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# STUDENT LEGAL AID THE SEARCH FOR LEGITIMACY

By LYLE S. FAIRBAIRN\*

In Ontario, "student" legal aid began as the illegitimate offspring of a revolution in legal education which erupted in 1949. Since that time, student legal aid activity has been nurtured in its development by the instinctive lust of undergraduate law students for practical experience in the world's second-oldest profession. The progressive withdrawal by law professors into academic insularity following the rebellion of 1949<sup>1</sup> was rendered difficult, and ultimately impossible, by the countervailing ambition of law students for early exposure to legal practice. As the philosophy of legal education has swung like a pendulum in search of equilibrium, successive generations of law students have sought, within the philosophical framework of the moment, to achieve legitimacy for this suspect activity. The pendulum is still swinging, and the search is still on — but legitimation is at last in sight.

## *The Formative Years*

For many years, legal education in Ontario was a matter exclusively within the jurisdiction of the Law Society of Upper Canada.<sup>2</sup> Law students seeking their call to the bar under that regime divided their time between formal instruction at Osgoode Hall and apprenticeship in Ontario law offices.<sup>3</sup> In 1949, the first university law school was established in an atmosphere of high drama; this development was also the precursor of an unfortunate schism between the practising bar and the full time law professors that has not disappeared entirely, even today. Until the establishment of a Bar Admission Course was settled upon as a compromise solution, the students enrolled in the first LL.B. course at the University of Toronto were destined for a professional purgatory; upon graduation, they could secure their call to the bar in any province of the country — except Ontario.

The mutinous actions of the academics in 1949 undoubtedly wrought an improved system of legal education in the province; unfortunately, they also ushered in an historical period of jurisdictional jealousy involving the scrupulous segregation of academic learning about the law from its practical application. It was during this period that law students first made serious beginnings to supplement their academic pursuits with student legal aid activity.

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<sup>1</sup> In the Fall of 1949, the first LL.B. course was established at the University of Toronto as a direct result of fundamental disagreement between several of the law professors at Osgoode Hall Law School and the Law Society concerning the objectives of legal education.

<sup>2</sup> C. A. Wright, *The University Law Schools* (1950), 28 Can. Bar Rev. 140.

<sup>3</sup> From time to time there were variations in the manner in which their time was thus divided.

In its initial stages of development, student legal aid was met with almost universal disfavour. Practitioners condemned it as unauthorized practice. Academics condemned it as an unworthy distraction from academic pursuits. Both sides condemned its potential for reviving the conflict of 1949. Magistrates condemned it on the ground that it was lacking in status. Even the public press condemned it with abusive epithets — which only served to augment the prevailing anxieties. Needless to say, in this hostile atmosphere, student legal aid did not suffer from any problems of exponential growth.<sup>4</sup> In fact, by 1964, its chief problem, still, was to secure a vine upon which to wither.

In the mid 1960's, it became apparent to students at Osgoode Hall Law School that the student legal aid program could not survive much longer as a perpetual orphan. Already the Province was making plans for a "comprehensive" legal aid scheme and there seemed to be no sign of the law schools relaxing their posture of disdain for practice matters. In the fall of 1964, the search for adoptive parents for the program commenced in earnest with formal representations by the students to the faculty of the law school and to the Joint Committee<sup>5</sup> which was then designing the new Legal Aid Plan. In both places, the representations received cautious but meaningful support and fresh currency was purchased for an old idea; namely that student involvement in the new Plan could result in the accrual of reciprocal benefits to legal aid and to legal education.<sup>6</sup> Nevertheless, the initial support which was won for the program was only support "in principle", and the impression was left with its proponents that this tenuous endorsement might "self-destruct" at the first sign of trouble. With four of the five Ontario law schools standing in united opposition to any form of student legal aid at the time, this was hardly reassuring.

### *Statutory Recognition*

It is difficult now to recapture in words the pride of the law students who read the first statutory mention of "student" legal aid in the Legal Aid Act of 1966.<sup>7</sup> Not only had the students' existence been recognized by an

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<sup>4</sup> In the early 1960's, the public press was not so much concerned with student legal aid activity *per se*; the press criticism was an indirect result of more expansive concerns about the old (and faltering) "voluntary" Legal Aid Plan.

<sup>5</sup> The Joint Committee, comprised of representatives from the Law Society and the Provincial government, was appointed in July, 1963, to review the effectiveness of the voluntary legal aid scheme (1951-1967) which preceded the present Plan. The Joint Committee's report embodies the principles which underlie the legal aid legislation of 1966. See *The Report of the Joint Committee on Legal Aid*, March, 1965.

<sup>6</sup> *Id.* at 78.

