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# EQUAL ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS

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Response to the Seventh to Ninth Periodic Reports of the United States to  
the Committee on the Elimination of All Forms of Racial Discrimination

Endorsed By: National Legal Aid & Defender Association, Sargent Shriver National Center on Poverty Law, Western Center on Law & Poverty, Detention Watch Network, National Center for Access to Justice at Cardozo School of Law, Citizen Works, Public Justice Center, Northern Manhattan Coalition for Immigrant Rights, Kathryn O. Greenberg Immigration Justice Clinic at Cardozo School of Law, American University Washington College of Law Center for Human Rights & Humanitarian Law Local Human Rights Lawyering Project

Prepared by:

Columbia Law School Human Rights Institute

Northeastern University School of Law Program on Human Rights and the Global Economy



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# INTRODUCTION

Only a small fraction of the legal problems experienced by low-income and poor people living in the United States—less than one in five—are addressed with the assistance of legal representation.<sup>1</sup> Many people who are low-income and poor in the United States cannot afford legal representation to protect their rights when facing a crisis such as eviction, foreclosure, domestic violence, workplace discrimination, termination of subsistence income or medical assistance, loss of child custody, or deportation.<sup>2</sup>

There is no federal constitutional right to counsel in civil cases, including in immigration proceedings.<sup>3</sup> On the contrary, the Supreme Court has created a presumption against appointing counsel in any civil case where physical liberty is not in the balance.<sup>4</sup> In fact, the Court’s decision in *Turner v. Rogers* refused to find a categorical right to counsel even in some civil cases where lengthy jail sentences are imposed.<sup>5</sup> And despite international consensus to the contrary, the United States Department of Justice participated as amicus in that case to expound on its position that there is no general right to civil counsel.<sup>6</sup> Compounding these problems, the primary mechanism for providing civil legal services to people who are poor and low-income is both underfunded and severely restricted. The result is a crisis in unmet civil legal needs that disproportionately harms racial and ethnic minorities, women, and immigrants.

The U.N. Committee on the Elimination of Racial Discrimination (the “CERD Committee” or the “Committee”) has expressed concern with the United States’ human rights record in this regard, calling particular attention to the “disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities” and calling on the U.S. to allocate sufficient resources to ensure legal representation of racial, ethnic and national minorities, especially where basic human needs are at stake.<sup>7</sup>

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

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

3. The U.S. Supreme Court has found a right to counsel in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring counsel be appointed for indigent defendants in state court facing imprisonment due to felony charges); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (requiring counsel for indigent defendants in state court facing imprisonment due to misdemeanor charges). In immigration proceedings, immigrants have the right to retain counsel at no expense to the government. 8 U.S.C. § 1229a(b)(4)(A) (2006).

4. *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).

5. *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 plaintiff is neither the state nor represented by counsel).

6. Brief for the United States as Amici Curiae Supporting Reversal, *Turner v. Rogers*, 131 S.Ct. 2507 (2011) (No. 10-10), 2011 WL 108380.

7. 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).

## MANY LOW-INCOME INDIVIDUALS ARE UNABLE TO OBTAIN LEGAL REPRESENTATION, BUT REPRESENTATION SIGNIFICANTLY IMPROVES THEIR CHANCES OF SUCCESS

Significant numbers of litigants must navigate the court system without a lawyer because they are unable to afford legal representation.<sup>8</sup> A large percentage of people who are unrepresented in fact qualify for federal or state-funded legal aid but do not receive it due to the limited resources for legal providers.<sup>9</sup> Furthermore, many low-income people in need of assistance are ineligible for services because they do not meet the extremely low threshold for legal services eligibility.<sup>10</sup> Meanwhile, many categories of indigent immigrants in need of legal assistance are ineligible for federally-funded legal services altogether due to funding restrictions.<sup>11</sup>

Though more research in this area is needed,<sup>12</sup> existing studies indicate that lack of legal representation dramatically impairs the ability of low-income people to effectively navigate the court system and attain successful outcomes.<sup>13</sup> Represented parties enjoy statistically more favorable results in housing,<sup>14</sup> family

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8. See LSC, *Documenting the Justice Gap*, *supra* note 1, at 1-2. For example, sixty percent of litigants in New York's family courts reported that they could not afford counsel. Engler, *supra* note 2, at 41 n.15. Similarly, seventy-six percent of litigants surveyed in New York housing courts in a 2007 study were unrepresented; of those who had lawyers, seventy-one percent relied on legal services and twenty-eight percent had a private attorney. Kira Krenichyn & Nicole Schaeffer-McDaniel, *Results From Three Surveys in New York City Housing Courts* 22 (2007). A 2003 study in Chicago showed that only five percent of tenants were represented in eviction hearings. LAWYERS' COMM. FOR BETTER HOUSING, *No Time for Justice: A Study of Chicago's Eviction Court* 4 (2003). Homeowners facing foreclosure fare no better; in 2009 seventy percent of New York homeowners facing foreclosure were unrepresented, and in 2010 nearly ninety-three percent of New Jersey homeowners facing foreclosure had no attorney on record. Nabanita Pal, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCHOOL OF LAW, *Facing Foreclosure Alone: The Continuing Crisis of Legal Representation* 4 (2011). 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); N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, *Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Courts* 2 (2004), available at <http://www.courts.state.nh.us/supreme/docs/prosereport.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 ASS'N TASK FORCE ON UNREPRESENTED LITIGANTS, *Report on Pro Se Litigation* 17 (1998), available at <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.").

9. LSC, *Documenting the Justice Gap*, *supra* note 1, at 1-2, 11 (finding that roughly half of the people who seek help from LSC-funded legal aid providers are denied service because of insufficient program resources).

10. LSC-funded services are available to those at or below 125 percent of the poverty line. Income Level for Individuals Eligible for Legal Assistance, 77 Fed. Reg. 4909-01, 4909 (Feb. 1, 2012) (to be codified at 45 C.F.R. pt. 1611). In 2013, this translated to an income of \$29,438 for a family of four. LEGAL SERVS. CORP., *Fact Sheet on the Legal Services Corporation* [hereinafter *LSC Fact Sheet*], <http://www.lsc.gov/about/what-is-lsc> (last visited July 2, 2014).

11. Restrictions on Legal Assistance to Aliens, 45 C.F.R. §§ 1626.1, 1626.5 (2012).

12. Alan Houseman, CTR. FOR AM. PROGRESS, *The Justice Gap: Civil Legal Assistance Today and Tomorrow* 15 (2011), available at <http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/justice.pdf>; see also Rebecca L. Sandefur, AM. BAR FOUND., *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project* 22 (2011) [hereinafter Sandefur, *Access Across America*], available at [http://www.americanbarfoundation.org/uploads/cms/documents/access\\_across\\_america\\_first\\_report\\_of\\_the\\_civil\\_justice\\_infrastructure\\_mapping\\_project.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf) ("The last national survey of public civil legal need is almost 20 years old, and was a service project of the organized bar.").

13. See LSC, *Documenting the Justice Gap*, *supra* note 1, at 2; Rebecca L. Sandefur, *The Impact of Counsel: An*

law,<sup>15</sup> child welfare,<sup>16</sup> small claims,<sup>17</sup> and employment-related civil rights cases.<sup>18</sup> Those who are represented by an attorney before administrative agencies governing such vital issues as social security, SSI, immigration, and unemployment also have higher success rates—in some cases up to two or three times higher—than those who are unrepresented in comparable cases.<sup>19</sup> In a survey of trial judges from thirty-seven states, the majority reported that pro se litigants were ineffective in their self-advocacy because they failed to present necessary evidence, committed procedural errors, or were unable to properly examine witnesses.<sup>20</sup>

## THE LACK OF A GENERALLY-RECOGNIZED RIGHT TO CIVIL COUNSEL HAS A DISPROPORTIONATE IMPACT ON RACIAL MINORITIES, WOMEN, AND IMMIGRANTS

Lack of access to civil counsel disparately impacts racial minorities and women for two reasons. First, due to discrimination and other institutional barriers to wealth and income equality, racial minorities and

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*Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 69 (2010) [hereinafter Sandefur, *Impact of Counsel*].

14. Engler, *supra* note 2, at 46-51; see also BOSTON BAR ASS'N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, *The Importance of Representation in Eviction Cases and Homelessness Prevention* 15 (2012) [hereinafter *The Importance of Representation*], available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>; see generally D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 927 (2013); Pal, *supra* note 8, at 8 (documenting the high number of unrepresented litigants in foreclosure cases); URBAN INST., *National Foreclosure Mitigation Counseling Program Evaluation: Preliminary Analysis of Program Effects* 3 (2010) (documenting the positive outcomes for homeowners who receive assistance from housing counselors in foreclosure cases).

15. 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).

