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INTRODUCTION

The theme of this conference, "Access to Justice," involves presuppositions that should be explored. My device for exploration will be a radical counter factual assumption: The assumption is that agencies at all levels of government—federal, state and local—ceased to provide funding for legal services for the poor. That is, public money is no longer provided for civil legal aid through the Federal Legal Services Program nor through such subventions as New York City has provided to the Legal Aid Society, nor is public money provided for criminal defense services through public defender offices and publicly-financed appointed counsel systems. In this nightmarish scenario, legal assistance to the poor is still provided through private endeavors, including financial support through private charity and the volunteer efforts of practicing lawyers and bar associations. The financial situation of legal aid today indeed could be viewed as closer to nominal and symbolic than to being actual and substantial. But in my scenario public support has been entirely terminated.

The purpose of the analysis is to consider seriously the consequences of a policy which some conservatives already affirm, or purport to affirm—that the Federal Legal Services Program, which presently provides the lion's share of public funding for legal aid, should be abolished. Like many other slogans from Left and Right, this proposal may be better as a sound bite than as a program of public policy. Instead of a sound bite, however, we should focus on the importance and political significance of public subvention of legal assistance for the poor, and consider the legal problems that would be presented if public subvention were terminated. The legal aid situation today can be interpreted as presenting in developing form what these legal problems would be.

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EQUALITY UNDER THE LAW

It was not too long ago that the financial situation of legal aid was the one set forth in my counter factual scenario, that is, nearly nonexistent. I will take the 1950's as the point for comparison. At the beginning of that period *Brown v. Board of Education*[1] had not been decided. The decision in *Brown* abolished legalized segregation in the public schools. More than that, however, the decision cut the legal ground from under an entire social and political orientation. The immediate problem of school segregation addressed in *Brown* had kept black people in a separate category of our collective consciousness. The black population in our society was considered to be the "lowest of the low," to borrow an unfortunate phrase used by George Bush in the 1992 election campaign. *Brown* declared the entire black population to be equal to the rest of us in legal contemplation. To raise the legal position of the "lowest of the low" to that of equality, as was projected in *Brown*, was necessarily to transform relationships among all other segments of society as well.

Hence, in my interpretation of our history, the decision in *Brown* cast doubt on all other social categorizations implicit in the American "good old days." The decision put into issue the question whether a woman's place was indeed in the home;[2] whether the United States Senate, previously organized on the basis of the "Solid South," would continue to be a conservative sanctuary;[3] whether the Episcopal Church would continue as this country's quasi-state church;[4] whether degrees conferred by state universities in such places as Texas and Florida could have parity with degrees conferred by Harvard, Yale and Princeton.[5] More generally, the *Brown* decision raised the question of whether other kinds of inequalities assumed to be natural were merely artifacts of our country's particular history. Salient among these received inequalities was *de facto* inequality before the law.

Of course, we proclaimed then, as we proclaim now, the principle of equality before the law. Words to that effect are inscribed on the mantel of the Supreme Court and are part of the legal catechism of every judge

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1. Brown v. Board of Education, 347 U.S. 483 (1954).

2. *See e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 140-42 (1994) (holding that gender discrimination in jury selection is unconstitutional); United States v. Virginia, 116 S. Ct. 2264 (1996) (holding that the Virginia Military Institute could not discriminate against women in admissions).

3. Baker v. Carr, 369 U.S. 186, 207-08 (1962) (one man, one vote); Reynolds v. Syms, 377 U.S. 533 (1964) (same); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (same).

