Legal Aid -- A Proposal

A. Kenneth Pye

George C. Cochran

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation


Available at: http://scholarship.law.unc.edu/nclr/vol47/iss3/2

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
INTRODUCTION

Many leaders of the bar assert that we need additional lawyers to meet the needs of our people, and that our present institutional arrangements are inadequate to provide the services that people need at a price that they can afford. These same leaders argue convincingly that the real threat to the bar does not lie in creative new programs that provide legal assistance to those whose needs are not now being adequately met. Paradoxically, their arguments reveal that the real danger may be an adverse reaction on the part of the public to a profession that has been permitted to exercise monopoly power for private gain but then fails to develop techniques to make its services available to all.

Many other lawyers approach legal aid with a trilogy of assumptions that are accepted as fundamental truths upon which all subsequent discussions must proceed:

1. We already have enough, if not too many lawyers;
2. There is no real need for a formalized program of legal assistance to the poor, because a poor man with a meritorious cause can always find some lawyer to take his case;
3. Any proposal that involves a change from the traditional system of an individual client selecting and paying a general practitioner will inevitably endanger the independence of the bar and constitute a threat to its economic well-being.

This dispute within the bar cannot be resolved by rhetoric. North Carolina provides an example of the need for lawyers. In 1966, there...
were 4,279 lawyers to serve a population of approximately 5,000,000,\(^3\) a ratio of 1,168 persons to each lawyer.\(^4\) Only South Carolina had fewer lawyers per capita.\(^5\) This is almost double the national ratio of 621 to 1.\(^6\)

This numerical imbalance suggests that practitioners command a sufficient clientele to generate remunerative incomes. Available evidence indicates, however, that lawyers in the state make considerably less, not more, than their colleagues elsewhere. Despite the comparatively large number of potential clients for each lawyer, the most recent study of the American Bar Association found that North Carolina sole practitioners rank 31 out of 34 in state rankings of average net income, and the average net income of North Carolina partners ranks them 25 out of 26.\(^7\) Indeed, the net income of North Carolina lawyers approaches only about 68 to 70 percent of the national average.\(^8\)

One reason for the low level of lawyers' incomes is the comparatively low income of many North Carolina citizens. A recent study by the North Carolina Fund reported that the state ranks forty-third in per capita income, and is tied for last in average hourly earnings of production workers in manufacturing industries.\(^9\) In 1966, 28.1 percent of North Carolina households reported incomes of under 3,000 dollars.\(^10\)

The problem is compounded by the high percentage of people located in rural areas and small communities. Traditionally, decentralization of population has tended to produce a higher percentage of single practitioners and small firms where specialization is the exception rather than the rule. In general, the income of single practitioners is far less than the income of partners.\(^11\) The lawyers in North Carolina, however, are much more centralized than the population as a whole. Almost one-half of the bar is located in cities of 50,000 or more, and these cities account for only about 20 percent of the state's population.\(^12\)

\(^4\)Id.
\(^5\)Id.
\(^6\)Id.
\(^8\)Id.
\(^11\)Smith & Clifton, supra note 7, at 52.
\(^12\)The 1967 Lawyer Statistical Report, supra note 3, at 3.
\(^13\)Computation made on the basis of statistics found in World Almanac &
The North Carolina bar is small and not relatively well paid. The population is decentralized and comparatively poor. These facts suggest that a substantial number of people in North Carolina have legal problems but cannot afford to pay a reasonable fee for an attorney. They also suggest that attorneys who can afford to handle cases for less than a reasonable fee are limited and, of those available, few are conveniently located.

Information is not available on how many poor people have legal problems or how many actually obtain the assistance of lawyers. One recent study concludes that two-thirds of lower-class American families have never employed an attorney. Some studies estimate a national average of seven to ten persons per thousand as a measure of those needing legal aid services. The demand, however, may be elastic. Communities that have initiated legal aid programs find that the number of people seeking services expands in proportion to the availability of conveniently located, competent attorneys.

Experience demonstrates that it is not necessary that the lawyer be paid by his client for the bar to retain its independence. The independence of the bar has never been threatened by insurance companies, which hire and pay lawyers in most of our defense personal injury practice. Likewise, assigned counsel systems supported by states or the federal government have demonstrated that an attorney may be paid by the piper while playing his own tune. The operation of legal assistance offices and organized defense efforts in the JAG offices of the armed services, the experience of fifty years in the public defenders' offices in California, and the experience in the many legal aid offices across the country show that lawyers by disposition and training refuse to pull their punches regardless of the source of their income. Indeed, in many communities the only complaints regarding counsel for the indigent relate to over-aggressiveness rather than to any unethical compromises of the rights of clients.

The advent of legal aid has not caused economic hardship to the legal
profession. It has relieved lawyers of the responsibility of undertaking unremunerative cases in order to see justice done and has produced a substantial number of referrals of clients who do not meet indigency standards. It has also produced a substantial volume of litigation in which a private practitioner is employed by a paying client to defend or prosecute a case because an indigent has counsel capable of representing him sufficiently well that a landlord, creditor or a public agency itself perceived the need for a lawyer.

Furthermore, legal services programs provide jobs for lawyers and training of the kind formerly available only in the offices of district attorneys, solicitors, or city attorneys. The trial bar of the next generation will owe a great deal to today's legal services programs, which are providing trial experience to young lawyers in numbers not previously possible.

Some individual lawyers may suffer temporary losses, however. Clients of marginal practitioners may qualify for free representation if the indigency standard is set at a reasonable level; other clients may compare the quality of the services of some private lawyers unfavorably with the kind of representation provided by a legal aid lawyer, who, secure in a salary, may be able to spend more time in preparation, and who also may benefit from the assistance of an investigator and a library that the private practitioner cannot afford. Some legal aid lawyers may develop reputations for excellence and constitute a substantial competitive force when they leave legal aid and enter private practice. Nonindigent clients who might have gone to Lawyer A by accident may end up in the offices of Lawyer B after referral from a legal aid office. Collection lawyers who make their living from a volume practice before small claims and landlord and tenant courts at a small fee per unit lose money when the routine of default judgments in those courts is interrupted by the assertion of a defense on the merits.

Some of these objections are not worthy of a response, but others pose real problems to public-spirited lawyers. What is necessary is the exercise of responsibility and authority by the bar in the development and operation of these programs. The bar is capable of supervising a legal services program in such a way as to minimize the unnecessary and unfair loss of business to anyone, while obtaining the advantages to lawyers, in-

---

17 Pye & Garraty, The Involvement of the Bar in the War Against Poverty, 41 Notre Dame Law. 860, 864-65 (1966) [hereinafter cited as Pye & Garraty].

18 Id.
digents, and the public that will result from providing representation to those who cannot afford it. Bars with experience have found that the advantages of legal aid programs more than outweigh their disadvantages.

THE LAST FIVE YEARS

As late as April, 1965, there were only 157 legal aid offices with paid staffs providing legal services to indigents in civil matters. Assistance was provided to indigents in 414,000 cases, at a cost of four and a third million dollars. Legal services in over 206,000 criminal cases were provided by 162 defender organizations at a cost of approximately five million dollars, in addition to state compensated counsel in some states. Exclusive of volunteer services, organized legal aid was providing representation in over 600,000 civil and criminal cases at a cost of nine and a third million dollars. Most of the offices had caseloads of over 1,000 cases per attorney per year. By April of 1968, there were 511 offices with paid staffs, which handled over 791,000 civil cases and 240 defender organizations which provided representation in over 465,000 criminal cases. In 1967 legal aid organizations provided representation to over 1,256,000 persons at a cost of 47,000,000 dollars. Of that amount, only $178,000 was spent in North Carolina, three quarters of it in Winston-Salem. At the end of 1968 there were 643 civil legal aid and 315 defender agencies in the country. Included in this number were four in North Carolina, all west of Raleigh.

The dramatic upswing in organized legal aid activity is only part of the story. In 1964, the federal government made funds available to compensate assigned counsel in criminal cases. A number of states enacted statutes to authorize compensation to appointed counsel at various stages of the criminal process. In other communities lawyers are now

---

19 National Legal Aid & Defender Ass'n, President's Annual Report for 1965 (1965).
20 Id.
21 Id.
22 Id.
23 Id.
24 Id. at 3.
25 Id. at 17.
26 American Bar Ass'n, Report and Recommendations of the Standing Committee on Legal Aid and Indigent Defendants 4 (1969) [hereinafter cited as Report, ABA Committee on Legal Aid].
being appointed to cases without being compensated. Volunteer services in civil cases also have been made available on an organized basis in many localities as part of the local contribution required for federal financial support. Additional volunteer lawyers are being provided by Vista, and the bar for decades has generously provided free services to the poor. The advent of organized legal aid, although steadily increasing, has not yet supplanted the need for this public service.

Many factors have contributed to this remarkable growth of legal assistance to the poor. In criminal cases the most important development undoubtedly was Gideon v. Wainwright and its progeny. States that previously demonstrated little solicitude for an indigent charged with crime in routine cases promptly began to provide lawyers when the absence of counsel was held to be a constitutional defect that rendered a state criminal judgment vulnerable to attack in the federal courts.

The most significant factor in civil cases was the Economic Opportunity Act of 1964 and the administrative decision, subsequently embodied in a 1965 amendment of the Act, that funds authorized for community action programs could be utilized to provide legal services. The magnitude of this development is evident from the fact that by the end of 1968, it had assisted 265 communities to provide expanded or new legal services at a cost of $42,000,000. In January of 1969, the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association credited the Legal Services Program of OEO with achieving a six-fold increase in the availability of legal services to the poor.

A third factor of crucial importance has been the attitude of the bar. In February, 1965, the House of Delegates of the American Bar Association unanimously approved a resolution directing the offices and committees of the Association to cooperate with OEO in the development and implementation of programs for expanding availability of legal services to indigents.

---

20 "Vista" is Volunteers in Service to America, a domestic volunteer service program established by Title VIII of the Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701-2981 (1964).
25 Report, ABA Committee on Legal Aid 2.
26 Id. at 3.
27 P. Wald, Law and Poverty: 1965 Report to the National Conference...
of the basic policies and have been in regular communication with OEO with respect to the administration of the program. Led by the ABA, many state and local bar associations have worked with OEO in getting new programs off the ground.

New vistas have been opened recently as a result of the decision of the Department of Health, Education and Welfare in late 1968 to provide legal services to the poor financed through federally assisted public welfare programs. The HEW program has been tersely summarized by the ABA Standing Committee on Legal Aid and Indigent Defendants:

In essence the HEW program provides for mandatory representation of welfare clients by lawyers at administrative fair hearing proceedings and for optional legal services of a broad nature for 8 million welfare recipients and other needy persons. Each state determines the nature and extent of its own "optional" program but the "full spectrum of service" is encouraged. This may include all matters excepting only fee-generating cases, juvenile representation and certain criminal cases where the state has an obligation to furnish counsel. The state must ordinarily contribute 25% of the cost with the remaining 75% being met by the federal government. Although the program is administered by state welfare departments, it is to be conducted professionally by lawyers in accordance with the standards and ethics of the legal profession. The program is to be developed and operated in close consultation with the organized bar and other interested groups. It is to be closely coordinated with and to use the existing facilities of OEO funded and other legal services and legal aid agencies wherever possible.

