THE PRICE OF PROGRESS: ESTIMATING THE FUNDING NEEDED TO CLOSE THE JUSTICE GAP

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I. INTRODUCTION

Low-income Americans often struggle to achieve favorable outcomes through the legal system because they lack access to quality legal services. The United States prides itself on believing that the justice system is fair - that the meritorious party will prevail. However, there is a strong bias within the justice system whereby affluent Americans are substantially more likely to achieve a favorable outcome than their low-income peers. Low-income Americans are more likely to attempt a pro se trial or face legal issues without seeking professional legal advice, often with unfavorable results. This is because many Americans are priced out of the market for legal services. The only way that many low-income litigants can afford legal services is through access to legal aid. Unfortunately, legal aid organizations do not have enough resources to serve all the low-income litigants in their geographic and practice areas. Literature on the subject refers to this as the "Justice Gap," the shortfall between the total need for legal aid among low-income litigants and the existing resources available to meet that need.

While service needs of low-income litigants are explored in other literature, existing scholarship has not yet accurately quantified that need in

[†] I thank Kathryn Callaghan, Kacie McPartland, and Javier Mesa for their contributions.

the current political environment. The Justice Gap has remained in this conceptual state for too long. The purpose of this Article is to recast the Justice Gap in dollars of civil legal aid funding needed to minimize the distortionary effects of wealthy bias in the justice system. Quantifying the shortfall lends perspective to the scope of the problem and identifies a funding target that policymakers can use to put low-income litigants on equal footing with more privileged Americans. As with any problem, the discovery of a true solution depends upon, and emerges from, a complete understanding of the problem itself. A deep understanding of the Justice Gap is the essential starting place from which policymakers should consider the financial and opportunity costs of any proposed solution. As the newly inaugurated Biden administration considers its domestic policy agenda and budget, now is an opportune time to revisit the issue of civil legal aid funding. This author's goal is to equip policymakers with the information necessary to take decisive legislative action to close the Justice Gap. Therefore, this Article begins with a brief description of the structural causes of the Justice Gap and the narrative history of funding civil legal aid in the United States. Section two of this Article empirically derives a funding target to provide adequate civil legal aid resources for low-income litigants. Section three inventories the consequences to the justice system if sufficient funding is not provided. Finally, section four concludes with a call to action for the President and Congress to take notice of the issue and increase federal funding for civil legal aid to place low-income litigants on an equal footing with their more affluent peers.

II. STRUCTURAL CAUSES OF WEALTH BIAS

Our legal system is structured to decide isolated grievances between individual parties. It is a constitutional principle that our courts do not offer opinions, they decide cases.[1] Parties that are ideologically or academically interested in the outcome of a particular case cannot always directly participate because of institutional legal principles such as the constitutional requirement for standing.[2] On the one hand, this prevents every private dispute from erupting into a national political debate. On the other hand, this leaves individual litigants to fend for themselves. Those without the resources to mount a legal challenge in defense of their rights have no recourse. In terms of outcomes, the results of a legal proceeding are generally confined to the parties in that case. Barring some exceptional doctrines, parties that are not directly involved in a dispute are not generally bound by the result, which limits the scope within which a legal decision can be

[1] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2416 (2018) (citing Art. III of the U.S. Constitution).

[2] *Trump*, 138 S.Ct. at 2416 (citing Spokeo, Inc. v. Robins, 578 U.S. 330 (2016)).

applied. Overall, this creates a system that can only move incrementally, as common law jurisprudence can only be changed one case at a time. Monumental decisions become precedent and shift the applicable legal paradigm, but there is no global navigation within this system, only minor course corrections made after hitting a legal bump in the road. How then, can our legal system address institution-wide problems? If our legal system is predicated on passing out justice one litigant at a time, is there any hope for attacking systemic inequalities predicated on a bias favoring wealth?

Unfortunately, wealth bias within the justice system is subtle. It is difficult to say that any particular legal decision was biased against a low-income litigant. This is compounded by the assumption that the system is fair. After all, the Constitution demands that people be given a fair trial.[3] However, fairness in this context is hardly comprehensive and generally requires only that Due Process be followed. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[4] *Palko v. Connecticut* explains further that fairness dictates a hearing must be "real," i.e., not a "sham or pretense."[5] There is no requirement that the litigants have equal resources or an equal likelihood of prevailing on a meritorious case. The *Palko* opinion also states that there can be no justice without a trial process that is free from legal errors; to contrive the ultimate results of a trial against litigants of lower economic means would qualify as such an error.[6] The synthesis of these two ideas is that a trial is "fair" so long as the parties and their evidence will be heard, they are given the same systematic process as others in comparable situations, and the results of the hearing are not fixed or fraudulent.

