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Legal Services and the Legal Establishment

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INTRODUCTION

THE JUSTICE PARABLE

Long before time began we commenced administering Justice to the poor at the lowest possible price. Freud's oedipus legend informs us that when Nature first divided the world's inhabitants into Man and the Lower Animals, the Primeval Father became the delegate agency for administering Justice within the human family while the Lower Animals had to struggle along with the rule of tooth and claw. The Primeval Father claimed ownership of the Primeval Mother and the Brother Clan was informed that they were expected to carry the wood and hustle up something for the Father to eat, because the Law of Nature was "them that's got is them that gets" and to obey the Law or he'd run them off into the Forest with the other animals. Well—the Brothers finally figured out they'd been had. They revolted, killed the Father and expropriated the Mother: thereby rejecting both the Law and its minister.

Our next attempt at the matter came when God struck a bargain with Moses that He'd give them a lot if the Priests would build a house for all the Children of Israel and administer a little Justice. The Priests did just that and things looked good until the pore folks commenced complaining about how they worked like dogs and could just barely come up with the rent, the place was falling down around their heads and how come the Landlord could violate the building code laws without getting in trouble with God. The Chief Priest told them the basic Law of God was "them that's got is them that gets" and they would get their reward in Heaven. Well—the Roman Empire finally decided to do a little urban renewal to get rid of all those shacks so everybody had to move in with the neighbors or go to jail for a few thousand years. The Priests wound up with some dusty scrolls, had to grow beards and live out in the Wilderness.

When the Europeans decided to set up Nation-States they got everybody together and signed the Social Contract which had a provision in there that henceforth the King would administer the

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Justice to rich and poor alike and Adam Smith would be in charge of the Wealth of Nations. The King held Court himself for a few centuries, then delegated the job to the lawyers when he got too busy sailing around in his yacht to new places like Africa and China and setting up land companies and factories and things like that. The Lawyers ran things pretty tight for a while and then the deserving poor got to complaining about their wages, hours and working conditions and how come everybody else got to wear fancy clothes and drive big shiny cars and go to the movies twice a week. The Lawyers explained to them that the Law of the Land was "them that's got is them that gets" and if they didn't like it they could leave. Well—they did leave. They booked passage on the Mayflower and split the scene.

So you see when we all came over to America we knew just how to go about administering Justice to the poor. We did it by following these simple rules:

1. Get a charter from Nature or God or the State that delegates the job to the Lawyers or the Priests or somebody's Father;

2. Divide the population into groups—the godly and the ungodly; the sons and the fathers; the rich and the poor;

3. Administer Justice to the groups fairly and with an even hand on the principle "them that's got is them that gets;" and, finally,

4. Tell anyone who doesn't like it they will be rewarded in Heaven and if that doesn't suit them they can either leave, go to jail or go live with the other animals.

THE LEGAL ESTABLISHMENT RHETORIC

I was not privy to the historical events recited in the parable, that doubtless explains my somewhat garbled account. But I was privileged to be a party to the historical event known as the National Conference on Law and Poverty in June of 1965 which marked the formal beginning of the Legal Services program. I was not a very important party to that conference, but I was physically present and I even got to make one of the short speeches during a deserted afternoon panel. More importantly, however, is the fact I was present at many of the small group discussions which were held. One I particularly remember was attended by representatives of the various groups already in the Poor People Law business who

first spoke the lines for the roles their groups have come to play with a political vengeance on the national stage.

The scene was set in one of those circular conference rooms in the State Department building. The Conference had just listened to Theodore Berry, Director of the Community Action Program of the then new Office of Economic Opporunity, affirm that "a Legal Aid Society, foundation, university or nonprofit corporation" could be federally-funded to operate legal services programs, that the Economic Opportunity Act requirement of "maximum feasible participation by the poor" meant that "approximately one-third of the governing board of the legal service program" should be representatives of the poor; and, that the relationship between the proposed legal services programs and the organized local bar associations was that the latter should have a fair and equitable lawyer referral mechanism to whom ineligible clients could be sent. Following this keynote address, the discussion groups dispersed to talk things over. I drifted into the designated room for the discussion on models for Legal Services Programs.

Present in that group was Theodore Voorhees, President of the National Legal Aid Defenders Association, the trade association for the old-line legal aid societies which enjoyed the support of the prestigiously aristocratic American Bar Association. The sincere, lachrymous Mr. Voorhees spoke for this "establishment." What he said worried him was the OEO requirements of poor people on the board, full spectrum legal service and absolutely no fees. What he meant was the traditional legal aid society board is composed of various brahmins of the local business, bench and bar community who decide what kinds of cases will be handled and almost invariably decide that divorces, welfare cases, debt claims, and practically every other type of meaningful case to the poor man should not be handled, either because it would not be "socially desirable," or the case presented an economic, rather than a legal problem.

Also present was a perplexed and harassed gentleman from the federal welfare department who couldn't understand how a poor man could possibly need a lawyer regarding welfare matters, or, for that matter, any matter involving government benefits which were privileges, not rights. He questioned whether such a program was needed at all with respect to such matters, setting forth quite succinctly the philosphy of his "establishment." He noted, "We watch out for the claimants' rights ourselves, lawyers just get in the

way." This philosophy was echoed by a prosecuting attorney from a middle-sized city in Kansas who said, "The poor don't need *another* lawyer, they already get free legal advice from public officials, who are—after all—usually in the best position to get them some effective relief." (emphasis supplied). He opined that the $15 million should go to the cities and counties to supplement their services. He became quite exercised when he was informed that as presently structured the Community Action Program was not initiated, approved or administered through the states or political subdivisions, nor were local politicians required to be on the boards. "That's un-American!" he exploded. A country judge from Tennessee pointed out that the $15 million divided among the nation's 3000 counties would give each one $5000 apiece—enough to hire a part-time attorney for the poor; a mayor from Pennsylvania noted he didn't particularly want the money but would like to appoint the director; and the representative of a mid-western governor wanted to know why his state couldn't just turn its share over to the state attorney general to compensate lawyers appointed to defend indigent criminals.

