
Martha F. Davis
Northeastern University, m.davis@neu.edu

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RACE AND CIVIL COUNSEL IN THE UNITED STATES: A HUMAN RIGHTS PROGRESS REPORT


Martha F. Davis
Northeastern University – School of Law
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Martha F. Davis†

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INTRODUCTION

The United States justice system has been called the “envy of the world,” yet that rhetoric rings hollow when millions of individuals, disproportionately people of color, cannot gain effective access to the courts in civil cases.1 According to the Legal Services Corporation, less

† Martha F. Davis is a professor at Northeastern University School of Law and faculty co-director of the Program on Human Rights and the Global Economy. Thanks to Risa Kaufman and John Pollock for their insights and assistance, to Elliott Hibbler for research assistance, and to Rick Doyon for his terrific administrative support.

1. The Due Process Guarantee Act: Banning Indefinite Detention of Americans: Hearing Before the Subcomm. on the Judiciary of the Senate, 112 Cong. 1 (2012) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (observing that indefinite detention of Americans degrades a U.S. justice system that is “the envy of the world”). In criminal cases, in contrast to civil, the U.S. Supreme Court established in Gideon v. Wainwright, 372 U.S. 335, 340 (1963), that court-appointed counsel is required under the Sixth Amendment to the U.S. Constitution.
than twenty percent of the legal needs of the poor can be met by underfunded and overwhelmed legal aid and pro bono lawyers. In the wake of the recent Great Recession, the number of self-represented litigants has risen to new heights. Expanding access to legal representation when dealing with issues of importance could make a significant difference in people's lives and well-being, increasing the chances of prevailing as well as boosting satisfaction with the outcome.

Responding to this "justice gap," a movement to establish a right to civil counsel has gained strength in recent years, supported by the American Bar Association ("ABA") as well as many state bar organizations and advocacy groups. Indeed, in a 2006 resolution endorsed by its House of Delegates, the ABA called on federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.


4. See generally Rebecca Sandefur, The Impact of Counsel: An Analysis of Empirical Evidence, 9 Seattle J. Soc. Justice 51, 51-52 (2010) (concluding that legal representation always increases the average likelihood of prevailing). Evidence also supports the fact that represented parties are more satisfied. For example, the state of Georgia found that sixty percent of those who represented themselves were unsatisfied with the result, while almost two-thirds of those who found an attorney were satisfied with the result. Comm. on Civil Justice—Supreme Court of Ga. Equal Justice Comm’n, Civil Legal Needs of Low and Moderate Income Households in Georgia: A Report Drawn from the 2007/2008 Georgia Legal Needs Study 2 (2009) [hereinafter Georgia Report], available at http://www.georgiacourts.org/files/legalneeds_report_2010%20final%20with%20addendum.pdf. See also Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment, 35 Law & Soc’y Rev. 419, 419 (2001) (finding that only twenty-two percent of represented tenants had final judgments entered against them, while fifty-one percent of tenants without legal representation had final judgments entered against them).


The United States’ debate of this issue has been shaped by the constraints of domestic law. More often than not, the public discussion of the proposed right to civil counsel in the United States has treated the issue as a race-neutral concern involving basic fairness in light of poverty-based disparities. Advocates argue, for example, that concepts of procedural due process—an issue of constitutional dimension—require expanded access to counsel in civil contempt proceedings or housing eviction cases or cases terminating parental rights. The racial impact of the lack of civil counsel—an issue that does not raise constitutional concerns absent evidence of discriminatory intent—often remains unarticulated. Yet international law continues to recognize such racial disparities, intentional or not, as human rights violations.


As described below, the United States' treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") require an explicit examination of the racial impacts of the lack of a right to civil counsel. The Committee on the Elimination of Racial Discrimination ("CERD Committee"), which monitors state parties' compliance with ICERD, squarely addressed this issue in its 2007-2008 review of U.S. compliance.\(^\text{11}\) Another review is expected in late 2014, and the United States has already filed its written report for that pending assessment.\(^\text{12}\) In anticipation of the 2014 review, this Article examines the ways in which the ICERD standards could influence the civil counsel debate and policy within the United States, requiring more rigorous examination of the ways in which lack of civil counsel compounds existing racial disparities.

