

# AN EVALUATIVE FRAMEWORK OF LEGAL AID MODELS

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The purpose of this Article is to place the systems for legal service to the poor in the developed countries of the world within an evaluative perspective that may be useful to planners of such systems in developing countries. Part I presents one exposition of the process of national development, with particular emphasis on the role of law and lawyers. Part II describes the major legal service systems used in the West. In Part III, some observations are offered about the relationship between a country's development goals and its choice of a legal service program or system.

## I. LAW, LAWYERS, AND LEGAL SERVICES IN A DEVELOPMENTAL CONTEXT

### A. *A Theory of Political Development*

Some generalities can be cautiously offered about the process of development of the modern state. Professor Organski, in a widely accepted approach, defines three stages of political development through which all nations must pass: (1) primitive unification; (2) industrialization; and (3) national welfare.<sup>1</sup> Primitive unification, briefly, is the coalescence of various traditional forces into a common authoritative framework (the nation-state). The impetuses behind this development are diverse. For instance, unification has sometimes occurred under colonial subjugation, and at other times, in the wake of an anti-colonial reaction. Law, particularly in its constitutive and institutive functions, plays a major role in establishing the unitary authority; but

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1. A. ORGANSKI, *THE STAGES OF POLITICAL DEVELOPMENT* (1965). For applications of this theory to legal systems, see Auerbach, *Legal Development in Developing Countries: The American Experience*, 63 PROC. AM. SOC'Y INT'L L. 81 (1969); Mendelson, *Law and the Development of Nations*, 32 J. POL. 223 (1970).

the legal profession, as we think of it, does not have much part in the transformations taking place at this stage.<sup>2</sup>

In the unification stage, allegiance to the emerging state is the prime demand on the population. Any dislocations that occur are ordinarily a consequence of the destruction of former allegiances.

The industrialization stage, in contrast, is characterized chiefly by the heavy demands made upon all segments of the population as a part of the pursuit of rapid economic growth and modernization. Social and economic exploitation, repression, and dislocation are common during this stage as three interrelated processes take place: the accumulation of capital, rural-urban migration, and the accession to power of modernizing elites. During this period of great internal disruption and change, government tolerates, and sometimes even encourages, the establishment of competitive power centers. In the context of this intranational contest for power, the need for the skills of representation, advocacy, and negotiation are sorely felt. This stage sees the rise of the legal profession as it is known in the West. Many of the characteristics and attributes of the profession may be traced to the fact of its ascendancy during this period.

The national welfare stage sees a role reversal by the state. The tensions generated by the industrialization stage are recognized to be inconsistent with the fundamental integrative thrust of the stage of primitive unification. For reasons that need not be explored here, ranging from rumblings of revolutionary discontent to the social conscience of older ruling classes, the state in the national welfare stage turns to implementing the idea of "commonwealth." The emergence of the social-welfare state is the predominant manifestation of this stage. Law, as the means by which economic growth is stabilized and wealth redistributed, will perform an important function during this period. Exactly what role the legal profession will play in this stage is problematic.

### B. *The Role of the Legal Profession*

In an essay on the adaptability of the legal institutions of industrialized countries to the needs of developing countries, Professor Franck

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2. In fact, except in an independence movement, which in theoretical terms is a spurious unification form, the profession as such rarely exists at this stage of development.

asserts that three types of law, lawyers, and legal institutions arose in the United States in response to each of Organski's three stages and that the legal culture of developing nations pursuing all three goals concurrently must furnish lawyers of all three types.<sup>3</sup> The bar must include those adept at achieving national unification and integration, those expert at promoting industrial and commercial growth, and those functioning to foster social justice, human welfare, and the equitable distribution of rights and privileges, duties and burdens.<sup>4</sup>

Conflict avoidance and reconciliation among the three will be a necessity, according to Franck, requiring a "predictive foresight, a shrewd awareness of potential trade-offs, and an ability to devise new incentives for compromise."<sup>5</sup> For this, there will be needed lawyers who specialize in "maximizing the participation of affected publics in the making and eventual execution of developmental decisions"<sup>6</sup> and who possess the skills of social planners.

Denied by the communications revolution the opportunity to develop "naturally" or gradually, a developing country faces the awesome task of meeting the demands of all three stages of political development at once. It is no wonder then that the legal profession, insofar as it can contribute to this undertaking, might be expected to perform a more demanding role than it played in the past. That little in its past has prepared the legal profession for its new role has not discouraged hopeful members from sounding the call. Urging that the lawyer in the developing countries assume an ever-increasing role as a planner, the late Professor Wolfgang Friedmann wrote:

If the lawyer continues to be identified . . . with the defense of the existing order and of vested interests, against the urgent needs and interests of societies that must lift themselves from poverty and stagnation to a radically higher level of economic and social development, often within a desperately short time, the lawyer will eventually be reduced to an inferior and despised status in the developing nations. [He] must become an active and responsible participant in the shaping and formulation of development plans. He must guide and counsel but also warn where necessary. He must acknowledge the drastically increased role of public law in developing societies, which usually have inadequate re-

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3. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767, 776-81.

4. *Id.* at 777.

5. *Id.* at 778.

6. *Id.*

sources, a totally inadequate quality and quantity of responsible private venture capital, gross educational deficiencies, and a minimum of technical skills and administrative experience.<sup>7</sup>

The demands upon the lawyer may go beyond freeing himself from alignment with vested interests; they might call for the apparent violation of norms to which he is deeply committed, such as equal treatment. As an example, Friedmann noted that, although the break-up of large, private landholdings may be desired by social planners, treatment of these interests must be differentiated from treatment of small peasant landholders. In the service of social policy, Friedmann suggested, the lawyer must compromise his tendency to protect equally the vested interests of both large and small landholders.

Although little in the record of the profession in developed nations suggests that the challenge of a new role will be met, sufficient signs of change justify a brief examination of the behavior of the profession, or, more precisely, the variation in behavior, with regard to legal assistance of the poor.

### C. *Legal Incompetence of the Poor—A Professional Failing*

In the industrialization stage, the working and consumer class makes up the great exploited mass in the drive toward national economic growth. Beneath this class, in terms of powerlessness, are the unemployed indigent. With no perceived power, this class neither attracts nor seeks the services of the legal profession. In the phrase of Carlin, Howard, and Messinger, they suffer from "legal incompetence"—an inability to further and protect their interests through active assertion of legal rights.<sup>8</sup> The authors describe several conditions in the law and the profession that contribute to the inadequacy of representation of the legally incompetent: (1) the "structure of rewards" in the legal profession; (2) "party initiative" requirements; and (3) "legal relevance."<sup>9</sup>

In their discussion of "structure of rewards," Carlin, Howard, and Messinger mean more than that success, for the private bar, is meas-

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7. Friedmann, *The Role of Law and the Function of the Lawyer in Developing Countries*, 17 VAND. L. REV. 181, 186 (1963).

8. Carlin, Howard & Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC'Y REV. 9, 69-71 (1967).

9. *Id.* at 63-67. A fourth condition, "focus on the particular case or controversy," was also described by the authors. *Id.* at 64.

ured in terms of financial compensation. Prestige, challenge, and continuity in work all operate to favor representation of the wealthy. Attitudes toward the practice of law for the poor, and many features of that practice, are strong disincentives to representation of the poor. Factors mentioned by the authors include: members of the profession, drawn substantially from middle class backgrounds, relate badly to lower class clientele; lack of resources causes lawyers to treat poor people's problems as "cut and dried", and thus the practice is considered to be tedious; the levels of administration that typically handle poor people's problems are least likely to appreciate vigorous representation and most likely to invite the compromise of ethical standards. Under such a "structure of rewards" it is no wonder that lawyers strive to move beyond the practice of the poor; those who do not do so are more likely to be incompetent, unethical, or resentful.<sup>10</sup>

The "party initiative requirement" is especially suited to maintaining the level of "legal incompetence" of the poor. This requirement is often enshrined in the law or professional codes of conduct through prohibitions against the solicitation of clients or the incitement of litigation. This requirement tends to minimize the use of legal services by the poor, and it contributes to the inadequacy of the representation received. Because the poor typically seek legal advice only when their legal problems are *in extremis*, the most effective form of representation, preventative service, is precluded.

Again as a result of unfamiliarity and distance, lawyers do not appreciate the "legal relevance" of poor clients' difficulties. There is a tendency among lawyers to define the problems of the poor as social or psychological rather than legal and to conclude, therefore, that therapy rather than justice is required. "The adoption of this perspective weakens the lawyer's capacity to recognize legal rights and seek legal remedies; it also provides him with a seemingly legitimate rationale for perfunctory service and for his reluctance to serve the poor as a lawyer."<sup>11</sup>

The fact that until now the profession's record of response to the legal needs of the poor has been uniformly insufficient, so much so that commentators could assert that economic poverty was nearly always synonymous with "legal incompetence," cannot be understood in terms of blame or fault. As previously intimated, the explanation arguably

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10. Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381, 384-86 (1965).

11. Carlin, Howard & Messinger, *supra* note 8, at 67.

lies in the circumstance that the shift from the industrialization stage to the national welfare stage is nowhere more than a recent and tentative phenomenon. Moreover, in no nation is there a legal profession wholly formed and conditioned by national welfare stage norms. To the contrary, every existing organized national bar has been conditioned by (and in many respects epitomizes) the ethic of the industrialization stage. Professionalism, as understood by the practicing bar, reflects all the "virtues" of the ethic of individualism that has served industrial and economic growth so admirably.

