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SHOULD THE GOVERNMENT FUND LEGAL SERVICES? IF SO, WHAT SHOULD THE LAWYERS DO?

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In our constitutional democracy, law, lawyers, and legal services all play special yet interconnected roles. In this constitutional democracy there are three institutions to which we turn to resolve conflicts and to establish rights, privileges and remedies. The traditional way, of course, views the courts, the executive and the Congress as in checks and balances. A more accurate perspective would lead to describing these entities as functioning in an interrelated, dialectical relationship. This dynamic relationship furnishes one reason why lawyers and legal services lawyers, in particular, are so important for us in our constitutional system.

Administrative agencies, as a component of the executive branch, necessarily look to the courts for guidance, for correction, for broad interpretation, for leadership, and for constitutional concerns. They are also supposed to implement laws passed by Congress. The courts look and defer to administrative agencies for their expertise. Courts expect them to do interstitial interpretation of the law's text and to implement the laws by promulgation and enforcement of regulations. Congress, in turn, expects the administrative agencies to provide the meat and bones to the laws enacted. They expect and sometimes anticipate the courts to set limits to the law's application, and they sometimes expect and anticipate challenges in the courts that will affect the actual application of the law. Therefore, you have in many cases a dialectic between these various agencies creating what we hope will be the appropriate applied living law.

Of particular importance and interest to lawyers is the Marshall decision in *Marbury v. Madison*,[1] which established a long time ago that the final adjudication of constitutionality would be done by the Supreme Court and courts under its guidance. This decision has made our type of

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1. Cranch 137, 2 LE 60 (1803).

dialectical, institutional, and constitutional democracy very dependent on litigation since the final adjudication is by the courts concerning the impact of our society's foundation document. We depend more than practically any other society on our courts to establish for us what the Constitution means and what effects it has on law and governmental actions. One consequence is that lawyers are required to make the whole system work by advocating in these areas, by working through governmental departments, and by serving in all these arenas in which the laws are brought to life.

As a result, legal services come into play in many ways. Let me just focus upon three. Why is it so crucial in a democratic society to have lawyers provide for the poor so that they, too, can be participants in our democratic system and can resolve their disputes as others do? Why should they receive recognition of their claims and needs? Finally, how can they make some progress in these institutions which are designed for all people who live in this constitutional democracy?

The first and most obvious associated and relevant constitutionally-based principle derives from Equal Protection. Lawyers are absolutely crucial in all litigable matters affecting individuals and their legal rights and privileges because rights for individuals and for groups of individuals must be articulated and promoted by the courts. Lawyers provide the court a means of resolving disputes, of specifying the right facts and the right principles. Clearly, when people are confronted with terrible threats to their well-being and lives such as eviction, loss of children, loss of liberty, loss of economic support, and these matters can be resolved by legal advocacy or recourse to the law in courtrooms or administrative hearings, then this route should be pursued for poor people just as surely as it is taken for warring corporations. In eviction proceedings, just as in federal adjudications of various types of entitlement, it is necessary to have both sides of the issue presented by lawyers. In this situation one side will prevail and the other will not, based on impartial adjudication with all relevant factors and governing principles articulated and implemented. What equal protection in this country implies is extension of the same class of principles for adjudicating and resolving disputes for the poor with their opponents employed elsewhere.[2] That is what we do at legal services. We try to see what implication and effect derives from the extension of an old class of principles in the law, be it administrative law, contract law, etc., when you apply these principles to

2. For a further discussion, *see* Lauren Hallinan, *MIE Interview: Jonathan A. Weiss*, XI JOURNAL OF MANAGEMENT INFORMATION EXCHANGE (Mar. 1997).

individuals, who have not had lawyers before now, and who can assert their claims and hope to resolve their grievances as others do. That is what was essentially behind the legal services idea when we began. This is the scenario: somebody comes in with a legal problem and now a lawyer represents them in various institutions where the legal aspects of that problem can be resolved by utilizing, for the first time, principles that other people had used to defend themselves or advance their interests.

This idea, of course, returns to my original point of a dialectic between the agencies. Legal services lawyers who are uniquely involved with the poor, who work in poor neighborhoods, and spend their time with poor people in those communities, go to the administrative agencies with them for applications, go to the tribunals, and stand up for them. Lawyers are thereby able to provide a way for those people to express what they want in the courtrooms and sometimes other places so that their legal participation informs the courts, informs the administrative agencies, informs the legislature of what these people really want, what they really need, and what they are asking to be articulated for them.

