

ACCESS TO CIVIL JUSTICE: KEEPING AMERICA'S PROMISE

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We the People of the United States, in order to form a more perfect Union, establish Justice . . .

— United States Constitution, Preamble

I. INTRODUCTION

Equal justice under law was a fundamental value in America even before we were a country. In 1620, as the Pilgrims made their way to the New World, they drew up and signed an agreement called the Mayflower Compact. Chief among its principles was a call for “just and equal laws.”¹ A call for justice is enshrined in the first line of the Constitution, quoted above. It is also engraved over the entrance of the Supreme Court – “Equal justice under law” – and recited everyday by school children who proclaim in the closing words of the Pledge of Allegiance that we are a nation “indivisible, with liberty and justice for all.”

Today, the promise of equal justice is frequently expressed in non-partisan terms by a wide range of leaders. For example, at LSC's 40th Anniversary Conference held in September 2014, Supreme Court Associate Justice Antonin Scalia remarked:

The American ideal is not for some justice. It is, as the Pledge of Allegiance says, ‘Liberty and justice for all’. . . . Can there be a just society when some do not have justice? Equality, equal treatment, is perhaps the most fundamental element of justice.²

At that same Conference, Hillary Clinton, former Chair of LSC's Board of Directors remarked:

Guaranteeing legal services for all Americans makes us a better country and a fairer country. It helps by empowering people to solve those problems and it helps to level the playing field. It is not just a

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1. Mayflower Compact (Nov. 11, 1620), *available at* <http://www.constitution.org/bcp/mayfcomp.pdf> (last visited Mar. 11, 2015).

2. U.S. Supreme Court Justice Antonin Scalia, Remarks at the LSC 40th Anniversary Kick-Off Conference (Sept. 15, 2014) (transcript on file with Legal Services Corporation).

fair shot at the justice system, but it is a fair shot at the American dream.³

Although access to justice is thus a core national value, America's follow-through has not matched the grandeur of our pledge. For millions of Americans who cannot afford a lawyer, justice for all remains an unfulfilled promise. The crisis in delivery of civil justice is underscored by comparing data regarding unmet civil legal needs in America, discussed in Part II of this article, with data regarding the resources available to meet those needs, discussed in Part III. These data show that unmet civil legal needs in the country are at an all-time high, while the resources available to address those needs have dwindled in recent years.

This justice deficit will not be closed by simply following the path our country has already tread. We must summon the political will to transform justice for all from promise to reality. Part IV identifies three strategies that need to be pursued to bridge the access to justice gap: (a) raising public awareness about the crisis in access to civil justice, (b) increasing and better leveraging resources available to address currently unmet legal needs, and (c) making changes to the systems that deliver such resources. Continuing business as usual for civil justice would leave equal justice under law a distant aspiration. The strategies outlined here are necessary initial steps to change the status quo and help America keep her promise of justice for all.

II. UNMET LEGAL NEEDS IN AMERICA ARE AT AN ALL-TIME HIGH

In 1974, the prospect of justice for all advanced when Congress enacted, and President Richard Nixon signed, legislation establishing the Legal Services Corporation (LSC) to promote equal access to justice by funding high-quality civil legal assistance for low-income Americans.⁴ From that time, LSC has been the single largest funder of civil legal aid for the poor in the country. LSC awards grants through a competitive process and currently funds 134 independent legal aid organizations with approximately 800 offices throughout the United States and its territories.

LSC's grantees serve thousands of low-income individuals, children, families, seniors, and veterans in every county in the country. LSC grantees handle the basic civil legal needs of the poor, addressing matters involving safety, subsistence, and family stability. LSC grantees set case priorities based on community need.⁵ Legal assistance can protect children, keep families in their homes and help protect people from predatory lenders. Chart 1 below

3. Former Sec'y of State and former LSC Chair Hillary Rodham Clinton, Remarks at the LSC 40th Anniversary Kick-Off Conference (Sept. 15, 2014), *available at* <http://www.lsc.gov/media/videos#lsc40>.

4. Legal Services Corporation Act, 42 U.S.C. §§ 2996a–2996l (1976).

5. *See* 45 C.F.R. § 1620.3(b) (2015).