To our nation's shame, that definition of fairness rings hollow to the low-income litigant. Low-income litigants, particularly pro se litigants, are unlikely to have the resources to hire investigators to collect evidence or interview witnesses on their behalf. When the opportunity to be heard does arrive, the low-income litigant may not have anything to present except their own story. A report from the Federal Judicial Center for the Judicial Conference Committee on Court Administration and Case Management suggests that pro se litigants may not always utilize available discovery devices.[7] In a survey of chief judges and clerks of court in U.S. District

[3] Danforth v. Minnesota, 552 U.S. 264, 269 (2008) (citing to U.S. Const., Amdt. 14, § 1, discussing the requirement of a fair trial in the 14th Amendment Due Process Clause).

[4] Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976).

[5] Palko v. State of Connecticut, 302 U.S. 319, 327 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

[6] *Id*. at 328.

[7] DONNA J. STIENSTRA ET AL., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICTS COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 21 (Federal Judicial Center 2011),

Courts, only17 judges (29% of respondents) reported that pro litigants undertake discovery in most or all cases while 33 judges (57% of respondents) reported that pro se litigants only "occasionally" undertake discovery.[8] In the same survey, judges reported that "litigants in a majority of pro se cases have problems presenting the substance of their case to the court."[9] Overwhelmed and unprepared, the result is predictable: low-income litigants struggle to navigate court processes, but the imbalance does not rise to the level of a "sham" as a matter of law and thus there is no error which would give rise to a mistrial or appeal. In fact, this situation is likely to be regarded simply as good lawyering by opposing counsel. It is better than fair, it is good press for lawyers.

All we are guaranteed is a chance, an opportunity to be heard. In the words of U.S. Senator Elizabeth Warren of Massachusetts, "There are two legal systems: One for the rich and powerful, and one for everyone else."[10] From this perspective you can see how the price of seeking a positive outcome in court gets further and further out of reach as the cost of legal services increases.[11] The outcomes do not have to literally be rigged, it is enough that a disparity in resources between the litigants tips the scales of justice.[12] Little by little, the wealth bias adds up to an unfair system. Even if it is hard to spot in a single decision, the disparity in outcomes becomes clear at the macro level. Consider eviction proceedings as an example. Across the country, roughly 90% of landlords are represented by counsel, while only 10% of tenants have that luxury.[13] A study of New York City court cases found that when tenants represent themselves, they are evicted in

https://www.fjc.gov/content/assistance-pro-se-litigants-us-district-courts-report-surveys-clerks-court-and-chief-judge-1.

[8] *Id.*

[9] *Id.* at 23.

[10] *See* Zachary D. Carter, *Elizabeth Warren: American Justice Is 'Rigged' In Favor of The Rich*, HUFFPOST (Feb. 3 2016, 10:55 AM), https://www.huffingtonpost.com/entry/elizabeth-warren-american-justice-rigged-for-rich_us_56b205a2e4b04f9b57d7e5fe (A video recording of Warren's comments from the Senate floor on February 3, 2016).

[11] Joseph S. Hall, *Guided to Injustice: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1366 (1999) [hereinafter *Guided to Injustice*] (Facing prosecution for crimes with increasingly harsh mandatory sentences, indigent defendants that are "innocent, or not as guilty as their sentence would suggest" will sometimes plead guilty just to receive a shorter prison sentence for conduct that they didn't actually engage in.).

[12] *Guided to Injustice*, *supra* note 11, at 1366. (Discussing how indigent defendants, represented by public defenders often have to make a difficult choice on how to split their meager resources between defending the merits of the prosecution's case in chief or saving those resources for the sentencing phase).

[13] Lauren Suddeal and Darcy Meals, *Every Year, Millions Try To Navigate US Courts Without A Lawyer*, THE CONVERSATION (September 21, 2017, 8:36 PM), https://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159.

44% of cases; with a lawyer, tenants are only evicted in 10% of cases.[14] A low-income litigant may be afforded formal procedures and a symmetrical ruleset, but any system that fails to vindicate peoples' rights simply because they cannot afford to pay for legal services is a painful contortion of the word "fair."

In a capitalist system of individual property ownership, a basic assumption is that people are independent economic actors with their own private resources. However, 80% of Americans are in debt,[15] and nearly 70% say it is a "necessity in their lives, although they would prefer not to have it."[16] The median debt of Caucasian households with incomes under $40,000 per year is $8,660, about one-third of their median net worth of $22,000.[17] The situation is substantially worse for minorities.[18] The majority of this net worth, if any, is tied up in home equity.[19] While a valuable financial asset, that equity will be of little use to low-income litigants. They could sell their home to fund a legal case, but then they and their family are homeless. Conversely, they could keep the house, but diverting income to pay for legal costs and missing time at work will put them behind on debt payments within a few months, so they are likely to default on their mortgage and lose the house anyway. This suggests that the majority of Americans are not so much free economic movers, but more akin to an indentured debtor class who is leveraged past the point of safety. Funding even a simple legal case would stretch average Americans beyond their means. Funding a civil legal case is likely impossible for families below the household median income. Again, it strains credulity to label that situation as "fair."

