

## New Sheriff, Old Problems: Advancing Access to Justice Under the Trump Administration

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**ABSTRACT.** There is a crisis in access to justice in the United States. The justice gap—the gap between people’s legal needs and the legal services available—is wide and growing. Recent data from the Legal Services Corporation and the University of Chicago confirm that this gap primarily stems from a lack of information about legal rights, remedies, and resources. This information gap can be remedied by increasing public education on these topics and by improving the means of seeking legal assistance. I argue that information-centered advocacy may be the most effective means of closing the justice gap. Such advocacy may also be the most resource efficient, a critical consideration in a landscape where proponents of access to justice lack the political support to win increased federal funding for civil legal aid. However, the success of this approach will ultimately depend on a second, more challenging feature of the current American government: fundamental threats to the justice system currently emanating from the executive.

From lead paint in a rented apartment to custody arrangements, many people in the United States have legitimate civil claims. However, few can secure legal help. The justice gap—the gap between people’s civil legal needs and the resources available to meet those needs—is unacceptably high and growing. According to a 2017 study by the Legal Services Corporation, eighty-six percent of the civil legal problems reported by low-income Americans in the past year received insufficient or no legal help.<sup>1</sup>

Underlying this access to justice crisis is an information gap. Those with unmet legal needs are often unaware that their needs can be resolved through

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1. *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. (June 2017), <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<http://perma.cc/A4BZ-KQSZ>] [hereinafter *Justice Gap*].

law, or are unfamiliar with means of exercising their rights. This Essay highlights the information gap behind the justice gap and suggests ways to improve access to justice. Public education about individual rights and how to exercise them – as well as the orders, laws, and policies that could erode them – is more important than ever. Only with full information can citizens fully and meaningfully participate in democratic processes.

Part I describes the information gap at the heart of the access to justice crisis. Part II addresses strategies for disseminating information. Finally, Part III situates this dilemma within the current policymaking landscape, where truth, justice, and the rule of law are themselves under attack. In the face of this greater challenge, it is uncertain whether these strategies for narrowing the information gap are viable.

## I. THE INFORMATION GAP AND THE JUSTICE GAP

The Sixth Amendment to the United States Constitution requires that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”<sup>2</sup> In *Gideon v. Wainwright*, the Supreme Court found the assistance of counsel to be a fundamental right, 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.”<sup>3</sup> Nine years later, in *Argersinger v. Hamlin*, the Court clarified that defendants cannot be imprisoned if unrepresented. “[A]bsent a knowing and intelligent waiver,” wrote Justice Douglas, “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”<sup>4</sup> Yet deficiencies in public defender systems in the United States deprive thousands of defendants of meaningful representation every year.<sup>5</sup>

Unmet legal needs in the civil context are even more staggering. The Supreme Court has not recognized a right to counsel in a civil action,<sup>6</sup> and private representation costs an average of \$200 to \$300 per hour.<sup>7</sup> It is rare that both

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2. U.S. CONST. amend. VI.

3. 372 U.S. 335, 344 (1963).

4. 407 U.S. 25, 37 (1972).

5. See, e.g., Oliver Laughland, *The Human Toll of America's Public Defender Crisis*, GUARDIAN (Sept. 7, 2016), <http://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system> [<http://perma.cc/C3KZ-MCP2>].

6. *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 26-27 (1981).

7. Martha Bergmark, *We Don't Need Fewer Lawyers. We Need Cheaper Ones*, WASH. POST (June 2, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones> [<http://perma.cc/477Q-352B>]; Steven Davidoff Sol-

parties in a civil trial have representation: in more than three-fourth of all civil cases in the United States, at least one litigant is self-represented.<sup>8</sup> In family law, domestic violence, housing, and small-claims cases, the numbers are particularly bad: one or both parties lack representation in seventy to ninety-eight percent of these cases.<sup>9</sup>

Congress created the Legal Services Corporation (LSC) in 1974<sup>10</sup> to meet “a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances.”<sup>11</sup> Congress 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. Congress also noted that “for many of our citizens, the availability of legal services has reaffirmed faith in our government and laws[.]”<sup>12</sup>

While LSC is the single largest source of civil legal aid funding in the United States,<sup>13</sup> its impact is limited. Only those “who live in households with annual incomes at or below 125% of the federal poverty guidelines—in 2015, \$14,713 for an individual, \$30,313 for a family of four” are eligible for LSC-funded aid.<sup>14</sup> Further, while unmet legal needs have grown,<sup>15</sup> appropriations and funding streams for civil legal aid have shrunk.<sup>16</sup> Basic field funding,

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omon, *Law Schools and Industry Show Signs of Life, Despite Forecasts of Doom*, N.Y. TIMES (Mar. 31, 2015), <http://www.nytimes.com/2015/04/01/business/dealbook/despite-forecasts-of-doom-signs-of-life-in-the-legal-industry.html> [<http://perma.cc/SYR3-M9UG>].

8. *The Landscape of Civil Litigation in State Courts*, NAT'L CTR. ST. CTS., at iv (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<http://perma.cc/MA8X-ME3V>].

9. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 741 (2015); see also DEBORAH RHODE, ACCESS TO JUSTICE (2004) (detailing the significance of being forced to self-represent and the barriers to succeeding pro se).

10. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (1974).

11. *Id.* at Title X, § 1001.

12. *Id.*

13. *Who We Are*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are> [<http://perma.cc/7NPV-FVPC>].

14. *Id.*

15. See, e.g., RHODE, *supra* note 9, at 8 (“[T]he role and reach of law is increasing, a trend that reflects broader global forces. . . . Unsafe conditions, abusive marriages, discriminatory conduct, and inadequacies in social services that were once accepted as a matter of course now prompt demands for legal remedies and for assistance in obtaining them. More and more of our everyday life is hedged about by law. Family, work, and commercial relationships are subject to a growing array of legal obligations and protections. As law becomes increasingly crucial and complex, access to legal services also become increasingly critical.”).

16. *Equal Access To Justice: Ensuring Meaningful Access To Counsel In Civil Cases, Including Immigration Proceedings*, COLUMBIA LAW SCH. HUMAN RIGHTS INST. & NORTHEASTERN UNIV. SCH. OF LAW PROGRAM ON HUMAN RIGHTS AND THE GLOB. ECON. 12 (July 2014), <http://web.law>

which funds direct legal services, comes out to just \$5.85 per eligible person.<sup>17</sup> Adjusted for inflation, the Corporation's budget has decreased by three-hundred percent since 1981, while the number of Americans eligible for aid has grown by fifty percent.<sup>18</sup> More than sixty million Americans currently qualify for legal aid.<sup>19</sup> Yet few seek it, and only half of those who do seek legal aid get help.<sup>20</sup> LSC programs aided 1.8 million Americans in 2013 but turned another 1.8 million or more people away.<sup>21</sup> A June 2017 LSC report estimates that in the next year, individuals will approach LSC grantees for assistance with more than 1.7 million problems and that they will receive "limited or no legal help" for more than half of these issues.<sup>22</sup>

As congressional appropriations decreased, so too did revenue from LSC grantees' second largest source of civil legal funding: Interest on Lawyer Trust Account (IOLTA) programs. Every state has an IOLTA that uses interest earned on client funds that lawyers temporarily deposit in a trust account to

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.columbia.edu/sites/default/files/microsites/human-rights-institute/files/equal\_access\_to\_justice\_-\_cerd\_shadow\_report.pdf [http://perma.cc/2LEB-EUH4] [hereinafter COLUMBIA ACCESS TO JUSTICE REPORT]; *FY 2016 Spending Bill Increases Funding for LSC by \$10 Million*, LEGAL SERVS. CORP., (Dec. 18, 2015), <http://www.lsc.gov/media-center/press-releases/2015/fy-2016-spending-bill-increases-funding-lsc-10-million> [http://perma.cc/M85A-72SL]; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 129 Stat. 2242 (2015); *Fiscal Year 2017 Budget Request*, LEGAL SERVS. CORP., <http://lsc-live.app.box.com/LSCFY2017BudRequest> [http://perma.cc/25GP-2QYF] [hereinafter FY 2017 BUDGET REQUEST]. Adjusting for inflation, the \$420 million LSC received in FY 2010 would be approximately \$456,330,000 in 2016 dollars. *CPI Inflation Calculator*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl> [http://perma.cc/LGA3-MKHV]; *Civil Legal Services: Low-Income Clients Have Nowhere to Turn Amid the Economic Crisis*, BRENNAN CTR. FOR JUSTICE 1 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Justice/CLS/LSC-%20New%20Need%20Memo.pdf> [http://perma.cc/9F7Z-MBAE] [hereinafter *Civil Legal Services*].

17. FY 2017 BUDGET REQUEST, *supra* note 16, at 2.
18. Memorandum from James J. Sandman, President, Legal Services Corporation, to Finance Committee, Legal Services Corporation (July 13, 2015), <http://www.lsc.gov/sites/default/files/LSC/about/budget/LSCFY17MgmtRecom.pdf> [http://perma.cc/HLF4-F472].
19. *Id.* at 4.
20. *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 12 (Sept. 2009) [hereinafter *Documenting the Justice Gap*], [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf) [http://perma.cc/D43B-899C].
21. *Who We Are*, *supra* note 13.
22. *The Justice Gap*, *supra* note 1, at 6.

fund legal aid.<sup>23</sup> In 2007, IOLTA income was more than \$370 million.<sup>24</sup> By 2009, it was just \$92 million due to falling interest rates.<sup>25</sup>

LSC figures underrepresent the scale of unmet legal needs because they include only those instances in which help was sought and denied, not all in which help was needed.<sup>26</sup> They capture a relatively privileged subset of Americans—privileged in terms of time, information, or energy. These figures also do not account for the unmet legal needs of the many individuals above the LSC eligibility cutoff.<sup>27</sup>

Relying on these figures would presuppose that all those individuals who had a need for legal services recognized that need and sought help. Many people do not recognize their problems as having a legal dimension or solution.<sup>28</sup> It is increasingly clear that the information gap—the gap between what people believe their rights and means of acting on those rights are and what their rights and resources actually are—is an even greater factor in the justice gap than cost.<sup>29</sup>

When the Non-Partisan and Objective Research Organization at the University of Chicago (NORC) conducted a survey on behalf of LSC for its 2017 report, it found seven in ten low-income households had faced legal problems within the last year.<sup>30</sup> It reached this figure by asking experiential questions that captured unidentified legal needs: Had a member of the household been billed incorrectly for health care in the last 12 months? Had a student in the

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23. *What is IOLTA?*, NAT'L ASS'N IOLTA PROGRAMS & ABA COMMISSION ON IOLTA, <http://www.iolta.org> [<http://perma.cc/W37T-8SCD>].

