

## The Need for Legal Aid Reform: A Comparison of English and American Legal Aid

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### Recommended Citation

Young, Marianne Wilder (1991) "The Need for Legal Aid Reform: A Comparison of English and American Legal Aid," *Cornell International Law Journal*: Vol. 24: Iss. 2, Article 9.  
Available at: <http://scholarship.law.cornell.edu/cilj/vol24/iss2/9>

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# The Need for Legal Aid Reform: A Comparison of English and American Legal Aid

## Introduction

Providing civil legal services to those who otherwise could not afford them is an integral part of social justice and social reform.<sup>1</sup> Advocates of increased legal aid contend that improved access to justice may result in critical law reform or in fundamental changes in the rights of the poor.<sup>2</sup> Consequently, expanding legal aid may address systemic social conditions that breed and maintain poverty. Government funded legal assistance, both in the United States and abroad, is one effort society has made toward the idea of equal justice for all.<sup>3</sup>

Unfortunately, the history of legal aid in the U.S. has been far from bright. Notwithstanding that some form of legal assistance for the poor has been available since the latter part of the nineteenth century, until 1964 all legal aid was privately funded with only minor government or community support.<sup>4</sup> Prior to federal involvement, overwhelming caseloads and minimal services characterized legal aid programs which had little general or lasting impact on the poor.<sup>5</sup> By 1964, when the Johnson Administration introduced a program of federal funding through the Economic Opportunity Act of 1964 as part of its "war on poverty," the idea of meeting legal aid needs with local offices staffed by salaried lawyers and providing legal services free of charge to eligible

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1. Cappelletti & Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective*, in ACCESS TO JUSTICE 6 (M. Cappelletti & B. Garth eds. 1978).

2. Zemans, *Recent Trends in the Organization of Legal Services*, 14 ANGLO-AM. L. REV. 286, 286 (1985).

Civil legal aid is not necessarily confined to meeting individual client needs. For example, one of the most controversial aspects of legal assistance to the poor is the extent to which legal aid lawyers should engage in law reform through such activities as tenant-organizing, lobbying the legislature, or picketing certain landlords. Such activities not only result in law reform but may provide long-term solutions to the underlying problems of poverty and ultimately increase the legal rights of the poor.

3. *The Legal Services Corporation: Past, Present and Future?*, 28 N.Y.L. SCH. L. REV. 593, 593 (1983).

4. See generally *id.* at 593-612 (brief history of civil legal services for the poor in the U.S.).

5. WASHINGTON COUNCIL OF LAWYERS, REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR 2 (Nov. 1983) [hereinafter REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR].

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clients had taken a firm hold in this country.<sup>6</sup> Since that time, however, federally funded legal assistance has met with mixed success.

The Legal Services Corporation (LSC), which provides free representation in noncriminal matters to persons living near or below the poverty line, now administers all federally funded legal assistance. The LSC has been the target of the political Right for some time. President Reagan unsuccessfully attempted to dismantle the program by calling for zero funding of the LSC in every budget he submitted to Congress.<sup>7</sup> As a result, legal services for the poor have suffered greatly. For example, according to a recent New York State Bar Association report, New York's poor face nearly three million legal problems a year without legal help.<sup>8</sup> More than eighty percent of the 30,000 tenants evicted in New York City each year do not have lawyers to help them fight to keep their apartments;<sup>9</sup> as a result, nearly one-third of those evicted end up in public shelters.<sup>10</sup> During the fifteen months covered by the Bar Association's survey, unless the matter involved an emergency, forty-three percent of all legal aid programs in New York State were unable to accept new clients at some point.<sup>11</sup> Although qualification standards are high, two million people in New York City alone are eligible for free legal services; this number far exceeds the capacity of civil legal aid resources.<sup>12</sup> Thus, at a time of vast expansion in the ranks of the poor,<sup>13</sup> civil legal assistance has been woefully inadequate.

Ever since *Gideon v. Wainwright*<sup>14</sup> and *In re Gault*,<sup>15</sup> the government

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6. Saltzman, *Private Bar Delivery of Legal Services to the Poor: A Design for a Combined Private Attorney and Staffed Office Delivery System*, 34 HASTINGS L.J. 1165, 1166 (1983).

7. Address by W. Durant, III, *Maximizing Access to Justice* (Feb. 12, 1987), reprinted in 53 VITAL SPEECHES AND DOCUMENTS OF THE DAY 540 (1987). Although President Reagan was unable to abolish the LSC, drastic budget cuts in the 1980s seriously hampered the program. See *infra* notes 143-50 and accompanying text.

8. *New York's Poor Face Nearly Three Million Legal Problems a Year Without Legal Help*, Wall St. J., Oct. 19, 1989, at B8, col. 4 [hereinafter *New York's Poor*].

9. *New York Bar Says Plan to Aid Evictees Is Coming Up Short*, Wall St. J., Dec. 21, 1988, at B6, col. 3.

10. *Poor Said to Lack Advice on Eviction: The Civil Liberties Union Calls Legal Services Inadequate*, N. Y. Times, Aug. 9, 1987, § 1, at 32, col. 1.

11. *New York's Poor*, *supra* note 8, at B8, col. 4.

12. Murray, *Private Bar Is Offered Opportunity to Provide Legal Services to the Poor*, N.Y.L.J., May 1, 1985, at 27, col. 1.

13. Beginning in the mid-eighties the U.S. experienced the highest percentage of Americans living below the poverty line since the mid-1960s. REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR, *supra* note 5, at 10.

14. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held that the sixth amendment to the Constitution, providing that in all criminal prosecutions the accused shall have the right to assistance of counsel for his or her defense, is obligatory on the states by means of the fourteenth amendment. Consequently, indigent criminal defendants in state as well as federal courts have a constitutional right to have counsel appointed to them.

15. In *re Gault*, 387 U.S. 1 (1967), involved a petition for a writ of habeas corpus to secure the release of a fifteen year old boy committed as a juvenile delinquent to a state industrial school. The Court held that due process required that juveniles have the right to counsel in all juvenile delinquency proceedings and that counsel must be provided on request when the family is financially unable to employ an attorney.

has provided counsel to poor persons in criminal cases and in juvenile matters. Unfortunately, progress toward increasing resources for civil legal representation has been comparably slow. Civil legal aid is, however, often just as critical as criminal legal assistance. Archibald R. Murray, Executive Director and Attorney in Chief of the Legal Aid Society, points out:

The civil legal needs of the poor are every bit as pressing and devastating as the need for representation when faced with criminal prosecution. For the family facing eviction from its home there can be no more devastating prospect . . . . Eviction almost guarantees that the family will join the ranks of the homeless.<sup>16</sup>

Given the potentially severe consequences of losing civil legal matters, the lack of an effective legal aid plan demands the attention of the legal community.

A significant imbalance exists between the need for civil legal assistance for poor people and the legal services available to them. This gap is disturbing, particularly given that every lawyer has an ethical duty to serve the poor. According to the Lawyers' Code of Professional Responsibility, "the basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. . . . Every lawyer, regardless of professional prominence or professional workload should find time to participate in serving the disadvantaged."<sup>17</sup> Because the disparity between legal needs and available services is contrary to fundamental principles embodied in the U.S. legal system, such as equal access to justice,<sup>18</sup> the U.S. needs to re-examine federally funded legal aid in order to find a viable system to meet the desperate needs of the poor.

One of the most frequently debated questions concerning legal services for the poor is whether the delivery model for legal aid should be private attorneys or staffed office systems.<sup>19</sup> Use of private attorneys is also known as the "compensated private attorney model," or the "pri-

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16. See Murray, *supra* note 12, at 27, col. 1.

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-225 (1980).

18. Souther, *Funding and Innovation Are Needed to Provide Legal Services for the Poor*, N.Y.L.J., May 1, 1989, at 5, col. 1.

Although equal access to justice is the law, and an implicit part of our American ideals, it is unfortunate to note that significant sectors of the population do not, in fact, have equal access to justice. With the ever-rising costs of legal services, the poor, and often the middle class as well, find that they are financially impeded from attaining legal representation. Without the benefits of qualified legal representation, these people do not truly take part in a system of equal access to justice.

*Id.*

19. See generally, Dooley, *Legal Services for the Poor: The Debate Between Staffed Programs and Judicare*, 17 CLEARINGHOUSE REV. 193 (1983).

