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COMMENTS ON
“AFTER LEGAL AID IS ABOLISHED”
BY GEOFFREY C. HAZARD, JR.

*Frank Rosiny**

Geoff and I agree that “We ought to be much more serious about legal aid for the poor.” There is—to borrow Geoff’s phrase—“greater urgency to . . . make procedural justice a reality”; but not for the reasons Geoff has advanced.

The urgency derives from an ever-increasing awareness of the widening gulf between those whom our society has blessed with its abundance and those who have too little.

Think of it . . . as Roy just mentioned . . . yesterday, the Dow closed above 9,000. For the first time in recent memory, the federal government is projecting a surplus. Yet, 13% of our population continues to live in seemingly intractable poverty. And, still, we cannot find the price of two B-1 bombers to provide them with adequate legal services.

Geoff’s initial reference to *Brown v. Board of Ed.* struck a responsive chord because I was in the South shortly after that case had been decided, and I know first hand how far we had to go in order to secure in practice the theoretical rights announced by the Court.

It took many years . . . years which saw much violence, pain and courage . . . to realize those ideals . . . and the job is not yet done. You may recall some young men from this area who gave their lives in Mississippi for those ideals—that was 10 years **after** *Brown v. Board of Ed.* They were also years in which the lower courts—both state and federal—were repeatedly asked to fill in the gaps left by the Supreme Court’s pronouncements . . . or to translate those constitutional principles into concrete results at the local level—the level where all of us live.

Without that kind of local implementation, the Supreme Court’s decision in *Brown v. Board of Ed.* could have remained as meaningless as the assurances of personal freedom in the Soviet Constitution.

It is essential to the proper functioning of our democratic system that the poor and disadvantaged have meaningful access to the courts in

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order to prevent the abridgement of their constitutionally ordained rights by the elected representatives of the so-called "silent majority." Without such meaningful access, those rights will exist only in theory . . . and, for all practical purposes, may in time cease to exist.

We know that there are lawyers among us who will always step forward and volunteer to carry the fight *pro bono publico*. But, because the fight is truly *pro bono publico*, in fairness, and consistent with our democratic ideals, public funds should be made available to them.

Not all injustice makes it to the editorial pages of *The New York Times*. Not every case is *Brown v. Board of Education*. When an indigent person is unfairly threatened with eviction, or Social Security benefits are wrongly cut . . . when he or she can't get adequate medical attention . . . there is a **quiet injustice** that few will ever hear about. And unless we have put in place appropriate mechanisms to address that kind of injustice, we fail as a nation.

By way of illustration, the Social Security laws are very complex. Few private lawyers can afford to take the time to study those laws. Even fewer are equipped to handle the thousands of individual cases seeking restoration of benefits improperly denied. Without such lawyers—supported today by a pittance of public funding—there would be absolutely no check on the excesses of a faceless administrative agency bent on producing a particular bottom line result.

No matter how we may deplore the litigiousness . . . the downright adversariness . . . which has infected our society, litigation still provides the most effective check on the abuses of an indifferent bureaucracy . . . or, worse yet, on those agencies which have been co-opted by the very industries and interests which they are intended to regulate.

Geoff's praise for European administrative agencies and civil law judges—with their power to dispense "law that is . . . legally [or substantively] correct"—is misplaced . . . and particularly inappropriate in light of the present debate surrounding legal services. It is even more disturbing to find such praise a recurrent theme of this conference.

In stark contrast to the independence of our judiciary, with its proven ability to check the excesses of an abusive government, the inquisitorial judges of civil law systems have time and again demonstrated a disappointing tendency to be co-opted by the prevailing party line and have too easily come to function as an arm of executive policy.

The system which Geoff today holds up as a model gave history the same courts that convicted Emile Zola of libel and sentenced him to a year in prison for having written an article protesting the unjust conviction of Alfred Dreyfus. Have we forgotten so quickly the Moscow show

trials of the 1930's or the civil law judges who spit out their venom on the hapless victims of Nazi oppression?

To characterize such abominations as the excesses of what Geoff refers to as "bad states" is too facile. It ignores the extent to which the judicial infrastructure failed to prevent—or actually abetted—the conditions which made these states "bad."

I submit that, in America, we can have both—due process and legal correctness—but without meaningful access to the courts, we will have neither.

Also troubling is Geoff's statement that "public subvention of partisan advocacy contradicts a principle of democratic equality." Rather, I would say that partisan advocacy might have that effect where, for example, it achieves more than the constitution or the laws of the land are intended to secure for its clients. But where such advocacy does no more than secure for its clients that to which they are lawfully entitled, there is no contradiction. The principle of equality before the law requires that the rights of all—rich and poor—be protected. The protection of those rights does not "contradict a principle of democratic equality," it defines the very essence of our democracy and its assurance of equality before the law.

Geoff says that "the concept is that participation [in legal disputation—or litigation] will, of its own force, yield satisfactory dispositions—that is, dispositions whose content will not require further examination by anyone in a position of responsibility." However, that is not "the concept" and—as our recent experience with the LSC litigation demonstrates—such a concept does not reflect the way our system works.

The current unhappy mess in Legal Services began with Congress serving up the 1996 Budget Act. That Act and the interim LSC regulations which it spawned were contested in the courts, which provided some measure of relief. The LSC then created new regulations to implement the Budget Act in a way which it purports to be in conformity with the judiciary's interpretation of the Constitution's mandate. Once again (albeit without immediate success), those regulations were attacked in the courts. So it is that the process continues to swing from Congress to the courts . . . to the agency . . . back to the courts . . . and, most assuredly, it will go back to Congress.

Advocacy is not all good or all bad. There is good advocacy and bad advocacy. There are worthy causes and unworthy causes. And, certainly, effective advocacy does not always produce the best judgment or fairest

result. But, the process is rarely ever at rest and is subject to continual reexamination.

Geoff's historical review of legal aid in terms of supply and demand neatly sets the stage for what seems to be a kind of zero-based budgetary analysis of what would happen if public funds were suddenly denied.

However, given the exigencies which presently beset the Legal Services Corporation, rather than accept Geoff's challenge to engage in a kind of zero-based budgetary analysis of public subvention for legal aid, perhaps, we should begin to think in terms of striking a better balance.

In the present context, few of the contestants are searching for compromise or common ground.

But, as people of good will, we know that all conflict should be resolved, and as good lawyers, we ought to be able to find the means to do it.

The greatness of our society . . . the hope and promise of our nation . . . lies in the **mix** of private and public institutions. No one side—whether public or private . . . no single branch of government—whether legislative, executive or judicial . . . can be depended on to the exclusion of all others.

Neither side of the debate has all the answers. Neither side owns the truth. But both must begin to work toward a solution . . . if we are to advance as a civilization worthy of the name . . . if we are to move closer to our democratic ideal of social justice.

History teaches us that the processes of our government are cyclic and pendular. Extremism begets extremism . . . but, in time, because we are a free and open society, protected by an independent judiciary and bar, moderation will one day prevail.

Let us work to speed the coming of that day by thinking in terms of how each interest can accommodate the legitimate concerns of the other.