The American Bar Association has indicated its willingness to participate in the development of this program and has urged HEW to continue the closest cooperation with state and local bar associations in the development and operation of the program.

Partly because of the failure of some OEO officials to understand local bar attitudes, bar approbation has not been universal. Fortunately, the fear of a "rigid hostility of change" has not been justified in North Carolina. In 1969, there were OEO-supported programs in Charlotte and Winston-Salem and a privately-funded office in Greensboro. In addi-

---

7 Report, ABA Committee on Legal Aid 3.
78 Id. at 2.
79 Id. at 4.
80 This language was used to characterize the attitude of some bar associations in Frankel, Experiments in Serving the Indigent, 51 A.B.A.J. 460, 461 (1965).
81 See Moize, Symposium—A Legal Service Program for West Virginia—Legal Aid in North Carolina, 70 W. Va. L. Rev. 277, 301 (1968).
tion, an OEO grant to the Duke University School of Law established a neighborhood office in Durham and authorized the utilization of students from the law schools in the state to provide logistical assistance to operational legal aid programs in North and South Carolina.

**The Effectiveness of Legal Services Programs**

There is little evidence that permits firm conclusions concerning the effectiveness of legal services programs. Any evaluation depends upon subjective judgments concerning goals and the best means of achieving them. In most legal services programs there is an attempt to undertake all types of legal services to as many of the poor as can be represented at all stages of civil proceedings, with at least lip service to the notion of simultaneously undertaking law reform and community education.\(^4^2\) It is one thing for an individual program to determine that its principal mission is to obtain basic institutional reform in the expectation that this will permit or help the poor to break out of the cycle of poverty. It is another for a program to set as its goal the representation of the largest number of indigents possible in the legal matters that concern them most. A program with either goal can be evaluated in terms of how close it comes to its principal objective with the resources it has available. When a program has both objectives and accords neither a clear priority, its performance is much more difficult to assess.

Judgments concerning effectiveness are also made difficult because of the newness of most programs. It takes time to assemble a staff, work out local arrangements with the bar, become known in the community, establish routine office practices, develop specialties among staff members, and replace initial appointments that simply do not work out.

All legal aid programs supported by OEO funds are evaluated at least once a year by teams normally composed of an OEO staff member and consultants drawn from private practice, the law schools, or other legal services programs. In addition, the National Legal Aid and Defender Association sends representatives to visit the offices of its members. OEO has attempted to develop uniform criteria for evaluation in guidelines provided its evaluators.\(^4^3\) However, the quality of the reports vary considerably, and it is not yet possible to form a general impression of the effectiveness of legal services programs across the country by a composite of the evaluation reports.

\(^4^2\) See Pye, supra note 16, at 244.

\(^4^3\) See Barvick, Legal Services Program Evaluations, 26 Legal Aid Brief Case 195 (1968).
This much, however, is clear. The quality of personnel in legal services offices has improved. A substantial number of the best young law school graduates are accepting positions in legal services programs. In particular, the Reginald Heber Smith Fellowship program, providing graduate education in law and poverty with the assignment of fellows to individual legal services offices, has stimulated the imagination of law students across the nation. It is particularly gratifying that a number of the best students, who could be employed elsewhere at much higher salaries, have chosen (temporarily at least) to forsake greater financial gain for legal aid work.

At the same time, some programs still employ attorneys whose level of competence renders them unemployable by many law firms. There have also been some occasions when a premium seems to have been placed on selecting attorneys of a particular race or ethnic group rather than hiring on the sole criterion of the best available lawyers.

Boosted to a considerable extent by substantial raises in salaries, the morale in legal service programs is high. It is too soon to estimate what the long-range effects of a changed personnel situation will be. Salaries above the starting level are extremely low compared with private practice, or government, or legal education. This poses a real threat that many of the best people will have to leave legal aid work as their families grow and their financial obligations mount. A distinct possibility exists that only the least qualified will remain and that the directors and supervising attorneys twenty years from now will be the people who could not leave because other jobs were not readily available to them.

Efforts at continuing legal education for attorneys in legal aid work have been extremely successful. The National Institute for Education in Law and Poverty at Northwestern University has presented several regional institutes on subjects such as the welfare system and consumer problems. The National Clearinghouse for Legal Services distributes summaries of relevant cases, briefs, memoranda and pleadings. OEO publishes a newsletter, *Law in Action*, and there is now a Commerce Clearing House poverty law service. Attorneys throughout the country are able to keep abreast of the latest developments in areas of particular concern to the poor.

Undoubtedly, there are economies that can be effected in some offices. Some OEO legal services offices have equipment not regularly found anywhere except in the largest law firms or government offices. Xerox equipment, cameras, and the most expensive dictating equipment have been
authorized in some grants upon the assumption that attorneys for the poor should have equipment as good as that available to attorneys for the rich. The result has been that some legal aid offices have equipment that a substantial percentage of lawyers in private practice cannot afford. Though the best available equipment is helpful, some corners can be cut without materially impairing efficiency. The same criteria should be used in equipping legal services offices that would be used by the average attorney in practice.

In many large legal aid offices there are substantial staffs of sub-professional personnel other than secretaries. Many of these people are valuable additions to the offices, serving as office managers, investigators, or librarians; but some of them are not qualified to do the job for which they were hired. There have been occasions when men without experience have been hired as investigators and used as messengers. Euphemisms such as "in-service training" have substituted for training programs or prior experience as justification for the employment of members of minority groups to serve as contacts with a local community. In some cases the individuals serving in these positions resemble the political patronage appointees of bygone days more than the kind of sub-professional personnel who should be found in a lawyer's office. There are, however, problems of community contact when an office opens, particularly if the staff lawyers are white and its clientele is composed largely of Negroes or Mexican-Americans. The ability of the office to provide jobs to members of the community is an important way to gain acceptance of the attorneys who are beginning their practice. In the long run, however, efficiency will require that only competent people be hired or that substantial training programs be introduced. There is not enough money available for legal aid to permit funds to be used to alleviate the problem of unemployment among unskilled people in the ghetto.

One contribution of legal services not contemplated at the time the federal program was initiated is the role that these programs play in watering down the tinderbox in our ghettos. In a sense, the legal services office operates as a safety valve—a device for letting off steam. It is a place where someone can come for the redress of grievances with some hope of success without the necessity of resorting to violence. As an outlet for the frustrations of ghetto dwellers it may be a more useful device.

"There are some training programs, however. Dixwell Legal Rights Association, Inc., of New Haven, Connecticut, a research and demonstration project funded by OEO, is an example."
of social control than riot equipment for a police department. The legal services program received a considerable boost from the conclusions of the National Advisory Committee on Civil Disorders, which urged the expansion of programs providing legal assistance to the poor. The role that can be played by legal services in curbing potential urban disorders was graphically illustrated in the report of the Commission:

Among the most intense grievances underlying the riots of the summer of 1967 were those which derived from conflicts between ghetto residents and private parties, principally white landlords and merchants. Though the legal obstacles are considerable, resourcefulness and imaginative use of available legal processes could contribute significantly to the alleviation of tensions resulting from these and other conflicts. Moreover, through the adversary process which is at the heart of our judicial system, litigants are afforded meaningful opportunity to influence events which affect them and their community. However, effective utilization of the courts requires legal assistance, a resource seldom available to the poor.

Litigation is not the only need which ghetto residents have for legal service. Participation in the grievance procedures suggested above may well require legal assistance. More importantly, ghetto residents have need of effective advocacy of their interests and concerns in a variety of other contexts, from representation before welfare agencies and other institutions of government to advocacy before planning boards and commissions concerned with the formulation of development plans. Again, professional representation can provide substantial benefits in terms of overcoming the ghetto resident's alienation from the institutions of government by implicating him in its processes. Although lawyers function in precisely this fashion for the middle-class clients, they are too often not available to the impoverished ghetto resident.46

The role of a private lawyer is not restricted to the representation of clients in adversary proceedings. He is a planner, providing advice to his clients concerning the best ways to plan for their private or business lives. These same talents are being used by legal aid lawyers for the poor. During the last year there has been a substantial increase in the role of legal services programs in self-help economic efforts among the poor. Local legal aid lawyers are attempting to create new housing, new commercial and credit organizations, new service and production enterprises, and new cooperatives. These new functions may prove to be of greater significance than any other phase of legal aid work.48

INSTITUTIONAL REFORM

It is probably unfair at this time to attempt to estimate the impact of legal services programs in effecting institutional reform. The great majority of offices have spent more of their time servicing routine cases, and such efforts as have been directed to the promotion of institutional reform have been too diffuse. Presupposing, however, that such reform activity provides some qualitative measure of the "work product" for these past few years, a review of recent cases would be instructive. In doing so it is prudent to question whether the goal of basic institutional reform can properly be attained through the judicial process. We shall consider these issues in the context of those areas of the law which were not subject to serious judicial scrutiny prior to 1965, but which are currently considered appropriate for judicial reform.

Court Costs and Fees

There can be no justice for the poor if they are unable to secure redress in the courts. There are in existence a myriad of charges, such as filing and marshal's fees, fees for jury demands, supersedas bonds, and publication costs, which are considered a traditional part of our judicial system, and which effectively block access of the poor to the courts. As Elihu Root observed:

The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.47

In 1924, the American Bar Association drafted a Model Poor Litigant's Statute providing for waiver of security for costs and fees and the appointment of a "conducting attorney" to be paid from public moneys.48 Later,

47 Root, Ought We Bestir Ourselves?, 17 LEGAL AID REV. 1, 4 (1919). One year later, Charles Evans Hughes took notice of court procedure and added:

The poor man must have legal advice and except in the simplest matters he needs skilled advice to present the merits of his case. Simplicity in court procedure and the multiplication of tribunals with specific functions are not enough. Speed and cheapness do not suffice. . . . You may provide the machinery of courts, but to have justice according to law, save in a very limited class of cases where a judge may act as an advisor, you must have the aid of lawyers.

Hughes, Justice and the Poor—Legal Aid Societies, Their Function and Necessity, 18 LEGAL AID REV. 1, 4 (1920).

in 1941, legislation was recommended which would provide a fund for auxiliary charges of litigation such as witness fees and advertising costs.49 A 1966 report of the ABA concluded:

Although fees charged to litigants do not produce nearly enough revenues to operate the federal and state courts, such fees and auxiliary charges are so high as to constitute a substantial deterrent to the poor litigant if he must pay for these expenses himself.60

It would be expected that the courts themselves would perceive the gross injustices of a system that closes its doors to all save the financially eligible. The reverse has proven true.