16. FIRST STAR & CHILDREN'S ADVOCACY INST., *A National Report Card on Legal Representation for Abused and Neglected Children* 8, 12 (2009), available at [http://www.firststar.org/documents/Final\\_RTC\\_2nd\\_Edition.pdf](http://www.firststar.org/documents/Final_RTC_2nd_Edition.pdf), quoting A.E. Zinn & J. Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (2008), available at [http://www.chapinhall.org/article\\_abstract.aspx?ar=1467](http://www.chapinhall.org/article_abstract.aspx?ar=1467) (finding that children who are represented during dependency proceedings reach permanency more quickly, but that only sixty-three percent of states mandate the appointment of an attorney in these cases).

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

18. Amy Myrick, Robert L. Nelson & Laura Beth Nielson, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 710 (2012).

19. *Id.* at 58-59; see also N.H. CITIZENS COMM'N ON THE STATE COURTS, *Report and Recommendations* 10-11 (2006), available at [http://www.courts.state.nh.us/press/2006/cc\\_report.pdf](http://www.courts.state.nh.us/press/2006/cc_report.pdf) (finding that unrepresented individuals typically do an inadequate job of self-representation, resulting in compromised justice). One recent randomized study reached a different conclusion, finding that a particular clinic staffed by law students did not yield positive results. D. James Greiner & Cassandra Wolos 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 July 13, 2014) (noting, among other things, that study's findings were not statistically significant, that it looked at representation by law students as opposed to trained advocates, that its scope was limited, and that it randomized offer of legal representation but not actual use).

20. LEGAL SERVS. CORP., *Budget Request: Fiscal Year 2015*, at 8 (2014) [hereinafter LSC, *FY 2015 Budget Request*], available at <http://www.lsc.gov/sites/lsc.gov/files/LSC/pdfs/LSCFY2015BudgetRequest.pdf>, citing ABA COAL. FOR JUSTICE, *Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts* (2010).

women are more likely to experience poverty in the United States. These groups are therefore more likely to be involved in poverty-related legal proceedings where basic needs are at stake. For example, recent studies show that African Americans are disproportionately represented in eviction<sup>21</sup> and foreclosure<sup>22</sup> proceedings. Racial minorities and women are also more likely to experience discrimination that gives rise to legal claims.<sup>23</sup> Second, although racial minorities and women are over-represented among people who qualify for civil legal assistance,<sup>24</sup> state-level studies on access to justice indicate that such groups make up a disproportionate number of litigants without representation.<sup>25</sup> In New York City family and housing courts, for example, the vast majority of litigants without representation are racial minorities.<sup>26</sup> A study of plaintiffs in employment civil rights suits showed that racial minorities were more likely to be unrepresented.<sup>27</sup> Illustrating the intersection of race and gender, most low-income litigants in Pennsylvania family courts, who include a disproportionate number of racial minorities and women, lack

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21. In a 2012 study of evictions in Milwaukee, nearly half the evictions were in black neighborhoods, compared to twenty percent in white neighborhoods; sixty percent of the tenants in eviction court were women. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIOLOGY 88, 88, 98 (2012). Similarly, in a 2007 study of New York housing courts, African Americans accounted for fifty percent of tenants, but just twenty-five percent of the total population. Krenichyn & Schaeffer-McDaniel, *supra* note 8, at 26.

22. CTR. FOR RESPONSIBLE LENDING, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* 8-9 (2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf> (showing that African-American and Latino borrowers experienced foreclosure rates of 7.9 percent and 7.7 percent respectively during economic crisis between 2007 and 2009, compared to a 4.5 percent foreclosure rate for white borrowers with the same income). See also Ira Goldstein, TRF, *Subprime Lending, Mortgage Foreclosures and Race: How Far Have We Come and How Far Have We to Go?* 6 (2008), available at [http://www.prrac.org/projects/fair\\_housing\\_commission/atlanta/SubprimeMortgageForeclosure\\_and\\_Race\\_1014.pdf](http://www.prrac.org/projects/fair_housing_commission/atlanta/SubprimeMortgageForeclosure_and_Race_1014.pdf) (showing that racial minorities were disproportionately targeted by predatory lending and exploitative real estate practices during the subprime mortgage crisis).

23. See NEV. SUPREME COURT ACCESS TO JUSTICE COMM'N, *Assessment of Civil Legal Needs and Access to Justice in Nevada* 8 (2008), available at <http://www.socialent.com/wp-content/uploads/2009/05/nevada-civil-legal-needs-assessment-report-final-document.pdf> (stating that one in ten households with a Native American tribe member experiences problems specifically related to being Native American that require legal assistance); COMM. ON CIVIL JUSTICE, SUPREME COURT OF GA. EQUAL JUSTICE COMM'N, *Civil Legal Needs of Low and Moderate Income Households in Georgia: A Report Drawn from the 2007/2008 Georgia Legal Needs Study* 2 (2009), available at [http://www.georgiacourts.org/files/legalneeds\\_report\\_2010%20final%20with%20addendum.pdf](http://www.georgiacourts.org/files/legalneeds_report_2010%20final%20with%20addendum.pdf) (finding that discrimination was an overwhelming concern of respondents to survey about legal needs).

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

25. See TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *Report to the Chief Judge of the State of New York* 11-12 (2010) [hereinafter N.Y. Task Force], available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf> (families most in need of legal assistance in New York are minorities); Amelia T. Lafont et al., *Civil Legal Needs of Low Income Arkansans: 2013 Legal Needs Assessment Final Report* 22 (2013), available at [http://lri.lsc.gov/sites/default/files/LRI/pdf/13/LAA\\_needsassessment\\_2013.pdf](http://lri.lsc.gov/sites/default/files/LRI/pdf/13/LAA_needsassessment_2013.pdf) (legal needs relating to government benefits may disproportionately affect minorities).

26. N.Y. Task Force, *supra* note 25, at 11-12; OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, *Self-Represented Litigants: Characteristics, Needs, Services (The Results of Two Surveys)* 3 (2005), available at [http://www.nycourts.gov/reports/AJI\\_SelfRep06.pdf](http://www.nycourts.gov/reports/AJI_SelfRep06.pdf).

27. Myrick et al., *supra* note 18, at 714 (showing that 20.79 percent of African-American plaintiffs, 21.38 percent of Hispanic plaintiffs, and 25.58 percent of Asian-American plaintiffs in employment discrimination suits were pro se throughout, compared to only 8.37 percent of white plaintiffs).



representation.<sup>28</sup> Similarly, a California study found that about eighty-five percent of litigants appearing in family court without an attorney were women, and the majority of them were women of color.<sup>29</sup>

Lack of legal 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 opportunity to be represented by retained counsel,<sup>30</sup> there is no statute directing the federal government to pay for counsel in these cases, leaving many who cannot afford it without representation. Overall immigration representation statistics have improved in recent years. In 2009, approximately thirty-five percent of immigrants in removal proceedings had representation; by 2013, that number climbed to fifty-nine percent.<sup>31</sup> However, the figures for detained immigrants remain abysmally low: a staggering eighty-four percent lack counsel.<sup>32</sup> It is particularly difficult for detained immigrants to find legal representation because of the remote location of many immigration detention facilities.<sup>33</sup>

Unfortunately representation statistics for removal proceedings do not include data on economic status. Presumably the poor are the most likely to proceed without representation, with the increasing rates of representation in immigration cases serving to further marginalize the poorest immigrants. The representation statistics also do not include data on race, ethnicity, or national origin, making it impossible to fully determine the impact of lack of counsel on minority groups. However, data do show that Latin American immigrants are disproportionately targeted for removal proceedings.<sup>34</sup> They are also significantly more likely to be poor<sup>35</sup> and therefore unable to afford counsel.

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28. PA. SUPREME COURT COMM. ON RACIAL AND GENDER BIAS IN THE JUSTICE SYS., *Final Report* 457 (2003), available at [http://www.pa-interbranchcommission.com/\\_pdfs/FinalReport.pdf](http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf).

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

30. 8 U.S.C. § 1229a(b)(4)(A) (2006).

31. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, *FY 2013 Statistics Yearbook* F1 (2014) [hereinafter DOJ, *FY 2013 Yearbook*], available at <http://www.justice.gov/eoir/statspub/fy13syb.pdf>.

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

33. Forty percent of Immigration and Customs Enforcement bed space is located more than sixty miles from an urban center. HUMAN RIGHTS FIRST, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review* 31 (2011), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>. See also Report on Immigration in the United States: Detention and Due Process, Inter-Am. Comm'n H.R., ¶¶ 336-84, OEA/Ser.L/V/II, doc. 78/10 (2010) (expressing concern regarding the lack of available representation for immigrants and, in particular, the unique challenges faced by detainees).

