IN PURSUIT OF THE PUBLIC INTEREST: THE MASSACHUSETTS EXPERIENCE

BY

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This commentary is about the lawyers who provide legal services for low-income persons. There is no doubt that these lawyers are primarily concerned with the public interest.[1] There is little glory for those who have dedicated themselves to establishing the rights of low-income persons. Nor do they toil for money; the entry-level salary for these legal service lawyers in Massachusetts is now $21,000,[2] well below even the modest level for lawyers in other public service.

In this writing, I substitute facts and realities for the cliches and misconceptions with which readers may ponder "public interests."[3] I draw not only upon institutional data but upon my intimate knowledge as a chief justice who, for fourteen years, supported the cause of legal services for the poor. My focus on Massachusetts in no way limits the reach of the text; I suggest that the Massachusetts experience is a microcosm of the effort that has been made or should be made in every one of the 50 states. Although I offer a tribute to many Massachusetts people who have worked effectively in this vital cause, I also show, in the conclusion of this essay, that Massachusetts and other states meet only a small fraction of the need for legal services for the poor.

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[1] It is not always an easy thing to locate or define the public interest in the practice of law. By objective measure, the public interest may be where the perceiver's prejudices place it, as in the case where environmental protection may clash with the need for inexpensive electric power. By subjective measure, the lawyer may look to her own motives, to determine the dominant force. This is not to denigrate the value and validity of competent and honest service by a lawyer to a client in return for a fee. In one sense, a lawyer serves the public interest whenever she well serves a private client. Further inquiry here as to motivation may be a useless argumentative pursuit. For instance, where is the principal motive of the tort lawyer? In fair compensation for her client? In her contingent fee? Or in her concern that doctors and others not be negligent?

[2] Massachusetts Legal Assistance Corporation Annual Report 7 (September 30, 1990). This is the entry level salary at legal services corporations in various communities of Massachusetts.

[3] I am reminded of the lawyer who inquired of my secretary a few years ago, "How much does the court pay for *pro bono* work?"

EARLY HISTORY OF LEGAL SERVICES

For generations, bar associations and bar leaders have urged attorneys to represent, at little or no fee, indigent persons accused of crime; indeed, such representation as to many criminal charges is now constitutionally required.[4] However, there has been no broad mandate for representation of low-income clients in civil matters.

Some lawyers in every generation have recognized that the poor should have access to legal assistance, and be provided service at reduced or no fee.[5] The twentieth century saw the emergence of legal aid offices. For the first time, there were some lawyers who devoted all of their energies to the disadvantaged. Reginald Heber Smith, general counsel of the Boston Legal Aid Society, undertook the first national study of legal aid in 1919. His book, JUSTICE AND THE POOR, documented 40 organizations in 37 cities and urged the private bar to expand the legal aid movement.[6] By 1963, there were 249 programs in operation, but funding was meager.[7] Contributions came from the private bar, private foundations, charitable institutions, and a few municipalities.

The growing complexity of living under the law just about guaranteed the inadequacy of these scattered efforts toward legal services. The economic class least able to cope with the government, or with private adversaries, was now increasingly confronted with the problems of the homeless, battered wives, custody of children, medical care for the elderly and disabled, general welfare relief, drug treatment, public housing rights, evictions and other landlord and tenant controversies, racial discrimination, employment and hiring discrimination, prisoners' rights, rights against utilities, consumer laws and a host of other legal difficulties.

It became evident that the mere administrative necessity of bringing lawyers together with needy persons was a vast project which could not be accomplished, despite the best efforts of those motivated by good will and volunteerism, with the existing casual approaches. Only a publicly funded program could provide adequate resources to support full-time legal service lawyers, and the resources to organize and administer the efforts of part-time *pro bono* lawyers.

In 1965 federal funding for legal services first appeared when the Office of Economic Opportunity, established by Congress, included an Office of Legal Services.[8] The office was later abolished in favor of the Legal Services Corpo-

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[4] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

[5] NATIONAL LEGAL AID & DEFENDER ASS'N, HISTORY OF LEGAL SERVICES: CRITICAL EVENTS AND LEGAL DEVELOPMENTS 1 (R. Schulzinger ed. 1990)

[6] *Id.* at 2.