Costs and charges have frequently been viewed in the same context as requirements pertaining to time of filing of briefs, notices of appeal, and other procedural niceties, which—if not complied with—may reach jurisdictional proportions. Thus, in 1868, the Wisconsin Supreme Court, although noting that it seemed “almost like a hardship that a poor man should not be able to litigate,”51 dismissed an appeal for inability to post a bond. Similarly, when pressed with the argument that denial of judicial review for want of means to pay a seven dollar filing fee was a violation of the equal protection clause, a three-judge district court in Connecticut concluded in 1968 that, although it was a great injustice, the court should not, by resort to the Constitution, overturn over one hundred years of accepted practice.62 The court’s awareness of a wrong possibly susceptible to constitutional sanctions, however, far exceeds that of the District of Columbia Court of Appeals, which blandly dismissed an action because of the defendant’s inability to post a required bond:

The present case is a civil action between private parties. In such litigation the rights of both parties must be respected. We are aware of no constitutional principle which authorizes a denial or diminishing of rights of one litigant because of the financial condition of another.63

49 American Bar Ass'n, Committee on Legal Aid Work, Annual Report & Transcript of Proceedings of 5th Open Meeting on Legal Aid Work (1941).


51 Campbell v. Chicago & N.W. Ry., 23 Wis. 490, 491 (1868).


There have been continued efforts for judicial relief. In *Williams v. Shaffer*, the petitioners were given notice of summary eviction proceedings against them. A Georgia statute provided for a full hearing upon the posting of cash collateral equal to double the rent to become due in six months. Although agreeing to pay into the court all rents to become due (and thus protect the landlord), they were unable to secure a sufficient sum of money to satisfy the collateral requirement. Their defenses were dismissed and the eviction effected. The Supreme Court of Georgia affirmed, and certiorari was denied. Mr. Justice Douglas, joined by the Chief Justice and with the concurrence of Justice Brennan, dissented, concluding, *inter alia*:

The effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn on the tenant's wealth. . . . We have recognized that the promise of equal justice for all would be an empty phrase for the poor if the ability to obtain judicial relief were made to turn on the length of a person's purse . . . . I can see no . . . justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty . . . .

. . . This Court of course does not sit to cure social ills that beset the country. But when we are faced with a statute that apparently violates the Equal Protection Clause by patently discriminating against the poor and thereby worsening their already sorry plight, we should address ourselves to it.55

Following this decision, the Director of Legal Services for OEO called for a program that would "press outward the boundaries" of equal protection and due process on behalf of the poor.56 Subsequent decisions indicate that the leverage supplied by the dissent in *Williams* has been effectively applied.

In the latter part of 1968, an action was brought in Fulton County, Georgia, to have tenants evicted under the statute questioned in *Williams*. Again the tenants were unable to post the required bond. In ordering the case to proceed without payment, the trial court went to the heart of the constitutional issue:

54 385 U.S. 1037 (1967). It was argued that the same equal protection concepts employed in cases striking down fees and costs in criminal appeals apply to civil cases. See *Griffin v. Illinois*, 351 U.S. 12 (1956). In *Griffin*, the petitioner was denied a free transcript essential to appellate review. In striking down the denial, the Court held that distinctions based on wealth—at least those which discriminate against basic rights of the poor—are invalid in criminal cases.

55 385 U.S. at 1039-40, 1041.

56 *Griffin, Director's Column, Law in Action*, Oct.-Nov. 1968, at 3.
The real question at issue is whether the defendants are to be granted a hearing before their dispossession. The requirement that an indigent post a bond before he is granted a hearing is an impossibility. The uncontradicted evidence in these proceedings show that the defendants are indigent and unable to obtain bonds; this situation takes on increasing importance when considered in light of the evidence that during the year 1967 more than 19,000 dispossessory warrants were issued in Fulton County and the fact that defenses were actually interposed in merely 13 instances.

The constitutional guarantee of equal protection of the laws is not subject to a construction which allows a man of means to defend his rights in court while denying the same opportunity to the indigent. The availability of the courts is necessarily open to all—both rich and poor alike. Equal protection of the laws does not permit as a condition precedent for access to the machinery of the courts a bond which the defendant is without means to procure.57

One month later, Helen Jeffreys sued her husband for divorce in the Kings County branch of the New York Supreme Court. She was unemployed, living on public assistance, and unable to pay the fees and expenses necessary to prosecute the action. Inasmuch as her husband could not be located, publication expenses amounting to some three hundred dollars were to be incurred. The “beginnings and glimmerings”58 in Williams were sufficient justification for the court to conclude that the equal protection clause required dispensing with the payment of these costs. The opinion concludes: “[T]he establishment of civil courts for enforcing claims and vindicating legal rights is so fundamental, the state cannot close the system to any person because of poverty.”59 A similar result was reached by an Oregon circuit court, which held filing fees for divorces as applied to indigents unconstitutional, on the grounds that access to the courts was a protected first amendment right of “redress of grievances,” as well as a requirement of the due process of law made applicable to the states through the fourteenth amendment.60

---

59 Id. at —, 296 N.Y.S.2d at 87.
As conceived by the Housing Act of 1937, access to public housing is restricted to "families of low income . . . who are in the lowest income group and who cannot afford to pay enough to cause private enterprise in their locality . . . to build an adequate supply of decent, safe, and sanitary dwellings for their use." Every state now has either federal or state-supported units in plan or operation. In fact, at the close of 1965 more than one out of every hundred people lived in publicly assisted housing with over half of the occupancy below the age of eighteen. The demand is exemplified by the New York Housing Authority, which receives 90,000 applications out of which it selects, on the average, 10,000 for admission. The question of who should be admitted and on what conditions becomes critical when, by definition, such projects are designed to fulfill the housing needs of a population segment unable to find decent housing elsewhere.

The federal housing law sets forth no specific eligibility standards save for requesting local agencies to adopt admission policies that, in addition to recognizing their responsibility for housing displaced families and veterans, give full consideration to the applicant's age, disability, and need. No restrictions are imposed on the administration of projects or the termination of tenancies. In substance and in form the power

---

67 Id. at 172 n.41.
68 Whether public housing, in light of the deterioration of its buildings, the continuing instability of its residents, and the crime and human misery that are now part and parcel of its projects, adequately meets the needs of its residents is a question beyond the scope of this article. The problems have been documented by others. See Fisher, Twenty Years of Public Housing (1959); H. Salisbury, The Shook-Up Generation 74-77 (1958); Friedman, supra note 62; Mulvihill, Problems in the Management of Public Housing, 35 TEMP. L.Q. 163 (1962); Rosen, supra note 63; Note, Government Housing Assistance to the Poor, 76 YALE L.J. 508 (1967).
69 42 U.S.C. § 1410(g) (2) (1964).
70 The housing acts passed by Congress contain one ground (excluding the Gwinn Amendment, infra note 82) for eviction—over-income. Every local housing authority is empowered "to maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statutes or regulations under which such housing accommodations are administered . . . ." 42 U.S.C. § 1404(a) (1964). Each local authority is also required to make a "periodic reexamination" of its tenants' income and "require any family whose income has increased beyond the approved maximum income limits for
to decide ultimately all tenant qualifications resides with each local authority.

There is reason to believe that some tenants seeking improvements in a project have been threatened with termination for "partisan" or "controversial" activity. Families engaging in political activities, and those with illegitimate children or an imprisoned family member have been subjected to ejectment. In fact, the administration of local housing authorities has been so fraught with abuse that Mr. Justice Fortas was forced to comment:

Residents of public housing accommodations are subjected to inquiries and surveillance concerning their morals and private life, on the theory continued occupancy to move from the project unless the public housing agency determines that, due to special circumstances, the family is unable to find decent, safe and sanitary housing within its financial reach . . ." 42 U.S.C. § 1410(g)(3) (1964).


89 In Housing Auth. v. Venezie, 25 BEAVER Co. L.J. 92 (Pa. Ct. C.P. 1963), an eviction was upheld when the tenant refused to stop associating with certain named individuals; cf. Thorpe v. Durham Housing Auth., 89 S. Ct. 518 (1969). Contra, Holt v. Richmond Redevel. & Housing Auth., 266 F. Supp. 397 (E.D. Va. 1966), noted in WELFARE L. BULL., Feb. 1967, at 5 (eviction for political activities held violative of first amendment rights). See generally Rosen, supra note 63, at 193-97. Indicative of attitudes demonstrated by various project managers is the following comment: "We don't want none of them organizers in here . . . all they do is stir up trouble. Used to be some organizers around here. But we cleaned them out good. Lotsa Communists. That's what they were." H. SALISBURY, supra note 65, at 67.

90 In Richardson v. Housing Auth., Civ. No. 678 (E.D.N.C. 1966), noted in WELFARE L. BULL., Nov. 1966, at 6-7, a class action was brought seeking to have declared unconstitutional a covenant that read:

If additional illegitimate children are born to me or any members of my immediate family during my tenancy in properties of the landlord . . . I will within thirty (30) days after birth of such child, vacate and remove myself and family from any property or housing accommodations either owned, operated, or managed by landlord . . .

Id. at 6.


91 Sanders v. Cruise, 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958). In New York City Housing Auth. v. Watson, 27 Misc. 2d 618, 207 N.Y.S.2d 920 (Sup. Ct. 1960), the court held that a tenant could not be evicted because her husband had been convicted of a crime and imprisoned.
that it is a permissable [sic] condition of the receipt of the benefits of public housing. They are kept on the short string by month-to-month tenure . . . . [They have been] evicted without any statement of reasons.\textsuperscript{72}

After three years of litigation, the unbridled discretion of the administrators of these projects has been substantially limited. A few examples demonstrate the trend in judicial thinking.

\textit{Admission Procedures}: On September 9, 1966, 31 persons brought a class action under the Civil Rights Act challenging the admission procedures employed by the New York Housing Authority.\textsuperscript{78} As a group they filed a total of 51 applications for admission, 36 in 1967 or earlier and some as early as 1961. None had been advised at any time of his eligibility or ineligibility for public housing.\textsuperscript{74}

Primary among the complaints set forth were deficiencies in admission procedures: absence of regulations pertaining to admission requirements; failure to process applications chronologically or in accordance with any ascertainable standards; the automatic expiration of all applications at the end of two years; the refusal to give credit for time passed to renewal applications; and the lack of a waiting list or other information from the housing authority regarding an applicant's status.\textsuperscript{75} Although it was a case of the first instance, the court encountered little difficulty in finding a claim upon which relief could be granted.

