1: The Legal Aid Movement and the Goal of Equal Justice

This is a book about a political invention of the mid-twentieth century—the Legal Services Program of the United States Office of Economic Opportunity. But, in a real sense, this invention owes much to concepts incorporated into the philosophy of Anglo-American society during the mid-thirteenth to mid-fifteenth centuries.

From the pledge of the *Magna Carta*, "To no one will we sell, to no one will we refuse or delay, right or justice,"[2] extracted out of King John in 1215, early English justice evolved a principle that free counsel should be provided to litigants too poor to employ their own.[3] This common law development culminated in the inclusion of a written guarantee in the Statute of Henry VII enacted in 1495:

> . . . [T]he Justices . . . shall assign to the same poor person or persons counsel learned, by their discretions, which shall give their counsel, nothing taking for the same; . . . and likewise the Justices shall appoint attorney and attornies for the same poor person or persons. . . .[4]

These early provisions in the English law arose during a period when that nation was wrestling with some of the fundamental issues of the relation between man and the state. Many of the notions that found their way into the United States Constitution originated in the minds of Englishmen who were deciding under what terms they would surrender their personal sovereignty to another authority. It is significant that a guarantee of counsel in court proceedings apparently was deemed an essential part of this social contract. If a man were to give up his right to take or protect property by force of arms, he needed assurance that he would have an equal opportunity to prevail in the substitute arena for deciding these disputes, the courts. To the English subject of the fifteenth century, equal opportunity in the courts entailed the assistance of legal counsel and, when necessary, counsel supplied by the government.

In the centuries that followed, actual practice began to fall short of these early *in forma pauperis* provisions,[5] although the goal of equal justice implicit

in the *Magna Carta* and the Statute of Henry VII was never extinguished. Ultimately the gap that had developed between the ideal and reality so disturbed the collective conscience of the British electorate that Parliament enacted a comprehensive statutory right to counsel in 1949, backed fully by the government treasury.[6]

The historical right to counsel that had existed in English legal proceedings was not imported into colonial America. Unlike the mother country with its complex and technical courtroom rules, practice in the frontier society was straightforward and inexpensive. In a majority of cases, both litigants could and did proceed without the assistance of lawyers.[7] As a matter of fact, several colonial legislatures passed statutes barring lawyers from lower courts.[8] Consequently, at the time this nation was shaping its political philosophy and in the era when its founders were contemplating the same issues of personal sovereignty and social contract that occupied the English nation-makers between the thirteenth and seventeenth centuries, legal counsel was not perceived as a necessary requisite for equal opportunity in the judicial proceedings most relevant to the poor.

The implications of this temporary happenstance were profound and long-lasting. The written Constitution of the United States contains a commitment to the principle of justice[9] but no explicit guarantee of the legal help essential to that goal. The Bill of Rights is premised on concepts of "due process" and filled with provisions designed for the protection of the individual and the regulation of government, yet the only right to counsel explicitly endorsed is for Federal criminal cases.[10] Even as civil procedures and proceedings became more complex in the decades after approval of the Constitution, omissions derived from a simpler age persisted, and counsel was denied to the poor in cases only a trained lawyer was capable of conducting.

One result of the momentary simplicity of life in the foundation years of the Republic is that no sustained effort was undertaken to help people unable to afford their own lawyer until fully 100 years after the Declaration of Independence.[11] The motivation for this initial venture in legal assistance came not from a conviction that counsel is a matter of right, but rather indignation over the abuse of the legal process by those able to retain their own lawyers. It was March 8, 1876, when the German Society in New York City established the first legal aid organization—*Der Deutsche Rechtsschutz Verein*[12]—in order to discourage exploitation of newly arrived German immigrants by "runners, boardinghouse keepers and a miscellaneous coterie of sharpen."[13]

The second legal aid organization in the United States also was originated out of indignation, in this case over "the great number of seductions and debaucheries of young girls under the guise of proffered employment" in Chicago. Formed in 1886 under the auspices of the Woman's Club, it operated under the name of The Protective Agency for Women and Children.[14] It is unclear how many seductions or debaucheries were averted by Chicago's

"Protective Agency" lawyers. But they evidently established the need to provide legal help for the poor in that city, because in 1888 the Bureau of Justice, the first true legal aid society open to people of any nationality or gender, was set up by the Chicago Ethical Cultural Society.[15]

In each of these cases, the organization furnishing legal assistance was a private, not a governmental, agency. The financial support came from charitable donations rather than the public coffers. And the services rendered were perceived as a gratuitous dole, not a matter of legal right.

