

To Establish Justice For All (2013)

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Prologue

Until fairly recently, I was a judge on an appellate court in Los Angeles, where I spent a quarter of a century. Every morning of oral argument during that time, we judges asked the lawyers, court staff, and others in the audience to stand and face the U.S. flag at one corner of the courtroom in order to pay respects to that symbol of our democracy and as the clerk recited each time, “the principles for which it stands, liberty and justice for all.” I hesitated each time over those last three words, “justice for all.” Why? Because I was painfully aware our nation was far short of providing justice for so many people living in this great country, those unable to afford the lawyers who hold the keys to our legal system. I also was mindful of the tremendous, seemingly insurmountable obstacles faced by those who have tried to make “justice for all” a reality, many of whom have dedicated their lives and their careers to that cause. This book is an attempt to tell their story and in doing so the history of civil legal aid in this country.

We begin with the aspirations in our national rhetoric—what the country tells its people and the rest of the world about our guiding principles. “To Establish Justice” is the very first goal the U.S. Constitution sets for our “more perfect union” in the Preamble to the nation’s founding document. The primacy of that mission is echoed not only in the Constitution’s later guarantees of “due process” and “equal protection of the laws,” but in our pledge of allegiance’s promise this nation provides “justice for all” and the slogan carved above the entrance to the U.S.

Supreme Court, “Equal Justice Under Law.” Presidential addresses and patriotic orations from lesser politicians are liberally laced with celebrations of our nation’s commitment to “equality before the law,” to the principle “no man is above the law or below it,” and “justice for all Americans.”

If all this noble rhetoric reflects reality, ours must be a nation where law and the courts are fair for everyone in the land, even if life sometimes isn’t. And certainly, if that is true the poor must stand equal to the rich before the nation’s judges, even if they don’t in so many other areas of the society. To stand equal in U.S. courts, in turn, people must have lawyers especially if the other side does. This includes people too poor to afford a lawyer’s fees. Although the U.S. government has done much “to establish justice” in this land, if it is to establish justice for the bottom quarter or third of the nation’s population the government must provide them lawyers. Given this fact, it may surprise most citizens who have heard and believed the rhetoric of equal justice in this country that it was only a decade short of the bicentennial year of the nation’s founding before the U.S. government or any government in United States first began supplying lawyers for poor people in civil cases—not nearly enough but at least some.

This book tells the story behind our nation’s tardy and as yet unfinished effort to make those people unable to afford lawyers equal to those who can—and thus for the first time establish justice for that segment of the population. That effort is usually called “legal aid” or “legal services for the poor.” “Legal aid” is not exactly a term that conjures up images of turmoil and controversy in most peoples’ minds. It sounds so much like “first aid,” and “band aid,” and similar help for those in trouble it is difficult imagining why anyone would oppose it. Yet for most of the last half century, legal aid for poor people has been a major political and ideological

battleground, a target of nearly constant assaults from the right wing of U.S. politics as well as some powerful politicians and wealthy campaign contributors.

In a sense it has been a contest over two visions of what poor people deserve in the way of legal aid. To analogize to health care—should the government only provide them a network of first aid stations or should it also give them access to specialists and hospitals when they have serious illnesses. The code words for the first aid station approach in the legal aid context is having offices that limit their mission to just taking care of poor people’s “everyday” or “routine” problems. The language describing the broader vision started with the very first legal aid society, which included in its mission “promoting measures for their protection.” During the war on poverty it was called “law reform” and later was labeled “impact work” or “high-quality legal services.”

This lengthy and heated battle between those favoring the first aid station model and those who believe poor people need and deserve a broader range of services has been highly visible to insiders, especially in Congress, with several presidential administrations, and among leaders in the legal profession. But for most U.S. citizens it has remained largely hidden from view. Virtually from birth we are bombarded with messages that this country guarantees “justice for all” and “equal justice under law” and offers everyone “due process of law” and “equal protection of the laws.” No surprise then that polls show most citizens of this country assume the U.S. Constitution guarantees low-income litigants a right to free counsel in civil cases just as it does in criminal cases. That assumption is dead wrong, of course, as is the comforting corollary that no one can deprive the poor of lawyers in any civil case. To the contrary, those opposing effective legal representation of the poor have threatened the survival of legal aid and fought to curtail what those lawyers can do for their clients.

This book tells the history of civil legal aid, from its earliest days in the last quarter of the 19th century through the 20th century to the current era. Born during the worst depression of the 19th century, legal aid has lived through and often been influenced by the main currents in U.S. history since that time. It became a national movement during the last stages of the Progressive era, survived the Great Depression, gained momentum during the McCarthy era, finally earned government funding when the country declared a war on poverty, was a target of the Reagan Revolution, saw its recovery during the Clinton administration cut short by the Contract with America, leading to a compromise that brought a measure of peace but at great cost that has endured through the George W. Bush, and so far, the Obama administrations.

