

EXTENDING LEGAL SERVICES TO THE POOR
A Challenge to and an Opportunity for the
Members of the National Bar Association, Inc.

Remarks of
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PRELIMINARY REMARKS

When I got formal notice Monday, August 2, from Attorney Odas Nicholson that I was to speak on extending legal services to the poor, I concluded that she thought I was either a genius or a fool: a genius if she thought I could adequately prepare a creditable talk on such short notice, a fool if she thought I would dare attempt a talk without adequate preparation.* Now I know I am not a genius. You soon will learn, I am afraid painfully, to what extent I am a fool. A professor, let alone a law professor, would no sooner reject an opportunity to harangue a captive audience than a "dedicated" medical doctor would stop treating a wealthy hypochondriac. The only difference is that innocuous pills are easier to take than professorial preachments--the latter being neither painless nor innocuous. I will endeavor to be as painless and harmless in my remarks as I can--to myself.

When I read through the wonderful program prepared so ably by the Program Committee and observed the very interesting subjects and the very eminent speakers to speak on them, I wondered what I was doing on the Program--especially in two places. I was constrained to conclude that the Program Committee has been overthrown by that egalitarian revolution which some academic critics say has overtaken the Supreme Court in all areas of Constitutional Law. That is to say, the Program Committee is no respecter of persons. Or would it be better to say, in the spirit of the Economic Opportunity Act, that Kenneth S. Tollett was placed on the Program of Events twice so as to obtain "maximum feasible participation" of the disadvantaged and the undistinguished?

*I should like to acknowledge the invaluable assistance of Donald K. Hill a first-year law student, at Texas Southern University who did some of the hurried research without which this talk could not have been prepared at all on such short notice.

The ebb and flow of national policy have given rise to five administrations which can be characterized by five catch-phrases: the New Deal of President Franklin D. Roosevelt, the Fair Deal of President Harry S. Truman, the No Deal of President Dwight D. Eisenhower, the New Frontier of President John F. Kennedy, and the Great Society of President Lyndon B. Johnson. Each of these administrations in its own way confronted poverty. The first could not have confronted society at all without confronting poverty because practically the whole nation was in a state of poverty. The second planted seeds of hope and concern for the despised and the infirm. The third confronted poverty by trying to face the past. The fourth confronted it by trying to pirouette beyond the boundaries of the present and the practical with elegance, style and taste--Jack and Jacqueline, pas de deux, gracefully traversed the new frontier of art, drama, and the arrestingly eloquent pronouncement. President Johnson has perpetuated the tradition of FDR, brought to bloom the seeds of HST, reversed the stance of IKE, and given substance to the style and grace of JFK. In short, in the midst of plenty and affluence, President Johnson has declared war on poverty, which stabs the stomachs of one-fifth of our society, which saps the spirits of, what Michael Harrington called, "The Other America."

Allusions to style bring to mind fashions in social or national thought. Changes in fashions of thought are like changes in the styles of swim suits: the more they uncover the facts of life, the more we become interested in and tempted to deal with those facts. The poor have become fashionable, but they have little else in their favor. And the only reason

I imply that it is in their favor that they have become fashionable is that a fashion in our society is like a fad, and fads, like old soldiers, don't die, they just fade away. However, the unfortunate thing about this unhappy analogy is that the poor may, indeed, fade away, but only from view, not from existence.

The first point Michael Harrington makes in his celebrated *THE OTHER AMERICA*,¹ which is dubbed as sparking the War on Poverty, is "the millions who are poor in the United States tend to become increasingly invisible."⁽¹²⁾ He gives many reasons for their invisibility: slums are off the beaten tracks in the large cities, Appalachia is viewed by visitors during its season of resplendent scenic beauty, affluent suburbia is even farther from the slums and "America has the best-dressed poverty the world has ever known."⁽¹²⁾ He further comments in this connection,

"There are tens of thousands of Americans in the big cities who are wearing shoes, perhaps even a stylishly cut suit or dress, and yet are hungry. It is not a matter of planning, though it almost seems as if the affluent society had given out costumes to the poor so that they would not offend the rest of society with the sight of rags."⁽¹³⁾

They are either too old or too young to be seen. Eight million are over sixty-five and even more are under eighteen. They are politically invisible, atomized, faceless and voiceless. It may be worthwhile to keep them in fashion, if for no other reason than to insure that they remain visible.