The legal profession was also well-represented and the presidents of several state bar associations were anxious to find out more about the proposed program. They agreed with Voorhees that "poor people on the board" was absurd because the person had to be too stupid to serve on such a board, or else he would not be poor; but they felt strongly that the poor man needed a lawyer if he was going to deal with a governmental agency of any kind—assuming he had anything worthwhile to deal with it about—and it was just a question of guaranteeing larger fees for the lawyer. By and large, however, they couldn't fathom what kinds of legal problems a poor person *could* have, since if he was poor then he couldn't have anything worth litigating over and if he had a personal injury claim he could get a lawyer to handle it on a contingent fee basis. On top of that they thought they detected potential violations of the Canons of Ethics prohibitions against solicitation and unauthorized practice in the proposed operations of these legal services programs. What was wrong with funding the bar referral systems, they asked over and over. What they were most anxious about, however, was the unspoken implication that the organized bar not only was not going to get any of the $15 million but that somebody else *was* going to get it. One of them finally asked the question point-blank: "The organized bar has historically represented the poor man for

nothing when he couldn't afford to pay a fee. What is the role of the state and local bar association in this program?" He simply couldn't believe it when the answer came back, "There is no role for state and local bar associations." Speaking the sentiments of his "establishment" he said: "We had better not oppose this or, like the doctors, we'll have socialized law jammed down our throats. We better get control of it somehow."

With all due deference to those estimable gentlemen of the law, they were just not even in the ballpark. Working, as they obviously were, against an intellectual landscape dominated by the conceptual models with which they were most familiar, their expressed attitudes were not surprising when evaluated in light of their ignorance of the facts and their lukewarm sympathy toward the goals of the program.

THE LEGAL "ESTABLISHMENT" REALITY

We had suddenly discovered there were a lot of poor people living in this country. A hint in Galbraith's THE AFFLUENT SOCIETY (1958), became a slap in the face with Harrington's THE OTHER AMERICA (1963) and THE WASTED AMERICANS, followed by particularized dimensions of the same in Bagdikian's IN THE MIDST OF PLENTY (1964), Caplovitz THE POOR PAY MORE (1963), and Caudill's NIGHT COMES TO THE CUMBERLANDS (1962). These modern muckrakers stirred up a flurry of magazine articles, Presidential Commission Reports and resounding speeches by American Bar Association luminanes. But it remained for the good grey Social Security Bulletin to tell us the real magnitude of the problem. Mollie Orshansky, of the Social Security Administration Division of Research and Statistics, published her article *Counting the Poor: Another Look at the Poverty Profile,* in January 1965, informing us:

> From data reported to the Bureau of the census in March 1964, it can be inferred that 1 in 7 of all families of two or more and almost half of all persons living alone or with nonrelatives had incomes too low in 1963 to enable them to eat even the minimal diet that could be expected to provide adequate nutrition and still have enough left over to pay for all other living essentials. *Soc. Sec. Bul. Jan.* 1965 p. 4.

She based this inference on the assumption that a family of four

could meet this standard on 90c per day per person, or $77 a week. Translated into population figures this meant:

> There is thus a total of 50 million persons of whom 25 million are young children who live within the bleak circle of poverty or hover around its edge.

She ultimately noted, using the 1965 rule of thumb definition of a poor person as one who is a member of a family aggregating $3000 annual income and $1500 for an individual, one derives a total poor population of 34½ million people—give or take a few hundred thousand. (p. 13).

The picture was further refined by her second article on the subject which was published six months later in July, 1965. She noted that of these 34½ million people "—nearly 6 million were children under age 6, and 9 million of those in poverty were at least 65 years old."

Adding in the 7½ million parents of these children in poverty, and the nearly 3 million aged individuals living with a family, she was able to account for about 4/5ths of the poverty population which was either too young or too old to be in the nation's labor pool.

"But, even so," one heard these gentlemen remark, "that is not to say they all need a lawyer." And it was true enough that we had no statistical picture of the magnitude of the national need for legal services. We did know that Lee Silverstein of the American Bar Foundation has estimated in 1964 there are approximately 300,000 felony cases and 4,500,000 misdemeanor cases in the state courts each year; and the 1963 Report of the Attorney General's Commission had told us there were 33,000 federal criminal cases each year; and the FBI's uniform crime reports for 1964 told us there were 35 arrests per 1000 persons that year. We also knew that at least half of these nearly 5,000,000 defendants was too poor to afford a lawyer. Reasoning from this information one could conservatively estimate that at least 2,000,000 now, 20,000,000 sometime every year, and sometime during their lifetime all the 34 million poor would have problems absolutely requiring legal service they were unable to afford. As Dean Pye noted in his 1966 article *The Role of Legal Services in the Anti-poverty Program, Law and Contemporary Problems,* 211, 217:

> In January [of 1966] the office of Economic Opportunity referred to the necessity of providing lawyers for the nation's

> poor—some 35,000,000 persons in families with annual incomes under $3,000. This estimate, which seems to have intended to include all of the poor, is probably the most accurate. It is difficult to see how any poor person can attain maturity and at no time have need for legal advice. The fact that many do not know that they have legal problems, or do not seek the assistance of a lawyer to advise them when problems are perceived, does not mean they have no need for legal assistance. The percentage seeking the advice of a lawyer is only a fraction of those who could and should benefit from such advice. Furthermore, the demand for legal services increases directly in proportion to their availability and the publicity accorded to them. Only after legal services are provided and the poor are informed of their availability and importance will the true dimensions of the problem be known. *Id.* p. 217

But even if these gentlemen had known this information, they were not prepared to accept the implications because of their respective ideologies.