The performance of the profession, and of governments in general, in the legal resolution of the difficulties of the poor must be seen as a reflection of the prevailing moral, political, and economic philosophies of the period in which the present bar developed. Tracing that thesis through the history of legal services to the poor back to ancient Rome, Dr. Cappelletti has identified three strains of impulse to service.<sup>12</sup> There is the "charitable" motivation, with its roots in the medieval period when European nations were going through the unification stage. The idea of charity was consistent with the concept of mercy, bestowed as an act of grace, by an all powerful but benevolent sovereign. It was not until the grave pressures of industrial revolution were imminent that the second impulse, the "political right" motivation, emerged. This is most familiar to us in the concepts of natural justice and equality articulated in the era of the French and American revolutions. According to this view, legal standards defining the limitations on the power of the state vested corresponding rights in the individual. While grand admonitions of equal justice and rights were readily articulated in the context of political conflict, the real impact of the concept occurred in the economic field. Under the banner of freedom of contract great advances in economic growth were achieved. Legal aid, under the banner of equal justice, made small gains beyond that which was "due" under charity. The central ethic of the legal profession as we know it, the lawyer-advocate as the voice of the individual client's will, developed in this context.

The last impulse, perhaps only now in the process of forming, might be called the "social welfare" motivation. It calls for affirmative action by the state

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12. Cappelletti & Gordley, *Legal Aid: Modern Themes and Variations*, 24 STAN. L. REV. 347, 348-64 (1972).

to attack and ameliorate . . . [undesirable] social . . . conditions [by means of] the rational allocation of limited resources . . . . By attacking broad social conditions . . . it promotes effective economic and social equality.<sup>13</sup>

#### D. *The Lawyer's Response—Two Archetypes*

As noted previously, lawyers in industrialized countries generally respond to the need for legal assistance to the poor according to industrialization-stage norms. Recent years, however, have witnessed a noteworthy development of the national welfare perspective, particularly in the United States.<sup>14</sup> Since it is argued here that the source and nature of the lawyer's response may fundamentally influence the choice of the legal service model implemented, it may be worth examining, briefly, how the two perspectives are manifested in practice. Generalizing from the experience of United States, it is possible to present a bipolar description of the practicing legal assistance lawyer.<sup>15</sup> At the two poles stand the "traditionalist" (lawyer as professional technician) and the "reformist" (lawyer as social engineer and planner).

The traditionalist, who epitomizes the industrialization-stage ethic, might be defined most succinctly as the agent of economic man. He is, in Western society, the embodiment of the utilitarian principle—maximizing benefits and minimizing costs for his client. This calculus is the very code of his profession. Assisting the poor, for him, simply entails the parallel extension of services enjoyed by the paying client. Ideally he serves his client as a dedicated professional with equal vigor regardless of the client's cause or station; "neither homage to the rich, nor empathy for the poor" might be his motto.

The traditionalist belief that justice is born of conflict between equally equipped champions (lawyers) rests upon assumptions about the law<sup>16</sup> and about the availability of lawyers that, to say the least, are

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13. *Id.* at 407. This motivation could also be called "political" were it not for the confusion in terminology that might result.

14. The declaration of the "War on Poverty" by President Johnson and the establishment of a nationally-funded legal service program of grand design and dimension prompts the statement in the text. Since different premises obtain in socialist states, the comparative statement is not intended to extend to them. See generally Cahn & Cahn, *Power to the People or the Profession?—The Public in Public Interest Law*, 79 *YALE L.J.* 1005, 1006-07 (1970).

15. The description is intended purely as a depictive device because reality is almost invariably a matter of continua and tendencies.

16. These assumptions encompass the interrelated beliefs that the allocation of

questionable. A hallmark of traditional positions, in any context, is an unwillingness to re-examine underlying assumptions. Often the idea of questioning does not even occur. One explanation for this characteristic is that traditions are protected against premise challenges by institutions. For example, one of the tenets of the traditionalist—scrupulous adherence to the professional code of ethics (an institutional command)—actually operates as a means of obviating the need to question the validity of the assumption about the availability of lawyers. As noted earlier, ethical rules promulgated by bar associations to regulate intraprofessional behavior prohibit such things as advertising, solicitation, and stirring up litigation. The main purposes of these rules are said to be the preservation of existing patterns of competition in the bar, protection of the public from misrepresentation, prevention of “commercialization of the practice of law,” and protection of the image of the profession in order to sustain public confidence in it.<sup>17</sup> Whatever else can be said about these justifications, clearly the rules minimize the chances of contact between lawyers and the class of potential poor clients.<sup>18</sup> Thus, the need to confront the assumption of availability is largely averted.

Another assumption of the traditionalist, which bears study because it will especially affect the manner in which he practices law for the poor, is that the law will produce just and fair results for all participants so long as it is functioning properly. Accordingly, the lawyer's main job is to assure proper functioning. Conversely, policy-making is not a lawyer's job. Therefore, the traditionalist will pointedly ignore his personal beliefs and political views in the representation of his clients. This antipathy for the policy-making role has certain virtues as far as

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rights and duties in the legal system is fair and self-correcting, that the legal problems and claims of the poor and nonpoor are substantially similar, and most doubtful, that law is causally isolable from other cultural and social factors. These beliefs are not compatible with the view that the legal system contains “favored party” status for certain groups, in terms of both substantive law and procedural rules. In an unpublished paper, Professor Galanter of Buffalo University School of Law, has attempted to demonstrate the institutional bias against the poor built into the United States legal system. M. Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 1973 (unpublished paper on file at State University of New York at Buffalo School of Law). For examples of “favored parties,” see Carlin, Howard & Messinger, *supra* note 8, at 12-17.

17. B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 150-59 (1970).

18. Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 301 (1970); Note, *Ethical Problems Raised by the Neighborhood Law Offices*, 41 NOTRE DAME LAW. 961 (1966); Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972);



a poor client is concerned. The traditionalist is less likely to be paternalistic and less likely to manipulate the client and usurp his decision-making prerogatives.<sup>19</sup>

This attitude toward the lawyer's role, nevertheless, has serious disadvantages for clients who are dependent and nonassertive, common traits of the "legally incompetent." If, in addition, the lawyer's services are motivated by feelings of charity, or even worse, are reluctantly tendered as a professional or governmental obligation, that service will tend to be passive to a fault. A poor client of such an attorney may expect little more than assurance of procedural correctness through the representation of the "passive" traditionalist.

The "active" traditionalist, acting perhaps from the "political rights" motivation, may press legalistic arguments for substantive and procedural changes in the law, but he too will tend to restrict his advocacy and representation to traditional modes and forums. His basic instinct and emphasis will be toward achieving the application and implementation of existing laws and precedents. In a sense, this lawyer's activity will be directed toward the expansion of legal rights on the horizontal plane.

The reformist is more difficult to describe, if for no other reason than that he is a relative newcomer to the legal profession. In his less radical guise he pursues solutions to the problems of the poor by a policy-making and planning process designed to alter or replace existing legal institutions and procedures. He tends to think of his clients as an interest group and prefers to devise long-range strategies to serve the collective interest rather than represent the individual client in the manner that best meets the client's immediate needs.<sup>20</sup>

The nonradical reformist shares the faith of the traditionalist. He has faith in the capacity of the existing order to correct itself and clings to a belief that, with the right formula, the poor can be elevated to substantial parity through legal change and without a fundamental reordering of economic and political institutions.<sup>21</sup>

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19. Cahn & Cahn, *supra* note 14, at 1005-06.

20. A good example of this aspect of the reformist's practice can be found in the experience of the legal arm of the National Association for the Advancement of Colored People. Its school integration strategy spanned more than a decade; often in that period the immediate advantage of a particular client had to be subsumed in the effort to attain the group's long range goals. See NAACP v. Button, 371 U.S. 415 (1963).

21. See Byrd & Gitcheil, *Two Lawyers Look at Legal Aid*, 25 ARK. L. REV. 446 (1972); Cheatham, *Availability of Legal Services: The Responsibility of the Individual*

The radical reformist harbors grave doubts about the corrigibility and reformatory power of the legal system. Since he does not believe that the fundamental reordering of the economy and the polity,<sup>22</sup> which he perceives as necessary, can be accomplished through reform of the law, the radical reformist has constant role identification difficulty.<sup>23</sup> As his planning and policy-making views transcend the professionalism of the advocacy models, so his view of legal change transcends the mere redefinition of substantive legal doctrines and procedures.<sup>24</sup>

Why in the face of such attitudes, do we persist in calling the radical reformist a lawyer? The reason is that, whatever else he asserts

*Lawyer and of the Organized Bar*, 12 U.C.L.A.L. REV. 438 (1965); Miller, *The Role and Responsibility of the Legal Profession in a Changing Society*, 33 TENN. L. REV. 433 (1966); Viles, *The War on Poverty: What Can Lawyers (Being Human) Do?*, 53 IOWA L. REV. 122 (1967). A good representation of this viewpoint is considered by many to be that made by Professor Hazard in *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969).

22. He is searching for the true middle ground between a free and a planned economy and between a centralized and decentralized polity. Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1079-91 (1970).

23. See Kinoy, *The Role of the Radical Lawyer and Teacher of Law: Some Reflections*, 29 GUILD PRAC. 3 (1970), in which, at the outset, Professor Kinoy says the following:

[T]o my colleagues in struggle, and particularly to those who have newly come to the battle, the questions are often more pressing. It is not a total contradiction to be a radical teacher of law, a "radical" lawyer—a contradiction which can only be resolved by exculpatory proclamations that "law is illegal" or hortatory pronouncements that the only struggle is in the streets . . . .

To these earnest and deeply troubled lawyers I have but one reply. Yes, the "radical" teacher of law, the "radical" lawyer, lives, functions, struggles, in the midst of contradiction; his or her life is itself a contradiction.

*Id.* at 3.

24. The radical reformist might also be described as an unabashed, self-proclaimed social engineer. For different reasons, some find little place for him within the profession. See Black, *Some Notes on Law Schools in the Present Day*, 79 YALE L.J. 505, 509-12 (1970). Professor Black writes:

Others of our students will be wanting to be prepared to go more directly for the jugular of social injustice. As to them, we ought to help them sharpen the knife, if they believe, with us, that the most thorough possible understanding, the best possible training in thought, is the right whetstone. If, instead of that, they want present action, there are plenty of other places where they can find it. There is no reason to think either choice is mistaken.

