

Closing the Courthouse Door on Maryland's Poor¹

If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.

Judge Learned Hand

The American legal system promises equality in the administration of justice. Since the beginning of the Republic, we have aspired, as John Adams urged, to be “a nation of laws, not men.” Evidence of this promise appears throughout our founding documents. The Fifth and Fourteenth Amendments to the United States Constitutions guarantee equal protection of the laws and due process. Maryland’s Declaration of Rights requires the administration of “justice and right, freely without sale, fully without denial, and speedily without delay, according to the law of the land.” Article 19. Even the edifice of the Supreme Court re-enforces the aspiration. “Equal Justice Under Law” is proudly inscribed above the entrance through which each litigant passes on their way to the Court chamber.

Sadly, however, the promise of equal justice remains, for many in Maryland, a hollow one. The courts are often perceived as distant and remote institutions that are frequently unavailable when needed and ordinarily hostile to the interests of the average person. Many Marylanders are exposed to the courts only when the system is being worked against them: their landlord seeks an eviction, a business seeks to collect a debt, the State seeks to take their children or expose them to criminal penalties. In those matters, far too often, Oliver Goldsmith’s cynical observation is a reality: “Laws grind the poor and rich men rule the law.”

The barriers to equal access to justice are real and plentiful and for poor persons and persons historically disenfranchised, are often insurmountable. Physical barriers for persons with disabilities and language barriers for non-English speakers literally keep litigants out of court. The unavailability of lawyers for those who cannot afford to pay an attorney’s fee to

properly pursue claims and defenses, or to help develop the law are equally real obstacles to meaningful equality in our legal system.

Lack of Counsel in Civil Cases Bar Poor Persons from Equal Justice

Possibly the most profound barrier is the unavailability of counsel to assist persons who cannot afford to pay a lawyer to handle a civil matter.² Almost eight percent of Maryland's five million residents live in poverty.³ Many more live near the poverty line. As a result, approximately 20% of Maryland's citizen's – more than one million people – are eligible for free legal services through programs funded by the Maryland Legal Services Corporation.⁴

Nationally, approximately one half of poor and moderate income families experience a legal problem each year.⁵ Thus, it is not surprising that despite a network of almost 30 legal services organizations,⁶ 80% of poor persons with a civil legal problem in Maryland cannot find counsel.⁷ The combined staffs of these programs is 160 lawyers, or one lawyer for every 6250 poor person in the state.⁸ By contrast, there are 27,000 lawyers in the Maryland Bar, or one for every 185 Maryland residents. As any recent visitor to our courts knows, a very substantial percentage of the pending cases involve at least one unrepresented party and that party is usually poor.⁹

The legal needs of this population are immense. Poor persons are more likely to encounter the legal system in cases where the stakes are high than persons of means. The legal cases involving the poor are most often about their ability to remain in their home, their right to maintain an income or to keep their family together. These cases are often complex, involving significant legal and procedural issues. Despite a growing sensitivity by the bench to *pro se* litigants, the laws and rules are simply not designed to accommodate an untrained advocate. Certainly, no person who can afford counsel would ever go into the courtroom unassisted if the

outcome of the case could result in the loss of a home or the removal of a child from the family. Poor persons should not be required to do so either.

Funding for Civil Legal Services in Maryland is Grossly Inadequate

All sources of funding for civil legal services in the State, including government and private money, amounts to \$23 million.¹⁰ This is an investment of less than \$23 for each of the more than one million Marylanders eligible for free legal assistance. Although this might seem like a substantial commitment, it is paltry by contrast to the resources available to the rest of the legal industry. In 1997, total law firm receipts in Maryland were more than \$1.8 billion,¹¹ more than 80 times the amount of money spent on civil legal services for the poor. In FY 2001, Maryland budgeted \$242 million for the Courts,¹² \$48 million for the Office of Public Defender,¹³ and \$20 million for the Office of the Attorney General.¹⁴ Even the Workers Compensation Commission got \$12 million.¹⁵

Current civil legal services funding is less than 1.25 % of the total fees collected by lawyers in Maryland each year, and less than one tenth the amount spent on the courts. In the context of the size of the legal industry and the resources already committed to the institutions of the legal system, an increase in funding for legal services to the poor sufficient to address the unmet need would be a modest investment.

