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The Legal Profession
and the Process of Social Change:
Legal Services in England
and the United States*

By JERRY ALAN GREEN† AND ELLEN SICKLES GREEN‡

IN a decade characterized by technological achievements that make science fiction a reality as rapidly as it is written and by military potential that is capable of making human life an historical phenomenon, most inquiries resolve themselves into a question of how meaningful social change can be brought about.

Americans and Englishmen alike take pride in the assertion that their societies are governed by laws, not men; in both countries there is an ever-deepening awareness of the state's social responsibility for its citizens. Recent legislation and case law in England and the United States have played a part in the effort to bring about social reform. Outstanding in the United States are lines of judicial decisions that denounce separate public educational facilities for children of different races,¹ extend to state legislatures the requirement that political representation be based on population,² and require that poverty not be a criterion for depriving people of certain basic privileges such as a fair trial and appellate review.³ The most significant legislative measure in the field of social reform was the passage of the Economic Opportunity

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1. *E.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

2. *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962).

3. *E.g.*, *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

Act of 1964.⁴ Under the authority of the Act, the Legal Services Division of the Office of Economic Opportunity established legal services offices staffed with full-time salaried counsel for those who could not otherwise afford their own attorney.

Since the doctrine of precedent is strongly adhered to in England, test cases have not been readily viewed as a means to change the law. Generally law reform has come, instead, through parliamentary enactments. In 1949, Parliament established a government-sponsored system of legal aid.⁵ Its structure is somewhat different from that of the American program. Its purpose is to enable an indigent person to seek legal assistance from any practicing lawyer participating in the Legal Aid Scheme. The solicitor's and barrister's fee is provided wholly or partly at public expense.⁶

The two legal aid programs are founded in the principle, common to both legal systems, that justice requires equal access to the law by the rich and the poor alike. For a while, the American Bar Association seriously considered the English system as a more appropriate alternative for the United States than the neighborhood law office program.⁷ Recently, comparative evaluations and descriptive analyses of both programs have been provided in the legal literature.⁸

4. Pub. L. No. 88-452, 78 Stat. 508 (codified in scattered sections of 42 U.S.C.).

5. Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51.

6. For discussions of English legal aid see Dworkin, *The Progress and Future of Legal Aid in Civil Litigation*, 28 MOD. L. REV. 432 (1965); Matthews, *The English System—A Native View*, 22 LEGAL AID BRIEF CASE 71 (1963); Parker, *The Development of Legal Aid in England Since 1949*, 48 A.B.A.J. 1029 (1962).

7. See, e.g., Elson, *The Rushcliffe Report*, 13 U. CHI. L. REV. 131 (1946). While there are still those who would suggest the adoption of some facets of the English judicare scheme in the United States, there are English lawyers who believe that the American experiment has greater potential and should be introduced in England. See Abrahams, *The English Legal Assistance Plan: A Description of Its Machinery*, 36 A.B.A.J. 31, 33 (1950); Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1963); Liell, *Why Not Neighborhood Law Offices?*, 111 SOL. J. 763 (1967); Smith, *The English Legal Aid Plan: Its Significance for American Institutions*, 35 A.B.A.J. 453, 528 (1949); Utton, *The British Legal Aid System*, 76 YALE L.J. 371 (1966); Zander, *Poverty and the Law*, 1966 SOCIALIST COMMENTARY 13.

8. See generally Marsh, *Neighborhood Law Offices or Judicare?*, 25 LEGAL AID BRIEF CASE 12 (1966); Masotti & Corsi, *Legal Assistance for the Poor: An Analysis and Evaluation of Two Programs*, 44 J. URBAN L. 483 (1967); Paulsen, *The Expanding Horizons of Legal Services*, 67 W. VA. L. REV. 179, 267 (1965); Silverstein, *The New Ontario Legal Aid System and Its Significance for the United States*, 25 LEGAL AID BRIEF CASE 91 (1967); Stohr, *The German System of Legal Aid: An Alternative Approach*, 54 CALIF. L. REV. 801 (1966); Voorhees, *The OEO Legal Services Program: Should the Bar Support It?*, 53 A.B.A.J. 23 (1967); Note, *Symposium on Legal Aid*, 30 SASK. B. REV. 85 (1965).

In 1964, Americans Edgar and Jean Cahn wrote "The War on Poverty: A Civilian Perspective,"⁹ in which the authors described how a neighborhood law office would function, why it was necessary, and what some of its operative problems would be. Two years later, with the advantage of hindsight, they began to question the effectiveness of neighborhood law offices:

Underlying our exposition of the neighborhood law firm was the belief that we had provided a blueprint for an institution which would be responsive to the poor [W]e failed to consider that in theory all instrumentalities of law are founded upon a principle of responsiveness—nonetheless they have not worked. And slowly, but surely, neighborhood law firms, while paradoxically shedding light in an effective manner on the problems of the poor have already begun the long road to unresponsiveness.¹⁰

The Cahns asserted that "[t]he difficulties now being experienced by neighborhood law firms go to deficiencies in the nature of the legal system itself—deficiencies experienced by the middle class as well as the poor."¹¹

As architects of the neighborhood law office, the Cahns had a high regard for the potential role that lawyers could play in the effort to bring about meaningful social change; yet they felt compelled to reconsider their first evaluation of legal services by focusing on the inadequacy and inability of the courts to deal with the problems inherent in change.¹² Their second study encouraged us to examine, through a comparative analysis of the two legal aid systems, the purposes and objectives of a legal aid effort operating within the legal system.

An adjunct of the legal system, legal aid is designed to aid the poor. The specific ways in which each plan attempts to accomplish this end raise considerations about how legal aid involves lawyers in social planning and change. It is this aspect of both programs which is explored in this article. Using a functional analysis, we attempt to describe the differences and similarities between the American and English legal aid programs and thereby highlight their successes and failures in realizing their respective objectives.

Although the focus of our analysis is the extent to which legal aid efforts involve the law and lawyers in the process of social change, in working from this hypothesis toward a comparative study we do not assume that either program was designed and implemented toward this

9. 77 YALE L.J. 1317 (1964).

10. Cahn & Cahn, *What Price Justice: Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966).

11. *Id.* at 929.

12. *Id.* at 929-30.

end. The concept of social change is used, instead, as a sounding board; and a comparison between the two approaches is always qualified by the distinctive objectives of each program. Furthermore, even though the difficulties that prevent the complete success of both the English and American plans are examined, it is not the authors' intention to ascertain which plan is better or more advanced, but to emphasize their aims and social effects. Although suggestions regarding changes or superior procedures are not offered; we believe that a perspective on the dynamics behind the operation of a legal aid effort helps to explain the forces tending to impede and limit its progress. An understanding of these forces may itself aid in the formulation of alternative legal efforts to facilitate creative social change.

I. Concepts of Social Change

The concept of social change can include at least two processes: providing the poor with the amenities of a more comfortable life and changing the nature of their relationship with those who live around them in comfort. The crucial question is whether these changes can be realized under present English and American political systems.

Behind these two processes of social change lie two aspects of poverty. First, poverty is a product of substantial disparity of income distribution. Lack of financial means brings hunger, sickness, and inadequate facilities for education and recreation. Government welfare programs and organized charities can finance efforts to alleviate these conditions. Health programs, food subsidies and distribution centers, education and recreational activities all contribute to one aspect of social change by providing the services that are lacking because of inadequate financial means. This will be termed *quantitative* change.

Second, people of cultural or racial minorities suffer from an awareness that their lives are not subject to their own direction. They evidence little motivation to adopt and pursue the values and goals of the society whose rules they are taught to follow. This is the poverty of people who do not belong. Their identity is derived from a culture apart from that of the society within which they live.

In England, there are immigrants from countries that had been colonies of the British Empire for many generations. Yet they often retain their foreign identity, values, and heritage. The same can be said of the American immigrant from Mexico, the Orient, or the Caribbean. Similarly, the black American has a separate identity, culture, and value system. To the greater American society, he is an immigrant even though his ancestors lived in America. His slave heritage re-

mains alienated from the cultural mainstream; until recently he had no basis for developing a new identity. Immigrant communities are not ordinarily educated in the manner of thinking necessary for successful participation in the greater society. Consequently, they are left out. The remedy for this kind of poverty is a *qualitative* change in the relations between the poor and the rest of society.

The poverty that must be remedied by qualitative change is a consequence of economic and societal impotence. The poor man is on the receiving end of decisions that give shape to his day. For instance, others decide what buildings are constructed in his neighborhood and how his community will look. The poor man also lacks influence over the kind of job he may hold, the kind of food he eats, the clothes he wears, and the education his children receive. He cannot afford the alternatives that provide a choice for many others. Moreover, even the few who can afford to choose have only a choice between those alternatives presented to them. This choice is not the same as influence, for financial ability does not guarantee influence. Those affected lack the relations to institutions that would allow them to create the alternatives needed to escape their poverty of influence.

Decision-makers are influential not only because of their wealth, but also because of their relationships to institutions. The president of a corporation makes important decisions, but it is the prominence of the corporate institution in the economic order that determines the widespread effect of these decisions. The general, the president, and the prime minister all derive their power from their relations to a social institution and the relation that institution bears to the rest of the social order.

The individuals who occupy positions of influence have the ability to maintain their status through an "accumulation of advantages."¹³ Their policies and procedures for distributing goods and services are designed to be self-perpetuating. They have access to better consumer goods, less expensive products, easier credit, and the means of avoiding taxes. In other words, as the economic position of an individual becomes more strategic, he gains access to various means whereby he might increase his wealth; the risk involved in making money varies in inverse proportion to the individual's influence.¹⁴

Qualitative change refers to the process of adapting social relations to include the identities, values, and learning of cultural minorities in-

13. C. MILLS, *THE POWER ELITE* 110 (1956).

14. *See generally id.* at 110-15.

stead of excluding and exploiting these groups. Initially, this requires facilitating the development of cultural minorities so that the characteristics and tendencies revealed by their own development will define the nature of the resulting interrelations with other social, economic, and cultural entities. The focal point of qualitative change is in the greater society, not, as with quantitative change, in the minority social group. Alleviation of this aspect of poverty requires an evaluation of society, its objectives, and institutions by new standards; it can be accomplished only by a qualitative change in social life.

This dual concept of social change does not require the destruction of a social order although it does necessitate its transformation. The process may take place within existing institutions, or it may transpire in spite of them. If change is to take place successfully within the English or American social systems, effective use must be made of the tools that these societies provide. The traditions of law, economics, and politics seem to invite participation; yet society often remains unresponsive. The issue presented is whether the American and English legal services programs, as adjuncts of traditional institutions, are capable of facilitating needed quantitative and qualitative social change.

The traditional concept of social change within the system is a familiar one. As people become aware of their individual and communal aspirations, they discover that fulfillment of these aspirations entails discussion and confrontation. The greater the extent of their participation in this debate, the more the solution will reflect their interests.¹⁵ Participation in the existing political process may actually be motivated by programs that provide only increased comforts. These comforts, however, may help a person increase his understanding of the socially accepted manner of life and thereby enable him to evaluate that life by his own standards.¹⁶ Ideally, this would lead to a qualitatively different life.

The difference between quantitative and qualitative change is the difference, as illustrated above,¹⁷ between raising the level of life and allowing a new life to develop. Qualitative change provides social relationships that cultural minorities are a part of in that these relationships are self-defined. Since definition of these relationships cannot

15. See generally E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 7-28 (1960).

16. For example, by virtue of his family's particular social environment, the young person may learn to understand his parents' way of life and either seek it for himself or distinguish it from his own aspirations.