It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. For this reason alone due process requires that selection among applicants be made in accordance with "ascertainable standards" . . . and, in cases where many candidates are equally qualified under those standards, that further selections be made in some reasonable manner . . . . \textsuperscript{76}

Subsequently, an action was brought in the southern district of New York alleging that the housing authority was discriminating against welfare recipients.\textsuperscript{77} The court struck down the classification on equal protection grounds, reviewed the selection system, and ordered its re-

\textsuperscript{73}Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968).
\textsuperscript{74}Id. at 264.
\textsuperscript{75}Id.
\textsuperscript{76}Id. at 265.
organization to meet due process standards, e.g., notification, chronological waiting lists, etc.\textsuperscript{78}

The assertion of applicants' rights has not been limited to New York. In early May of 1968, a class action was brought against the Philadelphia Housing Authority alleging unconstitutional discrimination against families having illegitimate children.\textsuperscript{79} The action was dismissed with prejudice after the signing of a stipulation providing: (1) that the applications of the plaintiffs would be approved; (2) that the housing authority would no longer consider as a sole basis for denial of admission the presence in the family of a child or children born out of wedlock; and (3) that the authority's standards would provide for written notice of the reason for refusal of admission and allow appeal, for review purposes, to an official other than the person who rejected the application.\textsuperscript{80}

\textit{Evictions}: Housing authorities have adopted a standard month-to-month lease, which (as originally conceived) permits evictions to be accomplished with the minimum of delay.\textsuperscript{81} Prior to 1966 only nominal interference from the courts was experienced.\textsuperscript{82} On March 29 of that

\textsuperscript{78} Id. at 109-11.
\textsuperscript{80} Clearinghouse Rev., May-June 1968, at 2.
\textsuperscript{81} For a definitive history of the provision see Rosen, \textit{supra} note 63, at 185, 203-07.

year, Mr. and Mrs. Bennie Vinson were given notice of eviction from their apartment by the Greenburgh (N.Y.) Housing Authority. No reason was given other than an oral disclosure on behalf of the authority that Mrs. Vinson and her children would be permitted to remain if she compelled her husband to leave the apartment and then sought public welfare assistance and an order of support. Upon her refusal to force him to leave, summary eviction proceedings were brought. The trial court dismissed the proceeding citing the authority's "irresponsibility." On appeal the decision was affirmed. As a threshold matter the court made a realistic appraisal of a housing authority's special responsibilities to those it is designed to serve:

[I]t must be acknowledged that the housing authority prescribes terms of the lease and that the tenant does not negotiate with the authority in the usual sense.... In this condition of affairs, to impose a requirement of good faith and reasonableness on the party in the strong bargaining position when he exerts a contractual option is but a reflection of simple justice....

The eviction of a family in the income bracket eligible under the standards of public housing from its household is a serious blow. If, in fact, a mistake has been made in the accusation against the tenants of improper conduct or a violation of regulations, or if the reason for the ouster has no better basis than dislike or unjustified discipline, the requirement of the disclosure of the ground for termination of the lease affords the tenant the opportunity to protest its exercise. On the other hand, the authority will suffer no more than delay in the ultimate eviction in the event the termination of the lease is made on reasonable grounds; and in the meantime the authority may control excessive misbehavior of the tenant through police action. Sociological implications, however, were far exceeded by the court's analysis of applicable constitutional limitations:

"Due process of law," is not confined to judicial proceedings, but extends to every case which may deprive a citizen of Life, Liberty, or plicitly, held housing authorities to a higher standard of conduct than a private landlord, their rationale was limited to the specific context of cases arising under the Gwinn Amendment. Housing Auth. v. Turner, 210 Pa. Super. 62, 191 A.2d 869 (1963) (reaffirming the proposition that eviction can be for no reason at all); accord, Housing Auth. v. Venezie, 25 Beaver Co. L.J. 92 (Pa. Ct. C.P. 1963). Contra, Holt v. Richmond Redev. & Housing Auth., 266 F. Supp. 397 (E.D. Va. 1966).


Id. at 341-42, 288 N.Y.S.2d at 164.
Property, whether the proceeding be judicial, administrative, or executive in nature. . . . Once a State embarks into the area of housing as a function of government, necessarily that function, like other government functions, is subject to constitutional commands . . . . Low rent housing . . . imports a status of a continuous character, based on the need of the tenants for decent housing at a cost proportionate to their income, subject to the compliance of rent when due. "The Government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law."86

Other courts have questioned the constitutionality of the thirty-day eviction process on different grounds. For instance, when a Louisville, Kentucky, tenant was evicted without reason, the court held that the one-month lease created an "estate" in reality. Accordingly, the housing authority was held to have created a property interest that was protected by the due process and equal protection clauses of the fourteenth amendment.86 Later, in a similar case, the northern district of Texas issued a temporary injunction restraining eviction proceedings, called for a "fair hearing" on the issues of reasons for eviction, and concluded that both the equal protection and due process clauses had been violated by the authority's summary procedure.87

Paralleling these "minor skirmishes" was the war between Mrs. Joyce Thorpe and the Durham (N.C.) Housing Authority.88 Mrs. Thorpe was elected president of a tenant's association on August 10, 1965. The next day her lease was cancelled; no reason was given.89 It was argued that her case raised distinct constitutional issues: first, her eviction was invalid per se because it was designed to suppress or to retaliate against the exercise of her first amendment freedoms; second, the due process clause gave her, as a public housing tenant, the right to notice of the reasons for eviction. She also argued that she had a right to a "due process hearing" in a public housing eviction proceeding.

While the case was in litigation, the Department of Housing and Urban Development (HUD) issued a circular requiring that tenants be

86 Id. at 340-41, 288 N.Y.S.2d at 163-64.
89 Id. at 520.
given notice of the reasons for eviction and opportunity to reply.\textsuperscript{90} Two
years later, and after two hearings before both the North Carolina Supreme Court and United States Supreme Court,\textsuperscript{91} the United States Supreme Court decided the case on the basis of the circular. Mrs. Thorpe had retained possession of her apartment throughout the litigation; the circular applied to all tenants presently residing in federal-funded public housing; a fortiori, if Mrs. Thorpe were to be evicted the procedure utilized must comply with the HUD directive.\textsuperscript{92} By basing its decision upon the circular, it became unnecessary for the Court to determine the constitutional issues.

An analysis of the case, however, reveals the Court’s concern with the constitutional issues involved. When first heard (and remanded to the state court for further proceedings), Mr. Justice Douglas concurred, stating:

It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment.\textsuperscript{93}

On final hearing the Court noted that a tenant would have considerable difficulty effectively defending against an illegal eviction if the authority were under no obligation to disclose its reasons, and cited Justice Douglas’ concurrence.\textsuperscript{94} The Court also noted with approval the authority’s concession that the power to evict was limited to the extent that it could not be exercised against those who engaged in constitutionally-protected

\textsuperscript{90} The circular provided:
Within the past year, increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a local authority to evict a tenant without advising him of the reasons for such eviction. Since this is a federally assisted program, we believe that it is essential that no tenant be given notice to vacate without being told by the Local Authority . . . the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish. In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Id. at 521 n.8.

\textsuperscript{91} The course of Thorpe v. Durham Housing Auth. through the courts is reported in 207 N.C. 431, 148 S.E.2d 290 (1966); 386 U.S. 670 (1967); 271 N.C. 468, 157 S.E.2d 147 (1967); 89 S. Ct. 518 (1969).

\textsuperscript{92} 89 S. Ct. at 527.

\textsuperscript{93} 386 U.S. at 678.

\textsuperscript{94} 89 S. Ct. at 527 n.45.
Compliance with the HUD circular by providing notice of charges was deemed "essential to remove a serious impediment to the successful protection of constitutional rights."

Although insisting on notification of reasons for eviction, the Court declined to establish any guidelines for a hearing by the authority in the event that the tenant challenged the reasons advanced for the eviction. The Court concluded that, if the hearings were "inadequate," HUD could well decide to implement guidelines for one that is "appropriate." Cited as an appropriate model were the provisions of 24 C.F.R. §§ 1.1-.12 (1968). These sections establish a detailed procedure to dispose of complaints of racial discrimination in federally assisted programs, including independent investigation of complaints, full hearing on the record and judicial review.

Private Housing

Public housing provides needed shelter for many of the nation's less privileged. An estimated eight million families, however, are compelled by segregation and poverty to live in the decaying slums of our central cities. Dilapidated conditions, exorbitant rents, and the adverse social consequences of tenement housing are fully documented. As summarized by Mr. Justice Douglas:

The problem of housing for the poor is one of the most acute facing the Nation. The poor are relegated to ghettos and are beset by substandard housing at exorbitant rents. Because of their lack of bargaining power, the poor are made to accept onerous lease terms. Summary eviction proceedings are the order of the day. Default judgements in eviction proceedings are obtained with machine-gun rapidity, since the indigent cannot afford counsel to defend. Housing laws often have a built-in bias against the poor. Slumlords have a tight hold on the Nation.

95 Id. at 526 & n.44.
96 Id. at 526-27.
97 Id. at 527.
98 Id. at 527 n.48.
99 Id.
The National Conference on Law and Poverty concluded in 1965 that a primary goal of expanded legal services must be to provide representation for those seeking adequate housing.\footnote{P. WALD, supra note 36, at 20.} As a prerequisite, “[f]undamental revision of the antiquated landlord-tenant law [through] . . . legal skill, time, perseverance, and freedom from retaliatory pressures” was to be undertaken.\footnote{Id.} Although lack of uniformity of housing and landlord tenant laws necessarily places jurisdictional restraints on the impact of decided cases, it is clear that there have been attempts to meet this challenge.


In the District of Columbia, efforts of the Neighborhood Legal Services Program established two important precedents for the city’s slum dwellers. First, a tenant who reports housing code violations may not
be evicted for that reason. Second, a lease is unenforceable against a tenant if, at the time it was entered into, the dwelling was in violation of the housing code. In such cases, no suit for possession may be brought. It is expected that these decisions will form the basis for similar suits in other jurisdictions.

Even more significant than the results accomplished by these decisions was the receptiveness of the judiciary to a re-evaluation of tenant's rights in light of the social realities of slum housing. For instance, in deciding that "retaliatory evictions" were not to be countenanced in the District of Columbia, Judge J. Skelly Wright concluded:

As judges, "we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." . . . [W]e have the responsibility to consider the social context in which our decisions will have operational effect. In light of the appalling condition and shortage of housing . . ., the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated.

Similar considerations were employed by the Supreme Court of Pennsylvania in overruling previous decisions absolving the landlord from liability for injuries caused by his failure to repair:

We must recognize the fact that . . . critical changes have taken place economically and socially. Aware of such changes, we must realize further that most frequently today the average prospective tenant vis-à-vis the prospective landlord occupies a disadvantageous position. Stark necessity very often forces a tenant into occupancy of premises far from desirable and in a defective state of repair. The acute housing

---

114 A circuit court in Connecticut recently followed Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968), in holding that a lease is unenforceable if the premises were violative of the housing code when the lease was entered. Jensen v. Salisbury, CCH POVERTY L. REP. ¶ 2330.28 (Conn. Cir. Ct. 1968). In contradistinction, the courts have not voided leases where violations occurred after rental of the property. See, e.g., Saunders v. First Nat'l Realty Corp., CCH POVERTY L. REP. ¶ 2330.85 (D.C. Ct. App. 1968).
shortage mandates that the average prospective tenant accede to the
demands of the prospective landlord as to conditions of rental which,
under ordinary conditions with housing available, the average tenant
would not and should not accept.

