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Serving the Public Interest: An Overstated Objective

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Serving Public

By John A. Humbach

Mandatory pro bono publico legal services is a misconceived idea. Its result could be a bonanza for the big firms.

OUR LAWS PROMISE us many rights, but the rights are only as good as the laws' implementation. And our legal system undoubtedly delivers far less than its literal promise. The recent American Bar Foundation survey, *The Legal Needs of the Public* (1977), shows that the probability a lawyer will be consulted for various problems is as low as 12 per cent for serious problems with bureaucracy (nonbusiness related); 10 per cent for serious consumer problems (including landlord-tenant); 5 per cent for serious property damage (nonbusiness related); and 1 per cent for job discrimination. Two of three Americans have consulted a lawyer only once in their lives or never at all.

It is clear that there are many occasions when legal services would be useful but are not being provided. The question is what the legal profession can do and should be fairly expected to do about this.

First, what can the legal profession do about the massive differences in access to legal services? The answer, I am afraid, is not much. President Carter charged last year that 90 per cent of the lawyers represent only 10 per cent of the people (64 A.B.A.J. 840 (1978)). Our egalitarian ethic is appalled by these claims, but it is even more staggering to think of what would be involved in trying to provide all of the people with the legal services now enjoyed by the most favorably treated 10 per cent. We already have more lawyers per capita than any other country. If we doubled our numbers immediately, the shortfall would still be massive. A little extra pro bono publico work by each lawyer (even, as has been proposed by the American Bar Association Special Committee on Public Interest Practice, 5 to 10 per cent of a lawyer's time) would hardly make a dent. To tout these schemes as a response to inequality is pure public relations gimmickry.

What can we make of this? The first thing is to avoid confusing lawyer justice with social justice. The statistics show vast differences in access to legal services, but what about the general level of justice?

For one thing, the statistics on lawyer access do not show great inequality. Instead, they show that most people get about the same level of legal services—a level that is very low. Evidently, people who have potential legal problems mostly manage to reach a resolution by extralegal means.

These extralegal resolutions may or may not be parallel to or imitative of the solutions lawyers would provide. But that is beside the point. Unless we are going to increase drastically the proportion of the work force engaged in law practice, we have to reconcile ourselves to this reality: we do not want the legal system to be capable of offering all of the protection it may seem to promise. It will never redress every technical battery or defamatory slight. It will never wring every dollar due from the social welfare system. In fact, the entire range of supposed legal protections is subject to the following rueful but real qualification: they are available only if somebody, willingly or unwillingly, pays the cost of providing them.

Why must this be? Why cannot the law's protection correspond fully to its promise? The answer is priorities. Nobody wants to devote $500 blocks of lawyers' time to $15 problems.

The use of lawyers by the middle class demonstrates the point. Except for a narrow range of property-related matters—conveyances, wills, and marital separations — the middle class makes just about as little use of legal services as those who literally cannot afford them. Even prepaid legal insurance plans have proved surprisingly unpopular. Why? Because people do

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not want to give up what they would have to in order to buy a little more of our lawyer justice, except when the expected benefit is worth the cost. *People's priorities are different.*

However, just because lawyers are expensive, it does not mean that lawyer justice is by and large reserved for the rich. With our almost unique contingent fee system, we are the most litigious, that is, justice-seeking, society on Earth. Contingent fees permit just about any substantial legal claim to be pursued if getting the justice is worth the cost. The assertion of rights defensively is, of course, a different matter. Defense is primarily a matter of protecting property from judicial execution. The cost of this protection (for most of us, liability insurance) is part of the price of owning property. The problem of criminal defense is somewhat special, analogous to that of criminal prosecution. If there is going to be a criminal justice system, there has to be some mechanism for determining who the criminals are. Prosecution and defense both are parts of the mechanism. The social interest in identifying the criminals justifies the social burden of running the basic epistomology.

This is not to say all is perfect. To be sure, a little more lawyer justice here and there would even things up a bit so far as social justice is concerned. But occasional miscarriages of justice do not make for an "unjust society" unless we start mistaking ice cubes for the tips of icebergs. We cannot become frenzied just because there is not a lawyer to *solve every legal problem. If social justice* requires legal services for every problem that could be handled legally, then the world will never know social justice. I do not believe, however, that the requirements of social justice are so *stringent.*

So we cannot do much about the distribution of legal services. But a question still remains. What should lawyers, as a profession, fairly be expected to do in light of the maldistribution that exists? Just because we cannot do much does not mean we should simply do nothing. Not only as members of the justice profession, but as human beings, we should be sensitive to injustice. The pit of unfulfilled human need may be practically bottomless, but this fact should be a stimulus, not a discouragement, to the generosity of our charitable impulses. As professionals, moreover, we are uniquely able to fill needs of a particular type—legal needs —and it should be part of our professional ethic, as well as the written ethics, to help those who cannot pay.