1. Harrington, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES*. (Penguin Books, 1964). Figures in parentheses in text refer to pages in the work cited.

This is a copy of the speech as given with very minor editorial changes. Citations have been added for the convenience of readers who might like to further explore problems discussed.

This invisible man theme is very familiar to most of this group, I would assume. Negroes, rich or poor, are invisible. That was the theme of Ralph Ellison's THE INVISIBLE MAN. This makes the poor Negro an invisible, invisible man. (At last we can extract some semblance of profound truth from that proverbial Negro clown, I don't recall whether he was Steppen Fetcher, Amos, Andy, or Calhoun, who said, "I feels so unnecessary.") He was expressing, perhaps, the redundant absurdity of being colored. It is probably this redundancy which leads Harrington to observe, "In a sense, the Negro is classically the 'other' American, degraded and frustrated at every turn and not just because of laws." (73)

This aspect of Negro poverty I should like to linger over longer, for it must be kept foremost in mind as I develop later a major theme of my talk. Please indulge me to quote Harrington at length:

To be equal, the Negro requires something much more profound than a way 'into' the society: he needs a transformation of some of the basic institutions of the society. . . (73) According to the Department of Labor in 1960, 4 per cent of Negro employees were 'professional, technical and kindred workers' (compared to 11.3 per cent for whites): 2.7 per cent were 'managers, officials and proprietors' (the white figure is 14.6 per cent). In short, at the top of the economic structure there were 6.7 per cent of the Negroes--and 25.9 per cent of the whites. And this, in itself, represented considerable gains over the past two decades. (74)

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Perhaps the most shocking statistic in all this is the one that describes what happens when a Negro does acquire skill and training. North, East, South, and West the pattern is the same: the more education a Negro has, the more economic discrimination he faces . . . the white Southern college graduate receives 1.85 times the compensation of his Negro counterpart, and in the North the white edge is 1.59. (77)

I would assume that recent governmental programs to afford equal job opportunities have improved this situation somewhat. But Harrington goes on to say, contrasting the absence of visibility and thus non-discrimination of amalgamated or second generation immigrants with the continuation of visibility of Negroes and thus the continuation of discrimination:

The doctor or the lawyer will find it extremely difficult to set up practice in a white neighborhood. By far and large, they will be confined to the ghetto, and since their fellow Negroes are poor they will not receive so much money as their white colleagues. The Negro academic often finds himself trapped in a segregated educational system in which Negro colleges are short on salaries, equipment, libraries, and so on. Their very professional advancement is truncated because of it. (77)

Thus the absurdity and contradiction of the Negro professionals' predicament is compounded. He is visibly invisible. I must stop this line of preliminary analysis, for it is taking on a Kafkaian type absurdity that taxes the mental equilibrium of the speaker, if not you, my listeners--that is, those of you who are still awake. Suffice it to say that the rate of poverty among Negroes is double that among whites.

It might not be too much of an imposition upon you if I correlate some of the previous preliminary observations to law and particularly to the members of this Association. Before I do that, I should like to outline very briefly some of the present institutions which skirmish with poverty and their strategies. They are private and public.

Private Institutions

Since private charity is having the least impact on poverty, I will deal with it first, rather quickly. With the exception of the great

Foundations, such as Ford, Rockefeller, and Carnegie, private efforts to deal with poverty have been rather spasmodic and futile. Churches have their charity offerings, which comprise nickels and dimes, and are rather appetizers, warm-ups, for the important general and building fund offerings to follow. These charity offerings, like so many other efforts at private charity are more significant for the spirit they display than for their substantive effects.

But churches, especially some Negro churches, have unwittingly contributed to the perpetuation of poverty and even submissiveness among Negroes. Here I am alluding to the often repeated spiritual affirmation: "You can have all the world, but give me Jesus." Now I am not against Jesus, but neither am I against all the world, especially some of its goods.