The term "delivery model" for the purposes of this Note refers to the method used to provide legal aid. While there are other models, this Note focuses on the private attorney and the staffed office delivery systems because they characterize legal aid in England and the U.S. With respect to the U.S., this Note primarily addresses federally-funded legal aid despite the fact that there are numerous private and pro bono

vate attorney" or "private bar" system.<sup>20</sup> The staffed office system is often referred to as the "neighborhood office system," the "legal aid model," or the "staff attorney model."<sup>21</sup>

In England, state-financed legal aid has existed for approximately forty years.<sup>22</sup> The U.S. has provided state-financed legal aid for only approximately half that time.<sup>23</sup> England and the U.S. have adopted dramatically different systems. Comparing legal aid in England and the U.S., however, illustrates the advantages and disadvantages of both schemes and suggests ways to improve civil legal assistance in the U.S. While social, political, and legal differences in the two societies render an unqualified comparison dangerous, there are enough similarities so that some comparison is worthwhile. There is an observable trend in both England and the U.S. toward a legal aid scheme that combines elements of the private attorney system and the staff attorney model.<sup>24</sup> Fundamental differences in philosophy, however, continue to distinguish the two legal aid programs.<sup>25</sup>

This Note assesses the relative strengths and weaknesses of the legal aid delivery systems in England and the U.S., particularly with respect to recent changes that have taken place in both countries,<sup>26</sup> and

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programs which also play a significant role in providing civil legal assistance to the poor.

20. Saltzman, *supra* note 6, at 1167 n.13.

21. *Id.*

22. Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, ch. 51. The scheme actually began on October 2, 1950. See generally, S. POLLOCK, LEGAL AID: THE FIRST 25 YEARS (1975).

23. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964). The first local legal aid offices were funded in 1965.

24. Zemans, *supra* note 2, at 291.

25. Freedom of choice and individual client needs continue to be the primary focus of English legal aid. The British approach represents a more traditional view of legal services because it tends to accept the norms of the legal system and attempts to provide a service for poor people which is comparable to that provided to the wealthy, without questioning the underlying system. Little emphasis is placed on social outreach programs or addressing the more fundamental issue of poverty.

Alternately, one of the underlying purposes of the LSC continues to be to "serve best the ends of justice and assist in improving opportunities for low-income persons" 42 U.S.C. § 2996(3) (1982). The staff attorney approach embodied in the LSC illustrates a more "strategic" approach to legal assistance. As Zemans points out, "such a programme is oriented to identifying the significant social problems facing the community it is serving" and attempts to develop a long-term approach to the problems of the poor. Zemans, *supra* note 2, at 292-294.

There is, however, a move in England and in the U.S. toward incorporating aspects of both delivery models into their respective legal aid programs. According to Zemans, the trend toward a mixed system of legal assistance reflects a political compromise necessitated by declining support for legal aid programs and the resulting need for the political and financial support of the legal profession. *Id.*

26. For example, in England there has been a growing trend toward utilizing legal aid offices to supplement private attorney involvement. In the U.S., on the other hand, federally funded legal aid offices are increasingly unable to adequately address the legal problems of the poor because of a lack of resources and, consequently, the private bar is being called on, either through judicare-type programs or pro bono work, to help fill the gap.

proposes solutions to overcome the systems' inherent weaknesses. Section I examines the mechanics of the two systems, focusing on the methods used to provide legal assistance, the type of work covered, the administrative aspects of each program, and the qualification criteria used. Section II analyzes the advantages and disadvantages of each system and suggests ways to improve legal aid in the U.S.

## I. Background

### A. English Legal Aid

The English Legal Aid and Advice Act<sup>27</sup> was passed in 1949 to provide a comprehensive system of legal services for the lower and middle classes. Its effect was to replace a system of legal assistance based upon charity by one based upon rights or entitlement.<sup>28</sup> At the heart of the English legal aid system is its most controversial feature: complete utilization of barristers and solicitors in private practice to provide the necessary legal services to the poor.<sup>29</sup> Barristers and solicitors are paid from a special fund at a slightly reduced rate from their usual fee. The fund is comprised of government subsidies supplemented by monies received from legal aid recipients, based on their ability to pay, and from damages and costs recovered in successful legal aid actions.<sup>30</sup> General administrative control of the system is in the hands of the local legal profession with practicing attorneys determining whether an applicant's case warrants legal aid.<sup>31</sup>

At the time of its inception, the financial qualifications for legal aid in England were very liberal: an estimated eighty percent of the population qualified for some form of legal assistance.<sup>32</sup> From the beginning, the Law Society,<sup>33</sup> which was responsible for administering the scheme, envisioned a legal aid system that guaranteed access to legal services to all sections of society.<sup>34</sup> The scheme requires that those who are financially able contribute a certain amount for their legal representation; those who cannot afford assistance receive completely free services.<sup>35</sup>

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27. Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, ch. 51. The act has since been amended and is now referred to as the Legal Aid Act of 1988 and includes civil legal aid, criminal legal aid, and advice and assistance. Legal Aid and Advice Act of 1988, ch. 34. The Legal Aid and Advice Act applies to England and Wales. This Note focuses on legal aid in England, rather than all of Great Britain.

28. S. POLLOCK, *supra* note 22, at 5.

29. This delivery model has come to be known as "judicare," the legal analogue to medicare, and is also referred to as the "English System." Saltzman, *supra* note 6, at 1167 n.13.

30. See *infra* notes 95-102 and accompanying text.

31. See *infra* notes 103-06 and accompanying text.

32. T. GIFFORD, *WHERE'S THE JUSTICE?: A MANIFESTO FOR LAW REFORM* 78 (1986).

33. The Law Society is a professional organization analogous to the American Bar Association.

34. S. POLLOCK, *supra* note 22, at 94.

35. The contribution is intended to "mitigate" the privileges afforded by legal aid so that assisted persons do not take advantage of the system by bringing frivolous

Because the legal aid scheme sought to provide legal assistance to a broad section of the population it was a genuinely progressive measure.<sup>36</sup> Unfortunately, the means test used to determine eligibility has fallen behind inflation so that in reality the impact of the legal aid system has not been as far reaching as anticipated.<sup>37</sup> Nevertheless, today, over half the population still qualifies for some form of legal aid.<sup>38</sup> When compared with legal assistance in the U.S., the scope of coverage in England is remarkable because it is not limited only to the very poor.

### 1. Scope of Coverage

The English legal aid scheme consists of three major components: legal aid for civil court proceedings, legal advice and assistance, and criminal legal aid.<sup>39</sup>

#### a. Civil Legal Aid

##### (i) Freedom of Selection

Legal aid entitles a recipient to the services of a solicitor and, in the event that the matter goes to trial, a barrister.<sup>40</sup> Like the unassisted claimant, the legal aid recipient freely chooses a solicitor in private practice; the only limitation on choice is that the solicitor must be willing to handle legal aid matters. The Law Society envisioned that most solicitors would participate in at least some legal aid while others might make a living solely from government-subsidized legal aid matters. Initially, many attorneys participated to some extent in both the legal aid and the legal advice programs.<sup>41</sup> Unfortunately, as a result of the numerous problems inherent in the program such as inadequate remuneration and

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claims. According to the Council of the Law Society, contributions are "an important and essential part of a publicly funded legal aid system to prevent unreasonable conduct of legally aided litigation and to prevent assisted persons from profiting at the expense of public funds." COUNCIL OF THE LAW SOCIETY, NOTES FOR GUIDANCE § 46 (1985), *reprinted in* THE LEGAL AID HANDBOOK 253-54 (1986).

36. T. GIFFORD, *supra* note 32, at 78.

37. M. ZANDER, LEGAL SERVICES FOR THE COMMUNITY 34 (1978). Between 1964 and 1974 the proportion of households with children eligible for legal aid declined from 64% to 23%. *Id.*

38. 38TH LEGAL AID ANNUAL REPORT 119 (1987-88).

39. Sections 8 to 13 of the Legal Aid Act of 1988 concern advice and assistance and are also known as the "green form" scheme because of the green application forms used. Sections 14 through 18 relate to civil legal aid while sections 19 to 26 cover criminal legal aid. For purposes of this Note, criminal legal aid and the duty solicitor scheme will not be discussed.

40. Legal Aid Act of 1988, ch. 34. The English legal profession is divided into barristers and solicitors. Solicitors' primary responsibility is giving advice, while barristers focus on litigation. In actuality, solicitors perform a great deal of trial work because they need only retain a barrister in the higher courts. M. ZANDER, *supra* note 37, at 25.

41. "It is one of the great virtues of the English system that it involves so large a proportion of the profession at all levels of experience." M. ZANDER, *supra* note 37, at 35.

frequent delays in receiving payment,<sup>42</sup> an increasing number of lawyers in recent years have chosen not to participate.<sup>43</sup> For example, only four percent of solicitors receive more than forty percent of their gross income from legal aid.<sup>44</sup> Added to the problem of declining attorney involvement is the fact that many recipients of legal assistance have never consulted a lawyer, and consequently, have no idea to whom they should turn for legal advice. Given these circumstances, freedom of selection, although admirable in theory, is limited in practice.