According to the 2015 update to the Civil Legal Needs Study conducted by the Washington State Supreme Court, the average household faces 9.3 legal issues per year.[20] 65% of those problems are never resolved; potentially because the claimants cannot afford counsel and do not have the legal literacy to pursue their claims pro se.[21] Only 24% of respondents in the study were

[14] NEW YORK CITY BAR ASSOCIATION, FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS, https://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf.

[15] THE COMPLEX STORY OF AMERICAN DEBT – LIABILITIES IN FAMILY BALANCE SHEETS, THE PEW CHARITABLE TRUSTS 2 (2015) https://www.pewtrusts.org/en/research-and-analysis/reports/2015/07/the-complex-story-of-american-debt.

[16] *Id.* at 18.

[17] *Id.* at 5.

[18] *Id.*

[19] *Id.* at 8.

[20] CIVIL LEGAL NEEDS STUDY UPDATE COMMITTEE, CIVIL LEGAL NEEDS STUDY UPDATE 3 (Washington State Supreme Court 2015).

[21] *Id.* at 16.

able to get legal help of any kind for their problems.[22] This is to say that, even among that quarter of the population, some may not have been able to afford full trial representation.[23] An astonishing 58.4% of those studied felt that the civil justice system had not treated them fairly on a consistent basis.[24] These statistics demonstrate that low-income litigants are most likely going to be without the valuable assistance of counsel in court.

The right to counsel is an essential part of our adversarial justice system.[25] Without technical legal knowledge, low-income litigants are at a severe disadvantage when confronted by both the intricacies of an arcane legal system and the zealous advocacy of opposing counsel.[26] As Justice John Paul Stevens wrote, "without counsel, the right to a trial itself would be of little avail."[27] Supreme Court jurisprudence recognizes that a trial is not fair when the defendant is deprived of effective assistance of counsel at critical stages.[28] It stands to reason that the same logic would apply in cases where the defendant is not indigent or the claim is not criminal. However, the Constitution has not been construed to require counsel be provided in civil cases or that available counsel actually provide effective assistance.[29] If poverty denies access to meaningful legal representation, and representation by counsel is essential to a fair trial, can any pro se litigant really be said to receive a fair trial?

This situation cannot be resolved through the common law because established precedent holds that a civil trial is not unfair simply because a litigant cannot afford full representation. Accordingly, there is no sound constitutional basis for challenging the current state of the legal system through the courts. Additionally, there is no way to mount a constitutional challenge against the courts themselves for discriminating against Americans on the basis of their wealth because of another well-established precedent: poverty is not considered a "suspect class."[30] Government discrimination against the poor (in this case, a class of plaintiffs who were unable to pay for

[22] *Id.* at 15.

[23] *Id.*

[24] *Id*. at 17.

[25] U.S v. Cronic, 466 U.S. 648, 558-661 (1984).

[26] *Id.*

[27] *Id*. at 653 (internal quotations omitted).

[28] *Id*. at 659 ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial."), *see also, id*. at 654 ("If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated.").

[29] *See* Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

[30] *See* Armour v. City of Indianapolis, Ind., 566 U.S. 673, 681 (2012). This citation is not offered as a direct source for the assertion made in this sentence, but rather an entree for the reader to step into this body of jurisprudence. *See also* San Antonio Independent School District v. Rodriguez, 411 U.S. 959 (1973).

a sewage assessment as a lump sum) does not violate the Equal Protection clause of the Fourteenth Amendment so long as there is a "plausible policy reason for the classification."[31] A plausible policy reason could simply be that it is cheaper or more expedient to treat the poor differently.[32] The court system is expensive and governments can save precious funds in the budget by turning a blind eye to the Justice Gap without fear of a constitutional challenge. Therefore, Americans cannot hope to succeed in closing the Justice Gap through an Equal Protection claim against the government. The only way to make wholesale change in the justice system is through the legislative branch. The ABA has urged governments at every level to create a civil right to counsel, but so far it has not been implemented at any level.[33] For now, the most effective policy solution to address the Justice Gap is to boost funding for civil legal aid.

Congress already funds civil legal aid; however, the current level of funding is inadequate to meet the current need for services. In theory, Congress could appropriate sufficient funding to guarantee all Americans representation by competent counsel. The balance of this Article serves to document the full extent of the Justice Gap by developing and examining a credible cost estimate for the problem. Quantifying the problem and its consequences is an important step in generating the political will necessary to implement solutions. With the newly seated Biden administration, this is the ideal moment to reconsider the price and value of ending the Justice Gap.

