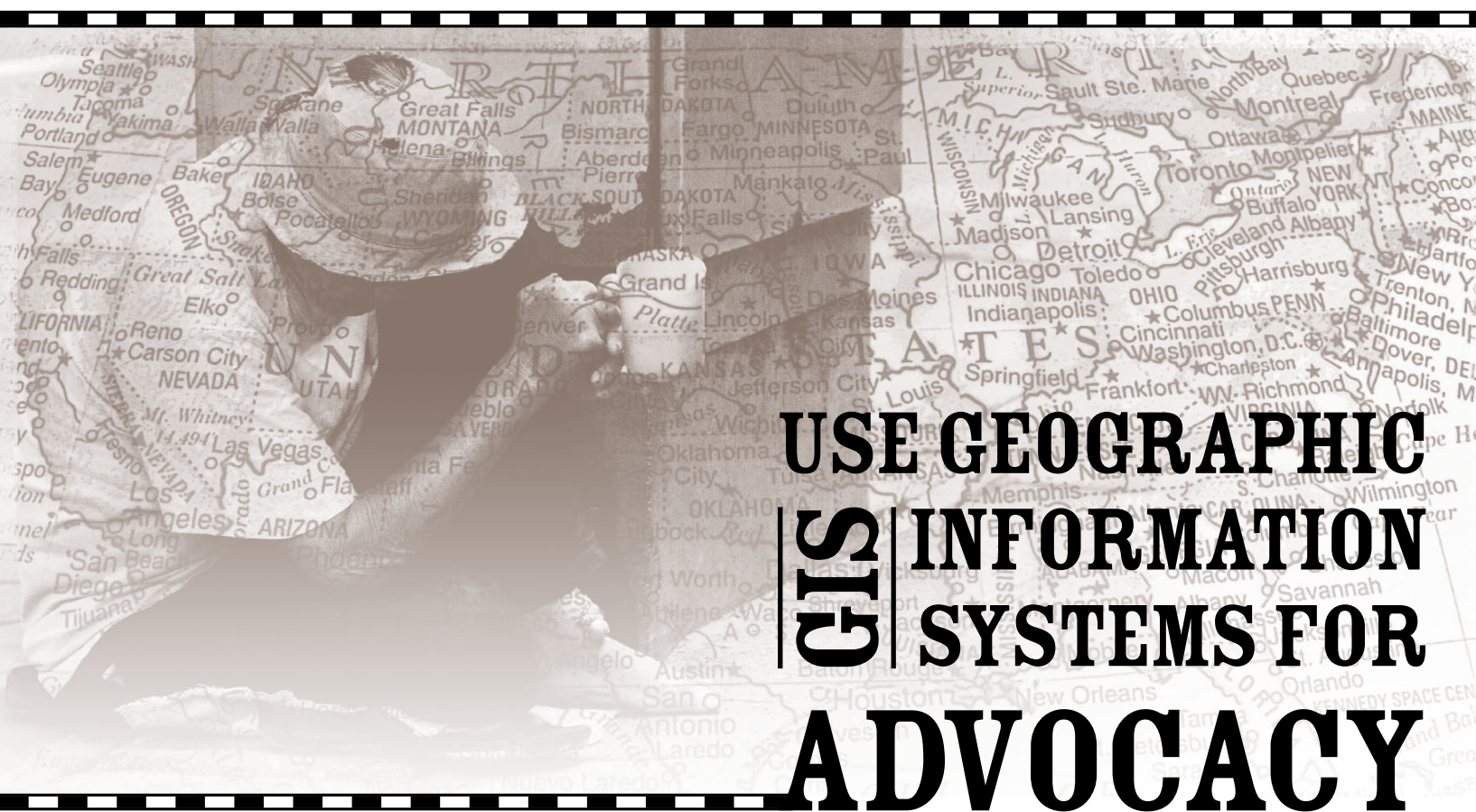


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THREE PHASES OF JUSTICE FOR THE POOR:

from CHARITY *to* DISCRETION *to* RIGHT

By Justice Earl Johnson Jr. (Ret.)