By the 1960s, the Chicago and New York legal aid societies had been joined by hundreds of similar organizations and criminal-defense agencies.[16] (A full account of the intervening 72 years would occupy several volumes.[17]) I propose to briefly summarize that history only as a backdrop for making a more complete investigation of two issues of special relevance to the development of the OEO Legal Services Program: first, the ideals and goals motivating the leadership of the legal aid movement; and, second, the attitude of participants in the movement toward public (especially Federal) subsidization of legal assistance.

A BRIEF HISTORY OF THE LEGAL AID MOVEMENT

Until 1920, legal aid was provided by a loose, unorganized collection of independent organizations located in a few of the country's larger cities. After that year, it emerged as something that could be called a movement, with a measure of organization and a unifying national mission.

The legal aid movement was largely the creation of one man and one book. In 1914, Reginald Heber Smith, a 25-year-old graduate of Harvard Law School, accepted an offer to take over the reins of the newly formed Boston Legal Aid Society. This was not a great honor, since the BLAS had only two lawyers at the time, but in this, his first job upon graduation from law school, Smith became appalled by the miserable way the law treated his clients. This, in turn, aroused him to seek a grant from the Carnegie Foundation to write a book about the current legal system and what it meant to America's poor.

Starting in 1916, Reginald Heber Smith toured the legal aid societies and the court systems of the nation uncovering the facts and writing the book that was to be the first definitive treatment of inequality in the administration of justice. His book, *Justice and the Poor,*[18] pulled few punches. Smith had taken a hard look at the state of justice in America and found it wanting.

The first section of *Justice and the Poor* marshals case histories and statistics demonstrating that America did not live up to her rhetoric about equal justice. Smith found barriers to justice in 1918 that still exist over 50 years later—court fees, litigation expenses, the cost of getting a lawyer. He summed up the situation in these words:

> The essentially conservative bench and bar will vehemently deny any suggestion that there is no law for the poor, but, as the legal aid societies know, such is the belief today of a multitude of humble, entirely honest people, and in the light of their experience it appears as the simple truth.
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> In that direction we have imperceptibly, unconsciously and unintentionally drifted. The end of such a course is disclosed by history. Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes. . . . And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end.[19]

Then as now, virtually the only encouraging sign was the existence of a handful of dedicated lawyers on the payroll of legal assistance organizations. Smith's book recounted the history of legal aid in the United States from the inception of *Der Deutsche Rechtsschutz Verein.* It was with some pride that he noted the "enormous growth" of legal aid societies after the turn of the century. By 1917, there were actually 41 cities with some sort of legal aid organization.[20] This represented an annual investment of $181,408[21] in legal assistance to the poor of the nation. There were 62 full-time legal aid attorneys at that time and 113 part-time attorneys[22] who spent from one-half to one-third of their working day on legal aid. The 41 legal aid organizations handled a total of 117,201 cases that year.[23]

Reginald Heber Smith's primary recommendations for the future concerned the means of opening up courts to the poor and finding more money to support legal aid. The keystone of his proposed strategy was the formation of a national association of legal aid offices.

> The need for some union of legal aid organizations that will rationalize the work and provide a central responsibility and authority is obvious. . . . For the future, the work is too great to be conducted in a slipshod way, and its extension into new fields is too important to be left to a hit-or-miss policy . . . matters of policy should become uniform as rapidly as possible. . . . Some initiative must be manifested in establishing societies where they are needed. There must be some central body authorized to represent and speak for the organized legal aid movement in the councils of the bar, at the meetings of charities, and in the law school conference. . . . If their voice is to be heard, as it has not been heard in the past, and if their opinions are to carry weight, they must present a united front, having clearly formulated their aims and speak with singleness of mind to a definite . . . purpose.[24]

Smith's book ended on the hopeful note that:

> These suggested future developments are all practical and capable of achievement. Once these matters are given proper presentation, the loyal support of the bar, the assistance of the courts, and the sustaining interest of the public may be

> confidently expected. The ends which they seek to attain are of direct concern not only to the fair administration of justice, but to the well-being of the nation.[25]

It would be practically impossible to find a critic of Reginald Heber Smith's book at the present time. But when it was first published in 1919, *Justice and the Poor* caused a storm in the legal profession. Smith had exposed the inequity of the American legal system, which alienated many lawyers and judges. As Henry W. Taft, president of the New York Bar Association said:

> [*Justice and the Poor*] has evoked public criticisms of the administration of justice which are unfortunate, particularly in this period of unrest. . . . Its author . . . is not free from some blame for this, for his generalizations have been frequently made for rhetorical effect. . . .[26]

Even the officials of the American Bar Association were upset. They refused to turn over the membership list when Smith said he wanted to send a copy of his book to every member of the profession. However, despite the carping, Smith's book stirred the conscience of some of the leaders in the American bar, particularly Charles Evans Hughes, former presidential candidate and future Chief Justice of the Supreme Court. And largely as a result of his interest the entire sixth session of the 43rd Annual Convention of the American Bar Association, held in 1920, was devoted to a panel on legal aid. Reginald Heber Smith, Charles Evans Hughes, Ernest Tustin, and Judge Ben Lindsey all delivered speeches about the general problem of poverty and the administration of justice.