***Pro Se* is not the Answer**

Over the last decade, in response to the flood of unrepresented litigants, a plethora of *pro se* projects have been created. The Judiciary itself has created *pro se* programs in 18 Maryland counties.¹⁶ These programs attempt to assist unrepresented litigants by giving advice and information. In some circumstances this may be enough, but often, and unpredictably, it is not. It is often impossible to know what case will take an unexpected and complicating twist. The

legal process is frequently perverted, despite the best efforts of the bench, by the imbalance that occurs when one party is represented and the other is not.

The problems that plague the Rent Division of the Baltimore City District Court are an illustration. One hundred and eighty thousand cases are filed in the Court each year. Only one judge sits in the Court deciding hundreds, and on some days thousands of cases. At stake in each case is whether a tenant, usually very low-income, will be evicted. Although the cases are simple – the only issue before the Court is whether there is rent due and owing – the fact that counsel rarely appear in these cases has allowed unconscionable and unconstitutional practices to become the routine. For example, Maryland law allows service of process in a rent case to be made by mail and by posting the unit door. The Sheriff is responsible to accomplish service and defective service deprives the Court of jurisdiction over the case.¹⁷ Research by the Public Justice Center found that thousands of cases were not properly served and that tenants were being evicted without notice of the cases pending against them. Each year more than 5000 summons were returned by the post office as undeliverable, most either because the address could not be read or because the Sheriff failed to affix postage. These returned summons were left in boxes and were never opened or brought to the attention of the Court. To make matters worse, the Sheriff posted the outer door of apartment buildings, not the individual unit, thus dramatically diminishing the chances that the tenant would receive actual notice. Such service of process is contrary not only to the laws of Maryland, but to principles of due process articulated by the United States Supreme Court.¹⁸

This illegal practice was permitted by the Court in large part because poor tenants rarely had lawyers in these cases to raise the complex statutory and constitutional arguments. Although both the Public Justice Center and the Legal Aid Bureau provide assistance to low-income

tenants, the demand for services overwhelmingly outstrips the available resources. Thus, this basic violation of due process, which deprived the Court of jurisdiction in thousands of cases, and worked real and preventable injustice on litigants, was allowed to persist for years. Had more tenants had a lawyer, the issue would have been litigated earlier and harm prevented.

Pro Bono is Important, but is not the Whole Answer

The efforts to increase *pro bono* through the promulgation of Rule 6.1 requiring mandatory reporting of donated hours and the Court of Appeals' efforts through the Judicial Commission on *Pro Bono* are important steps in bringing greater resources to serve persons who cannot afford counsel. However, *pro bono* is not, and can never be, the complete answer. *Pro bono* has been an important part of the American legal landscape since Legal Aid was founded in New York in the early 19th Century. Although commitment to *pro bono* has ebbed and flowed over the years, it has never come close to solving the problem that most poor persons don't have access to counsel to solve their legal problems. It was the recognition of this basic fact that led to the creation of the Legal Services Corporation and federal funding of legal services.

There are several reasons why *pro bono* will always be only a partial solution. First, the burden of *pro bono* is not spread evenly. The entire bar and judicial system are responsible to ensure equal access to justice, not just the lawyers who are willing to step to the plate and perform their duty. Equal access to justice is not charity. "Equal access to justice is the *sine qua non* of a just society."¹⁹

Second, the legal issues of the poor are often specialty areas best practiced by an expert. Few unaided *pro bono* volunteers will be able to as effectively negotiate the nuances of the Medicaid regulations or the rules governing public housing tenancies as legal aid lawyers who have practiced in the area for years. Other areas such as debt collection and family law are better

suited for *pro bono*, although the poverty of a client will add a unique nuance to each case.

Private law firms are particularly effective in assisting with large or complex litigation, to which they bring experience, expertise and resources.

Third, *pro bono* is not a reliable resource. The availability of donated time and resources changes over time. Last year, the Maryland Legal Services Corporation reported an 8% decline in *pro bono*, despite that the Court and the organized bar were undertaking important programs to increase volunteer efforts.²⁰ The willingness of attorneys and firms to commit to volunteer projects is influenced by numerous business factors. A firm with an over-abundance of paying work may not have the capacity to take on a non-paying project. By the same token, a firm without sufficient work may lack the resources to help. Moreover, some cases might be so controversial or involves such a powerful member of the business community that no firm will take them.

Fourth, *pro bono* is not as efficient as staffed programs in many circumstances. Staffed programs develop expertise that expedites the work and can take advantage of the efficiencies of scale in ways that private practitioners handling a small group of *pro bono* cases might not.

