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HARRY M. CAUDILL*

Soon after I began practicing law in the little town of Whitesburg, Kentucky back in 1948 an incident occurred which starkly illustrates a great and chilling shortcoming of our system of justice. It points up a defect that is found all over America and, I am afraid, is pretty well endemic here in southern Appalachia where there is such a disproportionate number of impoverished people.

The ink was scarcely dry on my law degree and I was still brimming with the concepts of ethics and devotion to justice that had been preached so relentlessly through my years at the University of Kentucky College of Law. I was in the office of the oldest member of the County Bar and we were having quite a bull session on laws old and new. Presently a young man came in and indicated that he wanted to discuss a criminal case. My old and learned colleague pointed to a chair and listened to his story. The young man was charged with an offense not at all uncommon in the southern coal fields: larceny of copper wire from a coal mine. After my friend had heard the facts as related by the accused he looked at him so long and intently that the prospective client began to squirm uneasily. He shuffled his feet and looked at the floor. After he had squirmed long enough the lawyer (and, incidentally, he was an excellent advocate who had built an enviable reputation in countless criminal cases over a period of four decades) — demanded of his would-be client, "Now, son, what about the fee? How much money have you got?"

Here a new pause ensued, after which the young man blurted out, "That's part of my trouble. Right now I don't have any money, but I hope to get some in a few days. My brother is coming in from Michigan and he will help me as much as he can. But, anyway, I want my rights protected."

The old barrister's reply, uttered half in jest and half sincerely, fell like a sledge hammer: "Hell, son, in this world if a man has not got any money, he has not got any rights."

Of course, the counselor took the case, and he invited me to help him and to share the non-fee on a perfectly fair fifty-fifty

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basis. Happily our client was acquitted despite a preponderance of convincing evidence that he was exceedingly guilty. But the verdict could not erase from my memory those harsh words, so axiomatic in their ringing finality, "In this world, if a man has not got any money he has not got any rights."

A client of mine — a gentleman who generally managed to avoid the penitentiary in a long and checkered lifetime that ended, at last, with a gun-shot — put it somewhat differently: "The more money a man has the more justice he gets." On another occasion I heard him state his opinion of the law in these cynical terms: "The law," he said, "is the only net that was ever woven to let the big fish swim safely through and catch the little fish swimming after."

Sadly, I have concluded that while wealth may virtually assure justice to a litigant, a lack of wealth can bring injustice to the innocent, even where formal vindication can be preceded by long intervals of incarceration because of inability to post bail, defenses hastily prepared and inadequately presented, imprisonment pending appeal, unduly abbreviated appellate records and, most galling of all, many indignities and humiliations.

That there is a great need for a publicly financed program of formal legal services to the poor can scarcely be doubted. Legal services are as important to meaningful and effective citizenship as medicine, food, shelter and clothing. In our affluent society a man without these necessities or who has only a tenuous and uncertain hold upon them, is thereby set apart from his more fortunate fellows. It is arguable that a new caste feeling is developing in America — one that elevates its Brahmins because of their wealth and sees the poor as a sub-order composed of the unambitious, the shiftless, the ineffective, the failures. In short, the moneyless are becoming our unclean, our contemptibles — and this notwithstanding that very often it is the impoverished who work the longest and the hardest.

And as they hold the poor man in lessening esteem it is inevitable that the people who run his community and who generally sit upon its juries will come to be suspicious of his word even as they debase his individual worth. Thus when he stands accused before the bar, it is supremely difficult for him to receive an unbiased hearing. His poverty has ever so subtly weighted the scales against him. When he rises in his old, outworn and cast off clothing he is

generally defenseless and often is almost indefensible, and this for the simple reason that the hearts of those who have "made it" are slowly closing against those who have not, fostering a bias that erodes the presumption of innocence. In this development — which I believe is new to American society — we find a vast new challenge to our traditional system of justice and to the lawyers who must make it work.

There are tens of thousands of paupers in the southern mountains and hundreds of them are before the courts each year in criminal matters. The man with financial resources can generally muster excellent, or at least adequate, representation. It often befalls that a penniless defendant has the advice of no legal counsel whatever until the morning of his trial. Then, an interrogation in the court room in the presence of the jury discloses that the man has no money, has been in jail for several weeks for lack of bail and that an unpaid attorney must be appointed for him. Generally, the appointee will be the youngest and least experienced member of the bar. For example, when I began practicing I was promptly appointed to defend a murder case which had received wide press coverage and had aroused strong and general public outrage. From the defense point of view it was a dreadful case and I was totally unprepared for the responsibility. The Commonwealth Attorney was a veteran and was assisted by one of the most adroit trial lawyers ever to practice in Kentucky. They shattered me. The only thing going in the defendant's favor was sympathy — the jury so deeply sympathized with the defendant because of the ineptness of his greenhorn lawyer that they sentenced him to a merciful life imprisonment. Often, though, ineptness does not pay such dividends for a defendant. Instead it brings him to the electric chair or to unwarranted imprisonment.