*Id.* at 511. See also Note, *supra* note 22, at 1093-94:

Where the political lawyers represent groups, those groups tend to be "radical" in the sense that they are committed to fundamental change in the structure of American society . . . . Indeed, wary of any activity that confirms or maintains "the system," some radical lawyers are hostile to the work done by "public interest lawyers"; such work is counterproductive, in their view, for while it can make the system slightly less oppressive, it defuses efforts for more radical change.

or does, he is grounded in a client-representative relationship that legitimates his conduct and confers his status. Moreover, the reformist seeks attainment of his goals and, perhaps makes a creative contribution through the expansive exploration and redefinition of that relationship. To use the law and the representative relationship as a vehicle for change is not a new idea, but to use it as a socializing and politicizing tool for change, rather than as a stabilizing instrument, is a bold idea. The first idea, change through law, is synonymous with incremental, orderly change. The latter idea carries no such assurances.<sup>25</sup>

By expanding the modalities of representation to include education, organization, development, and politics, the radical reformist hopes to set in motion forces that will lead to the fundamental reordering he desires. First, education of the members of poor communities about their rights and how, when, and where to assert them is seen by radical reformists as the appropriate answer to the "naturally selective" failure of the law to penetrate those communities. The initial focus is upon legal factors that tend to perpetuate the state of "legal incompetence," such as default judgments, prejudgment attachment, or the failure of officials, including lawyers, to explain their actions.<sup>26</sup> The primary method of education is to draw the poor directly into the legal process.<sup>27</sup>

Secondly, organization is typically the basic device of the proponent of political action. The radical reformist also has discovered its uses.

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25. See Black, *supra* note 24. In discussing the civil rights movement in the legal profession, Professor Black says:

The progression here is classic. The institution of law travailed. From the school segregation cases forward, law by its only known means—judicial decisions, statutes, administrative rulings—washed out of its fabric every trace of racism—or as nearly as that is possible in human political action. . . . Things have gotten tangibly and intangibly better for many blacks in ways which can be traced to law as clearly as effect can be traced to cause in most social matters.

*Id.* at 506-07.

Still, some would add that, even out of this purely legal progression, unknown forces have been loosed in American society. Few would be so bold as to claim that racism has been eliminated here, or that its end will not require yet more travail or even turmoil.

26. See, e.g., Harrington, *Preventive Law for Low Income Groups: The Texas Southern Experience*, 21 J. LEGAL ED. 339 (1969). See also Seidman, *The Communication of Law and the Process of Development*, 1972 WIS. L. REV. 686.

27. Participation is a functional prerequisite to penetration and presumably would increase the "effectiveness" of a legal system. See Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29, 43-44 (1969). See also Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927, 954 (1966).

He contends that just as economic interests made historic gains through the organizational device of incorporation, so too will breakthroughs be achieved in social advancement through organization. Lawsuits and common legal needs, if handled correctly, serve remarkably well as focal points for organization. Moreover, once organizations are launched, the system's attempt to control the form and activities of the organization will tend to maintain the lawyer in a critical, advisory position. This in turn, presents otherwise unavailable opportunities for achieving desired reformist goals. For example, in the litigation field, he can more readily sustain class actions, or he can make credible threats of economic reprisal, such as boycotts or strikes. More constructively, organization provides wider educational opportunities and the foundations for economic development activity.<sup>28</sup>

Thirdly, development of social structure is a relatively new approach in poverty advocacy, even as practiced by the radical reformist. Housing projects, food cooperatives, community development projects, and neighborhood businesses require the assistance of the lawyer, paradoxically, in one of his most traditional guises, as business counselor. The difference is that the radical reformist will be balancing his rational planning (for economic benefit maximization) with encouragement of community participation (in the service of increasing legal competence and penetration levels).

Lastly, political activity on behalf of the poor raises the most difficult questions about the role of the radical reformist. Once the line between representation and activism fades or disappears, the radical reformist, as suggested earlier, endangers his own status. It becomes difficult for him to explain how he arrogated the representational role, particularly in a democracy. Nevertheless, petitioning, electioneering, and demonstrating all have their places in his developmental plans. Whether he executes this aspect of his role best by contesting injunctions against his clients' demonstrations or securing freedom for imprisoned group leaders, for example, or by advising violation of injunctions or pursuing political tactics in the courts, is a controversy that not even the self-proclaimed radicals have yet resolved.<sup>29</sup>

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28. Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053-58 (1970).

29. See Kinoy, *supra* note 23, at 17 (emphasis original):

[T]o mold one's role as a lawyer or teacher of law in such a fashion as to facilitate the resolution of contradictions in a positive direction . . . requires initially the willingness to study in depth the particular characteristics of the individual case or people's movement in which the radical lawyer is involved,

## II. A DESCRIPTION OF LEGAL AID MODELS

In Part I, our purpose was to gain some insight into the development process, with particular emphasis on the place of the law and lawyers. If, as suggested, legal service models reflect the different stages of development and replicate the range of professional response to these stages, surely planners would want to raise such theoretical considerations to a conscious level when making choices among the models of legal services. Implicit in such a suggestion is an assumption that rational discourse can have an effect on policy formulation and implementation and, more specifically in our context, can dictate the choice of "the right" model or, with more certainty, the superiority of one model over another. We make no such sweeping claim, however.

It is our belief that historical imperatives—existing social forces and conditions, political institutions, personalities—far more than planning, will determine in any particular country whether legal services for the poor will be fostered and, if so, according to what model. For example, the existence of the English legal tradition in a former colony would be likely to lead to the adoption of the English legal assistance model even if rational planning indicated the adoption of a different one.

To cast doubt on the significance of rationality, however, does not deny the utility of the endeavor; it merely defines it more modestly. Recognition of the limitations imposed by existing circumstances and conditions simply diverts rational inquiry into pragmatic channels. Instead of producing a theoretically "best" model, the evaluative standard we envision need only supply the basis for selecting the "best suited" model. Presumably a service may be rendered by providing planners with a scheme for perceiving how different models comport with their perception of their country's developmental stage and plan.

Furthermore, by "best suited" we do not purport to say anything about the national goals against which the standards should be measured. Reference to and reliance upon certain theories about the evolution of legal institutions and the adoption of certain descriptions of the legal profession do not mean that we have any "first principles" that enable us to determine what constitutes progress and the "right" choice

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so as to discover in that precise situation the most effective way to facilitate the interplay of both roles—the defense of the elementary forms of democratic liberties there under attack and, utilizing the arena the enemy has chosen, the development of a political counter-offensive which deepens the understanding of masses of people and accelerates their already swirling motion.

at each stage of development. Whatever opinions we hold apply to our own country and, in any case, are reserved. Perhaps an example can best make the point. Suppose that in a nation emerging from a tribal culture a unitary criminal code is rigorously enforced as a deliberate means of promoting a national legal ethic. Policymakers might conclude that if the state provided legal assistance to the accused, the exemplary function of public criminal prosecutions would be diffused, hopelessly confusing some segments of the population. In such a situation an assigned-counsel model might be chosen, even though theoretically a publicly supported legal service model would be preferable.

In sum, generalities must yield to particularities; a framework is a generality, and it cannot presume to offer more than a frame of reference. In this spirit, the description of legal aid models that follows is offered only as an inventory of possibilities. For purposes of inter-model comparison, the description is broken into the elements of (a) Funding and Policy, (b) Delivery Mechanism, and (c) Operations. Frequent allusion is made to the theoretical backdrop sketched in Part I, but no systematic reference is attempted. This is not an abandonment of theory, but simply a recognition that no purpose is served by repetitiveness.

## A. *Legal Aid Society*

### 1. *Funding and Policy*

Organizations of the "Legal Aid Society" model are funded predominantly through private sources; to a great extent, it is these sources that determine policy.<sup>30</sup> One source of funds is the large, private charitable institution or social agency. Legal aid offices so funded are component parts of the funding agencies. As such, they are funded only to the extent of legal aid's priority in the agency's overall budget; the priority usually is low. Furthermore, budgeting can be uncertain and subject to change.

Other sources of funds are local bar associations and local governments. Local bar associations, though they often have a voice in policy, infrequently give financial support to legal aid organizations. Com-

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30. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, ANNUAL REPORT (1963). For a thorough history of legal aid, see E. BROWNELL, LEGAL AID IN THE UNITED STATES (1951, Supp. 1961). For a more recent review, see Silverstein, *Thoughts on the Legal Aid Movement*, 40 SOCIAL SERV. REV. 135 (1966).

bined funding has been the most successful, probably because a diffusion of funding also diffuses policy-making power, and the project's staff can exercise more control over direction than in the case of exclusive funding. In addition, budgets are more secure with multiple funding sources. The Legal Aid Society model is characterized by combined funding.

In 1965 legal aid organizations in the United States received about \$5 million, channeled primarily through general charitable resource clearing houses such as the United Fund and Community Chest. As a consequence, there have been two basic effects on general policy: an overriding charitable intent towards clients, and a reluctance to act in local commercial litigation in which program efforts may be directed against contributor-businessmen.<sup>31</sup>

An important result of the large policy-making role of local bar associations has been the imposition of rigid controls on client eligibility and the subject matter of cases. Although this is not the only limiting force, it appears to be a major influence in all programs. The reason for the control appears to be the preservation of business for private practitioners.<sup>32</sup>

When the tie with a charitable organization is strong, general policy is usually made by the parent organization, with the result that the legal aid program tends to degenerate into an in-house legal department for the social agency. Consequently, potential clients are unaware that legal representation is available on a wide variety of matters, including those unrelated to the activities of the particular charity.