In the opinion of the Committee, the value of this experience for students can hardly be overstated. Should the results obtained continue to be as striking as those obtained in the comparatively short time the Committee has been functioning on an organized basis, the value of its operations to the public are self-evident. It is apparent that the participation by law schools and the students-at-law in the legal aid plan should be encouraged. There is a place for law schools in the plan and, in particular, for the students who are serving the out-of-school part of the Bar Admission Course administered by the Law Society of Upper Canada.

<sup>7</sup> S.O. 1966, c. 80.

august body of parliamentarians, the term "law student" was even *defined*.<sup>8</sup> Their basic insecurity slowly gave way to a shaky confidence produced by a minute shift in onus — at least, now, they had to be "repealed" to be gotten rid of.

The provisions of the Legal Aid statute, however, merely embodied the earlier agreement "in principle"; its sole operative provision was that "there may be established in accordance with the regulations . . . student legal aid societies".<sup>9</sup> It was not until the spring of 1968 that a subcommittee of the Legal Aid Programme Committee<sup>10</sup> began to grapple with the specific implications of this section of the statute. The subcommittee's terms of reference were to:

. . . conduct such a study on the subject of student participation in The Ontario Legal Aid Plan as it saw fit, and to make recommendations respecting the manner in which the endeavours of student legal aid societies might be integrated (by regulation) with The Ontario Legal Aid Plan.<sup>11</sup>

Although subcommittee's terms of reference alluded to student legal aid societies in Ontario as a plurality, the primary objective at the time was to legitimize the activity at Osgoode which, owing to the provisions of the new comprehensive legal aid legislation, was then operating in a fresh context of illegality.<sup>12</sup> In any event, before the subcommittee could make recommendations concerning the "integration" of student legal aid activity with the new Plan, it was necessary to give serious consideration to the rationale which had sustained this phenomenon.

In the conclusion to its report, the subcommittee emphasized that the character of student legal aid programs in Ontario, as elsewhere in Canada and in the United States, was yet ill-defined:

Student legal aid societies may be currently characterized as highly diverse, experimental programs, whose nature and form vary in accordance with the following factors:

- (a) the stated objectives of any particular program,
- (b) the pedagogical philosophy held at particular law schools,

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<sup>8</sup> *Id.* at s. 1(k).

<sup>9</sup> *Id.* at s. 20(d).

<sup>10</sup> The Legal Aid Programme Committee was charged with implementing the bold new Plan in 1967. It was intended that the Programme Committee be dissolved after the Plan was operational and that the administration be turned over to "The Legal Aid Committee" — comprised entirely of elected Benchers. Before the Programme Committee was dissolved, the Law Society amended its regulations to permit some non-bencher members to serve on the Legal Aid Committee.

<sup>11</sup> *Subcommittee Report To The Legal Aid Programme Committee, April 1968, p. (i).*

<sup>12</sup> In 1968, it was suggested that the student legal aid committee at Osgoode Hall Law School cease using the phrase "legal aid" in connection with its activities until formal integration with the Plan had been accomplished. It was during 1968 that the term "Student Defenders" was first adopted. The term persists in use today to describe that part of the C.L.A.S.P. program which receives formal referrals from the York County Area Director — although the reasons for its use have long since disappeared. Apart from modest beginnings by some students at U. of T. (who had operated formerly under the umbrella of the Osgoode program) there were in fact no other organized student legal aid programs in the Province at the time.

- (c) the presence or absence of a public legal aid scheme and its degree of comprehensiveness,
- (d) the nature of the prevailing system of legal education,
- (e) the views held by local bar associations concerning such programs,
- (f) the size of the community in which the program is located and the extent of the community's indigent population, and
- (g) the permissiveness, or otherwise, of local legislation respecting court appearances by law students.<sup>13</sup>

Given these conclusions about the basic character of student legal aid activity, it was at once apparent that the programs which might develop in Ontario at individual law schools — if they developed at all — would likely differ substantially in their objectives, manner of administration and function. Although it was thought that the new Legal Aid Plan would tend to circumscribe the function of student legal aid societies, the prevailing views of most legal educators were so essentially antagonistic toward this activity that any discussion of "objectives" seemed moot at the time. Nevertheless, without knowing which of three possible objectives might secure ascendancy at individual schools, the subcommittee noted that student legal aid programs might be "designed to serve (a) a special educative function, (b) a community need and/or (c) merely as an extra-curricular activity."<sup>14</sup>

#### *Clinical Training: The Early Rationale*

Even in 1967, and in spite of the general climate of dissent at other law schools, the Osgoode Hall Law School recognized that student legal aid activity could be made to serve the purposes of legal education:

The Student Legal Aid Programme at Osgoode originated as an extra-curricular activity and has continued more or less on that basis to the present time. While no concerted efforts have been made to adapt the programme in whole or in part for specific purposes, it is clear from the statement of the Osgoode administration contained in Schedule VII to this report that there is a strong conviction as to its educative value specifically in such active subject areas as public housing, urban renewal, child welfare and consumer protection. The structure of any future programme at Osgoode is likely to reflect the conviction that such programmes serve a dual function: (a) Firstly, (and primarily), to serve specific educational purposes and (b) to contribute toward the fulfilment of a genuine community need by assisting indigents who would otherwise be unrepresented in minor matters having some legal merit.

