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The American Approach: Public Funding, Law Reform, and Staff Attorneys

E. CLINTON BAMBERGER, JR.*

Legal aid in the United States has three characteristics that I consider fundamental, essentially immutable, and affecting the rational purposes of legal aid. Those characteristics are substantial public funding, reform of the law for the benefit of the poor, and full-time salaried lawyers specializing in the law of the poor. I will do no more than describe those characteristics in the simplest terms, suggest some possible consequences and concerns, and turn to Professors Schlesinger and Gordley for an analysis of other legal aid systems and how they compare with legal aid in the United States.

A. PUBLIC FUNDING

In 1962 about $4 million was donated by private sources to support legal aid in the United States.¹ In 1967 the Legal Services Program of the Office of Economic Opportunity made grants of $41 million dollars for legal aid.² For the fiscal year that began on October 1, 1976 the Legal Services Corporation has an appropriation of $125 million to support civil legal assistance for the poor.

When legal aid depended on private charity no one expected that there would be sufficient resources to provide legal assistance to all the poor. Whatever impetus for growth there was came from the leaders of the National Legal Aid and Defenders Association. They set objectives no grander than the establishment of offices in every principal city. There were never enough resources or offices or enough lawyers in any office to do more than assist a very small percentage of the poor.³ The poor were not involved in determining the policy of legal aid. What was

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2. Johnson, The O.E.O. Legal Services Program, 14 CATH. LAW. 99 (1968). For further quantitative analysis of the OEO Legal Services Program, see E. JOHNSON, JR., supra note 1, at 188-91.

done was done by lawyers.\textsuperscript{4}

The infusion of public funds made legal aid for all the poor a possibility. The poor are now involved and, along with the legal aid lawyers, they expect sufficient funds to give legal assistance to all who need but cannot afford it. Some claim that the expectation is a political right.\textsuperscript{5}

The cost of barely adequate legal aid for all the poor is roughly $500 million. That would support five attorneys for every 10,000 poor people.\textsuperscript{6} Although we spend much more for less important things than justice, if we are to spend a half a billion dollars (or even when we spend a quarter of that, as we do now) to provide lawyers for poor people, we must think more about who else needs and cannot afford lawyers, and why anybody needs so much lawyering. Some of that thinking has begun. Pre-payment for legal assistance, legal cost insurance, and legal services as a fringe benefit of employment are new interests of those people who live between the poor and the rich and cannot afford the legal advice they need. Their interests were stimulated by the growth and visibility of legal aid for the poor.

There is now discussion of reducing the unmet need by "delawyering." The tasks reserved for lawyers and the reasons for their monopolies are not always clear. The scope of the practice of law is so uncertain that it could be defined as the tasks clients will pay lawyers to perform. Those tasks become the reserved practice of law and the exclusive province of lawyers whether they are performed for the rich or the poor. If public funds pay the bills of lawyers for the poor when non-lawyers can do the work as proficiently and at a savings, then clients and taxpayers will question the monopoly. In response to these issues, legal aid offices have expanded the use of para-legals to advise and represent the poor, particularly in seeking and protecting welfare payments and other administrative benefits. Some bar associations have

\textsuperscript{4} Privately funded legal aid offices were vulnerable to restrictive pressure from local bar and business interests which had offered financial support. J. CARLIN, J. HOWARD & S. MESSINGER, \textit{CIVIL JUSTICE AND THE POOR} 50 (1967).


\textsuperscript{6} In contrast with this long-range goal of providing barely adequate services through five attorneys for every 10,000 poor people, there are in the general population 14 lawyers available for every 10,000 persons. The bare minimum nature of the five attorney goal can be seen from the following: In a 1975 study, the Bureau of Social Science Research found that 23 percent of the nation’s poor face civil legal problems each year. Thus, for every 10,000 poor persons, there will occur approximately 2,300 legal problems each year—an overwhelming case load by the standards of private legal practice. The rough cost estimate of $500 million to provide this bare minimum of legal services to the poor people in the United States may not be enough. This is supported by the experience of the legal services programs which has shown that the average annual cost of funding one full-time legal services attorney with supporting staff and facilities is at least $35,000. \textit{See Legal Services Corporation Budget Request for Fiscal Year 1976}, at 9-10 (1976).
responded by seeking to prohibit non-lawyers from “practicing law.” It remains to be seen just which tasks will succumb to the delawyer ing process.

As the role of family, church, and private charity have declined we have asked the law and its institutions to do more. If you are poor, you depend on the law, regulations, and bureaucracies for the necessities of life. A law, a regulation, and a bureaucrat dispense food through food stamps, shelter through public housing, and medicine through Medicare. The poor are over-regulated by law.

Providing more legal aid will accentuate the inquiry of whether we need so much law in the lives of the poor. We must think more seriously about what we expect of the law and legal institutions.

B. LEGAL AID: FOR WHAT PURPOSE?

The first public money for legal aid was distributed with the rhetoric and philosophy of the War on Poverty, criticism of the old legal aid, and the promise of something more for the poor. Legal aid of the past was accused of seeking only to assure representation. It was said to be concerned with the form of due process—that the poor should have a lawyer for their “day in court”—and not with the substance of injustice in the laws that affect the poor. The new breed of legal aid lawyers was expected to redress the wrongs the law had inflicted upon the poor. The law and the lawyers would make the poor not so poor.

