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PROPOSAL: A NATIONAL LEGAL SERVICE

MARVIN E. FRANKEL*

I. THE BASIC PROPOSITION

The invitation to this conference on "The Commercialization of the Legal Profession" suggested that we might look at "long-range trends" in both doctrine and commerce affecting matters like the distribution, quality, and cost of legal services. Our broad topic builds upon the undoubtedly correct premise that things happening to and in the profession are fairly describable under the rubric of "commercialization." The idea of commercialization reflects perceptions about how lawyers find and serve clients; how much the interest in money may be increasing among members of the profession; and how partnerships and other forms of lawyers' organizations have grown, administered themselves, and died as the trade in lawyers' talents has evolved. Whatever else they may be, these things are matters of degree—from before the earliest days of the Republic, though not always acceptably to everyone, lawyers' services have been articles of commerce. Lawyers for the most part have worked for paying clients, and people who could not pay have generally done without lawyers.

I've thought for a long time that there is something wrong with such a state of affairs. In a country that professes to have at the pinnacle of its ideals what is inscribed on the pediment of the Supreme Court building—"Equal Justice under Law"—the buying and selling of legal services is a stark anomaly. To quote Justice Hugo Black, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."¹ To be sure, Justice Black did not want that statement to be taken too literally, as cases before and since have demonstrated. But perhaps he should have. And, arguably, the proposition cannot coexist tolerably with a commercialized legal profession. The point of such an argument is simple: In a complex world, effective access to justice requires access to effective legal services. Where money determines the availability and quality of lawyers, the promise of equal justice is broken. That is at least a fairly plausible contention—with which I happen to agree.

So I want to propose for discussion a topic that might be entitled "The

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1. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

Un-Commercialization of the Legal Profession.” By “un-commercialization” I mean to suggest in a word that for the fair administration of justice, lawyers, like judges, ought to be available to everyone without regard to wealth. As I disclose by the title of this article, I believe that this is attainable by means of a National Legal Service (NLS), a counterpart of a national health service (which is still not in place in the United States and South Africa, alone among capitalist, industrialized nations). It might be said, if not insistently, that an NLS should be with us an even more compelling objective than a national health service: the Constitution, while ordained to “establish Justice,”² says nothing about health.

In submitting this proposal I’m revisiting an idea I published some fifteen years ago.³ That first version suggested that the way to make legal services universally available was simply to nationalize the bar. Having reconsidered, and striving to approach a degree of concrete realism, I now recast the proposal to outline a contributory scheme of insured legal assistance. In the pages that follow, I recall the need for reform and then sketch some dimensions and expected difficulties of the proposed arrangement.

II. THE STRAINED QUALITY OF RATIONED JUSTICE

In one of his many expressions that quickly became commonplace, Learned Hand said, “Thou shalt not ration justice.”⁴ And what Mary Wollstonecraft said in 1792 remains true for most purposes: “It is justice, not charity, that is wanting in the world.”⁵ Those statements capture much of what I want to say, in many more words, about the gap between “equal justice for all” and our existing methods of supplying lawyers’ help for some of the nonrich members of the community. The gap is a matter of both quantity and quality.

A. Legal Aid

It is no new perception that indigent people have needs for lawyers. But it was scarcely more than a century ago when it began to be thought in the United States that these needs ought to be supplied for people who could not pay for legal services. The still-prevalent thought was that legal aid was a subject for charity.⁶ There are many good things to say for legal aid

2. U.S. CONST. pmbl.

3. See MARVIN E. FRANKEL, *JUSTICE: COMMODITY OR PUBLIC SERVICE* (1978); Marvin E. Frankel, *An Immodest Proposal*, N.Y. TIMES, Dec. 4, 1977, § 6, at 92.

4. Learned Hand, *Thou Shalt Not Ration Justice*, Address to the Legal Aid Society of New York (Feb. 16, 1951), in *LEGAL AID BRIEF CASE*, Apr. 1951, at 3, 5.

5. MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN* 155-56 (photo. reprint 1970) (2d ed. 1792).

6. The first legal-aid program was set up by the German Society of New York in 1876 for

programs and for the many good people who work in their offices. My thesis here focuses, however, on their insufficiencies.

