[29] 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 the U.S. into compliance with its obligations to provide equal access to justice under Article 14 of the ICCPR.[30] In its response to the Committee's List of Issues, the U.S. reiterates the importance of the Access to Justice Initiative.[31] 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 14.

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.

26 *See* American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases* (Feb. 2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf; *see also* Amnesty International, *Jailed Without Justice: Immigration Detention in the U.S.A.*, 30 (2008), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

27 Donald Kerwin, Migration Policy Institute, *Revisiting the Need for Appointed Counsel*, 5-7 (April 2005), http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

28 *See* Steering Committee of the New York Immigration Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings,* 33 Cardozo L. Rev. 357, 364-65 (Dec. 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*].

30 *Id.* at ¶¶ 301-02.

31 *United States Written Responses to Questions From the United Nations Human Rights Committee Concerning the Fourth Periodic Report,* ¶ 29, U.N. Doc. CCPR/C/USA/Q/4/Add.1 (July 8, 2013).

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.[32]

Article 14 of the ICCPR guarantees procedural fairness, providing, in relevant part, that:

> All persons shall be equal before the courts and tribunals. In 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.[33]

Article 2 of the ICCPR establishes that each state is bound by the treaty to undertake to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . "[34] Article 26 of the ICCPR reiterates the guarantee of non-discrimination.[35]

As articulated by the Human Rights Committee, these protections include the right to counsel in certain civil cases. General Comment 32 clarifies that Article 14'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

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 50 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; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967), *ratified by the U.S.* Sept. 8, 1992 [hereinafter *ICCPR*]. Under U.S. 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, § 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 U.S. attached an understanding that "to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall 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." *U.S. reservations, declarations, and understandings,* International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

33 *ICCPR*, art. 14.

34 *Id.* at art. 2.

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").

> 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.[36]

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."[37] In commenting on Sweden's treatment of its indigenous Sámi population, the Committee recommended that the government provide adequate legal aid to Sámi villages in land rights disputes.[38] 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.[39] The Committee has made similar recommendations with regard to treatment of asylum seekers by the governments in Switzerland and El Salvador.[40] And the Committee recommended that the government of Serbia provide for free legal assistance "in any case where the interests of justice so requires."[41] Similarly, the Committee has found that a state's failure to provide counsel in contentious civil cases violates its obligations under the Covenant.[42]

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

36 Human Rights Comm., *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and To a Fair Trial*, ¶ 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

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

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

39 Human Rights Comm., *Concluding Observations--Chile*, ¶ 14, U.N. Doc. CCPR/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. CCPR/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. CCPR/C/SLV/CO/6 (Nov. 18, 2010).

41 Human Rights Comm., *Concluding Observations--Serbia*, ¶ 18, U.N. Doc. CCPR/C/SRB/CO/2 (March 24, 2011).

42 *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, ¶ 7.10, U.N. Doc. CCPR/C/67/D/845/1998 (2002) (finding a violation of Article 14 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. CCPR/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).

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.[43] Similarly, Special Rapporteurs have noted that civil counsel can play a significant role in vindicating and protecting the rights of racial minorities,[44] women,[45] and migrants.[46] 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."[47]

Most recently, the Special Rapporteur on the Independence of Judges and Lawyers noted in her March 2013 report to the General Assembly that "legal aid is an essential component of a fair and efficient justice system founded on the rule of law... it is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights"[48] 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.[49] The Special Rapporteur emphasized that the right to free legal assistance applies in "any judicial or extrajudicial procedure

43 Special Rapporteur on Adequate Housing, *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,* Human Rights Council, ¶ 69, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012) (by Raquel Rolnik).

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

45 *See* 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*, Human Rights Council, ¶ 83, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk) ("States must ensure that quality physical and psychological health services and legal assistance are provided to victims of violence"); Special Rapporteur on Violence against Women, its Causes and Consequences, *Annual Report to Comm. on Human Rights: International, Regional and National Developments in the Area of Violence against Women (1994-2003)*, Human Rights Council, ¶ 90, U.N. Doc. E/CN.4/2003/75 (Jan. 6, 2003) (by Radhika Coomaraswamy) ("States should establish, strengthen or facilitate support services to respond to the needs of actual and potential victims, including . . . legal aid. . . .").

46 *See* Special Rapporteur on the Human Rights of Migrants, *Annual Report to the Human Rights Council*, Human Rights Council, ¶ 46, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008) (by Jorge Bustamante); *See also* Special Rapporteur on the Human Rights of Migrants, *Annual Report to the Comm. on Human Rights*, Human Rights Council, ¶ 24, U.N. Doc. E/CN.4/2003/85 (Dec. 30, 2002) (by Gabriela Rodríguez Pizarro) ("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* Special Rapporteur on Extreme Poverty and Human Rights, *Report on Access to Justice for People Living in Poverty*, Human Rights Council, ¶ 62, U.N Doc. A/67/278 (August 9, 2012) (by Maria Magdalena Sepúlveda Carmona).

48 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) (by Gabriela Knaul).

49 *Id.* at ¶ 28.

aimed at determining rights and obligations"[50] 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."[51]

The CERD Committee has taken particular notice of the United States' failure to provide counsel in civil cases. During its 2008 review of the United States, the CERD Committee expressed concern that the lack of civil counsel for persons living in poverty disproportionately and negatively affects racial minorities in the U.S.[52] and recommended that the U.S. "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."[53]

The U.S.'s 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' obligation 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.[54] 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.[55]

The Charter of the Organization of American States, of which the United States is a member, contains explicit support of the civil right to 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."[56] 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.[57]

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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 "[The 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." *Airey v. Ireland*, 2 Eur. Ct. H.R. 305, ¶¶ 24-26 (1979).

55 *See Steel and Morris v. The United Kingdom*, 22 Eur. Ct. H.R. 403 (2005). *See also* Martha F. Davis, Program on Human Rights and the Global Economy, Northeastern Law School, *Comment to Petition 10-08*, 6 (Sept. 12, 2011), http://www.wicourts.gov/supreme/docs/1008commenthrge.pdf.

56 Charter of the Organization of American States, art. 45, *opened for signature* Apr. 30, 1948, 1609 U.N.T.S. 119, amended by Protocol of Buenos Aires, O.A.S.T.S. No. 1-A (1967), further amended by Protocol of Cartagena, O.A.S.T.S. No. 66 (1985), further amended by Protocol of Washington, OEA/Ser.A/2 Add. 3 (SEPF) (1992), further amended by Protocol of Managua, OEA/Ser.A/2 Add. 4 (SEPF) (1993).

57 Inter-Am. Comm'n 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/

II. THE UNITED STATES GOVERNMENT FAILS TO MEET ITS INTERNATIONAL OBLIGATIONS

In its report to the Human Rights Committee, the U.S. 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."[58] 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 it mentions for addressing these inequities are the Legal Services Corporation, the Access to Justice Initiative, and the *in forma pauperis* statute. While the U.S. 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 U.S. highlights the Legal Services Corporation (LSC) as a key component in its efforts to improve civil litigants' ability to access equal justice.[59] 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. 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."[60] Congress also emphasized its desire that the Legal Services Corporation be independent, that "the lawyers in the program have full freedom to protect the best interests of their clients," and that the U.S. 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."[61] 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

Ser.L./V/II.129 Doc. 4 (2007).

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

59 *Id.* at ¶ 302.