A. Legal Aid, Noblesse Oblige And The "Hey, Boy" System

Speaking for the Aristocracy, the Legal Aid Society representatives voiced the ideology of Noblesse Oblige operating through the charitable institution model of a legal services agency. I call this the "Hey, boy!" approach. Beginning around the turn of the century the Legal Aid movement had come to enjoy the whole-hearted public support of such aristocrats of the legal profession as William Howard Taft, Charles Evans Hughes, Elihu Root, Reginald Heber Smith, Harrison Tweed, Whitney North Seymour, Emery Brownell and Orison Marden. By 1965 there were 547 legal aid offices offering civil legal services to indigents in 414,000 cases and criminal representation in 206,000 cases, at a total cost of $9 1/3 million. This model was thus handling over 600,000 cases and it was estimated this represented less than 10% of the national need.

Yet the deficiencies of this approach ran incomparably deeper than being merely inadequate in terms of the numbers of unrepresented people. That presumably could be remedied by liberal transfusions of federal money. With enough money legal aid societies presumably could add more offices, expand their spectrum of coverage and even improve the quality of their service by cutting caseloads

down from the average 1300 per man per year they were struggling under.

What was more grievously lacking from its model was the necessary philosophy to undertake legal ministration to people living in legal ghettos—a class in legal servitude. A fair summary of the attitude of the legal aid society in America is the following description from Johnstone and Hopson LAWYERS AND THEIR WORK (1967) p. 28:

> American legal aid and public defender offices serve only persons of very limited financial resources, in accord with express eligibility standards. Many legal aid offices take only civil matters, some take both civil and criminal matters, and public defender services are available only for those charged with criminal offenses. Legal aid is generally not available in matters customarily taken by private practicitioners on a contingent fee basis. Many legal aid offices restrict the divorce cases they will take, such as cases in which a "social need" for a divorce seems to exist . . . Essentially, legal aid and defender offices in the United States are charity or community service operations serving those in need of legal assistance who cannot afford to pay for it.

Fatal to the whole idea of the legal aid society model was the almost total absence from its institutional psyche of any passion for law reform, for aggressive opposition to the local "establishment," for long-range planning to reach the causes instead of the symptoms of poverty, to prescribe cures, not palliatives.

B. REFERRALS, SPRING STREET LAWYERS AND CHARITY CASES

But the legal aid society representatives were not the only ones voicing noblesse oblige and soup kitchen models. The bar association representatives also spoke from such perspectives; but they talked about bar referral systems, Spring Street lawyers, and the asserted universal practice of individual practitioners handling cases free for the poor.

The phrase "Spring Street Lawyer" is my way of identifying that class of lawyer who typically handles the legal problems of the poor and who is normally termed an "ambulance chaser" by the more respected members of the profession. In Little Rock, Arkansas, where I was for a time a deputy prosecuting attorney and a member

of an insurance defense firm, Spring Street ran alongside the courthouse and was lined with hole-in-the-wall one-man offices of lawyers, bail bondsmen and "private investigators." From Spring Street came those all to frequent instances of double-dealing, money stealing and squeezing fees from clients' families. Thus, while members of the bar claim that any poor person who really needs a lawyer can get one, they mean one of three things:

1) If he has a good personal injury suit they will be glad to handle it themselves;

2) If he has any other type of legal problem, then someone else might take it for him, or he can call up the lawyer referral secretary; and

3) If he has no money and no property but his family owns a hill farm or a car or even has a job, then he can get a Spring Street lawyer to represent him.

There are about 300,000 lawyers in this country, or approximately one for each 650 people. We add about 15,000 recent graduates each year; an unspecified number of older lawyers quit, die or drop out, and we have a net gain each year. We are running short, however, and by 1984 we will need 40,000 more lawyers than we will have. Only an estimated ¾ths of these lawyers are in private practice. Forty percent of them live in cities of ½ million or more, and only a little over half the lawyers in private practice are solo practitioners. My observation has been that Spring Street lawyers make up less than 20 percent of the bar, they ordinarily practice alone and most of their business consists of appointed criminal defense work where they can hijack a fee before showing up for the trial. The remainder of the bar participates in the referral program —that is, all except the upper 25-30 percent who have "arrived," are on retainers and can't spare the time and the upper-middle 25 percent who are trying to get retainers and thus don't have the time. By my rough calculations that leaves considerably less than 100 thousand lawyers available to work the Bar Association Lawyer Referral Programs and do the charity work, and they are the recent graduates who need the experience and can't refuse to take the cases on grounds they are too busy.