Smith's own speech summarized the arguments he had made in *Justice and the Poor* and closed with a ringing call to action.

> If we were to take command of the moral forces which are now stirring throughout the nation, we shall find public opinion ready to fight staunchly at our side. Let us assume that leadership by declaring here and now that henceforth within the field of law the mighty power of the organized American Bar stands pledged to champion the rights of the poor, the weak, and the defenseless.[27]

At first, it looked as if the "mighty power of the organized American Bar" was going to make equal justice for the poor its primary mission in life. At the 1920 ABA meeting a Special Committee on Legal Aid was created and no less a personage than Charles Evans Hughes was named as chairman.[28] A year later the Special Committee was converted to a Standing Committee on Legal Aid,[29] and Reginald Heber Smith was named chairman (a position he held until 1937). In 1923, Smith's recommendation for the establishment of a national organization of agencies and persons interested in legal aid, a point he urged so strongly in *Justice and the Poor,* became a reality when the National Association of Legal Aid Organizations (this organization was later to become the National Legal Aid and Defender Association) was formed.[30] Shortly

thereafter a number of state and local bar associations formed committees to promote legal assistance to poor people in their jurisdictions.

The decade of the 1920s was an era of promising growth for legal aid. During the ten years immediately after the formation of the Standing Committee on Legal Aid by the ABA, 30 new legal aid organizations[31] came into existence and the total financial resources available for legal aid more than doubled.[32]

With the onset of the Depression, the members of the American Bar Association, and private attorneys everywhere, had a new concern—their own livelihood. Corporations were going bankrupt, people were broke, and those clients that were not either bankrupt or broke were out to trim expenses. The legal profession was shocked to find out that when people began to trim expenses, lawyers were one of the first services to be eliminated. Only the legal aid societies found their client rolls burgeoning; the rest of the profession was in a pronounced decline.

The legal aid caseload swelled from a total of 171,000 new cases in 1929 to 307,000 in 1932,[33] almost a doubling in the workload during the first three years of the Depression. But financial support for legal aid did not keep pace. In fact, it dropped off. As an example, in New York City—where the legal aid movement started—only 229 lawyers out of the 17,000 practicing in the city made contributions to the legal aid society in 1934.[34] As a result, the number of cases confronting legal aid societies so outstripped legal aid facilities that clients became tired of waiting and tired of inadequate service. For the rest of the decade, the caseload actually declined.[35]

From the beginning, legal aid leaders worked through local bar associations to establish legal aid societies. Occasionally, they attempted to set up societies through local charitable organizations or other community groups. But as Harrison Tweed said while serving as NLADA president, "We have found, however, that this procedure does not succeed. The absence of leadership and approval by the bar association . . . renders it all but impossible to establish a new office or even to materially strengthen an existing one."[36] Not that Tweed and his associates found every local bar to be an ally. As Tweed complained sarcastically, "Anyone who has had anything to do with legal aid knows that local bar associations do not always rally to a man in a fight to the finish for the establishment of adequate service to the poor."[37]

Emery Brownell, longtime staff leader of the NLADA, was even more critical of local lawyers. In his 1951 definitive study of legal aid, written for a survey of the legal profession, Brownell wrote, "Whether due to unfounded fear of competition, inherent lethargy, or mere lack of interest, the failure of local bar associations to give leadership, and in many cases the hostility of lawyers to the idea, have been formidable stumbling blocks in the efforts to establish needed [legal aid] facilities."[38]

The legal aid movement was dependent on local bars for support but, as Harrison Tweed, Emery Brownell, and other legal aid leaders were frank to admit, unfortunately the bars tended to be apathetic or hostile when initially approached about establishing legal aid facilities; it is surprising that anything was accomplished. The men who went out in the field to sell legal aid to the local bars soon learned that flowery speeches about equal justice and the moral responsibility of the bar did not produce new legal aid societies. What sold lawyers were documents that stressed practical advantages of the legal aid office: a legal aid society will keep undesirable, nonpaying clients out of the private practitioner's office; a legal aid society will secure back wages for a discharged employee or support funds for a deserted wife, thus keeping people off the relief rolls; a legal aid society will educate people who have not used a lawyer before about the value and necessity of lawyers, which will increase the business of private attorneys; a legal aid society offers an opportunity for younger members of the profession to gain valuable experience; and, a legal aid society builds the public relations image of the bar with the general public.[39]

