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Obligation Ignored: Why International Law Requires the United States to Provide Adequate Civil Legal Aid, What the United States is Doing Instead, and How Legal Empowerment Can Help

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OBLIGATION IGNORED: WHY INTERNATIONAL LAW REQUIRES THE UNITED STATES TO PROVIDE ADEQUATE CIVIL LEGAL AID, WHAT THE UNITED STATES IS DOING INSTEAD, AND HOW LEGAL EMPOWERMENT CAN HELP

ZACHARY H. ZARNOW*

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I. INTRODUCTION

In the United States, wealth buys justice.¹ Millions of poor and middle-class Americans are unable to exercise their rights because of unmet civil legal needs.² Numerous studies and reports have found that in cases and administrative matters relating to bankruptcy, housing, family law, unemployment, domestic violence, healthcare, and consumer fraud, Americans face a critical lack of legal representation and assistance.³ Despite the due process concerns that motivated the Supreme Court's decision in *Gideon v. Wainwright*, the Court has found no constitutionally-mandated right to counsel in a civil case.⁴ To make matters worse, what little civil legal aid the United States does provide is underfunded, severely restricted, and unable to meet demand.⁵ The United States is virtually alone among wealthy Western democracies in so inadequately providing for the indigent with civil legal needs.⁶ This state of affairs persists despite studies showing that funding civil legal aid is not a budgetary drain but, instead, actually saves money and can yield economic growth.⁷

Providing adequate civil legal aid makes economic sense, but it is also a legal duty.⁸ The United States is ignoring its obligations under

1. See generally Deborah L. Rhode, *Access to Justice in the United States: Narrowing the Gap Between Principle and Practice*, in THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES 229 (Jorrit de Jong & Gowher Rizvi eds., 2008) (detailing inequalities and inadequacies in the justice system for the indigent, middle class, and those representing themselves).

2. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009) [hereinafter JUSTICE GAP 09], available at http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf (finding that half of those seeking civil legal aid are turned away).

3. See *infra* Appendix 1 (listing studies that detail the extremely low levels of civil legal aid in the United States).

4. See *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (mandating the provision of counsel to indigent criminal defendants); see also *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-33 (1981) (finding a presumption against the civil right to counsel unless a loss of physical liberty is at stake).

5. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (enacting restrictions on the activities the Legal Services Corporation can legally undertake); JUSTICE GAP 09, *supra* note 2, at 12, 16-18, 28.

6. See Raven Lidman, *Civil Gideon As A Human Right: Is the U.S. Going to Join Step With the Rest of The Developed World?*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 789 (2006) (cataloguing fifty-eight countries with a civil right to counsel and detailing the nature and scope of that right); see also WORLD JUSTICE PROJECT, RULE OF LAW INDEX 92 (2010), available at http://www.worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010_2.pdf (ranking the United States eleventh out of thirty-five countries in providing access to justice and worst in its income group and region).

7. See *infra* Appendix 2 (listing studies demonstrating the economic benefits of providing civil legal aid).

8. See Charter of the Organization of American States art. 45, *opened for*

international law and betraying its founding principles by letting this neglect continue.⁹ Americans who must face complex legal issues without help are unable to functionally exercise their rights.¹⁰ The United States is bound by international agreements to dedicate every effort to providing a level of civil legal aid that ensures the realization of human rights.¹¹ The United States is violating those agreements.

This Comment argues that to comply with international law, the United States should abandon *Lassiter v. Department of Social Services*' reasoning and reform and fully fund the Legal Services Corporation (LSC). Part II explores international sources of a right to civil legal aid and the failures of the United States to realize that right.¹² Part III argues that the United States is failing to meet its international legal duty to provide adequate civil legal aid, as evidenced by the shortcomings of the LSC and the Supreme Court's *Lassiter* decision.¹³ Part IV recommends that, to meet its international obligations while avoiding the problems of the current indigent criminal defense scheme, the United States should implement a system that utilizes legal services professionals instead of exclusively relying upon lawyers, drawing on practices from the international development model of legal empowerment of the poor (LEP).¹⁴

signature Apr. 30, 1948, 2 U.S.T. 2394, 1609 U.N.T.S. 119 (entered into force Dec. 13, 1951) [hereinafter OAS Charter] (requiring member states to provide civil legal aid).

9. See *id.*; see also *Gideon*, 372 U.S. at 342-45 (finding a constitutional due process right to counsel in a criminal case).

10. See generally Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators and Clerks*, 67 FORDHAM L. REV. 1987 (1999) [hereinafter Engler, *And Justice for All*] (examining various empirical reports detailing the poor success rates of litigants without counsel); 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) [hereinafter Engler, *Connecting Self-Representation*] (surveying quantitative reports showing that representation is a significant factor in improving a claimant's chances for success in eviction, custody, and debt collection cases, as well as in administrative proceedings).

11. See, e.g., Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (requiring adequate access to counsel to ensure equal protection before the law); International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter CERD] (requiring the provision of legal representation when basic human needs are at stake); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (requiring legal aid to secure the right to housing).

12. See *infra* Part II (defining the scope of the obligation).

13. See *infra* Part III (describing the United States' failure to comply with international law).

14. See *infra* Part IV (arguing for the adoption of a new model of civil legal aid that uses non-lawyers); U.N. COMM'N ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE 3 (2008), available at http://www.undp.org/legalempowerment/report/Making_the_Law_Work_for_Everyone.pdf (defining the LEP as "a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests").

II. BACKGROUND

A. *International Sources of a Right to Civil Legal Aid*

1. *Economic, Social and Cultural Rights and Civil and Political Rights*

The Universal Declaration of Human Rights (UDHR) is the aspirational origin of economic, social, cultural, civil, and political rights.¹⁵ Among other things, the UDHR calls for the protection of the rights to own property, to work, to social security, and to a fair trial.¹⁶ The International Covenant on Economic, Social and Cultural Rights (ICESCR) builds on this foundation by further detailing rights such as adequate housing, social security and insurance, labor rights, and education.¹⁷ The United States has ratified the International Convention on Civil and Political Rights (ICCPR), which requires procedural fairness in law, non-discrimination and equality before the law, and the provision of a fair trial.¹⁸

The UDHR, ICESCR, and ICCPR mandate a civil right to counsel in certain circumstances.¹⁹ The Committee on Economic, Social and Cultural Rights has found that under the ICESCR, governments should provide legal aid to those facing forced evictions.²⁰ The Human Rights Committee has also encouraged states to provide the indigent with free legal aid in civil cases and has noted that in some instances, states may even be obligated to

15. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 71 (Dec. 10, 1948) [hereinafter UDHR] (codifying the concept of human rights in the world community).

16. See *id.* at arts. 10, 17, 22-23, 25 (describing the economic, social, civil, and political rights).

17. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR] (further explaining the economic, social, and cultural nature of human rights).

18. See International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR] (delineating the human rights that impact civil and political activity); see also *U.S. Reservations, Declarations, and Understandings, International Convention on Civil and Political Rights*, 138 CONG. REC. 8070-71 (1992) (declaring the non-self-executing nature of the Covenant, which means that full enforcement of Covenant provisions domestically is dependent on Congress passing implementing legislation).

19. See Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Aug. 27-Sept. 7, 1990, ¶¶ 8, 11, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990) (expressing the international norm of providing effective access to legal services when fundamental rights are at stake).

20. See Comm. on Econ., Soc. & Cultural Rights, General Comment No. 7: The Right to Adequate Housing (Art. 11.1) Forced Evictions, ¶ 15, U.N. Doc. E/1998/22, Annex. IV (May 20, 1997) [hereinafter General Comment No. 7] (finding that housing is a basic human need and its status as such requires protection, including the provision of counsel to indigents so that they can realize this right).

do so under Article 14 of the ICCPR.²¹ As a result, state parties to the ICCPR often report to the Human Rights Committee on their efforts to provide counsel in civil matters.²² The Committee has also requested information on such efforts to assess a country's compliance with the ICCPR.²³

The Council of Europe embraced these rights on a regional level in the European Convention for the Protection of Human Rights (ECHR).²⁴ In *Airey v. Ireland*, the European Court of Human Rights construed Article 6 of the ECHR, requiring the right to a fair hearing, to mean that indigents must have "effective access" to courts.²⁵ Effective access requires either the provision of an attorney or the simplification of a proceeding so that a layperson would not need a lawyer in order for the hearing to be considered fair and accessible.²⁶ Subsequent decisions have affirmed the need to provide legal aid to ensure effective access to the courts.²⁷ In short,

21. U.N. Human Rights Comm., General Comment No. 32: Article 14, Right to Equality before Courts and Tribunals and To a Fair Trial, ¶ 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter General Comment No.32] (noting that the availability of legal assistance often determines whether access to a proceeding or participation in a proceeding can meaningfully be said to exist).

22. See, e.g., U.N. Human Rights Comm., ICCPR Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant—Fifth Periodic Report: Canada, ¶ 95, U.N. Doc. CCPR/C/CAN/2004/5 (Nov. 18, 2004) (describing Canada's legal aid scheme); U.N. Human Rights Comm., ICCPR Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant—Fifth Periodic Report: Germany, ¶ 190, U.N. Doc. CCPR/C/DEU/2002/5 (Dec. 4, 2002) (detailing the provision of legal aid in Germany).

23. See, e.g., U.N. Human Rights Comm., ICCPR Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant—Concluding Observations: Czech Republic, ¶ 16, U.N. Doc. CCPR/C/CZE/CO/2 (Aug. 9, 2007) (noting with concern the lack of legal aid for Roma victims of discrimination); U.N. Human Rights Comm., ICCPR Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant—Concluding Observations: Chile, ¶ 14, U.N. Doc. CCPR/C/CHL/CO/5 (May 18, 2007) (encouraging Chile to provide legal aid to workers so that their complaints can be heard).

24. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR] (applying the normative human rights framework of the UDHR to Europe); see also PIERRE-HENRI TEITGEN, REPORT TO THE CONSULTATIVE ASSEMBLY OF THE COUNCIL OF EUROPE ON THE ESTABLISHMENT OF A COLLECTIVE GUARANTEE OF ESSENTIAL FREEDOMS AND FUNDAMENTAL RIGHTS ¶ 6 (1949), available at <http://assembly.coe.int/Conferences/2009Anniversaire49/DocRef/Teitgen6.pdf> (drawing on the UDHR while drafting the ECHR).

25. See *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 21 (1979) (noting that effective access to the courts ensures the protection of civil, political, economic, and social rights).

26. See *id.* (recognizing that the protection of rights is paramount over the form of assistance that ensures such protection).

