

BEYOND PARTISANSHIP AND IDEOLOGY—ACCESS TO JUSTICE AS
GOOD GOVERNMENT

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Justice is doing right, based on the truth, the law, and morality—variables that are each often thought of, whether rightly or wrongly, as subjective and conflicting. Views differ on what justice is. There is greater consensus on what justice is not. Justice is not partial, unequal, or unfair. It is even-handed. It applies the same way to all, across the board. It must always treat likes alike. Even school children know that being treated differently without justification ‘tain’t fair. This is not a partisan or ideological idea. It is not the platform of one political party or the other. It is not conservative or liberal. It is much more basic than any of that.

For a promise of justice to be real, it cannot be a mere abstraction, pie in the sky. It must be meaningful, concrete, and accessible. Whoever seeks justice must be able to invoke the promise personally and secure its benefits. That promise may be innocent until proven guilty. Or recourse for fraud, negligence, or other civil wrong. Or a fair division of a marital estate in divorce and custody in the best interest of a child. Or nondiscrimination in the workplace. Or available housing. Or protection for victims of domestic violence or for those who are incapacitated and in need of a guardianship. Or benefits for military veterans who put themselves in harm’s way to preserve the promise of justice for us all. For justice, the promise made must also be the promise kept. Justice beyond reach is injustice.

The justice system is one of laws best navigated—maybe *only* navigated—by lawyers. Self-representation is usually ill-advised. Access to justice is mostly possible only with a lawyer’s assistance. In criminal cases, that assistance is guaranteed by the United States Constitution.¹ If you cannot afford a lawyer, every criminal defendant must be told, one will be appointed for you at public expense.² That right does not extend to civil

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¹ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² *Miranda v. Arizona*, 384 U.S. 436 (1966); *Dockerson v. United States*, 530 U.S. 428 (2000).

proceedings, although in a few situations, by statute, legal counsel may be provided at government expense.³

Expense is the principal impediment to obtaining legal representation, and thus the principal impediment to access to justice.⁴ Legal fees are far beyond the reach of many who need legal services—the very poor and people of limited means—while others can easily afford to hire lawyers. Access to justice that depends on the seeker’s means is not impartial, equal, or fair. To the contrary, justice must apply irrespective of wealth or status.⁵ Justice for only those who can afford it is neither justice for all nor justice at all.⁶ I’ve imagined a *Twilight Zone* episode in which a hungry traveler in a strange town goes from eatery to eatery trying to find food. One is closed, another has a steep admission fee, a third is for members only, a fourth has an order form written in gibberish. In the end, he’s still hungry.⁷ For many Americans, the justice system is too expensive, too hard to navigate, too far removed from real people, as closed as if the courthouse doors, open to others, were locked to them. Justice to them seems as far out of reach as food for my traveler.

So, whatever our differences over what justice is, we should easily agree that conditioning access to that justice on the seeker’s wealth is not justice. Recognizing this, the legal profession, as steward of the justice system, has for centuries taken upon itself some responsibility to provide legal services free of charge.⁸ No law requires this. It is simply at the core of the

³See, e.g., Tex. Fam. Code § 51.01 (child entitled to counsel in a juvenile detention proceeding); *id.* § 107.013 (parent entitled to counsel in parental rights termination proceeding); *id.* § 157.163 (parent entitled to counsel in child support enforcement proceeding when incarceration is a possible result).

⁴See *What is Access to Justice?*, TEX. ACCESS TO JUSTICE FOUND., <https://www.texasatj.org/what-access-justice> (last visited Nov. 11, 2020).

⁵See *Leviticus* 19:15 (“You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.”) (English Standard Version); *Deuteronomy* 1:17 (“You shall not be partial in judgment. You shall hear the small and the great alike. You shall not be intimidated by anyone . . .”) (English Standard Version); see also 28 U.S.C. § 453 (“Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: ‘I . . . do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States. So help me God.’”).

⁶See Nathan L. Hecht, *The Twilight Zone*, 148 DAEDALUS 190 (Winter 2019).