34. More than sixty-five percent of noncitizens in removal proceedings in 2013 were from just four countries: Mexico, Guatemala, El Salvador, and Honduras. DOJ, *FY 2013 Yearbook*, *supra* note 31, at D1. Combined, all Latin American and Caribbean immigrants made up fifty-five percent of the immigrant population of the U.S. in 2013. PEW RESEARCH CTR., *Changing Patterns of Global Migration and Remittances* 8 (2013), available at <http://www.pewsocialtrends.org/2013/12/17/changing-patterns-of-global-migration-and-remittances/>. On the disproportionate targeting of Hispanic communities for immigration enforcement, see also Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 112-115 (2013) (finding that Obama administration's "Securing Communities" program, which claimed to focus on removing "criminal aliens" focused on heavily Hispanic communities, rather than high crime communities).

35. In 2012, Mexican and Central American immigrants faced poverty rates of twenty-eight and twenty-two percent, respectively, compared to an overall poverty rate in the U.S. of sixteen percent. PEW RESEARCH CTR., *Statistical Portrait of the Foreign-Born Population in the United States, 2012* (2014), available at

In removal proceedings, representation can have a substantial impact on whether a person is able to remain in the country.<sup>36</sup> For example, one study in New York found that seventy-four percent of non-detained immigrants with counsel prevailed in their cases, compared to only thirteen percent of non-detained immigrants without counsel.<sup>37</sup>

Federal law does not currently provide a right to counsel in immigration proceedings for even such vulnerable populations as unaccompanied immigrant children<sup>38</sup> or immigrants with serious mental disabilities.<sup>39</sup> The lack of right to counsel for immigrant children has become an especially serious problem in the last year as a surge of unaccompanied young migrants have been crossing the southwest border fleeing violence in their home countries, primarily Honduras, Guatemala, and El Salvador.<sup>40</sup> Since October 2013, more than 52,000 children have been taken into custody.<sup>41</sup> This represents a tenfold increase compared with 2009.<sup>42</sup> With no right to legal representation, these children face a “Dickensian absurdity” in which they are required to appear before judges and trained government lawyers with no idea of what

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<http://www.pewhispanic.org/2014/04/29/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2012/>.

36. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT, Apr. 2005, at 5, available at [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf) (finding success rates of 34 percent for represented, non-detained immigrants versus 23 percent of unrepresented, non-detained immigrants; 24 percent for represented detained immigrants compared to 15 percent for unrepresented detained immigrants; 39 percent for represented, non-detained asylum seekers versus 14 percent of unrepresented, non-detained asylum seekers; and 18 percent for represented, detained asylum seekers compared to 3 percent of unrepresented, detained asylum seekers). Other immigration studies demonstrate similar results. *Asylum Denial Rate Reaches All Time Low: FY 2010 Results, a Twenty-Five Year Perspective*, TRAC IMMIGRATION (2010), available at <http://trac.syr.edu/immigration/reports/240/> (in 2010, 11 percent of asylum applicants without legal representation were granted asylum, compared to 54 percent of those with representation); *Immigration Judges*, TRAC IMMIGRATION (2006), available at <http://trac.syr.edu/immigration/reports/160/> (between 1994 and 2005, 46 percent of represented asylum seekers received relief compared to 7 percent of unrepresented asylum seekers). See also Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded*, 04-06 Immigr. Briefings 1 (2004).

37. See N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363-64 (2011).

38. See generally Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41 (2011). A group of unaccompanied immigrant children have recently filed a nationwide class action against the federal government for its failure to provide them with legal representation as it carries out deportation proceedings against them. See *J.E.F.M. v. Holder*, No. 14-CV-01026 (W.D. Wash. filed July 9, 2014).

39. See HUMAN RIGHTS WATCH, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System* 42 (2010), available at [http://www.hrw.org/sites/default/files/reports/usdeportation0710webwcover\\_1\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usdeportation0710webwcover_1_0.pdf). However, a federal district court recently held that federal law requires the government to provide counsel for immigrants with serious psychiatric disorders that render them incompetent to represent themselves. See *Franco-Gonzalez v. Holder*, No. 2:10-CV-02211 (C.D. Cal. Apr. 23, 2013) (order granting permanent injunction), available at <http://www.aclu-sc.org/franco-injunction>.

40. Op-Ed., *Innocents at the Border: Immigrant Children Need Safety, Shelter and Lawyers*, N.Y. TIMES, June 17, 2014, at A24. See also Frances Robles, *Fleeing Gangs, Children Head to U.S. Border*, N.Y. TIMES, July 10, 2014, at A1 (describing gang violence causing children to flee Central American countries).

41. Alan Greenblatt, *What’s Causing the Latest Immigration Crisis? A Brief Explainer*, July 9, 2014, NAT’L PUBLIC RADIO, <http://www.npr.org/2014/07/09/329848538/whats-causing-the-latest-immigration-crisis-a-brief-explainer>.

42. *Id.*

is going on, some reportedly clutching teddy bears for comfort.<sup>43</sup> Unaccompanied children are just one piece of the current border crisis.<sup>44</sup>

## THE UNITED STATES MUST TAKE STEPS TO ADDRESS THE CIVIL ACCESS TO JUSTICE GAP

In its report to the Committee, the United States acknowledges that it “faces challenges in . . . its provision of free and affordable civil legal services to the poor and middle class” and “recognize[s] that these challenges are felt acutely by members of racial and ethnic minorities.”<sup>45</sup> The government identifies several mechanisms it employs to mitigate the justice gap. Chief among those mentioned are the Legal Services Corporation and the Department of Justice’s Access to Justice Initiative.<sup>46</sup> However, these measures are insufficient to address the serious justice gap in the United States.

In order to meet its human rights obligations, the federal government must recognize the discriminatory impact of the status quo and 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 disproportionate impact of lack of counsel on minorities; fully funding the Legal Services Corporation and lifting restrictions that prevent legal services lawyers from providing necessary services; and intensifying the Access to Justice Initiative’s activities with respect to civil legal services and providing it with the necessary leadership and resources. 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.

## THE UNITED STATES HAS AN INTERNATIONAL LEGAL OBLIGATION TO ENSURE MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS

In ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD” or the “Convention”), the United States undertook to “eliminat[e] racial discrimination in all its forms.”<sup>47</sup> CERD defines racial discrimination as activity which has the “purpose or effect” of impairing the exercise

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43. *Id.*; Sonia Nazario, *Child Migrants, Alone in Court*, N.Y. TIMES, Apr. 11, 2013, at A23.

44. Families crossing the border are being detained in record numbers, and the Obama Administration has requested more than \$3.7 billion in funding to address the border crisis. The request includes funding to add more than six thousand new family detention beds in remote facilities that are difficult for attorneys to access. See *Review of the President’s Emergency Supplemental Request: Hearing before the S. Comm. on Appropriations*, 115th Cong. (July 10, 2014) (statement of Jeh Johnson, Department of Homeland Security Secretary), available at <http://www.dhs.gov/news/2014/07/10/written-testimony-dhs-secretary-jeh-johnson-senate-committee-appropriations-hearing>.

45. *Seventh to Ninth Periodic Reports of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination*, ¶ 62, U.N. Doc. CERD/C/USA/7-9 (Oct. 3, 2013) [hereinafter *U.S. Government Report*].

46. *Id.* at ¶¶ 61, 63-64.

47. International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1), *opened for signature* Mar. 7, 1966, 1966 U.S.T. 521, 660 U.N.T.S. 195.

of human rights.<sup>48</sup> With regard to access to justice, the Convention requires States Parties to guarantee the right to equality before the law, including the “right to equal treatment before the tribunals and other organs administering justice.”<sup>49</sup> It further requires access to “effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination.”<sup>50</sup>

Through General Comments, the CERD Committee has further elaborated these rights and has called for states to recognize a civil right to counsel and to implement measures to guarantee access to justice in civil matters, including immigration proceedings. In General Recommendation No. 29, the Committee recommended that States Parties “[t]ake the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid.”<sup>51</sup> In General Recommendation No. 30, the Committee addressed the rights of non-citizens in particular. It recommended that States Parties “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health.”<sup>52</sup> With regard to immigration proceedings, the Committee urged States Parties to ensure “that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies.”<sup>53</sup>

Other international bodies have reached similar conclusions concerning the importance of civil legal representation to fundamental fairness and protection of human rights. The U.N. Human Rights Committee (the “HRC”), which oversees states’ compliance with the International Covenant for Civil and Political Rights (the “ICCPR”), has also taken particular notice of the United States’ failure to provide counsel in civil cases, including in immigration proceedings. In its 2014 review of the United States, the HRC recommended that the U.S. take steps “to improve the provision of . . . legal representation for women victims of domestic violence.”<sup>54</sup> The HRC also expressed concern regarding the deportation and mandatory detention of certain categories of immigrants, and recommended that the U.S. “take measures to ensure that affected persons have access to legal representation.”<sup>55</sup> In its review of other countries, the HRC has expressed concern on numerous occasions over states’ failure to provide counsel in various types of civil and immigration cases.<sup>56</sup>

More broadly, in General Comment No. 32, interpreting the ICCPR’s article 14 guarantee of the right to equality before the courts, the Human Rights Committee found that:

Access to administration of justice must effectively be guaranteed in all such cases to

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48. *Id.* at art. 1(1) (emphasis added).