24. *Civil Legal Services*, *supra* note 16, at 1.

25. *Id.* The website maintained by the National Association of IOLTA Programs and the American Bar Association Commission on IOLTA asserts, contrary to the Brennan Center's figures, that "[i]n 2009, the U.S. IOLTA programs generated more than \$124.7 million nationwide." *What is IOLTA?*, *supra* note 23; see also *IOLTA Prepares to Make Grants with New Funding*, N.C. ST. BAR ASS'N, <http://www.nciolta.org/publications/news/iolta-update> [<http://perma.cc/FK3M-QVS8>]; Robert J. Derocher, *The IOLTA Crash: Fallout for Foundations*, 37 B. LEADER (Sept.-Oct. 2012), [http://www.americanbar.org/publications/bar\\_leader/2012\\_13/september\\_october/iolta\\_crash\\_fallout\\_foundations.html](http://www.americanbar.org/publications/bar_leader/2012_13/september_october/iolta_crash_fallout_foundations.html) [<http://perma.cc/L2AB-JBKE>] (explaining that IOLTA income "plummeted" after 2007 and discussing solutions to the funding crisis).

26. *Documenting the Justice Gap*, *supra* note 20, at 12. Another factor to consider: LSC grantees may not solicit cases.

27. RHODE, *supra* note 9, at 117.

28. Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 724-28 (2015).

29. *Id.* at 722-23.

30. *Justice Gap*, *supra* note 1, at 7.

household been bullied or denied accommodations?<sup>31</sup> Just twenty percent of those the survey identified as facing legal problems sought legal help.<sup>32</sup> Forty-two percent of those who did not seek help cited either not knowing the problem was legal in nature (twenty percent) or being unsure of how to secure help (twenty-two percent).<sup>33</sup> By contrast, fourteen percent cited cost concerns.<sup>34</sup>

In her analysis of the 2013 Community Needs and Services Study, Rebecca Sandefur notes that while two-thirds of those surveyed reported civil legal issues, just nine percent of respondents identified the situation as legal in whole or part.<sup>35</sup> Respondents sought legal help for thirty-nine percent of the civil legal issues they described as legal in nature and just fourteen percent of others.<sup>36</sup> The same survey found respondents only cited cost as a barrier to seeking help seventeen percent of the time.<sup>37</sup>

The information gap and the resulting justice gap have the greatest implications for some of the most vulnerable populations in the United States: people of color, women, immigrants,<sup>38</sup> the elderly,<sup>39</sup> people living with disabili-

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31. 2017 *Justice Gap Measurement Survey*, NORC U. CHI. (2017), <http://lsc-live.app.box.com/s/jyw3gm6s93d4d4kng70cvw2abbev1jz3> [<http://perma.cc/HK7X-8HVK>].

32. *Justice Gap*, *supra* note 1, at 7; see also Debra Cassens Weiss, *86 Percent of Low-Income Americans' Civil Legal Issues Get Inadequate or No Legal Help, Study Says*, AM. BAR ASS'N J. (June 14, 2017), [http://www.abajournal.com/news/article/86\\_percent\\_of\\_civil\\_legal\\_issues\\_of\\_low\\_income\\_americans\\_get\\_inadequate\\_or](http://www.abajournal.com/news/article/86_percent_of_civil_legal_issues_of_low_income_americans_get_inadequate_or) [<http://perma.cc/N8M5-T5DA>] (discussing the results of the NORC survey).

33. *Justice Gap*, *supra* note 1, at 33.

34. *Id.* at 34.

35. Sandefur, *supra* note 28, at 724-25.

36. *Id.* at 725.

37. *Id.* at 722, n.11.

38. Human Rights Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases*, COLUMBIA LAW SCH. 3-5 (Aug. 2013), <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Access%20to%20Justice%20Shadow%20Report%20-%20Final%20%28small%20size%29.pdf> [<http://perma.cc/9JB7-243F>]. Of special note is the lack of right to representation at deportation proceedings.

