

1-1-1999

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Recommended Citation

Horowitz, Michael and Weiss, Jonathan A. (1999) "Informal Debate between Michael Horowitz and Jonathan A. Weiss on Funding Legal Services," *Journal of the Institute for the Study of Legal Ethics*: Vol. 2 , Article 32.

Available at: <https://scholarlycommons.law.hofstra.edu/jisle/vol2/iss1/32>

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INFORMAL DEBATE BETWEEN MICHAEL HOROWITZ AND JONATHAN A. WEISS ON FUNDING LEGAL SERVICES

Roy Simon:

Mr. Weiss, would you like a few minutes to respond to Mr. Horowitz' comments?

Mr. Weiss:

As I listened, I had the feeling I was watching somebody shadow box in the dark. We heard echoes of ideas emerging from a type of time warp. We have not been regaled with these sort of Reagan anecdotes and figures for many years now: trillions of dollars spent, all manner of people coming in with weird stories.

But to whom were we supposed to be listening? We were listening to people that talk to each other inside the Beltway. We were not hearing the voices and viewpoints of the poor, of Legal Services clients. We heard the protests of those in power over the poor, claiming to know about the poor and what they need more than the poor themselves or those who represent them.

The real question is, who plays God? One virtue of our democratic system with its dialectical checks and balances is that we try to stop anybody from playing God. That's what I said earlier. One reason we have our system of checks and balances of dialectical limitations with our governmental institutions is that the Courts provide one forum where people can come and be heard, and administrative agencies provide another where they also should be heard.

I don't trust school principals; I don't trust the people who say, "Oh, if you would leave me alone, how much good I would do. How wonderful I am. Mr. Reagan, please let me do what I want; let me go beat people up; let me throw people out; I know what's right." Mr. Reagan knows what's right; Mr. Horowitz knows what's right; the school principal knows what's right. But others may disagree, and a democracy is supposed to guarantee that they, too, are heard and heeded.

During Mr. Horowitz' discourse I listened in vain to hear what any poor person said. Did any poor person come in and say, "Oh, please, keep those lawyers away from me. Please, don't let me go to court. Please, throw me out of school; please, throw me out of public housing."? No! Poor people, the ones I know, and I've been there for close to

over thirty-three years, come to me and say, "Please help". And I don't think I could or should play God in the controversies in which they are enmeshed.

I don't think I can do that much except try my best to advocate for them and hope it works out. I don't think lawyers can do that much in general. But lawyers are important in this country and we can help the poor. We can help them by acting as lawyers for them. Nothing more. Nothing less.

I wanted to ask you one question. Since you don't like what lawyers have done, Michael, since you don't believe in entitlement, since you don't believe in due process, would you deny all big businesses the right to have these large firms go represent them against government agencies that give them contracts? If, for example, the Defense Department decides to cut off Boeing, would you say, "Oh, we have to worry about the economic allocation of resources, so let's not have any lawyers go there; let's not let anybody protest this decision; once they are cut off, that's it; thank you, Mr. Reagan?"

I'm for a golden rule principle: we ought not establish for the poor the kind of regimes that we wouldn't dream of living under ourselves. That I think is the first step towards truly using the legal system to help the poor.

Roy Simon:

Ladies and gentlemen, particularly for the law students among you. We have a microphone to the right, and we urge everyone to participate.
Professor Silverman:

I find this an increasingly empty debate. Let me explain what I mean by that. It's impossible for me to believe that Mr. Horowitz does not believe that government powers sometimes get abused. It is also very difficult for me to believe that John Weiss really believes that there will be incredible civil disorder in the streets if civil legal aid were to vanish tomorrow. In fact, there isn't much evidence of increasing civil disorder as government financing for legal services has declined over the last five to ten years. In short, it is easy to raise serious questions about individual propositions that each of you offers. But I wonder if you can't agree on the following proposition. Isn't it true that if we asked, in the aggregate, what has been the social effect of civil legal aid for the poor over the last 20 to 30 years, isn't it true that both of you really have to answer, "Boy I'm not sure". Aren't there serious issues of fact about those net aggregate effects? Both of you, of course, are very skilled advocates and, therefore, you know how to make hay out of reductive, individual examples. The public housing example that Mr. Horowitz