49. *Id.* at art. 5(a).

50. *Id.* at art. 6.

51. CERD Comm., *General Recommendation No. 29: Article 1, Paragraph 1, of the Convention (Descent)*, ¶ 5(u), U.N. Doc. A/57/18 at 111 (2002).

52. CERD Comm., *General Recommendation No. 30: Discrimination Against Non-Citizens*, ¶ 7(29), U.N. Doc. A/59/18 at 93 (2004).

53. *Id.* at ¶ 6(25).

54. Human Rights Comm., *Concluding Observations—United States of America*, ¶ 16, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

55. *Id.* at ¶ 15.

56. *See, e.g.*, Human Rights Comm., *Concluding Observations—Sweden*, ¶ 21, U.N. Doc. CCPR/C/SWE/CO/6 (May 7, 2009) (recommending that the Swedish government provide adequate legal aid to indigenous Sámi villages in land rights disputes); Human Rights Comm., *Concluding Observations—Czech Republic*, ¶ 16, U.N. Doc. CCPR/C/CZE/CO/2 (Aug. 9, 2007) (recommending that the Czech Republic “provide legal aid for victims of discrimination” in order to rectify the problem of discrimination in housing faced by the Roma); Human Rights Comm., *Concluding Observations—Switzerland*, ¶ 18, U.N. Doc. CCPR/C/CHE/CO/3 (Nov. 3, 2009) (recommending 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”).

ensure that no individual is deprived, in procedural terms, of his/her right to claim justice . . . . The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way . . . . States are encouraged to provide free legal aid in [non-criminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.<sup>57</sup>

The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), which the U.S. has signed but not yet ratified, calls upon States Parties to provide legal protection for women against discrimination through “competent national tribunals and other public institutions.”<sup>58</sup> Article 15 requires that States Parties “accord to women equality with men before the law.”<sup>59</sup> Interpreting this provision, the Committee on the Elimination of Discrimination Against Women (the “CEDAW Committee”) has repeatedly called for the provision of civil legal aid.<sup>60</sup>

Numerous U.N. special rapporteurs and independent experts have likewise emphasized the importance of ensuring access to counsel in civil cases, particularly where counsel is necessary to secure basic human needs. The Special Rapporteur on Adequate Housing has noted that legal remedies are an important procedural protection against forced evictions but that such remedies are only effective where provision is made for the supply of civil legal aid.<sup>61</sup> Furthermore, the Housing Rapporteur has observed that forced evictions disparately impact women, indigenous people, and ethnic and racial minorities.<sup>62</sup> Other special rapporteurs have stated that civil counsel can play a significant role in vindicating and protecting the rights of people of color,<sup>63</sup> women,<sup>64</sup> and migrants.<sup>65</sup> As these experts note, meaningful access to civil

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

58. Convention on the Elimination of All Forms of Discrimination against Women, art. 2(c), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

59. *Id.* at art. 15.

60. See, e.g., Comm. on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations—United Kingdom*, ¶¶ 22-23, U.N. Doc. CEDAW/C/GBR/CO/7 (July 30, 2013); Comm. on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations—Cambodia*, ¶ 16, U.N. Doc. CEDAW/C/NZL/CO/7 (Aug. 6, 2012); Comm. on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations—Cambodia*, ¶¶ 12-13, U.N. Doc. CEDAW/C/KHM/CO/4-5 (Oct. 18, 2013). General Recommendation No. 21 from the CEDAW Committee clarifies Article 15, stating that “[a] woman’s right to bring litigation is limited in some countries . . . by her access to legal advice and her ability to seek redress from the courts.” Comm. on the Elimination of all Forms of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, art. 15, ¶ 8, U.N. Doc. HRI/GEN/1/Rev.6 at 250 (2003). In such cases, the CEDAW Committee found, states are effectively “denying women their rights to be equal with men.” *Id.*

61. Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, ¶ 69, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012); see also Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, ¶ 59, A/HRC/4/18 (Feb. 5, 2007) (“All persons threatened with or subject to forced evictions have the right of access to timely remedy. Appropriate remedies include a fair hearing, access to legal counsel, [and] legal aid . . .”).

62. Comm’n on Human Rights, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, ¶ 16, U.N. Doc. E/CN.4/2004/48 (Nov. 2, 2004).

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

64. See Comm’n on Human Rights, *Special Rapporteur on Violence Against Women, Its Causes and Consequences, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶ 83, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (“States must ensure that quality physical and psychological health services and legal assistance are provided to victims of violence.”); Comm’n on Human Rights, *Special Rapporteur on*

counsel is a lynchpin to many other rights. As the Special Rapporteur on Extreme Poverty recently commented:

[I]ack of legal aid for civil matters can seriously prejudice the rights and interests of persons . . . for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions.<sup>66</sup>

Most recently, the Special Rapporteur on the Independence of Judges and Lawyers noted in her March 2013 report to the General Assembly that “[l]egal aid is an essential component of a fair and efficient justice system founded on the rule of law,” and that “[i]t is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights,”<sup>67</sup> including the right to a fair trial and the right to an effective remedy.<sup>68</sup> The Special Rapporteur emphasized that the right to free legal assistance applies in “any judicial or extrajudicial procedure aimed at determining rights and obligations”<sup>69</sup> and that “the notion of beneficiaries of legal aid should be extended to any person who comes into contact with the law and does not have the means to pay for counsel.”<sup>70</sup>

The United States’ failure to ensure meaningful access to counsel in civil cases is out of step with international consensus, as well. In particular, the European Court of Human Rights (the “ECtHR”) and the Inter-American Commission on Human Rights have both articulated states’ obligations to provide counsel in civil cases. In 1979, the ECtHR ruled in *Airey v. Ireland* that the right to fair trial may demand that a state provide free legal assistance to those unable to obtain it when that assistance is necessary to provide effective access to the court.<sup>71</sup> Explaining its reasoning, the ECtHR stated that the European

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*Violence Against Women, Its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, ¶ 90, U.N. Doc. E/CN.4/2003/75 (Jan. 6, 2003) (“States should establish, strengthen or facilitate support services to respond to the needs of actual and potential victims, including . . . legal aid . . . .”); Comm’n on Human Rights, *Report of the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, ¶ 47, U.N. Doc. E/CN.4/2005/48 (Mar. 3, 2005) (“Even where laws are in place to recognize the interests of women, where one partner is seeking to dissolve a marriage or domestic partnership, women often lack the means to retain adequate legal counsel or access the courts to protect their personal interests.”).

65. See Human Rights Council, *Special Rapporteur on the Human Rights of Migrants, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 46, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008); see also Human Rights Council, *Special Rapporteur on the Human Rights of Migrants*, ¶ 10, U.N. Doc. A/HRC/7/12/Add.1 (Mar. 4, 2008); Comm’n on Human Rights, *Special Rapporteur on the Human Rights of Migrants, Specific Groups and Individuals—Migrant Workers*, ¶ 24, U.N. Doc. E/CN.4/2003/85 (Dec. 30, 2002) (“When the migrant must take the initiative for such [administrative] review, lack of awareness of the right to appeal and lack of access to free legal counsel can prevent the migrant from exercising his/her right in practice.”).

66. See Human Rights Council, *Special Rapporteur on Extreme Poverty and Human Rights, Extreme Poverty and Human Rights, Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 62, U.N. Doc. A/67/278 (Aug. 9, 2012).

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

68. *Id.* at ¶ 28.

69. *Id.* at ¶ 27.

70. *Id.* at ¶ 35.

71. 2 Eur. Ct. H.R. 305, ¶ 26 (1979) (“[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.”).

Convention on Human Rights “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly true of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.”<sup>72</sup> The ECtHR later expanded on this holding, emphasizing that legal aid may be required depending on the particular circumstances of a case, including, “the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent him or herself effectively.”<sup>73</sup>

The Charter of the Organization of American States, of which the United States is a member, contains explicit support of the civil right to counsel, stating a goal to “dedicate every effort” to “[a]dequate provision for all persons to have due legal aid in order to secure their rights.”<sup>74</sup> The Inter-American Commission on Human Rights has reinforced this view, noting that states can be obligated to provide free civil legal services to those without means in order to prevent a violation of their right to fair trial and judicial protection.<sup>75</sup>

## THE U.S. GOVERNMENT FAILS TO MEET ITS INTERNATIONAL OBLIGATIONS REGARDING ACCESS TO JUSTICE

In its report to the CERD Committee, the United States acknowledges the inequities that exist within the justice system for individuals who are unable to afford civil representation, conceding that “there is no right to counsel at government expense for civil matters.”<sup>76</sup> Under U.S. law, the same is true for immigration proceedings, which are considered civil in nature.<sup>77</sup>

The U.S. report goes on to discuss federal initiatives designed to mitigate the lack of a civil right to legal representation. The primary federal initiatives and mechanisms the report mentions for addressing these inequities are the Legal Services Corporation and the Access to Justice Initiative. These limited initiatives, while laudable, fall far short of adequately responding to the justice gap, and particularly to its disparate impact on minorities and women. Beyond those measures discussed in the government’s report, other federal measures also fail to adequately address the civil justice gap.