Although the primary focus of this book is on the institutions that finance and support legal aid—in the beginning the charitable societies, and later on the Office of Economic Opportunity (OEO) Legal Services Program and the Legal Services Corporation—it does not ignore the clients and their lawyers. Whole chapters are devoted to the cases some clients brought to legal aid offices and the exploits of the lawyers who took those cases as far as needed, sometimes all the way to the U.S. Supreme Court. In addition, “Reports from the Front” recounting other cases are interspersed between some of the chapters dealing with the political history of the movement.

Along the way, the reader will learn of the original vision that was not fully realized until the mid-1960s when the “war on poverty” produced the first government funding of lawyers for the poor in this country. The young lawyers recruited to join that program had many successes in the courts and legislatures, some of the more dramatic of which will be recounted. Among them:

- A series of cases that brought an end to “local option hunger” when hundreds of counties refused to offer “food stamps” to their poorest citizens.
- Court victories that ended “retaliatory evictions” when tenants reported broken windows and toilets, rat infestations, holes in walls and roofs, and other dreadful conditions to city housing code enforcement authorities.
- A campaign that finally began enforcement of long-ignored health and safety statutes designed to protect workers in the nation’s vast agricultural fields.
- Advocacy and sometimes litigation resulting in more units of new, low-income housing units.
- A U.S. Supreme Court decision requiring local welfare authorities to give recipients a hearing before cutting off their payments, one of 70 cases government-funded legal aid lawyers won in the nation’s high court during the seven years from 1967 to 1974.

Government-funded legal aid lawyers also lost some cases. But it was the many successes that brought the unintended consequences. They made some powerful enemies for the federal program that supported these energetic lawyers serving the poor. This launched a 30-year political war that drew in some of the most important figures of recent U.S. history. Readers will encounter historical figures such as Teddy Roosevelt and Charles Evans Hughes, Ronald Reagan and Warren Rudman, Dick Chaney and Hillary Clinton, Donald Rumsfeld and Sargent Shriver, Walter Mondale and Newt Gingrich, and Jacob Javits and Robert Taft Jr., among others. All of them, along with several others, played leading roles in the drama that is the political history of the last four decades of civil legal aid in the United States. They also will meet Howard Phillips

and others in the “New Right,” who for decades have made the overthrow of the federal government’s legal services program the number one item on their agenda. They also will learn how far some powerful interests, such as agribusiness, will go to strike back against lawyers and their clients who manage to beat them in the courts.

The book is divided into six parts published in three volumes—each part consisting of several chapters and covering a different historical era. Volume one contains two parts—first, the Charitable Era from 1876 through 1964, when civil legal aid depended entirely on the generosity of private donors, mainly wealthy ones; and second, the war on poverty era, from 1965 through 1974, when civil legal aid became part of the war on poverty as the OEO legal services program when it earned headlines and enemies aplenty.

The second volume also has two parts: first, the attempt to rescue the legal services program when the war on poverty collapsed by creating an independent Legal Services Corporation, a rescue effort that took nearly four years, 1971–1974, and second, that corporation’s first dozen years, 1975–1992, which early on brought great progress followed by a brush with extinction.

The third volume contains the final two parts. The first relates the congressional constriction of access to justice for poor people and how that has affected the nation’s civil legal aid system, 1992–2008. The final part contrasts the development of legal aid in the United States with its evolution in other industrial democracies, then speculates about its possible future in this country.

Finally, a personal note: This is written by someone who participated in some parts of that history—rather than a completely detached observer. I was at the center of events for a few years and active at the periphery for many others. I started as a poverty lawyer in the ghettos of

Washington, D.C., then became the first deputy director and second director of the federal government's first program funding legal representation of the poor—the OEO's Legal Services Program. Later as a member of the National Advisory Committee to the OEO Legal Services Program, I was one of a number of people involved in the legislative campaign that ultimately created the Legal Services Corporation. This independent public corporation took over from the OEO program and now continues to administer the federal government's funding of legal services for the poor. Later I was appointed as an appellate judge in California, and remained interested but largely uninvolved in events affecting the Legal Services Corporation at the national level, while becoming active in access to justice initiatives at the state level in California.

Thus, at some points, I was a personal witness to what happened. Even for those events, I usually have succeeded in interviewing others who were present and checked my recollection against theirs. For the remainder of the history, which forms the bulk of the narrative, I rely on the usual sources a complete outsider would employ—documents, meeting transcripts, congressional hearings and floor debates, interviews with participants, and in this instance, a set of over 70 videotaped oral histories collected at the National Equal Justice Library (NEJL) now housed in the Georgetown Law School's law library building.

Thus, this is a history with a point of view. It is the point of view of someone who served in various ways on one side of an ongoing struggle—in this instance, the struggle to bring equal justice to the nation's lowest-income population, now numbering over 60 million people. In that, it is similar to the many books about battles written by those who served on one side or the other in wartime. Or, the accounts of election campaigns produced by those who worked in one of the candidate's campaign. In this instance, the legal services program's side sometimes won and

sometimes lost, and finally ended up after 30 years of conflict with a negotiated peace. In telling this story, I have tried to be as objective as possible, but it is not always that easy to be neutral about justice for anyone, including the poor.

It is also is difficult if not impossible to understand the more recent politically turbulent era without going back to the beginning of legal aid for the poor in this country, which happened to be the centennial year of America's independence.