Their most obvious shortfall is in their defined mission to serve only the poor, and only for stated needs. It is by now common knowledge that many people who can't pass means tests are unable to afford decent legal services. In fact, it is arguable that the ill-defined "middle class" has been for a long while the group most neglected in this regard—or, more certainly, the group perceiving itself as the most neglected—with vivid political consequences both in the Reagan-Bush era and in the nature of the Clinton counterattack.

To focus briefly on legal aid and to start with the aspect closest to commerce, legal aid resources are, by any acceptable measure, far from adequate to meet the needs of people who can't afford to hire lawyers. The shortfall stems both from the deep level of indigence required to qualify for assistance⁷ and from budgetary limitations sharply restricting the services available for those who qualify.⁸

Total national expenditures in 1991 for civil legal assistance to poor people, from the Legal Services Corporation and from other sources, came to a little over \$533,000,000.⁹ For criminal cases in the preceding year (to use a quickly available figure), the total was slightly more than \$1,742,000,000.¹⁰ These sums covered only limited needs of people at the bottom of the economic ladder. A nationwide American Bar Association survey indicated that in 1989 only twenty percent of the legal needs of the poor were being met.¹¹

For those who do qualify—and, indeed, for all of us—the fact that legal aid is supplied as a charity is its most galling aspect. Charitable handouts, with some exceptions, are not elevating for the recipients. When they comprise the means necessary for claiming justice, the irony adds a grating harshness. If we were a thoroughly good society, everyone would call with dignity for every human right, including the right to a lawyer's assistance.

The charitable nature of legal aid entails almost always that it is given to

people of German origin. The idea spread to other cities and came to make help available for indigent people without regard to ethnic or racial categories. See EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* 7-11 (1951).

7. For example, agencies funded by the Legal Services Corporation are generally forbidden to serve any person whose income exceeds 125% of current official Federal Poverty Income Guidelines. See 45 C.F.R. §§ 1611.3(b), 1611 app. A (1992).

8. See THE [NEW YORK CITY] LEGAL AID SOCIETY, 1992 ANNUAL REPORT 15-21 (1993), for examples of the difficulties encountered by indigents needing legal assistance.

9. See LEGAL SERVICES CORP., 1991 ANNUAL REPORT 7-8 (1992).

10. SUE A. LINDGREN, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT, 1990 3 tbl. 2 (1992).

11. See *Poor's Legal Needs Not Being Met; Increased Funding Needed For Legal Services Corporation*, American Bar Association Says, PR Newswire, April 19, 1990, available in LEXIS, News Library, Wires File.

the next recipient in line by the next available lawyer. For the paying client the choice of counsel, and the relationship built upon the choice, is commonly a matter of deep personal moment. It follows that courts will go substantially out of their way to ensure that the client's choice is respected and supported. A Supreme Court that was not particularly radical found in 1932 that it was "hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."¹² If a defendant with money were denied "the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is the cornerstone of the adversary system, would be undercut."¹³ But the charity case is different; the legal aid client must take what is given.

B. Conscripting Volunteer Lawyers

Mandatory pro bono (sic) service for lawyers appears at the moment to be an idea whose time has come.¹⁴ One hopes that it will soon go away. Beyond its oxymoronic quality, the idea of mandatory pro bono work has all the flaws of legal aid, and then some. Whereas legal aid lawyers spend full time at their jobs, often acquiring expertise and empathy that help them to serve effectively, the impressed pro bono lawyer is likely to approach amateur status—as in the example of the corporate bond expert found for a few hours advising on welfare entitlements, appearing in housing or family court, or otherwise being compelled to skirt the edges of malpractice for the poor.

The political and spiritual objections to mandatory pro bono service run deeper. Perhaps the least of these has to do with the governmental taking of services without compensation—a kind of expropriation the community does not undertake when it purchases food (or the services of architects, physicians, social workers, and other professionals) for the poor. If compulsory legal services are held constitutional for the most part (as I believe they will be, although the question is not yet thoroughly settled),¹⁵ the idea remains

12. *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *accord* *Glasser v. United States*, 315 U.S. 60, 75 (1942); *Chandler v. Fretag*, 348 U.S. 3, 9-10 (1954).