### THE LEGAL SERVICES CORPORATION IS UNDERFUNDED AND RESTRICTED

In its report to the CERD Committee, the United States highlights the Legal Services Corporation (“LSC”) as a key component in its efforts to improve civil litigants’ abilities to access equal justice.<sup>78</sup> LSC was created by Congress in 1974 as an independent nonprofit corporation to promote equal access to justice and

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72. *Airey v. Ireland*, 2 Eur. Ct. H.R. 305, at ¶ 24 (1979).

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

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

75. 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/Ser.L./V/II.129 Doc. 4 (Sept. 7, 2007).

76. *U.S. Government Report*, *supra* note 45, at ¶ 61.

77. 8 U.S.C. § 1229a(4)(A) (“[An] alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”).

78. *U.S. Government Report*, *supra* note 45, at ¶ 61.

provide grants for civil legal assistance to low-income Americans.<sup>79</sup> The federal legislation authorizing LSC noted that Congress was acting in response to its finding that “there is a need to provide equal access to the system of justice in our Nation” and that “there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel.”<sup>80</sup> Congress also emphasized its desire that LSC be independent, that the lawyers in the program “have full freedom to protect the best interests of their clients,” and that the United States would continue to give “the program the support it needs in order to become a permanent and vital part of the American system of justice.”<sup>81</sup> Yet, due to chronic underfunding and a barrage of restrictions, LSC has fallen short of its initial promise.

#### ▪ **LSC IS SEVERELY UNDERFUNDED**

Over the past several years, LSC has been hit with massive cuts to its congressional appropriations, ninety percent of which it distributes to 134 independent civil legal aid programs.<sup>82</sup> Congressional appropriations for LSC have steadily decreased over the past several years, from \$420 million in 2010 to \$365 million in 2014.<sup>83</sup> While these numbers are stark, they do not accurately illustrate the real scope of the federal government’s decreasing support for LSC. Accounting for inflation, the appropriations for LSC in 2013 were near an all-time low.<sup>84</sup> If LSC’s funding had kept pace with inflation when compared to its 1995 appropriations, the agency’s funding today would be more than \$600 million.<sup>85</sup> These decreases are of particular concern as they come at a time of economic crisis, when more and more Americans are falling below federal poverty guidelines and are in more need of civil legal services than ever before.<sup>86</sup> Legal services providers report being flooded with a huge increase in clients seeking legal assistance for more severe legal problems.<sup>87</sup>

The recession has also affected LSC grantees’ non-federal sources of funding, leaving devastating holes in the budgets of LSC-funded organizations.<sup>88</sup> Interest on Lawyer Trust Accounts (“IOLTA”) programs are the largest national source of civil legal funding after LSC grants, amounting to thirteen percent of funding for LSC-funded organizations in 2008 and serving as an even more critical source for programs that do not receive LSC funds.<sup>89</sup> The economic recession resulted in a massive decline in interest rates and a consequent decrease in revenues that IOLTA uses to fund legal services organizations. From 2007 to 2009, IOLTA revenues decreased seventy-five percent, from \$371 million to just \$92 million.<sup>90</sup>

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79. See LEGAL SERVS. CORP., *History: The Founding of LSC*, <http://www.lsc.gov/about/what-is-lsc/history> (last visited July 23, 2014).

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

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

82. *LSC Fact Sheet*, *supra* note 10.

83. LEGAL SERVS. CORP., *LSC Funding* [hereinafter *LSC Funding*], <http://www.lsc.gov/congress/lsc-funding> (last visited July 2, 2014).

84. LSC, *FY 2015 Budget Request*, *supra* note 20, at 1; see also LEGAL SERVS. CORP., *2012 Fact Book 3* (2013) [hereinafter *LSC Fact Book*], available at [http://www.lsc.gov/sites/lsc/gov/files/LSC/lscgov4/AnnualReports/2012%20Book\\_FINALforWEB.pdf](http://www.lsc.gov/sites/lsc/gov/files/LSC/lscgov4/AnnualReports/2012%20Book_FINALforWEB.pdf).

85. LSC, *FY 2015 Budget Request*, *supra* note 20, at 1.

86. BRENNAN CTR. FOR JUSTICE, *Civil Legal Services: Low-Income Clients Have Nowhere to Turn Amid the Economic Crisis* 1 [hereinafter BRENNAN CTR., *Civil Legal Services*], available at [http://brennan.3cdn.net/ed5d847dfcf163a02a\\_exm6b5vya.pdf](http://brennan.3cdn.net/ed5d847dfcf163a02a_exm6b5vya.pdf) (last updated June 25, 2010).

87. *Id.*

88. *Id.* at 2.

89. *Id.*

90. *Id.*



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 thirty offices.<sup>91</sup>

As a result, LSC and its grantees have been unable to meet current demands for their civil legal services. Programs funded by LSC provide legal assistance to more than 2.3 million people, seventy percent of whom are women.<sup>92</sup> However, one in five Americans meets the federal poverty guidelines that qualify them for civil legal assistance by LSC.<sup>93</sup> This population numbered over 63.5 million in 2012, which is an all-time high and represents a twenty-five percent increase over 2007.<sup>94</sup> This number is expected to increase to 67.2 million in 2015.<sup>95</sup> A disproportionately high number of individuals who meet the federal poverty guidelines for LSC-funded legal services are racial minorities.<sup>96</sup> In 2012, the percentage of African Americans, American Indians, Alaska Natives, and Latinos who qualified for LSC services was more than *double* the percentage of whites who qualified.<sup>97</sup> Further, in 2008, an estimated 25.3 million, or almost half, of those eligible for LSC funding faced a civil legal problem.<sup>98</sup>

LSC-funded programs have nowhere near the funding and resources necessary to respond to this need.<sup>99</sup> According to the LSC's 2009 report *Documenting the Justice Gap in America*, "for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources."<sup>100</sup> This means that LSC-funded organizations are forced to reject nearly one million cases because they lack the funding to handle them.<sup>101</sup> According to LSC's report, "state legal needs studies conducted from 2000 to 2009 generally indicate that less than one in five low-income persons get the legal assistance they need."<sup>102</sup> Due to funding constraints, some LSC grantees have been forced to make difficult decisions regarding which clients they can take and which they must turn away. For example, some LSC grantees reportedly only assist victims of domestic violence in cases where children are involved.<sup>103</sup>

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

92. *LSC Fact Sheet*, *supra* note 82.

93. LSC, *FY 2015 Budget Request*, *supra* note 20, at 1, 4.

94. *Id.*

95. *Id.* at 4.

96. See Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, U.S. CENSUS BUREAU, *Income, Poverty and Health Insurance Coverage in the United States: 2012*, at 13-16 (2013), *available at* <http://www.census.gov/prod/2013pubs/p60-245.pdf>.

97. U.S. CENSUS BUREAU, *Selected Characteristics of People at Specified Levels of Poverty from the 2012 American Community Survey*, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_12\\_1YR\\_S1703&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_S1703&prodType=table).

98. Sandefur, *Impact of Counsel*, *supra* note 13, at 58; Sandefur, *Access Across America*, *supra* note 12, at 2 (stating that more recent studies show that low-income people may experience higher rates of civil justice problems than the general population).

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

100. LSC, *Documenting the Justice Gap*, *supra* note 1, at 1.

101. *Id.* at 9.

102. *Id.* at 3.

103. LSC, *FY 2015 Budget Request*, *supra* note 20, at 7.

Moreover, these numbers may underestimate the problem. The last accurate measurement of LSC's ability to address the justice gap was conducted in 2009, before the economic recession pushed an ever-growing number of Americans below the federal poverty line.<sup>104</sup> The recession disparately impacted racial minorities, who experienced higher rates of economic loss due to foreclosure and loss of retirement assets than similarly-situated white families.<sup>105</sup> One study estimates that whites lost eleven percent of their wealth in the great recession, compared to black and Hispanic families who lost thirty-one percent and forty percent of their wealth, respectively.<sup>106</sup>

▪ **LSC GRANTEEES 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.