But still the organized bar could indulge itself in its favorite illusion that its models were meeting the need. As evidence the lawyers could cite their Canon 29 obligation "to improve not only the

law but the administration of justice" and their Canon 32 statement of principle that the lawyer finds his "highest honor" in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen." They could cite the 1958 Arden House Conference report of the ABA and the ALLS, which recognized "the lawyer's responsibility as a guardian of due process of law and his responsibility to make legal service available to all" among other responsibilities. (44 A.B.A.J. 1159). They might even have cited the 1965 ABA pledge "to cooperate with the OEO . . . in the development and implementation of programs for expanding availability of legal services to indigents. . . ."

Unfortunately, these lofty statements would have been all they could have cited—for there was little else of note to say about the operation of their lawyer referral systems. In fact, a strong provision of their own formal code of ethics—Canon 27—prohibited "solicitation and advertising" these systems unduly. It was not until *Jacksonville Bar Association v. Wilson,* 102 So.2d 292 (Fla. 1958), that anyone knew for sure whether the referral system could be advertised at all. The significance of this, and some notion of the effectiveness of these programs, is indicated in the 1964 Lawyer Referral Bulletin in an article reporting on a survey of operations in 1963 wherein it was noted that heavily advertised referral programs (yellow pages plus newspaper ads) served 15.86 persons per 10,000 population, while unadvertised programs averaged serving 1.29 persons per 10,000 population. Countryman, THE LAWYER IN MODERN SOCIETY, pp. 549-551. In addition, the referral lawyer is authorized to and invariably tries to charge a fee—any sized fee—for the service he renders. For people living on 90 cents per day for food, any fee is too large.

This cottage industry model of the "compensated private attorney" which the bar has espoused since the pre-industrial revolution era and which remains unadulterated even in today's 150-man so-called law factories, simply would not work because of its unbelievable inefficiencies, high costs and flat-world intellectual outlook. Nurtured on the appellate case syndrome through law school, firmly grounded in the black-letter rules of nitpicking, pettifogging and legalisms, and profoundly aware of the supposed distinctions between political matters—legal issues—and economic problems, the established bar sincerely believes in a Law of the Old Testament, an Economics of Adam Smith and a Sociology of Charles Darwin. Their recom-

mended model was too little, too late and too outmoded. The Cahns demonstrate this devastatingly in their Notre Dame Lawyer article *What Price Justice—The Civilian Perspective Revisited,* NOTRE DAME LAWYER 927 (1966).

C. WELFARE, POLITICS AND THE "YOU DON'T NEED A LAWYER" MODEL

What is there to say about the welfare establishment model? Has it been economically and politically possible to set up a federal legal services agency like Social Security, complete in all its parts, hire several thousand lawyers to staff offices throughout the country, install central records-keeping, and in all respects model the program after the "top of the Social Security bill" that might have been worth pursuing. I recall Harold Lasswell recommending this approach. The First New Deal model might have worked. But the recommendations from the politicians was to model the program after the "bottom of the Social Security bill"—the Public Assistance provisions—and provide federal funding for state and local government administered legal services programs. The Second New Deal model clearly would not work.

This approach would have combined the worst of all possible arrangements. All the bureaucratic structural features of what today we call "the welfare establishment" would have been embodied in the legal services program, and coupled with the insufferable mock-patronizing philosophy which presumes the welfare worker right and the claimant wrong, we would have yet another faceless, heartless Kafkaesque bureaucratic monster which neither thought nor felt—only functioned. When one goes a mental step further and realizes such a program would have to be a so-called "voluntary" one with federal agency promulgating minimum standards and the states individually electing to install a legal services program, and appropriating some matching money for it, the impossibility of the whole thing becomes clear. We would wind up with an agency which operated in only a few states and differently in each of those, with its biennial existence dependent on state legislatures, and prohibited from suing both the federal government and the state agencies. Judging from past performance one would expect de jure racial discrimination from the south, de facto discrimination from the north and an official "You don't need a lawyer for this" attitude everywhere.

The whole dismal picture of welfare in this country portrayed in the 1966 Symposium Issue of the California Law Review would likely be introduced root and branch. We would have a triple system of law in this country—one for the rich guarded by the ABA, one for the middle class guarded by the state bars, and one for the poor—with its official custodian, the Welfare Establishment.

D. THE OEO MODEL

Well. Everyone knows what we did: We tried to choose the most functional and desirable features from these recommended models and construct a new and distinct one which, hopefully, would embody the virtues but not the vices of the parent ones.

FIRST. From the old-line legal aid society model we took the salaried lawyer in a neighborhood law office located in low-income areas. These were often store-front offices, open during times of the day convenient to the poor and unpretentiously furnished to encourage access. But we put poor people on the governing board to set the policies and encouraged board-spectrum coverage. Jean and Edmund Cahn's seminal law review article in the 1964 YALE LAW JOURNAL describes the concept. We also drew from pilot programs operated in New Haven, Connecticut, and Washington, D. C.

SECOND. From the old-line welfare agency model we took the federal-local matching funds financing device, the idea of educating the poor concerning their legal rights and the idea of minimum national standards coupled with flexible local requirements concerning standards of indigency, types of cases, records-keeping and periodic evaluation of the program. But we insisted on hiring the poor themselves wherever possible, encouraged local in kind contributions and hoped for long-range planning and programming ideas. To avoid state-by-state perversion of the programs we dealt directly with local non-governmental agencies.