No longer does the average prospective tenant occupy a free bargain-
ing status and no longer do the average landlord-to-be and tenant-to-be
negotiate a lease on an “arm’s length” basis. Premises which, under
normal circumstances, would be completely unattractive for rental are
now, by necessity, at a premium. If our law is to keep in tune with
our times we must recognize the present day inferior position of the
average tenant vis-à-vis the landlord when it comes to negotiating a
lease.120

Consumer Protection

Since the poor have little money to spend, it is difficult for many
to understand that their problems in the consumer field require the ser-
vice of legal aid. The phenomenal expansion of installment buying,
accompanied by soliciting promises of “no money down” and “easy
credit,” however, has produced what Senator Warren Magnuson describes
as “the dark side of the marketplace,” where:

[T]he unscrupulous souls now reach deep into the ghettos and the
ranks of the uneducated and unsophisticated to extract large sums. A
rich new field was to be found in the mass exploitation of great num-
bers of the lower and middle classes who knew little about the traps
in contracts.117

David Caplovitz’s landmark work reveals a commercial jungle “in which
exploitation and fraud are the norm rather than the exception.”118 Indeed,
the extent of exploitation has been noted as being “greater than many of us
realize. To a large extent—and this may be a little strong to swallow at
first—consumer exploitation has replaced labor exploitation as the real
problem of our times.”119 And, of course, it is the low-income consumer
who suffers the greatest exploitation.120

Briefly described, he is a member of a class that totals some twenty-

---

(1968).
116 Preface to 1967 edition of D. CAPLOVITZ, THE POOR PAY MORE at xviii
(1967).
119 W. MAGNUSON & J. CARPER, supra note 117, at 56 (quoting Sidney Mar-
golis).
120 For an analysis of these consumers, see St. Thomas More Institute on Legal
six million persons; for him credit is an economic necessity, not a rational choice; he has no "rating" from the local credit bureau and therefore grants "security interests" to the seller; he borrows goods, not money; he is geographically immobile and lacks consumer sophistication; and his ignorance and inability to buy elsewhere render contract terms meaningless or unimportant. He is an ideal prey for those who practice exploitation.

Illustrative of these conditions are the operations of the New York Jewelry Company located in the District of Columbia. As described by the Federal Trade Commission, it is patronized by those who:

[H]old extremely low-paying jobs, have no bank accounts or charge accounts, and do not own their own home. Many of its customers are Negro. . . . [I]ts advertising specifically appeals to those people who cannot obtain credit elsewhere or who have lost their credit. . . .

The company has been in business twenty-five years. Its success is exemplified by the calendar year 1965 when it had a total sales volume of 355,000 dollars and gross profits of 310,529 dollars. Merchandise includes eyeglasses, watches, jewelry, radios, and used television sets. These are sold at "bargain" prices and with "easy credit" to enable the customers to enjoy the "good things in life" that they could not otherwise afford. On December 8, 1968, however, the FTC found that New York Jewelry's method of helping their customers did not square with the requirements of Section 5 of the Federal Trade Commission Act.

"Free eye examinations" and "complete eyeglasses including lenses and frame" were advertised for $7.50. A tabulation showed that 90 percent of sales were for more than 23 dollars with only one pair selling for less than 17 dollars. Put another way, 17 percent of sales were at $79.50 and 72 percent in excess of 39 dollars. Far from being "discounts," average sales were "in fact . . . 202 percent of, or about twice as high as the trade area prices." Sales of watches produced even more dramatic figures.

[T]icketed prices for Bulova watches represented markups averaging 700% in contrast to the trade area markup of approximately 100%.

---

121 Leon A. Taschof, 3 Trade Reg. Rep. 18,606 (F.T.C. 1968).
122 Id. at 20,943.
123 Id.
124 Id. at 20,944.
125 Id. at 20,946.
126 Id.
127 Id. at 20,948.
For example, one invoice in the record covering 8 different models of Bulova watches which had cost the respondent from $16 to $28 indicates sales proceeds by respondent on these items ranging from $125 to $149.50.\textsuperscript{128}

Similar pricing practices—typified by transistor radios costing $3.45 being listed at $59.50—were common.\textsuperscript{129}

The “bargains” offered by the company, however, were not limited to merchandise. Having decided to make a purchase, a customer was offered “easy credit” through one of four different installment contracts carrying annual interest rates of 53 percent, 67 percent, 47 percent, and 124 percent respectively.\textsuperscript{130} The consequences which followed for those whom the company called its “AAA-1 Preferred Customers”\textsuperscript{131} were clear:

The record contains stipulated evidence that during 1964, for example, New York Jewelry filed 1178 laws suits against defaulting customers. In 1965 respondent filed 1631 such law suits and in 1966, 707. As for garnishment proceedings, it was stipulated that in the 14-month period January 1966 through February 1967 New York Jewelry filed 411 garnishment proceedings. For purposes of comparison, it was further stipulated that the C & P Telephone Company during the same 14-month period had only 91 garnishment proceedings, the Hecht Company 217, Kay Jewelers (with 10 branch stores in the Washington area) 202, and Reliable Stores Corporation 305. All of these stores undoubtedly had many times more customers than the respondent's 5000.\textsuperscript{132}

Put more concisely: the New York Jewelry Company sued about one out of every three customers.\textsuperscript{133} Reviewing the overall operation of the store, the Commission delineated what it considered the proper scope of business ethics for the ghetto merchant:

At first blush these allegations in the complaint respecting respondent's eligibility and collection practices might appear to rest on a premise that it is illegal or somehow wrong or unfair for a retailer to adopt a generous policy with respect to the extension of credit. We reject any such a premise. To even suggest the validity of such a premise would carry particularly harsh overtones for our nation today when we are so tragically aware of the almost twenty-six million people in our

\textsuperscript{128} Id. at 20,954.
\textsuperscript{129} Id. at 20,955 n.40.
\textsuperscript{130} Id. at 20,950.
\textsuperscript{131} Id. at 20,944. The Commission attached an appendix showing a “customer profile” which vividly portrays the lot of the low-income consumer. Id. at 20,960.
\textsuperscript{132} Id. at 20,956.
\textsuperscript{133} Id.
country who are living below or just at the poverty line and who can only hope to acquire even the bare necessities of life by purchasing on time, much less any of the other goods and services so consistently advertised in every media as being part of the good life in our society. The need in our nation is for more reasonable credit eligibility criteria and for greater availability of credit in many areas of our economy.

Nor do these complaint allegations proceed on any notion that buyers—and particularly low-income consumers—are under no obligation to exercise self-restraint and responsibility for their own actions. No one has suggested that the law merchant should be suspended because a customer comes from the low-income segment of our society. A retailer's credit eligibility and collection practices as such are not the thrust of this charge in the complaint.

On the other hand, it is manifestly unfair to adopt a marketing policy which has the effect of luring unsophisticated customers into entering contractual obligations which in all likelihood they have little understanding of, by convincing them that the credit is "easy" and prices are low and at the same time following a rigid collection policy resulting in default judgments and garnishments being levied against their meager wages.\textsuperscript{134}

The intrusion of the FTC into business practices such as those of the New York Jewelry Company has been rare. For the legal services attorney, however, similar operations have not been uncommon. Operating within a framework of established contract law outstripped by the credit revolution,\textsuperscript{135} he has protected clients from the holder in due course doctrine,\textsuperscript{136} sought to apply usury laws to certain "finance" and "carrying"

\textsuperscript{134} Id. at 20,956-57.
\textsuperscript{135} The inappropriateness of contract law in the credit revolution is definitively analyzed by Magnuson and Carper:

Our whole legal doctrine which governs contracts is based on a presumption that both parties are of equal ability to realize the consequences of the transaction and fulfill them. At a time when the credit-buying system was highly sophisticated and those trading with each other were usually businessmen and usually on equal footing with each other, it was reasonable to expect credit buyers to exercise match-wits caution. Rare was the man forty years ago who completed a big transaction without days to study papers, usually with the help of an attorney. Today, millions sign installment contracts of tremendous legal consequences, often without reading or understanding them, after only ten minutes thought. It is ludicrous to suppose that a buyer with no knowledge of the law is on a par with a dealer whose sophisticated lawyers have meticulously worded the contract to the undisputed advantage of the seller. Yet the law continues to operate as if the credit revolution wrought no changes at all in the buyer-seller relationship, as if at one time equality exists.

W. MAGNUSON & J. CARPER, supra note 117, at 69.

\textsuperscript{136} The Uniform Commercial Code § 3-302 defines holder in due course as one...
charges,\textsuperscript{137} attacked the validity of collection practices\textsuperscript{138} and garnishment proceedings,\textsuperscript{139} and brought many deceptive sales practices into the open.\textsuperscript{140}

Sanctions imposed in many of these cases have vastly improved the

who takes an instrument for value, in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

Legal aid attorneys have had some success in defeating a note creditor's immunity from claims or defenses by establishing participation in the underlying sales transaction sufficient to strip him of holder in due course status. For example, in the District of Columbia, a door-to-door salesman sold carpeting under a plan whereby the buyer would obtain a credit on the purchase price for furnishing the salesman with "leads" to prospective customers. The buyer was asked to sign a purchase contract and a promissory note for 1,500 dollars. Referrals in fact did not result in a credit to the purchase price. Investigation of the finance company that purchased the contract and the note revealed that it had participated in the transaction to such a degree that it was exposed to the defense arising out of the misrepresentation as to credit for referrals. \textit{Highlights of Recent Cases}, June 1968, at 11 (publication of Washington, D.C., Neighborhood Legal Services Program). \textit{Accord}, Financial Credit Corp. v. Williams, 246 Md. 575, 229 A.2d 712 (1967); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967) (both cases involve investigations into the issue of whether there was a "good-faith" holder). For orientation on the subject see Comment, \textit{Holder in Due Course—A Memo to Poverty Lawyers}, 22 Rutgers L. Rev. 281 (1968).


\textsuperscript{139} In Sniadach v. Family Finance Corp., 37 Wis. 2d 163, 154 N.W.2d 295, \textit{petition for cert. filed}, 37 U.S.L.W. 3003 (July 2, 1968) (No. 130), the constitutionality of garnishment proceedings was tested for the first time. It was contended, \textit{inter alia}, that the procedure used in Wisconsin for pre-judgment garnishment deprived the wage earner of due process inasmuch as, before the garnishment, there was no right to notice and hearing or other procedure to challenge the legality of the garnishment.

