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Promise and Reality in Legal Services

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PROMISE AND REALITY IN LEGAL SERVICES*

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Ten years ago a creative and energetic new federal initiative—the Legal Services Program of the Office of Economic Opportunity—began to give life to the legal profession's ancient commitment to the principle that each citizen, without regard to means, should have access to the institutions of justice. The enthusiasm and accomplishment of this creative period led to reaction, controversy, and challenge. Faced with threats to its continued existence, the Legal Services Program lost some of its innovative zeal and concentrated on the delivery of legal services to the poor in an economical and highly professional manner.

Today, much of the controversy over the Legal Services Program has abated; the gains of the past have been consolidated; the program has matured; and there is general acceptance of the principle that poor people are entitled to legal representation at public expense. With the establishment of the new national Legal Services Corporation, an historic opportunity exists for further evolution and development of the legal services idea.

The creation of an independent corporation was not repudiation of the past, but an extension based on the firm foundation already laid down. It constituted a shift of emphasis, a codification of developing restrictions designed to prevent abuses of the program, and a new beginning in which fresh approaches and energies could be applied to the further development of the Legal Services Program.

The evolution of the Legal Services Corporation Act[1] is ably sketched by Warren George in this issue of the *Cornell Law Review*.[2] The history is an exciting one of political compromise, and it leaves him with "cautious optimism" for the future. The constitutional problems posed by the Act's exclusion from legal services of abortion and desegregation cases, and by its restrictions on political activity of staff attorneys, are illuminated in a comprehensive Note

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The views expressed herein are those of the author and not necessarily those of the Legal Services Corporation.

[1] 42 U.S.C. §§ 2996-96*l* (Supp. IV, 1974).

[2] George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976).

which also appears in this issue.[3] Although I disagree with some of the conclusions of these authors, their work will contribute to the understanding and solution of current problems.

Before turning to the development of the Act and the specific problems facing its implementation, it is well to consider the Act's overall role in providing effective legal services to all Americans. The Act is predicated on the great principle that the poor are entitled to a competent lawyer in civil cases. This principle—a congressional policy—also is based on firm constitutional roots.

I

The statutory responsibility of the Legal Services Corporation is to provide "high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel."[4] That mandate was established on the basis of a considered congressional judgment that "equal access to the system of justice in our Nation" must be provided to all individuals.[5] The task of the Corporation and the legal profession is to make this lofty goal a reality in the lives of poor Americans.

The poor in this country are entitled to publicly supported legal assistance because access to the legal system is an inherent right of citizenship. If political liberty means anything, it must mean the opportunity to utilize the legal system. One of the responsibilities of citizenship is living within the legal system; one of the rights of citizenship is to utilize the system. The inherent dignity of each citizen requires access to justice.

When Congress adopted the Legal Services Corporation Act, it recognized the vital role of legal services in establishing and maintaining respect for the law. The Act declares that "for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws . . . ."[6] Citizens can be expected to obey the law only if they feel themselves as under, not outside, the law, with full access to legal rules and legal institutions.

Congress also decided that legal assistance for the poor should be more than a component of government programs aimed at reducing poverty. It determined that legal assistance for the poor is

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[3] Note, *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734 (1976).

[4] 42 U.S.C. § 2996(2) (Supp. IV, 1974).

[5] *Id.* § 2996(1).

[6] *Id.* § 2996(4).

unlike the social programs of the Community Services Administration and other agencies. Congress found that a separate, private corporation was essential to ensure that the Legal Services Program would be "free from the influence of or use by it of political pressures . . . ."[7]

It is easy to lose sight of the poor themselves and their legal problems in the welter of statistics *about* the poor and their need for legal services. While the statistics are compelling, behind the numbers are real people: a self-reliant ninety-one year old Iowa woman whose landlord has tired of her and seeks her eviction; a California wife who is old enough to qualify for Medicare, and whose husband is qualified, but whose Medicare claim has been disallowed; a World War I veteran in the Midwest who has lived, gardened, kept bees, and accumulated junk at the same address since long before the city grew up around him and wrote zoning laws that said his junkyard is illegal; a workman who has suffered a nervous breakdown on the job, but whose state workmen's compensation board rules that mental illness caused by the work situation is not compensable. These are some of the clients the Congress had in mind when it established the Legal Services Corporation. They are clients who might never dream of entering the office of a private attorney since they have no money to do so.