(ii) Courts and Cases

Legal aid for matters resulting, or likely to result, in litigation accounts for the bulk of civil work under the English scheme.<sup>45</sup> Initially, application of the legal aid scheme was limited to certain courts, but legal assistance is now available for litigation matters in practically all courts.<sup>46</sup> The statute, however, continues to include important exceptions: actions before certain administrative tribunals and several causes of action, including defamation and relator<sup>47</sup> actions, may not be funded.<sup>48</sup> As a result, legal aid is not available in areas where some of the greatest injustices occur.<sup>49</sup>

Like many other legal aid plans, the largest percentage of English legal aid cases involve matrimonial questions.<sup>50</sup> In 1988 through 1989, the most recent year for which statistics are available, forty-six percent of all civil legal aid work involved matrimonial issues.<sup>51</sup> Because a substantial portion of English legal aid resources are channeled into matrimonial actions, some have criticized the legal aid scheme as an instrument for the destruction of marriage. Legal aid for matrimonial matters, however, has resulted in the simplification and humanization of

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42. In an attempt to rectify the problem of declining attorney involvement, however, the Lord Chancellor recently agreed to introduce a permanent payment on account system and to phase out the percentage deduction from solicitor's costs and counsel's fees in high court cases. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 5.

43. T. GIFFORD, *supra* note 32, at 82. A 1988 Law Society survey revealed that the number of offices giving up legal aid work was alarmingly high. According to the study, the primary reason for giving up legal aid work was inadequate compensation. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 119.

44. T. GIFFORD, *supra* note 32, at 78.

45. In 1987 there were 209,051 reported applications for advice and assistance, while 373,776 applications for legal aid certificates were received. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at app. 21(1F), 28 (2B(i)(a)).

46. Pelletier, *English Legal Aid: The Successful Experiment in Judicare*, 40 U. COLO. L. REV. 10, 16 (1967).

47. A relator action involves an action by a party in interest who is permitted to institute a proceeding in the name of the People, the Attorney General, or other official when the right to sue resides solely in that official. BLACK'S LAW DICTIONARY 1159 (5th ed. 1979).

48. Legal Aid Act of 1988, ch. 34, sched. 2, pt. II.

49. T. GIFFORD, *supra* note 32, at 83-84; S. POLLOCK, *supra* note 22, at 115.

50. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 100.

51. 39TH LEGAL AID ANNUAL REPORT 25, app. at 2A(i) (1988-89). Out of 237,170 legal aid certificates, 108,101 were related to matrimonial matters.



divorce law in England.<sup>52</sup> Thus, although many criticize legal aid in England for its narrow focus on individual clients, rather than addressing the larger problems of the poor as a whole, the legal aid scheme has led to law reform.

### (iii) The Legal Aid Act 1988

In response to some of the weaknesses of the English legal aid scheme, the Legal Aid Act 1988<sup>53</sup> (the "Act") incorporates several changes into the program; these changes, however, have received varied reactions in the legal community. A major change brought about by the Act is its provision for "contracting out" legal aid work. To address problems arising in publicly aided multiparty actions, the statute enables the Legal Aid Board<sup>54</sup> to enter into contracts with a particular firm or firms of solicitors to provide representation in certain types of proceedings.<sup>55</sup> Consequently, the Board, rather than the client, chooses which solicitors will handle particular legal matters. The contracting out provisions are among the most controversial aspects of the new Act. Practicing attorneys fear that contracting out could lead to a virtual monopoly on subsidized legal assistance in some areas,<sup>56</sup> perhaps resulting in corner cutting and poor quality work.<sup>57</sup>

One of the strongest objections to contracting out legal aid work is that it denies the client the basic right to select his or her own solicitor, historically a right of importance to the English legal aid scheme.<sup>58</sup> The Lord Chancellor's Advisory Committee on legal aid contends that freedom of choice is a reasonable price to pay to secure greater coordination and efficiency of multiparty actions, which in the long run should produce better results for the client.<sup>59</sup> In this respect, the English system is becoming more like the U.S. system where freedom of choice is sacrificed for greater efficiency and, ideally, increased quality of legal services.

## b. Legal Advice and Assistance

### (i) Statutory Scheme

Legal advice and assistance,<sup>60</sup> more commonly referred to as "green

52. S. POLLOCK, *supra* note 22, at 69-70.

53. Legal Aid Act of 1988, ch. 34, § 24.

54. The Legal Aid Board is the new organization created by the Act to administer the legal aid system in place of the Law Society.

55. Legal Aid Act of 1988, ch. 34, § 15(5).

56. *Lawyers Fear for Future of Legal Aid*, 131 SOLIC. J. 1636 (1987).

57. *Id.*

58. Legal Aid Act of 1988, ch. 34, § 32(2). See Smith, *Legal Aid—The Bill*, 137 NEW L.J. 1212 (1987).

59. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 107-08.

60. Legal Aid Act of 1988, ch. 34, §§ 8-13. Advice and assistance also includes assistance by way of representation which was:

introduced in 1980 to cover domestic proceedings in magistrates' courts but has been extended to cover proceedings before a Mental Health Review Tribunal, to allow representation of a parent or guardian in certain child care

form,"<sup>61</sup> is intended to cover preliminary advice and assistance from a solicitor, including writing letters, entering into negotiations, obtaining opinions, and preparing tribunal cases. Green form does not cover representation before a court or tribunal, nor can a person qualify for green form if he or she is already receiving assistance under the civil legal aid provisions of the Act.<sup>62</sup>

The Act authorizes the Lord Chancellor to exclude certain types of advice or assistance. For example, the Lord Chancellor may exclude categories of work from the legal aid scheme because advice agencies<sup>63</sup> may already offer advice on matters involving particular areas of law.<sup>64</sup> In addition, the Lord Chancellor has the power to exclude certain types of assistance merely because he believes they do not merit public funding.<sup>65</sup> The Act specifically excludes advice on wills and conveyancing from coverage.<sup>66</sup> Thus, the Act gives the Lord Chancellor a great deal of discretion to prevent inefficient and unnecessary duplication of legal services.

The responsibility for deciding whether a person qualifies for green form rests with the solicitor. After meeting with the client, the solicitor makes an immediate determination of eligibility and, using government guidelines, decides whether a contribution is due.<sup>67</sup> The solicitor must collect any contributions due from the client and cannot recover unpaid contributions from the Legal Aid Board.<sup>68</sup> If the solicitor determines that the value of the legal services needed will be above fifty pounds, or ninety pounds where the work includes filing a petition for divorce or judicial separation, he or she must first obtain approval from the Legal

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proceedings, representation where the police apply for a warrant of further detention where a suspect is detained at a police station and representation for a prisoner before a Disciplinary Tribunal.

THE LEGAL AID HANDBOOK, *supra* note 35, at 9.

61. Advice and assistance is known as the "green form" scheme because of the green application forms used.

62. While both civil legal aid and legal advice and assistance are included in the same statute, a person cannot receive legal services under both provisions of the Act. Normally, depending on the nature of the problem, a person qualifies for legal advice and assistance first. Advice and assistance is limited to more routine problems not requiring court involvement, such as giving preliminary advice. Once the matter involves litigation, the recipient must apply for civil legal aid. If the solicitor determines upon initially meeting the client that the case clearly involves litigation, he or she will instruct the client to apply directly for civil legal aid.

63. Advice agencies are staffed social service offices which provide limited legal advice on minor issues.

64. See Legal Aid Act of 1988, ch. 34, § 4(4).

65. *Id.*

66. See *White Paper on Legal Aid in England and Wales: A New Framework* (CM 118) para. 28 (1987); Legal Advice and Assistance (Scope) Regulations 1989, SI 1989/550.

67. Unlike earlier acts, the financial limits of eligibility for advice and assistance are not set out in the Act itself but are prescribed by regulation. Further flexibility is guaranteed by permitting regulations allowing for legal advice and assistance in certain situations without regard to financial resources. Legal Aid Act of 1988, ch. 34, § 9.

68. THE LEGAL AID HANDBOOK, *supra* note 35, at 8.

Aid Board through a special application process. Legal services which will cost less than these amounts do not require prior board authorization.<sup>69</sup>

The program, in theory, is commendable in that it provides legal advice and assistance to the poor at no cost or at a minimal fee, and it tries to confront problems before they result in costly litigation. In practice, however, the fifty and ninety pound limits are too low, forcing solicitors to submit claims at these limits in order to avoid delays in giving advice and in receiving payment.<sup>70</sup> Consequently, solicitors are under-compensated for their work, may be tempted to cut corners because of the difficulty in obtaining adequate remuneration, and sometimes choose to forego legal aid work altogether.

