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POVERTY AND JUSTICE

*Honorable Birch Bayh**

For too many centuries the title of this symposium might have been, more realistically, "Poverty or Justice." These terms should not be mutually exclusive. Today it is our objective to eliminate this dichotomy. Justice for the poor, however, does not mean favoritism or special privileges for any particular group — quite the contrary. We are concerned with equal legal rights — that is, equal standing before the law and equal access to those instruments of the law essential to an adequate defense. No person guilty of any wrongdoing, whether it be plunder or pillage, rape or ransacking, should expect preferential treatment or be allowed to escape punishment merely because he is poor. No special class or category should be recognized. The law must apply equitably to all persons, regardless of their economic or social status.

What is justice? Who can fully answer this question which has baffled legal and political philosophers through the ages? Those who believe in democracy agree that the concept of justice must entail the actuality of equality before the law. This is not a new idea. The statue of Themis, the Greek goddess of law and order, illustrates the ancient Greek belief in equality before the law. Her blindfold prevents her from seeing the accused so that her scales might weigh the facts objectively. In the sixth century B.C. the Greek leader Solon attempted to put this idea of equality into practice, stating:

I have given the common people sufficient power to assure them of dignity and I have protected those of great wealth and influence. I took a firm stand, holding my stout shield over both classes, so that neither should win any unfair advantage.¹

Solon's efforts were only partially successful because his attempts to institute equality were hindered by his compromises with each class, pleasing neither class. Even the famed Greek democracy did not allow complete equality under the law. This was due partially to the status of women and slaves and partially to the complete sovereignty of the Greek assembly. The Roman philosopher Cicero said, "The good of the people is the chief law." But, although Cicero proposed equality, he ignored the slavery that surrounded him.

The rise of Christianity broadened the acceptance of the concept of equality by considering men to be brothers under the fatherhood of God. The teachings of the Christian fathers asserted not merely the equality but the superiority of the humble and the poor, proclaiming, "Blessed are the poor in spirit, for theirs is the kingdom of heaven."² In actuality, however, earthly justice remained the property of the rich.

Democratic thought, as we know it in the United States, found much of its basis in the philosophy of John Locke, who suggested not only the basic equality of man but his natural right to life, liberty and property. Regarding equality

* United States Senator, Indiana.

1 BARKER, GREEK POLITICAL THEORY 43 (1925).

2 Matthew 5:3.

before the law, Locke stated that rulers "are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough."³ But even the United States, based on the philosophy of Locke in many respects, began as a country of religious intolerance and slavery. We tend to forget too easily the Salem witchcraft trials and the shameful record of involuntary servitude that characterized the early period of our history.

The actuality of equality in the United States grew as the constitutional guarantees of civil liberties slowly became real rather than merely theoretical rights. The abolition of slavery, the expansion of suffrage, the institution of the fourteenth amendment and the implications arising from its guarantee of equal protection before the law contributed to the comparatively rapid evolution of meaningful equality in the United States.

Have we today finally gained equality before the law? Have the Constitution of the United States and the laws arising under it truly established justice as its preamble promises? Supreme Court Justice Black once said, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."⁴ No, it is fair to say we have not yet established absolute justice. We have been steadily approaching equality before the law, but the fact remains that the kind of trial a man gets today still does depend on the amount of money he has. We have a debt to pay. It is a long standing debt, over 2500 years old. It is a debt owed to the theory of democracy, the theory of equality — a concept that must become a reality if we are to establish justice in the United States.

Protection of the poor in criminal cases is becoming a reality. In the 1938 decision of *Johnson v. Zerbst*,⁵ the Supreme Court declared that federal courts had no jurisdiction to try a defendant who is unable to employ an attorney unless counsel is appointed for him or he waives his right to counsel. It held that "the Sixth Amendment withholds from Federal Courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty *unless he has or waives the assistance of counsel.*" (Emphasis added.)⁶ Moreover, the Court said that the courts will indulge every reasonable presumption against waiver.⁷ There was a long bleak period of time between the establishment of the Bill of Rights and this implementation of the sixth amendment. Fortunately, the expansion of this principle through the fourteenth amendment was not long in coming.

In 1963, the Supreme Court held in *Gideon v. Wainwright* that rights protected by the sixth amendment were incorporated within the scope of the due process clause of the fourteenth amendment.⁸ By virtue of this decision the states were required to appoint counsel in criminal cases where the defendant was financially unable to retain a lawyer. Only a year later, in *Escobedo v.*

3 LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government* ch. XI, § 142, in *TWO TREATISES OF CIVIL GOVERNMENT* 117, 189 (Dent & Sons 1924).