60 Legal Services Corporation Act, 42 U.S.C. § 2996(2) (2008).

61 *See* 42 U.S.C. § 2996(6) (2008); *see also* Richard Nixon, *Special Message to the Congress Proposing Establishment of a Legal Services Corporation* (May 5, 1971), The American Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=2998 (last visited July 24, 2013).

appropriations, 90 percent of which it distributes to 134 independent civil legal aid programs.[62] Congressional appropriations for LSC have steadily decreased over the past several years: from $420 million in 2010 to $341 million in 2013.[63] 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 40% of what they were at the height of LSC funding in 1979.[64] 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 in more need of civil legal services than ever before.[65] Legal services providers report being flooded with a huge increase in clients seeking legal assistance for more severe legal problems.[66]

The recession has also affected LSC grantees' non-federal sources of funding, leaving devastating holes in the budgets of LSC-funded organizations.[67] Interest on Lawyer Trust Account (IOLTA) programs are the largest national source of civil legal funding after LSC grants, amounting to 13 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.[68] The economic recession resulted in a massive decline in interest rates and a consequent decrease in revenues which IOLTA uses to fund legal services organizations. From 2007 to 2009, IOLTA revenues decreased 75 percent, from $371 million to just $92 million.[69]

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 1,000 staff positions and more than 30 offices.[70]

As a result, LSC and its grantees have been unable to meet current demands for their civil legal services. Programs funded by LSC see nearly a million cases per year to their conclusion and provide other legal assistance to more than 2.3 million people, 70 percent

62 Legal Services Corporation, *Fact Sheet on the Legal Services Corporation*, http://www.lsc.gov/about/what-is-lsc (last visited July 15, 2013) [hereinafter *LSC Fact Sheet*].

63 Legal Services Corporation, *LSC Funding*, http://www.lsc.gov/congress/lsc-funding (last visited July 15, 2013) [hereinafter *LSC Funding*]. In September 2012, Congress allocated $350 million to the Legal Services Corporation for FY 2013. This was eventually reduced to $341 million due to sequestration in late March 2013. *Id.*

64 Legal Services Corporation, *Fact Book 2012*, 3 (July 2013), http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/2012Fact%20Book_FINAL.pdf [hereinafter *LSC Fact Book 2012*].

65 Brennan Center for Justice, *Civil Legal Services: Low Income Clients Have Nowhere to Turn Amid the Economic Crisis*, 1 (June 25, 2010), http://brennan.3cdn.net/ed5d847dfcf163a02a_exm6b5vya.pdf.

66 *Id.*

67 *Id.* at 2.

68 *Id.*

69 *Id.*

70 John G. Levi, *Opening Remarks at the 2013 White House Forum on Increasing Access to Justice* (April 16, 2013), *available at* http://www.lsc.gov/board-directors/chairmans-page/statements/lsc-chairman-john-levis-remarks-2013-white-house-forum.

of which are women.[71] However, nearly one in five Americans meet the federal poverty guidelines that qualify them for civil legal assistance by LSC, a population that now numbers over 60.4 million and increased by 3.6 million from 2010 to 2011.[72] This number is expected to increase to 66.6 million in 2013, an increase of 35.1% since 2005.[73] A disproportionately high number of individuals that meet the federal poverty guidelines are racial minorities and women.[74] And, in 2008 an estimated 25.3 million of those eligible for LSC funding (almost half of those eligible) faced a civil legal problem.[75]

LSC-funded programs have nowhere near the funding and resources necessary to respond to this need.[76] 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."[77] This means that LSC-funded organizations are forced to reject nearly one million cases because they lack the funding to handle them.[78] According to the 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."[79]

And 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.[80]

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 percent of

71 *LSC Fact Sheet*, *supra* note 62.
72 Press Release, Legal Services Corporation, *Statement by John G. Levi, Chairman Board of Directors, on New Federal Poverty Data* (Nov. 13, 2011), *available at* http://www.lsc.gov/media/press-releases/statement-john-g-levi-chairman-board-directors-new-federal-poverty-data [hereinafter *Statement by John G. Levi*].
73 Conference of Chief Justices and Court Administrators, *Resolution 1 in Support of Continued Federal Funding for the Legal Services Corporation*, American Bar Association 5 (May 2012), http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/05/national_meetingofstateaccesstojusticechairs/ls_sclaid_atj_funding_lsc.authcheckdam.pdf.
74 *See* U.S. Census Bureau, *Current Population Survey, Annual Social and Economic Supplement* (2012), http://www.census.gov/prod/techdoc/cps/cpsmar12.pdf.
75 Rebecca Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 Seattle J. Soc. Just. 51, 58 (2010). More recent studies among low income populations in specific states or communities have often found even higher rates of the incidence. Sandefur, *supra* note 7, at 2.
76 *Statement by John G. Levi*, *supra* note 72.
77 *Documenting the Justice Gap*, *supra* note 1, at 1.
78 *Id.* at 9-11.
79 *Id.* at 3.
80 Brennan Center for Justice, *supra* note 65, at 1.

the poverty line, which for a family of four amounts to an income of $27,938 a year.[81] While these income thresholds limit the number of individuals qualified 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.[82] 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.[83] The Trafficking 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.[84] However this representation must be "directly related to the prevention of, or obtaining relief from, the battery or cruelty."[85]

Federal restrictions also prohibit LSC-funded organizations from representing incarcerated individuals in any civil litigation or administrative challenges to the conditions of incarceration.[86] 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.[87]

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 rulemak-

81 Legal Services Corporation: Income Level for Individuals Eligible for Legal Assistance, 77 Fed. Reg. 4909, 4910 (Feb. 1, 2012) (to be codified at 45 C.F.R. pt. 1611).

82 Restrictions on Legal Assistance to Aliens, 45 C.F.R. § 1626 (2011). *See also* Alan W. Houseman & Linda E. Perle, Center for Law & Social Policy, *What Can and Cannot Be Done: Representation of Clients by LSC Funded Programs*, 5 (Jan. 22, 2009), http://www.clasp.org/admin/site/publications/files/0524.docx.

83 45 C.F.R. § 1626.4; Houseman & Perle, *supra* note 82, 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).

84 *See* Violence against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2160, § 104(a)(C).

85 *See* 45 C.F.R. § 1626.4(2).

86 *See* Restrictions on Legal Assistance with Respect to Criminal Proceedings, 45 C.F.R. § 1613 (2011); Restrictions on Actions Collaterally Attacking Criminal Proceedings, 45 C.F.R. § 1615 (2011); Representation of Prisoners, 45 C.F.R. § 1637 (2011). *See also* Houseman & Perle, *supra* note 82, at 5.

87 Restriction on Representation in Certain Eviction Proceedings, 45 C.F.R. § 1633 (2011); Restriction on Assisted Suicide, Euthanasia, and Mercy Killing, 45 C.F.R. § 1643 (2011). *See also* Houseman & Perle, *supra* note 82, at 5-6.

ing.[88] Federal restrictions forbid conducting or participating in grass roots lobbying[89] 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."[90] LSC-funded organizations cannot initiate, participate, or engage in class actions.[91] 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.[92] This provision has been called the "poison pill" due to the impediments it places on the legal tools and activities available to organizations that take a single dollar of LSC funding.[93] For example, in Maryland, where LSC funding accounts for only 16% of total funding, restrictions nonetheless impact 100% of the practice.[94] According to a 2009 report, nationwide, this restriction annually inhibits over $490 million of state, local and private funding, which is 58 percent of the resources of LSC grantees.[95] It also deters non-federal spending on legal services by denying state, local, and private funders control over how their money is spent.[96] In order to escape these federal restrictions on non-federal funding sources, LSC recipients must set up affiliate or separate entities and transfer the non-LSC funds to these new organizations for use in federally restricted activities.[97] These funding acrobatics to "unrestrict" non-federal money waste scarce resources by requiring the creation of inefficient, duplicative organizations, further limiting the funding available to civil legal services.[98]

President Obama and the U.S. Senate Appropriations Committee have advocated

88 Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612 (2011). *See also* Houseman & Perle, *supra* note 82, 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 rule-making and may "participate in a public comment in a rulemaking proceeding").

