

Why Big Business Should Support Legal Aid

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Abstract: Corporations are part of the fabric of society. As members of American society – often, very powerful and influential ones – corporations have a deep interest in the health of the nation’s democracy, a mainstay of which is the system of justice writ large. The concept of justice for all is so important to this democracy that the founders placed it in the Constitution’s first line. But the system is not perfect. Attaining equal justice for all citizens and governing by the rule of law too often are merely aspirations. Corporations have a stake in ensuring that their disputes with others are resolved fairly, in a legal system that is viewed as treating all litigants equally under the law, regardless of size, wealth, or power. Corporate engagement in strengthening legal services in the United States is, in this way, an expression of corporate self-interest.

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Why do corporations have a stake in the issue of justice? What is their interest in lifting up the poor, improving the lives of low-income and disadvantaged people and groups, and striving for equal access to justice for all? How is supporting a well-functioning, fair, and accessible legal system an act of deep political, economic, and social self-interest for a corporation?

Beyond engaging with and depending on various elements of the justice system, corporations are part of the fabric of society. As members of American society – often, very powerful and influential ones – corporations have a deep interest in the health of the nation’s democracy, a mainstay of which is the system of justice writ large. While corporations can have very clear identities – brands, trademarks, and other symbols that can be familiar to the public – they (and other forms of business associations) are wholly products of law.

As Chief Justice John Marshall wrote in the early days of the Supreme Court: “A corporation is an

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artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”¹ Whether only a few people or thousands make up its shareholders, leaders, and employees, they are not the corporation: under law, the corporation exists as an entity unto itself, with equal standing and responsibility for some purposes as if it were a person.

Like people, corporations must pay taxes and follow rules and regulations, and they can enter into contracts and buy and sell property. Corporations can also sue and be sued, and then be bound by the result: recovering or owing compensation, or being subject to other court orders that resolve a dispute. Corporations can be held criminally accountable for breaking laws, just as natural persons can. Corporations, as legally recognized entities, routinely interact with the law.

Depending on the nature of their business, corporations interact with different segments of the law, with some areas so routinely that they are part of the corporation’s day-to-day work. The patent system can be particularly important, to take an example. Under the United States’ patent laws, inventors may obtain the reward of a patent – a time-limited monopoly over one’s own invention – in exchange for disclosing the invention to the public, which adds to human knowledge and allows for future advancements. Patents, Congress declared, can cover “anything under the sun that is made by man.”²

Patents are granted in all types of industries and sciences. In the pharmaceutical industry in which Merck operates, and in other high-technology areas, patents are critical; they are a fundamental means of protecting the inventive work of our employees. At Merck, where I am chairman

and CEO, when our scientists develop a novel, lifesaving medicine or vaccine, we seek for it the legal protection of a patent.

The U.S. patent system dates back to the Constitution, in which the founders gave Congress the right to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”³ Congress soon exercised this right for inventors in the first Patent Act, just as it protected the writings of authors in the Copyright Act. The U.S. Patent and Trademark Office – the agency responsible for assessing whether a claimed invention meets the legal qualifications for a patent – has issued over ten million patents. In the past decade, the ever-increasing pace has reached about three hundred thousand patents granted each year.

Like other corporations, Merck also uses the U.S. trademark system to protect our company’s brand names and the reputations of our medicines. And like other corporations, Merck routinely engages with the U.S. Food and Drug Administration. We make commitments to that agency for new medicines that we would like to launch, selling and marketing our products once the agency approves products for distribution.

Other areas of law – occupational health and safety requirements, employee benefits, consumer protection, and contracts to own and rent property, facilities, and equipment or to distribute or supply our goods and services – likewise directly influence the way Merck carries out its work. The corporation’s lawyers and business leaders give them significant attention. The company routinely appears in courts across the country to address legal issues that arise.