III. THE COST OF CIVIL LEGAL AID

Civil legal aid in the United States started as the product of private charity.[34] In 1875, the German Immigrants' Society in New York city implemented a legal assistance program, naturally to help recent immigrants navigate the unfamiliar U.S. legal system.[35] By the mid-20th century, most major cities had some type of program to assist the poor with civil legal matters, but the privately-sourced funding and focus on urban areas left the system a spotty "patchwork" with significant holes.[36] The federal government did not step into the arena until President Lyndon B. Johnson's infamous "war on poverty."[37] Over the decade from 1965 to 1975, funding

[31] *Id.*

[32] *Id.* at 681 ("…there is such a plausible reason if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

[33] *See* Daniel C. W. Lang, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 WIDENER L. REV. 289, 298-300 (2011).

[34] *Id.* at 290.

[35] *Id.*

[36] *Id.*

[37] *Id.*

for civil legal aid increased dramatically, particularly in rural areas.[38] The Legal Services Corporation ("LSC") was created as an ultimate replacement for the Legal Services Program operated by President Johnson's Office of Economic Opportunity.[39] While the LSC is superficially similar to an executive agency, it is led by a bipartisan oversight board whose members are subject to the advice and consent of the Senate.[40]

Today, the LSC is the largest source of funding for civil legal aid organizations in the country.[41] Approximately 90% of its budget is sent to local organizations that provide diverse legal aid services to low-income Americans and other specified groups.[42]

The LSC was created by Congress in 1974 with a budget of $90 million.[43] Adjusting for CPI inflation, that budget would be worth $503,100,000 in 2020 dollars, but the LSC's current budget is just $415 million.[44] This suggests the LSC is underfunded by ~$80 million. However, the cost of legal services has risen substantially faster than the CPI; inflation in legal services between 2000-2018 was about 3.61% per year.[45] Prices in this category rose much faster than the base CPI rate of 2.09% over the same period.[46] For comparison, the LSC requested a budget of $527 million in 2018, and they characterized that as a "modest attempt to begin addressing the need."[47] Notably, the House of Representatives passed the "Fiscal Year 2020 Commerce, Justice, Science and Related Agencies (CJS) Appropriations Act," which would have funded the LSC at $550 million - a 33% increase over Fiscal Year 2019 funding.[48] However, the Trump administration opposed it and the Senate passed a more modest

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[38] *Id.* at 291.

[39] *The Founding of LSC*, LEGAL SERVICES CORPORATION, lsc.gov/about-lsc/who-we-are/our-history

[40] *Id.*

[41] Jim Sandman, *Fiscal Year 2018 Budget Request* 40, 41 LEGAL SERVICES CORP. (May 2017), https://www.lsc.gov/our-impact/publications/budget-requests/fiscal-year-2018-budget-request [hereinafter "2018 Budget Request"].

[42] *Id.*

[43] Legal Services Corporation Act of 1974, Pub. L. No. 93-355 (1974).

[44] Jim Sandman, Fiscal Year 2021 Budget Request Tables, Legal Services Corp. (May 2020), https://www.lsc.gov/spotlight-blog/budget-request-tables.

[45] According to the author's own calculations, based on publicly available data from U.S. BUREAU OF LAB. STAT., CPI DATASET 43, 44 (2021) (https://www.bls.gov.regions/mid-atlantic/data/producerpriceindexlegal_us_table.htm).

[46] *Id.*

[47] 2018 Budget Request.

[48] *ABA SUPPORTS LSC REQUEST FOR ADDITIONAL EMERGENCY FUNDING TO ADDRESS COVID-19 PANDEMIC*, AM. BAR ASS'N (April 2020), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation/#:~:text=The%20Legal%20Services%20Corporation%20has%20been%20appropriated%20%24550%2C000%2C000%E2%80%94a%20%24135%2C000%2C000,current%20funding%20of%20%24415%20million.

appropriations bill. For fiscal year 2021, the LSC requested an appropriation of $652.6 million, hoping that the Democratic-controlled 117th Congress will be more generous than its predecessors.[49] Given the unprecedented economic and public health crisis presented by the novel coronavirus COVID-19, even this substantial increase may not be enough.

The LSC budget shortfall goes back to the 1980s. In the first five years of its operation, the LSC ramped up funding to an impressive $321 million in 1981.[50] That amount is what the LSC considered to be its level of "minimum access funding,"[51] the amount of money it would take to fully fund two lawyers, with appropriate support staff and facilities, per 10,000 low-income people."[52] For reference, the number of dedicated legal aid attorneys for low-income litigants varies by state between 0.43 and 4.35 attorneys per 10,000 low-income people.[53] It should be noted that the attorneys currently working in this field should not be considered fully funded.[54] On average, civil legal aid attorneys earn lower salaries than their peers in other practice areas and often have less access to support staff or office equipment.[55]

To put this in perspective, there are approximately 40 attorneys per 10,000 people in the general population.[56] It can be argued that truly equalizing access to justice means making the same number of attorneys available to the poor as are available to everyone else.[57] This seems appropriate considering that low-income Americans do not necessarily experience fewer legal problems than their more affluent peers. However, 40 attorneys per 10,000 low-income people is an almost unimaginable increase from current funding levels. For now, the LSC continues to seek a more achievable goal of 10 attorneys per 10,000 low-income people.[58]

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[49] *FY 2021 Budget Request*, LEGAL SERVS. CORP., https://www.lsc.gov/media-center/publications/budget-requests/overview.