After nearly two decades of stagnation the legal aid movement received an assist from a totally unforeseen source. In 1950, Great Britain instituted its so-called Legal Aid and Advice Scheme.[40] The threat of a similar government-financed plan in the United States spurred many formerly apathetic state and local bar associations to establish private legal aid societies.[41] By the end of the 1950s, Emery Brownell, NLADA executive secretary, could report: "The fact is that there has been a breakthrough. Whereas in 1949 . . . 43% of the large cities were without offices, the percentage . . . was reduced to 21% by the end of 1959."[42]

Despite its comparative prosperity, the movement entered the 1960s far short of meeting the need for its services. True, there were 236 legal aid organizations of various descriptions and 110 defender offices.[43] But in 1962 the combined budgets of all the legal aid societies in the entire nation totaled less than $4 million.[44] This amounted to less than two-tenths of 1 percent of the nation's total annual expenditure for the service of lawyers[45]; two-tenths of 1 percent of the nation's legal resources to provide representation for the more than one-fourth of the nation's population unable to afford a lawyer when they needed one. Expressed in other terms, the equivalent of 400 full-time lawyers were available to serve almost 50 million Americans (a ratio of one lawyer for 120,000 persons) as compared with almost 250,000 full-time attorneys to take care of the remaining 140 million (a ratio of one lawyer for every 560 persons).[46]

In the 1960s the legal aid movement continued to depend almost entirely on charitable contributions for sustenance. Staff attorneys were woefully underpaid and carried unrealistic caseloads.[47] The characteristic failings were catalogued in an earlier Russell Sage Foundation study.

> Three out of four accepted applicants for legal aid receive only a single brief consultation; only a minimal amount of time is given to the investigation of fact, to legal research and drafting of legal documents, and to court work. Many offices, in fact, are incapable of handling cases that require extensive investigation or time-consuming litigation. The situation is further aggravated by low salaries, high turnover in personnel and inadequate direction "by disinterested or inactive boards of directors." There is little time or incentive to enter into a contest over legal principle, to make or alter a law, or to combat institutionalized sources of justice.
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> The effectiveness of Legal Aid is also limited by its vulnerability to pressure from local bar and business interests which are its principal financial supporters. . . . Pressure from local businessmen has led to the exclusion of bankruptcy cases in many Legal Aid offices, and it has resulted in a reluctance to pursue claims against local merchants, landlords, and others whose interest would be threatened by more vigorous representation. The tendency, therefore, is for Legal Aid to become a captive of its principal financial supporters.[48]

In part, the movement leadership was innocent of the flaws in legal aid. Much that was wrong was the product of things beyond their control, such as an attitude of apathy among local bar associations and from the general public. Legal aid leaders tried, but their persuasion and might yielded only thousands of dollars where scores of millions would have been insufficient. Legal assistance simply was not high on the agenda of community chests, bar associations, and the like. And even when they got the money, it often came with strings. It was scarcely the fault of the legal aid movement that landlords and merchants lacked the public spirit to finance lawsuits against their interests.

But legal aid decision makers also were captives of the movement's own philosophy. Their horizons were limited, their range of policy options circumscribed by unconscious acceptance of shared goals and attitudes. In this they are not unique. I think it is fair to say that for most policy makers the scope of objectively feasible alternatives is much broader than the choices subjectively considered as possible courses of action. Sometimes consciously but more often subconsciously we write off perfectly reasonable, and sometimes optimal, alternatives because they do not fit our mental set.

In the next two sections we trace the evolution of the most relevant attitudes shared by policy makers in the legal aid movement.

THE MOTIVATING PHILOSOPHY OF THE LEGAL AID MOVEMENT

For all practical purposes, the philosophy of the legal aid movement originated where the movement itself started, with Reginald Heber Smith and his

book, *Justice and the Poor.* This is not to deny a certain debt to philosophers as ancient as Socrates and Plato. But the goals and rationale of the American legal aid movement were derived principally from the writings of Smith.