Prior to the commencement of this Subcommittee's deliberations, the administrators of other law schools in the province had not considered the merits of student legal aid programmes to a point of consensus. Having regard to the experimental nature of such programmes, and the general lack of experience elsewhere in the province, it is unlikely that such consensus will be reached either easily or quickly, if at all. This is certainly the case insofar as the details of any proposed programmes may be concerned; in some schools it is also true of their merits in principle.<sup>15</sup>

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<sup>13</sup> *Supra*, note 11, at 53.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 19-20.

In its report, the subcommittee analyzed the reasons for the phenomenal post-war growth of student legal aid programs in the United States. One of the contributing factors to this growth was the demand for more practical training of undergraduate law students in the United States as a result of the brutal metamorphosis which they were obliged to undergo upon graduating from university law schools directly into practice. This reasoning is more relevant in Ontario today than it was in 1968 when the role of articling in Ontario legal education seemed somewhat more secure.<sup>16</sup> Although the system of articles was being maligned by heretical students even before 1968,<sup>17</sup> the same factors which have contributed to inherent diversities between individual student legal aid programs also render them unsuitable for more than a *contributory* role in any formal clinical training exercise:

Clinical training, however, as a method of providing sound, comprehensive, practical training to any given student body as a whole, is generally held in disrepute in the U.S. In fact, such programmes have proven to be generally ill-suited to serve this purpose because they tend to be unwieldy with large numbers of students; they lack uniformity and vary in function by reason of local conditions not only from state to state, but also from area to area within any given state.<sup>18</sup>

Throughout, the thinking in Ontario law schools concerning legal aid and legal education has been very much influenced by developments in the United States. Unfortunately, the effect of wholesaling U.S. ideas in Ontario is not something which can be measured with much precision. If the import-export trade in original ideas was looked at closely, however, it would be clear that we suffer from a rather acute deficit in our balance of payments position. At any rate, the fact that developments in legal education in Ontario were so often preceded by similar developments in the U.S. is more than mere coincidence.

By 1968, there was much accord between Ontario law schools and the major U.S. law schools concerning the general objectives of legal education, but there was a lag of several years before the former began serious experimentation with U.S. clinical training methods. In 1968, the subcommittee studying student legal aid observed as follows:

The willingness of American law schools to experiment in this area is explained in part by the fact that they regard their objectives in legal education in a broader context than the mere pursuit of technical precision in the substantive law. These views have been articulated by Ontario educators as well. The opinion that these broader objectives are best accomplished in the classroom is perhaps losing some ground in the U.S. to the more recent notion that they might be more forcefully achieved by means of teaching techniques which involve the motivation of students through actual involvement and contact (with the public)

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<sup>16</sup> See *Report of the MacKinnon Committee on Legal Education in Ontario*, 1973.

<sup>17</sup> See Fairbairn, *Legal Aid Clinics For Ontario Law Schools* (1965), 3 Osgoode Hall L. J., 325.

<sup>18</sup> *Supra*, note 11 at 2.

in relatively controlled circumstances. In this connection, the student legal aid programme has been a most popular educational device, albeit an experimental one.<sup>19</sup>

### *Community Need*

In the 1960's, the real impetus for the development of clinical training programs in the U.S. was the latent demand for assisted legal services which the new Legal Services Program sought to meet along with a patchy network of pre-existing legal aid bureaux. The Legal Services Program was established in 1965 following a formal declaration of "war on poverty" by the U.S. Presidency in the preceding year.<sup>20</sup> At a very early stage, it was evident that the new program would rely substantially upon young lawyers recently graduated from university law schools; in the result, many schools began to reflect upon their institutional obligation to ensure the fitness of recruits for the legal services undertaking. As a pedagogical philosophy, the "boot camp" approach was not entirely successful but it did serve to engender a good deal of rethinking concerning the premises underlying a sound legal education.

The increased demand for legal services by the poor has led to a conviction on the part of some U.S. educators that particular attention ought to be directed toward an understanding of the legal needs of the poor. This has had the effect of producing increased law school activity in the areas of consumer credit problems, the administration of justice, law reform, criminal law and domestic relations.