## (ii) Alternative Legal Aid Programs

In addition to the green form system of legal advice and assistance, numerous other programs exist in England to address the legal needs of the poor. Unlike the statutory scheme, indigent clients can receive help from staff or volunteer solicitors in Citizens' Advice Bureaus, legal advice centers, and community law centers. These alternative programs are worth mentioning because of their increasing importance in England and similarity to staff-delivery programs in the U.S. As more and more solicitors decide not to participate in the legal aid scheme because of its inherent weaknesses, these staff programs have begun to fill the gap.<sup>71</sup> In this respect, the legal aid "scene" is beginning to look more like the federally funded legal aid program in the U.S. Actual government funding, however, continues to be channeled into the legal aid scheme set forth in the Act.

### (a) Citizens' Advice Bureaus

Although not funded by the Legal Aid Act, Citizens' Advice Bureaus (CABs) have been extremely effective at disseminating information concerning legal rights and legislation, and in helping people secure publicly funded benefits and services.<sup>72</sup> CABs provide legal advice on general matters involving welfare laws. In addition, they serve an important function by assisting applicants in preparing legal aid applications and by referring applicants to solicitors willing to handle legal aid and advice matters.<sup>73</sup>

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69. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 4.

70. *Id.* Although the limit has increased over the years, in 1973 an attorney could perform just over four hours of work within the cost limit, while today the limit covers less than 1-1/2 hours worth of work. The Lord Chancellor has indicated that the limit may be set as a multiple of the hourly rate. In any event, the present rate is insufficient because most advice matters require a solicitor's attention for more than 1-1/2 hours in order to adequately represent the client.

71. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 103; *White Paper*, *supra* note 66, at paras. 24, 26.

72. S. POLLOCK, *supra* note 22, at 52-53.

73. *Id.*

### (b) Legal Advice Centers

Legal advice centers, run by staff attorneys or volunteer lawyers, provide free legal advice and refer clients to local solicitors willing to engage in work under the legal aid scheme.<sup>74</sup> Although there are well over 200 legal advice centers in England, they lack funds and can only address relatively simple legal matters. Clients requiring continuing legal help or whose problems are more complex must turn to the private profession and obtain assistance under the Legal Aid Act. Ethical rules also limit the type and extent of work barristers and solicitors can do in such centers.<sup>75</sup> For example, private practitioners who take part in voluntary advice schemes are severely limited in the extent to which they can take a client back to their office; in most cases they must first obtain a Law Society waiver.<sup>76</sup>

In the early 1960s, when the neighborhood legal services office became the chief means of addressing the legal needs of the poor in the U.S., the legal profession in England debated the merits of such a system. The Law Society in particular actively opposed the idea of salaried solicitors providing legal services paid for with public funds.<sup>77</sup> More recently, in view of the increasing inadequacy of the private attorney system, support for advice centers has grown.<sup>78</sup> In its 1987-88 annual report on legal aid, the Lord Chancellor's advisory committee recommended strengthening advice centers by adding fifty additional staff resource lawyers to assist in training volunteers.<sup>79</sup> In addition, the White Paper on legal aid, which became the foundation for the Legal Aid Act 1988, advocated expanding the use of advice centers to handle areas where the special expertise needed is likely to be greater than that of solicitors in private practice.<sup>80</sup> It appears therefore that the British are considering adopting some of the more positive attributes of legal aid in the U.S.

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74. Although legal advice centers are a more recent development, since 1946 the Law Society's legal aid policy included a large number of salaried advice centers. In practice, however, salaried advice agencies have not become an integral part of the legal aid scheme. *Id.* at 73.

75. M. ZANDER, *supra* note 37, at 55. Consequently, the primary value of legal advice centers has been their ability to provide diagnostic consultations, make referrals, and handle routine problems requiring oral advice.

76. *Id.* According to Zander, barristers and solicitors can only provide oral advice confirmed in writing and draft letters to be signed by the client. *Id.*

77. *Id.* at 66-70. Many commentators, including the Law Society, feared losing the independence of the legal profession and the complete nationalization of legal services.

78. The judicare system is inadequate to the extent that fewer and fewer solicitors choose to participate in the program and eligibility requirements have increased, making it more difficult for applicants to qualify for legal assistance. In addition, staff programs may be able to provide higher quality legal services more efficiently because of expertise in "poverty law."

79. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 103.

80. *White Paper*, *supra* note 66, at paras. 24, 26.

### (c) Community Law Centers

The apparent success of American law centers set up in the 1960s led England to establish community law centers comprised of staff lawyers. These centers have become an important feature of legal aid for the poor in England.<sup>81</sup> Community law centers have the capacity to deal with group injustices which solicitors in private practice cannot address because they must focus on the individual needs of their clients.<sup>82</sup> As the U.S. legal aid program illustrates, however, law centers are not without their problems.<sup>83</sup> Gradually the legal profession in England is beginning to realize that the work of law centers and private solicitors is "complementary rather than competitive,"<sup>84</sup> so that when used properly, a broader range of legal services can be more effectively offered to the poor.

While law centers provide needed expertise in the special legal problems of the poor and valuable services in areas not covered by solicitors, these centers continue to face severe funding difficulties.<sup>85</sup> Although the Legal Aid Act 1988 falls far short of funding any comprehensive network of community law centers, the Act does enable the Legal Aid Board to issue funding grants to law centers.<sup>86</sup> Gradually, legal aid advocates are beginning to realize that increased funding for staff-type programs such as community law centers is vital to meeting the legal needs of the poor on a broad basis.

## 2. Administration, Application and Cost

### a. Administration of the Scheme

The Act transferred responsibility for administration of the legal aid system from the Law Society to a new Legal Aid Board consisting of between eleven and seventeen members appointed by the Lord Chancellor.<sup>87</sup> The Lord Chancellor has largely delegated his general supervisory power over administration of the Act to an advisory committee which reviews the work of the Legal Aid Board.<sup>88</sup> While one of the hallmarks of the legal aid scheme has been control by the profession, through both the Law Society and the solicitor's evaluation of client eligibility, only two positions on the Legal Aid Board are guaranteed for

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81. For the advantages of community law centers, see M. ZANDER, *supra* note 37, at 78-80.

82. T. GIFFORD, *supra* note 32, at 81.

83. Among the various problems facing law centers are high staff turnover, inadequate compensation, and poor working conditions.

84. T. GIFFORD, *supra* note 32, at 90. Law centers tend to focus only on certain areas of work, concentrating on the worst injustices, or test cases benefitting large groups. Consequently, because of limited resources, they are forced to refer many individual cases to private attorneys.

85. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 102. Of the 61 law centers presently in England, a majority are funded solely by local governmental authorities.

86. Legal Aid Act of 1988, ch. 34, § 4(4).

87. *Id.* at § 3.

88. *Id.*

solicitors.<sup>89</sup> This provision has been widely criticized as a means to silence the private solicitor, but in the long run it may prove advantageous if it increases the involvement of those well-versed in the problems of poverty, such as social workers or other experts.

For purposes of the legal aid scheme, England and Wales are divided into fifteen administrative areas, each containing an area committee and a legal aid office run by an area director.<sup>90</sup> The area committee handles appeals concerning refusal of aid and financial matters, including client billing.<sup>91</sup> Although the number of staff personnel needed to administer the system is quite large, from 1987 to 1988 only 7.21% of the net legal aid fund expenditure, or 25.5 million pounds, was spent on program administration.<sup>92</sup> This figure seems quite low given the complexities of administering a *judicare* program.

As is typical of bureaucracies, administrative problems plague the English legal aid system. From 1986 to 1987 the average time to process an application for a legal aid certificate was 124 days. In contributory cases the average time was as high as 231 days in South London.<sup>93</sup> As a result of these delays, the number of emergency certificates granted when the client has an immediate need and cannot wait for approval has greatly increased. Not only have increased backlogs of work given cause for concern, but delays in payment of bills continue to threaten the system because these areas significantly impact practitioners.<sup>94</sup>

## b. Legal Aid Eligibility

### (i) Financial Eligibility Requirements

Unlike the LSC programs in the U.S., English legal aid and advice is not free to all clients; if financially able, clients must make a co-payment directly to the solicitor. Financial eligibility is determined by calculating disposable income and disposable capital. Only those with weekly disposable income under 114 pounds and total disposable capital, after taking into account certain allowances, of less than 800 pounds are eligible for advice and assistance.<sup>95</sup> Using tables provided by the government, the solicitor determines eligibility and collects any contributions due from the client.<sup>96</sup> No contributions are required for legal aid where dis-

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89. *Id.* at § 3(7).

90. THE LEGAL AID HANDBOOK, *supra* note 35, at 7.

91. *Id.*

92. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, app. at 26. This represents a decrease from 8.15% in 1983-84.

93. 37TH LEGAL AID ANNUAL REPORT 147-48 (1986-87).