17. See text accompanying notes 13-15 *supra*.

precede the process that creates them, today's problem lies not in the definition of new relationships but in the discovery of means to facilitate their development. Our concern is with the relevance of law and lawyers to this process.

A. The Function of Law

Law is a complex blend of diverse elements such as economic, political, religious and social ideologies. While law is not merely a derivative of these elements, it is intimately related with their functioning. This interdependence often occasions legal ratification of values manifest in these ideologies. Criminal as well as civil law substantiates the significance of the social order when it reinforces public concepts of right by condemning those who would violate its precepts. By doing so, the law can reaffirm the social order and safeguard from discredit the personal value derived from that order by the public. The substantive law tends to reflect the social and economic order in a manner that both acquaints members of the community with the principles of that order and compels their conformity to it.¹⁸

Lawyers are familiar with such concepts as public policy, custom and usage, and the standard of the reasonable man. These concepts are indicative of the interdependence between law and society; they are manifestations of the manner in which law reflects determinants of the social order. Accordingly, the law often confirms that which disputing parties might have expected and relied upon, by deferring judgment to the interests that brought about that reliance, such as social and economic expectations or conditions enunciated by prior law.¹⁹

The relation of law to social and economic designs has intrigued many legal scholars.²⁰ In his classic work, Karl Renner demonstrated

18. See generally J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 470-89 (1966).

19. To say that the legal system reflects certain forces is not to assert that the forces discussed are the only components of the substantive law. Legislatures and courts have acted for reasons of religious belief, moral conscience, necessity and fear. However, basic influences on law do include those that are promulgated by the economic order and reflected in the social and economic ideology.

20. For example, Oliver Wendell Holmes wrote: "The training of lawyers is a training in logic. . . . The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. . . . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. . . .

. . . .
". . . [L]et us consider . . . the ideal toward which [the law] tends. . . .

the influence of economics on the law by showing how legal institutions, such as the law of property, remained relatively stable over periods of dynamic economic development in which the purposes that these legal institutions served changed markedly. He found that although substantive legal concepts, such as owner, tenant, and purchase, remained at least linguistically the same over a period of time, the human relations that these terms described varied significantly.²¹ Renner observed that economic developments, unrelated to the norms of the law, were instrumental in transforming the meaning of this legal language.²²

History exemplifies this process. A hundred years ago, the law of contracts embodied the concepts of meeting of the minds and voluntary agreement; the function of the law was to guarantee the individual nature of the contract.²³ The purchaser's desire for a particular item was met by the seller's supply of such item, and the rate of exchange replaced the value of the item that the seller relinquished. Today, that item is mass-produced and mass-marketed. Consequently, the courts will enforce contracts in which there is no meeting of the minds regarding an important part of a contract. For example, where there is no agreement on the price to be paid by a contracting buyer, the courts may impose one.²⁴ Although contract law today is composed of the same substantive elements as before, its major function is to protect against coercion.²⁵ The necessities of mass production and distribution,

" . . . For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66, 468-69 (1897).

21. K. RENNER, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* 104-33 (1949) [hereinafter cited as RENNER].

22. *Id.* at 117-18.

23. See generally Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921). "A gospel of freedom was preached by both metaphysical and political philosophers in the latter half of the eighteenth century.

. . . .

"It was a consequence of the emphasis laid on the ego and the individual will that the formation of a contract should seem impossible unless the wills of the parties concurred. Accordingly we find at the end of the eighteenth century, and at the beginning of the nineteenth century, the prevalent idea that there must be a 'meeting of the minds' . . . in order to form a contract; that is, mental assent as distinguished from an expression of mutual assent was required." *Id.* at 366, 368.

24. See UNIFORM COMMERCIAL CODE § 2-305(1)(b): "The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if . . . the price is left to be agreed by the parties and they fail to agree"

25. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). See also UNIFORM COMMERCIAL CODE § 2-302(1), where the courts are given the authority to refuse to enforce any contract, or part thereof, that it deems "unconscionable."

required by the economics of scale, seem to account for this transformation.

Fundamental changes in society are possible without contemporaneous changes in the legal system. Eventually, however, the actual norms of the law will shift to approximate the economic developments that have previously modified the effect of the law.²⁶ For example, contract law may be modified to serve more accurately the function of regulating product distribution. Contemporary contract principles may become extinct and the function that they were made to serve by economic necessity will be governed by a law justifying only certain marketing practices. At this point, it will again be the necessity of economic developments that will have determined the change in the law. We do not mean to simplify the relationship between these disciplines by a cause and effect analysis; rather, we mean to assert that each discipline often seems to accommodate itself to new developments in the other.

Economic pressures experienced in the development of law operate over a period of time and impose gradual and relatively imperceptible changes upon society. Thus, while changes in the social order are being effected by the continued maturation of economic interrelations, the neutral language of the law may remain capable of representing various political and economic principles.

In some instances, economic influence upon the law can be found to pervade such concepts as equality, fairness, public policy and reasonableness. The meaning of these words may well reflect the dictates of economic decisionmaking and its legitimating ideology. An example of this is the application to the corporation of the principle of equality embodied in the fourteenth amendment of the United States Constitution.²⁷

Successful economic activities may directly finance a change in the law. The operation of lobbies exemplifies a built-in means to encourage the law's responsiveness to economic developments and interests. Unfortunately, there is rarely money available for the financing of a lobbyist for the poor. Their interests are effectuated by a myriad of "band-aid" remedies within the social system: charitable contributions, philanthropy, public demonstrations, or, in some instances, violence or the threat of violence. The success of such influences in the political

26. See RENNER 252-54.

27. See *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578 (1896).

process is limited; they must compete with the self-generating strength of economic factors for the transformation of interests into law.²⁸

The interdependence of law, politics and economics is vivid and profound. This is not to say, however, that these disciplines are necessarily nonautonomous. Therefore, the discussion presented in this article—the capacity of legal aid programs to foster social change—is really an inquiry into the conditions under which legal initiative will and will not succeed, as well as an evaluation of the conditions that encourage and discourage the law to adapt itself to changes in the wider culture.

B. The Process of Change

Quantitative change is not merely a process of making life better for the poor; it is a search for new values and different perspectives. The poor live on the fringe of the social order, which gives shape to the law. Their closeness to the edge is a measure of their peril; it is also a measure of their proximity to a perspective from which that order can be evaluated and qualitative changes discovered and introduced. The lawyer, in his traditional role of advocate, may obscure this perspective by resort to legal definition and resolution. If problems are defined in preexisting legal references, the possibility of innovative solutions is reduced.

Stimulus for innovative change in existing institutions must come from outside the structure sought to be changed. In *One Dimensional Man*, Herbert Marcuse demonstrated how, in various forms of creative arts, it is essential to the process of creation that critical theory and expression be able to operate upon the present state from a posture outside it. If this principle is operative in the development of the substantive law and social conditions, then legal aid, because it is an adjunct of the legal system, may deprive the social system of the external motivation essential for change and progress. As a means of access to the law, legal aid may represent an institutional effort to incorporate the forces of social change, directing them into the legal system.

28. "Today . . . the myth that leaving basic financial decision to the 'marketplace' is a requisite of freedom serves to *rationalize* the inability of political institutions to deal with the problems of poverty, miseducation, and exploitation which are endemic to urban ghettos. *The system of politics as it exists legitimates and enforces the economic decision-making apparatus* which owns the slums, automates the production lines and farmlands without consideration of those displaced, runs away to low-wage areas, and generally behaves in ways which serve the economic self-interest of owners and disserve the community at large." Tigar, Book Review, 77 *YALE L.J.* 597, 602 (1968) (emphasis added).

The existence of alternatives is essential if rational principles are to provide meaningful choices. Offering the poor access to the legal system incorporates choice into a world of thought already defined and thus limits the possibilities of progress. These solutions create forms that "appear to reconcile the forces opposing the system and to defeat or refute all protest in the name of the historical prospects of freedom from toil and domination. Contemporary society seems capable of containing social change—qualitative change"²⁹

To canalize solutions into traditional forms is to divert attention from possibilities of progressive innovation. This concept was seen by Professor Kenneth B. Clark, who asserted that

[t]he Negro in America, by virtue of the pervasive patterns of racial rejection, exclusion or a token and often self-conscious acceptance by a minority of white liberals, has been forced into a degree of alienation and detachment which has resulted in . . . sharpened insights and increased sensitivity to some of the subtle forces which are significant in our complex social structure.³⁰

The anxiety of the Negro is an example of the forces of social change, which, when not dispelled within the legal system, may precipitate revolutionary social development.³¹

C. Social Change Through Law

Although the legal process remains essentially unchanged, it may be open to innovation and experimentation fostered by groups within that institution. This tolerance for change is a measure of the legal system's capacity to respond to variations in the social complex. Legal aid may provide the vehicle for social change within the system if it has the capacity to encourage new social ideas within the law. To the extent that it does, the observations of Marcuse are limited in their appli-

29. Introduction to H. MARCUSE, *ONE-DIMENSIONAL MAN* at xii (1964).

30. Clark, *What Motivates American Whites*, *EBONY*, Aug. 1965, at 69, quoted in S. CARMICHAEL & C. HAMILTON, *BLACK POWER* 180 (1968).

31. See S. CARMICHAEL & C. HAMILTON, *BLACK POWER* (1968), where although the authors advocate achieving social change with language that implies an avoidance of existing political mechanisms (for example, they urge "searching for new and different forms of political structures to solve political and economic problems." *Id.* at 39) they also encourage the use of traditional political methods. "Before a group can enter the open society, it must first close ranks. By this we mean that group solidarity is necessary before a group can operate effectively from a bargaining position of strength in a pluralistic society. Traditionally, each new ethnic group in this society has found the route to social and political viability through the organization of its own institutions with which to represent its needs within the larger society. . . .

.....
"Only [black people] can help create in the community an aroused and continuing black consciousness that will provide the basis for political strength." *Id.* at 44, 46.

cation to problems of poverty and social change. However, both concepts are operative—the legal system is a limitation on social change; the legal system may provide a vehicle for social change. Our objective is not so much to champion the one to the logical defeat of the other as it is to articulate both concepts in order that they may be useful in practical analysis.

Lawyers functioning on behalf of the poor can bring about social change by means of activities not unrelated to their traditional practices of representation and confrontation.³² But with the poor these terms adopt new connotations. Legal representation means the services of a lawyer who is sensitive to the interests of the poor. If the lawyer's services were subject to their direction, legal representation would evoke the support of the poor. Genuine representation would include extra-legal functions, such as establishing cooperative economic enterprises.

By understanding the social and economic problems of the ghettos, lawyers may not only look to the law as a potential remedy but assert corrective measures as well. Lawyers for the poor can go to the courts and legislature and, by confrontation, establish new precedent and new laws, thereby aiding in the modification of existing legal relations and the development of new areas of the law beneficial to the poor.

Social change benefits more than just the poor. Lack of political, social, and economic influence is a handicap imposed on the majority of society. The mass society as well as the alienated poor stand to realize their potential for expression with the development of qualitative social changes.

The knowledgeable man in the genuine public is able to turn his personal troubles into social issues, to see their relevance for his community and his community's relevance for them. He understands that what he thinks and feels as personal troubles are very often not only that but problems shared by others and indeed not subject to solution by any one individual but only by modifications of the structure of the groups in which he lives and sometimes the structure of the entire society.³³

A progressive lawyer is a teacher in the community. Bringing the law to the poor serves initially to acquaint them with an arena within which many problems may be resolved. It also focuses attention on the problems themselves, thereby initiating activity that would not otherwise be forthcoming. The lawyer can enable members of a com-

32. See generally Carlin, Howard & Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, 1 *LAW & SOC. REV.* 9, 59-62 (1966).