[50] Lang, *supra* note 33 at 291.

[51] *Id.*

[52] *Id.* at n.21.

[53] David S. Udell, *Fiscal Year 2016 Budget Request*, LEGAL SERVS. CORP., 2 (June 2014), https://www.lsc.gov/sites/default/files/LSC/pdfs/6-27-14%20NCAJ%20letter%20to%20LSC%20re%202016%20Budget%20Estimate.pdf.

[54] Lang, *supra* note 33 at 293 ("Although funding has slightly increased over the years, it still remains totally inadequate.").

[55] *See* Sonia Weiser, *Lawyers by Day, Uber Driver and Bartenders by Night*, N.Y. TIMES (June 3, 2019), https://www.nytimes.com/2019/06/03/nyregion/legal-aid-lawyers-salary-ny.html ("The Legal Aid Society, the nation's oldest nonprofit legal services organization, offers law school graduates starting salaries of $53,582, which increase to $62,730 upon admittance to the bar, according to an internal document. The overall median salary for first-year associates at private law firms in 2017 was $135,000, according to the National Association for Law Placement").

[56] Udell, *supra* note 53, at 3.

[57] *Id.*

[58] *Id.*

Unfortunately, the LSC was not destined to stay at its "minimum access" level of funding for very long. The budget was slashed by 25% in 1982 and then again by 30% in 1996.[59] Adjusted for inflation, LSC funding has never regained that 1981 highwater mark and by 2006 it was down a full 54.5% from its peak.[60] In addition to cuts to the budget, significant restrictions were imposed on what types of programs the LSC could support, including bans on class action lawsuits and cases involving abortion.[61] Policy changes also made it so that organizations would lose their LSC funding if they engaged in the prohibited activities, even if they did so through the use of funds from other sources.[62] If the LSC budget had remained at its peak 1981 level, its budget would now be roughly $730 million adjusted for inflation, substantially above its current funding.[63] That figure pales in comparison to the LSC's estimate of what it would take to finance the recommended 10 attorneys per 10,000 low-income people level: $2.89 billion.[64] Even then, this number only accounts for paying the lawyers and support staff, but does not budget for funding other innovative programs which might help reduce the need for legal services, such as simplifying court procedures.[65] Assuming a simple linear correlation between increased funding and increased access to justice, it would take roughly $11.5 billion to reach 40 attorneys per 10,000 low-income people - the level of access available to the general U.S. population.[66] Some additional funding can come from other sources such as private charities and local governments, but most of it will need to come from the federal government. However, it appears the federal government is not yet ready to commit funding to reach this level of civil legal aid provision, as Congress has not approved LSC funding at anywhere near this level.[67]

While $2.98 billion is a huge amount of money in comparison to current LSC funding, it must be considered in the larger context of the federal government's budget. Due to the outbreak of the novel coronavirus COVID-19, the 2020 federal budget was anomalous. According to the Bipartisan Policy Center, the fiscal year 2020 budget deficit was $3.1 trillion, nearly

[59] Lang, *supra* note 33, at 291.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 293.

[64] Udell, *supra* note 53, at 3-4.

[65] *Id.*

[66] Based on the author's own calculation. 4 * 2.89 = 11.56.

[67] *See 2018 Budget Request*, *supra* note 41, at 3.

triple the deficit for fiscal year 2019.[68] Federal spending skyrocketed to address this public health crisis and stabilize the economy in the short term. The distortions of COVID-19 crisis response make it difficult to evaluate the long-term costs and benefits of funding civil legal aid at the $2.98 billion target level. Rather than compare this funding target to the current federal budget, it is more helpful to evaluate it with reference to a recent, but more "normal" year.

Mick Mulvaney, former Director of the Office of Management and Budget under former President Donald Trump, distributed the White House's 2018 budget proposal.[69] The 2018 budget requested $27.7 billion for the Department of Justice, reflecting a $1.1 billion or 3.8% decrease from 2017.[70] This budget eventually passed through Congress in approximately the same form as an omnibus spending bill named The Consolidated Appropriations Act.[71] According to an analysis performed by the Congressional Budget Office, the proposed 2018 budget called for roughly $4 trillion in spending, $593 billion of which was to be run on a deficit.[72] $2.98 billion is just 0.00074% of the total 2018 federal budget and 0.0043% of the budget deficit.[73] Even if we project this same $2.98 billion outlay to continue for the next twenty years at the same level, it would only represent just 0.004% of the pre-COVID government debt.[74] These numbers are too small to accurately picture with mental math, but they represent massive sums of money that would need to be collected from real U.S. tax dollars in the future. Ultimately, Congress must decide how that money should be allocated to provide for the general welfare, but a quick glimpse at the numbers reveals that equal justice under the law for all citizens could be purchased for a very modest sum.