As noted above, 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 the poverty line, which for a family of four in 2013 amounted to an income of \$29,438 a year.<sup>107</sup> 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.<sup>108</sup> There are some narrow exceptions to this prohibition. For instance, LSC-funded organizations may represent immigrants who are lawful permanent residents, who are married to, the parent of, or the unmarried minor child of a U.S. citizen, or who have been granted a certain recognized status.<sup>109</sup> The Trafficking Victims Protection Act and the reauthorization of the Violence Against Women Act also permit organizations to use non-LSC funding to represent undocumented individuals who have been battered or subjected to extreme cruelty by a spouse or parent, as well as undocumented individuals whose children have been battered or subjected to extreme cruelty.<sup>110</sup> However this representation must be "directly related to the prevention of, or obtaining relief from, the battery or cruelty."<sup>111</sup>

Federal restrictions also prohibit LSC-funded organizations from representing incarcerated individuals in any civil litigation or administrative challenges to the conditions of incarceration.<sup>112</sup> An LSC-funded

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104. *Civil Legal Services*, *supra* note 86, at 1.

105. URBAN INST., *Less than Equal: Racial Disparities in Wealth Accumulation* 3 (2013), available at <http://www.urban.org/UploadedPDF/412802-Less-Than-Equal-Racial-Disparities-in-Wealth-Accumulation.pdf>.

106. *Id.* at 2-3.

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

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

109. 45 C.F.R. § 1626.5; Houseman & Perle, *supra* note 108, 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).

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

111. 45 C.F.R. § 1626.4(2).

112. See Restrictions on Legal Assistance with Respect to Criminal Proceedings, 45 C.F.R. § 1613; Restrictions on Actions Collaterally Attacking Criminal Convictions, 45 C.F.R. § 1615; Representation of Prisoners, 45 C.F.R. § 1637; see also Houseman & Perle, *supra* note 108, at 5.

organization may not be involved in any litigation involving abortion, or defend someone in public housing eviction cases if the person threatened with eviction has been charged or convicted with a drug crime related to the sale, distribution, or manufacture of a controlled substance, and the public agency asserts that this drug charge or conviction threatens the health or safety of other tenants or employees.<sup>113</sup>

When civil legal services organizations accept federal funding from LSC, they also face a number of restrictions on the type of legal work and advocacy they may perform. LSC grantees may not engage in the political process through advocacy or representation before legislative bodies on pending or proposed legislation; nor may they represent clients or client interests in front of administrative agencies that direct rulemaking.<sup>114</sup> Federal restrictions forbid conducting or participating in grassroots lobbying<sup>115</sup> and prohibit LSC-funded groups from establishing “training programs to advocate particular public policies or political activities or to train people to engage in restricted activities.”<sup>116</sup> LSC-funded organizations “cannot initiate, participate, or engage in class actions.”<sup>117</sup> This restriction impedes the efficiency of LSC-funded attorneys: They cannot represent large numbers of people in a single action, but must instead bring many different cases regarding the same wrong. The inability of LSC-funded attorneys to pursue complex systemic matters limits the potential for outcomes that have a greater long-term economic impact.<sup>118</sup> Thus LSC funding restrictions contribute to systems that lock low-income people of color in poverty.<sup>119</sup>

The LSC appropriations legislation further restricts and limits the activities of LSC grantees by extending the federal restrictions to all the grantees’ activities, even those fully financed with non-LSC funding.<sup>120</sup> This provision has been called the “poison pill restriction” due to the impediments it places on the legal tools and activities available to organizations that take a single dollar of LSC funding.<sup>121</sup> For example, in Maryland, where LSC funding accounts for only sixteen percent of total funding, restrictions nonetheless impact one hundred percent of the practice.<sup>122</sup> According to a 2009 report, nationwide, this restriction annually inhibits over \$490 million of state, local, and private funding, which is fifty-eight percent of the resources of LSC grantees.<sup>123</sup> It also “deters non-federal spending on legal services” by “den[ying] state, local, and private funders control over how their money is spent.”<sup>124</sup> In order to escape these federal

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113. Restriction on Assisted Suicide, Euthanasia, and Mercy Killing, 45 C.F.R. § 1643; Restriction on Representation in Certain Eviction Proceedings, 45 C.F.R. § 1633; *see also* Houseman & Perle, *supra* note 108, at 5-6.

114. Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612; *see also* Houseman & Perle, *supra* note 108, at 3-4 (describing the one exception where, if approached by a government body with the request, an LSC-funded organization may use non-LSC funds “to respond to a written request for information or testimony” regarding legislation or rulemaking, and may “participate in a public comment in a rulemaking proceeding”).

115. 45 C.F.R. § 1612; *see also* Houseman & Perle, *supra* note 108, at 4.

116. Houseman & Perle, *supra* note 108, at 6; *see also* 45 C.F.R. § 1612.

117. Houseman & Perle, *supra* note 108, at 4; *see also* Class Actions, 45 C.F.R. § 1617.

118. Wade Henderson & Jonathan Smith, *The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate*, CLEARINGHOUSE REV. 210, 216 (July-Aug. 2006) (providing examples of how lack of access to a lawyer can be a factor in keeping a family poor).

119. *Id.* at 213.

120. Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 45 C.F.R. § 1610; *see also* Houseman & Perle, *supra* note 108, at 4.

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

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

123. Rebekah Diller & Emily Savner, BRENNAN CTR. FOR JUSTICE, *A Call to End Federal Restrictions on Legal Aid for the Poor* i (2009), available at [http://brennan.3cdn.net/7e05061cc505311545\\_75m6ivw3x.pdf](http://brennan.3cdn.net/7e05061cc505311545_75m6ivw3x.pdf).

124. *Id.*

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.<sup>125</sup> 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.<sup>126</sup>

President Obama and the United States Senate Appropriations Committee have advocated 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 that bar LSC grantees from claiming, collecting, and retaining attorney fee awards.<sup>127</sup> However, the President’s 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.

The 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—approaches that lawyers representing clients such as corporate interests routinely pursue without compunction. 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.

## THE ACCESS TO JUSTICE INITIATIVE IS A POSITIVE DEVELOPMENT THAT HAS NOT REACHED ITS POTENTIAL

The United States’ report to the CERD Committee champions the Access to Justice Initiative (“ATJ”) in the Department of Justice as a mechanism “to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.”<sup>128</sup> The Department of Justice established ATJ in March 2010 in response to what it recognized as “the access-to-justice crisis in the criminal and civil system.”<sup>129</sup> Announcing the creation of the new initiative, Attorney General Eric Holder described ATJ 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.”<sup>130</sup>

ATJ is a promising development and has potential for expanding civil legal representation, albeit in modest respects. ATJ has indeed improved access to civil legal services in some areas. For example, ATJ collaborates with other federal agencies to encourage them to incorporate such legal services into their work. ATJ has launched the Legal Aid Interagency Roundtable (“LAIR”), which works with seventeen participating agencies to increase public awareness of the impact of legal aid programs in furthering federal efforts to increase access to education, employment, health, and housing, and to remove barriers

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125. Houseman & Perle, *supra* note 108, at 4.

126. Diller & Savner, *supra* note 123, at i.

127. BRENNAN CTR., *FY 2011 Appropriations Process*, *supra* note 121; Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009).

128. *U.S. Government Report*, *supra* note 45, at ¶ 63.

129. DEP’T OF JUSTICE, *The Access to Justice Initiative* [hereinafter DOJ, *ATJ Mission*], <http://www.justice.gov/atj/> (last visited Oct. 9, 2013).

130. Eric Holder, U.S. Attorney Gen., Dep’t of Justice, Remarks at the Street Law Awards Dinner (Apr. 28, 2010), *available at* <http://www.justice.gov/ag/speeches/2010/ag-speech-100428.html>.

that prevent access to federal programs.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup>

In addition, ATJ has 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.<sup>134</sup>

Nevertheless, ATJ faces significant constraints. Currently, ATJ is operating at limited capacity without a permanent senior counselor and with insufficient staffing. ATJ currently functions with approximately six 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. While positive, it is a modest intervention in its current form.

## **OTHER FEDERAL EFFORTS, WHILE WELCOME, FALL SHORT OF ADEQUATELY ADDRESSING THE CIVIL ACCESS TO JUSTICE GAP**

Beyond LSC and ATJ, the federal government administers additional programs to address concerns surrounding access to justice for immigrants. The Executive Office for Immigration Review (“EOIR”) is the agency within the Department of Justice that is primarily responsible for administering the U.S. immigration court system.<sup>135</sup> EOIR’s Office of Legal Access Programs (“OLAP”) oversees several initiatives on legal access, including: the Legal Orientation Program (“LOP”), the Legal Orientation Program for Custodians of Unaccompanied Alien Children (“LOPC”), and the BIA Pro Bono Project. The federal government also recently announced the “justice AmeriCorps” program to provide representation to unaccompanied immigrant children.

