

National Consortium on Racial and Ethnic Fairness in the Courts

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The promise of equal justice

There is no greater challenge confronting the Courts today than the challenge of equal justice. The American legal system promises equality. Since the beginning of the Republic, we have proudly claimed, what John Adams urged, to be “a nation of laws, not men.” Evidence of this promise appears throughout our founding documents. The Fifth and Fourteenth Amendments to the United States Constitutions guarantee equal protection of the laws and due process. The edifice of the Supreme Court reinforces the aspiration. “Equal Justice Under Law” is proudly inscribed above the entrance through which each must litigant pass on their way to the Court chamber. Even the Pledge of Allegiance promises “liberty and justice for all.”

Sadly, however, for far too many, this great promise remains a hollow one. The courts are often perceived as distant and remote institutions that are unavailable when needed and ordinarily hostile to the interests of the average person. Most people living in poverty are exposed to the courts only when the system is being worked against them: their landlord seeks an eviction, a business seeks to collect a debt, or the State seeks to take their children or expose them to criminal penalties. In those matters, far too often, Oliver Goldsmith’s cynical observation is a reality: “Laws grind the poor and rich men rule the law.”

The Unavailability of Counsel is Effectively the Denial of Justice

While our democracy is founded on the ideals of equality and fairness, those ideals are realized only to the extent that the least powerful in our society have effective means to enforce them. Courts are important, although not exclusive, guarantors of these rights, yet our judicial institutions are largely beyond the reach of most persons living in poverty.

Our legal system is designed for lawyers. Substantive legal principles and procedural rules are often complex and interrelated in ways not obvious to those not trained in the law. While there are courts with relaxed rules designed for unassisted litigants -- such as small claims court -- they are of very limited jurisdiction. In most cases, it is nearly impossible to negotiate the system to resolve the simplest matter without a lawyer.

The legal needs of persons living in poverty are immense. Poor persons are more likely to encounter the legal system in cases where the stakes are high than persons of means. The legal cases involving the poor are most often about their ability to remain in

their home, their right to maintain an income or to keep their family together. Despite a growing sensitivity by the bench to *pro se* litigants, the laws and rules are simply not designed to accommodate an untrained advocate. Certainly, no person who can afford counsel would ever go into the courtroom unassisted if the outcome of the case could result in the loss of a home or the removal of a child from the family. Poor persons should not be required to do so either.

Nationally, approximately one half of poor and moderate-income families experience a legal problem each year. A national network of civil legal services programs struggle to meet their needs. The Federal government dedicates approximately \$336 million to provide legal services to the nations poorest 31 million residents. Approximately \$1.5 billion is available for civil legal services from all sources, public and private. This sounds like a lot of money until it is placed in context of the legal industry. Total law firm revenues exceed \$175 billion each year. Legal Services for the poor make up less than 1% of the industry, while servicing nearly 15% of the population. To put a finer point on it, there are at least a half dozen DC firms who by themselves bring in gross receipts in excess of the entire national network of legal services programs.

To get a sense of the disproportional distribution of legal talent, we need not look past the District of Columbia. Of the 76,000 members of the DC Bar, 30,000 of whom are local to DC, approximately 100 work for a legal aid organization-- far too few to adequately serve the 110,000 potential clients who might require legal representation.

The disproportionate allocation of resources is not just limited to the bar. Courts as well treat the issues of poor litigants differently than the issues of those with means. Cases involving poor and unrepresented litigants are heard hastily in overcrowded courtrooms plagued by crowded dockets. Contract and tort cases with any significant amount of money at stake are given a different treatment. Time is set aside to ensure that the litigants have the opportunity to present their case.

Lawyers matter

Chief Justice William Howard Taft, wrote in 1926:

[T]he real practical blessing of our Bill of Rights is in its provision for a fixed procedure securing a fair hearing by independent courts to each individual. . . **Something must be devised by which everyone, however lowly and however poor, however unable by his means to employ a lawyer and to pay court costs, shall be furnished the opportunity to set fixed machinery of justice going.**
(emphasis added)

In the 80 years since Justice Taft wrote those words, the mechanism he urged to provide counsel does not exist. The consequences of the failure to heed his urging are

played out every day in every court across the nation. The result is that persons living in poverty are routinely denied their most basic rights.