27. See, e.g., *Steel v. United Kingdom*, 18 Eur. Ct. H.R. 22 (2005) (holding that the legal and factual complexity of the case obligated the UK to provide counsel); *Bertuzzi v. France*, 2003-III Eur. Ct. H.R. 117 (2003) (requiring the provision of representation when it has been deemed crucial to a case); *Aerts v. Belgium*, 29 Eur. Ct. H.R. 50 (1998) (stating that denying qualifying citizens access to legal aid is a denial of the

international interpretive bodies have found that the similarly-articulated rights of the UDHR, ICESCR, ICCPR, and ECHR require a similar protection—the provision of civil legal aid.²⁸

2. *Other U.N. Conventions Also Mandate Civil Legal Aid*

The United States has ratified the Convention on the Elimination of all Forms of Racial Discrimination (CERD), which protects numerous civil, political, economic, social, and cultural rights.²⁹ Under the CERD, state parties must prohibit and eliminate racial discrimination and must guarantee equality before the law.³⁰ The United States is one of only two countries to have signed but not ratified the Convention on the Rights of the Child (CRC) and the only state to have signed but not ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).³¹

The CERD, CRC, and CEDAW create interpretive and monitoring bodies which have all found that full compliance with their respective conventions requires providing civil legal aid in certain circumstances.³² The CERD Committee has stressed that full compliance with the CERD requires free access to interpreters and legal aid for victims of racism to

right to a tribunal); *Andronicou v. Cyprus*, 3 Eur. Ct. H.R. 389, ¶ 199 (1997) (declining to specify a particular legal aid scheme but reaffirming that access to the courts must be guaranteed for indigents).

28. Compare ECHR, *supra* note 24, at art. 6 (“In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”), with ICCPR, *supra* note 18, at art. 14 (“All persons shall be equal before the courts and tribunals. In the determination . . . of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”), and UDHR, *supra* note 15, at art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations . . .”).

29. See CERD, *supra* note 11 (requiring countries to ensure the dignity and inherent equality of all people by prohibiting and redressing racial discrimination); U.S. Initial Rep. to the Comm. on the Elimination of Racial Discrimination Addendum, § B5, U.N. Doc. CERD/C/351/Add.1 (Sept. 21, 2000) (describing the United States’ efforts to comply with CERD); see also 140 CONG. REC. 14,326-27 (1994) (ratifying CERD).

30. See CERD, *supra* note 11, at art. 5 (listing rights that state parties must protect).

31. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] (requiring states to protect the human rights of children); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (defining what constitutes discrimination against women and obligating countries to prevent and redress such discrimination).

32. See CRC, *supra* note 31, at arts. 43-45 (establishing monitoring bodies that solicit reports from countries, gauge country compliance with their respective agreements, and provide advice on how countries can better comply); CEDAW, *supra* note 31, at arts. 17-22 (establishing the same); CERD, *supra* note 11, at arts. 8-14 (also creating the same).

facilitate bringing actions to court.³³ Victims of discrimination based on descent should also receive legal aid.³⁴ The CERD Committee's report on the United States' compliance recommended that the United States fund legal representation of indigent racial, ethnic, and national minorities in civil proceedings, particularly when basic human needs such as housing, health care, and child custody are at stake.³⁵

The CRC Committee has stressed that full compliance with the CRC requires states to remove barriers to the adequate administration of juvenile justice and has called on states to ensure legal assistance for juveniles.³⁶ Finally, the CEDAW Committee has also reiterated, both in its commentary on the CEDAW and in its reports on country compliance, that providing legal aid is often necessary to protect the rights of women enshrined in the CEDAW.³⁷ Thus, like the UDHR, ICESCR, and ICCPR, the CERD, CRC, and CEDAW have also established that civil legal aid is a necessary condition for the enjoyment of the human rights they protect.

33. See U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 31: Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, ¶ 30, U.N. Doc. A/60/18; GAOR 60th Sess., Supp. No. 18, 98-108 (Oct. 3, 2005) [hereinafter General Recommendation No. 31] (addressing, but not limiting, this requirement to the criminal context).

34. See U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 29: Discrimination Based on Descent, ¶ 5(u), U.N. Doc. HRI/GEN/Rev.9 (Vol. II) (Jan. 11, 2002) (reiterating that discrimination based on descent is also prohibited under the CERD).

35. U.N. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention—Concluding Observations: United States of America, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) [hereinafter CERD Report USA] (noting that the lack of a generally recognized right to counsel in civil proceedings has a disproportionate impact on racial, ethnic, and national minorities).

36. See, e.g., U.N. Comm. on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, ¶ 4, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) (recommending increased access to legal aid for minors); U.N. Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Comm. on the Rights of the Child—China, ¶ 26, U.N. Doc. CRC/C/15/Add.56 (June 7, 1996) (requiring better protection of the rights of children in China); see also U.N. Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations of the Comm. on the Rights of the Child—Lebanon, ¶ 43, U.N. Doc. CRC/C/15/Add.54 (June 7, 1996) (requiring better protection of the rights of children in Lebanon).

37. See, e.g., U.N. Comm. on the Elimination of Discrimination against Women, General Recommendation No. 21: Equality in Marriage and Family Relations, U.N. Doc. A/47/38 (Apr. 12, 1994) (noting that to have equality before the law, women should not be barred, legally or financially, from legal advice or access to court); see also U.N. Comm. on the Elimination of Discrimination against Women, Rep. of the CEDAW, ¶ 110, U.N. Doc. A/57/38; GAOR 57th Sess., Supp. No. 38, 90-94 (2002) (critiquing Saint Kitts and Nevis' lack of legal aid for women).

3. *The Inter-American System*

The Charter of the Organization of American States (OAS Charter) and the American Declaration of the Rights and Duties of Man (ADR) contain rights to civil legal aid, equality before the law, due process, and a fair trial.³⁸ The United States signed and ratified the OAS Charter in 1948.³⁹ The United States has signed but not ratified the American Convention on Human Rights, which complements the other two OAS documents.⁴⁰ Nonetheless, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights consider all three documents to be interrelated and enforce their provisions against all members that have ratified the OAS Charter.⁴¹ Those two bodies have found that to fully protect the human rights guaranteed by the Inter-American system, states must guarantee adequate access to counsel and civil legal aid.⁴²

4. *Civil Legal Aid is Adequate Only if it Ensures the Protection of Rights.*

What the obligation to provide legal aid requires depends on the circumstance and may not always necessitate the provision of counsel. In some instances, waiving or eliminating court fees or providing interpreters free of charge may suffice.⁴³ The CERD Committee has cited free legal help, advice centers, legal information centers, and centers for conciliation

38. See OAS Charter, *supra* note 8 (establishing the OAS and applying human rights norms to the Americas); Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4/Rev.9 (Jan. 31, 2003); 43 AJIL Supp. 133 (1949) [hereinafter ADR] (defining human rights under the OAS system).

39. See OAS Charter, *supra* note 8, Signatories and Ratifications (establishing the United States as a founding member).

40. See American Convention on Human Rights, Signatories and Ratifications, *opened for signature* July 18, 1978, 1144 U.N.T.S. 123 (further elaborating the human rights guarantees of the OAS system).

41. See, e.g., *Ramos v. United States*, Case P4446/02, Inter-Am. Comm'n H.R., Report No. 61/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 at 457 (2003) (finding that the United States' ratification of the OAS Charter obligates its compliance with the American Declaration because the Declaration contains and defines the human rights set out in the OAS Charter); *Joseph v. Canada*, Case 11.092, Inter-Am. Comm'n H.R., Report No. 27/93, OEA/Ser.L/V/II.85, doc. 9 rev. 32 (1994) (denying admissibility of a claim but applying the American Convention while acknowledging that Canada has not ratified the Convention).

42. See Inter-Am. Comm'n H.R., Access to Justice As a Guaranty of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II.129 doc. 4, ¶ II(a), (Sept. 7, 2007) [hereinafter Inter-American Commission] (recognizing that if indigence prevents a person from using the law to assert rights protected by the Convention because they cannot afford counsel, then that person is being discriminated against and is not receiving equal protection before the law).

43. See General Comment No. 32, *supra* note 21, ¶¶ 10-14 (explaining that achieving equality of access to courts is more important than the means by which that access is achieved).

and mediation as methods of providing legal aid.⁴⁴ However, where basic human needs such as housing, health care, child custody, or liberty are at stake, treaty-monitoring bodies have been specific in their calls for “legal representation of indigent persons.”⁴⁵

The European Court of Human Rights has found that complexity is the determinative criterion for deciding when a lawyer must be provided.⁴⁶ If a proceeding is so legally and factually complex that an indigent layperson would be unfairly disadvantaged without counsel, professional assistance is crucial to a case, or if procedures are complicated and inaccessible, the state must provide counsel.⁴⁷

Under the Inter-American system, the nature of the right at stake and the complexity of the issue at hand both are considered when determining whether counsel is required.⁴⁸ The Inter-American Commission requires a determination based on “a) the resources available to the person concerned; b) the complexity of the issues involved; and, c) the significance of the rights involved.”⁴⁹

Taken as a whole, the duty to provide adequate civil legal aid necessitates different tiers of assistance, with the requirement of access to assistance setting the floor.⁵⁰ At their core, the United States’ obligations are about protecting rights.⁵¹ Legal aid is a method for achieving this, and that method must adjust to the needs of the person, the nature of the right, and the legal system.⁵² Where the right is fundamental or the complexity is overwhelming, the United States must provide indigents with a lawyer.⁵³

44. See General Recommendation No. 31, *supra* note 33, ¶¶ 6-9 (recognizing that remedies for victims of racism can only be ensured if effective access to justice is provided).

45. See CRC, *supra* note 31, at art. 37 (requiring legal assistance when a child’s liberty is at stake); CERD Report USA, *supra* note 35 (recommending the provision of counsel when basic human needs are at stake); General Comment No. 7, *supra* note 20, ¶ 15 (recommending legal aid as a procedural protection when forced evictions take place).

46. See *Steel v. United Kingdom*, 41 Eur. Ct. H.R. 22 ¶¶ 59-72 (2005) (holding that the legal and factual complexity of the case necessitated the provision of counsel).

47. See *id.* (mandating civil legal aid); *Bertuzzi v. France*, 2003-III2 Eur. Ct. H.R. 117 (2003) (same); *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 21 (1979) (same).

48. See Inter-American Comm’n, *supra* note 42, ¶¶ 3-6 (describing the access to justice standards of the Inter-American system).

49. *Id.* ¶ 56.

50. See *id.* ¶¶ 3, 6 (noting that states have the obligation to remove economic obstacles that prevent access to the courts).

51. See CRC, *supra* note 31 (defining human rights and the obligations of countries to respect, protect, and fulfill those rights); CEDAW, *supra* note 31 (same); CERD, *supra* note 11 (same); ICCPR, *supra* note 18 (same); ICESCR, *supra* note 17; (same); OAS Charter, *supra* note 8 (same); UDHR, *supra* note 15 (same).

52. See Inter-American Commission, *supra* note 42, ¶ 56 (establishing the criteria for determining what level of assistance to provide).

