

RATIONING JUSTICE

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I INTRODUCTION: RATIONING ACCESS TO JUSTICE FOR THE POOR

A national survey of economically disadvantaged Americans, conducted *prior* to recent reductions in and restrictions on government-funded legal services programs, found that 80% of the legal problems of the poor were handled without legal assistance.¹ Undoubtedly, the current reductions and restrictions have only made matters worse.

The widespread and pervasive denial of legal assistance to the poor has profound political and moral implications for our social order. In his classic study *Democracy in America*, Alexis de Tocqueville observed that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”² He further asserted that in the United States the power of lawyers “extends over the whole community.”³

Access by the economically disadvantaged to what Tocqueville characterized as “the power of lawyers”⁴ offers to them the possibility of equal justice when they face the government and other powerful or affluent legal adversaries. Meaningful access to justice requires the assistance of a competent lawyer. When we deny legal representation to individuals because of their inability to pay for it, we not only place a prohibitive price tag on justice, we effectively deny those individuals the ability to defend or pursue their lawful personal, economic, and political interests.

In a world where the availability of legal services for the poor is severely limited, only a small percentage of economically disadvantaged individuals can have the assistance of lawyers in resolving their legal problems. In such a world—our world at present—the

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1. See AMERICAN BAR ASS'N CONSORTIUM OF LEGAL SERVS. AND THE PUB., TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY 37 (1989).

2. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed. & Henry Reeve et al. trans., Vintage Books 1990) (1835).

3. *Id.*

4. *Id.* at 275.

idea of universal access to justice is not a reality, but an aspiration. In such a world we are forced to ration justice for the poor. It is one thing to acknowledge the rationing of justice for the poor as a fact; however, it is another matter to accept that fact as how things ought to be. Of course, we need to analyze the legal needs of the poor and develop rational plans for allocating what is in fact a scarce resource. We have always had to control intake and set priorities in legal services—we have had no other choice. But we must also aspire to something better: increasing the access to justice of the economically disadvantaged.

II RATIONAL RATIONING

A variety of normative assumptions exist that can serve as criteria for rationing legal services. These different criteria can be employed to develop an allocation strategy for deploying the scarce legal services resources for the poor in a rational and fair manner.

A. *Equal Opportunity for Legal Representation*

At first glance, the most attractive criterion for allocation is that all economically disadvantaged people should have an equal opportunity to obtain legal representation. However, legal services are scarce, and thus the equal opportunity method of allocation would favor those who are the most aggressive in seeking out legal assistance and those who reach the appropriate legal services provider when the available resources are not already fully committed. Those who, for lack of knowledge, social skills, or referral assistance, fail to apply for legal services in an efficient or timely manner would be denied legal assistance, no matter how badly they need it or how meritorious their claims. Such an “equal opportunity” rationing criterion thus involves no priority-setting and is essentially a “first come, first served” method of rationing.

B. *Morally Worthy or Deserving Cases*

An alternative to the equal opportunity model, but equally problematic, is that legal services providers should screen all applicants for legal assistance and accept only the cases of the “worthy” or “deserving” poor. Applying this standard would necessarily require legal services providers to make judgments about which applicants have a moral claim of entitlement to legal assistance. Legal services providers would be faced with problematic situations. For example, is a public assistance recipient who faces termination of

benefits for failing to comply with workfare requirements “worthy” of legal assistance in challenging the termination? Is a family that has previously been evicted for nonpayment of rent “deserving” of legal representation in a subsequent eviction proceeding?

Requiring legal services attorneys to evaluate, on a case by case basis, the moral worthiness of applicants for legal assistance is not only administratively unfeasible, but ethically problematic. This is not to say, of course, that some comparative assessment of competing claims for assistance is not appropriate and necessary. But this does not justify legal services lawyers assuming the role of moral arbiters over otherwise eligible applicants for legal aid.