This Article is organized as follows. Part I first examines the existing data demonstrating racial disparities in access to counsel. This Part then sets out the relevant provisions of ICERD and the standards for assessing compliance articulated by the CERD Committee, reporting the conclusions that the CERD Committee reached in its 2007 review of the United States.

Part II briefly reviews U.S. progress since the 2007 Committee review. Much of this has been summarized in the recent report, Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases, reprinted in this volume.\(^\text{13}\) The review here augments that work by focusing on those few initiatives that have highlighted racial disparities in access to counsel, and on the continued gaps in knowledge of the racial dynamics of this issue.

Part III probes the ways in which the results of the 2007-2008 ICERD review were used by domestic advocates engaged in litigation, legislative advocacy and education concerning the right to civil counsel. This survey reveals that, despite the CERD Committee’s strong statements, U.S. advocates rarely invoked the CERD Committee


conclusions in domestic advocacy.

In anticipation of the 2014 review, Part IV suggests possible avenues for strengthening the connections between the CERD Committee's work and U.S. advocacy on the right to civil counsel.

The Article concludes that ICERD has an important role to play in providing a legal framework for addressing the racial impacts of the lack of civil counsel—a framework that is lacking in domestic law. However, ICERD will not have significant domestic influence until both U.S. human rights advocates and the CERD Committee thoughtfully tailor their work to the U.S. context, with a view toward shoring up the domestic power and authority of international law.

I. RACIAL DISPARITIES AND THE HUMAN RIGHT TO CIVIL COUNSEL

A. The Evidence of Racial Disparities in Access to Counsel

Race has not been put forward as a central issue by the U.S. civil counsel movement, but the evidence demonstrating the racial disparities in access to counsel is deeply disturbing. Some of this evidence was presented to the CERD Committee during its review in 2007-2008. Yet at that time, available data focusing on racial impacts was scarce. Indeed, a few months after the CERD review, Professor Rebecca Sandefur observed that "[n]o major qualitative study has focused expressly on race and disputing, justiciable problems, or contact with civil courts or staff." In the absence of direct data, some analysts simply relied on known information concerning racially disparate poverty rates and the evidence that access to counsel makes a difference in case outcomes to assert—quite reasonably, albeit without direct evidence—that lack of civil counsel compounded existing racial disparities.

More than six years later, as demonstrated in the Access to Justice report and augmented below, the data continues to paint a clear picture of the connections between lack of access to counsel and loss of basic needs. Among other things, civil counsel pilot programs are beginning to yield results. The final report on a Massachusetts pilot program provided evidence that civil counsel can make a difference in case outcomes and can help to address the racial disparities in access to counsel.

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16. See, e.g., Henderson & Smith, supra note 9, at 210.
program offering targeted representation in housing court in Quincy, Massachusetts, determined that in a tightly controlled, randomized experiment,

two-thirds of the tenants who received full representation were able to stay in their homes, compared with one-third of those who lacked representation. Even for those represented tenants who moved, they were better able to manage their exit on their own timetable and their own terms. Full representation therefore allowed more than two-thirds of the tenants in this pilot to avoid the destabilizing consequences of eviction, including potential homelessness. Represented tenants also received almost five times the financial benefit (e.g., damages, cancellation of past due rent) as those without full representation. 18

More results will be forthcoming as California and other states with pilots in the pipeline proceed with civil counsel programs in the near term. 19 These results combined with persistent data on the overrepresentation of minorities among those eligible for scarce legal assistance provide continued support for the assertion that lack of a right to civil counsel has racial impacts. Increasingly, available data, often gathered by the state-level Access to Justice Commissions or Civil Legal Needs Surveys that have proliferated in recent years, 20 also directly illuminates the race-based impacts of lack of civil counsel. For example, the New York study concluded that

low-income New Yorkers most in need of legal assistance are families with children under age 18, African Americans, Latinos, immigrants, unemployed New Yorkers, uninsured New Yorkers, and New Yorkers with disabilities. Their problems are varied and include problems with employment (25 percent), health insurance or medical bills (25


percent), and public benefits (23 percent).\textsuperscript{21}

In its study, Arkansas found evidence that legal issues relating to government benefits may disproportionately affect minorities.\textsuperscript{22} The Nevada Civil Legal Needs Survey reported that approximately one in ten households with a Native American tribe member experienced problems specifically related to being Native American that could require legal assistance.\textsuperscript{23} In Georgia, a state where one out of three African Americans is poor, the Legal Needs survey found that “discrimination was an overwhelming concern of survey respondents.”\textsuperscript{24}