And what were those goals and rationale? After specifying the injustices of the American legal system as it existed in 1916, Reginald Heber Smith spelled out the mission of the fledgling legal aid movement:

> We can end the existing denial of justice to the poor if we can secure an administration of justice which shall be accessible to every person no matter how humble. . . . .
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> In vast tracts of the civil law and in all of the criminal law related to the more severe crimes, equality in the administration of justice can be had only by supplying attorneys to the poor. . . . . [T]he legal aid organizations must extend themselves into all of the large cities, and must triple their staff and undertake a three-fold increase of their work. If these things can be done, that part of the denial of justice which is traceable solely to the inability of the poor to employ counsel will be eliminated, and it is only in this way that the great difficulty of the expense of counsel will be completely overcome.[49]

Smith's statement of goals was echoed many times by subsequent leaders of the bench and bar. In 1926 Chief Justice Taft wrote:

> [T]he real practical blessing of our Bill of Rights is in its provision for fixed procedure securing a fair hearing by independent courts to each individual . . . but if the individual in seeking to protect himself is without money to avail himself of such procedure, the Constitution and the procedure made inviolable by it do not practically work for the equal benefit of all. Something must be devised by which everyone, however lowly and however poor, however unable by his means to employ a lawyer and to pay court costs, shall be furnished the opportunity to set fixed machinery of justice going.[50]

Fifteen years later, Associate Justice Wiley Rutledge spoke to the same goal, "Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."[51]

Academic supporters of legal aid sounded the same theme. In 1926 Professor William Vance of Yale Law School summarized:

> The process of setting the machinery of the law in motion involves effort and expense. Those very weak economically . . . cannot bear this expense. What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?[52]

In a similar vein, Dean Arthur T. Vanderbilt of New York University Law School wrote in 1938, "In the process of improving the administration of

justice, legal aid work challenges our attention. It is the only practicable method, thus far discovered, to guarantee no person shall be denied equal protection of the laws because he is poor."[53]

American Bar Association leaders with varying degrees of enthusiasm have reiterated the goal of equal justice. At the founding of the legal aid movement in 1920, Charles Evans Hughes said,

> The legal aid society is an agency of justice—doing what it is not practicable for lawyers to do individually on any large scale. The legal profession owes it to itself that wrongs do not go without a remedy because the injured has no advocate. . . . Does the lawyer ask, who is my neighbor? I answer—the poor man deprived of his just dues.[54]

The leadership of the legal aid movement itself never wavered from the central theme. One of the most influential, Harrison Tweed, an eminent Wall Street lawyer who served several terms as NLADA president, expressed the urgency in 1951, "Every lawyer and every layman should help with mind and money, heart and soul, until the objective of justice for all has been attained. Then, but not until then, we can all go fishing."[55] And the longtime executive secretary of the National Legal Aid movement, Emery Brownell, reinforced the view, "If law is to fulfill its important mission, the facilities of Legal Aid in the United States must be materially strengthened, for here is the tested and exclusive means of assuring that every citizen stands equal before the law."[56]

Reginald Heber Smith, who maintained a position of leadership in the legal aid movement through the 1950s, warned that equal justice was not merely a goal for the legal aid movement but a prerequisite for the survival of American democracy. As he said in 1951:

> It is a fundamental tenet of Marxian Communism that law is a class weapon used by the rich to oppress the poor through the simple device of making justice too expensive. According to this view, lawyers are simply the mercenaries of the property class. The danger of this attack lies in the fact that it awakens a response in all those who feel they have been denied their rights. Nothing rankles more in the human heart than a brooding sense of injustice. The illness we can put up with; but injustice makes us want to pull things down.
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> This has always been true because it is human nature. In 1901 Lyman Abbott, Editor of *Outlook,* said in his address at the 25th Anniversary Dinner of the Legal Aid Society in New York, "If ever a time shall come when in this city only the rich man can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the firebrand of revolution will be lighted and put into the hands of men, and they will almost be justified in the revolution which will follow."[57]

It is difficult to detect much sympathy for the social and economic deprivation of the poor in the writings of the leaders of legal aid, but their sensibilities

as lawyers clearly were shocked by the deprivation of due process caused by poverty. An abiding concern with the integrity of the legal system and threats to its survival pervade the pronouncements of the movement. Each man, rich or poor, deserves his day in court; that is what this country is all about; and besides, if we do not insure that access, the masses will revolt and tear down our system of government. Entirely missing is an evident stake in the outcome of the poor man's day in court and its implications for his other social and economic problems.[58] Legal aid discharges its responsibility and satisfies its ultimate goal if a poor man is provided reasonably qualified legal counsel. Apparently, lawyers must bear the guilt for inequality in the administration of justice but need not share the guilt for the existence of poverty. These attitudes generally were not a product of insensitivity on the part of those who supported legal aid but rather the result of a failure to appreciate any close connection between a denial of equal justice and the perpetuation of economic inequality.

