



Making Justice Equal

By Rebecca Buckwalter-Poza December 8, 2016

Access to justice is now more critical than ever. In the United States, Americans need a lawyer's help for everything from avoiding an unjust eviction to preventing a wrongful conviction. Yet, effective legal assistance remains out of reach for the majority of Americans. The gap between legal needs and the services available exacerbates systemic inequities and disadvantages that will only grow over the next four years. This series examines the state of access to justice in the United States and how public and private actors can join forces to make justice equal for all Americans.

For two years, Mary Hicks paid \$975 per month for a run-down Washington, D.C., apartment. When she contacted the landlord about mold and mildew in the bathroom and holes in the walls, he did nothing. After Mary began to withhold rent, her landlord sued her.

Mary sought help from a law clinic. Her student attorneys not only kept her from being evicted and ensured that her landlord made the repairs but also reduced her rent to \$480 after discovering that her unit was rent-controlled.¹

Mary was fortunate. While 90 to 95 percent of landlords are represented by lawyers before the Landlord and Tenant Branch of the D.C. Superior Court, only 5 to 10 percent of tenants have legal assistance.² Unlike criminal defendants, parties in civil cases do not have a generalized right to counsel. While all states provide a right to counsel for at least a few types of civil cases, most parties in civil cases that involve high stakes and basic human needs, such as housing, do not have a right to representation.³

In more than three-fourths of all civil trial cases in the United States, at least one litigant does not have a lawyer.⁴ Figures are even starker when it comes to family law, domestic violence, housing, and small-claims matters—those involving disputes over amounts up to \$25,000, depending on the state. At least one party lacks representation in 70 to 98 percent of these cases.⁵

And these are just the Americans who make it to court. Without access to legal advice, many are unaware of their legal rights and potential claims. Past estimates and more recent state-by-state studies suggest that about 80 percent of the civil legal needs of those living in poverty go unmet⁶ as well as 40 to 60 percent of the needs of middle-income Americans.⁷ But because these figures depend upon self-selection and self-reporting, however, and because many Americans do not identify their unmet legal needs as such, it is impossible to estimate Americans' total unmet legal needs.⁸

To deny Americans access to legal assistance is to deny them their rights and protections. This is because, to a greater degree than other countries, the United States places the burden on an individual to seek justice by going to court.⁹ Other developed democracies have enshrined the right to counsel in civil cases and devote 3 to 10 times more funding to civil legal aid than the United States.¹⁰ In areas from environmental regulation and workplace discrimination to civil rights and housing, Americans must hire or find their own attorneys to enforce the law. The result is a divide between those who can afford legal assistance and those who cannot.

This issue brief is the first in a series that examines access to justice as a long-neglected policy concern integral to American democracy—one that is under threat from the coming administration.¹¹ It provides important information on the U.S. justice gap and makes the case for prioritizing improvements in civil aid and indigent defense through legislative and infrastructure initiatives. It also outlines steps that state legislators, courts, and outside actors, such as advocacy organizations, can take to make justice equal.

Understanding the justice gap

The justice gap—that is, the gap between legal needs and services available—has the greatest implications for the United States' most vulnerable populations: those at greatest risk under the policies announced by the incoming administration.¹² On the civil side, people of color,¹³ women,¹⁴ immigrants,¹⁵ the elderly,¹⁶ people with disabilities,¹⁷ and lesbian, gay, bisexual, and transgender, or LGBT, people¹⁸ are more likely to live in poverty and more likely to need legal assistance. Claiming protections under the Americans with Disabilities Act, for example, often requires, at a minimum, legal advice, and at most, litigation.

The justice gap not only most affects those living in poverty but also perpetuates poverty. It also comes at great cost to government: Preventing eviction, for instance, is less expensive for governments than providing emergency housing or covering the higher costs associated with homelessness. In particular, providing attorneys for litigants in cases involving housing, health care, and domestic violence saves governments money and creates both social and economic benefits.¹⁹

In New York state, every dollar spent on civil legal aid creates \$10 in benefits for the recipients of the assistance, their communities, and the state combined.²⁰ Likewise, North Carolina aid providers found that each dollar the state spends on legal aid yields \$10 in economic benefits.²¹ Montana²² and Pennsylvania²³ have each seen a return on investment of \$11 per dollar spent on legal aid.