Racial disparities in poverty and legal need are present even in states that lack racial and ethnic diversity. For example, most people in the legal-aid-eligible population of New Hampshire are white, yet racial minorities are overrepresented relative to their overall numbers: While constituting only one percent of the general population, thirty-six percent of New Hampshire’s African-American population is eligible for legal aid. The small absolute numbers may obscure the racial inequalities that exist for this population—and the impacts that they feel when civil counsel is unavailable.\textsuperscript{25}

Finally, while not broken out by race, the Michigan report described some of the devastating individual and community impacts when legal needs are unmet. According to the report,

\begin{quote}
[the poor economy]... brings about an increase in certain legal problems; Michigan’s high foreclosure rate has caused the need for legal help in foreclosure prevention to increase and is just one example of how a bad economy creates legal problems that, if unaddressed, can lead to family upheaval and community erosion.\textsuperscript{26}
\end{quote}

Given the general data concerning the racial impact of predatory

\begin{itemize}
\item[24.] Georgia Report, supra note 4, at 5, 16.
\end{itemize}
mortgage lending, it seems likely that these impacts are concentrated in African-American-identified communities, but the Michigan report unfortunately does not probe the race question.\textsuperscript{27}

In sum, the contributions from state-level reports are filling out the national picture, with several reports confirming that the lack of a right to civil counsel has uniquely harsh impacts based on race and ethnicity. Yet, because of the uneven approaches to data collection and the lack of research coordination across jurisdictions from the federal level, as well as the failure at every level to prioritize examination of racial impacts, there is still much more to learn.\textsuperscript{28}

\textbf{B. The International Human Rights Standards}

ICERD, adopted and opened for signature in 1965, is an international treaty committing its state parties to eliminate racial discrimination in a wide range of areas, from citizenship to education to voting rights.\textsuperscript{29} The definition of discrimination under the treaty is broad and includes instances of unintentional racially disparate impact, a contested category of discrimination under U.S. law.\textsuperscript{30} The United States ratified the treaty in 1994 with reservations, understandings, and declarations ("RUDS") that purport to limit the government's obligations to implement the treaty.\textsuperscript{31} Among other things, the RUDS indicate that the treaty is non-self-executing, therefore requiring additional Congressional action before complete domestic implementation. Despite these RUDS, as a party to the treaty, the United States is obligated to submit periodic reports to the CERD.

\textsuperscript{27} See Jacob Rugh and Douglas Massey, \textit{Racial Segregation and the American Foreclosure Crisis}, 75 \textit{Am. Soc. Rev.} 629, 630 (2010).

\textsuperscript{28} Catherine R._Albiston and Rebecca Sandefur, \textit{Expanding the Empirical Study of A2J}, 2013 \textit{Wis. L. Rev.} 101, 110 (2013) (stating that we “know little of the impacts of inequality in access to justice on other forms of social inequality,” including race). \textit{See also LAFONT ET AL., supra} note 22, at 6-8 (describing wide variety of research approaches adopted by legal needs studies).


\textsuperscript{30} Article 1, ¶ 1 of ICERD defines the concept of racial discrimination as follows: “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” (emphasis added).