C. “Emergency” Cases

Another basis for rationing legal services is that legal services providers should accept only “emergency” cases. Emergency situations would include cases of individuals facing imminent loss of child custody, housing, income, or utilities, and facing other similar circumstances that require immediate attention. While many legal problems of the poor could qualify as emergencies, most would not fall into this category.

The typical caseload of a legal services program includes some cases that demand immediate, aggressive attention. Most, however, need long-term professional attention. Thus, the majority of the legal needs of the poor cannot adequately be addressed by a legal services “emergency room.”

D. Normative Assumptions That Do Not Focus on Individual Representation

The three rationing criteria described in the above paragraphs relate to individuals seeking legal assistance. There are other normative assumptions which can serve as rationing criteria that do not focus on individual representation. These criteria are thought to increase the impact and scope of legal services in order to address the problems of the poor. For example, one such criterion is that to maximize the impact of their representation, legal services lawyers should represent groups in the form of class actions and engage in law reform litigation. Another criterion is that legal services lawyers should work for economic redistribution. This can be accomplished by using the law to affect the distribution of government funds and benefits, as well as the distribution of private wealth. A third, related normative assumption is that legal services lawyers should openly support community organizing efforts and

other poverty-based movements in order to increase the political power of the poor.

Adopting these rationing standards might increase the overall impact of the efforts of legal services attorneys; however, the majority of economically disadvantaged individuals in need of legal assistance would be left without representation. Implementing these normative assumptions as rationing criteria would result in denying legal services to individuals except insofar as they might benefit indirectly from social reform efforts or directly as members of a group targeted for representation.

The rationing of legal services in a rational way involves articulating and applying normative assumptions about how scarce legal resources ought to be allocated. In the present circumstances, however, no distributive criterion, or combination of criteria, can fully accommodate the legal needs of the poor.

III BEYOND RATIONING

At the same time that we develop principled approaches to the rationing of legal services, we must also think about and plan broad-based institutional strategies for ensuring equal access to justice in the future. This will require both reducing the need for legal services and increasing the availability of legal services.

A. Reducing the Need for Legal Services

Improving the economic circumstances of those who currently live in poverty could reduce or eliminate many of their legal problems. As anyone who has been a legal services attorney knows too well, many of the so-called legal problems of the poor are in fact a function of their poverty. The poor suffer many consequences because of insufficient income from low wages, unemployment and underemployment, and inadequate government benefits. The poor live in substandard, overcrowded private housing in run-down slum neighborhoods or in ill-managed, crime-ridden public housing projects; they have poor diets, health care, and education; and they are prone to stress, depression, lack of motivation, health and family problems, and substance abuse.⁵

The income inequality in the United States is the most extreme in the Western World. The rich are still getting richer, and the

5. See PETER H. ROSSI, *DOWN AND OUT IN AMERICA* 143-79, 186-88 (1989).

poor are still getting poorer.⁶ The United States has the highest child poverty rate of any Western industrialized nation.⁷ In addition, welfare benefits for single mothers in the United States are among the lowest in the Western World. As one commentator has observed:

American adults are the most selfish of any Western country. Among the Western [W]orld's 20 richest nations, the United States houses the wealthiest grown-ups and the poorest children. We levy the lightest taxes, rank dead last in social spending on young people, rank second to last in spending on education and rank first in children living in families with incomes below meager federal poverty guidelines (\$15,000 per year for a family of four). Seven million youths live in utter destitution (that is, in families with incomes less than half of the poverty level).⁸

In the face of these disturbing facts, our government is denying the poorest of our citizens welfare benefits, food stamps, medical insurance, disability benefits, housing subsidies, and legal services.