But what about going beyond this? What about mandatory pro bono publico work — a legal requirement that lawyers must work 5 to 10 per cent of their time on a no-fee or low-fee basis, "quantifying" our public interest responsibility, as it is euphemistically called? These proposals are, I think, misconceived, unfair, and probably counterproductive of their ostensible *objectives. Here is why.*

The problem of inadequate legal services to those who cannot pay is really only part of a much larger problem—poverty. The poor not only do not *get enough legal services; they tend to* have inadequate shelter, not enough food, low-quality clothing, bad plumbing, less entertainment — in short, too little of just about everything. That is the definition of being poor. This raises two important questions.

First, if the poor suffer deprivation of all sorts, is an expanded supply of legal services what they really want? Or are their priorities more like those of the middle class? That is, given the choice, would they prefer that lawyers render their charity in some other form? I suspect I know the answer, although hard data are difficult to come by. However, there is no reason for guessing. If we really want to be helpful to the poor, and not just play a public relations game, we should give them not 5 or 10 per cent of our time but 5 or 10 per cent of our incomes. With the money, the poor could buy our legal services if that is what they really want, or they could use the money for something else —

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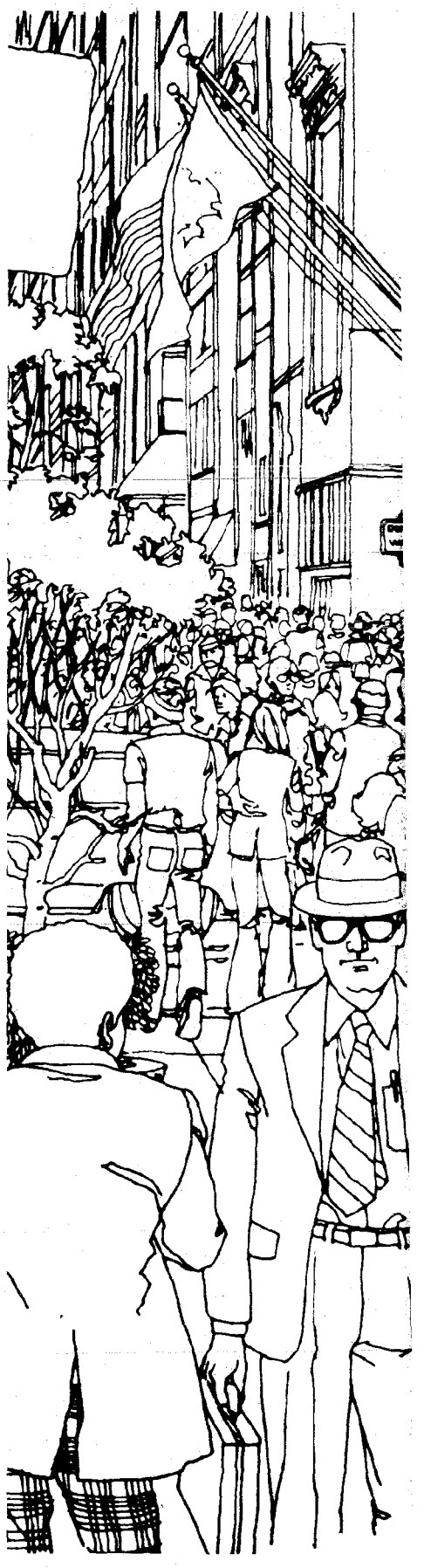

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whichever would make them happier. Merely to increase substantially the quantity of free legal services is largely to waste our time, if even the poor, given the value, would likely think it more worthwhile to spend it on something else.

The second question raised by mandatory pro bono publico schemes is one of fairness. Yes, there is a maldistribution of legal services in our society. But since this is essentially a part of a much larger problem — the social problem of poverty — it is illogical to saddle one small group in society with a very burdensome special tax. It makes about as much sense as taxing beauticians to save the whales. Mandatory pro bono publico would be nothing less than a tax—an excise tax levied on the practice of the legal profession. Since the problem is general, so should be the solution. The general tax bases should be resorted to for fairness, not to mention effectiveness.