13. *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

14. Among the writings supporting the idea, see Howard A. Matalon, Note, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, 71 B.U. L. REV. 545 (1991); Cynthia R. Watkins, Note, *In Support of a Mandatory Pro Bono Rule for New York State*, 57 BROOK. L. REV. 177 (1991). Requirements of mandatory pro bono service have been imposed in a number of jurisdictions, including a number of federal district courts. See [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 91:6009-91:6010 (Sept. 26, 1990).

15. Lawyers' resistance to the compulsory acceptance of assigned cases by claiming constitutional violations has not thus far been notably successful. See *Williamson v. Vardeman*, 674 F.2d 1211 (8th Cir. 1982) (upholding compulsory duty to serve without compensation but

offensive and anomalous as a matter of policy. There is everything to be said, of course, for genuinely voluntary and effective pro bono service by lawyers. Going further, there may be sound arguments for required community service on a grander scale—by most or all professionals as well as nonprofessionals. There are no such arguments for the singular draft of lawyers.

What may be worse is the false solace that the profession and the community at large appear to derive from the compulsory donation of a few hours of problematic service. Like other beneficent “points of light,” this one helps to blind us to the vast sea of darkness. The typical proposal requires each lawyer to give twenty-five to fifty hours per year. Although that may comfort us on our professional (and perhaps wider) guilt excursions, it is scarcely a Band-Aid when measured against the need. Insofar as it makes us think we’ve substantially reduced the problem, it has the same pathological consequences as any phony cure.

C. Assigned counsel

Almost 200 years passed after the adoption of the Bill of Rights before a major promise of the Sixth Amendment—the right of a defendant in a criminal case “to have the Assistance of Counsel for his defence”¹⁶—was made a practical reality by requiring the states as well as the federal government to provide lawyers for defendants who lack the means to pay for them.¹⁷ As a result, at least in many urban centers, the great majority of criminal defendants today are represented by appointed counsel, whether designated ad hoc by the court or enlisted in more routine, orderly, and effective fashion through state, federal, and local public-defender services. To a far more limited degree, there are select categories of civil cases in which statutes provide for appointing counsel to indigent litigants.¹⁸

It is difficult to make general statements about the quality of representation by appointed counsel. In some large cities, the public defenders and

holding unconstitutional the compulsory payment of expenses); *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). It may well be, however, that the compulsory service must at least be limited in quantity to pass constitutional muster. *See* Family Div. Trial Lawyers of the Superior Court-D.C., Inc. v. Moultrie, 725 F.2d 695, 704-09 (D.C. Cir. 1984); *People ex rel. Conn v. Randolph*, 219 N.E.2d 337 (Ill. 1966). *Menin v. Menin*, 359 N.Y.S.2d 721 (Sup. Ct. 1974), cites a wider contrariety of views than I have summarized here and holds that *in civil cases* attorneys have a constitutional right to reject assignments unless they are compensated.

16. U.S. CONST. amend. VI.

17. *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963), extended to the states this requirement, made applicable to federal prosecutions 25 years earlier by *Johnson v. Zerbst*, 304 U.S. 458 (1938).

18. For example, 28 U.S.C. § 1915(d) (1988) authorizes a federal court to “request” attorneys to represent *in forma pauperis* litigants whose submissions are not rejected as frivolous.

legal-aid lawyers representing impecunious defendants are on the whole as good as or better than the average paid defense counsel. In a great many state courts (and to a highly publicized degree in capital cases in the South), appointed lawyers have repeatedly been called into question on claims that their performance fell below minimum acceptable levels of competence. In one not wholly extraordinary case from Texas, at the end of 1992 the Fifth Circuit affirmed the granting of habeas corpus relief to a prisoner who had been assisted on his way to a death sentence by assigned counsel to whom the state paid \$11.84 per hour. In a laconic two-paragraph decision, Judge Higginbotham stated: "Unfortunately, the justice system got only what it paid for."¹⁹ That observation, by a judge who has never been accused of radicalism, reiterates a basic thesis of this paper.²⁰