53. See *id.* ¶ 7 (requiring assistance when a case is technically complex); CERD

Where a right may be effectively enforced or protected without the use of counsel, but realization of the right still requires assistance, the United States must ensure access to that assistance.⁵⁴ This obligation is a legal one, derived from international agreements that have already proven persuasive in United States courts.⁵⁵

B. The State of Civil Legal Aid in the United States

1. A Failure of the Courts

Prior to 1981, the Supreme Court was developing a line of judicial reasoning that evidenced growing support for the provision of counsel to indigents in civil proceedings.⁵⁶ This reasoning was based on due process and the right to be heard and did not focus on whether a loss of personal liberty was at stake.⁵⁷ Those decisions reflected the Court's long-held belief that assistance of counsel is critical to fairness in the judicial system, particularly when indigence is a barrier to legal assistance.⁵⁸

The seminal criminal case in this area, *Gideon v. Wainwright*, demonstrates this principle. In *Gideon*, the Court found that an indigent defendant facing loss of personal liberty required the assistance of a lawyer, not because the possibility of jail necessitated it, but because of the danger of having an unfair trial otherwise.⁵⁹ The potential for

Report USA, *supra* note 35 (requiring assistance when basic human needs are at stake).

54. See *Steel v. United Kingdom*, 41 Eur. Ct. H.R. 22 (2005) (interpreting the duty to provide legal aid based on human rights which must also be enforced by the United States); *Bertuzzi v. France*, 2003-III Eur. Ct. H.R. 117 (2003) (same); *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 21 (1979) (same).

55. See *infra* Appendix 3 (listing cases in the United States that discussed and cited international law).

56. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 268-71 (1970) (recognizing the relationship between the right to counsel and the right to be heard, and the need to consider capacities and circumstances to determine if someone can exercise that right).

57. See *Goss v. Lopez*, 419 U.S. 565, 575-77 (1975) (finding that a personal liberty loss is not required to implicate due process); *Mayer v. City of Chi.*, 404 U.S. 189, 196-99 (1971) (finding no constitutional difference between a fine and a loss of personal liberty in providing a record of the proceedings for use on appeal to an indigent defendant); *Boddie v. Connecticut*, 401 U.S. 371, 376-82 (1971) (determining that a court-fee structure denied due process to indigents seeking divorce despite the civil nature of the proceeding, involving no loss of liberty).

58. See *Douglas v. California*, 372 U.S. 353, 355-58 (1963) (discussing discrimination against the indigent, and finding a right to counsel on appeal in a criminal case); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (establishing the right to counsel for indigents in criminal proceedings on due process grounds); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (reasoning that in a criminal case, even an educated and intelligent person needs the guidance of counsel at every step to ensure a fair trial).

59. See *Gideon*, 372 U.S. at 344-45 (reasoning that individuals facing legal proceedings who cannot afford a lawyer cannot be assured a fair trial unless a lawyer is provided for them).

imprisonment raised the stakes, but it was the unfairness of the proceeding that would trigger that potential deprivation of liberty that implicated the due process clause.⁶⁰

In 1981, the Supreme Court ruled in *Lassiter v. Department of Social Services* that, unlike in the criminal context, there is no inherent right to counsel in a civil proceeding.⁶¹ The Court instead found that a due process inquiry should be conducted on a case-by-case basis.⁶² This inquiry consists in the first part of a three-factor balancing test adopted from *Mathews v. Eldridge*.⁶³ The test considers (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through procedures and the likely value of additional or different procedural safeguards; and (3) the government's interest and resulting fiscal and administrative burdens that would result from additional or replacement procedures.⁶⁴ In the second part of the inquiry, the results of the test are weighed against a presumption that there is no right to counsel except when losing the case would result in the loss of personal liberty.⁶⁵ The *Lassiter* decision, therefore, effectively ties the right to counsel in a civil proceeding to a personal liberty interest.⁶⁶

State courts have overwhelmingly treated the Supreme Court's decision as if it meant that the appointment of counsel is *never* required in a civil proceeding.⁶⁷ This is a misinterpretation of the Court's holding that the appointment of counsel is merely not *always* required, depending on the outcome of a case-by-case due process analysis.⁶⁸

The courts that have actually engaged in the due process analysis

60. See *id.* at 345 (arguing that without a lawyer, a proceeding is unfair because even the intelligent and educated layman may not be able to navigate the procedural and evidentiary complexities of the courtroom).

61. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-33 (1981) (failing to extend the logic of *Gideon* to the civil context in a case dealing with termination of parental rights).

62. See *id.* at 31-32 (adopting a case-by-case approach to due process described in *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

63. 424 U.S. 319, 335 (1976).

64. See *id.*

65. See *Lassiter*, 452 U.S. at 25-27 (construing a liberty interest as the heaviest factor to be weighed).

66. See *id.* at 26 ("[A]s a litigant's interest in personal liberty diminishes, so does his right to appointed counsel").

67. See Clare Pastore, *Life After Lassiter: An Overview of State Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006) (reviewing approximately 500 published state court decisions that deal with a right to counsel and cite *Lassiter*, and finding that most of them ignore the case-by-case analysis in favor of a blanket denial of counsel).

68. See *Lassiter*, 452 U.S. at 27, 33 (weighing the *Mathews* factors against a presumption against the right to counsel and finding no such right in these circumstances).

envisioned by *Lassiter* have developed precedent showing that the appointment of counsel is sometimes required in civil proceedings.⁶⁹ Across the country, courts have held that where a state statute affords counsel to parents in a state-initiated termination of parental rights proceeding, counsel must be afforded in privately-initiated termination cases as well.⁷⁰ In addition, many impassioned dissents have argued that the state should provide counsel to indigents because the reasoning behind *Lassiter* was flawed.⁷¹

2. *A Failure of the Federal Government*

The Office of Economic Opportunity (OEO) was established in 1964 to address systemic causes of poverty by collaborating with regional legal services providers to advocate and bring test cases before courts and administrative bodies.⁷² In 1974, the Legal Services Corporation (LSC), which had a much more limited mandate, replaced the OEO.⁷³ The LSC has been prohibited from its inception from funding the filing of class action lawsuits, class action appeals, or amicus curiae class actions, and it may not lobby for the passage or defeat of any federal or state legislation.⁷⁴ This reflects a shift in purpose from the OEO's efforts to address systemic causes of poverty to the LSC's mandate to focus on specific legal needs.⁷⁵

69. See, e.g., *Pasqua v. Council*, 892 A.2d 663, 669-73 (N.J. 2006) (finding that when indigent parents are subject to coercive incarceration for violating child support orders, they have a right to appointed counsel under the federal and state constitutions); *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010, 1013-20 (Wash. Ct. App. 2009) (holding that in a child truancy proceeding, the child must be afforded counsel), *rev'd en banc*, 257 P.3d 570 (Wash. 2011).

70. See, e.g., *In re K.L.J.*, 813 P.2d 276, 279, 286 (Alaska 1991) (holding that equal protection and due process require the appointment of counsel); *In re Adoption of K.L.P.*, 763 N.E.2d 741, 751 (Ill. 2002) (same); *In re S.A.J.B.*, 679 N.W.2d 645, 650 (Iowa 2004) (same); *In re Adoption of K.A.S.*, 499 N.W.2d 558, 567 (N.D. 2004) (same); *Zockert v. Fanning*, 800 P.2d 773, 777-78 (Or. 1990) (same).

71. See, e.g., *Quail v. Mun. Court*, 217 Cal. Rptr. 361, 364 (Ct. App. 1985) (Johnson, J., concurring in part and dissenting in part) (calling for a right to counsel for an indigent tenant defending an unlawful detainer); *In re McBride*, 766 N.W.2d 857, 858 (Mich. 2009) (Corrigan, J. and Kelly, C.J., dissenting from order denying certiorari) (arguing that denying a father access to counsel during proceedings terminating his parental rights violated state and federal law).

72. See Economic Opportunity Act of 1964, 42 U.S.C. § 2701 (1964) (repealed 1981) (establishing a legal corps to fight systemic poverty through civil and administrative legal representation).

73. See Legal Services Corporation Act, 42 U.S.C. § 2996 (1974) (amended 1977) (amending the Economic Opportunity Act of 1964) (creating the LSC to supplant the legal activities of the OEO).

74. See 42 U.S.C. § 2996e(d) (listing congressionally imposed restrictions on activities).

75. See *The Law: Corporation for the Poor*, TIME MAG., July 28, 1975, <http://www.time.com/time/magazine/article/0,9171,913362,00.html> (describing the philosophical shift in mission from the OEO to the LSC that reflects the political change in Washington).

The LSC uses congressionally-appropriated funds to make grants to regional legal services providers who then assist those who qualify financially.⁷⁶ In 1981, Congress appropriated \$321.3 million to the LSC, which is the closest Congress has ever come to ensuring that the LSC's level of funding keeps pace with the rate of inflation.⁷⁷

Since that high-water mark, the LSC's funding levels have dropped while restrictions on its activities have grown.⁷⁸ After President Reagan attempted to de-fund the LSC in 1981, its funding levels never fully rebounded.⁷⁹ The result of this underfunding is that the LSC cannot meet the demand for its services.⁸⁰ Years of research by the LSC consistently shows that nearly eighty percent of civil legal need in the United States goes unmet.⁸¹ Additionally, the LSC turns away about half of those seeking assistance from LSC-funded legal aid organizations because the organization lacks resources.⁸²

The dearth of LSC assistance due to a lack of funding is exacerbated by restrictive limitations placed on the LSC in 1996.⁸³ The 1996 restrictions prohibit LSC-funded programs from working on redistricting cases,

76. See § 2996e(a)(1) (providing the only direct source of federal funds for civil legal aid).

77. See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 26, 38 (2007), available at <http://www.clasp.org/admin/site/publications/files/0158.pdf> (detailing the persistent inadequacy of LSC funding over time). See generally LEGAL SERVS. CORP., BUDGET REQUEST FISCAL YEAR 2012 (2011), available at <http://lsc.gov/sites/default/files/LSC/lscgov4/FY2012BudgetRequest.pdf> (describing the LSC's modest funding increase request).

78. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (enacting new restrictions on the LSC and LSC-funded organization activities); Evan Thomas & Bennett Beach, *Law: One More Narrow Escape*, TIME MAG. Nov. 23, 1981, <http://www.time.com/time/magazine/article/0,9171,922707,00.html> (describing President Reagan's efforts to zero-fund the agency which eventually resulted in a twenty-five percent reduction in funding and more restrictions on LSC activities).

79. See HOUSEMAN & PERLE, *supra* note 77, at 29-33 (explaining how political pressure from the White House resulted in dramatic cuts to LSC funding and a loss of political independence).

80. See JUSTICE GAP 09, *supra* note 2, at 1 (describing the long-standing gap between available services and need).

81. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS Preface (2007) [hereinafter JUSTICE GAP 07] (incorporating new state-level surveys in an updated report finding a continued gap between legal need and assistance available in the United States).

82. See JUSTICE GAP 09, *supra* note 2, at 1 (describing the funding and service gap between demonstrated need and availability).

