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A Conservative Rationale for The Legal Services Program

EARL JOHNSON, JR.*

The Legal Services Program has now been in operation about two years. During that time, it has made grants to 250 programs in 48 states, the District of Columbia and Puerto Rico. It has made grants to programs in all 30 of the largest cities in the United States, and in 17 of the 20 next largest cities. It has spent a total of \$29 million, and presently has approximately 1700 attorneys actually working in various programs, shortly to be over 1800 attorneys, and several thousand additional supporting personnel.

It would be foolish to attempt to describe this vast program as a slight modification of an existing Federal program, or to try to tell you here today that we are really doing nothing unusual or different.

Above all it would be foolish to make such an argument because the Legal Services Program *is* unusual and different. Indeed it is daring and bold, for it is the first attempt in our country (and perhaps the first attempt in any country in the world) to provide, on a mass basis, legal assistance for poor people who heretofore have had to face the mountains and mazes of a complicated legal system by themselves, without either education, sophistication, or the assistance of anyone who has these essential attributes.

I am here today to discuss with you the specific jobs being done by this program. By the time I have finished speaking, I hope that I will have persuaded you that the program is not only desirable, but is vitally necessary, and is in fact the most conservative and constructive approach to the problem that any government could have taken.

But before I attempt to enlist your support for our program, I would like to read to you a brief excerpt from an article that recently appeared in the *District of Columbia Bar Journal*. The article was written by Tim Murphy, a recently appointed judge in the District of Columbia Court of General Sessions, the court of lowest jurisdiction in that city. Judge Murphy's article is a discussion of Small Claims Court in Washington, a court that was established some 20 years ago, as he notes, "to assist in securing justice for persons having small

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claims who are financially unable to retain counsel." He comments on the court as follows:

Does the court . . . meet the needs of our poor? I submit not. The Court is not the court of the neighborhood litigant. . . . Quite the contrary, it is primarily the court of the skilled lawyer representing large debt collection companies, credit stores, corporate defendants and insurance companies. Further, these lawyers and their organizations are almost without exception litigating against pro se parties (persons representing themselves). In spite of the court's informal practices, the pro se party is at a definite disadvantage when he appears in court.

The pro se party's biggest disadvantage is his ignorance of even the most fundamental principles of law and procedure. This ignorance results in a serious loss of bargaining power from the start of the proceedings [For example] In the conference room the pro se party must bargain with a trained specialist attorney. Although compromise is frequently reached for an amount below the claim, it is frequently only a token reduction. On the other hand, in the rare cases where both parties are represented by counsel and compromise is effected, the claim is normally reduced 50% or more or dismissed altogether.

If settlement is not effected and the case goes to trial, the pro se party . . . has trouble in cross-examination, argument, and in presenting witnesses on his behalf. In order to prevent total chaos, the Court must interject itself into the proceeding. This results in a great deal of court time being spent explaining court procedure, the rights of parties, and also the law, *e.g.*, why contributory negligence bars recovery. . . . During my initial assignment in Small Claims I was very sensitive to the rights of the pro se party. Yet in almost every case in which a party was represented by counsel that side won primarily because the Court could not overlook the facts and law developed by counsel's superior skills. . . .

The vital function of counsel arises even before litigation begins. Only lawyers, not the Court, can investigate the facts in a case, talk to witnesses, and develop a defense or plaintiff's case as might be required. An equally basic service counsel could perform here is in advising the poor about their financial habits

and directing them to resources where they can get financial counseling and aid. I doubt if it is a proper function of a court to tell a party not to patronize a certain store or not to borrow from small loan companies. An attorney certainly can if he deems such advice sound.

I need hardly tell most of you here that Judge Murphy's description of the need for attorneys in the District of Columbia Small Claims Court would apply not only to Small Claims Courts elsewhere, but also to any other court before which poor people appear. The poor when faced with a legal problem do not have counsel to develop facts and conduct investigations. They do not know the substantive and procedural rules that define their rights. They are not skilled at negotiations. And they do not know how to ask those questions that would bring out the best side of their case, even should such a best side exist. Indeed Judge Murphy's Small Claims Court is unusually advantageous to the poor, for there are very few courts in which a judge will even feel permitted, let alone obliged, to intervene on behalf of a litigant who is losing his case because of lack of counsel. As any practicing attorney knows, these are the day-to-day facts of legal life in America.

