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# WILL JUSTICE BE RATIONED?

JEROME J. SHESTACK\*

The Report on the Delivery of Legal Services of the State Bar of Wisconsin<sup>1</sup> is not just another well-meaning report to be shelved and consigned to oblivion, as are most such reports. To understand its significance for these times, it serves to revisit briefly the progress of legal services to the poor and to view the Wisconsin report in the context of past developments, current conditions, and future needs. We write here with a broad brush.

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Long ago, Thomas Jefferson wrote that “equal and exact justice to all” was a “bright constellation” of our political faith.

Who would deny that the very essence of a democratic society is the concept of equal justice under law? Indeed, a just rule of law assumes equal access for all involved in the legal process. So too, an adversary system such as ours presupposes that both parties have reasonably like opportunity to present the facts and contentions upon which the adjudicator passes. Where a party is denied access to the administration of justice and, therefore, suffers the consequences of that denial, the failure is both of the justice system’s pretension and its fulfillment.

Denial of access to justice is not merely a theoretical defect in the administration of justice; it has deep practical ramifications. Lacking effective representation, poor persons often see the law not as a protector, but as an enemy which evicts them from their flat, victimizes them as consumers, cancels their welfare payments, binds them to usury, and seizes their children. We know now the unhappy results of the law’s failure to meet the just expectations of those it governs. Law loses its stabilizing influence; at best, there is alienation and unrest; at worst, violence.

Thus, the deepest interests of society demand that we address ourselves to the task of providing legal services to those in need of them. Looking back, it is astounding that it has taken so long to appreciate this.

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1. *Commission on the Delivery of Legal Services, Final Report and Recommendations*, 1996 STATE BAR OF WISCONSIN [hereinafter *Commission on the Delivery of Legal Services*].

As late as the start of the 1960s, the right to legal services was not recognized in theory except in capital criminal cases. In civil cases, the vast numbers of poor not only lacked civil legal services, but were unaware that such services could help. Inexplicably, the legal profession was content to let this be. True, there were a few dedicated lawyers who struggled to maintain legal aid agencies, but the great majority of the bar seemed oblivious of any real obligation by our profession to give meaning to the concept of equal justice.

As late as 1964, all of the legal aid and defender agencies together served less than five percent of the poor; nine cities of over 100,000 had no legal aid at all; in over 100 medium-sized cities the programs were pitiful; and in numerous rural counties there was nothing. The entire 1964 budget for the country's legal aid agencies was less than \$6 million.

By the mid 1960s, the situation had dramatically changed. The impetus came not from the bar, but from the Economic Opportunity Act of 1964.<sup>2</sup> That Act created the Office of Economic Opportunity. Sergeant Shriver became the first Director of the OEO and promptly established a Steering Committee, of which I was a member, to formulate a new OEO funded program to provide legal services to the poor. Shriver and the Committee approached American Bar Association officials to enlist their critical support of the new program.

To the credit of the ABA, it determined that the OEO legal services program should be supported and encouraged.<sup>3</sup> In February 1965, the House of Delegates of the ABA adopted a historic resolution directing its officers and committees to cooperate with OEO in the development of legal services programs for the poor. Lewis Powell, (later Justice) was then President of the ABA; his advocacy was undoubtedly a prominent factor in persuading the House of Delegates to endorse the new program. The initial successful launching of the federal legal services program was now assured.

The OEO funded program grew apace. By the beginning of 1970, legal services programs had been established in forty-nine states and in more than fifty of the largest cities. By 1971, Congress had appropriated \$71.5 million in Federal Funds for civil legal services.<sup>4</sup>

In 1974, at the instance of the OEO Steering Committee and other bar leaders, Congress established the Legal Services Corporation (LSC)

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2. DELIVERY OF LEGAL SERVICES STUDY, A RESEARCH PROJECT ON THE DELIVERY OF LEGAL SERVICES TO THE POOR 2 (Legal Services Corporation 1977).

3. *Id.*

4. *Id.* at 7.

as a non-profit entity intended to be a permanent part of the justice system.<sup>5</sup> It was thought that the Corporation would provide protection from the partisan political intrusions that had intermittently plagued the OEO program.

The LSC's initial efforts were encouraging. The LSC itself does not itself provide legal services; rather, it helps fund independent, local legal services programs within the framework of the LSC Act. Each program is governed by an independent board which decides what kinds of services will be provided. Generally, each such board consists mostly of attorneys, but with one-third of the board consisting of eligible clients. By 1981, virtually each county in the nation had access to a legal services program.

