

1-1-1999

Response to Should the Government Fund Legal Services - If So, What Should the Lawyers Do

Michael Horowitz

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/jisle>

 Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Horowitz, Michael (1999) "Response to Should the Government Fund Legal Services - If So, What Should the Lawyers Do," *Journal of the Institute for the Study of Legal Ethics*: Vol. 2 , Article 31.

Available at: <http://scholarlycommons.law.hofstra.edu/jisle/vol2/iss1/31>

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Journal of the Institute for the Study of Legal Ethics by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

RESPONSE TO “SHOULD THE GOVERNMENT FUND LEGAL SERVICES? IF SO, WHAT SHOULD THE LAWYERS DO?” BY JONATHAN A. WEISS

*Michael Horowitz**

OPENING STATEMENT

John and I may be the luckiest members of our law school class of all-stars—some of whom sit in the Cabinet, others in Congress, others as law school deans, still others as corporate titans, with many wealthy beyond the dreams of avarice. Whatever our classmates may be doing, however, few have had the freedom that John and I enjoy to indulge our consciences and to pursue our visions of principle and equity. As an iconic figure who for more than 30 years has committed himself to helping the poor with devotion and profound integrity, John is the most decent, the luckiest of us all.

As John would be the first to say, however, his selflessness and personal integrity should not be sufficient to carry this afternoon’s debate. He would be the first to insist that his redistributionist vision for the poor must be effective and serviceable, must stand the critical test of whether it actually works. I know that he will likewise insist that the Legal Services Corporation—to which he has devoted his career— must prove its worth to the poor by means other than feel-good rhetoric.

I’m here this afternoon because I think that John’s vision, although held with honesty and integrity, has for the most part been strategically mistaken. I believe that the reach of John’s vision for the Legal Services Corporation and the legal system—one broadly shared in law schools and amongst legal elites—has badly exceeded its grasp. I believe that what may fairly be called the Legal Services Corporation vision has helped create a crisis of confidence in the legal profession that is broadly and increasingly shared by the American people. I believe that the utopian character of this vision has—as ever with utopian visions—caused its proponents to be tragically unaware of the negative effects they have had on the very people they sought to assist. In establishing rights

* Senior Fellow at the Hudson Institute in Washington, D.C. and director of the Hudson Institute’s Projects for Civil Justice Reform and International Religious Liberty.

regimes, in seeking to constitutionalize public policy decision-making, in its often undemocratic pursuits and in its often unrealistic assessments of what lawyers are capable of achieving, the Legal Services Corporation vision has often hurt and frequently devastated the poor.

Let's begin with the due process rights regime that the Legal Services Corporation has had considerable success establishing. Much of that legal revolution—and it has been nothing short of that—has in my view been based on patronizing views of the poor and their needs, based on a sense that a caring elite of lawyers is needed to reduce the authority and discretion of the local officials who run the public institutions on which poor people and their communities are obliged to rely. In establishing constitutional norms to govern decisions (ranging from suspensions and expulsions from public schools to evictions from public housing, from the rights of squeegee men to the manner in which police can patrol the streets) the procedural due process rights regimes that John and his Legal Services Corporation colleagues worked so hard to establish have transferred massive powers from local officials to lawyers and the courts—and have done so across a broad range of public policy fronts.

And with what results? While wealthy and middle class people summarily evict next-door neighbors who play the piano too loud, it now takes major efforts, often against great odds, before dope dealers and violent sociopaths can be evicted from the public housing projects in which the putative beneficiaries of the rights revolution live. (That achieving the evictions requires reliance on habitually indifferent and often less-than-competent Housing Authority lawyers further compounds the problem faced by the law-abiding tenants whom Legal Services Corporation lawyers almost never represent.)

