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## Promises and Realities: The Continuing Myth of Equal Justice for All

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## PROMISES AND REALITIES: THE CONTINUING MYTH OF EQUAL JUSTICE FOR ALL

H. Bruce Hamilton\*

The law locks up both man and woman  
who steals the goose from off the common,  
but lets the greater felon loose  
who steals the common from the goose.

—ANONYMOUS

Canon 2 of the *Code of Professional Responsibility* states that, "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."<sup>1</sup> Ethical Consideration 2-25 listed under Canon 2 states in part that, "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."<sup>2</sup> Providing legal services to all people, regardless of their financial position, has long been a professed objective of the profession. This "responsibility" is in line with national objectives.

May I remind you that the Declaration of Independence, the Constitution and the Bill of Rights, the foundations of our society, were born of a revolution and are still today the most radical, revolutionary documents in the history of mankind. These pillars of our society promised the fulfillment of a truly revolutionary concept, equal rights for all. As we all know, these documents made only one exception: that being the exclusion of slaves and Indians from this promise. The Emancipation Proclamation, a war and amendments to the Constitution eliminated this exception. Now, for better than a hundred years, the promise of equality has existed for all Americans.

But promise and reality can often be two very different things. Who can deny that these revolutionary concepts are largely unfulfilled? And who can really doubt that both our economic system and our governmental processes in fact promulgate inequality? Low income citizens and members of minority groups are discriminated against . . . *period*. The simple fact is that these citizens are

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<sup>1</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1969).

<sup>2</sup> *Id.*

powerless, and when one group has power and another does not, the powerless group will be unjustly treated. Such power disparities are a basic ingredient of injustice.

Perhaps you doubt these blunt conclusions. Well, take a look at our nation's economic structure. There is no mention in those historic documents of capitalism, socialism, communism, or any other "ism." And yet I have heard our economic process described as "socialism for the rich and private enterprise for the poor."

Our nation's tax structure provides discrete but handsome doles for the affluent and an occasional pittance for the poor. For example, in 1970 nine billion dollars was deducted for mortgage interest payments,<sup>3</sup> a benefit primarily for suburban homeowners, with no corresponding benefit for low income citizens who pay rent. That nine billion dollars is four times greater than the appropriation for public housing for the nation's poor.<sup>4</sup> Fifteen billion dollars was written off for those people who played the stock market;<sup>5</sup> this is more than the cost of the President's proposed welfare reform.<sup>6</sup> And yet we hear much talk across our nation, and from our elected officials here at home, of the cost of welfare. But do you know that less than 40% of the nation's poor receive any public assistance at all?<sup>7</sup>

If you would like another timely example, simply compare the government's reaction to the financial plight of the Lockheed Aircraft Corporation with its reaction to a small farmer forced out of business or the closing of a neighborhood store.

So much for our economic system—what of our governmental process? And our legal system in particular? It is painfully clear that our legal system has failed to deliver equal justice under law to all comers. We of the legal profession learn nice sounding phrases such as: due process of law, equal protection of the laws, right to counsel, freedom of speech, innocent until proven guilty, and many more. But all too often, such phrases simply serve as convenient conscience-soothing myths while the unfeeling process continues daily to treat low income citizens and members of minority groups with fear, ignorance, intolerance, and perhaps worst of all, indifference.

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<sup>3</sup> Harrington, *Eradicating Poverty*, PLAYBOY, Jan. 1971, at 149.

<sup>4</sup> *Id.*; see also TAX FOUNDATION, INC., FACTS AND FIGURES ON GOVERNMENT FINANCE 16 (1971).

<sup>5</sup> Harrington, *supra* note 3.

<sup>6</sup> *Id.* The President has requested approximately \$742 million for welfare reform and community services. U.S. GOVERNMENT PRINTING OFFICE, THE BUDGET OF THE UNITED STATES GOVERNMENT 1972 (1971).

<sup>7</sup> Harrington, *supra* note 3.

No one can really doubt that the U.S. Steel Corporation, Jacqueline Kennedy Onassis or H. L. Hunt could obtain a reasonable approximation of justice through our process. But can we say the same for a skid row derelict, an Appalachian tenant farmer, a Sheridan County Indian, an Omaha ghetto black, or a Lincoln welfare mother?

Am I too harsh? Perhaps. Much has been done to rectify such injustices, yet can anyone deny that the promise of two hundred years is still a substantially unmet pledge? The economic system, the legal system, in short, the *system* has failed approximately one-fourth of all Americans.

Furthermore, I submit that the inescapable conclusion is that the legal profession has not only failed to correct such injustices but that the profession, above all others, has been at the forefront of the movement to create and maintain such inequalities. Lawyers as a whole are nothing but hired guns; their services provided to the highest bidder. Consequently, many "young" lawyers are beginning to realize, only after they enter the field, that law, lawyers and legal institutions do not serve the majority of people.