In the United States, there is widespread support for the absurd proposition that the poor are to blame for their own poverty, that social programs that assist the poor are to blame for perpetuating poverty, and that in order to escape from poverty, the poor need only to get a job.⁹ Statistics, however, tell a different story. In

6. See Daniel H. Weinberg, *A Brief Look at Postwar U.S. Income Inequality*, in 191 CURRENT POPULATION REPORTS: CONSUMER INCOME 1 (Bureau of the Census, Econ. and Statistics Admin., U.S. Dep't of Commerce, Series No. P-60, 1996); Richard Freeman, *Toward an Apartheid Economy*, HARV. BUS. REV., Sept.-Oct. 1996, at 114, 115.

7. Child poverty rates in Western Europe are below 10% (with the exception of Ireland [12%]) as compared with a 21% rate in the United States. Other specific rates are: Austria, 4.8%; Belgium, 3.8%; Denmark, 3.3%; Finland, 2.5%; France, 6.5%; Germany, 6.8%; Italy, 9.6%; Luxembourg, 4.1%; Norway, 4.6%; Sweden, 2.7%; Switzerland, 3.3%; United Kingdom, 9.9%. Timothy Smeeding, Luxembourg Income Study, Syracuse University (1991) (unpublished report, noted in Jean Hopfensperger, *In France a Security Blanket for All Families with Children*, STAR TRIBUNE (Minneapolis-St. Paul), Apr. 14, 1996, at 1A, available in 1996 WL 6909245).

8. Mike Males, *The Anti-Kids Crusade of 1996*, NEWSDAY, July 14, 1996, at A41, available in 1996 WL 2529528.

9. The "bible" of the conservative attack on government assistance to the poor is CHARLES A. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984). Murray argues that federal welfare programs have discouraged the poor from seeking employment and marrying and encouraged them to become dependent on welfare and to give birth to out-of-wedlock children. Murray views the poor as rational actors who, after accounting for their possibilities, began pursuing the most advantageous course of action and thus decided to sign onto the welfare

the current American labor market, a significant proportion of those who are already employed are living in poverty.¹⁰ Even if every adult receiving welfare was able to work—including mothers of young children without affordable day care, adults with no skills or work experience, and elderly and disabled legal immigrants—there are not nearly enough unskilled jobs available.¹¹ Moreover, moving welfare recipients from the welfare rolls into unskilled, low-wage jobs not only leaves these recipients in poverty but threatens to lower the wages for such jobs even further, possibly increasing unemployment.¹²

We need to maintain poverty at the forefront of the political agenda, not by attacking those who are the victims of social and economic forces beyond their control but by restarting the War on Poverty. By improving the economic circumstances of those currently living in poverty, we could reduce their need for legal services.

B. Increasing the Availability of Legal Services for the Poor

Poverty is the most pressing and pervasive social problem in American society, and therefore we need to make poverty a major legal issue. We must move poverty to the center of human rights discourse so that it becomes an integral part of the other human rights struggles of racial minorities, women, children, the elderly, and people with disabilities.

rolls. Thus, Murray claims, the poor have become the victims not of a socio-economic system but of their own choices and actions—and of social policies which encourage them to seek public assistance. For a convincing critique of Murray's analysis, see Christopher Jencks, *How Poor Are the Poor?*, N.Y. REV. OF BOOKS, May 9, 1985, at 41, reprinted in CHRISTOPHER JENCKS, *The Safety Net*, in RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 70-91 (1992). For alternatives to Murray, providing more systemic and nuanced accounts of the causes of poverty, see ROSSI, *supra* note 5, at 181-211, and the thoughtful explanations in WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987) and WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* (1997).

10. See Freeman, *supra* note 6, at 117.

11. See Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 739 (1998); Brendan P. Lynch, *Welfare Reform, Unemployment Compensation, and the Social Wage: Dismantling Family Support Under Wisconsin's W-2 Workfare Plan*, 33 HARV. C.R.-C.L. L. REV. 593, 603 (1998); Andrew S. Gruber, Comment, *Promoting Long-Term Self-Sufficiency for Welfare Recipients: Post-Secondary Education and the Welfare Work Requirement*, 93 NW. U. L. REV. 247, 283-84 (1998).