In this connection the student legal aid programme has been used as a facility to foster interest in practising law in traditionally unpopular areas after graduation. Heavy emphasis in such programmes is characteristically placed on the public service aspects of professional responsibility. The extent to which they have a curative effect on that shortage of highly-qualified lawyers (whether occasioned by disinterest or the shifting demands on the profession) is difficult to measure. The startling growth of student legal aid programmes in the U.S. however, is some evidence of the confidence reposed in them by the educators and legal aid personnel most directly involved.<sup>21</sup>

In Ontario in 1968, however, the time was not yet ripe for the Province's law schools to be accorded any substantial role in legal aid founded upon notions of public service. Most of the law schools remained steadfast

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<sup>19</sup> *Id.* at 3-4; at p. 3 of its report the subcommittee noted the nature of curriculum changes that were occurring in some U.S. law schools to accommodate this revision of thinking:

In response to an increased demand for legal services by the poor, a number of U.S. law schools have begun to emphasize the concept of "client counselling". The apparent reason for the introduction of such studies into the curricula of some schools appears to be based on a desire to achieve broader educational and social objectives — often by means of pervasive pedagogical techniques. Accordingly, heavy emphasis is placed on fact-finding and analysis and interviewing skills in situations of relatively controlled but direct involvement.

In this connection student legal aid programmes (usually operated in conjunction with the local legal aid office) are used as a teaching device to develop an understanding of the principles of legal interviewing; the nature of the counselling process; as a vehicle of interdisciplinary contact and also to acquaint students with the variety of non-legal solutions available to persons who find themselves in a situation of cyclical poverty.

<sup>20</sup> The Economic Opportunity Act, 1964.

<sup>21</sup> *Supra*, note 11 at 5.

in their position that any such development should be thwarted before it began and the individual faculty members who most cherished their academic insularity clearly regarded the Law Society's subcommittee as a subversive influence. As well, at this juncture, the highly principled Legal Aid Plan of 1967 (regarded by most as a "comprehensive" scheme) was barely one year old. Its frenetic beginnings precluded sober reflection upon gaps in its performance and accordingly, there was little evidence of any emerging role within the Plan for the law schools — even if they had been inclined to take it up. In the result, the task facing the subcommittee established to recommend means by which student legal aid activity might be "integrated" with the new Plan became very difficult indeed. Bluntly stated, the issue was how to effect a synthesis of essentially polarized views:

The division of responsibility for legal education in Ontario, and the natural diversity of views held in connection with student legal aid programmes, dictates that any legislative approach which may be adopted in connection therewith must provide for the maximum self-determination by the administrators of the various law courses, that is consistent with the intent, purposes and proper administration of The Ontario Legal Aid Plan. Such a legislative approach involves, *inter alia*, the fundamental right (in the law schools) to reject such programmes in principle.<sup>22</sup>

### *Exponential Growth*

Following the publication of the Report of The Joint Committee on Legal Aid in 1965 which recommended a "comprehensive" legal aid scheme, there was considerable speculation among law students as to whether any meaningful role would be reserved to them, in practice, under the new Plan.<sup>23</sup> In April of 1968, however, the subcommittee studying the question of student legal aid activity presented its report to the Legal Aid Programme Committee and, in the following year, the report's recommendations were implemented by regulation.<sup>24</sup> Since that time student legal aid societies, like the Plan itself, have suffered exponential growth.

The section of the Legal Aid Regulation pertaining to student legal aid societies was designed to serve several purposes, namely:

- (a) to create the *procedure* whereby individual law schools might, at their sole option, apply to the Legal Aid Committee for its approval concerning the establishment of a student legal aid society,<sup>25</sup>
- (b) to *vest responsibility for the control and supervision* of the student legal aid society in the dean of the particular law school — subject to a right in the Legal Aid Committee to withdraw its approval (and the Plan's support) in the event of maladministration,<sup>26</sup>

<sup>22</sup> *Id.* at 55.

<sup>23</sup> This particular concern on the part of law students tends to be cyclical as the Plan expands to accommodate new forms of unmet need. The concern is entirely unwarranted; however, it is sustained in part by the fact that there can be no "formal" reliance upon student legal aid societies to deliver enumerated types of legal service in any particular locality, or at all. O. Reg. 557, S.O. 75, 76 (a) and (b).

<sup>24</sup> Now R.R.O. 1970, Reg. 557, ss. 74 to 82 inclusive, and s. 139.

<sup>25</sup> *Id.* ss. 74, 75.

<sup>26</sup> *Id.* ss. 75, 76.



