The Human Rights Policy Seminar
University of North Carolina School of Law

A BASIC HUMAN RIGHT: MEANINGFUL ACCESS TO LEGAL REPRESENTATION

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June 2015

http://www.law.unc.edu/documents/academics/humanrights/malr.pdf

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EXECUTIVE SUMMARY

For many years, the United States has received immense scrutiny concerning the extent to which it provides individuals access to meaningful legal representation. It is fairly clear that access to legal services in the United States is inadequate. In its present state, the majority of individuals who are unable to obtain counsel on their own are left without a fair chance at legal recourse in a wide array of legal proceedings. The consequences are many, but none as troubling as the effects on the basic human rights of individuals without access to quality legal representation.

This report argues that the current state of access to counsel in the United States fails to meet U.S. obligations under international and regional human rights norms. It is intended to aid advocates looking to international and regional human rights bodies, specifically the Inter-American Commission on Human Rights, for assistance in reforming the system in the United States and in pressuring the U.S. government to provide a universal right to meaningful access to legal representation.

The argument made in this report is twofold. Firstly, the U.S. justice system is lacking because international and regional bodies have repeatedly noted that the United States needs to provide meaningful access to legal representation as a basic right. Secondly, other affirmative rights that the United States is obligated to protect under human rights norms cannot be realized without meaningful access to legal representation.

This report proceeds in four sections.

SECTION ONE of the report establishes the basis in international and regional human rights norms for a universal right to meaningful access to legal representation. The instruments discussed in this section not only provide support for access to counsel being ensured as a basic

right, but also lay out several other fundamental liberty interests. The purpose of this section is to demonstrate what liberty interests the United States is required to protect under its obligations to human rights norms. The section also provides a brief overview of the considerable inadequacy of the protection of these rights in U.S. jurisprudence.

SECTION TWO of the report examines the first area of U.S. jurisprudence that does not guarantee a basic right to meaningful access to legal representation: civil proceedings. The section outlines the disturbing array of fundamental rights that are left unprotected for those individuals who are unable to obtain counsel on their own in civil proceedings. Without a right that allows these individuals to access counsel, their fundamental interests in housing, employment, family, sustenance, and more are left unprotected and vulnerable to erosion.

SECTION THREE of the report surveys the next area of U.S. jurisprudence, in which domestic law does not recognize an individual's basic right to meaningful access of legal representation: immigration removal proceedings. The section describes the deprivation of liberty that immigrants experience throughout these proceedings and the fundamental unfairness of the immigration court system. Not only do these aspects of the proceedings unveil the desperate need for counsel to advocate for respondents' rights throughout the process, but the section further shows that legal representation has a dramatic effect on the outcome for immigrants.

SECTION FOUR of this report focuses on the criminal defense system in the United States, which is the one area that a right to counsel is recognized. However, quality legal representation is a rare encounter for indigent criminal defendants. Due to chronic underfunding and inadequate assurances of the quality of counsel, even this area of U.S. jurisprudence fails to meet obligations under international and regional human rights norms. Criminal defendants without

access to effective legal counsel do not receive the protection of their fundamental right to liberty that the United States has promised to provide.

The report concludes with the suggestion that advocates consider the invoking the guidance and authority of the Inter-American Commission on Human Rights which is well-positioned to consider the human rights obligations of the U.S. government to provide meaningful access to legal representation to all.

INTRODUCTION

The Importance of Access to Counsel in Instituting the Rule of Law and Defending Human Rights

1. The Rule of Law is a legal concept that has been essential to governance for centuries, and it has been recognized by both the international and domestic community.[1] The Rule of Law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."[2]
2. The American Bar Association's (ABA) World Justice Project (WJP) defines the Rule of Law as "a system of rules and rights that enables fair and functioning societies."[3] The WJP Rule of Law Index 2014 recounts four universal principles of the Rule of Law, including (1) universal accountability under the law, (2) clear, fair, and just laws that protect fundamental rights and are enforced evenly, (3) a fair, efficient, and accessible process for enacting, administering, and enforcing laws, and (4) "competent, ethical, and independent representatives and neutrals who are of sufficient number [and] have

[1] *See* Judith N. Shklar, *Political Theory and the Rule of Law*, in *The Rule of Law: Ideal or Ideology* 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (discussing Montesquieu and Aristotle's understanding of the Rule of Law and the rule of reason). *See also* Article 39, Magna Carta (1215) ("No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."); THE FEDERALIST NO. 51 (James Madison) (1788) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."); Preamble, U.N. Charter, para. 3 (1945) (The UN aims to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) ("[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.").
[2] William Davis and Helga Turku, *Access to Justice and Alternative Resolution*, 2011 J. Disp. Resol. 47, 48.
[3] *What is the Rule of Law*, WORLD JUSTICE PROJECT, http://worldjusticeproject.org/what-rule-law (last visited June 8, 2015).

adequate resources" to deliver timely justice.[4] Similarly, the Organization of American States (OAS) notes that "justice and the rule of law are the two main pillars of a free state."[5] Further, States are not truly free or democratic without an impartial justice system.[6]

3. A fair justice system is an important component of the rule of law and democratic governance.[7] Without a "well-functioning civil justice system – a core element of the rule of law – individuals with a dispute have few options other than giving up on any attempt to solve it or resorting to violence or intimidation to settle the conflict."[8]
4. Legal scholars and the international community agree that a fair and impartial judicial system requires a right to counsel.[9] Equal access to counsel affects the populace's perception of judicial fairness, and ultimately, the legitimacy of the government.[10] "Every day the administration of justice is threatened . . . by the erosion of public confidence caused by lack of access."[11]
5. For many individuals, having access to legal representation can make the difference between maintaining or losing ownership of one's home, having enough food to eat, keeping one's family together, or obtaining protection from threats to bodily harm or

[4] WORLD JUSTICE PROJECT, THE WJP RULE OF LAW INDEX 2015, 4 (2015) *available at* http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.
[5] *Justice*, ORG. OF AM. STATES, http://www.oas.org/en/topics/justice.asp (last visited June 8, 2015).
[6] *Id. See also* Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 813 (2005) (noting that the "[r]ule of law is integral to and necessary for democracy and good governance" and attempts to establish democracy without the rule of law have collapsed).
[7] WORLD JUSTICE PROJECT, *supra* note 4 at 6
[8] *Id.*
[9] *See* Tarik N. Jallad, *A Civil Right to Counsel: International and National Trends* (UNC Ctr. on Poverty, Working Research Paper August 2009) (noting that several democracies are moving towards providing a right to counsel).
[10] *See* Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 121-127 (2003).
[11] AM. BAR ASS'N ET AL., REPORT NO. 112A, REPORT TO THE HOUSE OF DELEGATES 10 (2006)(alteration in original) (quoting Ronald George, Chief Justice, Supreme Court of California, State of Judiciary Speech to California Legislature (2001)) *available at* http://www.legalaidnc.org/public/Participate/legal-services-community/ABA_Resolution_onehundredtwelvea[1].pdf.

even death. Those who have no means to protect and enforce their fundamental rights will have diminished trust in their government and little faith in the Rule of Law. Without meaningful access to legal representation (MALR) for rich and poor alike, inequality and injustice will be hallmark characteristics of society.

The Role of Lawyers in Establishing the Rule of Law and Defending Human Rights

6. Lawyers have been recognized as "the key guardians of the rule of law."[12] Lawyers have a responsibility to protect access to the Rule of Law, particularly for vulnerable populations.[13] The privilege and honor of representing individuals in their legal matters bestows on lawyers a professional, ethical, and social duty to protect the fundamental rights of individuals.

7. As Sir John Dalberg-Acton noted, "Power tends to corrupt and absolute power corrupts absolutely."[14] As legal professionals, lawyers are equipped with the knowledge and skills to identify and prevent abuses against the individual. A lawyer's true role in the administration of justice is to ensure that every person has "their position presented fearlessly and zealously by an independent lawyer within the limits of the law; that no one should be denied the benefit of the law; and that no one may escape the consequences of the law."[15]

The Importance of Meaningful and Effective Counsel

8. In 1919, Reginald Heber Smith's book, *Justice and the Poor*, challenged lawyers to provide free legal assistance to the poor and spurred the ABA to create the Standing

[12] Lorne Sossin, *The Public Interest, Professionalism, and Pro Bono Publico*, 46 OSGOODE HALL L.J. 131, 132 (2008).
[13] *Id.*
[14] Letter from Sir John Dahlberg-Acton to Bishop Mandell Creighton (April 5, 1887), *in* HISTORICAL ESSAYS AND STUDIES (J. N. Figgis & R. V. Laurence eds., London: Macmillan 1907).
[15] THE LAW SOCIETY OF UPPER CANADA, IN THE PUBLIC INTEREST: THE REPORT AND RESEARCH PAPERS OF THE LAW SOCIETY OF UPPER CANADA'S TASK FORCE ON THE RULE OF LAW AND THE INDEPENDENCE OF THE BAR (Toronto: Irwin Law, 2007) at 1.

Committee on Legal Aid and Indigent Defendants and laid the foundation for today's Legal Aid.[16] Smith noted that barriers to access to justice harms the poor and allows their oppressors to wield the legal system as a weapon against them.[17]

> The administration of American justice is not impartial, the rich and poor do not stand on equality before the law, and the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons . . . . There is something tragic in the fact that a plan and method of administering justice, honestly designed to make efficient and certain that litigation on which at last all rights depend, should result in rearing insuperable obstacles in the path of those who most need protection, so that litigation becomes impossible, rights are lost and wrongs go unredressed.[18]

9. Simply providing counsel is not a sufficient remedy unless the counsel is meaningful and effective. People can only have meaningful access to justice if "they have the ability to prevent the abuse of their rights and obtain remedies when such rights are abused."[19]
10. The average layman cannot navigate the complicated pathways of the legal system as well as an attorney. Those who cannot afford legal representation face an uphill battle and struggle to maintain basic human rights. Vulnerable populations often need the most legal protection.
11. In many contexts, the lack of effective assistance of counsel can lead to life-altering consequences and denials of our most basic human rights.[20]

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[16] Alan Houseman, NAT'L CTR. ON POVERTY LAW, *Poverty Law Manual for the New Lawyer: Legal Aid History* (2002), *available at* http://web.jhu.edu/prepro/law/Pre-Law.Forms.WordDocs/Public.Interest.Law.1.pdf.
[17] REGINALD HEBER SMITH, JUSTICE AND THE POOR, 8, 15 (Patterson Smith Publ'g 3d ed. 1972).
[18] *Id.*
[19] OFFICE OF DEMOCRACY AND GOVERNANCE, U.S. AGENCY FOR INT'L DEV., GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 12 (2013) *available at* http://pdf.usaid.gov/pdf_docs/PNADT593.pdf.
[20] *See* Zachary H. Zarnow, *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*, 20 AM. U. J. GENDER SOC. POL'Y & L. 273, 290 (discussing the relationship between internationally recognized basic human rights and the rights at stake in litigation).

12. Human rights bodies have encouraged States to provide funding for legal representation for those who cannot afford counsel, particularly when basic human needs and fundamental rights are at risk.[21] A lack of meaningful access to effective counsel has a disproportionate impact on vulnerable communities and violates the right to a fair trial and equality before courts and tribunals.[22] When a person is most vulnerable, a lawyer "can make the difference between a just and an unjust outcome, or fair or unfair treatment."[23]

> The law permits every [person] to try [her] own case, but 'the lay vision of every man his own lawyer has been shown by all experience to be an illusion.' It is a virtual impossibility for a [person] to conduct even the simplest sort of a case under the existing rules of procedure, and this fact robs the in forma pauperis proceeding of much of its value to the poor unless supplemented by the providing of counsel . . . . We can end the existing denial of justice to the poor if we can secure an administration of justice which shall be accessible to every person no matter how humble, and which shall be adjusted so carefully to the needs of the present day world that it cannot be dislocated, or the evenness of its operation be disturbed, by the fact of poverty.[24]

13. Smith's account of the pervasive systematic failures and dark realities of the U.S. justice system is still salient. In order to maintain the Rule of Law, it is imperative that lawyers work to protect human rights and that all people have access to legal counsel and meaningful legal representation when those basic human rights are implicated.[25]

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[21] *See, e.g.*, Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008)[hereinafter UNCERD].
[22] U.N. Human Rights Comm., *General Comment No. 32: Right to equality before courts and tribunals and to a fair trial*, 19th Sess., U. N. Doc. CCPR/C/GC/32, ¶ 13 (2007).
[23] THE LAW SOCIETY OF UPPER CANADA, *supra* note 15 at 1.
[24] Reginald Heber Smith, *supra* note 17 at 32, 240.
[25] For a discussion of the current lack of equal access to justice and legal representation, see Gene R. Nichol, Jr, *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. 325 (2010).

I. INTERNATIONAL, REGIONAL AND DOMESTIC NORMS THAT SUPPORT MEANINGFUL ACCESS TO LEGAL REPRESENTATION

A. International Treaties

The Universal Declaration of Human Rights and International Covenant on Political and Civil Rights

14. Honoring and implementing human rights cannot happen without MALR. Every right articulated in an international treaty, national constitution, local law or any other legislation necessitates the presence of an effective, responsive legal system and competent, zealous advocates to uphold that right in fact. The right to MALR is therefore the conduit by which every other right is defended, making it a right unequivocally worthy of the Inter-American Commission on Human Rights' (IACHR) attention and investigation.

15. The texts of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Political and Civil Rights (ICCPR)—two cornerstones of international human rights norms[26]— indisputably support and *de facto* require MALR to move their commitment to human rights from acknowledgment to reality.

16. Since the ICCPR is often considered a codification of the principles laid out in the UDHR, these two human rights documents will be addressed together in this section.[27]

17. The UDHR and ICCPR speak to the principle of MALR in both direct and indirect ways. Many articles of the UDHR and ICCPR directly address MALR by articulating procedural due process safeguards necessary for individuals involved with the legal

[26] Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998) (describing the UDHR as the "single most important reference point for cross-cultural discussion of human freedom and dignity in the world today").

[27] Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59, 60 (1998) (pointing out that the ICCPR was derived from the UDHR and is considered the embodiment of some of its most important "first-generation" human rights).

system, such as the right to counsel, the right to a fair and public hearing, and the right to a competent judicial or administrative determination. Other articles that are more substantive in nature, such as ones that guarantee the right to life, liberty, family, education, and other basic needs, indirectly but firmly support a right to MALR to effectively advocate for these rights.

18. The following are examples of *procedural* due process rights expressed in the UDHR and codified in the ICCPR that *directly* relate to the need for a right to MALR:

    a. ICCPR
        1. Article 2(3): "***any person whose rights or freedoms*** as herein recognized ***are violated shall have an effective remedy***..."
        2. Article 2(3): "any person claiming such a remedy shall have his ***right thereto determined by competent judicial, administrative or legislative authorities***, or by any other competent authority…"
        3. Article 9(4): "***Anyone who is deprived of his liberty by arrest or detention*** shall be ***entitled to take proceedings before a court***, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."
        4. Article 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 and of any criminal charge*** against him."
        5. Article 14(1): "***All persons shall be equal before the courts and tribunals.*** In the determination of any criminal charge against him, or 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***…"
        6. Article 14(3): "***In the determination of any criminal charge*** against him, ***everyone shall be entitled to the following minimum guarantees***, in full equality…(b) To have ***adequate time and facilities for the preparation of his defence*** and to ***communicate with counsel*** of his own choosing… (d) To be tried in his presence, and to defend himself in person or through ***legal assistance*** of his own choosing; to be informed, ***if he does not have legal assistance, of this right; and to have legal assistance assigned*** to

him…and without payment by him in any such case ***if he does not have sufficient means to pay for it*** …"[28]

19. The following are examples of *substantive* rights expressed in the UDHR and the ICCPR that necessitate MALR for their enforcement and protection:

b. ICCPR

(1) Article 6(1): "Every human being has the ***inherent right to life***. This right shall be protected by law. No one shall be arbitrarily deprived of his life."
(2) Article 7: "***No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment***."
(3) Article 9(1): "Everyone has the ***right to liberty and security of person.*** No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."
(4) Article 10(1)**:** "***All persons deprived of their liberty shall be treated with humanity*** and with respect for the inherent dignity of the human person."
(5) Article 17(1)**:** "***No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home*** or correspondence, nor to unlawful attacks on his honour and reputation."[29]

c. UDHR

(1) Article 23: "(1) Everyone has the ***right to work***…to just and favourable condition of work and to protection against unemployment. (2) Everyone, without discrimination, has the ***right to equal pay for equal work***. (3) Everyone who works has the right to just and favourable remuneration…"
(2) Article 25**: "**(1) Everyone has the ***right to a standard of living adequate for the health and well-being of himself and of his family***, including ***food, clothing, housing and medical care*** and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
(3) Article 26**:** "(1) Everyone has the ***right to education***…"

[28] INTERNATIONAL COVENANT ON POLITICAL AND CIVIL RIGHTS, entered into force Mar. 23, 1976, 999 U.N.T.S. 171, S. Exec. Doc. No. E, 95-2 *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[29] *Id.*

(4) Article 13**:** "(1) Everyone has the ***right to freedom of movement and residence*** within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country."
(5) Article 17: "(1) Everyone has the ***right to own property***… (2) No one shall be arbitrarily deprived of his property."[30]

20. Although the UDHR is not an international treaty like the ICCPR, the United States has affirmed its commitment to its principles through its membership in the United Nations (UN) and its ratification of the ICCPR.[31] The United States ratified the ICCPR on June 8, 1992 but entered the declaration among others "[t]hat the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing."[32]
21. There has long been heated debate in the United States about whether individuals can invoke international human rights norms or make claims under international human rights treaties in an American court of law.[33] On one hand, many American legal scholars have argued that under the Supremacy Clause of the U.S. Constitution[34] international treaties ratified by the United States should trump domestic law and therefore be self-executing,

[30] UNIVERSAL DECLARATION OF HUMAN RIGHTS, December 10, 1948, GA res. 217A (III), UN Doc A/810 at 71 *available at* http://www.un.org/en/documents/udhr/.
[31] Glendon, *supra* note 26 at 1155.
[32] INTERNATIONAL COVENANT ON POLITICAL AND CIVIL RIGHTS, entered into force Mar. 23, 1976, 999 U.N.T.S. 171, S. Exec. Doc. No. E, 95-2, Declarations and Reservations *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[33] Foster v. Neilson, 27 U.S. 253, 314 (1829) (This is often cited as the seminal case for establishing the principle of self-executing versus non-self-executing treaties in U.S. law. Here the Court held that some international treaties are addressed "to the political, not the judicial department; and the legislature must execute [the treaty] before it can become a rule for the Court."). *See also* Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 3 U. ST. THOMAS L.J. 311 (2005) (arguing the U.S. reservations and declarations to international human rights treaties are not exceptional nor necessarily problematic). *But see* M. Shah Alam, *Enforcement of International Human Rights Law By Domestic Courts in the United States*, 10 ANN. SURV. INT'L & COMP. L. 27 (2004) (arguing that Art. VI of the U.S. Constitution should be used by U.S. courts to enforce human rights treaties); Carlos M. Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) (also supporting enforcement of international treaties in domestic courts via the Supremacy Clause); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 129-33 (1999) (arguing that the non-self-executing declarations that the US attaches to international HR treaties that it ratifies are invalid).
[34] U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

meaning they should not need further legislation to make them legally binding in domestic courts.[35] At the same time, American courts have repeatedly rejected claims brought under international human rights treaties such as the ICCPR, finding that such treaties are non-self-executing and therefore unenforceable absent specific domestic legislation giving them the force of law in domestic courts.[36]

22. The purpose here is not to detangle or settle the self-executing versus non-self-executing debate. The issue is raised, however, to point out that invoking international human rights norms to advocate for a right to MALR in the United States can hit roadblocks of controversy and criticism from deeply-rooted policy, domestic legal jurisprudence, and some scholarly work that insists that treaties that are ratified by the United States do not automatically become binding domestic law.

23. However, the presence of this prevailing U.S. position with regards to international human rights norms is even more reason for the IACHR to call upon the U.S. government to revise and renew its commitment to the human rights ideals that it claims to honor in its domestic community and has been an integral part in creating and promoting on the international stage.[37] Furthermore, such a call from the IACHR would provide meaningful support to the recommendations issued by the U.N. Human Rights Committee and other international monitoring bodies that bear on the failure of the United States to fulfill its obligations under international human rights treaties that it has ratified and pledged to uphold in good faith.[38]

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[35] Sloss, *supra* note 33 at 131 (arguing further that the terms self-executing and non-self-executing have not been sufficiently defined and argues that a true understanding of their meanings would actually allow international human rights claims under non-self-executing treaties).
[36] *Id* at 150-51.
[37] Copelon, *supra* note 27 at 59-60.
[38] U.N. HUMAN RIGHTS COMMITTEE, ICCPR Periodic Review of US, Concluding Observations, CCPR/C/USA/CO/3/Rev.1, ¶ 10 (2006) ("The Committee notes with concern the restrictive interpretation made by

24. In addition, the United States may have an obligation to abide by the principles of the UDHR and the ICCPR, even if it argues that it is not bound to make their provisions legally binding in domestic courts. Some legal scholars have argued that the UDHR has risen to the level of customary international law, which would make it binding on all nations including the United States.[39] The United States also has a clear minimum obligation to not contradict or undermine the principles of the international treaties that it has signed and ratified.[40]
25. Finally, the United States has an ethical and moral obligation to uphold the principles of the UDHR and ICCPR as a world leader and an example other nations look up to for its commitment to human rights, Rule of Law, and faith in the legal system's power to establish justice, vindicate rights, and remedy wrongs.
26. The U.S. government in fact acknowledged the need to improve compliance with many international human rights provisions, on issues that range from access to housing and juvenile justice to domestic violence and immigration detention during the last two Universal Periodic Reviews (UPR).[41]

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the State party of its obligations under the Covenant" and "[t]he State party should review its approach and interpret the Covenant in good faith").

[39] Hurst Hannum, *The Status of the Universal Declaration of Human Rights in International Law*, 25 GA. J. INT'L & COMP. L 287, 315 (1995/1996). *See also* Jack Rockers and Elizabeth Troutman, DANGEROUS DETENTION: HUMAN RIGHTS STANDARDS AND ENFORCEMENT IN IMMIGRATION DETENTION, UNC Chapel Hill School of Law Report, p. 10 (2009) (stating that "[a]lthough the United States is a party to only some of the instruments that address human rights, treaties are not the only source of international human rights standards…The United States must also comply with *jus cogens* norms (often called peremptory norms). *Jus cogens* are defined as those norms that are 'accepted and recognized by the international community of states as a while…from which no derogation is permitted.' Furthermore, the United States is obligated to comply with customary international law that emerges 'from a general and consistent practice of states followed by them from a sense of legal obligation'").

[40] Vienna Convention on the Law Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. at 331 *available at* http://www.worldtradelaw.net/misc/viennaconvention.pdf ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when…it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval.").

[41] HUMAN RIGHTS INST., HUMAN RIGHTS INSTITUTE IN THE UNITED STATES: PRIMER ON RECOMMENDATIONS FROM THE INTER-AMERICAN HUMAN RIGHTS COMMISSION & THE UNITED NATIONS (2015), *available at* http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/primer._june_2015.for_cle.pdf (summarizing UPR recommendations that the US government accepted in different thematic areas of human right

27. Establishing a universal right to MALR is critical to transforming the U.S. government's promises of improvement into reality. For instance, the U.S. government agreed to prevent racial bias in the criminal justice system through appropriate measures.[42] Providing for a right to MALR in all criminal cases, where quality and not just presence of counsel is ensured, would help accomplish this goal. Likewise, the U.S. government's promise to make sure immigration detention centers meet basic universal human rights criteria and to investigate each immigrant incarceration can only be realized if there is a right to MALR to enforce such assurances.[43]

28. The U.S. government's compliance with the ICCPR, especially its access to justice provisions, is a particularly timely matter. The U.N. Human Rights Committee conducted its periodic review of the U.S.'s ICCPR compliance in March of 2014 and made clear that MALR is an issue of top priority in its recommendations.[44] The Committee's call upon the United States to provide universal MALR has now been reiterated multiple times in the international community.[45] During its ICCPR periodic review in 2006, the U.S. government was repeatedly urged to address the issue of MALR in the civil, criminal, and immigration contexts alike.[46] In its most recent periodic review in 2014, the United States was again urged to improve its access to justice for several groups who were denied it because of their inability to access legal representation.[47]

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concerns); U.N. Human Rights Council, Draft Report of the Working Group on the Universal Periodic Review, May 4-15, 2015, U.N. Doc. A/HRC/WG.6/22/L.10.

[42] *Id* at 20.

[43] *Id* at 47.

[44] U.N. Human Rights Committee, Concluding Observations on the Fourth Report of the United States of America, 110th Session, para. 15 (Mar. 10-28, 2014) *available at* http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf.

[45] *Id.*

[46] *Id*. *See also* ICCPR 2006 U.S. Periodic Review Concluding Observations, *supra* note 38.

[47] *See* Draft Report of the Working Group on Universal Periodic Review, *supra* note 41.

29. In conclusion, the right to MALR is a right firmly grounded and supported by the international human rights norms set out in the UDHR and ICCPR. The United States has the obligation of honoring and upholding these norms whether it is via ratification of a treaty, participation in the international human rights framework, or its position as a world leader. Finally, the United States has a duty to address MALR because it has been an issue that the international community has repeatedly expressed its concern about and asked the United States to remedy. In light of these realities, the United States has countless legally, morally, and ethically compelling reasons for establishing and guaranteeing the right to MALR in all legal contexts—criminal, civil and immigration. At this point, it would be a source of political and diplomatic embarrassment for the United States not to do so given the plethora of voices that have raised the issue.

International Convention on the Elimination of All Forms of Racial Discrimination

30. The United States signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). All OAS Member States have signed and ratified this convention.[48]

31. CERD defines racial discrimination as

> **"*any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*"**[49]

CERD's core purpose implicates MALR as a substantive right and as a mechanism for implementation of all of its provisions.

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[48] *Second Progress Report of the Special Rapporteurship on Migrant Workers and their families in the Hemisphere*, 2000, 85, *available at* www.cidh.org/Migrantes/migrants.thematic.htm.

[49] *See* International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 1(1), 660 U.N.T.S. 195, 216 [hereinafter CERD].

32. Articles 1-7 require the States that have accepted CERD to ***eliminate racial discrimination*** and improve relations among all races. Several of these obligations involve providing meaningful access to legal redress.

33. Article 1 requires States to take remedial measures to ***protect racial or ethnic groups*** to ensure that all races enjoy fundamental rights and freedoms.[50] Article 2 requires states to ***condemn all forms of racial discrimination***. Governments must ***change laws or policies that create or further racial discrimination***, remove any laws that are racially discriminating, and encourage racial tolerance.[51]

34. In its 2008 review of the United States, the U.N.'s Committee on the Elimination of Racial Discrimination (UNCERD) urged the United States to ***prohibit and eliminate racial discrimination in all forms, including indirect discrimination, discrimination by private actors, and discrimination under the guise of free speech***.[52] Further, although the United States has different levels of government, it should have "a coordinated approach towards the implementation of the Convention at the federal, state, and local levels."[53]

35. Article 5 requires States to ***foster racial equality in the legal system***. States must offer all races ***equal protection in the courts*** and protect all races from violence. Governments must also ensure that all races have equal access to public service and enjoy civil, economic, social, and cultural rights. These rights include the right to work, housing, social services, and education.[54]

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[50] *Id.*
[51] *Id.* at art. 2.
[52] Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008)[hereinafter UNCERD].
[53] *Id.* ¶ 13.
[54] UNCERD, *supra* note 52 at art. 5.

36. Human rights experts have been particularly concerned about protecting the rights guaranteed under Article 5. In 2008, CERD concluded that the United States should ***provide funding for legal representation of ethnic and national minorities***, particularly when basic human needs are involved.[55] The United States must also ***improve its efforts against racial profiling,***[56] ***racial disparities in the criminal justice system***, [57] including minority children sentenced to life imprisonment without parole,[58] and the disparate use of the death penalty[59] or deadly force against racial minorities and undocumented migrants.[60] These obligations are best, if not only, realized through meaningful legal advocacy.
37. UNCERD was also concerned that not only are minorities disproportionately represented in the criminal system, but they are also disenfranchised after they have served their sentences.[61]
38. Article 6 requires States to give everyone effective legal protection and remedies in state tribunals, against acts of racial discrimination.[62] CERD also noted that the United States must "***guarantee equality between citizens and non-citizens***" especially in tribunals.[63]
39. CERD also urged the United States to ***eliminate housing discrimination*** that forces minorities to live in poor communities with "sub-standard housing conditions, limited

[55] UNCERD, *supra* note 52 ¶ 22.
[56] *Id.* ¶ 14.
[57] *Id.* ¶ 20.
[58] *Id.* ¶ 21.
[59] *Id.* ¶ 23.
[60] *Id.* ¶ 25.
[61] *Id.* ¶ 27.
[62] UNCERD, *supra* note 52 at art. 6.
[63] UNCERD, *supra* note 52 ¶ 24.

employment opportunities, inadequate access to health care facilities, under-resourced schools, and high exposure to crime and violence."[64]

40. CERD guarantees equal access to legal representation and protection of fundamental rights, the substance of which have been mentioned above. The international community has deemed these rights important enough to receive international protection. Unfortunately, the United States has not met its obligation to protect these rights.

Convention Against Torture

41. The United States has also signed and ratified the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). CAT defines torture as:

> ***any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacit***y.[65]

42. CAT requires States to prevent and punish torture. Further, under CAT, ***there is no justification for torture***, including war and orders from superior officers. States may not send persons to other countries if there are substantial grounds to believe they will be tortured. UNCERD was disappointed that the United States allowed detained non-citizens "subjected to torture or cruel, inhuman, or degrading treatment or punishment" by transferring them to countries "where there are substantial reasons to believe that they will be subjected to such treatment."[66]

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[64] *Id*. ¶ 16.
[65] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, art. 3, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113, 114 [hereinafter CAT].
[66] UNCERD, *supra* note 52 ¶ 24.

43. CAT has both an indirect and direct relationship to MALR. Prisoners may be subject to conditions that are cruel, inhuman, and degrading in violation of CAT. Without access to counsel, they will not be able to seek effective relief.

44. Article 6 requires States to allow persons in custody to speak to their country's representative.[67] When a person is taken into custody, States are also required to immediately notify their country that they are in custody. Without counsel, these provisions are often overlooked with grave implications for the person in detention.