4 *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

5 304 U.S. 458 (1938).

6 *Id.* at 463.

7 *Id.* at 464.

8 372 U.S. 335 (1963).

Illinois, the Court held that accused persons have the right to counsel during any interrogation after the investigation of a crime focuses on the accused.⁹ Although the time at which an attorney must be appointed for indigent defendants has not yet been finally determined, this test should come soon.¹⁰ If true equality before the law is to exist, the *Escobedo* rule must in fact apply to the poor as well as to the rich.

The decisions in these cases have expanded the idea of equality before the law; but even they have not yet guaranteed its fulfilment. As late as 1963, the Attorney General's Committee on Poverty and the Administration of Federal Justice stated in its report:

Although *Johnson v. Zerbst* did not resolve all issues relating to the constitutional rights of counsel in the federal courts, the fundamental obligation of the federal government was clearly and unmistakably indicated. It is a matter for legitimate concern, therefore, to discover that, except for legislation restricted in its application to the District of Columbia, *Congress has as yet done little to implement the constitutional commands by placing the defense of financially disadvantaged persons on a systemic and satisfactory basis* and that the federal statutes leave us little closer to the solution of these basic problems today than was true a quarter-century ago when *Johnson v. Zerbst* was decided. (Emphasis added.)¹¹

Today some of the problems presented in this report have been alleviated by the enactment of the Criminal Justice Act of 1964.¹² The act applies, however, only to federal courts.

In applying the right to counsel to state courts, the *Gideon* Court stated, "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."¹³ Positive suggestions for the further improvement of rights guaranteed accused persons were recommended in a study sponsored by the American Bar Association. These suggestions would help implement the principles set forth in *Gideon v. Wainwright*:

- (1) appointment of counsel at the first court appearance;
- (2) a uniform eligibility test for assignment of counsel;
- (3) compensation for assigned counsel and a competent director to distribute assignments equitably among the bar;
- (4) provisions for contribution to the compensation of assigned counsel by defendants of moderate means;

9 378 U.S. 478, 492 (1964).

10 Ed. note: Subsequent to the date of the symposium, the Supreme Court handed down the historic decision in *Miranda v. Arizona*. 34 U.S.L. WEEK 4521 (U.S. June 13, 1966). In setting out standards for in-custody interrogation of persons in criminal cases, the Court said:

In order fully to apprise a person interrogated of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. *Id.* at 4532. The Court further stated that the admissibility of any in-custody statement taken in the absence of counsel was dependent upon the state meeting a heavy burden of proof with respect to the waiver of the right to counsel during the interrogation.

11 U.S. ATTORNEY GENERAL, REPORT OF THE COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 14 (1963).

12 18 U.S.C. § 3006A (1964).

13 372 U.S. 335, 344 (1963).

- (5) assigned counsel for misdemeanors;
- (6) procedures to insure representation for post-conviction remedies; and
- (7) strict procedures to insure that waivers of counsel are made only with the full comprehension of the defendant.¹⁴

The effective implementation of these suggestions by the states would go a long way toward governmental guarantee of equality under the law in criminal cases. This is not enough, however. As Andrew Jackson said:

There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

There is, however, more to the concept of equal protection under the law than the guarantee of adequate counsel for the accused. There is more to the concept of equal protection under the law than the guarantee of criminal justice. We should strive for justice under the civil code as well.

Although this is a country of affluence, twenty percent of our citizens live in poverty. Poverty is not a concept. It is a harsh, cold and hungry reality. Who are the poor and what do they know of law — and what do they care? Their knowledge of law focuses primarily on a force which may be used against their interests. Most people have yet to learn that the law was made to protect them from abuse. The poor segment of society is generally the uneducated segment and, therefore, more open to abuse. It is common knowledge that poor families on occasion have been sold items on credit at high prices with exorbitant carrying charges. This problem has been summarized by the President's Panel on Consumer Education for Persons With Limited Incomes:

The poor are often a clearly defined target for unscrupulous sales techniques. Their capacity to protect themselves from fraud, deception, and misrepresentation is usually limited — they may be unaware of being defrauded; they may be unaware of their rights; or they may be reluctant for a variety of reasons to instigate corrective action. Their inaction is often interpreted as satisfaction.¹⁵

At a recent conference on the legal problems of the poor, Dr. David Caplovitz described the case of a housewife who bought a watch from a door-to-door peddler for sixty dollars:

I gave him \$3 down and I got a payment book in the mail. About a month later I had the watch appraised in a store and I found out it was worth only \$6.50. I called up the company and said I wouldn't pay for it, that they should come and get it. They told me I had to pay or they would take me to court. And I said, "Fine, take me to court and I'll have the watch there." The next thing I knew about this, I get a court notice of

¹⁴ WALD, *LAW AND POVERTY 1965: A REPORT TO THE NATIONAL CONFERENCE ON LAW AND POVERTY* 59 (1965).