⁷See *id.*

⁸DEBORAH RHODE, ACCESS TO JUSTICE 47 (2004).

profession's noble traditions.⁹ Beginning at the end of the nineteenth century, lawyers in New York began to associate for the purpose of providing free legal services to those who could not afford them.¹⁰ Over time, legal aid organizations were formed throughout the country.¹¹ Today state and local bar associations encourage and facilitate lawyers in providing legal services *pro bono publico*.

That Latin phrase is important. It means for the *public* good. Not just *pro bono*: for the client's good, who receives free legal services, or for the lawyers' good, who have the satisfaction of helping clients in need, or for the profession's good, in furthering the cause of justice. Legal services *pro bono publico* are for the *public's* good. Providing free legal services to those who need them to secure what justice promises them strengthens the community and promotes confidence in the rule of law.¹²

Lawyers cannot meet the challenge alone. The needs are far too great. Texas lawyers have reported contributing some 2.8 million hours of free services a year, still only a fraction of the need is met.¹³ The public must help fund more legal services for the poor to further improve access to justice. After all, doing so is to the public good.

Improving access to justice—making justice more impartial, more equal, fairer—should not be a partisan issue, dependent on political ideology, though it has been. It is much less so now. I offer my perspective on why, what has changed, and what the future holds.

I. PUBLIC FUNDING FOR ACCESS TO JUSTICE — THE FIRST PHASE

Sargent Shriver, director of the Office of Economic Opportunity and architect of President Johnson's War on Poverty, and Lewis F. Powell, Jr.,

⁹ See Nathan L. Hecht, *Perspectives on the Need for Pro Bono and Lo Bono Legal Services*, THE ADVOCATE (2019).

¹⁰ See Alan W. Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, CENTER FOR LAW AND SOCIAL POLICY (rev. Jan. 2007), <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/0158.pdf> at 3.

¹¹ See *id.*

¹² See Nathan L. Hecht, *Perspectives on the Need for Pro Bono and Lo Bono Legal Services*, THE ADVOCATE (2019).

¹³ Milan Markovich & Gabriele Plickert, *2017 Texas Attorney Survey: Pro Bono Report*, STATE BAR OF TEXAS, at 5 (September 2018), https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=43251.

then president of the American Bar Association and later Associate Justice of the United States Supreme Court, are credited with founding the federal legal services program.¹⁴ In 1967, Shriver added legal aid to the services provided low-income communities.¹⁵ The move generated controversy in the Congress. Critics worried that federally funded lawyers would weaponize class actions, voting and employment rights lawsuits, and other legal proceedings to advance political positions.¹⁶ In the early 1970s, supporters sought to transfer the federal legal aid program to the Legal Services Corporation, a federal nonprofit corporation to be created for that purpose, but it took years for differences over the legislation to be reduced sufficiently to allow enactment. The bill finally passed Congress, and on July 25, 1974, President Richard Nixon signed it.¹⁷ It was one of his last acts in office.¹⁸

Passage of the legislation only stiffened opposition in many quarters to LSC and the idea of publicly funded legal aid. The invention of a new funding mechanism, following changes in federal tax law allowing interest on lawyer trust accounts—IOLTA—compounded criticism. A lawyer who holds money for a client may not deposit it in his own account but must put it in a separate trust account.¹⁹ While interest is earned on the account balance, a particular client's funds may be on deposit only a short time, so that the account interest attributable to those funds is small. Accounting for it separately from interest on other clients' funds is not economically viable. State legislation was proposed to require that lawyers pay the interest to a fund for legal aid. Florida adopted the first IOLTA program in 1981.²⁰ The Supreme Court of Texas ordered a voluntary IOLTA program in 1984²¹ at

¹⁴*History—The Founding of LSC*, LEGAL SERVICES CORPORATION, <https://www.lsc.gov/about-lsc/who-we-are/history> (last visited Oct. 27, 2020).

¹⁵John Bouman, *The Path to Equal Justice*, THE SHRIVER BRIEF (May 11, 2016), <https://theshriverbrief.org/the-path-to-equal-justice-1f8e6b277607>.

