

2008 PATHWAYS TO JUSTICE CONFERENCE

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THREE PHASES OF JUSTICE FOR THE POOR: FROM CHARITY TO DISCRETION TO RIGHT

by

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When preparing for this speech I made a surprising discovery – a couple of them. First, that it is 44 years since I first became a legal services lawyer and thus found the cause that was my vocation for several years and my avocation ever since. But then I did another calculation and realized that 44 years before my entrance into the field was when the national legal aid movement first started – in 1920. So in one way or another I've been involved for half the time the legal aid movement has existed. I had always thought of the start of that movement as being back, way back in the mists of time. Especially for the younger members of this audience I am sure 1964 also appears to be way back in the mists of time.

But then I was struck with the symmetry – 44 years of justice for the poor being a matter of private charity, followed by another 44 years of justice for the poor being a matter largely of *discretionary* government funding. And now, on the horizon at least, perhaps a third phase – justice for the poor as a matter of right.

And so I thought I would speak to you today about how each of the first two phases got started, and then explore the prospects for that third phase coming into existence. Although the first and second phases may seem obvious and inevitable developments in retrospect, both were born despite serious controversy over whether they should happen.

So let's start with the birth of the national legal aid movement in 1920.

To do so, we go back to 1916 in New York City, home of the nation's first and at that time one of only a handful of legal aid societies in the country – and by far the largest. It had almost ten lawyers on staff. In a development that came to have national importance, the Legal Aid Society board managed to persuade Charles Evans Hughes to take over as the society's President. Hughes was the most prominent lawyer in New York and maybe the entire country. He had been the Republican candidate for President in 1912 and lost that election by a whisker. At this point in his career, he was on his way to the ABA presidency and not many years after that was appointed Chief Justice of the United States.

In 1919, three years after Hughes took over the presidency of the Legal Aid Society in New York, Reginald Heber Smith published his landmark book, *JUSTICE AND THE POOR*. This book written by Smith, then the 29-year-old directing attorney of the tiny Boston Legal Aid Society, proved highly controversial within the legal profession. How could this young lawyer,

not yet 5 years out of law school, have the audacity to indict the nation's legal system for its treatment of the poor. Many bar leaders publicly condemned Smith and his book. And legal aid, which Smith had lauded as the cure for the problem, also became controversial --with many of those lawyers denying it was needed.

But because of his involvement as president of the Legal Aid Society, Charles Evans Hughes found great truth in JUSTICE AND THE POOR. He used his influence to make legal aid the subject of the main plenary session at the 1920 ABA annual conference and featured Reginald Heber Smith and his book as the focal point of that session. Hughes' prestige and his eloquence won the day over the many naysayers in the bar. Later in that meeting, largely because of Hughes advocacy the ABA adopted legal aid as its major mission and established the Special Committee on Legal Aid to further that mission. Charles Evans Hughes agreed to chair that committee and made sure Smith was appointed as a member. (This is the committee that later evolved into the ABA Standing Committee on Legal Aid and Indigent Defendants.)

Thus was born the national legal aid movement and the ABA's commitment to spread legal aid societies around the country. Because Charles Evans Hughes had laid his hands on Smith, two years later the young lawyer was in a position to lead the effort to create the National Association of Legal Aid Organizations – which, in turn, evolved into the National Legal Aid and Defender Association.

The ABA and NLADA were quite successful in their primary mission – spreading legal aid societies across the country. But it was a very thin spread with many such societies consisting of a single part-time lawyer or a small committee of volunteer pro bono lawyers. Hard for us to believe in 2008, but forty-four years into the national charitably-funded legal aid movement the combined budgets of all the legal aid societies in the country totaled a little over 5 million dollars – that's \$30 million in 2008 dollars. The combined legal staffs of all those legal aid societies totaled some 400 full-time-equivalents.

By the early 1960s some young lawyers outside the legal aid movement—most in their late 20s -- began discussing problems with the current legal aid societies and the possibility of a federal program to fund and improve legal aid. Lawyers like Gary Bellow, Edgar and Jean Cahn and a handful of others. The staff of the National Legal Aid and Defender Association, on the other hand, along with many local legal aid lawyers, were alarmed by the notion of government funding. That may be hard to believe in retrospect. But there was more than one reason for this reaction.

First, from the beginning of the national legal aid movement there had been a quiet discussion going on about whether legal aid should be funded by government not just private charity.

One of the earliest of those quiet discussions took place in 1919 when the young Reginald Heber Smith had the chutzpah to mail a copy of his manuscript of JUSTICE AND THE POOR to Justice Brandeis and ask for a meeting to discuss it. After reading the manuscript, Justice Brandeis invited Smith to his hotel room in Washington, D.C. For the most part, the Justice was very complimentary -- agreeing with Smith's sharp and often eloquent critique of how poor people were treated in American's courtrooms and by the legal system in general. But as Smith himself later reported, the Justice did differ with Smith's strong preference for charitable funding rather than government funding of legal aid. Justice Brandeis took the position the provision of legal aid for indigent litigants was a basic governmental responsibility – a matter of justice not charity.