The unavailability of lawyers to represent tenants facing eviction is an oft-cited problem here in the District and around the country. It is a useful example of the consequences of the denial of counsel because it presents this issues in the starkest possible light and in a context in which the disparity in the quality of justice dispensed is easy to grasp. Housing court is a useful example as well because the issues at stake are of such great moment to the tenants involved.

The District's situation is not atypical. Nearly 50,000 cases are filed each year in the landlord and tenant branch of our Superior Court. Eighty-five percent of landlords have lawyers, but fewer than 1% of tenants are represented by counsel.

One might question whether the presence of a lawyer would make a difference. Do tenants actually have a defense or would a lawyer merely be form over substance? A recent study of the Housing Court in New York City found a dramatic difference in outcome between represented and unrepresented tenants. Attorneys were randomly assigned to litigants and compared to an unrepresented control group. The researchers found that the rate of entry of judgment was reduced from 52% to 31%, warrants of eviction were cut nearly in half and defaults dramatically reduced. Most significantly, 18.8% of tenants with a lawyer obtained a stipulation for an abatement of rent while only 3.2% got one without counsel and 45.9% of tenants with a lawyer obtained a stipulation requiring repairs while only 28.2% of unrepresented tenants were able to reach such an agreement.

These statistics are confirmed by the daily experience of poverty lawyers who practice in the landlord and tenant court. Every day legal services lawyers prevent the eviction of families that would have been put out on the street without counsel. As one client succinctly noted: "With Legal Aid on my side, the judge was able to see the truth. The system finally worked for me and my kids."

This point was addressed in the family law context by Judge Cathell of the Court of Appeals of Maryland when he wrote his concurrence last year in *Frase v. Barhardt*:

While I certainly cannot speak for the individual judges of this Court, it is my belief that there is no judge on this Court that believes in his or her heart or mind, that justice is equal between the poor and the rich - even in the tradition hallowed halls of our appellate courts. Each of us knows, I believe, that an unrepresented parent involved in the appellate process in respect to custody, visitation, or parental termination issues, when opposed by competent counsel for the opposing party (sometimes opposed by an organ of the State with its legions of lawyers), is normally not afforded the equal protection of the laws, *i.e.*, an equal

access to justice to which all citizens are entitled - in spite of the efforts of this Court to afford that equality. With the constraints of the adversarial court system, and the prohibitions it (and our cases) place upon judges not to assist either side, the poor, unrepresented parent faced with experienced counsel on the other side is at a great, system-built-in, disadvantage.

Lawyers are not enough to make equal justice meaningful, Court procedures must change as well

While improving access to lawyers is an indispensable element of making justice equal for all, by itself it is not enough. Administrative agency and court procedures must be changed to accommodate the realities of life of very poor litigants. Barriers to access that daily deny poor litigants the opportunity to be heard and to have their disputes fairly resolved often include neutral features of the operation of the court.

Something as simple as the way that the Court manages the scheduling of hearings can have a profound effect. It is often not easy for a poor litigant to attend court. Transportation can be difficult and child-care hard to find. If the litigant is working, it is often in a low-wage job with little or no paid leave and a boss that might well be unsympathetic to the needs of the litigant to attend court. Litigants who are forced to wait all day to resolve a simple matter, are required to return multiple times or required to file separate actions to address related disputes are sometimes forced to settle unfavorably or to abandon their rights. A tenant sued for possession may give up her right to claim a defense of housing code violations because she cannot wait the hours it takes just to meet with the judge to get a court date for some point in the future in when she might be able to present her defense.