¹⁶*Id.*

¹⁷42 U.S.C. § 2996.

¹⁸The day before, the United States Supreme Court had held that President Nixon was required to produce the Watergate tapes. *United States v. Nixon*, 418 U.S. 683 (1974). Two days later the House Judiciary Committee adopted articles of impeachment. On August 9, 1974, the President resigned.

¹⁹*See* Tex. Disciplinary Rules of Prof'l Conduct R. 1.14, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013).

²⁰*IOLTA History*, IOLTA, <https://www.iolta.org/what-is-iolta/iolta-history> (last visited Oct. 27, 2020).

²¹Administrative Order dated May 9, 1984.

the behest of then Chief Justice Jack Pope, and four years later made it mandatory.²²

IOLTA programs were challenged as a taking of clients' property requiring just compensation under the Fifth Amendment to the U.S. Constitution.²³ Lawsuits were brought, not so much by owners of the funds, but by groups who wanted to end IOLTA funding of legal aid. After years of litigation, and two trips to the U.S. Supreme Court, the Court held that IOLTA programs did effect a taking of property belonging to the owner of the funds on deposit, but that just compensation was not required because the interest was of minimal value due to the expense and difficulty of calculating and remitting it.²⁴ By 2003, when the Supreme Court ruled, every state had an IOLTA program.²⁵

II. PUBLIC FUNDING FOR ACCESS TO JUSTICE — THE SECOND PHASE

The increased public funding of legal aid, first with federal appropriations to LSC, and then through IOLTA programs, continued to fuel criticism that cases were being brought not merely to help the poor obtain justice but to further political agendas. In 1997, Congress responded by limiting the kinds of matters on which LSC funds could be used.²⁶ Without setting out the very detailed provisions here, it is enough to say that matters handled by federally funded legal aid lawyers could not be in any way political, as viewed very broadly by lawmakers, and were confined to basic civil legal services.²⁷ Texas adopted the restrictions at the same time for any state funding of legal aid, including IOLTA,²⁸ while simultaneously adding a filing fee to fund basic civil legal services.²⁹ Supporters of legal aid ardently opposed the new restrictions as critically impairing the mission of legal aid, while opponents distrusted that they

²² Administrative Order dated December 13, 1989; *see also* *What Is IOLTA?*, TEX. ACCESS TO JUSTICE FOUND., https://www.teajf.org/attorneys/what_is_iolta.aspx (last visited Oct. 27, 2020).

²³ *See* *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *see also* *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998).

²⁴ *See* *Brown*, 538 U.S. 216; *Phillips*, 524 U.S. 156.

²⁵ *Brown*, 538 U.S. at 221.

²⁶ 42 U.S.C. § 2996f.

²⁷ *Id.*

²⁸ Act of May 20, 1997, 75th Leg., R.S., ch. 699, § 1, 1997 Tex. Gen. Laws 2336, 2337-2338 (codified at Tex. Gov't Code § 51.943).

²⁹ *Id.* at 2336-2337, now codified as Tex. Gov't Code § 51.901.

would be of significant effect and anyway, were too little too late. Many conservative and Republican members of Congress repeatedly proposed abolishing LSC or greatly reducing its funding.³⁰

In 2001, the Supreme Court of Texas formed the Texas Access to Justice Commission to develop and implement policy initiatives to enhance justice in civil matters, but also to educate the public and legislators about the mission of improving access to justice.³¹ As a result of similar efforts throughout the country, the sharp partisan divide has steadily subsided. One can pinpoint the turning point in Texas: February 16, 2009, a little before 11:00 a.m., at a hearing of the Senate Finance Committee of the 81st Legislature.³² Chief Justice Wallace B. Jefferson was testifying on the budget request of the Supreme Court of Texas. The committee chair was Senator Steve Ogden, a Naval Academy graduate and nuclear submarine officer with an MBA from Texas A&M University. He was in the oil and gas business in Bryan, Texas. He was not a lawyer. He had served 12 years in the Texas Senate. Chairman Ogden was a conservative Republican in a conservative Republican Legislature.