Corporate power and engagement are often put to use to ensure, or drive toward, well-developed, sophisticated legal

regimes; the patent laws, for instance, have undergone various iterations, tweaks, and wholesale changes, with the result that the American patent system today is well-developed and its legal doctrines extensive. These and other laws relevant to corporate enterprises can guide company behavior and reduce the number of disputes, so that corporations like Merck can produce the benefits to society – in our case, lifesaving therapeutics and vaccines – for which the societal “charter” described by Chief Justice Marshall was intended.

The U.S. legal system – a system fundamental to the healthy functioning of democracy, reaching far beyond issues of corporate governance and business – aspires to be egalitarian. The founders premised this nation on the rule of law – a legal principle that citizens would not be governed by the arbitrary power of autocracy or tyranny, but by laws that administer justice fairly and peaceably – to which all, in this diverse society, are accountable, and from which all benefit. No one is above the law, and all deserve equal treatment under the law.

The concept of justice for all is so important to this democracy that the founders placed it in the very first line of the highest legal authority. The Constitution begins: “We the People of the United States, in Order to form a more perfect Union, establish Justice” before ensuring domestic tranquility or providing for the common defense. This promise of equal standing before the law – justice for all – is among the noblest of ideals that our nation’s founders espoused. Alexander Hamilton put it this way: justice is “the first duty of society.”

But the system is not perfect. Attaining equal justice for all citizens and governing by the rule of law too often are merely aspirations. When one looks objectively

at how the system dispenses justice to the poor and disadvantaged, the inequities are obvious. The system, in civil and criminal matters, is not a fair and even playing field, or equally accessible to all.

A major roadblock to equal access to the justice system is competent counsel. Private legal counsel is often expensive. Successful corporations can afford counsel, and the quality representation provided by the lawyers whom Merck hires matters. The difference between good, bad, or nonexistent legal representation can make or break any case. More fundamentally, it can shape law in a certain direction. But for individuals, the cost of counsel can be significant. For the vast majority of the poor and economically struggling, it is prohibitive: they are not able to hire an attorney to advocate for their most basic legal needs.

The Supreme Court has held that the Constitution guarantees legal counsel to indigent defendants charged with crimes that could lead to significant jail time, although, even here, the system for meeting this constitutional requirement is far from adequate. Court-appointed criminal defense lawyers too often are undercompensated and overworked, with untenably large caseloads. While courts sometimes appoint lawyers in civil cases based on a litigant’s financial need, and pro bono lawyers – that is, those who work for the public good, without compensation (*pro bono publico*) – help fill the gap, legal services do not fully meet the overwhelming need for legal counsel. Given the growing rate of poverty and income inequality, the need for pro bono legal assistance is even more critical and expanding.

My representation of James Willie “Bo” Cochran, a death-row inmate in Alabama wrongly accused and convicted of murder, opened my eyes to the

extraordinary unfairness and inequity of our justice system, and to the difference that competent legal representation can make. Mr. Cochran's case also impressed on me that all stakeholders in this society – businesses and individuals alike – have a duty to challenge the system as a whole to do better.

Mr. Cochran, a black man, was convicted of the 1976 shooting death of a white grocery store manager in Birmingham, Alabama, by a jury composed of eleven white jurors and one black juror. As punishment, the jury sentenced Mr. Cochran to death.

I was introduced to Mr. Cochran, whom I later came to know well as “Bo,” in 1991, before I joined Merck. I was working as a corporate litigator in Philadelphia at Drinker Biddle & Reath, a national law firm, and I was representing Merck and other companies in their business cases. The late Esther Lardent, a prominent advocate for death penalty reform, brought Bo's case to my attention. I learned that he had been convicted on the basis of highly circumstantial evidence.

A store robbery had occurred the night of the homicide, and Bo admitted to the robbery. But there was no eyewitness to the fatal shooting, which took place in a trailer park where the manager had followed the robber out of the store. The homicide happened around the time that two armed police officers, also white, arrived at the park to investigate the robbery; residents heard gunfire, but no one saw who fired the shots. There was no physical or forensic evidence tying Bo to the shooting. There was, however, evidence suggesting an accidental police shooting and subsequent cover-up.

