

ACCESS TO CIVIL JUSTICE:

Racial Disparities and Discriminatory Impacts Arising from Lack of Access to Counsel in Civil Cases

**A Response to the 2007 Periodic Report
of the United States of America**

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*Program on Human Rights
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INTRODUCTION

While the U.S. Constitution has been construed to provide a right to counsel at state expense for those accused of a crime, there is currently no such federal constitutional right for litigants in civil cases, even when the litigant is indigent and even when the case involves critical needs such as child custody, housing, food or health. Instead, civil counsel is provided through legal aid and pro bono programs that are severely underfunded, such as the Nevada civil assistance program cited favorably at paragraph 152 of the U.S. Periodic Report to the CERD Committee. Many states provide a right to counsel at state expense for parents when they stand to lose their parental rights, and for children in abuse and neglect cases. Indeed, more than half the states have established such a right for indigent parents, even though the U.S. Constitution does not mandate it.¹ But nowhere in the United States is the right to civil counsel comprehensive.

A recent survey of civil legal aid in the U.S. estimated that less than 20 percent of indigent civil litigants' legal needs are met under the current system.²

Since racial minorities are disproportionately poor, they are disproportionately harmed by the lack of civil counsel.³ Empirical studies confirm this racially disparate impact. This racial justice issue is within the scope of articles 5 and 6, which address fair procedure and adjudication through the lens of equality and non-discrimination. Both articles include civil matters and explicitly require that States take positive steps to ensure effective access to the apparatus of the State's justice system. The Committee has underscored the importance of counsel in realizing these rights. General Recommendation XXXI highlights the importance of making it easier for victims of acts of racism to seek *civil* redress in the courts by, inter alia, providing free assistance of counsel.⁴ General Recommendation XXIX addressing "Discrimination based on Descent" recommends more generally that State Parties "take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including providing legal aid, facilitating group claims and encouraging non-governmental organizations to defend community rights."⁵

DISCUSSION:

1. Access to Legal Counsel is a Critical Component of Access to Justice

¹ John Nethercut, "*This Issue Will Not Go Away*": *Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REV. 481-490, 484 (Nov.-Dec. 2004)

² Alan Housman, *Civil Legal Aid in the United States: An Update for 2007* (Center on Law and Social Policy, Aug. 22, 2007), at p.9.

³ See generally Wade Henderson and Jonathan M. Smith, *The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate*, 40 CLEARINGHOUSE REV. 210, 211 (July-Aug. 2006) (African Americans and Latinos are more than twice as likely as whites to be poor; nearly 40% of families headed by African American or Latino women are poor).

⁴ Gen. Rec. 31, at 103, ¶C (17)(b)

⁵ Gen. Rec. No.29, at 111, ¶ 5(u)

The rising frequency of unmet legal needs in the United States has led to vast numbers of civil litigants appearing without legal counsel.⁶ American family and housing courts are dominated by unrepresented litigants.⁷ Courts have often characterized those without counsel as “choosing” to “self-represent,” but given the benefits of representation, most litigants would prefer to have legal counsel assisting them with their civil claims.⁸

Empirical evidence, particularly drawn from domestic violence and housing litigation, amply demonstrates the significance of counsel in ensuring that a case comes to a fair and accurate conclusion. For many cases and litigants, access to an attorney makes a significant difference.⁹ For example, one recent study found that access to legal services was one of the primary factors contributing to a twenty-one percent national decrease in incidents of domestic violence,¹⁰ in part because of the assistance that lawyers provide in crafting effective remedial provisions. Indeed, another study reported that litigants represented by counsel enjoyed an eighty-three percent success rate in gaining protective orders while unrepresented litigants had only a thirty-two percent success rate.¹¹ In the housing area, studies similarly show that tenants' access to counsel is a “crucial factor affecting case outcomes and preventing evictions.”¹² Research demonstrates that in some states, unrepresented tenants *never* prevail in their claims against landlords, regardless of whether the landlord is represented or pro se; clearly, the provision of counsel to these tenants “is a crucial factor affecting the outcome of the case and preventing eviction.”¹³