89 45 C.F.R. § 1612. *See also* Houseman & Perle, *supra* note 82, at 4.

90 *See, e.g.*, 45 C.F.R. § 1612. *See also* Houseman & Perle, *supra* note 82, at 6.

91 Class Actions, 45 C.F.R. § 1617 (2011). *See also* Houseman & Perle, *supra* note 82, at 4-5. It is worth noting that the U.S., 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").

92 Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 45 C.F.R. § 1610 (2011). *See also* Houseman & Perle, *supra* note 82, at 4.

93 Brennan Center for Justice, *FY2011 Appropriations Process for Civil Legal Services* (March 11, 2011), http://www.brennancenter.org/analysis/fy-2011-appropriations-process-civil-legal-services (last visited July 24, 2013) [hereinafter *FY2011 Appropriations Process*].

94 *See* Maryland Legal Aid, *Annual Report 2012*, 16 (May 2013), http://www.mdlab.org/LAB%20docs/2012-annual-report.pdf.

95 Rebecca Diller & Emily Savner, Brennan Center for Justice, *A Call to End Federal Restrictions on Legal Aid for the Poor*, i (2009), http://brennan.3cdn.net/7e05061cc505311545_75m6ivw3x.pdf.

96 *Id.*

97 Houseman & Perle, *supra* note 82, at 4.

98 Diller & Savner, *supra* note 95, at i.

the repeal of restrictions on LSC funding, including the poison-pill provision. This effort made some progress in 2010, when the U.S. House of Representatives and U.S. Senate voted to remove restrictions on LSC grantees claiming, collecting, and retaining attorney fee awards.[99] However, the President and Senate's efforts to repeal the poison pill restriction in the 2011 appropriations bill failed. Despite President Obama's recent exhortations to Congress to repeal the poison pill provisions, the broad restrictions on non-LSC funds remain.

These federal restrictions severely limit the independence and flexibility of LSC grantees. They also undermine efforts to effect systemic change through strategies that extend beyond direct legal services to political participation and community outreach and education. Congress' current, restrictive treatment of LSC funded organizations thus falls far short of its original vision of a legal services funder that provides rigorous, critical, and independent civil legal support to address the vast justice gap in this country.

B. The Access to Justice Initiative Lacks the Resources and Capacity that are Necessary to Fulfill its Mandate Regarding Civil Legal Assistance

The U.S.'s Fourth Periodic Report to the Human Rights Committee champions the new Access to Justice Initiative (ATJI) in the Department of Justice as a mechanism that works "within the Department of Justice, across federal agencies, and with state, local, and tribal justice system stakeholders to increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers."[100] The U.S. Department of Justice established the ATJI in March of 2010 in response to what it recognized as "the access-to-justice crisis in the criminal and civil system."[101] Announcing the creation of the new initiative, Attorney General Eric Holder described the Access to Justice Initiative as an invaluable arm of the Department of Justice that would complement the work of the department by "provid[ing] access to justice and… work[ing] to continuously enhance the fairness and integrity of our legal system."[102]

The ATJI is a promising development and has strong potential for addressing civil legal needs. Indeed, the ATJI's mission – "to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth or status" – appears to be comprehensive.[103] And the Initiative has indeed improved access to civil legal services to some degree. The Initiative, for example, collaborates with other federal

99 *FY2011 Appropriations Process*, *supra* note 93; Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034.
100 *Fourth Periodic Report, supra* note 29, at ¶ 318.
101 Access to Justice Initiative, Department of Justice, *Mission,* http://www.justice.gov/atj/ (last visited July 24, 2013) [hereinafter *Access to Justice Initiative Mission*].
102 Department of Justice, *Attorney General Holder Delivers Remarks at Street Law Awards Dinner* (April 28, 2010), http://www.justice.gov/ag/speeches/2010/ag-speech-100428.html (last visited July 24, 2013).
103 *Access to Justice Initiative Mission, supra* note 101.

agencies to encourage them to incorporate such legal services into their work. The Initiative has launched the Legal Aid Interagency Roundtable (LAIR), which works with 18 participating agencies to increase public awareness around the impact of legal aid programs in furthering federal efforts to increase access to education and employment, health and housing, and the removal of other barriers that prevent access to federal programs.[104] For example, LAIR has worked with the Department of Justice's Bureau of Justice Assistance to secure federal funds to pay for legal assistance in securing driver's licenses, expunging criminal records, and litigating inappropriate denials of housing or employment.[105] And LAIR has worked with the U.S. Department of Veteran Affairs and the Office of Tribal Justice Support to facilitate the development of Medical-Legal Partnerships, which allow vulnerable individuals to receive medical support and legal assistance at the same time.[106]

In addition, the Initiative has introduced AmeriCorps VISTA, the U.S. federal government's national service program designed to fight poverty, to legal services organizations and has provided guidance for legal services organizations interested in sponsoring a VISTA project at their site.[107] The Initiative has also collaborated with other organizations and agencies to improve access to legal services and, importantly, is working to create an independent structure to produce research about legal aid, the dimensions and drivers of unmet legal needs, and the relative effectiveness of delivery of legal services.[108]

Nevertheless, the ATJI faces significant constraints. Currently, the ATJI is operating at limited capacity without a permanent Senior Counselor and with insufficient staffing. At a point when the ATJI had a high profile senior counselor, the initiative appeared to have influence as a "bully pulpit," as illustrated by Lawrence Tribe's call for the institution of an Access to Justice Commission in every state in his 2010 speech to the Annual Conference of Chief Justices.[109] The judges present responded with a resolution of the Conference of Chief Justices in support of Access to Justice Commissions.[110] It has been over one year since Mark Childress, Lawrence Tribe's successor, left the

104 Access to Justice Initiative, Department of Justice, *Three-Year Anniversary Accomplishments*, 5 (March 2013), http://www.justice.gov/atj/accomplishments.pdf [hereinafter *Three-Year Anniversary Accomplishments*]; *see also* Department Of Justice, *Acting Associate Attorney General Tony West Speaks at the National Academy of Elder Law Attorneys 2013 Annual Conference* (May 2, 2013), http://www.justice.gov/iso/opa/asg/speeches/2013/asg-speech-1305021.html (last visited July 24, 2013); Department of Justice, *Attorney General Eric Holder Speaks at the White House Forum on Increasing Access to Justice* (April 16, 2013), http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1304161.html (last visited July 24, 2013).

105 *Three-Year Anniversary Accomplishments*, *supra* note 104, at 5.

106 *Id.* at 6.

107 *Id.*

108 *Id.* at 8.

109 Department of Justice, *Laurence Tribe, Senior Counselor for Access to Justice: Keynote Remarks at the Annual Conference of Chief Justices* (July 26, 2010), http://www.justice.gov/atj/opa/pr/speeches/2010/atj-speech-100726.html (last visited July 24, 2013).

110 Conference of Chief Justices & State Court Administrators, *Resolution 8: In Support of Access to Justice Commissions*, 1 (July 28, 2010), http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/Resolution_8_ATJ_07_10.authcheckdam.pdf.

post of Senior Counselor to become Deputy Chief of Staff at the White House. To date, only an acting Senior Counselor fills the role. The appointment of an accomplished successor to the role of Senior Counselor would enable the ATJI to enhance its influence. Moreover, the Initiative currently functions with approximately five staff members, and does not possess the capacity to engage in its own research or analysis, to disseminate best practices, or to engage extensively in public education efforts to raise awareness around the importance of civil legal assistance in the United States.