United Funds and Community Chests gather funds for distribution to a whole spectrum of problems involving poverty, ranging from the subsidization of Legal Aid Clinics and Charity Hospitals to homes for unwed mothers and Christmas baskets, the latter being more of a salving of the rich's consciences and conspicuous charity (conspicuous being used here in the perjorative Veblenian² sense) than a serious sustained effort to confront and conquer poverty.

Various Foundations contribute scholarship money for college students and this may be their most significant direct contributions to the poverty war. However, in more recent years, the foundations have got into the pilot project game and studies of various causes of poverty,

2. See Veblen, *THEORY OF THE LEISURE CLASS* (Modern Library ed., 1954)

the failure of the poor and the deprived to achieve and adapt, and other basic questions involving the structure, complexion, and nature of our society. In the long run, these studies and experimental pilot projects may be the most significant contributions private foundations can make to the problem under discussion.

Some of my remarks regarding private charity may sound cynical and suspicious. They are intended partially to be so, but I do not intend to in any way condemn private charity. Poverty is too all pervasive and great for private philanthropy (adequately) to deal with it. This last remark leads to a discussion of public or government charity and the necessary attending laws which must implement public efforts. The importance of law is readily apparent.

Public Institutions

By way of making a transition from private philanthropy to public philanthropy, I should like to quote a very penetrating and incisive comment of the late Professor Edmond Cahn which said:

Never in previous history have so many social and individual problems been put under the sway of law. Law has absorbed substantial slices of relations and transactions that used to belong to homes, churches, voluntary associations, and other disciplinary organs of social environment. Law has assumed burdens that our ancestors left to corporate religion, private benevolence, group ethics, the play of market and economic forces, and the unpredictable shifts of weather and climate. (2)³

This quoted comment must be recognized as a fact if we are to properly understand the role of law and lawyers in the poverty war and especially if we are to maintain the proper attitude toward government

3. Cahn, Law in the Consumer Perspective, 112 U. Pa. L. Rev. 1(1963)

in this struggle.

Government and law have expanded their incidence in all areas of our society. In frontier and horse and buggy days, rules of the road did not need government implementation. Restrictions on the use of property would have been meaningless and useless in very sparsely populated areas. The very existence of government emerged because of the transition of man from a state of nature and natural rights to a state of community and civil rights.

It is invidious to refer to the state or government as the French economist Bastiat did. He said of the state or government, "It is the great fictitious entity by ~~which~~ everyone seeks to live at the expense of everyone else." In complex, congested, urbanized communities, government cannot escape its responsibility to deal with social and communal problems, including poverty.

How is government dealing with poverty? So as to treat this aspect of talk from both a constructive and critical perspective, I should like to refer to a very similar and far-reaching article published in the Yale Law Journal in 1964 by Professor Reich, entitled The New Property. I predict this article is going to revolutionize law and especially its practice before administrative and welfare agencies. His discussion and analysis are not only peculiarly apposite to the developing poverty programs such as that undertaken by the Office of Economic Opportunity, but to the whole range of expanding legal and governmental regulations. He said:

One of the most important developments in the United States during the past decade has been the emergence

of government as a major source of wealth. . .It draws in revenue and power and pours forth wealth: money, benefits, services, contracts, franchises, and licenses...The distribution of largess is on a vast, imperial scale.

Social insurance substitutes for savings, a government contract replaces a businessman's customers and good will. Increasingly, Americans live on government largess--allocated by government on its own terms, and held by recipients subject to conditions which express 'the public interest.' (733)⁴

Briefly, let me outline the nature and scope of the largess of government.

First, income and benefits in the form of social security, unemployment compensation, aid to dependent children, veteran's benefits, and other state and local welfare amounted to about 58 billion dollars in 1961.

Second, federal, state, and local governments were responsible for 9 million jobs in 1961. Add the defense industry and you add 3-4 million more jobs. Fifteen to twenty per cent of the labor force receives its primary income from government.