39. Juliette Cubanski, Giselle Casillas, & Anthony Damico, *Poverty Among Seniors: An Updated Analysis of National and State Level Poverty Rates Under the Official and Supplemental Poverty Measures*, KAISER FAMILY FOUND. (June 10, 2015), <http://kff.org/medicare/issue-brief/poverty-among-seniors-an-updated-analysis-of-national-and-state-level-poverty-rates-under-the-official-and-supplemental-poverty-measures> [<http://perma.cc/AB88-23Z2>]; see Jeffrey D. Colman & Danielle E. Hirsch, *Increasing Access to Justice for the Elderly and Others: The Illinois Experience*, 24 EXPERIENCE 1 (Spring 2014), [http://www.americanbar.org/publications/experience/2014/spring/increasing\\_access\\_justice\\_the\\_elderly\\_and\\_others\\_illinois\\_experience.html](http://www.americanbar.org/publications/experience/2014/spring/increasing_access_justice_the_elderly_and_others_illinois_experience.html) [<http://perma.cc/DB5C-652S>].

ties,<sup>40</sup> and LGBT individuals,<sup>41</sup> many of whom are likely to live in poverty and more likely to face discrimination giving rise to legal claims. Claiming the protections of Title IX or gaining the benefits of legislation like the Americans with Disabilities Act, for example, usually requires legal assistance. Information must be disseminated both more broadly and more strategically to promote public awareness of individual legal rights.

Data collection must also improve so that the scope of legal need can be mapped and targeted policies developed. Recent studies have supported conclusions drawn from earlier data suggesting that not only do eighty percent of the civil legal needs of those living in poverty go unmet, forty to sixty percent of the needs of middle-income Americans do as well.<sup>42</sup> But the utility of these figures to policymakers is questionable at best because they are based on self-reporting. People who do not identify their unmet legal needs are essentially invisible, making it impossible to estimate Americans' total unmet legal needs.<sup>43</sup> New data collection strategies are needed.

## II. MAKING JUSTICE EQUAL: CLOSING THE INFORMATION GAP

As Stephen Bright has observed, “No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.”<sup>44</sup> Many are aware of the right to counsel; few recognize how infrequently it is

40. Pam Fessler, *Why Disability and Poverty Still Go Hand in Hand 25 Years After Landmark Law*, NAT'L PUB. RADIO (July 23, 2015, 3:38 PM), <http://www.npr.org/sections/health-shots/2015/07/23/424990474/why-disability-and-poverty-still-go-hand-in-hand-25-years-after-landmark-law> [<http://perma.cc/FLW2-5Z2D>].

41. M.V. Lee Badgett, Laura E. Durso & Alyssa Schneebaum, *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, WILLIAMS INST. (June 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> [<http://perma.cc/9YUY-5SUC>]; Nico Sifra Quintana, *Poverty in the LGBT Community*, CTR. FOR AMERICAN PROGRESS (July 1, 2009), [http://www.americanprogress.org/wp-content/uploads/issues/2009/07/pdf/lgbt\\_poverty.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2009/07/pdf/lgbt_poverty.pdf) [<http://perma.cc/L56Z-DKMP>]; Press Release, Legal Services NYC, Poverty Is an LGBT Issue: New Report Identifies Low-Income LGBT Legal Needs (Jan. 19, 2016), <http://www.legalservicesnyc.org/news-and-events/press-releases/966-poverty-is-an-lgbt-issue-new-report-from-legal-services-nyc-identifies-civil-legal-needs-of-low-income-lgbt-community> [<http://perma.cc/D377-5Y3X>].

42. RHODE, *supra* note 9, at 79; *The Unmet Need for Legal Aid*, LEGAL SERVICES CORP., <http://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> [<http://perma.cc/M43Z-2WVC>]; American Bar Association, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 12 (2016).

43. Rebecca L. Sandefur, , 67 S.C. L. REV. 443, 453 (2016).

44. Stephen B. Bright, *Turning Celebrated Principles into Reality*, CHAMPION 6 (Jan.-Feb. 2003), [http://library.law.yale.edu/sites/default/files/turning\\_principles\\_into\\_reality\\_-\\_gideon\\_at\\_40\\_-\\_champion.pdf](http://library.law.yale.edu/sites/default/files/turning_principles_into_reality_-_gideon_at_40_-_champion.pdf) [<http://perma.cc/WSV7-SGDR>].

honored. For both criminal and civil justice, as Stanford's Deborah Rhode writes, "[w]hat perpetuates the [access to justice] problem is the lack of public recognition that there is a serious problem."<sup>45</sup>

The information gap is twofold. Those capable of influencing the policy-making process do not recognize the scarcity of legal resources or the magnitude of need; those who need legal resources do not necessarily recognize it, nor do they know where they can seek help. Neither of these problems can be resolved without addressing the other. The most critical work on access issues will therefore be educational in nature.

Public dialogue conducted in mainstream media has the potential to reach all the relevant stakeholders. This was the premise of the project I began at the Center for American Progress, a leading progressive policy institution, to offer research and communications support to direct providers and put access to justice on policymakers' radars. Anecdotally, sharing the stories of those denied justice because of barriers to access through multiple media, particularly radio and television, as well as multiple outlets, is the most effective means of broadening awareness. Placing opinion pieces, publishing policy papers, and doing outreach to offices proved limited in terms of broad effect—but extremely useful for reaching policymakers.

Policy experts and lawmakers can be reached through both informal and formal outreach, and through private and public-facing initiatives. That is to say, invisible institutional channels—the distribution of a memo never meant for publication through government affairs staff—and informal, invisible channels—the social chat or casual contact with a policymaker or their staff—may be as effective as highly public ones. The impact of these combined strategies can be enormous: when a policymaker speaks even casually with colleagues on an issue, it becomes more salient and interest may grow, creating other points of access.