In the criminal system, too, those who cannot afford an attorney are at a disadvantage—even with the constitutional right to representation. Terrence Miller met his court-appointed defense attorney for the first time on the morning of his first hearing on drug charges.²⁴ The attorney, who had not handled a criminal case in seven years, had been assigned to Miller’s case only four days prior.²⁵ He was only able to speak to Miller for a few minutes.²⁶ Yet the judge denied the lawyer’s requests for more time to prepare, and Miller was convicted in just a few days.²⁷ A New Jersey appellate court affirmed the conviction on the grounds that Miller failed to prove that the trial would have gone differently had he met his attorney earlier.²⁸

In the last year for which the Bureau of Justice Statistics published detailed figures, more than 80 percent of felony defendants charged with violent crimes in the largest U.S. counties could not afford to hire attorneys; the same was true for 66 percent of such defendants in U.S. district courts.²⁹ Other estimates for the percentage of criminal cases involving indigent defendants nationwide put that figure as high as 90 percent.³⁰ Current funding and staffing levels for publicly funded lawyers cannot keep up with this demand. One estimate suggests that 6,900 more public defenders would be needed to manage the current caseload in the United States.³¹

Defendants with publicly appointed attorneys are more likely to be detained before trial as well as more likely to be jailed.³² Facing time and resource limitations, publicly funded attorneys often resort to plea bargains: 90 to 95 percent of defendants represented by a public defender plead guilty.³³ People of color are disproportionately represented among those in poverty and in the criminal justice system due in part to racial profiling and bias at stages from investigation to prosecution. As a result, they are disproportionately disadvantaged by the failings of indigent defense systems.³⁴

Over the past century, and even recently, Congress and the courts have achieved remarkable progress on civil rights, social welfare, and criminal justice through landmark legislation and rulings. But if the people for whom these rulings are meant to protect do not have access to civil legal aid or receive adequate defense representation, these protections become irrelevant to their daily lives.

Shortfalls in civil legal aid

When Congress created the Legal Services Corporation in 1974,³⁵ it was responding to “a need to provide equal access to the system of justice in our Nation.”³⁶ The Legal Services Corporation Act’s sponsors noted that “providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice and assist in improving opportunities for low-income persons.”³⁷

Today, the Legal Services Corporation is the biggest source of funding for civil legal aid for low-income Americans.³⁸ It funds programs that provide direct legal services in every state.³⁹ Legal aid lawyers help Americans meet everyday needs, including housing and health care. They also provide assistance in extreme circumstances, such as making sure that victims of 9/11 and the Deepwater Horizon oil spill in the Gulf Coast received benefits from government compensation funds.⁴⁰

Unfortunately, in practice, too few Americans qualify for legal aid due to the extremely low income cutoff. In 2015, an individual had to make less than \$14,713 per year—a family of four, less than \$30,313 per year—to be eligible for Legal Services Corporation aid.⁴¹ Americans making several times as much can ill afford to hire a lawyer, a luxury that runs \$200 to \$300 per hour on average.⁴² The high cost of justice has a deterrent effect on even high-income individuals, who pursue legal action to resolve unpaid debts just 46 percent of the time.⁴³

Worse, funding shortages mean that only half of those who are eligible for and seek legal aid get help.⁴⁴ While Legal Services Corporation programs aided 1.8 million Americans in 2013, another 1.8 million or more people were turned away.⁴⁵ And, of course, these figures underrepresent the scale of the problem because they only include cases in which help was sought and denied—not all those where help was needed.⁴⁶

Congress has not only placed restrictions on who can receive aid but has also politicized how aid can be used. For example, just as the Hyde Amendment bars the use of federal funds to pay for abortion,⁴⁷ the Legal Services Corporation Act bars grantees from most abortion-related legal proceedings.⁴⁸ Legal Services Corporation-funded programs also cannot lobby government offices, agencies, or legislators—or take class-action cases.

As a result of congressional restrictions, legal aid attorneys are limited in what they can do to affect the overarching policies and institutions that foment and entrench injustice. And once a program accepts just \$1 of Legal Services Corporation funding, it must adhere to these restrictions in all activities, even if it receives money from other, nonrestricted sources.⁴⁹

Today, unmet legal needs are at an unacceptable level and growing as civil legal aid funding is shrinking.⁵⁰ Congressional appropriations for the Legal Services Corporation were just \$385 million in 2016.⁵¹ In the early 1980s, by contrast, the corporation received more than \$770 million annually.⁵² Adjusted for inflation, the corporation's budget has decreased by 300 percent since 1981, even as the number of Americans eligible for aid has grown by 50 percent.⁵³

Beginning in 2009, the second-largest source of legal aid funding in the United States also began to decrease. Since 1980, all 50 states have created Interest on Lawyers Trust Account programs, or IOLTAs. These accounts fund legal aid with interest earned on client funds that lawyers temporarily deposit in a trust account.⁵⁴ In 2007, IOLTA income was more than \$370 million. By 2008, however, it fell to \$284 million, and, in 2009, it was just \$92 million due to dropping interest rates.⁵⁵