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shows the principal subject-matter areas in which LSC grantees provided service in 2014.⁶

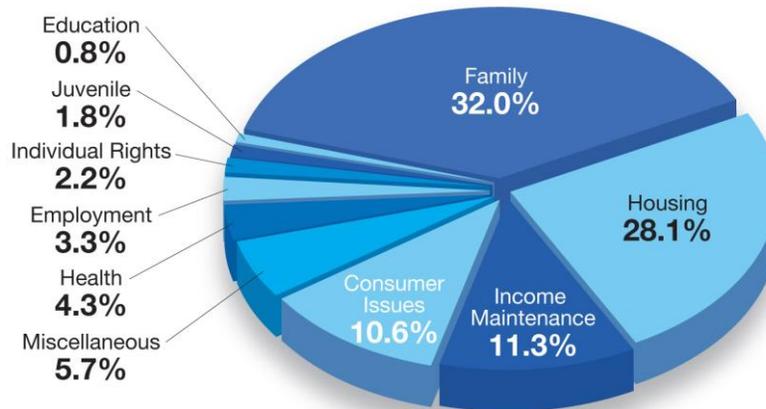


Chart 1. 2014 LSC-Eligible Case Services by Case Type

Nearly one in three Americans—96 million people—qualified for LSC-funded services at some time during 2013, the most recent year for which U.S. Census Bureau data are available.⁷ As depicted in Chart 2 below, over the past fifteen years, the number of people eligible for LSC services has grown by nearly 50%.⁸ The number of people eligible for civil legal aid from LSC-funded programs is up 25% since the start of the recession in 2008.⁹

6. LEGAL SERVS. CORP., 2014 LEGAL SERVICES CORPORATION BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 18 (2014).

7. LEGAL SERVS. CORP., FISCAL YEAR 2016 BUDGET REQUEST 3 (2015). 63.6 million people—one in five Americans—had annual incomes below the income threshold for LSC-funded legal assistance. *Id.* These people had annual incomes below 125% of the federal poverty line: \$14,363 for an individual; \$29,438 for a family of four. *Id.* Another 32.4 million people had incomes below the 125% level for at least two consecutive months during the year. *Id.*

8. *Id.* at 2 (citing U.S. Census Bureau, Table S1701: Poverty Status in the Past 12 Months (2010); Emily Monea & Isabel Sawhill, *An Update to "Simulating the Effect of the 'Great Recession' on Poverty,"* BROOKINGS INST., Sept. 13, 2011; U.S. Census Bureau, 2012 National Population Projections: Summary Tables, Middle Series (Dec. 2012)).

9. *Id.*

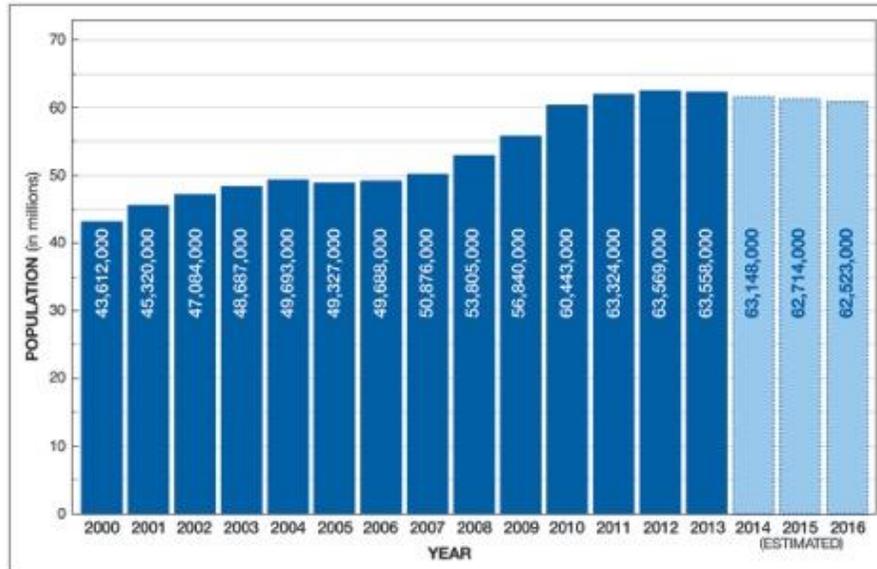


Chart 2. Number of Americans Eligible for Civil Legal Assistance (2000–2016)

III. RESOURCES AVAILABLE TO MEET CIVIL LEGAL NEEDS FOR THE POOR ARE INSUFFICIENT TO MEET THE GROWING NEEDS

While the number of Americans eligible for civil legal assistance has steadily increased, funding for civil legal services has generally been declining. As depicted in Chart 3, LSC funding for LSC's basic field grantees is down over fifteen percent since 2010.¹⁰ Temporary state funding from foreclosure settlements and other sources have filled almost half of this gap, but these funds often come with significant restrictions on how they can be spent.