Persuading other actors in the social justice space to understand access as a prerequisite for social progress is complicated by the stiff competition for funding. Social justice advocates must be convinced that access to justice is an intersectional issue that complements, rather than competes with, their existing initiatives.

Among those already working on this issue, there are myriad opinions about priorities, strategies, and prospects for alleviating the justice gap. Engaging major actors in this space in person, at conferences and convenings, proved critical. So did, to a surprising extent, social media engagement. Members of the tight-knit but far-flung access to justice community have a robust presence

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45. RHODE, *supra* note 9, at 15.



on Twitter, for example. Upon the release of *Making Justice Equal*, a report on the status of access to justice in the United States, access to justice advocates from Virginia to California shared the piece via Twitter; it went on to become a top product that week for the Center for American Progress with more than 1,000 downloads.

Policymakers and advocates can effect significant change in this space. Among other things, they can pressure courts to simplify legal processes, appoint attorneys more often, and ensure that defenders have the time to prepare a defense. Advocates and academics convinced of the relevance of the information gap to social justice will continue to develop new approaches. For example, proposing the use of technology to piggyback on current social services, such as case workers' home visits or wellness checks, to gather data about legal needs. Such efforts require a minimal investment while also offering the possibility of having a fuller picture of legal needs when more funding is available to meet them. Outside actors can also incorporate self-help and educational resources into new editions of materials they already distribute to facilitate self-representation. In the realm of direct services, bar associations, law firms, and law schools can increase pro bono requirements and commitments.

With publicity and greater outreach comes not only public education but buy-in within the communities most likely to have low trust in government. The demographics of those who mistrust government, unsurprisingly, correspond to those most affected by the justice gap—those living in poverty, people of color, women, immigrants, the elderly, people with disabilities, and LGBT individuals.<sup>46</sup> The justice system is failing them. Concern for and attention to the justice gap, particularly from policymakers, may increase their trust and participation in a branch of government. Thus, the ultimate result would be not only a reduced justice gap but also a broader increase in engagement with government and its mechanisms.

### III. ACCESS TO JUSTICE UNDER THE TRUMP ADMINISTRATION

The justice gap seems certain to grow, and significantly, under the Trump Administration, for familiar political reasons. But along with these challenges, advocates face a new front: a fight to uphold the justice system itself. After all, to improve access to justice, there must still be justice to access.

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46. Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016, 9:03 AM), <http://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal> [<http://perma.cc/3BA4-REXJ>].

A. *The Landscape: Familiar Threats*

Federal actors will be unlikely to take steps to narrow the justice gap in the foreseeable future. While serving on the Republican Study Committee, Vice President Mike Pence previously proposed eliminating LSC.<sup>47</sup> In his proposed budget for 2018 (the so-called “skinny budget”), President Trump did the same.<sup>48</sup> The most promising federal policy options for improving access—an increase in LSC funding, an expansion of eligibility for aid, and the termination of restrictions on aid—are out of reach.

Even as funding shrinks, so, too, do means of creating and enforcing protections through agency regulation. In January 2017, the House of Representatives signaled its intent to move forward with a trio of bills that would lock rulemaking and vitiating existing regulatory schemes—the Midnight Rules Relief Act, the Regulations from the Executive in Need of Scrutiny Act (REINS), and the Regulatory Accountability Act (RAA).<sup>49</sup> Often overlooked in the access to justice debate, the regulatory state is responsible for creating enforceable protections—bans on harmful substances, like lead paint, and rules to ensure safe drinking water, for example.<sup>50</sup> Deregulation has staggering implications for human health and safety.<sup>51</sup>

Meanwhile, legislation like the Fairness in Class Action Litigation Act would block critical avenues for civil rights litigation and efforts to ensure corporate and governmental accountability.<sup>52</sup> Class actions are a particularly critical means of surmounting the information gap. Representative plaintiffs who

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47. *RSC Budget Options 2005: Summary and Explanation of Offsets*, REPUBLICAN STUDY COMM. (Sept. 21, 2005), <http://www.fedsmith.com/wp-content/uploads/2005/10/RSCprop.pdf> [<http://perma.cc/A7QX-7MGV>].

48. *America First: A Budget Blueprint To Make America Great Again*, OFF. OF MGMT. & BUDGET (2017), [http://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](http://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf) [<http://perma.cc/YN2W-JZ4S>].

49. Rebecca Buckwalter-Poza, *Deregulation Nation: Congress Wants To Let Corporations Take Charge*, CTR. FOR AM. PROGRESS (Jan. 27, 2017, 9:02 AM), <http://www.americanprogress.org/issues/democracy/news/2017/01/27/297417/deregulation-nation-congress-wants-to-let-corporations-take-charge> [<http://perma.cc/HXW4-Y4AV>].

50. *Id.*

51. Joe Valenti & Rebecca Buckwalter-Poza, *Who Pays for Rolling Back Regulations?*, CTR. FOR AM. PROGRESS (Mar. 13, 2017, 12:46 PM), <http://www.americanprogress.org/issues/economy/news/2017/03/13/428049/pays-rolling-back-regulations> [<http://perma.cc/VNQ7-UXXJ>].