83. See Omnibus Consolidated Rescissions and Appropriations Act § 501 (enacting new restrictions on the LSC and LSC-funded organization activities which further inhibit access to legal aid as well as the types of activities permitted).

abortion cases, cases regarding certain types of aliens, on behalf of prisoners, or on behalf of people in public housing evictions who have been charged with drug crimes that are alleged to threaten the health or public safety of public housing residents or employees.⁸⁴ The restrictions also foreclose LSC-funded programs from advocacy or representation before legislative bodies or administrative rulemaking proceedings.⁸⁵ Until Congress repealed the restriction in 2010, programs funded by the LSC could not claim, collect, or retain attorneys' fees from adverse parties, even when doing so would be permitted otherwise.⁸⁶ Additionally, since 1996, the LSC has been required to identify potential client plaintiffs by name.⁸⁷

The 1996 restrictions apply to any organization accepting LSC funding, so legal services providers that accept LSC funding cannot engage in any activity forbidden by Congress in the Legal Services Act, even if they want to do so using non-LSC funds.⁸⁸ Largely as a result of these restrictions, many legal service providers have declined LSC funding.⁸⁹ In Washington, D.C. and thirty-seven states, more legal service providers used non-LSC funds than accepted LSC grants in 2005.⁹⁰ Much like indigent civil litigants, legal aid providers must struggle to make do without federal help.

3. *A Failure of the State Governments*

Some state governments have attempted to fill the gaps left by the LSC by implementing their own civil legal aid programs, but these programs are limited in scope.⁹¹ In California, the legislature enacted the Sargent Shriver Civil Counsel Act, which creates a right to counsel for low-income parties

84. *See id.*

85. *See* Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974) (enacting restrictions that reflect the shift away from the political philosophy that had previously enabled the OEO's broader activities).

86. *See* 45 C.F.R. §§ 1609, 1610, 1642 (2011) (promulgating a new agency rule in accordance with the changed authorizing statute that now allows the collection and retention of attorneys' fees).

87. *See* 42 U.S.C. § 2996f(a)-(b) (potentially discouraging potential plaintiffs who must be identified by name, even if the case is sensitive or involves a minor).

88. *See* § 2996f.

89. *See* ALAN HOUSEMAN, CTR. FOR LAW AND SOC. POLICY, THE FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 3-6 (2005) (detailing the decline in legal services providers accepting LSC funds).

90. *See id.* at 6 (reflecting the shift away from accepting restrictive LSC funding).

91. *See* FLA. STAT. ANN. § 39.5075(2), (5) (West 2011) (providing an attorney to children applying for special immigrant juvenile status); 2010 LA. SESS. LAW SERV. ACT 738 (West 2011) (providing an attorney to children in termination of parental rights proceedings); ASSEMBLY B. NO. A01310, REG. SESS. (N.Y. 2011), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A01310%09%09&Summary=Y&Actions=Y&Votes=Y&Text=Y (pending before Housing Committee) (providing a lawyer to indigents during certain types of mortgage foreclosure actions).

facing critical issues of basic human needs.⁹² The Act is still in pilot testing and it remains to be seen if its scope will be expanded.⁹³ Encouragingly, the rationale and language of the Act are reflective of efforts by the American Bar Association (ABA) to implement a civil right to counsel at the state level, indicating that the ABA's efforts may be producing results.⁹⁴

III. ANALYSIS

The United States has been described as a "settler's society," where the pioneer spirit of making it on one's own is more highly valued than the norms of social justice and collective responsibility found in human rights agreements.⁹⁵ This contention may explain the country's historic predisposition, but it does not excuse its violations of international law. The international agreements the United States has ratified, as well as those it has signed, require the provision of adequate civil legal aid to ensure that the human rights they articulate are protected.⁹⁶ Because legal aid is a means of realizing those rights, such aid is adequate only when it results in a person being able to exercise and protect their rights.⁹⁷ The decision to underfund and restrict the LSC and the high bar set by *Lassiter* do not allow for this, and as such, are evidence of an obligation ignored and a

92. See Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE § 68650 (West 2011) (listing qualifying basic human needs, such as housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child).

93. See *id.*

94. See Am. Bar Ass'n, House of Delegates Resolution 112A on Civil Right to Counsel (Aug. 7, 2006) [hereinafter ABA Resolution], available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (endorsing the civil right to counsel where basic human needs like shelter, sustenance, health or child custody are at stake). Compare AM. BAR ASS'N., STATE BASIC ACCESS ACT (2008), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/ca_state_basic_access_act_feb_08.authcheckdam.pdf (providing legislative findings, definitions, and statutory language), with Sargent Shriver Civil Counsel Act § 68650 (reporting findings similar to those of the ABA and adopting very similar statutory language).

95. See Bas De Gaay Fortman, *Poverty as a Failure of Entitlement: Do Rights-Based Approaches Make Sense?*, in INTERNATIONAL POVERTY LAW: AN EMERGING DISCOURSE 34, 36-38 (Lucy Williams ed., 2006) (explaining the difficulty of applying public justice rights to a settler's society predicated on individual autonomy); Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 575 (1983) (discussing the individualistic nature of American society).

96. See generally UDHR, *supra* note 15 (defining rights that have been interpreted to require civil legal aid to ensure their protection); ICESCR, *supra* note 17 (same); ICCPR, *supra* note 18 (same); CRC, *supra* note 31 (same); CEDAW, *supra* note 31 (same); CERD, *supra* note 29 (same); OAS Charter, *supra* note 8 (same).

97. See Inter-American Commission, *supra* note 42, ¶ 1 (explaining that the OAS recognizes the link between access to justice and the realization of rights).

violation of international law.⁹⁸ The persuasive power of international norms and jurisprudence, and the binding obligations of international law require the United States to change its ways.⁹⁹

A. Lassiter Was Decided Incorrectly Because the Decision Conflates the Due Process Right to a Lawyer with a Personal Liberty Interest and this Frustrates Compliance with International Law Which Demands the Provision of Legal Representation when Basic Human Needs are at Stake or a Proceeding is Too Complex for a Layperson to Adequately Represent Themselves.

I. Lassiter Was Decided Incorrectly Because Whether There is a Due Process Right to the Provision of Counsel Does Not Turn on Whether There is a Personal Liberty Interest at Stake.

The Supreme Court got *Lassiter* wrong for the same reasons it got *Gideon* right. In *Gideon*, the Court rejected the *Betts v. Brady* case-by-case determination of whether a defendant needed the assistance of counsel, finding instead that there must be an absolute right to counsel in criminal cases to ensure a fair trial.¹⁰⁰ The *Gideon* Court noted that its precedent supported such an extension and that reason and reflection plainly indicated that assistance of counsel is necessary to ensure procedural fairness.¹⁰¹ In *Lassiter*, the Court swung the other way, and found in favor of a case-by-case approach to determining if counsel is required, based in large part on the lack of personal liberty loss at stake in a civil trial.¹⁰² The Court came to this conclusion despite precedent leading up to *Lassiter*, which supported the extension of the right to counsel to indigents in civil proceedings on due process grounds, without tying this right to concerns for physical liberty.¹⁰³ The courts below had been less concerned with whether the judicial process

98. See *id.* (finding that states must remove regulatory, social, and economic obstacles that prevent or hinder access to justice).

99. See CERD Report USA, *supra* note 35 (urging the United States to provide civil legal aid so as to ensure access to remedies for victims of racial discrimination).

100. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (describing the Sixth Amendment's guarantee of counsel as a fundamental right applicable to the states).

101. See *id.* at 343-44 (noting that *Betts* represented a sharp break from precedent).

102. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981) (adopting the case-by-case approach from *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

103. See *Goss v. Lopez*, 419 U.S. 565, 575-77 (1975) (finding that a personal liberty loss is not required to implicate due process); *Boddie v. Connecticut*, 401 U.S. 371, 376-82 (1971) (ruling that a court-fee system denied due process to indigents seeking divorce despite the civil nature of the proceeding); *Mayer v. City of Chi.*, 404 U.S. 189, 196-199 (1971) (requiring the provision of the record for use on appeal by an indigent defendant after a finding that there is no constitutional difference between a fine and loss of personal liberty); *Goldberg v. Kelly*, 397 U.S. 254, 268-71 (1970) (reasoning that the right to be heard is connected to the right to counsel).

would result in physical liberty loss than with ensuring that the process was fair.¹⁰⁴

In *Gideon*, the Court recognized that the loss of liberty is a punishment so severe that counsel must always be provided to ensure a fair trial.¹⁰⁵ The Court did not, however, tie the right to counsel to the severity of the deprivation, either by length or type (maximum security, solitary confinement, possibility of parole, etc.).¹⁰⁶ *Lassiter* contradicts *Gideon* by holding that it is precisely the severity of the deprivation that dictates whether counsel is required, a position expressly rejected by the *Gideon* court.¹⁰⁷ In the civil context, the disadvantages an indigent faces because of a lack of assistance can also lead to life-altering deprivations, many of which deal with basic human needs.¹⁰⁸ The loss of a civil case may result in the loss of child custody, a home, a job, or healthcare.¹⁰⁹

In *Lassiter*, the Justices' policy concerns prompted an abrupt departure from precedent and led to a skewed balancing test.¹¹⁰ Simply put, the Justices were worried that if they granted a right to counsel in this case, they would have to grant a right to counsel in all civil cases.¹¹¹ An in-depth examination of their private papers and conference notes demonstrates that the path clearly marked by precedent and constitutional analysis was abandoned in favor of judicial restraint and deference to the legislature.¹¹² It was those policy concerns that made the right to counsel in civil cases subordinate to personal liberty interests, instead of properly extending the *Gideon* logic of procedural fairness to cases where basic human needs are

104. See *Douglas v. California*, 372 U.S. 353, 355 (1963) (“[T]here can be no equal justice when the type of appeal a man enjoys ‘depends on the amount of money he has.’”); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (finding that the guidance of counsel is crucial to procedural fairness).

105. See *Gideon*, 372 U.S. at 337-40 (stating that due process is implicated by the potential for personal liberty loss as a result of an unfair proceeding).

106. See *id.* at 342-43 (providing a blanket right to counsel, irrespective of the nature of the personal liberty loss).

107. See *id.* at 344-45 (noting that it is procedural fairness that implicates the need for a lawyer without tying this need to the severity of the personal liberty loss at stake).

108. See ABA Resolution, *supra* note 94, at 13 (defining basic human needs as including, at a minimum, shelter, sustenance, safety, health, and child custody).

109. See, e.g., Engler, *Connecting Self-Representation*, *supra* note 10, at 44-67 (describing the potential repercussions of losing a civil case and demonstrating through empirical research that representation significantly increases the chances of litigant success).

110. See Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U. L. REV. 1057, 1089 (2010) (exploring the policy concerns and private papers of the Justices).

111. See *id.* at 1089 (quoting Justice Powell's concern: “if we reverse, what principle will prevent a vast extension of [the] right to counsel?”).