Our crowd of upper middle class types insists on summary suspensions of *potential* school troublemakers by the heads of the private schools to which our kids go, even as the rights revolution has often given near-tenured status to wildly disruptive children who profoundly debase the learning environments of urban public schools. In the malls in which upper middle class kids congregate, intense behavioral regulation takes place through private, contract-based codes of conduct issued by shopkeepers and enforced by the security guards they employ. But, conversely, thanks to rights regimes said to have been established by Legal Services Corporation attorneys for poor people, cops walking the beats of mean city streets risk personal liability lawsuits for merely asking menacing loiterers to identify themselves or move on. We rights establishers get warm feelings in our bellies for establishing and constitutionalizing the rights of ghetto residents *vis-à-vis* the public institutions

on which the poor have no choice but to rely precisely as we and our families have fled from the very public institutions that we have subordinated to lawyers, lawsuits and legal codes. We rights establishers insist on defining the outer edges of permissible conduct in the communities in which we live through contract regimes that we establish by and for ourselves. The highly legalized constitutional regimes we have imposed on poor communities are regimes we wouldn't dream of living under.

With such notable exceptions as saintly utopians like John Weiss and cloistered men of integrity like Justice Brennan, a powerful measure of hypocrisy has also animated much of the rights revolution. What Fred Segal has called the "moral deregulation" of the rights revolution and what Mary Ann Glendon has described as the "radical, personal individualism" that the rights revolution sought to enshrine as the preeminent constitutional norm had its roots in 60's and 70's efforts of middle class lawyers to loosen *their* felt bonds of Victorian constraints. Wanting greater sexual freedom, greater cultural freedom, greater escape from our grey-flannel-suit worlds, we "gifted" the poor with community institutions lacking in authority to restrict behavior and conduct. Of course, we had private institutions, money, education, family and hard-wired, internalized value systems that provided safety-net protection for us when we "dropped out" to challenge prevailing values or public authorities. Moreover, the "challenges" that our dropouts posed to the prevailing values of our communities generally took the form of louder and looser clothes, home drug use and consensual sex. The poor, on the other hand, in whose name the rights revolution was "won," had nothing to turn to when our anti-communitarian, asocial revolution turned mean for them—as it did in spades. America's poor people in distress were left with us—the very lawyers who had undermined the viability of their schools, homes and neighborhoods, the very change agents who had turned local officials into limited-authority, risk-averse figures lacking in any real capacity to exercise community leadership.

When I was a member of the Reagan Administration, I met with the handful of ghetto school principals who were actually producing first-rate educations for their students—and were doing so without baseball bats or resorting to violence. They were extraordinary men and women who had magically rescued seemingly hopeless institutions and turned them into effective places of learning. I remember one of the principals who, at a meeting with President Reagan, profusely thanked him for raising the school discipline issue as a matter of serious national concern. (The thanks were much deserved, for President Reagan had been

viciously attacked as indifferent to poor urban children, as seeking to distract attention from the need to give more federal dollars to public schools, when he raised the school discipline issue.) The principal said: "You could have poured a billion dollars into my school when I took it over, and it would have been like pouring money down a rat hole. But I instituted dress codes, suspended kids for not doing homework, insisted that behavioral standards be met. Now I've got long waiting lists of kids trying to get into my school, high proportions of kids graduating, high proportions going on to college." He asked the President: "Want to know why I succeeded?" After the President allowed that he did, the principal responded: "The secret to my success was that the Legal Services lawyers never found out what I was doing while I implementing student codes of conduct that violated all sorts of laws and rules, when I disciplined and suspended disruptive kids." And then he said: "Mr. President the lawyers now know what I'm doing but are not suing me. Do you want to know why?" The President said that he did, and the principal answered: "Because my community would lynch them if they dared to try." At that remark, twenty or so principals sitting in the White House Cabinet Room, probably the most heroic group of men and women I'll ever be in the same place with, broke into spontaneous applause. There you have it. Heroes educating young ghetto children against all odds, thinking of the Legal Services Corporation, the lawyers and the legal system as principal adversaries, as enemies of the discretion and authority they needed to do right by ghetto students.

Many other stories of this sort can be told. Frank Keating, now the Governor of Oklahoma, was General Counsel of HUD when he told me of a visit he and then-Secretary Kemp paid to a public housing project. At the show-and-tell session conducted for them by residents of the project, they were told that a team of the biggest, strongest, toughest residents had been created to pay late-night visits to the apartments of known troublemakers and to demand that they clear out of their apartments "before the sun rose." The residents completed their report to Governor Keating and Secretary Kemp by proudly telling them that the troublemakers were now gone, that their project had become a nice place in which to live. *Imagine!* Good people forced to become vigilantes and vigilantes thinking themselves as heroes, because the law had become so Dickensian, so blind and hostile to real-world needs and effects, so much tougher on vulnerable poor people than on those who preyed on them, so much a process of utopian abstraction to the comfortable lawyers and judges who created laws that governed everyone but themselves.