These clients are among the million poor people served each year by 258 field programs of the Legal Services Corporation. They are the fortunate ones: they live in areas where legal services programs exist; they were not turned away because their legal aid office had been closed down for lack of funds, nor were they denied assistance because their cases were not of the emergency nature to which many underfinanced, understaffed legal services programs must limit themselves.

According to 1970 census data, there are approximately twenty-nine million poor persons in the United States and its territories.[8] These people are "poor" as defined by the government. The figure does not include the millions more whose economic power has been eroded by inflation or who have been caught up in the rising tide of joblessness. Of this total, nearly twelve million poor people have no access to legal services attorneys.

About seventeen million of the poor live in areas that theoreti-

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[7] *Id.* § 2996(5).

[8] The data in this and the following paragraphs is from L. GOODMAN & M. WALTERS, THE LEGAL SERVICES PROGRAM: RESOURCE DISTRIBUTION AND THE LOW INCOME POPULATION 11-59 (1975).

cally offer services, but nearly six million of those have only token access: less than one lawyer for every 10,000 poor persons. By contrast, in the general population there is one lawyer for every 893 persons. The state of Georgia, for example, is "covered" by legal services—yet there is but one legal services lawyer for every 22,700 poor. For another ten million poor, the outlook is only slightly less bleak: for them, present legal services programs provide only one to two attorneys for every 10,000 poor. By any criteria, that is wholly inadequate. Only among the remaining 1.2 million poor persons is there access to legal services that approaches a significant figure, varying between two and five attorneys for every 10,000 eligible persons. Even that figure does not approach the proportion of attorneys available to those who can pay.

Similar results are reached by extrapolating from the American Bar Foundation's recent survey of legal needs.[9] This study indicates that, on the average, twenty-three percent of the indigents in the United States are faced with a legal problem each year. The range of problems is staggering: Social Security, housing, consumer matters, insurance, welfare, family crises, grinding financial problems and bankruptcies, repossessions, unemployment compensation, and many more. Since twenty-nine million Americans live in poverty, their total legal needs may be seen as 6,670,000 legal problems each year—a figure that increases to 7,870,000 when the effect of unemployment is added.

Since about one million cases are actually handled by legal services attorneys each year, less than fifteen percent of the potential need is being met. The others are left to face their private crises alone. Many of them—and their number is increasing as legal services resources remain virtually static—may have nothing but a brief letter to show for their attempts to gain access to America's system of justice: "We regret that there is not now a legal services program serving your community . . . ."

Only increased funding will enable the Legal Services Corporation to hang out a "walk-in" sign in areas where that sign has been effectively taken down and in areas where it has never hung at all. Increased funding is necessary to provide the manpower and resources so that an elderly woman in Texas can reach out for the same kind of help that saved the Iowa woman from eviction.

But the current funding shortage has reached crisis propor-

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[9] B. CURRAN & F. SPAULDING, THE LEGAL NEEDS OF THE PUBLIC: A PRELIMINARY REPORT OF A NATIONAL SURVEY 59-77 (American Bar Foundation 1974).

tions. Existing legal services programs are crippled by a budget that until this year—and in the face of high unemployment and record inflation—had not been increased since the 1971 fiscal year. These programs are providing high-quality legal services under the most discouraging conditions, but their quantitative coverage of the eligible poor in their areas is minimal at best. Following careful evaluation and modification of these existing programs, their capabilities must be strengthened.

Furthermore, an estimated twelve million (40.5%) of the nation's twenty-nine million poor live in areas where there are no legal services programs at all. Inflation and unemployment increase that number even more. Like those in the nominally "covered" areas, these men and women are "otherwise unable to afford adequate legal counsel . . . ,"[10] in the terms of the Act. Yet they too face eviction, welfare and Social Security problems, landlord-tenant disputes—the whole gamut of private legal quandaries that confront poor Americans everywhere. Unless service is expanded to these areas, the Legal Services Corporation Act will be, for these people, a nullity—further evidence that government does not help them. Congress clearly intended precisely the opposite result.