Appointed counsel, granting their virtues, embody several of the evils already identified. They are often ill-paid, ill-equipped, and casually assigned. They are, with rare exceptions, literally "assigned" to, not chosen by, their clients. Even the positive talents many of them possess are disbelieved or ignored because the lawyers are seen uniquely as counsel for the indigent, and therefore, by free-market definition, inferior. When dubious seizures of the assets of alleged narcotics or racketeering defendants—presumed to be innocent—have caused them to become indigents qualified for assigned counsel, both the affected defendants and the bar have reacted with horror. The Supreme Court, however, has sustained by a five-to-four margin a statute achieving this result, observing along the way that a high quality defense is likely to come at a high price and that the stripped defendant's being relegated to appointed counsel is simply a part of that "harsh reality."²¹

D. The Legal Services Corporation

In some promising respects, the federal Legal Services Corporation (LSC)

19. *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992).

20. See *supra* text accompanying note 1. The January/February 1993 issue of *The American Lawyer*, entitled *Poor Man's Justice: A Special Report on Indigent Defense Thirty Years After Gideon*, is laced through with depressing stories (together with some that are uplifting) of assigned counsel in grave cases who are paid peon wages and are often unqualified, sometimes overworked, and at other times indifferent. One story, *Canada's Cadillac*, describes the Ontario Legal Aid Plan, under which a defendant can obtain a voucher negotiable for payment to a participating member of the bar selected by the defendant. See William W. Horne, *Canada's Cadillac*, AM. LAW., Jan./Feb. 1993, at 62. The system, while imperfect, seems superior to arrangements in most American cities—indeed, in every American city if the matter of client choice is, as it should be, given heavy weight. Sixteen Ontario lawyers, judges, and other officials interviewed for the story—including some stern critics of the Ontario Legal Aid Plan—"remain fiercely committed to the underlying principle of their plan, the right to counsel of choice for indigent clients." *Id.* at 64.

21. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989); accord *United States v. Monsanto*, 491 U.S. 600, 614 (1989).

is the germ of the basic idea in this essay. During the short War on Poverty in the 1960s, the Office of Economic Opportunity (OEO) funded modest programs of legal services for the poor. The programs included infusions of money for existing legal-aid agencies, as well as experiments with new forms of community organizations.²² The idea was attacked from the beginning (and is still attacked today). There were heated charges that lawyer/ideologues, usually young, and suspect on other grounds as well, were using government money to *sue the government*. Hanging on by a thread, and always on exiguous budgets, the OEO effort became the LSC in 1974.

The life of the LSC has remained a battle for survival. Then-Governor Ronald Reagan sought earnestly to destroy it, at least in California. Elevated to President, Reagan, followed by President Bush, continued the assault. Although failing to destroy the LSC totally, Reagan and Bush populated its board with people sharing their views, adopting as government policy the cohabitation of foxes and chickens. The LSC has barely survived, in a weakened state, never achieving a budget above \$350 million.

I've included only a hasty account of a bloody political story.²³ It is enough, I think, to remind us that an immensely broadened LSC, which is in a sense what I'm proposing, does not loom in our immediate future. Reinhold Niebuhr expressed the apt sentiment: "Nothing that is worth doing can be achieved in our lifetime; therefore we must be saved by hope."²⁴ I proceed in that view. I'm willing of course to push this project every fifteen years or so. But I can't keep it up forever, so I come to South Carolina with hope and for help.

III. A NATIONAL LEGAL SERVICE

The proposal for a National Legal Service is quickly stated, and I've already stated it. To be sure, God (or, as it is sometimes said, the devil) is in the details. Either way, attention must be paid to the details. The extended elaboration of my basic proposition is, however, a matter for thought and debate beyond the dimensions of an introductory paper. So this writing will pretend to do little more than its assigned office—to serve as a basis for discussion.

The envisioned NLS would be, very simply, the single payer for a

22. See, for ancient credentials and other possible relevance, Marvin E. Frankel, *Experiments in Serving the Indigent*, 51 A.B.A. J. 460 (1965).