[7] These and other historical details shown herein are from NATIONAL LEGAL AID & DEFENDER ASS'N, HISTORY OF LEGAL SERVICES: CRITICAL EVENTS AND LEGAL DEVELOPMENTS (1990), [hereinafter HISTORY OF LEGAL SERVICES], together with interpolations from my own experience.

[8] HISTORY OF LEGAL SERVICES at 5. Despite controversy and on-going tension with

ration, and to this date the corporation has administered substantial federal funding.[9] The Legal Services Corporation currently funds 325 programs that handle about 1.5 million legal matters annually. The 1990 congressional appropriation is $314.9 million.[10]

The history of federal funding for the Legal Services Corporation has not been serene. There are those who declare that the funds have never met more than a small fraction of the necessity. Despite these contentions, the decade of the 80's brought about a funding *decrease* of 25% which persists today.[11]

Of course, the funding problem is caused, in part, by the competition from other federal fiscal ventures. However, the Corporation must also contend with opposition generated by social and political philosophy. Local bar associations and traditional legal aid societies continue to fear the competition for clients from publicly supported legal services, and fear that private clients will suffer from new legal challenges brought on behalf of low-income clients.

The more important opposition has come from some members of the executive and legislative branches who did not and do not accept either the concept of the Legal Services Corporation or the extent to which it is funded. Opposition efforts have centered on: reducing funding, restricting client eligibility, restricting the national and state systems of support services, and replacing the staff attorney system with either compensated private attorney programs or law school clinics.[12]

Undoubtedly the greatest focus of political opposition has been against law reform, which is the aim of many involved in legal services and which is in some measure inherent in any competent program of legal services.

LAW REFORM THROUGH LITIGATION

Many dedicated persons have worked effectively to assist the disadvantaged by originating and championing social legislation in the federal and state legislatures, and by successful work with courts and administrative agencies to reform rules and regulations. Nevertheless, even greater progress has resulted as a consequence of litigation.

Traditional legal aid offices were not in the business of social welfare advances. As early as 1964, however, Attorney General Nicholas Katzenbach stated that law can be used as an "instrument of orderly and constructive social change."[13] Despite the opposition of political conservatives, legal services not only established the rights of individual clients but accomplished

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local community action agencies (which were the actual recipients of the funds used for legal services) over $20 million was allocated for over 130 OEO grants by the end of fiscal year 1966.

[9] *Id.* at 6-7.

[10] *Id.* at 10.

[11] *Id.* at 9.

[12] HISTORY OF LEGAL SERVICES at 9.

[13] *Id.* at 3.

long-range advances for all low-income people.

Brown v. Board of Education,[14] for example, began with the representation of just a few individuals. Through litigation, public and private institutional policies have also been challenged and made to conform to orderly rules. Thus, in *Goldberg v. Kelly*,[15] public assistance recipients were held entitled to an administrative hearing before their benefits could be terminated. Few other cases have been as compelling as *Brown* or *Goldberg* in their impact, but the litany of significant cases is impressively long. This is not to say that reform is achieved only through cases that establish new law, but that sometimes valuable rights are recognized and enforced simply by applying existing legal principles to people who have never before been represented in court.

THE MASSACHUSETTS EXPERIENCE

Even at its peak, federal funding for the Legal Services Corporation has never been sufficient to meet the need. With the reduced federal funding of recent years, a number of Massachusetts people have been diligent in the search for ways to supplement federal money with local funding. These advocates have been resourceful and persistent, and the state legislature has been cooperative. Without this local funding, future prospects for providing more nearly adequate legal services to low-income people in Massachusetts would be discouraging indeed. Only those who know of the extraordinary difficulty of gaining state funding for any purpose can appreciate the remarkable accomplishment in Massachusetts.

THE MASSACHUSETTS LEGAL ASSISTANCE CORPORATION

State funds have been placed in the control of a non-profit corporation, created by statute in 1982, called the Massachusetts Legal Assistance Corporation (MLAC).[16] Unlike the Legal Services Corporation, the policies of MLAC have been insulated from political intrusion, because the high court of the state, and not the executive branch, appoints the directors. It follows that MLAC is free of the impediments and inhibitions that accompany federal grants.

MLAC's funds come from four sources: a statutorily-authorized surcharge on civil court filing fees, the Interest on Lawyers' Trust Accounts (IOLTA) program established by the Supreme Judicial Court; direct state appropriations to fund three specific projects; and a contract with the state Department of Public Welfare. Total income from all sources in 1990 was $8.589 million.[17]

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[14] 359 U.S. 294 (1955).