Some state IOLTAs have been more gravely affected than others. In North Carolina, the state IOLTA disbursed more than \$4 million in grants in 2008 and 2009. In 2016, IOLTA grants came to just \$2 million.⁵⁶ Texas, meanwhile, saw a staggering 80 percent decline in IOLTA revenue, from \$20 million in 2007 to \$4.4 million in 2012.⁵⁷

Many IOLTA programs have attempted to mitigate losses by developing relationships with banks, asking for higher returns on their accounts in return for publicly acknowledging banks' assistance, and making lawyers' participation—and their use of the highest-yield account possible—mandatory.⁵⁸

Some states are also exploring creative solutions for bolstering IOLTA revenues. In Indiana, legislators approved a \$1 civil filing fee that will generate \$450,000 for legal aid. The Indiana and Pennsylvania supreme courts have mandated that some portion of all unclaimed funds from class action lawsuits be directed to IOLTAs.⁵⁹ But these policies only help mitigate the effect of low interest rates on IOLTA programs.⁶⁰ It is also important for state legislatures to take steps to fund legal aid directly.

The crisis in indigent defense

The Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.”⁶¹ In *Gideon v. Wainwright*, the Supreme Court found the Sixth Amendment right to counsel to be fundamental, noting, “In our adversary system of criminal justice, any person ... 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.”⁶²

Nine years later, in *Argersinger v. Hamlin*, the Court clarified that this Sixth Amendment right to counsel applies in all criminal proceedings where the loss of liberty may be involved:

*Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.*⁶³

Despite these words, many defendants who cannot afford counsel in the United States go unrepresented or do not receive adequate and meaningful representation.

In 2004, 41 years after the ruling in *Gideon*, the American Bar Association published a report titled “Gideon’s Broken Promise,” which concluded that “indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.”⁶⁴

The nationwide crisis in indigent defense has its roots in inadequate funding at the state level. In 2016, the Missouri state public defender’s office needed a budget increase of \$23.1 million to represent indigent defendants in state court.⁶⁵ Gov. Jay Nixon (D) recommended an increase of just \$1 million, leading to the director of the Missouri State Public Defender System’s headline-making decision to highlight the shortfall by appointing the governor as a public defender.⁶⁶ The Missouri indigent defense system ranks 49th in the United States.⁶⁷

Around the country, defendants find themselves represented by undertrained, unsupported, or overloaded defense counsel. Additional structural problems include courts failing to provide counsel as required by the Constitution or state law; prosecutors pushing defendants to waive the right to counsel or to plead guilty; and judges permitting or even soliciting deficient waivers of the right to counsel.⁶⁸ Some judges and elected officials even improperly exert influence over defense counsel. As a whole, the criminal justice system suffers from a lack of oversight and accountability.⁶⁹

Although data on indigent defense systems are limited,⁷⁰ it is clear that this crisis has escalated since the *Gideon* ruling. Public defender programs are underfunded and overburdened. The gap between public defense capacities and need is only growing, yet from 2008 to 2012, total state government funding on public defense changed relatively little, ranging from \$2.2 billion to \$2.4 billion.⁷¹ Nationwide, prosecutors’ offices receive \$3.5 billion more in funding than public defense budgets.⁷²

Making justice equal

Making justice equal for all Americans must be a priority for the incoming administration, Congress, and state governments.

Congress must increase Legal Services Corporation funding, expand eligibility, and lift restrictions on aid. Legislators should begin by removing the so-called super restriction that limits Legal Services Corporation grantees’ use of noncorporation funding. State

legislatures must likewise increase funding for legal aid and, like Indiana, find ways to revive and support IOLTA programs. State supreme courts should follow Indiana and Pennsylvania in directing unclaimed class action awards to legal aid.

Ultimately, improving indigent defense systems requires state legislatures to increase funding for defender programs and improve infrastructure. Federal actors can help bridge the gap, however, by publicizing existing federal grants that public defenders can use to fund defense work and increasing congressional appropriations for additional grants.

Courts and outside actors also have roles to play. Judges should exercise their discretion to appoint attorneys more often and ensure that defenders have the opportunity to give the best defense possible. Courts can simplify legal processes and promote access to justice technology—such as educational applications—to make it easier for individuals to navigate the legal system on their own. Bar associations, law firms, and law schools can increase pro bono contributions and enact policies to improve access to legal services.

Finally, issue advocacy organizations working to protect and advance the interests of the people that the justice gap most affects—those living in poverty, people of color, women, immigrants, the elderly, people with disabilities, and LGBT people—must begin to address and prioritize access to justice. Equal access to legal representation in the justice system is critical to ending poverty, combating discrimination, and creating opportunity—especially now.

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