Government agencies grant occupational licenses to doctors, lawyers, and others. They grant franchises to taxis, TV channels, liquor stores and others. Federal government contracts involve over 50 billion dollars. "These contracts often resemble subsidies: it is virtually impossible to lose money on them." (735)

4. Reich, The New Property, 73 Yale L. J. 733(1964) Profesor Reich has just published another article more specifically relevant to the subject under discussion, Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245(1965)

Since I am adding footnotes there is another article in the same issue which members of the N. B. A. should be especially interested in. Witherspoon, Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process, 74 Yale L. J. 1171(1965)

Federal subsidies to agriculture, the shipping industry,⁵ local airlines, housing, scientific research, and health and education amounted to about 8½ billion dollars in 1964.

The above figures graphically indicate the nature and scope of government largess, and I have said nothing about the use of public resources, such as lands, mines, timber forests, cattle grazing land, parks and recreational facilities, highways and other resources owned by governments. Further, I have said nothing about postal services with their special rates for newspapers and mail order houses, insurance-for home builders, and last, but not least, the communication satellite.

Why do I talk about all of this government largess? For two reasons: (1) Those who would criticize the poverty program should note to what extent the government is pouring out great benefits to industry, private enterprise, and all segments of our economy. Until now the poor have been getting the short end of government largess. Thus there is very little basis for criticizing it as special or preferential treatment of the poor, and (2) those who would resist and not take advantage of this governmental largess are resisting the inevitable, indeed, the accomplished fact. We as lawyers, thus, would be ill advised if we seek to resist the poverty program and government largess.

In 1961 personal income in the U. S. was \$416,430,000, government expenditures were \$168,875,000,000, and government payrolls were \$45 000 000,000. This is too much to fight. It must be joined, but joined to our advantage. Indeed, "the prospect is that government largess

5. See excerpts from Meleman, OUR DEPLETED SOCIETY (1965) in the Saturday Review, 8(July 31, 1965).

will necessarily assume even greater importance as we move closer to a welfare state." (738) Witness the recent passage of the medicare amendment to the Social Security laws and the rent subsidization program. A welfare state undertakes responsibility for the welfare of its citizen and American citizens are becoming more and more insistent about their welfare.

Thus, a remarkable transition is taking place in our society. I teach Contracts and I usually open my course with the statement of the British legal historian Maine, who said that the development of modern governments and progressive societies or economics manifests a movement "from Status to Contract," from feudalism to freedom of contract or free enterprise. This movement has been reversed.

We are moving back in the direction of status. Rights must be added to this status. A license to practice law creates a status relationship, more important than property, and if it is taken from you, your livelihood is removed. Thus a license to practice law should no longer be spoken of as a privilege, but it must be regarded as a right with all or the legal protections appertaining to rights.

Culture and society create wealth and value. Law creates property. Law creates government largess. Government largess must be protected and secured so far as the individual is concerned the way property has heretofore been protected and secured. Government largess must be regarded as creating rights, not privileges, and a condition of obtaining it must not be the surrender or waiver of basic individual and personal constitutional rights.

The Challenge and the Opportunity.

What all this adds up to in terms of extending legal services to the poor is that the discretion of government officials must be limited to welfare programs, investigators must stop their "mid-night raids" to see if a man is in the house, a TV in the kitchen of mothers' receiving aid to dependent children benefits.⁶ In short, the law and lawyers must protect the rights of the poor who receive government largess as well as the rich who receive government contracts and franchises. Government power is necessarily expanding but it must be regulated and humanized within legal boundaries. This presents a challenge to and an opportunity for lawyers. The trend of the times demands more lawyers, not less. Government largess may make lawyers the supreme profession in our society if it responds to the challenge and the opportunity.

6. See Wald, Law And Poverty: 1965, 30, (Report to the National Conference on Law and Poverty, 1965), copies of which were distributed at N.B.A. Convention. See also U. S. Department of Health, Education and Welfare, Conference Proceedings: The Extension of Legal Services to the Poor (1964). In addition to reading the above two books, I was privileged to attend the National Conference on Law and Poverty, sponsored by the U. S. Department of Justice and the Office of Education Opportunity in Washington, D. C., June 23-25, 1965, at which many papers were given on the general subject under discussion. I had hoped that I would have had time to summarize the aforementioned books or pamphlets and also the Law and Poverty papers, but the task was too great. I commend these documents to my readers and I am sure the proceedings of the Conference on Law and Poverty will be printed soon for distribution.