[15] 397 U.S. 254 (1970).

[16] MASS. GEN. L. ch. 221A, § 2 *et seq.* (1990)

[17] Massachusetts Legal Assistance Corporation Annual Report 8 (September 30, 1990). More than 93% of MLAC's funds go directly to programs to provide services to low-income persons; 6.3% is spent on administrative expenses. *Id.* at 9. All facts herein as to MLAC are from the institution's Annual Report for the Fiscal Year 1990,

In 1990, income from the surcharge on all civil court filings, which is $10 on all cases except small claims, where the surcharge is $4, totalled $2.769 million. The amount distributed to legal services programs was $2.74 million, a 31% increase over the 1989 distribution.[18]

Between 1985 and 1989, the Commonwealth had a voluntary plan for lawyers whereby the interest accruing on clients' accounts in such small amounts that it could not be directed to clients themselves, was instead donated to legal charities. In 1989, the Supreme Judicial Court replaced the voluntary plan with a mandatory IOLTA program, which began January 1, 1990. Under the IOLTA plan, Massachusetts lawyers who handle client funds are required to use IOLTA accounts and to designate the Massachusetts Bar Foundation, the Boston Bar Foundation, or the Massachusetts Legal Assistance Corporation (MLAC), to receive interest on these accounts. By September 1990, more than 80% of the approximately 18,000 eligible practicing attorneys had enrolled.[19] The mandatory program brought $2.9 million to MLAC, more than three times the 1989 amount of $898,326.[20]

For the last several years, the legislature has directed funds to MLAC for three projects which enable legal services programs to represent low-income Massachusetts residents who have been denied rights and benefits as a result of illegal federal government action. In addition to assisting individual clients, the legislature recognized that these three programs create substantial cost-savings and economic benefits for Massachusetts. One such program is the Disability Benefits Program (DBP), which has a success rate above 90% in representing poor and disabled Massachusetts residents who were wrongfully denied federal benefits. The program returns approximately $6.30 to the Commonwealth's coffers for every dollar received, and DBP projects that in 1991, it will save Massachusetts $3.2 million in General Relief, Medicaid and AFDC payments.[21]

Similarly, in 1990, the Medicare Advocacy Project won $405,000 for clients, and $556,520 for the state by providing free legal representation to elderly and disabled persons.[22]

And the Asylum Representation Project (ARP) has assisted 3,000 clients who are refugees from war-torn and economically ravaged countries to become productive members of Massachusetts' communities and workforce. ARP was instrumental in securing permanent legal residency status for these individuals.[23]

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together with my own detailed knowledge acquired in 14 years as chief justice.

[18] *Id.* at 8.

[19] *Id.* at 9-10. The remaining 20% assert that they maintain no accounts for client funds.

[20] *Id.* at 10.

[21] *Id.* at 11.

[22] *Id.* at 12.

[23] *Id.*

Pro Bono Lawyers in Massachusetts

With an ever-increasing need for more legal advocates, bar associations throughout the Commonwealth have intensified their efforts to expand *pro bono* services.[24]

The Massachusetts Bar Association (MBA) has doubled its *pro bono* staff resources by changing "its role from providing direct *pro bono* services to clients on a part-time basis to creating a full-time statewide program to support and to provide backup to collaborative *pro bono* efforts between legal services and the private bar."[25] Moreover, many of Boston's largest law firms were persuaded by the Boston Bar Association's Committee on Public Interest Involvement of Lawyers to adopt formal *pro bono* policies. Individual lawyers were asked to contribute not less than 35 hours a year in the public interest.[26]

In addition, the MBA initiated the "Countdown to 500," a project which recruited 500 additional lawyers to participate in *pro bono* panels. Following the MBA's lead, many local bar associations strengthened their recruitment efforts, and currently, more than 3,000 lawyers have signed up to participate in organized *pro bono* programs. In order to provide support and training to these attorneys, MLAC and the MBA established the *Pro Bono* Coordinators Association, which has been successful in increasing the effectiveness of *pro bono* activities throughout New England.[27]

The Massachusetts Law Reform Institute

The Massachusetts Law Reform Institute (MLRI) was formed in 1968 to work with legal services projects It does not primarily provide direct legal assistance to indigent persons. Rather it drafts and supports legislation and regulations to remedy oppressive conditions, intervenes and assists in test cases and in cases that can affect large numbers of indigents, and works on special projects in cases that require reform. It is not a creature of statutes; it is a private organization, supported by private grants and some public funding.