The Corporation is requesting appropriations that will begin meeting these needs for legal assistance. The responsibility, however, does not rest solely on the federal government. The private bar, local communities, and state and local governments also have a responsibility to see that this aspect of the American dream is fulfilled. Financial and moral support will be needed from all sources to accomplish this fundamental objective.

II

The Supreme Court has also emphasized the importance of the right to counsel. Over ten years ago, the Court declared that the right to counsel in felony cases is "fundamental."[11] Clarence Earl Gideon had "conducted his defense about as well as could be expected from a layman[,]"[12] but the Court recognized that a poor man whose liberty was threatened by a felony charge could not have a fair trial without the assistance of a lawyer. The Court reached back to its language in *Powell v. Alabama* to illustrate a criminal defendant's need for counsel:

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[10] 42 U.S.C. § 2996(2) (Supp. IV, 1974).

[11] Gideon v. Wainwright, 372 U.S. 335 (1963).

[12] *Id.* at 337.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[13]

These reasons apply with equal force to many civil cases. An indigent civil defendant may be unable to present his defense because of lack of counsel. Civil litigation encompasses the same range of complexity found in criminal proceedings. The application of novel legal theory to uncertain facts can provide the same degree of challenge. There are technical pleading and pretrial motion procedures that can tax the skills of even the best trained lawyers. The use of sophisticated discovery devices is often essential to adequate trial preparation. Competent handling of a trial is a difficult art—so difficult that Chief Justice Burger and other federal judges have argued that even many lawyers lack the competence to do an adequate job.[14] If indigent civil litigants are to enforce their rights, or to defend them against diminution, they often need the assistance of qualified counsel.

Once the right to counsel in criminal proceedings was established, the logic of extending a similar right to at least some indigent civil litigants seemed compelling and inevitable. As yet, this development has not occurred. Although the right to counsel has since been extended to misdemeanor defendants who face the prospect of time in jail,[15] there has been only limited acceptance of the principle that indigents have a constitutional right to the assistance of counsel in noncriminal proceedings.

There are several reasons for this judicial reluctance. First, the courts have failed to acknowledge just how far the legal needs of the poor are from being adequately met. If the courts are aware of this

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[13] *Id.* at 344-45, *quoting* Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[14] Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice,* 42 FORDHAM L. REV. 227 (1973); Kaufman, *Advocacy as Craft—There is More to Law School Than a Paper Chase,* 28 SW. L.J. 495 (1974).

[15] Argersinger v. Hamlin, 407 U.S. 25 (1972).

problem, they tend to dismiss the need of poor civil litigants for counsel by characterizing their legal problems as "simple." Second, the courts have taken unrealistic and shortsighted views of the due process and equal protection rights of indigents in civil proceedings. Third, and perhaps most fundamental, the courts are troubled by the spectre of limitless public expense if indigent civil litigants are afforded a right to counsel. This fear suggests that the courts may not "find" a right to counsel in civil cases until legislatures, state and federal, make a greater commitment to legal services for the poor than they have in the past.

The needs of the poor for legal assistance, however, do not correspond to the judicial distinction drawn between civil and criminal actions. Civil litigation can result in far graver deprivations of liberty or prosperity than confinement in jail for a short period of time after conviction on a misdemeanor charge. Imposition of unrealistic alimony or child support requirements, loss of custody of children, civil commitment as an incompetent, and eviction involve consequences of major importance. Post-judgment wage garnishment, or loss of a required license, may make it impossible to find employment. Inability to challenge housing code violations, fraudulent credit transactions, or welfare terminations may result in great economic harm.

That a lawyer's assistance may make the difference between success or failure in a civil case is not simply a theoretical possibility. A study of mental commitment proceedings in Ohio demonstrated an almost perfect correlation between the assistance of counsel and the decision not to commit.[16] Another study found that civil plaintiffs representing themselves had little chance of surviving a motion to dismiss on the pleadings or of settling a case, and virtually no chance to obtain discovery or a trial on the merits.[17] Yet another study found that civil defendants represented by counsel in debt cases were almost six times as successful in obtaining a release from their debt as those unable to obtain a lawyer.[18]

A commitment from our courts to the proposition that civil litigants have a broad right of access to the justice system requiring the assistance of counsel would further efforts to meet the true legal needs of the poor. It is no answer to say that the judge in a civil case

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[16] Wenger & Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions*, 10 J. HEALTH & SOC. BEHAVIOR 66, 69 (1969).