52. Rebecca Buckwalter-Poza, *Unfairness in Class Action: A New Attack on Civil Rights*, CTR. FOR AM. PROGRESS (Mar. 6, 2017, 9:02 AM), <http://www.americanprogress.org/issues/courts/news/2017/03/06/427463/unfairness-in-class-action-a-new-attack-on-civil-rights> [<http://perma.cc/EC4M-KMXA>].

are aware of their rights and can seek legal assistance are able to bring suit on behalf of those who are not and cannot. In the course of a successful class action, other members of the class are informed of their rights and see them vindicated without cost.

The propagation of forced arbitration, which corporations often attempt to exploit to keep consumers out of court and at the mercy of private arbitrators, is also troubling.<sup>53</sup> The information gap ossifies when individuals are prevented from bringing suit and sharing arbitration outcomes. The topic is particularly timely given that the Supreme Court in January granted certiorari in three cases surrounding class action waivers in arbitration agreements.<sup>54</sup>

Although legislation and regulations permit private enforcement, hurdles to filing suit and the ease of settlement encourage bad actors to sin in perpetuity.<sup>55</sup> Narrowing private avenues to seek justice will also compound the effects of non-enforcement at the Department of Justice under Attorney General Jeff Sessions. For example, Attorney General Sessions has already established that the DOJ will back away from investigating abuses in local policing and rejected the notion of systemic abuses,<sup>56</sup> leaving private enforcement as one of few remaining paths to accountability. Advocates and policymakers must now not only raise awareness of the justice gap but respond to legislative and administrative developments that will exacerbate it.

Public education is not only critical to addressing the access gap—it is among the most viable means of doing so in this landscape as it is a relatively low-cost form of advocacy. But it may not be enough. The Trump Administration has created a new, overarching legal need: to preserve the rule of law, not just individual rights.

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53. Joe Valenti & Rebecca Buckwalter-Poza, *Senators Must Ask Gorsuch if He Will Force Americans into Arbitration*, CTR. FOR AM. PROGRESS (Mar. 16, 2017, 9:01 AM), <http://www.americanprogress.org/issues/economy/news/2017/03/16/428284/senators-must-ask-gorsuch-will-force-americans-arbitration> [<http://perma.cc/Z3WZ-ERYM>].

54. Sean McCrory & Rob Friedman, *Supreme Court Will Review Three Cases Involving the Lawfulness of Class and Collective Action Waivers*, LITTLER (Jan. 13, 2017), <http://www.littler.com/publication-press/publication/supreme-court-will-review-three-cases-involving-lawfulness-class-and> [<http://perma.cc/469K-A6AU>].

55. See RHODE, *supra* note 9, at 21 (“This nation also finds privately financed lawsuits to be a fiscally attractive way of enforcing statutory requirements without spending taxpayer dollars on legal costs. Much of this country’s environmental, health, safety, consumer, and antidiscrimination regulation occurs through litigation.”).

56. Adam Serwer, *Jeff Sessions’s Blind Eye*, ATLANTIC (Apr. 5, 2017), <http://www.theatlantic.com/politics/archive/2017/04/jeff-sessions-blind-eye/521946> [<http://perma.cc/R27E-ZV37>].

*B. What Lies Ahead: New Challenges*

The President's untruths<sup>57</sup> are not lies, precisely; they are not plausible alternative claims meant to withstand an application of logic. Rather they are demonstrably, even facially, false statements meant only to sound good. That is, designed solely to appeal to an audience. Consider the President's fondness for offering specific figures – percentages of the electorate, billions of dollars, or inauguration attendees – without any support and even contrary to all available evidence. For example, the President has repeatedly stated that he lost the popular vote only because three to five million people voted illegally, despite voting officials' rejection of this claim.<sup>58</sup>

President Trump suborns the public to reject the notion of—or perhaps the value of—truth and logic. His campaign against journalism—so-called “fake news”<sup>59</sup>—is an effort to remove obstacles to his efforts to recast reality without accountability to fact or regard for plausibility. This assault on truth necessarily jeopardizes the rule of law. Law is grounded in truth and reason—in facts, evidence, and the application of logic to these precursors. To reject fact or imply it is mutable, fungible—think “alternative fact”—is to reject law.

Of course, the President attacks law not just by dismantling its conceptual foundations but also more directly. A week into his presidency, on January 27, 2017, President Trump issued an executive order—“Protecting the Nation from Foreign Terrorist Entry into the United States”—confirming his intent to challenge the separation of powers and the rule of law. Chaos ensued. Sixteen state attorneys general formally signaled their intention to sue over the executive order.<sup>60</sup> Thousands of Americans protested in major cities, from Los Angeles to Boston.<sup>61</sup> Following early losses in court challenges, President Trump prom-

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57. *Donald Trump*, POLITIFACT, <http://www.politifact.com/personalities/donald-trump> [<http://perma.cc/24LF-HGK3>].

58. Michael D. Shear & Emmarie Hutteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. TIMES (Jan. 23, 2017), <http://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html> [<http://perma.cc/5LWL-NRMH>].