- (c) to sanction the development of a formal *referral relationship* between a local area director and an approved student legal aid society with respect to:
  - (i) student appearances by law students in minor courts or other tribunals on behalf of legal aid applicants who had been refused legal aid for other than financial reasons, and
  - (ii) arranging for assistance to be rendered by law students to duty counsel and panel solicitors,<sup>27</sup> and
- (d) to give effect to the principle that student participation in the Plan, in terms of cost, was essentially *voluntary*.<sup>28</sup>

These particular provisions of the regulation, in comparison to other enactments, must appear very curious indeed to persons unfamiliar with the issues underlying student legal aid activity. In fact, the effectiveness of these provisions is entirely predicated upon the achievement of a high degree of consensus and cooperation between the Law Society and the law schools, collectively and individually. *Inter alia*, the regulation was structured to respect the self determination of the law schools in matters of legal education, to ensure that student legal aid activity did not interfere adversely with the administration of the Plan, to accommodate different approaches to student legal aid activity by individual schools and to ensure high minimum standards of performance on the part of all students participating in such activity.

Within less than two years following the enactment of the regulation, all six of the Province's law schools had applied for and received approval to establish student legal aid societies.<sup>29</sup> Since 1965, the number of minor legal problems attended to by such societies, or affiliated student organizations, has increased from 100 per annum, to nearly 6000 per annum.

One might assume from this phenomenal growth in student legal aid activity, that there can no longer be any question of its formal legitimacy in the law schools, with the public, with the Law Society or in the courts. Not so! In fact, during the past seven years *none* of the issues of formal legitimacy have been resolved. The extent of the activity belies the residual misgivings of law school faculties reluctant to restrain it. The *status* of undergraduate law students to advise or represent legal aid applicants at all remains uncertain. The principles upon which the Plan can, or should, extend *financial assistance* to student legal aid societies are not yet crystalized. Even now, there is no settled conviction on the part of the law schools, or of the Law Society, concerning the *basic premises* upon which this activity is to be given formal support, as opposed to tacit recognition. The accelerating student legal aid activity of recent years, however, has served to circumscribe the dimensions

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<sup>27</sup> *Id.* ss. 77, 78 and s. 81.

<sup>28</sup> *Id.* s. 139.

<sup>29</sup> As had been anticipated, the applications disclosed very different approaches to the matter of supervision and control, and the proposed function of the individual societies. Applications were received from Osgoode Hall (September 17, 1969), The University of Toronto Law School (October 1, 1969), Queen's University (October 30, 1969), The University of Western Ontario (March 9, 1970), The University of Windsor (October 2, 1970) and The University of Ottawa (August 11, 1971).

of the legitimacy issue, and, as well, to further demonstrate the magnitude of a known gap between the promise and the performance of the Ontario Legal Aid Plan.<sup>30</sup>

### *The Incidents of Legitimacy*

The incidents of legitimacy are formal recognition (by the public and the profession), status, and financial support. With respect to all three matters, the progress made by student legal aid societies, although real, is still largely tentative and ad hoc in character.

The issue of formal legitimacy poses a number of difficult and as yet unresolved questions: To what extent does student legal aid activity have formal educative value? Can it be adapted to serve educational purposes without infringing upon the rights of legal aid applicants? Should law schools be undertaking substantial "public service" commitments? Should the Legal Aid Plan subsidize legal education? Does student legal aid activity have "research" value? Should the law schools give a new emphasis to clinical training? Is clinical training too costly? Will it work with large numbers of students? Will the Plan expand to "occupy the field"? Should law students be giving legal advice? What is legal advice? Should members of student legal aid societies be accorded a special status to appear in court? In other tribunals? How should the status be limited? What professional supervision should accompany student legal aid activity? Etc., etc.

In view of the extent of the student legal aid activity which exists *in fact*, it must be recognized that any fresh attempts to resolve the issues of formal legitimacy begin from a position of default.<sup>31</sup> It is probable that the issues will remain unresolved until the law schools have developed more settled views on the subject of clinical training and until there is developed within the framework of the Legal Aid Plan itself a more satisfactory basis for co-operative involvement in the matter of Community Legal Services.<sup>32</sup>

A number of factors have combined to complicate the issue of formal legitimacy of student legal aid activity, including the progressively expanding character of the functions undertaken by law students, a comprehensive review of the basic purposes and function of the Legal Aid Plan by a recently appointed Task Force, introspection by some law schools concerning their own role "in the community", and fundamental rethinking (in a clinical training context) about the premises of a sound legal education during the period of formal instruction in law schools.

Two ironies emerge from this unsettled state of affairs. Although the law students themselves played a key role in occasioning this rethinking in legal

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<sup>30</sup> See *The Community Legal Services Report*, Law Society of Upper Canada, August 1972.