Committee, a panel of international experts who monitor parties’ compliance with their treaty obligations under ICERD.\textsuperscript{32}

The United States filed its initial compliance report in 2000, covering several reporting periods at once, shortly before the United Nations ("U.N.") World Conference Against Racism in Durban in 2001.\textsuperscript{33} After a long delay, the United States filed a second cumulative compliance report with the CERD Committee in 2007. In the years between the first and second reports, a more sophisticated, better organized, and more highly resourced domestic human rights movement developed in the U.S.\textsuperscript{34} Many civil society organizations engaged with the second CERD review process in a highly strategic and coordinated way, preparing a detailed "shadow report" critiquing the official U.S. report and traveling to Geneva to speak directly with members of the CERD Committee and the U.S. government delegation.\textsuperscript{35}

One focus of the 2007-2008 U.S. shadow report was the racial impact of the lack of access to civil counsel. A section of the shadow report addressed this issue directly.\textsuperscript{36} Further, a number of organizations attending the review hearings in Geneva pushed for attention to this issue.\textsuperscript{37}

This advocacy focused on several provisions of CERD that address fair procedure and adjudication through the lens of equality and non-discrimination. In particular, Article Five requires that States Parties undertake "to guarantee ... the right to equal treatment before the tribunals and all other organs administering justice."\textsuperscript{38} Further, addressing the remedies available to victims of discrimination, CERD’s Article Six provides that States Parties

shall assure to everyone within their jurisdiction effective protection

\textsuperscript{32} G.A. Res. 2106, supra note 29, at Art. 9 ¶ 1.
\textsuperscript{35} A first-hand account of this process is set out in Hadar Harris, \textit{Race Across Borders: The US and ICERD}, 24 \textsc{Harv. Blackletter L.J.} 61 (2008).
\textsuperscript{36} This portion of the Shadow Report was published separately as: \textsc{Ne. Univ. Sch. of Law, Program on Human Rights and the Global Econ., Access to Civil Justice: Racial Disparities and Discriminatory Impacts Arising from Lack of Access to Counsel in Civil Cases} (2007), \textit{available at} http://www.northeastern.edu/law/pdfs/academics/phrge-derd.pdf.
\textsuperscript{37} See generally Harris, supra note 35.
\textsuperscript{38} G.A. Res. 2106, supra note 29, at Art. 5.
and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.\textsuperscript{39}

As advocates pointed out, both of these formulations encompass civil matters and explicitly require that States take positive steps to ensure effective access to the apparatus of the civil justice system. Further, advocates cited other formal guidelines and statements issued by the CERD Committee to indicate the international community’s growing concern regarding racially equitable access to justice, including civil counsel.\textsuperscript{40}

The CERD Committee’s 2007-2008 review of the United States culminated in the committee’s Concluding Observations.\textsuperscript{41} The wide-ranging document praised some developments, such as the reauthorization of the Violence Against Women Act and, at the state level, California’s approval of a new law intended to address racial disparities in housing.\textsuperscript{42} However, the CERD Committee expressed many grave concerns, particularly noting the continued absence of a national human rights institution, the persistent racial disparities in criminal law enforcement, and the ways in which post-Katrina responses exacerbated racial gaps.\textsuperscript{43}

On the issue of access to civil counsel, the CERD Committee spoke with unprecedented clarity, framing it as a human rights issue. As set out in the CERD Committee’s Concluding Observations,

\textit{[t]he [CERD] Committee . . . notes with concern the disproportionate impact that the lack of a generally recognized right to counsel in civil proceedings has on indigent persons belonging to racial, ethnic and national minorities . . . . The [CERD] Committee . . . recommends that the State party allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or}

\textsuperscript{39} \textit{Id.} at Art. 6.


\textsuperscript{41} \textit{Concluding Observations, supra} note 11.

\textsuperscript{42} \textit{Id.} at ¶¶ 5, 9.

\textsuperscript{43} \textit{Id.} at ¶¶ 12, 20, 31.
child custody, are at stake.\(^{44}\)

The CERD Committee requested interim reports concerning some of the items addressed in its Concluding Observations, such as the government’s post-Katrina efforts, but it did not request such an interim update on the issue of civil counsel.\(^{45}\) In 2013, the United States reported to the CERD Committee for the first time since 2007 on its progress in implementing the committee’s recommendations concerning civil counsel, in further compliance with its treaty obligations under ICERD.