Corporations and sometimes middle class people hire lawyers who articulate their viewpoint, knowing how law-bound the society is, and how they, therefore, need these presentations to these tribunals or to the courts. By going to court people show us what we need to know about what they think, what they need, what they go through. They serve an informative purpose for these tribunals and particular courts. Legal Services opens up a dialogue between this society and the poor, the oppressed, and the impoverished.

In particular, I would say one of the most important issues to be addressed is the function of Legal Services lawyers, as well as lawyers in general, in administrative agencies. It is, of course, much more glamorous to try a case and argue in front of judges in the public eye. However, where you really encounter what poor people suffer and undergo, and where you learn a great deal is in administrative agencies. All of us, of course, have experienced the deadly inertia and even irrational hostility that bureaucracies perpetuate against us and at some point or other. We all know how frustrating the experience may be. For poor people it is much more extreme, for they are the constant victims suffering dire consequences. They are subject to a mass of rules that nobody really understands, implemented by people who are at best indifferent and, at worst, maliciously hostile. The results are often devastating upon the individuals who are dependent upon the proper functioning of that administrative agency.

A poor person (and, when available, a lawyer for a poor person) confronts administrative agencies that operate with an overwhelming oppressive anonymity, often burdening rather than benefitting those whose lives are dependent upon them, frustrating rather than furthering the purposes of the laws they are supposed to implement. The most important thing that should be done and can be done for justice in administrative agencies is to make those people who make the decisions visible and accountable for those decisions. Before the establishment of legal services for the poor was set up, people in administrative agencies basically ran the lives of the poor like a feudal kingdom. They had authority; they had decrees, and nobody challenged them. When legal services came in, we challenged their rulings. We went to hearings; we brought lawsuits; we salvaged the right of individuals so that what was done was visible, observable and correctable by the courts—and those who decided cases were made accountable.

One of the most recent cases we had in my office, for which the Legal Services Corporation tried to close us down (for having a class action), followed about twenty years of injustice. We finally documented that one of the administrative law judges was a racist. She believed, for example, that Puerto Ricans didn't want lawyers and, therefore, refused to let them proceed with lawyers. So we brought a class action and got all her cases reopened. This was again a matter of accountability and visibility. Justice, while late, would have never arrived for the disabled poor denied what they should have had, but for the fact a large number of Legal Services lawyers had gone to social security hearings and had this experience with the racist judge, brought it up on appeal, and established over and over again that her decision should be reversed for egregious misbehavior. The other side of this equal protection is the social, political effect of legal representation for the elderly. I think Mr. Horowitz and I agree that the poor essentially live in a state which Sir Henry Maine called a "status" society rather than a "contract" society.[3] Most of us establish many of our private rights and expectations in this law-driven society by agreements which are articulated sometimes in writing. Poor people, to the contrary, have little more than a dependency and a set of expectations. The only way in which they can be integrated into our society is by being accorded the dignity they deserve and the treatment other people receive. When they have, for the first time in their lives, somebody who says to them, "I am your agent; I represent you; I will do what you want; I stand for you, and

3. For further discussion *see* Jonathan Weiss, *Law & the Poor*, 26 J. Soc. Issues 59 (1970).

I will try to have the law do for you what it does for everybody else"; when we finally present them with what is the first real offer of dignity that society has presented them, this creates a very important, political, social effect.

Another dimension of this general proposition seems to me to be very important. The old traditional common law doctrine is that it is better to resolve disputes in a courtroom than by violence in the streets. Rather than have people assault each other, attack each other, we guide them to go to an impartial tribunal to find an opportunity for a fair adjudication as to which side should prevail and to what degree, so that some final resolution is obtained, enabling people to move on with their lives. As I suggested, poor people have not had this access to resolve their disputes, as they survive in this feudal kingdom, where they have only a bundle of expectations and fears. By enabling them to go with an advocate to various agencies, we are directing them for the first time to a place where disputes are resolved in a non-violent and hopefully objective manner. I believe such an arena provides an important effect in preventing riots, revolution, crime, and civil violence. If you feel there is no place to go but the streets, you go to the streets. Legal Services provides another alternative to that route by enabling access to the conventional tribunals to resolve disputes.