IV. THE NEED FOR ACTION

The Justice Gap and its incumbent consequences have drawn significant scrutiny and criticism to the justice system, the profession of law, and the

[68] BIPARTISAN POL'Y CTR.,, *Deficit Tracker*, https://bipartisanpolicy.org/report/deficit-tracker/#:~:text=The%20federal%20government%20ran%20a%20deficit%20of%20%243.1%20trillion%20in,of%20the%20economy%20since%201945 (last visited Jan. 28, 2021).

[69] *See* OFF. OF MGMT. & BUDGET, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN (2017).

[70] *Id* at 29.

[71] Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018).

[72] CONG. BUDGET OFF., AN ANALYSIS OF THE PRESIDENT'S 2018 BUDGET 6 (2017), [hereinafter 2018 BUDGET ANALYSIS].

[73] 2,980,000,000/4,008,000,000,000 = 0.0007435129740518962 and 2,980,000,000/693,000,000,000 = 0.0043001443001443.

[74] *See* 2018 BUDGET ANALYSIS, *supra* note 72, at. 6 tbl. 2 (referring to CBO's $15.568 trillion public debt figure for 2018).

American system of legal education.[75] One group of commentators described the situation as, "a disgraceful failure of our legal system to meet the serious legal needs of most Americans, who are increasingly priced out of the market for legal services."[76] This sentiment is echoed by other scholars who lament the "shameful irony that the nation with the world's most lawyers has one of the least adequate systems for legal assistance."[77] Even the judiciary is not beyond reproach, as some blame judges for creating case law on effective assistance of counsel that is a "conceptual embarrassment."[78] Perhaps worse, the judicial branch has largely acquiesced to budget constraints that place severe burdens on "unworthy poor."[79]

Each of these is a scathing indictment of responsibility for the Justice Gap. Unfortunately, the Justice Gap continues to exist, largely unmitigated. "Access to justice is the subject for countless bar commissions, committees, conferences, and colloquia, but it is not a core concern in American policy decisions, constitutional jurisprudence, or law school curricula."[80] The endless parade of symposium speeches and scholarly writings has not been effective in making the Justice Gap a policy priority for many mainstream politicians. Solutions remain almost entirely within the sphere of social justice activism and vague political campaign promises. Unfortunately, even good faith efforts to close the justice gap have been stymied by general indifference and lack of resources. While apathy and inertia are always political challenges, there will be serious negative consequences for the American justice system if the problem is not addressed. Since many of those consequences will affect lawyers most acutely, lawyers should be the most motivated to implement an effective solution. The following are just some of the potential negative consequences that could manifest if the Justice Gap continues to grow.

A. Delays And Inefficiency

Pro se litigants place an increased burden on courts and slow down the litigation process as they are unfamiliar with court procedures.[81] Because pro se litigants cannot operate as independently as licensed attorneys, pro se litigants often turn to court staff and administrators for support.In a survey of

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[75] *See e.g.*, George Critchlow, Brooks Holland & Olympia Duhart, *The Call for Lawyers Committed to Social Justice to Champion Accessible Legal Services through Innovative Legal Education*, 16 NEV. L.J. 251, 256 (2015).

[76] *Id.*

[77] Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785,1786 (2001).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Lang, *supra* note 33, at 297.

U.S. District court clerks, respondents reported that many pro se litigants fail to comply with procedural rules for service of process, demand in-person hearings, and repeatedly seek continuances.[82] Respondents also reported that many pro se litigants require the assistance of court staff to file or obtain copies of pleadings and records.[83] Similarly, Pro se litigants are often unsure of the best way to present their case and so they turn to judges and court staff for legal advice.[84] This raises significant ethical issues. First, many court staff are not licensed to practice law and so should not advise litigants about potential courses of action.[85] Second, a conflict of interest could arise where court personnel render assistance to one party in the litigation, undermining the impartiality of the tribunal.[86] 30% of the judges surveyed by the Federal Judicial Center reported that many pro se litigants made requests for inappropriate direction or advice.[87]

At best, dealing with pro se litigants wastes the court's time as clerks and staff decipher poorly drafted and improper pleadings and motions.[88] At worst, courts may be forced to rule against a meritorious claim or motion because of an error in the pleadings or procedures used. This denies substantive justice to the litigants *and* wastes the court's time. The net effect is that even simple litigation slow downs delay justice for everyone, even wealthier litigants who have paid for professional assistance from licensed attorneys.[89] For example, in Cook County, Illinois, the average disposition time for civil trials is already over five years.[90] If the Justice Gap continues to widen, these delays will only increase. As the justice system becomes less efficient at processing cases, the cost of taxpayer funding to keep it functioning will increase. Moreover, at a certain point, justice delayed is no justice at all. If taxpayers are expected to pay more for justice, they should rightly expect it to actually be more just. Unfortunately, the opposite is likely to be true. America must act on the Justice Gap to avoid a critical system-wide breakdown in the operation of courts.