4. The election of John F. Kennedy can be interpreted as marking that transition

5. SHELDON GOLDMAN, PICKING FEDERAL JUDGES 347 (1997) (noting a general decline in federal district court appointees who have graduated from Ivy League law schools).

and barrister. Indeed, equality is inherent in the concept of law itself. Law consists of generalizations, as for example, the criminal prohibitions against murder, assault and theft, and the civil rules of tort liability. It is the essence of a generalization that it governs all—not some, but all—concrete instances that come within its terms. Thus, conduct legally defined as "assault" is assault no matter by whom committed. The same principle of equality is inherent in procedural law. When the law states that "no person" shall be compelled to incriminate himself, it means no person. Hence, when we say that everyone is equal before the law, we must mean that everyone is, so far as practicable, entitled in legal process to essentially equal treatment. Or we are simply mouthing comforting phrases. Or simply being hypocrites. Or some combination of all of the above.

Notwithstanding the universal embrace of the idea of equality before the law, however, in the days of Harry Truman and Dwight Eisenhower—those days to which we are invited to return through nostalgia music disks—there was no equality before the law. In particular, the poor enjoyed no such equality.

PUBLIC DEFENDERS AND THE FEDERAL LEGAL SERVICES PROGRAM

The 1960's witnessed very substantial expansion of public subvention of representation of criminal defendants and as well subvention of civil legal aid.[6] For those accused of federal crimes, remedial legislation provided for federal defender offices in United States Districts with relatively high case volumes and for compensated appointed counsel in other Districts. In the same period at the state level, public defender systems in many states enjoyed increases in their staffing and support resources; some states relied chiefly on appointed counsel systems but gave those systems more support; most jurisdictions adopted public defender offices for their cities and appointed counsel systems in smaller towns and rural counties. In New York City, the Legal Aid Society, a private agency in its management but essentially public in financial support, became the recipient of larger public subventions.

On the civil side there was a quantum leap in public legal assistance.[7] This resulted primarily from the Federal Legal Services Program created through Lyndon Johnson's Great Society with the political and

6. Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419-29 (1996); *see also* 18 U.S.C. §§ 3005 & 3006A (providing for public defender in criminal cases).

7. *See* Roger Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L REV. 531, 587-88 (1994).

moral support of the American Bar Association under leadership of Lewis F. Powell, Jr. (subsequently Justice of the Supreme Court). The federal program involved subvention through annual grants to local legal aid agencies, to other legal aid programs sponsored by law schools, and to still other more or less free-standing agencies (such as California Rural Legal Assistance). Federal money for civil legal aid was augmented in some localities by municipal or state subvention, and by bar association grants, law school subsidies, and private charity. An increasing number of lawyers in private practice or employment contributed services in kind, a contribution not only of substantial material value but, even more important, of political and moral significance.[8] Many larger law firms established "in house" legal aid programs that continue to the present day.

These public, charitable and professional subventions of legal aid and public defender systems could be considered the "supply side" response to the concept of equality before the law.

Over the same period, there were dramatic changes in constitutional law that transformed the "demand side" for legal aid in criminal and juvenile delinquency proceedings. These changes took the form of increasingly exacting requirements of procedural formality and fairness under the rubric of Due Process. The basic "demand side" change in the law was the decision in *Gideon v. Wainwright*[9] in 1963, holding that a criminal accused must be provided with counsel if he could not afford to retain counsel himself. That covered a large majority of criminal felony prosecutions. The "demand" was increased in decisions such as those imposing the exclusionary rules,[10] the requirement of jury trial in cases where imprisonment was a possibility,[11] and appointment of counsel in juvenile court.[12] There was a synergistic effect between the rule in *Gideon v. Wainwright* and the increasingly strict procedural requirements because the procedural requirements imposed under the rubric of Due Process were simply unworkable without counsel for the defendant.

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8. Hon. Joseph W. Bellacosa, *Obligatory Pro Bono Public Legal Services: Mandatory or Voluntary? Distinction with a Difference?*, 19 HOFSTRA L. REV. 745, 749 (1991) (noting an increase in *pro bono* activities by law firms).

9. Gideon v. Wainwright, 372 U.S. 335 (1963); *See also* A. LEWIS, GIDEON'S TRUMPET (1964).

10. *See* Mapp v. Ohio, U.S. 367 U.S. 643, 655 (1961).

11. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

12. *See In re* Gault, 387 U.S. 1, 36-37 (1967).

THE ADVERSARY SYSTEM

The adversary system is the essential mechanism of American criminal procedure as received through historical tradition. On the prosecution side, the American system of criminal justice involves professional lawyers in prosecutorial offices, making presentations before judges whose essential function is to be a neutral arbiter between contending partisans. Our system's dependency on the adversary system indeed was a basis of Justice Black's opinion in *Gideon v. Wainwright*.[13] This mechanism contrasts with that which has obtained in other countries, even in England, where court prosecutions ordinarily are conducted by police officers, and in the civil law countries, where the judiciary shoulders responsibility for fair procedure and just outcome and where the prosecution is regarded as a judicial office. Correlatively, the provision of defense counsel for indigents in this country generated wider and more insistent claims in the name of Due Process. Many if not most of the Supreme Court's decisions following *Gideon v. Wainwright* were initiated by lawyers for indigent criminal defendants. *Gideon v. Wainwright* remains good law and remains preemptive on the "demand side" for legal services to the poor in criminal cases.

The Due Process requirement that an accused must have legal counsel in effect compels the public, through its legislative and fiscal agencies, either to forego criminal prosecutions or to provide counsel for the indigent criminal defendants. The public choice, of course, has been to provide counsel, but reluctantly and usually at marginal levels of quantity and sometimes marginal levels of quality. The Supreme Court decision in *Strickland v. Washington*[14] can be interpreted as judicial acceptance of the ugly disparity between the requirement of adequate counsel and the level of adequacy that the public is willing to finance. More fundamentally, in a political system in which the courts declare the law but the legislatures control the fisc, the decision in *Strickland v. Washington* memorializes the real limits of our concept of procedural Due Process that can be enforced by the judiciary.

CIVIL LEGAL ASSISTANCE

It is familiar that there is no comparable "demand side" rule applicable in civil legal aid. In 1971 in *Boddie v. Connecticut*,[15] the Supreme

13. "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

14. Strickland v. Washington., 466 U.S. 668 (1984).

15. Boddie v. Connecticut, 401 U.S. 371 (1971).

Court flirted with the idea that Due Process in "serious" civil cases requires assistance of counsel as it does in criminal cases. But in 1981 in *Lassiter v. Department of Social Services*,[16] the Court refused further extension of the law in that direction. A few states, notably New York, have gone a few steps further.[17] However, no politically sober judge, however anguished by injustice unfolding before her eyes, is willing to hold that civil justice requires appointment of counsel for any party unable to afford counsel.[18] Nor would any politically sober judge hold that having office legal counsel in nonlitigation matters is a "fundamental right," as some state courts have held with regard to adequately funded public education.[19] There is manifest conflict between the understandable judicial attitude that legal aid is not a "right" and the proposition that we have equality before the law. The contradiction is simply one of many that must be endured by sensitive realists in contemporary society.

FINANCIAL COST POLITICAL IMPACT OF CIVIL AID

The reason why sensitive realists must endure this contradiction is at the same time simple and profoundly complex. The simple point is that legal aid is expensive. Shortly after the launch of the Federal Legal Services Program, I did a back-of-the-envelope estimate of the cost of an "adequate" civil legal aid system. My guess was $300-400 million in 1967 dollars. That would be $4-5 billion in 1997 dollars. It is wildly implausible that Congress or state and local legislative bodies would be willing today to provide that level of funding for civil legal aid, on top of the funding for criminal defender and juvenile court representation.[20] In this regard, those of us in the "chattering classes" have to recognize that the "silent majority" has a very different view than we do of law and assistance of legal counsel. The majority considers that law is something to be obeyed and that engaging a lawyer is ordinarily a signal that something illegal has occurred. The great divide in public opinion in this

16. Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

17. *See, e.g.*, Amendola v. Jackson, 346 N.Y.S.2d 353, 357-58 (N.Y. Sup. Ct. 1973) (holding that there is a constitutional right to counsel in proceeding regarding alleged violation of child support orders).

