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## ALEXIS DE TOCQUEVILLE, ATTICUS FINCH, AND LEGAL SERVICES FOR THE POOR IN THE NINETIES

*Talbot D'Alemberte*†

### INTRODUCTION

The title above highlights the problem of equal access to justice in its historical context. Tocqueville visited the United States nearly 160 years ago and based his classic work, "DEMOCRACY IN AMERICA,"<sup>1</sup> on his observations of our young country. Atticus Finch was the lawyer-hero in Harper Lee's *TO KILL A MOCKINGBIRD* who took up the hopeless and unpopular defense of a black man accused of raping a white woman in the Deep South of the 1930's.<sup>2</sup> Both are relevant to today's serious problem of unequal access to the law in American society. Let me begin with Tocqueville.

After his nine-month visit to America in 1831 and 1832, Tocqueville wrote a nearly encyclopedic picture of our way of life and government.<sup>3</sup> His work continues to inform readers about

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1. A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* (R. Heffner ed. 1956) [hereinafter *TOCQUEVILLE*].

2. H. LEE, *TO KILL A MOCKINGBIRD* (W. Heinemann Ltd. 1960).

3. TOCQUEVILLE, *supra* note 1, at 49-54. "There is no family or corporate authority, and it is rare to find even the influence of individual character enjoy any durability . . . Men are there . . . more equal . . . than in any other country." *Id.* at 54.

American society. He was struck not only by our ideals of equality and democracy, but also by our shortcomings. In re-reading *DEMOCRACY IN AMERICA* recently, I was struck by the relevance of his observations about our legal profession. He wrote:

Lawyers belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link between the two great classes of society.<sup>4</sup>

Tocqueville looked upon lawyers as “the most powerful, if not the only, counterpoise to the democratic element.”<sup>5</sup> He contrasted the many innovations in our political laws—innovations created because of popular pressure—with the conservative nature of our civil laws, stating, “American lawyers are disinclined to innovate when they are left to their own choice.”<sup>6</sup>

And so it has remained for the 160 or so years since Tocqueville visited here. American civil law and justice are available mostly to those who are able to pay, while poor and middle-income Americans are often left without protection. I fear that this gap between the need for legal services and the actual delivery of these services is widening today.

The 1980s saw growing inequality of income and wealth in America. Although average incomes increased, growing numbers of American families found that spiralling cost increases put such basics as housing and health care beyond their reach, while those at the top prospered.

At the same time, the cost of legal representation has risen, driven by rising salaries, inflation, and investment technology. In addition, innovations that could reduce legal costs—such as mediation, lawyer referral services, and prepaid legal plans—have fallen short of their promise to make access to legal aid for common civil problems more affordable.

Moreover, the Legal Services Corporation (LSC) has declined as a source of legal aid to the poor.<sup>7</sup> During the last decade, the Reagan administration’s hostility to this agency resulted in

4. TOCQUEVILLE, *supra* note 1, at 125. Tocqueville observed that laws in America are administered by many, rather than concentrated in the hands of a few. *Id.* at 62–63. He also noted that judicial pronouncements are founded on the Constitution, which can only be modified by a vote of the people. *Id.* at 73–75.

5. *Id.*

6. *Id.* at 126.

7. D. BESHAROV, *LEGAL SERVICES FOR THE POOR*, 211–12 (1990) [hereinafter BESHAROV].

decreased funding and in an agency leadership bent on hampering the work of legal services attorneys.<sup>8</sup> We are, in fact, the only major Western nation that does not provide counsel in civil matters as a fundamental and enforceable right.

Two American Bar Association (ABA) studies<sup>9</sup> recently confirmed what working lawyers and others had already observed: affordable legal aid for civil matters is increasingly scarce. One of the studies found that, among the low-income households surveyed, four out of five had experienced civil legal problems in the previous twelve months, but could not obtain legal assistance.<sup>10</sup> The other study found that, in the previous three years, two out of five Americans at all income levels could not afford to obtain legal help for their common civil law problems.<sup>11</sup> Those unable to obtain necessary legal help included eighty percent of the poor people surveyed—and one-third of the more affluent persons.<sup>12</sup>

In other words, despite many efforts by the organized bar and state and federal governments, we are falling terribly short of providing affordable legal assistance to most Americans. We should be much more concerned as a profession—and as a nation—about solving this problem.

While we are all deeply troubled and moved to action by the closing of hospital emergency rooms to poor people with medical crises, we too often fail to act when we see the closing of our legal system to poor people with legal crises. If we fail to act, it will fulfill Tocqueville's characterization of us as conservatives who are resistant to change.<sup>13</sup> We are capable of more.

#### ATTICUS FINCH

While Tocqueville's observation may assert itself in this decade, there is another observer, albeit fictional, who can help lead us to a solution. That observer is Atticus Finch, who practiced law

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8. *Id.* at xiii.

9. CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AMERICAN BAR ASS'N., TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY (1989) [hereinafter ABA SURVEYS].

10. *Id.* at 4.

11. *Id.* at 37.

12. *Id.* at 4.

13. TOCQUEVILLE, *supra* note 1, at 126.

in Harper Lee's fictional Maycomb, Alabama—known to most of us through late-night television in the movie version of *To Kill a Mockingbird* starring Gregory Peck.<sup>14</sup>

At a time when lawyers study the latest episodes of *L.A. Law* for helpful tips, we may regard Atticus as an anachronism. He had no fast cars or expensive clothes. He was a small-town lawyer who lived in a simple, wooden frame house and provided a full range of legal services to the people—often paid in hickory nuts and collard greens.

In the movie, there is a scene in which the county judge comes by to visit, late at night, after the children are in bed. Judge Taylor asks Atticus to defend Tom Robinson, a black man who has been charged with rape and is too poor to afford counsel. After an exchange of pleasantries, Judge Taylor gets down to business and says, "Grand jury'll get 'round to chargin' him tomorrow. I, uh . . . I was thinking about appointing you to take his case. Now I realize you are busy these days with your practice . . . and your children need a great deal of your time."

Atticus answers, "Yes sir." There is a long pause. "I'll take the case."

"I'll send a boy over for you tomorrow when his hearing comes up. Well, I'll, uh, see you tomorrow, Atticus," says the Judge as he rises to leave.

"Yes sir," answers Atticus.

After a few steps, Judge Taylor turns and says, "And thank you."<sup>15</sup>

In that brief scene, a challenge was thrust upon Atticus Finch. He assumed the difficult, time-consuming defense of an outcast, indigent client, against the tide of public opinion and, in this case, racial prejudice. Finch took up the challenge with little hesitation, out of a sense of duty to the profession and to society. This sense of duty may seem old-fashioned today, yet it typified what Tocqueville had in mind when he wrote about American lawyers being "the connecting link between the two great classes of society."<sup>16</sup> And it is a sense of duty which we must renew today, if we are to fulfill our obligation to our society and to our nation.

14. *To Kill a Mockingbird* (Universal International 1962).

15. *Id.*

16. TOCQUEVILLE, *supra* note 1, at 125.

Remember also the character of Judge Taylor in that scene in *To Kill a Mockingbird*. Just as Atticus was an archetype, so was the judge. Atticus, after all, did not seek the case; Judge Taylor asked him to serve. The story is set in 1932, one hundred years after Tocqueville's visit and just before the first Supreme Court decision involving the right to counsel, *Powell v. Alabama*,<sup>17</sup> the "Scottsboro trial," which was decided that very year. In *To Kill a Mockingbird*, Judge Taylor understood that a just system required a lawyer to represent a poor man in court. The judge was simply acting from a sense of duty, to see that Tom Robinson was represented.

Now, nearly sixty years after *Powell v. Alabama*, attorneys are petitioning the Florida Supreme Court to adopt a rule to establish programs that would extend to all Floridians the right to counsel in civil matters.<sup>18</sup> This rule is one of several methods to extend this right to those who cannot afford to pay for such legal services.

The Florida petition argues that judicial responsibility for providing representation to the poor dates back to the time of King Henry VII.<sup>19</sup> Translated into modern English, the 1495 statute states:

That every poor person ... which ... shall have cause of action ... against any person ... within this realm shall have by the discretion of the Chancellor of this realm ... writ or writs original and writs of subpoena ... therefore nothing paying to your highness for the seals of the same, nor to any person for the writing... And after the said writ or writs be returned, ... the Justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their Counsels, nothing taking for the same.<sup>20</sup>

This statute remains in force in England and here because America and Florida explicitly adopted English common law. Florida attorneys assert that in Florida today, the poor have the right to writs under seal, to help in filling out writs, and to "counsel learned," all without cost.<sup>21</sup>

But we do not have to go back to 1495 to demonstrate that judges have the duty to see that justice is rendered and that

17. *Powell v. Alabama*, 287 U.S. 45 (1932).

18. Petition for Provision of Legal Services to the Poor (Amendment to the Rules Regulating The Florida Bar and the Rules of Judicial Administration), No. 74,538, filed in Florida Supreme Court, Aug. 8, 1989, reprinted in 17 FLA. ST. U.L. REV. 111 (1989) [hereinafter Attorney Petition].

19. STATUTES OF THE REALM, 1495, 11 Hen. 7, ch. 12 (repealed 1883, 46 & 47 Vict. 49).

20. *Id.*

21. Attorney Petition, *supra* note 18.

the right to appoint counsel is within the inherent power of the judiciary. If this were not so, we would not need the section of the rules governing lawyers that makes it clear that appointments can be refused in certain cases.<sup>22</sup>

Moreover, we have a rule that establishes guidelines for a lawyer's conduct in accepting or refusing judicial appointments.<sup>23</sup> It is there because the judicial power is there. The rule protects lawyers from appointments that are harmful to livelihood or principles. It is all the protection we need.