There's a second element to the revolutions wrought and the further revolutions sought to be wrought by John and his Legal Services Corporation colleagues. In addition to its disempowerment of local community officials, and replacing them with our distant selves as the community's real decision makers, the legal revolutionaries sought and seek to use the courts as engines of massive public spending and massive income redistribution. Their belief in this regard was articulated by one of the speakers at today's conference who commented that the problem with the poor in America is that they don't have enough money. That "cute" comment, that trite reductionist view has been an animating belief of the legal rights revolutionaries—and it couldn't possibly be more wrong. I can't imagine a more simplistic, tragic view of the needs of the poor than that statement, and yet it nicely captures another real agenda of John and his colleagues—the effort to use the legal/litigation system to achieve non-democratic, legal/constitutional mandates to entitlement-based income redistribution. The same people who see in the Constitution a government not powerful enough to let a public school principal suspend a menacing and disruptive kid see in the same Constitution a government with the power to massively redistribute income, to decide who gets how much money, to ensure income transfers divorced from and unrelated to work.

If government monies and income transfers were capable of solving the problems of the poor, America would be a utopia by now, and poverty would long since have been on the way out if not abolished. In fact—as I can tell you from my experience as General Counsel of the Office of Management and Budget—a generous, caring America has spent more than five trillion dollars—that's five *trillion* dollars—on the poor during the past few decades. Such a sum—five thousand billion dollars—is a literally incomprehensible quantum of resources. Yet during the very period when government expenditures for the poor increased by orders of magnitude, and then some, the bleakness and meanness of life for American ghetto residents likewise increased. Whether social pathology is measured in terms of crime or male participation in the workforce or underclass growth or diminished public school performance, John's income-transfer, value-neutral, resource-based vision has grown hand in hand with tragedy and decline and hopelessness in our poorest communities. Thank heavens that the ultimate vision of John and Charlie Reich and Justice Brennan—their hope of establishing substantive due process rights to income transfers and welfare entitlements—has not been enshrined in the Constitution, has not been

immunized from such democratic adjustments as welfare reform and Social Security reform legislation.

The high watermark of John's vision was Justice Brennan's decision in *Goldberg v. Kelly*. William Brennan, a great man, the most powerful legal figure of the century, a man whose personal integrity matched John's (an integrity not always matched by their comrades in arms) viewed *Goldberg* as his favorite, his most important decision. *Goldberg*, a paean to the virtues of welfare, a constitutional pronouncement that the poor were passive victims with highly limited capacity to alter their fates, was itself based on the most cited and influential law review article of the century, Charlie Reich's *The New Property*. According to Reich, and to John and *Goldberg*, economies are zero-sum processes characterized by government rules that give unearned wealth to the haves and deny it to the have-nots. If, as Charlie Reich believed, most private wealth came from government-dispensed licenses and subsidies, it only seemed fair to see in the Constitution a comparable right of the poor to get their slice of the government-baked pie. At a minimum, said *Goldberg*, if we can't directly create substantive due process entitlements to welfare, let's at least create procedural due process rights that can make it difficult if not effectively impossible to take welfare away once it has been given. The *Goldberg* procedural due process mandates swiftly became the basis of student and tenant and street vagrant rights and a raft of other decisions protecting disruptive behavioral conduct. It was thus from *Goldberg* that the dual Legal Services Corporation vision flowed — the vision of a government that couldn't enforce norms of conduct but was constitutionally required to transfer wealth from those who worked and followed the rules to those who often didn't.