Poverty is not a new phenomenon on our national landscape. We had always had it, and indeed in the 19th century poverty was regarded by many as a mark of great nobility. "Of all the advantages that come to any young man," write G. J. Holland, "I believe it to be demonstrably true that poverty is the greatest." The air was thick with Horatio Alger stories, and hundreds of penniless immigrants arrived at America's doorstep ready, willing and able to climb from penury to penthouse in the short space of a single generation. Poverty was viewed, according to our mythology, as a temporary state out of which anyone could rise with ambition and energy, and in which other people remained only because of their intrinsic stupidity, viciousness or immorality.

In such an atmosphere, the need for vast government programs to assist poor people was non-existent. The poor like the rich believed that America offered them an escape from squalor, and demanded of themselves self-discipline rather than community organization. It was the spring of the American year, and everyone believed in the future.

For you and me, that spring still exists. But for the poor, the trees have all flowered and the leaves have now begun to fall. For the

poor, the bare outlines of their lives have become visible in the past 30 years, and the more visible these outlines have become, the less the poor have liked it. Poor people no longer believe that it is a heavenly blessing to be poor, or that the world lies before them like a land of dreams. They believe, whether we like it or not, that they are oppressed; that their children will be as oppressed as they are; and that justice is a flower which will never bloom on the barren plots that surround their miserable homes. They have stopped asking polite questions about "why" and "wherefore;" they have begun, over the past years, to demonstrate, to riot, to destroy and to kill people.

The perfect solution to this problem, of course, would be for us to see the tide of events before us and put a stop to it. We could dedicate ourselves to informing the poor, as a noted churchman did at the beginning of this century, that:

The poor should not be ashamed of their poverty, nor disdain the charity of the rich; for they should have especially in view Jesus the Redeemer, who, though He might have been born in riches, made Himself poor in order that He might ennoble poverty and enrich it with incomparable merits from heaven.

But unfortunately, the poor are no longer willing to listen to moral preachments. Third generation welfare mothers no longer believe that their lives are noble. The victims of crooked installment contracts no longer suffer their yoke gladly when told that their forbearance demonstrates their "incomparable merit." The poor want Freedom Now, not words. And if they cannot accomplish changes by persuasion they will accomplish them in the streets. Those are the social facts of life in 1967.

As a lawyer, I view these facts as you do, with the most grievous concern. My training, like yours, is in the law, the courts, and in judicial solutions to social problems. The social unrest that leads to riots in Watts, Rochester, Philadelphia and New York City is to me a frightening demonstration of the fact that our traditional procedures for the resolution of grievances have stopped working. I see people fighting battles in the streets instead of in the courtrooms; I see them throwing rocks instead of words; and I see them picketing instead of drafting briefs. These disturbances, if permitted to continue, pose the gravest threat to the future of our country.

We in legal services are attempting to bring the disturbances to a halt. Faced with poor people who will no longer quietly tolerate

conditions they regard as unbearable, we are attempting to accomplish the following goals:

1. The establishment of law offices in poor neighborhoods and rural areas in order to make legal services more accessible to the poor.
2. Reform of the laws that affect poor people: consumer relations, landlord-tenant, welfare law, and domestic relations.
3. Education of poor communities so that they avoid legal pitfalls. The emphasis in our community education programs is on preventive law.
4. Representation of groups of poor people. We represent groups because they have more power than individuals; a group of tenants, for example, can bring more pressure to bear on a slum landlord than could one individual tenant who might easily be evicted.

I began this speech by telling you that we have spent, in the past 18 months, over \$29 million on these projects. I would like to give you some examples of the way in which this money has been spent.

First of all, we have spent money on the establishment of law offices. In most of the large cities in America, Legal Services has established offices in the actual neighborhoods in which poor people live: the neighborhoods of rat infested houses, crooked or underhanded businessmen, and hundreds of families who spend their entire lives on public welfare. Legal Services has also recognized that the problems of the rural poor need treatment, and we have consequently established a number of programs to deal with rural poverty. We have two programs in South Dakota in which lawyers ride circuit over a wide area on two Indian reservations, providing representation for these people for the first time. A similar program exists in Arizona, on the Navajo reservation, where a young graduate of Harvard Law School utilizes a helicopter to reach some of his clients. We also have rural programs in northern Wisconsin, central California, and in and around Clarksdale, Mississippi.