45. Article 7 requires States to ***guarantee fair treatment at all stages of legal proceedings***. This provision directly implicates the need for MALR in matters that bear on cruel, inhumane, degrading treatment or worse. CERD urged the United States to ***give noncitizens held as "enemy combatants" a remedy for human rights violations and "judicial review of the lawfulness and conditions of detention***."[68] Any effective remedy would require legal counsel to ensure all persons receive a fair hearing.

46. As noted above, CERD found that the United States needed to prevent racial disparities and cruel punishment in the criminal justice system,[69] including minority children sentenced to life imprisonment without parole,[70] and the disparate use of the death penalty[71] or deadly force against racial minorities and undocumented migrants.[72]

47. CAT, like the other international and regional treaties discussed in this section, codifies the international community's fervent belief that certain fundamental rights, including MALR and freedom from torture, are important enough to be protected on an

[67] CAT at art. 6.
[68] *Id.*
[69] UNCERD, *supra* note 52 ¶ 20.
[70] *Id.* ¶ 21.
[71] *Id.* ¶ 23.
[72] *Id.* ¶ 25.

international scale. The international community has also found that the United States has not lived up to these norms and expectations.

B. The Inter-American System

American Declaration on the Rights and Duties of Man

48. The American Declaration of the Rights and Duties of Man (American Declaration) was the first international general human rights treaty.[73] It was adopted at the Ninth International Conference of American States in Bogota, Colombia in April 1948.[74] The Charter of OAS was also adopted at this meeting.[75] Although the provisions of the American Declaration are largely included in the American Convention on Human Rights, its terms are still enforced, particularly with regard to countries that have not ratified the American Convention on Human Rights such as the United States.

49. The American Declaration's Preamble states that "***all men are born free and equal in dignity and in rights***."[76] These rights and the correlating duties are interrelated and are supported by legal and moral principles.

50. The first chapter of the American Declaration lists the civil, political, economic, social, and cultural rights of citizens of the Americas.[77] Many of these rights are dependent upon MALR. Citizens of the Americas have ***a right to life, liberty, personal security, and equality before the law***.[78] They also enjoy rights "to protection of honor, personal

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[73] American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1.
[74] *Id*.
[75] Charter of the Organization of American States, Apr. 30, 1948, O.A.S.T.S. No. 1, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, O.A.S.T.S No. 1-A, OEA/Ser. A/2(SEPF)Add., by the Protocol of Cartagena de Indias, Dec. 5, 1985, O.A.S.T.S. No. 66, OEA/Ser.A/41 (SEPF), by the Protocol of Washington, Dec. 14, 1992, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), and by the Protocol of Managua, June 10, 1993, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), [hereinafter OAS Charter].
[76] American Declaration of the Rights and Duties of Man, *supra* note 73, Preamble, ¶¶1-3.
[77] *Id*. at Art. I-XXVIII.
[78] *Id*. at Art. I-II.

reputation, and private and family rights."[79] People also have the ***right to a family, protection of family, mothers, and children***, and the ***right to have a home and move freely in their home state***.[80] They also have the ***right to work for fair compensation and social security***.[81] These substantive rights are inextricably linked to MALR.

51. Citizens of the Americas have ***rights to a fair trial***, of assembly, of association, to own property, and to petition the government.[82] They have the ***right to due process of law, to receive asylum, and to be protected from arbitrary arrest***.[83]

52. The American Declaration reaffirms the fervent belief held by the nations of the Americas that the rights of man "are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality."[84] These rights are so essential that they must be protected at the international level, and thus the right to MALR is required at an international level in order to assure their realization.[85]

American Convention

53. The American Convention is a regional human rights document of particular importance to the issue of MALR. It is the principal legally-binding treaty of the IACHR. Although the United States has not ratified the Convention, it has acknowledged its significance through its participation in and contribution to the Inter-American system and as a member of this regional framework.[86]

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[79] *Id.* at Art. V.
[80] *Id.* at Art. VI-VIII.
[81] *Id.* at Art. XIV-XVI.
[82] *Id.* at Art. XVIII-Art. XXIV.
[83] *Id.* at Art. XXV-XXVII.
[84] *Id.* ¶ 2.
[85] *Id.* ¶ 3.
[86] HUMAN RIGHTS INST., *supra* note 41 at 11.

54. For example, the United States "formally participates in cases before the IACHR [by] submitting legal briefs, offering hearing testimony, and attending working meetings."[87] Furthermore, the U.S. government has made efforts to partially comply with IACHR's recommendations in several cases, and the Obama administration in particular has expressed a heightened interest in engaging with the IACHR and taking its recommendations for improving human rights in the United States seriously.[88]

55. Moreover, the Inter-American Court has determined that the American Convention, along with other international and regional treaties, informs the interpretation of the American Declaration, which is binding on the United States as a member of OAS.

56. In addition, many of the rights and recommendations articulated by the IACHR and the American Convention closely mirror those found in the ICCPR, CERD and CAT—all of which the United States has signed and ratified and are therefore binding on the United States. Given that the rights enumerated regionally typically echo those in the international human rights treaties, the obligation to safeguard such rights under the American Convention is arguably binding on the United States by the mere fact of their duplication.[89]

57. To give a few examples, Article 8(1) of the Convention states that "[e]very person has the ***right to a hearing***, with due guarantees…by a ***competent, independent, and impartial tribunal***…in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other

[87] *Id.*
[88] *Id* at 12.
[89] *Id.* ("While the IACHR and the U.N. are separate systems, their interpretations of human rights norms are dynamic and they build upon each other. Indeed, the Inter-American Commission has explicitly recognized that it interprets the American Convention and the American Declaration in light of evolving international standards.").

nature."[90] This article is similar to Article 10 of the ICCPR, which states that every person is entitled to a ***"fair and public hearing"*** in front of an ***"independent and impartial tribunal"*** in the determination of rights, obligations and criminal charges.[91]

58. Likewise, Article 25 of the Convention states that "[e]veryone has the ***right to simple and prompt recourse***, or ***any other effective recourse***, to a competent court or tribunal for protection against acts that violate his fundamental rights..."[92] This language echoes the language of the ICCPR Article 2(3), which similarly states that any person whose rights are violated "***shall have an effective remedy***."[93]

59. Finally, many of the *substantive* rights enumerated in the American Convention, that MALR is needed to safeguard, are also mentioned in other international treaties. For instance, the right to life, liberty and security as well as the right to be free from torture, inhumane or degrading punishment and the right to be free from interference with regards to one's private life, family and home are all rights mentioned in both the American Convention and international human rights treaties such as the ICCPR and CAT.[94]

Conclusion

60. In conclusion, "***International standards … provide that a government is to ensure that lawyers and legal services are available to all persons subject to the State's jurisdiction,***

[90] AMERICAN CONVENTION ON HUMAN RIGHTS, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, Art 8(1).
[91] ICCPR, *supra* note 28 at Art. 10.
[92] AMERICAN CONVENTION ON HUMAN RIGHTS, *supra* note 90 at Art 25(1).
[93] ICCPR, *supra* note 28 at Art. 2.
[94] *See* AMERICAN CONVENTION ON HUMAN RIGHTS, *supra* note 90 at Art. 4(1) ("Every person has the right to have his life respected" and "No one shall be arbitrarily deprived of his life"), Art. 5(2) ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment"), Art. 7(1) ("Every person has the right to personal liberty and security"), Art. 11(2) ("No one may be the object of arbitrary or abusive interference with his private life, his family, his home…or of unlawful attacks on his honor or reputation"); *also see* ICCPR, *supra* note 28 at Art. 9 ("Everyone has the right to liberty and security of person"), Art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"), Art. 17 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home…nor to unlawful attacks on his honour and reputation").

throughout the national territory and without distinction. Such services are especially intended for socially and economically disadvantaged persons."[95]

61. "The IACHR has held that for access to justice to be adequate, the formal existence of judicial remedies will not suffice; instead, those remedies must be effective for prosecuting and punishing the violations denounced and in providing redress."[96]

62. Even though the United States has not ratified some treaties, such as the American Convention, it is still bound by many of its principles *de facto* because they reiterate and reaffirm many of the same rights articulated in treaties that the United States has ratified. In fact, the pervasiveness of textual support for a right to MALR in both the American Convention and other international human rights treaties discussed above should give the IACHR even more reason to take on this important issue and call on the United States to live up to its obligations under these human rights documents.

C. Inter-American System Special Rapporteurs – Reports & Documents[97]

63. The following section discusses international standards as indicated by the IACHR Rapporteurships. Special Rapporteurships are created to "strengthen, promote, and systematize the Inter-American Commission's own work on" various issues.[98] They interpret the Commission's work and conduct research and scholarship beyond that offered by the Commission at large. Their reports provide more-specific guidance on

[95] Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, 20 Jan 2007, OAS/Ser.L/V/II., Doc. 68, ¶ 54 *available at* http://www.cidh.oas.org/women/Access07/Report%20Access%20to%20Justice%20Report%20English%20020507.pdf. *See also* United Nations, Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba), 27 Aug. to 7 Sep. 1990, UN Doc. A/CONF.144/28/Rev. 1 (1990), UN Doc. A/CONF.144/28/Rev.1 (1990), ¶ 118.

[96] *Access to Justice for Women Victims of Violence in the Americas*, *supra* note 95 ¶ 5.

[97] For a thorough review of the IACHR's views concerning access to justice as expressed in other documents, see Erin Smith, *Status of Right to Counsel in the Inter-American System of Human Rights* (attached). Smith addresses criminal defense, civil cases, immigration, and migrant farmworkers' access to the legal system. She goes on to review opportunities for engaging the Commission on the issue.

[98] www.oas.org/en/iachr/mandate/rapporteurships.asp

issues addressed by the IACHR and call attention to otherwise unaccounted for scholarship and research.

64. Reports frequently point to parallels or consensuses between the provisions of different international instruments,[99] emphasizing those principles. They also provide guidance regarding the interwoven theme of MALR. The Rapporteurships noted below represent concerns particularly relevant to MALR in the United States.

Special Rapporteurship on Migrant Workers and Their Families

65. This Rapporteurship focuses on matters concerning "the respect and guarantee of the rights of migrants and their families … and other vulnerable groups within the context of human mobility."[100]

66. Its objectives include calling attention to the duty to respect migrants' human rights; making recommendations regarding the protection and promotion of those rights; and acting on reports of violations of the human rights of migrant workers or their families.[101]

67. Under the American Convention and the American Declaration, the Rapporteurship has noted that Member States are obligated to "***ensure the human rights of all immigrants, documented and undocumented alike; this includes the rights to personal liberty, to humane treatment, to the minimum guarantees of due process, to equality and***

[99] In addition to the American Convention on Human Rights ("the Convention") and the American Declaration of the Rights and Duties of Man (American Declaration"), rapporteurships frequently cite the United Nations Universal Declaration of Human Rights ("Universal Declaration"), other United Nations instruments, and UNESCO instruments.

[100] www.cidh.org/Migrantes/migrants.background.htm#_ftn1

[101] www.cidh.org/Migrantes/migrants.functions.htm

nondiscrimination and to protection of private and family life."[102] ***This entails protection against arbitrary arrest***[103] ***and, generally, against pre-trial detention.***[104]

68. The Rapporteurship has expressed concern that "large-scale migration has led to an alarming increase of racist and xenophobic incidents."[105] For instance, "Migrants are often unfairly associated with all kinds of criminal activities."[106] Additionally, authorities often mistreat migrant workers and their families.[107]

69. The Rapporteurship has stressed that ratification of the CERD commits a nation to international efforts regarding racial discrimination and immigrants. It ***"calls on all nations that have signed such agreements to take appropriate measures to assure that migrant workers and members of their families do not suffer violations of their basic rights due to acts of discrimination, racism or xenophobia."***[108]

70. Moreover, migrant workers face a variety of administrative and judicial procedures "to settle disputes over wages, housing, health care or other benefits, or to settle some matters related to their status as migrants."[109] There is a consensus among a number of the afore-mentioned instruments that States must respect a certain floor of due process in any cases where human rights are at stake. Under Article 1 of the American Convention and similar provisions in other instruments:

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[102] Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, 30 Dec. 2010, OEA/Ser.L/V/II, Doc. 78/10 *available at* http://www.cidh.oas.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf.
[103] *Id*.
[104] *Id*. ¶¶ 32-34.
[105] *Id*. ¶ 73.
[106] *Id*.
[107] *Id*. ¶ 75.
[108] *Id*.
[109] Inter-American Commission on Human Rights (IACHR), *Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere*, 16 April 2001, OEA/Ser.L/V/II.111, Doc. 20 rev. *available at* https://www.cidh.oas.org/annualrep/2000eng/chap.6.htm.

… State Parties have the obligation to respect and ensure the rights covered in the text. Article 2 of the American Convention, moreover, obliges states to adopt the measures necessary to give effect to those rights. Taken together these two articles mean that any state whose judicial organization and procedures do not include mechanisms to protect such rights, must create them and ensure that they are accessible to all persons under their jurisdiction. If such mechanisms do exist but are not effective, the state is obliged to reform them and make them truly effective guarantees of the rights in question.[110]

71. Articles 8 and 25 of the Convention (setting forth the right to a fair trial and the right to judicial protection, respectively) set the floor for the "content and scope of the rights of a person under the jurisdiction of a state party, be it in a criminal, administrative, tax, labor, family, contractual or any other kind of matter."[111]

72. The principles of equality and nondiscrimination bar, *inter alia*, discrimination between nationals and foreigners in the recognition of human rights.[112]

73. Due process requires "*an impartial hearing in decisions that affect [a defendant's] fate, his or her right to present evidence and refute the State's arguments, and the opportunity to be represented by counsel*."[113]

74. The more substantive content of the due process may vary according to what is at stake for the individual. "***However, whenever effective enjoyment of a right or a legitimate interest is at stake, the authorities should decide the case only after the interested party has been duly heard***."[114]

75. The Rapporteurship noted a further consensus between Article 8 of the American Convention and Article XXVI of the American Declaration concerning the minimum guarantees of due process in recognition of human rights. Each stresses equal entitlement

[110] *Second Progress Report*, *supra* note 109 ¶ 89.
[111] *Id.* ¶ 90.
[112] *Report on Immigration in the United States*, *supra* note 102 ¶¶ 94-95.
[113] *Id.* ¶ 40 at 14–15.
[114] *Id.* ¶ 95. *See* European Commission on Human Rights, *Hortolomei v. Austria*, April 1998, 38.

by all persons to the following minimum guarantees during any proceeding that can result in a penalty of any kind:

> the right to a hearing, with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal; prior notification in detail to the accused of the charges against him; the right not to be compelled to be a witness against oneself or to plead guilty; the right of the accused to be assisted without charge by a translator or interpreter; ***the right of the accused to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;*** the right of the defense to examine witnesses present in the court and to obtain their appearance as witnesses, experts or other persons who may throw light on the facts; and the right to appeal the judgment to a higher court.
>
> The nature of immigration proceedings calls for strict enforcement of these guarantees, just as in criminal proceedings.[115]

76. Further, in these proceedings, "[T]ranslation and explanation of all legal concepts in the language of the defendant is essential and should be financed by the state."[116]

Special Rapporteurship on the Rights of Women

77. The Special Rapporteurship on the Rights of Women was charged with "analyzing the extent to which laws and practices involving women's rights in the OAS member States comply with the general obligations set forth in regional human rights instruments" such as the American Convention, the American Declaration, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women [Convention of Belém do Pará]."**[117]** The Office's current mandate focuses on obstacles to full exercise of fundamental rights, seeking a "comprehensive vision of how to realize those rights."[118]

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[115] *Report on Immigration in the United States*, *supra* note 102 ¶¶ 57-58 at 19–20.
[116] *Second Progress Report*, *supra* note 109 ¶ 96.
[117] *Rapporteurship on the Rights of Women: Mandate*, ORGANIZATION OF THE AMERICAN STATES, http://www.oas.org/en/iachr/women/mandate/mandate.asp (last visited June 1, 2015). *See also* 2002 Update on the Work of the Rapporteurship on the Rights of Women, *available at* www.cidh.oas.org/annualrep/2002eng/chap.6h.htm.
[118] *Id.*

78. The Office has prepared thematic reports,[119] including a report focusing on access to justice for women victims of violence.[120] This issue presents special, particularly noteworthy problems, but the discussion nevertheless highlights norms, standards, and values applicable throughout the OAS system, and provides meaningful guidance concerning MALR in the United States. The following therefore focuses on access to justice for women victims of violence.

79. "[V]ictims of gender-based violence often do not have access to adequate and effective legal remedies by which to denounce the violence they have suffered. The vast majority of these incidents go unpunished, leaving women and their rights unprotected. The Commission observes that most cases involving violence against women are never punished, which serves to perpetuate the practice of this serious human rights violation."[121]

80. Gender-based violence reflects "historically unequal power relations between women and men, and … the right of every woman to a life free of violence includes the right to be free from all forms of discrimination and to be valued and educated free of stereotyped patterns of behavior." Such violence "obstructs [women's] exercise of other basic civil and political rights, as well as economic, social and cultural rights."[122]

[119] Reports *available at* www.oas.org/en/iachr/women/reports/thematic.asp.
[120] Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, 20 Jan 2007, OAS/Ser.L/V/II., Doc. 68, *available at* http://www.cidh.oas.org/women/Access07/Report%20Access%20to%20Justice%20Report%20English%20020507.pdf.
[121] *Id*. ¶ 2.
[122] *Id*. ¶ 11.

81. "Violence and discrimination are encumbrances to the full recognition and enjoyment of women's human rights, including their right to have their lives and their physical, mental and moral integrity respected."[123]

82. The principles of equality and nondiscrimination are absolute values under the American Convention, American Declaration, and Convention of Belém do Pará. These principles "uphold a woman's right to a simple and *effective* recourse, with due guarantees, for protection against acts of violence committed against her. They also establish the State's obligation to act with due diligence to prevent, prosecute and punish these acts of violence and provide redress."[124]

83. *"The case law of the Inter-American system holds that* de jure *and* de facto *access to judicial guarantees and protections is essential to eradicating the problem of violence against women …."*[125] Because a nation's judicial system is the "first line of defense for protecting women's individual rights and freedoms," responding effectively to human rights violations is crucial.[126] The principle of efficacy requires that States respond to violations with due diligence, creating the afore-mentioned obligations: "prevention, investigation, punishment and redress of the human rights violation and the obligation to prevent impunity."[127]

84. Under Articles 8 and 25 of the American Convention and of Article 7 of the Convention of Belém do Pará, "a State's obligation with respect to cases involving violence against women is not merely to prosecute and convict those responsible, but also 'to prevent

[123] *Id.* ¶ 12.
[124] *Id.* ¶ 23 at 10 (emphasis added).
[125] *Id.* ¶ 2.
[126] *Id.* ¶¶ 6, 23.
[127] *Id.* ¶¶ 26–27 (citing I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988. Series C No. 4, ¶ 166; I/A Court H.R., *Loayza Tamayo Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998; Series C No. 42, ¶ 170, citing I/A Court H.R., *The "Panel Blanca" Case (Paniagua Morales et al.)*; Judgment of March 8, 1998. Series C No. 37, ¶ 173).

these degrading practices.'" "The IACHR found that judicial ineffectiveness *vis-à-vis* cases of violence against women creates a climate of impunity conducive to domestic violence" because society perceives the government as unwilling to take action.[128]

85. Failure to investigate and failure to punish those responsible constitutes non-compliance with the State's obligations. Investigation must be conducted in earnest, must extend beyond mere formality, must have an objective, and must be assumed by the State rather than through private investigations placing burdens of proof on the victims.[129]

86. It is apparent that the legal protections demanded on behalf of women cannot be realized without providing them with MALR, understood to be implicit if not explicit in the Rapporteur's reports and injunctions.

Special Rapporteurship on the Rights of Persons Deprived of Liberty

87. This Rapporteurship "issues special recommendations to the Member States of the OAS in order to move forward with the respect and guarantee of the human rights of the persons deprived of liberty."[130]

88. The Office studies and promotes changes in law and policy to protect the rights of persons deprived of liberty.

89. The Rapporteurship defines deprivation of liberty as follows:

> Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This [includes those] under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status

[128] *Id.* ¶¶ 36–37.
[129] *Id.* ¶¶ 40–41.
[130] *Rapporteurship on the Rights of Persons Deprived of Liberty: Functions and Initiatives*, ORGANIZATION OF THE AMERICAN STATES, www.oas.org/en/iachr/pdl/mandate/Functions.asp (last visited June 9, 2015).

seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.[131]

90. ***Persons may be deprived of liberty only as established under domestic law and in accordance with international human rights law***. "Orders of deprivation of liberty shall be duly reasoned and issued by the competent authority."[132]

91. ***Under the principle of due process of law, persons deprived of liberty shall "at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law."***[133]

92. The Office has similarly been clear where access to the justice system is concerned: ***All persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights***.[134]

93. "[T]he State is in a special position as guarantor when it comes to persons deprived of liberty**,** and that as such, it assumes specific duties to respect and guarantee fundamental rights of these persons."[135] These specific duties to guarantee such individuals' fundamental rights particularly concern the rights to life and humane treatment. In fact,

[131] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, OEA/Ser/L/V/II.131 doc. 26, adopted 3–14 March 2008.
[132] Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 Dec 2011, OEA/Ser.L/V/II, Doc. 64, *available at* http://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf.
[133] *Id*. at 157 (emphasis added).
[134] *Id*. at 158 (emphasis added).
[135] *Id*. ¶ 8.

these rights are crucial to the task of rehabilitating convicts (often viewed as a primary justification for imprisonment).[136]

94. ***The Rapporteurship has in no uncertain terms concluded that MALR is essential to the principle of due process*:**

> ***All persons deprived of liberty shall have the right to a defense and to legal counsel, named by themselves, their family, or provided by the State; they shall have the right to communicate privately with their counsel, without interference or censorship, without delays or unjustified time limits, from the time of their capture or arrest and necessarily before their first declaration before the competent authority.***[137]

95. The Office has stressed Member States' obligation to "comply with their international obligations to protect and ensure the human rights at stake in citizen security by designing and implementing comprehensive public policies involving simultaneous performance of specific measures and strategic plans at the operational, normative, and preventive levels."[138]

96. The Rapporteurship has stressed the need to "ensure the special standards of protection for those persons or groups that are particularly vulnerable to violence and crime … notwithstanding the obligations that the member states have undertaken to protect and ensure the human rights at stake in the policy on citizen security to all persons subject to their jurisdiction."[139]

Special Rapporteurship on the Rights of Afro-Descendants and Against Racial Discrimination

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[136] *Id*.
[137] *Id*.
[138] Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, 31 Dec 2009, OEA/Ser.L/V/II, Doc. 57 *available at* http://www.cidh.oas.org/pdf%20files/SEGURIDAD%20CIUDADANA%202009%20ENG.pdf.
[139] *Id.* ¶ 9.

97. The Rapporteurship "provides specialized advice to the Commission in the proceedings of petitions filed to the IACHR regarding violations of the rights of Afro-descendants and racial discrimination."[140] The Rapporteurship conducts studies concerning racial discrimination and the rights of Afro-descendants, contributing to developing law.[141] This section refers largely to a report citing international studies, but the findings and views noted bear on MALR in the United States.

98. In both urban and rural communities, studies consistently suggest that "the Afro-descendant population in the Americas suffers from a situation of structural discrimination."[142]

99. Throughout the Americas, "the Afro-descendant population is disproportionately concentrated in the poorest areas … and suffers a greater exposure to crime and violence. Structural discrimination is further indicated by access to housing, availability of loans, healthcare, education, life expectancy, and access to public utilities and recreation. The population generally "occupies the lowest positions in the job hierarchy and mostly perform informal-sector and low-grade tasks or work that is poorly remunerated ...." Pay to Afro-descendants is unequal to that of non-Afro-descendants performing the same tasks.[143]

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[140] *Rapporteurship on the Rights of Persons of African Descent and against Racial Discrimination: Functions*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/iachr/afro-descendants/mandate/Functions.asp (last visited June 1, 2015).
[141] *Id.*
[142] Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas*, 5 Dec 2011, OEA/Ser.L/V/II. Doc. 62, *available at* www.oas.org/en/iachr/afro-descendants/docs/pdf/AFROS_2011_ENG.pdf.
[143] *Id.* ¶¶ 45–47.

100. "[T]he lack of judicial guarantees and the lack of sensitivity by the justice operators as regards racial discrimination contribute to the deepening of the resignation of discriminated groups, and to the perpetuation of segregation and exclusion patterns."[144]

101. ***Article 1.1 of the American Convention is a bar on discrimination, while Article 24 specifically demands equality before the law***. In light of Article 24, Article 1.1 "extends to the domestic law of the State Parties, permitting the conclusion that according to these provisions the State Parties, by acceding to the Convention, have undertaken to maintain their laws free from discriminatory regulations."[145]

102. The rights to equal protection under the law and the right to non-discrimination require that States abstain from regulations that are discriminatory in intent or effect. These same rights further require States to **"*establish norms and adopt the necessary measures to acknowledge and guarantee an effective equality of all people under the law*."**[146]

103. ***"States must be ready to provide disadvantaged people with pro bono legal services to enable them to access the judicial system."***[147]

104. The obstacles impeding justice for Afro-descendants are myriad:

a. bureaucratization in the justice system, the lack of an immediate information system, the language used in the judicial system, the bad management and organization of judicial instances, the lack of training of justice operators, the insufficiency of public defenders, the high costs of hiring a lawyer and of the judicial process, the lack of knowledge about the actions, and the instances before which one must appeal, the exercise mechanisms, and the lack of judicial recourses.[148]

105. "'[I]t is very difficult [for Afro-descendants] to have access to an effective judicial protection because they are stigmatized and discriminated against,' and … 'the complaint

[144] *Id*. ¶ 139 at 46.
[145] *Id*. ¶ 95.
[146] *Id*. ¶ 194 (emphasis added).
[147] *Id*. ¶ 132.
[148] *Id*. ¶ 128 at 43.

often does not lead to economic redress and, on the contrary, it might mean a waste of time and economic expenses.'"

106. ***The Rapporteurship has pointed to "the right to equality and nondiscrimination [as] the central, basic axis of the inter-American human rights system."***[149]

107. The Rapporteurship has emphasized the Court's view that "it is indispensable that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions."[150]

108. ***The Rapporteurship has called attention to the "material difficulties … associated with the geographic distance from the courts and the lack of free and adequate legal representation" as impediments to access to justice.***[151]

109. "[P]rocedural costs and the location of tribunals are factors that may also render access to justice impossible and, therefore, *result in a violation of the right to a fair trial*."[152] Proceedings must not be cost-prohibitive; such proceedings violate Article 8 of the American Convention. "[J]udicial remedies created to review administrative decisions must be not only prompt and effective, but also 'inexpensive.'"[153]

110. "States must adopt juridical and political measures to adapt the legislation and internal processes, and guarantee the effective access of Afro-descendants to justice. States must also take into account the material, economic and juridical obstacles, and the systematic exclusion from which Afro-descendants suffer."[154]

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[149] *Id*. ¶ 89 at 31-32.
[150] *Id*. ¶ 108 (quoting *Reverón-Trujillo v. Venezuela Case.* Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, ¶ 60).
[151] *Id*. ¶ 127.
[152] *Id*. ¶ 129 (emphasis added).
[153] *Id.* (internal citation omitted).
[154] *Id*. ¶ 141.

Synopsis of the IACHR Special Rapporteurships

111. The IACHR Rapporteurships routinely look to international instruments beyond those prepared by the IACHR. Such recognition frequently underscores the broad consensus among unrelated organizations, but also speaks to the value of openness to information from other organizations.

112. Rapporteurships have consistently called attention to the connections between access to justice and fundamental rights: Without access to justice, legal systems simply cannot secure fundamental human rights, substantive justice, and human dignity.

113. Rapporteurships have consistently noted that vulnerable groups face an increased deficiency in access to justice.

114. Thus, the Special Rapporteurships highlight the fact that international human rights norms require States to provide individuals with access to justice in order to ensure their fundamental rights. The Rapporteurships further illustrate that access to justice is an end that cannot be achieved without a universal right to MALR.

D. U.S. Jurisprudence

115. The Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution state that no person shall be "deprived of life, liberty, or property, without due process of law."[155]

116. The Due Process Clause has been interpreted by the U.S. Supreme Court to recognize and protect substantive, unenumerated rights such as the right to privacy, personal autonomy, and the right to have a family. For example:

- *Zadvydas v. Davis* held that the indefinite detention of lawfully present aliens violated the due process clause of the Fifth Amendment because freedom from incarceration is one of the most basic forms of liberty;[156]

[155] U.S. CONST. amends. IV, XIV.

- *Santosky v. Kramer* found that parents have a "fundamental liberty interest . . . in the care, custody, and management of his or her children," and that courts must provide indigent parents in termination of parental rights proceedings with "fundamentally fair procedures."[157]
- The *Board of Regents v. Roth*[158] Court looked beyond freedom from bodily restraint as the touchstone of liberty. The Court adopted an expansive definition of liberty which included the right of an individual to "contract, to engage in an of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, an generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men . . . there can be no doubt that the meaning of 'liberty must be broad indeed.'"[159]

117. It is clear that the definition of liberty under domestic law, as interpreted by the Supreme Court, implicates broad, fundamental rights. By recognizing these rights, the Supreme Court has signaled their importance to ordered society and the Rule of Law.

118. The Supreme Court's formulation of what constitutes a liberty interest under America's domestic due process guarantees is essentially the parallel of the fundamental liberties outlined by international human rights norms.

119. Although the Supreme Court has recognized the existence of these basic, fundamental rights that align with international human rights norms, it has failed to recognize that it is difficult, if not impossible, to realize those rights without the meaningful assistance of an attorney. The Court has not provided an affirmative right to MALR that is necessary to ensure and protect them.

No Comprehensive Right to Counsel When Basic Human Needs Are At Stake

120. Despite the fact that the outcomes of many civil cases implicate fundamental rights safeguarded by the U.S. Constitution, and basic human rights guaranteed by international treaties and the Inter-American System, the United States does not provide a

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[156] Zadvydas v. Davis, 533 U.S. 678 (2001).
[157] Santosky v. Kramer 455 U.S. 745 (1982).
[158] Board of Regents v. Roth, 408 U.S. 564 (1972).
[159] *Id*. at 572.

comprehensive, affirmative right to the meaningful assistance of counsel for indigent individuals in such cases.