II. ASSESSMENT OF U.S. PROGRESS

The Access to Justice Report, printed in this symposium issue, provides a detailed description of the United States’ progress in responding to international concern regarding access to civil counsel. While there have been a number of positive developments on the state and local levels, with pilot programs in several states and localities and modest legislative and judicial expansions of civil counsel rights, the overall picture is disappointing, particularly at the federal level. Funding for federal legal services remains low, and the federal government has failed to extend a right to appointed counsel in immigration proceedings—an area where federal law controls. Many question whether the federal government has provided adequate leadership on this issue.\(^{46}\) Indeed, in *Turner v. Rogers*, a recent case before the U.S. Supreme Court addressing the right to counsel in civil contempt proceedings, the U.S. government’s amicus brief took pains to make clear that the United States rejected any broad claim for a right to civil counsel.\(^{47}\)

The picture is even more disappointing in terms of specific efforts to remedy racial inequalities in access to civil counsel. The U.S. government’s signature program to address civil counsel issues on the federal level is the U.S. Department of Justice’s Access to Justice Initiative (“AJI”).\(^{48}\) There is no doubt that AJI has served as a catalyst for attention to access to justice, certainly by the research community and within government agencies, with some positive results in terms of grant funds to support legal services in specific areas. AJI’s work has,

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44. *Id.* at ¶22.
45. *Id.* at ¶45.
at times, drawn attention to the lack of knowledge concerning race and access to justice. However, AJI’s contribution to actually closing the racial justice gap is less clear, in part because it has not been assessed through that lens.

A. The Federal Access to Justice Initiative: Highlighting Research Gaps

AJI was created in March 2010 “to address the access-to-justice crisis in the criminal and civil justice system.” 49 Under the leadership of its first Senior Counselor, long-time Harvard Law Professor Laurence Tribe, AJI immediately prioritized the development of a broad research agenda. 50 Tribe returned to academia after only eight months at AJI, but the groundwork laid during his short stint in government resulted in continued dialogue concerning research on access to justice issues.

For example, in July 2010, Tribe gave keynote remarks at the Annual Conference of Chief Justices (“CCJ”) that included a charge to establish statewide access-to-justice commissions in all states that lacked a commission. Following his remarks, the CCJ unanimously adopted Resolution Eight: In Support of Access to Justice Commissions, urging states without an active commission to establish one. Many of the two dozen states lacking commissions responded positively. 51 AJI provided technical assistance and support to individual states and the ABA to develop a national strategy for establishing and strengthening commissions. 52 States contracted with private research organizations or academic institutions to complete surveys and assessments. 53 The result was a spate of new reports and on-the-ground research on unmet civil legal needs, with more still to come. 54 Unfortunately, without any national template and operating with scarce resources, many of these

51. Id.
state-level reports ignore the racial dimension of the problem and analyze access to counsel issues without taking that critical variable into account. 55

Soon after its creation, AJI also initiated a series of meetings leading to creation of a national research-focused Consortium on Access to Justice. 56 The consortium’s work led, in December 2012, to a two-day workshop entitled “Access to Civil Justice: Re-Envisioning and Reinvigorating Research,” supported by the National Science Foundation. The results of that meeting identify both the opportunities for and impediments to further research, while duly noting the absence of data on racial impacts. 57 As stated in the consortium report,

legal needs studies [do not] provide an adequate understanding of the stratification of access to justice by characteristics such as race, ethnicity, age, gender and geographic region. The fragmentary research available reveals considerable disparities in the amount of aid available. Certain subgroups are chronically underserved; the rural poor and non-English speaking immigrants face particular obstacles. Some disparities in access are a product of limited services. Others are related to psychological, structural and information barriers to seeking aid that affect population groups differently. Little systematic research is available on how these barriers operate and how they might best be addressed. 58

Recognizing the absence of research on the racial dynamics of access to justice is the first step toward remedying that situation. Still, it is difficult not to be disappointed that, more than four years after the CERD Committee’s Concluding Observations, simply identifying the research gaps is counted as progress.

B. State and Local Pilot Programs: Little Assessment of Racial Impacts

This dearth of race-based analysis is also evident in the evaluations of state and local pilot programs. Sponsored by a combination of bar associations, state funding, and outside support, pilot programs have been initiated in cities including San Francisco, Philadelphia, and Boston, and by states including California, Texas, and New York. Some of the focus areas for these programs—for example, foreclosure and eviction proceedings—may have particular impacts on the racially-
identified groups targeted by ICERD.\textsuperscript{59} However, the evaluations issued to date—of two pilot projects sponsored by the Boston Bar Association ("BBA")—have not examined the issue of race.