18. *Cf.* Judge Robert Sweet, *Civil Gideon and Justice in the Trial Court (the Rabbi's Beard)*, 52 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 915 (1997) (stating that we need "an expanded constitutional right to counsel in civil matters.")

19. *See* Horton v. Meskell, 172 Conn. 615, 646 (1977) (holding that the right to education is a fundamental right); Abbot v. Burke, 100 N.J. 269, 282 (1985) (same).

20. M.A. Stapleton, *LSC Funds Stable, Reporting Mandate Added*, CHICAGO DAILY LAW BULLETIN, November 14, 1997 (noting that Congress recently approved a $283 million budget for the Legal Services Corporation, which is the same as last year and much less than previous appropriations).

respect appears to be along class lines except for most members of racial minorities, who have a different view of the law itself. The financial requirements of "adequate" legal aid, therefore, is a subject not easily discussed in frank and open discussion. As long as the silent majority keeps coming to the voting booths, the political viability of substantial legal aid, although not its legal respectability, remains in shadow.

The more complex point is that, in the American political system, public subvention of legal assistance changes the political system itself.[21] This is obviously true, for example, when legal aid lawyers bring class suits challenging the acts of government, a subject that has attracted negative attention in Congress. The same holds for all kinds of "test" cases maintained on behalf of the poor—welfare rights, abortion rights, rights to equal school funding, etc. The political point can be simple stated: If an act of the legislature or the executive is not challenged in the courts, then the practical outcome is as the legislature or executive has ordained—subject of course to reconsideration through the political process. Judicial review through legal aid can nullify the choice made in the nonjudicial political process. If the act of government is successfully challenged, through litigation, then the practical on-the-ground outcome is somewhat different, sometimes radically different. Even if a legal challenge is unsuccessful, the threat of litigation, and the threat of the cost of litigation, impose significant inhibitions on nonjudicial policymakers.

In this view, legal aid, criminal as well as civil, is not merely legal but also political. It is one thing for participants in political controversy to use their own money to hire lawyers to carry controversies beyond lobbying the legislature and the executive and into the courts. It is another thing for the government itself to finance the hiring of lawyers to do this. The distinction holds even for causes that seem entirely just in the eyes of right-thinking people. After all, there would be no substantive controversy to litigate if everyone shared a single view of what is just. The political and constitutional problem here is essentially the same, perhaps in smaller and more diffuse form, as that posed by public financing of political campaigns.

The conclusion seems unavoidable that, to the extent that legal aid can have "political" consequences, a contradiction of principle is involved. The principle of equality before the law requires public support of advocacy for the interests of the indigent, which in effect amplifies the

21. The classic analysis is, of course, ALEXANDER DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer & Max Lerner eds. & George Lawrence trans., 1966) (1835).

electoral power marshaled in the name of the poor. Yet public subvention of partisan advocacy contradicts a principle of democratic equality.

THE "PROCEDURAL" NATURE OF CIVIL LEGAL AID

This brings me to my principal point. Our system of social ordering is dependent in extraordinary degree—in my opinion to an unrecognized degree—on a procedural principle of equal participation in legal disputation. The key terms here are "equal" and "participation." These terms are essentially procedural. The concept is that participation 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.[22]

This procedural concept underlies the Due Process decisions in criminal and civil cases. The courts say that an accused is entitled to a lawyer; the courts do not say that an accused is entitled to a fair-minded prosecutor.[23] The courts say that a litigant is entitled to a judge who is without legally defined bias; the courts do not say that a litigant is entitled to a judge who is demonstrably familiar with the applicable principles of law.[24] They say that a welfare claimant is entitled to some kind of hearing before being cut from the rolls.[25] They do not say that a welfare claimant is entitled to a bureaucratically regular and technically correct decision prior to a hearing.

And so on.

