



THE JUSTICE GAP

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[The address began with a short video titled *Justice for All* prepared by the Texas Access to Justice Commission, and narrated by Bill Moyers. It told the stories of four individuals whose access to our civil justice system through legal aid lawyers dramatically altered their lives.]

For me it all started in 1985 when I received a call from Academy Fellow To Be, Charlie Smith, then president of the State Bar of Texas. He asked if I, as president-elect, would stand in for him to welcome the Legal Services Corporation Board when they met in El Paso. It was at a time when our country's President had declared war on the federally funded legal aid program, eventually providing in 7 of his 8 budgets a "0" line item for legal services to the poor.

When the Congress continued to override him he appointed a hostile Board, some of whom set out to destroy from within what the President had been unable to destroy through de-funding. It was this hostile Board that I was to ceremoniously welcome.

They did not disappoint. Their attitude was arrogant and demeaning. The legal aid lawyers who appeared before them to explain their programs were met with distrust, with cynical skepticism and with no professional courtesy. The Board exhibited little knowledge, understanding or empathy for their budget restraints and working conditions, much less the needs of indigent clients. They made it clear that they did not trust lawyers, they did not trust the system and they did not trust those who sought legal aid.

It was both outrageous and humiliating, especially to those who labored day-in and day-out in the understaffed, poorly equipped offices for little pay to strive for a goal of equal access to justice among a vast indigent population.

This was also when James Kilpatrick and William Buckley complained in their syndicated columns about legal service lawyers –

those “Happy hot dogs of the liberal left” and “lobby of the left-minded lawyers” who want the general public to “rally around the socialist flag”. The Christian Voice publication listed opposition to federal funding for legal services to the poor as its third highest measure of a congressman’s “Christianity” – ahead of opposition to busing and abortion or support for school prayer.

I later learned it was a scene that the LSC Board had repeated in New Hampshire and Massachusetts, and their Bar Presidents were equally disturbed by what they saw and heard. Even more frustrating, there was no effective organized effort to combat it, either by the American Bar Association or other groups.

As a result, those two Bar Presidents and I formed a national organization, which operated outside the ABA, called “Bar Leaders for the Preservation of Legal Services to the Poor”. Overnight we had members in virtually every state who had some connection to their Representative or Senator. A newsletter was created, petitions were circulated, and Bar leaders came to Washington and testified before the House and Senate. Bar organizations started funding legal needs assessments and the public and politicians began hearing the true stories of families and individuals served by the unselfish and committed legal service attorney. The case was made for a national legal infrastructure specializing in poverty law. The LSC Board was confronted at every meeting in every part of the country to ensure that unfounded rhetoric was countered by the real story. They were educated, and in many cases converted, to understand and support the concept that a system of government based on the rule of law could not work if its poorest citizens were effectively denied access to its adversarial system of justice. Lawyers from across the nation rallied in support and continue to do so. Today, although still seriously under-funded, the LSC programs continue to provide the backbone for legal aid efforts in America.

Ironically, that New Hampshire Bar President, John Ross, now chairs the ABA’s Pro Bono Committee, I chair the ABA’s Standing Committee on Legal Aid and Indigent Defendants, and that

Massachusetts Bar President, Mike Greco, is the current President of the American Bar Association. Mike Wallace, one of the ring leaders on the hostile LSC Board in the 80's has just been nominated for the 5th Circuit Court of Appeals.

The case examples you saw on the video are not unique.

Incredibly, there are nearly 1 million similar cases handled annually by the 140 federally funded legal services programs in the United States. But just as incredible, is the fact that an additional 1 million cases are being rejected each year because programs lack sufficient resources to handle them. That number is a fact recently documented in a September 2005 report of the Legal Services Corporation entitled "Documenting the Justice Gap in America."

Congress explicitly recognized in the LSC Act of 1974 that "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice, assist in improving opportunities for low-income persons," and "has reaffirmed faith in our government of laws." The goal of providing equal access to justice for those who cannot afford to pay an attorney in civil matters remains the reason for LSC's existence and the benchmark for its efforts.

U.S. Supreme Court Justice Lewis Powell was even more poignant when he said "Equal justice under the law is not merely a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status."

In 1980, LSC identified as its initial goal the provision of at least a minimum level of access to legal aid in every county in the nation. Minimum access was defined as two lawyers, with appropriate support, per 10,000 low-income people.