C. The Federal *In Forma Pauperis* Provision is Discretionary, its Requirements are Hard to Meet, and Appointments Under the Statute are Extremely Rare

The federal *in forma pauperis* statute is another mechanism that the U.S. identifies as closing the justice gap for people in poverty and "ensur[ing] that indigent litigants have meaningful access to the federal courts."[111] The *in forma pauperis* statute provides that a court can "request an attorney to represent any person unable to afford counsel."[112] Yet this is simply an option for the court to ask an attorney to serve as counsel; whether an individual litigant benefits from this statute is solely up to the discretion of the specific judge presiding over the case.[113] The default rule varies across the country, but a majority of jurisdictions only grant requests for counsel in exceptional cases where the court determines that the indigent litigant has made sufficient efforts to obtain counsel independently and has been unable to do so in a case raising complex factual and legal matters where the indigent litigant lacks the competency to represent himself.[114] It is

111 *Fourth Periodic Report, supra* note 29, at ¶ 302 (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)).
112 *Id.*
113 *See Mallard v. U.S. Dist. Court for Southern Dist. of Iowa,* 490 U.S. 296 (1989) (holding that 28 U.S.C. § 1915(e), which provides that federal courts may "request" an attorney to represent those unable to afford counsel, does not authorize a federal court to make a compulsory appointment of an attorney to represent indigent clients in civil cases).
114 *See*, e.g., *Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007) (noting that to qualify for appointment of counsel, indigent litigant must make reasonable efforts to find counsel whom he or she is unable to secure himself and the court must consider whether given the difficulty of the case, the litigant is competent to try it himself); *Willis v. FBI*, 274 F.3d 531 (D.C. Cir. 2001) (noting that the discretionary decision of district courts to appoint counsel in forma pauperis is based on whether the litigant is able to represent himself and make logical representations in court, whether the case involves complex legal or factual issues, and whether extensive investigation and discovery is required); *Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999) (noting that appointment of counsel for indigent defendants under 28 U.S.C. § 1915(e) should be made only in exceptional circumstances); *Sidles v. Lewis*, 145 F.3d 1340 (9th Cir. 1998) (holding that the district court did not abuse its discretion by denying appointment of civil counsel for indigent litigant who had ability to articulate claims clearly and whose case was of a straightforward nature that did not indicate exceptional circumstances requiring appointment of counsel); *Duke v. Hawk*, 113 F.3d 1246 (10th Cir. 1997) (emphasizing that there is no right to counsel in civil cases but that the court should consider relevant factors in determining whether or not to appoint counsel including the merit of the claims, nature of the factual issues raised in those claims, litigant's ability to present the claims, and the complexity of legal issues raised by the claims); *Tabron v. Grace*, 6 F.3d 147 (3d Cir. 1993) (holding that counsel should be appointed in exceptional cases, which can be determined by looking at 6 factors: the plaintiff's ability to present his/her own case, the difficulty of the particular legal issues, the degree to which factual investigation is required and the ability of the plaintiffs to pursue that investigation, the plaintiff's capacity to retain counsel on his or her own behalf, the extent to which the case is likely to turn on credibility determinations, and whether the case will require testimony from expert witnesses); *Lopez v. Reyes*, 692 F.2d 15 (5th Cir. 1982) (noting

extremely difficult to reverse a court's refusal to provide counsel based on a challenge of the exercise of discretion given the high standard of review applied by appellate courts. Appellate courts review lower courts' denial of requests for appointment of counsel for abuse of discretion[115] and reversal requires a showing of prejudice.[116] Thus, even if an appeals court finds that a judge abused her discretion by failing to appoint counsel, the appellate court will not reverse the lower court's decision unless it believes that the result would have been different with the representation of counsel.[117]

Consequently, the primary benefit of *in forma pauperis* proceedings for civil litigants is its provision that "[a]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor."[118] Yet even this provision is subject to discretionary application by courts.[119] And, despite its general and seemingly expansive language, U.S. courts have generally read the provision of "costs and fees" narrowly to simply entitle an individual who qualifies for *in forma pauperis* status to a waiver of court filing fees.[120] Courts operating under the *in forma pauperis* statute frequently refuse to waive or provide relief for the many other expenses that are inextricable from and essential to typical engagement with the court system.[121]

Ultimately, the *in forma pauperis* provisions are too discretionary, unfunded, and narrowly applied to meet the obligation of fairness that is required under the ICCPR's article 14.

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that appointment of counsel for indigent defendants should be made only in exceptional circumstances); *Cook v. Bounds*, 418 F.2d 779 (4th Cir. 1975) (same).

115 *See*, e.g., *Bracey v. Grondin*, No. 12-1644 (7th Cir. March 15, 2013).

116 *See*, *e.g.*, *Duke v. Hawk*, 113 F.3d 1246 (10th Cir. 1997) (finding that district court decisions denying requests for appointment of counsel will not be overturned unless it will result in fundamental unfairness impinging on the indigent litigant's due process rights).

117 *See, e.g., Pruitt v. Mote*, 503 F.3d 647, 659 (7th Cir. 2007) ("even if a district court's denial of counsel amounts to an abuse of discretion, [appellate courts] will reverse only upon a showing of prejudice...an erroneous denial of pro bono counsel will be prejudicial if there is a reasonable likelihood that the presence of counsel would have made a difference in the outcome of the litigation").

118 28 U.S.C. §1915(a)(1) (2010).

119 *See, e.g., Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983) (per curiam) (noting "broad discretion"); *Williams v. Estelle*, 681 F.2d 946, 947 (5th Cir. 1982) (per curiam) (same); *Hogan v. Midland County Comm'rs Court*, 680 F.2d 1101, 1103 (5th Cir. 1982) (only limit on broad discretion is that court cannot act arbitrarily or dismiss application on erroneous grounds).

120 10 Fed. Prac. & Proc. Civ. § 2673 (3d ed.) (citing, *e.g.*, *In re Richard*, 914 F.2d 1526 (6th Cir.1990)).

121 10 Fed. Prac. & Proc. Civ. § 2673 (3d ed.) (citing, *e.g.*, *Harless v. United States*, 329 F.2d 397 (5th Cir. 1964)).

III. STATE EFFORTS TO FILL THE JUSTICE GAP ARE IMPORTANT BUT INSUFFICIENT

States do a great deal to mitigate the substantial gaps resulting from the federal government's failure to provide a broad right to counsel in civil cases. For example, all fifty states have statutory provisions that require the state government to provide counsel in some civil commitment hearings.[122] State legislatures have implemented a number of programs to increase access to civil counsel and examine the most cost-effective way of assisting low-income individuals in civil claims. A number of state court decisions have also required states to provide the right to counsel in specific types of civil cases. Finally, a number of state bar initiatives encourage state-wide efforts to provide counsel in civil cases. Still, states have a fragmented approach to providing meaningful access to counsel in civil cases, making the quantity and quality of services that low-income individuals receive dependent upon the state in which they reside. Moreover, there is no state that has made significant strides in providing a comprehensive right to counsel in cases involving basic human needs such as shelter, sustenance, and safety.