There exists more profound benefits for our community beyond the diminution of violence. When lawyers go to court for the poor people, you give poor people access to one of the institutions, one of the public forums where their view can be heard. Poor people can not go to the newspapers, are not heard on radio stations, do not write to magazines—they are neither heard nor heeded. They don't have much money to give to congressmen, but they do have a lawyer, once in a while, to present what they feel should be heard in court. What happens there may be reported in the media, may have consequences. The giving of this access, the one area of speech accessible to the poor, welcomes them to our society which is so basically predicated on free public speech.

The next consideration, of course, is justice. Everybody wants justice, at least for themselves. Poor people do, too. If by having a lawyer in a dispute the poor person gets at least the process and possible result, they now belong to our society and have achieved, at least, proximity to justice.

If one accepts the premise that poor people have a right to lawyers, the question is what kind of lawyers? The answer to that should be simple: a lawyer, like anybody else gets—with no ifs, ands, or buts—a lawyer whose obligation is simply and purely to do for that client in the legal

proceeding that which the client can not do for the client himself. That's what lawyers are supposed to do, and Legal Services lawyers should do it, too. Unfortunately, recently there has been a culmination of a long trend to place more and more restrictions[4] upon those people that Legal Services lawyers can represent, and the way we can represent them.

Some of these restrictions are clearly, in my opinion, violative of the Fourteenth Amendment which protects a "person(s)," some of whom we are not now allowed to represent, as they are now sometimes defined by that wonderful word, "alien." Other restrictions are based upon *allegations* of status crimes such as being a family member of someone involved with drugs. The new federal law excludes all of these people from representation.

These exclusions are another pernicious version of "the unworthy poor," as someone somehow decides, some people don't deserve lawyers if they can't pay for them. But the whole function of the law is to find who gets their just desserts, not to decide *before* you go to court that somebody is unworthy of finding out what justice is.

Another area of restriction is in the remedies that Legal Services lawyers are now allowed to seek for their clients. Among them are the denial of attorney's fees and the demand that every legal service lawyer drop all the class actions they have. Prior to an injunction against the Legal Services Corporation and the legal services program in New York issued by the Judge in one case, my office was theoretically closed down completely over night with no process or concern for all our clients because we *continued* our ethical duty of representation in a class action in front of her. We represented the homebound people who had all been cut off from any form of New York State entitlement program, without a hearing in their home, because after many years, home hearings suddenly terminated. New York State changed the law and said that, "You can't have a hearing in your home." At one point if you lived in an iron lung in Far Rockaway, the only thing you could do for a hearing was to go to the World Trade Center (which, by the way, is not accessible to handicapped people) and have your hearing there. If you could not go there, you lost everything. We brought a class action, and we said, "Let's at least try to have a telephone hearing first and then a home hearing second." We managed to have the change in procedure and saved literally thousands or maybe hundreds of thousands of lives.

4. Currently Pub. L. 105-119 Section 502, 111 Stat. 2240, 2510-12 (1970), *implemented at* 45 C.F.R. 610.8).

The result for us? We were told we had to drop that case because class actions were "illegal." But the Judge on that case thought their lives and our participation as a representative for that group of people facing death by bureaucracy was sufficient to order us not to be fired by the Legal Services Program in New York (through which our money comes) because of their fear of the Legal Services Corporation's threats about our continuing to save lives in that class action.

Attorney's fees serve a good societal purpose. They create awareness by corporations and official government that sanctions are available with money consequences for wrongdoing recognized by the courts. Such victories encourage members of the private bar to take up the causes and cases of the wrongfully treated—once we've established various types of rights, and once we establish that lawyers can be paid for vindicating them. Attorney's fees, as do class actions which may be invoked as litigation processes, form part of the litigation leverage that we must use on behalf of our clients.

These current restrictions on Legal Services lawyers have also entered the area which we would have thought was sacrosanct—the attorney-client relationship. The new restrictions require that before you start litigation you must get a sworn affidavit from your client as to the merits of the case. Now, I and every single practicing lawyer have found out that what your client remembers and tells you, as opposed to what you discover, can change enormously throughout a trial. Making this available (as it can be at some point, through the Freedom of Information Act, in my opinion) to people who are against Legal Services, those who are arrayed against poor people (with the now famous threat of "perjury" prosecution) inhibits clients before they say anything or assert their rights because of the fear of being vulnerable later on. This fear is based on what was said to the lawyer by the client in what should be complete confidence and privacy. What could be a clearer intrusion into the attorney-client privilege? A Legal Services lawyer is now *not* supposed to say to somebody, "What you say to me is confidential and will go no further." In my opinion, if that is what we must do under the new law, no matter where our other money comes from, if we can get one cent from the Legal Services Corporation, we can not practice law properly or ethically.