An important part of the above vision was a sort of economic illiteracy that failed to understand the dynamic nature of economies and wealth creation, that failed miserably to understand the productive effects of positive economic incentives and the devastating effects of perverse ones. It was a form of economic illiteracy that assumed that wealth could be created and sustained by the stroke of a judge's pen, or that of any public official. How else to explain the fact that the bulk of John's 30 years of service have not simply been to the poor, but to the *elderly* poor, to whom, in the name of "justice," John would redistribute even more of society's scarce resources? In fact, among the greatest threats America now faces is the fact that too much money goes to and has been promised to the elderly. Unearned Social Security benefits and other elderly entitlements are ticking A-bombs that, unless modified, can undermine our children's prospects, compromise the overall ability of society

to provide resources for health and education, and even significantly reduce society's ability to support safety net protection for the poor. John not only wants to protect current income entitlements of the elderly, but to increase and expand them. Has the Constitution he purports to construe ever met the budget that democratically elected officials now struggle with? Have Legal Services visionaries fighting for higher and higher public school budgets ever checked out the dramatic increases in those budgets that have occurred over the past few decades, and have they noted the lack of meaningful correlation between dollars given to urban public school systems and their actual performance?

Two final points. The Legal Services Corporation vision that John believes in has not only not worked. Its undemocratic practice of resorting to the courts to undermine value systems and to redistribute resources has created a crisis of confidence in legal institutions, if not the rule of law itself, on the part of the American people. When John and I graduated from law school, we assumed that our licenses would automatically translate to leadership roles in American life. This was because, as Tocqueville had written and as Lincoln had lived and practiced, lawyers were seen as helping agents of people who had serious disputes with others. John's anti-democratic vision—his belief in "public" law rather than merely "private" law—often consists of "big case" representations in which clients are the means by which lawyers become free to use their monopoly of access to the courts to advocate *their* visions of social justice. In today's world—where lawyers use clients rather than *visa versa*, where clients are the means rather than the ends of the legal process—most Americans and their institutions flee from our leadership and influence. Economists with sensible cost-benefit disciplines are rapidly replacing lawyers with utopian "rights" visions as our key public policy makers. This is not altogether good or in society's interest, but our overreach, our blindness, our utopian pretensions have brought all this on ourselves. It's our fault that today's law school graduates are increasingly thought of as necessary evils—as is perhaps even the very notion of the rule of law. To the extent that is so, the last three decades of Legal Services Corporation visions and resolutions, and their accompanying law school activism has much to answer for.

Finally, it's not accidental that the most vibrant, dynamic, democratic and productive component of American society—the American middle class, which most poor people aspire to join—are the ones least represented by lawyers. The American middle class makes its own mistakes and suffers its share of injustices, and somehow learns to live with them and move on. To be sure, there are times in many settings when we

all need lawyers, but the worst thing I can imagine would be to extend to the middle class the same right to counsel, with all of its perverse side-effects, that John ever-more widely seeks for the poor. We lawyers are important components of the justice system but, contrary to John's view, more of us and more power to us doesn't automatically translate to greater justice for all. As I look at a legal system and its lawyers who are viewed with increasing alarm by an American public that once profited from placing us at the center of its community and political institutions—as I look at an American society that does without us whenever it can and looks for ways to do without us yet more—I don't think of Americans as dumb or uncaring of others. I see America sending a wise signal to lawyers that bids us to look at ourselves and our excesses, to subordinate our visions of the good to the more limited objectives generally sought by our clients, to trust our democratic institutions more than ourselves as the agents most capable of bringing liberty and justice for all.

FIRST COMMENT

First, John, maybe you didn't hear. The heads of local community housing projects and the tenants they brought with them, the public school parents who came to us, were telling us that Legal Services Corporation lawyers were representing interests contrary and indeed hostile to theirs. Those forgotten clients had the same interests my kids have—to get troublemaking students suspended and disciplined and, if need be, to learn and profit from being the objects of (often imperfect) discipline. These people were not faceless bureaucrats but heroic principals who had moved their schools from the wasteland conditions that most ghetto schools still are in. They were kids whose parents were unable to afford the school choice exercised by wealthy and middle-class Americans, kids who were stuck in the schools to which the educational bureaucracies had assigned them, kids who, against all odds, wanted meaningful high school degrees and rigorous academic programs and access to college. They saw in such educations the means of escape from poverty, and they often saw lawyers like us as their enemies.