A. State Statutory and Constitutional Rights to Counsel are Patchwork

Statutory provisions and court decisions are the most common way in which states provide for meaningful access to counsel in civil cases. All states provide at least a limited right to counsel in some subset of civil cases. However, no state provides a general right to counsel for all civil cases.[123]

A comprehensive overview of statutes and cases providing a right to counsel in civil cases divides these statutes primarily into three broad categories: family law matters, involuntary commitment, and medical treatment.[124] In addition, there are a number of smaller categories in which states provide a right to counsel in civil cases, such as civil arrest or the release of mental health records.[125]

Collectively, these statutes and decisions fill part of the gap left by the federal govern-

122 John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L. Rev. 763, 800 (2013).

123 Until 2001, Indiana had a statute that stated, "If the court is satisfied that a person who makes an application [for in forma pauperis status] does not have sufficient means to prosecute or defend the action, the court shall … (2) assign an attorney to defend or prosecute the cause." Ind. Code § 34-10-1-2. As one court put it, the statute as it read at that time "mandates that courts appoint counsel for indigent civil litigants in all situations ... The threshold determination of indigency is a matter within the sound discretion of the trial court ... Once indigency is established, a trial court has no discretion under the statute to determine whether to grant a request for appointed counsel." *Dickson v. D'Angel*o, 749 N.E.2d 96, 99 (Ind. Ct. App. 2001). The statute was amended in 2001 to say that a court "may, under exceptional circumstances, assign an attorney to defend or prosecute the cause." *Id.*

124 *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, Clearinghouse Rev. J. Poverty L. & Pol'y 245, 245 (2006).

125 *Id.* at 247.

ment in the civil legal context. However, such protections are absent in many other types of civil cases, including those implicating fundamental human needs like housing, safety, sustenance, and private child custody disputes.[126] For example, the 2008 foreclosure crisis had a significant impact on low-income homeowners, who were more likely to have subprime mortgages resulting in foreclosure.[127] Without legal representation, many homeowners are unaware of legal defenses to foreclosure and unable to take advantage of loan modification and refinancing programs (in some cases, programs in which the homeowners were entitled by law to participate) that can help them retain their homes.[128] While nationwide data on the absence of legal representation is unavailable, data from several counties throughout the United States found that there are a high number of unrepresented defendants in foreclosure actions. For example, in Stark County, Ohio, 86 percent of defendants in foreclosure proceedings went without counsel in 2008.[129] In spite of the clear need for legal representation in foreclosure proceedings, states have not provided a right to counsel in these cases, even in places where the need is particularly high.

Moreover, the patchwork approach to right to counsel means that all individuals in the United States do not receive equal treatment with regard to meaningful access to counsel in civil cases, and residents of neighboring states are subject to substantially different statutory protections. In instances where a statutory provision makes appointment of counsel discretionary with the judge, the variance can even be from court to court or judge to judge. In some states, even where statutes provide for a right to counsel they require that persons request counsel.[130] This is problematic because litigants may not know that they have the right to do so.

Lastly, most state statutes providing for the right to counsel either explicitly or implicitly require that the person seeking state-provided counsel provide proof of indigence. While this ensures that limited resources can be allocated to those who need assistance the most, it could also limit people from seeking counsel if proving indigence is burdensome or if they do not meet the criteria set by the state, in spite of having limited resources. Indeed, there is widespread recognition that official federal poverty guidelines are out of date and thus may not capture the full extent of indigent need.[131] The current administration recently seemed to acknowledge as much by creating a "supplemental poverty measure" (SPM), based on the recommendations of a National Academy of Sciences working group in 1992.[132] The SPM accounts for a

126 *See* Pollock, *supra* note 122.
127 Melanca Clark, *Foreclosures: A Crisis in Legal Representation*, Brennan Center for Justice, 7 (2009), http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkx.pdf.
128 *Id.* at 12.
129 *Id.*
130 *See, e.g.*, Ala. Code § 12-15-305; Ariz. Rev. Stat. § 8-872; Ark. Code § 9-27-316(h)(1); 705 Ill. Comp. Stat. § 405/1-5; Ind. Code § 31-34-4-6; Me. Rev. Stat. tit. 22, § 4005.2; N.M. Stat. § 32A-5-16.E; Or. Rev. Stat. §§ 419B-195, 419B-518, 433-466; S.D. Codified Laws § 26-7A-31.
131 Rourke L. O'Brien & David S. Pedulla, *Beyond the Poverty Line*, Stanford Social Innovation Review 32-33 (Fall 2010), http://www.ssireview.org/articles/entry/beyond_the_poverty_line (last visited Aug. 2, 2013).
132 U.S. Census Bureau, *Observations from the Interagency Technical Working Group on Developing a Supplemental*

number of important issues which the official guidelines neglect, including regional variations in cost-of-living and changes in the make-up of the average American.[133] However, eligibility for government assistance like appointment of counsel is often still determined with reference to official poverty guidelines, leaving many low-income Americans without meaningful access to justice in civil disputes.[134]

B. State Pilot Programs are Promising but Too Few in Number

Pilot programs have been initiated in a handful of states to explore whether providing counsel in certain civil cases leads to more accurate outcomes, cost savings, and/or greater judicial efficiency. Since cost is often cited as the reason why states cannot create a general right to civil legal representation (as well as the fear that providing more lawyers will slow down the courts), such programs are important for determining how states can best allocate scarce resources.

A leading example is California's pilot program, created by the Sargent Shriver Civil Counsel Act in 2009.[135] The Sargent Shriver Civil Counsel Act provides roughly $9.5 million per year for six years for seven organizations to provide civil legal representation for indigent parties in claims involving basic human needs such as housing, guardianship, and child custody cases.[136] The purpose of the Act is to determine how to best target financial resources for indigent parties by looking at the severity of the case and whether the party is likely to prevail, among other factors. In addition, the Act provides funding to examine how "to change procedures and practices to ensure that those parties who still lack attorneys have meaningful access to the courts, have their cases heard on the merits, and do not unintentionally give up their rights."[137] The pilot will also examine how to better coordinate courts, government service providers, and community resources.[138] The seven organizations participating in the program received their first round of funding in 2011, and the project will terminate in 2017 unless the legislature extends the Act.[139]

State Access to Justice Commissions throughout the country are examining how to best implement pilot projects providing for more meaningful access to counsel in civil cases. For example, in 2011, the Maryland Access to Justice Commission released a detailed list of implementation strategies for the civil right to counsel, which includes providing legal representation through a mixed delivery model that uses non-profit legal

Poverty Measure, Department of Commerce 2-3 (2010), http://www.census.gov/ hhes/povmeas/methodology/supplemental/research/SPM_TWGObservations.pdf.

133 *Id.* at 3-5.

134 O'Brien & Pedulla, *supra* note 131, at 32.

135 Assem. Bill No. 590 (2009-2010 Reg. Sess.), §§ 68650-51.

136 Press Release, Public Counsel Law Center, *Los Angeles Legal Groups Receive $8.4 Million to Assist Individuals and Families in Housing Cases* (April 29, 2011), *available at* http://www.lafla.org/pdf/Final%20Shriver%20Release%204.29.pdf. For the list of grantees, see http://www.courts.ca.gov/15703.htm.

137 Judicial Council, Judicial Branch of California, *Closing the Loop: The Sargent Shriver Civil Counsel Act*, http://www.courts.ca.gov/15583.htm (last visited July 24, 2013).