[Editor's Note: Earl Johnson Jr., retired associate justice of the California Court of Appeal, presented the closing keynote speech at the Pathways to Justice Conference in Los Angeles, California, on June 7, 2008; the speech has been adapted slightly for publication here. Justice Johnson is scholar in residence at the Western Center on Law and Poverty and chairman of the Right to Legal Services Subcommittee of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants. The views expressed in this article are those of the author and not necessarily of the aforementioned organizations with which he is affiliated.]

Justice Earl Johnson Jr. (Ret.)
Scholar in Residence

Western Center on Law and Poverty
3701 Wilshire Blvd.
Los Angeles, CA 90010
805.985.8599
JUSTEJ@aol.com

As I began work on my new book, a history of legal aid from the beginning to the current day, I made a couple of surprising discoveries. First, that 44 years have passed since I first became a legal services lawyer and thus found the cause that was my vocation for several years and my avocation ever since. But then I did another calculation and realized that 44 years before my entry into the field was when the national legal aid movement first started—in 1920. So in one way or another I've been involved for half the time the legal aid movement has existed. I had always thought of the start of that movement as being back, way back, in the mists of time. Especially for the younger readers of this article, 1964 must also appear to be way back in the mists of time.

Reflecting back, I was struck with the symmetry—44 years of justice for the poor being a matter of private charity followed by another 44 years of justice for the poor being a matter largely of discretionary government funding. And now, on the horizon at least, is perhaps a third phase—justice for the poor as a matter of right.

And so I thought I would speak to you today about how each of the first two phases got started and then explore the prospects for that third phase coming into existence. Although the first and second phases may seem obvious and inevitable developments in retrospect, both were born despite serious controversy over whether they should happen.

Birth of the Legal Aid Movement

So let's start with the birth of the national legal aid movement in 1920.

To do so, we go back to 1917 in New York City, home of the nation's first and at that time one of only a handful of legal aid societies in the country—and by far the largest. It had almost ten lawyers on staff. In a development that came to have national importance, the Legal Aid Society board managed to persuade Charles Evans Hughes to take over as the society's president. Hughes was the most prominent lawyer in New York and maybe the entire country. He had been the Republican candidate for President in 1916 and lost that election by a whisker. At this point in his career, he was on his way to the American Bar Association (ABA) presidency and not many years after that was appointed Chief Justice of the U.S. Supreme Court.

In 1919, just two years after Hughes took over the presidency of the Legal Aid Society in New York, Reginald Heber Smith published his landmark book, *Justice and the Poor*. This book written by Smith, then the 30-year-old directing attorney of the tiny Boston Legal Aid Society, proved highly controversial within the legal profession. How could this young lawyer, only five years out of law school, have the audacity to indict the nation's legal system for its treatment of the poor? Many bar leaders publicly condemned Smith and his book. And legal aid, which Smith had lauded as the cure for the problem, also became controversial—with many of those critics in the legal profession denying that it was needed. They claimed to take care of the legal needs of any and all poor people who needed their help—on a pro bono basis.

But because of his involvement as president of the Legal Aid Society, Charles Evans Hughes found great truth in *Justice and the Poor*. He used his influence to make legal aid the subject of the main plenary session at the 1920 ABA annual conference and featured Reginald Heber Smith and his book as the focal point of that session. Hughes's prestige and his eloquence won the day over the many

naysayers in the bar. Later in that meeting, largely because of Hughes's advocacy, the ABA adopted legal aid as its major mission and established the Special Committee on Legal Aid to further that mission. Charles Evans Hughes agreed to chair that committee and made sure Smith was appointed as a member. (This is the committee that later evolved into the ABA Standing Committee on Legal Aid and Indigent Defendants.)

Thus was born the national legal aid movement and the ABA's commitment to spread legal aid societies around the country. Because Charles Evans Hughes had laid his hands on Smith, two years later the young lawyer was in a position to lead the effort to create the National Association of Legal Aid Organizations—which, in turn, evolved into the National Legal Aid and Defender Association (NLADA).