As you talk, John, about the wisdom of not trusting anyone and about the need to ensure that no one becomes God, I don't think you realize that as we lawyers protect others from imperfect Gods, that we assume that very role. And inefficient and distant Gods we are—offerors of dollars and abstract rules who are generally clueless about the dynamic natures of the communities we “help” and judge. I lived in Mississippi in the late 60's as a civil rights law professor and saw the

rule of law at its best, as it took on the thugs who sought to use segregationist laws to maintain an artificial caste system, who sought to use it as a barrier to social change. Only a lawyer, with the skewed talent we have to extend truth by analogy well past the point of diminishing return, with the capacity our training often gives us to elevate volumes of logic over pages of history, could analogize the great battle of *Brown v. Board of Education* to an effort to give squeegee men the right to menace motorists and their companion right to a permanent, publicly-funded income. Our hypocrisy should again be noted—we tell ourselves that the rights regimes we produce truly help the urban poor, and do so as we roll up our windows and drive to the suburbs in which we live.

As to Boeing, you've given us another example of reasoning by logic and analogy that extends beyond the point of common sense. The real analogy I see for poor people, John, is with middle class people whom they aspire to join, not to Boeing, an inanimate creature of legal fiction which no poor person can ever "become." I'm for giving the poor the same equivalence under the law that middle-class people have—not total but considerable freedom from the saving ministrations of lawyers—this so that poor children can more easily go to good schools, more often live in orderly communities, more fully learn the value of personal achievement and the price of failing to seek it. I'm for this golden rule principle: Let's not establish legal regimes for the poor that we wouldn't dream of living under ourselves. This, I think, is the critical first step in creating legal regimes that actually help poor people.

SECOND COMMENT

Your point and argument is a good one, John—if poor people are actually like Boeing. If they are, I would agree with you that every poor person ought to have the right to as many lawyers as does each Fortune 500 company. (For the record, I agree with you that many corporations receive unjustifiable government subsidies, and I have fought to eliminate them from federal budgets through political debate and effort.) Your Boeing analogy, John, makes it clear that you think of poor people in the aggregate, as if they were corporations—as if they were undifferentiated cohorts of people on whose behalf great lawyers should be battling for great rights. I think of poor people on a retail basis. I also think that lawyers earned America's trust and respect when we represented people on a retail basis, one at a time.

Quite by accident—surely not because of anything anyone taught me at Yale Law School—I've spent the bulk of my legal career representing individual middle-class citizens. You think of the poor as a mass

cohort, as a political interest group, just like Boeing is. I think of poor people as I did my middle-class clients—cops, firemen, people in difficult divorce proceedings, others that I represented, tried to do well by, made life occasionally better for, for the most part got out of the way of, as they forged their own lives and moved beyond their mistakes and lived their lives free of my helping beneficence.

THIRD COMMENT

I want to correct what may have been a misimpression created by my remarks. If there is any doubt on this score, let me state for the record and flatly acknowledge that there is and has been racism, bureaucratic indifference and profound error in decisions made by mid-level public officials. Of course this is so. My point is that, in establishing lawyer-driven regimes, we've been blind to the downside effects of our empowerment. Sometimes hypocritically, often innocently, we have at times created more problems for the people we've purported to help than those which had existed under lawyer-free regimes.

I see much injustice in not allowing communities to find the resources within themselves to solve their own problems. I see a decline of communitarian ethics when distant outsiders assume ultimate decision-making power over community institutions. I see our interventions as promoting risk-averse rather than creative and accountable public officials, if only because horror and trauma and the sheer time-consuming character of being sued often penalizes the caring officials who stick their necks out.

There's also the problem known to all who play the game of telephone. The legal system issues abstract rules of justice that become very different phenomena in the hands of lower-level legal actors and institutions. However stirring the language of a Supreme Court decision on the rights of students may be, it's a different matter for the hearing examiner and school board attorney at Big-City High whose self-interest, as they see it, is best promoted by telling the principal to leave the troublesome student alone, to give him a stern warning, to let matters go. The high-blown rhetoric of appellate courts often blinds us to what really happens when the rubber meets the road in the systems we administer. And our arrogance often blinds us to the fact that the informal justice meted out by less verbally articulate local officials gets decisions right more often than we imagine. So I, of course, acknowledge that less lawyered systems make mistakes, sometimes big ones, sometimes venal ones. My point is that our disempowerment of community leaders, our constitutionalization of anti-communitarian values that define deviancy down

and treat radical personal individualism as the behavioral norm, our economic illiteracy and our blindness to the devastating effects of perverse economic incentives has often been desperately tragic for the poor.