138 *Id.*

139 *Id.*

service providers and borrowing from the model of the Office of the Public Defender.[140] Recently, the state went a step further. The Maryland General Assembly passed a bill, in its 2013 session, creating a Task Force to Study Implementing a Civil Right to Counsel.[141] The Maryland task force will be staffed by the Access to Justice Commission and will produce a report and make recommendations by October, 2014 concerning providing a right to counsel, at public expense, in basic human needs cases.[142] The Texas Access to Justice Commission has also taken steps to support "right to civil counsel" pilot programs, creating in 2009 a new category of grant for precisely that purpose.[143] It is not just the access to justice commissions that have been involved. The Boston Bar Association's Civil Right to Counsel Task Force, for example, conducted pilots in two different housing courts,[144] and recently received money from the Massachusetts Attorney General to conduct a second round of eviction pilots. Pilot projects are also underway in Iowa (domestic violence)[145] and New York City (immigration).[146]

C. National and State Bar Initiatives are Important but Incapable of Closing the Gap on Their Own

Bar associations also work to increase access to civil legal representation by encourag-

140 Maryland Access to Justice Commission, Maryland Judiciary, *Implementing a Civil Right to Counsel in Maryland* (2011), http://www.courts.state.md.us/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf [hereinafter *Implementing a Civil Right to Counsel in Maryland*].

141 Maryland Judiciary Committee, *Senate Bill 262/House Bill 129: Task Force to Study Implementing a Civil Right to Counsel in Maryland* (Mar. 18, 2013), http://mgaleg.maryland.gov/2013RS/bills/hb/hb0129t.pdf.

142 The task force is charged to: (1) study the current resources available to assist in providing counsel to low–income Marylanders compared to the depth of the unmet need, including the resulting burden on the court system and the stress on other public resources; (2) study whether low–income Marylanders should have the right to counsel at public expense in basic human needs cases, such as those involving shelter, sustenance, safety, health, or child custody, including review and analysis of the Maryland Access to Justice Commission's "Implementing a Civil Right to Counsel in Maryland" report and each other previous report by a task force, commission, or workgroup on this issue; (3) study alternatives regarding the currently underserved citizenry of the State and the operation of the court system; (4) study how the right to counsel might be implemented in Maryland; (5) study the costs to provide meaningful access to counsel and the savings to the court system and other public resources; (6) study the possible revenue sources; and (7) make recommendations. *Implementing a Civil Right to Counsel in Maryland*, *supra* note 140.

143 Press Release, Texas Access to Justice Foundation, *Texas Access to Justice Foundation Awards New Grants for Pilot Projects Impacting the Texas Legal Delivery System* (Dec. 15, 2009), *available at* http://www.teajf.org/news/releases/Special-Board-Impact-Grants.aspx. Other examples include a proposal by advocates, in Wisconsin, to expand the court's rulemaking powers to allow for more appointments of counsel. This effort has transformed into a prospective pilot by the Wisconsin Access to Justice Commission to determine when judges would appoint had they the power. Supreme Court of Wisconsin, *In the Matter of the Petition to Establish a Right to Counsel in Civil Cases* (Feb. 24, 2012), https://docs.legis.wisconsin.gov/misc/sco/224.pdf. Also, the North Carolina Access to Justice Commission sponsored two pieces of legislation in 2009 and 2011 (ultimately unsuccessful) that would have appropriated funds for small pilot projects. *See* House Bill 1915, Session 2009 (as referred to the Judiciary II Subcommittee, May 20, 2011), http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1915v1.pdf; House Bill 895, Session 2011 (as referred to the Appropriations Committee, April 21, 2011), http://www.ncga.state.nc.us/sessions/2011/bills/ house/pdf/h868v1.pdf.

144 *See* Boston Bar Association Task Force, *supra* note 13.

145 University of Iowa, School of Social Work, *Current Grants,* http://www.uiowa.edu/~socialwk/research/recentgrants.shtml (last visited July 24, 2013).

146 Kirk Semple, *Plan Would Provide Help to Contest Deportation Cases*, N.Y. Times (Nov. 27, 2012), http://www.nytimes.com/2012/11/28/nyregion/plan-would-add-lawyers-to-contest-deportation-cases.html. *See also* Boston Bar Association Task Force, *supra* note 13.

ing members to provide *pro bono* services and advocating for funding and statutory changes. While these associations are private entities, they often work closely with government to develop and implement legal reform. State bar associations' work has expanded in recent years, largely in response to the American Bar Association's national efforts to increase access to civil legal representation and to encourage the private bar to fill the gaps left by the states and the federal government. State bar associations also work in tandem with state officials to facilitate access to civil legal representation.

In 2006, in response to the civil justice gap, the American Bar Association unanimously approved a resolution urging "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."[147] This resolution marked the first time that the ABA recognized the government's obligation to provide counsel to low-income individuals in civil proceedings.[148] State bar associations responded positively to the resolution.[149] The resolution forged a path for many state bar associations to advocate for the right to counsel in their respective states. While these resolutions are a promising step forward, they do not provide a right to counsel and are not legally binding.

Buoyed by the resolution's role in spurring several states to increase access to counsel in civil cases, advocates encouraged the ABA to provide more concrete guidance on what states should do to implement the resolution. As a result, in 2010 the ABA adopted the "ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings," which "set forth in clear terms the fundamental requirements for providing effective representation in certain civil proceedings to persons unable to pay for the services of a lawyer, in order to guide policymakers and others whose support is of importance to the implementation of civil right to counsel systems in the United States."[150] While these Principles are meant to aid in implementing the ABA's broad 2006 resolution, they only outline the minimum obligations that states should meet. In addition to the Principles, the ABA adopted the "ABA Model Access Act," which provides language that legislators can use in order to implement a statutory right to counsel.[151] The Model Access

147 American Bar Association, *Report to the House of Delegates: Resolution 112A*, 1(Aug. 7, 2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf (identifying the basic needs "most critical for low income persons and families") [hereinafter *Resolution 112A*].

148 American Bar Association, *Resolution 105 (Revised)*, 1 (Aug. 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf [hereinafter *Resolution 105*].

149 Thirteen state and local bar associations co-sponsored the ABA resolution. *Resolution 112A*, *supra* note 147, at 1. The Alaska Bar Association adopted a resolution that mirrored the ABA resolution, and the Conference of California Bar Associations recommended that the state constitution be amended to include language providing for a right to counsel. *Resolution 105, supra* note 148, at 1-2.

150 *Resolution 105, supra* note 148, at 10.

151 *See* American Bar Association, *Resolution 104 (Revised)*, 1 (Aug. 2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

Act and Basic Principles were co-sponsored by eleven state and local bar associations.[152]

No state has yet incorporated the Principles or Model Access Act into its respective laws or regulations. However, the 2006 ABA resolution mobilized state bar associations to take more affirmative steps towards increasing the right to counsel in civil cases. State bar initiatives can be divided into roughly three categories: initiatives that aim to make substantive changes to state statutes; initiatives that call for cost-effective research encouraging state governments (and the federal government) to increase funding for current state-provided civil legal assistance; and initiatives that focus on civil society-level engagement encouraging individuals to provide more *pro bono* services to low-income individuals requiring assistance. These initiatives are not mutually exclusive, and often work best when they are incorporated into a campaign to increase the right to counsel in civil cases.

A number of state bar associations have placed pressure on state governments to increase the right to counsel in civil cases. For example, the State Bar of California was integral in putting pressure on state lawmakers to enact the Sargent Shriver Civil Counsel Act and create a pilot program for expanding the right to counsel for civil claims.[153] Several state bar associations, including those in 28 states, are members of Access to Justice Commissions, which bring together various members of the legal community, including lawmakers, to address the need for civil legal representation for indigent individuals.[154] Many state bar associations, such as the Arizona State Bar and the State Bar of Michigan, mobilize lawyers to provide pro bono services and fundraise for organizations providing civil legal representation for indigent individuals.[155] Other state bar associations, such as the Alabama State Bar, use short-term awareness campaigns to spotlight civil legal representation issues.[156] However, many of these state bar initiatives, especially those calling on lawyers and law students to do more *pro bono*, fall short of advocating for or creating a right to counsel in civil cases. While these initiatives may help to narrow the justice gap, they are insufficient to close it.