Bo insisted he did not commit the murder, and he needed a lawyer to advocate for him on death row. I agreed, and an extremely dedicated team of lawyers successfully overturned Bo's conviction in

1995. Two years later, he was retried and acquitted.

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Without a doubt, Bo's ultimate acquittal is the high point of my legal career. It was one of the most challenging and rewarding cases I have ever handled.

Bo obtained his freedom and vindication after spending nineteen years on death row. His long unlawful imprisonment, and the injustice it did to Bo, his family, and the credibility of our legal system, cannot be overestimated. I learned that the lack of quality representation for Bo – he first met his court-appointed trial lawyer *at his trial* – and the prosecution's deliberate weeding out of African Americans for his jury are typical of many criminal cases across the nation.

Sadly, Bo passed away in 2016, but his optimism and his confidence in our legal team affirmed for me the social, moral, and political obligation of all citizens – and particularly the powerful – to reform our justice system for the good.

In many ways, the criminal case in which I represented Bo could not be more different from the business cases and laws with which Merck engages. Why should a corporation care about the poor quality of representation that Bo initially had? Even if Bo had received the representation required by law, why should corporations care to support a higher quality than that minimal level – a level that lawyers throughout the legal profession know is notoriously low? Why, too, should corporations support legal aid in civil matters, where the law generally does not require any representation at all? More broadly, why should a corporation care about meaningful access to justice *for all*?

Some may argue that, from a corporation's perspective, it suffices to focus on business aspects of the law – for instance, a well-functioning patent system

for corporations like Merck that depend on patent rights – and that if business law works well, that is enough. Some may posit further that a legal system (by design or not) that has strong institutions for businesses but not for individuals, and particularly not for the disadvantaged, is exactly what corporations *should* want. Improving the system for others could undermine the advantages to corporations of a system disproportionately favorable to them.

These positions are shortsighted and unrealistic. Certainly, corporations have an interest in the segments of the law that most directly affect them. But while corporations may always place a higher value on advocating for reform and success in those areas, it is not an either-or proposition. A healthy corporation should nevertheless appreciate the extent to which it depends on a well-functioning system as a whole. Effective corporations take that broader perspective. Corporations may have little direct interaction with various segments of the law – family law and the world of indigent criminal defense, among others – but they have just as much at stake as individuals in the fairness of how justice is dispensed. Forward-thinking companies realize that compartmentalized justice is unlikely to work for them or others.

A strong legal system is an important bulwark against the often imperceptible, but terribly damaging, erosion of democratic institutions and principles: “democratic backsliding,” as it has been termed. To protect against this, the legal system must be strong. To that end, legal aid for the less fortunate is critical. The Honorable Learned Hand, the great judge of the United States Court of Appeals for the Second Circuit, in speaking to the oldest legal-aid organization in the United States in 1951, captured the need to support legal aid this way: “If we are

to keep our democracy, there must be one commandment: Thou shalt not ration justice.”⁴

It is not only government, or individuals, or the tireless staff of legal-aid organizations who can be stewards of the arc of justice. Business has a stake in this work, too. If corporations are indifferent to, or seek to take advantage of, a rigged legal system, American society is not likely to fare well. This is the deeper business case for corporate engagement with, support for, and championing of legal aid that I will tease out here.

The credibility of the legal system – people’s faith in the fairness of the system and its rulings – is critical to its success. And the ongoing health of democracy demands a well-functioning system.

That credibility necessarily includes equal access to the doors and halls of justice, regardless of one’s circumstances. As Nelson Mandela said, “Overcoming poverty is not a gesture of charity. It is an act of justice.”⁵

A judicial system that fails to serve as a refuge and shelter for those whose rights and privileges are trampled on, either by the government itself or by others acting under the color of laws that are supposed to govern all equally, is not good for the social order because it undermines the credibility of the system as a whole.

The crisis of inadequate legal representation likewise threatens the legal system’s credibility. The system is not credible when it treats the poor, marginalized, and disadvantaged – a sizable portion of the population – differently.