10. See LEGAL SERVS. CORP., FISCAL YEAR 2013 BUDGET REQUEST 4 (2012); LEGAL SERVS. CORP., FACT BOOK 2011, at 6 (2012); LEGAL SERVS. CORP., 2012 FACT BOOK, 9 (2013); LEGAL SERVS. CORP., *supra* note 4, at 9.

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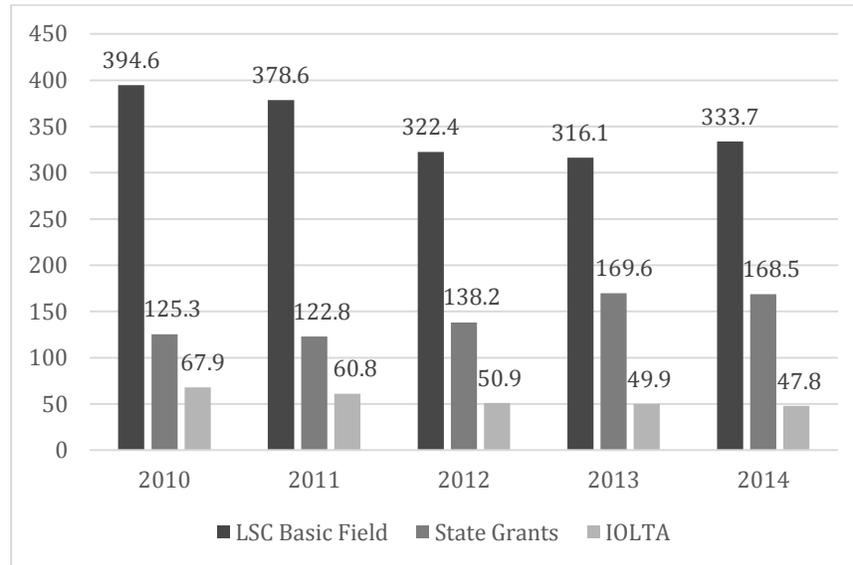


Chart 3. LSC Basic Field Grants and Other Core Funding in Decline (\$ millions)

As shown in Chart 4, if LSC's funding had merely kept pace with inflation since 1995, the 2015 appropriation would be more than \$620 million.¹¹ The \$375 million appropriated for 2015 is about 40% less than inflation adjusted funding for 1995, and federal funding per eligible client has dropped to an all-time low.¹²

11. LEGAL SERVS. CORP., *supra* note 7, at 4.

12. *Id.*

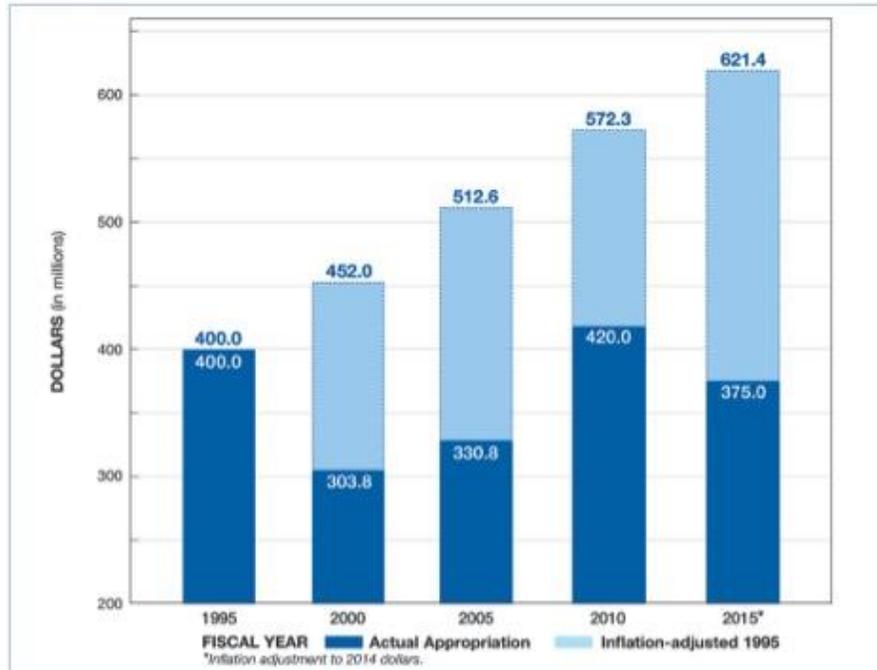


Chart 4. LSC Appropriations Compared to its 1995 Appropriations when Adjusted for Inflation