The American conception of justice is not simply encapsulated in the notion of Due Process, but is encapsulated in a notion of Due Process defined in terms of adversarial presentation. Indeed, so familiar and entrenched are these ideas that effort is required to think otherwise. Yet other possibilities can be imagined.

We should begin by recognizing that most "legal" problems of the poor arise from the interface with public authority. The interface can be direct, as in welfare claims or claims of police brutality. The interface

22. In my interpretation, this is the underlying logic of the requirement of "some kind of hearing" announced in Goldberg v. Kelly, 397 U.S. 254, 264 (1970). *See* H. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

23. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1965) (holding that criminal defendants have a right to counsel); *Cf.* Butz v. Economou, 438 U.S. 478, 509-510 (1978) (stating that prosecutors are entitled to absolute immunity from civil suits).

24. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824 (holding that a judge must recuse himself when he had recently filed a claim with similar issues to the one in this case); *Cf.* Henry v. Mississippi, 379 U.S. 443, 448-50 (1965) (holding that defendant's failure to timely object to introduction of evidence is a waiver of federal right to exclude evidence).

25. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

with public authority can be indirect, as in grievances that public authority is indifferent to violation of the legal rights of poor people as against others in private sector relationships. For example, the grievance can be that public authority is indifferent about tenants' rights against landlords to have heat in their building or to have their plumbing fixed. It could also be said, for example, that the public is indifferent to a poor child's right to go to a decent school.

With regard to these kinds of social problems, other countries have had a different approach for at least two centuries. European countries all have systems of administrative law and administrative courts whose function is not merely judicial review, as in this country, but an administrative law that is substantive as well as procedural and supervisory rather than merely reactive.[26] A question that arises in this country as a question of a right to a hearing is, in European countries, addressed as a question of a right to a correct result, with subordinate issues as to why a correct result had not been reached in the first instance. The idea is not "due process" but administrative and legal correctness, for the poor as well as for the more affluent.[27]

Something like the same idea also governs the administration of justice in the courts of the civil law systems. The civil law judge is not obligated merely to referee a dispute between parties according to rules of procedural fairness. Nor is the civil law judge concerned only with procedural fairness. Rather, the civil law judge has an affirmative responsibility, beyond what the parties may submit or argue, to achieve substantively correct judgments. This is not to suggest that European administrative justice plays out in accordance with its pretensions. Nor is it to suggest that civil law judges reach fairer and legally more correct judgments than their counterparts in this country. Nor is it to deny that the more affluent citizens in Europe generally get a better deal than the poor, as they do everywhere else in the world. It is simply to suggest that the Europeans have an entirely different frame of reference in addressing "justice."[28]

Justice in our implicit conception is an adventitious procedural outcome. Its basic concept is of the verdict of a jury of ordinary citizens choosing between contentions advanced through the adversary system

26. *See generally* JURGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 97-205 (1992).

27. This kind of difference is to be addressed in an international conference, Symposium, "Abuse of Procedural Rights," Int'l. Ass'n. of Procedural Law, at Tulane Law School, October, 1999.

28. *See* M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

under monitoring by an even-handed judge. The conception of "justice" elsewhere is substantive: "Justice" is a proper outcome achieved by exercise of professional bureaucratic responsibility on the part of a judge or administrative official, sometimes aided by party presentations but not in principle requiring such presentations.

Perhaps a few examples will convey more clearly the distinction I have in mind between a procedural concept of Due Process and a "substantive" one in the sense referred to above. Take the situation in *Bell v. Burson*,[29] which held that "some kind of hearing" was required as a basis for canceling a driver's license. While requiring an adversary hearing for protection of the interests of a licensed driver, the Supreme Court said nothing about the substantive standards for determining whether a driver's license may be canceled. Could a driver's license be canceled on the ground that the licensee had made false statements about his prior driving record? That he failed to obtain liability insurance, as required by law? That he failed to respond to reasonable questions when stopped by a policeman while operating his vehicle? Of course, there are profound reasons why our courts could not and should not venture into these substantive precincts. The substantive issues arise from legislation, not decisional law.