\textsuperscript{140} Bait advertising consists of offering to sell a product or service that the seller does not want or intend to sell in order to attract customers to some other, usually more expensive, product. For instance, the advertisement of employment opportunities has been found to be a type of "bait" when the advertiser is seeking students for instruction. \textit{Vogue Models, Inc. v. Tribett, CCH Poverty L. Rep.} \textsection 3705.17 (Ill. Cir. Ct. 1st Munic. Dist. No. 67 MI 526081, 1967). Automobile services, California v. Edgewood Auto Center, Inc., CCH \textit{Poverty L. Rep.} \textsection 3705.05 (Cal. Super. Ct., Los Angeles Co., No. 906457, 1967), and the selling of home
situation of the unwary consumer. They have not, however, resulted in a noticeable change in the hallowed and time-honored concept of "freedom of contract." It is this tradition that, when placed in the context of many modern merchandising techniques, allows and condones larceny in the market-place. Williams v. Walker-Thomas Furniture Co., however, may furnish the necessary precedent in some jurisdictions for the granting of judicial relief to those who are victims of the unscrupulous.

Mrs. Williams, a welfare recipient, purchased a stereo set and added it to her account under a printed form contract providing for installment payments. The contract contained a provision that kept a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. Under this provision, the debt incurred at the time of purchase of each item was secured by the right to repossess all items previously purchased. Mrs. Williams had made purchases for a period of roughly three years. When she defaulted on her payment for the stereo the store "retrieved every item it could lay its hands on." In striking down the contract under a common law doctrine of "unconscionability," the Court of Appeals for the District of Columbia set forth broad guidelines to be utilized in determining the validity of such contracts:

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The man-

improvement products or services, Matter of People of State of New York, CCH Poverty L. Rep. ¶ 3705.25, 158 N.Y.L.J. No. 10, p. 9 (N.Y. Sup. Ct. 1967), are also areas where bait advertising has been observed.

Selling used or rebuilt goods as new has been subject to sanction, J. Truett Payne Co. v. Jackson, 203 So. 2d 443 (Ala. Sup. Ct. 1967), as well as the technique of "referral selling" which the buyer is led to believe that he can pay for all or part of the service or product through commissions on sales made to persons whose names he submits as prospective customers. M. Lippincott Mtg. Inv. Co. v. Childress, 204 So. 2d 919 (Fla. Dist. Ct. App. 1967); Lefkowitz v. I.T.M., Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (N.Y. Sup. Ct. 1966).

350 F.2d 445 (D.C. Cir. 1965).

Id. at 447.

ner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." . . . We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.¹⁴⁵

The progeny of Williams¹⁴⁶ have brought into the judicial limelight even more glaring examples of commercial exploitation. It is expected that the decision will afford needed protection from overreaching by the unscrupulous.

¹⁴⁵ 350 F.2d at 449-50.
¹⁴⁶ A district court in Nassau County, New York, refused to enforce a contract for 1,146 dollars for a refrigerator freezer worth 348 dollars. Frostifresh Corp. v. Reynosa, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966). In New Jersey, a superior court was "shocked" by the sale of a 300 dollar freezer for 1,093 dollars, and refused to enforce the contract. Toker v. Pearl, 103 N.J. Super. 500, 502, 247 A.2d 701, 703 (Super. Ct. 1968). Summary judgment in favor of a finance company was refused in light of the fact that a car sold for 940 dollars with credit charges of 242 dollars required 570 dollars worth of repairs the week after it was sold. Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 297 N.Y.S.2d 391 (Cir. Ct. 1967). Finally, a Florida court concluded that "unconscionability" amounts to "fraud" and refused to enforce a contract for plumbing services totaling 2,600 dollars where the value of the goods and services was 921 dollars. Gulf Shore Dredging Co. v. Hutto, CCH POVERTY L. REP. ¶ 9052 (Fla. Cir. Ct. 1968).
Welfare

The welfare system has done little to wipe out the extreme poverty of some ten percent of our nation.\textsuperscript{147} Payments are below “minimum subsistence” in many states,\textsuperscript{148} and an estimated one-half of those eligible for welfare either do not qualify (in spite of “need”) under the morass of restrictive eligibility rules or have not applied out of pride, ignorance, or fear.\textsuperscript{149} Moreover, an all-pervasive local concern lest money be wrongfully received has forced some recipients to forfeit rights of privacy and dignity and receive in their place personal control of their lives by the local caseworker\textsuperscript{150} as the price for obtaining assistance. As observed by the National Advisory Commission on Civil Disorders: “The welfare system is designed to save money instead of people and tragically ends up doing neither.”\textsuperscript{151}

In 1965 the issue was clearly posed: could the legal services attorney work within a system admitted by most to be either outdated or mismanaged and, through the “test case” technique, aid in securing for many the assistance to which they were entitled under law? In addition, could legal aid attorneys secure judicial protection of the privacy of recipients? A description of the cases that have been litigated provides an insight into our present welfare system and the injustices that it has perpetrated on our nation’s poor.

The Social Security Act has long required “opportunity for a fair hearing” both in the denial of applications and in the termination of benefits.\textsuperscript{152} The “opportunity” has received minimal interpretation. It has not meant the right to know before a requested post-termination

\textsuperscript{147} Not including the aged, in 1966 there were, in the United States, approximately 21.7 million persons below the “poverty level” as defined by the Social Security Administration. \textit{Riot Commission Report} 458.

\textsuperscript{148} Id.

\textsuperscript{149} \textit{Hearings Before a Subcomm. of the House Comm. on Appropriations, 90th Cong., 2d Sess., pt. 3}, at 821 (1968).


\textsuperscript{151} \textit{Riot Commission Report} 457 (quoting Mitchell Ginsberg, former head of the New York City Welfare Department).

\textsuperscript{152} The categorical public assistance programs of the Social Security Act require a state plan to provide for the opportunity for a fair hearing before the administering agency for any individual whose claim for assistance is denied or is not acted on promptly. 42 U.S.C. §§ 602(a)(4), 1202(a)(4) (1964). Federal interpretation of this requirement can be found in \textit{Department of Health, Education, and Welfare, Handbook of Public Assistance Administration} pt. IV, §§ 6100, 6300(c) (1968).
hearing exactly what rules and evidence the department relied upon; it has not meant notice of the exact issues considered relevant; it has not meant a right to counsel at the hearing (the recipient could, of course, "employ" counsel); it has not meant that the recipient had a right to confront and examine witnesses; and it has not meant the right of access to department records that affect the case (including records of prior cases).\textsuperscript{153}

Mrs. Esther Lett, an AFDC mother in New York City, lay on the tile floor of the welfare center where minutes before she had fainted. She had not eaten all day and had come to the center to ask for emergency aid.\textsuperscript{154} She and her four children had for a month lived solely on the handouts of neighbors; nine days before, they were forced to go to the hospital with severe diarrhea—that day they had only a spoiled chicken to eat, donated by a neighbor.\textsuperscript{155}

Mrs. Lett had been a welfare recipient in "good standing," but one of her neighbors erroneously thought she was working and reported her to the department. The department, without notice, terminated her payments. Efforts by legal aid secured promises that payments would be resumed. She had come to the center to beg emergency assistance for food. When she awoke she was told immediate aid was impossible: it had not been "authorized."\textsuperscript{156}

Mrs. Velez and her four small children had been on welfare since her husband left home. The landlady told the welfare department that Mrs. Velez's husband had been visiting every night. The department, without notice, terminated her payments. Without welfare, she could not pay the rent, and she and her children were shortly evicted. They moved in with her sister who had nine children and was on relief. The thirteen children and the two mothers lived in a cramped apartment for four months. Poorly fed, when fed at all, Mrs. Velez's children soon lost weight and became ill. After four months the welfare department documented the fact that Mr. Velez had never visited his wife at night and reinstated her payments.\textsuperscript{157}


\textsuperscript{155}Id.

\textsuperscript{156}Id.

\textsuperscript{157}Id. at 10,258-59.
Mrs. Lett and Mrs. Velez were two of thirteen plaintiffs who appeared before a three-judge court in New York asking that welfare payments not be terminated without a prior hearing. The state cited a "pressing need" to protect the public's tax revenues that in itself justified a departure from the general standard of a "requisite due process . . . hearing before the final order becomes effective." The court, however, refused to accept the state's argument:

Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance, and the startling statistic that post-termination fair hearings apparently override prior decisions to terminate benefits in a substantial number of cases. The obvious fact is that there is no way truly to make whole a recipient like Mrs. Velez for the indignity of living with her sister and thirteen children in one apartment because of a wrongful termination. The equally obvious remedy is to take greater care to prevent such injustice before it occurs. While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits . . . .

Subsequently, an order was issued requiring, inter alia, adequate notice, a full hearing with the right of cross-examining witnesses, and an independent review of decisions within the welfare department prior to termination of benefits.

Other areas in which harsh procedural practices place the recipient at a disadvantage have also been under attack. Added to these "procedural due process" problems of recipients are the restrictive regulations that inflict indignities on their daily lives. One such indignity is the conditioning of welfare benefits on the recipient's giving his "consent" to the search of his home. Administrative utilization of such "consent"
is exemplified by a recent case arising in Alameda County, California. A social worker was discharged for his refusal to participate in an early morning "mass raid" to determine the continuing eligibility of recipients. In ordering reinstatement, the Supreme Court of California found that the coercive means of obtaining the constitutional waiver, i.e., withholding of money unless the waiver were given, rendered it invalid and that the mass searches were clearly unconstitutional. Subsequently, several actions in behalf of recipients were undertaken elsewhere in the United States to have such "home visits" declared unconstitutional.

The administration of the dependent children provisions of the Social Security Act (AFDC) provide further illustrations of harsh procedural practices. Briefly, a dependent child, in addition to being needy, must be deprived of parental support by reason of the death, continued absence, or physical or mental incapacity of the parent to be eligible for assistance. Some states have adopted optional "unemployed father" provisions that further define a dependent child as one whose need arises from the deprivation of parental support by reason of the unemployment of his father. In states having no such provision, a father must desert his family in order that his children may receive AFDC payments.

The requirement is commonly termed the "man in the house" rule.
A second variation is known as the "substitute father" regulation. Under such provisions, children are denied aid if the father is in the home, or if they have an alleged "substitute father"—a man who cohabits with the mother either in or out of the home. The issue of whether the children actually receive support from this individual is irrelevant.

After a clear showing that an alleged "substitute father" was not legally obligated, and in fact refused, to give needed support, an action was brought seeking to have Alabama's regulation declared to be in violation of the equal protection clause and in conflict with the Social Security Act. The state's argument was premised on its interest in discouraging immorality. The Supreme Court, however, found that the term "parent" as used in the act meant an individual who was under a state-recognized duty of support and that:

Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC.

... All responsible governmental agencies in the Nation today recognize the enormity and pervasiveness of social ills caused by poverty. The causes of and cures for poverty are currently the subject of much debate. We hold today only that Congress has made at least this one determination: that destitute children who are legally fatherless cannot be flatly denied federally funded assistance on the transparent fiction that they have a substitute father.