The BBA operated two pilot projects focused on shelter issues in the Quincy District Court ("Quincy") and the Northeast Housing Court ("Northeast") in Lawrence and Lynn, Massachusetts, with intake occurring for more than a year beginning in the spring of 2009. Both projects were designed as randomized studies with control groups, and evaluations included follow-up interviews with clients, project attorneys, court clerks, judges, and homeless shelter providers. The demographic composition of these sites differed significantly. The city of Quincy is majority white (sixty-seven percent), with a sizeable Asian population (twenty-four percent); Lawrence is majority Hispanic (seventy-six percent); and Lynn is fifty-eight percent white and thirty-two percent Hispanic.\textsuperscript{60}

The pilot projects yielded positive results. According to the final report prepared by the BBA, "[b]oth pilot projects prevented evictions, protected the rights of tenants, and maintained shelter in a high rate of cases."\textsuperscript{61} Specific findings include:

- "In Quincy, two-thirds of the tenants who received full representation were able to stay in their homes, compared with one-third of those who lacked representation."\textsuperscript{62}

- "Represented tenants also received almost five times the financial benefit (e.g., damages, cancellation of past due rent) as those without full representation."\textsuperscript{63}

- In Northeast, the study compared different levels of legal representation. The data there also confirmed the importance of some level of representation to positive outcomes.\textsuperscript{64}


\textsuperscript{62.} \textit{Id.}

\textsuperscript{63.} \textit{Id.}

\textsuperscript{64.} \textit{Id. at} 2-3.
The impacts of these programs were analyzed in detail by the program evaluator, Professor James Greiner of Harvard Law School. Greiner specifically noted the absence of socioeconomic analysis of the impacts of representation, attributing that to lack of funds. Among those socioeconomic impacts might be the effects of representation on racially-identified communities. Unfortunately, though, these promising pilot programs, mounted in demographically distinct locations, do nothing to fill the gap in knowledge of race-based dynamics of access to civil counsel. It is not clear whether future evaluations of these pilots or others will address this issue.

III. USING ICERD IN U.S. ADVOCACY FOR A RIGHT TO CIVIL COUNSEL

In the absence of a strong federal constitutional standard barring racially disparate impacts in access to the courts, ICERD could serve as an alternative framework for analyzing the race-based issues in the United States raised by the lack of a right to civil counsel. But while there continues to be substantial activity in the international arena to strengthen the human rights law relating to the right to counsel, there has been little progress toward using that international law to support the civil counsel movement in the United States.

On the international side, the activity has been substantial. The CERD Committee issued its statements of concern regarding lack of access to civil counsel in 2008. Since that time, several U.N. Special Procedures and other U.N. monitoring bodies have augmented the CERD Committee’s conclusions with their own observations and conclusions regarding the impact of the lack of civil counsel. The issue of lack of civil counsel in immigration proceedings was also briefed when the United States submitted to its first Universal Periodic

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65. See generally D. James Greiner et al., The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future, 126 Harv. L. Rev. 901 (2013).
66. Id. at 949-50. Client demographic data was collected by the researchers, but was not analyzed. See Bos. Bar Ass’n Task Force, supra note 62, at n.57.
68. Concluding Observations, supra note 11.
Review by the Human Rights Commission.\textsuperscript{70} U.S.-based advocates have been instrumental in this focused attention from the international community, encouraging UN committees and special procedures to build on each other's work.\textsuperscript{71}

On the domestic side, however, as described below, use of these conclusions, observations, and other comments within the United States in domestic litigation, legislative advocacy, or public education on the right to civil counsel has been the exception rather than the rule.