The ABA and NLADA were quite successful in their primary mission—spreading legal aid societies across the country. But it was a very thin spread with many such societies consisting of a single part-time lawyer or a small committee of volunteer pro bono lawyers. Hard for us to believe in 2008, but 44 years into the national charitably funded legal aid movement the combined budgets of all the legal aid societies in the country totaled a little more than \$5 million—that's roughly \$30 million in 2008 dollars. The combined legal staffs of all those legal aid societies totaled some 400 full-time equivalents.

Disagreement over Government Funding

By the early 1960s some young lawyers outside the legal aid movement—most in their late 20s—began discussing the problems of the current legal aid societies and the possibility of a federal program to fund and improve legal aid. These were lawyers such as Gary Bellow, Edgar and Jean Cahn, and a handful of others. NLADA staff members, on the other hand, along with many local legal aid lawyers, were alarmed by the notion of government funding. That may be hard to believe in retrospect. But there was more than one reason for this reaction.

To begin with, from the inception of the national legal aid movement a quiet discussion had been going on about whether legal aid should be funded by government and not just private charity.

One of the earliest of those quiet discussions took place in 1919 when the young Reginald Heber Smith had the chutzpah to mail a copy of his manuscript of *Justice and the Poor* to U.S. Supreme Court Justice Louis Brandeis and ask for a meeting to discuss it. After reading the manuscript, Justice Brandeis invited Smith to his hotel room in Washington, D.C. For the most part, the Justice was very complimentary—he agreed with Smith’s sharp and often eloquent critique of how poor people were treated in America’s courtrooms and by the legal system in general. But, as Smith himself later reported, the Justice did differ with Smith’s strong preference for charitable funding rather than government funding of legal aid. Justice Brandeis took the position that the provision of legal aid for indigent litigants was a basic governmental responsibility—a matter of justice not charity.

Over the years, many others joined in the discussion. But for a long time this discussion remained essentially hypothetical because governments in America weren’t exactly rushing in and offering to fund legal aid.

In the 1950s, however, the issue came to the surface for the first time—and did so in the context of the anticommunist and by extension antisocialist rhetoric of that decade. When England enacted its comprehensive government-funded legal aid scheme in 1950, the National Lawyers Guild along with some other lawyers proposed a similar program for the United States. Many in the ABA leadership decried this proposal as socialism of the legal profession and took a position similar to the medical profession’s opposition to government-funded medical care. Soon those in the legal aid leadership were trumpeting charitably financed legal aid societies as the bulwark against socialism of the legal profession. The NLADA president described the private legal aid

societies as the “American way to meet the need.”

Some of that attitude still lingered among those in the legal aid movement as federal government funding of legal services for the poor came closer to reality a decade later in the early 1960s. The reservations most frequently expressed, however, were much more practical. NLADA staff members and many in the local legal aid societies claimed federal funding would undercut charitable support for legal aid. They predicted the federal funding would cease sometime in the future, and, when it did, the charitable funding would have dried up and legal aid would have no money from any source.

As we have seen, those predictions proved to be completely off base. Although federal funding has declined a great deal during the past two decades, other sources of public funding—mainly Interest on Lawyers’ Trust Accounts (IOLTA) and state governments—have made up the difference. Equally important, private giving is significantly up from the levels reached when legal aid was entirely dependent on private charity. Today donations to legal aid from private sources are much larger even in inflation-adjusted terms than they were in 1965, just before federal funding started. In fact, in California alone legal aid receives substantially more from private sources than did the entire country before public funding started.

Fortunately, although NLADA staff members and many in the local legal aid societies initially were fearful of government funding, the NLADA board president at that time, Ted Voorhees, along with Bill McCalpin and others involved with legal aid issues in the ABA, saw federal government funding of legal aid as the opportunity that it was. In February 1965—through the efforts of McCalpin, ABA President Lewis Powell, and others—the ABA House of Delegates unanimously endorsed the Office of Economic Opportunity’s Legal Services Program and thus ushered in the second phase of legal aid development: discretionary government funding of justice for the poor. After sev-

eral more months of persuasion, scores of legal aid societies were lining up to find out how they could apply for government funding.