This is not to say that the private bar does not have an important role and that it can, and should, make a greater commitment to the provision of free legal services. Instead, it suggests that *pro bono* works best in an environment where there are stable and effective staffed programs that can identify cases, provide training, mentoring and back-up and can handle those cases best handled by a staffed program.

Physical Barriers Bar Persons with Disabilities From Equal Justice

Persons with disabilities and language minorities often find courthouses impossible to negotiate. Throughout the State, county courthouses lack accommodation for persons with

disabilities. In many courthouses, person who use wheelchairs have difficulty entering the building, finding an accessible bathroom, negotiating too narrow or too heavy courtroom doors, or accessing clerks behind high counters. Fewer accommodations yet have been made for persons who are blind or deaf. Few, if any, materials are printed in brail and outside the courtroom, sign language interpretation is ordinarily not available in the courthouse.

The Baltimore City Circuit Court is currently under renovation to bring it into compliance with the Americans with Disabilities Act (“ADA”). Sadly, this laudable effort was not undertaken without a fight. On July 26,1996, the sixth anniversary of the enactment of the ADA, the Public Justice Center, together with Andrew Levy, filed suit against the State to force changes to accommodate persons with disabilities. The Court lacked a wheelchair accessible entrance, forcing wheelchair users to enter through the garage. There were no wheelchair accessible bathrooms, interior doors were too narrow and some jury rooms and offices were up flights of stairs. Faced with a lawsuit, rather than address the deficiencies, the State chose to fight. Denial of the need for renovation was salt in the wounds that were inflicted on the counsel, parties, jurors and witnesses with disabilities when they were subjected to daily humiliation at the Courthouse. After years of contentious litigation, Federal District Judge Andre Davis found:

There is no genuine issue of material fact whether individuals with disabilities have ready and meaningful access to the Circuit Court. They do not. . . . There are serious ramifications when the very institution designed to ensure the delivery of equal justice under law to all individuals perpetuates such discrimination.²¹

Language Barriers Bar Non-English Speakers from Equal Justice

Language barriers are also severe in every aspect of the judicial system.²² On the most fundamental level, virtually all entry points into the Courts are barred by language. Summons

and hearing notices are not translated into Spanish, court forms and brochures are printed in English only, few clerk's offices have Spanish-speaking staff, and courtroom personnel rarely speak Spanish. These access barriers can have a profound impact on the rights of the Spanish speaker attempting to participate in the judicial process. It may prevent a potential litigant from asserting an important right or cause a defendant to waive rights or fail to attend court dates solely because she or he was unable to understand the proceedings.

The difficulties for a Spanish-speaking litigant are compounded by the fact that interpretation is often unavailable or inadequate. Interpreters are rarely available in Circuit Court civil proceedings. In criminal cases involving Spanish-speaking defendants or witnesses, a single interpreter may be available for the court for all witnesses, the prosecutor and the defense. This scheme does not adequately allow a criminal defendant the opportunity to fully understand the proceedings or to effectively participate in her or his defense. To make matters worse, the State lacks standards to ensure that court interpreters have the training and skills necessary to properly translate hearings.²³

In the modern regulatory environment, administrative agencies perform important adjudicatory functions.²⁴ From issuing licenses and resolving licensing disputes to deciding claims for workers compensation or unemployment benefits, administrative agencies play a pervasive role in daily life. Few State and local agencies are equipped to address the needs of Spanish-speakers. Agency materials and claim forms are rarely translated into Spanish and claims and inquiries in Spanish are rarely accepted.

The inability to access agency services and processes foreclose many Latinos from the enforcement of their rights or from full participation in productive economic activity. For example, a Spanish-speaker injured on the job might be unable to obtain rightfully owed workers

compensation, the victim of race discrimination might be prevented from relief under the Human Rights Act, a low-income tenant might be unable to get her or his home inspected for dangerous housing code violations and a worker cheated out of wages may be prevented from pursuing a remedy with the Department of Labor.

Important progress is being made to address these concerns. At the time of the writing of this article, language access bills are wending their way through the State General Assembly, although the prospects of passage are bleak. More promising are the deliberations by the Court's Rules Committee concerning a proposed new rule to ensure adequate interpreter service, an essential first step to language accessibility.