12. See Lauri Cohen, Comment, *Free Labor in the Name of Workfare: New York's Reaction to the Brukhman v. Giuliani Decision*, 64 BROOK. L. REV. 711, 731-32 (1998).

We cannot, however, make poverty a major legal issue in American society without legal resources. Such an effort requires broad-based institutional strategies for increasing the availability of legal services for the poor directed at legislation, government, the bar, and law schools.

1. Legislative and Government Strategies

Access to justice has a price tag that the poor cannot afford to pay. Political commitment to equal justice for all makes the provision of legal services to the poor a public responsibility. The right of the poor to civil legal services, coupled with adequate funding for those services, should not only be a federal statutory entitlement but also be incorporated into state statutes and constitutions.

In addition, the privilege of practicing law should be more fully monitored and regulated by government bodies. Providing free or low-cost legal services to the poor should be the legal obligation of every practicing lawyer, a condition of obtaining and retaining a license to practice in the jurisdiction.

2. The Role of the Bar and Law Schools

Lawyers are the trustees of justice, and their right to practice is a privilege. Accordingly, lawyers should have a legal duty to provide, and an ethical duty to support, free or low-cost legal services to those who cannot afford to pay for them. Law schools bear the primary responsibility for teaching legal ethics and professional responsibility, and for inculcating in students good professional values. We need to rethink the entire field of legal ethics and how it is taught.¹³ A central theory of such ethical education ought to be the obligation of the lawyer to work for social justice.

The current system of legal ethics is contained in the Code of Professional Responsibility and the Model Rules of Professional Responsibility, which together establish an ethical regime in which loyalty to clients, confidentiality, and zealous advocacy trump all other values. To the extent that ethical practices are enforced at all, it is essentially through the disciplining of "bad" lawyers—those who pursue their own self-interest to the detriment of their clients or who pursue their clients' interests "too zealously," trespassing on the legitimate interests of others.

13. In the critique of legal ethics and of the teaching of legal ethics contained in these pages, I have relied upon Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1998), and upon Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 GA. L. REV. 853, 864-67 (1997).

Thus, the existing disciplinary approach to legal ethics is a system which focuses on punishing those few offenders who are caught and prosecuted. An alternative would be to have a governing body of ethical standards and professional obligations that required lawyers to pursue justice and to participate in assuring equal justice for all.

Law schools can play an integral role in promulgating this alternative system of legal ethics. Law students can be taught about a range of issues including: the importance of legal representation for the just resolution of legal problems and disputes; how people obtain access to justice; the costs of legal services and the effect of those costs on persons of modest income; pro bono opportunities and obligations; the range of professional employment options (other than serving corporate America); and what it means to be an ethical and socially responsible lawyer in contemporary American society.¹⁴

Law professors can encourage their students to explore issues of professional identity and professional goals. The development of professional morality and habits of reflection and introspection should be stimulated and nurtured during law school, because the pace and pressure of law practice may prevent such reflection later in a lawyer's career.

Finally, law professors can teach students about the enormous effect lawyers have on society. Karl Llewellyn used to confront incoming first-year law students with the question, "Have you been called to the bar?"¹⁵ He would then challenge them to live up to the examples of individual lawyers who had played significant roles in pursuing justice in their practice of law. Lawyers are the trustees of justice, and thus law schools should inculcate this professional ideal in their students early on and throughout their legal education.

14. As one law professor expressed it:

If all I can do in law school is to teach students skills ungrounded in a sense of justice then at best there is no meaning to my work, and at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.

Jane Harris Aiken, *Striving to Teach "Justice, Fairness and Morality,"* 4 CLINICAL L. REV. 1, 6 n.10 (1997).

15. The author was a student in "Elements of the Law," Llewellyn's course for first-year law students at the University of Chicago in the Fall of 1960.