The "minimum access" funding level was achieved throughout

the nation in 1981, with an appropriation of a little over \$320,000,000. This commitment lasted for one year. For 1982, Congress reduced funding for LSC by 25%. Federal funding has never again reached the 'minimum access' level. Adjusted for inflation, 1981 remains the high water mark for LSC funding. In 2006 dollars, it would be more than twice LSC's current appropriation level.

Over this same period of time, the poverty population that is eligible for civil legal services increased from less than 44,000,000 in 1981 to over 49,000,000 in 2004, an increase of approximately 14%, and is over 50 million today. Despite these numbers, the President's budget for FY 2007 would cut the LSC appropriation by an additional \$20 million, which would strike at the very foundation of our country's poverty law system. And although billions of dollars have been appropriated for hurricane Katrina relief, none of that is earmarked for legal services for its victims. It was proposed, but defeated.

Despite efforts to broaden financial support, the United States spends only about \$2.25 per capita on civil legal assistance, a ludicrously inadequate amount for a nation in which roughly one-seventh of the population is in or near poverty and eligible for aid. The equivalent figure is about \$12 in New Zealand and \$32 in England.

It was never envisioned that the federally funded programs would meet the need alone, although they remain the primary source of civil legal aid for low-income Americans. Indeed, great strides have been made through Interest On Lawyers' Trust Accounts programs (IOLTA), state and local funding efforts and increased emphasis on pro-bono participation from the legal community. We now have Access to Justice Commissions in 20 states, Washington D.C. and Puerto Rico, involving active participation by state Supreme Court justices, which have revitalized and refocused the effort. Like was done with the IOLTA programs, we hope to expand that concept to all 50 states.

Nevertheless, the 2005 LSC Justice Gap Report concludes that, considering all sources, 80% of the legal needs of the poor, if not

more, remain unmet. While there is one lawyer providing personal civil legal service for every 525 people in the general population, there is only one legal aid lawyer (including all sources of funding) for every 6,861 low income people in the United States.

The LSC report concluded that in large portions of the country, the justice gap today is wider than it was 25 years ago.

It is a shameful irony that the nation with the world's highest concentration of lawyers has one of the least adequate systems of legal assistance. The poor rarely have a safety net, so their legal needs take on a special urgency. The fact that an increasingly large segment of our population does not effectively have access to our nation's system of civil justice is not only disturbing, it is a national disgrace.

The analysis for the Justice Gap Report was concluded in August 2005. Therefore, none of the data in the report reflects the vastly increased need for legal assistance that has resulted from the impact of Hurricane Katrina by a greatly expanded client-eligible population, not only in the states where the hurricane struck, but across the nation where evacuees have been relocated. A national disaster of this magnitude highlights the critical need for a solid civil legal assistance infrastructure and reaffirms the need for long-term adequate funding.

The individuals you saw on the video have told you how important it is.

Of course, our justice system has both a civil and a criminal component. Clearly, one of the hallmarks of America's criminal justice system, the one that separates us from those in most other countries, the one that everyone would agree defines our very concept of justice, which puts a premium on protection of the innocent, is the Supreme Court pronouncement in Gideon vs. Wainwright.

When Clarence Earl Gideon asked the Supreme Court to decide that he and every other poor criminal defendant is entitled by

the Constitution to have a lawyer provided by the state for his defense, he wrote: “I believe that each era finds an improvement in law, each year brings something new for the benefit of mankind. Maybe this will be one of those small steps forward.”

The decision in his case when it came on March 18, 1963, promised much more than a small step. The Court held that the Constitution did guarantee the right to counsel in all serious criminal matters – and before long it extended the right to virtually all criminal cases.

During the 40th anniversary year of the U. S. Supreme Court’s decision in Gideon vs. Wainwright, our Standing Committee on Legal Aid and Indigent Defendants held a series of public hearings to examine whether Gideon’s promise is being kept. Throughout 2003, extensive testimony was received from 32 expert witnesses familiar with the delivery of indigent defense services in their respective jurisdictions. They were from all geographic parts of the U.S. and represented 22 large and small states, as well as the major kinds of indigent defense delivery systems and payment methods.

Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America’s courts every year, in clear violation of the Gideon mandate, either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. It will not surprise anyone in this room that a right to counsel is meaningless unless that counsel is competent.

Recent polling shows that the majority of Americans believe that, in the interest of fairness, government should guarantee effective indigent defense services. This belief derives from concern about disparities in the treatment of rich and poor, as well as the potential for innocent persons being sent to jail simply because they cannot afford adequate legal representation. The mounting evidence of wrongful convictions over the past decade is undeniable proof that the fear voiced in these public opinion surveys is indeed a harsh reality.