\textit{A. Litigation}

Since 2007, there has been considerable litigation in federal and state courts addressing the right to civil counsel.\textsuperscript{72} However, diligent research has uncovered very little integration of international law into the briefing of these cases, with no references to ICERD at all. In Alaska litigation, the ABA filed an amicus brief that addressed in detail the European case law concerning the right to civil counsel, but it did not mention ICERD.\textsuperscript{73} In \textit{Turner v. Rogers}, litigated before the U.S. Supreme Court, no mention was made of ICERD. Indeed, the briefing did not address racial disparities at all in arguing for a right to counsel in civil contempt proceedings arising from an unpaid child support award, though there was extensive amicus discussion of the ruling's potential impact on low income fathers.

\textit{B. Legislative Advocacy}

The CERD Committee's concluding observations have been cited on a handful of occasions in testimony on the state and federal levels, highlighting the racial impacts of the lack of civil counsel. In 2010, the Northeastern Law School Program on Human Rights and the Global Economy ("PHRGE") submitted written testimony to the Senate Judiciary Subcommittee on Human Rights and the Law as part of an


\textsuperscript{71.} See generally Columbia Law School Human Rights Clinic, supra note 13.

\textsuperscript{72.} See generally John Pollock, \textit{The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases}, 61 DRAKE L. REV. 763 (2013) (reviewing litigation establishing rights to civil counsel).

historic hearing on implementation of human rights treaties. The testimony used the right to civil counsel as a case study, arguing that the United States had to that point—before creation of AJI—been largely unresponsive to the CERD Committee’s concerns and challenging the federal government to take action to provide appointed counsel in immigration proceedings. The U.S. Human Rights Network’s Task Force on the Effective Implementation of ICERD also cited the CERD Committee’s recommendations regarding civil counsel in its written testimony to the subcommittee.

Domestic advocates also submitted human-rights-based testimony to the Wisconsin Supreme Court as part of its consideration of a rulemaking petition to establish the right to civil counsel. The Chief Justice of the court, Shirley Abrahamson, solicited the human rights information, which was provided by advocates in live and written testimony. The Wisconsin justices considered this evidence but ultimately denied the petition, though they outlined a possible civil counsel pilot program and reiterated that individual judges retained discretion to appoint counsel in civil matters.

Finally, several law review articles urging legislation on a right to counsel in the immigration context have relied on international sources, including ICERD.


75. Id. at 579 (statement of the U.S. Human Rights Network CERD Task Force); see also id. at 220 (statement of the Nat’l Immigrant Justice Ctr.) (arguing that the ICCPR requires that counsel be provided in immigration proceedings).

76. See Petition to Establish a Right to Counsel in Civil Cases, WIS. COURT SYS. (Sept. 30, 2010), http://www.wicourts.gov/scrules/1008.htm.

77. Retired Associate Justice of the California Court of Appeal Earl Johnson delivered both live and written testimony that addressed international precedents for a right to civil counsel. Additional written testimony focused on ICERD and other international standards was presented by the Northeastern School of Law Program on Human Rights and the Global Economy.


C. Public and Judicial Education

The CERD Committee’s conclusions concerning race and civil counsel have been most utilized in domestic public and judicial education efforts. For example, as advocacy organizations have participated in the U.N. review processes, they often produce widely circulated reports for domestic consumption. Two examples focused on the right to civil counsel are Access to Justice in the United States, published by the Columbia Human Rights Institute and printed in this symposium issue, and Access to Civil Justice, published by PHRGE.80

Public discussions of the right to civil counsel also often include commentary on international aspects of the issue.81 The wave of attention that accompanied the anniversary of Gideon v. Wainwright provided a particular occasion for this, and many of the Gideon events included comment not only on civil counsel, but also on the relevant international law supporting it.82

Finally, the right to civil counsel has also been a topic of judicial education, serving as a vehicle for discussing the relevance of international law to domestic adjudication. For example, a module drawing on this material, including ICERD, has been presented at several educational programs involving state court judges.83 Similar modules have also been used for legal education more generally, targeting legal services lawyers and other public interest lawyers.84

Still, the domestic civil counsel advocacy involving ICERD seems


81. See, e.g., New York State Bar Association and 18 Law Schools Sponsor Forum on Right to Counsel in Civil Matters, N.Y. STATE BAR ASS’N (Oct. 1, 2013), http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=43799. This recent videoconference forum convened by the New York State Bar Association on the right to civil counsel was broadcast to all of the New York State law schools, plus Yale and Rutgers law schools, and specifically highlighted relevant international law and international examples.