If no tie to a particular social agency is present, as in the case of the classic Legal Aid Society, independence results in various benefits. According to an early observer,

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31. Carlin & Howard, *supra* note 10, at 417.

The refusal of most legal aid offices to represent indigents in divorce cases in all but the most urgent situations reflects the charitable underpinning of these organizations. Divorce, according to the usual policy rationale, is a privilege rather than a right; in any case, public policy should discourage it. A similar refusal to handle bankruptcy cases is probably a direct result of staff hesitancy to antagonize contributing business interests. Some point out, however, that those businessmen who support charity do not prey upon the poor, and that, in any event, the financial connection is too indirect to play a serious role in litigation policies. See *id.* at 415; Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 808-09 (1967).

32. See Comment, *supra* note 18, at 334.

This [independence] has made for greater responsibility and freedom of action in discovering their most useful roles in community service . . . . This independence has been especially advantageous for Legal Aid because the service could develop in close cooperation with the Bar where its professional roots must lie and, simultaneously, evolve effective ties with the social welfare field within which it must operate. Being "on its own" gives it a better status in the family of community agencies and yet assures its rating as a law office in the eyes of other lawyers. It can stand up to narrow and short-sighted factions in the bar when necessary and, with equal force, it can resist occasional pressures to subordinate its legal services to purely social welfare considerations.<sup>33</sup>

## 2. *Delivery Mechanism*

The delivery mechanism of legal aid programs has proved seriously ineffective from the standpoint of accessibility to the poor as well as the representation capability of the programs themselves.<sup>34</sup>

Although offices may be located in poor neighborhoods, many are in downtown office buildings or courthouses, which are often remote from client groups. A more serious accessibility problem is lack of publicity. Many potential clients simply are not aware of the availability of legal aid programs. Frequently, lack of publicity is the result of lack of funds, as well as the desire to discourage the expansion of already over-extended caseloads. Unsurprisingly, the help of legal aid agencies usually is not sought by the poor until they are sued, and often they do not seek help even then. These problems are compounded by bar association rules limiting solicitation, although recent inroads have limited interference with legitimate legal services activity.<sup>35</sup>

A potential client applying for legal aid faces strict screening. The first and most important eligibility standard is the inability to pay a fee to a private attorney; this scrupulously guarded control mechanism results in denials of about twenty percent of all applications for legal aid.<sup>36</sup> Strict financial eligibility rules have resulted in criticism of the extensive and sometimes degrading personal interviews that must be con-

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33. E. BROWNELL, *supra* note 30, at 88.

34. The chief reason may be the traditionally inadequate funding given such programs. Where such programs exist they have satisfied only about ten percent of the actual need for legal services.

35. Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972).

36. P. WALD, *LAW AND POVERTY* 49 (1965).



ducted before an applicant can see a lawyer. This interviewing, it is said, depersonalizes the lawyer-client relationship. A more serious problem is that the lay personnel involved in screening applicants may not be qualified to decide how serious a case is or how much merit it may have. These problems are a reflection of planning failures and the influence of professionalism with its accompanying insensitivity to human needs.<sup>37</sup>

Elsewhere, by comparison, the merits and probability of success of the applicant's case are proper factors in the eligibility decision.<sup>38</sup> In Germany full hearings are held to determine the plausibility of the applicant's case, and the applicant's adversary is even invited to contest eligibility. A problem with this application process is that one often needs a lawyer to get a lawyer.

The representational capability of legal aid offices is inadequate primarily because there is an excessive demand for limited resources. As a result of time pressures, most cases can be handled only perfunctorily. Cases that can be dealt with by a few calls or letters are well served, but anything more complex is beyond the capability of many offices. Fact investigation, legal research and drafting, and court appearances are victims of these pressures. It has been found that Legal Aid offices in which six percent or more of cases involve court work handle only half as many cases per attorney as offices in which less than six percent of the cases involve court work.<sup>39</sup>

### 3. Operations

Funding, policy-making and design of the delivery system of Legal Aid programs illustrate the traditional advocacy model. Representation is individual, and rarely are law reform cases prosecuted. No effort is made to give the poor anything more than adequate legal representation.

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37. See Capelletti & Gordley, *supra* note 12, at 387, 393. Gordley points out, correctly, that such program controls reflect traditional views about the right to legal aid—a legalistic and individual view. *Id.* at 387-88, 392-94.

38. Klausner & Riegert, *Legal Assistance in the Federal Republic of Germany*, 20 *BUFF. L. REV.* 583 (1971). The same criteria are used in Italy and France. See Capelletti & Gordley, *supra* note 12, at 364-73; Gori-Montanelli & Piergrossi, *The Availability of Legal Services to Poor People of Limited Means in Foreign Systems: Italy*, 6 *INT'L LAW.* 133, 137-38 (1972).

39. Carlin & Howard, *supra* note 10, at 417; see Gardiner, *Defects in Present Legal Aid Services and the Remedies*, 22 *TENN. L. REV.* 505 (1952).

## B. *Assigned Counsel*

### 1. *Funding and Policy*

Assigned counsel systems are widely used in the United States for the representation of indigent criminal defendants. They are established and funded by the state.<sup>40</sup> The widespread use of such programs reflects the American legal imperative that criminal defendants, regardless of their ability to pay, must be represented by counsel,<sup>41</sup> although no analogous commitment has been made on behalf of poor civil litigants.<sup>42</sup> Compensation for services and reimbursement for expenses range from nothing to amounts fixed by judicial discretion. On a local basis, counties are responsible for managing their own programs; often the funds committed are inadequate to pay the lawyers appointed. The differences in compensation of assigned counsel are striking from one locality to another. In all federal criminal proceedings, on the other hand, the Criminal Justice Act of 1964<sup>43</sup> has made adequate and uniform provision for compensating lawyers appointed to represent defendants charged with federal crimes. The program provides twenty dollars per hour for out-of-court and thirty dollars per hour for in-court work, with a ceiling of \$2000, which can be waived in a lengthy trial.<sup>44</sup>

### 2. *Delivery Mechanism*

The major variable in the delivery system of this model is the method of selecting lawyers. Of course, the selection method affects the quality of representation and the time of appointment of counsel, which, in turn, influence a defendant's chances of acquittal.

Commonly, the presiding judge appoints counsel from a list of lawyers participating in the program. The list may contain the names of lawyers who volunteered or were chosen to fulfill civic responsibility. Frequently, local bar associations are responsible for preparing lists and

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40. See 1 L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 15-38 (1965); Summers, *Defending the Poor: The Assigned Counsel System in Milwaukee County*, 1969 WIS. L. REV. 525.

41. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

42. See Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966); Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO U.L. REV. 21 (1967); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

43. 18 U.S.C. § 3006A (1970).

44. 18 U.S.C. § 3006A(d)(1), (2), (3) (1970).

keeping them current. There are a variety of other ways to select counsel; it is not uncommon for judges simply to appoint any lawyer waiting in the courtroom for just such work.<sup>45</sup>

It has been pointed out that this system lends itself to the procurement of young, inexperienced lawyers in need of fees and experience, often at the expense of indigent clients. This fact, coupled with the widespread inadequacy of compensation and reimbursement, results in the needless loss of many cases. Perhaps the most serious result is that more guilty pleas are entered by defendants represented by assigned counsel than by those with retained counsel.<sup>46</sup>

Usually counsel is assigned sometime after arrest and before trial. By the time counsel is appointed, many factors leading ultimately to conviction, such as confession, will have occurred.<sup>47</sup> Furthermore, until recently it was thought that misdemeanor defendants had no right to assigned counsel.<sup>48</sup>

Eligibility controls are varied; in general, however, they are applied less strictly than those in civil programs. This distinction is probably the result of the view that incarceration is a matter more serious than the consequences of civil disputes.

### 3. Operations

Law reform activity will rarely occur in assigned counsel programs because the motivation is absent. Assigned advocates are fulfilling a

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45. See Note, *Judicial Problems in Administering Court Appointments of Counsel for Indigents*, 28 WASH. & LEE L. REV. 120 (1971). Among the experiences of one of the authors, as teacher and student in a Boston clinical education program, was an afternoon spent observing such judicial appointments from a large pool of lawyers who, we were told, frequented the courtroom and whom the judge knew quite well. The court was the Boston Municipal Court, and the judge was the famous Elijah Adlow. Both institutions are retiring from the scene and with them, probably a form of law and justice that was always ad hoc, often visceral, and frequently nonconstitutional, but—one felt warmly—thoroughly fair more often than not.

46. ATTORNEY GENERAL'S COMMITTEE REPORT: POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 29 (1963). 1 L. SILVERSTEIN, *supra* note 40 at 21-25, points out that this may be as much for social reasons as a function of the lawyer's level of interest in the case; that is, statistics show that indigents are more likely to be guilty of crimes.

47. 1 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS—A PRELIMINARY SURVEY 23 (1964).

48. It is now established that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

civic duty, or, in many cases, gaining experience by trial representation. The time and expense of appellate preparations are usually considered dispensable, especially since many convictions of indigents are unlikely to be reversed. Thus, the traditionalist fits into the assigned counsel model.

### C. *Defender Systems*

#### 1. *Funding and Policy*

Funding of a private or public defender office is either private, public, or some mix of the two, depending on the statute or court rule authorizing it. The most distinctive difference, in this respect, from the assigned counsel model is the provision for a salary to a single individual or group of individuals. Hence, lawyers employed full time as defenders can exercise unfettered judgment in allocating their time and energy based on the merits of the cases. This freedom is not available to assigned counsel, who must justify their time on personal balance sheets, often at the expense of possibly meritorious, but time-consuming defenses.