112. See *id.* at 1089-91 (describing the Justices' concerns about the broader practical and economic effects of finding a civil right to counsel).

at stake.¹¹³ The Justices created a mis-calibrated balancing test that accords more weight to personal liberty than to basic human needs, and underweighs the devastating impact that a lack of counsel has upon litigant success and due process.¹¹⁴ The test is flawed, as evidenced by the lower courts' struggles to apply its reasoning and the gradual emergence of recognized situations where the provision of counsel is required.¹¹⁵

2. *Lassiter Frustrates Compliance with International Law Because it Mandates a Presumption Against the Provision of Counsel in Situations Where International Law Would Require Such a Provision.*

The Supreme Court has long recognized that the United States must respect and comply with international law and has accordingly looked to international and foreign precedent for guidance on domestic issues.¹¹⁶ Quite recently in *Roper v. Simmons* and *Lawrence v. Texas*, the Supreme Court cited international human rights instruments, laws of other countries, and decisions by the European Court of Human Rights when finding that executing juveniles and criminalizing consensual homosexual conduct is unconstitutional.¹¹⁷

The *Lassiter* Court had the same international guidance available, but chose to ignore it. Just two years prior to the *Lassiter* decision, the European Court of Human Rights decided the landmark case of *Airey v. Ireland* in favor of the right to counsel in civil cases.¹¹⁸ *Airey* dealt with a battered woman's struggle to obtain a divorce without a lawyer, a situation that is sadly common in the United States.¹¹⁹ Like the United States now,

113. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981) (construing the loss of physical liberty that could result from losing litigation as the critical factor in the analysis).

114. See Engler, *Connecting Self-Representation*, *supra* note 10, at 44-67 (cataloguing empirical studies that describe the poor success rates of unrepresented litigants in civil cases).

115. See *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010, 1016-17 (Wash. Ct. App. 2009) (finding the right to counsel for children in truancy proceedings), *rev'd en banc*, 257 P.3d 570 (Wash. 2011); Pastore, *supra* note 67 (describing a trend in state courts of not applying the balancing test).

116. See *infra* Appendix 3 (listing instances where international law has been used in United States courts).

117. See *Roper v. Simmons*, 543 U.S. 551, 574-76 (2005) (overturning *Stanford v. Kentucky*, 492 U.S. 361 (1989), and prohibiting the death penalty for juveniles under eighteen); *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding that a statute criminalizing consensual homosexual sexual conduct violated the Due Process Clause).

118. See 32 Eur. Ct. H.R. (ser. A) at 21 (1979) (requiring all members of the Council of Europe to provide a civil right to counsel).

119. See *id.* ¶¶ 8-9 (describing Mrs. Airey's indigence and years of struggle to separate from her physically-abusive husband who would not agree to a divorce).

at the time, Ireland had no civil right to counsel for indigents.¹²⁰ The European Court held that effective access to the courts, a key element in ensuring the realization of human rights, could not be said to exist where indigents are denied legal assistance.¹²¹ The *Airey* court's decision is not binding upon the United States, but it was based on an interpretation of language in the ECHR that is almost identical to language found in the ICCPR and UDHR, both of which the United States had signed at that time.¹²² Despite this, the *Lassiter* court did not consider the *Airey* decision.¹²³ The *Lassiter* Court's initial disregard for international precedent begat an ongoing violation of international law.

The *Lassiter* decision is an example of judicial action that runs counter to the human rights agreements that bind the United States.¹²⁴ The United States has signed, ratified, and agreed to abide by the ICCPR, CERD, OAS Charter, and ADR.¹²⁵ The Inter-American Court of Human Rights and the Inter-American Commission in particular have made it clear that this ratification means that the OAS Charter and ADR apply to the United States.¹²⁶ According to the Vienna Convention on the Law of Treaties, the United States must make a good faith effort to adhere to the object, purpose, and provisions of those agreements.¹²⁷

120. See *id.* ¶¶ 11 (detailing Mrs. Airey's difficulties in obtaining a divorce without the assistance of a lawyer in Ireland because of procedural and financial obstacles).

121. See *id.* ¶¶ 22, 24 (finding that under Article 6 of the ECHR, Mrs. Airey's ability to appear in person before the court does not fulfill the right to effective access to the court because her lack of counsel renders her appearance ineffective).

122. See ECHR, *supra* note 24, at 6; ICCPR, *supra* note 18, at 15; UDHR, *supra* note 15, at 10 (utilizing similar language to require equality before the courts).

123. See generally *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981) (applying the *Mathews v. Eldridge* balancing test and only examining domestic law).

124. See U.N. Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment No. 31] (forbidding the executive branch from seeking to relieve itself of responsibility for actions incompatible with the Covenant by pointing to the fact that it was another branch of government that acted).

125. See ICCPR, *supra* note 18 (enacting binding obligations upon the United States that cannot be derogated from under the Vienna Convention); CERD, *supra* note 29 (same); OAS Charter, *supra* note 8 (same); ADR, *supra* note 38 (same).

126. See *Ramos v. United States*, Case P4446/02, Inter-Am. Comm'n H.R., Report No. 61/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 at 457 (2003) (applying the OAS Charter and ADR to the United States).

127. See Vienna Convention on the Law of Treaties arts. 26-27, 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]; see also *Medellin v. Texas*, 552 U.S. 491, 533 (2008) (Stevens, J. concurring) (arguing that non-self-executing treaties still create international obligations); U.N. Human Rights Comm., General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994) (explaining the interpretive roles of the Vienna Convention and the Committee when determining the validity of a country's

Even in the case of the ICESCR, CRC, and CEDAW, where the United States is a signatory but not a state party by means of ratification, under international law, that signature creates an obligation to act in good faith and refrain from actions that would defeat the agreement's object and purpose.¹²⁸ In addition, because the ICESCR, CRC, and CEDAW have been nearly universally ratified, the rights they enshrine have entered the normative framework of customary international law and are, therefore, a part of United States law.¹²⁹

The United States' decision to adhere to *Lassiter* functionally deprives people of a means to realize their basic human rights.¹³⁰ These basic rights are at the heart of the international agreements that bind the United States, and the failure to respect, protect, and fulfill them contravenes the object and purpose of those agreements.¹³¹ For example, the right to education is a basic human right denied full realization because children in truancy proceedings are not provided counsel.¹³² The right to shelter is a basic human right denied full realization because Americans facing home foreclosures have no right to counsel.¹³³

The United States cannot pretend that customary international law does

reservations to the ICCPR).

128. See Vienna Convention, *supra* note 127, at arts. 10, 18 (applicable to the ICESCR, CRC, and CEDAW); U.N. Comm'n on Human Rights, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 4, U.N. Doc. E/CN.4/1987/17 (Jan. 8, 1987) [hereinafter Limburg Principles] (affirming the Vienna Convention's applicability to the ICESCR).

129. See *Medellin*, 552 U.S. at 533 (Stevens, J. concurring) (arguing that customary international law is part of domestic law); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (defining the law of nations and incorporating it into domestic law); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (finding that the law of nations is a part of domestic law that binds the Court); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that acts of Congress should never be construed to violate the law of nations if there are other possible constructions); Douglas J. Feith, *Obama Embraces 'Transnational' Law*, WALL ST. J., Mar. 23, 2011, http://www.dougfeith.com/docs/2011_03_23_Obama_Embraces_Transnational_Law.pdf (criticizing President Obama's acceptance of Protocol 1 of the Geneva Convention as legally binding upon the United States, despite non-ratification, because the Protocol has attained customary international law status); *infra* Appendix 3 (listing instances where United States courts cite international law).

130. See Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE § 68651 (West 2011) (noting that legal representation is critical to protecting basic human needs and reducing reliance on other state services).

131. See UDHR, *supra* note 15 (describing the rights every person is entitled to by virtue of their humanity, which all states must endeavor to protect); ICESCR, *supra* note 17 (same); ICCPR, *supra* note 18 (same); CRC, *supra* note 31 (same); CEDAW, *supra* note 31 (same); CERD, *supra* note 11 (same); OAS Charter, *supra* note 8 (same); ADR, *supra* note 38 (same).

132. See ICESCR, *supra* note 17, at art. 14 (defining the right to education); OAS Charter, *supra* note 8, at art. 49 (same).

133. See ICESCR, *supra* note 17, at art. 11 (defining the right to housing); OAS Charter, *supra* note 8, at art. 34 (same).

not apply domestically; federal and state courts have acted to the contrary.¹³⁴ The United States cannot pretend that a distinction exists between civil and political rights and economic, social, and cultural rights, making one justiciable and the other not; the world has decided otherwise.¹³⁵ The *Lassiter* Court's failure to recognize this dug a hole in the sand that the United States has stuck its head in ever since.

The *Lassiter* decision has wrongly been treated as the last word on the right to counsel in civil cases in the United States.¹³⁶ This is not so. The Court's decision simply shifted the obligation to act to the executive or legislative branch.¹³⁷ Despite the actions of the judiciary, the United States still must ensure that the requirements of international agreements are met and adequate civil legal aid is available in the United States.¹³⁸ In this regard, the United States has failed.

B. Existing Legal Aid Mechanisms Fail to Satisfy International Obligations Because They Do Not Provide Levels of Assistance That Are Adequate to Protect the Human Rights the United States Must Uphold.

The United States has the ability to provide civil legal aid in compliance with its international obligations.¹³⁹ Instead, the United States has not only ignored this duty, but has actively worked against its fulfillment.¹⁴⁰ The LSC, the only national-level mechanism for providing civil legal aid, is

134. See *infra* Appendix 3 (listing domestic court cases where international law has been considered and applied).

135. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Program of Action*, ¶ 5, U.N. Doc. A/CONF. 157/23 (July 12, 1993) (calling on the world community to recognize that all human rights are indivisible, interdependent, and interrelated and must be treated in a fair and equal manner, with the same emphasis).

136. See also *Turner v. Rogers*, 131 S. Ct. 2507 (2011). The Court held that an indigent defendant had no right to court-appointed counsel when faced with jail-time for violating a state court order, *id.*, some of the language in the decision has caused cautious optimism among "civil *Gideon*" proponents. See, e.g., *Turner's Trumpet: Child Support and the Right to Counsel*, THE ATL., June 21, 2011, <http://www.theatlantic.com/national/archive/2011/06/turners-trumpet-child-support-and-the-right-to-counsel/240753/> (noting that the decision requires additional safeguards and the potential provision of counsel to indigents in certain situations).

137. See General Comment No. 31, *supra* note 124, ¶ 4 (noting that the actions of one branch of government do not excuse the executive branch of its responsibilities).

138. See *id.* (reminding states that they cannot derogate from their obligations and duties under the Covenant).

139. See U.N. COMM'N ON LEGAL EMPOWERMENT OF THE POOR, *supra* note 14 (describing ways that states can meet their international obligations by utilizing non-lawyers and holistic legal empowerment of the poor techniques).

140. See Omnibus Consolidated Recessions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (1996) (restricting LSC activities); Legal Services Corporation Act, Pub. L. 93-355, 88 Stat. 378 (1974) (limiting the LSC's mandate, especially in comparison to the OEO that it replaced); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-33 (1981) (denying a right to counsel in civil cases).

limited in scope, inadequate in reach, and egregiously underfunded.¹⁴¹ Admirably, a number of states, law schools, and non-profit organizations have been trying to fill this gap for decades.¹⁴² Unfortunately, they too are unable to meet the level of need present.¹⁴³ The result is the lack of an adequate national legal aid scheme, which is a violation of international law.¹⁴⁴

1. The LSC Does Not Represent a Good Faith Effort by the United States to Provide Legal Aid Because it is So Severely Restricted and Underfunded That it Cannot Provide Minimum Access to Legal Aid.