Decreased funding is having an impact on legal aid programs and the services they are able to provide to needy clients. As reflected in Chart 5, between 2010 and 2014, LSC grantees were forced to cut staff, including eight percent of attorneys and higher percentages of paralegals and other support staff.¹³

13. LEGAL SERVS. CORP., GRANT ACTIVITY REPORTS—2010 (2010) [hereinafter LEGAL SERVS. CORP., 2010 Grant Activity Reports]; LEGAL SERVS. CORP., GRANT ACTIVITY REPORTS—2014 (2014) [hereinafter LEGAL SERVS. CORP., 2014 Grant Activity Reports].

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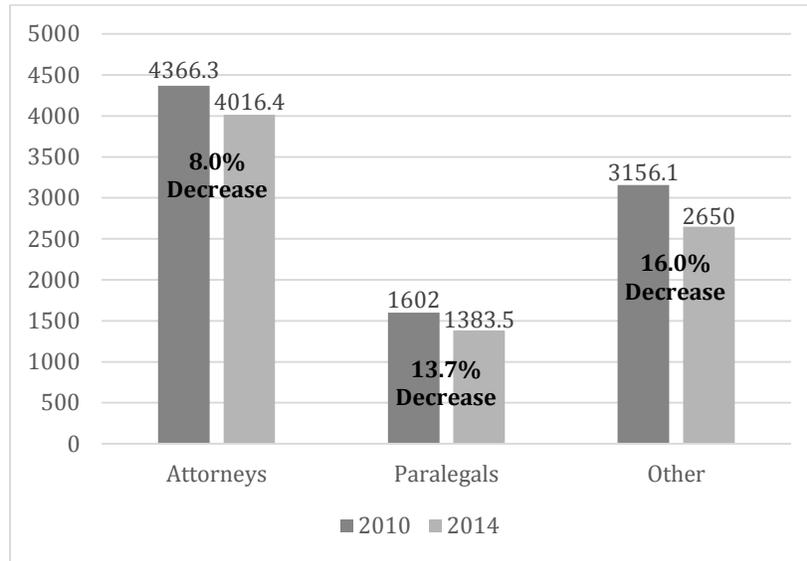


Chart 5. Impact of Decreased Funding on Staffing (2010–2014)

With fewer resources available to them, LSC grantees have had to turn away thousands of low-income Americans seeking civil legal assistance. According to a 2009 LSC report, 50% of all those who sought legal assistance from LSC grantees were turned away because of the lack of adequate resources.¹⁴ Nationally, LSC grantees served over 1.8 million low-income persons in 2013.¹⁵ Millions more requested assistance but did not receive it because of the lack of adequate resources. As depicted in Chart 6, between 2010 and 2014 – a period of sharply *escalating* legal needs – the number of cases handled by LSC grantees annually *decreased* by nearly twenty percent.¹⁶

14. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (Sept. 2009).

15. LEGAL SERVS. CORP., *supra* note 7, at 9.

16. LEGAL SERVS. CORP., 2010 Grant Activity Reports, *supra* note 13; LEGAL SERVS. CORP., 2014 Grant Activity Reports, *supra* note 13.