It has long been a myth that lawyers are neutral and detached. In fact, all lawyers choose their clients and their choice reflects the lawyer's view of society. And in so choosing, historically the profession has not aligned itself with the forces of change. "In fact, the role of the legal profession in relation to social movements reflects the class and racist orientation of the legal system itself."<sup>8</sup>

One author states:

Ours is a prostitute society. The system of justice, and most especially the legal profession, is a whorehouse serving those best able to afford the luxuries of justice offered to preferred customers. The lawyer, in these terms, is analogous to a prostitute. The difference between the two is simple. The prostitute is honest—the buck is her aim. The lawyer is dishonest—he claims that justice, service to mankind, is his primary purpose. The lawyer's deception of the people springs from his actual money-making role; he represents the client who puts the highest fee on the table.<sup>9</sup>

And, in most instances, no fee—no representation.

The Legal Services Program, of which I am a part, represents an attempt to correct this injustice by providing advocates for equal justice for all our citizens. Legal Services was created as a

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<sup>8</sup> LAW AGAINST THE PEOPLE 5 (R. Lefcourt ed. 1971).

<sup>9</sup> Kennedy, *The Whorehouse Theory of Law*, in LAW AGAINST THE PEOPLE 81-82 (R. Lefcourt ed. 1971).

portion of the War on Poverty—do you remember that skirmish? Today our government talks little of that commitment and the programs are underfinanced, understaffed and reach only a small percentage of the poor.<sup>10</sup>

Private practitioners tend to react to Legal Aid programs in one of two ways. They either oppose the concept, fearing a loss of fees, or they support the idea as long as the program handles divorces and bankruptcies and stays away from “law reform” efforts such as class action suits against governmental bodies. The organized bar, on a national level, has been a strong supporter of the program.<sup>11</sup> But, all too often local bar associations are not supportive.<sup>12</sup>

Far more discouraging is the fact that Legal Aid attorneys cannot help but find themselves questioning the success of their efforts. One author strongly describes this frustration that leads to the conclusion that one is not affecting the conditions of poverty in the least:

These law offices are actually vaseline dispensers. The staffers comfort the rapees, but they cannot stop the screwing. They cannot stop the system that fucks people over. They have to operate by what I call the “ass-by-ass” technique. They get one ass out of the wringer at a time.

The whole legal system is devoted to the “ass-by-ass” approach to injustice through which the law forces people to back into a wringer. The poverty lawyer is then permitted to “get them out,” thereby achieving a victory. Then the wringer starts up again or continues. The ongoing pressures of racism, materialism, war, greed, and poverty then force innumerable others back into thievery, drugs, unfair rental arrangements, larceny by banks and merchants. Poverty lawyers actually earn their living by allowing society to operate as a screwed-up washing machine from which the results are never clean. This failure of the societal washing machine constitutes a system of oppression. Oppression is a by-product of the malfunction.<sup>13</sup>

All of this leads to an incredible sense of frustration. There are simply very few meaningful alternatives for the young practitioner who wishes to find a shelter outside the “prostitute system.” I believe this is why there is so much talk about bringing down the

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<sup>10</sup> In Nebraska we have Legal Service Programs serving four counties (Lancaster, Douglas, Sarpy and Scottsbluff) and no organized, funded programs in the other eighty-nine counties.

<sup>11</sup> In 1965 the American Bar Association House of Delegates unanimously endorsed the establishment of the OEO Legal Services Program.

<sup>12</sup> In some communities legal aid offices are pleased if their bar association's attitude has “progressed” to a level of apathy.

<sup>13</sup> Kennedy, *supra* note 9, at 87.

entire structure. But this too is no real answer, for talk of revolution represents a plan for death not a plan for life. And is it not simply true that we are all part of the "system?"

The answer for those of us who recognize these basic injustices can only be to keep battling. We must continue to respond, we must be willing to take risks and we must avoid the ever present dangers of futility and expediency, of timidity and comfort. These dangers add up to a feeling that one man makes no difference, but we must believe that individual men can make a difference.

We too must recognize that we cannot go it alone. The profession must be prodded and pulled into the 20th century. Every lawyer should be challenged to reassess his commitment and re-dedicate his efforts. Every lawyer should strive to close the gap between our nation's and profession's promises and the poor's realities.

These are indeed trying times, but they are also exciting times. Movements for change are gaining momentum. The legal profession, whether it wants to or not, cannot stand by, above it all, as a technical profession.

I hope the profession and each of its practitioners will yet demonstrate that lawyers will seek social progress, that judges are right to break new legal ground, that it remains the historic role of this profession to promote reform, liberty and justice.