Anemic funding and a shrunken mandate have reduced the LSC to an organization unable to provide minimum access to legal aid in the United States.¹⁴⁵ This violates international law because it represents a failure by the United States to “respect,” “protect,” and “fulfill” the rights found in the international agreements by which it is bound.¹⁴⁶ America is not fulfilling its obligations to act with due speed and to the best of its financial abilities to ensure a minimum level of access to legal aid.¹⁴⁷

Since 1982, the LSC has been so underfunded that, according to its own standards, it has been unable to provide even “minimum access” to legal aid.¹⁴⁸ Minimum access represents the absolute minimum level of service

141. See BRENNAN CTR. FOR JUSTICE, CIVIL LEGAL SERVICES: LOW-INCOME CLIENTS HAVE NOWHERE TO TURN AMID THE ECONOMIC CRISIS (2010), *available at* http://brennan.3cdn.net/ed5d847dfcf163a02a_exm6b5vya.pdf (detailing the underfunded and over-demanded state of civil legal aid across states, which has resulted in an increase in pro se litigants, who are less successful than those who have legal assistance).

142. See, e.g., *Community and Economic Development Law Clinic*, AM. UNIV. WASH. COLL. OF LAW, <http://www.wcl.american.edu/clinical/community.cfm> (last visited Nov. 25, 2011) (providing free legal assistance to people and organizations engaged in neighborhood-based community development).

143. See JUSTICE GAP 07, *supra* note 81 (describing the overall state of civil legal need in the United States and finding that across states, at least eighty percent of need is unmet).

144. See *generally* Raven, *supra* note 6 (contrasting the situation in the United States with the more developed civil legal aid schemes around the world).

145. See JUSTICE GAP 09, *supra* note 2, at 9-12 (describing years of under-funding and limited assistance coverage).

146. See ICESCR, *supra* note 17 (defining “respect” as refraining from conduct that hinders the enjoyment of rights, “protect” as preventing violations of rights by individuals or non-state actors, and “fulfill” as taking positive actions to ensure the realization of rights and the availability of remedies for violations); ICCPR, *supra* note 18 (same); CRC, *supra* note 31 (same); CEDAW, *supra* note 31 (same); CERD, *supra* note 29 (same); OAS Charter, *supra* note 8 (same); ADR, *supra* note 38 (same).

147. See U.N. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter General Comment No. 3] (explaining that states must budget and request international assistance so that they can take immediate steps to fulfill their obligations under the Covenant).

148. See JUSTICE GAP 07, *supra* note 81, at 1-2 (defining “minimum access” as two

coverage that the LSC could provide and still be able to claim that the United States is providing civil legal aid.¹⁴⁹ Perversely, as the very need for such aid in the United States has grown, funding and availability have fallen.¹⁵⁰ For every two people seeking assistance from an LSC-funded program, one is turned away due to a lack of resources.¹⁵¹

This does not represent a good faith effort by the United States to abide by its international agreements.¹⁵² The provision of civil legal aid is a necessary condition for the full realization of the rights guaranteed by international agreements that bind the United States.¹⁵³ Accordingly, while the agreements recognize that the full realization of the rights they protect will occur gradually, the United States is still required to act immediately to facilitate the process of that realization.¹⁵⁴

The ESCR Committee has explicitly rebutted interpretations of the Covenant that attempt to frame truncated efforts to fully realize economic, social, and cultural rights as total compliance.¹⁵⁵ In General Comment 3, the Committee makes clear that taking steps does not mean dragging feet.¹⁵⁶ Gradual realization is to be accomplished through the immediate

lawyers for every 10,000 low-income people, and noting that this level of funding has been achieved only once, in 1981).

149. *See id.* (noting, however, that “minimum access” is not seen as sufficient, but rather represents a preliminary foundation upon which other resources could be layered).

150. *See id.* (explaining that “minimum access” has only been achieved from 1981-1982); *see also* BRENNAN CTR. FOR JUSTICE, *supra* note 141 (detailing the growing need and falling funding).

151. *See* JUSTICE GAP 09, *supra* note 2, at preface (describing the disparity in the availability of attorneys for low-income people compared to those above the LSC’s poverty threshold).

152. *See generally* Vienna Convention, *supra* note 127 (requiring a good faith effort by the United States to adhere to the object and purpose of agreements it has signed or ratified).

153. *See* Inter-American Commission, *supra* note 42, ¶ 6 (noting that providing free legal services prevents the infringement of the rights to a fair trial and to effective judicial protection, both of which are part of the essential preconditions that ensure the protection of other rights).

154. *Compare* CERD, *supra* note 11, at 2 (“undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination”), *and* CEDAW, *supra* note 31, at 2 (“pursue by all appropriate means and without delay a policy of eliminating discrimination against women”), *with* CRC, *supra* note 31, at 4 (“[U]ndertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”). All three conventions then detail the actions states must take to comply.

155. *See* General Comment No. 3, *supra* note 147, ¶ 9 (requiring states to take immediate steps that are substantive and will eventually allow for the full realization of rights).

156. *See id.* ¶ 9 (noting that progressive realization is informed by the overall purpose of the Covenant, which is to realize and protect economic, social and cultural rights); *see also* Limburg Principles, *supra* note 128, ¶¶ 16-20 (requiring states to act as expeditiously as possible).

adoption of legislation, provision of judicial remedies, and undertaking of other means in a manner as “expeditiously and effectively as possible.”¹⁵⁷ Financial constraints are no excuse either, as the United States is expected to fulfill this obligation to the “maximum of its available resources.”¹⁵⁸ Full realization may be gradual because of the nature of the rights, but the steps towards that realization must be undertaken immediately.¹⁵⁹

The ICCPR also requires immediate action by the United States.¹⁶⁰ The duty to act takes immediate effect and is not mitigated by political, economic, social, or cultural concerns.¹⁶¹ It is no excuse that national laws or the actions of a branch of government are incompatible with the provisions of the Covenant; the United States cannot invoke the Supreme Court’s decision in *Lassiter* to justify a failure to perform its duties under the Covenant.¹⁶²

The Inter-American System is similarly demanding of the United States.¹⁶³ The obligation to protect the rights guaranteed by the OAS’ binding foundational documents requires the United States to act immediately.¹⁶⁴ This obligation is not blind to economic concerns, but still requires the United States to guarantee a minimum threshold of rights and to match the depth of services with economic ability.¹⁶⁵

The United States is the richest country on earth, yet has underfunded its

157. See General Comment No. 3, *supra* note 147, ¶¶ 2-5, 7-9; Limburg Principles, *supra* note 128, ¶¶ 21-24.

158. See General Comment No. 3, *supra* note 147, ¶ 10; see also Limburg Principles, *supra* note 128, ¶¶ 25-28.

159. See General Comment No. 3, *supra* note 147, ¶ 9 (reminding states that immediate action is required and any retrogression must be fully justified in reference to the Covenant and the financial abilities of the state).

160. See ICCPR, *supra* note 18, at 2 (requiring states to undertake all necessary steps to give effect to the rights recognized in the Covenant).

161. See General Comment No. 31, *supra* note 124, ¶ 14 (noting that the duty to act takes effect immediately and is unqualified, and that a failure to act cannot be justified).

162. See *id.* ¶ 4 (reminding states that the obligations of the Covenant are binding on the state as a whole, which includes all branches of government and all governmental authorities).

163. See Inter-American Commission, *supra* note 42, ¶ 56 (advising states that the Inter-American system not only encourages the general practice of providing free legal assistance to indigents, but also requires states to immediately do so under defined circumstances).

164. See Inter-American Comm’n on Human Rights, Annual Report of the Inter-American Comm’n on Human Rights 1993 (11 Feb. 1994), OEA/Ser.L/V/85, Chap. 5(II), available at <http://www.cidh.oas.org/annualrep/93eng/chap.5.htm> (noting that the principle of progressivity still requires states to take immediate steps to attain the full realization of the rights they have pledged to uphold under the Inter-American system).

165. See *id.* (recognizing that a state’s level of development will impact its ability to implement rights, but explaining that the principle of progressivity requires states to act to the best of their abilities, and as their development increases, so must their efforts to implement rights).

only federal civil legal aid program for twenty-nine years and counting.¹⁶⁶ This flagrantly violates its legal obligation to act as expeditiously and effectively as possible to the maximum of available resources.¹⁶⁷ The LSC's 2012 funding request of \$516.55 million represents about .0002% of the United States budget and could surely be prioritized and increased.¹⁶⁸

In addition to the violations of international law that result from underfunding the LSC, restrictions on its activities both practically prevent and actively frustrate compliance with international law.¹⁶⁹ The restrictions Congress has attached to LSC funding not only limit what legal aid organizations can do with LSC money, they also limit what those organizations can do if they accept LSC money.¹⁷⁰ In the United States, even where a right is fundamental or a proceeding is complex, indigents have no guarantee of access to counsel in civil cases.¹⁷¹ These purposeful limitations and reductions in the provision of civil legal aid frustrate the object and purpose of the international agreements that bind the United States.¹⁷²

2. Non-federal Legal Aid Efforts Are Also Inadequate Because They Similarly Fail to Provide Adequate Access to Assistance Relative to Demonstrated Need.

State and private actors have attempted to fill the gap left by the LSC,

166. See LEGAL SERVS. CORP., *supra* note 77, at 1 (requesting an increase in funding of \$96.6 million, which is still less than would be required to provide minimum access); Edward A. Adams, *ABA Protests Proposed Cuts to Legal Services Funding*, A.B.A. J., Feb. 14, 2011, available at http://www.abajournal.com/news/article/aba_protests_proposed_cuts_to_legal_services_funding/ (protesting a proposed 28% cut in LSC funding).

167. See General Comment No. 3, *supra* note 147, ¶¶ 2-5, 7-10 (expanding on the concept of "progressive realization" and providing examples of legislative, judicial, and financial action required to comply with this concept).

168. Compare LEGAL SERVS. CORP., *supra* note 77, at 1 (requesting a \$96.6 million increase over the previous year's funding), with OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2012 BUDGET OF THE U.S. GOVERNMENT A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 119-20 (2010), available at <http://www.gpoaccess.gov/usbudget/fy11/pdf/summary.pdf> (summarizing the President's federal budget request totaling \$3.55 trillion).

169. See Omnibus Consolidated Receptions and Appropriations Act of 1996, Pub. L. No. 104-134, § 503 110 Stat. 1321 (1996) (forcing the LSC to use a competitive bidding process).

170. See *id.* (imposing restrictions on legal aid organizations that could apply not only to activities funded with LSC money but to activities funded from other sources as well).

171. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981) (holding that there is a presumption against the right to counsel in a civil proceeding).

