

Rescuing legal aid

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ABSTRACT

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FULL TEXT

Maria de Leon and her husband, Jesus Batista, were on the verge of homelessness when they arrived at the nonprofit Inner City Law Center on skid row. They'd always paid their rent on time and never complained to their landlord, even as conditions in their unit deteriorated. But then their landlord fell into foreclosure and the bank holding the mortgage attempted – illegally – to evict the family. A man who had promised to help with the eviction disappeared with \$1,400 of the couple's money.

Despite their woes, the De Leon-Batista family was lucky. The Inner City Law Center took on their case, stopped the illegal eviction and got the family's money back from the scammer.

Thousands of others are not so lucky. Publicly funded and private legal services for those who can't afford to pay are overwhelmed, and the need is rising dramatically as the country's economic crisis worsens. For every client whom legal services can accept, many are turned away because the number of lawyers available cannot meet the need.

At the Legal Aid Society of Orange County, which handled more than 34,000 calls on its hotline last year, waiting times have jumped from eight minutes to as much as 45 minutes since the fall of 2008. The group recently added three full-time paralegals to the eight already working the hotline, but they still can't keep up with the demand. On a recent Wednesday, the hotline received eight calls just from clients facing foreclosure, a situation that often requires time-consuming legal assistance. Executive Director Bob Cohen says the demand outstrips anything he's seen in his 35-year career in legal aid.

At best, being low income and having the right kind of problem gets a person in the door at a legal aid office. It doesn't guarantee that there's a lawyer available to help, no matter how meritorious the case. And there are numerous legal issues – including some kinds of consumer disputes, employment cases and some family law issues – that most legal aid offices don't have the staff to handle.

Every day, Americans without access to legal counsel unnecessarily lose homes, jobs, retirement benefits, healthcare and custody of their children. This is because in America, we have not yet recognized a right to counsel in civil cases, except in a tiny number of narrow areas. Indigent clients with the law on their side often find themselves losing to well-funded opponents simply because they have no means of fighting back.

In most of the developed world, the right to civil counsel is well established. In Britain, for example, indigent civil litigants have been entitled to representation since 1495, in the reign of Henry VII. In much of the rest of Europe, the right dates back to the mid-19th or early 20th century.

So how would we fund lawyers for all who need them? One approach would be to begin incrementally, recognizing a right to counsel in certain crucial areas (for example, housing, healthcare or child custody) as an initial step. The American Bar Assn. recommended such an approach in a unanimous 2006 resolution, as did a pilot proposal advanced by Gov. Arnold Schwarzenegger in 2007. And the New York City Council is now considering an incremental approach, with a proposal to guarantee counsel to low-income seniors facing eviction from rent-controlled apartments.

In the end, the cost of providing counsel must be balanced against the hidden costs of not providing representation: the societal costs of displacing a frail senior, for example, can dwarf those of providing legal help to avoid the eviction.

Today, it is unthinkable to imagine an indigent criminal defendant having to face trial, conviction and incarceration without a lawyer. Yet that scenario played out in courtrooms across the country until the Supreme Court held in 1963 that criminal defendants have a constitutional right to a lawyer.

The court ruled in that case, *Gideon vs. Wainwright*, that "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Justice is not served, said the court, "if the poor man charged with crime has to face his accusers without a lawyer to assist him."

We can no longer afford not to guarantee equal justice to the poor in civil cases as well.

In the 1960s, there was a change in attitude. People – and the courts – realized it was simply unacceptable that poor, unsophisticated, often illiterate defendants without lawyers could be sent to prison after proceedings they did not understand. The same is true for civil litigants today. It is time to match the reality of access to the rhetoric of equality. Justice demands no less.

Credit: Clare Pastore is a law professor at the USC Gould School of Law and a former legal services lawyer.

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