152 *Id.* at 1.
153 *Resolution 105, supra* note 148, at 2.
154 *See* Standing Committee on Legal Aid & Indigent Defendants, American Bar Association, *State Access to Justice Commissions: Lists & Links*, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html (last visited July 30, 2013).
155 State Bar of Arizona, *Access to Justice Task Force Report* (Nov. 7, 2011), http://www.azbar.org/media/322784/access_to_justice_task_force_report.pdf; State Bar of Michigan, *Resource Development Initiative: Access to Justice Campaign*, https://www.michbar.org/programs/ATJCampaign/home.cfm (last visited July 24, 2013).
156 Brad Carr, *Lawyers Work To Fill 'Justice Gap' By Providing Free Civil Legal Services To Half A Million Alabamians*, Alabama State Bar (Oct. 19, 2009), http://www.alabar.org/media/news/10192009_Justice_Gap.cfm (last visited Aug. 2, 2013).

IV. THE FEDERAL GOVERNMENT SHOULD ADOPT SEVERAL REFORMS

To fulfill its obligations under the ICCPR, the federal government should take steps to ensure meaningful access to counsel in civil cases, including and especially in instances where basic human needs are at stake. These steps include both adopting federal reforms and supporting state efforts. Specifically, the U.S. government should support research into the efficacy of providing counsel in certain categories of civil cases; fully fund the Legal Services Corporation and eliminate the restrictions on LSC grantee organizations; intensify and fully resource the Access to Justice Initiative; file supportive amicus briefs for right-to-counsel litigation in federal and state court; support, coordinate and encourage efforts on the state level to establish a civil right to counsel; and establish a right to counsel in federal civil cases where basic needs are at stake and in immigration removal proceedings.

A. The U.S. Should Undertake and Fund Research to Ascertain the Impact of Counsel in Certain Civil Cases

The government should lead and support empirical research on the impact of providing counsel in civil cases, particularly where basic human needs are at stake. Indeed, a number of studies examining a specific category of civil cases demonstrate that having legal representation is a key determinant of a successful outcome, improves court efficiency, and can lead to substantial cost savings for governments.[157] One study, for example, concluded that being represented by counsel doubled a litigant's chances of gaining an order of protection in the domestic violence context,[158] while another observed that legal representation had a major effect on eviction rates in housing cases.[159] And a meta-study examined a number of studies that have shown how legal services programs save municipalities money by lowering arrest rates, preventing domestic violence incidents, and avoiding wrongful evictions that increase homelessness.[160] Further study is required to examine the effect of counsel in civil cases involving other important interests and different categories of potential clients, including racial minorities and women. Moreover, there is a dearth of more systemic, national-level studies on civil access-to-justice issues.[161]

157 *See* David Udell & Rebekah Diller, *Access to Justice: Opening the Courthouse Door*, Brennan Center for Justice 1 (2007), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48493.pdf. *See also* Russell Engler, *Shaping a Context-Based Civil Gideon From the Dynamics of Social Change*, 15 Temp. Pol. & Civ. Rts. L.Rev. 697 (2006).

158 Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 Contemp. Econ. Pol'y 158 (2003).

159 Carroll Seron, et.al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001).

160 *See* Laura Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 Seattle J. Soc. Just. 139 (2010).

161 Deborah Rhode, *Access to Justice: An Agenda for Legal Education and Research*, Consortium on Access to

In order to meet these research needs, the government should reform the existing infrastructure for directing civil justice research. Current research efforts are coordinated by a diffuse network of institutions, including state/local bar associations, various legal services programs, the Legal Services Corporation, the American Bar Foundation, not-for-profit organizations, the Department of Justice's Access to Justice Initiative, and numerous law schools.[162] Nonetheless, there is widespread recognition among practitioners and academics that "efforts to understand the distribution of legal services and unmet needs [in civil cases] have suffered from the absence of any centralized organization responsible for collecting such data."[163] Additional research is also needed to determine the impact of civil legal aid on individuals and their communities, and how civil legal aid can best be delivered. As originally constituted, the LSC had such a centralized body, but it was subsequently abolished, an event which significantly hampered the national collection and coordination of civil legal aid research.[164] The Department of Justice has recently acknowledged this problem, hosting a series of meetings exploring the possibility of establishing "an independent structure to produce research about [civil] legal aid, the dimensions and drivers of unmet needs, and the relative effectiveness of different delivery models."[165] A new independent research unit could be housed in the Justice Department itself or reconstituted under the LSC.

Short of establishing such a body, the government should help fund and coordinate research initiatives focused on civil legal aid generally and the right to counsel in civil cases implicating basic human needs specifically.

B. The U.S. Should Fund the Legal Services Corporation Adequately and Ease Restrictions on LSC Grantees

The U.S. government has identified the Legal Services Corporation as the lynchpin in its efforts to promote access to civil legal aid.[166] However, unless funding is dramatically increased and restrictions on grantees eased, LSC will continue to fall far short of meeting the civil legal of those living in the United States. Since 2010, Congress has cut almost $80 million from LSC's budget.[167] These reductions come at a time when the number of people qualifying for LSC assistance is at an all-time high.[168]

Justice 3 (2011), http://www.law.harvard.edu/programs/plp/pdf/Access_to_Justice.pdf.

162 *Id.* at 13.

163 *Id.* at 3.

164 Houseman, *supra* note 11, at 15.

165 Access to Justice Initiative, Department of Justice, *Two-Year Anniversary Accomplishments*, 5 (Oct. 14, 2010), http://www.justice.gov/atj/accomplishments-7-9-12.pdf [hereinafter *Two-Year Anniversary Accomplishments*].

166 *Fourth Periodic Report, supra* note 29, at ¶ 302.

167 *See LSC Fact Book 2012*, *supra* note 64, at 3; *LSC Funding, supra* note 63. In September 2012, Congress allocated $350 million to the Legal Services Corporation for FY 2013. This was eventually reduced to $341 million due to sequestration in late March 2013. *Id.*

168 Legal Services Corporation, *Budget Request for Fiscal Year 2014*, 8 (June 2013), http://www.lsc.gov/sites/default/files/LSC/lscgov4/LSC_FY2014_Budget_Request_FINAL_6-10-2013.pdf.

LSC has estimated that it requires a Congressional appropriation of $486 million to meet the needs of those seeking civil legal assistance in 2014.[169]

To enhance the impact of LSC programs, the federal government should also remove the restrictions it places on LSC grantees, including restrictions on the categories of clients grantee organizations may serve, types of activities in which they may engage, and kinds of cases they may take. Short of this, the government should abandon the requirement that LSC-grantees confine their work to federal funding limits, even when activities are independently financed. Doing so will provide grantee organizations with needed flexibility and eliminate the need to create duplicative infrastructure in order to create partner programs not funded by LSC and thus not subject to LSC-funding restrictions. Scarce resources could then be rechanneled to directly serve the civil legal needs of low-income Americans.

C. The Federal Government Should Dedicate the Necessary Resources to the Access to Justice Initiative

The Access to Justice Initiative has made significant strides since it was established. The Initiative has worked with public defenders and other advocates to increase access to indigent legal defense, address due process concerns with the juvenile justice system, and collaborate with federal agencies and other stakeholders to improve the provision of civil legal services. Yet, the ATJI lacks the leadership and resources necessary to meet its ambitious mandate.