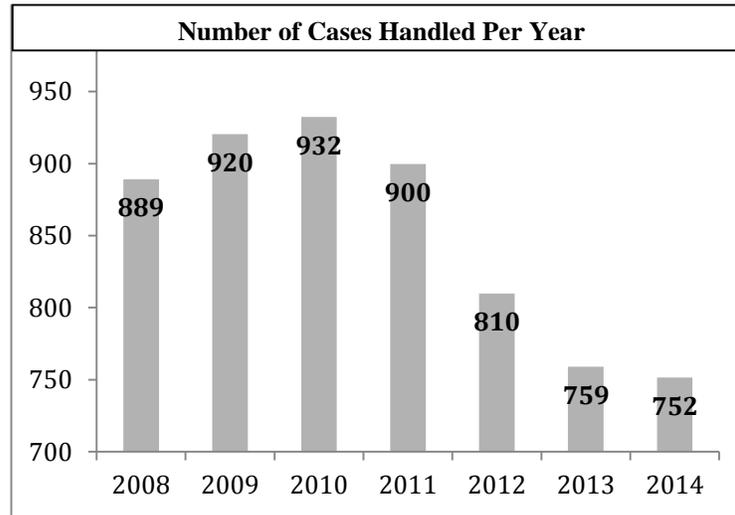


Chart 6. Impact Decreased Funding on Number of Cases Handled Per Year

Because of shrinking resources, legal aid programs have had to reduce the type of assistance they provide to clients. Fifty-two percent of LSC's funding recipients reported that in 2013 they changed case-acceptance policies, narrowed program priorities, or implemented similar measures that adversely affected client services.¹⁷ LSC-funded programs reported that they implemented one or more of the following changes in 2013:¹⁸

- 30% of LSC grantees reduced services by lowering income-eligibility limits, restricting overall case-acceptance standards, eliminating practice areas, or prioritizing cases with a high likelihood of success.
- 24% reduced the number of cases in which they provided extended representation.
- 39% reduced family law cases, such as eliminating specific types of cases (for example, contested divorces, custody).
- 27% reduced services to victims of domestic violence, for example, restricting services to cases where the victim had children, eliminating services in particular jurisdictions or not accepting referrals from outside agencies, limiting representation to securing protective orders, or restricting representation to emergency circumstances or the "most egregious fact patterns."
- 22% reduced representation in housing matters, for example, evictions and foreclosures.
- 21% reduced services in consumer cases, for example, bankruptcy, predatory lending, or consumer debt.

17. LEGAL SERVS. CORP., FISCAL YEAR 2016 BUDGET REQUEST 28 (2015).

18. *Id.*

State studies consistently show that only twenty percent of the civil legal needs of the eligible population are being met. For example, a recent study by the Boston Bar Association found that in Massachusetts civil legal aid programs turn away 64% of eligible cases.¹⁹ Nearly 33,000 low-income residents in Massachusetts were denied the aid of a lawyer in life-essential matters involving eviction, foreclosure, and family law such as cases involving child abuse and domestic violence.²⁰ People seeking assistance with family law cases were turned away 80% of the time.²¹

New York's recent findings confirm national data that fewer than twenty percent of all civil legal needs of low-income families and individuals are met. In 2013, more than 1.8 million litigants were not represented by counsel in civil proceedings in New York's state courts.²² In New York City, 91% of petitioners and 92% of respondents do not have lawyers in child support matters in family court, and 99% of tenants are unrepresented in eviction proceedings.²³ In New York State, 87% of petitioners and 86% of respondents do not have lawyers in child support matters in family court, and 91% of tenants are unrepresented in eviction proceedings.²⁴ These enormous volumes of unrepresented litigants in our Nation's courts fundamentally undermine the justice available to those litigants as well as to other parties whose cases are delayed because of the time required to fairly address cases involving unrepresented parties.²⁵

IV. MEETING AMERICA'S PROMISE

The crisis in access to justice described above will not go away unless our country takes strong steps to change the status quo. To move toward meeting America's promise of justice for all, we must, at a minimum, pursue three strategies: (a) raise public awareness about the crisis in access to civil justice, (b) increase and better leverage resources available to address currently unmet legal needs, and (c) make changes to the systems that deliver such resources.

A. Raising Public Awareness

The first challenge is "the invisibility of the access to justice issue – the widespread ignorance of the magnitude of the justice gap in the United States

19. See BOS. BAR ASS'N STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASS., INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 3 (2014).

20. *Id.*

21. *Id.*

22. See STATE OF N.Y. UNIFIED COURT SYSTEM, TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERV. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2 (2014).

23. *Id.* at 20.