FINALLY, we took from the traditional bar model the intensely private one-on-one attorney-client relationship, the insistence on local initiation and operation of programs, and emphasis on the rendition of legal service rather than economic, social or family counselling—although we encouraged team approaches and referrals to other counselling agencies. To leaven this the model encouraged group representation, test cases and communication of research and information throughout the programs. And to minimize organized

bar politics we by-passed the ABA and state bar associations altogether regarding initiation and operation of local programs, dealing instead with local bar organizations on an informal basis and encouraging them to sponsor programs.

One has only to read the OEO Guidelines and *How To Apply For A Legal Services Program* booklets to see the outlines of the model which was constructed. Flexible enough to be used by Atlanta and Philadelphia, adaptable enough for use in Montana and New York, in Toledo, Ohio, or Bolivar County, Mississippi, it yet was designed to operate in a highly urbanized setting—the ghettos of our cities.

Required to function in an urban setting, to address the most pressing of the legal needs of ghetto poor and to employ members of the legal profession as they were and are constituted, choice by OEO of the traditional legal aid society law firm model for its legal services apparatus was a rational one. The raw economics of the matter, conservative political pressures from the bar and a sense of urgency even then looking warily at the frustration and injustice of our urban ghettos justified the approach taken. But an instrument fashioned from bits and pieces of an old and out-moded model, designed to function in essentially the same old uneconomic way in a context which requires processing millions of cases instead of hundreds of thousands, and hastily erected around the professional dogmas of a cottage-industry-oriented economic group cannot be expected to outperform its design and technological limitations. Function minimally it would in an urban ghetto setting, handling crisis legal cases one at a time in the traditional litigation context. But it simply would not function in a rural setting, structuring legal solutions before they became crises and operating outside the ideology of the legal profession with its mind set on law, cases, courts, trials, appeals, and judgments. To demand that of the appartus was like demanding that the medical profession dispense happiness without using its hospitals, drugs, scalpels and bedpans.

AN ALTERNATIVE MODEL

One still, small voice at the conference in 1965 suggested that the legal problems of the rural poor were somewhat different from those of the urban poor and that the circumstances for administering legal services to the rural poor were such that the neighborhood law office device was inadequate and unworkable. A different approach was suggested for the non-urban poor of the country—by which was

meant those who lived outside the urban ghettos, scattered through our small and middle-sized regional cities and over the countryside in county seat towns and unincorporated communities. It seemed to me a different model altogether would have to be devised for this set of circumstances, and I saw no reason to begin with the premise that the traditional law firm was the preferred frame nor that cases to be litigated were the primary concern nor that lawyers were the best or the only ones to staff the model. My suggestion at that time was what I called Juricare—not to be confused with the Judicare program you heard about yesterday which takes its unimaginative cue from the "Medicare" which the doctors fought, lost and finally captured. My suggestion was regional Juricare centers throughout Appalachia, centered on multidisciplinary institutions and administering to the legal needs of their poor constituency in the analogously broad-spectrum ways a large regional hospital treats the health needs of its constituency by curing individual cases, initiating public health programs to prevent diseases and engaging in basic and applied research into the causes and cures of mortal woes. I suggested that if the legal profession in representing the rich in pursuit of its traditional fee could devise collapsible corporations for tax purposes, effect mergers among conglomerates and draw up iron-clad insurance policies then implementation of a new way to administer Justice to the poor would be a simple matter for us lawyers. I urged that the lawyers be given first refusal on the matter.

But that day has come and gone. The legal profession did not seize the enormous social opportunity to renovate its creaky machinery, nor did it even take full advantage of the modest opportunity offered by the neighborhood law office model to reexamine its feudal mindset concerning what is law, what are legal problems and what is the relationship between law and justice. The bar demonstrated that it has neither reach nor grasp of the problem. Instead it set out to capture the legal services operations it could not kill and make sure those which were born came into the world created in its own image. In my judgment the practicing bar has exercised its option and we should now set about designing a new social institution to perform the job we all know should be done.

One of the mixed blessings of being a fuzzy-headed law professor is that I am expected to be impractical, theoretical, and perhaps a little radical at times. This is one of those times I am going to invoke that special protection God provides fools, drunkards and law

professors; I am going to talk about the job which seems to be before you, what you may be able to use to advantage and suggest some theoretical considerations for your proposed legal services program. To free myself of my institutional biases I will try to look at things with the alien eyes of a man from Mars.

The excellent working papers prepared for this conference relieve me of the chore of delivering that dreary litany of poverty statistics so familiar in Appalachia. But in order to give us a starting point let's note that up to 40% of West Virginia's 1.8 million people may be members of a family group aggregating less than $3000 annually. Nearly half-a-million West Virginians are poor by anybody's definition. These people could be idealized into 100,000 family units of five persons—a mother, father and three dependent children—more accurately perhaps they can be seen as 50,000 such typical family units, 25,000 composed of an elderly man and his wife, 15,000 composed of ten persons (mother, father, 6 children and 2 elderly grandparents) plus 50,000 individuals.

They are born, grow up, go to school, work, marry, have children, get injured or sick, grow old, die like everyone else. They must eat daily, sleep every night, wear suitable clothes and pass the time like the rest of us. For most of their lives they want more than the bare minimums to keep them alive, would like some security for themselves, hope for something better for their children. Some are creatures of their subculture—some create their own misfortune. The very old have long since lost control over their lives and fortunes —the very young are often growing up without learning how ever to gain that control. In the center of this spectrum is often the injured, illiterate or unskilled father, unemployed and unemployable, the divorced or abandoned mother minimally capable of unskilled domestic labor, the potential high school dropout boy and soon-to-be fourteen-year-old bride daughter.