For example, ATJI has, over the past couple of years, worked with other advocates and stakeholders to partake in conversations around effective research and analysis models. With additional resources, ATJI could conduct its own research and evaluation, facilitate wide dissemination of best practices of state and federal efforts to improve meaningful access to legal representation in civil cases, and raise awareness about the importance of civil legal aid.

The initiative would also benefit from the appointment of senior leadership. As of now, the ATJI website lists only an "Acting Senior Counselor" under "Leadership,"[170] which gives the Initiative an uncertain status. With a more permanent Senior Counselor who can help to define a clear strategy and operational mission, the ATJI could function more deliberately and transparently as it works to meet its objectives.

Finally, the Initiative should be institutionalized within the DOJ, with an explicit mandate to increase access to counsel in civil cases. This will help to ensure the program's longevity and establish a clear trajectory for its work.

169 *Id.* at 1.
170 *Access to Justice Initiative Mission, supra* note 101.

D. The Federal Government Should Provide Support and Guidance for State and Local Efforts

In an understanding attached to its ratification of the ICCPR, the U.S. federal government committed itself to ensuring that state and local authorities adhere to the covenant.[171] In fulfilling its obligation to provide meaningful access to legal representation in civil cases, the federal government should thus support and encourage state and local governments to do so, as well. The government has two primary means for achieving this. First, it can direct federal funding so as to influence state and local activity and, second, it can exercise its considerable persuasive authority to guide compliance efforts.

Federal funding should support research and encourage implementation of state efforts to provide meaningful access to counsel in civil cases where basic needs are at stake. For example, federal funds can be used to encourage the creation of pilot programs, like the one instituted by California's Sargent Shriver Civil Counsel Act, which is designed to examine the cost-effectiveness of civil counsel. Similarly, federal funding might support programs examining the provision of counsel in foreclosure proceedings, especially important in the wake of the housing crisis.[172] Few such pilot programs exist, though there is great need for more research into who is affected by a lack of meaningful representation in civil cases, especially in minority or vulnerable communities. Additionally, federal funding can be tied to whether a state provides counsel in civil cases for vulnerable communities or in cases implicating basic human needs. For example, the Child Abuse Prevention and Treatment Act requires states accepting federal funds for child abuse programs to appoint a "guardian ad litem" of the child in all dependency cases.[173] A similar mechanism could be implemented with respect to the appointment of legal representation in other instances related to federal funding.

The federal government should also exercise its persuasive authority to promote the establishment of the civil right to counsel on the state level. Specifically, it should use programs like the ATJI to engage states in a dialogue about the issue of civil counsel, with the ultimate goal of encouraging states to adopt statutory language in keeping with the ABA's Model Access Act as well as its Principles for a Right to Counsel in Civil Legal Proceedings. Likewise, the government should develop and disseminate best practices regarding the establishment of a right to counsel in civil cases at the state level. The Department of Justice, by way of the ATJI, already does this in the specific context of child support proceedings,[174] and thus can develop and circulate

171 *U.S. reservations, declarations, and understandings,* International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

172 For an example of one such program, see New York Chief Judge John Lippmann's 2011 "State of the Judiciary" report, discussing a pilot program to ensure legal assistance in every foreclosure proceeding. John Lippmann, *The State of the Judiciary 2011: Pursuing Justice*, 7-9 (2011), http://www.courts.state.ny.us/admin/stateofjudiciary/SOJ-2011.pdf.

173 Ira Lustbader & Erik Pitchal, *Implementation of the Right to Counsel for Children in Juvenile Dependency Proceedings*, 36 Nova L. Rev. 407, 408 (2012).

174 *Two-Year Anniversary Accomplishments*, *supra* note 165, at 4.

"best practices" on a broader basis. Finally, the government can exert influence by filing supportive amicus briefs in right to counsel cases before the U.S. Supreme Court or state courts, or, at the very least, by not opposing the right to counsel (as unfortunately the government did in *Turner v. Rogers*).[175]

By leveraging its budgetary power and persuasive authority, the federal government can help tip the balance in favor of states complying with their obligation to ensure meaningful access to counsel in civil cases, particularly those implicating basic human needs.

E. The U.S. Should Introduce and Support Legislation Providing a Right to Counsel in Certain Federal Cases

The federal government should move beyond the discretion-based *in forma pauperis* statute and introduce legislation creating a comprehensive right to counsel in federal civil cases where basic human needs are at stake. Already a number of federal statutes provide for the appointment of counsel in certain narrow contexts.[176] The U.S. should broaden the range of civil cases where the right to counsel applies. In accordance with the basic contours of the ABA's resolution on civil counsel in 2006, federal legislation should establish the right to counsel in federal cases that implicate basic human needs including shelter, sustenance, safety, health, or child custody, provided certain financial and merit-based eligibility requirements are met.[177] Such legislation should, moreover, adhere to minimum standards for the implementation and provision of the right to counsel, as set forth in the ABA's "Basic Principles for a Right to Counsel in Civil Legal Proceedings."[178] Immigration proceedings similarly involve fundamental concerns, and thus counsel should be provided as a matter of right in such cases.

Enshrining the right to counsel in federal civil cases where basic human needs are at stake and in immigration proceedings would begin to close the justice gap while demonstrating the government's commitment to its international human rights obligations under the ICCPR.

175 Brief for the United States as Amici Curiae Supporting Reversal, Turner v. Rogers, 131 S.Ct. 2507 (2011) (No. 10-10).

176 Outside of the *in forma pauperis* statute, there are a handful of federal statutes that provide for the appointment of counsel in civil cases. *See, e.g.,* 18 U.S.C. § 983 (2011) (discretionary appointment of counsel in federal civil forfeiture proceedings and right to counsel where disputed property used as primary residence); 18 U.S.C. § 3006A (2011) (right to counsel for sexually dangerous persons proceedings in federal court); 18 U.S.C. § 4247 (2011) (right to counsel for federal civil commitment proceedings); 25 U.S.C. § 1912 (2011) (right to counsel for Indian parents in foster care or termination of parental rights proceedings); 28 U.S.C. § 1875 (2008) (right to counsel for jurors fired for jury service, if judge finds merit in claim); 42 U.S.C. § 3613 (2009) (discretionary appointment in housing discrimination cases); 50 U.S.C. App. §§ 521, 522 (2003) (no entry of judgment against defendant in military service unless counsel appointed, and if stay refused, counsel must also be appointed).

177 *Resolution 112A, supra* note 147.

178 *Resolution 105, supra* note 148.

CONCLUSION

By ratifying the ICCPR, the United States committed itself to ensuring meaningful access to justice for all its citizens. As part of this commitment, the U.S. must ensure meaningful access to counsel in civil cases, especially where core human needs are at stake and particularly where lack of counsel has a disparate impact on vulnerable communities. Current efforts at both the federal and state level are inadequate to fulfill this commitment. To meet its obligations under the ICCPR, the federal government should support research that examines the impact of counsel in civil cases and support efforts by state and local governments and others at the state and local level to improve meaningful access to counsel in civil cases. In addition, the U.S. must ease restrictions and increase financial and logistical support for the Legal Services Corporation and the Access to Justice Initiative, thereby enabling these efforts to reach their full potential. The U.S. should also file supportive amicus briefs for right-to-counsel litigation, and support and coordinate efforts on the state level to establish a civil right to counsel. Finally, the U.S. should establish a right to counsel in cases implicating basic human needs, including in immigration proceedings. By implementing these recommendations, the United States can begin to bridge the justice gap and uphold the dignity of all Americans.

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

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

August 2013

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