The independence of the defender, however, has been questioned by those who note that he must always consider that periodic approval of his budget must come from the same judge in whose court he tries cases. Moreover, it is said, the defender cannot be fully independent because the source of his salary is a governmental or political institution that may have a predisposition for one "side" of the criminal justice system.<sup>49</sup> A further general criticism is that some find unappealing a criminal justice system in which both the prosecutor and the defender are paid from the same source—the state.<sup>50</sup>

Lastly, studies have shown that, as a general proposition, defender systems are more economical to operate in thickly populated jurisdictions and that assigned counsel systems are financially more appropriate in sparsely populated jurisdictions, with the point of division being a population of 400,000.<sup>51</sup>

#### 2. *Delivery Mechanism*

The delivery process in this model is largely self-executing. The only administrative factor that varies from program to program is eligi-

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49. 1 L. SILVERSTEIN, *supra* note 40, at 50-52.

50. *Id.* at 63-69.

51. See generally 1 L. SILVERSTEIN, *supra* note 40.

bility standards; in this respect, assigned counsel and public defender programs are similar.

### 3. *Operations*

The continuity of the defender model leads to several consequences that distinguish its operation from that of the assigned counsel model. Selection of defenders is a more formal process, and the position often is subject to qualifications relating to education and experience. Hence, the defender may be more qualified and experienced than the typical appointed counsel, as well as more dedicated to his advocacy role, having chosen to work at it for a period of time rather than on an ad hoc basis.

This permanence also facilitates an ongoing, working relationship between prosecutor and defender that grows out of repeated encounters. As they grow to trust each other's judgment, the number of cases that can be "pleaded" without a trial increases, so that the defender can handle more cases and thereby dispense "more justice" to indigent defendants. Some critics point out that the closeness of the relationship between the two impedes the independence of the defender. The only clear point that can be made is that, since no checks are readily available on the conduct of the defender, his closeness to the prosecutor could cut both ways, depending on the individuals concerned. The result of comparison studies of assigned and retained counsel and public defenders must be tempered with the knowledge that there are 3,100 counties in the United States, each with a different system.<sup>52</sup>

## D. *Neighborhood Law Office*

### 1. *Funding and Policy*

The neighborhood law office (NLO) model was the chief innovation of the Legal Services Program (LSP). The LSP was set up as an adjunct to the Community Action Agencies (CAA) mandated by the Economic Opportunity Act of 1964.<sup>53</sup> Under the plan, individual local

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52. See, e.g., Gitelman, *The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases—An Empirical Study*, 24 ARK. L. REV. 442 (1971); Note, *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems*, 13 STAN. L. REV. 522 (1961).

53. Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, § 222(3), 81 Stat. 698.

LSP's normally incorporated as nonprofit institutions, established certain authority links with local CAA's and bar associations, and received eighty percent federal funding by annual contract with the Office of Economic Opportunity (OEO).<sup>54</sup> By 1971, the LSP had become an independent agency within OEO and expended sixty million dollars in 265 projects.<sup>55</sup>

Since the federal share of funds was largely without strings and the local share (twenty percent) was usually contributed by "in kind" services, finances did not influence policy to any great extent. Politics, however, played a large role.

According to Professor Earl Johnson, a former LSP director, the proponents of the new model combined the guiding view of the law reform school, which "sought formal changes in the legal structure primarily through the medium of litigation," and the view of the Cahns, who saw the lawyer as an advocate for the poverty community, aiding it to achieve a redistribution of income, education, and opportunity.<sup>56</sup> These views lie near the opposite end of the spectrum from the traditional advocacy model and, predictably, led to controversy.

Among the few specific statutory requirements for local programs was a provision that local and state bar association be "consulted" prior to the funding or refunding of projects.<sup>57</sup> Policy-making, as such, was decentralized, and local governing boards had nearly total authority, subject to a few limitations in the funding contract with the national LSP. A 1967 amendment to the statute required that one-third of the

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54. The Legal Services Corporation Act, 42 U.S.C. § 2996 (Supp. IV 1974), which became effective in July 1974, transferred the Legal Services Program from the Office of Economic Opportunity to a Legal Services Corporation. With a few exceptions, operation of the program at the local level is unaffected by the transfer. See text accompanying note 84 *infra*.

55. See OFFICE OF ECONOMIC OPPORTUNITY, ANNUAL REPORT (1971). See generally Caplan & Johnson, *Neighborhood Lawyer Programs: An Experiment in Social Change*, 20 U. MIAMI L. REV. 184 (1965); Green & Green, *The Legal Profession and the Process of Social Change: Legal Services in England and the United States*, 21 HASTINGS L.J. 563 (1970); Pye & Garraty, *The Involvement of the Bar in the War Against Poverty*, 41 NOTRE DAME LAW. 860 (1966).

56. See E. JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 32-35 (1974), summarizing Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

57. 42 U.S.C. § 2809(a)(3) (1970). The other two requirements were that services be of a high professional quality and that criminal representation not be undertaken. Although the law allowed state governors to veto programs (subject to OEO-LSP override), that has occurred only once, and then without political motivation. See 42 U.S.C.A. § 2996f(a)(1), (8), (b)(1) (Supp. 1975). See also *id.* § 2996(2).

membership of local CAA boards consist of members of the poverty community.<sup>58</sup> The national LSP required local LSP boards to conform to this ratio, and later required as well that sixty percent of each board be lawyers.<sup>59</sup> The latter effort was intended to increase the LSP's autonomy and it followed the development of friction between the social welfare role, as perceived by the community action agencies, and the professional advocacy role, as perceived by legal service lawyers.<sup>60</sup> The result of this requirement was that lawyers from local bars played a large role in policy formulation; to the extent they were conservative, policy was conservative.<sup>61</sup> Domination by either CAA personnel or local bar association members, it has been argued, undercut any significant role for the views of client groups and LSP staff members in policy development. Resulting conflicts may have impeded the program in the discharge of its functions; more important, however, general law reform activities, such as class actions or community education, were sometimes simply prohibited.<sup>62</sup>

## 2. *Delivery Mechanism*

Physical proximity to the client group was one of the chief goals of the architects of the LSP. Nearly all the LSP's were located in poverty neighborhoods, and many made special efforts to publicize their presence in the community.

Eligibility standards were set locally. The goal of the standards was two-fold: to minimize the risk of taking paying clients away from the private bar, and to ensure the most efficient application of LSP resources to aid those most in need. Very few programs systematized eligibility controls beyond those simple components. Some, however,

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58. 42 U.S.C. § 2791(f)(2) (1970).

59. See 42 U.S.C.A. § 2996f(c) (Supp. 1975).

60. See, e.g., Hannon, *The Leadership Problem in the Legal Services Program*, 4 LAW & SOC'Y REV. 235 (1969); Hannon, *Legal Services and the Community Action Program: Oil and Water in the War on Poverty*, 28 NLADA BRIEFCASE 5 (1969).

61. Cf. Hannon, *Murphy Amendments and the Response of the Bar: An Accurate Test of Political Strength*, 28 NLADA BRIEFCASE 163 (1970); Hannon, *National Policy Versus Local Control: The Legal Services Dilemma*, 5 CAL. W.L. REV. 223 (1969); Johnson, *Refutation and Endorsement: A Reaction to Hannon's Analysis of the Murphy Amendment and the Bar*, 28 NLADA BRIEFCASE 257 (1970). See also Shriver, *Organized Bar and OEO Legal Services*, 57 A.B.A.J. 223 (1971); Voorhees, *The OEO Legal Services Program: Should the Bar Support It?*, 53 A.B.A.J. 23 (1967).

62. Note, *The Legal Services Corporation: Curtailing Political Influence*, 81 YALE L.J. 231, 238-45 (1971); see 42 U.S.C.A. §§ 2996e(d)(5), 2996f(b)(5) (Supp. 1975).

examined possible future resources of clients, checked on the particular fee usually charged for the service sought, and even provided an internal appeals procedure for applicants denied aid.<sup>63</sup>

The OEO program had no provisions for relative eligibility, under which a client could get partial services or full services for a partial fee. In borderline cases in the early years of the program, judges and adversaries would sometimes make eligibility a substantive issue in the litigation in which they were involved.<sup>64</sup> Moreover, eligibility controls were used, on occasion, to deny representation to some civil rights plaintiffs, anti-establishment types, and those who were "involuntarily poor," such as young poverty workers.<sup>65</sup>

### 3. Operations

Throughout the program's existence each local office had to find its own balance between law reform activity and individual representation. The resulting well-known debate need not be recounted in detail.<sup>66</sup> Some lawyers favored broad law reform work, even at the direct expense of specific clients' interests, but usually at the more indirect expense of the diversion of resources from "service" functions. Others favored the service function, or individual representation. For reasons of both conscience and practicality, each side had legitimate grounds for its stand, though it appears incontrovertible that the law reformers purchased much greater amounts of justice per dollar than did the service-oriented advocates. Of particular merit in the LSP model was the flexibility that enabled both points of view to be tested against each other, often in the same office. This flexibility probably stemmed from

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63. Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 J. URBAN L. 549 (1967); Note, *supra* note 31, at 846. *But see* 42 U.S.C.A. § 2996f(a)(2) (Supp. 1975).

64. *See, e.g.,* Dimmick v. Watts, 490 P.2d 483 (Alas. 1971). *See generally* Stumpff & Janowitz, *Judges and the Poor: Bench Responses to Federally Financed Legal Services*, 21 STAN. L. REV. 1058 (1969).

65. In one case, a desegregation suit, plaintiff was denied eligibility despite a local program evaluator's finding in favor of it. *Symposium, Legal Services for the Poor*, 6 HOUSTON L. REV. 939, 1043-44 (1969).