Over the years, many other joined in the discussion. But for a long time this discussion remained completely entirely hypothetical because no government was stepping up and offering to fund legal aid.

The 1950s, however, brought the issue to the surface for the first time – and did so in the context of the anti-communist and by extension anti-socialism rhetoric of that decade. When England enacted its comprehensive government-funded legal aid scheme in 1950, there were those like the National Lawyer’s Guild that proposed a similar program for the U.S. The ABA president decried this proposal as socialism of the legal profession – taking a position similar to the medical profession’s opposition to government-funded medical care. Soon, those in the legal aid leadership were trumpeting charitably-financed legal aid societies as the “bulwark against socialism of the legal profession.”

Some of that attitude still lingered among legal aiders as federal government funding of legal services for the poor came closer to reality a decade later in the early 1960s. The reservations most frequently expressed, however, were much more practical. The NLADA staff and many in the local legal aid societies claimed federal funding would undercut the charitable support for legal aid. They predicted the federal funding would cease in the future and when it did the charitable funding would have dried up and legal aid would have no money from any source.

As we have seen, those predictions proved to be completely off base. Although we federal funding has declined a great deal the past two decades – other sources of public funding have made up the difference. Equally important, private giving is significantly up from the levels reached when legal aid was entirely dependent on private charity. Today, donations to legal aid from private sources are much larger in inflation-adjusted terms than they were in 1965, just before federal funding started. In fact, in California alone legal aid receives substantially more from private sources than it did in the entire country before public funding started.

Fortunately, although the NLADA staff and many local legal aiders were fearful of government funding, the NLADA board president at that time, Ted Voorhees, and Bill McCalpin, the chair of the ABA Standing Committee saw federal government funding of legal aid as the opportunity it was. In February, 1965, through the efforts of McCalpin, ABA President Lewis Powell and others, the ABA House of Delegates unanimously endorsed the OEO Legal Services Program and thus ushered in the second phase of legal aid development – discretionary government funding of justice for the poor. It took several more months of persuasion, but soon scores of legal aid societies were lining up to find out how they could apply for government funding.

I don’t have time to cover all the ups and downs and ups and downs and ups and downs that have characterized the past 44 years of government- funded legal aid. Many of you here are familiar with some or most of that history because you have lived through it. At a macro level, the biggest change in the past 44 years is that while we started out in the 1960s and 1970s with the federal government furnishing 90 to 95 percent of the financial support for civil legal aid in this country, now many state governments and some local governments have joined in and along with IOLTA supply a larger share of total funding than does the national government. On the other side of the ledger, while there were almost no restrictions on what legal services lawyers could do for their clients or who they could represent in the 1960s and 1970s, since 1996 this is no longer true for those working in programs that receive any federal funds. But this is all familiar territory for those in this room who live daily with the advantages and disadvantages of legal aid in the era of justice for the poor as a matter of discretionary government funding.

So I will now shift to what I see as a possible third phase of legal aid development – justice for the poor as a matter of right.

Just as a unanimous resolution of the ABA House of Delegates engineered by ABA President Lewis Powell ushered in phase 2 in 1965, in August, 2006 the ABA House of Delegates passed a unanimous resolution requested by ABA President Mike Greco that I have some hope will usher in this third major phase of civil legal aid history. I would like to say we are on the threshold of that era, and we may well be. But it is not the threshold of a doorway but the threshold of a wide porch leading to that doorway, I fear. Yet I am optimistic we will cross that porch eventually. The only question is when we will start and how long it will take to get across.

Why am I so confident? For several reasons.

It begins with the tension between the nation’s public rhetoric promising equal justice for all – rich, poor, and in between – and the reality that millions are denied the lawyers required to make that true. The rhetoric embodied in the due process and equal protection clauses of the constitution, and chiseled over the entrance to the U.S. Supreme Court, and recited daily in the pledge of allegiance as one of the two fundamental ideals of our nation – “justice for all.” A bedrock understanding about what America is all about so embedded in the public’s consciousness that when polled, nearly 80 percent of Americans believed there already was a constitutional right to counsel in civil cases. When it comes to truly fundamental bedrock values, history teaches us we can only tolerate a tension between ideal and reality for so long. Sometimes slowly, but almost always surely democratic societies move to close the gap. Equality before the law, equal justice for all, is definitely one of those bedrock values and the gap between ideal and reality is enormous, as we all know.

A second reason I am confident about the long term is the fact so many other comparable industrial democracies already have created rights to counsel in civil cases in their regular courts. Beginning with France in 1852, Italy in 1865, and Germany in 1877, most continental European countries enacted statutes requiring the appointment of free counsel for indigent litigants, both defendants and plaintiffs, in cases before their civil courts.