33. C. MILLS, *supra* note 13, at 318.

munity to articulate their own desires and labor for their realization. Access to the law can be a focal point for community awareness and for the rudiments of political organization. A legal interest held in common by many mutually disadvantaged individuals may awaken an entire community to the realization of its relationships with the rest of society. The lawyer as an independent representative is capable of catalyzing social awareness, which in time becomes its own source of continuing initiative. Once people are enlightened about the nature of their own existence in relation to others, their dependence upon representatives diminishes. Enlightenment stands between representative advocacy and participatory democracy.

D. Thesis

This discussion has suggested the existence of two functions that legal aid might fulfill. The first is that it can provide a limited nature of social change. It can alleviate some of the shocking conditions of impoverished life by providing a free and valuable service aimed at bringing the standards of that existence up to the lowest levels that the law will tolerate. The second is that it might attempt to provide a lasting stimulus to qualitative change in the lives of the poor and in their economic, political and social relations with the rest of society.

In this effort, legal aid will encounter difficulties. One initial hurdle is that because it operates within the legal context, legal aid is limited in its perception of the alternatives necessary for such change. Another problem is created by the economic and political influences operative on the law which often sustain the conditions of poverty and continue to oppose its alleviation. These difficulties underlie the political sensitivity of the American effort (the extent to which it is vulnerable to administrative, legislative, or financial regulation) and tend to explain why such a comprehensive program does not appear at all in the design or operation of the English legal aid scheme. Descriptions of the English and American approaches to legal aid yield insights into their respective goals and capacities for social change.

II. The English Approach to Legal Aid

A. The Legal Aid Scheme

The Legal Aid and Advice Act of 1949 authorized the Law Society³⁴ to issue regulations, subject to the approval of the Chancellor,

34. The Law Society was originally instituted in 1823. Its general purposes are to promote "professional improvement and [facilitate] the acquisition of legal knowl-

which would carry out the purposes of the Act.³⁵ The Law Society appointed a Legal Aid Committee composed of twelve solicitors, all members of the Council of the Law Society; four barristers, nominated by the General Council of the Bar; the president and vice-president of the Law Society; and one person nominated by the Lord Chancellor. Their administrative duties include preparing an annual report on the operation and finance of the Act.³⁶ Each of the twelve geographical areas of England and Wales has an area committee, composed of a total of sixteen solicitors and barristers. The members of the area committees supervise local committees, maintain panels of solicitors and barristers, investigate complaints against panel members, authorize payments of the participating solicitors and barristers, supervise the collection of monies, do the accounting, keep records, render reports, hear appeals from local committees, and consider certain applications under the General Regulations. The area committee is aided in this work by a paid administrative staff. Consent of the area committee is necessary for certain nonroutine steps in the litigation.³⁷

There may be as many local committees in an area as circumstances require. A local committee consists of practicing lawyers, who work with the assistance of a paid secretary and staff. The local secretary arranges meetings of three to five members of the committee as often as necessary, usually once a week, to determine whether legal aid certificates shall be issued in the cases presented.³⁸

This smaller, rotating group within the local committee is called the certifying committee. From the application and the correspondence presented by the applicant, the certifying committee must decide whether there is "reasonable grounds for taking, defending, or being a party" to the actual or contemplated proceedings.³⁹ It must also determine whether it is reasonable to grant legal aid under the particular

edge." T. Lund, *The Legal Profession in England and Wales*, 35 AM. JUD. SOC'Y 134 (1952), in B. BOYER, A. HARNO, R. MATHEWS & J. BRADWAY, *SELECTED READINGS ON THE LEGAL PROFESSION* 39, 42 (1962). Although membership in the Law Society is voluntary, Parliament has given it many duties regarding the legal profession, such as setting up codes of professional ethics and managing the examinations for solicitors. *Id.* at 43.

35. Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51, § 8(1).

36. See SELECT COMMITTEE ON ESTIMATES, FOURTH REPORT, No. 209, H.C. (5th ser. 1955-56).

37. See *id.* See generally B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS* 330 (1967) [hereinafter cited as ABEL-SMITH & STEVENS].

38. See SELECT COMMITTEE ON ESTIMATES, FOURTH REPORT, No. 209, H.C. (5th ser. 1955-56).

39. Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51, § 1(6).

circumstances;⁴⁰ if "a man of moderate means (sufficient to afford the cost of litigation but not in a position to waste money) would embark on litigation relying on his own means," then a grant of legal aid is considered reasonable.⁴¹

The certifying committee has before it a report of the National Assistance Board, which assesses the maximum contribution that the applicant could be asked to pay.⁴² Should the committee decide on a smaller figure and the case cost more than the amount requested, the assisted person can later be required to pay the difference between these figures or the maximum amount, whichever is the lesser.⁴³ The committee determines the manner in which such payment shall be made.⁴⁴

Usually, a person in need of legal aid goes directly to a solicitor who is on the legal aid panel. He may choose a solicitor upon the recommendation of friends, or he may be referred by a community social service agency. If a person happens to go to a Law Society office for help, he will be referred to a solicitor, since the Law Society performs only administrative duties. Because ethical problems preclude specific referrals,⁴⁵ the prospective client will be given a complete list of participating solicitors in his area.⁴⁶ Once a solicitor is contacted, the client, often with the solicitor's help, completes the legal aid application and files it. The local committee may then approve the application and issue a legal aid certificate, which will ensure that the solicitor will be paid for his work out of the Legal Aid Fund. If the local committee denies the application, the client may appeal to the area committee.⁴⁷

The assisted person must at all times have reasonable grounds for the prosecution of his action. A solicitor or barrister has the right to give up the case if, in his opinion, the assisted person has required the

40. *Id.* § 5(3).

41. Utton, *The British Legal Aid System*, 76 *YALE L.J.* 371, 372 (1966), quoting E. SACHS, *LEGAL AID* 82 (1951): "For example, aid would not be given where the applicant would usually be aided by some other organization or person, such as a trade association or trade union, or where the applicant wants to take an action with the aid of public funds which a person of moderate means would not as a rule take unless others helped to finance the proceedings."

42. Legal Aid (General) Regulations, *STAT. INSTR.* 1950, No. 1359, reg. 5(3).

43. Legal Aid (General) Regulations, *STAT. INSTR.* 1954, No. 166, reg. 5(5).

44. Legal Aid (General) Regulations, *STAT. INSTR.* 1950, No. 1359, reg. 5(8).

45. *See Self v. Self*, [1954] 2 *All E.R.* 550, 551 (P.D.A.) (it is not ethical to refer client to one of three solicitors).

46. Legal Aid (General) Regulations, *STAT. INSTR.* 1950, No. 1359, reg. 5(13).

47. *Id.* reg. 10(1).

proceedings to be conducted or continued unreasonably so as to incur an unjustifiable expense for the Legal Aid Fund.⁴⁸ The area committee may discharge a certificate if it discovers that the assisted person no longer has reasonable grounds for continuing the action or that it is unreasonable for him to continue to receive legal aid.⁴⁹

Lawyers are not required to participate in the Legal Aid Scheme. However, most do by signing the local list of participating barristers and solicitors maintained by the area committee. Once this is done, the lawyer has an obligation to accept a legal aid client unless he can demonstrate reasonable grounds for refusing to do so. Some firms do more legal aid work than others, but participating lawyers maintain their own private practices. Arguably, the original act envisioned the employment of full time legal aid lawyers, but this was never made a part of the Scheme as executed by the regulations of the Law Society.

In practice, a few lawyers do the bulk of the legal aid work. Most of these lawyers, however, do not handle enough legal aid work to enable them to become skilled in and sympathetic to the legal problems of the poor. Moreover, even if a solicitor's clients were all financed by legal aid, the philosophy of the Scheme is such that a legal aid client is not to be treated differently from a paying client. The import of this is that expertise in poverty problems is not considered; when it is mentioned, it is rejected as irrelevant. A primary goal of English legal aid is to eradicate the monetary differences between clients in order to put poor clients in the same positions as wealthier clients. One of the reasons for the Law Society's rejection of the neighborhood law office approach to legal aid was that it encouraged class division by consciously separating the poor and treating their legal problems differently from those of wealthier clients.⁵⁰

The belief that subsidized legal fees are all that is needed to give a poor person access to the law is manifest in the structure of the Legal Aid Scheme. The entire operation of the Scheme is administrative; its function is to determine under what circumstances legal aid funds may be granted.

48. *Id.* reg. 14(7).

49. *See* Legal Aid (General) Regulations, STAT. INSTR. 1950, No. 1359, reg. 7f, which permits the area committee to deny aid if it appears unreasonable in the particular circumstances of the case. In *The Queen ex parte Rondel v. Legal Aid Committee* [1967] 2 Q.B. 482, the denial of aid by an area committee was upheld under regulation 7f. The grounds for the area committee's refusal was that the applicant's action would ultimately be unsuccessful even though at the time he applied for aid certiorari had been granted to review his case.

50. THE LAW SOCIETY, LEGAL ADVICE AND ASSISTANCE MEMORANDUM, Feb. 1968.

A lawyer must apply to the area committee for approval of any step in a legal aid case that he considers necessary but that would involve an unusual expense.⁵¹ Appeals must be approved by the area committee. Once approved, no question about the propriety of his request and consequently the payment of his expenses can be raised.

The Lord Chancellor supervises the administration of the Scheme by the Law Society; the Law Society is responsible to his Department. The Lord Chancellor appoints auditors to review the financial aspects of the Scheme and annually submits the report of the Law Society to Parliament. He may also make regulations that effectuate the Scheme.⁵²

Legal advice is handled in a more simplified procedure than legal aid. A person pays the lawyer a nominal fee for a short period of his time, which will be devoted to advice on a single matter. If the applicant satisfied a means test, he pays but a fraction of this fee, and the solicitor is compensated for the remainder by the Legal Aid Fund.⁵³

B. Purposes and Objectives

The Legal Aid Scheme is primarily a legal institution. The intention of those who engineered its creation in the late 1940's and who administer the actual operation of the Scheme today is to institutionalize certain activities of the legal community.⁵⁴ The Scheme also represents an attempt to realize a legal ideal—justice requires that people have access to the courts regardless of their financial means.

This concept of equality of access to the courts must be distinguished, however, from the broader democratic ideal that a community ought to afford all of its members the opportunity to accomplish their goals through the existing legal system. The Legal Aid Scheme was not primarily intended to realize this broader ideal.

The extent to which the Scheme channels the social aspirations of the poor into the legal system is only a consequence of its function as a legal institution. As a result, many laymen and some lawyers concerned with alleviation of poverty conditions through qualitative as well as quantitative social change are often unsatisfied with the Scheme.

The Law Society, the official organization of solicitors in England and Wales, administers the Scheme through its Legal Aid Committee, which is composed of solicitors and barristers.⁵⁵ Lay representation in

51. Legal Aid (General) Regulations, STAT. INSTR. 1951, No. 166, reg. 14(6A).

52. See Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51, § 8(9).

53. *Id.* § 7.

54. See text accompanying notes 82-83 *infra*.

55. See text accompanying notes 34-36 *supra*.

the administration of the Scheme is limited to those on the Lord Chancellor's Advisory Committee. The Lord Chancellor appoints to this committee persons with "knowledge of the work of the courts and social conditions."⁵⁶ They consider only specific questions referred to them by the Lord Chancellor and comment on the Law Society's annual report.⁵⁷ The Government thought that the Advisory Committee would introduce into the Scheme a lay element sufficient for public accountability and control.