Secondly, we have spent money on law reform. We in Washington understand that it is not possible to come up with enough money this year or next to provide lawyers for every indigent in the United States—the necessary figure has been estimated as high

as one-half billion dollars per year. It is crucial, therefore, for us to spend our limited funds in the most effective manner, and that manner is to change the laws affecting the poor so that each of our efforts affects as many people as possible. Lawyers from the Neighborhood Legal Services Project in Washington, therefore, are testifying before the House Ways and Means Committee on certain welfare measures; lawyers from the program in Seattle issued a 50-page report on changes necessary in laws affecting the poor, and the program at the University of Detroit held a conference, attended by many state legislators, which examined in detail and proposed a number of major changes in Michigan's housing laws. This is an innovation in legal services.

Third, we have spent money on community education. The form to be taken by the community education program may vary enormously; in one particular successful program, the legal services program presents playlets at churches and community centers in the low income community depicting common legal situations facing the poor: signing a lease, buying furniture, or dealing with welfare authorities. The playlets are then followed by discussion of the problem presented. The object of the playlets, of course, as well as of the comic books, radio programs, speeches to low income groups, and door-to-door canvassing that are other common techniques utilized by community education programs, is to familiarize poor people with their rights so that they can take action to protect themselves in the future and to vindicate themselves in the present.

Fourth, we have spent money on group representation. There are two reasons why legal services programs have been making an increasing effort to represent groups almost in preference to individuals. First of all, where the object of the litigation is to establish a legal principle—and as a matter of sheer economy, it is almost an absolute rule that the time and efforts of legal services programs are better utilized by working for a change in the law than by representing thousands of people fighting the same battle over and over again—it is better to represent groups simply for technical reasons, because any one person who becomes involved in protracted litigation may either be removed from a case for jurisdictional reasons or may be required, for personal reasons, to drop the case; he may move from disputed premises, pay a disputed bill, or settle a controversy without regard to the longer term consequences of his settlement.

But there is an even stronger reason for representing groups, and that is that large groups of people often have the same basic interests, and it is simply easier on the litigants and on the lawyers if these interests can be expressed through one lawsuit rather than through a multiplicity of them. This is the theory on which trade associations and labor unions operate, and it is equally applicable to groups of poor people. Again, the legal services program represents groups because group representation makes the government dollar accomplish more than it could in any other way.

These are the four elements that describe all of the programs presently providing legal services to the poor. Those of you who are familiar with our programs know that I have not pulled any punches in my description. I have told you that many of these programs represent groups, that they are bringing test cases and working for legislative reform (to make that function sound even more daring, let's call it "lobbying") and I have told you that most of the projects have a community education program which probably increases business for our lawyers. Examined baldly, the program seems too different, too radical and too new to fit into the context of our traditional American institutions.

But is it really so new and daring? One of the most striking differences between the OEO program and the legal aid programs that have operated throughout America ever since 1876 is the community education program I have described to you. Unlike many legal aid societies, our programs actively announce their availability to people and invite them to come to our offices and receive advice about their legal problems. As unusual as this may seem to a community of practicing lawyers who would never think of engaging in such activities for their own benefit, the kind of solicitation indulged in by legal services programs is a totally normal and conventional activity that non-profit associations have indulged in for generations, without the slightest hint of concern from the courts, the bar or the public.

Let me give you an example. During the 1930's, a number of finance companies in the South had become so rapacious as to cause serious concern among the more responsible members of the community. The Bar Association of Atlanta, Georgia became particularly distressed about these companies, and determined to take action to bring them into the framework of the law. It therefore instituted, on a mass basis, a broad campaign against the

finance companies, utilizing every kind of publicity it could develop, and specifically offered anyone who had been victimized by a usurious money lender free representation, either as a defendant in a suit brought by a finance company or as a plaintiff in a suit to recover monies illegally paid under usurious contracts. The Gunnells Finance Company brought suit against the Bar Association to enjoin both the association and its members from conducting the campaign. The case went to the Georgia Supreme Court, which decided in favor of the Bar Association in *Gunnells v. Atlanta Bar Association*, 12 S.E.2d 602 (Ga. 1940). I would like to quote from that opinion, for it might apply without a word of change to what the Office of Economic Opportunity is doing today. The court said at 610-11:

We do not believe that it is true that the enforcement of the usury laws of this state is a matter solely for the law enforcement officers and of those from whom usury is being exacted and that it is illegal and unethical for lawyers to publicly criticize an alleged widespread violation of such laws and to seek to eradicate the evil by the means here shown. Much could be said as to why their position in the community makes it entirely appropriate that they undertake such a movement and assume such responsibilities in reference to the general welfare of the public.