In line with this attitude (or possibly contributing to its existence), Reginald Heber Smith, while damning inequities in the procedural law, found that:

> The body of the substantive law, as a whole, is remarkably free from any taint of partiality. It is democratic to the core. Its rights are conferred and its liabilities imposed without respect of persons. . . . [I]t is instantly apparent that the legal disabilities of the poor in nearly every instance result from defects in the machinery of the law and are not created by any discriminations of the substantive law against them.
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> On examination and on authority, the statement is warranted that the substantive law, with minor exceptions, is eminently fair and impartial. In other words, the existing denial of justice to the poor is not attributable to any injustice in the heart of the law itself. The necessary foundation for freedom and equality of justice exists. The immemorial struggle is half won.[59]

Whatever its sources, this philosophy was reflected in the policies of legal aid organizations. The Standards of the National Legal Aid and Defender Association, for instance, deemphasized the taking of appeals "to establish *useful* principles," stating that, unlike other appeals, they should be undertaken only "when costs are available."[60] Similarly, "actions to create legal machinery" for the "social betterment" of the low-income community were not even accorded the status of required standards by the NLADA. Instead they were characterized merely as "recommended policies" to be implemented by local legal aid societies "as far as local conditions permit."[61] Consequently, those legal actions probably best calculated to improve the social-economic status of the poor[62] were subordinated in the official national standards of the legal aid movement. As a further consequence, apparently no civil legal aid lawyer ever brought a case to the U.S. Supreme Court in the 89 years that legal

aid was provided before 1965[63]; in fact, only a handful of civil appeals were lodged in any court.

Because of its commitment to a goal of equal justice justified in terms of perfecting and protecting the legal system, the legal aid movement concentrated thought and energies on a specific task. ABA President Jacob Lashley defined that mission in 1941:

> The goal is as obvious as it is essential. We must so plan it, and organize it, and build it, that there is a nationwide network of legal aid offices. Every city or every county must have a definite office well known publicly as the courthouse itself, to which poor persons in need of advice and assistance can apply.[64]

The emphasis on maximum coverage resulted in the processing of over eight million legal aid clients from 1876 through 1948, at a total cost of only $20 million.[65]

Considering this goal of equal justice and its contemplated implementation through opening legal aid offices the length and breadth of the nation, it might have been expected that bar leaders would have been lobbying every session of Congress for the monies necessary to make their ideal a reality. Government funds already support legal assistance in England, Scandanavia, Germany, France, Switzerland, and apparently soon will be in Italy and Austria.[66] But American proponents of legal aid did not petition their Congress. For the reasons why they were reluctant, we must examine another phase of legal aid history.

FOUR DECADES OF DEBATE ABOUT GOVERNMENT FINANCING OF LEGAL ASSISTANCE TO THE POOR

By the 1960s, the legal aid movement was almost exclusively a privately financed undertaking. Local legal aid organizations derived their support from community chests (60 percent), bar associations (15 percent), individual lawyers and special fund-raising campaigns.[67] There was almost no governmental support—Federal, state or local—and a philosophical preference among the members of legal aid societies that things remain that way. But this was not always the case. In 1919, when Reginald Heber Smith wrote *Justice and the Poor,* he reported that 28 percent of the cities with a legal aid organization were served by municipal government agencies[68] and that this type of legal aid was on the increase.[69] Smith's own evaluation of these public bureaus was generally favorable.

> Certain direct advantages have resulted from the fact that a legal aid bureau was a public undertaking. St. Louis affords an excellent illustration because, during its history, it has been both a private and a public organization. The

> investigator reports that since the society came under public control her position has carried with it much greater dignity and power, enabling her to use channels formerly closed and to do more efficient work. . . . Even more important, the public bureaus are unquestionably better known, they reach a wider field, and they are answering the demand for legal assistance with a nearer approach to completeness than the private societies. . . . It may be here noted that since the Hartford society became a public bureau on January 1, 1917, its work has more than tripled. In St. Louis the work has likewise made a substantial increase.[70]

In fact, Smith viewed government-financed legal assistance as the wave of the future:

> Inasmuch as the legal aid organizations are rendering an essential public service, it is likely that ultimately their work will pass under public control. This fact should never be forgotten by those who are, or may become responsible for the future of organized legal aid, and they will do well to shape their plans with this end in view. There is no need to hasten this process of transferring the responsibility to the state, the ideas which must precede it are imperceptibly but steadily taking possession of men's minds, and the change will come about in its own good time.[71]

This was consistent with Smith's basic concept that legal aid should be an integral part of the administration of justice. Since judges, court clerks, and other elements of the justice system were paid out of public funds, he felt legal aid lawyers also should be part of the government obligation.[72]

The 1962 statistics reveal that Reginald Heber Smith's predicted drift toward government financing of legal aid did not materialize over the succeeding four decades, in part because state and local governments were slow to assume their responsibilities for the financing. But most members of legal aid societies were equally reluctant to press public officials to supply tax funds for legal assistance to the poor.