A third reason for my optimism is born of the way the highest courts in other parts of the world have interpreted constitutional language embodying the same concepts and derived from the same political theory as our “due process” and “equal protection” clauses. The framers of our declaration of independence and our constitution were heavily influenced by the social contract theory developed by European political philosophers. This is the social contract theory that also influenced European constitutions and their other basic political documents. Among the fundamental precepts of social contract theory is equality before the law – the notion that no person would surrender the right to settle disputes through force unless the sovereign substituted a forum where that citizen had a fair and equal chance of prevailing, no matter the resources or social station of the person on the other side. Thus, most European constitutions contain guarantees of “equality before the law” or of a “fair hearing,” or both, in civil cases --just as our constitution guarantees “due process” and “equal protection of the law” in those proceedings.

Given the common source of the constitutional language on both continents it is instructive to see how European courts have interpreted these concepts of equality and fairness. In 1937, the Swiss Supreme Court found the constitutional guarantee that “all Swiss are equal before the law” meant the government must provide free counsel to indigents in any and all civil cases requiring “knowledge of the law.” And in 1979, in a far-reaching decision, *Airey v*

Ireland, the European Court on Human Rights found a provision that only guaranteed civil litigants a “fair hearing” required member governments to provide free lawyers to those unable to afford counsel in the regular courts. The court reasoned that allowing impoverished litigants to appear without counsel and talk to the judge did not amount to *effective* access to justice or provide the “fair hearing” the European Convention guaranteed in civil cases.

Can it really be said the U.S. constitution doesn’t guarantee its citizens “equality before the law” and a “fair hearing” in civil cases while the European constitutions do? Or, that somehow lawyers are necessary for *effective* access to the regular courts in Europe, but not in this country? Or, that access to justice here doesn’t mean *effective* access to justice – but only the physical ability to enter the courtroom and talk to the judge? I think not.

Finally, I also am encouraged about the future of justice for the poor as a matter of right by things that have been happening right here in California this past few years. I have long held the view that what we are talking about creating and enforcing as a matter of right is not necessarily a lawyer in every case in every court and every forum that is deciding non-criminal cases. Rather, we are talking about *effective* access to justice, equality before the law, a truly fair hearing for all litigants, in such cases.

If the shortage of counsel for lower income people in California has had any virtue at all, it is the limited virtue that it has created a necessity. And necessity, as is often the case, has been the mother of invention. Overwhelmed with unrepresented litigants, especially in family law cases, a decade ago or so our courts began experimenting with programs providing self-help assistance to those pro se litigants. What started as an experiment is moving in the direction of an institution in this state. And, beyond providing self-help assistance, courts have begun to alter their own procedures and approaches when both sides appear without lawyers. Many judges take a more active role in uncovering the critical facts and controlling legal principles—rather than relying on the parties to find and present that information as they would in a traditional adversarial proceeding.

I do not view this development as competitive with legal aid. Instead I see them as complementary – self-help assistance and legal counsel. And, if properly done and integrated, they form two parts of a system that achieves the goal of effective access to justice in all cases – and does so in a cost-effective manner. A system that also includes lay advocates in forums where they are permitted and sufficient, and unbundled legal services when that is enough.

Equal justice will be provided as a matter of right when this full range of assistance and representation is available to all lower income Californians -and when the level of such assistance or representation is properly matched to the client’s need. That is, when self-help assistance is enough that is what is provided. And when a lay advocate or unbundled legal help from a lawyer will do the job that is what the client receives. But when -- as will often be true in many courts and many cases, only full representation by a lawyer will suffice -- then that is what the system provides. And, it does so as a matter of right not charity. Nor does it depend on the good luck that one of a small cadre of legal aid lawyers or perhaps a pro bono counsel has the time to take on that client’s cause.

In his state of the judiciary speech a few years ago our Chief Justice, Ron George, said, “If the motto 'and justice for all' becomes 'and justice for those who can afford it,' we threaten the very underpinnings of our social contract.” Unfortunately, despite the heroic and inspiring efforts of the people in this room, for many of California’s s lower income people--those who cannot be served with the limited resources currently devoted to providing them representation--

the "If" in Justice George's warning is really a "Because." That is, "*Because* the motto 'and justice for all' *already is*, for too many people 'justice only for those who can afford it,'" we *already* "threaten the very underpinnings of our social contract." Because of this reality, the social contract has been breached and many unfortunate millions are destined to be denied justice in California's courts and the rest of its legal system.

As all of you in this room know, that is not just something that should make us and other more fortunate Californians somewhat uncomfortable because maybe we have to cross our fingers when pledging allegiance to a country that supposedly provides justice for all. No, our state and nation's failure to guarantee justice as a matter of right has disastrous consequences for the daily lives of our state's most vulnerable people. For, without the effective access to justice such a right would guarantee, poor people in this state too often unjustly lose their housing, their possessions, their livelihood, their children, and nearly everything else that makes life worth living.

I say the time has come to honor the social contract. The time has come to provide the equality before the law that is an essential term of that contract. The time has come to give poor people the resources necessary for truly effective access to justice and truly fair hearings . It is no longer enough that we save a fortunate few from injustice and the resulting deprivations they are doomed to suffer. It is time that the few become the many, and ultimately the all – the "all" we have long promised will have justice in this land.