That judicial power is also recognized by a series of cases, the most important being the Florida Supreme Court's 1979 decision in the case of Rosemary Furman, who was charged with unauthorized practice of law.<sup>24</sup> In deciding against Ms. Furman, the court stated:

Without question, it is our responsibility to promote the full availability of legal services. . . . Devising means for providing effective legal services to the indigent and poor is a continuing problem. . . . Therefore, we direct the Florida Bar to begin immediately a study to determine better ways and means of providing legal services to the indigent. We further direct that a report on the findings and conclusions from this study be prepared and filed with this court.<sup>25</sup>

The same spirit of the Florida Supreme Court led it to establish the pioneering Interest on Lawyer Trust Accounts program (IOLTA),<sup>26</sup> which receives interest earned on client accounts to fund legal services for the poor. The IOLTA approach has since spread to other states.<sup>27</sup>

22. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1983).

Rule 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the rules of professional conduct or other laws;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

*Id.* See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-29, 30 (1981).

23. MODEL RULES OF PROFESSIONAL CONDUCT RULE 6.2 (1983).

24. Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979).

25. *Id.* at 382. But see Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 95 (1990).

26. BESHAROV, *supra* note 7, at 214.

27. *Id.*

Beyond these overt actions by the Florida court is the very charter of the Florida Bar. The court, in the opinion that allowed the integrated bar in 1949,<sup>28</sup> provided this definition:

The integrated bar has also been defined as the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which each member is obligated to bear his portion of the responsibility.<sup>29</sup>

I ask you also to think about the oath that the court prescribes for each of us when we are called to the bar. At that time, we raise our hands and pledge, "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed. . . ."<sup>30</sup> In the face of this and other evidence, I do not believe that it is possible to argue that the court is indifferent to the question of representation of the poor.

Some courts argue, of course, that we have largely ignored two great traditions: lawyer service by court appointment and judicial concern with the representation of the poor. In fact, one of the ironies of the movement that led to recognition of the constitutional right to counsel in criminal cases is that it has cut off the bar from the traditional manner of service to the poor.

*Gideon v. Wainwright*<sup>31</sup> made the representation of today's Tom Robinson the responsibility of society. Today's Judge Taylor does not have to ask lawyers to take on such cases. But the fact remains that our legal tradition and case law provide a solid base for any state to adopt a program permitting local and state bar organizations to provide civil legal services directly to the poor—supplementing such current efforts as the LSC.<sup>32</sup> The petition to the Florida Supreme Court represents one approach to improving legal services for the poor through judicial means.

#### METHODS FOR REVIVAL AND EXPANSION

Other initiatives exist to expand civil legal aid for the poor. First, the bar must again strengthen its support for reforming

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28. Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949).

29. *Id.* at 904.

30. *See, e.g.*, CAL. BUSINESS AND PROFESSIONS CODE § 6068 (West 1962).

31. 372 U.S. 335 (1963) (indigent defendant in criminal trial has right to free counsel).

32. BESHAROV, *supra* note 7, at 209–14.



and expanding the Legal Services Corporation. We consider it a major victory that the LSC is still living and breathing after the Reagan administration's eight-year campaign to gut it. At its peak in the late 1970s, the Legal Services Corporation served as a catalyst, sparking research on substantive poverty law issues and encouraging new approaches to delivery of services. The LSC also served as a conduit, aiding in the dissemination of federal funds to local legal services corporations.

By 1988, however, the federal budget for legal services had plummeted and the leadership of the LSC was openly hostile, armed with myriad regulations and onerous demands for paperwork designed to thwart local agency effectiveness. The idea of New Federalism, when viewed in the context of these programs, is an example of a zealous attempt to gain control and undermine congressional intent.

The Bush administration has replaced this hostility with a policy of benign neglect. Funding is still inadequate and key vacancies are still unfilled. But, thankfully, the open combat has ended. Now, the bar must encourage Congress and the Administration to renew our nation's commitment to legal services with a strengthened budget and an expanded mission. We can also encourage state and local governments to expand aid to such programs.

The second initiative is underway through the ABA's National Consortium on Legal Service and the Public,<sup>33</sup> which will be submitting its recommendations to the Board of Governors and House of Delegates for approval. The ABA created the Consortium in an attempt to revive a similar effort in the 1970s, which resulted in several innovations, such as lawyer referral networks and prepaid plans.<sup>34</sup>

The Consortium has brought together a diverse group of lawyers to formulate an action plan that may ultimately include a wide variety of policy changes, reform strategies, new initiatives, mid-course corrections, and cautious experiments. It has not yet completed its recommendations.