121. Even the domestic community has recognized that this provides an unacceptable lack of protection for basic human rights. The ABA has advocated for a right to counsel whenever a "basic human need" is at stake. In 2006, the ABA House of Delegates passed Resolution 112A, which encouraged legislatures to "provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake."[160] ABA defines "basic human needs" cases as involving: shelter (e.g., eviction proceedings), sustenance (e.g., "denials of or termination of government payments or benefits"), safety (e.g., "proceedings to obtain or enforce restraining orders"), health (e.g., claims to Medicare, Medicaid, or private insurance for "access to appropriate health care for treatment of significant health problems"), and child custody.[161]

122. In civil cases, United States domestic law does not recognize a comprehensive right to have counsel for low-income individuals provided at the state's expense. In *Mathews v. Eldridge*,[162] the U.S. Supreme Court has created a limited exception to this general rule. The Supreme Court set forth a balancing test to determine if a person is entitled to state-appointed counsel when a liberty interest is at stake. However, this exception is exceedingly narrow and does little to help most indigent individuals involved in civil cases where a liberty interest is at stake.

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[160] ABA Resolution 112A (Revised) *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.
[161] *Id*.
[162] Mathews v. Eldridge, 424 U.S. 319 (1976).

123. The interpretation that the Supreme Court has provided of its decision in *Mathews v. Eldridge,* through its application of the test in subsequent decisions, has created a presumption against the appointment of counsel when a civil case lacks a threat to physical liberty.[163] Even in those cases, there is still no presumption *for* the right to provision of counsel.[164]

124. Despite the negative jurisprudence from the U.S. Supreme Court, there are state courts that have declined to follow the above-mentioned precedent creating a presumption against the appointment of counsel. These states have recognized a constitutional right to counsel in some civil areas based on their state constitutions. [165]

125. States have also enacted legislation to expand the right to appointment of counsel in an increasing number of civil cases areas. Just to name a few:

- A bill was introduced in New York that would provide right to counsel for seniors in eviction cases.[166]
- Texas requires the appointment of counsel in adult protective service proceedings.[167]
- In Massachusetts there is a right to counsel in guardianship proceedings.[168]
- California recently passed the Sargent Shriver Civil Counsel Act, which funds pilot programs through which lawyers "shall be appointed to represent low income parties in civil matters involving critical issues affecting basic human needs."

126. Additionally, numerous state and local bar associations are establishing committees and task forces to recommend ways to expand the right to counsel in their jurisdictions.

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[163] *See* Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981).
[164] *See* Turner v. Rogers, 131 S.Ct. 2507 (2011) (holding no right to counsel in a case where a father was jailed for civil contempt for failure to provide child support).
[165] Zarnow, *supra* note 20 at 284. *Status Map*, NAT'L COALITION FOR CIV. RIGHT TO COUNSEL, http://www.civilrighttocounsel.org/map (last visited July 7, 2015).
[166] Emily Jane Goodman, *Facing Evictions -- Without the Right to Counsel*, GOTHAM GAZETTE (Jun. 30, 2008), http://www.gothamgazette.com/index.php/development/4014-facing-evictions-without-the-right-to-counsel.
[167] TEX. GOV'T CODE ANN. § 26.010 (West)
[168] MASS. GEN. LAWS ANN. ch. 119, § 29 (West) (stating "the probate and family court and the juvenile court departments of the trial court shall establish procedures for: (i) notifying the parent, guardian or custodian of these rights; and (ii) appointing counsel for an indigent parent, guardian or custodian within 14 days of a licensed child placement agency filing or appearing as a party in any such action . . .").

127. However, despite this progress, no states have yet provided a categorical right to counsel with respect to all cases implicating basic human needs.[169] Twenty-two states provide for a limited right to or appointment of counsel in some circumstances when a case implicates basic human needs – fifteen of these states provide for a discretionary appointment of counsel and in seven states the right or appointment is qualified.[170]

128. These efforts demonstrate that what is guaranteed in one state is not guaranteed in another, creating a patchwork of rights that vary by state. ***The patchwork of guarantees for the protection of fundamental rights that emerges demonstrates the need for reform and the creation of a uniform system to provide meaningful access to legal representation at both the state and federal level with respect to basic human needs.***

129. These efforts also illustrate the pervasive belief in the domestic community that the United States can and must do better to protect the fundamental rights of indigent litigants.

No Right to Counsel in Immigration Removal Proceedings

130. "Despite the harsh consequences of removal, the complexity of the immigration code, and the limited resources of many aliens, there is no comprehensive system for the provision of counsel to indigent aliens facing removal proceedings. Courts have held that immigration removal proceedings are not criminal in nature, so the Sixth Amendment right to counsel does not apply."[171]

131. These proceedings may have a devastating impact on fundamental rights and liberties. Immigration detention deprives individuals of their fundamental right to physical liberty.

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[169] *See Status Map*, *supra* note 165.
[170] *Id*.
[171] *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544 (2007).

Deportation has a host of other implications for liberty interests, including the separation of families, persecution in home countries, etc.[172]

132. Legal representation in immigration proceedings has proven to be an outcome-determinative factor in many cases,[173] yet a large number of immigrants have no alternative but to appear *pro se*.[174]

No Meaningful Access to Counsel in Criminal Cases

133. The landmark case *Gideon v. Wainwright*[175] created an affirmative right to counsel at the state's expense for indigent criminal defendants in state court, but limited the scope of its holding to criminal proceedings.[176] Additionally, the ruling did not set out any clear standards for states as far as the implementation of this right.[177]

134. Since *Gideon*, the United States has experienced a perpetual indigent defense crisis. The affirmative right created for indigent criminal defendants has proved virtually meaningless, because there are insufficient resources to meet these defendants' legal needs. The United States has failed to institute a system that guarantees access to effective legal representation. The right to counsel is nothing more than an empty promise when that counsel is inadequate, as is often the case.

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[172] *Id*. at 1558.
[173] *See* Katzmann Immigrant Representation Study Grp. & Vera Inst. Of Justice, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships: Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 3838 (2011).
[174] *See infra* note 462 and accompanying text.
[175] Gideon v. Wainwright, 372 U.S. 335(U.S. 1963).
[176] The *Gideon* Court appealed to a sense of justice, emphasizing, "[n]ot only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Id* at 344.
[177] Anthony C. Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 719-20 (2013).

135. It is clear that the inadequacy of funding for indigent services is the primary impetus for the inefficiency of counsel provided at the state expense.[178] "Court assigned lawyers are overworked, underpaid, and usually unable to provide effective lawyering."[179]

136. The inadequate representation that indigent criminal defendants receive can have severe consequences on one of the most important fundamental rights – physical liberty. "Point to almost any criminal justice issue – wrongful convictions, over-incarceration, non-violent offenders serving life sentences, etc. – and the root problem will be a lack of true advocacy on the part of people of insufficient means charged with or convicted of crime."[180]

U.S. Jurisprudence Does Not Meet Standard of Human Rights Norms

137. The U.S. Constitution safeguards important liberty interests that address whether people will continue to have a place to live, the right to raise or see their children, the ability to feed and clothe their family, or the right to remain in United States. However, there is a disconnect between the *articulation* and recognition of rights and the *fulfillment and protection* of those rights.

138. As long as the United States does not provide MALR in cases involving fundamental rights, it fails both its own citizenry and the international human rights community. It violates international human rights treaties such as the UDHR, ICCPR, CERD, and CAT. Most importantly, it leaves the rights guaranteed in these treaties unprotected.

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[178] *See* Martin Guggenheim, *The People's Right to A Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 408 (2012).
[179] *Id.* at 402.
[180] David Carroll, *Gideon's Despair*, THE MARSHALL PROJECT (Jan. 2, 2015, 7:15 AM), https://www.themarshallproject.org/2015/01/02/four-things-the-next-attorney-general-needs-to-know-about-america-s-indigent-defense-crisis.

139. In order to fully protect the rights guaranteed by the Inter-American system, the United States must provide adequate access to counsel, sufficient civil legal aid, and national standards to ensure the effectiveness of counsel for indigent criminal defendants.

140. While state legislatures, courts, and bar associations have attempted to remedy the problem of limited access to meaningful legal representation, a cohesive federal response creating an affirmative right to effective counsel in cases where basic human rights are implicated is necessary for the United States to comply with its own due process jurisprudence and international human rights commitments.

II. CIVIL LEGAL CLAIMS: MEANINGFUL ACCESS TO LEGAL REPRESENTATION & INTERNATIONAL HUMAN RIGHTS NORMS

A. Fundamental Rights and Meaningful Access to Legal Representation

141. The Supreme Court has held that people have a fundamental right to access to the courts.[181] As a general proposition, "[a]ccess to the courts [ ] is protected by specific guarantees in the Bill of Rights, most notably by the Sixth Amendment's guarantee of the right to counsel in criminal cases."[182] To date, the right to legal representation afforded to criminal defendants has not been made applicable to most civil cases.[183] As noted elsewhere in this document, this right is protected in various binding international treaties and norms.

142. The failure to establish the right to counsel in a broad spectrum of civil cases has been the subject of debate and criticism at least since 1963 when the Supreme Court ruled on

[181] *See, e.g.*, Windsor v. McVeigh, 93 U.S. 274, 277, 280 (1876); Bounds v. Smith, 430 U.S. 817, 828 (1977).
[182] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 932 (4th ed. 2011).
[183] Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 690 (2011).

Gideon v. Wainwright, the landmark case guaranteeing the right to counsel.[184] The Supreme Court guarantees this right because criminal defendants face a loss of liberty when they are imprisoned.

143. *Gideon* does not address the interests at stake in civil cases. Though most of litigants in these proceedings face no imprisonment, they are at risk of losing as much as liberty, if not more.

144. ***Eviction, foreclosure, bankruptcy, civil domestic violence, immigration, small-claims, child custody and divorce proceedings all have one thing in common: all of these claims implicate a "life, liberty, or property" interest protected by the Fifth and Fourteenth Amendments of the U.S. Constitution. Accordingly, these proceedings require meaningful due process protections.*** Nonetheless, many of the stakeholders involved in these proceedings do not have a guaranteed right to legal representation without which they are unable to navigate complicated processes and articulate their legal claims. The effect is that those unable to purchase legal representation for civil matters are often denied meaningful access to justice.

145. Many provisions of the American Declaration pertain to fundamental liberty interests that are at stake in civil cases. First, Article One asserts that "[e]very human being has the right to life, liberty, and the security of his person."[185] Likewise, Article Seventeen states that everyone "has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights."[186] In Article Eighteen, the Declaration alludes to the courts as an enforcement mechanism for these rights.[187]

146. Article Eight of the American Convention provides that "[e]very person has a right to a hearing, with due guarantees and within a reasonable time . . . for the determination of his

[184] *Gideon*, 372 U.S. 335 (1963).
[185] American Declaration, *supra* note 73 and accompanying text.
[186] *Id.* at art. 17.
[187] *Id.* at art. 18.

rights and obligations of a *civil*, labor, fiscal, or any other nature."[188] These interests are at stake in civil cases and the United States needs a civil *Gideon* to ensure that these rights are protected.

147. The United States Supreme Court has also emphasized the importance of the rights at stake in civil cases.[189] The Court has affirmed "that some liberties are so important that they are deemed to be 'fundamental rights,' " therefore warranting greater constitutional protection. [190] Many civil cases involve issues that are at the core of basic human rights and fundamental values, including but not limited to the following:

- Family integrity including termination of parental rights and child custody
- Housing and landlord-tenant disputes
- Income maintenance
- Competency determinations
- Juvenile proceedings

148. Furthermore, "[t]he proper functioning of the adversarial system requires - almost by definition - counsel on either side."[191]When one or more of the parties does not have MALR, the proceeding does not have this parity. The most concerning issue here is the "immense power disparities" that can result between parties.[192] Thus, people unable to afford legal representation often face unfair treatment in civil courts.[193]

149. As one scholar has opined, "[t]here is a widespread consensus that this 'justice gap' between rich and poor litigants threatens the credibility of the justice system, undermines public confidence in the law, and distorts the accuracy of judicial decision-making."[194]

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[188] *Id.* at art. 8 (emphasis added).
[189] *See* Moore v. East Cleveland, 431 U.S. 494 (1977).
[190] CHEMERINSKY, *supra* note 182 at 812.
[191] Nancy Leong, *Gideon's Law—Protective Function*, 122 YALE L.J. 2460, 2469 (2013).
[192] *Id*. at 2477.
[193] Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 4 U. TOL. L. REV. 365, 368 (2013).
[194] Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, GEO. J. ON POVERTY L. & POL'Y, 453, 453 (2011).

150. Other experts have observed that "determining whether counsel should be appointed should depend not only on what the individual stands to lose or gain, but also on the presence of a powerful adversary with the potential to engage in abuse of its power."[195] One reason that lawyers are more often assigned in criminal cases is based on the assumption that they are needed to protect individuals by serving as shields against government power.[196] However, it is often overlooked that private actors have assumed the role of the state in many realms of life and exert significant power over civic life.[197]

151. This section examines both the legal principles and social consequences that point to the need to expand the right to meaningful access to legal representation in many types of civil legal matters.

B. The Resource Gap and Indigent Services

152. Over a quarter of a century ago, Jimmy Carter famously stated that the United States has "the heaviest concentration of lawyers on earth ... but ... [n]o resources of talent and training ... is more wastefully or unfairly distributed than legal skills. Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented."[198] The data overwhelming indicates that the poor, one of the most vulnerable populations in the United States, do not receive adequate legal assistance.

153. The poor have different legal needs than those of middle and upper income individuals and families in the United States.[199] A 2009 report by the Legal Services Corporation

[195] Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV (FORTHCOMING 2015).
[196] *Id.*
[197] *Id.*
[198] ROBERT SCHLESINGER, WHITE HOUSE GHOSTS: PRESIDENTS AND THEIR SPEECHWRITERS 287 (Simon and Schuster 2008).
[199] Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 85 (2010) (citing a report that found "47 percent of households with incomes below 125 percent of the federal poverty line were experiencing one or more civil justice problems in the year prior to the survey, while 52 percent of

found that the average low-income family experiences an average of three legal problems a year.[200] The most common legal problems include:

- housing claims, such as evictions, utility issues, unsafe housing conditions, and homelessness;
- consumer claims, such as abusive debt collection, oppressive contract terms, bankruptcy, and consumer scams;
- employment claims, including wage claims, unemployment, discrimination;
- government benefits such as difficulty in applying and denials;
- healthcare including disputes over charges, access to services, and nursing home problems; and
- family law issues including custody, divorce, visitation and child support.[201]

Insufficient Funding

154. "Legal Services Corporation (LSC) is an independent corporation founded by Congress that provides grant funds, training, and technical assistance to civil legal aid programs."[202]

155. Each LSC-funded program must "develop its own priorities within the context of the circumstances in its own community, in consultation with the client community, subject to applicable legislative and regulatory restrictions,"[203] as well as funding constraints. The balance between case acceptance policies and funding restrictions results in legal aid offices being forced to make tough decisions about what types of cases and what types of clients the agency is able to effectively serve.

156. Despite having unique legal problems that implicate urgent and pressing human rights concerns, only one percent of lawyers and less than one percent of U.S. legal

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households with incomes above 125 percent of the federal poverty line (but not more than $60,000 per year) were experiencing at least one civil justice problem.").

[200] LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 13 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

[201] *Id*. at 5.

[202] *Legal Services Corporation*, USA.GOV, http://www.usa.gov/directory/federal/legal-services-corporation.shtml (last updated May 11, 2015).

[203] *Suggested List of Priorities for Legal Services Corporation*, LEGAL SERVICES CORP. (May 20, 1996), http://www.lsc.gov/foia/electronic-public-reading-room/suggested-list-priorities-lsc-recipients.

expenditures serve the sixty-three million poor and near poor in the United States that qualified for free legal help in 2010.[204] Strikingly, the ratio of free legal services attorneys available to the number of low-income Americans who need at attorney is 1-to-6,415.[205] By contrast, the ratio of attorneys to the general population is 1-to-525.[206]

157. The resource gap is manifested by the fact that at least half all LSC eligible clients are turned away from receiving even limited services.[207] In reality, the data indicate that only about twenty percent of clients seeking services actually receive legal services.[208]

158. These numbers make clear that the low-income Americans have a disproportionate lack of meaningful access to legal representation. They having pressing legal needs, yet insufficient funds to meet those needs, resulting in a resource and justice "gap" between socioeconomic classes.

159. The dire impact of the lack of MALR is manifested in the rates and ways in which lower income people in the United States lose their liberty, homes, children, and immigration status as compared to similarly situated upper and middle income Americans.

LSC's Access to Legal Services is not Meaningful

160. 2011 LSC data indicated that only 17.4 percent of all cases were litigated, and of those, 4.8 percent are uncontested matters.[209] The vast majority of services provided were counsel and advice (57.5 percent) and brief service (18 percent)."[210]

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[204] Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004).
[205] David Liu, *Civil Legal Aid by the Numbers*, CTR. FOR AM. PROGRESS (Aug. 9, 2011), http://www.americanprogress.org/issues/open-government/news/2011/08/09/10080/civil-legal-aid-by-the-numbers.
[206] *Id*.
[207] *Id*.
[208] Thomas G. Wilkinson, Jr., *Mind the Gap*, PA. LAWYER (2013), *available at* https://www.pabar.org/public/probono/Commentary-MindtheGap.pdf.
[209] *Legal Services Corporation: Fact Book 2011*, LEGAL SERVS. CORP. 23 (2013), available *at* http://grants.lsc.gov/sites/default/files/Grants/RIN/Grantee_Data/fb11010101.pdf.
[210] ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007 4 (2007), *available at* http://www.clasp.org/resources-and-publications/publication-1/0373.pdf.

161. Studies further show instances where legal aid providers and pro bono groups made arrangements with local courts to discharge some level of time obligations to poor family law clients. These arrangements established a form of "'private legal clinics' that provided 'legal consultations of a specified time and price without any further obligation on the part of the client or the lawyer.'"[211] This type of limited legal service fails to provide meaningful assistance to clients in need.

162. LSC funds also have restrictions that impede MALR. The funds cannot be used to bring a class action lawsuit which is one of the most effective legal strategies for combating certain civil proceedings that are particularly relevant for low-income individuals, such as wage discrimination cases.[212]

163. The prohibition against class action lawsuits for LSC-funded agencies acts to diminish meaningful legal representation in matters that bear on the poverty, gender, race, and ethnicity.

State Efforts Have Been Ineffective to Remedy Gap

164. While there have been admirable efforts made by civil society and local governments to address this issue of MALR for low-income individuals, they are merely stopgap solutions. The U.S. government needs to adequately fund LSC agencies.

C. Family Integrity and Family Law Proceedings

[211] D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 911-12 (2013).
[212] *See* ARIANE HEGEWISCH ET AL., INST. FOR WOMEN'S POLICY RESEARCH, ENDING SEX AND RACE DISCRIMINATION IN THE WORKPLACE: LEGAL INTERVENTIONS THAT PUSH THE ENVELOPE (2011), *available at* http://www.iwpr.org/publications/pubs/ending-sex-and-race-discrimination-in-theworkplace-legal-interventions-that-push-the-envelope-1.

165. International and regional human rights norms recognize the fundamental nature of an individual's rights associated with their family life, and emphasize the need for states to provide adequate protection to this fundamental interest.

166. In *Santosky v. Kramer*, the United States Supreme Court recognized that "Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[213]

167. In 2007 the ABA recognized the importance of family law services by passing a resolution calling for the government to provide free legal services to "low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody..."[214]

168. Nevertheless, many poor people appear in the family courts of the United States without the assistance of counsel.[215] In some locations, between seventy and ninety-eight percent of litigants in family cases are unrepresented.[216] A growing body of research indicates that outcomes for unrepresented litigants are frequently less favorable than those for represented litigants.[217]

International and Human Rights Norms' Recognition of Family Rights

169. Article 17 of the ICCPR states that "***No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence***…"[218]

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[213] Santosky v. Kramer, 455 U.S. 745, 753 (1982) (citations omitted).
[214] ABA Resolution 105 (Revised) *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf.
[215] Ryan Forston, *Alaska's Poor Need Legal Help in Civil Cases*, THE ANCHORAGE DAILY NEWS, Jul. 15, 2013, http://www.adn.com/2013/07/15/2975704/compass-alaskas-poor-need-legal.html.
[216] *See* DOCUMENTING THE JUSTICE GAP, *supra* note 263 at 5.
[217] *Id.*
[218] International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967), *ratified by the U.S.* Sept. 8, 1992.

170. Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) notes that ***the family is "the natural and fundamental group unit of society" and therefore should have "the widest possible protection and assistance***."[219] ***Children and young people should be protected and assisted "without any discrimination for reasons of parentage or other conditions***…"[220]

171. The Convention on the Rights of the Child (CRC) sets forth that states are encouraged to respect family integrity and that the extended family, community, or persons legally responsible for a child have the right to direct and guide the child.[221] More importantly, ***a child should not be separated from his or her family unless a tribunal determines separation is in the best interests of the child.***[222] During these proceedings, "all interested parties shall be given an opportunity to participate . . . and make their views known."[223] Even if it is in the child's best interest to separate him or her from a parent, the ***child has the right to keep a direct and personal relationship with his or her parent*** unless it is against the child's best interest.[224]

172. In the Inter-American system, the American Declaration states that "[e]very person has the right to the protection by the law from abusive attacks upon his honor, his reputation, and his private and family life."[225] Additionally, "***Every person has the right to establish a family***, the basic element of society, and to receive protection thereof."[226]

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[219] International Covenant on Economic, Social, and Cultural Rights, art. 10, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360, entered into force Jan. 3, 1976.
[220] *Id*.
[221] Convention on the Rights of the Child, art. 5, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989), entered into force Sept. 2, 1990.
[222] *Id*. at art. 9.
[223] *Id*.
[224] *Id*.
[225] American Declaration of the Rights and Duties of Man, *supra* note 73 at art. V.
[226] *Id.* at art. VI.

173. ***Children and young people should be protected and assisted "without any discrimination for reasons of parentage or other conditions***…"[227]

Domestic Law Recognizes the Right to Family as a Fundamental Interest

174. The Supreme Court has repeatedly stated that ***the right to choose how one raises his child and maintains a family is "of basic importance in our society***".[228] "Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[229]

175. Further, the Court noted that ***parents still have a fundamental liberty interest in caring for their children even if they have not been perfect parents*** or the State has temporarily taken custody of the child.[230] The Court noted that "***parents retain a vital interest in preventing the irretrievable destruction of their family life***."[231]

No Guarantee of MALR in Family Law Proceedings

176. Despite the important interests at stake in family law proceedings, the United States does nothing to ensure that parties to these proceedings have MALR.

177. Media and policy reports demonstrate that poor people seeking family services are often turned away by legal services providers. Many "legal services programs will not accept family law matters unless there has been serious domestic abuse."[232] In the absence of domestic violence, many LSC-funded agencies have expressed a reluctance to litigate

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[227] *Id*.
[228] M.L.B. v. S.L.J, 519 U.S. 102, 116 (1996) (citing Boddie v. Connecticut, 401 U.S. 371, 376, (1971)). S*ee also* Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").
[229] Santosky v. Kramer, 455 U.S. 745, 753 (1982) (citations omitted).
[230] *Id*.
[231] *Id*.
[232] *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 634 (1999).

family law cases claiming that they are too adversarial, complicated, and protracted.[233] Pro bono attorneys are also generally reluctant to handle family law matters.[234]

178. Even when individuals seeking family law services do receive some form of legal aid, it rarely means they received representation in court. In fact, the overwhelming majority of these cases do not involve litigation assistance. As noted previously in this section, 2011 LSC data indicated that only 17.4 percent of *all* cases were litigated, and of those, 4.8 percent were uncontested matters.[235] The vast majority of services provided were counsel and advice (57.5 percent) and brief service (18 percent)."[236]

179. One particular program demonstrates the limited representation provided in family law matters: Legal Aid of Southeastern Pennsylvania stated that twenty-five percent of the cases that they *handled* involved child custody disputes, but due to financial constraints, "handled" did not mean actual representation. In fact, the organization explained that they "only provide representation in a very limited number of child custody cases."[237]

180. There are also other obstacles, in addition to financial, that impede the provision of MALR. Some family law issues are structural and require legal challenges that go beyond individual cases in order to achieve meaningful change. For example, many states have violated the rights of custodial parents, usually mothers, by failing to collect and/or distribute child support payments. Remedy for such failure cannot be obtained parent-by-parent and are more suitable for class action litigation. However, Congress has barred LSC-funded attorneys from filing class action lawsuits.

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[233] Interview with former coordinator of statewide domestic violence initiatives for Legal Services of North Carolina, Apr. 16, 2014.
[234] *See* Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between the "Truly National and the Truly Local,"* 42 B. C. L. REV. 1081, 1130.
[235] *Legal Services Corporation: Fact Book 2011*, *supra* note 209 at 23.
[236] Houseman, *supra* note 210 at 4.
[237] *Custody and Visitation: How Legal Aid Helps*, 8 LEGAL AID OF SOUTHEASTERN PA. at 4 (Summer 2012), *available at* http://lasp.org/file/lasp-newsletter-10.pdf.

181. With sufficient funding, the family law needs of poor clients could be addressed. Further, the U.S. Congress should lift the class action restriction, which would allow attorneys to zealously represent their clients' interests in family court proceedings.

The Lack of MALR in Family Law and Termination of Parental Rights' Proceedings

182. Every state in the United States has a statute allowing courts to terminate parental rights.[238] Terminating parental rights ends the parent-child relationship and allows the child to be adopted.[239] Before terminating parental rights, most states require courts to determine that the parents are unfit and that ending the relationship is in the child's best interest.[240]

183. The Federal Adoption and Safe Families Act (ASFA) was designed to decrease the length of time a child spends in foster care.[241] Under the ASFA, termination of parental rights can be a fast *and* complicated process. The state may terminate parental rights and seek to have a child adopted rather quickly if they deem that a parent has not complied with the state's family reunification plan.

184. The ASFA requires states to terminate parental rights if children have been in foster care for fifteen of the last twenty-two months unless the child is placed with a relative or there are compelling reasons not to terminate parental rights.[242]

185. The U.S. Supreme Court has noted that procedural protections may be necessary, because in termination of parental rights (TPR) cases the state is attempting to deprive parents of a uniquely important interest.[243] Terminating parental rights is not only

[238] CHILD WELFARE INFORMATION GATEWAY. GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL *Rights* 1 (2013) *available at* https://www.childwelfare.gov/pubPDFs/groundtermin.pdf.
[239] *Id*.
[240] *Id*.
[241] 42 U.S.C. §671 (2014).
[242] 42 U.S.C. §675(5)(E) (2014).
[243] Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 27 (1981).

permanent, it also means that a parent has no right to communicate with the child or make any decisions regarding the child's "religious, educational, emotional, or physical development."[244] However, without access to counsel at the state's expense, the fundamental rights of many parents are left unprotected.

186. Despite the Supreme Court's articulation of the fundamental nature of the rights at stake, it has declined to require the appointment of counsel for parents faced with the permanent loss of their child. The Supreme Court has ruled that Due Process may require states to provide counsel for indigent parents, but did not go so far as to hold that the U.S. Constitution *always* requires the appointment of an attorney in a TPR proceeding: trial courts have the discretion to determine if counsel is required.[245]

187. Most parents in TPR proceedings are indigent.[246] While most states will now provide counsel for low-income parents, there are still states that do not. Furthermore, of the states that do provide for counsel, the quality of the provided counsel varies depending on the location. The result is a patchwork system where parents' meaningful access to justice and protection of their fundamental rights depends on geography. Some states automatically provide a right to appointed counsel in TPR proceedings.[247] Some appoint counsel when requested.[248] Others provide counsel if the parent suffers a disability.[249] However, states such as Mississippi do not provide any expressed right to counsel in TPR cases.[250]

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[244] *Id*. at 39-40 (Blackmun J., dissenting).
[245] *Lassiter*, 452 U.S. at 18. *See also* M.L.B., 519 U.S. at 102.
[246] Susan Calkins, *Ineffective Assistance of Counsel in Parental Rights Termination Cases*, 6 J. APP. PRAC. & PROCESS 179, 180 (2004).
[247] *See, e.g.*, IND. CODE § 31-32-4-1 (2012)
[248] *See, e.g.*, 750 ILL. COMP. STAT. ANN. § 405/1-5 (2012)
[249] MD. CODE ANN., FAM. LAW § 5-307 (2013)
[250] *See* MISS. CODE ANN. §§ 93.15.101-07 (2013) (providing for a right to be informed of the right to counsel, but not a right to the appointment of counsel if parent is indigent).

188. Even where parents have a right to counsel to protect their fundamental right to family integrity, they may not be afforded effective counsel or *meaningful* access to legal representation. Counsel appointed for TPR proceedings are often ineffective and inadequate due to lack of training, underfunding of the systems that appoint them, low pay for attorneys, large caseloads, and few resources.[251] The attorneys appointed in these cases are often inexperienced, which further exacerbates their ineffectiveness, given that these proceedings are difficult and time consuming.[252] Appointed attorneys are often not prepared for trial.[253]

189. Parents cannot receive a fair trial with ineffective counsel. Effective counsel is required to present the strongest argument against severing the bond between parent and child. Ineffective counsel may fail to show weaknesses in the state's argument that parental rights should be terminated.[254]

Disproportionate Impact of Foster Care on Poor, Rural, and Minority Families

190. Poverty is often synonymous with neglect in the child welfare system and parental income is a good predictor of whether or not a child will be removed from a home.[255]

191. Since parents in rural areas are often poorer than parents in urban areas, living in a rural area can "play a significant role in termination proceedings."[256]

192. Children of color, particularly African American and Native American children are disproportionately represented in the foster care system.[257]

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[251] Calkins, *supra* note 246 at 184.
[252] *Id*. at 185.
[253] *Id*.
[254] *Id*. at 229
[255] Janet L. Wallace & Lisa R. Pruitt, *Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 110 (2012).
[256] *Id*. at 122. *See, e.g.*, *In re* A.H., No. 01-0195, 2001 WL 1659290, at *2 (Iowa Ct. App. Dec. 28, 2001) (finding a mother unable to "act in the best interests of her children [since she was] "living in a trailer park in a rural area, isolated from services, shopping or neighborhood resources.")

193. African American children "experience poorer outcomes and are provided fewer services" than other children in the welfare system.[258] They are also more likely than Caucasian children to be reported for suspected child abuse,[259] are more likely to be removed from their homes, and are less likely to be reunited with their parents or other family members.[260]

194. As noted above, CERD requires states to eliminate all forms of racial discrimination.[261] The rights to family and family integrity are also protected by both international and inter-American human rights norms.[262] Indirect discrimination against poor, rural and minority families violates the fundamental right to be free from discrimination and to maintain family unity.