The Institute's successes have been important and varied. They have been accomplished through litigation of test cases, and by importuning the hierarchy of the judicial, legislative and executive branches.[28]

It played major roles in establishing rules of criminal procedure in the District Courts, in the creation of a Judicial Conduct Commission and in a Judicial Nominating Council for the purpose of recommending to the Governor qualified persons for appointment to the bench.[29]

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[24] *Id.* at 14-15, (summary of reports of the Massachusetts Bar Association and local bar associations of Massachusetts).

[25] *Id.* at 14.

[26] *Id.*

[27] *Id.*

[28] This appraisal is based upon my knowledge, as chief justice, of the detailed work of MLRI over 14 years.

[29] The entire chronology herein of MLRI's accomplishments is from Advocacy

MLRI's work in the area of court reform and access to the justice system has resulted in a number of permanent changes in how poor people are treated in courts and by administrative agencies. For example, it helped in fashioning and implementing Commonwealth's Fair Information Practices Act and the Criminal Offender Records Information (CORI) law. MLRI also played a role in enacting both a comprehensive indigent court costs statute and a statewide court interpreters statute. The statute was also responsible for the distribution system under which state agencies submit regulations for publication, as well as the requirement that state agencies send important warning notices to residents in languages other than English.[30]

MLRI has always had great success, both legislatively and through the regulatory process, in changing the way poor people are treated by their landlords and by public utilities. Over the years the Institute has worked with other advocates and clients to strengthen protection for tenants. Thanks largely to the legal services community, Massachusetts law now requires landlords to maintain their properties up to code, and provides tenants with defenses against evictions. It also helped to establish fair procedures for eviction cases, such as making it easier to file appeals, and it successfully advocated for discovery and other procedures under the District Court Summary Process Rules.[31]

The Institute's efforts led to the creation of housing courts in some of the state's major cities, as well as establishment of a number of other laws for protection of tenants. The Institute was also largely responsible for the state's anti-snob zoning law which prevents local governments from blocking low-income housing.

The breadth and scope of the Institute's efforts with housing is comparable to its work over the years with state welfare and health care programs, and its successes in establishing the integrity and fairness of those programs.

Things have not always gone easily or smoothly. In the early 1970's, fiscal shortfalls and accompanying political conservatism occurred much like those which reoccurred in 1990. Judge Peter Anderson, once a Law Reform lawyer, recalled those times:

> We lost everything, and I think there were four reasons: one, it was a very political time. The state was clearly in a lot of trouble. Second, we had a number of years of Nixon appointees to the Supreme Court. Welfare law had changed considerably. All the legal tools that had originally been available had been blunted. A lot of the constitutional arguments had reached their outer limits, and the whole tenor was of the judiciary pulling back from tampering with government initiatives. Third, the quality of advocacy was clearly better on the other side. We had a real fight on our hands legally. And the last thing was too much was happening at

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AND ACTION, MASSACHUSETTS LAW REFORM INSTITUTE, THE FIRST TWENTY YEARS (1988). [hereinafter ADVOCACY AND ACTION].

[30] ADVOCACY AND ACTION at 4.

[31] *Id.* at 6.

once. We probably should have cut our losses and not tried to fight everything.

So we lost everything. It was a very, very depressing time. I've never been so depressed professionally. It really was a crisis of confidence. You had to question your own skills. Did I blow it? What's going on here? Why are people who were friends, why are they doing this? It was very, very difficult on a hundred different levels.[32]

But Judge Anderson went on to speak of two favorable court decisions which they then achieved, and he spoke in words which suggest the persistence and resourcefulness of legal services lawyers in hard times:

Both of those were not just important for the legal victories that resulted, but it was such a morale booster for the whole advocacy community. We weren't licked. We weren't done. True, it wasn't 1968, '69, or '70, when you could bring these major constitutional welfare cases to the Supreme Court and win. Those days were gone. But if we worked hard enough and looked for the legal handles, we could really make a difference.[33]