The Court had been required to submit its budget request in August 2008. At that time, just before the national economic downturn, state IOLTA revenues were about \$20 million annually. By the time of the committee hearing six months later, after interest rates had fallen to zero, 2009 IOLTA revenues were projected to be no more than \$1.5 million. Chairman Ogden asked what the funds were used for, and Chief Justice Jefferson replied, “[t]hey are used to provide legal services to the poor.” What plan was there, Chairman Ogden asked, to continue to support that program? There was no replacement revenue source, was the answer. “We could appropriate general revenue, right?” Chairman Ogden asked. To be asked by a legislator whether the Legislature should spend more money on anything, let alone access to justice, was stunning. “[E]ither we just say, ‘Oh, well,’” Chairman Ogden continued, “or we look at another way of funding it. So we rely on your recommendation.” The Supreme Court’s recommendation was a general appropriation. In the end, the Legislature

³⁰ See Houseman & Perle, *supra* n. 10 at 36-37.

³¹ Order Establishing Texas Access to Justice Commission, Misc. Docket No. 01-9065, April 26, 2001, https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/01/01-9065.pdf.

³² Texas Senate Committee on Finance Hearing Streaming Video, Feb. 16, 2009, Part I, at 39:21, https://tlcsenate.granicus.com/MediaPlayer.php?view_id=14&clip_id=2686.

appropriated \$10 million a year in general revenue—half the loss IOLTA had suffered—for basic civil legal services.³³

The 81st Legislature firmly established public funding of basic civil legal services for the poor as good government. The Legislature had previously dedicated revenue from various fees for basic civil legal services: some case filing fees (which the 81st Legislature increased³⁴), attorney legal services fees,³⁵ and a nonresident attorney *pro hac vice* fee.³⁶ Never before had it appropriated general revenue for the purpose. The support for supplementing IOLTA funding was nonpartisan and noncontroversial.

The 81st Legislature also appropriated \$2 million for legal aid from the Sexual Assault Program's charge on sexually-oriented businesses,³⁷ contingent on available funds.³⁸ The Texas Access to Justice Foundation, which allocates legal aid funding to grantees, has used continued appropriations from that revenue to create LASSA—Legal Aid for Survivors of Sexual Assault.³⁹

Later the same session, the Legislature enacted legislation requiring the Texas Attorney General to allocate certain proceeds from the state's settlement of litigation, mostly consumer-protection cases, to the Supreme Court fund for basic civil legal services, rather than depositing those proceeds to the State's general revenue fund.⁴⁰ In 2013, the statute was renamed the Chief Justice Jack Pope Act, in recognition of his leadership in the Supreme Court's 1984 adoption of the Texas IOLTA program,⁴¹ and the

³³ Act of May 29, 2009, 81st Leg., R.S., ch. 1424, 2009 Tex. Gen. Laws 4483, 4975.

³⁴ Act of May 31, 2009, 81st Leg., R.S., ch. 183, § 5, 2009 Tex. Gen. Laws 3753, 3754 (amending Tex. Loc. Gov't Code § 133.153(a) (increasing the filing fee from \$5 to \$10 in the statutory and constitutional county courts and from \$2 to \$6 in the justice courts to support basic civil legal services for indigents)).

³⁵ Act of May 30, 2003, 78th Leg., R.S., ch. 227, § 14, 2003 Tex. Gen. Laws 1043, 1047-1048 (adding Tex. Gov't Code § 81.054(j) (\$65 fee) and amending (c) (for basic civil legal services)).

³⁶ Act of May 21, 2003, 78th Leg., R.S., ch. 221, § 1, 2003 Tex. Gen. Laws 1039 (adding Tex. Gov't Code § 82.0361 (\$250 fee)).

³⁷ 80th Leg., R.S., ch. 1206, § 5, 2007 Tex. Gen. Laws 4082, 4084 (codified at Tex. Gov't Code § 420.008(c)(11)).