The United States Has Failed to Comply With International and Regional Norms to Protect Family Integrity

195. International and regional laws provide the highest levels of protection for families, parents, and children. The United States has failed to meet these norms by failing to provide sufficient funding to ensure that individuals have access to legal services in family law proceedings, and by failing to provide adequate counsel and assistance to parents and children in TPR proceedings.

D. Housing and Landlord-Tenant Issues

196. According to many state studies about the types of cases LSC grantees handle, issues "in the areas of housing (such as evictions, foreclosure, utility issues, unsafe housing

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[257] Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 224 (2013).
[258] Mark E. Courtney et al., *Race and Child Welfare Services: Past Research and Future Directions*, 75 CHILD WELFARE 99, 125 (1996).
[259] Yuhwa Eva Lu et al., *Race, Ethnicity, and Case Outcomes in Child Protective Services*, 26 CHILDREN & YOUTH SERVS. REV. 447, 457 (2004).
[260] *Id*.
[261] *See supra* ¶ 32.
[262] *See supra* notes 219 -227.

conditions and homelessness)" are among the most common.[263] In 2011, LSC-funded organizations closed 9,920 foreclosure cases.[264] In 2014, 1,977 eviction notices were filed in the city of San Francisco alone.[265]

197. Housing discrimination is also a significant issue, with an estimated four million instances of it each year.[266] Unfortunately, "fewer than 30,000 complaints are filed every year."[267]

198. The Human Rights Council of the U.N. General Assembly has noted that the cost of legal representation obstructs many people from obtaining representation in housing matters.[268] The Council recommends that "[s]tates … establish funds and enable legal aid and assistance for the urban poor, in order to address power asymmetries that pervade conflicts over land and obstruct access to justice."[269]

199. "Human rights law requires that countries, respect, protect, and fulfill the right, to the maximum of the country's available resources, in a non-discriminatory manner."[270] Thus, international, regional, and domestic human rights norms are calling for a civil *Gideon* in housing matters.

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[263] *Documenting the Justice Gap in America*, LEGAL SERVS. CORP. 15 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.
[264] *Id*. at 11.
[265] *Memorandum from Delene Wolf, Executive Director of Rent Stabilization and Arbitration Board, to Angela Cavillo, Clerk of the Board of Supervisors*, (Mar. 11, 2014), *available at* http://www.sfrb.org/modules/showdocument.aspx?documentid=2700. The date range is March 1, 2013 to February 28, 2014. *Id*.
[266] *Fair Housing Enforcement at HUD is Failing*, The Leadership Conference on Civil and Human Rights & The Leadership Conference Educ. Fund, http://www.civilrights.org/publications/reports/fairhousing/enforcement-hud.html (last visited Mar. 24, 2014).
[267] *Id*.
[268] Raquel Rolnik, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, HUMAN RIGHTS COUNCIL OF THE U.N. GEN. ASSEMBLY 23 (Dec. 30, 2013).
[269] *Id*.
[270] *Housing Rights for All: Promoting and Defending Housing Rights in the United States*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY 15, n.18 (5th ed. 2011), *available at* http://www.nlchp.org/Human_Right_to_Housing_Manual.

Domestic Recognition of Housing as a Human Right

200. A variety of civil society organizations have written about the importance of housing rights. One of the most well-known organizations, the National Law Center on Homelessness and Poverty (NLCHP), has released several reports relating to the national housing crisis and its legal ramifications. First, in defining housing rights, the NLCHP advocates that the right to housing encompasses countless human rights:

- "The human right to adequate housing."
- "The human right to an adequate standard of living."
- "The human right to access safe drinking water and sanitation."
- "The human right to the highest attainable standard of physical and mental health."
- "The human right to a safe and healthy environment."
- "The human right of the child to an environment appropriate for physical and mental development."
- "The human right to access resources, including energy for cooking, heating, and lighting."
- "The human right of access to basic services, schools, transportation, and employment options."
- "The human right to affordability in housing, such that other basic needs are not threatened or compromised."
- "The human right to freedom from discrimination in access to housing and related services based on sex, race, and ethnicity, or any other status."
- "The human right to choose one's residence, to determine where and how to live, and to freedom of movement."
- "The human right to freedom from arbitrary interference with one's privacy, family, or home."
- "The human right to security, including legal security of tenure."
- "The human right to equal protection of the law and judicial remedies for the redress of violations of the human right to adequate housing. The human right to protection from forced evictions and the destruction or demolition of one's home, including in situations of military occupation, international and civil armed conflict, establishment and construction of alien settlements, population transfer, and development projects."[271]

[271] *Id*.

201. A Harvard University study noted that housing issues are significant because "shelter (a basic human need) is at stake."[272] Furthermore, due to the adversarial nature of these issues in courts and the complexity of housing issues, "these adjudications are at the core of the set of cases in which it is thought that the self-represented occupant is at her most vulnerable, especially when facing a represented evictor."[273]

202. The ABA observed that it "has forced members of [U.S.] society to live their daily lives in ways that threaten their dignity and sense of worth as a human being as well as their health and safety, contrary to [the] founding principles [of life, liberty, and the pursuit of happiness]."[274] The ABA argues that "[a]dequate housing requires more than four walls and a roof; it requires . . . effective access to justice . . . ."[275]

Lack of MALR in Eviction Proceedings

203. There have been many studies in various locales regarding the lack of legal representation or effectiveness of counsel in housing cases.[276] The Harvard Study on effectiveness of full representation, referencing these other studies that focus on the vulnerabilities of unrepresented tenants, concluded that "[w]ith respect to certain settings, however, these publications suggest that some courts may be failing to achieve even a rough approximation of justice in an area where the stakes are high,"[277] illustrating why attorneys are so crucial in housing cases.

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[272] D. James Greiner, *et. al.*, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 910 (2012).
[273] *Id*.
[274] *Resolution 117*, AM. BAR ASS'N 3 (Aug. 12-13, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/homelessness_poverty/resolution117.authcheckdam.pdf.
[275] *Id*.
[276] *See* Greiner *supra* note 272, at 910-11.
[277] *Id*.

204. A randomized experiment seeking to determine the effectiveness of legal representation in New York housing cases concluded "that low-income tenants with legal representation experience significantly more beneficial outcomes than their counterparts who do not have legal representation, independent of the merits of the case."[278] In regards to the cost of legal representation, it concluded "that the presence of legal representation may impose only modest time delays or other indicators of administrative burden on the court system and may even be more efficient for the courts in certain respects."[279]

205. The NY study also noted that almost all landlords involved in these disputes have legal representation while hardly any tenants share the same advantage. Furthermore, many of these tenants would be eligible for many legal services, as about 500,000 of them live below the federal poverty line.[280]

206. In its 2005 report titled "*Injustice in No Time: The Experience of Tenants in Maricopa County Justice Courts*," the William E. Morris Institute for Justice uncovered many shocking facts about the functioning of eviction cases in Florida.[281] First, even though eighty-seven percent of landlords had legal representation, no tenants did. In fact, fewer than twenty percent of tenants even appeared in court. This discrepancy seemed to have an impact on the outcome of the cases, as "[m]ost eviction cases [took] less than a minute to hear and many cases [were] heard in less than [twenty] seconds," which led to "swift judgments, overwhelmingly in favor of the landlords."[282]

Lack of MALR in Foreclosure Proceedings

[278] Carroll Seron *et al.*, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 420 (2001).
[279] *Id*.
[280] *Id*.
[281] *Injustice in No Time: The Experience of Tenants in Maricopa County Justice Courts*, WILLIAM E. MORRIS INST. FOR JUSTICE, (2005), *available at* http://morrisinstituteforjustice.org/docs/254961Finalevictionreport-P063.06.05.pdf.
[282] *Id*.

207. Many people in foreclosure proceedings are in dire situations.[283] The Brennan Center for Justice at New York University School of Law's report titled "*Facing Foreclosure Alone: The Continuing Crisis in Legal Representation*," details the severity of the foreclosure crisis. It notes that in 2010, one in every forty-five U.S. homes received foreclosure filings.[284] In fact, foreclosures were so prevalent that the 2011 Current Population Survey made "foreclosure/eviction" an official category in response to the "reason for move" question.[285]

208. Although few courts track whether homeowners in foreclosure proceedings have legal representation, the ones that do indicate that legal representation is uncommon.[286] The figures for people with legal representation in foreclosure mediations are similar.[287]

209. Foreclosure not only affects persons who have mortgaged their own home, but also people renting from a landlord facing foreclosure proceedings.[288] In 2009, Congress attempted to protect this vulnerable group with the "Protecting Tenants at Foreclosure Act" (PTFA).[289] This Act prioritized tenants' rights over the successor in interest's

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[283] *See* Nabanita Pal, *Facing Foreclosure Alone: The Continuing Crisis in Legal Representation*, BRENNAN CTR. FOR JUST. 2-3 (2011), *available at* http://www.brennancenter.org/sites/default/files/legacy/Facing_Foreclosure_Alone.pdf (quoting New York's Executive Deputy Attorney General Martin Mack).

[284] *Id.* at 2.

[285] *CPS User Note: Addition of Foreclosure/Eviction Reason for Move Category*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/migration/data/cps/usernote2012.html (last visited Mar. 24, 2014).

[286] Pal, *supra* note 283 at 4.

[287] *Id.* at 4-5. "Although a handful of mediation programs are tracking homeowner representation, the numbers are less likely to reflect the underlying situation in court since mediation is often optional and reaches only a proportion of cases. In some places, attorneys may formally "appear" as counselor of record for the mediation process but not in the underlying legal case. In addition, attorneys are sometimes permitted to appear on record as representing a homeowner for one particular session of mediation but not for the entire process. On the other hand, because the numbers reflect formal appearances they do not necessarily capture the fact that a homeowner may have received advice or counseling through a volunteer pro bono initiative or from a legal aid program. Nonetheless, the numbers of represented homeowners in mediation are strikingly low, as the examples from various states and jurisdictions below demonstrate." *Id.*

[288] Dina ElBoghdady, *Foreclosure Takes Toll on Increasing Number of Children*, WASH. POST, Nov. 22, 2010, at 1, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/21/AR2010112104255.html.

[289] Protecting Tenants at Foreclosure Act of 2009; 12 U.S.C. § 5220 (2014).

rights, specifically by allowing these tenants to stay in the home for a certain period of time, even if they did not have a lease.[290] However, the Act still did not provide adequate protection for tenants.[291]

210. Violations of the PTFA occurred frequently.[292] Common violations included "lack of communication from the new owner; illegal, misleading, or inaccurate written notices; harassment from real estate agents, law firms, or bank representatives; [and] failure to maintain the property."[293] Tenants described even more violations, including "new owners' bad faith assertions that tenancies were not bona fide, failure of new owners to determine the occupancy status of residents in foreclosed properties, and failure of new owners to provide information on where to pay rent and/or to request property maintenance."[294]

211. The PTFA's ability to help tenants in this situation was very limited. Remedying violations of the PTFA proved difficult for tenants.[295] No federal agency was responsible for enforcement of the PTFA, and victims often did not know to whom to report violations. Moreover, the PTFA itself does not provide for a private right of action. Finally, the PTFA was only valid legislation until December 31, 2014. As a result, the PTFA is no longer valid.[296]

212. Although the PTFA is no longer valid, its shortcomings may serve as guidance for future government efforts to deal with issues arising from the housing crisis. Many renters did not have access to legal representation when their PTFA rights are violated,

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[290] *Eviction (Without) Notice: Renters and the Foreclosure Crisis*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY 8 (Dec. 2012), *available at* http://www.nlchp.org/Eviction_Without_Notice.
[291] *See id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Eviction*, *supra* note 290 at 8.
[296] *Id.* at 7-8.

which drastically reduced the Act's effectiveness to protect the right to housing. MALR would significantly increase the ability of people to utilize government safeguards for their rights.

Consequences of loss of home and homelessness

213. Regardless of whether an individual or family faces foreclosure or eviction, an unfavorable judgment results in the loss of their home. Sadly, one of the most vulnerable populations in the United States—children—are severely affected by the loss of their home.[297] As of 2012, more than eight million children were affected by foreclosure.[298] The negative effects of foreclosure on children are extensive. They are more likely to perform poorly in school, have strained relationship with their parents, suffer stunted social skills, and experience damaged physical and mental wellbeing.[299] The ABA has found that children whose families are in unsafe or unstable housing situations face long-term consequences, "creating a cycle of poverty and homelessness."[300]

214. There are also many legal consequences that result from a summary eviction. "The [Public Housing Authority] may at any time deny program assistance for an applicant, or terminate program assistance for a participant . . . [i]f any member of the family has been evicted from federally assisted housing in the last five years."[301] Also, an eviction can negatively impact the homeowner's or tenant's credit-rating, which may prevent them from securing housing in the future.[302] "Finally, a court-ordered eviction, or certain kinds

[297] ElBoghdady, *supra* note 288.
[298] Julia B. Isaacs, *The Ongoing Impact of Foreclosures on Children*, FIRST FOCUS 1 (Apr. 2012), *available at* http://www.firstfocus.net/sites/default/files/Foreclosures%202012_0.pdf.
[299] *Id.* at 3, 5.
[300] AM. BAR ASS'N, *supra* note 274 at 8.
[301] 24 C.F.R. § 982.552(c)(1)(ii) (2014).
[302] Greiner, *supra* note 272 at 914.

of agreement for judgment, can make a household ineligible for some forms of emergency shelter assistance."[303]

215. Because eviction and foreclosure often lead to homelessness, the housing crisis in the United States has exacerbated the already-existing homeless problem.[304] The U.S. Department of Housing and Urban Development reported that on a single night in January of 2013, 610,042 people were homeless.[305] Over one million school-aged children nationwide were homeless during the 2011-2012 school year.[306] Tragically, families are at a greater risk of breaking up after they become homeless.[307]

216. Homelessness is not merely a general social problem; it is a human rights problem.[308] The homeless are often subjected to harsh treatment by local governments.[309] Many localities across the nation are criminalizing homelessness, which presents both practical difficulties and mental anguish for those affected.[310] By far, the most disturbing problem is the number of hate crimes committed against homeless persons.[311] Being homeless is dangerous, and a lack of legal representation in foreclosure and evictions proceedings increases the probability of this painful reality.

Lawyer Assistance

217. MALR can help homeowners protect their right to housing in many ways, specifically legal representation may help by "raising claims that protect homeowners from lenders

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[303] *Id.* at 914-15.
[304] NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HUMAN RIGHT TO HOUSING REPORT CARD 4 (2013), *available at* http://www.nlchp.org/HousingReport_2013%20copy.pdf.
[305] U.S. DEP'T OF HOUSING & URBAN DEV., THE 2013 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2013), *available at* https://www.onecpd.info/resources/documents/AHAR-2013-Part1.pdf.
[306] NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 304, at 4.
[307] Seron, *supra* note 278 at 422.
[308] AM. BAR ASS'N, *supra* note 274 at 8.
[309] *Id.*
[310] *Id.*
[311] NAT'L COAL. FOR THE HOMELESS, HATE CRIMES AGAINST THE HOMELESS 11 (2012), *available at* http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2010.pdf.

and servicers who broke the law; helping homeowners renegotiate their loans; . . . helping homeowners obtain protection of the bankruptcy law; [and] helping tenants when a landlord's property is foreclosed."[312]

218. Lawyers in one study about evictions were able to help tenants in multiple, specific ways:

- "[D]etermining what is actually owed by way of rent;"
- "[N]egotiating a reasonable time period for payment when money is owed;"
- "[N]egotiating with or litigating against welfare when, e.g., the agency has not issued the full amount of arrears, has issued them to the wrong landlord, or when the client qualifies for a special grant to cover rent; and,"
- "[O]btaining abatements of rent when repairs were not completed in a timely manner."[313]

219. Lawyers' assistance in housing issues is not limited to substantive issues. They also provide knowledge of the procedural aspects of the case that the average person would know little to nothing about.[314]

220. Also, legal counsel is especially important because landlords and creditors frequently navigate the courts, giving them an advantage over tenants and homeowners who do not. A lawyer can, by "understand[ing] the dynamics of a particular forum," "neutralize the power that the unrepresented litigant typically encounters."[315]

Positive developments

221. Generally, the federal government has not recognized a right to counsel in any housing matter.[316] However, several states are implementing programs to fill in these gaps.[317] For example, California Assembly Bill 590 established a pilot program where legal

[312] Pal, *supra* note 283 at 8.
[313] Seron, *supra* note 278 at 422.
[314] Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 79 (2010).
[315] *Id.*
[316] NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 304, at 7.
[317] *See id.*

services providers assist Californians at or below two hundred percent of the federal poverty level in civil suits.[318] The Act does not cover all civil cases—in fact, only "civil matters involving critical issues affecting basic human needs" are included.[319] "Housing-related matters" is one of such critical issues.[320] This assistance from legal services providers serves many functions:

> The purpose of these services is to ensure that *unrepresented parties in the proposed case types have meaningful access*, to guard against the involuntary waiver of rights in the selected legal areas or the disposition of cases by default, and to encourage fair and expeditious voluntary dispute resolution, consistent with principles of judicial neutrality.[321]

222. California will allot 9.5 million dollars per year for this program, which began in the 2011-2012 fiscal year.[322] The program will expire in 2017, unless the California General Assembly decides otherwise.[323] Fortunately, the pilot programs still prove useful for future efforts to create a civil *Gideon*:

> A close examination of AB 590 reveals three critical features of a potential new model for advancing a civil Gideon agenda: legislative line-drawing, targeted experimentation, and an emphasis on pragmatism. Each of these features represents a strategic adaptation to challenges that stymied past efforts, and together they trace a new path to expanding access to counsel for low-income persons.[324]

223. State advances provide hope that the nation is more open to enacting a civil *Gideon* in housing matters. However, although these pilot programs are helpful, they are not widespread. Hence, whether a tenant in an eviction proceeding receives legal

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[318] *Fact Sheet*, SARGENT SHRIVER CIVIL COUNSEL ACT (AB 590) 1 (Aug. 2012), *available at* http://www.courts.ca.gov/documents/AB-590.pdf.
[319] CAL. GOV'T CODE § 68651(b)(1) (Deering 2009).
[320] *Id.*
[321] SARGENT SHRIVER CIVIL COUNSEL ACT, *supra* note 318 (emphasis added).
[322] *Id.* at 2.
[323] *Id.* at 2.
[324] *Recent Legislation: Access to Justice- Civil Right to Counsel- California Establishes Pilot Programs to Expand Access to Counsel For Low-Income Parties*, 123 HARV. L. REV. 1532, 1535 (2010), *available at* http://www.harvardlawreview.org/media/pdf/april123_recent_legislation.pdf.

representation is based on where he lives. This is insufficient and arbitrary way of determining whose rights are guaranteed. Nor do these state pilot programs create a *right* to counsel.[325] Only a national civil *Gideon* can do that.

224. The Civil Asset Forfeiture Reform Act of 2000 is one of the exceptions to the general rule that legal representation is not guaranteed in civil proceedings.[326] The Act provides for a right to counsel for indigent contestants in judicial civil forfeiture proceedings as long as "the property subject to forfeiture is real property that is being used by the person as a primary residence . . . ."[327]

225. Louis S. Rulli, Practice Professor of Law and Clinical Director at University of Pennsylvania School of Law, notes that this right of "protection of the family home [in civil asset forfeiture cases] received enthusiastic support from Congress, reflecting deeply-held views that private homeownership represents a cornerstone of the American dream."[328]

226. Legal representation is especially important to safeguard individual liberties in these types of proceedings because revenue from seized property may directly benefit the law enforcement agencies that conduct the seizures and may disproportionately impact low-income minority populations.[329]

The United States is Obligated to Provide MALR in Housing and Landlord-Tenant Related Matters

227. Domestic organizations have recognized that the housing crisis implicates fundamental human rights, including the National Law Center on Homelessness and Poverty and the

[325] *Id*.
[326] Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. §983(b)(2)(A) (2014).
[327] *Id.*
[328] Rulli, *supra* note 183 at 712.
[329] *Asset Forfeiture Abuse*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/criminal-law-reform/civil-asset-forfeiture (last visited June 8, 2015).

American Bar Association. The breadth of studies that have been conducted and research that has been completed on the issue clearly shows that legal representation in foreclosure and housing matters is a major concern in the United States.

E. Income Maintenance and the Right to Subsistence

Substantive Rights Under International Treaties

228. Figures regarding hunger and poverty in the United States are disconcerting:

- Over fourteen percent of people in the United States do not have health insurance.[330]
- Hunger is suffered by over forty-five million people in the United States – including more than one in five children.[331]
- In 2010, more than seventeen million households in the United States faced food insecurity.[332]
- Over fifteen percent of people of Americans (and twenty-two percent of children) live below the official poverty line.[333]
- Each month, over sixty million people in the United States depended on social security or supplementary security income.[334]

229. A number of international treaties and instruments demand some level of public assistance for those in need. These include a number ratified by the United States:

- the Charter of the Organization of American States (Charter of OAS)[335];
- the American Declaration on the Rights and Duties of Man (Declaration) [336];
- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) [337];

[330] *Health Insurance Coverage*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/nchs/fastats/hinsure.htm (last visited June 8, 2015).
[331] *Hunger and Poverty*, FEEDING AMERICA, http://www.feedingamerica.org/hunger-in-america/impact-of-hunger/hunger-and-poverty/?_ga=1.196271343.293940308.1433808936 (last visited June 8, 2015).
[332] ALISHA COLEMAN-JENSEN ET AL., U.S. DEP'T OF AGRICULTURE, HOUSEHOLD FOOD SECURITY IN THE U.S. IN 2010 14 (2011), *available at* www.ers.usda.gov/Publications/ERR125/ERR125.pdf, p.14.
[333] CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, *Income in the United States, in* CURRENT POPULATION REPORTS: CONSUMER INCOME 14 (2011), *available at* www.census.gov/prod/2011pubs/p60-239.pdf.
[334] *Monthly Statistical Snapshot*, SOC. SECURITY ADMIN., www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ (last visited June 8, 2015).
[335] *See supra* note 75.
[336] *See supra* note73.
[337] *See supra* ¶ 30.

230. The Charter of OAS emphatically and specifically calls on Member States implement social security to alleviate poverty, ensure availability of food, and ensure medical attention.

231. "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: …

- "Protection of man's potential through the extension and application of modern medical science;
- "Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food;[and]
- "Urban conditions that offer the opportunity for a healthful, productive, and full life[.]"[338]

232. "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to *dedicate every effort* to … [d]evelopment of an *efficient* social security policy[.]"[339]

233. In addition to general security, the American Declaration requires special care for women and children; food, clothes, medical care; social security where persons are unable to work; and property sufficient to ensure dignity:

- "Every Human being has the right to life, liberty and the security of his person."[340]
- "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."[341]

[338] Charter of the Organization of American States, art. 34, Apr. 30, 1948, 119 U.N.T.S. 3, ratified by the U.S. Dec. 13, 1951.
[339] *Id.* at art. 45, (emphasis added).
[340] American Declaration of the Rights and Duties of Man, art. 1, O.A.S. Res. XXX, Int'l Conf. of Am. States, 9th Conf., OEA/ser.L/V/II.23 doc.21 rev.6 (May 2, 1948).
[341] *Id.* at art. 7.

- "Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."[342]
- "Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living."[343]
- "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."[344]

234. CERD requires that States respect "[t]he right to public health, medical care, social security, and social services[.]"[345]

235. The United States has ratified other treaties with public-assistance provisions, including:

- the International Covenant on Civil and Political Rights (ICCPR)[346];
- the International Convention Relating to Status of Refugees (ICRSR)[347]
- and the International Convention Against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment (CAT).[348]

236. Recently, the Inter-American Commission on Human Rights established a Special Rapporteurship on Economic, Social, and Cultural Rights.[349]

237. The United States has instituted a number of statutes and programs to provide income benefits intended to alleviate the problems. These include the Supplemental Nutrition Assistance Program (SNAP, often referred to as "food stamps"), Supplemental Security

[342] *Id.* at art. 11.
[343] *Id.* at art. 16.
[344] *Id* at art. 23
[345] International Convention on the Elimination of All Forms of Racial Discrimination, art. 5, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212, ratified by the U.S. Nov. 20, 1994.
[346] International Covenant on Civil and Political Rights, art. 26, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967), ratified by the U.S. Sept. 8, 1992.
[347] International Convention Relating to the International Status of Refugees, arts. 23–24, 189 U.N.T.S. 137, entered into force Apr. 22, 1954.
[348] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20(1988); 23 I.L.M. 1027 (1984), as modified by 24 I.L.M.535 (1985), ratified by the U.S. Nov. 20, 1994.
[349] IACHR Creates Special Rapporteurship on Economic, Social and Cultural Rights, Apr. 7, 2014 at http://www.thepanamericanpost.com/2014/04/iachr-creates-special-rapporteurship-on.html.

Income (SSI), Unemployment Insurance Benefits (UIB), Section 8 of the Housing Act of 1937[350] (often simply referred to as "Section 8"), Medicare, Medicaid, Temporary Assistance for Needy Families (TANF), Emergency Medical Assistance (EMA), Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the Low Income Home Energy Assistance Program (LIHEAP), and Veteran's benefits.

238. However, given the failure to adequately fund legal services for the poor, many individuals are unable to engage in administrative or judicial legal process to claim subsistence benefits to which they are entitled or to protect those benefits from being wrongfully terminated.

Lack of MALR in Administrative Proceedings

239. Poor people in the United States interact with administrative agencies on a daily basis. State and federal agencies are often responsible for determining who is poor and then doling out benefits accordingly.

240. Agency administrators "make the vast majority of government decisions, including many of the most important ones . . ."[351] These agency decisions are important means by which citizens may participate in democratic justice projects. Agencies are responsible for "distributing welfare, protecting the environment guarding public health, combating commercial fraud, and opposing race and gender inequality."[352] The following are three key examples of crucial nutrition, housing, and health benefits for poor people may qualify:

- The United States Department of Agriculture (USDA) administers the Food Assistance Programs to poor and needy families "such as Food Stamps, WIC, and School Meals, provides better access to food and promotes healthy eating through

[350] 42 U.S.C. § 1437(f).
[351] *See* Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 728 (2001).
[352] *See id.* at 732-733.

nutrition education programs." WIC is an especially valuable resource for women with children experiencing hunger because the program provides mothers and children with access to food.

- The U.S. Department of Housing and Urban Development (HUD) operates a housing voucher program called Section 8 that assists "very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market." Safe, affordable housing is a key concern for women fleeing violence. The National Housing Law Project stated that, "Gaining access to and maintaining affordable housing is essential to helping survivors of domestic violence, stalking and sexual assault to escape abusive relationships and start new lives free of violence."
- Medicaid is jointly financed state and federal healthcare program that "provides health coverage to nearly sixty million Americans, including children, pregnant women, parents, seniors and individuals with disabilities." Because women are poorer than men, women consist of two-thirds of all Medicaid beneficiaries.[353] Women who qualify for Medicaid receive, "a broad range of services important to women at different stages of their lives." The importance of Medicaid to the health of poor women and children is evidenced by the fact that forty percent of all births in the United States are financed by Medicaid.[354]

241. The programs providing benefits are implemented largely through administrative agencies and any litigation takes place in the context of an administrative adjudication. While administrative systems are not adversarial in the same way as criminal or civil litigation, the outcomes are just as important: The individuals dealing with such agencies are more likely to be poor, as the benefits programs were created precisely for the purpose of providing for those unable to provide for themselves. Therefore, agency decisions may literally and directly determine whether persons are able to afford food, shelter, or healthcare.

242. Individuals often have difficulty navigating the complicated and bureaucratic waters of administrative agencies, notwithstanding the fundamental rights at stake. Often, the assistance of counsel is necessary in order for individuals to have successful adjudications, appeals, and rule-making decisions before administrative agency bodies.

[353] *Medicaid's Role for Women Across the Lifespan*, KAISER FAMILY FOUNDATION, http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7213-04.pdf

[354] *By Population*, MEDICAID, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Population/By-Population.html (last visited June 8, 2015).

Attorneys are crucial advocates in obtaining services and challenging agency actions. For example:

- In 2014 The North Carolina Division of Employment Services instituted an agency directive "restricting attorney access to unemployment appeal notices." Advocates stated that the directive would "severely restrict unemployment claimants' ability to retain counsel and have due process during any hearing."[355] Thanks to litigation, a judge granted a preliminary injunction blocking the agency directive.
- Before LSC agencies were barred from filing class actions suits an LSC agency in Philadelphia filed a class action suit directed at ending agency practices that denied children age four and older benefits of the Women, Infants and Children ("WIC") program without notice of an opportunity for a hearing. The suit resulted in new administrative law processes to avoid "reckless bureaucratic error."[356]

243. Yet, LSC case acceptance statistics show that only 3.5 percent of cases involved an administrative agency decision.[357] Further, LSC funding restrictions prevent LSC lawyers from advocating and appearing before "legislative bodies or in administrative rulemaking proceedings."[358]

244. In addition to the lack of available legal services attorneys, there is a particular shortage of pro bono attorneys to assist poor individuals with claims involving means-tested benefits. These programs are governed by specific and complex regulations that generally escape the realm of expertise of most practitioners outside of indigent legal services programs.

The United States Provides Inadequate Protection of International and Human Rights by Failing to Provide MALR in Administrative Proceedings

[355] Sharon McCloskey, *Gaming the system at the Division of Employment Security,* NC POLICY WATCH, http://www.ncpolicywatch.com/2014/03/12/gaming-the-system-at-the-division-of-employment-security/#sthash.1QiDq2nR.pYjzgnNC.dpuf.
[356] *The Restriction Barring LSC-Funded Lawyers from Bringing Class Actions*, BRENNAN CTR. FOR JUST. (Sep. 26, 2003), http://www.brennancenter.org/analysis/fact-sheet-restriction-barring-lsc-funded-lawyers-bringing-class-actions.
[357] *See supra* note 210 at 4.
[358] *Id.*

245. For many poor people, the very ability to exist and thrive is dependent on various government programs, it is critical to assign a right to an attorney competent in the regulatory scheme that governs their claims.

F. Vulnerable Populations, Poverty, and the Justice Gap

246. It is well documented that the poor do not have adequate access to legal representation. However, "the poor" are not a homogenous group; there are sub-groups among the poor in the United States that are adversely and disproportionately harmed by the lack of MALR. While there are many sub-groups of poor people in the United States that receive inadequate access to justice, this section illustrates the disproportionate impact occasioned by lack of lawyers by focusing on two groups: women and racial minorities.