Mr. Justice Douglas concurred, finding that any system which penalized children for the sins of their mother was clearly a violation of the equal protection clause.

Other imaginative regulations have also come before the courts. Although one objective of the AFDC program is the strengthening of family life through care of dependent children in their own homes, many states have promulgated "employable mother" regulations that require able mothers to leave the home for employment. The rule in Georgia,

---

168 Sparer, supra note 167, at 16.
170 Id. at 318.
171 Id. at 325, 334.
for example, not only required all “able-bodied” mothers not needed in
the home to seek and accept “suitable” employment, but also defined
certain periods of the year as periods of “full employment,” during which
the welfare department automatically closed out all current cases and
denied all applications. The seasons were those in which there was a
great demand for cheap field labor.

The rule did not take into account whether a recipient could actually
find employment, or if she did so, whether full employment paid as much
as she was entitled to receive under welfare. The welfare regulations also
denied any supplementation to the “fully-employed” mothers even if it
were clear that they were working for less than minimum wages and
often receiving less than they would under welfare.

A Negro mother of seven sought to have the regulation declared un-
constitutional. Prior to the hearing Georgia modified the rule by allowing
some supplementation of full-time employment income where the employ-
ment income did not cover the pre-employment welfare budget. The court,
however, found the supplementation scheme (like the former one of no
supplementation) a denial of equal protection inasmuch as it gave less
to the recipient whose extra “source” of income was employment than
to one whose “source” was something other than employment. Con-
cluding, the court also required that before aid could be terminated or
reduced, a bona-fide offer of employment, which a mother could for “good
cause” refuse, be shown.

An equally troublesome area in the AFDC program is the maximum
grant limitation. As administered, each state calculates payments to
families according to the number of dependent children. Some states,
however, limit the lump-sum payment that any one family may receive.
As a result, an absolute ceiling is established without regard to how needy
the family is or how many children it has. Moreover, since federal regu-
lations permit children to live with specified relatives and still be eligible
for AFDC, it is apparent that dollar limitations on grants may en-
courage families to “distribute” children among other relatives.

Footnotes:

REV. 84, 88-89 (1967).
April 5, 1968).
170 Id.
177 Id.
178 See, e.g., Comment, Welfare's "Condition X," 76 YALE L.J. 1222, 1222-23
(1967).
result squarely conflicts with the Act's purpose of maintaining "continued parental care and protection."\textsuperscript{179}

A three-judge district court in Maryland recently held that the state’s "maximum grant" limitation was inconsistent with the Social Security Act and violated the equal protection clause.\textsuperscript{180} In doing so, the court delineated the irregularities resulting from its enforcement:

That the maximum grant regulation is offensive is easily demonstrable. AFDC is a program to provide support for dependent children. By the standards of need set by Maryland, a dependent child is in as great need and as deserving of aid, whether he be the fourth or the eighth child of a family unit, although if the latter, the amount of his need may not be quite as great as that of the former, because it is cheaper to provide clothing, food and shelter for the eighth child than for the fourth. Yet, the maximum grant regulation, in accomplishing its purpose of conservation of inadequate resources assumes that a child because he is the eighth (or any other number where to grant him benefits would bring the aggregate benefits to the family unit over the maximum grant) is either not in need or that his need must go unsatisfied. Reason and logic will not support such a result. The fact that such a child, if moved to the home of an eligible relative, may receive such benefits lends additional support to this conclusion. In effect, Maryland impermissibly conditions his eligibility for benefits upon the relinquishment of the parent-child relationship. We hold, therefore, that maximum grant regulation transgresses the equal protection clause.\textsuperscript{181}

These cases provide only surface indicia of the many issues which have been raised in the past three years.\textsuperscript{182} Their effect has been to change the status of welfare recipients from objects of charity to citizens asserting rights under the laws of the land.

Not all of the cases discussed here were brought by legal aid programs. The NAACP, the ACLU, the Lawyers’ Committee for Civil Rights

\textsuperscript{181} "Id. at 10,454.
\textsuperscript{182} Legal aid attorneys have attacked other welfare regulations productive of inequity and arbitrariness in the system. E.g., Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), \textit{prob. juris. noted}, 389 U.S. 1032 (1968) (No. 813, 1967 Term; renumbered No. 9, 1968 Term); residency requirement for eligibility held unconstitutional); Williams v. Shapiro, 4 Conn. Cir. 449, 234 A.2d 376 (1967) (state rule denying eligibility to persons with life insurance of a cash surrender value greater than 250 dollars, held constitutional); \textit{In re Cager}, — Md. —, 248 A.2d 384 (1968) (state may not deny AFDC assistance to dependent children on grounds of their mother’s immorality), \textit{citing} King v. Smith, 392 U.S. 309 (1968).
Under Law, and other organizations have participated in the struggle. Much of the credit belongs to the legal services programs, however, not only because of their participation in many of the cases, but because of the new sense of direction that they have imparted to other organizations.

Whatever their effectiveness in stemming the cycle of poverty, stimulating self-help economic efforts, or serving as a device for social control, legal services programs have provided justice to thousands of people in the last five years. The poor man who wishes a divorce, the widow who wishes to resist eviction from a house, the family that has purchased a defective appliance, the welfare recipient who has been denied funds, all are powerless in a system that requires the lawyer to serve as an intermediary in order to resolve disputes, unless a lawyer is available to them. The tremendous increase in the total number of cases handled is a measure of the number of times a poor man has been shown that justice is not an illusion in our society.

Unanswered Problems

As we move into the seventies, there are a number of problems that need to be solved. The following are areas which need immediate attention.

Funding

It is clear that the present level of funding is hopelessly inadequate to meet the needs of more than a small percentage of the people who require but cannot afford legal services. Little has been done to determine how much will be needed. The basic reason is that the amount involved, by any calculation, greatly exceeds any reasonable expectation of the funds that will be immediately available. We are reaching the point, however, at which we must develop reasonably accurate cost estimates for future services.

Estimates of the cost of a good national program must be purely speculative, but by the end of the seventies, approximately 400 million dollars is not an unreasonable figure.188 This sum may seem large, in view of the amounts we have spent on legal aid in the past. Yet it is small compared with the amount spent on health services, space exploration, the defense establishment, and many other federal programs. Obviously,

188 See Greenawalt, Reformers Against the Clock, in Symposium, OEO and Legal Services, 14 Cath. Law. 92 (1968). Mr. Greenawalt quotes the American Bar Foundation as estimating a cost of 300 to 600 million dollars. Id. at 98.
it will require political muscle to obtain appropriations of this magnitude. The goal will not be insurmountable if we accept a national commitment that a free society cannot ration justice.

There are genuine doubts whether money can be spent wisely unless the national program expands slowly. Planned development would place new programs only where there are "receptive boards," staffed with the "right kind" of attorneys. It is prudent to inquire whether these proposals to slow the growth of legal aid stem from a philosophy of an "approved school solution" for the way legal aid should be provided. Specifically, should this solution be the exclusive program for federal aid?

"Receptive boards" may be boards that accept the concept of representation of the poor in policy-making and do not interfere with the concentration of resources on test litigation; the "right kind" of attorneys may be recent graduates without experience at the bar, who are dedicated to the idea that the goal of legal aid is to accomplish fundamental institutional change through the litigation of test cases. For adherents of this approach, there is no need to seek funds for local communities that wish to choose their staffs from the practicing bar and devote their efforts primarily to servicing the needs of clients. Similarly, there is no need to consider the costs of financing "judicare" proposals, because they are unlikely to achieve the objective of institutional reform.

We will examine the component parts of this approach as we proceed. For now, it is sufficient to note that the objectives of legal aid and the manner in which these objectives can be accomplished are important determinants of how much money is needed. Institutional reform is necessary and—to a limited extent—can be accomplished through test cases at least in some jurisdictions. But we think that the basic objective of a national system must be to provide lawyers for people who need legal assistance in the routine problems that they meet in society. The achievement of this objective is much more costly than the budget proposals now considered appropriate by some OEO officials.

Necessarily, most of these funds must come from the federal government. Charitable giving for legal aid is not likely to increase significantly. The states do not have the revenue to meet their current needs for education, roads, sewerage, welfare and police services, and cannot be expected to foot the cost of the kind of program that is needed. The federal government, in the Economic Opportunity Act, recognizes its responsibility to promote the principles of equal justice implicit in the Constitution. This, however, does not eliminate the necessity for state funding as well. It
is essential to plan an integrated program which will provide legal services in civil and criminal cases with federal grants-in-aid meeting most of the costs. State participation should not be fictional, as has sometimes been the case with local share requirements under OEO. State funds, not services in kind, should be required, but money appropriated for criminal cases must be regarded as state contributions towards an integrated program for providing legal services to the poor.

The development of first-rate programs will require a different basis of funding. The present system of one-year grants provides no permanency during the first year of a program's operation. It impairs the capacity of a program to attract first-rate lawyers who do not wish to leave practice for a program that has no certainty of continuing, and exercises an inhibiting effect on local boards of directors and staffs.

**Techniques for Providing Services**

There is a need to develop greater flexibility concerning the best ways for providing legal services to the poor. In theory, creativity and innovation have been encouraged by OEO. In practice, the programs have largely consisted of staffed neighborhood offices. There is no effective method of providing legal services to many people throughout the country except by subsidization of private lawyers who undertake cases for indigents. Although the Wisconsin experiment (Judicare) has indicated that the costs of administration may be high, no alternative has yet been found for small towns and rural areas. A substantial reduction in costs is foreseeable, however, if the private attorney is given assistance. For instance, in certain areas of poverty law, assistance could be given by specialists located in the law schools or in legal aid centers in the state.

---


185 See Mooney, *Legal Services and the Legal Establishment*, 70 W. VA. L. Rev. 363 (1968). In describing a proposed system for West Virginia, Professor Mooney concluded:

I envisioned the law schools performing the legal R & D work of freeing a class from servitude, the central legal staff administering justice to poor communities and ghetto groups, and local lawyers ministering to people in crisis utilizing the regional center for their legal research, expert non-legal assistance and comprehensive legal care. The center would administer the legal services system for its area and communicate and coordinate its activities, research, and findings to the other regional centers. . . . It seemed to me not too far-fetched that the internal operations of the center would be system-
The California Rural Legal Assistance Program is presently consider-
ing the idea of organizing a large program along the lines of a law firm,
with the managing attorneys serving as partners and the staff attorneys
as associates. We should welcome experimentation with other ideas for
organization.\textsuperscript{186}

\textbf{The Future of the Office of Legal Services}

It is likely that the Office of Economic Opportunity will be reorganized
with a substantial segment of its programs distributed among the Depart-
ment of Health, Education and Welfare, the Department of Labor, the
Department of Housing and Urban Development, and other departments.
What will happen to Legal Services when OEO is reorganized? Under
HEW it might be submerged under the existing gigantic programs; under
HUD the importance of rural legal services might be ignored; in the
Department of Justice the program might play second fiddle to the prosecu-
tory arm of the government. Creation of a separate agency might result
in its being overpowered in the infighting for a bigger share of the annual
budget.