24. *Id.*

25. THE IMPORTANCE OF FUNDING FOR THE LEGAL SERVICES CORPORATION FROM THE PERSPECTIVE OF THE CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS, available at http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Web%20Documents/LSC_WHTPR.ashx.

today.”²⁶ As Texas Supreme Court Chief Justice Nathan Hecht said at LSC’s 40th Anniversary Conference in September 2014:

We hope that justice has few enemies. Most of what we struggle with, I don’t think is opposition to justice, but ignorance of what is going on . . . I think when you understand exactly what we do, and where the money goes, and what it’s used for, and how that makes a difference, then it’s much easier to find support for legal services.²⁷

Those who care about this issue must carry the message beyond legal aid organizations and others in the access-to-justice community to new audiences, particularly opinion makers and opinion leaders.²⁸

We must also find “people outside the legal aid world to make the case—including corporate general counsel, chief executive officers, and those foundation leaders who understand the issue and fund legal aid. The case for legal aid needs to be made in terms that those outside that community can understand, stressing the importance of fairness in our justice system, a value that recent research shows resonates deeply with the public.”²⁹

The arguments should be illustrated with compelling stories showing the profound impact of legal services on the lives of low-income Americans and make the economic case for legal aid as well. For example, one recent report concluded that civil legal services funding in New York State provides a return of approximately six dollars for every dollar of funding.³⁰

B. Increasing and Better Leveraging Resources

The second challenge is to attract more resources and better leverage those resources. The most fundamental need is clear: more resources. We must provide the funding necessary to adequately support LSC’s mission of funding high-quality civil legal assistance for low-income Americans. We cannot reasonably hope to keep America’s promise of justice for all with funding that is so low that it does not even approach the \$400 million LSC received in 1995³¹ – a year in which the number of persons financially eligible to received LSC-funded services was 30 percent *lower* than the number today.³²

Further, in a world of constrained resources and growing unmet legal needs, no matter what level of financial support legal aid organizations receive, they

26. James J. Sandman, *Rethinking Access to Justice*, 63 VA. LAWYER 28, 28 (Oct. 2014).

27. Texas Supreme Court Justice Nathan Hecht., Remarks at the LSC 40th Anniversary Kick-Off Conference Panel: State Supreme Court Chief Justices and Judges (Sept. 15, 2014), *available at* <http://www.lsc.gov/media/videos#lsc40>.

28. Sandman, *supra* note 29.

29. *Id.* at 28–29.

30. STATE OF N.Y. UNIFIED COURT SYSTEM, *supra* note 22, at 21–22.

31. LEGAL SERVS. CORP., *supra* note 7, at 4.

32. See ELEANOR BAUGER & LEATHA LAMISON-WHITE, U.S. DEP’T OF COMMERCE, ECON. & STATISTICS ADMIN., *POVERTY IN THE UNITED STATES: 1995* (Sept. 1996).

must better leverage those resources. LSC is focusing on two leveraging strategies: the use of technology and the use of pro bono resources.

LSC employs a range of approaches to expand access to justice through the use of technology. Since 2000, LSC has awarded Technology Initiative Grants (TIG) to support projects to develop, test, and replicate technologies that improve client access to high quality legal information and pro se assistance. Over the past fifteen years, TIG has funded more than 570 projects totaling more than \$46 million.³³ Currently the program is funded at \$4 million, annually.³⁴ With these grants, LSC grantees have been able to build a foundation for better service delivery that includes statewide websites, enhanced capacity for intake and case management systems, automated forms to support clients, staff, and pro bono efforts, user-friendly online tools for women veterans, mobile delivery of legal services for clients using text messaging, and video-conferencing technology that reaches low-income clients in rural areas.³⁵ With that foundation in place, LSC is poised to expand access to justice through additional technology innovations.

LSC has also collaborated with others to find ways to use technology to provide effective legal assistance. After convening a technology summit that included 75 representatives of legal aid programs, courts, bar associations, government, and business as well as technology experts, academics, and private practitioners, LSC issued a report in 2013 with recommendations to broaden and improve civil legal assistance through an integrated service-delivery system.³⁶

A second way to leverage the limited resources available to legal services providers is to expand the role of the private bar in civil legal aid. Several years ago, LSC convened a national Pro Bono Task Force, which issued a wide-ranging report and recommendations on ways to expand the number of lawyers who are willing to do pro bono work, and better match that larger available talent pool with the growing unmet need.³⁷ The Task Force recommended, *inter alia*, that LSC seek funding from Congress for a Pro Bono Innovation Fund and that LSC alter its regulations to encourage its grantees to make greater use of pro bono resources including small firm and solo practitioners, rural lawyers, emeritus and senior lawyers, government lawyers, corporate counsel, and law students and other non-lawyers.³⁸

With much help from others in the profession — Access to Justice Commissions, the ABA, and local bars — LSC has implemented many of those

33. LEGAL SERVS. CORP., *supra* note 7, at 17.

34. *Id.* at 14.