SCARCITY OF RESOURCES: AN ETHICAL DILEMMA

Public funding and volunteerism fall far short of meeting the need for legal services for the indigent. This results in the screening, or "gatekeeping," of prospective clients to determine which ones shall be served. This screening in turn may raise ethical, or even moral, issues.[34]

Every ethical instinct rebels against any lessening of zeal for the interest of each client in order that more clients may be served. What then? Shall clients be chosen on a first-come-first-served basis, or by lottery or other random selection, or by the intensity of need or degree of poverty? Shall some clients, already admitted through the gate, be abandoned, if more critical cases apply? All of these mechanisms introduce ethical and moral considerations.

Powerful arguments have been made that the selection process should consider, along with other criteria, the needs of the community served by the lawyer. Which clients present issues crucial to the community? The proposal is that only in this way can deficient resources supply the maximum of service.[35]

Some needy clients will be rejected as long as resources are scarce. As with other necessities of the poor (medical care, for example) the near prospects for adequate funding and adequate *pro bono* service are dim. Difficult and painful screening decisions remain for legal services lawyers.

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[32] *Id.* at 9.

[33] *Id.* at 10.

[34] Tremblay, *Towards a Community-Based Ethic For Legal Services Practice*, 37 UCLA L. REV. 1101, 1111 (1990).

[35] *Id.* at 1139.

CONCLUSION

Allan Rodgers, executive director of the Law Reform Institute, in 1988 talked with optimism of the future of legal assistance for the poor:

> The climate is such that for the first time since the early '70s, we are able to work on major structural changes. We have the opportunity now to shape major programs in housing, in health care, in employment, in benefits. I see the continuation of a broad, ambitious agenda. I also sense continuing growth in funding for legal services and increased private bar assistance. For a while I think we're going to be on a roll. The only thing that would scotch it is another change in public mood or a major fiscal crisis. If you had told me five years ago that we would be in this position today, I wouldn't have believed it.[36]

Unfortunately the "major fiscal crisis," spoken of by Allan Rodgers in 1988, and concomitant political conservatism, has occurred in Massachusetts and in the nation. It is ironic that present funding for legal services may be endangered by the present fiscal crunch. Ironic because the poor's necessity to assert their rights increases during hard times. The present estimate in Massachusetts is that, even with all the successful work done by so many dedicated people, only about 15% of the need for legal services is met. This estimate derives from a 1987 "Survey of Legal Needs" conducted by the Massachusetts Bar Association. Constantly increasing requests for assistance at present (an increase of 35,000 inquiries and requests for assistance in 1990, according to MLAC) indicate that, despite increased state funding in Massachusetts, service is still provided for no more than 15% of cases.

Assuming that 15% is a realistic appraisal in Massachusetts, where much effective work has been done by government and bar, we can speculate that many other states fall far below the 15% level. This in turn reflects badly upon both government and the bar, and underlines the crucial contributions of those lawyers who choose to work in legal services for the poor.[37] Legal services to the indigent inevitably and inescapably confronts and combats racial, religious, ethnic, and every other kind of unlawful discrimination. Nor do we speak here of vindicating rights in the abstract, having in mind the priority which legal services give to rights of the poor related to food, shelter, clothing and freedom from abuse of clients. Many judges and lawyers whom I respect have stated, in various forms of words, that our country and its aspirations suffer because the rights of a segment of our population are not recognized or enforced. Does the bar, and those who control our politics, accept and believe this wisdom? Judge Julian T. Houston of the Massachusetts Superior Court

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[36] ADVOCACY AND ACTION at 20.

[37] I have in this paper paid tribute to a group of Massachusetts lawyers who have for the most part remained nameless. To represent all of them let me pay tribute to two of the best and most dedicated, who have been in a struggle for the long haul: Allan G. Rodgers and Lonnie A. Powers, executive directors, respectively, of Massachusetts Law Reform Institute and Massachusetts Legal Assistance Corporation.

stated the issue forcefully and eloquently when he recently said:

> Our courts are already staggering under the weight of overburdened dockets with insufficient resources, and we do not serve the poor well.
>
> But if we fail to pay attention to the direction that our society as a whole is headed, the wonder will not be how do the courts serve the poor, the wonder will be how do the courts serve the people.[38]

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[38] MLAC Annual Meeting, May 30, 1990.