The advent of the Reagan era saw a determined effort by that administration to eliminate the federal Legal Services program entirely, a move strongly opposed by the American Bar Association.<sup>6</sup> Congress rejected the Reagan administration's effort, but did cut the budget by some 25% and imposed various restrictions on legal service activities.<sup>7</sup> Still, by 1995, the budget for the LSC had risen to \$415 million, a hearty sum, although still inadequate to satisfy the vast legal needs of the poor.<sup>8</sup>

The bulk of the problems handled by legal services lawyers fall in the family area (33%), followed by housing (21%), income maintenance (17%), consumer matters (11%), and healthcare (3.3%). Most of the matters are settled by advice or negotiation, but of those that go to trial, legal services lawyers have compiled a high success record and even a better one on appeals.

Legal services lawyers have also undertaken to bring about reform in poverty law. Following the philosophy that the American legal system is capable of response to societal needs, legal services lawyers undertook cases seeking to reform areas of the law which discriminate against the poor and create conditions of social injustice. These law reform efforts were often made through test cases or class actions, which impact on large numbers of poor. It is in this area, that the legal services program has had both its most striking successes and its greatest vulnerability.

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5. Legal Services Corporation Act of 1974, Pub.L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996).

6. See generally John M. Spralt, Jr., *Legal Services: Pro: An Effective Program Fights for Survival*, 1996 S.C. LAW 44.

7. *Id.*

8. By the end of 1995, there were about 4,700 attorneys working in legal services with an average salary of \$33,000, and an average experience of 7 years.

For example, legal services lawyers brought successful cases, to preserve medical aid to the indigent, to prohibit landlords from engaging in retaliatory evictions, to strike down unconscionable contracts which deny consumer defenses, to redress inequitable landlord-and-tenant laws which allow landlords to evict tenants without notice and often in retaliation for invoking municipal codes, to prevent mistreatment of Mexican farm laborers, and to redress other inequities. The number of such cases has been small, but their impact has been large.

Not surprisingly, such law reform activities have often challenged sacred cows and stepped on powerful toes; from grape growers to governors. Public officials do not relish having to defend their actions, particularly by organizations they fund, and entrenched forces resent having their fairness challenged. Giving the poor rights can be unpopular or made to look unpopular.

Oponents of the law reform activities of the program have argued that legal services lawyers should be limited to the representation of individual clients and should not engage in class-type actions designed to effect reforms in society of which a majority may disapprove. This argument misconceives the lawyer's function. Vigorous, innovative, and independent action on behalf of clients is the lawyer's function in classic terms. Lawyers have always given their clients this kind of representation by challenging statutes, instituting class actions for shareholders, bringing test cases, and, otherwise, seeking to change existing legal patterns on their clients' behalf. Surely, the poor are entitled to no less.

It is particularly unrealistic to limit poverty lawyers to individual representation when the lawyers who serve the poor are so few and the poor so many. Given the money, manpower, and time available, and facing the tremendous unmet needs of the poor, the better legal services programs must invariably rely on law reform class actions and test cases as a means of maximizing resources and benefitting large numbers of the poor at the same time.

Law reform thus is not radical or revolutionary; it follows traditional legal process and one certainly preferable to the alternatives. That these test cases have sometimes brought about dramatic change is not indicative of any unusual or atypical legal process but only of defects in the administration of justice which call out for repair.

An enlightened political leadership should approach legal services to the poor, not on the basis of whether it is popular or whether it serves entrenched practice, but on the basis that it is just. In a democracy, equal justice must be considered an absolute and not be subject to a political calculus. Today such enlightened appreciation is too little in

evidence on national, state, or local legislative levels. In its absence, reliance must be placed upon the lawyers of this nation to win the support needed for an effective legal services program. That support has been forthcoming.

In the wake of the November 1994 elections, the congressional onslaught against reforms in poverty law reached its apogee. A frontal attack on the Legal Services Corporation opened in Congress, directed not only against law reform activities, but against the program in its entirety. The attack this time differed from the one at the outset of the Reagan administration. During the Reagan Administration, the Executive Branch disapproved of the LSC, but Congress approved it. This time, the Executive Branch supported the LSC but Congress opposed it—and Congress was the funding arm.