¹⁵ PRESIDENT'S COMM. ON CONSUMER INTEREST, *THE MOST FOR THEIR MONEY: A REPORT OF THE PANEL ON CONSUMER EDUCATION FOR PERSONS WITH LIMITED INCOMES* viii (1965).

Judgment by Default for the \$69 balance, \$3 interest, \$5 "costs by statute" and \$14 court costs.¹⁶

The chief difference between this case and most instances of fraudulent treatment of the poor is merely that this woman discovered that she had been cheated. The mistaken belief that the legal remedy in such fraudulent situations is to stop paying is prevalent among the poor. As has been pointed out by another authority, "on a more basic level, [the poor man] seldom has the time, money, or knowledge to institute action against his seller, especially in a distant downtown court."¹⁷

Law has become so complicated that even the educated man must consult his lawyer constantly. The poor man is too often the uneducated man, with even less knowledge of the complexities of the law. The American Bar Association recognized this growing problem in its resolution of February 8, 1965:

Despite [the] considerable effort of individual lawyers and the organized bar over many decades, it is recognized that the growing complexities of modern life, shifts of large portions of our population, and enlarged demands for legal services, particularly as to persons of low income, the organized bar has an urgent duty to extend and improve existing services and also to develop more effective means of assuring that legal services are in fact available at reasonable cost for all who need them.

The problem of providing equal justice for the poor is a broad one. It has many sociological and psychological ramifications. It is in many respects a problem of education. The poor must be educated about their basic legal rights, for they cannot travel through life with a lawyer by their side. The Office of Economic Opportunity, in its community action programs, is attempting to implement this education. It will not be easily done. Technical pamphlets often remain unread — or read and not understood. Lectures remain unattended — or attended and not understood. Simple, basic information must be given to the poor and given to them by those they trust. This need was well described by a participant at a recent conference sponsored by the Department of Health, Education and Welfare:

Just being in the community — in an immediate neighborhood of the poor — working there and getting (at least occasionally) some results, is the single most important rule for a lawyer — or anyone else — who seeks to "educate" the community. If he does a good job in the neighborhood, he will become known. People will come with problems. He can act on some and educate others. A force will be generated in the community. When lawyers — or others — prove themselves to the community, they will find the audience they seek.¹⁸

16 Caplovitz, *Consumer Problems*, in U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CONFERENCE PROCEEDINGS: THE EXTENSION OF LEGAL SERVICES TO THE POOR 61, 65 (1964). See also CAPLOVITZ, *THE POOR PAY MORE* (1963).

17 WALD, *op. cit. supra* note 14, at 28.

18 Sparer, *Education on New York's Lower East Side*, in U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CONFERENCE PROCEEDINGS: THE EXTENSION OF LOCAL SERVICES TO THE POOR 122, 125 (1964).

This is the preventive side of the coin. But education must be further employed to teach the poor that they must seek legal advice when they need it and that such advice is available to them. Part of the problem when legal help is available is that the poor man often does not know how to obtain it or does not even realize that a lawyer could help his situation. Part of the problem is that those lawyers available to the poor usually are too remote. The poor too often live in a section of the city from which they may hesitate to stray. Organizations designed to help the poor individual often seem too distant and impersonal to give a remedy to his situation.