The advantages of legal representation are not limited to housing, domestic violence and family law matters, but cross the spectrum of litigation.¹⁴ For example, the impact of counsel has been repeatedly documented in civil cases involving the rights of immigrants. Asylum cases in particular have shown a dramatic difference in outcome for those represented by counsel. The American Bar Association reported that “persons with qualified and competent legal representation secure relief at far higher rates than pro se

⁶ Russell Engler, *Toward a Context-Based Civil Right to Counsel Through “Access to Justice” Initiatives*, 40 CLEARINGHOUSE REV., 196-209, 196 (July-August 2006).

⁷ *Id.* at 202.

⁸ *Id.* at 198. Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 CLEARINGHOUSE REV. 271-280, 280 (July-August 2006) (describing improved accuracy of outcomes when parties are represented).

⁹ David Udell and Rebekah Diller, *Access to Justice: Opening the Courthouse Door*, Brennan Center for Justice White Paper, at New York University School of Law, 1 (2007).

¹⁰ *Id.* At 6; see also Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL'Y 158, 169 (2003), available at <http://www.lanwt.org/pdfs/exdo.pdf>.

¹¹ Russell Engler, *Shaping A Context-Based Civil Gideon From the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L.REV. 697, at 714 (2006).

¹² *Id.* at 715. See also, 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, at 429 (2001) (finding that when low-income tenants in New York City's Housing Court are provided with legal counsel, they experience significantly more beneficial procedural outcomes than their *pro se* counterparts).

¹³ Engler, *supra* note 6, at 715.

¹⁴ Rebecca L. Sandefur, et al, *Lawyer, Non-Lawyer and Pro Se Representation and Trial and Hearing Outcomes*, Dept. of Sociology, Stanford University (2006), at 19. http://papers.ssrn.com/sol13/papers.cfm?abstract_id=913426.

litigants.”¹⁵ Likewise, a study conducted by Georgetown University Institute for the Study of International Migration, analyzing government statistics, concluded that asylum seekers are four to six times more likely to be awarded asylum when they are represented by counsel.¹⁶

Recognizing the critical role that counsel plays in access to justice, many nations have sought to affirmatively provide civil counsel as a matter of right. For example, the right to counsel in civil cases has existed for decades or even centuries in most European and Commonwealth countries.¹⁷ Significantly, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was construed in by the European Court of Human Rights in *Airey v. Ireland*, App. No. 6289/73 2 Eur. H.R. Rep. 305 (ser. A) (1979), as requiring appointment of civil counsel.¹⁸ In this decision, the court concluded that “indigents *cannot* have a ‘fair hearing’ unless represented by lawyers” (emphasis added).¹⁹ This decision applies to almost fifty nations and over 400 million people, requiring members of the Council of Europe to “provide counsel at public expense to indigents in cases heard in regular civil court.”²⁰

Other nations have also made strides toward more comprehensive provision of civil counsel. For example, in a recent Report to the UN Human Rights Committee (HRC), Canada described a Supreme Court decision requiring the government “to provide an indigent party with state-funded counsel.”²¹

The international recognition of the critical role that access to counsel plays in access to justice reinforces the weight of the empirical findings demonstrating that lack of counsel has a significant, negative impact on the case outcomes experienced by indigent litigants.

2. The U.S. Has Failed to Provide Adequate Access to Counsel in Civil Cases

The U.S. briefly touched on the right to counsel in civil cases in its Periodic Report concerning the International Convention on the Elimination of Racial Discrimination. In paragraph 152, the Report indicates, that “in many states counsel is available in *some* civil cases through state bar *pro bono* programs, and legal aid

¹⁵ ABA Report, *The Quest to Fulfill Our Nation’s Promise of Liberty and Justice For All: ABA Policies on Issues Affecting Immigrants and Refugees*, ABA Adopted by the House of Delegates (Feb. 13, 2006) (in 2003, only 14 percent of non-detained asylum seekers without counsel were granted asylum in comparison to 39 percent with counsel; and for detained asylum-seekers 3 percent gained asylum without counsel compared to 18 percent success with counsel).