The choice of the Law Society to administer the Scheme was the result of considerable controversy. The Haldane Society urged that control be vested in a public legal service department composed of three barristers, three solicitors, and five laymen appointed by various public bodies.⁵⁸ This proposal brought a rebuttal from Dr. Cohn, who agreed that "[t]here is . . . no reason why the legal profession should be entitled to be judge in its own cause."⁵⁹ However, he disagreed with the suggestion that laymen ought to have control: "As far as I can see, no other law has considered the problem of legal aid for the poor as one in which laymen have a special claim to be heard."⁶⁰ His final conclusion, that ultimate control of the Scheme ought to rest with the courts, has been shared by others.⁶¹

The choice of a government authority to administer the Scheme was rejected, because of the fear that government control would invite political problems and conflicts of interests should an assisted person have to proceed against any department of local authority or national government.⁶² Although precluding public control through government, the possibility of such conflicts does not appear to be an obstacle to other means of lay influence in the administration of the Scheme.

There was much parliamentary discussion of the desirability of having laymen in control of the Scheme;⁶³ indeed, there was consider-

56. Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51, § 13.

57. *See id.*

58. *See* LEGAL RECONSTRUCTION SUB-COMM. OF THE HALDANE SOCIETY, *THE LAW AND RECONSTRUCTION* 2 (1942).

59. Cohn, *Legal Aid for the Poor: A Study in the Comparative Law and Legal Reform*, 59 L.Q. REV. 250 & 359, 266 (1942).

60. *Id.* at 265.

61. *See, e.g.*, R. EDGERTON, *LEGAL AID* 64 (1945).

62. *See generally* Sachs, *supra* note 41, at 7-9.

63. Parliamentary discussion on the issue of control included a request of the Attorney General to consider adding a consumer element to the local committees. 459 PARL. DEB., H.C. (5th ser.) 1282 (1948-49). One M.P., a lawyer, said he thought it a mistake for the Scheme to be run as "a closed shop, entirely the preserve of lawyers." *Id.* at 1286. Another thought that the bill was "a sew-up between two branches of the legal profession. When it is a question of people coming for aid and advice in times of distress and difficulty, it would be advantageous to have someone on the committee who

able support among the public for lay participation in the administrative committees. The legal profession, however, claimed that this would subject them to possible political domination. The Law Society was "reported to have told the Lord Chancellor that if the Plan were amended in this manner, the members of the Law Society would not participate in the Plan's supervision or serve on the panels."⁶⁴ Consequently, a clause was inserted in the bill that specifically forbade any lay participation in the committees.⁶⁵ Among the reasons given for excluding laymen from participation on administrative committees were that applicants would not wish to reveal their personal problems to their neighbors or to those not bound by professional secrecy, and that the profession must be free from outside interference.⁶⁶ Nevertheless, one author has contended that

the complete exclusion of the "consumer element" seems unfortunate and provides gratuitous ammunition to those who argue that the chief beneficiaries of the Scheme will be the lawyers rather than the public. . . . [T]here should be some body, with a strong lay element, constantly watching the operation of the Scheme⁶⁷

This issue was taken up again in 1957 by Peter Beneson, who asserted that "it is high time that the legal monopoly was broken."⁶⁸ He argued that nonlawyers should comprise one half of the membership of legal aid committees.

Control, however, still lies entirely within the legal profession. "Freedom from the outside is the choicest liberty enjoyed by those who manage the Legal Aid Scheme . . . [I]t would be regarded as heretical to recommend the introduction [into the administration of the Scheme] of anyone who was not trained in the law. The lawyers have succeeded where every other professional body has failed. In an age where syndicalism is unfashionable, the legal system has managed to establish its

understood things from more than a purely legal point of view." 465 PARL. DEB., H.C. (5th ser.) 1357 (1948-49). To this the Attorney General replied: "I see no reason why a person who is unable to employ his own solicitor and pay for him, but has to seek and take legal advice under the provisions of this Scheme, should have lay people inflicted upon him when he wants to obtain legal advice and assistance." *Id.* at 1358. Apparently, the Attorney General failed to realize that the lay element was to participate in the control and administration of the Scheme and not in the dispensation of legal services.

64. Abrahams, *The English Legal Assistance Plan: A Description of Its Machinery*, 36 A.B.A.J. 31 (1950).

65. 465 PARL. DEB., H.C., (5th ser.) 1356 (1948-49).

66. Gower, *Legal Aid and Advice Act, 1949*, 13 MOD. L. REV. 81, 83 (1950).

67. *Id.* at 83.

68. P. BENESON, *THE FUTURE OF LEGAL AID* 33 (1957).

own corporate syndicate."⁶⁹

The complete control of the Scheme by the legal profession is but one manifestation of the fact that a significant purpose of the Act was to complete the symmetry between legal ideals and legal institutions, and not to deal qualitatively with the social conditions of poverty. The history of legal aid reveals that the Act was also an effort to codify a procedure by which lawyers would be paid for serving indigent clients.

C. History of English Legal Aid

England passed its first legal aid statute in 1494 permitting an indigent person to file forms in forma pauperis and entitling him to the free services of counsel.⁷⁰ This statute contained no provision for payment of counsel; but counsel was subject to admonition by the court if he refused to accept the case. The Act was extended to defendants in 1729.⁷¹ Few people, however, were able to qualify for legal aid. Since most actions in royal courts concerned property and since the legal aid plan was limited to those having no more than five pounds, almost all actions in London or at assizes were excluded.⁷²

In 1913, the Bar Council discussed the possibility of creating a "poor suitor's fund" from which attorney's fees could be paid; the plan was abandoned because of the probable unwillingness of the government to act upon such a plan.⁷³ Amendments to the Poor Persons Procedure, adopted in 1914, provided a fund for out-of-pocket expenses; nevertheless, some solicitors were requiring clients to pay a retainer before they would agree to take a case under the procedure.⁷⁴ Charitable organizations began to provide legal advice for poor persons, but apart from the transfer of administration of the Poor Persons Procedure to the Law Society in 1926, the basic system remained unchanged.⁷⁵

After World War II, there was an expanded need for legal assistance, and the existing legal services proved inadequate. The need for reform was made apparent by the inability of lawyers to satisfy the increased demand for divorce precipitated by wartime family dislocation. The Law Society set up a services divorce department with a staff of

69. *Id.* at 9.

70. 11 Hen. 7, c. 12.

71. 2 Geo. 2, c. 28, § 8.

72. ABEL-SMITH & STEVENS 136.

73. 134 THE LAW TIMES (London) 317 (1913).

74. REPORT OF THE COMMITTEE TO ENQUIRE INTO THE POOR PERSONS' RULES, CMD. NO. 430, at 6 (1919).

75. ABEL-SMITH & STEVENS 149.

salaried lawyers, while local poor persons committees formed similar poor persons civilian departments known as divorce departments.⁷⁶

In response to the request by lawyers for a complete investigation of legal aid, a government committee chaired by Lord Rushcliffe was constituted in 1944. The committee reported that the shortage of lawyers willing to handle legal aid divorce cases reflected the lawyers' desires to be paid for services that would have to be rendered gratuitously under the present system. The committee stated that "[t]he great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance"⁷⁷

A service which was at best somewhat patchy has become totally inadequate and . . . this condition will become worse. If all members of the community are to secure the legal assistance they require, barristers and solicitors cannot be expected in [the] future to provide that assistance to a considerable section as a voluntary service.⁷⁸

The Legal Aid and Advice Act, enacted in 1949, gave lawyers a legislative scheme to ensure payment for indigent cases.

[T]he scheme was not unwelcome to the Bar which was suffering from a shortage of work, the effects of high taxation and the post-war inflation. The scheme was expected to help barristers to "earn a living wage."⁷⁹

The Act was also hailed as being the key that would "open the doors of the courts freely to all persons who may wish to avail themselves of British justice without regard to the question of their wealth or ability to pay."⁸⁰ However, the expected increase in the use of legal assistance did not occur. The minimum capital⁸¹ and income limits did not take into account the tremendous increase in postwar price levels. As a result, "the scope of free legal aid was not to be much wider than before the war."⁸²

The Scheme was primarily a response to the problems of the legal profession rather than to the problems of the poor. Discussions on legal aid focused on the administrative aspects of the legal assistance program rather than on an inquiry into the social and economic con-

76. *Id.* at 137.

77. COMMITTEE ON LEGAL AID AND LEGAL ADVICE IN ENGLAND AND WALES, CMD. No. 6641, § 125.

78. *Id.* § 126.

79. ABEL-SMITH & STEVENS 328.

80. 459 PARL. DEB., H.C. (5th ser.) 1221 (1948-49).

81. The minimum capital limit was raised from 25 to 75 pounds.

82. ABEL-SMITH & STEVENS 326.

ditions of poverty or the action that might be undertaken by lawyers to alleviate these conditions. Viscount Jowitt, Lord Chancellor in 1956, has described two areas that he felt were successfully dealt with by the new legal aid system. The first is the problem of defining the principles that govern the determination of an applicant's means. The second is the difficulty in reconciling counsel's freedom to conduct a case as he sees fit with the need to control the expenditure of public funds.⁸³ No mention is made of legal aid as a means for realizing qualitative change in the lives of the poor.

Similarly, in 1954, the *Daily Mirror* of London held a conference on the Legal Aid Scheme. As their report indicates, the areas that they thought most worthy of discussion did not relate to the effect of the Scheme on the poor, but to its administration. The issues debated were: Is legal aid wasting government funds, does the Scheme encourage divorce, are frivolous cases certified by the Scheme and therefore contributing to the congestion of the courts, and does the Scheme impose difficulties upon nonassisted defendants?⁸⁴

D. The Adequacy of the Legal Aid Scheme

There is a noticeable lack of information with which to evaluate the capacity of the English Legal Aid Scheme to inspire social change. There is little material regarding the legal problems of the poor in the information published by the Law Society; most of it concerns data bearing on the technical administration of the Scheme and the expenses required to maintain it.

In 1965-66, for example, a total of 104,956 legal aid certificates were granted entitling that many people to some sort of legal assistance.⁸⁵ In addition, 59,589 persons received legal advice.⁸⁶ The Law Society's figures indicate that of 106,351 cases, 88,086, or 85 percent were in divorce and magistrate courts, and 14,351, or 13 percent were common law actions, primarily accidents and landlord-tenant matters.⁸⁷ Separate figures analyzing legal aid cases not proceeding to litigation indicate that about half of these are concerned with matrimonial problems, 40 percent with accidents, and three percent with landlord-tenant disputes.⁸⁸

83. Jowitt, *Forward* to E. SACHS, *LEGAL AID* at vi (1951). *See also id.* 30-39.

84. Cave, *Spotlight on Justice*, *Daily Mirror* (London) (1954) at 10.

85. LORD CHANCELLOR'S OFFICE, *COMMENTS AND RECOMMENDATIONS OF THE LORD CHANCELLOR'S ADVISORY COMMITTEE 12* (Sixteenth Report 1965-66).

86. *Id.* at 14.

87. *Id.*

88. *Id.* at 16.

Legal aid is presently available to individuals whose disposable income does not exceed £700 per year and those whose disposable capital is no more than £500.⁸⁹ For cases which do not involve court proceedings, the figures are less—£325 and £125 respectively.⁹⁰ By analyzing annual tax figures, it is possible to estimate the number of families that would actually qualify for legal assistance. The 1965 Inland Revenue Statistics indicate that out of 20½ million taxable incomes, over 18½ million were less than £1,000.⁹¹ Approximating disposable income from those figures as defined in the Scheme, most of these families would qualify. Adding 30 million persons not earning any taxable incomes,⁹² the 100,000 certificates granted represent 1/480 of those 48 million likely to be eligible for legal aid, just over one half of one percent.