247. Women and racial minorities make up the majority of poor people in the United States. Though fifteen percent of the general population in the United States is classified as poor, "only, 9.7 percent of non-Hispanic whites (18.9 million) were living in poverty, while over a quarter of Hispanics (13.6 million), and 27.2 percent of blacks (10.9 million) were living in poverty."[359] Further, roughly fourteen percent of the adult female population lives in poverty, in comparison, less than eleven percent of adult men lived in poverty.[360]

248. A significant portion of poor people in the United States are women. There are over 15.1 million poor women living in the United States, which means that one in eight women live in poverty; they are thirty-five percent more likely to live in poverty than men.[361] A recent study found that women were poorer than men in all racial and ethnic

[359] *Poverty in the United States: A Snapshot*, NAT'L CTR. FOR LAW & ECON. JUST., http://www.nclej.org/poverty-in-the-us.php (last visited June 8, 2015).
[360] *Women and Poverty*, WOMEN'S HEALTH USA 2011, http://mchb.hrsa.gov/whusa11/popchar/pages/105wp.html (last visited June 8, 2015).
[361] NAT'L WOMEN'S LAW CTR., CONGRESS MUST ACT TO CLOSE THE WAGE GAP FOR WOMEN: FACTS ON WOMEN'S WAGES AND PENDING LEGISLATION (2010), *available at* http://www.nwlc.org/sites/default/files/pdfs/PayEquityFactSheetFinal.pdf.

groups.[362]

249. According to Pew Research data, in 2012, twenty-seven percent of African Americans were poor and twenty-five percent of Hispanics were poor. By contrast, only 12.7 percent of Whites were considered poor.[363] People of color remain disproportionately poor because they are disparately and adversely impacted by a lack of MALR.

250. Accordingly, women and racial minorities have a disproportionately limited ability to access legal representation without aid. As stated above in regards to the resource gap, less than one percent of the United States' legal expenditures serves the sixty-three million poor and near poor in the United States. By contrast, ninety-nine percent of legal resources are distributed to middle and upper-income individuals, the majority of which are white and male.

251. MALR for women is necessary to assist them with, for example challenging wage discrimination and combatting domestic violence.

252. African Americans and Hispanics experience discrimination and poverty at higher rates than the rest of the population. Two notable examples of the symbiotic relationship between poverty and discrimination include: (1) the disparate and adverse impact that felony convictions have on communities of color that are manifested in the civil justice realm; and (2) the discriminatory impact foreclosure proceedings have in Black

[362]Alexandra Cawthorne, *The Straight Facts on Women in Poverty*, THE CENTER FOR AMERICAN PROGRESS, Oct. 8, 2008, http://www.americanprogress.org/issues/women/report/2008/10/08/5103/the-straight-facts-on-women-in-poverty/ ("Recent data shows that 26.5 percent of African American women are poor compared to 22.3 percent of African American men; 23.6 percent of Hispanic women are poor compared to 19.6 percent of Hispanic men;10.7 percent of Asian women are poor compared to 9.7 percent of Asian men; and 11.6 percent of white women are poor compared to 9.4 percent of white men.").

[363] Drew DeSilver, *Who's Poor in America? 50 years into the 'War on Poverty,' A Data Portrait*, PEW RESEARCH CTR., Jan. 13, 2014, http://www.pewresearch.org/fact-tank/2014/01/13/whos-poor-in-america-50-years-into-the-war-on-poverty-a-data-portrait/.

communities. Access to lawyers in these types of civil cases would materially improve poverty and discrimination in communities of color.

253. Without MALR, women and racial minorities are likely to remain disproportionately poor. They have no effective means to use the justice system to remedy violations of law that are largely responsible for their position in a lower socioeconomic class, such as gender and race discrimination.

Failing to Provide MALR to Women and People of Color Violates International Human Rights Norms

254. The United States' failure to provide MALR to women and racial minorities, violates the following international human rights norms:

- Article 23 of the UDHR states that everyone has a right to work in just and favorable conditions for equal pay.[364] The United States should abolish LSC restrictions that make litigating employment and wage discrimination claims difficult.
- The Universal Declaration of Human Rights states "everyone has the right to liberty and security of person. [365] Failure to provide all women with representation in civil domestic violence order proceedings infringes on the liberty and security interests of women.
- The ICCPR states that "All persons shall be equal before the courts and tribunals . . . [and] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law . . ."[366] When people of color do not have representation in bankruptcy proceedings they are not afford a fair hearing. Further, "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[367] A right without ***meaningful access*** to the proscribed remedy is no right at all. When women and people of color are unable to access judicial remedies because they do not have the assistance of counsel they have been effectively denied "a fair and public hearing by a competent, independent and impartial tribunal."
- The American Convention states "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and

[364] *See* UDHR, *supra* note 30 at art. 23.
[365] *Id*. at art. 3.
[366] *See* ICCPR, *supra* note 28 and accompanying text.
[367] UDHR, *supra* note 30 at art. 8.

obligations of a civil, labor, fiscal, or any other nature."[368] Many of the rights that women and people of color bare on "the rights and obligations of a civil, labor, fiscal, or any other nature," and failure by the state to provide meaningful assistance to counsel do not comport with the American Convention's requirement that every person has a right to a hearing "with due guarantees."

- The United States of America signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Articles 1-7 require states that have accepted CERD to eliminate racial discrimination and improve relations among all races. Several of these obligations involve providing meaningful access to legal redress.

MALR and Domestic Violence

255. Women face higher rates of domestic violence than men, and thus also need adequate representation in these matters. The Center for American Progress found that "[e]experiencing domestic or sexual violence can lead to job loss, poor health, and homelessness. It is estimated that victims of intimate partner violence collectively lose almost eight million days of paid work each year because of the violence perpetrated against them by current or former husbands, boyfriends, or dates."[369]

256. Women fleeing domestic violence have a whole host of unique legal needs. Legal services may be necessary in obtaining a life-saving order of protection, filing for a divorce, resolving marital property issues, and negotiating custody, visitation, and child support orders.

257. Despite the importance of such legal work and the fundamental nature of the rights at stake, only 5.8 percent of all LSC clients in 2012 received help in domestic abuse cases.[370]

258. Women fleeing violence have severely limited access to attorneys:

[368] American Convention, *supra* note 90 art. 8(1).
[369] *See* Cawthorne, *supra* note 362.
[370] *See Legal Services Corporation: Fact Book 2012*, LEGAL SERVS. CORP. 10 (2013), *available at* http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/ClientDemographics%282012FactBook%29.pdf.

- One study shows that "Legal services are the most expensive support service, the service to which the fewest women have access, and according to our research, the only service that decreases the likelihood women will be battered."[371]
- In California domestic violence restraining order cases, litigants are unrepresented ninety percent of the time.[372]
- A 2008 District of Columbia legal needs study found that ninety-eight percent of both petitioners and respondents in the Domestic Violence Unit of the DC Superior Court were unrepresented.[373]

259. It is very unlikely these women will able to effectively represent themselves. The trauma they have suffered as a result of the violence and the fear of contact with the abuser makes it even more critical that they have an attorney who can speak for them. Those who do not have access to attorneys to assist them in court are at risk of experiencing ongoing violence, or even death. They are likely to suffer from decreased income due to increased medical bills and lost paid work.

260. The failure to guarantee access to lawyers in domestic violence cases is a clear violation of the positive duty to protect women who are feeling from violence. The IACHR has identified the lack of pro bono attorneys representing victims of domestic violence as a critical issue, and highlighted that "[w]omen of means have far greater access to the justice system than do economically disadvantaged women. . . given the severity and prevalence of the problem of violence against women . . . more pro bono legal services are needed."[374]

261. An additional problem that a domestic violence victim experiences relates to the subordinated legal culture of domestic violence claims that often influences her lawyer's conduct. Domestic violence cases are scheduled with little time for actual hearings. Attorneys often withhold requests for certain forms of relief for fear of angering judges.

[371] *See* DOCUMENTING THE JUSTICE GAP, *supra* note 263.
[372] *Id.*
[373] *Id.*
[374] *Access to Justice as an Economic, Social, Cultural Right*. IACHR EXECUTIVE SUMMARY, Par. 65.

Gender bias manifested through judicial indications of the low importance of domestic violence cases creates disincentives for writing briefs, providing opening or closing arguments, or fully developing the facts or legal theories about domestic violence cases. These deterrents reduce the opportunities to practice the kind of law that might otherwise elevate the treatment of domestic violence cases on par with other civil cases. The marginalization of domestic violence cases often affects attorneys' perceptions of the nature of their work. Even legal services attorneys who most frequently represent domestic violence victims exhibit an attitude discounting these cases as routine "service" cases rather than complex "impact" litigation. [375]

Lack of MALR Inhibits Women's Ability to Fully Litigate Wage Discrimination Claims

262. Women are paid less than men across race and class lines. On average, women earn seventy-seven percent of the average male salary in similarly situated positions. In 2008, the median earnings of white, non-Hispanic women working full-time year-round was $37,389 compared to $51,244 for white, non-Hispanic men, meaning they earned only 73 cents for every dollar earned by their male counterparts.[376] Women account for three-quarters of workers in the ten occupations that typically pay less than $10.10 per hour, and even in these occupations, women make ten percent less than similarly situated men.[377]

263. The Center for American Progress has found that *"[d]iscrimination, not lack of training or education, is largely the cause of the wage gap*" (emphasis added).

[375] *See* Weissman, *supra* note 234at 1129, 1130.
[376] *See* NAT'L WOMEN'S LAW CTR., *supra* note 361.
[377] JOAN ENTMACHER ET AL., NAT'L WOMEN'S LAW CTR., MINIMUM WAGE (2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/women_are_76_percent_of_workers_in_the_10_largest_low-wage_jobs_and_suffer_a_10_percent_wage_gap.pdf.

264. Article 23 of the Universal Declaration of Human Rights states "Everyone has the right to work . . . to just and favourable conditions of work and to protection against unemployment . . . the right to equal pay for equal work . . . [and] just and favourable remuneration . . .."[378] Women and people of color who face discrimination in the workforce and are paid in a discriminatory manner are denied the universal right to work and receive equal pay for equal work, and have few means to right these wrongs when they do not have MALR to challenge such discrimination.

265. Domestic law has recognized the illegality of wage discrimination. However, the process for filing a wage discrimination claim is complicated and it can be very difficult for a plaintiff secure legal representation.[379] A plaintiff must file a complaint with the Equal Employment Opportunity Commission (EEOC) if she wishes to make a Title VII claim of wage discrimination (federal law). If the EEOC decides to investigate and prosecute the complaint, the EEOC, and not the employee, directs the lawsuit. If the EEOC declines to investigate, the plaintiff may seek to sue in federal court.

266. In order to prevail in a wage discrimination claim, the plaintiff bears the burden of proof, and in certain claims, must prove intentional discrimination. This is a high evidentiary bar to overcome, and the litigation and discovery costs associated with a successful claim are great. Private attorneys are likely to accept only very strong wage discrimination cases where damages are significant, and then, on a contingency basis.

267. 2012 LSC indicate that only .3 percent of LSC funded cases were categorized as Employment Discrimination Cases. This low number is likely attributable in part to the

[378] UDHR, *supra* note 30 at art. 23.

[379] According to the White House's Equal Pay Task Force, many "employees and employers are insufficiently educated on their rights and obligations with respect to wage discrimination" and has proposed a public education campaign. *See* National Equal Pay Task Force, http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf.

fact that LSC funds cannot be used to bring a class action lawsuit which is one of the most effective legal strategies for combating wage discrimination.[380] At the same time, Legal Services Corporation-funded programs are the primary, if not the sole means by which poor women can obtain legal representation. Thus, poor women are effectively prohibited from the type of legal claim that most effectively remedies wage discrimination. As a result, poor women suffering from gender discrimination in the work place are denied MALR and fundamental justice.

268. Without the ability to seek legal remedies to correct the situation, women will remain in a permanent state of second-class citizenship.

269. The lack of meaningful access to legal representation especially adversely impacts women of color. Statistically, African American and Hispanic women, by virtue of race and gender, are disproportionately affected by wage discrimination. In 2008, an African American woman earned sixty-one cents for every dollar earned by a white, non-Hispanic man, while a Hispanic woman earned only fifty-two cents on the dollar compared to white, non-Hispanic males."[381]

Racial Minorities: Disparate and Discriminatory Impact and the Need for MALR

270. The U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophonia, and Related Intolerance found that the intersection of race and poverty "creates structural problems that go far beyond patterns of income."[382] The U.N. Special Rapporteur found that the intersection of race and poverty "interacts with a

[380] See Ariane Hegewisch, *Ending Sex and Race Discrimination in the Workplace: Legal Interventions That Push the Envelop*e, THE INSTITUTE FOR WOMEN'S POLICY RESEARCH, http://www.iwpr.org/publications/pubs/ending-sex-and-race-discrimination-in-theworkplace-legal-interventions-that-push-the-envelope-1.
[381] *Id.*
[382] Doudou Diène, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, United Nations General Assembly, Apr. 28, 2009, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/130/57/PDF/G0913057.pdf?OpenElement.

number of mutually reinforcing factors, such as poor educational attainment, low-paying wages and inadequate housing, which create a vicious cycle of marginalization and exclusion of minorities."[383] MALR in a range of civil matters is key to alleviating the harms discrimination by combating "the overrepresentation of minorities in inferior schools, more vulnerable neighbourhoods, the juvenile justice system and the criminal justice system are to a large extent linked to their overall socio-economic situation."[384]

271. The U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophonia, and Related Intolerance found that:

- "[P]eople of African descent [in the United States] continue to suffer from discriminatory and consequently inadequate access to housing at various stages of the rental or sale process. In the United States, one in five individuals of an ethnic or racial minority experiences discrimination during a preliminary search for housing."[385]
- "23.7 percent of African American households and 21.7 percent of Hispanic households suffered from food insecurity."[386]
- "In the United States, where health insurance is correlated to employment and income, a significant number of persons of African descent are uninsured. Moreover, structural discrimination by healthcare institutions, and sometimes health professionals, means that people of African descent are often faced with unequal access to medicines and treatments."[387]
- "[S]ome laws and policies that are prima facie non-discriminatory but they have disparate effects for certain racial or ethnic groups. The key example of such practices is mandatory minimum sentences . . . work needs to be done to review mandatory minimum sentences for crack cocaine, which disproportionately affect African-Americans."[388]

These findings demonstrate ongoing discrimination against people of color in fundamental human rights realms. Legal representation is required to challenge these violations and the adverse effects of racial discrimination and poverty.

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[383] *Id.*
[384] *Id.*
[385] *Id.*
[386] *Id.*
[387] *Id.*
[388] *Id.*

272. Poor racial minorities make of the majority of LSC clients.[389] However, members of these groups do not have MALR due to the chronic underfunding of LSC agencies. LSC agencies are forced to routinely turn away eligible clients, who are largely members of racial minorities.

273. While there are only limited studies about the impact limited access to counsel has on racial minorities, a shadow report to the 2007 Periodic Report of the United States of America on Compliance with the CERD noted that, "[s]ince racial minorities are disproportionately poor, they are disproportionately harmed by the lack of civil counsel."[390] The shadow report looked to empirical evidence that found:

- "A 1997 Report issued by California's Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts estimated that about eighty-five percent of those appearing without counsel in family court are women, and that the majority are women of color. According to the Report, the parties appearing without counsel in the California family courts were "consistently treated with less respect and given insufficient information to carry out the roles that were assigned to them in representing themselves." The Report noted that these women "suffer a composite prejudice or bias based on the fact that they are women of color."[391]
- "Low-income litigants, who include a disproportionate number of women and minorities, are often disadvantaged in the family court system because they are not represented by counsel. Specifically, they often do not receive sufficient and comprehensible information concerning the availability of reduced fee and pro bono representation, nor do they receive complete information about their procedural and substantive rights and responsibilities."[392]

274. Despite the fact that studies show that people of color are treated unfairly by the justice system, remarkably:

> no work from the contemporary national surveys have yet focused on measuring and explaining race differences in the incidence of problems, in disputing behavior, in

[389] 53.6 percent of LSC clients were classified as either Black, Hispanic, Asian, Native American, or other. *See LSC 2021 Fact Book*, LEGAL SERVICES CORPORATION at 24 *available at* http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/ClientDemographics%282012FactBook%29.pdf
[390] *Access to Civil Justice*, Racial Disparities and Discriminatory Impacts Arising from Lack of Access to Counsel in Civil Cases, NORTHEASTERN SCHOOL OF LAW, http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cerd2008accesstociviljustice.pdf
[391] *Id.*
[392] *Id.*

how problems are handled, or with what results... [and] [n]o major qualitative study has focused expressly on race and disputing, justiciable problems, or with civil courts or staff."[393]

The Civil Collateral Consequences of Criminal Records Adversely Impacts Racial Minorities

275. Racial minorities are disproportionately imprisoned by the criminal justice system in the United States due to discriminatory police and judicial practices, as well as inadequate assistance of counsel due to overburdened and underfunded public defenders.[394] Besides the tangible impact of imprisonment, convicted felons must also face the collateral consequences of felony convictions upon reentering civic and private life. For example, after being released from prison, racial minorities "find themselves restricted from governmental assistance programs, such as housing, employment, education, and subsistence benefits."[395]

276. The federal collateral consequences of felony convictions include the following concerns:

- Federal law forbids felons from holding many government jobs or receiving federal contracts.
- The Higher Education Act of 1998 suspends their eligibility for student loans for at least a year, even for simple possession; longer, for second offenses and for selling drugs. This loss of benefits *may* be reinstated if the person goes through an "approved" drug treatment program."[396]
- People convicted of a drug felony can be denied all forms of federal assistance, including food stamps. Although states can opt out or narrow the focus of these penalties, only twelve states have entirely rejected them; slightly more than half have narrowed the scope of these rules.
- Federal law forbids all convicted felons from owning a firearm.

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[393] Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 350 (2008).
[394] *See infra* ¶ 427.
[395] Julie Ajinkya, *Top Five Facts about Women in Our Criminal Justice System,* CENTER FOR AMERICAN PROGRESS, HTTP://WWW.AMERICANPROGRESS.ORG/ISSUES/WOMEN/NEWS/2012/03/07/11219/THE-TOP-5-FACTS-ABOUT-WOMEN-IN-OUR-CRIMINAL-JUSTICE-SYSTEM/.
[396] Hugh Lafollette, *Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 22 J. OF APPLIED PHIL. 3 (2005).

- Everyone convicted of a drug-related felony, and indeed, many former felons, can be denied access to federal housing.

277. States may also impose additional civil consequences for felony convictions:

- Nineteen states may terminate the parental rights of convicted felons.
- In twenty-nine jurisdictions (includes states and the District of Columbia) being convicted of a felony is 'legal ground for divorce.'
- In twenty-five jurisdictions, convicted felons can never hold public office.
- In six states a felon can never hold public employment.
- In thirty-one jurisdictions convicted felons are permanently barred from serving on a jury.
- Forty-six jurisdictions require former felons to register with local law enforcement.
- All sexual offenders must register with local law enforcement officials for at least ten years after release from prison; longer times for certain offenses. The names of those registered are made available to any member of the public.[397]

278. In addition, there are market consequences for felony and misdemeanor convictions. Private employers may consider not hiring job applicants who have criminal records. Studies show that "a criminal record reduces the likelihood of a job callback or offer by approximately fifty percent."[398]

279. The EEOC has stated that while private employers "may consider" criminal background checks if they use an "individualized assessment,"[399] employers may not impose "an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII."[400] The EEOC makes clear those employers who use criminal background checks as a proxy for race may be in violation of Title VII.[401]

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[397] *Id.*
[398] Pager, Devah, *The Mark of a Criminal Record*, AM. J. SOC. 108 (2003).
[399] "Last year, the U.S. Equal Employment Opportunity Commission issued guidance that doesn't bar the use of criminal checks but that urges employers to consider the crime, its relation to an applicant's potential job, and how much time has passed since the conviction." William Harless, *'Ban the Box' Laws Make Criminal Pasts Off-Limits*, WSJ, Aug. 3, 2013,http://online.wsj.com/news/articles/SB10001424127887323997004578640623464096406
[400] Michelle Natividad Rodriguez, *65 Million Need Not Apply*, NAT'L EMP. LAW PROJECT, http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1
[401] *Id.*

280. Despite the EEOC guidance, a 2010 National Employment Law Project (NELP) study showed that major employers across the country "systematically" violate Title VII by requiring job applicants to show that they do not have an arrest history or felony or misdemeanor convictions.[402] The NELP study shows that "employers, staffing firms, and screening firms continue to disregard civil rights and consumer protections, categorically banning people with criminal records from employment."[403]

281. Given the widespread use of criminal background checks as a proxy for racial discrimination, individuals with criminal records routinely have their Title VII rights violated. They may have other rights violated as well, including voting, access to health, education, and housing.

282. In order to mitigate the collateral consequences of a criminal record, some states have passed "Ban the Box" laws. These laws "typically remove the question on the job application about an individual's conviction history and delay the background check inquiry until later in the hiring process."[404] To date, ten states have passed "Ban the Box" legislation.

283. At the individual level, justice requires MALR in cases where a formerly incarcerated individual's rights have been violated. Access to counsel would help to alleviate the barriers to re-entry that many individuals with criminal records face when attempting to reenter civil society.

284. At the macro level, lawyers are necessary to seek policy changes with regard to obstacles that formerly incarcerated people face in their attempt to re-enter society after they have served their sentences. Policy and legislative advocacy are necessary to change

[402] *Id.*
[403] *Id.*
[404] *Id.*

laws and policies that perpetuate disproportionate poverty, racism and inequities that flow from incarceration. These are civil matters and require civil legal representation. Yet the main source of lawyers for the poor, i.e., LSC-funded programs, are prohibited from advocating and appearing before "legislative bodies or in administrative rulemaking proceedings."[405] These prohibitions should be lifted so that lawyers can meaningfully advocate for their clients.

Lack of MALR in Banking Proceedings Adversely Impacts Communities of Color

285. Individuals involved in banking proceedings such as foreclosure and bankruptcy proceedings fare better when they have the assistance of counsel. For example, "[b]esides improving a debtor's chances during the bankruptcy proceedings, attorneys play a key role in deciding whether the debtor even files for bankruptcy in the first place."[406]

286. Low-income African Americans were disproportionately impacted by the 2008 Recession and the sub-prime mortgage housing collapse. African American communities were in the crosshairs of the foreclosure and bankruptcy crisis because nearly fifty percent of all loans given to African American families were deemed "subprime." Consequently, African Americans have borne the brunt of the crisis and have lost their homes and assets at disproportionately high rates compared with other populations in the United States.

287. African American litigants have largely faced bankruptcy proceedings *pro se,* without the assistance of counsel. In Washington D.C. "blacks are overrepresented (seventy-eight percent of petitioners) and whites underrepresented (eighteen percent) among bankruptcy

[405] *See* Houseman, *supra* note 210 at 4.
[406] Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231 (2009).

court *pro se* petitioners."[407] Given that the presence of an attorney results in more favorable outcomes for defendants in bankruptcy proceedings, it is noteworthy that African Americans are largely unrepresented and, in turn, their economic interests are unprotected.

288. Economic stability is a core human right, yet Black defendants in bankruptcy proceedings in the United States often navigate the legal system alone. The federal government and the states should supply legal representation at state expense when an individual is at risk of losing their assets, their home, and subjected to a debt restructuring plan.

The United States Needs MALR for Vulnerable Groups to Meet International Human Rights Norms

289. While laudable, pilot programs and *ad hoc* initiatives have not adequately addressed the unique legal needs women and racial minorities face. As long as women and racial minorities receive a disproportionate share of legal services in the United States, they will continue to bear the burden of disproportionate poverty in violation of multiple international human rights norms.

290. The IACHR has stated that member States have an obligation to provide free legal services "in order to enable groups that suffer disadvantage and inequality to access the judicial protective bodies and information about the rights they possess and the judicial resources available to protect them."[408] Increased access to legal representation would help the United States realize its international human rights obligations and alleviate women and people of color's disproportionate poverty and the harms of discrimination.

[407] *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias Special Committee on Race and Ethnicity*, 64 GEO. WASH. L. REV. 189, 268 (1996).
[408] *Access to Justice as an Economic, Social, Cultural Right*. IACHR EXECUTIVE SUMMARY, Par. 8.

G. Conclusion: Meaningful Access and Civil Legal Claims

291. Meaningful access to legal representation is necessary in order to protect fundamental human rights such as the right to housing and the right to family integrity. Further, meaningful access to legal representation is necessary in order for vulnerable populations such as women and people of color to challenge the adverse effects of pervasive racial discrimination and poverty in the United States.

292. The right to housing encompasses myriad human rights that affect not only homeowners, but the tenants of landlords as well. For example, foreclosure and eviction leads to homelessness, which affects not only adults, but children as well. Homelessness destroys families and puts people at risk of being arrested or physically assaulted. Because housing is a fundamental right, protection of this right should be prioritized. Studies have revealed that legal representation helps tenants in eviction proceedings remain in their homes. Unfortunately, the right to housing is insufficiently protected, as most tenants facing eviction and foreclosure do not have meaningful access to legal representation. Although some states are working towards providing counsel in these cases, representation is still rare.

293. The right to family is a fundamental interest protected by international and domestic law. However, poor, rural, minority, and mixed status families are threatened by a disproportionate impact of termination of parental rights. Most parents in termination of parental rights proceedings are indigent. While some states provide counsel for low-income parents, others do not. The result is a patchwork system where parents' access to justice and fundamental rights depends on geography. These families face additional

risks to their family integrity because counsel appointed for termination of parental rights cases are often inadequate and in effective.

294. Women and people of color are disparately and adversely impacted by the lack of meaningful access to justice because they are an especially vulnerable population. Women and people of color are disproportionately poor, and, as a consequence, face higher rates of homelessness and food insecurity. Further, women and people of color are poorer then similarly situated counterparts *because* of their race and gender. Discrimination based on race and gender is pervasive in the United States and legal representation is required to challenge these violations and the adverse effects of racial discrimination and poverty. Meaningful access to legal representation for women and people of color include, but are not limited to, fighting wage discrimination, receiving representation in domestic violence cases, challenging discriminatory bankruptcy and lending practices, and fighting for policy changes that would expand access to social services for formerly incarcerated individuals. The United States' ongoing failure to provide meaningful access to legal representation for poor women and poor people of color means that the United States is not in compliance with various international human rights treaties, including: the IACHR, the UDHR and the ICCPR.

295. In sum, people combating evictions, foreclosures, and TPR proceedings have woefully insufficient access to meaningful access to legal representation. Further, vulnerable populations such as women and people of color, also suffer from inadequate legal representation and, as a consequence, are unable to fully exercise their basic human rights and due process rights. While some states have created special pilot programs to address

the inadequacies, the patchwork of due process rights that has emerged at the state level is still insufficient. The federal government should and must respond to this crisis.

III. IMMIGRATION: MEANINGFUL ACCESS TO LEGAL REPRESENTATION & INTERNATIONAL HUMAN RIGHTS NORMS

294. Removal proceedings (commonly known as deportation proceedings) are federal administrative proceedings to determine if a person could be removed or deported under the immigration laws of the United States.[409] Removal proceedings take place before an immigration judge situated within the Executive Office for Immigration Review (EOIR).[410] A removal order requires the immigrant to leave the United States and bars the immigrant from returning, in some cases up to a lifetime.[411] In 2013, U.S. Immigration and Customs Enforcement (ICE) removed 368,644 immigrants.[412] In 2010, seventy-four percent of cases before immigration judges resulted in removal orders.[413]

295. The following story is just one of thousands of people who are removed from the United States every year:

> Consider Marco Merino-Fernandez, a 35-year-old client . . . . He was brought from Chile to the United States legally, when he was five months old, but like many legal permanent residents, he never became a citizen. He speaks English fluently and got a G.E.D. in Florida. Returning from a vacation abroad, in 2006, he presented his green card to immigration agents, who discovered that Mr. Merino-Fernandez, more than a decade earlier, had been convicted of two misdemeanors for drug possession, small amounts of marijuana and LSD. He was detained for months. After a brief hearing, a judge ruled that he was "an aggravated felon" and ordered him deported to Chile, where he had not been since infancy and where only a few relatives remained. After arriving in Chile, in 2007, Mr. Merino-Fernandez learned that his mother had died in Florida; he wasn't able to return for her funeral.[414]

[409] 8 U.S.C.S § 1229.
[410] *Id*.
[411] 8 U.S.C. 1182(a)(9) (2014).
[412] FY 2013 ICE Immigration Removals. U.S. Department of Homeland Security, available at https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf
[413] Executive Office for Immigration Review, U.S. Department of Justice, 2010 Statistical Yearbook, D2 (2010), available at http://www.justice.gov/eoir/statspub/fy10syb.pdf
[414] Daniel Kanstroom, *Deportation Nation*, N.Y. TIMES, Aug. 30, 2012, http://www.nytimes.com/2012/08/31/opinion/deportation-nation.html.

296. Article 13 of the ICCPR states, "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling security otherwise require, be allowed to submit reasons against his expulsion and to have his case reviewed by, ***and be represented for the purpose before, the competent authority or a person or persons designated by the competent authority."***[415]

297. Furthermore, as discussed throughout this report, there is a consensus among international human rights instruments that individuals should be guaranteed access to MALR when fundamental liberty interests and basic human needs are at stake.

298. Removal proceedings impact fundamental interests, including the right to family and family integrity,[416] the right to liberty,[417] the right to a fair hearing, and more.[418] Removal can have severe consequences, including permanent separation from family members or being returned to a country where a person's life is in danger. Supreme Court Justice Louis Brandeis famously wrote, removal may lead to the "loss of both property and life; or of all that makes life worth living."[419] With such essential human rights at stake, MALR is critical.