172. See generally Vienna Convention on the Law of Treaties, *supra* note 127 (expressing the international standard that states which sign or ratify an international agreement may not act in ways that contravene that agreement's object or purpose).

but their efforts still fall short.¹⁷³ At the state level, legal aid organizations and judges have tried to take action on access to justice issues, but they have been frustrated by funding shortfalls and apathy.¹⁷⁴ Efforts to implement statewide civil legal aid programs are encouraging, but only a few state laws have been proposed, and they are either narrow in mandate—only mortgage foreclosures or parental rights proceedings—or are still in the pilot phase and will depend on further funding and implementation.¹⁷⁵ Law schools provide services through clinical programs and outreach efforts, but these programs are limited in the number of clients they can serve.¹⁷⁶ Recent attacks by legislators and interest groups unhappy with legal clinic activities may shrink this assistance even further.¹⁷⁷ The shortcomings of national efforts to provide legal aid are echoed at the state level—funding shortages and restrictions combine to produce a patchwork system that also fails to meet international requirements.¹⁷⁸

C. The Indigent Criminal Legal Aid System is a Bad Model that Would Not Satisfy International Law Because it Relies Exclusively on Lawyers and is Ill-Suited to the Provision of Services on the Scale that a Civil System Would Require.

Civil legal aid cannot take the form of criminal legal aid. America's public defender model, which has proven itself to be a broken system, is ill-suited to the civil context.¹⁷⁹ To satisfy international law, America's civil

173. See generally BRENNAN CTR. FOR JUSTICE, *supra* note 141 (describing unmet need that is persistent over time and across states).

174. See *id.* (detailing nation-wide state-level funding cuts that have severely undermined service delivery); see also, e.g., John Eligon, *New York's Chief Judge Seeks More Legal Aid for Civil Cases*, N.Y. TIMES, Sept. 28, 2010, http://www.nytimes.com/2010/09/29/nyregion/29civil.html?_r=4&partner=rss&emc=rss (reporting on a series of hearings by Judge Lippman to raise awareness about the need to increase civil legal aid).

175. See Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE § 68651 (West 2011) (establishing a limited pilot project to test the feasibility, cost, and effectiveness of implementing a civil right to counsel in California with funding guaranteed through 2017).

176. See, e.g., *Statistical Information*, SMALL BUS. LEGAL CLINIC LEWIS & CLARK LAW SCH., http://www.lclark.edu/law/centers/small_business_legal_clinic/about/clients/statistics/ (last visited Nov. 25, 2011) (listing statistical information showing that the clinic serves around 120 clients yearly).

177. See Ian Urbina, *State Law Clinics Face a Backlash*, N.Y. TIMES, April 3, 2010, <http://www.nytimes.com/2010/04/04/us/04lawschool.html?pagewanted=1&th&emc=th> (reporting on criticisms and attacks on law school clinics).

178. See generally BRENNAN CTR. FOR JUSTICE, *supra* note 141 (describing unmet needs, funding shortages, and the combined effect of such across states).

179. See, e.g., Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake*, 1997 N.Y.U. ANN. SURV. AM. L. 783, 784, 788-89 (1999) (describing the failure of the indigent criminal

legal aid scheme must ensure that access to assistance, and the assistance itself rise, to the level required to ensure the protection and realization of human rights.¹⁸⁰

International interpretive bodies have construed the obligations incumbent upon the United States to mean that where basic human needs are at stake or overwhelming complexity is present, a lawyer is required.¹⁸¹ In other instances, assistance is still mandated to ensure the protection of rights, but may not necessitate a lawyer.¹⁸²

A civil legal aid scheme modeled after the criminal public defender system would not meet those parameters because the public defender system relies overwhelmingly on lawyers.¹⁸³ The public defender system is a steak knife and adequate civil legal aid requires an entire place setting. A lawyer is not always the appropriate implement, so a civil legal aid system should not rely on lawyers exclusively.¹⁸⁴ Where basic human needs are not at stake or procedures or issues are relatively simple, the services of a lawyer are unnecessary, prohibitively costly, and not required by international law.¹⁸⁵

IV. POLICY RECOMMENDATIONS

A. The United States Should Implement Lessons and Techniques from the Legal Empowerment of the Poor Model.

Legal Empowerment of the Poor (LEP) is a method of creating systemic

defense system to adequately serve the needs of those accused of a crime).

180. See Inter-American Commission, *supra* note 42, ¶ 55 (detailing requirements under the Inter-American system).

181. See CERD Report USA, *supra* note 35, ¶ 22 (recommending that the United States make legal aid available to racial, ethnic, and national minorities when basic human needs are at stake); General Comment No. 7, *supra* note 20, ¶ 15 (recommending the provision of counsel so that people forcibly evicted from their home in violation of the right to housing can seek redress from the courts); Inter-American Commission, *supra* note 42 (listing complexity as a factor supporting the provision of counsel).

182. See General Comment No. 32, *supra* note 21, ¶¶ 10-14 (encouraging states to provide free legal aid, but noting that in some instances lesser steps such as eliminating fees may be sufficient to ensure the protection of rights); General Recommendation No. 31, *supra* note 33, at IIC(17)b (citing legal help centers, legal information centers, and centers for reconciliation and mediation as permissible methods of providing legal aid in some circumstances).

183. See, e.g., *Services*, L.A. PUBLIC DEFENDERS OFFICE, <http://pd.co.la.ca.us/Services.html> (last visited Nov. 25, 2011) (indicating that in an office of over 1,000 employees, over 700 are lawyers).

184. See Bok, *supra* note 95, at 583 (arguing for the expanded use of paralegals to increase the efficiency in the legal system).

185. See General Comment No. 32, *supra* note 21, ¶¶ 10-14 (noting that the provision of a lawyer is only required in some circumstances, so long as other forms of aid adequately protect civil and political rights).

change by using the law, the legal system, and legal services as tools of empowerment that enable the poor and marginalized to protect and advance their rights and interests.¹⁸⁶ In this sense, the philosophy of LEP complements the international obligations of the United States, because LEP is at its core a technique for the realization of rights.¹⁸⁷ Distinctive among its features is a belief in community-based organizing and a bottom-up approach to problem solving that uses locally-based actors to effect locally-controlled change.¹⁸⁸ This process is instrumental in ensuring the actual enforcement of existing laws that protect human rights and in giving a voice to the poor and disadvantaged when it comes to reforming laws and regulations.¹⁸⁹ This often means using non-lawyers, such as community-based paralegals, to provide legal services where a lawyer is either unnecessary, too expensive, or impossible to provide.¹⁹⁰ Using these techniques, LEP projects have been able to resolve hundreds of thousands of civil cases in some of the least developed, poorest places on earth.¹⁹¹ LEP is a proven and effective method of delivering legal services that should be applied in the United States. The expanded use of paralegals, social workers, mediators, advice centers, and technology in a holistic LEP effort would allow the United States to meet its international obligations.¹⁹²

LEP techniques are neither radical nor expensive and could easily be

186. See U.N. COMM'N ON LEGAL EMPOWERMENT OF THE POOR, *supra* note 14, at 3, 25-40 (defining a holistic approach to the provision of legal services that focuses on bottom-up empowerment of local peoples rather than top-down legal system reform reliant upon outside experts).

187. See Mona Brother, *Legal Empowerment as a New Concept in Development: Translating Good Ideas into Action*, in RIGHTS AND LEGAL EMPOWERMENT IN ERADICATING POVERTY 47, 54 (Dan Banik ed., 2008) (describing the rights-based approach to development in LEP).

188. See INT'L DEV. LAW ORG., LEGAL EMPOWERMENT: PRACTITIONER'S PERSPECTIVES 63, 81, 157, 179, 235 (Stephen Golub ed., 2010) (providing examples of LEP projects from around the world).

189. See STEPHEN GOLUB, BEYOND RULE OF LAW ORTHODOXY: THE LEGAL EMPOWERMENT ALTERNATIVE 32 (2003) (noting both the potential and the observed impact of LEP efforts on the actual implementation of legal reforms and enforcement of laws).

190. See OPEN SOC'Y JUSTICE INITIATIVE, BETWEEN LAW AND SOCIETY: PARALEGALS AND THE PROVISION OF JUSTICE SERVICES IN SIERRA LEONE 15-23 (2006), *available at* http://www.soros.org/initiatives/justice/focus/legal_capacity/articles_publications/publications/between-law-and-society-20100310 (detailing the success of a program in Sierra Leone that relies on community-based paralegals to provide services to remote communities where lawyers are non-existent).

191. See INT'L DEV. LAW ORG., *supra* note 188, at 63, 81 (describing successes in Bolivia and Sierra Leone, among other places).

192. See General Recommendation No. 31, *supra* note 33, at IIA-C (requiring states to ensure the protection of human rights by strengthening the services provided to disadvantaged parties that access the legal system).

incorporated into existing institutions and service providers.¹⁹³ Some of LEP's characteristics are familiar from the OEO, the organization replaced by the LSC, which focused on community activism and holistic services.¹⁹⁴ There are even some legal aid organizations practicing these methods today, which could serve as models for scaling-up these techniques.¹⁹⁵ Critics of the state of access to justice in the United States have called for the expanded use of paralegals for decades, and some states have also begun to embrace an expanded use of paralegals.¹⁹⁶ The reasons for this are clear. Budgets have always been tight, especially when it comes to funding civil legal aid.¹⁹⁷ Paralegals and non-lawyer legal service providers are a cheap and effective form of legal aid.¹⁹⁸ Beyond this, though, both are an inexpensive way to realize the economic gains that come from providing civil legal aid.¹⁹⁹ Civil legal aid saves money and spurs economic growth.²⁰⁰ In an economic downturn, a rights-based approach to civil legal aid can provide critical savings to state-funded institutions like courts, homeless shelters, and schools.²⁰¹ Civil legal aid is both preventative care that prevents later catastrophe and an effective new procedure that cures existing ailments.

193. See generally GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992) (arguing for inclusive lawyering that involves the community in solving legal problems); Nathaniel Whittemore, *Legal Justice Goes Mobile*, CHANGE.ORG (Sept. 9, 2010), <http://news.change.org/stories/legal-justice-goes-mobile> (describing a low-cost, phone based legal information delivery service).

194. See generally *The Law: Corporation for the Poor*, *supra* note 75 (contrasting the LSC and OEO).

195. See *Holistic Defense*, BRONX DEFENDERS, <http://www.bronxdefenders.org/our-work/holistic-defense> (last visited Nov. 25, 2011) (utilizing "social workers, parent advocates, and community organizers" as part of their legal representation efforts); *Services & Programs*, CAL. RURAL LEGAL ASSISTANCE, INC., <http://www.crla.org/node/3> (last visited Nov. 25, 2011) (including community outreach and educational training in their activities).

196. See HAW. SUP. CT. R. 21(b)(10) (2011) (calling for an increase in the "utilization of paralegals and other non-lawyers in the delivery of civil legal services to low-income Hawai'i residents"); see also Bok, *supra* note 95, at 583 (arguing that efficient access to legal services throughout society will require the imaginative use of paralegals).

197. See HOUSEMAN & PERLE, *supra* note 77, at 38 (tracing the funding plight of the LSC).

198. See GOLUB, *supra* note 189, at 32 (describing the merits and successes of LEP techniques worldwide).

199. See *infra* Appendix 2 (listing studies demonstrating the economic benefits of civil legal aid both in savings and growth).