A categorical analysis of the types of cases processed under the Scheme provides another interesting observation. Ninety-three percent of England's marriages appear to escape the divorce courts, yet 80 percent of the claims processed concern matrimonial problems.⁹³ Is the Scheme attracting a disproportionate number of marital problems? There are three large charitable institutions in London (Cambridge House, Mary Ward Settlement House, and Toynbee Hall) which operate legal advice bureaus for the poor. All these institutions indicate that matrimonial matters occur with the same frequency as problems of landlord-tenant, employment and personal injury, and consumer transactions and credit relations; each of the four categories accounts for 20 percent of the total case load.⁹⁴

According to the Lord Chancellor's figures, landlord-tenant problems constitute only about three percent of the nonlitigation certificates and a bare fraction of court matters handled through the Legal Aid Scheme; the same problems compose 20 percent of all matters brought

89. Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51, § 2(1), as amended, Legal Aid Act of 1960, 8 & 9 Eliz. 2, c. 28, § 1(1).

90. Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, c. 51, § 5(5), as amended, Legal Aid Act of 1960, 8 & 9 Eliz. 2, c. 28, § 1(2).

91. Zander, *Poverty and the Law*, 1966 SOCIALIST COMMENTARY 13.

92. *Id.*

93. See Liell, *Why Not Neighborhood Law Offices?*, 111 SOL. J. 763 (1967).

94. LORD CHANCELLOR'S OFFICE, COMMENTARY AND RECOMMENDATIONS OF THE LORD CHANCELLOR'S ADVISORY COMMITTEE 16 (Sixteenth Report 1965-66). See also Liell, *Why Not Neighborhood Law Offices?*, 111 SOL. J. 763 (1967). It may be argued that 80 percent matrimonial cases reflects only the number eventually brought before the courts and is not an accurate percentage of the legal aid cases initially presented to a solicitor for advice. Divorce and separation require court proceedings whereas landlord-tenant disputes, accident claims, etc., can often be settled outside of court.

to charitable agencies.⁹⁵ These figures indicate that a substantial number of landlord-tenant problems among the poor are not coming to the attention of the Legal Aid Scheme.

In a northwest London ghetto, a large community organization, the Notting Hill Summer Project, was established to combat housing problems in the immediate area. The organization developed numerous community activities based on the participation thereby elicited. Although the organization filed numerous complaints with the local housing authority, some of which established novel legal precedent, their work was done almost entirely without the aid of lawyers. The participants did not consider the Legal Aid Scheme to be useful because it called forth individuals whose personal and business objectives were antithetical to the interests the poor community wished to assert.

When lawyers were used, they volunteered their services rather than process the legal aid applications necessary to receive compensation from the Legal Aid Fund. Many lawyers found that poor clients were offended and embarrassed by the questions they would have to answer to receive legal aid. For some work, the Scheme, with its tests for justifying a cause of action sufficient to warrant the expenditure of public funds, was thought to be too cumbersome to be adapted to this kind of community work. Lay representatives and lawyers did assist residents in prosecuting complaints under the Housing Act before the Rent Tribunal. The Legal Aid Scheme does not even provide for legal representation before this administrative agency.⁹⁶

Although recognizing the existence of housing problems of the poor, the Government apparently feels that such problems cannot be considered under the Legal Aid Scheme. After enumerating various housing abuses, an official study concluded:

[T]here can be no doubt that most of the abuses affect tenants of small means with little experience—indeed a marked fear of and distrust . . . of law and lawyers. It is true that this country enjoys an admirable legal aid system which brings legal remedies within the reach of all; but [several] factors must be borne in mind . . . (3) [T]he legal aid system necessarily involves a time lag while the case is examined with a view to the grant of a legal aid certificate. . . . (5) There is a marked shortage of solicitors operating legal aid in London County Courts and landlord-tenant disputes are notoriously complex and time-consum-

95. LORD CHANCELLOR'S OFFICE, COMMENTS AND RECOMMENDATIONS OF THE LORD CHANCELLOR'S ADVISORY COMMITTEE 16 (Sixteenth Report 1965-66).

96. The information in this paragraph and the preceding one is based on knowledge gained through observations and conversations while the authors were living in London, England.

ing.⁹⁷

E. Additional Sources of Legal Aid

Besides various community organizations, there are a few additional services that will direct individuals with legal problems to a solicitor. There are more than 430 Citizens Advice Bureaus in England administered by the National Council of Social Services and staffed by professional and volunteer workers. The Citizens Advice Bureaus make information concerning government agencies accessible to the public and attempt to answer public and personal inquiries, many of which involve legal technicalities which would have been directed to a lawyer in any other country.⁹⁸ The Citizens Advice Bureaus are a significant referral service for solicitors on the local legal aid panel. The Citizens Advice Bureaus receive over a million inquiries per year, roughly 25 percent of which concern housing difficulties⁹⁹—a proportion that approximates that reported by Mary Ward Settlement, Toynbee Hall and Cambridge House.¹⁰⁰

In addition to the Citizens Advice Bureaus, there are numerous Poor Man's Lawyer projects in operation throughout England.¹⁰¹ These projects are quite informal, and the services that they offer vary markedly. The most comprehensive programs are run by Toynbee Hall and Cambridge House, which offer the counsel of one or two volunteer solicitors one evening a week. Although cases rarely proceed beyond the letter-writing stage, many people are referred to private solicitors or members of a legal aid panel. Toynbee Hall conducts about 2,500 legal interviews each year and attracts people from a large portion of the greater London area. Similar services of varying scale and efficiency are conducted by local political parties and labor unions.¹⁰²

Local newspapers receive many legal inquiries. The *News of the World* conducts a John Hilton Advice Bureau, which receives about 150,000 problems per year. The *Daily Mirror* and *Sunday Mirror* receive over 70,000 inquiries annually through their Readers Service. *The*

97. HOUSING IN GREATER LONDON COMMITTEE REPORT, CMD. NO. 2605, at 176 (1965).

98. ABEL-SMITH & STEVENS 328-29.

99. NATIONAL COUNCIL OF SOCIAL SERVICE, PATTERN FOR PARTNERSHIP 22 (1959).

100. See text accompanying notes 93-95 *supra*.

101. There are no documented studies on the number of Poor Man's Lawyer projects. Consequently, it is not known how many exist to fulfill the legal needs of local communities.

102. Based on interviews and observations made by the authors while in London, England.

People receives about 50,000 requests for legal information each year.¹⁰³

One of the glaring difficulties with this referral procedure is that it is a service rendered after the legal difficulty has evolved. No attempt is made in any of these agencies to follow through on a referral, to educate the poor so as to enable them to avoid many legal problems, or to help them bring actions to alleviate their problems. The poor are usually on the defensive.

The results of government surveys have illustrated that people do not know the legal consequences of their actions and do not seek needed professional assistance. A report on consumer protection indicated that "the consumer made too little use of his legal rights, partly because he was unaware of them, and partly because the difficulty, cost and uncertainty of enforcing them by court action deterred him from making the attempt"¹⁰⁴ The report also found that most consumers were ignorant of retailers' duties regarding the quality of goods sold and did not know of basic implied warranties applicable to the goods that they purchased.¹⁰⁵ The report concluded:

There was widespread recognition that the ordinary consumer—devoid of technical knowledge, lacking ready access to independent technical advice, uncertain of the strength of his case, a stranger to the law and its way—must be reluctant to incur the considerable trouble and appreciable cost of pursuing what he regards as his legitimate complaint. [T]he rights which the law give [sic] to the consumer too often go by default.¹⁰⁶

F. The Plea for Neighborhood Law Offices

As the Law Society's figures demonstrate, the most obvious inadequacy of the Scheme is its inaccessibility. Eligible clients just do not seem to be using it. Thus, arguments in favor of the neighborhood approach, which includes the inherent benefits of creative advocacy,¹⁰⁷ have been presented to the Law Society.

In 1966, one of the first arguments in favor of neighborhood law offices appeared in an article attacking the deficiencies of the Legal Aid Scheme.¹⁰⁸ Advantages of the neighborhood law office, such as de-

103. The statistics are derived from telephone calls made to the newspapers concerned.

104. CONSUMER PROTECTION COMMITTEE, FINAL REPORT, CMD. NO. 1781, at 126 (1962).

105. *See id.* at 182.

106. *Id.* at 129.

107. For a full discussion of the concept of creative advocacy, see text accompanying notes 167-71 *infra*.

108. *See Zander, Poverty and the Law*, 1966 SOCIALIST COMMENTARY 13, 15.

veloping expertise among poverty lawyers, relieving solicitors of unremunerative legal work, and creating a constructive competition between private and neighborhood lawyers, have been presented.¹⁰⁹ Other appeals for neighborhood law offices have been voiced by individual lawyers.¹¹⁰

The Ford Foundation is sponsoring an English survey of legal needs and the extent to which they are being satisfied in three sample communities within the Greater London area. This will be the first empirical research effort of its kind, and the results will be evaluated in order to ascertain the extent to which institutional changes are needed in the present Legal Aid Scheme.

The Law Society's Advisory Committee on Legal Aid has rejected the suggestion that neighborhood law offices would improve the deficiencies in the present Scheme. The Committee suggested that the basic problem of accessibility be attacked by strengthening the facilities of the Citizens Advice Bureaus so that an increased number of needy individuals would be encouraged to take their legal problems from the Bureau to solicitors participating in the Scheme.¹¹¹ In its recent memorandum, the Committee listed the following reasons for rejecting demands for neighborhood law offices:

- a) Such a radical departure from the present concept of legal aid would introduce a separate legal service and "exercise a divisive social influence."
- b) It would be based upon notions of indigency and charity.
- c) It would eliminate or confuse the legal aid principle of obligation to contribute, where reasonable.
- d) It would necessitate additional administrative expense.¹¹²

III. The American Approach to Legal Aid

A. OEO Legal Services Program

For many years, American lawyers have provided a legal aid service for civil matters. Local bar associations usually sponsored legal aid societies which, as a charitable service, offered a limited variety of legal assistance to the poor.¹¹³

109. Liell, *Why Not Neighborhood Law Offices?*, 111 SOL. J. 763, 764 (1967).

110. *See, e.g.,* Zander, *Justice for the Poor*, *The Times* (London), Dec. 10, 1968.

111. *See* LORD CHANCELLOR'S OFFICE, COMMENTS AND RECOMMENDATIONS OF THE LORD CHANCELLOR'S ADVISORY COMMITTEE 5 (Sixteenth Report 1965-66).

112. THE LAW SOCIETY, LEGAL ADVICE AND ASSISTANCE MEMORANDUM, Feb. 1968.

113. *See generally* E. BROWNELL, LEGAL AID IN THE UNITED STATES (1951). "[Legal Aid is] essentially . . . the organized effort of the bar and the community to

The present legal services program is a response to the 1964 Economic Opportunity Act.¹¹⁴—the legislative mandate of the well-publicized “War on Poverty.” Although generally concerned with relieving the conditions of poverty, the Act contains no express reference to a legal assistance program. The Legal Services Program grew out of the Act’s provision for community action programs designed to “provide stimulation and incentive for urban and rural communities to mobilize their resources to combat poverty.”¹¹⁵

The Act operates by financing projects that originate at the local level. Individual legal services programs are not government agencies; rather, they are usually nonprofit enterprises incorporated under state law. In many instances, the programs have been created by legal aid societies previously operated by local bar associations. To establish a legal services program within the meaning of the Act, an organization must design a program that is responsive to the particular needs of the community.¹¹⁶ If a program qualifies, it is financed by the Office of Economic Opportunity to the extent of 90 percent of its operating budget.¹¹⁷ The remaining 10 percent, which must come from the local community, may be contributed in kind and often takes the form of services volunteered by professional people or office machinery donated by local businessmen.