23. For more of the details and the combative positions, see MARK KESSLER, *LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATIONAL POLITICS* (1987); *LEGAL SERVICES FOR THE POOR: TIME FOR REFORM* (Douglas J. Besharov ed., 1990); and Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521 (1980-81).

24. REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* 63 (1962).

substantial portion of the legal help that people need, and should be entitled to, in a just society. I've imagined that lawyering for business and other organizations—corporations, proprietorships, labor unions, etc.—would be excluded. But that, like everything, is negotiable.

In broad strokes, the NLS would be a much-expanded variant of the small-scale program, known as *Judicare*, that already exists under the LSC.²⁵ As I envision it, a substantial portion of NLS costs would be funded on a fee-for-service basis, with clients paying on a sliding scale based on ability to pay, but with all clients entitled to the same services under fee schedules. Fee schedules would vary by region—as do, for example, the salaries of United States Attorneys. Another portion of the funding would come from money judgments won by plaintiffs using the NLS (I bypass the very important specifics of this, among many other subjects). The balance of the funding would come from the United States Treasury.

It bears emphasis, to meet only a little of the expected opposition, that I'm urging a system in which people who can pay will pay. People who can will pay full fees; others, declining portions ranging down to zero. If this is not a total answer, it begins to deal with the legitimate concern that our already litigious citizenry would run further amok if lawyers came for free to everyone.

The establishment of an NLS would eradicate the tawdry regime of charitable justice for the poor. It would also mean that suitable advice and advocacy would be available for those who are now neither poor nor adequately served. If all clients could walk upright into lawyer's offices, we would move to a new mean of interior decorating—up from the too-frequently-shabby quarters of legal-aid offices and, at least for a segment of the bar, down from the pomp and glitz of the poshest existing firms. Other, more substantial, changes in the profession—the sizes of firms, the compensation of lawyers generally, and the modes of specialization—are among the things I've postponed trying to imagine.

Predicted changes in physical decor are superficial but not trivial. The more significant changes would be found in the style and quality of lawyers' performance. The brutal truth is that everything is poorer for poor people: they are likely to pay more rather than less for everyday commodities,²⁶ and they are treated more casually and less respectfully than their more affluent neighbors. In a society in which the question "what are you worth?" is answered with a number of dollars, the poor are more nearly worthless than other people. Even public facilities such as schools, streets, and parks are

25. *Judicare* is the program by which the LSC, under 42 U.S.C. 2996e(a)(1)(i) (1988), pays private counsel for services to poor people. Local programs are required to devote one-eighth of their LSC grants "to develop participation by private attorneys in delivering legal services." LEGAL SERVICES CORP., 1991 ANNUAL REPORT 16 (1992).

26. See DAVID CAPLOVITZ, *THE POOR PAY MORE* (1967).

notably inferior for the poor. Lawyers that serve everyone will be better on average than those that practice exclusively poverty law. There is no need to argue at length the benefit of this for the doing of justice as well as the appearance of justice.

Under the NLS, all people would have the privilege of shopping for the lawyers of their choice. Lawyers would retain the corresponding privilege of accepting or rejecting clients. It undoubtedly follows that elite lawyers could continue to be selective and that the most acclaimed and prestigious of them would continue to be hard to get. This is still a vast improvement over the current state of affairs, in which any choice at all is totally unavailable for the poor and only dubiously available for many who are not poor.

At this point in my revisit to, and revision of, the idea of a National Legal Service, having in mind the occasion for which this is written, it occurs to me that the host of questions and objections that the idea is sure to generate are the business of a book rather than the paper for which the organizers of this conference asked. This conference presents an opportunity to profit from the wisdom of the participants—even if it is expressed by protests and denunciations—before considering whether to embark on the book. The next, and last, section therefore outlines some chapter headings under which the proposed NLS may be discussed and further developed.