¹⁶ Andrew Schoenholtz and Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMM. L.J. 739 (Fall 2002); see also Eleanor Acer, et al., *No Deportation Without Representation: The Right to Appointed Counsel in the Immigration Context*, IMMIGRATION BRIEFINGS, (Oct. 2005), 3

¹⁷ ABA Task Force on Access to Civil Justice, “Report to the House of Delegates,” at 3 (Aug. 2006), available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentyonec.doc>

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ Fifth Periodic Report: Canada, 18/11/2004. CCPR/CAN/2004/5 (State Party Report) at p. 22, ¶ 95.

programs” (emphasis added).²² This assistance, however, is very limited, unevenly distributed, and falls far short of the equal access to justice envisioned by articles 5 and 6 of CERD and the Committee’s General Recommendations. Importantly, poor people vindicating critical needs in civil matters do not have a federal constitutional right to counsel. The U.S. Supreme Court ruled in *Lassiter v. Department of Social Services*²³ that there is no absolute right to appointed counsel for an indigent litigant in a case brought by the state to terminate parental rights. Instead, the Court instructed lower courts to apply a balancing test to determine whether counsel should be appointed in any given case, while applying a general presumption against appointed counsel except when there is a risk of loss of physical liberty.²⁴

The American Bar Association (ABA) addressed the inadequacy of current U.S. approaches to access to civil counsel in a 2006 Report endorsed unanimously by the ABA’s House of Delegates.²⁵ The ABA report found that “despite all the efforts of legal aid programs and pro bono lawyers, an ABA nationwide legal needs study in 1993 showed that legal help was not obtained for over 70 percent of the serious legal problems encountered by poor people.”²⁶ More recent studies indicate that the gap is widening.²⁷ In light of this crisis, the ABA called on “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.”²⁸ Adoption of such measures would be a significant step in discharging U.S. obligations under CERD.

Under the U.S. federal system, the right to counsel in civil matters is generally regulated at the state level. But as the ABA Resolution acknowledges, this system has provided only a patchwork of approaches with little or no oversight to ensure broad access to justice. A few states have provided a narrowly limited *constitutional* right to civil counsel (with others extending the right through statute), generally in cases involving parental rights. Among the states that have addressed the need for counsel in the civil justice system is Oregon, whose Supreme Court recognized that its constitution's due process clause required that the state government provide free counsel to parents in dependency and neglect cases.²⁹ Similarly, the Alaska Supreme Court held that counsel “must be appointed at public expense to an indigent party in child custody proceeding if

²² Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, at ¶ 152 (April 2007).

²³ 452 U.S. 18 (1981).

²⁴ *Id.* at 27.

²⁵ ABA Task Force on Access to Civil Justice, “Report to the House of Delegates,” 10 (Aug. 2006), available at <http://www.nlada.org>;
<http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentyonec.doc>

²⁶ *Id.* at 4.

²⁷ *Id.*

²⁸ *Id.* at 1.

²⁹ *Id.* at 7.

the other party was provided free representation.” In California the right to counsel has been extended to defendants in paternity suits.³⁰

Other states have provided a right to counsel in discrete areas identified by their legislatures.³¹ Most state right-to-counsel provisions fall within three broad categories: family law; involuntary commitment; and medical treatment, with a majority of jurisdictions providing counsel in abuse and neglect, and parental termination cases.³² However, because implementation is local and uneven, there are no national guidelines requiring “experience, training, or the fulfillment of any particular duties” by appointed attorneys, even when counsel is provided.³³ This lack of uniformity can deny effective and equal access to counsel even to litigants within the same state.³⁴ Further, coverage is uneven. For example, despite the data cited above demonstrating the significant impact that counsel have on the outcome of domestic violence cases, only one jurisdiction, New York, extends a right to counsel in such matters.³⁵ Likewise, federal law permits (but does not require) appointment of counsel in housing discrimination cases, but only four states address such an appointment in housing discrimination matters brought under state law.³⁶