<sup>31</sup> In view of the historical character of student legal aid (i.e. that of a "misfit") it was inevitable that formal recognition would be slow in coming. It has been accelerated substantially, however, by the exponential growth in the rate of legal aid activity generally between 1967 and 1972. So far as "student" legal aid activity is concerned, its phenomenal rate of growth was largely unforeseeable in 1967 owing to the climate of general opposition to the activity prevailing at that time.

<sup>32</sup> See, *supra*, note 30 at 74.

aid and in legal education, any resolution of the issue of formal legitimacy of student legal aid activity tends to be forestalled as a "peripheral" concern in both quarters. Secondly, the reticence displayed toward any formal involvement with Legal Aid in the 1960's by professors concerned about "academic" integrity appears to have been replaced by a new reticence toward the Plan founded upon the tentative view that this involvement *is* of educative value and that it should therefore be wholly-controlled by the law schools in the context of clinical training.

Clearly, student legal aid is not yet entirely free of jurisdictional jealousies, nor will it be until formal legitimacy has been achieved. The answer to this dilemma, as in the past, lies in the students themselves. Law students, however, must not be content to merely "flirt" with the responsibility by criticizing their faculties or the Law Society; rather, they must be prepared to "shoulder" it by formulating detailed proposals for student practice rules, for clinical training programs, for liaison with the profession, for involvement in community legal services and for financial support. They must be prepared to go further yet: namely, to advocate their proposals with an ostensible understanding of the issues involved and a demonstrated appreciation for the diverse points of view — and, if necessary, to submit draft legislation. Much of the ostensible resistance to formal legitimacy in student legal aid is illusory; more often, it is simple inertia resulting from the inability to divert precious time away from other issues.<sup>33</sup>

The questions of formal recognition, status before the courts and financial support for student legal aid are inter-related. Before there can be developed any sound basis for determining the degree of financial support which student legal aid deserves, there must be a modicum of agreement concerning the dimensions of its role in legal aid and in legal education. The matter of ascertaining a recognized role for student legal aid also bears on the question of formal status; until there is formal recognition that student legal aid societies are ideally suited to serve a special function, no case has been made out for a special status.

In spite of the fact that much student legal aid activity today involves direct, initial contact with the public in circumstances which call for the rendering of advice by law students, this particular activity is not strictly within the "approved function" of student legal aid societies. The Legal Aid Regulation contemplated only a referral relationship which called for the area director to screen all legal matters referred to student legal aid societies. Direct advice-giving by law students involves special hazards and unique problems of professional supervision. Nevertheless, assuming proper supervision, this particular role may ultimately be more deserving of formal recognition in terms of financial support than the "approved" role which calls

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<sup>33</sup> The demands on the time of bench members of the Legal Aid Committee (i.e. volunteers) have escalated, particularly during the past three years as the Plan's emphases are reordered.

for student intervention only after an applicant has been *refused* legal aid.<sup>34</sup> As the Plan expands to accommodate summary advice and assistance needs in a more direct, comprehensive and positive way, the opportunities for legitimizing this activity in a more controlled environment will abound.

On occasion, law students have sought to skirt the issue of professional supervision by suggesting that they, like lawyers, should be insured against "professional" negligence or, alternatively, should commence every interview with an iron-clad disclaimer of responsibility. These suggestions are exactly what they appear to be — unprofessional and irresponsible. Where supervision by faculty advisors requires to be supplemented it is available within the practising bar and, fortunately, there is evidence that the bar has been more frequently resorted to for such purposes in recent years.<sup>35</sup>

The question of financial support for student legal aid has tended to dominate the discussion at periodic meetings between the Legal Aid Committee and representatives of the various student legal aid societies. Many financial formulae<sup>36</sup> have been advanced in futile attempts to resolve this overtly contentious issue. Unfortunately almost every aspect of this issue *is* contentious: Many of the activities in respect of which financial support is sought are outside the "approved function" contemplated for such societies by the regulation. Even the approved function of student legal aid societies relates to matters concerning which legal aid has been "refused". Some of the budgets submitted by individual schools disclose costs which are out of all proportion to the service rendered — and sometimes reflect overall costs much higher than those which would be incurred if the same service was to be undertaken by solicitors.<sup>37</sup> When specific sums are allocated in the Legal Aid budget for student legal aid activity there is frequent disagreement between the law schools, or between the faculty and the students as to how it

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<sup>34</sup> A refusal connotes *disentitlement* to legal aid; it does not form a very satisfactory basis upon which to found a plea for the financial support of "student" legal aid.