Under LOP, EOIR partners with non-profits to educate detained immigrants on the immigration court process. Program providers are not permitted to use LOP funds for legal representation.<sup>136</sup> Instead, the program responds to the consistently low rates of representation in certain immigration detention centers by working to improve detained immigrants’ success rates absent representation. The LOP educational presentations are given to large groups of detained immigrants, and normally include a general large-group orientation as well as an opportunity for non-represented detained immigrants to

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131. U.S. DEP’T OF JUSTICE, ACCESS TO JUSTICE INITIATIVE, *Four-Year Anniversary Accomplishments* 6-7 (2014) [hereinafter ATJ, *Four-Year Anniversary Accomplishments*], available at <http://www.justice.gov/atj/accomplishments.pdf>; Tony West, Acting Assoc. Attorney Gen., Dep’t of Justice, Remarks at the National Academy of Elder Law Attorneys 2013 Annual Conference (May 2, 2013), available at <http://www.justice.gov/iso/opa/asg/speeches/2013/asg-speech-1305021.html>; Eric Holder, U.S. Attorney Gen., U.S. Dep’t of Justice, Remarks at the White House Forum on Increasing Access to Justice (Apr. 16, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1304161.html>.

132. ATJ, *Four-Year Anniversary Accomplishments*, *supra* note 131, at 7.

133. *Id.* at 4.

134. *Id.* at 9.

135. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *EOIR at a Glance* (2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm>.

136. VERA INST. OF JUSTICE, *Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II*, at 19 (2008), available at <http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf>.

briefly discuss their cases with counselors.<sup>137</sup> Since its establishment in 2003, LOP has become fairly widespread. A 2008 study by the Vera Institute of Justice, one of EOIR's non-profit partners, claims LOP assisted over 100,000 detained immigrants in its first four years.<sup>138</sup>

LOPC provides education to custodians of unaccompanied alien children and informs them of their rights and responsibilities during EOIR removal proceedings.<sup>139</sup> Like LOP, it is designed to mitigate the effects of lack of access to representation, but it does not actually provide representation.<sup>140</sup>

The BIA Pro Bono Project is designed to increase pro bono representation for immigrants. EOIR screens cases and, using criteria developed with partnering non-profits, sends case summaries to pro bono representatives who then decide whether or not to represent particular individuals.<sup>141</sup> During its ten years of implementation, the project has facilitated representation of 698 cases.<sup>142</sup>

Finally, as noted above, a new program was launched in June 2014 to address the crisis of large numbers of unaccompanied minors crossing the southwest border. The program, "justice AmeriCorps," is a partnership between the Corporation for National and Community Service and the Department of Justice. The program will provide \$2 million in grants to non-profits, which will then enroll approximately one hundred lawyers and paralegals to represent unaccompanied alien children.<sup>143</sup> Legal representatives will serve for about one year in exchange for a modest stipend.

While these federal efforts are positive and promising, they are inadequate to address the civil justice gap in the United States. LOP and LOPC are both designed primarily as "know-your-rights" trainings and do not provide any right or even access to legal representation. Instead, they seek to educate people on how to better represent themselves. Although such training is helpful, it is no substitute for legal representation. The BIA Pro Bono Project and justice AmeriCorps, on the other hand, do seek to provide legal representation to individuals in limited circumstances. This is very promising and an important step in the right direction. However, the scale of both projects must be expanded in order to make a difference for the vast majority of immigrants.

## THE FEDERAL GOVERNMENT SHOULD ADOPT SEVERAL REFORMS

To fulfill its obligations under CERD, 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 (1) support research into the disproportionate impact of lack of civil counsel on indigent persons belonging to racial, ethnic and national minorities; (2) fully fund LSC and eliminate the restrictions on LSC grantee organizations; (3) intensify and fully resource ATJ; (4) support, coordinate and

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137. DEP'T OF JUSTICE, *Office of Legal Access Programs*, <http://www.justice.gov/eoir/probono/probono.htm> [hereinafter DOJ, *OLAP*] (last visited July 23, 2014). For more information on LOP orientations, see VERA INST. OF JUSTICE, *supra* note 136, at 19-24.

138. VERA INST. OF JUSTICE, *supra* note 136, at 27.

139. DOJ, *OLAP*, *supra* note 137.

140. *Id.*

141. *Id.*

142. *A Ten-Year Review of the BIA Pro Bono Project: 2002-2011*, at 7 (2014), available at [http://www.justice.gov/eoir/reports/BIA\\_PBP\\_Eval\\_2012-2-20-14-FINAL.pdf](http://www.justice.gov/eoir/reports/BIA_PBP_Eval_2012-2-20-14-FINAL.pdf).

143. Kirk Semple, *U.S. to Provide Lawyers for Children Facing Deportation*, N.Y. TIMES, June 6, 2014, <http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html>.

encourage efforts on the state level to establish a civil right to counsel; and (5) establish a right to counsel in federal civil cases where basic needs are at stake and in immigration removal proceedings.

## THE UNITED STATES SHOULD UNDERTAKE AND FUND RESEARCH TO ASCERTAIN THE DISPROPORTIONATE IMPACT OF A LACK OF COUNSEL IN CIVIL CASES ON MINORITIES

The U.S. failure to treat the civil justice gap with the seriousness and urgency it deserves may be traced to the lack of information about its impact. To rectify this lack of information, the government should lead and support empirical research to assess the disproportionate impact that the lack of a generally-recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities, including those in immigration proceedings. A number of studies examining specific categories 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.<sup>144</sup> One study, for example, concluded that being represented by counsel greatly increased a litigant's chances of gaining an order of protection in the domestic violence context,<sup>145</sup> while another observed that legal representation had a major effect on eviction rates in housing cases.<sup>146</sup> 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.<sup>147</sup> 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 systemic, national-level studies on civil access-to-justice issues.<sup>148</sup>

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 and local bar associations, various legal services programs, LSC, the American Bar Foundation, not-for-profit organizations, ATJ, and numerous law schools.<sup>149</sup> 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."<sup>150</sup>

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144. See Press Release, N.Y. City Bar, City Bar Welcomes NERA Report Finding Appointed Immigration Counsel Would Pay for Itself (May 30, 2014), available at <http://www.nycbar.org/44th-street-blog/2014/05/30/city-bar-welcomes-nera-report-finding-appointed-immigration-counsel-would-pay-for-itself/>; David Udell & Rebekah Diller, BRENNAN CTR. FOR JUSTICE, *Access to Justice: Opening the Courthouse Door* (2007), available at [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_48493.pdf](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).

145. Liz Elwart et al., WISC. ACCESS TO JUSTICE COMM., *Increasing Access to Restraining Orders for Low Income Victims of Domestic Violence: A Cost-Benefit Analysis of the Proposed Domestic Abuse Grant Program* (2006), available at <http://www.nlada.org/DMS/Documents/1176146724.92/WI%20appendix8.pdf>.

146. 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, 429 (2001).

147. See Abel & Vignola, *supra* note 15, at 146-50.

148. Deborah L. Rhode, CONSORTIUM ON ACCESS TO JUSTICE, *Access to Justice: An Agenda for Legal Education and Research* 3 (2011), available at [http://www.law.harvard.edu/programs/plp/pdf/Access\\_to\\_Justice.pdf](http://www.law.harvard.edu/programs/plp/pdf/Access_to_Justice.pdf).

149. *Id.* at 13.

150. *Id.* at 3.

Additional research is also needed to determine the impact of civil legal aid on individuals and their communities, including its impacts on racial, ethnic, and national minorities, and how civil legal aid can best be delivered. As originally constituted, LSC had such a centralized body, but it was subsequently abolished,<sup>151</sup> an event which significantly hampered the national collection and coordination of civil legal aid research. 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.”<sup>152</sup> A new independent research unit could be housed in the Justice Department itself or reconstituted under LSC.

Short of establishing such a body, the government should help fund and coordinate research initiatives focused on civil legal aid generally and the effects of a lack of generally-recognized right to counsel on racial, ethnic and national minorities, in particular, including in immigration proceedings.

## **THE UNITED STATES SHOULD FUND THE LEGAL SERVICES CORPORATION ADEQUATELY AND EASE RESTRICTIONS ON LSC GRANTEES**

The U.S. government has identified LSC as central to its efforts to promote access to civil legal aid.<sup>153</sup> However, unless funding is dramatically increased and restrictions on grantees are eased, LSC will continue to fall far short of meeting the civil legal needs of those living in the United States. Since 2010, Congress has cut \$55 million from LSC’s budget.<sup>154</sup> These reductions come at a time when the number of people qualifying for LSC assistance is at an all-time high.<sup>155</sup> LSC has requested a Congressional appropriation of \$486 million for 2015.<sup>156</sup>

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 whom 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 within federal funding limitations, even when activities are independently financed. Making this change would 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.