66. *Cf. Hazard, Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242 (1969); Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969); Note, *Competition in Legal Services Under the War on Poverty*, 19 STAN. L. REV. 579 (1967). *See generally* Finman, *The Relationship Between Program Ideology and Program Performance*, 1971 WIS. L. REV. 1001.



the decentralized policy-making structure. That such decentralization did not result in any serious imbalance between the planners and the professionals may be partly attributable to the quality that Professor Franck has called the American's lawyer's successful reconciliation of contradictory social demands.<sup>67</sup>

It has been found that political influence impeded the operation of the LSP. When a group at the local level felt that its interests were in jeopardy as a result of a policy or a case being handled by the legal services office, it would politicize the issue and attempt to generate controversy. Such disputes arose with regard to local supervision, eligibility controls, and the kinds of cases the programs should handle.<sup>68</sup>

## E. *Legal Services Corporations*

### 1. *Funding and Policy*

The proposal to convert the Legal Services Program into a national corporation had as its goal the elimination of much of the political conflict by providing for more carefully structured policy-making inputs.<sup>69</sup> The proposal rejected by presidential veto in 1971 would have created an autonomous national board of directors composed of four groups: the bar, the community at large, the client group, and the legal services staff lawyers. The national board was provided very few general policy mandates or goals and left with a vast amount of discretion to decide specific policy. In addition to the promulgation of eligibility standards, the legislative mandate required the establishment of procedures that

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67. [The American Lawyer] has become an expert at designing both profound social transformation and pragmatic incremental initiatives, while maintaining intact those guidelines of consistent, reciprocal, orderly social interaction essential to stability and mutual confidence . . . .

Franck, *supra* note 3, at 793.

68. Suits against local business interests and the government have been the most controversial. See Falk & Pollak, *What's Wrong With Attacks on the Legal Services Program*, 58 A.B.A.J. 1287 (1972); Karabian, *Legal Services for the Poor: Some Political Observations*, 6 U. SAN FRANCISCO L. REV. 253 (1972); Robb, *Controversial Cases and the Legal Services Program*, 56 A.B.A.J. 329 (1970); Note, *supra* note 31; Note, *supra* note 62. For a discussion of ways to limit such interference, see Botein, *The Constitutionality of Restrictions on Poverty Law Firms: A New Case Study*, 46 N.Y.U.L. REV. 748 (1971).

69. Kantor, *National Legal Services Corporation*, 29 NLADA BRIEFCASE 7 (1971); Palmer, *A National Legal Services Corporation: The Legal Profession's Responsibility*, 46 CAL. ST. B.J. 447 (1971); Pearson, *To Protect the Rights of the Poor: The Legal Services Corporation Act of 1971*, 19 KAN. L. REV. 641 (1971).

would provide the poverty lawyer-client relationship the same insulation from outside interference as enjoyed by private attorneys and their clients.<sup>70</sup> One-half of the local boards were to be lawyers, one-third were to be poor persons.

The version of the bill finally enacted as the Legal Services Corporation Act of 1974 states as one of its purposes that

attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the profession.<sup>71</sup>

The makeup of the national board is altered to require only that a majority "be members of the bar of the highest court of the State."<sup>72</sup> Local offices must be governed by boards upon which sixty percent of the positions are filled by members of the state bar; one board member must be an "individual eligible to receive legal assistance . . . ."<sup>73</sup>

Although insulation of the local offices from political pressures is clearly a concern of the Act, more specific provisions are aimed at limiting the political and "radical" activities of the Corporation and local offices. Thus, corporation and local employees are prohibited from encouraging or participating in public demonstrations<sup>74</sup> and advocating or opposing referendums.<sup>75</sup> Certain class actions are prohibited,<sup>76</sup> as are "political activity"<sup>77</sup> and "frivolous appeals."<sup>78</sup> Corporation funds may not be used to support various training programs,<sup>79</sup> desegregation suits,<sup>80</sup> or provide legal assistance in certain abortion proceedings<sup>81</sup> or to deserters or draft evaders.<sup>82</sup> The national corporation is charged with establishing eligibility criteria, including maximum income levels and guidelines based on other regional and financial factors.<sup>83</sup>

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70. S. 1305, 92d Cong., 1st Sess. (1971).

71. 42 U.S.C.A. § 2996 (Supp. 1975).

72. *Id.* § 2996c(a).

73. *Id.* § 2996f(c).

74. *Id.* § 2996e(b)(5).

75. *Id.* § 2996e(d)(4).

76. *Id.* § 2996e(d)(5).

77. *Id.* §§ 2996e(e)(1), 2996f(a)(6).

78. *Id.* § 2996f(a)(7).

79. *Id.* § 2996f(b)(5).

80. *Id.* § 2996f(b)(7).

81. *Id.* § 2996f(b)(8).

82. *Id.* § 2996f(b)(9).

83. *Id.* § 2996f(a)(2).

## 2. *Delivery Mechanism*

The delivery mechanism of this model is nearly identical to the delivery features of the LSP.

## 3. *Operations*

Local operations will be similar to those under the LSP. Some observers think that the structural revisions will insulate lawyers for the poor from political pressures and influence, at least if careful attention is given to seating the "right" groups on the national and local boards.<sup>84</sup> A different reading of the proposals might be that Congress intended that the entire LSP be immersed in the political process so that operations conflict would be minimized. The price, however, of reducing conflict may be a reduction in effectiveness. Perhaps the best evidence that a legal service program is doing its job is the acrimony exhibited by its adversaries. Nevertheless, political interference can be a real and paralyzing dilemma unless there is enough flexibility in the policy-making process to accommodate meaningful compromises between the professionals and the planners.

## F. *Pro Bono Programs*

### 1. *Funding and Policy*

Programs pro bono publico, in which lawyers and law firms discharge what they conceive to be their public service responsibility by working at reduced or waived fees, are fully voluntary and require no extensive funding other than that for administrative services. Large urban law firms in the United States have recognized that the policy of permitting associates to spend up to twenty percent of their time on public service work may be a selling point to young recruits. This policy may prove, however, to be more a function of the lawyer employment market than a matter of commitment.

### 2. *Delivery Mechanism*

There are different ways to structure a firm's involvement in poverty law. The released-time model is the most common. Under this

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84. Note, *supra* note 62, at 275-86. The Note's author argues that policy-making authority should be distributed according to the *impact* the program will have on a group and that group's *contribution* to the program. Hence, the argument goes, client groups and staff lawyers should have the most say in policy. Such a constituency analysis is not likely to carry the day.

plan associates spend a prearranged portion of their working time on projects they choose independently.<sup>85</sup> Although many firms have offered such programs, the participation level has been low; regular firm work must still be done. Moreover, pro bono cases tend to be small and service-centered and therefore unattractive to young associates eager to engage in part-time law reform.

Some firms use a supervisor, who is usually a partner assigned to seek interesting public service work. Larger cases can be handled by such an approach because the efforts of several lawyers can be coordinated on a single project. The partner also lends status to the program within the firm.

Some firms have even set up branch offices in poor neighborhoods—store-front offices. A lawyer from a legal aid association often is hired to run the office. Staffing is by associates who rotate into the office for six to twelve months, or longer. To prevent being overcome by small “service” cases, the branch office often operates only by referral from other poverty law offices. The branch office can then select what it considers to be the most important cases.

A more advanced design is one in which the firm actually incorporates public service and poverty representation into its normal operating structure. A regular public service department will be established and headed by a partner, or a public service committee may be established to seek cases for incorporation into the firm’s regular administrative channels. The cases are viewed as involving areas of substantive law and are given their own pigeonhole at the firm.

### 3. *Operations*

One of the major problems in pro bono operations is the possibility of conflicts of interest. It is not uncommon that “financial interests” adverse to poverty clients will also be clients of the large urban law firm. Hence, many firms take special precautions to avoid the possibility of conflicts. When they are discovered, it is not uncommon for the firm to seek a discharge from the poverty client.

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85. See F. MARKS, K. LESWING, B. FORTINSKY, *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* 103-18 (1972) [hereinafter cited as MARKS]; Note, *Structuring the Public Service Efforts of Private Law Firms*, 84 HARV. L. REV. 410, 415-17 (1970).

## G. *Broker Models*

### 1. *Funding and Policy*

Several brokerage institutions have been established for the purpose of meeting the legal needs of the poor by coordinating the pro bono efforts of law firms. The Lawyers Committee for Civil Rights Under Law (LCCRUL), organized in 1964 to provide lawyers for civil rights workers in the South, has been quite successful. The national and local boards of directors are composed of members of the most prestigious law firms in the nation and many former high government officials. There are offices in thirteen cities.

Another similar effort is the Community Law Office (CLO) in New York. Under this program in 1970, 230 volunteer lawyers from large law firms, coordinated by a small full-time professional staff, handled over three thousand civil and criminal matters.<sup>86</sup>

### 2. *Delivery Mechanism*

A delivery mechanism is all that the broker model purports to be. It is an effort to match problems in law reform with lawyers capable of solving them. The main limitation of this model is that it requires a sizable, well organized, urban bar. It is unlikely that this model would be an effective approach to service or law reform in underdeveloped countries because of the inherent limitation in the number and size of the law firms. It should, however, be considered a valuable integrative tool that can educate lawyers to the plight and needs of the poor in developed countries.