<sup>35</sup> The Subcommittee considering student legal aid activity in 1967/8 outlined the alternative methods of supervision as follows:

supervision by: (a) faculty advisor(s), (b) a former practitioner having the adjunct status of a professor, (c) legal aid personnel, (d) one or more selected practitioners who might be paid an honorarium in connection therewith, (e) volunteer practitioners, by invitation and upon a scheduled rotation basis, (f) in the case of articulated students, by their principles, (g) senior student administrators, (h) general surveillance by duty counsel.

*Supra*, note 11 at 57. Virtually all of these methods of supervision, or combinations thereof, have now been employed by the various law schools. As the degree of student legal aid activity has increased, it has become more apparent that supervision of such activity by faculty advisors alone is inadequate.

<sup>36</sup> At various times, the formulae advanced have referred to the size of the membership in individual student legal aid societies, the number of "cases" undertaken, the enrolment at individual schools, the availability of funds from other sources, the financial contribution made by the various law schools and the cost of rendering similar services through civil duty counsel.

<sup>37</sup> Discrepancies of this kind raise a difficult issue; namely, the extent to which the Legal Aid Plan should subsidize the cost of legal education, if at all.

should be distributed. Until there is real agreement concerning the formal role of student legal aid in legal education and under the Plan, the funding of student legal aid societies will, at best, continue to assume the character of a L.I.P. program and, at worst, become a totally unprincipled political exercise.

As the Legal Aid Plan expands to better accommodate the need for summary legal advice and assistance, a yardstick will soon materialize by which the students' contributory role in this undertaking may be valued more definitively — at least in terms of public service. It is not a role which can be valued with precision through exact formulae, at least not in the immediate future, because no one yet is seriously suggesting that the principle of "voluntary" participation in the Plan by undergraduate law students should not be sustained.

Direct or peripheral law school involvement with the Plan in the context of clinical training poses more difficult questions of shared responsibility for the financial support of student legal aid activity. For some time, there has been general agreement that this activity involves the accrual of reciprocal benefits to Legal Aid and to legal education. Formal recognition of the educative value of this activity, however, has proceeded much more slowly than the recognition which it has achieved already in terms of public service. In recent years, however, the historical reasons for this disparity have undergone some abatement in significance as various law schools have formulated, and begun experimenting with, clinical training programs.<sup>38</sup> This development is an essential prerequisite to any formal recognition of the educative value of student legal aid activity which, up to the present time, has proceeded primarily as an unstructured extra-curricular activity.

Clinical training programs represent an attempt on the part of educators to structure an environment within which this activity can be adapted to serve the purpose of legal education. If they are successful in this regard, there will soon be established acceptable standards by which the educative value of this activity may be judged — and an environment in which its educative value may be enhanced.

The existing clinical training ventures in Ontario are of a tentative character and tend to emphasize strict environmental control by the law schools involved. The proclivity for strict control in the law schools is understandable in view of the local novelty of the exercise and the departure from tradition which it portends. However, if this proclivity endures, it will serve to inhibit the development of clinical training on any meaningful scale through the resulting foreclosure of opportunities to adapt the resources of the Legal Aid Plan to this supplementary purpose. Clinical training, in order to be

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<sup>38</sup> Parkdale Community Legal Services, established by Osgoode Hall Law School in September of 1971, is the most sophisticated of these experiments. In the past year, clinical training experiments have been undertaken as well by the law schools at the Universities of Windsor and of Western Ontario. One major departure from the Parkdale model involves the encouragement of supervised student legal aid activity in institutional settings — eg. in Family Court (Western) and in psychiatric and prison facilities (Queens).

successful on a scale that benefits more than a few select students, requires substantial resources of supervisory personnel and of physical facilities.<sup>39</sup> Unilateral undertakings by individual law schools without formal support from the profession and incidentally, from the Plan, are unlikely to evolve much beyond the original laboratory concept. At any rate, the evolutionary process has begun and formal recognition for student legal aid activity, in terms of educative value, cannot be far behind.

The status of undergraduate law students to appear in court or before quasi-judicial tribunals is ill-defined. Having regard to the nature and extent of current student legal aid activity, it is probable that the existing practice already exceeds the bounds of strict legal propriety to a considerable degree. Their status is governed on the one hand by a series of legislative provisions enacted for the "convenience" of litigants in minor matters and, on the other, by the provisions of The Law Society Act with respect to unauthorized practice.<sup>40</sup> If student legal aid activity is to achieve formal legitimacy, whether it is undertaken in the context of student legal aid societies or of clinical training, it is important that the status of undergraduate law students be rendered more certain.