These half-a-million people live out their lives in a world of sour, leaky shacks, greasy food, cheap clothes, inadequate schools, grimy police stations, welfare offices, unemployment offices, juvenile courts, small loan offices, food stamps, junk cars, cheap whiskey, a pleasureless past, meaningless present and a hopeless future. They probably commit more crime, have more domestic strife, forfeit more obligations, waste more time and energy, get hurt or sick more severely and go insane more frequently than the rest of us. Their legal problems may run the gamut of those courses taught in the first year

curriculum—torts, property, crimes and contracts and for them involve the very minimums of life itself; but as far as most lawyers are concerned all their legal problems can normally be subsumed under the fine old Latin phrase *de minimus non curat lex*—the law does not concern itself with trivial matters.

The fine working paper by Cheryl Wheeler on the legal needs of the poor in West Virginia gives us insight into the types of legal problems your poor citizens have. But there is another dimension to this conceptual categorization of their problems which seems to me to be an equally useful way to see the matter if we are going to devise ways to minister to their legal needs. A colleague at the University of Kentucky College of Law has recently pointed out the broader contextual situations from which arise the poor man's particular legal problem—whether it be characterized as a contract matter, a garnishment problem, a bankruptcy case or what. He notes in Viles, *The War on Poverty: What Can Lawyers (Being Human) Do?* 53 IOWA L. REV. 122 (1967), that the poor man's legal needs spring from three different contexts: 1) people in crisis; 2) residents in ghettos; and 3) a class in servitude.

A moment's reflection will illuminate the good sense of this way of characterizing the problem. Divorce, mental disease, arrest—all cause legal crisis. The serving of a writ of garnishment, eviction notice, notice of suspension of welfare benefits, warrant of arrest, job dismissal notice; nonarrival of a social security check, delay in payment of a workmen's compensation claim, refusal to pay a week's back wages, demand that higher rent be paid, nonrenewal of a loan, repossession of the car or appliance—all these events produce legal crisis, and only the lawyer can effectively cope with the matter for the victim—often by simply writing a letter to the loan company, department store, welfare office or landlord, or sometimes by simply telephoning the right person. The lawyer is the *only* person qualified to minister to people in legal crisis due to his unique ability to individualize fact patterns within a larger pattern of legality and represent people, not abstractions. In short his supreme grasp of that necessary concept "due process."

One could liken the whole of Appalachia to one giant rural ghetto if he wished. Some have done so. Unfortunately it does not help one to see the problem more clearly to engage in such simplistic idealizing. But it nevertheless may well be true that legal problems peculiar to our urban ghettos have their rural counterparts. Thus, dilapidated

housing, inadequate sanitation, poor schools, insufficient police protection, cultural isolation, unemployment and high potential for violence are not merely city problems. However, in rural areas these symptoms of poverty are spread over vast areas, separated by great distances, hidden back in the hollows and on the outskirts and back streets of small towns. There is no convenient landlord class to attack, no mass employers to bargain with, no nameless local bureaucracy to castigate. The legal problems of the rural ghetto, however, although rooted in the same patterns of quasi-lawful discrimination against the poor, are infinitely easier to address than their city counterparts. But to construct permanent or long-lasting legal solutions to ghetto legal problems in the cities is often impossible. Federally-funded credit unions offer the poor man a way out of endless debt; to remedy the sanitation problems of a rural community one can construct a sewer and water district; to alter housing problems one can devise low-cost housing projects; to improve school transportation matters one can directly approach county judges, school boards and the state officials; to teach employment skills one can establish training corporations and trade schools. Juvenile problems, literacy problems, welfare problems are all much easier to address and much more tractable in the rural ghetto than the urban ghetto. Solutions to all these social patterns of legal and illegal discrimination invariably require a remedy which must be framed in part by a lawyer. In fact, it is not unfair to say that the lawyer is the person uniquely qualified even to *see* the solution, and certainly is the one person in the community who possesses the skills necessary to gather the facts which show the pattern, choose the political or legal forum, represent the ghetto dweller, frame and implement the solution. In short, the lawyer's grasp of the many procedural ways equal protection of the law can be extended to rich and poor alike uniquely qualifies him for this role.

Finally, it requires no great prescience to give content to the phrase "class in servitude." One could more accurately phrase the idea "people in legal bondage." For many decades now we have been aware of the contract of adhesion which we all sign when we buy a car, a refrigerator, insurance protection, or a motorboat. Not too many of us, however, often sign installment sales contracts which obligate us to pay 38% interest, buy a $20 item for $30, or mortgage our house as security for the aluminum siding debt. For almost as long a period we have known about the "needs" test for welfare

benefits, but few of us have known the great latitude given caseworkers to decide whether a sewing machine or a lawn mower or a new cheap suit is a "need"; whether the produce from a few chickens, a Christmas gift of used clothing or nonexistent child support payments is "income"; or that the "man in the house rule" causes more desertion, personal immorality and poverty than it cures. We have always known about petty loansharks, corrupt bureaucrats, vindictive policemen, coldblooded utilities, and discriminatory school superintendents. But we may not have fully realized they all operate within the letter of the law and administer injustice in the name of the State, county and city. Again, it is the local lawyer who not only knows these things chapter and verse, he may be the only person who can bring the test case, file the class action, lobby through the legislation, or expose the malefactor in a way to loosen the legal bonds which imprison the poor man.