I don't have time to cover all the ups and downs and ups and downs and ups and downs that have characterized the past 44 years of government-funded legal aid. Many of you here are familiar with some or most of that history because you have lived through it. At a macro level, the biggest change in the past 44 years is that, while we started out in the 1960s and 1970s with the federal government furnishing 90-to-95 percent of the financial support for civil legal aid in this country, now many state governments and some local governments have joined in and, along with IOLTA, supply a larger share of total funding than does the national government. As a result, the combined public investment in civil legal aid, including IOLTA, is back to where the Legal Services Corporation budget alone was in 1981. On the other side of the ledger, while the funding is back to where it was, in 1981 legal services lawyers had almost no restrictions on what they could do for their clients or whom they could represent. Unfortunately, since 1996 this is no longer true for those working in programs that receive any federal funds. But this is all familiar territory for those in this room who live daily with the advantages and disadvantages of legal aid in the era of justice for the poor as a matter of discretionary government funding.

Justice as a Matter of Right

So I will now shift to what I see as a possible third phase of legal aid development—justice for the poor as a matter of right.

Just as in 1965 a unanimous declaration of the ABA House of Delegates engineered by ABA President Lewis Powell ushered in Phase 2—discretionary government funding—in August 2006 the ABA House of Delegates passed a unanimous resolution requested by ABA President Mike Greco that I have some hope will usher in this third major phase of civil legal aid history. I would like to say we are on the threshold of that era, and we may well be. But the threshold is not that of a doorway

but the threshold of a wide porch leading to that doorway, I fear. Yet I am optimistic we will cross that porch eventually. The only questions are when we will start, and how long will getting across the porch take.

Why am I so confident? For several reasons.

My confidence begins with the tension between the nation's public rhetoric promising equal justice for all—rich, poor, and in between—and the reality that millions are denied the lawyers required to make that promise come true. I am speaking, of course, of the rhetoric embodied in the due process and equal protection clauses of the U.S. Constitution and chiseled over the entrance to the U.S. Supreme Court and recited daily in the pledge of allegiance as one of the two fundamental ideals of our nation—"justice for all." A bedrock understanding about what America is all about so embedded in the public's consciousness that, when polled, nearly 80 percent of Americans said they believed a constitutional right to counsel in civil cases already existed.

When it comes to truly fundamental bedrock values, history teaches us that we can only tolerate a tension between ideal and reality for so long. Sometimes slowly, but almost always surely, democratic societies move to close the gap. Equality before the law, equal justice for all, is definitely one of those bedrock values, and the gap between ideal and reality is enormous, as we all know.

A second reason I am confident about the long term is that so many other comparable industrial democracies already have created rights to counsel in civil cases in their regular courts. Beginning with France in 1851, Italy in 1865, and Germany in 1877, by the end of the nineteenth century or early in the twentieth century, most continental European countries had enacted statutes requiring the appointment of free counsel for indigent litigants, both defendants and plaintiffs, in cases before their civil courts.

A third reason for my optimism is born of the way the highest courts in other

parts of the world have interpreted constitutional language embodying the same concepts and derived from the same political theory as our “due process” and “equal protection” clauses. The framers of our Declaration of Independence and our Constitution were heavily influenced by the social contract theory developed by European political philosophers. This is the same social contract theory that also influenced European constitutions and their other basic political documents. Among the fundamental precepts of social contract theory is equality before the law—the notion that no person would surrender the right to settle disputes through force unless the sovereign substituted a forum where that citizen had a fair and equal chance of prevailing, no matter the resources or social station of the person on the other side. Thus most European constitutions contain guarantees of “equality before the law” or of a “fair hearing” or both in civil cases—just as our Constitution guarantees “due process” and “equal protection of the law” in those proceedings.

Given the common source of the constitutional language on both continents, looking at how European courts have interpreted these concepts of equality and fairness is instructive. In 1937, in a case called simply *Judgment of Oct. 8, 1937*, the Swiss Supreme Court found the constitutional guarantee that “all Swiss are equal before the law” meant the government must provide free counsel to indigents in any and all civil cases requiring “knowledge of the law.” And in 1979, in a far-reaching decision, *Airey v Ireland*, the European Court on Human Rights found a provision that only guaranteed civil litigants a “fair hearing” required member governments to provide free lawyers to those unable to afford counsel in the regular courts. The court reasoned that allowing impoverished litigants to appear without counsel and talk to the judge did not amount to *effective* access to justice or provide the “fair hearing” the European Convention guaranteed in civil cases.