Currently, the status of undergraduate law students to appear in court is no higher than that of any lay person. Although the Legal Aid legislation provides some protection against prosecution for unauthorized practice, it does not purport to resolve the issue of formal status.<sup>41</sup> The extent of student legal aid activity, the development of "paraprofessional" undertakings, and the resurgent interest in clinical training, are several of the factors which make mandatory an early consideration of the question of appearances before minor courts and tribunals by persons other than counsel. Since lay persons are not officers of the court nor members of the Law Society, it is important to note that the courts do not exercise the same degree of control over such persons as they do of counsel, and further, that lay representatives are not bound by any rules of "professional" conduct. If law students are to become formal participants in the administration of justice, it is not enough to establish student practice rules; there must also be developed a code of prescribed standards of conduct applicable to lay representatives, with authority in the court or quasi-judicial tribunals to sanction irresponsible behaviour.

The rendering of legal advice in the context of "community" legal services poses more difficult questions of status and professional responsibility. In recent years, there has been considerable activity by law students, other

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<sup>39</sup> As already noted, several of the student legal aid societies have encouraged more intensive supervision by the practising bar. At the Parkdale clinic, the supervision of students by the salaried solicitors working in the clinic is supplemented by the supervision of an additional twenty or more private practitioners.

<sup>40</sup> See The Small Claims Court Act, R.S.O. 1970, c. 493, s. 100; The Mechanics Lien Act, R.S.O. 1970, c. 267, s. 238; The Canadian Criminal Code, s. 735(2); The Law Society Act, R.S.O. 1970, c. 238, s. 50; The Solicitors Act, R.S.O. 1970, c. 441, s. 1.

<sup>41</sup> O. Reg. 557, s. 78, contemplates an appearance by a law student participating in student legal aid society but "provided that . . . he is entitled in law so to appear."

lay individuals, and voluntary organizations seeking to liberalize access to summary advice and assistance. In many instances, the advice and assistance rendered in the community is not "legal" advice of the type usually rendered by lawyers; however, this development does raise perplexing definitional problems and, having regard to the unstructured environment in which the advice is rendered, some inherent dangers as well.

Although it is absurd to suggest that every question which presupposes an answer about the state of the law is "legal advice" which must in the public interest be given by a lawyer, individuals seldom seek advice in the abstract. In general, the type of legal advice required to be given by a lawyer is that which relates to the administration of justice rather than to the administration of a particular law. The former presumes the existence of a dispute, or a potential dispute, between parties opposed in interest on an identifiable issue, while the latter relates simply to the question of compliance with a particular law. Only in the event of serious disagreement as to what may constitute compliance with "the law" does the latter begin to assume the character of the former and even then, depending upon the tribunal in which the issue is required to be resolved, the advice of a lawyer may not be required as a matter of public interest.<sup>42</sup> However, where the range of remedies to be considered involves a potential application to a court before which the student or lay individual has no formal status, the spectre of unauthorized practice is legitimately raised as a matter of public interest.<sup>43</sup>

There is no convenient or practicable basis upon which legal advice requiring the skill of a solicitor can be segregated definitively from advice which does not require such skill. Although a law student may have status to "represent" an applicant in Small Claims Court, it cannot be presumed that he may "advise" applicants in every such case with impunity as if he were a solicitor. For instance, a student acting solely within the framework of his own experience might well advise an applicant to sue for damages in the Small Claims Court where the proper remedy was an action in the County Court for the rescission of a contract and the return of the entire purchase price of a used motor vehicle. It is a matter of public interest that indiscriminate lay-counselling on legal matters should not be encouraged; conversely, persons with limited professional qualifications should be encouraged to secure the degree of professional supervision that is consonant with their risk of exposure to legal questions.

### *Conclusion*

Student legal aid, once a highly suspect undertaking, has achieved considerable *de facto* recognition within the profession, the law schools, and The Legal Aid Plan during the past decade. In achieving this recognition

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<sup>42</sup> For example, if the issue involves the determination of entitlement to welfare or unemployment insurance benefits, it might be satisfactorily resolved before the quasi-judicial tribunals established under either scheme without the assistance of a lawyer.

<sup>43</sup> For example, in cases where the range of remedies to be considered includes applications for prohibition, mandamus, certiorari or a declaratory judgment, obviously advice by lay men is inappropriate.

through bold and persistent experimentation, it has served as a catalyst to new thinking about the objects of legal aid and of legal education. In many respects, it has desegregated the rigid and restrictive notions about student legal aid which once obtained in both quarters; it has fostered a climate for its own formal acceptance on the basis of reciprocal value to legal aid and legal education. Its inherent value to either undertaking continues to be judged by amorphous standards which, although yet unsettled, are clearly the subject of accelerated deliberations. This is encouraging because it is to be hoped that the philosophical framework will soon crystallize within which student legal aid may finally achieve formal legitimacy. Then, and only then, will its future be assured.