Many members of Congress opted for “zero funding” and the year 1996 saw the LSC more at risk than any time since it began. The American Bar Association undertook a heroic effort to salvage the LSC and with the help of state and local bars, literally saved the program from extinction—but not from substantial loss. The 1995 \$400 million level of funding was reduced to \$258 million, after a wrenching struggle. The effect on the nation’s legal services firms was devastating, with 25-30% reduction in lawyers and services. Hundreds of lawyers have been laid off and thousands of clients have been turned away. Moreover, even more restrictions were placed on federal legal services leaving huge gaps. Legal services to immigrants is one stark example of a long, continuing void.

The prospects for reinstatement of these funding cuts and elimination of restrictions are dubious, certainly in the near future. It is obvious that if the funding and service loss is to be replaced, it will fall, in large measure, upon the private bar.

Here we come to one of the most encouraging developments emanating from the federal legal services program. That has been the increasing willingness of lawyers, particularly young lawyers, to become involved in the problems of the poor. From the start, it was always recognized that even with generous congressional funding, government would never fill the unmet needs and that substantial private bar involvement was necessary. Over the past three decades, that involvement has materialized as private lawyers increasingly provided pro bono services to the poor. In almost every major city, and in many small cities and rural areas, local organizations enlisted private lawyers to help supply legal services to the poor. Some law firms established ghetto offices to serve the poor, others established public service divisions to

handle *pro bono publico* cases. In addition, IOLTA structures were established to help funding and many corporations supplied a variety of pro bono services through corporate counsel.

This trend in the private bar is a healthy one, fulfilling the higher traditions of the bar and speaks well for further development of legal assistance to the poor. In this development, the ABA has been a catalyst, guide, teacher, and inspirer, encouraging and even marshalling lawyers to provide legal services to the poor. That role has multiplied greatly in importance as legal services has been stricken by the Congressional onslaught.

It is in this context and in sensitivity to the current climate that the Wisconsin Commission on the Delivery of Legal Services issued its recent report and recommendations.<sup>9</sup> There are and will be many reports across the nation on legal services, with plans and recommendations aplenty, but the Wisconsin Report has some general striking aspects:

First, the Report addresses the hard issues in this area which bar associations are often loath to face. These are:

(a) While the need for the private bar to support legal services to the poor is at a zenith, economic pressures on young lawyers, resulting from the debt burden most face upon graduation, plus the increased emphasis in law firms on billable hours, have reduced the time available for pro bono service.<sup>10</sup>

(b) The legal profession is becoming increasingly specialized. As a result, the number of lawyers qualified to handle poverty law is further diminishing, at a time when poverty law issues are becoming more complex.<sup>11</sup>

(c) The use of nonlawyer advocates to relieve the burden of satisfying unmet needs consistently meets opposition for bar associations concerned that what is labeled "unauthorized" legal practice would encroach on lawyers' economic opportunity. The Wisconsin report comes down on the side of lay advocates at least in domestic abuse cases and in selected other situations.<sup>12</sup>

(d) Legal services are often not as cost effective as they should be and their availability is still not widely known.<sup>13</sup>

(e) Technology has yet to come to many legal service programs and the resources and teachers to utilize technology effectively

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9. *Commission on the Delivery of Legal Services*, *supra* note 1.

10. *Id.* at 19.

11. *Id.*

12. *Id.*

13. *Id.* at 19-20.

are sparse.<sup>14</sup>

Facing up to these problems is an obvious need and involves analysis and confrontation that many such commissions and task forces are unwilling to embrace.

Second, the Wisconsin plan is not content to make recommendations alone, but accompanies its recommendations with strategies for implementation and resource allocation.<sup>15</sup> That is unusual; most such reports and recommendations are read once, hailed and then quickly forgotten until a later Commission unearths the report in the course of once again addressing the same unmet needs. Not so here.

Third, the Report calls for institutional and judicial responsibility for the delivery of pro bono services, giving an ethical dimension to that responsibility.<sup>16</sup>

Fourth, the Report recognizes the need for the organized bar to provide a continuing implementation policy with respect to the private bar.<sup>17</sup>

Fifth, the Commission is proceeding through a series of pilot projects. Too often, resources are put into a program that fails causing discouragement of further initiatives. The Wisconsin approach created model pilot projects; if the models are successful, they can be replicated; if unsuccessful, they can be abandoned or modified. Hopefully, the pilot projects are only a start. Many innovative programs to obtain funding and to enlarge the scope and quality of services are in the offing with the ABA offering models, suggestions and critical information.