In Kentucky a couple of years ago a situation arose that demonstrates the kind of grotesque nightmare that can arise under our present practice. A ne'er-do-well named Joe Wedding was accused of the murder of a whiskey store proprietor. The community was enraged against the defendant who, of course, had not a dollar to his name. The Circuit Judge appointed all members of the county Bar to defend him. After a speedy trial he was sentenced to the electric chair. The case went to the Court of Appeals in *forma pauperis*. The Judges found, and, indeed, the defense attorneys conceded, that they had made practically no effective efforts in his

behalf. Notwithstanding the multiplicity of his lawyers, the case was reversed because he had lacked adequate counsel. His attorneys were sedate tax and probate practitioners and their very best attempts in the criminal field were simply not good enough to meet constitutional requirements.

Having failed to find adequate counsel for the accused in the county where the homicide occurred, the trial judge attempted a raid on the bar of Fayette County — two counties removed and in a different judicial district. He entered an order appointing the state's ablest criminal lawyer, former Congressman John Young Brown. Mr. Brown is a very busy man with a large state-wide practice. His reaction to the prospect of traveling about all over Kentucky representing non-paying clients at his own expense was as swift as it was predictable. He took the order to the Court of Appeals in a mandamus proceeding. Predictably, the mandamus was granted. Matters stood at an impasse when I last looked into the matter. Defendant, as a constitutional right, must have adequate counsel. Adequate counsel is not available in the county having jurisdiction. The Court cannot appoint a competent lawyer from another county. There are no funds to pay one. Joe Wedding is in jail. His alleged victim is in his grave. Time drags on and, as Mr. Dooley said, "The law is a ass, a bloomin' ass."

In law as in merchandise one rarely gets something for nothing. In the field of merchandising we recognize and discount the gimmicks that promise much for little. It is imperative that we be equally frank in the administration of justice. There we have been trying to get something for nothing for a long time. It has not worked and is not working now. Our system of unpaid appointed counsel for indigent defendants injures all it touches — the defendants, their lawyers, the judges, justice itself and a great constitutional principle. In my opinion a public defender is just as important, just as indispensable as a public prosecutor. It is passing strange that we write a presumption of innocence into our law, then designate an official to seek to overcome that presumption without providing one of equal rank to uphold it. It is time we remedy this glaring omission.

Joe Wedding's dilemma is a legal rarity. However, similar situations could doubtless be found in many states if appellate courts and Bar associations were to seek them out.

The protection of life and liberty ought to be the foremost and paramount objective of our free society, and in assuring justice to

the poor we are likely to dissolve much of the bitterness the poor in our time harbor for the law and for society.

The need for legal services in the civil field is equally glaring and almost as acute. For example, countless women endure weekly beatings at the hands of drunken and brutal husbands — husbands they cannot divorce because they have no funds. Dependent on their spouses for bread and powerless to obtain a legal separation and court-enforced support for their children they are locked into a life of double damnation — harlotry and servitude.

A properly organized legal aid service would free many such victims and set them on the road toward decent lives.

The lives of the poor are nearly as complex and problem-ridden as are the lives of the rich. Consequently, their legal needs are intricate and varied. Here in Appalachia thousands of silicotic coal miners have allowed their causes of action to lapse because they lacked sound legal counsel. Many small land owners have suffered terribly from mining, drilling and quarrying operators who have callously wrecked surface land, silted streams, uprooted forests and destroyed aesthetic values of whole landscapes. Meritorious tort claims have gone by the board or been settled for pittance in the absence of sound counsel. The truth is that lacking money, they often lack, also, a willingness to seek free counsel. When they come to an attorney's office they find it crowded with people who, presumably, are willing to pay. Sometimes they linger in the hall for a moment, look in hesitantly, and then leave. Nearly all such people — and I have seen scores of them — have a problem that someone ought to listen to. They are too reticent to ask advice for which they cannot pay. Often they suffer, sometimes permanently and seriously, because they did not wait and lay their troubles before the lawyer.

In my opinion, every state ought to set up an office of Public Advocacy, preferably with constitutionally defined duties. The Public Advocate should maintain an office in each district having a Circuit Judge, and his budget should be sufficient to enable him to investigate all criminal cases assigned to him by the courts, and to advance them skillfully and thoroughly.

The point will be made that Public Advocacy will be subjected to abuse and there is no question that abuses will occur. But every human undertaking is liable to abuse, even as the law is often employed to punish those who offend the influential and to lift

burdens from those best able to bear them. In my judgment any indigent person accused of a crime that can cost him his life or his liberty for any period of time however short, should have his case assigned to a Public Advocate, if he solemnly swears before the Judge in writing and in privacy, that he lacks the means to pay a defense lawyer in accordance with the minimum fee schedule of the local bar association. If he lies he would be subject to the penalties for perjury. The court could require him to list his assets, if he has any. The Public Advocate could and should make an investigation of his own to assure that the information on which the court acted is essentially true. When these simple and confidential measures have been taken and when the indigence of the accused has been ascertained, the state should finance his defense and such appeals as the accused and the Public Advocate agree to be desirable.