35. *Id.* at 17–19.

36. See LEGAL SERVS. CORP., REPORT OF THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE 1–12 (2013), available at http://www.lsc.gov/sites/lsc.gov/files/LSC_Tech%20Summit%20Report_2013.pdf.

37. See LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE (2012), available at http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf.

38. See *id.* at 5–11, 28.

recommendations, including the creation of a Pro Bono Innovation Fund. Congress allocated \$2.5 million for the fund in FY-2014, and after reviewing nearly 80 applications, LSC awarded the first eleven grants this past September.³⁹ Congress increased the appropriation for the Fund to \$4.0 million for FY-2015.

C. *Changes in the Delivery System*

The third challenge we face is to change the legal aid delivery system. Such changes could take a multitude of forms, such as limited-scope representation by lawyers⁴⁰ or provision of certain services by non-lawyers.⁴¹ Given enormous and growing demands and resource constraints, we must be creative and innovative in considering potential changes. As LSC's President Jim Sandman recently wrote,

It is not realistic to try to provide full representation in every case, and pursuing that goal at the expense of other alternatives is letting the perfect be the enemy of the good. The fact is that some assistance—including referrals to court-based resource centers or online self-help resources—is better than no assistance.⁴²

In late 2013, LSC released a report addressing this issue following a technology summit that it convened “to explore the potential of technology to move the United States toward providing *some form of effective assistance to 100 percent of persons otherwise unable to afford an attorney* for dealing with essential civil legal needs.”⁴³

The vision set forth in the report focuses on five main areas:

- 1) Creating in each state a unified “legal portal” which, by an automated triage process, directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire legal process.
- 2) Creating automated forms and other documents to support self-help and limited scope legal representation.

39. LEGAL SERVS. CORP., *supra* note 7, at 21–23.

40. See The State Bar of Cal., Comm. on Prof'l Responsibility & Conduct, *An Ethics Primer on Limited Scope Representation* (2004), http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/ethics_primer_on_limited_scope_representation.authcheckdam.pdf; J. Timothy Eaton & David Holtermann, *Expanding Access to Justice: Limited Scope Representation is Here*, CBA RECORD 36–41 (2010), http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/feature_eaton.authcheckdam.pdf.

41. See STATE OF N.Y. UNIFIED COURT SYSTEM, *supra* note 22, at 25–26. See also Wash. State Bar Ass'n, *Limited License Legal Technicians (LLLT)* (last visited April 15, 2015), <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians>; Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABA JOURNAL (Jan. 1, 2015), http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the.

42. Sandman, *supra* note 26, at 29.

43. LEGAL SERVS. CORP., *supra* note 36, at 1, 12 (emphasis added).

- 3) Taking advantage of mobile technologies to reach more persons more effectively.
- 4) Applying business process/analysis to all access-to-justice activities to make them as efficient as practicable.
- 5) Developing “expert systems” to assist lawyers and other services providers.⁴⁴

The report focused on the use of technology as one means to help bridge the access to justice gap, such as by creating new tools for self-help and to support limited scope representation. In considering the report, it must be underscored that, in many cases, full representation by a lawyer is required if justice is to be realized. Nonetheless, the goal and vision set forth in the report “represents a much-needed rethinking of the traditional service-delivery model and points to a future where *no one will get nothing*, which is what happens all too often today.”⁴⁵ In a world of constrained resources, this is a realistic but still inspiring goal for access to justice.

V. CONCLUSION

From America’s creation, justice for all has been a core national value, supported across the political spectrum. Despite its grandeur and the consensus behind it, the promise of access to justice will remain unfulfilled unless our Nation has the political will to change the status quo. Such a change will, at a minimum, require raising public awareness about the crisis in access to civil justice, substantially increasing and better leveraging resources available to address unmet legal needs, and modifying and augmenting the systems that deliver such resources. Together, these would be revolutionary changes and their accomplishment will foremost require leadership from, among others, America’s legal profession and judiciary, the business community, academia and politicians nationally and locally. Although the challenge of making these changes is great, the centrality of justice to our country should make their achievement one of our Nation’s highest priorities.

44. *See id.* at 2.

45. *See Sandman, supra* note 26, at 29 (emphasis in original).