³⁸ Act of May 29, 2009, 81st Leg., R.S., ch. 1424, 2009 Tex. Gen. Laws 4483, 4975.

³⁹ See *Legal Aid for Survivors of Sexual Assault (LASSA)*, TEX. ACCESS TO JUSTICE FOUND, <https://www.teajf.org/grants/LASSA.aspx>.

⁴⁰ Act of May 29, 2009, 81st Leg., R.S., ch. 853, § 1, 2009 Tex. Gen. Laws 2108 (up to \$10 million per biennium) (codified at Tex. Gov't Code § 402.007).

⁴¹ Act of May 16, 2013, 83rd Leg., R.S., ch. 208, § 1, 2013 Gen. Laws 895.

revenue available under the Act biennially was increased from \$10 million to \$50 million.⁴² The coverage of the Act has been expanded⁴³ and the revenue available is now \$50 million per year.⁴⁴ Texas Attorneys General have always allocated case settlements to basic civil legal services to the limit allowed.

The 2009 state budget stated that the \$10 million per year appropriation was “one-time only,”⁴⁵ but it has been renewed (in slightly varying amounts) by every Legislature since then—in 2011,⁴⁶ 2013,⁴⁷ 2015,⁴⁸ 2017,⁴⁹ and 2019.⁵⁰ It has been made part of the Supreme Court’s baseline budget. Additionally, in 2015, the Legislature appropriated an additional \$1.5 million per year specifically for legal aid for veterans.⁵¹ The force behind the appropriation was Lieutenant Governor Dan Patrick, who has successfully pressed for continuing appropriations for veterans legal assistance in each of the two legislative sessions since.⁵² In the last session, at Governor Greg Abbott’s behest, the amount was doubled for the biennium.⁵³

Since 2014, recurring opposition to LSC funding in the Congress has steadily diminished, and funding has increased, though it is only now returning to previous levels. Support for legal aid has grown through understanding its mission of access to justice. There can no longer be any question that legal aid makes the promise of justice real through legal assistance that the recipients could never afford themselves. As one domestic abuse victim said during a press conference at the Texas State

⁴² *Id.* § 2, 2013 Tex. Gen. Laws at 896.

⁴³ Act of May 23, 2015, 84th Leg., R.S., ch. 520, § 1, 2015 Tex. Gen. Laws 1895.

⁴⁴ Act of May 10, 2019, 86th Leg., R.S., ch. 191, § 1, 2019 Tex. Sess. Law Serv. 333 (West).

⁴⁵ Act of May 29, 2009, 81st Leg., R.S., ch. 1424, 2009 Tex. Gen. Laws 4483, 4975.

⁴⁶ Act of May 28, 2011, 82nd Leg., R.S., ch. 1355, 2011 Tex. Gen. Laws 4025, 4511.

⁴⁷ Act of May 26, 2013, 83rd Leg., R.S., ch. 1411, 2013 Tex. Gen. Laws 3743, 4255.

⁴⁸ Act of May 29, 2015, 84th Leg., R.S., ch. 1281, 2015 Tex. Gen. Laws 4343, 4863.

⁴⁹ Act of May 27, 2017, 85th Leg., R.S., ch. 605, 2017 Tex. Gen. Laws 1648, 2179.

⁵⁰ Act of May 26, 2019, 86th Leg., R.S., ch. 1353, 2019 Tex. Sess. Law Serv. 4037 (West).

⁵¹ Act of May 29, 2015, 84th Leg., R.S., ch. 1281, 2015 Tex. Gen. Laws 4343, 4864.

⁵² Act of May 27, 2017, 85th Leg., R.S., ch. 605, 2017 Tex. Gen. Laws 1648, 2180; Act of May 26, 2019, 86th Leg., R.S., ch. 1353, 2019 Tex. Sess. Law Serv. 4037 (West).