Looking at the Wisconsin report from a national perspective, surely it is a sound way for a Commission of the bar to approach and try to solve a complicated and urgent problem in providing equal access to justice in its state. Most bars have yet to proceed in that mode. Wisconsin is a felicitous exception.

At the end of the current day and indeed, at the end of many to come, the burden will increasingly fall on private lawyers. Here, we must confront a question that haunts a calling dedicated to justice but facing an age in which materialism appears to be the prevailing value. Why should lawyers assume so large a burden? It is not a casual question. In law practice, time and compensation are inextricably

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14. *Id.* at 20.

15. *Id.* at 27-48 (Recommendations 1-14).

16. *See, e.g., id.* at 32 (Recommendation No. 4).

17. *See, e.g., id.* at 43 (Recommendation No. 11) ("The state Bar should systematically coordinate, support and promote pro bono activities.").

combined. Why should we give up the one and sacrifice the other to become involved in *pro bono* areas?

To be sure, as human beings, all of us have an obligation to help our fellow human beings—an obligation stemming from a common divinity, or from a simple sense of decency, or from the need to preserve civilized society, or, perhaps, from all of these.

But there are also special reasons for us as lawyers— reasons that even the most committed attorneys need to recall and embrace. Some say that society confers on us a unique privilege to practice law, therefore, we should be willing to accept a unique responsibility to society. The ethical code of the American Bar Association so provides. Some say that from those to whom much is given, much is expected. We, as lawyers, have special abilities including analytical skills, dispute resolution skills, and concept comprehension. Society does need our talents. Some say that, if we fail to address crucial issues of our society, we will be confined to lesser roles and entitled to lesser respect in our society. That is true, too.

Indeed, all of these reasons are true. But all meld into the simple obligations of the legal profession. To truly embrace a profession concerned with justice, surely, we must commit to the central problem of justice, to balance inequities, to redress injustice, to insure equal access to justice.

And there is still another reason which I would share with the readers of this article. No other profession qualifies one better to partake in the joy of striving for the public good. I have traveled with many lawyers along *pro bono* paths. Some of the issues have been large, some small, some of the gains monumental, some incremental. It is exciting to contribute to the public issues of our era, to be involved in the moral issues of our society and to advance access of the disadvantaged to our system of justice. Almost always, I have found that serving *pro bono* causes is deeply satisfying, memorable, and fulfilling.

In a society where so many are powerless, where lifetimes are spent in humdrum detail, where few can be actors in the enfolding spectacle; our profession has a singular opportunity to contribute to society's needs, to make a limping legal structure work for justice, to give meaning to equal justice, to revitalize old institutions to serve today's demands, to grow ourselves, and to be part of the vital struggle for human dignity and worth. In short, our profession has the opportunity to accomplish much. It is an exhilarating and joyful prospect.

History tells us that a nation's progress to social justice is often painful; it is painful today. Part of our progress must be the realization

that access to legal services must be more than an expectation; it must be a right, a matter of justice.<sup>18</sup> How to achieve that right remains the ultimate challenge to our nation and in particular, to our profession whose ministry is justice. Learned Hand once observed that if democracy is to survive, it must observe one principal commandment: "Thou Shalt Not Ration Justice."<sup>19</sup> That commandment is what the right to legal services is all about.

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18. It bears noting at this point, that while there is no specific constitutional provision providing a right to legal services for civil cases, as in criminal cases, yet, there is a sound conceptual basis for according a constitutional dimension to legal services for civil defendants. A defendant in a civil legal action may lose money or goods, be evicted, lose custody of children, or suffer other disabilities. Such loss may not be ordered by a court without due process of law, and at this stage of constitutional sophistication it seems quite proper to hold that the fundamental fairness embodied in the due process concept is lacking where a defendant cannot afford representation. In *Williams v. Shaffer*, Justice Douglas, dissenting from a denial of certiorari in a case regarding rights of a poor tenant in an eviction proceeding, provided a valuable insight:

We have recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judicial relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters.

*Williams v. Shaffer*, 385 U.S. 1037, 1039 (1967).

19. Learned Hand, Address before the Legal Aid Society of New York (Feb. 16, 1951).