200. See *id.* (listing studies finding a return of between four and seven dollars for every dollar spent on indigent legal services).

201. See *id.* (demonstrating that spending on legal aid is a pre-emptive measure that solves problems before they become more costly).

B. The Legal Community Can Successfully Integrate Non-Lawyers into Service Delivery.

Resistance to the expanded use of non-lawyer legal services providers is shortsighted and unimaginative.²⁰² The stratification of skill levels, duties, and specializations that would result from expanded paralegal use would parallel those that already exist in the medical services field.²⁰³ Professional organizations, medical schools, hospitals, and legislatures do not insist that medical services must come first and foremost from doctors.²⁰⁴ To provide an adequate level of access and service, the medical community has embraced levels of specialization and care that include community health workers, EMTs, nurses, nurse practitioners, physician assistants, doctors, and specialists. Community health workers, which are most analogous to community-based paralegals, have made dramatic contributions to the health of the communities they serve.²⁰⁵ Legislation and accreditation, similar to those used in the medical field, can mitigate concerns regarding paralegal skill and liability.²⁰⁶ Training and certification, combined with statutes and professional codes of conduct that define permissible activities and responsibilities can ensure minimum

202. See generally Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 703 (1996) (arguing that non-lawyers can effectively provide legal services and describing a regulatory framework and steps that the legal profession can undertake); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) (discussing the use of non-lawyers as a method of increasing access to justice).

203. Cf. Jay Hancock, *Md. Should Make Nurse Practitioners Independent*, BALTIMORE SUN, Apr. 14, 2010, http://weblogs.baltimoresun.com/business/hancock/blog/2010/04/md_should_make_nurse_practitioner.html (noting the evolving role of nurse practitioners as doctor replacements); *Physician Education, Licensure, and Certification*, AM. MED. ASS'N, <http://www.ama-assn.org/aps/physcred.html#physed> (last visited Nov. 25, 2011) (explaining the different levels of certification and education required for certain types of doctors and medical specialists).

204. See GOLUB, *supra* note 189, at 6 (explaining how a reliance on only lawyers in the legal field is analogous to a reliance on only urban hospitals and doctors in the medical field).

205. See Jackline Oluoch, *The Community Health Workers Program Receives an Award for Excellence*, MILLENNIUM VILLAGES BLOG (Feb. 8, 2011), <http://blogs.millenniumpromise.org/index.php/2011/02/08/the-community-health-workers-program-receives-an-award-for-excellence/> (discussing recognition from the World Health Organization of the successes of a community health-worker program in reducing child morbidity and mortality).

206. See Sonkita Conteh, *Joint Statement on the Draft Legal Aid Bill 2010*, SIERRA EXPRESS MEDIA, Apr. 13, 2010, <http://www.sierraexpressmedia.com/archives/7281> (describing a South African bill to authorize the expanded use of paralegals); OPEN SOC'Y JUSTICE INITIATIVE, COMMUNITY-BASED PARALEGALS – PRACTITIONER'S GUIDE 41, 120-22 (2010), available at http://www.soros.org/initiatives/justice/focus/legal_capacity/articles_publications/publications/paralegals-manual-20101208/paralegal-guide-20101208.pdf (noting that paralegal programs should seek to cooperate with governmental authorities so as to gain statutory recognition, as was done in Nigeria, Mongolia, and Hungary).

standards and establish mechanisms for redressing malpractice.²⁰⁷

V. CONCLUSION

The United States has spent decades failing to provide a level of civil legal aid that ensures the protection and enjoyment of human rights.²⁰⁸ This failure is more than just unfortunate; it is a violation of international law.²⁰⁹ The international agreements, which the United States has agreed to be bound by represent a promise by the United States to respect, protect, and fulfill the human rights they espouse.²¹⁰ To honor this promise, the agreements require the United States to ensure the conditions where the full realization of those rights is possible.²¹¹ Civil legal aid is a means to that end.²¹² The form that such a system takes is important only insofar as it enables that end to be met.²¹³ The public defender model is broken and ill-suited to the task.²¹⁴ Current civil legal aid efforts are inadequate and underfunded, but the answer is not just more money.²¹⁵ The methods of service delivery need to be reevaluated and reformed to ensure compliance

207. See *id.* at 79-92, 105-113, 120-22 (describing training, monitoring, and accreditation strategies that ensure quality, consistency, and efficiency of paralegal programs); *Model Rules of Prof'l Conduct*, AM. BAR. ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Nov. 25, 2011) (explaining the Model Rules and tracing their development and adoption by the states).

208. See JUSTICE GAP 09, *supra* note 2, at 1, 12, 16-18, 28 (documenting the underfunded, restricted, and inadequate federal legal aid system's inability to provide services to all those who need them).

209. See generally OAS Charter, *supra* note 8 (requiring member states to provide civil legal aid to ensure the protection of basic human needs and human rights that are protected under the Inter-American system).

210. See ICESCR, *supra* note 17, at art. 3 (requiring states to refrain from conduct that impairs the exercise of rights, prevent violations of those rights by third parties, and take positive steps to ensure the realization of those rights); see also ICCPR, *supra* note 18 (same); CRC, *supra* note 31, at art. 4 (same); CEDAW, *supra* note 31, at art. 4 (same); CERD, *supra* note 29, at art. 2 (same). See generally OAS Charter, *supra* note 8, at art. 34 (same); ADR, *supra* note 38 (same).

211. See Inter-American Commission, *supra* note 42, ¶ 2 (indicating that civil legal aid's utility is in its ability to ensure the realization of rights).

212. See *id.* (recognizing the centrality of equal protection before the law in realizing human rights).

213. See General Recommendation No. 31, *supra* note 33, at IIA (emphasizing that the protection of rights is more important than the means by which that protection is ensured).

214. See generally Bright, *supra* note 179 (detailing the woeful state of the overwhelmed indigent criminal defense system that relies on public defenders who are unable to handle their case loads); Erik Echolm, *Citing Workload, More Public Defenders are Refusing New Cases*, N.Y. TIMES, Nov. 8, 2008, <http://www.nytimes.com/2008/11/09/us/09defender.html> (reporting on the refusal of public defender offices across seven states to take on new cases because of overwhelming workloads).

215. See generally BRENNAN CTR. FOR JUSTICE, *supra* note 141 (documenting inadequacies and under-funding in civil legal aid across states).

with international law and norms.²¹⁶ The LEP international development model provides useful insights into the ways the United States could reform its civil legal aid programs to comply with international law and avoid the failures of current systems.²¹⁷

216. See Inter-American Commission, *supra* note 42, ¶¶ 56-65 (indicating the analysis required to assess the type of legal aid required in a given situation).

217. See GOLUB, *supra* note 189, at 29-32 (contrasting traditional rule of law reforms with LEP methods of securing human rights and social justice).

APPENDIX 1: CIVIL LEGAL AID IN THE UNITED STATES IS INADEQUATE

DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004) (providing an overview of the representation gap in America and detailing, in an empirical study, the nationwide dearth of pro bono work by lawyers).

MELANCA CLARK & MAGGIE BARRON, BRENNAN CTR. FOR JUSTICE, *FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION* (2009), *available at* <http://www.brennancenter.org/content/resource/foreclosures/> (finding that across jurisdictions, 60-92% of foreclosure defendants were unrepresented).

JUSTICE ACTION GRP., *JUSTICE FOR ALL: A REPORT OF THE JUSTICE ACTION GROUP: STATEWIDE ACCESS TO JUSTICE PLANNING INITIATIVE* (2007), *available at* <http://www.mbf.org/JAGReport12-17-07.pdf> (describing the unequal provision of justice in Maine and proposing steps to remedy the inequalities).

M.D. ACCESS TO JUSTICE COMM'N, *INTERIM REPORT AND RECOMMENDATIONS* (2009), *available at* <http://www.courts.state.md.us/mdatjc/pdfs/interimreport111009.pdf> (explaining the causes and effects of a lack of access to justice in Maryland and proposing solutions).

APPENDIX 2: ECONOMIC BENEFITS OF PROVIDING CIVIL LEGAL AID

Economic Benefit of Meeting Civil Legal Needs, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/DMS/Index/000000/000050/document_browse (a repository of quantitative reports from states including Florida, Massachusetts, Minnesota, Nebraska, New Hampshire, New York, and Wisconsin detailing the economic benefits and potential cost-savings of providing civil legal assistance).

N.Y.C. DEP'T. OF SOC. SERVS., *THE HOMELESSNESS PREVENTION PROGRAM: OUTCOMES AND EFFECTIVENESS* (1990) (determining that for each dollar spent on indigent representation in eviction proceedings the city saves four dollars in costs related to homelessness).

THE PERRYMAN GRP., *THE IMPACT OF LEGAL AID SERVICES ON ECONOMIC ACTIVITY IN TEXAS: AN ANALYSIS OF CURRENT EFFORTS AND EXPANSION POTENTIAL* (2009), *available at* <http://www.nlada.org/DMS/Documents/1236008203.14/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf> (finding that the state economy gains \$7.42 for every dollar spent on indigent civil legal services).

Editorial, *Need a Lawyer? Good Luck*, N.Y. TIMES, October 15, 2010, at A32 (discussing costs resulting from lack of representation, such as court delays and burdened homeless shelters and hospitals).

APPENDIX 3: INTERNATIONAL LAW IN UNITED STATES COURTS

Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (“[T]he Court is bound by the law of nations which is part of the law of the land.”).

The Paquete Habana, 175 U.S. 677, 700 (1900) (establishing customary international law as part of domestic United States law).

Asylum Case (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20) (describing regional customary international law).

Sterling v. Cupp, 625 P.2d 123 (Or. 1981) (discussing the UDHR and ICCPR in holding that opposite gender prison searches violate the Oregon Constitution).

Boehm v. Superior Court, 178 Cal. App. 3d 494 (Cal. App. 1986) (applying provisions of the UDHR to a welfare statute).

Grutter v. Bollinger, 539 U.S. 306 (2003) (Ginsberg, J. & Breyer, J., concurring) (referencing international law in a decision finding a law school’s practice of considering race and ethnicity in admissions constitutional).

Medellin v. Texas, 552 U.S. 491, 533 (2008) (Stevens, J., concurring) (arguing that even if a treaty is not self-executing or implemented by Congress, it can still create international obligations that influence state policies).

Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002) (applying treaty obligations and customary international law to a federal immigration statute), *rev’d on other grounds sub nom Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

Atkins v. Virginia, 536 U.S. 304, 317 (2002) (finding the imposition of the death penalty for crimes committed by mentally retarded offenders to be unconstitutional, and noting the overwhelming disapproval of this

practice by the “world community”).

Roper v. Simms, 543 U.S. 551, 574-76 (2005) (overturning *Stanford v. Kentucky*, and prohibiting the death penalty for juveniles under eighteen).

Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) (overturning *Bowers v. Hardwick*, and holding that a statute criminalizing consensual homosexual sexual conduct violated the Due Process Clause).