The role of public advocacy in civil proceedings is more delicate and difficult to define. In all probability it can be best effected by the "Judicare" system pioneered in Wisconsin. Through this method we would apply to law the principles that have worked thus far reasonably well in medicine. All members of the Bar who elect to participate in the program would be certified by the public agency having charge of the funds. Certain broad categories of legal services would be made available under the plan. The indigent client would retain complete freedom of choice. If an attorney consulted under the plan decides the client has a meritorious cause of action or that a justiciable wrong has been inflicted upon him—and that the cause cannot generate a fee on a routine basis—the attorney would perform the indicated service to protect the client's interest. At the conclusion of the proceeding the attorney would bill the agency in conformity with rates fixed previously by the State Bar Association and the agency.

An immediate question is whether it would not be more feasible to recruit lawyers and set them up in a special office and authorize them to handle the legal work of the indigent. Would not such an office relieve the regular Bar of the burden of working for the poor for small fees or none? Would not such an office be more efficient and less costly?

I have no doubt that such offices and their staffs would be accepted by the poor, just as members of the United Mine Workers of America quickly accepted the services of hospitals and doctors

when they were provided by the Union. But such offices would inevitably raise serious doubts and strong opposition from the Bar.

For example, lawyers staffing such offices would be suspected of champerty. Bureaucracies find work to justify their continued existence and attorneys would be suspected of launching useless actions in order to consume their budgets and justify new appropriations. Lawyers would be certain to fear the appropriation of their contingent fee cases by a tax-supported agency. Such a system would move us close to corporate law practice—agency practice by public servants who might hunt clients as public assistance workers now sometimes seek people to assist. Then, too, the Bar's long-cherished freedom of choice among lawyers would be denied the poor and vouchsafed for the well-to-do, another discrimination in itself. And by restricting the poor to the services of such a staff the law might deny them access to the best lawyers—lawyers they might choose under *Judicare*.

Established lawyers would see in the new legal services office a subsidized competitor, and lawyers like competition no better than doctors, merchants and union laborers. And lawyers are influential people whose opposition can, in the present context, crush any legal services program that arouses their ire.

For these reasons it is essential in planning legal aid services that the regular Bar be consulted in advance; that the services of the established lawyers and their advice be solicited and respected. Otherwise they will feel their pocketbooks threatened and this will cause their ethics to ache. Then in solemn conclave assembled they will duly resolve that the proposed service is unethical, unthinkable, ruinous and socialistic. But set up a system that benefits them by entering fees in their record books and you will find that most of them will bless the program, as doctors now bless Medicare and marvel that they ever opposed it.

Let us learn from old battles and avoid needless new ones. Here in West Virginia as across the line in Kentucky and Virginia such programs are sorely needed. Such services should have been provided as a matter of routine many years ago. We cannot afford further delay. A super-nation that spends the equivalent of three hundred pounds of dollar bills to kill a single Asian guerrilla cannot afford to quibble over the fiscal chicken feed that would provide decent legal counsel to the poor who father—or who are—so many of our fighting men.

Such a program should bring real progress to the Bar, to Justice, to the States. Lawyers would begin to receive fees for services they have generally rendered for little or nothing. Justice, a concept that defies price, would find her scales steadied as skilled advocates begin to speak for people who have long been woefully under-represented at the Bar. And tranquility would be enhanced in states that no longer limit justice to those of its citizens who can afford it.

Such a program will bring new responsibilities commensurate with the new opportunities. The heaviest responsibility will fall on the Bar—a duty to organize no-nonsense ethics committees to hear complaints and to make certain abuses are held to an absolute minimum.

A cry will go up that a program of legal services for the indigent is merely an extension of welfarism, and that it will contribute to the erosion of character all of us have detected among the “welfare classes” over the last twenty years. It is unquestionably true that multitudes have become habituated to relief much as drunkards become habituated to whiskey. This situation, too, presents a great challenge to each of us and to the nation. All of us want to see such unfortunate men and women restored to dignity, usefulness and self-supporting, tax-paying citizenship. That task must be tackled aggressively by the government, but to succeed it must be supported strongly by labor unions, industrial managers, clergymen and teachers. That problem is one the Bar, too, must help solve.

In any event, it is difficult to believe that the character of a poor and inarticulate person can be impaired by making the services of a lawyer available to him when his basic rights are threatened or denied.

To the contrary, the effect would be one of uplift and a renewal of confidence and when such a program is instituted lawyers will be given a unique opportunity to inspire those they serve.