Today for Legal Service lawyers everything involving attorney-client communication is swamped with paperwork. My office has nearly tenfold the amount of forms to answer than I used to have—a burden other lawyers do not carry. Are they "aliens"? Was any family member ever convicted of or accused of being involved with a prohibited drug?

Where are your time sheets? What money did you use for what? Did you look at this regulation or look at that regulation? All this interferes with my attending to what should be done by a lawyer—what is your problem, how can I understand it, how can I help you, how can I do my best to resolve it? I have to interfere in that lawyer's work by intruding on the privacy of my client and paying attention to forms rather than people.

All types of subjects for litigation are now excluded. You have to take a leap of judgment and figure out what there is that is not due to change in the welfare law and what is a constitutional challenge to it before you can take welfare cases under the current restrictions. Suppose you have a client on welfare who has been wronged, but you are not permitted to raise a constitutional challenge to help that client. At best, this makes a lawyer operate piecemeal. It is very important that a lawyer be allowed to present his whole case. Lawyers are officers of the court. A court relies upon a lawyer to present all the facts after the availability of all the remedies as requests to that court so the court can act properly. If the most efficient way to handle that case is a class action, the lawyers should move for it on behalf of the court as well as the client. If a constitutional issue arises which can resolve the matter, then it should be presented to the court.

This consideration leads us back to the constitutional area of checks and balances and the role of the judiciary. A court *must* have that motion for class action and that constitutional challenge. If there is a way to resolve the case by ruling on the constitutionality of the welfare statute, the court must have that presented. However, the restrictions and bureaucrats say that we are not allowed to do just that. We're not even allowed to bring a lawsuit against the statute continuing these inexcusable restrictions to preserve our ethical practice and obligations to the court and clients. But we should be able to raise what is unconstitutional, in my opinion, by attacking the clearly unconstitutional statutes under which our authorization issues and affects *all our funding and practice*.

There's even a particular congressional sleight of hand which nobody has focused on. We are able (as I understand the Second Circuit's reading of the statute at oral argument on these restrictions) to support the way current congressional districts are laid out, but *may not* oppose that system. When a poor person comes in and says, "The person who represents me insulted me, vilified my race, my religion everything about me and said you don't belong in my district; you're only a small part," I can't advocate that this district ought to be changed; I can't represent that person. I can only defend the status quo. Congress has

passed a law that says, "We'll give money to lawyers to defend us and they can find a poor person to represent to help defend our gerrymandered district if they want to, but may not change the districts from where our power comes." This, I think, shows again the absurdity of these restrictions. They were just designed to harass lawyers so they could not do what they should for the poor and disenfranchised.

Suppose Congress passed a law and said, "We note that the large law firms take a tremendous amount of time in court, what with endless discovery and an enormous amount of motions arriving every day (as I discover when I litigate with them). Well, those in-house counsel that corporations employ don't do that. We're going to pass a law which restricts large law firms to only two pages of interrogatories, three depositions, of only a half a day of each, but in-house counsel have unlimited discovery." Then I'm sure the Bar would act as it has not for us. I use this word purposely. As one man, they would rise and object to this law as a terrible intrusion into attorney-client relationships and the mandated "zealous" advocacy that lawyers must exercise on behalf of their clients. If Congress passed a law and said, "We're going to fund federal defender programs, but only if the lawyers never invoke the Fifth Amendment," the whole defense Bar would rise up and say, "This is an outrage. You can not prevent us from doing on behalf of our indigent defendants that which every other criminal law defense lawyer does!" So, too, the Bar ought to rise up now and say that these restrictions that we now are challenging in the Second Circuit and the Ninth Circuit, and eventually maybe the Supreme Court, are outrageous, unconstitutional and an unwise invasion into the attorney-client relationship.

In our democratic, constitutional society, we need lawyers to make institutions work. The poor have been excluded from proper participation in these institutions, to our loss, to society's loss, to their loss, to the great peril of justice, to the danger of civil unrest. The only possible solution is that Legal Services should be greatly expanded rather than restricted by a series of vicious, petty attacks which display ignorance of what our country is, what lawyers do, and what Legal Services is all about.