In my office, a recent case powerfully illustrated this point. A woman who had been a victim of domestic violence sought our help. After having secured temporary relief, the case was set down for trial on a permanent order. Trial was continued at least three times. One continuance was the consequence of weather. But on two separate occasions, the case was set for trial, the client and witnesses prepared, all concerned wait for hours at court, only to have the Judge tell them that she cannot hear that case that day and to come back another time. After seven months, the client gave up and abandoned her case. Her decision was influenced not only by the burden of the logistical arrangements, but the emotional toll of preparing for trial only to be sent home with the matter unresolved. This was a litigant with a lawyer. Imagine what would have happened to her had she been unrepresented.

Speed, as well as delay, can obstruct equal justice. The most troubling observation of a recent study of the Chicago housing court was the speed at which justice was dispensed. After having observed hundreds of cases, the researchers found that the average trial lasted between one and five minutes. Such haste to reach a decision, not

only risks reaching the wrong result, but undermines the faith that the parties have in the integrity of the system.

Other barriers include technical or complex pleading rules and the maze of Court processes. Something as simple as an application for status as *in forma pauperis*, if not made simple, can be an impossible hill to climb. Just to get a case filed IFP, a litigant might be required to obtain a form from a clerk, have it notarized in another office, and submit to examination before a judge who may, or may not be assigned to their case. Compounding the litigants' confusion, the standards to grant or deny the request are often vague and the exercise of judicial discretion without transparency.

While enormous progress has been made to reduce language barriers and to improve cultural competence -- largely as a result of the work done by the National Consortium and its members -- problems still exist. While interpreters are much more readily available in Court proceedings where there are large language minority communities, many areas of the country have not implemented effective programs and quality continues to be uneven. Moreover, administrative agencies, which often adjudicate disputes involving poor persons, are rarely linguistically accessible.

There are programs that work

A remarkable program here in the District shows the power of an innovation that accommodates poor litigants. Domestic violence is a severe and persistent problem in the District of Columbia. In 2003, 6,050 persons sought services from the Superior Court in connection with an incident of domestic violence. Nearly 4,200 of these persons sought a civil protection order.

While domestic violence affects all classes of women, women living in the District's poorest communities are disproportionately victims. The District is divided into eight wards. The most easterly wards, Wards 7 and 8, are the most economically depressed and experience the highest levels of poverty. Those wards also produce the highest number of domestic violence cases. More than half of all contacts with the court regarding domestic violence came from women living in these two wards (Ward 7 had 918 contacts and Ward 8 had 2,015 contacts).

Wards 7 & 8 are also among the most geographically separate parts of the District with the least access to convenient public transportation. Located across the Anacostia River, served by a single subway line and a network of busses, it can be a burden for a violence victim to travel downtown to go to Court. The already powerful forces preventing women from getting protection, such as a controlling violent partner, economic dependence, and child care are compounded by the practical challenge of a lengthy trip across town.

To address this need, the Court established a Domestic Violence Intake Center in the heart of Ward 8. The Center is truly a one-stop shop. The Superior Court, Metropolitan Police, Office of Corporation Counsel, the United States Attorney and non-

profit service providers work together at the site to ensure that women who are experiencing violence can access the constellation of services they need, and through a video link up, they can obtain a temporary protective order.

According to statistics maintained by the Clerk of the Superior Court, the Center has had the expected effect—women who would otherwise have been unable to obtain services can access them at the Southeast Center. The Center is now just over a year old. In 2002, approximately 4,900 domestic violence victims sought services from the Court and in 2003 that number jumped to 6,050. New filings for civil protection increased by 8%. The only material change that can explain the increase was the creation of the Southeast Center, which served 1,442 persons in 2003. While some women who would have gone to the main courthouse accessed services at the Center, many who were served at the site would have been unable to get help had the Center not been there.

Meaningful Access to Counsel is a Racial Justice Issue

Increasing access to counsel in civil cases and reform of court procedures to facilitate self-representation is a meaningful part of the effort to ensure that the courts are free from racial and ethnic bias.

Despite the very important work done by many here at this conference over the last 20 years, institutional racial bias continues to plague the legal system. Every day, lawyers working with persons living in poverty meet and often overcome the structural imbalance and petty insults that are a pervasive part of the administrative and judicial systems that work with the poor. This bias is often subtle and difficult to quantify, but it is oppressive nevertheless. The more frequently that advocates test bias, the sooner it will be eliminated.