cites is a very easy target. It is very likely that we pay too high a due process price for rules that restrain eviction. On the other hand, John Weiss very clearly scores when he points to certain abuses on the part of bureaucrats. I suggest that this is an issue that we will never resolve. The aggregate effects of civil legal aid for the poor will never be satisfactorily resolved given our limitations of science. I think it is unspeakable that we would simply cut the poor loose without the assistance of the profession. Why is that so? Can I represent that my justification for that kind of proposition is thoroughly rational and driven by the facts? No. Part of it is emotional, of course. Mr. Weiss has been very good at summing up those emotional echoes.

The debate does not focus much attention on alternatives. And there is an alternative, it seems to me, although it is not an uncontroversial alternative. A few years ago, particularly in the late 80s and early 90s, there was a good deal more discussion than there is today, of an alternative to federal funding for the legal services corporation. That alternative model, as most people in the room know, goes by the label "mandatory *pro bono*". I would like to jettison that label and identify what is really an issue. While I stress that it is far from a perfect model, over the years I am inclined to think that a focused kind of tax on the legal profession with tax revenues earmarked for civil legal assistance purposes, is a more promising model than the model involving the legal services corporation and the kind of conflict and controversy that we have, which I believe will never be resolved. I'd very much like to have your opinion about what is known as the mandatory *pro bono* model but more accurately described as tax of the legal profession.

Mr. Weiss:

In response to that rather academic exercise in criticism, I'm sorry you found our discourse empty. I'm also sorry you don't know how to quantify what you want to quantify. I regret that you find the presentation of your favorite idea more important than listening to the substance of our discussion.

There is no way to *quantify* justice. There is no way to measure justice scientifically, mathematically. There is no way to discover *in the classroom* whether or not some legal principles work out for justice or for societal advancement in the long run.

I represent individuals, I do not represent abstract groups. I do not move in academic circles and have calipers that extract ideas. I do not move inside as those in power think they should do.

But what I do know is that people come into my office with problems. I do my best to address them. I do know that after all these

years some people are somewhat less worse off because of what we Legal Services lawyers have done. And I do know your system has been offered and completely failed every time it was tried.

Watching people like myself who have done it, I've noticed a few things worth pointing out. One is that the law has changed for the better. Another is that some people have thought they belong to the American society who didn't before—just because they had Legal Services lawyers fight for them. And the third is, I am sorry, but I do know that when people are cut off from what they deserve and are left without hope, they do start to raise trouble. I have myself walked into rooms and said, "Please let's not have a riot because maybe we can win this case in court." That has happened a number of times. At the moment things are quiet but if this country, in my opinion, goes the way it is going and you cut off people from lawyers, you may not be able to measure it in your classroom, but you may very well see it in the streets.

I believe that, and I think you ought to take that problem very seriously. You look out your Hempstead classroom window at expanses of grass. I work in New York in the slums. What we see are two different types of things. I do not warn you of crabgrass, but you should listen to my thoughts from the pavements.

One final remark. Since we are having a conference on ethics, I must go on record as saying I am very disturbed from a legal ethics perspective that Michael Horowitz appears to claim, as I hope he did not mean, that he restricts his zealous advocacy by the amount of fee he receives. That he believes it was good for him to limit what he did because he didn't get paid as much as he thought he should have been paid in order for him to do more. His job is like my job (no matter what we receive) which is to do all we can for our client. In that way, we may have in some minor way served the good of all of us.

Let me just say yet one more thing. The single most absurd statement I've actually heard today is the claim of an imbalance of resources favoring the poor! Once again, I do go to court; I do go to administrative agencies; I do litigate against the City; the State, the Federal government. I do litigate against big companies. Let me tell you, the idea that Mike Horowitz suggested earlier that somehow we have more resources than our opponent is completely wrong—the truth is the exact opposite.

We at Legal Services have very few resources. We are overwhelmed with papers served on us. We are overwhelmed with the presumption the other side is right. We are way underfunded. What we need is more resources and understanding—a little more respect for us so that our clients can get a little more respect too.