

Pro Bono and Access to Justice in America

A Few Historical Markers

By Marlene Coir

In his foreword to a symposium on the history of pro bono legal services, Russell Pearce reviews the evolution of the American legal profession's commitment to pro bono publico, or the common good. Pearce professes that, in the nineteenth and early twentieth centuries, lawyers viewed themselves as members of the governing class, above self-interest in their pursuit and promotion of the rule of law. In the twentieth century, governing-class lawyers advocated for the common good through organizations such as the NAACP and the National Consumers League while enjoying lucrative employment within the private sector.¹ Cause lawyers, working for and paid by public-interest organizations, evolved in pursuit of the same goals as the governing-class lawyers; however, their service is said to come from a sense of moral commitment to a particular set of issues or objectives.²

Individual attorneys may also provide professional services at no fee to those who cannot afford legal assistance. They do this "within the framework of their professional roles" as the governing-class lawyers did a century ago, but the work is more often done to assist an individual rather than promote a common good. Of course, the choice of the work done pro bono may reflect that attorney's commitment to a particular cause.³

Our concept of a justice system of laws equally applied to all men is said to be rooted in the Magna Carta of 1215 and the 1495 Statute of Henry VII,⁴ but it is also opined that equal access to justice means equal access to legal representation, and that this remains illusive.⁵ While providing legal counsel for those who cannot afford to retain an attorney takes its precedent from fifteenth-century English law, those early appointments were

made only as deemed necessary by the presiding jurist.⁶ In English criminal proceedings through the early part of the nineteenth century, those charged with treason could request that legal counsel be appointed on their behalf. Individuals accused of misdemeanor offenses were eligible to retain legal counsel at their own expense. However, those charged with felonies, including capital crimes other than treason, were not even allowed to retain counsel.⁷

Similar provisions for appointed counsel were created in some of the early American colonies, but it is unclear when these discretionary appointments were actually made.⁸ In late-nineteenth century America, various jurisdictions had provisions for appointing counsel in cases involving serious crimes; however, appointments were usually discretionary or exceptional, and often ineffectual. In some jurisdictions, any attorney who happened to be in the courtroom at the onset of a criminal hearing might be called on to defend the accused.⁹

Near the turn of the twentieth century, Clara Foltz, the first woman to practice law in California, promoted the institution of a public defender's office, which would receive the same funding and force as the prosecutor's office.¹⁰ In 1914, Los Angeles County became the first jurisdiction to open a public

defender's office. Other metropolitan areas followed this lead;¹¹ however, as late as the mid-twentieth century, a survey found that even in those states that provided counsel to indigent felony defendants, appointment was made *after* arraignment. In 40 percent of those jurisdictions surveyed, no legal counsel of any kind was provided for criminal defendants who could not retain an attorney.¹² It was not until after the United States Supreme Court holdings in *Gideon v. Wainwright* and its progeny that a right to retained or appointed counsel was established for a defendant facing charges that might deprive him or her of a fundamental or liberty interest.¹³

Access to legal counsel for those who cannot afford retaining an attorney is important in civil matters as well. In 1876, what is recognized as the first American legal aid society began to serve the German immigrants of New York. Der Deutsche-Rechtsschutz-Verein was conceived to provide ad hoc assistance in such matters as domestic and landlord-tenant disputes and generally discourage the exploitation of the newly arrived foreigners. At its onset, services were offered exclusively to those of German birth, but by 1890 the society expanded its services to all indigents and became known as the New York Legal Aid Society.¹⁴ There was a

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short-lived precursor to the New York organization—between 1865 and 1868, the Reconstruction-era Freedman's Bureau provided attorneys from the private bar in the District of Columbia and some of the southern states to represent African Americans in both criminal and civil cases.¹⁵

The 1919 publication *Justice for the Poor* by Reginald Heber Smith, organizer of the Boston Legal Aid Society, brought national attention to the inequality of justice in the United States. His work spurred the American Bar Association to create what became the Standing Committee on Legal Aid. In the

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next decade, the National Association of Legal Aid Organizations, which later became the National Legal Aid and Defender Association, was formed. Legal aid organizers worked with local bar associations through the 1950s, but the quality of the services often depended on fluctuations in the enthusiasm of the associations and individual attorneys in promoting and financing such endeavors.¹⁶

In the 1960s, the rise of the U.S. civil rights movement and the war on poverty brought a surge in poverty law and access-to-justice programs. Promotion by notable activists and prominent ABA involvement brought new interest and funding to local legal aid associations.¹⁷ Like other components of the civil rights movement, legal aid societies, with their increasing emphasis on legal reform, were subject to political backlash. In 1974, Congress created the Legal Services Corporation, which would provide support and some guarantee of autonomy for poverty law programs. Since its inception, this

national office and its activities have also been the subject of political opposition.¹⁸ The debate over which kind of legal aid and how much access to justice should be provided for those who cannot afford legal representation has continued for decades.

For those who would like to pursue more in-depth reading on the history of and the divergent philosophies regarding legal aid and pro bono work, two recommended titles are *Access to Justice* by Deborah L. Rhode and *The Right to Justice* by Charles K. Rowley.

If anyone wishes to do primary research on the history of the access-to-justice movement, the National Equal Justice Library and Archives, housed at Georgetown Law School, has complete online accessibility at <http://www.ll.georgetown.edu/nejl/>.¹⁹ ■

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FOOTNOTES

1. Pearce, *Historical perspectives on pro bono lawyering: The lawyer and public service*, 9 Am U J Gender Soc Pol'y & L 171 (2001).
2. *Id.* at 174.
3. *Id.* at 176.
4. Rhode, *Access to Justice* (New York: Oxford Univ Press, 2004), p 47.
5. *Id.* at 51; see also Rowley, *The Right to Justice: The Political Economy of Legal Services in the United States* (Brookfield, Vermont: Edward Elgar, 1992), p 4.
6. Rhode, *supra* at 47.
7. *Id.* at 49–50.
8. *Id.* at 51.
9. *Id.* at 53.
10. Babcock, *Clara Shortridge Foltz: Inventing the Public Defender* in Gross (ed), *Nobel Purposes, Nine Champions of the Rule of Law* (Athens, Ohio: Ohio Univ Press, 2007), p 68.
11. *Id.* at 75.
12. Rhode, *supra* at 52–53.
13. *Id.* at 57–58; see also Freidman, *Essay: Access to justice: Some historical comments*, 37 Fordham Urb L J 3, 7 (2010).
14. Rowley, *supra* at 4; Rhode, *supra* at 58.
15. Miller and Hard, *Pro bono: Historical analysis and a case study*, 21 W St U L Rev 483, 488 (1994).
16. Rowley, *supra* at 5–6; Rhode, *supra* at 58–59.
17. Rowley, *supra* at 7–11.
18. Rhode, *supra* at 63–64.
19. Last accessed August 16, 2011.