IV. PROBLEMS, OBJECTIONS, AND OPPORTUNITIES

A. *Is This a Full-Employment Program for Lawyers?*

The meager federal program now run by the LSC has been assailed as serving essentially to make work for lawyers. Critics argue that if the money were given directly to the poor rather than being appropriated for lawyers, the poor could then decide for themselves whether their estimates of marginal utility led them to spend it on legal services rather than warmer clothing, crack cocaine, more palatable food, or whiskey (no one now seems to make the same argument, if anyone ever did, with respect to medical services).²⁷ Lawyers, it is argued, prefer the LSC setup because it lines their pockets.

I've started in gingerly fashion with that argument because it is weak and trivial. Granting cheerfully that lawyers are not less greedy than other people, a plan to get rich off the LSC would be like a conspiracy to rob a closed bank. The bulk of the appropriated funds goes to community agencies that employ

27. See, e.g., Stephen Chapman, *The Rich Get Rich, and the Poor Get Lawyers*, NEW REPUBLIC, Sept. 24, 1977, at 9.

full-time lawyers at atrociously low salaries, and Judicare accounts for very few dollars' paying very low fees. Granting that lawyers for some people make work for lawyers for other people, the dollars involved are minuscule in the scheme of supplying legal help for the indigent. Whatever else he had in mind when he led the fight for federal legal aid as head of the American Bar Association, then-Mr. (later Justice) Lewis Powell was not plotting a financial coup for the bar.

But that argument, for all its *ad hominem* subtlety, deals only with lawyers for the poor, which is not the present proposal. One may argue that when the federal fisc is the backup payer for legal services for *everyone*, the already swollen ranks of lawyers will multiply to share in the new wealth. And won't the ingenuity of the profession contrive new ways for Americans to joust in the courts, to resist regulation, and to test other adversarial encounters? Among the many other worrisome problems is the possibility of sheer fraud by lawyers in league with putative clients making claims for phony legal assistance.

Problems like these are genuine, and readily predictable both *a priori* and from experiences like those of Medicare. They are soluble, I think, at least to the incomplete and nonfinal extent characteristic of political and social solutions. They are also formidable obstacles to the acceptance of the NLS, which is likely to be opposed by both lawyers and nonlawyers for both similar and different reasons. For discussion and future exploration, I mention obvious lines along which answers may be sought.

First, fees can of course be regulated, no less for socially useful purposes than for monopolists' benefit.²⁸ The experiences of Medicare, including the cases of fraud, can teach useful lessons for this purpose. Although the analogies are admittedly far from exact, they are not useless. The differences between the professions are such that the costs of legal services should be more manageable than those of medical care. For example, a hugely expensive infrastructure, necessary for effective medical care, is for the most part unnecessary for the provision of effective legal services, so the nightmarish inflation of medical costs need have no counterpart in the practice of law.

Moreover, the essential lesson, to keep our eyes on the target, is simpler and more pointed. Virtually no one, with apologies to Milton Friedman and his friends, questions any longer that the national community must arrange affordable health care for everyone, even though we lag behind the rest of the world in forming a national health service (despite that lag, the United States spends more for medical care than any other country). The struggle to control costs will not end soon, but it is unlikely to alter the national consensus calling for universal access to medical care. The situation with respect to legal aid

28. Cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (holding that a state-bar-prescribed minimum fee schedule violated the Sherman Act's price-fixing prohibition).

will not—or should not—be different. When the commitment is made, the means of affording it will be found.

When that happens, lawyers, like medical doctors today, are likely to discover that they have not on the whole suddenly become plutocrats. Groping always toward rationality, the people and their elected representatives will sooner or later prevent attorneys from confusing their economic worth with that of baseball players, film stars, and business leaders. Indeed, farsighted lawyers interested in acquiring wealth may be expected to be among the leaders resisting the idea of an NLS, reasonably believing that it portends a decline, rather than a rise, in professional incomes.