Legal aid that levels the playing field and promotes meaningful reform is an important component to improving the credibility and integrity of the system, so corporations have as much stake in those efforts as the recipients do. By ensuring that everyone, regardless of his or her

circumstances, has a path toward equal justice, a trustworthy legal system promotes social cohesion. Business has an interest in promoting this goal. The rate at which societies fall apart, and chaos ensues, accelerates exponentially when people have no stake in the social order, or at least believe they do not. Companies – no matter how strong or profitable – simply cannot operate in such an environment. Consider how many companies have felt compelled to pull out of failed or failing states (like Venezuela) in recent years when citizens have taken to the streets to protest the lack of transparency and fairness in their country’s justice system. The rule of law matters to business.

Recent events underscore that civil discord could similarly affect the United States. Consider the weeks of unrest in Ferguson, Missouri, following the fatal shooting of Michael Brown, an unarmed black teenager, by a white police officer in 2014. There can be little doubt that the angry reaction of so many of Ferguson’s citizens was a direct result of the perceived failure of the justice system to provide those citizens equal protection of justice. Although the consequences of this failure are most directly borne by black citizens, who have long suffered this unequal treatment, the resulting damage to the credibility of the justice system is harmful to all citizens, including corporations. Just ask the many companies in and around Ferguson that were unable to do business during this tense period about the business costs of such public unrest.

The health of the legal system is inextricably intertwined with a corporation’s most precious asset – the public’s trust – and, conversely, its biggest liability – public distrust. A corporation’s products or services are, of course, a principal

means for engendering public trust, but those are not the only ways. The manner in which a corporation operates toward others can also be critically important.

Fairness in the legal system is paramount to ensuring corporate public trust, particularly when corporations dwarf their opponents. If the public believes that corporations exist to take advantage of those less powerful, the vital necessity of public trust is absent, and distrust is fostered.

Corporations have a stake in ensuring that their disputes with others are resolved fairly, in a legal system that is viewed as treating all litigants equally under the law, regardless of size, wealth, or power. In the health care industry, we know that our work touches lives, often in personal ways. To have credibility in the outcomes of litigation that involve such issues and to maintain the public trust, the system needs to be fair not just to Merck and other corporations, but also to individuals, including those with whom corporations seek resolution in court.

Corporations are also drivers of novel, cutting-edge issues and legal principles – today’s fast-paced changing technology has this effect on patent law. But groundbreaking legal victories will not be as long-lasting or as meaningful as they should be if the system that produces them is not fair and reliable.

A strong and healthy legal system serves other long-term interests for corporate self-expression through the support of legal aid. Corporations are made up of employees, stockholders, officers, directors, and board members; and facing outward, corporations have customers, collaborators, and competitors.

Corporations have a stake in affording equal access to justice to these individuals. There are, of course, short-term

financial gains to a corporation if the justice system efficiently and fairly addresses and assists employees with legal disputes; the workplace will be less disrupted and less earnings will be lost. But corporations also have a deeper stake in justice reform beyond the aspects on which they may directly depend. The individuals they interact with and their loved ones may have fundamental legal needs: for example, related to housing, special education, health care, veterans' rights, or criminal charges. Justice-system reform can force changes in these and other areas – changes that can facilitate employees being committed and confident contributors to the corporate enterprises where they work, and all with whom corporations interact to reach their full potential and engage in good citizenship.

The fairness of the legal system also relates to corporate interest in developing human capital for the next generation. Corporations will suffer if they cannot tap into the talent of individuals left behind by society. The core of the American dream is the tenet that, if people work and study hard enough, they can lift themselves up. Poverty is largely a matter of lack of opportunity, not a willing choice or unavoidable fate for those who find themselves in need. When access to the justice system is equal, those who face economic challenges are more likely to prosper and contribute: becoming the next scientist who discovers a groundbreaking compound in the laboratory, the next lawyer who secures an important acquisition in the deal room, or the next front-office administrator who keeps the company in good standing. That is good for the individuals, and for the business. But when the legal system deals justice unevenly, it limits that potential for good.