Jimmy Ray Bromgard was convicted in 1987 of a brutal rape of an 8 year old girl in Billings, Montana. He was arrested because a policeman thought he resembled the composite police sketch. The victim was never really certain that Bromgard was her attacker, testifying that she was only 60-65% sure. Bromgard's lawyer was under a contract to provide all the representation in the county for a flat fee. He met with his client only once before the trial began. He failed to challenge the girl's courtroom identification, he undertook no investigation, including testing the semen found on the girl's dress, he gave no opening statement, he did not prepare a closing argument, and he failed to file an appeal in the case. The lawyer also failed to object when the state's expert witness testified without any scientific basis that the chances were only 1 in 100,000 that hairs found at the crime scene were not Bromgard's. Not surprisingly he was convicted (it took the jury one hour), and sent to prison for 40 years. If not for DNA testing he would still be there today. Jimmy Ray Bromgard was exonerated and released from prison in 2002, but only after serving 15 years for a crime he did not commit.

Unfortunately, his case was no anomaly. Before recent reforms, it was estimated that the system in Montana had roughly 100 people wrongfully imprisoned per year. The problem was not just overzealous prosecutors, it was a public defender system that left poor people accused of crimes consistently shortchanged.

Angel Resendez and Robert Will are two men who have little in common beyond an address on Texas' death row, and one other curious detail. The bulk of their legal briefs, filed 1 1/2 years apart by a Houston lawyer appointed to appeal their cases, are word for word identical, right down to a capitalization error on page 17. The appeals focus primarily on a single technical challenge to Texas law on death-penalty jury instructions, without mentioning either Resendez or Will by name or referring to their trials. Both also list incorrect conviction dates for the men.

What's more, the appeals' author missed routine filing deadlines to move Resendez's case into the federal courts. Deprived of any

federal review, Resendez faces an accelerated May 10th execution date.

Like the infamous case where Calvin Burdine's attorney slept repeatedly during his client's trial, this is another black-eye for Texas' capital punishment system which has historically relied on court-appointed defense lawyers of varying experience, skill and motivation.

In North Carolina, one defense lawyer was convicted of possessing child pornography. Another admitted drinking hard throughout his client's murder trial. A third committed felony credit card fraud. Each of their clients ended up on death row.

The good news is that in 2001 North Carolina started appointing only qualified lawyers to death penalty cases. The sad news is that about 150 death row inmates who went to trial before 2001 didn't benefit from these improvements, and many had inadequate legal representation. As the state capital defender stated: "I don't think there is any question that there are people on death row now that wouldn't be there if they had better representation."

In San Jose, California the newspaper did a three-year investigation of criminal jury trials in Santa Clara County. Its conclusions were chilling: "Whether it was from prosecutors' excesses, defense lawyers failures or the appellate courts' indifference in some cases, people went to prison for crimes they did not commit."

In October of 2004, 17 years after he was sentenced to death for murder by arson, Ernest Ray Willis stepped out of prison a free man and became the eight death row inmate to be exonerated in Texas. His original lawyer, trying his first death case, had spent less than three hours with him before the trial and later surrendered his license on cocaine charges. Ernest Willis' savior was James Blank, a New York intellectual property lawyer with the firm of Latham and Watkins, working for free, who stayed with the case for 12 years and whose team logged close to 10,000 hours on his post conviction representation. They proved there was no murder because there was no arson.

While it is impossible to know the actual number of innocent persons convicted of crimes in this country, numerous studies in recent years have proven that the phenomenon is much more common than once believed. One study estimates that the actual number of wrongful convictions in serious felony cases nationwide may be as high as 10,000.

As of April 2006, the Innocence Project at the Benjamin N. Cardozo School of Law listed on its website profiles of 175 persons, convicted of both capital and non-capital crimes in 31 different states and the District of Columbia, who collectively served more than 1,800 years in prison for crimes they did not commit. These individuals were later exonerated from 1989 to 2006 due to DNA evidence that conclusively established their innocence. It is the development of DNA evidence that has exposed the pathology of Gideon's promise.

Now we know that wrongful convictions occur with some frequency, which ought to make government officials especially interested in making certain that adequate defense services are provided to the indigent. Not only is this important to assure that innocent persons are not imprisoned, but also because every wrongful conviction means that the crime's real perpetrator remains at large and able to commit new offenses.