94. *Id.*

95. THE LEGAL AID HANDBOOK, *supra* note 35, at 1. These figures in U.S. dollars are \$163 and \$1,145, respectively. Wall St. J., Dec. 22, 1986, at 29, col. 1. Clients receiving supplementary benefit of family income or having a weekly disposable income of less than 54 pounds are eligible for free legal advice and assistance. This figure in U.S. dollars is \$77. *Id.*

96. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 10.

posable income is 2,255 pounds a year or less.<sup>97</sup> Civil legal aid will not be granted, except in extenuating circumstances, if disposable income is greater than 5,145 pounds or if total disposable capital is 4,710 pounds or more.<sup>98</sup> Any costs incurred over the amount of the contribution are absorbed by the legal aid fund.<sup>99</sup>

Since English law allows judgments to include successful litigants' attorney's fees, an assisted person may be reimbursed for the full amount of any contribution should the action succeed. Any recovery by an assisted person, however, whether costs or damages, is first applied toward reimbursement of legal aid fund expenditures.<sup>100</sup> If an assisted party loses a suit, the Act provides that his or her liability under a court order for costs shall not exceed an amount which is reasonable given the surrounding circumstances.<sup>101</sup> Consequently, the Act protects the legal aid recipient, win or lose.

In addition, in matters brought by assisted individuals, courts can require the legal aid fund to reimburse the costs of successful unassisted parties where it is satisfied the party would otherwise suffer severe financial hardship and it is fair for the costs to be paid out of public funds.<sup>102</sup> Thus, the Act provides a degree of security for the unassisted defendant against government-funded frivolous claims.

## (ii) Merits Test

In addition to meeting certain financial criteria,<sup>103</sup> the legal aid applicant must meet a two-fold merits test. First, a person must show "that he has reasonable grounds for taking, defending or being a party" to the action. Second, aid may be denied if "it appears unreasonable that he should receive it in the particular circumstances."<sup>104</sup> It appears, however, that the majority of legal aid applicants are able to meet the eligibility criteria. For example, approximately eighty-five percent of the applications for advice and assistance were granted in 1988 through 1989,<sup>105</sup> and approximately fifty-six percent of the applications for legal aid certificates were approved.<sup>106</sup>

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97. THE LEGAL AID HANDBOOK, *supra* note 35, at 2. This figure in U.S. dollars is \$3,229. Wall St. J., *supra* note 95, at 29, col. 1.

98. THE LEGAL AID HANDBOOK, *supra* note 35, at 3. These figures in U.S. dollars are \$7,368 and \$6,745, respectively. Wall St. J., *supra* note 95, at 29, col. 1.

99. Prior to the Legal Aid Act of 1988, contributions were payable over a 12 month period. They are now payable over the duration of the proceeding, which only creates further delays for practicing lawyers because many cases extend beyond a year. Legal Aid Act of 1988, ch. 34, § 16. Consequently, solicitors must wait longer for their money from the client.

100. *Id.* at § 17(1).

101. *Id.* at § 18(4)(b), (c). Factors to be considered include the financial resources of the parties and their conduct in the proceeding.

102. *Id.*

103. See *supra* notes 95-102 and accompanying text.

104. S. POLLOCK, *supra* note 22, at 37.

105. 39TH LEGAL AID ANNUAL REPORT, *supra* note 51, app. at 21.

106. *Id.* app. at 27.

## c. Cost

Like publicly funded legal aid elsewhere, the cost of English legal aid and advice continues to increase due to the growing need for government-funded legal aid and the inflationary cost of litigation. Legal aid expenditures for 1988 totalled 387 million pounds. Of this amount, thirty-three percent, or 136 million pounds, went to civil legal aid and eighteen percent, or 68 million pounds, was spent on legal advice and assistance, including assistance by way of representation.<sup>107</sup>

## B. Federally Funded Legal Aid in the U.S.

The U.S. government began funding civil legal aid in 1965 as part of President Johnson's "war on poverty." The primary goals of the federal legal services program, administered through the Office of Economic Opportunity,<sup>108</sup> were the following: (1) providing ordinary legal services to the poor, including offering civil legal advice, drafting legal documents, conducting negotiations, and representing claims; (2) law reform; and (3) community education to inform the poor of their legal rights.<sup>109</sup> Within a year and a half, the legal services program had a budget totalling forty million dollars, issued 300 grants, and established 800 neighborhood law offices serving 210 communities in all but two states.<sup>110</sup> Since this time, however, government-supported legal aid has proven extremely vulnerable to political pressure.<sup>111</sup>

From its inception, the program envisioned a federally funded organization of "store-front" lawyers representing the poor. In 1974, when the LSC replaced the Office of Economic Opportunity as the agency primarily responsible for administering federal funds for civil legal aid, funds continued to be channeled principally to staffed offices.<sup>112</sup> Staff attorney programs continue to constitute the chief delivery model in the U.S. today, but considerable debate has taken place over whether the LSC should institute alternative delivery systems such as *judicare*.<sup>113</sup> In 1980, the LSC published a study of other deliv-

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107. *Id.* app. at 75. These figures in U.S. dollars are \$692.7 million, \$243.1 million, and \$121.5 million, respectively. Wall St. J., Dec. 30, 1988, at C13, col. 1.

108. The Office of Economic Opportunity was established by the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964). The 1966 Amendments to the Act provided specific authorization to fund programs providing legal services to the poor. Economic Opportunity Amendments of 1967, § 211-1(b), Pub. L. No. 89-794, 80 Stat. 1451, 1462 (1966) (repealed in part by Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378).

109. M. ZANDER, *supra* note 37, at 63.

110. *The Legal Services Corporation*, *supra* note 3, at 598.

111. *Id.*

112. The LSC was created by the Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. §§ 2996-2996l (1982)). The LSC is an independent nonprofit corporation which provides no direct legal aid to clients; rather, it grants funds to private legal services programs in each state that in turn provide direct services for the poor. Although other sources of federal funding for legal aid exist, LSC is the chief source of funds. Saltzman, *supra* note 6, at 1166 n.10.

113. Saltzman, *supra* note 6, at 1167-1168.



ery methods and concluded that little difference existed in the quality of services provided under the alternative systems.<sup>114</sup> Thus, the study found that the U.S. staff attorney delivery model is not necessarily better or worse at meeting the needs of the poor than a *judicare* system which encourages increased involvement of the private bar.

Unlike the English civil legal aid system, which reimburses private practitioners for their representation of individual clients, under the Legal Services Corporation Act ("LSC Act"), the LSC issues grants to state or local legal services organizations<sup>115</sup> which provide actual legal advice and representation to eligible clients.<sup>116</sup> Although the LSC is charged with ensuring that grant money is used to provide economical and effective delivery of legal assistance,<sup>117</sup> once the minimal statutory requirements are met, the LSC exercises little control over what actually goes on within the individual legal aid offices.<sup>118</sup> While nothing in the LSC Act requires grant recipients to adhere to a particular delivery model, the majority of the over 300 legal aid offices receiving LSC funds are staff-attorney type programs.<sup>119</sup>

### 1. Scope of Coverage

Like the English legal aid system, the type of services provided under government supported legal aid is not without limits. Although federally funded legal assistance was initially viewed as a tool for addressing the overall problem of poverty, the LSC Act contains numerous restrictive amendments designed to curtail activities that might result in controversial law reform.<sup>120</sup> For example, the statute prohibits legal

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114. LEGAL SERVICES CORPORATION, THE DELIVERY SYSTEM STUDY: A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES (1980) [hereinafter LSC REPORT]. See pages i-viii for the LSC Board's conclusion, recommendations, and policies based on the study.

115. 42 U.S.C. § 2996f(a)(6) (1982).

116. *Id.* at § 2996a(1)(A).

117. *Id.* at § 2996f(a)(3).

118. According to a 1983 field study conducted by the LSC, only 2.1% of the annual LSC budget goes to field monitoring and evaluation, indicating that contact with the local legal services offices is minimal. Each legal aid office submits a grant application in the fall which provides details of how the office is to be run, the number of attorneys and other staff needed, salaries of staff members, other funding sources, and equal employment and affirmative action data. LEGAL SERVICES CORPORATION, CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORPORATION STATUTE OF 1983: A FACT BOOK 1-2 (1983).

119. By 1981, however, 20 *judicare* programs were operating under LSC funding. *The Legal Services Corporation*, *supra* note 3, at 617.