B. Concerning Political and Ideological Uses of Lawyers

In the 1960s, when the OEO funded lawyers for poor people, an early and persistent battle raged around the use of government money to support political and ideological claims. As I've mentioned, it seemed absurd to some officials, notably Governor Reagan of California, that the government should be getting sued with its own money (as if "the government" had proprietary interests of its own rather than serving only the interests of the public). Deeper grounds for objection came from a perception, undoubtedly with some basis in fact, that mostly young and radical lawyers were using poverty-aid funds to pursue their own ideological causes—claims for novel rights, liberties, and restrictions upon established authority—in the courts. The controversy lasted until 1974, when the statute creating the LSC was enacted, and beyond: the LSC was, and remains, constrained against funding a host of legal activities, including advocacy of ballot measures;²⁹ efforts to influence legislation or the issuance of executive orders, regulations, or similar "promulgations";³⁰ organizing "any association, federation, or similar entity";³¹ efforts to obtain nontherapeutic abortions;³² and the litigation of school desegregation issues.³³ The LSC must also insure that attorneys receiving its grants refrain from engaging in political activities.³⁴ Restrictions like these raise a swarm of hot issues of law and policy. Unlikely to be resolved with finality in the near future, disagreements of this nature could remain with us even at the possibly remote time when the NLS is created.

However, when the government guarantees to everyone the access to justice for which lawyers are needed, a new variant of these ideological strains

29. 42 U.S.C. § 2996e(d)(4) (1988).

30. *Id.* § 2996f(a)(5).

31. *Id.* § 2996f(b)(7).

32. *Id.* § 2996f(b)(8).

33. *Id.* § 2996f(b)(9).

34. *Id.* § 2996f(a)(6).

will emerge. In the American constitutional tradition, there are virtually no limits upon the contentions lawyers may bring and have brought to the courts. People with money have challenged things ranging from the income tax to child labor laws, restrictions on (or the allowance of) pornography, and the right to religious uses of peyote. Until unthinkable changes are made in the Constitution, the courts will remain open to vindicate de Tocqueville's observation that in America every political question sooner or later becomes a judicial question.³⁵ Every question, that is, for which a questioner is affluent, or lucky, enough to be able to muster legal assistance. The proposed NLS is destined on principle to eliminate this large exception to de Tocqueville's rule.

It appears that the conflict about "political" lawsuits under the OEO and the LSC may have no field of battle under the NLS (this is one reason why people like former-President Reagan and Senator Helms will fight against the NLS, though it is easy to predict their relentless opposition on broader grounds in any event). The reason for this observation also shows, from a somewhat unexpected perspective, how the regime of privately paid counsel has blocked and limited the promise of the equal protection of the laws. For people who can afford lawyers, there has never been a barrier to legal complaints involving the ballot box, the validity of executive regulations, claimed rights to nontherapeutic abortions, and the like. And no one has dared to suggest that lawyers retained by affluent people should stay out of politics. However, restrictions like these have been imposed by the majority on poor people and their lawyers. They will not be imposed under the NLS. New questions may well arise as to whether some types of lawsuits or advocacy should be forbidden to *anyone*. Questions of that nature are not all bad. But they are bad, in my opinion, when they are addressed only to lawyers for the poor.

C. Can we Afford a National Legal Service?

The total cost of legal services in 1990 was reported to have been approximately \$92 billion.³⁶ Certainly a substantial portion of that amount was for corporate and organizational services that would be excluded from the NLS I propose. The additional cost to the public of the NLS is a sum that someone may compute, but I have not yet tried to do that. Nor have I attempted to project possible savings that the NLS may prompt us to achieve—for example, by finally abolishing the idiocy of our negligence

35. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed. & Henry Reeve trans., 1945) (1835).

36. I arrived at this figure by combining the receipts of taxable and nontaxable legal-services firms reported in Tables 1310 and 1311 of BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1992 777-78 (112th ed. 1992).

system for taking care of injured people and substituting (1) a system of universal compensation for victims and (2) a greater use of criminal sanctions for truly gross negligence.

The gist of this subpoint, and a fitting conclusion to my remarks, is that I make no forecast of what the NLS would cost but that there is no serious question about affording it. The cost of a war is never predictable, but we bear it. We can afford what we have to afford. And the simple argument here, fashioned from the Constitution's Preamble, is that the determination to "establish Justice" is not less fundamental than "to provide for the common defence."³⁷

37. U.S. CONST. pmbl.