### 3. *Operations*

The work of the LCCRUL is mainly directed toward law reform. Lawyers volunteer to handle specific cases, and the firms, in most cases, contribute money as well as services. Work is funneled through a firm partner to willing associates and, in this way, contacts are set up for the ongoing collection and disposition of caseloads. An American Bar Foundation study has assessed the LCCRUL as being of great, but as yet unrealized, potential, and, more important, it is seen as an excellent

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86. Kass, *An Experiment in Legal Services*, 58 A.B.A.J. 585 (1972). See generally MARKS 151-85.

vehicle to help elevate the social consciousness of lawyers and law firms.<sup>87</sup>

The CLO is devoted primarily to the procurement of service-type representation for members of the poverty community. Blocks of time are committed to the CLO annually by large urban law firms. The firms promise to:

(a) maintain a specified level of participation in CLO; (b) treat CLO matters handled by participating lawyers as regular firm matters; (c) designate a CLO liaison partner to exercise general supervision over the firm's CLO practice; (d) indicate those partners who, together with CLO's professional staff, are responsible for supervising the lawyers' performance in civil and criminal matters; (e) maintain complete files and time records on all CLO matters; (f) adjust firm workloads to take CLO assignments into account; and (g) in general, communicate to all partners and associates the firm's recognition that representation of poor clients is as legitimate and normal a part of the practice of law as [non-poverty] representation.<sup>88</sup>

## H. *Public Interest Law Firms*

### 1. *Funding and Policy*

Public interest law firm models may be distinguished by their sources of funding. The membership-supported model, such as the Environmental Defense Fund, derives its operating revenue from dues-paying members and charitable contributions. Foundation-supported programs are of similar structure except that their revenue source is limited to a single organization whose resulting control over operating policy is nearly total.<sup>89</sup> Self-supporting public interest law firms are among the most innovative proposals;<sup>90</sup> funding is achieved by whatever a client organization can pay and by awards of attorneys' fees in large lawsuits. It has even been suggested that contingency fees be allowed in claims for punitive damages. Other proponents point out that there

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87. MARKS 135.

88. Kass, *supra* note 86, at 587.

89. See MARKS 151-85; Berlin, Roisman, & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970); Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

90. An example is Public Advocates, Inc., of San Francisco; it has succeeded in receiving some large fee awards.

is more independence in this model than is available in other funding modes.

## 2. *Delivery Mechanism*

Public interest law firms, in nearly all cases, are engaged in broad-scale law reform activities rather than individual client services. But without an effective case intake mechanism, this model is in constant danger of losing contact with the needs of the poor and thereby losing its delivery mechanism and broad impact.

## 3. *Operations*

The membership and foundation-supported models are normally nonprofit corporations staffed by full-time professionals. The membership-supported firm does not provide individual legal services to its members, although some members may be plaintiffs in law reform suits. Although these plaintiffs have full legal standing in most cases, it is important to note that they are not necessarily indigents, but are parties interested in a public issue.<sup>91</sup>

In the United States, foundation-supported firms cannot engage in legislative advocacy because of the adverse tax consequences to the parent foundation.<sup>92</sup> A more serious, conceptual problem exists for the self-supporting models: Should lawyers choose their clients and cases according to the former's values? Should lawyers be permitted to operate in a client vacuum, with their own policies as the only determinants of the arguments made and relief sought in court? Or should these policy determinants be supported by an "outside" constituency, a client? Accountability has been considered one of the most important questions requiring examination as the size and number of public interest firms increase.<sup>93</sup>

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91. Observe the different operation of service-oriented membership firms, such as the NAACP Legal Defense Fund. See Note, *Membership Supported Law Firms: A Resolution of the Public Interest Law Dilemma*, 60 CALIF. L. REV. 1451 (1972). The NAACP was plaintiff in a landmark Supreme Court case, *NAACP v. Button*, 371 U.S. 415 (1963), which helped articulate the right of such programs to exist in the face of attacks from bar groups.

92. INT. REV. CODE of 1954, § 501(c)(3) allows business deductions for expenses of corporate lobbyists, but denies tax-exempt status to charitable or public-service efforts to influence legislation.

93. See MARKS 224-38; Ferten, *Preliminary Thoughts about Public Decision-Making and Legal Aid: The Prospects for Legitimacy*, 1 CONN. L. REV. 263 (1968); Note, *supra* note 89, at 1128-37.

## I. *Prepaid Legal Services*

### 1. *Funding and Policy*

Financing is the core idea in the prepaid legal services model. Under such a program persons associated in a group periodically contribute a fixed, relatively small fee. In return, those who encounter legal difficulties are represented by staff lawyers for no additional charge. In short, the cost of legal services is spread among many people. Since there are charges that must be paid to maintain coverage, this model is designed primarily for moderate-income people rather than the hard-core poor.<sup>94</sup>

The prepaid legal service model, or prepaid legal cost insurance as it is sometimes titled, closely parallels prepaid medical care delivery systems; consequently, actuarial work and cost analysis are important to the success of the program. Calculations begin with a given level of contributions and the number of covered individuals; the resulting figures are matched with the level and type of benefits that could economically be provided to the members. Conversely, a desired list of benefits could be subjected to a cost analysis to determine a minimum per capita annual payment figure. Flexibility can then be put into the scheme by the selective use of ceilings, policy limitations, and deductibility features. Fairly reliable data about the kind of cases and frequency of the use of lawyers must be available in order to make calculations.

### 2. *Delivery Mechanism*

Accessibility is a feature nearly as important as financing. Since the legal representation has been arranged in advance there will be no problem obtaining a lawyer for the client. Who that lawyer may be differs with the type of plan.

Under the "closed panel" plan the selection of a lawyer is restricted to a limited list or a limited territory. Closed panel plans have existed for some time and usually, but not always, restrict the scope of available legal services to problems arising out of a certain activity, such as civil rights (for example, the NAACP) or automobile driving (for example, the AAA).

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94. Ashe, *Group Legal Services—Equal Justice in Fact: A Prognosis for the Seventies*, 23 SYRACUSE L. REV. 1167 (1972); Steiner, *Bargained-for Group Legal Services: Aid for the Average Wage Earner?*, 11 ARIZ. L. REV. 617 (1969); Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility*, 35 U. CHI. L. REV. 417 (1968).



An "open panel" plan allows participants to seek representation from a wide geographic area and usually for a wider range of legal problems. The open panel plan was first initiated in 1971 in Shreveport, Louisiana.<sup>95</sup>

### 3. *Operations*

Legal representation benefits are distributed in two basic ways: by type of problem and specific type of assistance required. Types of benefits can range from a narrow category, such as employment-related matters, to an almost unlimited range of personal legal problems. Specific matters usually excluded from coverage are cases generated by a business venture of a member or involving a contingency fee, controversies where both parties are subscribers to the plan or are in an employer-employee relationship, situations in which another insurance policy or program provides for legal representation, title work, and the completion of tax forms.

Specific types of benefits are divided into advice and consultation, office work, such as conferences and negotiation, and major legal expense benefits. Each type of benefit is assigned a dollar limitation, and some have deductibility limitations.

In operation this model is strictly directed toward client service, hence it is a traditional advocacy model. The introduction of its innovative funding arrangement has caused some turbulence, however, because of the existing professional regulations against the lay practice of law, solicitation, and encouraging litigation. These problems are well on their way to being remedied.<sup>96</sup>

## J. *Judicare-American Model*

### 1. *Funding and Policy*

A judicare program has existed on an experimental basis in a large rural area in Wisconsin since 1966.<sup>97</sup> The program is totally subsi-

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95. Roberts, *Shreveport Plan for Prepaid Legal Services—A Unique Experiment*, 32 LA. L. REV. 45 (1971); see AMERICAN BAR ASSOCIATION, HANDBOOK ON PREPAID LEGAL SERVICES (1972).

96. See Christensen, *Regulating Group Legal Services: Who Is Being Protected—Against What—and Why?*, 11 ARIZ. L. REV. 229 (1969); Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966 (1967); Note, *Group Legal Services*, 79 HARV. L. REV. 416 (1965).

97. Preloznik, *Wisconsin Judicare: An Experiment in Legal Services*, 57 A.B.A.J.

dized by the state government. Under the program, pre-enrolled clients obtain their own lawyers from an available panel, and the lawyers are reimbursed directly from the judicare office. Fees are set at about fifteen dollars per hour, and no lawyer can receive more than a ceiling amount in any one year. In addition to fees, lawyers may be reimbursed for costs and expenses not specifically covered by the statute or applicable court rules. Policy decisions are made by a governing board consisting of lawyers and laymen.

One of the main problems of the program has been its cost. According to some, the average cost per case of the judicare model has been three times the cost per case of a similar neighborhood law office.<sup>98</sup> Furthermore, it is argued that the moderately poor receive better services than the hardcore poor because the cultural and geographical distribution of lawyers participating in the program favors the wealthier areas.

## 2. *Delivery Mechanism*

Prospective clients apply for a judicare card from a local community action representative or welfare director. Eligibility is based on the same means test used in the legal aid model.<sup>99</sup> Once a client has a card, he can obtain a lawyer of his choice for most services, except for matters involving criminal representation, income taxes, patent and copyright problems, and contingent fee cases.

Judicare representation is probably not as accessible to potential clients as neighborhood law office representation. Moreover, since the program employs no full-time staff attorneys, other than those employed primarily in administration, a base from which to conduct law reform activities is absent. Hence, this model is primarily a service model.

## 3. *Operations*

Proponents assert that the use of the private bar leads to a more thorough coverage of dispersed rural poverty communities and that the traditional attorney-client relationship is better preserved. In addition, in-

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1179 (1971); Schlossberg & Weinberg, *The Role of Judicare in the American Legal System*, 54 A.B.A.J. 1000 (1968).

98. Goodman & Feuillan, *The Trouble With Judicare*, 58 A.B.A.J. 477 (1972). *But see* Brakel, *The Trouble With Judicare Evaluations*, 58 A.B.A.J. 704 (1972).

99. *See* text accompanying note 36 *supra*.

digents can, in theory, no longer argue that their lawyers are not of the caliber of those of their adversaries.

The greatest strength of a *judicare* program is the facility with which legal services may be provided in rural areas. No other program, except perhaps the prepaid, open-panel plan, can achieve the same degree of decentralization and still continue to be effective. Cost levels, however, have cast doubt on the prognosis for this model.