The Act provides that the management of the program include the “maximum feasible participation of residents of the areas served.”¹¹⁸ The directors of most programs include residents of the poor community, educators, and leaders of the civic or business community. The program employs a staff of lawyers and administrative and clerical personnel necessary for its activities. Frequently, law students are employed to assist lawyers, and often, community residents work as aides to facilitate communication with indigenous neighborhood organizations. In addition to provisions for a wide range of legal services, the Office of Economic Opportunity *Guidelines* suggest that offices be located in areas where they are accessible to the poor,¹¹⁹ that efforts be

provide the services of lawyers free, or for a token charge, to persons who cannot afford to pay an attorney’s fee and whose cases are unremunerative on a contingent fee basis.” *Id.* at 3.

114. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified in scattered sections of 42 U.S.C.).

115. Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 201, 78 Stat. 516.

116. 42 U.S.C. § 2809(a)(3) (Supp. III, 1968).

117. *Id.* § 2812.

118. 42 U.S.C. § 2782(a)(3) (1964).

119. OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICE PROGRAMS 27 (1967).

made to encourage education and research in new areas of substantive law relevant to poverty problems,¹²⁰ and that community educational activities be conducted to acquaint people not only with the legal assistance service but with the ways in which legal problems can be avoided.¹²¹

Each program is initiated and directed by the local community. Financial tests which determine eligibility for legal services are not standardized. Each project determines and administers its own "means" test, which excludes those who "can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter."¹²²

Depending upon the size of the project, the administrative staff of a legal services program includes a director, who is often a lawyer, sociologists, accountants, and legal specialists. In large urban areas, there may be a central administrative office, which coordinates the activities of neighborhood offices located in different areas of the city. A typical neighborhood office might contain three or four lawyers, secretarial staff, and a community worker. Some projects maintain a collective research program at the central office which serves all the neighborhood offices. This program may be conducted by research attorneys with the assistance of law students who may be participating in a work-study arrangement between the law school and the legal services program.

The size of some larger projects has necessitated legal specialists who devote most of their time to a particular area, such as housing or welfare law. These specialists usually work in the central office, from which they help the neighborhood office lawyers conduct test cases or carry out particularly difficult legal procedures that require their expertise.

The director and the specialist attorneys are in a position to assess problem areas in the law where litigation or legislative reform could alleviate institutional conditions of poverty. The specialists pursue solutions to problems of general application to the poor, such as the enforcement of building regulations; attorneys in the local offices pursue individual problems for a client, such as establishing a particular landlord's duty to repair.

Usually lawyers do not maintain a private practice in addition to their work for the neighborhood office; their salaries are comparable

120. *Id.* at 2.

121. *Id.* at 24

122. *Id.* at 7.

to those of lawyers in private practice. Volunteer attorneys may work with the legal services program by devoting several hours each month to a case that has been referred from a neighborhood office, by advising neighborhood lawyers on a particular legal topic, or by conducting educational discussions in the neighborhoods. Other professional services may be utilized in the same manner, and such sources help to make up the nonfederal share of the operating budget that must be donated by the local community.

To effectively respond to the needs of a community, a legal services program must develop working relationships with various municipal authorities. Lawyers maintain relations with the police in order to facilitate communication between the community and law enforcement authorities. They may also work with welfare agencies, public health agencies, school boards, and other public bodies to facilitate the referral of legal problems to the neighborhood office.

That the Legal Services Program is part of the War on Poverty is initial evidence of the fact that the program is intended as a means for involving the law and lawyers in the process of social change. The role of the Legal Services Program in the War on Poverty is defined in the Office of Economic Opportunity *Guidelines*:

The Congressional Statement of Findings and the Declaration of Purpose as a preamble to the Act presents a mandate to the Office of Economic Opportunity "to eliminate the paradox of poverty in the midst of plenty in the Nation by opening to everyone the opportunity . . . to live in decency and dignity." In any comprehensive attack on the causes and effects of poverty, the law and lawyers are of singular significance.¹²³

As the first director of the Legal Services Program stated: "It is the assumption of government responsibility in a field where private citizens have long recognized a grave need which they have attempted unsuccessfully to meet."¹²⁴

The intention of the Legal Services Program was that lawyers would express the forces of social change and channel them into legal procedures in the same manner that they conduct other legal or financial business. The program would "settle lawyers in the neighborhoods, representing the poor and attempting to articulate their needs."¹²⁵ The neighborhood lawyer would be an advocate of the poor both in the

123. *Id.* at 1.

124. Bamberger, *The Legal Services Program: Is It Socialized Law?*, 51 MASS. L.Q. 313, 316 (1966).

125. Caplan & Johnson, *Neighborhood Lawyer Programs: An Experiment in Social Change*, 20 U. MIAMI L. REV. 184, 185 (1965).

courtroom and in the community; he would argue his client's case with civic authorities and federal agencies.¹²⁶

The development of a program giving a voice to the poor through one of the more legitimate means of voicing grievances was likely to result in unanticipated events. The action generated by lawyers working with people who are slowly engaging themselves in a struggle to change their role in society was bound to produce results that would cause Congress much uneasiness. In its War on Poverty, Congress had passed a bill out of which emerged a legal services program. This program was seen by its creators as a prescription for a quantitative and qualitative transformation of the conditions of poverty.¹²⁷

Change never comes easily. The time lag that occurs before the social change generated by neighborhood lawyers can be adequately reflected in national politics inevitably causes conflict. A tension between the desire to legitimize the needs of the poor and the fear that the result would be contrary to the conventional development of society marked the annual congressional debates considering the re-funding of the Legal Services Program. This conflict is manifest in the recent history of California Rural Legal Assistance.

B. The Political Sensitivity of Progressive Legal Advocacy: CRLA

As one of the largest agencies under the Office of Economic Opportunity's Legal Services Program, the California Rural Legal Assistance Program receives an annual grant in excess of one million dollars to employ over 40 lawyers on behalf of the rural poor living in California.

In 1967, CRLA handled nearly ten thousand cases. One of these involved proceedings against state administrative agencies on behalf of clients who were allegedly being deprived of welfare benefits to which they were entitled. County officials objected to the availability of free legal assistance for these people, disputing the propriety of suits against government agencies by a federal delegate agency. Sutter County Supervisors were "concerned and appalled with the harassment given the supervisors and county officials."¹²⁸ They claimed that free legal advice at the taxpayers' expense should not be available for those who would litigate against government agencies.¹²⁹ They also asserted that CRLA was engaging in political and union activities in violation of their

126. *See id.* at 187.

127. 1967 U.S. CODE CONG. & AD. NEWS 2447-48, 2451-52.

128. The Independent Herald (Yuba City), June 19, 1967, at 1, col. 5.

129. *Id.*

original purpose of providing free legal advice to poor people in divorce and other civil cases.¹³⁰

In 1967, CRLA succeeded in enjoining the United States Department of Labor from certifying the importation of Mexican farm labor, an activity that for years has plagued the efforts of California farm laborers to obtain decent wages and working conditions.¹³¹ CRLA obtained an out-of-court settlement of the issue with the Labor Department. Their success was met by the congressional charge that CRLA was involved in Communist activities¹³² and was abusing public funds.¹³³ California's Congressman Sisk added that

[t]he spirit of the grant given to CRLA . . . plainly intended that . . . concern should be for individual people and that it was not contemplated the CRLA would be a federally funded law firm to litigate all of the major social problems of our society, without restraint, as its own judgment dictated.¹³⁴

He asserted that CRLA was "bent on pitting class against class in the abrasive style which seems to be so much in vogue today."¹³⁵

Lawyers in the Poverty Program justified the criticized activities:

A lawyer's representation must include the right to sue governmental agencies if his client's interests so warrant . . . a lawyer cannot refrain from suing governmental agencies merely because he receives part of his salary from the government . . . and the legal profession cannot countenance the creation of a double standard of justice in this country where the rich have recourse against the government but the poor do not.¹³⁶

Director of CRLA, James Lorenz, pointed out that competent lawyers could not be retained for the poor if such a double standard were to be applied; this is a restriction most lawyers would not tolerate.¹³⁷

Senator George Murphy charged

130. *Id.*

131. *See* Alaniz v. Wirtz, Civil No. 47807 (N.D. Cal., filed Sept. 8, 1967). The Secretary of Labor had been certifying the importation of braceros under 8 U.S.C. § 1182(a)(14) (1964), which excluded alien workers from the United States only if there were sufficient workers in the United States who are willing and qualified to work. Since the importation of aliens increased the labor supply, thereby lowering wages and working conditions, it was asserted that the plaintiff workers would be irreparably damaged unless the Secretary was enjoined from importing foreign workers. Brief for Plaintiff at 2, Alaniz v. Wirtz, Civil No. 47807 (N.D. Cal., Filed Sept. 8, 1967).

132. *See* 113 CONG. REC. 26945 (1967) (remarks of Congressman Mathias).

133. *See id.* at 27129 (remarks of Senator Murphy).

134. *The Fresno Bee*, Oct. 1, 1967, at 4, col. 4.

135. *Id.* at 4, col. 5.

136. Press Release of Arnett Hartsfield, Los Angeles Neighborhood Legal Services Society, Sept. 27, 1967.

137. *See* *The Fresno Bee*, *supra* note 134, at 4, col. 5.

that CRLA had "meddled" in political and social affairs . . . "outside the purposes of the organization."

. . . .
[T]he program was . . . diverted from its original objective to political and social welfare purposes.

. . . .
I will do all I can to submit legislation to restrict CRLA by law to its proper and intended activities. If that cannot be accomplished, I will oppose further funding of the program.¹³⁸

On October 4, 1967, Murphy proposed a modification of the Legal Services Program in the form of an amendment to the Economic Opportunity Act: "No project under such program may grant assistance to bring any action against any public agency of the United States, any State or any political subdivision thereof."¹³⁹ The amendment was defeated by a vote of 36 in favor, 52 opposed, and 12 abstaining.¹⁴⁰

Renewed debate on the floor of Congress illustrated attempts to develop political controls to regulate the activities of poverty lawyers. The suggestion was made, for example, that restrictions could take the form of legislative requirements that legal service programs be operated only under the auspices of local bar associations.¹⁴¹ This proposal reflected full knowledge of the inhibiting effect such a requirement would have upon the services offered.

One of the issues in this controversy was the proportion of effort to be spent on behalf of individual clients and on behalf of groups through collective advocacy or the prosecution of test cases. It was clear that the more successful group cases were, the more obvious would be the political sensitivity of the Legal Services Program. As a member of the Advisory Committee to a CRLA office said: "[i]f they take cases that can help more than just one poor person, they can make some good changes while they're here. [But] I don't think they'll be here very long!"¹⁴²

California's Fresno County Farm Bureau urged that an end be put to CRLA's harassment of agricultural interests. They charged that CRLA's efforts were "against agriculture and the best interests of the community."¹⁴³ The deans of ten law schools, however, came to the defense of the principles of legal advocacy at issue. In a letter to the *New York Times*, they warned: "If CRLA is destroyed, the message will

138. Appeal-Democrat (Marysville-Yuba) Oct. 2, 1967, at 1, col. 7.

139. 113 CONG. REC. 27871 (1967).

140. *Id.* at 27873.

141. *Id.* at 30580.

142. 43 THE NEW YORKER, Nov. 4, 1967, at 182.

143. Appeal-Democrat (Marysville-Yuba), Nov. 24, 1967, at 1, col. 3.

be clear to programs that might contemplate challenging, innovative litigation: Do not incite the displeasure of public officials."¹⁴⁴

CRLA would have to rally a strong national lobby or suffer the consequences of adverse political reaction. It appears that the Governor of California was seriously considering vetoing the program when it came up for re-funding in December.¹⁴⁵ Although the Governor's approval is not a requisite for federal funding of the CRLA,¹⁴⁶ his veto would raise political difficulties.