59. Christopher Rosen, *All the Times Donald Trump Has Called the Media “Fake News” on Twitter*, ENTMT'W WKLY. (July 24, 2017, 7:33 AM), <http://ew.com/tv/2017/06/27/donald-trump-fake-news-twitter> [<http://perma.cc/644M-H7VW>].

60. Edward-Isaac Dove, *Democratic State Attorneys General Vow Action Against Refugee Order*, POLITICO (Jan. 29, 2017, 4:04 PM), <http://www.politico.com/story/2017/01/trump-immigration-attorneys-general-234338> [<http://perma.cc/9XDU-V75D>].

61. Matthew Weaver et al., *Travel Ban: Trump Defends Order as Dispute over UK Visit Deepens*, GUARDIAN (Jan. 30, 2017, 11:09 AM), <http://www.theguardian.com/us-news/live/2017/jan/29/donald-trump-us-travel-ban-refugees-airports> [<http://perma.cc/PY5R-YFE2>].

ised,<sup>62</sup> then issued, a second executive order. A federal court stay on that order was partially lifted by the Supreme Court.<sup>63</sup>

Although it is tempting to dismiss President Trump's executive orders<sup>64</sup> as political theater, these performances erode the rule of law. Both orders demonstrate, on the most charitable read, a disregard for law. In response to the administration's practice of sending immigration officers into state courthouses to arrest undocumented individuals seeking judicial relief, California Chief Justice Tani Cantil-Sakauye, a Republican appointee, used the annual State of the Judiciary address to the Legislature to warn that "the rule of law is being challenged."<sup>65</sup>

Issuing executive orders that make no attempt to hew to federal law or judicial precedent demeans the authority of the other branches. It also encourages other political actors to attempt to defy rather than work within law. The conservative push to criminalize protest,<sup>66</sup> for example, popped up in five states,<sup>67</sup> then ten,<sup>68</sup> then eighteen.<sup>69</sup> These legally nonviable measures, clothed in the

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62. Maura Dolan & Jaweed Kaleem, *Trump Says He Will Issue a New Order After a 'Very Bad Decision' Blocked His Initial Travel Ban*, L.A. TIMES (Feb. 16, 2017, 5:55 PM), <http://www.latimes.com/nation/la-na-travel-executive-order-20170216-story.html> [<http://perma.cc/XLB2-T7PE>].
63. Josh Gerstein, *Supreme Court Allows Trump's Travel Ban To Take Partial Effect*, POLITICO (June 26, 2017, 10:41 AM), <http://www.politico.com/story/2017/06/26/supreme-court-to-take-up-trumps-travel-ban-let-parts-of-it-take-effect-239956> [<http://perma.cc/U8FW-HSK2>]; *Trump Travel Ban: Second U.S. Judge Block[s] New Executive Order*, BBC (Mar. 16, 2017), <http://www.bbc.com/news/world-us-canada-39287656> [<http://perma.cc/Y4H2-XX9R>].
64. David Lauter, *Bold Promises, Fewer Results: Trump's Executive Orders Don't Always Live up to his Claims*, L.A. TIMES (Apr. 16, 2017, 3:00 AM), <http://www.latimes.com/politics/la-na-pol-trump-executive-orders-20170416-story.html> [<http://perma.cc/5LUP-KXNY>].
65. Alexei Koseff, *California Chief Justice Warns that "The Rule of Law Is Being Challenged,"* SACRAMENTO BEE (Mar. 27, 2017), <http://www.sacbee.com/news/politics-government/capitol-alert/article141124348.html> [<http://perma.cc/7K6P-GCWL>].
66. Mitch Smith & Michael Wines, *Across the Country, a Republican Push To Rein in Protesters*, N.Y. TIMES (Mar. 2, 2017), <http://www.nytimes.com/2017/03/02/us/when-does-protest-cross-a-line-some-states-aim-to-toughen-laws.html> [<http://perma.cc/8YSN-GTMA>].
67. Spencer Woodman, *Republican Lawmakers in Five States Propose Bills To Criminalize Peaceful Protest*, INTERCEPT (Jan. 19, 2017, 8:38 AM), <http://theintercept.com/2017/01/19/republican-lawmakers-in-five-states-propose-bills-to-criminalize-peaceful-protest> [<http://perma.cc/2AKX-9N6E>].
68. Spencer Woodman, *Update: Lawmakers in Ten States Have Proposed Legislation Criminalizing Peaceful Protest*, INTERCEPT (Jan. 23, 2017, 12:34 PM), <http://theintercept.com/2017/01/23/lawmakers-in-eight-states-have-proposed-laws-criminalizing-peaceful-protest> [<http://perma.cc/U97P-AL53>].
69. Christopher Ingraham, *Republican Lawmakers Introduce Bills To Curb Protesting in at Least 18 States*, WASH. POST (Feb. 24, 2017), <http://www.washingtonpost.com/news/wonk/wp/2017>

legitimacy of the legislative process and presented alongside genuine efforts at law-making, benefit from false equivalency. Even judicial invalidation legitimizes facially illegal provisions by recognizing them.