120. Conservatives often oppose government funding of legal aid because they view it as a tool to promote liberal ideology. For example, conservatives oppose attempts by LSC lawyers to influence legislation through lobbying for increased rights for the poor or to encourage tenant organization. Involvement in such activities, however, while often feared, is nonexistent; legal aid lawyers are, for the most part, too overwhelmed with dealing with individual client needs to actively engage in these more seemingly "radical" activities. Notwithstanding the reality of LSC programs, as Kenneth Jost recently pointed out, critics "continue to spread the myth that legal-aid lawyers are pursuing a political agenda rather than helping the poor resolve

services lawyers from attempting to influence the passage or defeat of any legislation unless the legislation directly affects the LSC or a particular client.<sup>121</sup> In addition, the statute forbids LSC involvement with school desegregation cases,<sup>122</sup> nontherapeutic abortion cases,<sup>123</sup> and selective service and desertion matters.<sup>124</sup> To further limit the ability of LSC lawyers to bring about radical change, the LSC Act prohibits legal services attorneys from filing class actions without prior administrative approval.<sup>125</sup>

Finally, to alleviate criticism from private practitioners that legal aid interferes with the private market for legal services, the statute proscribes the use of legal aid in fee-generating cases.<sup>126</sup> In this respect, government-funded legal aid in the U.S. is markedly different from the English system where reimbursement of the legal aid fund is provided, in part, through fee-generating cases.<sup>127</sup> Despite these restrictions, as long as individual legal assistance projects follow the guidelines outlined in the statute and the LSC regulations, they are relatively autonomous and are free to provide whatever legal services they deem necessary.

Federally funded legal assistance was originally conceived as a means to reform laws by bringing test cases and advocating legislative changes. This reform was meant to address the structural problems which cause poverty. In practice, however, the majority of LSC-funded programs provide legal aid in the form of noncontroversial individual representation.<sup>128</sup> Thus, legal aid in the U.S. is similar to the British scheme. Furthermore, in the U.S., as in England, the bulk of legal aid work involves family matters.<sup>129</sup>

## 2. *Administration of LSC-funded Legal Aid Projects*

### a. *General Administration*

The LSC Act seeks to satisfy not only the need for political independence of the LSC and of individual field programs but also Congress'

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'ordinary day-to-day legal problems.' " Jost, *Sabotaging Legal Aid*, *Christian Science Monitor*, June 2, 1989, at 19, col. 3.

121. 42 U.S.C. § 2996e(c) (1982).

122. *Id.* at § 2996f(b)(9).

123. *Id.* at § 2996f(b)(8).

124. *Id.* at § 2996f(b)(10).

125. *Id.* at § 2996e(d)(5).

126. *Id.* at § 2996f(b)(1). Fee-generating cases are cases in which the aided party may recover pecuniary damages. For example, the statute precludes using LSC funds to aid plaintiffs in personal injury actions because the potential damage awards would take fees away from private lawyers willing to work on a contingency basis.

127. *See supra* note 100 and accompanying text.

128. Most LSC-funded cases involve only one client and concern ordinary problems. The breakdown of legal aid cases is as follows: 30% involve family matters; 17% involve housing problems; 13% involve income matters, such as social security, welfare, and unemployment compensation disputes; 12% involve consumer and finance law; and 21% involve several other categories such as employment disputes, and immigration and naturalization. *The Legal Services Corporation, supra* note 3, at 613-14.

129. *Id.*

desire for some measure of accountability. To foster political independence and accountability, the President appoints the LSC's eleven-member board of directors with the advice and consent of the Senate, and no more than six of the directors can be from the same political party.<sup>130</sup> Furthermore, the Act prohibits the use of LSC funds for political purposes.<sup>131</sup> In addition, the requirement that local legal services programs which receive LSC grants be governed by a board of which approximately two-thirds of the members are attorneys further promotes accountability.<sup>132</sup>

Although LSC projects involve federal funds, administration of legal aid under the LSC Act occurs at the local level once the project meets the relatively minimal federal guidelines concerning eligibility and scope of work. A nine-member advisory council in each state, appointed by the governor, oversees local activities, guards against violations of the LSC Act,<sup>133</sup> and files an annual report with the President and Congress.<sup>134</sup> The local legal services programs are independent, nonprofit corporations governed by a board of directors drawn from the local community.<sup>135</sup> A designated percentage of private lawyers and eligible clients serve on the board.<sup>136</sup> Based on local needs and resources, the local board establishes overall policy, sets priorities for the program, and hires its own staff.<sup>137</sup>

#### b. Eligibility

Like the English legal aid system, eligibility for legal aid under the LSC is determined on the basis of income and capital. A number of other criteria are also relevant, however, including fixed debts, medical expenses, cost of living variations, and other factors which affect a client's ability to pay for legal services.<sup>138</sup> The local field office, as in England, determines eligibility using the program's guidelines when the client requests assistance. Eligibility is tied closely to the Federal Poverty Income Guidelines, and although local offices may impose more stringent requirements, the standard is equivalent to 125% of the national poverty level.<sup>139</sup> The maximum income level for a family of four to qualify for legal aid under the LSC is \$14,562; the maximum income level for an individual is \$7,212.<sup>140</sup> Consequently, unlike the British system, federally funded legal aid is limited to the very poor.

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130. 42 U.S.C. § 2996c(a) (1982).

131. *Id.* at §§ 2996e(d)(3),(4), 2996f(a)(5).

132. *Id.* at § 2996f(c).

133. *Id.* at § 2996c(f).

134. *Id.* at § 2996g(c).

135. *Id.* at § 2996f(c); REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR, *supra* note 5, at 4-5.

136. REPORT ON THE STATUS OF LEGAL SERVICES, *supra* note 5, at 4-5.

137. *Id.* at 5.

138. 42 U.S.C. §§ 2996f(a)(2)(A)-(B) (1982).

139. Maximum Income Level, 45 C.F.R. § 1611.3 (1988); Legal Service Corporation Poverty Guideline, 45 C.F.R. § 1611, app. A. (1988).

140. These figures are for all states except Alaska and Hawaii. *Id.*

## c. Costs

One of the biggest problems facing the LSC, and legal aid programs everywhere, is funding. This problem became particularly acute during the Reagan Administration. As its goal, LSC seeks to provide two attorneys for every 10,000 poor people, which it believes represents "minimum access" to legal assistance.<sup>141</sup> Although it met this goal in 1980, it has since failed to achieve minimum access, in large part, because of reduced funding and numerous attempts by the Reagan Administration to abolish the program altogether.<sup>142</sup>

Since the conservative attack on the LSC which began in the 1980s, Congress has continued to fund LSC. This funding, however, has been at reduced levels. In 1981 for example, the LSC budget was reduced more than twenty-five percent from \$321 million to \$241 million.<sup>143</sup> LSC supporters have managed to fend off further cuts, but funding, when adjusted for inflation, is still about twenty-three percent below its pre-Reagan level.<sup>144</sup> Obviously, a cut of this proportion greatly reduces the effectiveness of the legal aid program and is a serious blow to the poor, particularly in view of the dire need for expanded legal assistance.<sup>145</sup> Between 1981 and 1983, decreased funding forced 25.5% of all legal aid field programs to close.<sup>146</sup> Budget cuts have also resulted in (1) the elimination of specialized units,<sup>147</sup> (2) reduced training programs,<sup>148</sup> (3) an inability to handle complex cases and engage in "impact work,"<sup>149</sup> and (4) reduced support services and legal research capabilities.<sup>150</sup>

Although the LSC clearly needs increased levels of funding, it effectively keeps administrative costs down. In 1983 for example, only 4.2% of the total legal services budget went to management, administration, field monitoring, and evaluation. The remaining 95.8% of the funds went directly to the 326 legal services programs administered in 1,121 individual legal aid offices.<sup>151</sup> When compared to administrative costs of judicare systems such as the English system, staff attorney programs thus appear to be more efficient.<sup>152</sup>

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141. *The Legal Services Corporation*, *supra* note 3, at 609.

142. *Id.* at 609-11.

143. Besharov, *Legal Services Corporation Is Alive and Ailing*, Wall St. J., June 22, 1989, at A14, col. 4.

144. *Id.*

145. *See supra* notes 8-13 and accompanying text.

146. REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR, *supra* note 5, at 24.

147. LSC-funded specialized law units, which focused on particular areas of law such as consumer, family, and housing law, have since been eliminated. *Id.* at 34.

148. *Id.* at 36.

149. *Id.* at 37-38.

150. *Id.* at 38.

151. LEGAL SERVICES CORPORATION, *supra* note 118, at 1-2. Because of the cutbacks in funding, the number of field programs declined from 1,475 in 1981 to 1,121 in 1983.

152. *See supra* notes 92, 151 and accompanying text.