[17] Schmertz, *The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary*, 27 FED. B.J. 235, 243 (1967).

[18] B. RUBIN, CONSUMERS AND COURTS 109 (1971).

can inject himself into the proceedings so as to counteract the absence of counsel. Judicial ethics and the adversarial system require impartiality of judges. Moreover, the fate of the unrepresented indigent defendant should not be made to depend on the courts' ability to take the place of counsel. In many civil cases, if poor litigants do not have the assistance of counsel while their adversaries do, then their constitutional rights to due process and equal protection are subverted.

III

In a free society, the system of justice rests on a fundamental notion of social contract: we give up our right to resolve disputes by force because a substitute arena—the courts—exists to decide such disputes. But if this arena is to be a meaningful substitute, all must have an equal opportunity to enter and to prevail there. Equal opportunity in the courts often requires the assistance of counsel, appointed if necessary.

The right to a "fair hearing" is a fundamental tenet of constitutional due process. The courts have recognized that as the gravity of the consequence increases, the scope of due process protection expands. But the courts have not fully recognized that the gravity of the consequences flowing from success or failure in civil cases is often equivalent to that involved in criminal cases. An unskilled civil litigant is no better equipped to present his case than is his counterpart in the criminal courts. Thus, where the consequences of failure in civil litigation are sufficiently grave, an indigent is denied due process if he does not have the guiding hand of counsel at every step of the proceedings. Without such assistance he simply has no meaningful "access" to the justice system.

The kinds of civil matters in which the potential consequences are sufficiently grave to require the assistance of counsel have already been mentioned. Obviously, civil commitment is one. Loss of custody of children is another. Contested divorces, or divorces in which child custody or support are at issue, would also seem to require a lawyer's participation. Loss or impairment of housing, furnishings, public assistance, or employment are also consequences that have a profound influence on the ability of our poor citizens to lead decent lives. Where these consequences are threatened, the assistance of a lawyer ought to be mandatory.

If the poor cannot hire a lawyer and without a lawyer their chances of enforcing claims or vindicating rights are impaired, then the justice system is in effect closed to people because of their

poverty. When "the kind of trial a man gets depends on the amount of money he has[,]"[19] the poor are denied equal protection as well as due process.

As in the due process context, an equal protection argument can be constructed by focusing on the gravity of consequences or the importance of the interests involved. When the consequences threatened are sufficiently grave, and a due process right to counsel attaches, a failure to appoint counsel for the poor amounts to a denial of equal protection. Desires to protect the public purse or discourage frivolous litigation are insufficient justification for ignoring the needs of poor civil litigants.

The utility of such an approach is apparent. No rule directing the appointment of counsel in every case would be necessary. The court would simply be required to determine whether the interests threatened are sufficiently important and the issues sufficiently complex to require the appointment of counsel. A flexible case-by-case approach could be relied upon to develop the parameters of a right to counsel in civil litigation. Most important, a clear signal for improvement of civil legal assistance would be given to legislative bodies. The legislatures could respond by appropriating the funds necessary to ensure implementation of a basic constitutional right or by developing creative alternatives to appointment of counsel in certain kinds of cases. For example, the aid of well-trained paralegal assistants in some matrimonial and welfare disputes might assure that an indigent gets a fair hearing.

Although there has been some movement towards recognizing a constitutional right to counsel in certain special situations—usually where the state is involved as one party, as in civil commitment and child neglect proceedings[20]—early hopes that a comprehensive theory would be forthcoming have been disappointed.

In *Boddie v. Connecticut*[21] the Supreme Court declared unconstitutional the application to indigents of a statute requiring the filing of court fees as a condition precedent to bringing a divorce action. The Court held that the statute's application violated the due process requirement of a meaningful opportunity to be heard, but carefully limited the scope of its decision. The Court stressed the important position of the marriage relationship in this society's

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[19] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

[20] *See, e.g., In re* Ella B., 30 N.Y.2d 352, 285 N.E.2d 687, 334 N.Y.S.2d 337 (1972) (child neglect proceedings); *In re* Fisher, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974) (civil commitment proceedings).