The hidden nature of this bias was the subject of an interesting study of racial attitudes in Philadelphia legal proceedings. After extensive interviews, focus groups and case studies, the researchers concluded: “For U.S. lawyers comfortable with the cultural assumptions of the legal system, it is hard to prove that the workings of the legal system can be discriminatory when on the surface the laws are not. . . [S]uch injustice may be hidden in the unrecorded and often unofficial stages of the process, where few lawyers have been trained to look.” This point illustrates the importance of having attorneys and advocates on the staffs of legal aid offices that are from the communities being served.

The work of legal services lawyers is, in part, the struggle for racial justice. Racial minorities are disproportionately subjected to poverty and thus disproportionately suffer the impact of a lack of meaningful access to justice. The consequences that flow from the denial of representation -- such as an avoidable eviction, unnecessary family instability or the improper loss or denial of an income -- further exacerbate economic inequality and perpetuate racial disparities in income, wealth and social status.

Law applied in an unequal fashion tends to obstruct the ability of the poorest and most economically disadvantaged to accumulate the wealth that is necessary to move out of poverty. It is expensive to be poor. Poor persons pay a premium for everything they do. The lack of a steady income results in frequent shut offs of utilities and costly fees to re-initiate service. Inner city groceries are more expensive and provide fewer options than big box stores in the suburbs. Credit through pay-day lending, rent-to-own and from sub prime lenders is often at rates that would be usurious in other contexts.

This economic exploitation is compounded by the vulnerability of persons living in poverty to fraud, predatory practices and other abuse. For example, with few advocates available to help, the poor family who is losing a home as a result of an illegally predatory sub-prime loan has no where to go. These cases, often complex to the experienced advocate, are well beyond the reach of the unrepresented litigant. The result is that what little equity that might exist is lost and that family sinks deeper into poverty.

The loss of accumulated wealth need not be the result of malicious motives. Here in the District wealth is being drained each day out of poor, largely African American communities to the benefit of wealthy, largely White individuals through the operation of our property tax and probate systems. It is not unusual for a low-income family to have acquired a home decades ago when an hourly wage-paying job could support a modest mortgage in the District. The generation that purchased these homes is now dying. These homes are passed down, often informally, to the child who cared for the parents in later years. Title is never properly transferred. Because many of these homes are in transitional neighborhoods, speculators watch them like vultures, swooping in to buy them at the first default on taxes. As a result of a confused title and an inability to negotiate the system, often these homes are lost together with their equity, and developed for purchase by high income, often young, often White city dwellers.

The equity in that house, especially in a neighborhood of rising property values, represented a real opportunity for that African American family to move from poverty. It was lost for no other reason than the complexity of the legal process and the unavailability of lawyers to provide help.

Equal Access is a Necessary Component of our Civil Justice System

The crisis in equal justice is so pervasive and so long standing that we largely fail to note its existence. The promise of equal justice is so often made and so often falls short that we have become immune to the harm created by the gap between doctrine and reality. To a large degree, the profession has grown used to, and comfortable with, the fact that the quality of civil justice that a person receives depends on what she or he can afford.

This gap, however, is not lost on our clients and neighbors. The difference in justice and lack of transparency in proceedings breeds mistrust and undermines the authority and integrity of judicial decisions. Where litigants do not feel that they have been treated fairly, they will view judicial decisions as arbitrary.

To make our civil justice system fair, we must renew our commitment to equal justice. That may mean a dramatic increase the availability of lawyers for the poor. This is neither a new nor a radical idea. It is the core principle of the federally funded Legal Services Corporation. Its origins are, however, more ancient and found in the *Magna Carta*: “To no one will we sell, to no one will we refuse or delay, right or justice.” In 1495, King Henry VII required that attorneys be appointed for poor persons. He promulgated a statute that provided: “[T]he Justices . . . shall assign to . . . poor . . . persons, counsel learned by their discretions which shall give their counsels nothing taking for the same.”