Can one really say the U.S. Constitution doesn’t guarantee its citizens “equality before the law” and a “fair hearing” in civil cases while the European constitu-

tions do? Or that somehow lawyers are necessary for *effective* access to the regular courts in Europe but not in this country? Or that access to justice here doesn’t mean *effective* access to justice—but only the physical ability to enter the courtroom and talk to the judge? I think not.

Finally, I also am encouraged about the future of justice for the poor as a matter of right by things that have been happening right here in California these past few years. I have long held the view that what we are talking about creating and enforcing as a matter of right is not necessarily a lawyer in every case in every court and every forum that is deciding noncriminal cases. Rather, we are talking about *effective* access to justice, equality before the law, and a truly fair hearing for all litigants in such cases.

If the shortage of counsel for lower-income people in California has had any virtue at all, it is the limited virtue that it has created a necessity. And necessity, as is often the case, has been the mother of invention. Overwhelmed with unrepresented litigants, especially in family law cases, a decade or so ago our courts began experimenting with programs providing self-help legal assistance to those *pro se* litigants. What started as an experiment is moving in the direction of an institution in this state. And, beyond providing self-help assistance, courts have begun to alter their own procedures and approaches when both sides appear without lawyers. Many judges take a more active role in uncovering the critical facts and controlling legal principles—rather than relying on the parties to find and present that information as they would in a traditional adversarial proceeding.

I do not view the development of self-help legal assistance as competitive with legal aid. Instead I see self-help assistance and legal counsel as complementary. And, if properly done and integrated, they form two parts of a system that achieves the goal of effective access to justice in all cases—and that does so in a cost-effective manner. This system also includes lay advocates in forums where they are permitted and sufficient, and unbundled legal help when that is enough.

Equal justice will be provided as a matter of right when this full range of assistance and representation is available to all lower-income Californians and when the level of such assistance or representation is properly matched to the client's need. That is, when legal self-help assistance is enough, that is what is provided. And when a lay advocate or unbundled legal help from a lawyer will do the job, that is what the client receives. But when—as often will be true in many courts and many cases, only full representation by a lawyer will suffice—then that is what the system provides. And it does so as a matter of right not charity. Nor does the client's receipt of legal assistance depend on the good luck that one of a small cadre of legal aid lawyers or perhaps a pro bono counsel has the time to take on that client's cause.

In his state of the judiciary speech a few years ago, Ron George, chief justice of California, said, "If the motto 'and justice for all' becomes 'and justice for those who can afford it,' we threaten the very underpinnings of our social contract." Unfortunately, despite the heroic and inspiring efforts of the people in this room, for many of California's lower-income people—those who cannot be served with the limited resources currently devoted to providing them representation—the "If" in Justice George's warning is really a "Because." That is, "*Because* the motto 'and justice for all' *already is*, for too many people 'justice only for those who can afford it,'" we *already* "threaten the very underpinnings of our social con-

tract." Because of this reality, the social contract has been breached, and many unfortunate millions are destined to be denied justice in California's courts and the rest of its legal system.

As all of you in this room know, the continuing denial of justice to many of our state's poor people is not just something that should make us and other more fortunate Californians somewhat uncomfortable because maybe we have to cross our fingers when pledging allegiance to a country that supposedly provides justice for all. No, our state's and nation's failure to guarantee justice as a matter of right has disastrous consequences for the daily lives of our state's most vulnerable people. For, without the effective access to justice such a right would guarantee, poor people in this state too often unjustly lose their housing, their health, their livelihood, their children, their possessions, and nearly everything else that makes life worth living.

■ ■ ■

I say the time has come to honor the social contract. The time has come to provide the equality before the law that is an essential term of that contract. The time has come to give poor people the resources necessary for truly effective access to justice and truly fair hearings. Saving a fortunate few from injustice and the resulting deprivations they are doomed to suffer is no longer enough. It is time for the few to become the many and ultimately the all—the "all" we have long promised will have justice in this land.

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—The Editors

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