Governor Reagan's Executive Secretary created apprehension that the continuance of CRLA's program would meet resistance:

The administration is concerned with CRLA's method of operation not its successes. The encouragement of litigation has perhaps open[ed] the door too wide to the indigent client . . . [It has] imposed burdens on rural courts by [its] incursions into social legislation.¹⁴⁷

The Governor stated: "We think that [CRLA has] gone a little afield and . . . has kind of been a promoter of social causes."¹⁴⁸

On January 11, 1968, however, Governor Reagan outlined the conditions under which he would be willing to allow the continuation of CRLA and would approve its pending grant from OEO of \$1,441,333. CRLA must reduce its staff to realistic levels, keep its hands off landmark cases, and cease providing assistance in lawsuits that might involve public agencies. Furthermore, in each county in which CRLA provides a service, they must ascertain from local bar associations whether there are other legal services already available to the poor. Existing services would preclude the operation of a CRLA office in that county. CRLA repudiated these conditions.¹⁴⁹

The Governor did not veto the CRLA grant, but, in announcing the decision not to do so, his officers indicated that his conditions were substantially complied with by the agreement of an Office of Economic Opportunity director to reexamine salary and staffing procedures.¹⁵⁰ An Office of Economic Opportunity spokesman observed that this communication could not be interpreted as a change in the terms of the original CRLA grant approved in December, 1967.

144. N.Y. Times, Nov. 27, 1967, at 46, col. 3.

145. See text accompanying notes 147-48 *infra*.

146. See 42 U.S.C. § 2824 (Supp. III, 1968), which provides that the Director may provide assistance to state agencies in accordance with state law.

147. L.A. Times, Dec. 21, 1967, at 3, col. 6.

148. Sacramento Bee, Dec. 22, 1967, at 13, col. 5.

149. L.A. Times, Jan. 15, 1968, at 3, col. 1; *id.*, Jan. 20, 1968, at 3, col. 1.

150. L.A. Times, Jan. 20, 1968, at 3, col. 1.

He characterized the agreement as "creating better cooperation and communication between OEO and the Governor's office."¹⁵¹ The Governor's office subsequently issued a statement that "unresolved issues . . . will be the subject of continued discussions during the coming year."¹⁵²

The activities of CRLA are but one example of the concerns and struggle of a legal services program. All over the United States, OEO offices are offering legal assistance to the poor. Together, the poor and their lawyers are fighting for law reform in such areas as welfare rights, food aid programs, police brutality, working conditions, housing, credit, voting requirements, consumer fraud, and medical and hospital services.¹⁵³

As these voices are heard in the community and in legal forums, conflicts arise between their aspirations and public opinion. The force and necessity for social change is felt by all, but the appropriate means for achievement are rarely agreed upon. The struggle is constant; perhaps one of the more encouraging aspects of the Legal Services Program is that it continually attempts to confront the legal system. Poverty problems are publicized and favorable decisions are often won. In the process, however, judicial procedure tends to authenticate and limit the political drive for social change.

IV. Social and Economic Factors and Their Relationship To Change

Differences in the structure and operation of the English Legal Aid Scheme and the American Legal Services Program highlight their individual characteristics. The American Legal Services Program has embodied a number of features that follow from the intention of the Economic Opportunity Act to facilitate social change through government-sponsored institutions within the legal system. The English Legal Aid Scheme embodies few of these progressive characteristics. However, the conservative development of the English Scheme and the political difficulties that the Legal Services Program has encountered derive from similar social and economic factors.

A. Accessibility and Identity

The Legal Services Program succeeded in a number of very tangible respects in its effort to establish lawyers in a posture outside the

151. *Id.* at 3, col. 2.

152. *Id.*

153. See OFFICE OF ECONOMIC OPPORTUNITY, 3 LAW IN ACTION, No. 6 (1968).

existing framework of legal institutions. By situating the neighborhood lawyer in a locality accessible to the poor and by giving the poor an influence in the policies of the neighborhood office,¹⁵⁴ the Legal Services Program illustrated its recognition of the need for an external stimulus to change. The proponents of this program knew that the direction for change had to come from the poor community; the Government hoped that local energies could be usefully channelled by the legal profession. Such a program would enable the law to facilitate the process of social change and legalize the energies behind it.

Located in poor communities and often open in the evenings and on weekends, neighborhood law offices are readily accessible to community members. More poor people seek legal services since offices are in their neighborhoods, unobstructed by plush carpets and expensive entrances.

The distribution of lawyers in England, on the other hand, is geographically weighted in favor of financial centers; their offices are well-protected by social and psychological barriers, which the poor are reluctant to overcome. In London, lawyers remain concentrated in the commercial West End and the financial centers of the City District. Accessibility remains the argument most forcefully offered in England in support of the neighborhood office approach.

In a neighborhood law office, the full-time staff lawyer is given the opportunity to develop an expertise at handling problems unique to the poor. He is likely to develop, if he does not already have, a sympathy for the legal difficulties and personal ambitions of poor people. His consequent political interest is a manifestation of the same kind of identity that the corporate lawyer obtains from social intercourse with executive clientele. A lawyer does not see himself as one who represents just any person with any problem; he often sees himself as an advocate for, and in this sense, representative of, the group that his practice serves.

The English solicitor or barrister does not adopt the attitude toward the legal aid client that the American scheme encourages. He will process the assisted person's case without much attention to its broader social context; moreover, interviews suggest that, in at least some cases, he works according to professional standards below those by which his work for paying clients is measured. Frequently his legal aid work is prolonged over an unreasonable length of time. In other words, he may be found to share the attitudes and motivations of the

154. See text accompanying notes 119 *supra*.

upper-middle-class lawyer in America, derived from the aspirations of the upper-middle-class businessmen in both countries. When solicitors serve the aided client with social motivations basically antithetical to the poor, the poor will be reluctant to seek their assistance.

B. The Role of the Poor Community

The American Legal Services Program increased its potential for encouraging social change by including the poor among those participating in the administration of the program. All Economic Opportunity Act community action programs must be "developed, conducted, and administered with the maximum feasible participation of residents . . . served."¹⁵⁵ Underlying this principle is a recognition of the difficulties inherent in creating an agency of change within an institutional framework. By utilizing the poor in the administration of the scheme, program directors evidently hoped to tap essential external interests and energies.

Apart from a single lay advisor on the Legal Aid Committee of the Law Society, the English Scheme has no such provision.¹⁵⁶ Although many people fought for lay participation in the Scheme ("lay" was the closest they got to "poor"), the Law Society retained complete control.¹⁵⁷ Consequently, the personal and vocational interests of participating lawyers, often antithetical to the interests of the poor, were left to guide the progress of the Scheme.

The Law Society's control of the Scheme should be contrasted with the United States Government's supervision of the Legal Services Program. The English experience has resulted in no external control; lawyers direct lawyers in the administration of the Scheme, thus removing even limited public accountability. In the United States, the Legal Services Program is at least subject to the dynamics of the political process.

Yet the principle of community participation in the Office of Economic Opportunity's Legal Services Program undergoes analysis better in theory than in practical application. Resident individuals are selected to perform administrative or clerical roles more often than to serve in a policy-formulating capacity. The *Guidelines* adopted a "flexible" atti-

155. Economic Opportunity Act § 202, 42 U.S.C. § 2782(a)(3) (1964).

156. Laymen serve on the Lord Chancellor's Advisory Committee, 12 & 13 Geo. 6, c. 51, § 13; but their function is strictly advisory. They do not aggressively pursue the social and economic interests of the poor, and their influence in the administration of the Scheme is not substantial.

157. See text accompanying notes 62-65 *supra*.

tude suggesting that "at least one representative" from each poor community should serve on the board of directors.¹⁵⁸ Most boards, while large in number, contain a minority of resident representatives. These resident representatives are not sufficiently influential on the board to determine policy. The political objectives of the ghetto are many and diverse and cannot be represented by "at least one" delegate for each community served. The representative likely to be chosen is one whose career or community position distinguished him in some manner. He will therefore often have a significant establishment posture, which will diminish the effectiveness with which he could represent the diverse political interests in his community.

The difficulties in effectuating the principle of maximum feasible participation reflect the reluctance of vested political interests to encourage a qualitative change in the nature of ghetto communities. An advocate of qualitative change is not likely to be selected as a board member. A respectable black board-member, who may have distinguished himself by government service or in business, probably will favor the availability of additional services in his community at government expense. On the other hand, he is not likely to encourage the implementation of programs designed to organize his community around new and independent economic entities, for to do so would disparage the means by which he achieved his own distinction.

C. Lawyers' Role in Society

Jurisprudential differences between the legal systems of the United States and England have given rise to varied functions served by the legal profession and the law in their respective societies. This helps to explain why the American lawyer was given a greater role in the battle with poverty by the Legal Services Program than was his English counterpart by the Legal Aid Scheme.

American lawyers participate in social and economic developments to a greater extent than do their English counterparts. The American lawyer is a business advisor and a tax consultant; he occupies directing positions in civic and social enterprises. The English lawyer long ago lost the tax-advising business to the accountants,¹⁵⁹ he is not as influential in business, and his leadership in social affairs is generally limited to his activities as a politician.

The kinds of problems handled by the English courts are less varied

158. OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICE PROGRAMS 12 (1967).

159. ABEL-SMITH & STEVENS 209-10.

than the scope of social concerns that reach American courts. Public ministries govern the activities of many functions that in the United States are handled by lawyers.

There is a sharp difference between the changes . . . which may come because of the English legal aid scheme and the kinds of changes which might be wrought by aggressive American legal assistance. The English plan hardly affects public law at all because the ordinary British Courts handle many fewer matters in this area than do American Courts. The English judges . . . infrequently sit in judgment upon official acts. Complaints about housing, welfare, planning, and the like, are handled in the appropriate ministries and . . . tribunals.¹⁶⁰

The concept of law has much greater certainty to an English lawyer than to an American lawyer;¹⁶¹ although judicial decision can modify the law, the doctrine of precedent is probably much stronger in the English court.¹⁶² Parliament, not the courts, is the more accessible vehicle for social change. Consequently, English lawyers do not see casework as a significant instrument of social change—an attitude not limited to lawyers but shared by the public as well. In an interview, one community leader indicated that he did not even expect two opposing lawyers to have different views of the applicable law, since they were both primarily officers of the court, bound by the applicable precedent. Such opinions do not encourage resort to the law for change.

The Legal Services Program offers a different posture for confrontation with government authorities than the English Legal Aid Scheme. The problems of the poor may often be relieved through the work of municipal authorities; but in many instances, local authority is a source of aggravation. In the United States, the financing of many local agencies, such as those administering housing and welfare programs, is closely tied to sources at the federal level. Consequently, it has long been recognized that the Legal Services Program often faces the political dilemma of having to deal critically, perhaps destructively, with government-financed programs. For example, last year a tenants' association in San Francisco was represented in its attempt to stop a federal redevelopment project on the grounds that the tenants' consequent displacement would not be in conformity with federal relocation standards.¹⁶³ The Legal Services Program "envisions institutionalized con-

160. Paulsen, *Expanding Horizons of Legal Services II*, 67 W. VA. L. REV. 267, 289 (1965).

161. *See id.* at 290.

162. *See id.* at 287.

163. *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968); see text accompanying notes 131-35 *supra*.

flict within the official power structure. The agencies and departments of the city will be partners to the lawyer, but partners he is required to oppose"¹⁶⁴

"Will the lawyer be permitted to bite the hand that feeds him in the inevitable suits against the welfare department and other local government agencies?"¹⁶⁵ This has been regarded as a "high potential for conflict with the officials who make public policy affecting the poor."¹⁶⁶ The same tensions are not likely to be generated by the English lawyer.