I hope to rework this speech into a full-fledged article in the near future, using more fully the wealth of information in the aforementioned papers.

This challenge and opportunity lead me to more practical considerations, practical considerations relevant to the seminar subject this morning, relevant to the role the N.B.A. membership must play in the War on Poverty and other attempts to help the poor.

We must not respond negatively to the attempts of government to extend legal services to the poor. If what I have said meant anything, it meant this will come by and by. The question is will we be bypassed because we are upset over the standards of indigency, stultified because the government is taking an interest in people we have been serving all the time? My answer is we need not be bypassed, we need not be stultified if we use our heads, experience and ingenuity.

What must we do?

1) Familiarize ourselves with these new programs, especially the War on Poverty program.

2) Submit plans ourselves.

3) Demand maximum participation of our members in these programs. Get on the inside of these programs so we can have a say about the definition of the standards of indigency.

4) Propose that, perhaps, instead of legal centers providing legal services for the poor, let them be clearing houses for referring cases to our members who are already experts in criminal law, family law, landlord tenant law, usury laws, and what have you with the view that the centers provide compensation for our services

rather than taking over some of the practice we already have,⁷ a practice woefully undercompensated.

Don't underplay this referral idea even in the absence of a poverty program. Lawyers referral services are exposed to big cases, big personal injury and other types of lucrative cases. If we are not on the inside, the cases will go uptown, downtown or away from wherever we are.

The Lure of the Inside

A caveat should be quickly interjected here. Beware the lure of the inside! Never stop thinking. Never forget, until our whole society is transformed, that you are a Negro.⁸ The Uncle Tom has been replaced by the "safe" Negro. He is the Negro who thinks he is on the inside. He is the Negro who is let in the vestibule but not the living and dining rooms. He is the Negro who is told that if all your people were like you there would be no problems, and he buys it. He is the Negro who is given a title or a position without real power. He is the Negro who is permitted to sit at the conference

7. Attorney ~~James~~ G. Banks, Executive Director of United Planning Organization of Washington, D. C., pointed out in his remarks after my talk that he had not encountered a single case which an Attorney would dream of taking, except as a charity case.

8. Since some readers may misconstrue the above sentence, I should like to add that it is proper to be conscious that you are a Negro, but you should not be self-conscious. This distinction is important and the above remarks should be read in the light of it.

table but not expected to speak, at least not to speak in the interest of the masses of the Negroes, the majority of the Negro bar.

Prepare for good faith action on the part fo the whites, but expect bad faith. Offer cooperation and coordination, but be prepared to act independently and courageously. Listen courteously to suggestions and proposals but weigh them carefully and critically. Act with purpose. Time action. Don't act imprudently, impetuously or thoughtlessly. Bring to bear in conferences, discussions and negotiations all your well-developed forensic and adversary skills, nurtured over the years by the knocks and jousts of court battles and life. Listen and act with that third sense which you have had to develop over the years for survival. In short, think, plan, devise strategy, act, and plan again.⁹

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9. At this point I had planned to relate the experiences of the Houston Lawyers Association in submitting a proposal to the Office of Economic Opportunity for Neighborhood Legal Services Centers. A press release describing that proposal was handed out at the beginning of the above talk. Rather, I closed with the following remarks, as best I can recall them:

Judge Billy Jones (who presided over the Seminar) told me to cut my remarks to about ten minutes. You can see I didn't obey the Judge. Perhaps, you and, especially, Judge Jones will appreciate a story I will close with instead of talking more.

A few months ago my wife and I were invited to a Masquerade Ball. She obtained an elaborate costume but got nothing for me. On the night we were to go, I protested the fact she had a costume and disguise and I had nothing. She said, "Ken, don't worry about it. Just be pleasant and nobody will recognize you."