A tax payable only in services, not commutable to a cash payment, would be particularly insidious in imposing what would be in effect, and perhaps in law, an involuntary servitude. The Supreme Court has not yet ruled whether that scheme would violate the letter of the Thirteenth Amendment, but surely it would violate the amendment's spirit. And to assert glibly that a lawyer has no "right" to practice law, or can always give up the profession, training, and experience, is more to demonstrate cynicism than constitutional validity.

Then there is the issue of competency. What happens when a lot of securities and patent lawyers are turned loose on the legal problems of the poor? My guess is that there might be a lot of malpractice. The legal problems of the poor are not necessarily unsophisticated or simple. Consumer law, landlord-tenant, and social services are all specialties, and their mastery hardly can be accomplished by practicing them a couple of weeks a year. If we are going to help the poor, we should offer them more than the diminished enthusiasm of forced labor or the seat-of-the-pants guesswork of high-minded poverty law dilettantes. They are entitled to lawyers who take their causes seriously and are able to handle them as serious cases.

What intrigues me about mandatory pro bono publico work is the question of *cui bono*—that is, who benefits? At first glance the obvious beneficiaries appear to be the poor. But on reflection it is not so obvious they will benefit. For example, suppose that lawyers, looking for ways to fill their quota, start impeding debt collection or complicating evictions of nonrent-paying tenants. The immediate result is to increase the fees to the lawyers of landlords and merchants, thus increasing the costs of those suppliers. The longer-run effect is likely worse: to increase the price or decrease the supply of housing and credit to the poor. It is a great social injustice that many people cannot afford decent housing. It may be even more unjust that tenants can be evicted for failing to pay the rent on a tumble-down slum. But additional inputs of lawyer justice are not likely to solve those social problems. Indeed, if the poor end up paying more to defend landlords and merchants, things may even get worse.

The most intriguing *cui bono* aspect of mandatory pro bono schemes is the different effect they could have on lawyers in different kinds of practice. Those in small firms and sole practitioners will be affected far more drastically than members of large firms.

Sole practitioners would have trouble paying the "tax"

First, lawyers who practice alone or in small firms would be least able to avoid the full brunt of a mandatory pro bono publico "tax." Because these lawyers earn their livings by selling only their own time, their options would be slight. Either they could devote less time to their paying clients and thereby reduce their incomes, or they could give up time otherwise available for personal leisure, family activities, and the like. Or, of course, they could try some combination of more work and less pay.

Another group of lawyers includes employees of corporations, of government, or of firms owned by other lawyers. Mandatory pro bono publico may have divergent effects on them. For example, a corporate or government lawyer might have to satisfy a 5 per cent requirement by donating two weeks of his vacation to a public interest law firm. Or, employer willing, the two work weeks could occur during regular work time, in which case the lawyer would not be burdened much at all unless his salary were adjusted to reflect his reduced productivity. The impact of a pro bono publico tax on this group could be heavy or light, depending on whether employers allowed its burden to be shifted effectively to them.

Lawyers who will least feel the burden are those whose business is to buy legal services wholesale and sell them at retail. These are, of course, the members of large law firms. Since big-firm partners do not make their money solely by selling their own time, they can much more readily parry the time burdens of mandatory pro bono publico. Already large-scale buyers and sellers of legal services, they simply can hire extra associates, let them do pro bono publico work full time, and thereby satisfy the obligations of the firm. This "collective" approach to fulfilling a firm's pro bono publico responsibility has been endorsed by the principal proponents of mandatory pro bono publico work — the A.B.A. committee. And as a painless escape hatch for the highest-paid members of our profession, the "collective" responsibility approach hardly could be excelled.

Indeed, members of large firms may even benefit — and not only from the implicit good public relations. There may be cash profits as well. After all, most situations requiring legal services have two sides. Whenever clients who cannot pay get more legal services, clients who can pay need more legal services. This results in new business for the bar. Of course, this new business is little help to lawyers who sell only their own time. With their own pro bono publico duties, they would be hard put to take on additional work, even if it paid.

But for the buyers and sellers of legal services, this new business could be a small bonanza. They could hire new associates to do the work, pay them wholesale, and sell their time retail, and an entire new source of profits could be exploited from the increased turnover of big-firm lawyers' stock in trade.

What can we conclude about this misconceived idea of mandatory pro bono publico work for lawyers? At best, it is an expression of the idealism of a profession dedicated to public service. At worst, it is a public relations gimmick, designed to deflect the suspicion that lawyers are basically a bulwark between justice and the elite. At bottom, however, it is neither of these. It is simply an idea whose time should never come. ▲

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