## **THE FEDERAL GOVERNMENT SHOULD DEDICATE THE NECESSARY RESOURCES TO DEEPEN AND EXPAND THE ACCESS TO JUSTICE INITIATIVE’S ACTIVITIES**

ATJ has made significant strides since it was established. ATJ 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

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151. Houseman, *supra* note 12, at 15.

152. ATJ, *Four-Year Anniversary Accomplishments*, *supra* note 131, at 9.

153. See *U.S. Government Report*, *supra* note 45, at ¶ 61.

154. See *LSC Fact Book 2012*, *supra* note 84, at 3; *LSC Funding*, *supra* note 83.

155. LSC, *FY2015 Budget Request*, *supra* note 20, at 1.

156. *Id.*



civil legal services. Yet, ATJ lacks the resources and infrastructure necessary to meet its ambitious mandate.

For example, ATJ has, over the past couple of years, worked with other advocates and stakeholders to stimulate conversations concerning effective research and analysis models. With additional resources, ATJ 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.

ATJ would also benefit from the appointment of senior leadership. For more than a year, the ATJ website has listed only an “Acting Senior Counselor,”<sup>157</sup> which gives the Initiative an uncertain status. With a more permanent Senior Counselor who can help to define a clear strategy and operational mission, ATJ could function more deliberately and transparently as it works to meet its objectives.

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

## THE FEDERAL GOVERNMENT SHOULD PROVIDE SUPPORT AND GUIDANCE FOR STATE AND LOCAL EFFORTS

In an understanding attached to its ratification of CERD, the U.S. federal government committed itself to implementing the Convention where it has jurisdiction over particular matters, and to ensuring the fulfillment of the Convention where state and local authorities have jurisdiction over particular matters.<sup>158</sup> 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 three primary means for achieving this. First, it can fund state access-to-justice initiatives; second, it can develop, evaluate, and disseminate “best practices” for state and local governments; and third, it can file supportive amicus briefs in right-to-counsel litigation in state courts and in appropriate federal cases.

First, in support of state access-to-justice initiatives, 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, such as: the program instituted by California’s Sargent Shriver Civil Counsel Act, which is designed to examine the cost effectiveness of civil counsel; the New York Immigrant Family Unity Project, which provides representation for detained immigrants facing deportation;<sup>159</sup> or the San Francisco pilot project to provide counsel in eviction cases.<sup>160</sup> Federal funding can also be used to support broader-scale efforts, like the pending proposal in New York City to provide counsel in housing eviction cases.<sup>161</sup>

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157. DOJ, *ATJ Mission*, *supra* note 129.

158. 140 Cong. Rec. S7634 (daily ed. June 24, 1994).

159. See Press Release, N.Y. City Council, Speaker Quinn, Council Members & Immigrant Rights Groups Announce Pilot Program Providing Legal Counsel for Immigrants Facing Deportation (July 19, 2013), *available at* <http://council.nyc.gov/html/pr/071913nyifup.shtml>.

160. See JOHN AND TERRY LEVIN CTR. FOR PUB. SERV. AND PUB. INTEREST, *San Francisco Right to Civil Counsel Pilot Program Documentation Report* (2014), *available at* <http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=49157>.

161. Sherlyn Aldas, *Tenants Rally for Legal Reform*, HUNTS POINT EXPRESS, June 11, 2014, <http://huntspointexpress.com/>.

Similarly, federal funding should support programs examining the provision of counsel in foreclosure proceedings, which is especially important in the wake of the housing crisis.<sup>162</sup> 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 should 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” for the child in all dependency cases.<sup>163</sup> 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 ATJ to engage states in a dialogue about the issue of civil counsel, with the ultimate goal of encouraging states to adopt statutory language recognizing a civil right to counsel.

In response to the civil justice gap, in 2006 the American Bar Association (the “ABA”) 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.<sup>164</sup>

This resolution marked the first time that the ABA recognized the government’s obligation to provide counsel to low-income individuals in civil proceedings.<sup>165</sup> State bar associations responded positively to the resolution,<sup>166</sup> and 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 afford a lawyer.<sup>167</sup>

In addition to the principles, the ABA adopted the ABA Model Access Act, which provides language that legislators can use to implement a statutory right to counsel.<sup>168</sup> No state has yet incorporated the

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

163. Ira Lustbader & Erik Pitalch, *Implementation of the Right to Counsel for Children in Juvenile Dependency Proceedings: Lessons from Kenny A.*, 36 NOVA L. REV. 407, 408 (2012).

164. Howard H. Dana, *Report to the ABA House of Delegates: Resolution 112A*, at 1 (2006) [hereinafter *Resolution 112A*], available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](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”).

165. Robert E. Stein, *Report to the ABA House of Delegates: Resolution 105* (revised) (2011) [hereinafter *Resolution 105*], available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_105\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf).

166. Thirteen state and local bar associations co-sponsored the ABA resolution. *Resolution 112A*, *supra* note 164. 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 165.

167. *Resolution 105*, *supra* note 165.

168. See Lorna G. Schofield, *Report to the ABA House of Delegates: Resolution 104* (revised) (2010), available

Principles or Model Access Act into its respective laws or regulations. However, the federal government can work with states to encourage their adoption of statutory language in keeping with these guiding documents.

Second, the federal 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 ATJ, already does this in the specific context of child support proceedings, and thus can develop and circulate “best practices” on a broader basis.<sup>169</sup>

Finally, the federal 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*).<sup>170</sup> The government can also file amicus briefs in support of right to counsel in appropriate federal cases.

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

## THE UNITED STATES SHOULD PRIORITIZE ESTABLISHING A RIGHT TO COUNSEL IN CERTAIN FEDERAL CASES

The federal government should prioritize establishing a right to legal counsel for immigrants in civil immigration proceedings and indigent litigants in other federal civil cases where liberty interests or basic human needs are at stake. Already a number of federal statutes provide for the appointment of counsel in certain narrow contexts.<sup>171</sup> In the immigration context, the government is currently working to pass comprehensive immigration reform, and a bill passed by the Senate in June 2013 included a provision requiring the appointment of counsel at government expense for unaccompanied minors, those with severe mental disabilities, and other particularly vulnerable individuals.<sup>172</sup> The bill has not yet been considered in the House.

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at

[http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_104\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf).

169. ATJ, *Four-Year Anniversary Accomplishments*, *supra* note 131, at 8.

170. Brief for the United States as Amici Curiae Supporting Reversal, *Turner v. Rogers*, 131 S.Ct. 2507 (2011) (No. 10-10), 2011 WL 108380.

171. 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(b) (2006) (discretionary appointment of counsel in federal civil forfeiture proceedings and right to counsel where disputed property used as primary residence); *Id.* § 3006A(a)(2) (right to counsel for sexually dangerous persons proceedings in federal court); *Id.* § 4247(d) (right to counsel for federal civil commitment proceedings); 25 U.S.C. § 1912(b) (2006) (right to counsel for Indian parents in foster care or termination of parental rights proceedings); *Id.* § 1875(d)(1) (right to counsel for jurors fired for jury service, if judge finds merit in claim); 42 U.S.C. § 3613(b) (2006) (discretionary appointment in housing discrimination cases); 50 U.S.C. app. §§ 521(b)(2), 522(d)(2) (2006) (no entry of judgment against defendant in military service unless counsel appointed, and if stay refused, counsel must also be appointed); 8 U.S.C. § 1232(c)(5) (2012) (Secretary of Health and Human Services must “ensure, to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security . . . have counsel to represent them in legal proceedings”).

172. S. 744, 113th Cong. § 3502(c) (2013).

The President should support these efforts and work to 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.<sup>173</sup> 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.<sup>174</sup> For their part, immigration proceedings implicate all of the basic human needs cited above and more. Indeed, deportation may result in loss of “life, or of all that makes life worth living.”<sup>175</sup> Thus counsel should be provided as a matter of right in immigration proceedings as well.

Enshrining the right to counsel in federal civil cases where basic human needs are at stake, including in immigration proceedings, would begin to close the justice gap and address continued racial disparities while demonstrating the government’s commitment to its international human rights obligations under CERD.

## CONCLUSION

By ratifying CERD, the United States committed itself to ensuring meaningful and equal access to justice. As part of this commitment, the United States must ensure meaningful access to counsel in civil cases, especially where lack of counsel has a disparate impact on vulnerable communities and where core human needs are at stake. Current efforts are a step towards fulfilling this commitment, but are on their own inadequate. To meet its obligations under CERD, 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 United States must ease restrictions and increase financial and logistical support for LSC and ATJ, thereby enabling these efforts to reach their full potential. The United States should also file supportive amicus briefs for right-to-counsel litigation in both federal and state courts, and support and coordinate efforts on the state level to establish a civil right to counsel. Finally, the United States 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, combat the impacts of discrimination, and uphold the dignity of all Americans.

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173. *Resolution 112A, supra* note 164, at 1.

174. *See generally Resolution 105, supra* note 165.

175. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).