⁵³ Act of May 26, 2019, 86th Leg., R.S., ch. 1353, 2019 Tex. Sess. Law Serv. 4037 (West).

capitol, legal aid “saved my life.”⁵⁴ LSC and the Texas Access to Justice Foundation have scrupulously audited all funds spent to ensure that their mission is well served. And studies throughout the country, like the one in Texas in 2013,⁵⁵ have uniformly shown that legal aid benefits result in a distinct, measurable, economic benefit to communities by strengthening those who receive it. Improving access to justice is good government.

III. THE WAY AHEAD

A Congressional leader once observed that mustering support for funding LSC was difficult because members viewed it as important only to lawyers. When non-lawyer groups are told of the work to improve access to justice and the pressing need of the poor for basic civil legal services, the most common reaction is: I had no idea.

Better understanding of legal aid—who is helped, with what issues, in what ways, to what ends—builds support for access to justice as good government. Several years ago, LSC formed its Leaders Council comprised of some lawyers but also many prominent business leaders and corporate CEOs, academics, former public officials, and sports figures. The Council’s purpose is to raise understanding of LSC’s functions and their importance among non-lawyers. Businesses, for example, can better see how legal aid helps their employees and families, their customers, and their communities. In-house counsel have been vital participants in offering *pro bono publico* representation and in encouraging outside counsel with whom they work to join them. The Council is, of course, nonpartisan and non-ideological.

The American Academy of Arts and Sciences is an honorary society, founded in 1780, with members drawn from science, scholarship, business, public affairs, and the arts. Its purpose, according to its mission statement, is “to examine new ideas, address issues of importance to the nation and the world, and work together to cultivate every art and science which may tend to advance the interest, honor, dignity, and happiness of a free, independent, and virtuous people.”⁵⁶ In 2015, the Academy became convinced that

⁵⁴ Press Conference: Access To Justice, Texas Legal Services Video, Feb. 16, 2009 at 22:41, https://tlchouse.granicus.com/MediaPlayer.php?view_id=6&clip_id=424.

⁵⁵The Perryman Group, *Current and Potential Economic Benefits of Legal Aid Services in Texas: 2013 Update*, Tex. Access to Justice Found. (Feb. 2013), <https://www.teajf.org/news/docs/Impact-of-Legal-Aid-2013-FINAL.pdf>.

⁵⁶*Mission*, AM. ACADEMY OF ARTS & SCIENCES, <https://www.amacad.org/about-academy> (last visited Oct. 27, 2020).

improving access to justice was essential to public wellbeing and that that message should be delivered more effectively outside the American legal community. In the past few weeks, it has published its final report, *Civil Justice for All*, to make the case to non-lawyers for public funding of legal aid to the poor and to make concrete recommendations for improving access to justice.⁵⁷ The Academy, similarly, is nonpartisan and non-ideological.

As much as has been done to improve access to justice, the “justice gap”—the term for the shortfall in meeting the need for legal assistance among the poor and those of modest means—is still more a gulf than a gap. To be eligible for LSC-funded and most Texas-funded legal aid, a client must be living at no higher than 125% of the federal poverty level: \$15,175 per year for an individual and \$31,375 per year for a family of four. About 5.2 million Texans currently qualify. Legal aid organizations help over 140,000 Texas families each year.⁵⁸ A 2017 study by LSC estimated that its legal aid providers meet around one-third of the need nationally.⁵⁹ Based on the number of people whom legal aid providers must turn away for want of resources to help them, Texas providers’ informed but non-scientific estimate is much less.

Partisan divisions over improvements to access to justice long impaired the cause. The more recent willingness of all, regardless of partisan affiliation, to address the issues as crucial to good government has brought about important advances. Only in this way can the promise of equal justice to all become a reality.

⁵⁷ *Civil Justice for All*, AM. ACADEMY OF ARTS & SCIENCES (2020), https://www.amacad.org/sites/default/files/publication/downloads/2020-Civil-Justice-for-All_0.pdf.

⁵⁸ *Access to Justice Facts*, TEX. ACCESS TO JUSTICE FOUNDATION, <https://www.teajf.org/news/statistics.aspx> (last visited Oct 27, 2020).

⁵⁹ *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVICES CORP. (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.