## II. Analysis

### A. Judicare Versus Staff Attorney Programs

#### 1. Addressing the Problems of Poverty

In the late 1970s the LSC conducted an extensive study of the staff attorney legal aid program and alternative methods of providing legal assistance, including judicare. Its final report, issued in June, 1980, found no significant differences in cost, client satisfaction, or quality of services between judicare and staff attorney programs.<sup>153</sup> The LSC concluded, however, that staff programs did more "impact work," permanently improving the legal rights and living conditions of the poor, than did programs based primarily on private attorney involvement such as judicare.<sup>154</sup> The study suggested that full-time staff attorneys are more likely to engage in law reform activities and to develop broad legal attacks on poverty problems than are compensated private attorneys.<sup>155</sup> The study also found that the most effective three methods of delivering legal aid—combined judicare and staff programs, contracts with law firms as a supplement to staff programs, and pro bono private bar delivery in partnership with staff programs—could easily involve the private bar.<sup>156</sup>

Consequently, the English legal aid system, to the extent that it seeks to address the underlying problems of the poor, would benefit from increased staff-attorney programs which could be provided through its existing law centers and advice bureaus. Presently, federally funded legal aid in the U.S. appears, at least in theory, to be more committed to social change because experienced staff attorneys can prioritize and channel resources to format social change. In contrast, civil legal aid in England is not limited to meeting the needs of the very poor.<sup>157</sup> Consequently, addressing the problem of poverty is not its primary goal.

English legal aid represents a fundamentally different approach to poverty. Clearly, it is concerned with the problems of the poor; however, it arguably does not stigmatize those who are needy because it treats the poor and the rich equally. For example, setting up separate legal aid offices for the poor serves to isolate the poor from the rest of society, and thereby stigmatizes the poor and shields the remaining population from the problems of poverty. In addition, while many of the problems dealt with in legal aid offices are unique to the poor, the majority of their problems, which involve family matters, are not.<sup>158</sup>

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153. LSC REPORT, *supra* note 114, i-viii (LSC Board's conclusions, recommendations, and policies based on the study).

154. *Id.* at 136.

155. Research indicates, however, that this difference is probably insignificant because in practice most legal services programs focus on noncontroversial individual representation. See generally, *The Legal Services Corporation*, *supra* note 3, at 612-29.

156. LSC REPORT, *supra* note 114, at vii.

157. See *supra* notes 34-38 and accompanying text.

158. See *supra* notes 128-29 and accompanying text.

By treating the legal problems of the poor as a specialty to be addressed only in legal aid offices,<sup>159</sup> many lawyers justify their lack of involvement in legal assistance programs. For example, separate legal aid offices and legal services lawyers allow private attorneys to isolate themselves from the problems of the poor and to convince themselves that these problems do not exist or are being adequately addressed. Not only is this contrary to the lawyer's professional responsibility but it also hinders progress toward the goal of equal access to justice. Because the need for legal aid is so great, any viable solution to the desperate situation of the poor requires the involvement of the entire bar.

The best approach to providing legal assistance, therefore, is a mixed delivery system consisting of a substantial number of staffed legal aid offices which also utilize the services of private lawyers. Staff attorneys can focus on the larger picture, offer guidance and training where necessary, and provide needed organization. Staff attorneys cannot meet the legal needs of the poor alone, however, particularly in view of recent federal budget cuts. Thus, they must find ways to tap into the enormous resources of the private bar.

## 2. *Efficiency of Legal Aid in the U.S. and England*

Advocates of the American system argue that staff attorneys develop expertise in "poverty law" and, consequently, efficiently provide higher quality legal services. Some argue that staff attorneys "tend to be hard-working, committed attorneys who have chosen to represent the poor despite their own low salaries," while private attorneys participating in judicare programs "tend to be inexperienced or marginally successful attorneys who take judicare cases, despite low compensation, because they need the experience or the money."<sup>160</sup> LSC attorneys may be more altruistic than private attorneys. There is, however, no evidence that private solicitors involved in English legal aid are any less committed to providing quality legal services to their clients, regardless of who pays the bill. In addition, there are no guarantees that staff attorneys are more experienced than private attorneys in specialized areas of the law. LSC programs, however, unlike the judicare system in England, assure some measure of quality control through the mechanisms inherent in a staff office.

While expertise in "poverty law" may be helpful, many of the difficulties facing legal aid clients are not problems unique to the poor. In

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159. The legal problems of the poor have come to be viewed by some as a special area of law often referred to as "poverty law," which primarily involves welfare matters such as housing and income maintenance. In some ways this is an unfortunate term, because it suggests there is a special branch of the law which applies only to the poor as opposed to the rest of society. While there is value in focusing on the rights of people under severe financial disadvantages, the concept of "poverty law" tends to be divisive and has led to the concept of the "poverty lawyer." The problems surrounding poverty should not be left for a few people to solve. Instead, they demand the attention of all members of society, including the organized bar.

160. Saltzman, *supra* note 6, at 1171.

fact, the vast majority of cases involve routine family matters.<sup>161</sup> Thus, lawyers should not use their lack of training in poverty law as a justification for their refusal to participate in legal aid, particularly when the legal problems of the poor are of such a magnitude that they cannot be adequately addressed by legal aid offices alone.<sup>162</sup>

### 3. Comparative Costs of Each System

Although the American and English systems are vastly different and therefore difficult to compare in terms of cost, staff attorney legal aid appears less costly than the English *judicare* system.<sup>163</sup> One must keep in mind, however, the distinct goals of the two schemes. For example, the English system seeks to provide legal aid to a greater percentage of the population than the U.S. system, which focuses its legal assistance efforts on the most needy.<sup>164</sup> Ideally, given the skyrocketing cost of hiring any attorney for even the simplest matter, a system based on a sliding scale requiring contributions would best insure equal access to justice. In theory at least, a greater number of people would benefit from such a program. It seems fair to require each person to contribute what he or she is able.<sup>165</sup> Obviously, involving the private bar with legal aid programs is costly. Advocates of staff attorney programs argue that administrative costs of centralized legal aid offices are lower than in mixed delivery stems, and staff attorneys, because of their expertise, provide representation more efficiently than private lawyers. Even if the government maintains a low level of compensation for private attorneys, which is a problem from the standpoint of encouraging attorney participation, administrative costs of the English legal aid program are still relatively high.<sup>166</sup> When the scope of services is considered, however, the

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161. See *supra* notes 128-29 and accompanying text.

162. According to William J. Dean, Director of Volunteers of Legal Service in New York City, "the mismatch between private bar skills and the legal needs of the poor is no excuse. This difficulty is usually overstated." He points out that lawyers learn new things everyday and cites as an example the Lawyers Committee for Human Rights, which took hundreds of attorneys without any knowledge of immigration law and trained them to handle asylum cases effectively. Dean, *The Poor of the City*, N.Y.L.J., May 16, 1989, at 3, col. 1.

163. Johnson, *Further Variations and the Prospect of Some Future Themes*, in *TOWARDS EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* 140-55 (M. Cappelletti, J. Gordley & E. Johnson, Jr., eds. 1975).

164. See *supra* notes 32-38, 139-40 and accompanying text.

165. There are probably persons with moderate incomes who would benefit from increased access to legal services but, because of the enormous costs often involved in hiring a lawyer, are unable to utilize such services. These persons would benefit from subsidization of legal services. Those who are unable because of their financial position to contribute to legal aid would continue to receive free legal assistance.

166. In 1983, 95.8% of LSC funds went directly to providing legal services and only 2.5% was used for central management and administration. This does not include, however, management and administration costs at the local level. LEGAL SERVICES CORPORATION, *supra* note 118, at 2; Oleske, *Federally Funded Legal Services after Two Decades*, 29 BOSTON B.J. 4, 7 (1985). In comparison, 7.21% of the English legal aid budget for 1987-88 was expended on administration. 38TH LEGAL AID ANNUAL REPORT, *supra* note 38, at 76, app. 4H(i).

difference in expense does not appear as severe.<sup>167</sup>

If staff attorney legal aid is indeed less expensive, the private attorney aspects of English legal aid could be supplemented by staff attorneys experienced in poverty law, who could deal with problems requiring specialization. Particularly in geographic areas heavily populated by the poor, increased use of community law centers and legal advice centers would prove beneficial.

#### 4. *Range of Services Provided by Legal Aid Offices*

The legal aid offices funded by LSC and the community law centers and legal advice centers in England may provide a wider range of services than a system comprised solely of compensated attorneys. Such offices often have social workers, community advocates, and legal assistants who can address a variety of problems.<sup>168</sup> Arguably, these centers also provide a higher level of service because they deal with the "whole person," rather than focusing on discrete legal issues as a private attorney might. Thus, legal aid centers may be able to provide a broader range of legal and social services, thereby better meeting the needs of indigent clients.

Legal aid offices are more accessible to the poor and, consequently, are more likely to be fully utilized. Poor clients may feel more comfortable seeking legal assistance from a neighborhood legal center than from a private attorney's office, which might be imposing and inconveniently located.