The issue of government versus private financing of legal assistance surfaced at the very moment the ABA gave legal aid its endorsement and support. At the 1920 meeting of the American Bar Association, Ernest L. Tustin advocated publicly financed municipal legal aid bureaus. The recognition that legal assistance was a public responsibility made such organizations "superior to private organizations in the psychological results produced." It also would contribute to confidence in the law and its administration.[73] But Tustin's line of argument was not persuasive to Charles Evans Hughes. In his address, the future Chief Justice argued that, "Unfortunately, the administration of municipal government in this country has not been so successful as to justify at present its extension to this field. The service is one which politics would ruin."[74]

This debate over the respective virtues of public and private financing of legal aid continued at a quiet, gentlemanly level for the next three decades.

In 1926, Chief Justice William Howard Taft expressed a more tolerant attitude toward public support than had Charles Evans Hughes just six years earlier.

> Without expressing a final personal conclusion on the subject, it seems to me that ultimately these instrumentalities will have to be made part of the administration of justice and paid for out of public funds.[75]

Proponents of legal aid were as divided during the 1920s as the profession's leaders, Hughes and Taft. Generally, representatives of societies along the eastern coast were suspicious of public involvement while west of the Alleghenies, most felt that government help was necessary and desirable.[76] The leading private organization, the venerable New York Legal Aid Society, proved its disdain for public support by refusing to touch a $25,000 municipal fund specifically appropriated for its use.[77]

Opponents of public provision of legal aid seized on some flagrant examples of political interference to document their case. A newly elected mayor in Dallas, Texas attempted to replace the attorney for the city's legal aid bureau with a personal friend and political ally. When this move created a public outcry, the mayor did away with the bureau entirely. The same fate befell municipal legal aid in Portland, Oregon, where the legal aid attorney had made the political error of campaigning against the successful mayoralty candidate.[78] The main admitted disadvantage of private financing, however, was the fact that there was never enough of it. Seldom articulated was the "political interference" to which privately funded legal aid attorneys also were subject.[79]

Whether welcomed as the preferable approach or tolerated as a necessary evil, municipal financing of legal aid was increased throughout the 1920s.[80] But the Depression reversed that trend dramatically. With tax revenues shrinking, many municipal governments found themselves in deep fiscal difficulties. Since legal aid bureaus were among the last services to become a municipal responsibility in most communities, they were the first to go when funds ran short. Several were abolished; some had their budgets drastically reduced; a few were converted to privately financed legal aid societies.[81]

Contrary to the Smith thesis, the municipal legal aid bureaus never recovered from the forced retrenchment of the Depression years. As Emery Brownell later observed:

> At one time it was considered that public bureaus held a distinct advantage in the important matter of securing financial support. There appears to be no reason why this should not be so, since the cost of legal aid service is extremely small compared with its direct and indirect benefits and must appear as a very small item in a city budget. Prior to 1932 this proved to be the general experience. Since then, however, the societies, especially those participating in Community Chests, have proven themselves better able to secure funds for the service.[82]

By 1962, there were only five municipal legal aid bureaus still in existence —four fewer than in 1919, seven fewer than in 1932. Where municipal bureaus had constituted 28 percent of the total number of legal aid organizations in 1919, only 4 percent were municipally funded in 1962.

As municipal funds dried up during the 1930s, some in the legal aid movement began to look to higher levels of government for the needed financial support. Under the leadership of Land Summers, the Seattle Bar Association in 1938 lobbied a plan for state government financing of legal aid through the Washington legislature. A statute[83] was passed that authorized the state bar association to administer a statewide system of legal aid. The Board of Governors of the State Bar was considered a public body (Washington had an integrated bar) and thus eligible to receive and administer state tax monies. Unfortunately for the course of legal aid in Washington state, this provision languishes on the statute books. In the more than 30 years since its passage, the Washington legislature has never seen fit to appropriate funds for the system it authorized in 1938.