There is yet another dimension to the matter which should be ventilated before we go too far along this analytical line. The lawyer is uniquely qualified to perform some of these necessary functions, but is utterly *unqualified* to perform others, and is not *uniquely* qualified to perform all aspects of those he can perform.

First, few lawyers as presently constituted psychologically are qualified to create their client's goals for him nor can they initiate the client's course of action toward those goals absent a "legal problem." Generally speaking, lawyers are neither particularly courageous nor socially innovative people, preferring to react rather than act if forced to do either. Bascially conservative people—and quite properly so—they are excellent technicians who can tell you why such and such a thing cannot be done. They are trained to perform this function by a legal education which—it is often said only half-jokingly—"sharpens their mind by narowing it," by a professional life conducted through "cases," "cases of action," "plaintiffs and defendants," "contracts-torts-property-crimes," and by a healthy regard for the artificial distinctions drawn between "economic-legal" matters and "political-social" activities. Their close professional association over the past few hundred years with the industrializing processes of our society has blinded them to the almost inevitable wreckage caused by that same process—impoverishment of those too old, too young or too crippled to work, the dismemberment of the family, debilitation of the community and the tremendous burdens thrown on our over-taxed social service apparatus—schools,

courts, police, governments of all kinds. Aware of these matters as citizens, yet they have not felt any professional responsibility for them as lawyers.

Second, the lawyer has allowed himself to become almost quaint in his technological obsolescence concerning the way in which he goes about practicing his trade. Dicken's portrait of the English Court of Equity circa 1868 in his novel BLEAK HOUSE and the famous case of *Jarndyce v. Jarndyce* is not too far removed from the operation of the American legal system a hundred years later. The legal profession still processes its product by hand, through face-to-face dealings, embodied in laborious hand-crafted documents issuing from work units too small to be economical and organized along handicraft production lines. Its work rules prohibit directly and indirectly those production methods by which other service industries —banks, insurance companies, investment companies—or other service professions—the medical profession, investment advisors, engineers—have come to process much more business with much fewer men. I wager productivity-per-lawyer has not materially improved since the days of Abraham Lincoln. The last really significant technological change was the substitution of a legal secretary with a typewriter for the apprentice law clerk with a quill pen. Not only is the lawyers' work regimen uneconomic, his ideology toward his work is such that he seldom recognizes himself what he actually does as distinguished from what he thinks he does.

Finally, many things done by lawyers could be just as well or better done by sub-professionals. I have already mentioned that most indispensable subprofessional the legal secretary, who, as everyone knows draws many contracts, deeds, by-laws, pleadings, articles, affidavit and fills in hundreds of forms which her boss passes off as his own work. She even does a certain amount of client interviewing. Despite the obvious good sense and economy of this arrangement, the lawyer conceals it from his client and himself, and thus far not extended it to his other routine and unprofitable activities. We could, for example, have created a diversified race of legal subprofessionals as the medical profession has done with its nurses, roentgenologists, anesthesiologists, microbiologists, diagnosticians, and all those dozens of different kinds of bedpan carriers. We could have standardized and delegated them the processes of ordinary interviewing, investigating, negotiating, drafting, deposing and discovering, advising and recommending. We could have consolidated

small work units into larger and more economic ones organized on more rational lines. And we could have begun to adapt our work processes so as to take economic advantage of computer technology, integrated systems management devices, closed-circuit television, and all the wondrous electronic gadgets utilized by our industrial institution to enhance its manpower productivity. To take only the most rudimentary example, simply visualize the law firm as an information gathering center which daily processes facts, court decisions, agency actions, client activities and legal analyses or syntheses, and, freed of the institutional rhetoric concerning how it is supposed to perform this activity, set about mentally equipping and organizing it to do the best and most efficient job of information-gathering. I daresay you would come up with some drastic changes over the way it is typically done.

Now having talked about everything else in the world I propose to say a few words about the central topic here: possible model for a legal services program in West Virginia. Yesterday you heard about the standard OEO Neighborhood Legal Services program, the Wisconsin Judicare project, the Washington D. C. and California Rural Legal Aid operations. Each is commendable and each is deficient to some degree or other. I would propose to discuss briefly not a specific program, but a possible model for a future program which very well might incorporate aspects of these existing programs and contain features which none of them currently possess;

My short speech before the National Conference on Law and Poverty in the Summer of 1965 evoked the image of a regional legal services center for rural areas, resembling in many ways the large regional hospitals which are so familiar in the Appalachian area. I there expressed confidence that the law schools, the state bar associations, the States and OEO could implement such centers in the standard metropolitan areas which ring and are scattered throughout Appalachia. I will not repeat my entire suggestion here, but I envisioned the law schools performing the legal R & D work of freeing a class from servitude, the central legal staff administering justice to poor communities and ghetto groups, and local lawyers ministering to people in crisis utilizing the regional center for their legal research, expert non-legal assistance and comprehensive legal care. The center would administer the legal services system for its area and communicate and coordinate its activities, research and

findings to the other regional centers. I frankly envisioned that the state would furnish the physical plant and OEO and the law schools would undertake to locate personnel, funds and materials in the centers; and that the very processes of the center would not only become internalized into the curriculum of the law school, but the regional bar associations would similarly come to utilize the center like local doctors use a University Medical School hospital. It seemed to me not too far fetched that the internal operations of the center would be systematized and computerized so as to process the large number of cases to be handled, that outreach and intake would be facilitated by specialized groups of subprofessionals, circuit riders and communicators of various kinds. I could also see how systemwide communication and coordination could be achieved by leased wire service, closed circuit television systems radiating to lawyer's offices from the center, and by a motor pool of helicopters—the only feasible way to travel in such extensive and rugged territory.