299. Yet the United States does not recognize a right to have counsel appointed in immigration proceedings. Section 292 of the Immigration Nationality Act allows

[415] ICCPR, *supra* note 28 at art. 13.
[416] General Comment No. 16: The right to respect of privacy, family, home . . . (art.17), U.N. H.R. Comm., 32d Sess., ¶ 5 (1988).
[417] See ICCPR, art. 9(1); American Declaration of the Rights and Duties of Man (ADHR), art. 25, O.A.S. Res. XXX, Int'l Conf. of Am. States, 9th Conf., OEA/ser.L/V/II.23 doc.21 rev.6 (May 2, 1948).
[418] ICCPR, art. 14(1); *CERD*, *supra* ¶ 30, art. 6., UDHR, art. 18
[419] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

noncitizens in removal proceedings to have the "privilege" of being represented by counsel, but explicitly states that this shall be at "no expense of the government."[420]

300. The one important exception, which has been a positive recent development in immigration proceedings, requires the government to provide legal assistance for mentally disabled individuals in immigration courts.[421] The development stems from the 2013 federal court decision in *Franco-Gonzalez v. Holder*,[422] a class-action lawsuit brought on the behalf of mentally disabled immigration detainees who were forced to represent themselves during their detention and deportation proceedings.[423] Shortly after the decision, federal immigration officials issued a new federal government policy making "government-paid legal representation available to people with mental disabilities in immigration courts in every state."[424]

301. As a result, the vast majority of the hundreds of thousands of noncitizens appearing in immigration removal proceedings every year do so without legal representation.[425] Without a right to MALR in immigration proceedings, noncitizens have trouble securing representation because they are unfamiliar with the legal system and don't know how, they can't afford it, and/or they are detained.

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[420] 8 U.S.C. § 1362 (2006).
[421] *See* Julia Preston, *In a First, Judge Orders Legal Aid for Mentally Disabled Immigrants Facing Deportation*, NY TIMES (April 23, 2003), http://www.nytimes.com/2013/04/25/us/legal-aid-ordered-for-mentally-disabled-immigrants.html?ref=politics&_r=1.
[422] Franco-Gonzalez v. Holder, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, (C.D. Cal. Apr. 23, 2013)
[423] *See* Preston, *supra* note 421.
[424] *Id*.
[425] *See* Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2013); Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 169 (2010).

302. The result is detrimental to immigrants and their families. Evidence from studies consistently shows that legal representation makes a drastic difference on an immigrant's likelihood of success in these proceedings.[426]

303. Given the fundamental liberty interests at stake in immigration proceedings, and the clearly demonstrable impact of legal representation in safeguarding these basic liberties, the United States must provide a right to appointed counsel in order to comply with international human rights norms.

A. A Civil Proceeding

304. The ICCPR clearly states that "[e]veryone 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 and of any criminal charge*** against him."[427]

305. One of the central justifications given for not providing a right to counsel at the government's expense in immigration proceedings is that these proceedings are civil in nature. As such, they are not entitled to the same degree of protections as criminal defendants under the Sixth Amendment right to counsel.[428]

Criminal Punishment vs. Deportation

306. The main purported distinction between criminal cases and removal proceedings is that removal does not constitutes a punishment the same way that incarceration does for criminal defendants.[429] However, for many immigrants, the prospect of removal is far more formidable of an outcome than that of imprisonment.

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[426] Johnson, *supra* note 425 at 2409; AM. IMMIGRATION COUNCIL, TWO SYSTEMS OF JUSTICE: HOW THE IMMIGRATION SYSTEM FALLS SHORT OF AMERICAN IDEALS OF JUSTICE 10 (2013).
[427] International Covenant on Political and Civil Rights, entered into force Mar. 23, 1976, 999 U.N.T.S. 171, S. Exec. Doc. No. E, 95-2, art. 10.
[428] *See* KATE M. MANUEL, CONG. RESEARCH SERV., R43613, ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6 (2014).
[429] Fong Yue Ting, 149 U.S. at 698 (1893).

307. The Supreme Court itself has conceded that removal does constitute a punishment:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.[430]

From the Court's acknowledgement of the penalties suffered by an individual who is not able to prove legal grounds to remain in the United States, it follows that there should be a right to counsel to protect the rights implicated by such penalties.[431]

No Procedural Safeguards for Immigrants

308. Not only does the classification as a civil case deprive many immigrants of the much needed assistance of meaningful legal representation, it deprives them of several procedural safeguards required in criminal proceedings. This deprivation only exacerbates their need for legal counsel.

309. Criminal defendants are tried in the jurisdiction the offense occurred to prevent separating defendants from families, difficulties finding attorneys, and problems gathering evidence.[432] In contrast, immigrants are routinely put in removal proceedings far away from the state they were stopped in, far away from their attorneys, family and loved ones, and any evidence necessary for their case.[433]

310. While United States citizens are protected by the Ex Post Facto Clause[434] in criminal proceedings, immigrants in removal proceedings are not.[435] Since Congress expanded

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[430] Bridges v. Wixon, 326 U.S. 135, 154 (1945).
[431] U.S. CONST. amend. VIII.
[432] *See* U.S. CONST. art. III, §2, cl. 2.; U.S. CONST. amend. VI.
[433] *See* U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 0-3 (2009), *available at* https://www.oig.dhs.gov/assets/Mgmt/OIG_10-13_Nov09.pdf ("Transfer determinations made by ICE officers at the detention facilities are not conducted according to a consistent process," which "leads to errors, delays, and confusion for detainees, their families, and legal representatives").
[434] U.S. CONST. art. I, §9, cl. 3.

the definition of "aggravated felonies," immigrants may be removed based on old criminal convictions that would not have made them deportable when they were committed, or based on conduct for which they were never imprisoned.[436] Immigrants may even be deported for minor convictions many years later.[437]

311. Criminal defendants are warned of their rights before interrogation, immigrants may be given less informative warnings after removal proceedings have begun rather than after questioning.[438]

312. Immigrants do not enjoy the same evidentiary protection as other defendants in court. Unlike criminal defendants, immigrants facing removal proceedings are generally not protected by the Fourth Amendment or the Exclusionary Rule.[439] Immigration officials often enter private homes without consent or search warrants and may even detain or arrest persons without probable cause.[440] Hearsay is also admissible in removal proceedings, but is not admissible in other cases.[441]

313. In removal proceedings, the State is not required to share exculpatory evidence with the accused.[442] Aliens in immigration proceedings do not have automatic access to their

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[435] Galvan v. Press, 347 U.S. 522, 531 (1954); INS v. St. Cyr, 533 U.S. 289 (2001) (holding that Congress may retroactively change removal grounds).
[436] 8 U.S.C. §1101(a)(43).
[437] *See, e.g.*, Rivas-Melendrez v. Napolitano, 689 F.3d 732, 739 (7th Cir. 2012) (The court dismissed a challenge to a removal order of a "long-time permanent resident, husband, and father of four who has served in the military and remained gainfully employed—on the basis of a 30-year-old statutory-rape conviction.").
[438] *See* Matter of E-R-M-F- & A-S-M-, 25 I&N Dec. 580, 588 (2011). *See also* Bustos-Torres v. INS, 898 F.2d 1053, 1056 (5th Cir. 1990) ("*Miranda* warnings are not required in the deportation context, for deportation proceedings are civil, not criminal in nature . . . "); Trias- Hernandez v. INS, 528 F.2d 366, 368 (9th Cir. 1975) (noting that removal proceedings "are civil rather than criminal in nature and rules for the latter are inapplicable").
[439] INS v. Lopez-Mendoza, 468 U.S. 1032, 1056 (1984) (noting that the only evidentiary rule applicable in removal proceedings is that the evidence be relevant and material); 8.C.F.R. §1240.1(c) (2014).
[440] *See* Matthew Mulqueen, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN'S L. REV. 1157, 1160 (2008).
[441] *See* Matter of Grijalva, 19 I. & N. Dec. 713, 722 (BIA 1988).
[442] *See* AM. IMMIGRATION COUNCIL, *supra* note 426 at 8 (defining "exculpatory evidence" as evidence in the government's possession that is favorable to the accused).

immigration records that are in the government's possession.[443] In many cases these records may provide a legal basis to challenge the removal order,[444] but the immigrant may only receive this information by filing a Freedom of Information Act[445] request. This is an entirely different process than the removal process, and may take longer than the removal process. Moreover, it is nearly impossible that an immigrant will both know to file this and how to do so without the assistance of legal counsel.[446]

Scant Limits on Authority of Officials

314. Criminal defendants accepting plea deals must appear before a judge to make sure that they were not forced to take the plea and understand the consequences of accepting a guilty plea.[447] Immigrants in removal proceedings, however, may agree to "stipulated removal" without ever appearing before a judge.[448] Immigrants who agree to stipulated removal may be advised of their rights by immigration officers before they are "asked" to sign removal-related forms, rather than a judge who might attend to notice and due process concerns. Often, they are asked to sign forms quickly and without the advice and counsel of an attorney.[449]

315. Unlike criminal defendants, whose cases are adjudicated by a neutral party, immigrants are adjudicated by immigration judges. The judges are actually attorneys appointed by the Attorney General in the DOJ, the division of the executive branch that is bringing the

[443] *Id.*
[444] *See id.* (describing a 2010 case where a man's claim that he was a naturalized U.S. citizen was supported by a naturalization application in his immigration record, but he was removed because he was unable to gain access to the documents).
[445] 5 U.S.C.S. § 552 (2014).
[446] *See* Dent v. Holder, 627 F.3d 365 (9th Cir. 2010)(holding that a failure to provide immigration files to non-citizens in contested removal proceedings may be a due process violation).
[447] Brady v. United States, 397 U.S. 742, 748 (1970).
[448] 8 U.S.C. §1229a(d) (2014).
[449] *See* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication,* 91 N.C.L. REV. 475 (2013) (arguing that stipulated removal violates the Fifth Amendment).

case against the immigrant. These immigration judges are subject to performance evaluations instead of judicial standards of conduct that apply to other judges.[450] Despite repeated requests to remove immigration judges from the executive department, some from immigration judges themselves, the United States refuses to allow immigration courts to be independent tribunals.[451]

316. Additionally, many immigrants who do not meet the requirements for admission to the United States are subject to expedited removal.[452] They are often removed without ever seeing an immigration judge, ***because immigration officers have the power to issue final orders of removal.*** [453] ***In fact, most immigration removal orders are issued by immigration officers who are not judges, and may not even be lawyers***.[454] At least seventy-five percent of immigrants removed in 2012 never had a hearing or appeared before an immigration judge.[455]

317. In a clear violation of both CERD, racial profiling is a common in immigration enforcement.[456]

Immigrants Have Limited Opportunities for Relief

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[450] *See* Hon. Dana Leigh Marks, *"Still a Legal 'Cinderella'? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*," FED. LAWYER, March 2012, at 29-30 (Dana Leigh Marks is President of the National Association of Immigration Judges' National Union.).

[451] *See, e.g.*, Maria Sacchetti, *Immigration Judges Pushing for Independence, Say Department Impedes Timely, Open Operation*, BOSTON GLOBE, July 17, 2013, *available at* http://www.bostonglobe.com/metro/2013/07/16/federal-immigration-judges-seek-independence-from-department-justice/S27pDSkb1qx2CoWUmLLR7H/story.html; Dana Leigh Marks, *Let Immigration Judges be Judges*, The Hill, (May 9, 2013), *available at* http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges; Dana Leigh Marks, *Needed: An Independent Court*, N.Y. TIMES, July 12, 2011 *available at* http://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/an-independent-immigration-court-is-needed; Judge Stephen Reinhardt, *Judicial Independence and Asylum Law*, IARLJ CONFERENCE 2002 18 (2003).

[452] 8 U.S.C.S. §1225 (2014).

[453] 8 U.S.C.S. §1225(b)(1)(A)(i) (2014).

[454] *See* AM. IMMIGRATION COUNCIL, A DECADE OF RISING IMMIGRATION ENFORCEMENT 3 (2013), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/enforcementstatsfactsheet.pdf.

[455] JOHN F. SIMANSKI AND LESLEY M. SAPP, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 (2013) *available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf.

[456] *See* Carrie L. Arnold, *Racial Profiling in Immigration Enforcement*, 49 ARIZ. L. REV. 113, 119-121 (2007).

318. Unlike criminal defendants who have rights to direct and collateral appeals, immigrants have limited opportunities to challenge removal orders.[457]

319. While criminal defendants may challenge a punishment as "cruel and unusual,"[458] immigrants may not challenge removal orders according to the same standard.[459] Legal scholars and some judges, however, have long decried removal as cruel and unusual punishment.[460] Immigrants who are removed often have developed substantial ties to their community in the United States. They may have to permanently say goodbye to close family members, including parents, spouses, and even minor children, employment and educational endeavors, their religious practices, and other forms of community. Some immigrants are removed knowing that they are being returned to a country where they face certain death.[461]

320. The United States made a commitment to protect these immigrants in the CAT, and yet, in 2012, immigration officials only granted protection in two percent of CAT asylum applications.[462]

321. Immigrants also may not challenge "discretionary" determinations, including waivers of some grounds of ineligibility, which are often granted as humanitarian relief.[463]

B. Immigration Detention: A System of Abuse

[457] 8 U.S.C.S. §1252 (2014)
[458] U. S. CONST. amend. VIII
[459] *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).
[460] *See, e.g.*, *id*. at 759 (Field, J., dissenting) ("[N]othing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted.").
[461] *See Lawsuit Claims Woman's Deportation was a Death Sentence*, TEX. OBSERVER, June 6, 2013 *available at* http://www.texasobserver.org/lawsuit-claims-womans-deportation-was-a-death-sentence/.
[462] U.S. DEP'T OF JUSTICE, FISCAL YEAR 2012 STATISTICAL YEARBOOK M1 (2013), *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf.
[463] 8 U.S.C. § 1252 (2014).

322. Every day, hundreds of thousands of immigrant detainees in the United States face indefinite periods of confinement and complex immigration proceedings without meaningful due process guarantees or access to legal representation.

323. Article 9 of the ICCPR states that "[e]veryone has the right to liberty and security of person" and that "[n]o one shall be subjected to arbitrary arrest or detention."[464]

324. International as well as regional bodies have allowed for immigration detention, recognizing that it is one of the tools governments have to monitor border security and enforce immigration law.[465] For example, in the 2010 Inter-American Court of Human Rights case *Velez Loor v. Panama*, the Court pointed out that "States may establish mechanisms to control the entry…of individuals who are not nationals."[466]

325. However, these international and regional authorities have also made it unmistakably clear that immigration detention is subject to important limitations. For example, the Special Rapporteur on the Human Rights of Migrants noted in 2008 that international law "recognizes every State's right to set immigration criteria and procedures" but "does not allow unfettered discretion to set policies for detention …of noncitizens without regard to human rights standards."[467] Likewise, in *Velez*, the Inter-American Court emphasized that a State's mechanisms for regulating its borders must "[be] compatible with the norms of human rights protection."[468]

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[464] ICCPR, *supra* note 28 at Art 9(1).
[465] Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L. J. 243, 267-68 (2013). *See also* ICCPR GENERAL COMMENT NO. 15, *supra* note 483.
[466] Velez Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 97 (Nov. 23, 2010).
[467] SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS, Addendum: Mission to the United States of America, U.N. Doc. A/HRC/7/12/Add.2, 9 (Mar.5, 2008) (by Jorge Bustamante).
[468] Velez, *supra* note 466; *also see* Gilman, *supra* note 465 at 267-68.

326. Numerous U.N. member countries that participated in the U.S.' Universal Periodic Review in 2010 made recommendations that the U.S. government to: ensure that immigrant detainees in deportation proceedings are entitled to counsel,[469] provide for language access in the courts,[470] incarcerate immigrants only exceptionally[471] and consider alternative to immigration detention.[472] These recommendations have yet to be implemented.

327. When DHS officials detain immigrants, they take away one of their most basic human rights— the right to liberty. This fact alone warrants guaranteeing immigrant detainees MALR and is at the heart of why the U.S. government needs to recognize immigrant detainees' right to representation.

U.S. Detention Policies Do Not Comply With International Human Rights Norms

328. The United States has one of the largest influxes of immigrants in the world.[473] The International Organization for Migration (IOM) reported that the United States had a total of 38.4 million international migrants in 2005.[474] Furthermore, the United States is "one of the leading countries for granting asylum and resettling refugees."[475] In an effort to manage this large influx of new immigrants the U.S. Congress "vastly expanded" the deportation and immigrant detention systems starting in the 1980s and 1990s.[476] Specifically, in 1996, the U.S. Congress passed the Illegal Immigration Reform and

[469] U.N. HUMAN RIGHTS COUNCIL, Report of the Working Group on the Universal Periodic Review, United States of America, Doc. A/HRC/16/11, 16th Session, ¶ 92.185 *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement.
[470] *Id*.
[471] *Id* ¶ 92.182.
[472] *Id* ¶ 92.212.
[473] *Id*. ¶ 2.
[474] *Id*.
[475] *Id*.
[476] Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to* Reform, 80 U. CHI. L. REV. 137, 141 (2013).

Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA).

329. According to the IACHR, these two pieces of legislation have "significantly expanded the use of mandatory detention without bond, added to the list of crimes that subject legal immigrants…to mandatory deportation, and generally created a more stringent approach to immigration policy."[477] Furthermore, the U.S. Supreme Court has acquiesced, or even given leverage, to this expansion at times through its case law. In the 2003 case *Demore v. Kim*, for instance, the Court upheld the institution of mandatory detention.[478]

330. Mandatory detention requires that an individual be held in one of the three hundred U.S. detention facilities,[479] without the possibility of release on bond, while their removal proceedings are pending. A large number of immigrants are subject to mandatory detention, regardless of the impetus for their removal or any consideration of whether "they pose a risk of flight or a danger to the community."[480]

331. The IACHR has emphasized that dealing with immigrants should be carried out with a "presumption of liberty" and that "immigration detention must be the exception" rather than the rule in enforcing immigration laws.[481] The 2012 U.N. High Commissioner for Refugees (UNHCR) guidelines on asylee detention also state that detention "should

[477] *Report on Immigration in the United States*, *supra* note 102 ¶ 5.
[478] Demore v. Kim, 538 US 510 (2003).
[479] Dora Schriro, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, U.S. Department of Homeland Security, p. 2 (Oct. 6, 2009) *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.Schriro.
[480] AM. IMMIGRATION COUNCIL, *supra* note 426 at 6.
[481] *Report on Immigration in the United States*, *supra* note 102 ¶¶ 39, 242 ("[T]o be in compliance with the guarantees protected in Articles I and XXV of the American Declaration, member States must enact immigration laws and establish immigration policies that are premised on a presumption of liberty—the right of the immigrant to remain at liberty while his or her immigration proceedings are pending—and not on a presumption of detention").

normally be avoided" and should always be "a measure of last resort."[482] These guidelines clarify that "[d]etention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case."[483]

332. The IACHR and others have also underscored that immigration detention is only one of many tools available to the State to satisfy immigration policy goals and that alternatives to detention should be pursued.[484] In fact, the ideal is for immigration detention to be eliminated completely as it takes away the fundamental liberty of an individual without criminal charge and is thus hard to justify.

333. Article 9 of the ICCPR further states that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court" so "that the court may decide…on the lawfulness of his detention and order his release if the detention is not lawful."[485]

334. The number of individuals in immigration detention has more than doubled from 209,000 in 2001 to 477,523 in 2012.[486] Detention has not only increased in terms of individuals detained, but it has also increased in terms of typical length of detention as

[482] U.N. High Comm'r for Refugees, GUIDELINES ON THE APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS AND ALTERNATIVES TO DETENTION (2012) *available at* http://www.refworld.org/pdfid/503489533b8.pdf.
[483] *Id*. *See also Report on Immigration in the United States*, *supra* note 102 ¶ 39; Human Rights Comm'n, *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) (This is the seminal international human rights case on immigration detention. It set out the proportionality analysis for immigration detention and held that such detention is arbitrary and a violation of human rights if it is not proven necessary.).
[484] *Report on Immigration in the United States*, *supra* note 102 ¶ 18. *See also* United Nations WORKING GROUP ON ARBITRARY DETENTION, REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION, Doc. A/HRC/10/21, ¶ 67 (February 16, 2009) ("[D]etention shall be the last resort and permissible only for the shortest period of time and that alternatives to detention should be sought whenever possible"), Das, *supra* note 476 at 140-45.
[485] ICCPR, *supra* note 28 at Art 9(4).
[486] *Report on Immigration in the United States*, *supra* note 102 ¶ 7; *See* Mark Noferi and Rachel Reyes, *Immigration Detention: Behind the Record Numbers*, CENTER FOR MIGRATION STUD. NEWS, Feb. 13, 2014, *available at* http://cmsny.org/immigration-detention-behind-the-record-numbers/.

well, with greater numbers of detainees to process and longer wait times in turn.[487] The Supreme Court has upheld mandatory detention based on the argument by the U.S. government that the average removal proceeding did not take more than forty-seven days.[488] However, forty-seven days is a significant deprivation of liberty. That time period could mean the separation of an individual's family, loss of a job, loss of property, and many other significant consequences.

335. Moreover, forty-seven days is only the average. As of 2010, about 5 percent of detainees (at roughly 19,000 individuals per year) were held for more than 4 months and another 2,100 detainees were held for more than a year.[489] In many cases, detention went on for much longer with some individuals being held for over a year pending removal proceedings.[490]

336. Immigration detention in the United States does not comport with human rights standards for civil detention as agreed upon by international and regional authorities alike. The sheer number of immigrants held in detention alone indicates a "systematic emphasis on detention" that is "without meaningful constraint" or individual case-by-case analysis.[491] In its thorough investigation of detention and due process in the United States, the IACHR itself concluded that the United States uses detention regularly, presuming rather than proving its necessity in most cases.[492]

Detention Becomes Barrier to Retaining Counsel

[487] Das, *supra* note 476 at 138. *See also* BEHIND THE RECORD NUMBERS, *supra* note 486.
[488] AM. IMMIGRATION COUNCIL, *supra* note 426 at 6.
[489] Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. 24, 49 (2010).
[490] *Id*. *See also* Das, *supra* note 476 at 138; BEHIND THE RECORD NUMBERS, *supra* note 486.
[491] Gilman, *supra* 465 at 295.
[492] *Report on Immigration in the United States*, *supra* note 102 ¶¶ 17-18.

337. Aside from the obvious denial of the basic right to liberty, another major problem with detention of noncitizens in removal proceedings stems from the remote locations in which they are detained. Immigrants are routinely placed in detention centers in remote locations, far from the locations at which they were apprehended.[493] Not only does this place considerable distance between the immigrant, their families, and the evidence they may need for the case, but it also may serve as a barrier for access to counsel.

338. In its recent March 2014 review of the U.S.'s ICCPR compliance, the U.N. Human Rights Committee also called attention to this important link between deprivation of liberty and the right to counsel stating: "The Committee is concerned that…mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the [ICCPR]" and that Committee urges the United States to "take measures ensuring that affected persons have access to legal representation."[494]

339. Detained respondents are significantly less likely to secure legal representation.[495] This is in large part because they are in detention and do not have any access to legal representatives in order to secure their services. Studies consistently indicate that over ninety percent of detained respondents are unrepresented in removal proceedings. A study of Seattle and Tacoma immigration courts showed that more than sixty-eight

[493] *See* AM. IMMIGRATION COUNCIL, *supra* note 426 at 9.
[494] U.N. Human Rights Committee, Mar. 10-28, 2014, *Concluding Observations on the Fourth Report of the United States of America*, ¶ 15 *available at* http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf.
[495] Peter Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation*, 78 FORDHAM L. REV. 541, 542 (2009).

percent of respondents were detained.[496] Of the non-detained respondents in that study, sixty-eight percent were able to obtain representation.[497]

340. A comprehensive report on immigration removal proceedings by the ABA noted that "remote facilities, short visiting hours, restrictive telephone policies, and the practice of transferring detainees from one facility to another – often more remote – location without notice stand in the way of retaining counsel for many detainees."[498]

341. For those detainees who must appear *pro se*, their detention prevents them from accessing legal resources, documents, and evidence that they may need to successfully challenge a removal order.[499]

342. A New York study launched by Judge Robert Katzmann of the Second Circuit Court of Appeals found that ninety-seven percent of unrepresented immigrant detainees lost their deportation cases while seventy-four percent of those represented and not detained were successful in securing the relief for which they qualified.[500]

343. The outcomes of these cases are not mere statistics. They implicate the fundamental rights of real people who lost their liberty for weeks, months or even over a year in detention facilities while waiting for their cases to proceed.[501] They also implicate the lives of countless immigrants who are now separated from their families and have lost their property, livelihoods and homes due to lack of a guaranteed right to counsel.

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[496] Adams, *supra* note 534 at 172.
[497] *Id*.
[498] A.B.A., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES § 5-9 (2010).
[499] *Id*.
[500] NEW YORK IMMIGRATION REPRESENTATION STUDY, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS (2011) 1, *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.
[501] BEHIND THE RECORD NUMBERS, *supra* note 486 (explaining that while DHS reported in 2009 that noncitizens in its custody were typically detained for an average of 30 days, an independent study "found the average length of detention was much longer for those in formal removal proceedings—81 days" and that 13% of detainees are held for six months or longer. More recent statistics show a continuing trend of long detention periods. The average length of detention for immigrant detainees in New York in 2011 was 205 days, almost seven months).

Criminalizing Practices in Immigration Detention Facilities

344. The United States currently has more than three hundred immigration detention facilities throughout the United States and its territories.[502] The majority of these facilities operate like prisons rather than civil detention centers. A 2009 report on ICE immigration detention stated that "[w]ith only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons."[503]

345. The same report points out that ICE has no formally published policy, procedures or technical manuals specific to immigration detention.[504] Instead, the report explains, "ICE relies primarily on correctional incarceration standards" in operating these detention centers.[505]

346. This criminalization of the immigration detention process is cause for great concern because as a matter of international, regional and U.S. law, immigration detention is separate and distinct from criminal incarceration.[506] Furthermore, the purported civil nature of the removal proceeding is the very reason that the U.S. government does not provide the same procedural safeguards to respondents in these proceedings as it does to criminal defendants, such as the right to appointed counsel.

347. In a 2012 report, the U.N. Special Rapporteur on the Human Rights of Migrant Workers noted that detention "should under no circumstance be of a punitive nature."[507] The

[502] Schriro, *supra* note 479.
[503] *Id*.
[504] *Id* at 16.
[505] *Id*.
[506] *See* ICCPR, *supra* note 28 Art. 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"). *See also* AM. CONVENTION, *supra* note 90 at Art. 5 ("Punishment shall not be extended to any person other than the criminal."); Kansas v. Hendricks, 521 U.S. 346, 356–64 (1997) (finding that civil commitment is constitutionally allowed but only in "narrow circumstances" and if there is no "punitive" objective or intent).
[507] Special Rapporteur on the Human Rights of Migrants, ¶¶ 31, 70 U.N. Doc. A/HRC/20/24 (Apr. 2, 2012).

Special Rapporteur has also stated that "[i]rregular migrants are not criminals *per se* and should not be treated as such."[508]

348. On a regional level, the Inter-American Court for Human Rights found in *Velez* that immigration detention is non-punitive in nature. Furthermore, in its 2009 report on immigration detention, the IACHR itself took great issue with the criminalization of immigration detention. It pointed to the fact that the American Declaration states that "no person may be deprived of liberty for non-fulfillment of obligation of a purely civil character."[509]

349. The IACHR's visits to immigration detention centers in Arizona and Texas in 2009 revealed that although conditions varied by center "they all employ disproportionately restrictive penal and punitive measures."[510] The visits exposed that immigrant detainees were made to wear prison uniforms and subjected to multiple head counts that "require[ed] that they remain in their beds for as much as an hour at a time."[511] Other times detainees were locked and confined to their cells or beds and were also handcuffed and shackled when they made court appearances or any time they were taken outside the confines of the detention center.[512] The IACHR called this treatment "unacceptable for any detainee" and a violation of the right to humane treatment.[513]

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[508] U.N. COMM'N HUMAN RIGHTS, *Specific Groups and Individuals: Migrant Workers*, E/CN.4/2003/85 (December 30, 2002) (by Gabriela Rodriguez Pizarro), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf.
[509] *Report on Immigration in the United States*, *supra* note 102 ¶ 33; IACHR, AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN, Art. XXV (May 2, 1948) *available at* http://www.refworld.org/docid/3ae6b3710.html.
[510] *Report on Immigration in the United States*, *supra* note 102 ¶ 246. *See also Conditions of Confinement in Immigration Detention Facilities*, ACLU, AT 9-10, *available at* https://www.aclu.org/files/pdfs/prison/unsr_briefing_materials.pdf (last visited June 9, 2015).
[511] *Id.*
[512] *Id.*
[513] *Id* ¶ 247.

350. It is clear that the criminalization of immigration detention is firmly prohibited by U.S. obligations under international and regional human rights norms.[514] Yet criminalizing treatment is commonplace in U.S. detention centers. This criminalization presents yet another reason immigrant detainees are entitled to the same right to appointed counsel as criminal defendants. Alternatively, it shows that MALR is necessary to protect against the use of criminalizing practices and to ensure that detention, if warranted, is truly civil in nature

MALR is Needed to Maintain Balance of Interests and Power Between the Government and Immigrant Detainees

351. Furthermore, immigration detention entails a gross imbalance of power. Immigrant detainees are often newcomers—unfamiliar with the language, culture and legal system of the United States. Even for those who have lived in the United States for many years, navigating the complex legal landscape of immigration law is nearly impossible without legal assistance. Yet these detainees are expected to read and understand dense legal documents, sort through the maze of immigration laws and regulations and present cohesive and coherent legal arguments to win their case.[515]

352. On the other hand, government attorneys representing the U.S. Department of Homeland Security (DHS) or the U.S. Immigration and Customs Enforcement (ICE), are intimately familiar with immigration provisions and procedures and are trained legal professionals.[516] Therefore, MALR is desperately needed to put the government and immigrant detainees on equal footing in adversarial proceedings. Without representation

[514] Gilman, *supra* note at 465; *Report on Immigration in the United States*, *supra* note 102 ¶ 245 (pointing out that ICE's administration itself has "repeatedly acknowledged that most undocumented immigrants are not detained in a manner or in conditions suitable to their status as civil detainees").
[515] Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 66-67 (2012).
[516] *Id.*

for the detainees, such immigration proceedings are inherently unjust and thus violate universal as well as domestic standards for a fair hearing.

Poor Conditions and Inhumane Treatment in Detention Facilities

353. Article 10 of the ICCPR states that "[a]ll persons deprived of their liberty shall be *treated with humanity and with respect* for the inherent dignity of the human person."[517] This article underscores the fact the government takes on the responsibility of treating immigrant detainees humanely when it makes the decision to detain.