Indeed, Subtitle B of the recently enacted federal Innocence Protection Act was written against the backdrop of a shameful record of failure by many states to provide competent lawyers to indigent defendants facing the death penalty. Testimony in both the Senate and House Judiciary Committees revealed that of the 38 states that authorize capital punishment, very few have established effective statewide systems for identifying, appointing and compensating competent lawyers in capital cases.

Discussing the testimony, U. S. Senator Patrick Leahy said: "Even the best lawyers in these systems are hampered by inadequate compensation and insufficient resources to investigate and develop a meaningful defense".

For persons wrongfully convicted, the cost of inadequate defense representation is reflected in countless wasted years spent in prison, the deprivation of cherished rights, adverse immigration consequences, and quite possibly the loss of life.

If the Gideon promise to a right to counsel is exercised this way in death cases, we can only imagine how it is being administered in cases with less severe penalties, but still with serious collateral consequences.

To put this in a financial perspective, in the United States the expenditure per capita for criminal legal aid is about \$10 per person, with less than that in 29 states, while the comparable figure in England is \$34 per person — a difference of 3 to 1.

It is astonishing for most Americans to learn that England spends twice as much defending criminal cases as they do prosecuting them. In the United States, the situation is the opposite. Further, since the mid-1990's Congress has appropriated almost \$6 million to train local and state prosecutors, but none for state and local indigent defense attorneys until last year when \$783,000 was finally provided for death penalty representation.

Caseloads are radically out of compliance with national standards. In some places in New York, there are caseloads of 1000, 1200, 1600 cases for a single lawyer. In Rhode Island, public defender felony caseloads surpass national standards by 35-40% and misdemeanor caseloads exceed national standards by 150%. In one county in Pennsylvania, the caseload of the public defenders' office was about 4,000 cases in 1980 while the same number of attorneys handled an estimated 8,000 cases in 2000.

In contrast, there is Tom Mesereau, the lead attorney for Michael Jackson, Robert Blake and Mike Tyson, who has handled, at his own expense, six Alabama and Mississippi death penalty cases since 1999. Tom, a California attorney, who had no connection to Alabama or Mississippi, originally volunteered through an ABA project concen-

trating on the Deep South where the death penalties given were among the highest in the nation and no money or lawyers were provided for death penalty appeals. In all six cases, Tom's clients were either acquitted or convicted on lesser charges.

And Seth Waxman, with Wilmer, Cutler, Pickering, Hale and Dorr in D. C., whose pro-bono work over the last few years includes arguing in two rounds before the U.S. Supreme Court, in which he prevailed, and another case out of Missouri in which the Supreme Court barred the execution of juvenile offenders.

And Max Baker of the Chattanooga civil law firm of Chambliss and Bahner, who was appointed to represent Michael McCormick at the princely rate provided in Tennessee of \$20/hour out of court and \$30/hour in court. After spending more than \$300,000 in time and out-of-pocket expenses, including paying investigation and experts, the death penalty conviction was overturned and remanded for re-trial.

What a difference a competent lawyer with adequate resources makes.

And how the entire American legal community – big firms, small firms, public interest groups, academics, law school clinics, the American College of Trial Lawyers and individual attorneys have volunteered to represent the over 550 detainees from forty countries held at Guantanamo Bay, Cuba, many held there for more than three years without charge or trial.

There is some hope for change. Major reform measures have been enacted in Texas, known as the Texas Fair Defense Act, and Virginia has created a new Indigent Defense Commission. In 2003 Georgia also enacted legislation to overhaul its indigent defense system. In 2003, following a law suit by the New York County Lawyers Association, New York passed legislation increasing its rates of compensation. Studies in Louisiana, Mississippi, Nevada and Pennsylvania have documented serious deficiencies and recommended improve-

ments. Michigan has developed a plan through a Public Defense Task Force for the state's indigent defense services and is working on implementation.

In the meantime the funding continues to be sorely lacking, injustice continues and the Gideon promise remains far from a reality.

In closing, the difference between justice and injustice, in either the civil or criminal system, is the lawyer, the competent lawyer, for which the Fellows of this Academy set the standard. While we proudly proclaim the rule of law to our Chinese and Italian guests, we must be mindful that we, ourselves, have a long way to go in making our system a just one. The Justice Gap in our country is immense, but our commitment to narrow it can never cease.

Anthony Lewis, author of the book, Gideon's Trumpet, says it best:

“Ours is a government of laws, not men. American society is founded on the commitment to law, binding the rulers as it does the ruled. Our willingness to assure the least among us the guiding hand of counsel is a test of our American Faith.” Thank you.

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