IV
CONCLUDING THOUGHTS—DOING THE BEST WE
CAN WITH WHAT WE HAVE

There has never been a period in American history when the poor were in greater need of advocates than at present. Now is not a time to give up the struggle for social justice; it is a time to renew our efforts and our commitment.

In the face of reductions in government financial support for legal services and government-imposed restrictions on the types of legal assistance that government-funded legal services programs are allowed to provide, we must not ask "Can we help the poor?" but rather "How will we do the work that needs to be done?"¹⁶ And there is much work to be done.

First, we need to establish poverty as the most serious social issue of our time. We must recognize that it is implicated in most other social problems that afflict our society.

Second, we need a new, or updated, analysis of the legal needs of the poor and of methods to address those legal needs. Those whose problems involve essential matters such as income maintenance, housing, family, health care, public benefits, education, and consumer issues benefit from, and often require, legal assistance in order to achieve an appropriate resolution. What is the extent of the need for legal services, and what would it take to meet this need?

Third, we need a priority-setting strategy that will help us decide in a reasoned way how to deploy our currently inadequate legal resources in order to address the legal needs of the poor.

Fourth, we need to learn how to encourage and relate to community organizing efforts among the poor. We should keep in mind the political dimensions of effective legal advocacy for poor people.

Fifth, as we think, study, and analyze the problem of providing legal services to the poor, we need to act. For some this will mean representing individual clients; for others, it will mean bringing class actions, serving as legal counsel to community groups, or providing legislative advocacy; for still others it will mean legal research and scholarship in support of the work of legal services attorneys.

16. I thank Daniel Greenberg, Executive Director of The Legal Aid Society of New York, for putting these questions to me.

Finally, we need a strategy to confront and minimize the impact of recent restrictions imposed by Congress on the activities of government-funded legal services programs.

The first and most obvious strategic response is to challenge those restrictions¹⁷ through lawsuits and legislative advocacy, on both constitutional and ethical grounds. The new restrictions prohibit legal services lawyers from: bringing class actions;¹⁸ participating in legal efforts to challenge or promote reforms in federal and state welfare systems;¹⁹ seeking to influence the content of regulations and executive orders of government agencies;²⁰ participating in training programs that defend or advocate changes in existing public policies;²¹ representing families facing eviction from government-subsidized housing because a family member has been accused of a drug offense;²² and engaging in the other forms of forbidden legal assistance to individuals and groups—for example, the representation of certain ineligible immigrants.²³ Sooner or later, these restrictions must be seen as an intolerable and unconscionable interference by government in the practice of lawyers who serve the poor.

In the meantime, we must find ways to work around the restrictions in order to address the legal needs of the poor. Some legal services programs undoubtedly will refuse to be bound by the restrictions and thus decline federal funding, engaging in aggressive private fund-raising in an effort to replace the lost funds. Back-up centers that have lost their federal funding also will likely increase their private fund-raising efforts and take on the responsibility of bringing class actions and engaging in other prohibited law reform activities. Similarly, law school clinical programs can increase their involvement in class action litigation and other forms of prohibited legal services.

But even with the restrictions, programs with government funding can continue to do all the legal services work that is not prohibited by the restrictions—individual representation in housing, public benefits, consumer, family, and other cases. The restrictions do not affect most of the day-to-day work of most legal services

17. The restrictions have been finalized in the regulations of the Legal Services Corporation, 45 C.F.R. §§ 1600-1699 (1997).

18. *See id.* § 1617.3.

19. *See id.* § 1612.3.

20. *See id.*

21. *See id.* § 1612.8.

22. *See id.* § 1633.3.

23. *See id.* § 1626.3.

lawyers. The struggle for justice is not only about changing unjust laws or legal arrangements but also about making existing law work for everyone.

What we need today is more than class actions and other forms of law reform advocacy and group representation. We need lawyers in every type of legal employment who will offer their skills, energy, and passion for justice in service to economically disadvantaged people who desperately need legal assistance. We need lawyers who will pursue justice for themselves, their clients, and their communities.