Let me also get to your question of how to fund legal services for the poor, because I do think that poor people ought to have access to lawyers. I believe that mandatory legal services or reasonable taxes on lawyer incomes represent a fair *quid pro quo* for the right to practice law. In my view, lawyers rather than stenographers and truck drivers should be taxed to provide the *pro bono* services we lawyers are ethically mandated to offer to needy clients who can't afford our customary fees. I also believe that the "free" legal services model of the Legal Services Corporation has undermined fee-for-service legal clinic models that would have offered great promise to the poor—with benefits including greater competition between lawyers, sharp reduction of patronizing *noblesse obligé* attitudes on the part of "public interest" rather than merely fee-paid lawyers, and the greater dignity and control that poor people would have had if they had been represented by lawyers they chose and paid for.

In setting up payment and representation systems for poor people, there's a final issue that needs to be addressed—the need to replicate for the poor the same sort of limited representation that middle-class clients have. Contrary to John's views, there's great virtue in such limited representation. When I represented my middle-class clients, there was a meter running, or a flat fee arrangement that made clear that there was just so much I was obligated to do. Often, what I was paid to do was less than what my clients wanted me to do. I couldn't make a federal case out of every complaint, couldn't fully appeal every adverse ruling, couldn't always raise complex constitutional issues in every landlord-tenant case I took on. When I had a client that didn't want to pay the man the two bucks, I did what I could and often more than I should have done in terms of my own economic self-interest, but my client was ultimately constrained in ways that Legal Services clients often are not. And, you know, my clients were often saved by such limitations. Often, after losing their cases, they actually went on to live their lives, to find different sources of income, and new bases of esteem after our relationship had ended.

My concern is to have something that inherently limits the extent to which lawyers can be used as damn-the-costs instruments of ultimate client salvation, to have markers that limit the use of clients as nominal instruments employed by lawyers to fight lawyer-perceived forms of battles for perceived social justice. Merely shifting the tax mode from the

public to the bar doesn't solve that problem, for if the process of representing clients fails to generate the cost-benefit controls that pricing mechanisms impose, lawyers and legal systems are certain to get out of control. The ultimate objective is to give poor people the same limited access to lawyers, the same let-me-help-solve-your-problem that middle-class people have, rather than the let-me-solve-society's-problems on which John's vision is based.

FOURTH COMMENT

As we close, it's important to note what John and I agree upon. We both believe that the condition of the underclass, the growing hopelessness and pathology of urban ghetto life, is a disgrace to our nation. Indeed, we both believe that America won't survive if we don't ameliorate those problems. Not because we'll be done in by the riots John threatens, but because we will have lost the status that Lincoln once rightly conferred on us—the last best hope of mankind.

Believing this as I do, I think it particularly strange for John to think of himself, and those who share his view, as unambivalent if not singular instruments of dignity and justice for the poor. According to John, if there's more and yet more money for those who share his view, if there's more and yet more power given to him and those who share his desire for lawyers to intervene in resource allocation decisions and public policy decisions, America's quotient of dignity and justice will go up. It is precisely that kind of moral blindness, precisely our inability as lawyers to ask the Pogo question of ourselves and to wonder whether the enemy may not be us, that has caused the American people to increasingly distrust us. Let's look to our own stars. Let's understand that while we often solve problems, we are powerfully capable of creating as many problems as we solve—and have often done so. I have a more limited view of our reach, of what we can do. I have a greater faith in democratic and local community institutions as self-correcting instruments of social policy. I have a very skeptical notion of people who think they are God's chosen instruments. It's for those reasons that I believe that it is a wise American public that has brought about today's crisis of the American legal profession. Unless we change, unless we gain perspective and humility about who we are and what we can do, we lawyers will become increasingly marginalized in American society. This will be a sad development, not only for us, but for a society we once brilliantly served.