The Consortium will study thoroughly the extent of the need for legal services to the poor and the many forms of that need. The two ABA surveys<sup>35</sup> merely outlined what must eventually

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33. ABA SURVEYS, *supra* note 9, at 5.

34. *Id.*

35. ABA SURVEYS, *supra* note 9.

become a more detailed picture of society's legal needs and their changing character. For example, the evolution of due process rights for welfare and disability recipients suggests a need for representation in hearings that did not exist a few years ago.

The Consortium has also been looking at the manner in which lawyers deliver legal services, particularly scrutinizing a lawyer's earliest point of contact with people in need. Ironically, it is often the receptionists, the parties with the least legal training, who first encounter people in need, and who are inclined to screen out prospective clients. In effect, receptionists dispense the only legal advice many people receive.<sup>36</sup> Most important, the Consortium will recommend innovative solutions to build on the successful programs of the past.

The third initiative would build on existing voluntary programs to help poor clients. States could expand the use of interest on lawyers' trust accounts or similar funds. Since Florida established the nation's first IOLTA program, this program and others have produced over \$100 million for legal services.<sup>37</sup> Funds may also come from user-fees, such as filing-fee surcharges earmarked for civil legal services. Such programs are underway in several jurisdictions.<sup>38</sup>

Another possible plan could include allocating to pay for legal services a portion of windfall class action awards in cases in which the size of the class members' individual recovery is so small that it is not cost-effective to distribute the amount. Also, we can surely expand law firm *pro bono* programs to emulate the pioneering bar association programs in Maryland, Boston, and Chicago.<sup>39</sup> Growing numbers of voluntary bars include the provision of *pro bono* service as a membership requirement.<sup>40</sup>

Moreover, law schools have taken up the challenge by increasing the number of legal aid clinics and centers of poverty law research.<sup>41</sup> This year, law students around the country raised more than \$1.2 million from their fellow students. These funds

36. Report of the National Conference on Access to Justice in the 1990s 11 (New Orleans, La., June 9–11, 1989) (unpublished report).

37. BESHAROV, *supra* note 7, at 214.

38. Recommendation No. 3, Joint Commission on Delivery of Legal Services to the Indigent in Florida (Feb. 1, 1991).

39. L. Cardin and J. Rhudy, *Expanding Pro Bono Legal Assistance in Civil Cases to Maryland's Poor*, 49 MD. L. REV. 1, 8–13 (1990).

40. Attorney Petition, 17 FLA. ST. U. L. REV. at 114 n.5.

41. Besharov, *supra* note 7, at 100, 168.

went to support the work of more than 550 students and recent graduates in legal services offices, civil rights organizations, and consumer and environmental groups.<sup>42</sup>

### CONCLUSION

In short, we lawyers can do our profession and our society a tremendous service by renewing our commitment to adequate representation of the poor. We can petition the courts for a "civil *Gideon* rule" to establish court-supervised state and local programs for legal aid. We can also increase funding for the Legal Services Corporation, continue the work of the ABA's Consortium on Legal Services and the Public, and build on existing voluntary programs. Only then can we breathe life into the ideal of justice for all. It is our duty and our privilege to serve the least among us, as well as those clients who help to produce an enviable standard of living for many of us.

We can realize again the ideal of Tocqueville, that lawyers in America are indeed "the connecting link between the two great classes of society"<sup>43</sup>—serving great public needs, as well as our own needs—and show that we can indeed be innovative. Much has been said in recent years about the many changes in our profession, and many have agonized over what is perceived as a loss of professionalism.

Today we find ourselves in a profession which has never been so prosperous, never so numerous, never so well-educated—and never more unsure of itself and its role in society. We are right to ask ourselves questions about our profession. We should start with the most fundamental question for all of us who are called to the bar. That question is: "What do we profess?" The first answer to that question must be that we profess to be the special guardians of the public interest, to see that there is reality in the words that complete the Pledge of Allegiance: "... with liberty and justice for all."

We are given our special status in society, we are allowed independence and self-regulation, and we in this one profession are allowed to dominate one branch of government because history has shown that we are equal to the challenge. We will

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42. J. Levinger, *Law Firms Give \$145K for Public Interest Grants*, THE NAPIL CONNECTION 1-4 (July 1990).

43. TOCQUEVILLE, *supra* note 1, at 125.

continue to connect society. We will find innovative ways to make justice available to all.

In *To Kill a Mockingbird*, there is a touching scene in which Atticus Finch's daughter, Scout, asks him why he defended Tom Robinson. His answer is simple and straightforward, the same we would give today as we take on a similar responsibility. His is an answer all of us would be proud to say. It is simply "I am a lawyer."<sup>44</sup>

That is all any of us should have to say.

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44. *To Kill a Mockingbird* (Universal International 1962).