354. Likewise, several international and regional treaty provisions, including Article 16 of the CAT and Article 5(2) of the American Convention strictly prohibit any form of torture or cruel, inhuman, or degrading treatment or punishment of any individual, particularly for individuals in detention or prison."[518]

355. U.S. jurisprudence echoes these international and regional standards for humane treatment of detainees. In *Youngberg v. Romero*, the U.S. Supreme Court stated that civil detainees have certain liberty interests, which include reasonably safe detention conditions, freedom from unreasonable physical restraint and the right to food, clothing, medical care and shelter.[519]

356. Despite this clear consensus on the government's responsibility to ensure humane detention conditions, many U.S. immigration detention centers suffer from chronic overcrowding and lack of adequate food, lack of working showers and toilets, unclean quarters, poor ventilation, little or no access to medical care and even detainee deaths.[520]

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[517] ICCPR, *supra* note 28 at Art. 10(1) (emphasis provided).
[518] UN General Assembly, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, Dec. 10, 1984, U.N.T.S. vol. 1465, Art. 16; AM. CONVENTION, *supra* note 90 at Art. 5(2).
[519] Youngberg v. Romeo, 457 U.S. 307, 315-316 (1982).
[520] *Conditions of Confinement in Immigration Detention Facilities*, ACLU, *supra* note 510. *See also Report on Immigration in the United States*, *supra* note 102; Kalhan, *supra* note 489 at 47.

357. Lack of proper medical attention for immigrant detainees is one of the biggest concerns for immigrant detainee advocates. According to the American Civil Liberties Union (ACLU), inadequate access to medical care is the "most common complaint from detainees across the country."[521] There are "severe and widespread problems with access to chronic and emergency medical care," including "long delays prior to medically necessary surgical procedures" and "unresponsiveness to requests" for care.[522]

358. Lack of medical care is inextricably linked to another grave problem in detention centers—detainee deaths. It is estimated that over one hundred detainees have died in ICE custody since 2003, oftentimes due to lack of proper medical attention.[523]

359. Commenting on these deaths the IACHR has previously stated that it is "alarmed by the growing list of immigrants who have died in detention, in many cases from health conditions that would have responded to proper, timely treatment."[524]

360. Physical, verbal and emotional abuse is also prevalent in immigration detention facilities. Dozens of detainees at centers such as the New Jersey Hudson County Jail, the Middlesex County Jail in New Jersey, and the Otero County Prison in New Mexico reported that guards used obscenities and racial slurs when addressing them. [525] At the Passaic County Jail, dogs were used for three years to intimidate and attack immigrant detainees, and in at least two cases, dogs purportedly bit detainees. Unfortunately, these harassments and abuses often go undisciplined. [526]

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[521] *Id*. at 3-8 (documenting a number of specific cases of detainees and lack of medical care in detention centers).
[522] *Id*.
[523] *Id*.
[524] *Id* at ¶ 275.
[525] *Conditions of Confinement*, *supra* note 520 at 10-12.
[526] *Id*.

361. Sexual abuse is another grave concern. According to the ACLU, U.S. government officials received nearly two hundred allegations of sexual abuse from detainees since 2007 alone.[527] Given the lack of transparency in these detention centers, however, the ACLU predicts that this figure is only the "very tip of the iceberg."[528] The sexual abuse problem is exacerbated by the fact that many detainee victims are "unable to come forward with...complaints due to fear of retaliation, resulting trauma, or lack of access to attorneys."[529]

362. Without legal advocates, immigrant detainees facing inhumane conditions or abuse are often left silenced and stranded. They are unable to file complaints, compel accurate fact-finding or press charges against the government or other perpetrators of abuse against them. They are not only unable to fight for their freedom; they are defenseless against severe human rights violations in their confinement. The outcomes are traumatic and sometimes even fatal.

C. Impact of Representation on Removal Proceedings

363. As the previous section indicates, detention can serve a formidable barrier to accessing legal representation. In addition to detention serving as a barrier to MALR for many respondents in removal proceedings, most respondents simply cannot afford to pay for legal representation.[530]

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[527] *See Sexual Assault of Immigrants in Detention*, ACLU, https://www.aclu.org/know-your-rights/sexual-assault-immigrants-detention (last visited June 9, 2015).
[528] *Id.*
[529] *Id.*
[530] *See* Amy Zimmer & Xiaoquing Rong, *Show Me the Money (and Some Creative ID)*, CITY LIMITS, Mar. 2004, http://www.citylimits.org/news/articles/3042/show-me-the-money-and-some-creative-id#.U08lUPldWAU.

364. Although immigrants have the right to hire their own attorney, even when they hire an attorney at their own expense, they may still be denied access to their attorneys.[531] A recent study showed that the Department of Homeland Security frequently discouraged immigrants from retaining counsel, restricted communications with counsel, and often completely barred counsel from being present during interrogations.[532]

365. Even worse, many immigrant detainees are persuaded to drop any claims for relief or are pressured to voluntarily deport before they appear at any hearing at all.[533] Without counsel to advise them otherwise and desperate to earn back their liberty, many detainees succumb to these pressures without knowing that their due process rights have been egregiously violated.

366. Whatever the reason, no right to appointed counsel has a drastic impact on the outcome of removal proceedings to the detriment of the fundamental liberties of the respondents.

367. The presence of legal representation can help process immigrant detainees' cases faster and more efficiently, cutting down on both the number of detainees in custody at a given time and the length of time each detainee spends in an immigration detention facility.[534]

368. As one study reported, "[r]epresentation is a highly significant factor determining the outcome of immigration cases."[535] Non-detained noncitizens in removal proceedings with counsel obtained relief in seventy-four percent of their cases, in contrast to a mere

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[531] LEGAL ACTION CTR., BEHIND CLOSED DOORS: AN OVERVIEW OF DHS RESTRICTIONS ON ACCESS TO COUNSEL (2012), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Behind_Closed_Doors_5-31-12.pdf.

[532] *Id*.

[533] Das, *supra* note 476, at 140-45.

[534] Letter from Lenni Benson, N.Y.C. Bar, Comm. on Immigration & Nationality Law, to U.S. Senate Judiciary Committee on S. 744 (April 24, 2013) *available at* http://www2.nycbar.org/pdf/report/uploads/20072470-SupportofRighttoCounselbill.pdf (arguing that providing a right to counsel to noncitizens reduces government costs by "1) preventing unnecessary court proceedings, 2) reducing the amount of time noncitizens spend in detention, and 3) relieving the burden of government support to disrupted families").

[535] Katzmann Immigrant Representation Study Grp. & Vera Inst. of Justice, *Innovative Approaches to Immigrant Representation: Exploring New Partnerships: Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*. 33 CARDOZO L. REV. 357, 383 (2011).

thirteen percent success rate for non-detained noncitizens who proceeded *pro se*.[536] Those that were represented and not detained were six times more likely to prevail that those who were not represented.[537]

The Difficulties of Facing a Removal Proceeding Without Adequate Counsel

369. Immigration laws are so complex they are described as a "labyrinth" and "second only to the Internal Revenue Code in complexity."[538] Despite this, unlike indigent criminal defendants, indigent immigrants in deportation proceedings do not receive representation at the state's expense.[539] In 2010, the Department of Justice expressed its concern with "the large number of individuals appearing pro se."[540]

370. Due to the complexity of the laws, the question of whether or not an alien is "illegal" is also very complicated. It requires an extensive knowledge of immigration law and immigration proceedings to assert a persuasive claim of legality. Furthermore, the respondent's argument of legality is up against a U.S. trial attorney that is trained specifically to present arguments within the complexity of immigration law.[541] This power imbalance in the face of a decision that will so profoundly impact the respondent's fundamental liberties is nothing short of abhorrent.

371. Additionally, "[t]he immigration code is rife with categories, subparts, exceptions, waivers, and cross-references. In additions to the provisions that immigration judges must

[536] *Id*.
[537] *Id*.
[538] Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987).
[539] 8 U.S.C. § 1229a(b)(4)(A) (2014) (providing for a right to counsel only at the noncitizens' expense).
[540] U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK at C3 (2011), *available at* http://www.justice.gov/eoir/statspub/fylOsyb.pdf.
[541] *See* Adams, *supra* note 425 at 169.

enforce uniformly, there are many discretionary provisions offer aliens relief from deportation under certain circumstances."[542]

372. There are multiple forms of relief that a respondent may be able to successfully claim to cancel a removal order.[543] Firstly, it is unlikely that a respondent will know the potential forms of relief available to him without the assistance of counsel.

373. Determinations of relief are made based on the discretionary analysis of an immigration judge. "Considerations that tilt toward a favorable exercise of discretion include family ties in the United States, duration of residence in the United States, evidence of hardship to the noncitizen and her family upon removal, service in the U.S. armed forces, a history of employment, the existence of property or business ties in the United States, service to the community, proof of rehabilitation after any criminal conviction, and evidence of good character. Adverse factors include the grounds for removal, any other violations of the immigration laws, the existence, recency, and seriousness of a criminal record, and any evidence of bad character."[544] Effective lawyering is necessary to successfully portray detailed factors that will result in a favorable exercise of discretion for the respondent.

374. Furthermore, there is a history of poor quality decision-making by the immigration bureaucracy. Since respondents are unlikely to be sufficiently knowledgeable in immigration law to recognize such incidences, meaningful access to counsel is important to avoid erroneous decisions.[545]

Discriminatory Practices in Removal Proceedings

[542] *See A Second Chance*, *supra* note 171 at 1559.
[543] *See* A.B.A., *supra* note 498 §§ 1-6, 1-7.
[544] *See* Johnson, *supra* note 425 at 2407-08.
[545] *Id*. at 2407.

375. Not only is there a history of poor quality decision-making by the immigration bureaucracy, but there is also evidence of discriminatory practices in immigration removal proceedings. Evidence consistently indicates that immigration enforcement officials focus predominantly on Hispanic communities. These communities are mostly not associated with high crime rates, and officials in fact comparatively direct a much smaller amount of focus to high crime communities.[546]

376. The statistics of noncitizens in removal proceedings provides even more supporting evidence of discriminatory practices. There are disproportionately high rates of individuals from a Mexican or Central American background in these proceedings in comparison to their proportion of the overall immigrant population.[547]

377. The assistance of counsel would allow more immigrants that are victims of discriminatory practices to challenge the impermissible bias. On a larger scale, a general right to access to counsel would help to reduce the overall opportunity for such bias to influence removal proceedings.[548] Moreover, since these are a largely disenfranchised group, access to counsel is one of their only options to ensure the accountability of unfair treatment of this sort.[549]

Ineffective Assistance of Counsel

378. Due to the lack of protection for the rights of respondents in immigration proceedings, it is common for these respondents to receive poor quality legal representation in the cases where they are able to obtain counsel.[550]

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[546] *Id*. at 2411.
[547] *Id*.
[548] *Id*.
[549] *Id*.
[550] *Id.* at 2403.

379. Immigration courts allow respondents to be represented by lawyers, qualified law students, and "accredited representatives" and "reputable individuals" authorized by the Board of Immigration Appeals (BIA).[551]

380. In a recent study, New York immigration judges said that almost half of the time, immigrant representation "does not meet a basic level of adequacy."[552] Some immigration attorneys are simply unprofessional.[553] The New York immigration judges reported that almost half of the attorneys were not prepared and did not know the relevant law or the facts of their client's case.[554]

381. Ineffective assistance of counsel is a direct denial of MALR, particularly in the immigration context. Mistakes can have serious permanent consequences, including removal, denial of the right to an appeal. Adding insult to injury, as noted above, unlike other clients, an immigrant may not be able to file an appeal due to ineffective assistance of counsel or sue the lawyer for malpractice.[555]

382. One source of this inadequate representation is lawyers with an overburdened caseload. Lawyers serving respondents in immigration court often charge low fees to accommodate their clients, but take on more cases than they should in order to cover their costs.[556]

383. There are also attorneys who contract their services to respondents in removal proceedings that simply lack the appropriate legal expertise to provide effective assistance.[557]

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[551] *See* A.B.A., *supra* note 498 § 5-5.
[552] Katzmann Immigrant Representation Study Grp. & Vera Inst. of Justice, *supra* note 535 at 389.
[553] Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 604 (2009).
[554] Katzmann Immigrant Representation Study Grp. & Vera Inst. of Justice, *supra* note 535 at 389.
[555] *Id*.
[556] Richard L. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N.C. L. REV. 1449, 1473 (2006).
[557] *See* A.B.A., *supra* note 498.

384. It is unfortunately very common in removal proceedings that the desperation and naivety of respondents is exploited by unscrupulous attorneys. It is highly unlikely that an attorney will be held accountable for this sort of exploitation, which is one of the major reasons that poor quality representation is common in these proceedings.[558]

385. If an immigrant does not speak English or speaks English as a second language, he or she might not understand what is happening in the removal proceeding and may not even realize if the lawyer is incompetent.[559]

386. As one court has observed, "[u]nlicensed notarios and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation" prey on vulnerable immigrants desperate for legal assistance.[560] Although the United States is aware that these immigrants are denied access to justice and, moreover, are victims of fraud, removal orders may not be challenged because of ineffective assistance of persons who are not attorneys.[561]

Consequences Suffered by Families

387. The implication that removal proceedings have for a noncitizen's right to liberty in and of itself necessitates a right to MALR. Additionally, there are still more fundamental liberty interests at stake in these proceedings, other than the basic right to liberty. Immigration detention and deportation often threaten an immigrant's right to family and family integrity.

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[558] *See* Johnson, *supra* note 425 at 2403.
[559] Hon. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit, Statement Before the Sen. Comm. on the Judiciary on April 3, 2006, (testifying that listening to testimony through interpreters for an entire case is frustrating and may impact how an immigration judge views testimony.").
[560] Morales Apolinar v. Mukasey, 514 F.3d 893, 897 (9th Cir. 2008).
[561] Hernandez v. Mukasey, 524 F.3d 1014, 1018-19 (9th Cir. 2008)).

388. More than three million children who are natural born U.S. citizens are also members of families with at least one undocumented noncitizen parent.[562] These children cannot be deported; however, the same is not true for their noncitizen parents. Unless they are otherwise eligible to regularize their status, current immigration laws do not allow noncitizen parents of U.S. citizen children to remain in the United States.[563] Between July 1, 2010 and September 31, 2012, these parents accounted for 23 percent of all deportations.[564] The Applied Research Center has found that there are more than 5,100 children in foster care because their parents have been detained or deported.[565]

389. In some states, if a parent fails to respond to a motion to terminate parental rights within thirty days, the court has the discretion to terminate all parental and custodial rights of that parent.[566] However, if the deportable parent is held in detention or is being or is being transported from detention center to detention center, responding to a TPR motion without counsel will be virtually impossible.[567] Moreover, deportable parents held in detention might not be able to communicate with their children as required under state reunification plans.[568] These parents have absolutely no opportunity to fight for their parental rights or protect their children and families.

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[562] Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* 8 (2006), Pew Hispanic Ctr., *available at* http://pewhispanic.org/files/reports/61.pdf.
[563]*Matter of Ige*, 20 I. & N. Dec. 880 (BIA 1994).
[564] Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES, (Dec. 17, 2012), *available at* http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html.
[565] Seth Freed Wessler, *Thousands of Kids Lost From Parents in U.S. Deportation System*, COLORLINES, (Nov. 2, 2011), *available at* http://colorlines.com/archives/2011/11/thousands_of_kids_lost_in_foster_homes_after_parents_deportation.html.
[566] N.C.GEN.STAT. §7B-1107.
[567] Nina Bernstein, *Immigrant Jail Tests U.S. View of Legal Access*, N.Y. TIMES, Nov. 2, 2009, at A1 (noting that deportable immigrants are routinely transported between states.).
[568]C. Elizabeth Hall, *Where Are My Children . . . and My Rights? Parental Rights Termination As A Consequence of Deportation*, 60 Duke L.J. 1459, 1490 (2011).

390. Immigration decisions, particularly deportation orders, can become *de facto* custody decisions.[569] This is a particularly egregious denial of legal representation, and many immigrants may not realize their parental rights and family integrity are at stake in removal proceedings. Between 1998 and 2007, 108,434 immigrant parents who were removed from the United States had U.S. citizen children. Deporting a parent who then leaves his child behind destroys family integrity and often results in the termination of parental rights.[570] Yet both immigration courts and family courts have little, if any opportunity to consider the intersection of family law and immigration law on the rights to family integrity.

391. Although appellate courts may reverse lower courts that terminate immigrant parental rights on questionable grounds,[571] if an immigrant is deported, it is unlikely that he will be able to appeal a termination of parental rights decision. He may be unreachable in his home country or may not understand court documents that are not in his native language. If an immigrant does not obtain legal counsel before he is deported, it is unlikely that he will be able to appeal a parental rights termination case.[572]

392. It is not sufficient that the government has the discretion to deny an immigrant parent's fundamental right to family unity, and yet not provide a right to MALR. It would also be more efficient and cost effective to allow deportable parents to remain in the United

[569] David B. Thronson, *Custody and Contradictions: Exploring Immigration Law As Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 454 (2008).
[570] S. Adam Ferguson, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 87 (2007).
[571] Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C.J.L. & Soc. Just. 63, 98 (2012) (noting that in the prominent decisions, the appellate courts unanimously overturned the lower court decisions). *See e.g*., *In re B & J*, 756 N.W.2d at 237; *In re Angelica L*., 767 N.W.2d at 80.
[572] Yablon-Zug *supra* note 571 at 98 n.250 (noting that cases that are appealed are usually brought by parents represented by large pro bono organizations with excellent representation).

States until the conclusion of legal proceedings involving their child where parents were guaranteed legal counsel at state expense.

The Inability of Current Legal Aid to Live Up to Human Rights Norms

393. Without a government-funded and guaranteed right to MALR, legal advocacy for immigrants has been patchy at best. Immigrants who are fortunate enough to secure legal counsel typically receive legal services through non-profit organizations, pro bono programs or law school clinics.[573]

394. As of 2013, there were an estimated 863 non-profit organizations across the United States that provided legal services for immigration and citizenship cases.[574] Although this number seems large, it is important to remember that some of these are LSC-funded organizations, and are therefore subject to restrictions on representing immigrants.[575] For example, only certain categories of immigrants—such as victims of human trafficking, domestic violence or sexual assault—can receive legal services from LSC-funded programs.[576]

395. The U.S. Department of Homeland Security, in conjunction with the U.S. Department of Justice, has made some effort in closing this legal assistance gap in the detention context through "legal orientation programs" or LOPs. LOPs are legal education and limited representation initiatives where immigrant detainees are given general presentations on

[573] Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2289 (June 2013).
[574] *Id* at 2290.
[575] NAT'L IMMIGRATION LAW CTR., GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS: LSC-FUNDED LEGAL SERVICES (revised Sept. 2012) *available at* file:///C:/Users/Ola/Downloads/LSC-funded_services_rev-2012-09%20(1).pdf; BRENNAN CTR. JUST., FACT SHEET: THE RESTRICTION BARRING LSC-FUNDED LAWYERS FROM ASSISTING CERTAIN IMMIGRANT GROUPS (2003), *available at* http://www.brennancenter.org/analysis/fact-sheet-restriction-barring-lsc-funded-lawyers-assisting-certain-immigrant-groups.
[576] *Id*.

immigration law and procedures, provided with lists of pro bono attorneys and sometimes allowed limited consultations with counsel.[577]

396. However, there are at least two major problems with LOPs. First, their coverage is very limited. As of March 2010, LOP was operating in a mere twenty-five out of the hundreds of detention facilities across the United States.[578] Second, as the IACHR itself has noted, LOP attorneys are "only permitted to spend approximately twenty-five percent of their work hours in direct representation of clients."[579] Therefore, LOP does not come close to adequately addressing the need for comprehensive MALR for immigrants.

397. The IACHR has noted that "the expansion of immigration detention has outpaced the expansion of funding for LOP."[580] As a result, LOP services are reaching "a shrinking percentage of the immigration detention population."[581] By 2013, it was estimated that LOP services reach "less than thirty percent of detainees in removal proceedings each year."[582]

398. In an attempt to fill the holes left by LSC restrictions and limited government legal assistance programs, private and semi-private non-profit organizations have stepped in and played a large role in providing legal advocacy and direct representations for immigrants.[583]

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[577] *Report on Immigration in the United States*, *supra* note 102 ¶ 383.
[578] *Id*. ¶ 384. CTR. FOR VICTIMS OF TORTURE, TORTURED & DETAINED: SURVIVOR STORIES OF U.S. IMMIGRATION DETENTION 16 (2013) *available at* http://www.cvt.org/sites/cvt.org/files/Report_TorturedAndDetained_Nov2013.pdf.
[579] *Report on Immigration in the United States*, *supra* note 102 ¶ 384.
[580] *Id*.
[581] *Id*.
[582] TORTURED AND DETAINED, *supra* note 578 at 16.
[583] *See* AMERICAN CIVIL LIBERTIES UNION, "Locked Up: Class-Action Lawsuits Challenge Mandatory Detention of Immigrants"(Aug. 8, 2013) *available at* https://www.aclu.org/blog/immigrants-rights/locked-class-action-lawsuits-challenge-mandatory-detention-immigrants (mentioning at least two class actions challenging immigration detention: *Gordon v. Napolitano,* filed in Massachusetts, and *Khoury v. Asher*, filed in Washington state).

399. While the efforts of these organizations are admirable and desperately needed, protecting legal rights of immigrant detainees cannot be left to non-profit advocacy organizations and limited government programs like LOP. MALR should not be a privilege that is available only at some detention centers or dependent on local non-profits. Therefore, the goal of establishing a right to MALR would be to make legal representation of the highest quality a fundamental right for all respondents in removal proceedings. However, as the IACHR investigates this issue further, it is helpful to know that many organizations are already working on providing for immigrants' right to MALR. This means that much of the infrastructure, expertise and community connections needed to expand immigrants' MALR are already in place. They just need an ideological and financial commitment from the U.S. government to reach all immigrants.

D. Direct Implications for International Human Rights Norms

400. From the international to the domestic level, there is a universal recognition that taking a person's liberty away triggers the duty to provide for certain due process protections. The right to MALR must be one of these due process guarantees particularly in the case of immigrant detainees and potential deportees, oftentimes who have little or no criminal background, lack familiarity with the language and legal system, and commonly come from vulnerable groups, such as asylum seekers, women, children and the mentally disabled.

401. Even without these complicating factors, however, noncitizens in removal proceedings have the right to MALR simply by virtue of being individuals deprived of one of the most central human rights—the right to liberty.

Support for MALR in Immigration Proceedings from Comprehensive Reports

402. Countless human rights advocates and organizations across the United States and across the world fully support the arguments laid out above as to why immigrant detainees' have a right to MALR. They have poured immense amounts of their time, money, resources, skills and effort into calling upon the U.S. government to recognize this right and provide for it in practice. The wealth of existing advocacy on this issue is evidence that it is of pressing importance and deserves the IACHR's investigation, advocacy and action moving forward.

403. In 2009, Amnesty International issued a report titled *Jailed Without Justice: Immigration Detention in the USA.*[584] The report addressed issues such as the apprehension of asylum seeks, exorbitant bonds for detainees, lack of access to lawyers and the inhumane conditions of immigration detention. In its recommendations, the report called upon DHS to ***"ensure that all immigrants have unrestricted access without delay to competent legal representation in order to be able to challenge their detention."***[585]

404. Also in 2009, the IACHR itself, as mentioned above, released an in-depth report on the topic of immigration detention titled *Report on Immigration in the United States: Detention and Due Process*.[586] This report took a thorough look at the state of immigration detention in the United States, investigating everything from inhumane detention conditions, reports of detainee deaths, challenges facing vulnerable populations, lack of access to counsel, the criminalization of detention, grievance procedures and a myriad of other due process concerns. Throughout the report, and particularly in its

[584] Amnesty International, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2009) *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.
[585] *Id* at 45 (emphasis provided).
[586] *Report on Immigration in the United States*, *supra* note 102 ¶¶ 39, 242.

recommendations, the IACHR urged the U.S. government to provide legal assistance and representation for all immigrant detainees.[587]

405. Yet another 2009 report by the Constitution Project explicitly addressed the issue of immigrant detainees' right to MALR. The report, titled *Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings,* [588] called for "government funded and appointed counsel for all indigent noncitizens in removal proceedings" and was heavily cited in the IACHR 2009 report.[589]

406. In 2010, the ABA's Commission on Immigration put out its own report on the issue titled *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*.[590] The report discussed reforms needed throughout the immigration system, with a section on representation in particular. In that section, the report asserted that "a right to representation at government expense should be recognized" for noncitizens eligible for relief as well as vulnerable groups such as unaccompanied minors and persons with mental disabilities.[591]

407. In 2011, the New York Immigrant Representation Study, an initiative of the Study Group on Immigrant Representation, published a report summarizing the results of a two-year study on immigrant access to legal assistance. The report, titled *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings*, is

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[587] *Id.*
[588] THE CONSTITUTION PROJECT, RECOMMENDATIONS FOR REFORMING OUR IMMIGRATION DETENTION SYSTEM AND PROMOTING ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS (2009) *available at* http://www.constitutionproject.org/manage/file/359.pdf.
[589] *Id* at 8.
[590] A.B.A., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.
[591] *Id* at 5-10.

one of the most comprehensive and oft-cited authorities on the topic of immigrant detainees' right to MALR. It demonstrated that immigrant detainees are severely underserved in terms of legal counsel and proposed systematic changes to change this finding. [592]

408. In January 2013, the Migration Policy Institute also issued a comprehensive immigration report that addressed immigration detention titled *Immigration Enforcement in the United States: The Rise of A Formidable Machinery.*[593] The report dedicated a chapter to issues such as expedited removal, mandatory detention, alternatives to detention and detention reform. It concluded, among other things, that lack of legal counsel is one of the central problems in the U.S. immigration system.[594]

409. In November 2013, the Center for Victims of Torture released a report called *Tortured & Detained: Survivor Stories of U.S. Immigration Detention.*[595] The report recounted the stories of asylum-seekers who ended up in immigration detention centers and emphasized that detention can exacerbate trauma for this vulnerable population. Among its recommendations, the report called on the U.S. Department of Justice to "establish systems for *government-funded counsel* for survivors of torture and other particularly vulnerable immigrants in detention."[596]

410. In February 2014, the Center for Gender & Refugee Studies at the University of California-Hastings released a report titled *A Treacherous Journey: Child Migrants*

[592] ACCESSING JUSTICE II, *supra* note 500.
[593] MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013) *available at* http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery.
[594] *Id* at 119, 121, 137.
[595] TORTURED & DETAINED, *supra* note 578.
[596] *Id* at 3 (emphasis provided).

Navigating the U.S. Immigration System.[597] The report pays special attention to the challenges facing unaccompanied minors in the U.S. immigration system. It points out that "the U.S. government usually does not appoint counsel for unaccompanied children in immigration proceedings," which oftentimes results in negative and sometimes traumatic experiences for minors in the immigration system.[598] These children are expected to face the complexities of immigration court proceedings alone. Accordingly, the report calls on "Congress and relevant government agencies" to "allocate resources appropriate to children's legal and social service needs," including "*legal representation all the way through a child's case*."[599]

Advancing Immigrants' Right to MALR Using International Human Rights Norms

411. Starting from an international level, the United Nations has taken great interest in the issue of immigrant detainees' right to representation and has repeatedly encouraged the U.S. government to address the issue through its treaty compliance reviews.

412. At a regional level, the IACHR itself has taken keen interest in advocating for immigrants' due process rights in detention. In 2008***, the IACHR held a thematic hearing on "[d]ue process problems in the application of policies on immigrant detention and deportation in the United States***."[600] At this hearing, Commissioner Felipe Gonzalez, the Rapporteur on the Rights of Migrants and now Rapporteur for the United States, noted with concern that many immigrants in detention find it difficult to see their lawyers, if they have a lawyer, due to the remote locations of the detention centers as well

[597] CTR. FOR GENDER & REFUGEE STUDIES, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM (2014), *available at* http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf.
[598] *Id* at iii.
[599] *Id* at 78 (emphasis provided).
[600] INTER-AMERICAN COMMISSION FOR HUMAN RIGHTS, Hearing: "Due process problems in the application of policies on immigrant detention and deportation in the United States" (2008) video recording *available at* http://www.oas.org/oaspage/videosasf/2008/10/CIDHmartes2_inmigrantes_estados_unidos.wmv.

as frequent transfers.[601] As a result of this hearing, the IACHR visited several U.S. immigration detention centers and issued an extensive report on immigration detention and due process in 2009.

413. Furthermore, a number of grievances regarding immigration detention have been filed with the IACHR. A 2013 report written by Columbia Law School's Human Rights Institute reported that ***issues concerning immigrants' rights, particularly with regards to detention and due process, made up the "second largest category of cases" filed with the IACHR***.[602] Specifically, the report noted that thirteen petitions have been filed and merits decisions have been issued for five of these cases.[603] In eight of the cases in this category, the IACHR "issued precautionary measures to either stay deportations or ensure deportees would obtain adequate medical treatment."[604]

414. The cases varied in the concerns they raised, but included grievances regarding access to justice and detention conditions and overall indicated the "need for a human-rights based approach to immigration."[605] The IACHR's involvement in these cases shows that it is engaged in the issue of immigrant detainees' right to MALR and considers it of high priority.

415. With tens of thousands of U.S. immigrants facing detention, deportation and even death every day, the time to act on this issue is not tomorrow or the day after, but today. Furthermore, each day that passes without the U.S. government providing for this right exacerbates the costs, inefficiency and dysfunction of the immigration system and puts the government at greater risk for liability of human rights violations. Simply put, there

[601] *Id* at 44:30.
[602] HRI PRIMER ON RECOMMENDATIONS FROM THE IACHR AND UN, *supra* note 41 at 41.
[603] *Id*.
[604] *Id*.
[605] *Id*.

is too much at stake for inaction or delayed action to be an option. The time to insist that the U.S. government provides for immigrants' right to MALR is now.

IV. THE CRIMINAL JUSTICE SYSTEM: MEANINGFUL ACCESS TO LEGAL REPRESENTATION & INTERNATIONAL HUMAN RIGHTS NORMS

416. A common theme among an array of international and inter-American human rights' instruments recognizes the important need for protection of the fundamental liberty interests that are at the core of all criminal proceedings: the right to life, liberty, and the security of person.[606] Criminal proceedings are one of the most direct processes by which States may affect, limit, or revoke these fundamental liberties.

417. To safeguard these liberty interests, international human rights instruments enumerate specific rights of defendants in criminal proceedings that ensure a fair trial.