I could cite other cases, including cases from the Supreme Court, which also hold that the solicitation of cases by non-profit organizations is not in conflict with the Canons of Ethics. But one sentence in the *Gunnell* opinion seems to sum up the attitude our courts have taken towards organizations that seek to help poor people otherwise unable to obtain counsel. The court analyzed the activities of the Atlanta Bar Association, and concluded, "For all this they should be commended rather than condemned." Incidentally, the Committee on Professional Ethics of the Florida Bar Association recently came to the same conclusion. After analyzing a proposal made by the Bar Association of Tampa and Hillsborough County for a program of legal services, the Ethics Committee not only concluded that "We see no ethical objection to the legal services program conducting general seminars of an educational nature," but added that "We think that education which is in fact preventive education is not only not precluded but is praiseworthy."

A second aspect of our program which seems daring and bold

to many people is the emphasis we have placed on law reform. "Law reform" and "test cases" are phrases which give some lawyers an uncomfortable feeling. A few even interpret these phrases to represent something radical and sinister. But what is a "test case?" It is simply a lawsuit to which you devote enough time and effort to present your side of a legal issue in the best possible light with knowledge that you probably will have to carry the case to the appellate courts. Ordinarily you know beforehand that precedents do not exist on the key issue involved in the case, or that the existing precedents are against your client. But bringing test cases is not a subversive tactic; it is a lawyerlike method of offering the courts an opportunity to think about new issues or rethink old issues.

I suspect that the reservations some of you may have about law reform stem from a belief that present law is fine—that the status quo should not be tinkered with. I am sure there are lawyers who approve of laws that prevent a person from receiving welfare until he has been a state resident for a year, or two years, or three years and, as in some states, even six years. And there are lawyers who approve of court decisions that allow a landlord to evict a tenant merely because the tenant has reported housing code violations to the proper local authorities.

I am sure there are lawyers serving as members of boards of direction of local legal services programs, and even as staff members, who feel that many of the laws and court decisions which the poor want to challenge are good laws and good decisions. It is to be expected and it is healthy. I am not concerned about it . . . so long as these lawyers fully appreciate the duty of lawyers serving clients, rich or poor—the duty to use every argument and every ethical strategem, to raise every non-frivolous issue and to raise it artfully and argue it persuasively.

We have no loyalty oath in the Legal Services Program—no oath that a board member or staff attorney must believe in the ultimate virtue of every legal change and every legal advantage the poor desire to achieve. But I submit the poor do deserve the same unquestioning devotion as the clients of other lawyers. I know a lawyer in Chicago, for example, affiliated with one of the largest, most prestigious firms in the city, who handles the tax work for some of the most powerful corporations and wealthiest individuals in America. This lawyer does *not* believe in the policy justification

for oil depletion allowances—but no one is more artful in the use of these statutory provisions to save his clients' tax monies than he. He does not believe in the special tax break afforded capital gains. But no lawyer constructs more imaginative, better reasoned briefs for extension of this tax break to other forms of income. This lawyer understands his role as a member of the legal profession, and I respect him for it. And I respect him even though I do not believe in the desirability—or merit—of many of the issues he raises. And yet, the more imaginative the argument he develops, the more persuasively his argument is presented, the more respect I have for him as a lawyer. The Legal Services Program asks no more than this: that even though staff attorneys, board members, and other lawyers who do not favor the changes which the poor demand, nevertheless make certain that those changes are presented to the courts and presented with as much imagination and persuasive skill as able lawyers can muster. The lawyers making those arguments, and the Legal Services Program which supports those lawyers, deserve the respect—and assistance—of the most conservative lawyers in America.

Legal services programs not only bring test cases but actually work wherever possible to bring about legislative reform, and the ethical justification for these functions has been questioned by some members of the bar.

Lobbying, in the true sense of the word, however, is a traditional part of the attorney's rule. Canon 26 specifically provides for such functions, and a number of bar associations have specifically encouraged their members to join wherever possible in attempts at law reform by legislative action. The Committee on Professional Ethics of the Florida Bar Association, however, has expressed the social importance of lobbying more eloquently than I could. The committee stated in an opinion published in the *Florida Bar Journal* that:

. . . [W]e are immodest enough to believe that participation of lawyers is an indispensable element in legislative activity, and that our brethren who have so participated have in overwhelming measure brought honor to our profession.