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[82] STIENSTRA ET AL, *supra* note 7, at 23.

[83] *Id.*

[84] Judges' Views of Pro Se Litigants' Effect on Courts, 40 CLEARINGHOUSE REV. 229 (2006).

[85] *Id.*

[86] *Id.*

[87] *See* STIENSTRA ET AL *supra* note 7.

[88] Judges' Views of Pro Se Litigants' Effect on Courts, 40 CLEARINGHOUSE REV. 229 (2006).

[89] *Id.*

[90] Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RSRV. L. REV. 4, 813, 814 (2000).

B. The Public Will Lose Confidence In The Justice System

Continuing the wealth bias within our justice system undermines public confidence in our courts and the legal profession.[91] People who feel victimized by an unfair justice system after, for example, taking a guilty plea in order to avoid a harsher sentence, are much more likely to break the law.[92] In a very concrete way, allowing the Justice Gap to continue will create more unlawful conduct. Of course, this will recur in a cyclical feedback loop: Americans who spurn the justice system and transgress against the law will be much more likely to have an encounter with the justice system; in that encounter they will presume that they are treated unfairly; afterwards they will attempt to "re-extract" compensation from society by committing additional crimes or torts.[93] The Justice Gap perpetuates and deepens resentment among both the litigants and their community. A lack of public confidence in the justice system will force the public to turn towards non-legal "self-help." In the short term, this will further increase the docket load as society engages in more crimes, torts, and breaches of contract. In the long term, this will add additional fiscal pressure to state and local justice systems as they are forced to step up law enforcement efforts, add additional court staff, or even build entirely new facilities like courthouses and police precincts.

C. Negative Economic Impacts

There is an economic cost associated with social inequalities such as those produced by unreliable or poorly-enforced legal rights.[94] In many ways, our legal system is meant to protect and support our economic system by providing economic actors consistency and certainty in how their transactions will be respected and enforced. Without clear and unbiased protection of economic rights, individuals and businesses cannot safely engage in complex transactions. At the macroeconomic level, that increased risk drives up the cost of investment. At the microeconomic level, landlords might demand higher rent or deposits from tenants to compensate for the risk that a lease won't be enforced. Lenders may demand additional security or charge higher interest rates in financing transactions. Entrepreneurs may avoid incorporating a business entity or developing intellectual property. As more individuals miss out on opportunities that could have benefited themselves and their communities, these individual decisions accrue into a

[91] Hall, *supra* note 11, at 1366.

[92] *Id.*

[93] *Id.*

[94] *See* DAVID COLE, NO EQUAL JUSTICE 169-180 (1999) (A more developed discussion of the impact of the Justice Gap on economic development).

collective chilling effect on economic growth and innovation. The long-term effects of this chill will fall hardest on low-income communities.

4. If Lawyers Don't Take The Initiative, It May Be Forced On Them

In some jurisdictions, Courts have the authority to appoint members of the Bar to represent indigent criminal defendants.[95] In these cases, a lawyer's fee may be capped based on the type of case assigned.[96] This has the extremely undesirable result of reducing an attorney's effective hourly rate below $4 in some cases.[97] At that level of compensation, lawyers could do better selling sodas on the beach.[98] The situation is not necessarily better for jurisdictions that provide for court-appointed representations to be taken on through voluntary independent contracts.[99] In such systems, attorneys place competitive bids to be awarded a specified percentage of the court's docket, irrespective of the number or complexity of cases that ultimately entails.[100] This system leads to incredibly high-volume caseloads and a race-to-the-bottom in compensation. Although participation is voluntary, the prospects for compensation among participating lawyers are still poor, incentivizing guilty-plea-only defenses by barely competent counsel.[101]

Consider how it would affect the market for legal services if courts were forced to implement analogous programs to help curb delays in their civil dockets. Lawyers would prefer to spend more time on higher-paying cases which match up with their areas of expertise. However, court-imposed civil representation could force these lawyers to take on cases that pay low fixed fees set by the court with little choice in which clients or cases can be accepted or refused. Lawyers will effectively be forced to perform more work - they would not choose - for rates of compensation that may be worse than minimum wage - combined with a voluminous and unwieldy caseload. This is worse than paying higher taxes to fund legal aid because the lawyers not only have to bear the financial burden themselves rather than sharing it with society, but lawyers also have to actually perform the work themselves. Imposing mandatory court-appointed civil representation is admittedly a worst case scenario. Although no jurisdiction has announced plans to make such a change, the horror of what it would entail makes taxpayer-funded legal aid seem quite comfortable by comparison.