He is not part of an organization committed to social and legal reform; he is a private practitioner performing a service for a client for a fee. Even when he takes a case which involves opposition to public officials or policy, it is calculated to be conducted in a narrow technical manner not likely to cause significant concern within the official power structure.¹⁶⁷

D. The Remedial Nature of Legal Aid and Creative Advocacy

The law serves the poor in a qualitatively different manner than it serves the middle class and the institutions of commercial enterprise. Law is generally of remedial service to the poor; in the service of middle class and commercial interests, however, it is also a creative force.

The problems that compel the poor to seek access to the law are derived basically from situations in which relief or assistance is necessary. If forthcoming, legal help may serve to extricate the client from his legal problem. Lawyers for the poor often fail to go beyond this specific aid; they seldom attempt to discover a remedy for the difficulties that gave rise to the legal problem or to find solutions for the conditions that brought about the client's financial inadequacy. This is not to suggest that the poor client is always in a defensive legal posture. The legally aided might aggressively seek redress against exploitative consumer practices and thereby succeed in reducing price discrimination or unfair marketing techniques. Nevertheless, he will remain dependent upon activities of external business interests, which continue to take profits out of his community in the process of providing him with basic commodities. Housing abuses ranging from substandard physical conditions to illegal rent payment arrangements can be corrected by aggressive legal representation. This does not help to alter the tenant's dependence upon the landlord. If legal pressures force a landlord to

164. Caplan & Johnson, *Neighborhood Lawyer Programs: An Experiment in Social Change*, 20 U. MIAMI L. REV. 184, 185 (1965).

165. *Id.* at 187.

166. Masotti & Corsi, *Legal Assistance for the Poor: An Analysis and Evaluation of Two Programs*, 44 J. URBAN L. 483, 499 (1967).

167. *Id.* at 500.

modify rents and make repairs that eliminate his profit, he may sell the building or put it to other uses.

Contrast with these remedial uses of the legal process the services to which the law is put by the middle and upper classes. Only a small portion of commercial legal work is remedial in nature, in contrast to the creative character of purchase and sale agreements, the development of marketing relationships and legal efforts that regulate the manufacturing process. The legal methods employed to meet the poor person's housing problems do not compare to the creative ways in which the law operates in other areas of housing—legal relationships guide engineering and architectural developments, land conveyancing and complex possession transfer arrangements such as long-term leases and secured sales.

Progressive legal work in many Legal Services Programs is beginning to provide this form of creative advocacy for the poor. Some programs have centralized research efforts, which provide numerous neighborhood offices with specialized expertise. Specialists in difficult problem areas, such as housing and welfare, devote their energies to discovering ways of eliminating institutional sources of poverty. Such activities demonstrate that there are creative functions that legal services can provide for the poor as well as for the financially stable. Lawyers can help to organize cooperative enterprises such as tenant-owned apartment buildings.¹⁶⁸ Tenant unions can be established under local law, and contractual status can be given to rent obligations and maintenance and repair agreements.¹⁶⁹ Consumer independence can be promoted through the establishment of cooperative service centers and consumer-owned retail stores. Although financial difficulties and management problems present formidable obstacles to these experiments, such projects are nevertheless being undertaken. Organizational advocacy represents another dimension of progressive representation. Advocates for community organizations have the opportunity to represent numerous individuals with a common need. Frequently, organization can begin around a common legal problem.

Creative advocacy has promoted well-calculated assaults on whole areas of substantive law aiming at reform, new legislation, and the elimination of unfair laws. A wealth of literature continues to come from law schools, as professors and students respond to these innovations in legal practice. Universities offer new courses that explore the problems

168. See generally Comment, *Community Apartments: Condominiums or Stock Cooperative?*, 50 CALIF. L. REV. 299 (1962).

169. See generally 2 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 237 (1967).

of the poor. Members of the bench and bar are consequently given opportunities to facilitate change in the substantive law.

The structure of the English Scheme in no way provides for such creative advocacy. Whereas the activities of a neighborhood office in the United States begin with the individual case and may extend to strategic advocacy and organizational representation, the focus of administrative activity in the Legal Aid Scheme is on operations prior to the handling of the case. The solicitors who administer the Scheme are concerned with the standards by which a case is judged to merit legal representation at public expense and with a determination of the financial qualifications of the client.

It is significant that under the English Scheme there is no individual charged with the evolution of creative advocacy. No one is officially concerned with particular economic or legal problems of the poor; the Scheme does not allow for such a role to be assumed even by a participating solicitor. Formal procedures exist for the dispensation of advice and for the processing of a case through the stages of litigation; although presently there are efforts to simplify and expand the advice procedures,¹⁷⁰ there is no provision in the Scheme that could accommodate creative advocacy. In order for legal aid to be granted, the applicant's problem must pertain to a claim or controversy that might proceed to litigation and which is already enumerated in a list of actions appropriate for legal aid funds.¹⁷¹

E. Political Sensitivity

To the extent that the Legal Services Program puts legal minds and talents to the task of articulating the needs of the poor, it is a significant stimulant to meaningful social change. Nevertheless, the economic and social forces that oppose its progressive measures continue to undermine the very existence of the program. Efforts such as those of CRLA and other groups to affect the economic relations between the poor and the rest of society inevitably incur the wrath both of the legislators, who appropriate the funds, and of the electorate.

The tenor of the political and financial resistance that will confront neighborhood lawyers will vary in direct proportion to the degree of aggressiveness with which they pursue institutional changes.¹⁷² The professional in a neighborhood office works within this precarious con-

170. See, e.g., Liell, *Why Not Neighborhood Law Offices?*, 111 *SOL. J.* 763 (1967).

171. See *Legal Aid and Advice Act of 1949*, 12 & 13 *Geo. 6*, c. 51, § 1.

172. Carlin & Howard, *Legal Representation and Class Justice*, 12 *U.C.L.A.L. REV.* 381, 431 (1965).

text, while his English counterpart, serving a legally aided client, is spared from it.

In England, the creators of the Legal Aid Scheme did not anticipate political resistance to social change because they did not intend to confront those who might offer resistance. The Scheme developed primarily as a means to codify a procedure by which lawyers would be paid for conducting indigent litigation. Although individuals who were devoted to the causes of the poor worked hard for the enactment of the Scheme, they did not design it.

In contrast, the Legal Services Program, as part of the broad legislative program of the Economic Opportunity Act, was intended to be the legal faculty in a general effort to eliminate the conditions of poverty. The difficulties in institutionalizing an agency for change remain. Political and economic blocs resist pressures that attempt to alter their structure. The example of the progressive efforts of CRLA illustrated the reaction that these efforts precipitated.¹⁷³ The significance of this example lies not in the effect that the political battle had on the Legal Services Program, but in its exemplification of the correlation between such progressive activities and the political process.¹⁷⁴ The vulnerability of the program cannot be assessed without considerable speculation; however, an analysis of the CRLA example indicates the consequences of partisan legal representation sponsored at public expense.

In this dilemma lies the concept of political sensitivity. As lawyers assist the poor to alter their social and economic relations with the rest of society, they marshal the resistance of society against the uncertainty of social change. Yet it is at the expense of society that such activity must be maintained.¹⁷⁵

Differing perspectives hinder the resolution of this dilemma. On

173. See text accompanying notes 131-35 *supra*.

174. Another attack on the program has been a bill which attempts to limit further the political activity on the part of workers in the poverty program. H.R. 12335, 90th Cong., 1st Sess. (1967); H.R. 12365, 90th Cong., 1st Sess. (1967). The bill attempts to expand the already elastic area of prohibited "political" activity. The limitation itself gives rise to an internal inconsistency in the Economic Opportunity Act in that its basic objectives are political. The limitations give to those who would oppose the offering of progressive legal services a banner to wave in resisting any of its progressive and inherently "political" activities.

175. Robert Hutchins, Director of the Center for the Study of Democratic Institutions in Santa Barbara, California, has stated the same dilemma as it applies to the role of the state supported university. If the society hopes to be improved through university education, the university must be free, in fact encouraged, to criticize the society. Society must continue to support an institution which may well champion the alteration of its own constitution. See R. HUTCHINS, *THE UNIVERSITY OF UTOPIA* 88 (1964).

the one hand, there are the moral and political motivations that maintain the legal services program, provide for its recurring congressional financing and continue to encourage the exploration of avenues of qualitative social change. On the other, there are the social and economic forces that resist change, the psychological fears that different perspectives on life will devalue the present ones. Even those who resist change may admit the necessity of certain quantitative alterations that guarantee minimal standards of life and yet continue to resist qualitative modifications of social and economic relations.

The success of progressive efforts of the Legal Services Program will continue to precipitate resistance. This will likely take the form of pressures tending to shape legal assistance to a "Judicare" program offering the type of services provided by the English Legal Aid Scheme. This resistance could be minimized by pursuing quantitative benefits for the poor, such as elevating their standard of living, while doing little to alleviate the conditions of their poverty by attempting to pursue qualitative changes in their social relationships.

V. Society's Tolerance for Change

Society's potential for peacefully accommodating basic changes can be measured by its tolerance for certain recent attempts to implement change. When social problems reach a breaking point, it is seldom that public attention is drawn to the source of the difficulty. Instead, the public chooses to treat symptomatically the manifestations of discontent. Students at the University of California, Berkeley, and the London School of Economics, London, are forced to extremes in order to publicize deeply inculcated restrictions on political expression; the voices of the students are barely heard above the public analysis of university discipline and irresponsible behavior. Columbia University erupts against entanglements of administrative bureaucracy, government and the corporate world only to elicit condemnation for the inexcusable nature of their form of protest.¹⁷⁶

As the nation's poor marched on Washington, the War on Poverty crept slowly behind them, dwarfed by the magnitude of the nation's defense expenditures. Domestic social service programs are sacrificed in the interest of maintaining and fortifying international commitments. Basic to these commitments is the defense of ideology—the United States protects the world against the onslaught of "Communist aggres-

176. N.Y. Times, May 24, 1968, at col. 1, in which former United States Supreme Court Justice Abe Fortas said the student activities were "totally inexcusable from the point of view of even primitive morality."

sion." The judgment that ideological commitments are more crucial than the needs of people of the United States or any other country reflects an intolerance for social change.

Some degree of social change may take place peacefully within the present network of legal, political, and economic relationships. Such relationships, however, are founded upon a set of values mutually acceptable to the bulk of society. Change within these institutions is therefore dependent upon the extent to which individuals can afford to relinquish some of these values in exchange for values professed by those who demand something new.

Yet in most cases, these values are characteristically intolerant of change. Individuals are psychologically dependent upon them, in that reliance upon their widespread application attributes significance to individual lives. People feel secure in the knowledge that others behave in a similar manner; therefore, they can strive for success knowing that merit will be judged by predictable standards.¹⁷⁷ Consequently, those institutions founded upon a particular set of values generally remain conservative or inimical to change. The values upon which society is built are subtly expressed through the vehicle of political and economic ideology and the intricate rules of status and custom. The legal system is, in part, their backbone. It reinforces their structure and secures the adherence of individuals to their patterns. To expect that agencies of change will operate smoothly within this context is to forget, for a moment, what the values upon which society is based are all about.

177. "The culture, in other words, cannot provide its members with a feeling of primary value in a world of meaning unless it provides a prescription for meaningful action on the part of all. Status and role serve further to make behavior predictable, so that the meaning in every day life becomes dependable." E. BECKER, *THE BIRTH AND DEATH OF MEANING* 85 (1966).