This independent Juricare Center system could thus function in the three dimensions essential to solving the problem. Thus equipped and operating it could render valuable advice, recommendations and assistance to its state legislature, state administrative agencies and state and local judiciary. More importantly, the center would provide systemwide communication among the participating lawyers of the legal matters handled by that center and others. Publications, workshops, and professional exchange of ideas, information and techniques would keep the system lawyers informed and provide them in depth understanding of the legal problems of the constituency.

The center itself would employ significant numbers of subprofessionals as interviewers, community organizers, investigators, communicators and internal administrators. Its core staff would be salaried professionals from all disciplines. System lawyers, on the other hand, could accept salaried positions, annual retainer arrangements with the center, or receive compensation in the form of fees under a special minimum fee schedule. Whatever his compensation arrangements, the lawyer would occupy his traditional role in the attorney-client relationship and have complete control over the legal advice or service rendered to the client.

Perhaps the most valuable feature of the regional Juricare Center would be its educational function. Systematic outreach programs would advertise the existence and operations of the center, educate

potential client groups of their legal rights concerning individual matters, inform community groups of legal alternative structures and organizations to accomplish community goals, and advise public officials—mayors, county judges, etc.—the options open to them under state and federal programs relating to their local poor. Law students from the state law schools would be employed in both credit and non-credit work to help operate the center and the system. They could do much of the drafting, research, memorandum and brief writing, and be exposed to the techniques and skills of system lawyers as they went about representing poor clients in the myriad ways lawyers do. The students could be permitted to counsel, advise and represent poor clients under supervision of a system lawyer. In helping operate the center they would be exposed to the use and potential of the electronic gadgets which gathered, processed, stored and regurgitated the information the center used. The center could thus train its own future managers and lawyers.

But this sort of free associational thinking can go on literally forever. Why not provide subprofessional circuit rider interviewers with portable television equipment to transmit the client interview straightway into the system lawyers' office? We do it for the NBA—the National Basketball Association. Why not draft model low-cost housing proposals usable in any one of twenty communities or all twenty at once? Why not employ a hundred law students, supervised by twenty lawyers in twenty counties, to clear a thousand land titles in one summers work? Why not discover and bring one big test case on the definition of disability under the Social Security law, writing a Brandeis Brief to bring before the court all the relevant materials on the subject? All these things still seem to me to be possible, desirable, economic.

I feel an economically-sized Regional Juricare center will administer a legal services system throughout 50 counties, five small cities and one regional city. By my own intuitive estimate—by that I mean rank guess—it costs approximately $20,000 per rural county to operate an OEO-funded legal services program for one year. Such a program will have one lawyer, a two man staff, a donated office, access to the county law library and a few hundred dollars expense money. Fifty counties times $20,000 each is $1 million. Such a system might process 50,000 cases a year at the rate of 1000 cases per lawyer for fifty lawyers—a man-killing load you must admit. But it would likely still be short of meeting the legal

needs of the 750,000 poor in that 50-county area. I believed then and believe now that a regional Juricare center and system organized along the lines suggested could operate on that same $1 million and process 100,000 cases a year, all the while devising and implementing social and legal solutions for the causes of these problems thereby forestalling them. I believe it could accomplish this *without* putting fifty lawyers on its payroll, without violating the private lawyer's central role and without dehumanizing the process to the point no man rich or poor would use it. I believe the by-products of its operation alone would justify the cost of its operation—by-products in legal research, professional training and social betterment of the towns and communities in its region.

Finally, I believe the Regional Juricare Center would contain the potential for and ultimately would evolve into a Regional Consumer Law Center, not merely for the poor, but for that even larger neglected class in American Society—the ordinary middle class consumer. It thus could become a new American institution so badly needed and so conspicuous by its absence from the social scene. Surely it has not gone unnoticed that the ombudsman serves the middleclass—not the poor—that Ralph Nader focuses on the health, safety and economic welfare of the middleclass consumer—not the poor— and that the renewed interest of the FTC in cigarette smoking, Betty Furness and state legislatures in truth-in-lending bills and the new Consumer Frauds Division in the Justice Department are looking at consumer problems—not just the problems of the poor. The Regional Judicare Center would be structured to fill this gap as the consumer law revolution reaches into the future and transforms our law.

CONCLUSION

To summarize my discussion the following quotation from an article by Jean and Edgar Cahn, *What Price Justice: The Civilian Perspective Revisted,* 41 NOTRE DAME LAW. 927, 929, 937 (1966), seems to sum it up well:

> [I]t is the author's contention that the ends of justice will not be served if all that neighborhood law firms do is foist on the poor a legal system which the middle class has rejected as obsolete, cumbersome, and too expensive in money, psychological strain, and investment of time. This would be true, even if particular legal doctrines were less biased against the poor.

The legal system referred to by the Cahns was pungently described by Karl Llewellyn in 1930 in the following language which seems a good way to end this harangue. Llewellyn described a contract right under our law thus:

> If the other party does not perform as agreed, you can sue, and if you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, and you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will probably get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent, has not secreted his assets, you can, in further due course, collect with six percent interest for delay.

Llewellyn, *A Realistic Jurisprudence—The Next Step,* 30 COL. L. REV. 431, 437 (1930).