[21] 401 U.S. 371 (1971).

hierarchy of values and the states' "monopoly of the means" of formally dissolving a marriage. It concluded that the state interests involved—preventing frivolous litigation and preserving the public treasury—were outweighed by the denial of due process. Although Justice Black later argued that *Boddie* necessitates the appointment of counsel for indigents in divorce and other civil cases,[22] the Supreme Court has not even been willing to strike down filing fee requirements for other civil proceedings.[23]

The Court's unwillingness to extend *Boddie* beyond its factual setting has resulted in unrealistic distinctions. Other civil cases are of far greater importance to the poor and to society than divorce proceedings. As a practical matter the courts are often the only forum with power to settle disputes or vindicate rights, and resort to judicial process by an indigent litigant is usually no more voluntary than that of a criminal defendant haled into court to defend himself.

Moreover, the Supreme Court's focus since the *Boddie* case on filing fees as the touchstone of access to justice is short-sighted. It allows courts to declare that so long as such fees are waived the indigent litigant has an opportunity to be heard, even though he has no attorney to present his case. For example, in *Matter of Smiley*[24] the New York Court of Appeals recently held that indigent parties to divorce actions have no right to appointed counsel. In ruling that representation by counsel is not a legal necessity for meaningful access to the courts, the court characterized most divorce litigation between indigents as "simple" because there are no complicating money issues to be resolved. The court also implied that existing legal aid and legal services programs are sufficient to meet the needs of the poor for legal assistance in divorce cases; if not, the court suggested that any request for assistance should be addressed to the legislature.

Obviously, the legal needs of the poor are not being met, and all divorce litigation is not simple. Where complex defenses are involved, or where such fundamental interests as support or child custody are disputed, an indigent may not have his position fairly presented and heard without the assistance of counsel. Something more basic was troubling the New York court:

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[22] Meltzer v. C. Buck Le Craw & Co., 402 U.S. 954, 959-60 (1971) (opinion dissenting from denial of certiorari, Black, J.).

[23] Ortwein v. Schwab, 410 U.S. 656 (1973) (upheld imposition of court fee to appeal agency reduction of welfare benefits); United States v. Kras, 409 U.S. 434 (1973) (upheld imposition of bankruptcy filing fee).

[24] 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

> [A]mong the many kinds of private litigation which may affect indigent litigants, matrimonial litigation is but one. Eviction from homes, revocation of licenses affecting one's livelihood, mortgage foreclosures, repossession of important assets purchased on credit, and any litigation which may result in the garnishment of income may be significant and ruinous for an otherwise indigent litigant. In short, the problem is not peculiar to matrimonial litigation. The horizon does not stop at matrimonial or any other species of litigation.[25]

This statement, of course, is correct. It shows that the courts basically are fearful of taking a step that would require appointment of counsel in many equally important classes of civil litigation. The costs of providing counsel in all such cases would be large and the courts would be uncomfortably dependent upon the legislatures to pay for this right to counsel.

IV

If a right to counsel in civil cases is to be provided, then the case must be argued in the legislative halls as well as in the courts. Civil legal assistance is a responsibility shared by the bar and by each level of government. On the national level the Legal Services Corporation must seek appropriations that will allow the Corporation, with the assistance of private, state, and local funds, to approach the mandated goals of providing equal access to the system of justice and providing high quality legal assistance to all who cannot otherwise afford it.[26]

We now have a national commitment to the provision of legal aid to the poor and a new instrumentality—the Legal Services Corporation—to give life to this commitment. At present, however, the gap between promise and performance is wide. The statutory principle of "equal access to the system of justice" is all-inclusive; it does not apply only to some of the poor, or to those in Vermont but not those in Alabama, or to those in San Francisco but not those in Baton Rouge. The ancient commitment of the legal profession, and the guiding premise of the Legal Services Corporation Act, is that *all* who are poor are entitled to adequate representation. The great challenge of the years ahead is to provide the machinery and resources so that this principle will be observed in practice as well as honored in theory.

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[25] *Id.* at 440-41, 330 N.E.2d at 57, 369 N.Y.S.2d at 93. *See also* Brown v. Lavine, 37 N.Y.2d 317, 333 N.E.2d 374, 372 N.Y.S.2d 75 (1975) (denied right to counsel at hearing to contest denial of welfare assistance).

[26] 42 U.S.C. § 2996 (Supp. IV, 1974).