Corporations have a stake in combating myths about the poor, the disadvan-

taged, and those who are discriminated against. Even though factually wrong, insidious myths remain today: that people who are socioeconomically disadvantaged or who have endured discrimination are fundamentally different from the “rest of us,” that they are content with their station in life and do not want to contribute to our society, and that they will always be poor. Besides blinding many to the imperfections of the justice system, these myths create divisions, a first step toward weakening social cohesion and, in turn, making democratic, collective institutions vulnerable to incremental erosion. Supporting legal aid is a powerful way that corporations and their leaders speak and act to correct these myths about those who live with needs or conditions different from their own, and to strengthen the collective social endeavor.

I know firsthand that much of the mythology of disadvantage is untrue. I was born and raised in an impoverished community in North Philadelphia. My father was a hardworking janitor with limited formal education. He was also one of the most intelligent people I know. He devoured two newspapers a day and, later on, sampled my siblings' and my college textbooks as well. He taught me that I could, and should, become the best version of myself. I take seriously the responsibility to help others have the same chance. A justice system that is unfair, unresponsive, or based on myth undermines that possibility.

Business has another stake in shoring up our legal institutions, one that underlies the rest: corporations are citizens just like you and me, and if America is to have a long-term healthy democracy, all Americans need to participate. This is a reality for businesses and individuals alike, given the too-frequent stalemate that our national government finds itself in.

In many ways, corporations have special opportunities to operate as model citizens. Not every moment in the limelight might be welcome to corporate leaders. But corporations have an excellent platform from which to speak and be heard, and to act and lead by example. Corporations also have flexibility and nimbleness, particularly compared with government institutions that must operate within the constraints of public budgets, votes, and partisan divisions. And American corporations are among the most imaginative, innovative, and scrappy in the world.

Using their bully pulpit, corporate leaders can put resources and expertise to use to change the mindset about inequality. They can set tones and inspire. They can marshal valuable skills to make equal opportunity for justice a living, breathing reality, and can mobilize other passionate individuals to join and grow the efforts. Corporate citizenship may be a “legal fiction”; yet that does not mean corporations have no soul. Their leaders can reflect and shape those souls.

When I think about model corporate leadership, Dr. P. Roy Vagelos, Merck’s CEO from the 1980s to the early 1990s, comes immediately to mind. Dr. Vagelos was the key advocate in Merck’s decision to make one of its medicines freely available. A Merck scientist, Dr. William Campbell, and a Japanese collaborator, Dr. Satoshi Omura, had recently discovered a compound that ultimately led to the development of Mectizan, a drug that treats onchocerciasis, a debilitating eye disease also known as “river blindness” that is prevalent in poor, remote areas such as in Africa and Latin America. Very soon after their breakthrough, Merck, under Dr. Vagelos’s leadership, launched a program that would make a tremendous impact on the tens of millions of people infected: Merck has partnered

with organizations to donate Mectizan to everyone who needs it, until river blindness is entirely eradicated.

Begun in 1987, Merck’s Mectizan donation program has successfully eliminated the disease in numerous countries, improving possibilities for families, communities, and entire nations. The discovery by Dr. Campbell and Dr. Omura earned them a Nobel Prize. Mectizan is a tremendous source of pride for Merck scientifically. But not lost on me is the impact that a corporation and its leaders can have, as demonstrated by Dr. Vagelos and his leadership in Merck giving away one of its greatest inventions.

I have sought to lead Merck with similar commitment, and I am particularly proud of our signature Merck for Mothers program. In this global initiative, Merck has dedicated \$500 million since 2012 to help end preventable maternal mortality worldwide. We have worked with more than ninety partners to establish over fifty programs in thirty-plus countries, and we are seeing impressive progress in improving access to quality maternal health care and family planning services. These examples reflect what a pharmaceutical company striving to improve the world can do. Corporations engaged in everything from entertainment to financial services to retail to technology have their own expertise and creative talents to bring to bear.

For corporate engagement with justice reform in particular, a prime corporate resource is the legal department. Today, the head of a corporate legal department – the corporation’s general counsel – often serves dual roles as the company’s chief lawyer and a corporate executive. That was my experience at Merck, when I served as general counsel and executive vice president.