A Solution in Necessary

There is a real crisis which demands an urgent solution. A solution, however, will be difficult. As we have seen on the national level with the aggressive attacks on federal Legal Services Corporation funding, business interests will go to extraordinary lengths to ensure that poor people do not have lawyers. The politics within the bar will also be complicated. Some will fear mandatory *pro bono* others will argue that it is the responsibility of government, not members of the legal fraternity to provide help. Reducing language and physical barriers will not be cheap.

We must not be deterred by the difficulty of the issue. For what is at stake is the very integrity of our system of justice. As Judge Jack B. Weinstein noted:

Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice for all remain a mockery for the poor and the oppressed.²⁵

We should act urgently and with dispatch, as if our legal system depends on it. It does.

1. By Jonathan Smith, Executive Director of the Public Justice Center. The Public Justice Center is a nonprofit legal services organization dedicated to expanding the rights of the under represented. Established in 1985, the PJC has sought to focus its attention on a broad range of significant civil rights and anti-poverty issues.

2. The problem is not limited to civil cases. Despite *Gideon v. Wainwright*, thousands of poor criminal defendants go without counsel at critical stages of their cases. For example, in Baltimore City, the Office of the Public Defender lacks the resources to provide counsel to most incarcerated pre-trial defendants at bail hearings.

3. www.census.gov/hhes/poverty/poverty99/pv99state.html and www.census.gov/population/estimates/state/st-99-2.txt

4. Programs receiving State funds through the Maryland Legal Services Corporation may provide services to poor persons who have household incomes of less than 50% the median income of the State. Maryland Code, Article 10 § 45(e).

5. *Legal Needs and Civil Justice, A Survey of Americans, Major Findings from the Comprehensive Legal Needs Study*, Consortium on Legal Services and the Public Interest, American Bar Association (1994), at 23.

6. *Annual Report of Maryland Legal Services Corporation*, July 1, 1999 to June 30, 2000 at 4.

7. *Action Plan for Legal Services to Maryland's Poor*, A Report of the Advisory Council of the Maryland Legal Services Corporation (1988) at ix.

8. *Report and Recommendation*, The Maryland Judicial Commission on Pro Bono, March 2000 ("Pro Bono Commission Report") at 2.

9. The Maryland Judicial Commission on *Pro Bono* found that one-fourth of the civil docket and one-half of the family docket involved *pro se* litigants. Report and Recommendations at 4.

10. John A. Tull, *Report on the Evaluation of the Legal Services Delivery System in Maryland*, April 2000 at 2.

11. U.S. Census Bureau, *Maryland 1997 Economic Census, Professional, Scientific and Technical Services*, October 1999 at 7.

12. http://mlis.state.md.us/2001RS/budget_docs/All/Operating/C00A00_-_Judiciary.pdf

13. http://mlis.state.md.us/2001RS/budget_docs/All/Operating/C00B00_-_Office_of_the_Public_Defender.pdf

14.http://mlis.state.md.us/2001RS/budget_docs/All/Operating/C00C_-_Office_of_the_Attorney_General.pdf

15.http://mlis.state.md.us/2001RS/budget_docs/All/Operating/C00F00_-_Workers_Compensation_Commission.pdf

16.Pro Bono Commission Report at 4.

17.*Harvey v. Slacum*, 181 Md. 206 (1942).

18.*Greene v. Lindsey*, 456 U.S. 444, 451 (1982); 86 *Opinions of the Attorney General* ____ [Opinion No. 01-007 (February 15, 2001)].

19.Weinstein, J., *The Poor's Right to Equal Access to the Courts*, 13 Connecticut Law Review 651 (1981) at 655.

20.*Annual Report of Maryland Legal Services Corporation*, July 1, 1999 to June 30, 2000 at 2.

21.*Reid v. Glendenning*, (Case No. AMD-96-2337 D. Md.) Opinon date & page

22. The failure of the judicial system to adequately address the needs on monolingual Spanish speakers is documented in *Unequal Justice: Barriers to Justice for Latinos in Maryland*, a report published by CASA of Maryland and the Public Justice Center in 1999.

23. Although the Court has a certification program, one does not need to be certified to serve as an interpreter. Administrative Order Establishing Minimum Requirements for Court Interpreters, Maryland Court of Appeals, December 7, 1995 at ¶ 3.

24.*South Carolina State Ports Authority v. Federal Maritime Commission*, 2001 U.S. App. Lexis 3784 (4th Cir. March 12, 2001).

25.Weinstein, J., *The Poor's Right to Equal Access to the Courts*, 13 Connecticut Law Review 651, 655 (1981).