The Depression also spawned the first proposal for Federal financing of legal assistance. In 1937, Pelham St. George Bissell, a justice of the municipal court in New York City, conceived a plan which would use Works Progress Administration (WPA) funds to open a branch office of the New York Legal Aid Society in the Bronx. The office would be manned by unemployed lawyers, of which there were many in those days, and administered with the "advice and assistance" of the Legal Aid Society. Interestingly, this proposal earned the stamp of approval of the Legal Aid Committee of the Association of the Bar of the City of New York. However, before the office could become a reality, the WPA appropriation was cut by Congress and the agency withdrew its offer of support.[84]

This whole experience, however, had made the Legal Aid Committee of the New York Bar aware of the possible use of Federal funds. Its 1937 report said, "It would be well for this committee, next year, to make further investigations along this line with a view toward extending legal aid to other parts of the city, with the aid of funds supplied by the Federal, state, or municipal authorities, but under the general direction of the Legal Aid Society."[85]

Although public financing—and especially Federal financing—of legal aid was always considered to be relatively controversial in some quarters, until 1950 it remained a respectable alternative, one that could be urged before any bar association or legal aid society. Then, two events converged to throw public provision of legal aid into disrepute. In 1949, England adopted a comprehensive nationwide system of legal aid—the Legal Aid and Advice Act of 1949.[86] This is a government-financed system which compensates private attorneys for any cases they handle on behalf of people who cannot pay a fee. The subsidy

is available to persons who are unable to afford legal help or who can only pay part of the fee.

At almost the same time, Senator Joseph McCarthy of Wisconsin launched the attacks that began the era that was destined to bear his name. "Creeping socialism" became the great evil, the insidious enemy of American society. And anything which smacked of Federal government action was equated with "creeping socialism." Every loyal citizen and every patriotic organization became alert to Federal encroachments, especially in their own backyards. To many leaders in the American bar, anything patterned on the British system constituted "socialization of the legal profession."

Only the National Lawyers' Guild among legal organizations in the United States came out for a system of Federal support for legal aid. The 1950 Convention of the Lawyers' Guild received and endorsed a report from its Committee on Professional Problems entitled "The Availability of Legal Services and Judicial Processes in the Low and Moderate Income Groups and Proposals to Remedy Present Deficiencies."[87] The rather conservative recommendation of this report envisioned creation of state legal aid commissions to be administered by the state bar associations. These commissions would receive and disperse Federal funds to local commissions, which, in turn, would screen applicants for legal assistance and refer impoverished clients to private attorneys. The entire program—like the British system—was to be financed by government but controlled by bar associations.

Despite the conservative nature of its recommendations, endorsement by the National Lawyers' Guild did not make the average lawyer favorably disposed toward a program of Federal support based on the British model.[88] The reaction of Robert G. Storey, Dean of Southern Methodist Law School and former president of the American Bar Association, was typical:

> What are the trends toward regimentation of our profession? To me, the greatest threat aside from the undermining influence of Communist infiltration is the propaganda campaign for a Federal subsidy to finance a nationwide plan for legal aid and low-cost legal service. . . .
>
> It is obvious that certain members of the bar and particularly the National Lawyers' Guild are spearheading the organized effort to obtain a federal legal assistance act. It is true that they represent a minority of the bar; yet the previous illustrations [the methods by which Hitler and Lenin secured their revolutions by taking over the legal professions in their respective countries] emphasized that an organized minority with ruthless methods has been responsible for the downfall of many governments.[89]

Suddenly the legal aid movement was America's savior from "socialization of the legal profession." The 1950 report of the ABA Standing Committee on Legal Aid leaned heavily on this argument: "The private legal aid office,

operated and supervised by lawyers, . . . is, we believe, the American way to meet the need."[90] And Orison Marden, president of the NLADA at the time, cited as one of the primary values of legal aid societies to the legal profession the fact that legal aid is the prime buffer against the socialization of the profession.[91] In 1950, the ABA General Assembly passed a resolution condemning any government role in providing legal aid and reiterating the principle of interest and control by bar associations.[92] (In retrospect, it seems ironic that the British system of legal aid incurred the violent opposition of most members of the American Bar when it first came to the attention of the profession in this country. Fifteen years later many rank-and-file lawyers were to embrace this approach to legal assistance as the "savior of the legal profession."[93])

As the 1960s began, the organized bar and the legal aid movement still were firmly committed to the advantages of privately financed and controlled legal aid. They were only a few years past the ABA resolution condemning government influence. Thus, it is not surprising that no bar leaders rushed forward to testify when Congress conducted its hearings about the war on poverty. In an earlier time—the 1930s, for instance—proponents of legal aid might have embraced the opportunity to obtain government funds. But the rhetoric and experience of the 1950s had turned the leaders of the legal aid movement completely away from a consideration of Federal financial support. Even after the war on poverty came into existence, it was unrealistic to expect the initiative for Federal involvement in legal assistance to come from the American Bar Association or the National Legal Aid and Defender Association.