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95 *See* Rhode, *supra* note 77 at 1788-1789.

96 *Id.*

97 *Id.* at 1789.

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 1789-1790.

V. CONCLUSION

The Justice Gap is just the latest form of an age-old struggle that predates the modern legal system: every resource gained allows the holder to wield more power against those with less. The "haves" get to use what they have to take even more from the "have-nots." We have seen this play out within our justice system as it has erected multiple legal barriers, both procedural and substantive, to keep the poor from enjoying equal justice. This has compromised the essential promise, enshrined on the façade of the Supreme Court, that all Americans are entitled to equal justice under the law. Low-income litigants experience an alarming number of legal issues each year and must face the vast majority of those issues without legal assistance as they are unable to afford even basic legal services.[102] Without help, low-income litigants stand almost no chance of successfully navigating the procedural labyrinth of our modern courts. As a result, some plaintiffs may choose to forego legal action because of inadequate access to justice.[103] If not addressed, the Justice Gap could sow dissatisfaction with and distrust of our justice system.

Shrinking the Justice Gap down to the "minimum access level" of 2 attorneys per 10,000 low-income individuals already costs taxpayers ~$500 million dollars in federal funding for civil legal aid every year.[104] However, meaningful change in access to justice may not be achieved until that number is increased to 10 attorneys per 10,000 low-income individuals, which would require ~$2 billion more in federal funding for civil legal aid every year.[105] Increasing access to justice to 40 attorneys per 10,000 low-income individuals would put low-income litigants on even footing with their middle and upper class peers, but this level of access would require ~$11.5 billion in funding, assuming a linear relationship between increased access and increased funding.[106] While these numbers are staggering, they represent just a tiny fraction of the federal budget deficit and a total government debt.[107] Access to justice is likely less expensive and a better overall value in terms of public good than many popular progressive policy proposals, such as universal healthcare or tuition-free university education. Further, increased funding for civil legal aid is the most direct and most effective way to ameliorate the pernicious social issues caused by the Justice Gap. These factors alone should make increasing civil legal aid funding a top political priority for the Biden administration, but there is also a price to inaction. If

[102] *Supra* note 20.
[103] *Supra* note 20.
[104] *Supra* note 43.
[105] *Supra* note 64.
[106] *Supra* note 64.
[107] *Supra* note 71.

the Justice Gap is allowed to continue unabated, the social and economic consequences will be dire.[108]

Failure to close the Justice Gap could negatively impact the reputation of our legal institutions.[109] This is already playing out through the accelerating breakdown in the operation of our justice system and the quality of results it produces.[110] Currently, the justice system is not providing fair results for the poor, but if increased caseloads create disposition delays, middle-income and wealthy litigants will also be locked out of justice when the system descends into total gridlock. If courts are forced to appoint or contract with private attorneys to help ease the case load of public defenders, the legal profession will bear the brunt of the cost, including significant losses in compensation and professional autonomy.[111] Meanwhile, a failing justice system that lacks public confidence will have widespread economic aftershocks as entire communities are forced to forego beneficial economic actions that are wholly lawful, but legally complex.[112] While these effects may initially be confined to poor communities, the highly integrated and globally-networked structure of our economy will spread the effects across the country.[113] This will have a chilling effect on American business as people are no longer able to freely pursue their highest-value economic choices. Even worse, communities may turn away from the justice system altogether if public trust is not increased.[114] If swift actions to close the Justice Gap are not taken, Americans are collectively risking their own financial and legal futures. If nothing else, our own self-interest should motivate us to higher civic duty in pursuing greater access to justice.

Regardless of where one falls on the political and socio-economic spectra, the arguments in favor of increasing funding for civil legal aid are clear: (1) closing the Justice Gap can help curb wealth bias in our justice system by reducing disparities in access to justice; (2) increased federal funding is the most efficient and most direct way to close the Justice Gap; (3) the closing the Justice Gap outweigh the necessary costs of $3-12 billion per year in additional federal spending; and (4) the potential negative consequences of failing to end the Justice Gap provide added incentives that should not be ignored. Therefore, Americans must come to a consensus on this point: the Justice Gap must be closed. The Biden administration and Congress must make funding civil legal aid a priority on their policy agendas.

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[108] *Supra* Section III.

[109] *Supra* Section III, note 89.

[110] *Supra* Section III, note 89.

[111] *Supra* Section III, note 95 to 101.

[112] *Supra* note 92-94.

[113] *Supra* note 92-94.

[114] *Supra* note 92-94.

The American people must be willing to pay the modest price necessary to meet this goal. The price of progress is too low to ignore. The progress itself then, is a remarkable bargain. It is time for the Biden administration and Congress to take decisive action: increase funding for civil legal aid to more than $2.89 billion per year and fulfill the promise of equal justice for all.