#### 5. *Private Attorney Involvement*

Wide-scale private attorney participation is critical to meeting the desperate need for legal aid and addressing the problems of the poor. Freedom of selection, the hallmark of the English legal aid system, however, is not a crucial part of a successful legal aid program. Freedom of choice in determining whom to hire as counsel is an admirable objective, especially if the goal of legal assistance is to provide legal services similar to those used by the wealthy. Since there are, however, a decreasing number of attorneys involved in English legal aid and since most individuals do not know how to select a lawyer, sacrificing a portion of this freedom and encouraging greater staff involvement may result in higher quality legal services for a greater number of people. At least with respect to certain more complicated legal matters requiring expertise in the legal problems of the poor, an area of law which is quite small,<sup>169</sup> staff attorneys may be able to provide better legal assistance.

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167. The English system is broader in scope because legal assistance is not limited to the very poor.

168. In 1983, in addition to the 4,791 attorneys funded by the LSC, LSC field programs employed 2,052 paralegals, 293 law clerks and 851 professional non-attorneys. LEGAL SERVICES CORPORATION, *supra* note 118, at 13.

169. See *supra* notes 161, 162 and accompanying text.



An advantage of the English legal aid system, however, is its ability to marshal the support of large numbers of private attorneys to assist in providing legal services to the poor. Not only does the English system expose lawyers to the problems of the poor, but judicare is less vulnerable to political pressure. Moreover, because English legal aid solicitors act independently, they are better able to preserve the traditional attorney-client relationship. Consequently, with such large-scale support and an emphasis on noncontroversial services, the system withstands political attack more successfully than its American counterpart.

#### B. Recommendations For The Future

Federally funded legal aid programs should focus on individual client needs rather than seeking fundamental changes in society. Legal aid should not be a battleground for liberals and conservatives because the poor, as evidenced by legal assistance during the past decade, suffer as a result. By providing noncontroversial individual representation as in England, government funding could achieve bipartisan support and thereby ensure legal aid's continued existence. Broad political support is crucial to adequately meeting the legal needs of the poor.

The legal aid budget cuts could not have come at a more inopportune time; legal services programs began to scale down operations just as the need for legal assistance began to surge.<sup>170</sup> Furthermore, legal services programs have suffered greatly from the twenty-five percent cut in the LSC budget. A 1983 study on the status of legal services for the poor conducted by the Washington Council of Lawyers revealed that (1) the reduction in funding has not been made up by increased involvement by the private bar; (2) programs have lost an average of thirty percent of their staff attorneys and nearly one-third of their non-attorney staff; (3) hundreds of thousands of potential legal aid clients were denied access to legal services because of office closings; (4) legal aid offices are forced, due to lack of resources, to handle primarily emergency cases; and (5) the decrease in available legal aid has created frustration and disillusionment among the poor with the American ideal of equal justice.<sup>171</sup> Lack of funding and political pressures within the LSC have left the poor in a desperate situation.

Legal aid desperately needs an increase in funding. Although the LSC is not free of problems, it needs more money to provide legal services through local legal aid offices.<sup>172</sup> In view of the drastic need for

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170. The increased demand for legal aid is due in part to the massive restructuring and contraction of social service programs by the Reagan Administration. It is also a product of recession, especially the decline in employment which created hundreds of thousands of newly eligible legal services clients. REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR, *supra* note 5, at 7.

171. *Id.* at 1.

172. A recent study conducted by the American Enterprise Institute under a contract from the LSC indicates that there is a decline in the productivity of local legal aid offices. Data collected annually by the LSC suggests that the decline in productivity between 1975 and 1987 could be as much as 20%. In addition, the study notes

legal aid, funding must be returned at least to its pre-Reagan level. In the long run, because it probably is less costly and more efficient than relying on the private bar, higher public appropriations for full-time professional legal services may be the most effective answer to the desperate need of the poor for legal help. Full-time professional legal assistance alone, however, is not enough.

Ideally, the vast majority of legal aid work should be done by government lawyers working from local legal aid offices. Private attorney involvement offers a greater degree of freedom of choice, heightens lawyers' awareness of the unique problems of poverty, and fulfills the demands of the code of professional responsibility. The high expense of training, the enormous administrative burdens and the need for technical assistance and supervision, however, make a private attorney based *judicare* system less desirable. The private bar lacks experience in public benefits, food stamp law, Aid to Families With Dependent Children (AFDC), Medicare/Medicaid, federal housing law, and tenants' rights issues. A mixed system, therefore, with a substantial staff base would improve delivery of legal aid. It should, however, be left to the local program offices to determine the appropriate composition of private and staff work.

Until government funding reaches an adequate level, legal aid programs will have to rely on the private bar to provide necessary services. Many areas around the country are beginning to consider mandatory *pro bono* programs in an attempt to address the growing need of the poor for representation.<sup>173</sup> Presently, only about seventeen percent of the nation's 659,000 private attorneys engage in any type of *pro bono* program.<sup>174</sup> The only way to meet the current crisis in legal aid is to tap into this yet unused resource. While mandatory *pro bono* may or may not be an ideal solution, the English system demonstrates the advantages of private attorney involvement.

Recent attempts to increase private attorney involvement in legal aid are admirable, but the private bar has yet to fill the gap between the desperate need for legal representation and the availability of legal assistance.<sup>175</sup> One possible solution would be to require mandatory legal aid work and split costs between clients and the government, with a portion of the costs compensated by the state and a portion by the indi-

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that many LSC attorneys lack the skills, experience, or supervision needed to handle cases expeditiously. According to Douglas J. Besharov, who completed the study: "Since staff turnover is high, many lawyers fresh out of school handle cases under the supervision of attorneys with only two or three years' experience. The turmoil of recent years has taken its toll on staff quality and morale, which, in turn, reduces productivity." Besharov, *supra* note 143, at A14, col. 4.

173. *The Sad Fate of Legal Aid*, TIME, June 20, 1988, at 59.

174. *Id.*

175. Critics of the LSC often argue that the private bar can replace the services formerly provided by the LSC. At least as of 1983, however, the private bar had not filled the gap created by decreased federal funding. REPORT ON THE STATUS OF LEGAL SERVICES FOR THE POOR, *supra* note 5, at 43.

vidual client if the client was able to pay. At the very least, the state should compensate attorneys for out-of-pocket expenses. Attorneys could also have the option of foregoing government aid and providing their services pro bono. Such a mixed system would make mandatory legal aid work less financially burdensome for attorneys, particularly for small practitioners, because attorneys would not be forced to work without at least some compensation.

In addition, financial burdens on attorneys could be decreased if legal aid recipients had to pay a set reduced rate. Social service programs increasingly require co-payments from people who cannot afford to buy goods or services at their market price. Incurring some out-of-pocket costs encourages recipients to prioritize their needs. In this way, scarce resources are directed to the services that recipients consider most important. In addition, requiring legal aid recipients to contribute to the cost of their legal services when they are financially able removes the stigma of legal aid as charity. Not only would this proposal allocate resources to those who need them most, but would also theoretically serve more people in need of legal services. Thus, requiring legal aid clients to make a contribution toward their legal services, when they are financially able to do so, would be advantageous.

## **Conclusion**

Increased federal funding of civil legal aid and expansion of staffed legal aid offices are critical to providing adequate and effective legal assistance. In addition, because of the enormous need for civil legal aid, federal legal assistance programs must find ways to encourage private attorney involvement. A mandatory pro bono requirement is one solution; the controversial nature of such a requirement, however, suggests that a long battle may ensue before such a program is adopted. Instead, the advantages of increased private bar involvement, as evidenced by the British scheme, could be achieved by incorporating *judicare* components into the present legal aid system. For example, such a scheme might include requiring a contribution from those able to pay and compensating private attorneys for at least a portion of their services.

The failure to provide adequate legal aid takes an enormous toll not only on the poor but also on the public as a whole. The absence of adequate representation and the subsequent denial of access to public resources imposes significant social and economic costs on society. Denying a poor family counsel in an eviction proceeding, for example, greatly increases the likelihood that the family will become homeless, thereby increasing the cost to society in dealing with homelessness.

In addition, increased legal aid is needed to maintain the legitimacy and integrity of the legal system. The Committee to Improve the Availability of Legal Services recently noted that the gap between the need for legal services and their availability undermines the legitimacy of the legal system itself:

It is grotesque to have a system in which the law guarantees to the poor that their basic human needs be met but which provides individuals no realistic means with which to enforce that right. The absence of legal assistance to the poor goes to the essence of some fundamental principles ingrained in our jurisprudence: simple equity, due process, equal protection, even elementary access to the judicial system to redress wrongs.<sup>176</sup>

Equal access to justice is a fundamental principle in American society. Without access to adequate legal representation in civil as well as criminal matters, however, equal access to justice is a meaningless concept. An adequate legal aid system is necessary to ensure that the poor do not become frustrated and disillusioned with the ideal of equal justice.

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176. COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, PRELIMINARY REPORT TO CHIEF JUDGE WACHTLER 15 (submitted June 30, 1989).