In sum, President Trump disregarded the Constitution, defied congressional intent, and declined to ensure executive agencies complied with court orders<sup>70</sup>—or perhaps instructed them not to comply. He then explicitly attacked the judiciary following legal challenges to each iteration of the executive order, criticizing the courts,<sup>71</sup> judges,<sup>72</sup> and their decisions on the bans.<sup>73</sup> After now-Justice Neil Gorsuch distanced himself from the President who nominated him, calling the Executive’s criticism of the Judiciary “disheartening,” President Trump doubled down, saying “I’ll criticize judges.”<sup>74</sup> President Trump’s contravention and criticism of the apparatus meant to check him works to erase the notion of legitimacy.

Acknowledging this assault on the rule of law is critical to efforts to expand access to justice, especially those predicated on the dissemination of information. Without notions of veracity and legitimacy, there is no concept of relative authority. Who is to say what rights are? An op-ed or an ad in a newspaper may be dismissed more readily. Identifying legal needs will still be possible. But making people aware of their rights and remedies does little when not only

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/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states [http://perma.cc/3998-HUKX].

70. Temporary Restraining Order, *Aziz v. Trump* (E.D. Va. Jan. 28, 2017) (No. 1:17-cv-116), <http://www.justice4all.org/wp-content/uploads/2017/01/TRO-order-signed.pdf> [http://perma.cc/49XF-79KV]; Kaveh Waddell, *An Army of Attorneys Descends on Dulles*, ATLANTIC (Jan. 29, 2017), <http://www.theatlantic.com/politics/archive/2017/01/an-army-of-lawyers-stands-by-to-help-at-dulles-airport/514853> [http://perma.cc/2Y29-P5WS]; Amanda Whiting, *Despite Court Order, US Officials Won't Allow Lawyers at Dulles To See Detainees*, WASHINGTONIAN (Jan. 29, 2017), <http://www.washingtonian.com/2017/01/29/customs-and-border-protection-still-not-allowing-lawyers-to-see-detainees> [http://perma.cc/GM28-WBZA].
71. Matt Shuham, *Trump Criticizes Judges Deciding on His Order: “Courts Seem To Be so Political,”* TALKING POINTS MEMO, (Feb. 8, 2017, 9:56 AM), <http://talkingpointsmemo.com/livewire/trump-says-court-would-earn-respect-by-supporting-his-authority> [http://perma.cc/3YDY-GHPH].
72. Michael C. Bender, *Trump Criticizes “So-Called Judge” Who Lifted Travel Ban*, WALL ST. J. (Feb. 5, 2017, 12:03 PM ET), <http://www.wsj.com/articles/trump-attacks-judge-who-lifted-travel-ban-1486228352> [http://perma.cc/XFX3-5YK9].
73. Dolan & Kaleem, *supra* note 62.
74. Glenn Thrush, *“I’ll Criticize Judges,” Trump Says, Hours After a Scolding for Doing Just That*, N.Y. TIMES (Mar. 21, 2017), <http://www.nytimes.com/2017/03/21/us/politics/trump-gorsuch-criticizing-judges.html> [http://perma.cc/5P8V-9HTL].

those rights but the venues for adjudicating claims arising from them are eroding daily.

## CONCLUSION

On December 8, 2016, a group of constitutional scholars published an open letter urging President-elect Trump “to uphold and adhere to the rule of law.”<sup>75</sup> They enumerated concerns about Trump’s conduct and rhetoric with respect to the First Amendment’s guarantees of free speech, a free press, and religious exercise.<sup>76</sup> His attacks on the judiciary, the scholars noted, “have the potential to undermine the public’s confidence in the judiciary” and signal disregard for judicial independence—as did the promise to appoint a justice who would overrule *Roe v. Wade*.<sup>77</sup> In conclusion, they offered, “we sincerely hope that you will take your constitutional oath seriously, so far you have offered little indication that you will.”<sup>78</sup> Their concerns were well-founded, but the scope of the consequences they forecast were too narrow.

The U.S. justice system had many structural flaws on November 8, 2016. Principal among them were barriers to individuals, particularly low-income Americans, seeking justice. Millions of people never realize avenues for pursuing protection, remedies, and enforcement taken for granted by the public and policymakers. And the gap between needs and resources is growing. The justice gap, particularly the information gap underlying it, has always detracted from democratic processes.

Since November 9, however, threats to access to justice, and democracy itself, have grown by an order of magnitude. Every deficit contributing to the crisis in access to justice will remain or be exacerbated. While prioritizing the information gap in the effort to close the justice gap is the best hope for combating these trends, it may not be enough at a time when the predicates of the rule of law itself—truth, logic, authority—are under threat.

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75. Elise Boddie, Gilbert Paul Carrasco, Erwin Chemerinsky et al., An Open Letter from Constitutional Law Scholars to President-Elect Donald Trump 1 (Dec. 8, 2016), <http://www.acslaw.org/sites/default/files/pdf/ACS%20Open%20Letter%20to%20President-Elect.pdf> [<http://perma.cc/75TN-THPG>].

76. *Id.*

77. *Id.* at 2.

78. *Id.* at 3.

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