When the chief corporate lawyer also serves in an executive capacity, she brings

a legal perspective to the day-to-day work of the corporation and to its big-picture goals and aspirations. Lawyers have taken an oath to their profession and share a collective responsibility to the fundamental belief in justice for all. That view strengthens corporate understanding of our critical participation in what makes our democratic society function.

Merck's legal department has long engaged with legal aid. The formalization of this program resulted in part from the chief lawyer having an executive role. Our program began in 1994, under the leadership of then-General Counsel and Senior Vice President Mary McDonald. Today, almost two hundred Merck employees (lawyers, paralegals, and support staff) devote thousands of hours a year to pro bono work, contributing in a broad array of areas, including bankruptcy, immigration, landlord/tenant disputes, domestic violence, family law, social security disability, special education, and veterans' affairs.

Active citizenship by a corporation and its employees does not mean Americans should absolve government leaders of their responsibility for making the nation's aspirational notions of justice a reality. A healthy democracy demands that its elected representatives be engaged in furthering the greater good, and corporations, like other citizens, should seek to hold them accountable.

As a recent example, I am proud that Merck joined over 180 other companies in publicly advocating for congressional support of the Legal Services Corporation (LSC).⁶ The LSC was created in 1974 with bipartisan congressional sponsorship as the primary funder for legal-aid organizations across the United States, with more than 90 percent of its funds currently distributed to over 130 different legal-aid programs in every state and territory. The LSC is also a thought leader on

how to engage corporations and in-house counsel in financially supporting and undertaking pro bono work. Corporations have a stake in using our powerful voices to demand government support for the LSC and other organizations that fight for equal justice in America on a daily basis.

Corporations generally want to leave a lasting imprint on society. Corporations might merge, be acquired, or reorganize themselves, but they plan to operate for the long haul. Merck is such a company. For over 125 years, Merck has been a global health care leader dedicated to helping the world be well through its innovative health solutions.

A corporation's legacy is personal to those who lead and work there. We see ourselves as stewards of businesses that have a significant impact on the public, and we want our life's work to reflect who we are.

Hand in hand with achieving our long-term goals and taking charge of our legacy is a well-functioning and fair justice system—one that provides meaningful access to all. An example is my representation of Bo Cochran. Death penalty cases are intense, expensive, and lengthy. The appeal of Bo's death sentence was still pending when I went in-house to Merck. I am grateful to the company for allowing me to serve actively on Bo's legal team for what turned out to be several more years.

And now, as Merck's CEO, the company's commitment to improving the lives of others is always at the front of my mind. Another of my predecessors, George W. Merck, famously said in 1950, "Medicine is for the people. It is not for the profits. The profits follow, and if we have remembered that, they have never failed to appear."⁷ Merck aims to be a good corporate citizen. That is our desire for our legacy.

This deeper sense of corporate citizenship – people before profits – is intertwined with ensuring the dignity of people when they have civil or criminal legal needs. Corporate engagement in strengthening legal services in the United States

is, in this way, an expression of corporate self-interest. The best corporate citizens see *value* and *values* as aligned. They recognize the true reward of devoting time and energy to ensuring adequate justice: the opportunity to improve many lives.

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ENDNOTES

- ¹ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 4 Wheat. 518, 636 (1819).
- ² *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) [quoting S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952); and H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952)].
- ³ U.S. Constitution, art. I, § 8, cl. 8.
- ⁴ Learned Hand, “Address at the New York Legal Aid Society’s 75th Anniversary Dinner,” New York City, New York, February 16, 1951.
- ⁵ Nelson R. Mandela, “Address for the Campaign to Make Poverty History,” London, United Kingdom, February 3, 2005.
- ⁶ “Letter to All Members of Congress,” *The Wall Street Journal*, March 28, 2017, <http://online.wsj.com/public/resources/documents/CorporateCounselLSCLetter.pdf>.
- ⁷ George W. Merck, “Address to the Medical College of Virginia at Richmond,” Richmond, Virginia, December 1, 1950.