82. Id.; see also Symposium, Why Civil Gideon Won’t Fix Family Law, 122 YALE L.J. 2106 (2013) (including several articles addressing relevant international law).

83. The Aspen Institute hosted an event titled “U.S. State Courts: Learning from Other Jurisdictions,” from January 20-22, 2012. The author participated in developing the curriculum for this event.

to be less than the sum of its parts. To date, the highly successful efforts on the international stage to hold the United States accountable and to ensure that the CERD Committee speaks to this important issue have not translated into powerful advocacy tools on the domestic level.

IV. IMPROVING THE CERD COMMITTEE’S EFFECTIVENESS IN SUPPORTING ACCESS TO CIVIL COUNSEL IN THE U.S.

In this Part, I make some preliminary suggestions that might make the CERD Committee’s work more readily useful to domestic advocates and more effective in influencing federal and state policy on the civil right to counsel. The CERD Committee has expressed its commitment to “a continuous process of improvement of its working methods, with the aim of maximizing its effectiveness and adopting innovative approaches to combating contemporary forms of racial discrimination.” Consistent with that goal, I offer the following thoughts.

First, some of the lack of domestic take-up of the CERD Committee’s work is because U.S. judges, policymakers, and litigators have inadequate knowledge of international law. Domestic advocates can and should continue to expand general educational efforts on international human rights law. However, the CERD Committee might also address this issue, as the U.N. Human Rights Committee has in the past, by calling on the United States to increase its efforts at targeted human rights education.

Second, the CERD Committee often speaks in general terms, not dictating specific approaches, with good reason given the sensitivities around national sovereignty. At times, however, the general nature of the committee’s statements can undermine their utility in domestic advocacy contexts. More specific recommendations from the committee, perhaps under the umbrella of overarching general observations, could encourage greater take-up by domestic advocates. For example, the committee could recommend that the federal government provide greater financial incentives to support states and localities mounting civil counsel pilot programs, highlighting some of the current initiatives in California, Massachusetts, and so on, and encouraging their attention to racial impacts. A more specific General Comment from the committee on access to both criminal and civil

justice would also provide important guidance to states parties and civil society.

Third, along these lines, research on the dynamics of race and access to civil counsel is critical and will drive more effective advocacy. Given the strong research network established in the United States over the past few years, and the general consensus that sufficient research on race and justice is lacking, the CERD Committee can be more pointed in calling on the federal government to support research on the impact of lack of civil counsel on racial and ethnic minorities.

Fourth, the United States now has a track record of significant delays between submissions to the CERD Committee. In the past, the committee has been tempered in requesting interim reports, and has limited those requests to the most urgent matters. While the question of race and the civil right to counsel is qualitatively different from a natural disaster such as Hurricane Katrina, requesting an interim report on the civil counsel issue would underscore the seriousness with which the committee views this basic question of access to justice, and would also help build on the domestic momentum. A request for an interim report would reflect the timeliness of this issue.

Fifth, the CERD Committee's work can garner additional strength from the statements of other U.N. bodies, including treaty bodies and special procedures. The committee's Concluding Observations should draw on all of these sources of international authority to make a strong and clear statement concerning the United States' obligations to provide access to civil counsel in cases involving important needs, particularly in light of the racial disparities involved.

CONCLUSION

In 2008, the CERD Committee was clear and direct in its statements concerning the significance of the civil right to counsel in the United States as a matter of racial justice and human rights. Despite some promising pilot projects and increased organization of the research community, the federal government's overall progress in addressing the Committee's concerns since 2008 has been slow. At the same time, domestic advocates have failed to use the emerging international law on this issue as part of their advocacy efforts on the ground. In part, this "disconnect" may reflect the influence of domestic law constraints, since current U.S. constitutional doctrine—unlike human rights law—does not recognize racial impacts alone as sufficient to establish a constitutional violation. However, this Article argues that human rights law provides a vehicle for raising these issues despite the constraints of
domestic law, and suggests ways in which the CERD Committee could facilitate greater domestic take-up of its important recommendations concerning race and access to justice.