In relation to the element of voluntariness in the lawyers' participation, it has been pointed out that

[j]udicare is essentially an uncontrollable system—or nonsystem. . . because the supply of services is dependent on the separate, autonomous and unpredictable decisions of hundreds of scattered private lawyers as to whether they will handle given numbers and types of clients and cases. Some lawyers will foster a feeling in the poor community that they will handle as many indigent clients as may care to come, while others will discourage them altogether. Without an enforceable quota system, the potential for uneven distribution of services would persist, in contravention of the principle that the benefits of federally funded programs should be equally available to all eligible persons.<sup>100</sup>

## K. *Judicare-English Model*

### 1. *Funding and Policy*

*Judicare* was introduced in England by the Legal Aid and Advice Act of 1949.<sup>101</sup> The scheme is administered by the Law Society, which directly reimburses the many participating lawyers at rates somewhat below standard fee levels. Funding is by government subsidy.

The program's policy still has traces of its charitable underpinnings; suits concerning defamation or breach of promise to marry are not taken. One of the reasons for the success of this *judicare* program is said to be the discipline and cohesiveness of the English legal profes-

100. Goodman & Feuillan, *supra* note 98, at 481. For comparison of *judicare* and legal services, see Marsh, *Neighborhood Law Offices or Judicare?*, 25 NLADA BRIEF-CASE 12 (1966); Note, *Judicare as an Alternative to Legal Aid in Albuquerque*, 1 N. MEX. L. REV. 595 (1971).

101. 12 & 13 Geo. 6, c. 51; see B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965*, 315-48 (1967); Boskey, *Availability of Legal Services to Poor People and People of Limited Means in Foreign Systems: England and Wales*, 6 INT'L LAW. 128-32 (1972); Cappelletti & Gordley, *supra* note 12, at 374-76; Pelletier, *English Legal Aid: The Successful Experiment in Judicare*, 40 U. COLO. L. REV. 10 (1967); Utton, *The British Legal Aid System*, 76 YALE L.J. 371 (1966).

sions, a factor that should be considered by any nation attempting to import the model.

## 2. *Delivery Mechanism*

Eligibility is determined primarily by a means test administered by the Ministry of Social Security. In addition, the statute prescribes that aid be given only when it is "reasonable" to do so; hence the scheme is a modified version of continental systems that examine the merits of applicants' cases.

Depending on his income and wealth, a client can receive full or partial government payment for legal services, although the wealth limits have been criticized as being unrealistically low (\$600 to \$1600 annual income; \$300 to \$1200 capital assets). Decisions on eligibility are made by a certifying committee operating without benefit of appearances by the applicant or his adversary. Since the legal factors impelling the applicant to seek assistance must set forth, along with financial data, a lawyer would appear to be needed before aid is granted; this possibility does not, however, seem to have caused too much difficulty.

An independent provision in the scheme permits up to one and a half hours of oral advice to persons of a certain income category. This provision supplements another Law Society plan under which any person, regardless of his income, can have up to half an hour of consultation with a participating lawyer for \$2.40. A recent proposal by the Law Society would provide up to sixty dollars of legal services for anyone asking for it.<sup>102</sup>

## 3. *Operations*

About one half of the civil cases litigated in England are subsidized, in part, by the legal aid scheme.<sup>103</sup> A principal limitation of the system is the preclusion of legal aid jurisdiction before special tribunals that govern many areas of English law. Perhaps a greater limitation lies in the fact that Britain has developed no vehicle for dispensing with court costs assessed against indigents. In spite of these limitations, the English scheme has brought the poor a long way along the road to justice.

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102. Note, *The Law Society's £ 25 Scheme*, 119 *NEW L.J.* 752 (1969).

103. Dworkin, *The Progress and Future of Legal Aid in Civil Litigation*, 28 *MOD. L. REV.* 432 (1965).

### III. SOME OBSERVATIONS ABOUT THE CHOICE OF MODELS

Those who advocate legal aid development on a substantial scale in nations in which poverty is widespread inevitably must justify their position by discovering some possibility that legal assistance can profoundly affect the distribution of wealth and social and political power. To gain a better appreciation of whether such a potential exists in any particular country for any particular legal service model requires study, research, and experimentation of a kind and depth that has yet to be undertaken.<sup>104</sup> In this light, only a few general observations can be offered about the relevance of what has been said to the selection of models.

The first observation is that the degree to which lawyers' attitudes and viewpoints influence the choice of model depends upon who designs and promotes the legal service program. Obviously, if the design is left to lawyers, their predispositions will count for much more than if a legal service scheme is adopted by government planners in furtherance of specific governmental policy. Even in the latter case, however, the attitudes of lawyers may substantially influence the choice of the model and its implementation. This will be so because the planners themselves will probably be lawyers or persons who tend to rely on lawyer's advice and lore. Even if the influence of lawyers' attitudes does

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104. At a workshop that was held in the summer of 1974, a group of legal services administrators and scholars from numerous Asian countries showed a decided preference to deal with model selection in practical, as opposed to theoretical, terms. Among a list of criteria they considered relevant, only the last coincided with the discussion in this Article. The list was as follows:

- (a) Acceptability of the Model. What existing groups and forces will resist the particular model? Who will oppose and who will support each model?
- (b) Costs and Financing. What resources are available to each model? Is public funding of one model more likely than the next and why? Are certain models inherently more expensive?
- (c) Personnel. Is more competence and imagination likely to be attracted to and generated by one model or the other? What about the frustrations and difficulties of working conditions in one or the other?
- (d) Quality of Service. Will evaluation of performance and quality controls be more effective under one model or the other? Will training be better or easier under one model or the other?
- (e) Efficiency. Will there be greater opportunities for adopting techniques of management and administration that are likely to increase the effectiveness and scope of the service, in one model rather than the other?
- (f) Penetration. Is one model more likely to yield more profound legal and social changes favorable to the poor than are others? Will one model or the other better enhance the legal competence or political assertiveness of the poor?

(Materials pertaining to the Asian Workshop on Legal Services to the Poor are on file at Boston College Law School and at the International Legal Center in New York.)

not intrude at this stage, lawyers' influence cannot be wholly avoided insofar as attorneys are necessary to the plan's implementation. What this means to planners in developing nations is that in any legal aid program, the "legal profession factor" must be carefully considered and incorporated or perhaps discounted. The second observation then is that any model choice that depends heavily on the private bar, or its associational organs, must recognize that the attitudes of the traditionalist lawyer will predominate. Therefore, goals that are more ambitious than those of the traditionalist may be thwarted. The *judicare* and the legal aid society models are, in this regard, prime examples of models that tend to place professional values in the forefront. This tendency is most prevalent in models that also impose the burden of financing the plan on the profession. He who pays the piper . . . .

There are two general ways of mitigating the impact of the traditional lawyer. One is to choose a model that empowers the planners, or those to whom they delegate such power, to supervise closely the activities of the participating lawyers. This method probably entails, to some degree, the second method of achieving the purpose of mitigating the professional's influence: employ lawyers who share the goals of the program. Both methods require a measure of governmental control, which, in its more efficient forms, means a governmental agency or service. The best American example of this model choice would be a defender system.

Of course, this approach may minimize the influence of the profession as such, but it serves whatever goal the planners happen to be pursuing, including specific traditionalist goals. In fact, it is unlikely that any directly and closely controlled governmental legal aid program will pursue anything but conservative goals. The reason for this, our third observation, is that a government devoted to basic social and economic reforms will probably choose means more direct than legal aid programs for accomplishing its goals.<sup>105</sup>

Our last observation concerns the perplexing "free-floating" or "hy-

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105. This may account for the general disinterest in legal aid programs shown by socialist-leaning governments. We would not hazard a guess whether this disinclination to establish a legal services program is a mistake or not, but it could be argued that a legal services program committed to government reform policies could fulfill two useful purposes. First, such a program could prevent entrenched interests from falling back on the law to defend their position, while at the same time it would help preserve respect for the rule of law. Secondly, it could educate the poor in the exercise of their newly-created rights.

brid" models. These models represent legal aid programs that are funded by government, but which are, in varying degrees, free to pursue goals fashioned by the staff lawyers and the interest groups they happen to represent. Although traditionalist lawyers with strong social consciences are attracted to such programs, the overwhelming appeal of hybrid models is to the reformist lawyer who finds few other "legitimate" outlets for his drives. It is the natural tendency of hybrid models, therefore, to be "captured" by the reformists, which, inevitably sets off the dynamics of reaction.<sup>106</sup>

The perplexing nature of hybrid models, however, stems neither from the fact that they are likely to be "captured" by reformists rather than traditionalists, nor from the concomitant inhibitive effect of the potential reaction, which, paradoxically, forces the reformists toward traditional behavior patterns. What is perplexing is that those programs, exemplified by the OEO neighborhood legal service or the emerging group plans, which hold the greatest promise for reform through legal action, are likely to prove least attractive to reform-minded planners for the very reason that such programs defy planning<sup>107</sup> and tend to "escape their creators." Legal service programs that may produce challenges to governmental policies and actions are not likely to hold much attraction for developing nations bent upon pursuing the three-stage goals all at once.<sup>108</sup> Nevertheless, it is possible that with detailed planning, such as limits on the kind of cases accepted or restraints on initiating certain actions without prior planning agency approval, the "hybrid" models in less "free-floating" forms could be made to serve the needs of the developing nations best of all.

Finally, it should be re-emphasized that the framework constructed in this Article is intended merely as an instrument into which the varied conditions that exist in each society must be set. The conditions, in the final analysis, must determine the model choice in each country.

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106. For a flavor of the schism that has developed between officialdom and legal service program lawyers in the United States, see Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A.J. 930 (1972); Klaus, *Legal Services Program: Reply to Vice-President Agnew*, 58 A.B.A.J. 1178 (1972).

107. "Free floating" plans may be the "socio-legal" analogue to the rise of independent power sources during stage one in the "eco-legal" sphere. If that is the case, they may be a phenomenon unique to the transition period from stage two to stage three.

108. See text accompanying note 8 *supra*. But see B. Metzger, *Legal Services to the Poor and National Development Objectives*, in LEGAL AID AND WORLD POVERTY—A SURVEY OF ASIA, AFRICA, AND LATIN AMERICA 3-18 (1974).