But there is a reason perhaps still more fundamental for judicial abstention. What would be the frame of reference—the point of beginning, the basis of orientation—in which a court would begin analysis of welfare rights or driver license rights, or welfare rights or public education rights for that matter? In a traditional legal frame of reference, both a welfare claim and a driver's license are "privileges." As such, the state is free to prescribe the conditions upon which the claim or license is to be enjoyed and free also to terminate them. Another quite different frame of reference was articulated some years ago by Charles Reich in an article called "The New Property."[30] Professor Reich would have it that claims to welfare were a form of property, governed by the full panoply of legal rights attaching to property—including, presumably, the right to just compensation if the government were to seek to terminate the payments! Needless to say, there is a lot of political open water between the conception of "privilege"and this conception of compensable property right. Perhaps also needless to say, there is a complex web of policy and technical considerations involved in devising and administering a system of drivers licensure, welfare benefits and public education.

29. Bell v. Burson, 402 U.S. 535 (1971).

30. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

Another kind of example further illuminates the difficulties in judicial formulation of substantive conceptions of justice. These are cases where the courts have tried to establish substantive standards under a constitutional rubric other than Due Process or Equal Protection. The most conspicuous instance is, of course, "abortion rights," which the Supreme Court formulated under the rubric of a right to privacy.[31] I will not venture analysis of that intensely controversial issue. I merely observe that this issue involves supremely intricate congeries of policy, technical, moral, and religious considerations, which the Court's formulations have not yet integrated into coherent law.[32] Another instance is the Court's endeavor to define a "wall" between Church and State under the rubric of the Establishment and Free Exercise Clauses.[33] Still another is *Buckley v. Valleo,*[34] the Court's venture in controls on political contributions, which many observers regard as a legal mishmash and a policy disaster.[35] These examples demonstrate the legal perils to be encountered in giving substantive content to "equality" in the interest of the poor. What, exactly, is "decent housing," whether public or private? What is an "adequate public" school education? What is a "reasonable" provision of mental health care?

In considering these issues of substantive justice, it will be unavailing to compare what is provided to the poor through public subvention with what "the rich" can procure with their own money. It is impossible to provide everyone a home in Scarsdale, an education at Andover, and medical care at the Mayo Clinics. The real economic and political issue is one of marginal betterment, where the comparison must be between categories on either side of a boundary of eligibility. We are now coming to understand the extraordinary technical and political difficulty in defining such categories, for example, in health care.

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31. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

32. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (4th ed. West 1991) (stating that "the formal tests that should be employed by a court that is reviewing the constitutionality of any type of abortion regulation are not very clear.") *Id.* at § 14.29 at 771.

33. *See, e.g.*, Everson v. Board of Education, 330 U.S. 1, 16 (1947) (stating that the Establishment Clause was intended to create a wall of separation between the Church and State). *See also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989) (analyzing the history of religious freedom in the United States and the Establishment Clause).

34. Buckley v. Valleo, 424 U.S. 1 (1976).

35. *See* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality and Campaign Finance*, 86 GEO. L.J. 45, 46-48 (1997) (describing Buckley as "one of the most widely scorned decisions in the recent history of the Court" and outlining the arguments against the decision).

CONCLUSION

The problem I wish to present, therefore, is this:

If we abolished legal aid, we would also have to abandon our historic premise that "justice" is essentially procedural—the product of "some kind of hearing" with the assistance of some kind of counsel. We would then confront a choice between abandoning any pretense to equal justice, on the one hand, and, on the other hand, adopting substantive concepts of justice in a wide range of settings where poverty is a salient factor. I assume that abandoning any pretense to equal justice would be unacceptable.

The system of legal aid, impoverished as it has become, therefore may be saving us from, or at least postponing, politically uncomfortable alternatives. By the same token, however, there is greater urgency to make serious effort to make procedural justice a reality, that is, to establish real legal aid for the poor.