Unfortunately, these principles were not, as a practical matter, imported into the American jurisprudence with the founding of the republic.

The United States lags behind the rest of the industrial world in its commitment to equal justice

The United States stands alone in the industrialized world in its lack of commitment to civil legal aid for the poor.

England has for centuries had a system to provide counsel in civil case, France and Germany enacted the right in the mid-1800’s, the Swiss found the right in their Constitution in the 1930s, and Canada, New Zealand and Australian have provided attorneys to the poor as a matter of right for decades. The European Court of Human Rights found that it is an obligation imbedded in the European Convention and applies to each signatory. The Court concluded that the right to a “fair hearing” by definition included the right to counsel in certain civil cases. The Court went on to point out that fairness may require more than that the State remove barriers by getting out of the way, but that positive action might be required. The Court wrote” the State cannot simply remain passive and there . . . is no room to distinguish acts and omissions.”

The nations mentioned above, while they have far lower rates of poverty, spend far more on legal aid for the poor. England spends ten times per capita what is spent in the United States, Canada and Sweden spent three times as much and Germany and France more than twice.

The denial of equal justice must again be part of the public debate

As we venture deep into this electoral season, I am struck by how small a role equal justice plays in the political debate. At this conference, we are looking back 50 years to the landmark decision in *Brown v. Board of Education*. Forty-one years ago, Martin Luther King, on the steps of the Lincoln Memorial, delivered his “I Have a Dream” speech. Dr. King gave America a vision of racial equality. He also gave us a vision of equal justice – justice that includes everyone on equal terms. He spoke of a promise made to every citizen, of a “sacred obligation” of fair and equal treatment. Dr.

King compared this obligation to an unpaid check, a check that must be paid because “we refuse to believe that the bank of justice is bankrupt.”

The same year as Dr. King’s great speech, in *Gideon v. Wainright*, the United States Supreme Court recognized what Justice Black called the “obvious truth” – that in a criminal case the average person could not get a fair trial without “the guiding hand of counsel.” The denial of a lawyer, the Court concluded, was the denial of a fair trial.

In that time and political space, access to civil justice on equal terms also was an issue on the front burner of the political debate. In a speech before the National Legal Aid and Defenders Association in 1962, one politician who aspired to become president, spoke these words:

As lawyers, our first responsibility is, of course, to see that the legal profession provides adequate representation for all people in our society. I would suggest there is no subject which is more important to the legal profession, that is more important to this nation, than...the realization of the ideal of equal justice under law for all.

Those words, and that sentiment, which are completely absent from the campaign for President on going today, were spoken not by Eugene McCarthy, not by Hubert Humphrey, not by Bobby Kennedy, but by Richard M. Nixon.

As I prepared these remarks and looked for inspiration, I found a somewhat older political source. The Lord Chancellor of England, Henry Peter Brougham, in 1845 wrote:

It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence.

It is time to hear those kinds of words in our political discourse.

Conclusion

There is a real crisis which demands an urgent solution. A solution, however, will be difficult. For the last 20 years, we have seen aggressive attacks on federal Legal Services Corporation funding. In that context business and farming interests have gone to extraordinary lengths to ensure that poor people do not have lawyers. The politics within State Bar Associations and with the courts will also be complicated. Some will

fear mandatory *pro bono*, others will argue that it is the responsibility of government, not members of the legal profession to provide help. Reducing language and physical barriers will not be cheap.

We must not be discouraged by the magnitude of the task. There was a time not long ago when many argued that it would be impossible to provide counsel to every indigent criminal defendant facing jail time. The Supreme Court forced the profession to change its thinking with *Gideon v. Wainwright*. A similar paradigm shift is required so that we can ensure that counsel are available for equally devastating events such as the loss of a home, the break up of a family or the denial of a meager income necessary to sustain body and soul.

Untempered by sufficient resources to ensure equal and meaningful access to justice, our legal system has become so brittle it is reaching a breaking point. It is as important today as it has every been in our history to heed Judge Learned Hand warning: “If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”