Reginald Heber Smith, a leader of legal aid in the first part of this century, contended that the substantive law treated the rich and the poor alike. He concluded that the poor suffered only because they did not have access to the law and the courts. If the poor had lawyers, they would have the fairness guaranteed by the law to both the rich and the poor.

The truth was and is that the law favors the rich and powerful, favors landlords over tenants and sellers over buyers. William Gossett, a national leader of the legal aid movement, a past president of the American Bar Association, and former general counsel to the Ford Motor Company, is a more credible authority for that view than I. He has said, “[a]s every lawyer knows, there are appalling injustices in the laws governing the relations between landlords and tenants . . . . So in

9. Id. at 33.
most states, legislative changes in landlord and tenant law are long overdue."\textsuperscript{10}

Legal services lawyers have assumed activist roles to effect change for the clients they represent. That is the zealous representation the Code of Professional Responsibility requires on behalf of every client.\textsuperscript{11} It is not distinguishable from the devotion to the causes of the banks, businesses, and insurance companies that were clients of the law firm with which I practiced for fifteen years. The obligation of legal aid lawyers to seek change in the law for the benefit of the poor fulfills the aspiration stated in the Code of Professional Responsibility:

> Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law . . . .\textsuperscript{12}

It should make no difference that the lawyer is supported by public funds. What matters is that the just law is enforced and the unjust law amended.

Law is a medium of economic and social power and lawyers are the brokers of law. As the poor have access to more lawyers they will have the chance to use the law to change existing relationships in order to seek power and a better place in society.

C. SALARIED LAWYERS OR JUDICARE?

Full-time, salaried lawyers have predominated in legal aid in the United States from its beginning. The first government funding of legal aid through the Office of Economic Opportunity was conditioned by the agency's concept that the lawyers should be accessible in the neighborhoods of the poor. Lawyers in private practice cluster in the business and financial districts; they are rare birds where the poor live. The traditional legal aid practice and the neighborhood law office concept favored the employment of full-time legal aid lawyers.

Within a month after the federal effort began there were inquiries and applications to allow the poor to select the lawyer of their choice to be


\textsuperscript{11.} "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . ." \textit{ABA Code of Professional Responsibility} EC 7-1 (footnotes omitted).

\textsuperscript{12.} \textit{ABA Code of Professional Responsibility} EC 8-2.
compensated from the public fund. The proposal took the name "judicare" from its medical counterpart. Its model was the British scheme that began in 1949. The proponents of a judicare system argued that the poor would be better served if they could choose from the best and most experienced members of the bar. The possibility of payment for work done for poor clients was an attractive concept for some.

In 1965, judicare had two principal advantages for promoters of effective legal aid. First, it would bring to legal aid the resources of the entire bar—at least all who would accept the poor as paying clients. Second, one could entertain the notion that, through the experience of serving the poor, more lawyers would learn of the legal needs of the poor, the complexities of the legal problems those needs involved, and the satisfaction gained from addressing those needs. Those lessons would generate more support for legal aid and its objective of equal justice.

However, unknown risks and perceived disadvantages suggested caution. Judicare was not likely to produce specialists in poverty law. Reform of the law might take longer under the judicare system. Three lawyers, representing three different tenants evicted because they complained of the landlord's housing code violations, might each obtain a delay of the eviction—but the pervasive problem would not be dealt with, and the test case to prevent retaliatory evictions might never be brought. The costs would, most likely, be higher through judicare. Salaried attorneys who become experts in problems of the poor and design systems to expedite repetitive work should be able to render comprehensive service at a lower cost.

To test the validity of those concerns, judicare experiments were begun in California, Connecticut, and Wisconsin. The offices in California and Connecticut have closed, the Wisconsin program still operates, and newer projects are functioning in West Virginia and Montana.

Major studies of the judicare experiments have reached contradictory conclusions. The authors of each assail the others for the biases of the


15. The hallmark decision prohibiting retaliatory evictions was obtained by a salaried legal aid attorney in Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).


researchers, the faults of the methodology, and the invalidity of the conclusions. We have many more facts than we did a decade ago but the validity of conclusions is not appreciably stronger. There must be additional experiments, better data accumulation, and more valid conclusions. The Legal Services Corporation Act is beginning to fill this need by requiring a report to the Congress on varying methods of providing legal services, including judicare. The Corporation has made grants for eight new judicare offices with requirements to produce facts that will support research to measure effectiveness, cost, and client satisfaction.

It is interesting to note that the English, who began in 1949 with judicare, have in recent years begun to imitate the full-time salaried attorney model of legal aid found in the United States. The reasons for change in England mirror the causes for skepticism about judicare in the United States.

America is not the leader in the provision of legal assistance for the poor. If we are to continue to be a society bound by law we must continue to expand the modes of access to the legal system. No people among us have a greater need for legal assistance than the poor. As Dean Cramton said, we have barely begun to provide equal access to the systems that dispense justice.