418. Recurrent among these instruments is the right to legal counsel for indigent criminal defendants:

- ICCPR Article 14(3)(d) guarantees the right an individual "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[607]
- American Convention Article 8(2)(e): "[T]he inalienable right to be assisted by counsel provided by the state."[608]

419. The Sixth Amendment of the U.S. Constitution similarly provides criminal defendants with the right "to have the Assistance of Counsel for his defence."[609]

420. Further, in *Gideon v. Wainwright,*[610] the U.S. Supreme Court affirmed that the assistance of counsel is a constitutional safeguard protecting the human rights of life and liberty. As such, the Court held that there was a constitutional requirement, under due process of the Fourteenth Amendment, for states to provide counsel to criminal

[606] *See, e.g.*, UDHR, *supra* note 30 at art. 3; ICCPR, *supra* note 28 at art. 6(1), 9(1); American Convention, *supra* note 89.
[607] ICCPR, *supra* note 28 at art. 14(3)(d).
[608] American Convention, *supra* note 89 at art. 8(2)(e).
[609] U.S. CONST. amend. VI.
[610] Gideon v. Wainwright, 372 U.S. 335 (1963).

defendants who are unable to afford their own legal representation in order to ensure a fair trial.[611]

421. Thus, at least as a matter of formality, the decision in *Gideon* put United States domestic law in harmony with international human rights norms. However, international norms and the inter-American system have established that ***the appointment of "public defense counsel for the sole purpose of complying with procedural formality would be tantamount to not having legal representation."***[612]

A. International Standard for a Fair Trial

422. Ineffective counsel not only renders the right to counsel meaningless, but it also makes it impossible to realize other specific rights of individuals in criminal proceedings. Thus, the defendant is left with no assurances of a fair trial and their fundamental liberty interests vulnerable to abuse of power.

423. As such, international human rights norms recognize the right to competent and effective counsel as a right in and of itself. In order for the United States to completely fulfill its obligations under international human rights norms, it must ensure that the provision of counsel is competent and effective.

The Right to Competent and Effective Counsel

424. General Comment 34 to the ICCPR, adopted by the U.N. Human Rights Committee, regarding the right to counsel in criminal proceedings states that "lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with

[611] *Id*. at 344.
[612] IACHR, Report on the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/VII, Doc. 46/13 (30 Dec. 2013) *available at* http://www.oas.org/en/iachr/pdl/reports/pdfs/Report-PD-2013-en.pdf.

generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter."[613]

425. The U.N. Human Rights Committee's case law has repeatedly emphasized that it is incumbent upon a State to ensure that legal representation is effective.[614]

426. The inter-American system has established the following fundamental standards concerning the quality of counsel:

- "Legal Assistance provided by the State should be given by legal practitioners appropriately qualified and trained and whose actions are properly supervised."
- "States should adopt all appropriate measures so that the defense provided is effective, for which it is necessary that defenders act diligently."[615]

The Right to Adequate Time and Preparation

427. Human rights norms require that criminal defendants have the right to adequate time to properly prepare their defense in order to ensure the minimum guarantees of due process necessary to protect the fundamental liberty interests at stake.[616]

428. Article 14(3)(b) of the ICCPR provides that criminal defendants are entitled "[t]o have adequate time and facilities for the preparation of his defence."[617]

429. The U.N. Human Rights Committee case law on this issue takes into consideration the number of times the defendant was able to meet with his lawyer, the amount of time the defendant was able to consult with his lawyer during these meetings, the span of time for which the lawyer was appointed versus the longevity of the entire proceeding, and the

[613] OPEN SOC'Y JUST. INITIATIVE, CASE DIGESTS: INTERNATIONAL STANDARDS ON CRIMINAL DEFENCE RIGHTS (2013), *available at* http://www.opensocietyfoundations.org/sites/default/files/digests-arrest%20rights-human-rights-committee-20130419.pdf.
[614] *Id*. at 31.
[615] Report on the Use of Pretrial Detention in the Americas, *supra* note 612 ¶ 192.
[616] M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 278 (1993).
[617] ICCPR, *supra* note 28 at art. 14(3)(b).

evidence and prosecution materials that were made available for the preparation of defense.[618]

430. Similarly, Article 8(2)(d) of the American Convention requires that criminal defendants be guaranteed "adequate time and means for the preparation of his defence" as part of their right to a fair trial.[619]

431. Although the American Convention may not be binding on the United States, the inter-American system as a whole has adopted this guarantee into its application of human rights standards. Additionally, it has recognized that the realization of this right is not possible without the assistance of effective counsel.

432. The Inter-American Commission has stated, ***"According to this Commission and other pertinent authorities, the right to effective assistance of counsel is crucial to the fairness of a proceeding, in part because it is intimately connected with the right of a defendant to adequate time and means for the preparation of his or her defense."***[620]

B. The United States Indigent Defense Crisis

433. The criminal indigent defense system in the United States is in a state of crisis. Some have declared it to be in a state of collapse.[621] The crisis comes at the expense of millions of persons accused of crimes who are caught in the criminal justice system. The issues are structural, multiple, and varied. From over-criminalization and under-funded public defender offices, the criminal justice landscape has become the focus of research and analysis, and media attention—all of which underscores with alarm and concern the failings of the legal system.

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[618] *See id*. at 21-23.
[619] American Convention, *supra* note 90 at art. 8(2)(d).
[620] Abu-Ali Abdur' Rahman, Case 12.422, Inter-Am. Comm'n H.R., Report No. 13/14, OEA/Ser.L./V/II.150, doc. 17 ¶ 55 (2014).
[621] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (Harvard University Press 2011).

No Proper Standards for Effectiveness

434. In addition to the right to counsel, the U.S. Supreme Court has also considered the issue of effective assistance of counsel. In *Strickland v. Washington,*[622] the Court developed a two-prong test to determine whether a defendant would be entitled to relief based on a claim of ineffective assistance of counsel. First, a defendant would need to show that the counsel's performance was deficient, and second, that the deficiency actually prejudiced the defendant to the extent that he was deprived the defendant of a fair trial.[623]

435. The *Strickland* test for ineffective assistance of counsel has proved to be a difficult one to meet, and places an enormous burden of proof upon the indigent defendant. A study released in 2010 found that out of over 2,500 claims of ineffective assistance of counsel only four percent were successful.[624]

436. A further problem is that courts determine whether an attorney's performance was effective by considering prevailing professional norms. The crisis facing public defender systems that affect a defense attorney's ability to properly represent his or her client may serve to undermine professional norms and thus lower the standards by which effective assistance is considered.

437. As many studies have reported, *Strickland* has done little to improve the quality of representation for criminal defendants.[625]

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[622] 466 U.S. 668 (1984).
[623] *Id.* at 687.
[624] Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, AM. CONSTITUTION SOC. (2011) *available at* https://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf.
[625] *See also* Amanda Sweat, *Sacking Strickland: The Search for Better Standards in Determining Inadequate Counsel for Indigent Defendants*, TRINITY PAPERS, Jan. 1, 2012, *available at* http://digitalrepository.trincoll.edu/cgi/viewcontent.cgi?article=1015&context=trinitypapers; Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process,* U. PA. L. REV. (1986): 1259-1289; Amy R. Murphy, *The Constitutional Failure of the Strickland Standard in Capital Cases Under the Eighth Amendment*, 63 LAW & CONTEMP. PROBS. 179, 179-2015

438. The National Legal Aid & Defender Association (NLADA), founded in 1911, described as "the oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel"[626] reports that "[t]he dirty little secret of the criminal justice system is how many people accused of a crime in this country get no lawyer at all."[627] They also describe staggering caseloads that exceed acceptable standards, uneven and often poor quality of representation, underfunding, and political interference with the obligations of public defender offices.[628]

439. Without proper standards of effectiveness, the right to counsel becomes a right deprived of significance, and further weakens the viability of our criminal justice system.

Chronic Under-Funding for Indigent Defense

440. One central shortcoming of *Gideon* is that the Supreme Court required States to provide counsel to indigent criminal defendants at the state's expense, but did not set forth any uniform standard for funding. The lack of uniformity has resulted in an indigent defense system where access to MALR may depend entirely on geography.

441. By virtually every measure, indigent defense services are drastically underfinanced across the nation.

442. In 2013, sequestration and cuts from within the U.S. Judiciary resulted in a $51 million shortfall in FY 2013 for federal public defenders. For example, in 2013, the Federal

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(2000); *Inadequate Representation*, ACLU, https://www.aclu.org/inadequate-representation?redirect=capital-punishment/inadequate-representation (last visited June 5, 2015).

[626] *About NLADA*, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, http://www.nlada.org/About/About_Home (last visited June 5, 2015).

[627] *5 Problems Facing Public Defense on the 40th Anniversary of Gideon v. Wainwright*, NLADA, http://www.nlada.org/Defender/Defender_Gideon/five_problems.pdf (last visited June 5, 2015).

[628] *Id.*

Public Defender in Arizona was forced to lay off ten employees and extend the furlough days already imposed on employees to ninety days.[629]

443. Funding amounts for public defenders and prosecutor offices are also starkly disparate. In 2013, federal prosecutors who are employed by the Department of Justice, had access to $27 billion. Federal Public defenders on the other hand had access to only $6.7 billion.[630] The ratio of prosecutors to public defenders is estimated at 280 to 38 or more than 7 to 1.

444. Paying public defenders a fair or reasonable salary has been impossible in many states. A Nashville public defender noted, "The public defender's office is suffering because we can't afford to pay our lawyers their market value." [631]

445. Several jurisdictions have adopted contract pay systems that allow bid for contracts.[632] In many of these systems, the lowest bids win without regard to quality or competency.[633] Thus, the government chooses to pay for the least expensive legal representation with little or no regard for competent representation.[634]

446. The low pay provided across the nation to counsel for indigent defendants fails to attract many qualified, competent attorneys, and restricts the pool of attorneys willing to represent indigent defendants. To further exacerbate this problem, the lack of resources prevents training opportunities for the less experienced attorneys who are willing to

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[629] *Id*.
[630] Ian Millhiser, *Public Defenders Hit up to Six Times Harder Than Prosecutors by Sequester*, THINKPROGESS (March 18 2013, 5:10 PM), http://thinkprogress.org/justice/2013/03/18/1725691/public-defenders-hit-up-to-six-times-harder-than-prosecutors-by-sequester/.
[631] Brian Haas, *Prosecutors, Public Defenders Plead for More Staff*, THE TENNESSEAN (April 2, 2014), http://www.tennessean.com/story/news/crime/2014/04/02/prosecutors-public-defenders-plead-staff/7231769/.
[632] Robert G. Spangenberg & Marea Beeman, *Indigent Defense Systems in the United States*, 58 DUKE LAW & CONTEMP. PROBS. (1995) *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4264&context=lcp.
[633] *Id*.
[634] *Id*.

represent criminal indigent defendants.[635] In the legal profession, experience and continued training are critical to effective lawyering, and they are drastically unaccounted for in the provision of indigent defense services.[636]

447. Insufficient funding also limits the resources that are available to state-appointed counsel in preparation of their client's defense. For example, eighty-seven percent of public defender offices do not have a full-time private investigator, which is essential to thorough preparation in a criminal proceeding.[637] Only seven percent of county-based public defenders' offices meet the national standard for investigator-to-attorney ratios.[638] Forty percent do not have staff investigators at all.[639]

Over-criminalization

448. The over-criminalization of offenses is a major issue that is contributing to the collapse of the indigent defense system. This issue is directly linked to the overburdening of public defenders that are understaffed and overworked.

449. Nonviolent crimes, like minor drug possession, make up a significant portion of the cases handled by indigent defense services. Only 7.6 percent of federal powder cocaine prosecutions and 1.8 percent of federal crack cocaine prosecutions are for high level trafficking.[640] Studies show that marijuana arrests are made every forty-two seconds and thus account for forty-eight percent of all drug arrests.[641] Most marijuana arrests are for

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[635] *System Overload: The Costs of Under-Resourcing Public Defense*, JUST. POLICY INST. (July 2011) *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.
[636] *See id*. at 15.
[637] *See id*.
[638] Benner, *supra* note 624 at 6.
[639] *Id*.
[640] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 19 (2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.
[641] Steve Nelson, *Police Made One Marijuana Arrest Every 42 Seconds in 2012*, US NEWS, Sept. 16, 2013,

simple possession.[642] African Americans are also disproportionately arrested for marijuana at 7.8 times the arrest rate of whites.[643]

450. For the last thirty years the number of criminal offenses included in the U.S. Code has increased from 3,000 to 4,450.[644] On average, Congress has enacted one new crime every week for the last thirty years. Congress codified 452 new criminal offenses from 2000 to 2007.[645]

451. This trend is not unique within the federal criminal justice system.[646] It is also quite common among the states.[647] For example, the Texas legislature has created 1,700 criminal offenses.[648] Eleven felonies alone have been codified that relate to the harvesting and handling of oysters.[649]

452. If reform initiatives were adopted, decriminalizing minor drug offenses like simple marijuana possession would provide some relief to the indigent defense system by reducing the number of cases handled by public defenders. The ABA, in a recent report, has also called attention to this idea.[650] According to the report, in order for decriminalization to be successful it has to not only reclassify criminal statutes but also enable defendants to complete diversion programs.[651] These programs allow defendants'

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http://www.usnews.com/news/articles/2013/09/16/police-made-one-marijuana-arrest-every-42-seconds-in-2012
[642] *Id*.
[643] Robert C. Boruchowitz, *Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. FOR SOC. JUST. 891, 895-896 (2013).
[644] *Overcriminalization: An Explosion of Federal Criminal Law*, HERITAGE FOUND. (April 27, 2011), http://www.heritage.org/research/factsheets/2011/04/overcriminalization-an-explosion-of-federal-criminal-law.
[645] *Id*.
[646] Boruchowitz, *supra* note 643.
[647] *Id*.
[648] *Id*.
[649] *Id*.
[650] Debra Cassens Weiss, *Would Decriminalizing Minor Offenses Help Indigent Defense Crisis? ABA Committee Weighs In*, A.B.A. J. (Jan. 8, 2013, 2:00 PM), http://www.abajournal.com/news/article/decriminalizing_minor_offenses_could_help_indigent_defense_crisis_aba_commi/.
[651] *Id*.

low-level charges to be dismissed if they perform community service, substance abuse or other rehabilitative requirements.[652]

453. Although a handful of states have adopted legislation aimed at improving the situation, an overwhelming majority of states have done nothing. Currently, only seventeen states have enacted legislation aimed at decriminalized minor offenses.[653] Further complicating this issue are states that have chosen to define decriminalization differently.[654] For example, some states define it to mean the issuance of a civil infraction whereas in other states it can mean no jail time but a misdemeanor charge. The lack of a consistent approach among the states can have troubling repercussions for defendants who find themselves in the wrong state.

454. A majority of states have not adopted any systemic approaches to the indigent defense system. If these efforts are undertaken, case numbers may drop, and state-appointed counsel may be better able to represent clients.[655]

The Overburdening of State-Appointed Counsel

455. The over-criminalization and the under-funding of indigent defense systems have resulted in a crisis in access to meaningful legal representation in criminal matters, because of the drastic impact on the quality of representation that is provided to criminal indigent defendants.

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[652] *Id*.
[653] Aaron C. Davis, *D.C. Council Votes to Eliminate Jail Time for Marijuana Possession*, WASH. POST (March 5, 2014), http://www.washingtonpost.com/local/dc-politics/dc-council-eliminates-jail-time-for-marijuana-possession-stepping-to-national-forefront/2014/03/04/df6fd98c-a32b-11e3-a5fa-55f0c77bf39c_story.html.
[654] 1VINCENT N. PARRILLO, *Decriminalization*, *in* ENCYCLOPEDIA OF SOCIAL PROBLEMS (Sage Publ'g 2008).
[655] This of course only holds true for states that have no extended the right to counsel to all misdemeanor charges. THE SPANGENBERG PROJECT, CTR. FOR JUST., LAW & SOC. AT GEORGE MASON UNIV., AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY, REDUCTION, AND ALTERNATIVE SENTENCING (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_tsp_reclassification_report.authcheckdam.pdf.

456. Across the country, public defender officers are overburdened.[656] The ABA has promulgated standards that establish the maximum number of cases an individual public defender may be assigned.[657] According to such standards, a public defender should handle no more than 400 misdemeanor cases and 150 fifty felonies.

457. In most locations, ***the numbers of cases that public defenders are required to carry grossly exceed the numbers set by professional standards.*** For example, public defenders in Michigan in 2009 were assigned 2,400 cases per year. Florida's annual felony caseloads rose to 500 per defender, and its misdemeanor totals rose to 2,225 per defender.

458. In Tennessee, six attorneys handled over ten thousand misdemeanors.[658]

459. Inevitably, the quality of representation offered by public defenders burdened with such staggering caseloads suffers. In Louisiana, because of their caseloads, public defenders ***can only devote on average of eleven minutes*** to each individual defendant's case. In most jurisdictions this number is less than an hour.

460. Recently, an ABA-sponsored study revealed that in Missouri, a state especially impacted by the crisis, public defenders were unable to spend more than twelve hours on

[656] Carrie Johnson, *Legal Advocates want Overhaul of Public Defender System*, NPR, Oct. 2, 2013, http://www.npr.org/blogs/thetwo-way/2013/10/02/228572418/legal-advocates-want-overhaul-of-public-defender-system.

[657] *Eight Guidelines of Public Defense Related to Excessive Workloads,* A.B.A. (Aug. 2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf. *See also* Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIMINAL JUST. 24 (2011), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsu11_benner.authcheckdam.pdf.

[658] Benner, *supra* note 624 at 2.

felony cases when forty-seven hours per case was required to assure proper representation.[659]

461. Due to massive case volumes and time constraints, attorneys are often unable to perform basic but critical functions.[660] Tasks such as interviewing clients, conducting investigations, taking depositions, preparing for mitigation, and counseling clients are not being performed.[661] There simply is not enough time or staff available.[662]

462. No systemic efforts have been undertaken to decriminalize minor offenses or to begin properly funding indigent defense systems. Although a few jurisdictions have engaged in some reform initiatives, the system is on the verge of collapse without any hope of substantial improvement.

C. The Consequences of Inadequate Legal Representation

463. Indigent defendants are at an enormous disadvantage when represented by inexperienced, overworked, and/or incompetent attorneys, and in many cases there is a direct effect on their basic human rights.

Arbitrary Pretrial Detentions

464. Oftentimes defendants do not meet with lawyers until they have been in jail for months, or even years in some cases, due to either the overburdened workload of the public defender or late appointment of counsel. This clearly jeopardizes a defendant's chances

[659] A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), *available at* http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf.

[660] Benner, *Eliminating Excessive Public Defender Workloads*, *supra* note 657.

[661] Rachel M. Zahorsky, *Public Defenders Can Reject Cases Because of Excessive Workloads, State Supreme Court Rules*, A.B.A. J (2013).

[662] *Id*. *See also Supreme Court Says Public Defenders Can Reject Cases Due to Overload*, A.B.A. J (May 28, 2013 11:30 AM), http://www.abajournal.com/news/article/state_supreme_court_says_public_defenders_can_reject_cases_due_to_overload.

at pretrial release, but also limits the indigent's assurances of adequate preparation for their defense.

465. News articles have covered numerous cases where accused individuals, who are ultimately found to be innocent, languish in detention for years due to delays caused by the indigent defense crisis.[663]

466. Pretrial detention not only revokes an individual's basic right to liberty, but it may have effects on other fundamental rights. It could lead to the loss of a defendant's job, or separation of a family.

467. The National Association for the Advancement of Colored People (NAACP) report on the indigent defense crisis in Mississippi documented inordinate delays before a defendant's case could be heard by the courts. Some defendants wait up to one year before they meet with their court-appointed attorney; others meet their lawyers on the day of trial.[664]

Assembly Line Justice

468. The National Association of Criminal Defense Lawyers & The Sentencing Project report on a criminal justice system that "privileges the prosecutor and is structurally oriented to reward efficiency through plea bargains, rather than reinforcing institutional safeguards intended to achieve fairness in outcomes."[665]

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[663] William Glaberson, *Waiting Years for Day in Court*, N.Y. TIMES, April 14, 2013, at A1.

[664] *Assembly Line Justice: Mississippi's Indigent Defense Crisis*, NAACP LEGAL DEF. & EDUC. FUND, INC. 6 (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.

[665] THE SENTENCING PROJECT, NCADL, CRIMINAL COURTS RACIAL DISPARITIES IN CRIMINAL COURT PROCESSING IN THE UNITED STATES**,** RESPONSE TO THE PERIODIC REPORT OF THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2007), *available at* http://www.sentencingproject.org/doc/publications/CERD%20December%202007.pdf.

469. The ABA warns, "Under no circumstance should a lawyer recommend to a defendant acceptance of a plea unless an appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."[666] However, the looming caseloads that counsel for indigent defendants face creates an enormous pressure to resolve cases as quickly as possible.

470. The pressure to resolve cases as quickly as possible in order to manage caseloads translates into a large incentive to plead out. Ninety-four percent of all state convictions and ninety-seven percent of all federal convictions are obtained through guilty pleas and not trials.[667]

471. This practice has become so prevalent in indigent defense cases that the system has been termed "assembly line justice," where the defendants are processed through the system rather than receiving any meaningful legal representation for their individual cases.

Potential for Wrongful Convictions

472. Additionally, an overburdened public defender is at a heightened risk of making mistakes that may have serious consequences affecting an indigent client's rights. The worst-case scenario for the drastically insufficient legal services provided to indigent criminal defendants is a wrongful conviction. However, the excessive caseloads of public defenders allow more possibility that a mistake will be made and the worst-case scenario could become a reality.

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[666] A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 4-6.1(b)(Am. Bar Ass'n 3d ed. 1993), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html.

[667] Thomas Giovanni and Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, BRENNAN CTR. FOR JUST. (April 9, 2013), http://www.brennancenter.org/publication/gideon-50-three-reforms-revive-right-counsel.

473. In the wise words of former Attorney General Janet Reno, "A good lawyer is the best defense against wrongful conviction."[668]

Contribution to Mass Incarceration in the United States

474. The massive incarceration that is a notorious characteristic of the criminal justice system in the United States can be partially attributed to the lack of MALR for indigent criminal defendants, validating that ***MALR is a necessary right to protect an individual's fundamental liberty interest from abuse of power in a criminal proceeding.***

475. The United States imprisons more people than any other country in the world.[669] One in thirty-one adults is either in prison or on some form of supervision in the community.[670] One in one hundred adults is incarcerated and one in forty-five adults is on some form of probation, supervised released, or on parole.[671] At any given time in the United States, there are 2.5 million people in prisons. The number of individuals in United States prisons is so high it rivals the population of Chicago, the fourth largest city in the country.[672]

476. In 2011, nearly half the people in state prisons were incarcerated for nonviolent crimes.[673] Drug crimes make up almost half of the offenses for people in federal prison.[674]

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[668] *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, CONSTITUTION PROJECT (2009), *available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf.
[669] Hope Metcalf & Sia Sanneh. *Overcriminalization and Excessive Punishment: Uncoupling Pipelines to Prison*, Report from Yale Law School (2012) *available at* http://www.law.yale.edu/documents/pdf/Intellectual_Life/liman_overcriminalization.pdf.
[670] *Id*.
[671] *Id*.
[672] *Id*.
[673] E. Ann Carson & William J. Sabol, *Prisoners in 2011*, U.S. DEP'T OF JUST. (2012) *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf.
[674] *Id*.

477. People of color are also more likely to face the harsh(er) ramifications of the law.[675] African Americans and Latinos account for 61.4 percent of people under correctional jurisdiction.[676] African American males are incarcerated at a rate seven times greater than white males and for Latino men it's three times higher.[677] African Americans account for 56.4 percent of those serving life without parole.[678] They are also five times more likely to be sentenced to death.[679]

Failure to Remedy

478. Notwithstanding growing concern, poor defendants charged with criminal acts continue to suffer a deprivation of access to justice and meaningful legal representation.

479. In 2010, the Department of Justice convened a national symposium on indigent defense entitled, "Looking Backward, Looking Forward."[680] Over eighteen months ago, U.S. Attorney General Eric Holder established a Department of Justice internal group focused on the indigent defense crisis, specifically to identify funding sources, launch legislative initiatives, and create structural solutions.[681] The group has yet to reveal any of these findings, or take further steps.[682] The Department of Justice has yet to take sufficient action, notwithstanding their welcomed concern, which serves to deepen fears about the future of the criminal justice system.

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[675] *Id*.
[676] *Id*.
[677] *Id*.
[678] *Id*.
[679] *Id*.
[680] National Symposium on Indigent Defense, *Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations*, U.S. DEP'T OF JUST. (Feb. 25-26 1999), *available at* http://www.sado.org/fees/icjs.pdf.
[681] Attorney General Eric Holder, *Brennan Center for Justice Legacy Awards Dinner Speech*, New York, NY; Brennan Center for Justice at the New York University School of Law (Nov. 16, 2009) (transcript available at http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html) .
[682] *Id*.

480. For years the failings of the criminal justice system have been well documented, researched, and analyzed. Experts and advocates have sounded the alarm but nothing has changed. Every day thousands of individuals must bear the ramifications of a crumbling criminal justice system. They suffer the effects of over-criminalization while at the same time, they are provided counsel that is ineffective overburdened, understaffed, and underpaid. Unless meaningful structural reform is undertaken, the criminal justice system will continue to erode the meaning of the Rule of Law.

481. These scholarly findings make evident: "the failure to protect the right to counsel has significant consequences for individuals accused of a crime, for the integrity of the court, for respect for the Rule of Law, and for individual judges who fail to honor the right to counsel."[683]

D. Systemic Failures in the Scheme of International Human Rights Norms

482. The current state of indigent criminal defense in the United States does not even meet the standards set by domestic law, and it clearly does not fulfill U.S. obligations under international human rights norms.

483. In domestic law, it is well established that an attorney's failure to investigate factual innocence or circumstances for mitigating punishment is a violation of the Sixth Amendment right to counsel.[684] Yet it is well-documented that due to the dysfunctional nature of the indigent defense system, this is nearly impossible in many cases. Thus, not living up to "general professional ethics" as is required by the U.N. Human Rights Committee to fulfill the human rights' obligation of a right to effective assistance of counsel.

[683] Boruchowitz, *supra* note 643.
[684] Benner, *supra* note 624 at 2.

484. The shortcomings of indigent defense in the United States also clearly point to a lack of qualified and trained attorneys circulating in the indigent defense system, which is required to meet standards of human rights norms in the inter-American system.

485. The statistics concerning the lack of time and preparation devoted to an indigent criminal defendant's case by state-appointed counsel are alarming on their face. Moreover, these statistics obviously indicate that ***the right to adequate time and preparation for trial is virtually nonexistent for the indigent criminal defendant***. Therefore, by international human rights standards, these ***defendants are deprived of the right to effective assistance of counsel that is obligated by international human rights norms***, and have no guarantees of a fair trial to ensure that their fundamental liberties are protected.

486. In its 2013 report, the U.S. Human Rights Network documented the lack of dignity afforded to defendants in the criminal justice system. ***The report emphasizes that the collapse of the system is a violation of core of human rights values, and the "acknowledgment that we are all human beings deserving of equal dignity and rights" and further defines the need to address the crisis through a human rights framing.*** [685]

CONCLUSIONS

487. In sum, the United States legal system in its current state clearly does not offer equal access to justice. The lack of a universal right to MALR is inconsistent with the United States' obligations to human rights within both the international and the inter-American system. Moreover, this shortcoming leaves fundamental liberty interests of indigent individuals left unprotected in civil, immigration, and criminal proceedings alike. The

[685] Deborah Labelle, *Criminal Justice & Human Rights in the United States*, U.S. HUMAN RIGHTS NETWORK (2013), http://www.ushrnetwork.org/sites/ushrnetwork.org/files/criminal_justice_framing_paper_-_ushrn.pdf.

lack of adequate protection of these rights is an even more profound deviation from the United States' obligations to human rights norms in the international and inter-American system. The consequences on individuals' fundamental liberty interests are too severe to ignore.

488. Poor people simply cannot afford the assistance of counsel on their own to defend their rights. Without it, indigent claimants have hollow guarantees of their fundamental liberty interests because they have no effective way to access legal redress. If a right without a remedy is no right at all, it follows that a right without meaningful access to legal representation is no right either.

489. Domestic pressure has failed to prompt a satisfactory reform of access to counsel in the United States. However, the United States has accountability in broader regional and international systems; accountability that it has voluntarily placed upon itself through participation in these bodies and ratification of many of their governing instruments.

490. Not only is it in the interest of international and regional bodies, such as the IACHR, to reform the problems with access to counsel in the United States, it is within the power of these bodies to exert pressure on the United States government to fix the problem.

491. The problem of lack of MALR in the United States is complex and has many moving parts. However, the IACHR is especially well-positioned to take on this issue. The IACHR's past research, engagement, and work on the issue of access to counsel means it has a substantial depth and breadth of expertise on the topic and can inform, as well as influence, the U.S. government with regards to indigents' right to MALR.

492. By holding a thematic hearing on the issue, the Inter-American Commission on Human Rights can amplify the many existing voices around the United States and around the

world that insist that the U.S. government must recognize a universal right to MALR for all who cannot afford counsel and provide the funding, infrastructure and personnel to put this right into practice.

GLOSSARY OF ACRONYMS

Acronym	Definition
ABA	American Bar Association
ACLU	American Civil Liberties Union
AEDPA	Antiterrorism And Effective Death Penalty Act
ASFA	Adoption and Safe Families Act
BIA	Board of Immigration Appeals
CAT	Convention Against Torture
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
DHS	Department of Homeland Security
DOJ	Department of Justice
EEOC	Equal Employment Opportunity Commission
EMA	Emergency Medical Assistance
EOIR	Executive Office for Immigration Review
HUD	Department of Housing and Urban Development
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Political and Civil Rights
ICE	Immigrations and Customs Enforcement
ICESCR	International Covenant on Economic, Social and Culture Rights
ICRSR	International Convention Relating to Status of Refugees
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
IOM	International Organization for Migration
LIHEAP	Low Income Home Energy Assistance Program
LOP	Legal Orientation Programs
LSC	Legal Services Corporation
MALR	Meaningful Access to Legal Representation
NAACP	National Association for the Advancement of Colored People
NELP	National Employment Law Project

NLADA	National Legal Aid and Defender Association
NLCHP	National Law Center on Homelessness and Poverty
OAS	Organization of American States
PTFA	Protecting Tenants at Foreclosure Act
SNAP	Supplemental Nutrition Assistance Program
SSI	Supplemental Security Income
TANF	Temporary Assistance for Needy Families
TPR	Termination of Parental Rights
UDHR	Universal Declaration of Human Rights
UIB	Unemployment Insurance Benefits
UNCERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review
USA	United States of America
USDA	United States Department of Agriculture
WIC	Special Supplemental Nutrition Program for Women, Infants, and Children
WJP	World Justice Project