In areas of civil litigation under exclusive federal control, such as immigration law, the picture is even bleaker. Federal law prohibits use of government funds to support representation of aliens in removal proceedings, even in instances of prolonged detention.³⁷ Even unaccompanied alien children subject to civil immigration proceedings in the U.S. have not been afforded a right to representation, but must instead rely on voluntary *pro bono* representation. As Washington, D.C. attorney Christopher Nugent recently testified before the Inter American Human Rights Committee, despite this *pro bono* effort, “the vast majority of unaccompanied alien children go unrepresented in their removal proceedings.”³⁸

The 2001 Concluding Observations by the Committee on Elimination of Racial Discrimination addressed to the U.S. specifically emphasized that “irrespective of the relationship between the federal authorities, on the one hand, and the States, which have extensive jurisdiction and legislative powers, on the other, with regards to its obligation under the Convention, the Federal Government has the responsibility to ensure its

³⁰ *Id.*

³¹ Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. at 245, 245-270 (July-August 2006).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 251.

³⁵ *Id.* at 269 (Table).

³⁶ *Id.* at 269 (Table).

³⁷ 8 U.S.C. s. 1362.

³⁸ Testimony of Christopher Nugent, Senior Counsel with the Community Services Team of the international law firm of Holland and Knight in Washington D.C., before the Inter American Human Rights Commission, Oct. 12, 2007 (Washington, D.C. (available at www.womenscommission.org/pdf/OAS_testimony_CNugent.pdf).

implementation on its *entire territory*” (emphasis added).³⁹ By the U.S.'s own admission, this obligation has not been met with respect to the provision of access to counsel in civil cases.

3. Lack of Access to Civil Counsel Undermines the Rights of Racial Minorities

Racial minorities are disproportionately harmed by the lack of a right to civil counsel, placing this issue squarely within the scope of CERD. While data is not plentiful, a number of empirical studies confirm this racially disparate impact. A 1997 Report issued by California’s Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts estimated that about 85 percent of those appearing without counsel in family court are women, and that the majority are women of color.⁴⁰ According to the Report, the parties appearing without counsel in the California family courts were “consistently treated with less respect and given insufficient information to carry out the roles that were assigned to them in representing themselves.”⁴¹ The Report noted that these women “suffer a composite prejudice or bias based on the fact that they are women of color.”⁴² Among other things, the Report recommended collection of further race-specific data, particularly data concerning the total number of litigants unrepresented by counsel.⁴³

A more recent state report completed in 2003 specifically highlighted the disproportionate racial impact of the lack of subsidized civil counsel.⁴⁴ The Pennsylvania Supreme Court, Committee on Racial and Gender Bias in the Justice System’s findings indicated:

Low-income litigants, who include a disproportionate number of women and minorities, are often disadvantaged in the family court system because they are not represented by counsel. Specifically, they often do not receive sufficient and comprehensible information concerning the availability of reduced fee and *pro bono* representation, nor do they receive complete information about their procedural and substantive rights and responsibilities.⁴⁵

³⁹ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14/08/2001. A/56/18, paras. 380-407 (2001), at para. 383.

⁴⁰ *Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts*, Judicial Council of California, at 13, January 1997.

⁴¹ *Id.* At 162-163 (quoting Assemblywoman Kuehl).

⁴² *Id.* at 162.

⁴³ *Id.* at 173.

⁴⁴ *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*. Harrisburg: Pennsylvania Supreme Court, Committee on Racial and Gender Bias in the Justice System, March 2003.

⁴⁵ *Id.* at 457.