The lawyers who work for legislative reform in the Legal Services Program are doing nothing more than American lawyers have been doing for their clients for many years. And they

hope to bring as much honor to our profession as their colleagues have brought during their service to the public.

Lobbying, law reform and the community education by attorneys are three aspects of legal services that have been most questioned by critics of the program. I suspect, however, that these specific criticisms do not capture the deepest sense of the bar's misgivings about the program.

It has been suggested that that deeper sense is financial—lawyers fear that legal services programs will take business away from them and their colleagues. But if the financial argument were the only one, it would have been answered long ago by the stream of statistics that demonstrates a vast increase in business for private attorneys in almost every location in which legal services programs are instituted.

I do not believe the financial argument is the crucial one. I suspect, on the contrary, that the real thrust of the criticism is simply a deep and philosophical conservatism that is profoundly suspicious of any program as new as this one. It is the belief that America has survived for 200 years without any program of federally financed legal services for poor people, and that none is necessary today. It is the conviction that the gradual expansion of legal aid has been sufficient to deal with the problem, and that even if it were not, private charity and not public programs should be expanded. It is the love of America and its institutions, and a deep concern over any modification of those institutions, that leads conservatives to doubt the wisdom of this program.

I share with you that concern. I know that a federally sponsored program of legal aid seems to be a radical innovation in our society, and I know, better perhaps than you do, that our program in fact is new in many ways. As a lawyer, I also know that institutions develop gradually, and that slow change is often the best change. For that reason, I ask the same questions you do about the wisdom of our program.

But when I have asked these questions, I have not been able to conclude that the mere fact of newness is sufficient to make our program suspect. Indeed, I believe from a conservative point of view, that this program is desperately necessary for our society, for without it, we run the risk of vastly greater social turmoil

than we could ever cause by spending money to represent poor people in the courts and legislatures of the United States.

Is this a conservative position I am taking? I feel it is conservative in the most profound sense of that word, for it is designed to conserve all that is best in our society and our institutions: our system of adversary justice, which can never work unless there are real adversaries; our system of judicial determination of disputes, which can never work unless the people have confidence in the courts and the legal system; and our system of representation by counsel, which cannot be made to work if one party has no counsel.

The United States of the 1960's is not the United States of 50 or even 25 years ago. The poor people are no longer willing to put up with injustice; it makes them want to tear things down. Increased education, the jobs and money made available by our booming economy, the civil rights movement, and a large body of social legislation enacted over the past 30 years have given the poor an awareness of their position and a desire to express themselves that they have never had before. And at the same time, these facts have made the rest of the country aware of, and given them a feeling of responsibility for, the welfare of the poor.

America of the 1960's is no longer a country in which a stern lecture and a reprimand will return a whole population of immigrants back to the sweat shops to redouble their efforts to get rich. Today the poor, and especially the racial minorities, have suffered too long and too severely to quietly accept further oppressions. Fifty years ago, the voice of the age said, "The public be damned." Today, that voice cries out from the centers of the great cities of America with different words. It now is accompanied by a torch, and it shouts forth, burn baby burn.

We in the United States are faced with great social turmoil. That turmoil will not be dissipated by oppression; as Edmond Burke, the great English conservative said, "Freedom and not servitude is the cure of anarchy, as religion, and not atheism is the true remedy for superstition." The Legal Services Program offers to poor people an opportunity to resolve their grievances against society—and to them society is the welfare department, the loan shark, and the crooked storeowner—in the way that other Americans have always solved their grievances: in the courtroom, quietly, without fanfare. It offers to poor people, in effect, a way to join

our society, and to benefit from the institutions, we have developed over a thousand years—a way to participate in institutions from which poverty has heretofore excluded them. I have said that the Legal Services Program seems radical on the surface. But is it really radical? Who is changing, our society or the poor people?

I suggest to you here today that the effect of the Legal Services Program is to change the poor people by bringing them into our society, and to leave our society and our essential institutions intact.

If it is possible in 1968 to invent a more conservative approach to the problems that face our country, I would like to hear what it is. The absence of a worthwhile answer to that challenge probably accounts for the broad support the Legal Services Program has received from conservative, as well as liberal, members of the bar. I submit that every member of the bar, conservative and liberal alike, has reason to embrace this program and that every citizen of this nation, conservative as well as liberal, has reason to pray for its success. It is our last, best hope to achieve essential change within a framework of law and order and to preserve law and order amid the turmoil of a tide of rising expectations.