One of the most difficult problems confronting poverty stricken persons is their fear of reprisal in civil cases. Most poor live without a lease on their dwelling. Action brought against their landlords might result in their quick eviction. The time necessary to bring a civil suit could result in the loss of their jobs. This problem is well illustrated by the case of a Washington, D.C., Negro who protested the refusal of his landlord to maintain tolerable living conditions in his slum home. His predicament has been described by one keen observer:

The name of Mr. Smith, who drew up the petition, appeared first among the signatures. Shortly after the petition was sent to the bureau, he received an eviction notice from the landlord. His rent was paid up, there had been no complaints against him by the landlord, there was obviously no other reason for his eviction but his audacity in complaining. At this point the Director and the representatives of the [Girard Street] Association got in touch with the landlord who made it very clear that he would evict whom-ever he pleased and that he would not deal with any "outside troublemakers" or associations, but only with individual tenants. Help was sought from the Legal Aid Society, which only confirmed that there was no legal remedy against retaliatory eviction, that the 30-day eviction was legal and that the only thing Mr. Smith could do was to vacate the premises. Although the Director used every resource and every connection at her disposal, she was unable to find suitable housing for the evicted family.¹⁹

Despite the efforts which have been made to provide legal aid for the poor, the fact is that present facilities are extremely inadequate. In 1964, nine cities with populations over 100,000 as well as many smaller cities had no legal aid facilities.²⁰ An investigation of one hundred and ten cities, housing one-fifth of our total population, revealed that they lacked adequate legal aid facilities. Known expenditures for legal aid totalled only four million dollars, less than two-tenths of one percent of the total national expenditure for legal services.²¹ This remains true despite the fact that the poor are more ignorant of their rights and more susceptible to fraud and unfair practices than others.

Benjamin Franklin once stated, "The all of one man is as dear to him as the all of another . . . the poor man has an equal right but more need to have representatives in the legislature than the rich one." In the same sense, the poor have equal right but more need for legal aid than the rich; yet, statistics show

19 PERMAN, *THE GIRARD STREET PROJECT* (1965).

20 Gossett, *Annual Report of the President*, in 42 NATIONAL LEGAL AID & DEFENDER ASS'N, ANNUAL CONFERENCE SUMMARY OF PROCEEDINGS 62, 67 (1964).

21 Carlin & Howard, *Legal Representation and Class Justice*, 12 U.G.L.A.L. REV. 381, 410 (1965).

the small amount of money spent for the protection of the poor, as opposed to that spent for the protection of the rich. These statistics prompted this statement of the President of the National Legal Aid and Defender Association:

The harsh fact is that in the United States today, just as many indigent persons are deprived of legal assistance as receive it. Too often troubled people find that Legal Aid does not really exist in their communities or that it is fenced off from them by too stringent eligibility rules, anachronistic policy on the types of cases handled, lack of publicity, insufficient staff personnel or unconscionable delays in service. Too often within the inner city there is but an illusion of service — an attractive facade.²²

To cope with this problem fully — in addition to that of educating the poor about the availability of legal aid — there must be a great expansion and improvement of presently available facilities. This cannot be accomplished without the assistance and participation of lawyers. We have a duty to the poor, a duty stated in Proverbs: "Open thy mouth, judge righteously, and plead the cause of the poor and needy."²³ We have a duty, if we believe in justice, to extend the concept of equality before the law. Themis may be blindfolded but her ears are bare. Although she cannot see the tattered clothes of the man before her, she can hear words uttered in his defense. Shall the defendant be mute? If so, what shall balance the scales? Too often the scales have been balanced by gold.

Today we are beginning to realize the actuality of the concept of equality that was proposed over 2500 years ago. To present and prospective members of the bar, this provides a great challenge and a great opportunity. We must provide more adequate educational opportunities for the poor to give them the skills to pull themselves up by their own bootstraps. We must reform the bail system to provide a system consistent with equality before the law. We must expand present services to the poor, both in criminal and in civil cases. We must be willing to tithe of our talents and skills to assist those in need.

Progress is being made. There could be nothing more satisfying to those of us who believe in the theory of democracy than the implementation of justice as a workable reality. This can be accomplished only by close cooperation between government, the private sectors of our society and the legal profession. The revered Learned Hand once said, "If we are to keep our democracy, there must be one commandment: *'Thou shalt not ration justice.'*" (Emphasis added.)²⁴ This idea undergirds the structure of legal aid societies. This idea constitutes the pillar on which democracy is built. These pillars cannot be weakened. They must be strengthened. You and I, as students of the law interested in maintaining strong legal foundations, have the responsibility to provide the mortar and the stone and the effort to make and keep our democratic structure safe and sound, judicious and just.

²² Gossett, *supra* note 20, at 67.

²³ Proverbs 31:9.

²⁴ Address by Learned Hand, Seventy-fifth Annual Dinner of the Legal Aid Society of New York, Feb. 16, 1951, in Smith, *Introduction to BROWNELL, LEGAL AID IN THE UNITED STATES* at xviii (1951).