Attorneys who participated in roundtable discussions that informed the Committee's report also noted that "a disproportionate number of *pro se* litigants were women or members of minority groups."⁴⁶

Other state task forces also found that minorities and women are more likely to be family court users than whites.⁴⁷ In addition, many reported "harsher treatment or barriers for women and minorities."⁴⁸ Among the most echoed sentiment was that review of biases in the civil justice system was made more difficult by the "lack of statistical information of the sort that is more readily available in both criminal and juvenile justice system."⁴⁹

The family court system is not the only place where this racial impact is felt. Additional proof of the disproportionate racial impact of lack of counsel appears in a New York City Housing Courts Study published in February 2007.⁵⁰ The study surveyed tenants at three housing courts in New York City over a five month period.⁵¹ The cases involved critical issues of human needs, including payment of rent, habitability, and eviction. Over 70 percent of the tenants appearing in court were not represented by counsel.⁵² Further, nearly 50 percent of the tenants in housing court were Black/African American, in contrast to the New York City census data indicating that Black/African Americans account for 24.5 percent of the city's population. Whites, in contrast, were underrepresented in the housing courts.⁵³

Finally, the racial impact of U.S. immigration policies and proceedings has been thoroughly documented and analyzed.⁵⁴ Here, too, the failure to provide counsel in civil immigration proceedings such as removal and asylum proceedings clearly has a disparate impact on racial minorities.

RECOMMENDATIONS:

⁴⁶ *Id.* at 461. *See also Id.* at 549.

⁴⁷ *Report on the Commission on Racial and Ethnic Fairness in the Judicial Process*. Maryland Courts, at 2. (2004)

⁴⁸ *Indiana Supreme Court Commission on Race and Gender Fairness Executive Report and Recommendations*. Supreme Court of Indiana, at 4 (2002).

⁴⁹ *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, Salem: Office of the State Court Administrator, Oregon Judicial Department, May 1994.

⁵⁰ Results From Three Surveys In New York City Housing Courts, Prepared by: Kira Krenichyn, PhD. and Nicole Schaeffer-McDaniel, M.A., Center for Human Environments, Graduate Center of the City University of New York, New York (Feb. 2007).

⁵¹ *Id.* at 1.

⁵² *Id.* at 2.

⁵³ *Id.* at 26.

⁵⁴ *See, e.g.*, American Civil Liberties Union, *America's Disappeared: Seeking International Justice for Immigrants Detained After September 11* (2004) (almost all immigrants "rounded up" after September 11 were Arab or Southeast Asian men); Susan M. Akram and Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11 2001: The Targeting of Arabs and Muslims*, 58 ANN. SURV. AM. L. 377 (2002).

In sum, the lack of civil counsel is a key factor perpetuating racial bias in the administration of civil justice in the U.S. State laws fail to provide comprehensive rights to counsel in cases with significance consequences for minority litigants. Likewise, federal laws fail to provide a civil right to counsel in areas under federal authority that impact racial minorities, such as immigration. Task forces created by state courts, as well as the ABA, have concluded that the patchwork of under-funded legal aid offices and volunteer programs for providing civil counsel are insufficient to assist indigent litigants in cases involving critical needs. *Pro bono* services, while well-meaning, are simply not sufficient to eliminate the discriminatory impact of this systemic problem.

In order to address this serious issue, we propose that the U.S. government expand the access to civil justice of racial minorities, including:

(1) funding and implementing a system for providing a right to counsel in civil cases, particularly in matters of fundamental human needs as recommended by the American Bar Association. Such standards would be a significant step toward discharging U.S. obligations under CERD. Specific implementation measures might include providing additional funding for federal legal services to provide more comprehensive civil legal representation to indigents as well greater coordination and training for pro bono representation;

(2) further data collection, assessment and public reporting on the discriminatory impact of the current system of providing civil counsel, including collection of data documenting the gender aspects of this racial discrimination.

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