To leave it in OEO might jeopardize its growth, particularly if the
stronger components, like Operation Head Start, were transferred to
other departments leaving only the weaker and more controversial pro-
grams. It must have independence wherever it is placed. Few would
deny that its separation from the community action programs of OEO
would be desirable. Although supported by CAP funds, most legal ser-
services programs are not and have not been integrated parts of community
action programs. Nevertheless, the OEO grants provide that local CAP
programs shall "supervise, evaluate, and provide guidance" to legal
agencies which are technically delegate agencies to the local CAP
grantees.\textsuperscript{187} Their inclusion under the CAP umbrella has done much to

\textsuperscript{186} See Reichert, \textit{Progress Report: Tri-County Legal Services Program}, 9
N.H.B.J. 259 (1967); Shamberg, \textit{The Utilization of Volunteer Attorneys to
Provide Effective Legal Services for the Poor}, 63 Nw. U.L. Rev. 159 (1968).
See also Comment, \textit{Beyond the Neighborhood Legal Office—OEO's Special Grants
in Legal Services}, 56 Geo. L.J. 742 (1968).

\textsuperscript{187} Paragraph 3 of the standard Contract Form, OEO Instruction 6710-1 (Aug.
1968), includes the sentence "The Grantee [the CAP agency] shall supervise, evalu-
contribute to administrative inefficiency and bar opposition, and little to improve legal services available to the poor. There should be direct funding to local legal services programs.

Maximum Feasible Participation of the Poor

There are other problems as well. One results from OEO's insistence on "poor on the board." The Act requires the "maximum feasible participation of residents of the area and members of the groups served." Early in the history of the OEO, this crystallized into a requirement that one-third of the members of boards of directors should be representative of the poor (modified by exigencies in some communities). The issue of "poor on the board" raised an emotional block which substantially hindered the development of legal services programs in some communities. There are many members of the bar who doubt the poor have much to contribute to the determination of the policies of a legal services program; they argue that the poor should be heard through advisory committees, rather than through membership on the board of directors. They also resist the idea that ethical decisions brought before the board should be determined in part by laymen. OEO has insisted that the poor do have a contribution to make in the kind of policy decisions made by the board of directors. Some OEO representatives have suggested that, regardless of what the poor can contribute to the solution of problems, there is a certain therapeutic value in permitting them to sit with members of the establishment.

There are examples where the representatives of the poor have contributed materially to the work on boards; there are examples where they have contributed little. There are also examples where insistence on representation by OEO has met resistance in local communities with the result that the poor received neither representation on the board nor the legal services that they needed. Most programs, however, will be lawyer-run regardless of whether there are poor on the board. A much greater flexibility on the part of OEO or its successor is required if legal services programs are to be accepted in the communities least enamored with them. Frequently, these are the communities that have the greatest need. The insistence upon a particular formula for constituting a board of directors...
may sacrifice the legal needs of the poor to an OEO principle of limited utility.

**Counsel in Criminal Cases**

A major problem arises in criminal cases. OEO is barred from providing funds for criminal representation. The reasoning is apparently that counsel for indigent defendants in criminal cases is constitutionally required, and, hence, the costs of providing counsel should be borne by the states. Thus, an anomaly is created: a man may be provided counsel by an OEO-financed legal aid program if he is to be evicted from his home, but he may be unable to obtain counsel if he is tried for a misdemeanor. In communities where a state-supported public defender or assigned counsel system is available, no material harm results if the services provided by these organizations are coextensive with the needs of indigent criminal defendants. Unfortunately, however, some states have interpreted *Gideon* to require that counsel be provided only in a felony trial and still cling to the belief that they may constitutionally avoid the appointment of counsel in misdemeanor cases and at preliminary hearings in felony cases. In many states, legislation is still necessary to implement *In re Gault.*

---


190 The right of indigents to appointed counsel in misdemeanor cases varies from state to state at present. The Supreme Court has failed to decide the issue, and *Gideon v. Wainwright,* 372 U.S. 335 (1963), has not been extended, as yet, to misdemeanors. In *Patterson v. Warden,* 372 U.S. 766 (1963), the Court vacated a Maryland misdemeanor conviction and remanded "in light of our opinion in *Gideon v. Wainwright.*" Three years later, in *Winters v. Beck,* 385 U.S. 907 (1966), the Court declined to review a decision of the Arkansas Supreme Court holding that there was no constitutional duty on the states to appoint counsel in misdemeanors, 239 Ark. 1151, 397 S.W.2d 364 (1965). Black and Stewart, JJ., dissented from the denial of certiorari. 385 U.S. at 907. The states have divided into four groups. Some have statutes requiring the appointment of counsel in misdemeanor cases. CAL. PEN. CODE § 859 (West 1956); N.Y. COUNTY LAw § 722-b (McKinney 1965); N.Y. CODE CRIM. PROC. § 699 (McKinney 1965); TENN. CODE ANN. §§ 40-2002, -2003 (1955); TEX. CODE CRIM. PROC. art. 26.04 (1965); W. VA. CODE ANN. § 62-3-1 (1966). Other states have extended the right to appointed counsel to misdemeanors under the administrative powers of their supreme courts. *MacDonnel v. Commonwealth,* 353 Mass. 277, 230 N.E.2d 821 (1967); State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967). A third group has recognized a constitutional right to appointed counsel in misdemeanor cases. Balkovak v. State, 229 Ind. 294, 98 N.E.2d 250 (1951); State v. Blank, 241 Ore. 627, 405 P.2d 373 (1965); accord, *McDonald v. Moore,* 353 F.2d 106 (5th Cir. 1965). Finally, other states have refused to find a constitutional right or to impose a state rule requiring counsel. *Cableton v. State,* 243 Ark. 351, 420 S.W.2d 534 (1967); State v. Bennett, 266 N.C. 755, 147 S.E.2d 237 (1966). But see *State v. Morris,* — N.C. —, 165 S.E.2d 245 (1969).

Certainly legal assistance to protect liberty is at least as important as legal assistance to protect property rights. It is difficult to defend a system that will provide counsel in a small claims court but deny it in a misdemeanor trial.

Even in states where there are sound systems for providing legal aid in civil and criminal cases, there may be a need for integration of the two programs. Almost all systems of legal aid in criminal cases are predicated upon the assumption that the need for an attorney ends with an acquittal or an appeal. Any sound system for providing legal services to the indigent, however, must appreciate that the legal problems of the poor man in a criminal case do not end with final judgment. The acquitted defendant is still poor and has substantial problems to face when he leaves the courtroom. The convicted defendant needs a continuing relationship with counsel while he is in prison in order to effectively seek a reduction of sentence, to have representation before the parole board, or perhaps to prepare a collateral attack on his conviction. His family needs legal assistance in civil matters while he is in prison. Crime, criminals, and falsely accused defendants do not exist in a vacuum. While many crimes may be unrelated to economic matters, many have their roots in poverty. It is equally true that representation of the poor in civil matters provides an opportunity for advice and counseling that may prevent the involvement of a client in the criminal process. The merger of civil and criminal legal aid is required if we are to provide legal services that will really meet the needs of the indigent in a systematic and efficient manner.

Priority for Test Cases

Legal aid programs in the seventies must face up to the question whether priority should be given to the litigation of test cases.\(^\text{19691}\) The OEO emphasis on representation in test cases is predicated upon the assumption that substantial changes in legal institutions can be accomplished and that the limited funds available should be used to handle cases that affect a broad constituency, as distinguished from the particular client for whom representation is being provided. The successful use of

---

\(^{19691}\) One of the authors of this article suggested at an earlier date that OEO attempt to establish priorities, and urged that institutional reform should receive the highest priority. At the same time, however, he urged that OEO be candid with the bar and he noted that there was a substantial doubt whether law reform could be accomplished through test litigation in many fields. See Pye, supra note 16, at 246-49. The views expressed in this article constitute a substantial change of attitude brought about by experience during the last three years.
test cases in civil rights litigation and in criminal procedure are cited as examples. Proponents of the theory assert that it is nothing more than the kind of representation routinely provided to trade associations, in which counsel screens cases looking for the best fact pattern to use as a vehicle for vindicating the rights of the constituent members of the association. There is, of course, considerable merit in these arguments.

On the other hand, some argue that the principal purpose of legal aid is to provide a lawyer to a poor man who needs counsel in matters which the client deems to be most significant. Implicit in this proposition is the assumption that test cases will arise inevitably without planning, and that no legal services program can continue to enjoy community confidence and support if, in order to hoard its resources to handle a test case, it fails to provide the services people need. This contention is further bolstered by the fact that placing a priority on test cases seems to suggest that it is proper for a legal services attorney to “play God,” and to manipulate the clients who come to him for help in order to achieve what he perceives to be a greater good.

The split between the two camps is perhaps more theoretical than real. Obviously a lawyer cannot ethically refuse to assert a “test case” contention if he thinks the best interests of his client will be served by arguing the point. Programs with the greatest test case orientation will still undertake some routine matters to serve clients. It is a question of emphasis in most legal aid offices. However, there are today legal services programs with substantial staffs that have never successfully litigated any major test cases and appeal only a few cases in a year. In contrast, the California Rural Legal Assistance Program (CRLA) has achieved substantial results by concentrating its resources on the litigation of test cases, with significant victories in major cases.103 A price has been paid, however. Indigent farm laborers in the area have been turned away from CRLA offices when they sought a divorce or other routine legal assistance, which meant a great deal to them personally, although little to the poor community of rural California.

The test case approach has certain basic weaknesses. First, as long as legal services programs depend upon local support for their continuation, it is very unlikely that local communities are going to subsidize

103 The reports of CRLA reveal a number of outstanding successes. An example is the case in which a 210 million dollar reduction in the state-supported medical services for 1.5 million poor and aged Californians was restored as a result of a suit filed on behalf of a welfare recipient. Morris v. Williams, 67 Cal. 2d 733, 433 P.2d 697, 63 Cal. Rptr. 689 (1967).
programs that not only fail to meet the immediate needs of their poor as perceived by them, but also are designed to change basic institutions in the community, which the community thinks are operating well. One cannot successfully require local policy-making and funding, and also expect priority to be given to securing the kind of basic changes thought desirable by OEO, but which the local political system is not yet prepared to make and which the local poor may not understand. Communities will refuse to provide the local funding in those parts of the country that are not receptive to the kind of changes OEO would like to accomplish.

Secondly, it is easy to overestimate the contributions that test cases can make in civil matters. Necessarily, test cases must be won in appellate courts since few trial courts will display a disposition to depart from settled law. In criminal cases, the government has little latitude in mooting an appeal by compromising a case after conviction. In some civil areas, such as housing and consumer protection, it is reasonable to anticipate that the economic interests affected can and will make a concerted effort to buy off the appellants in at least some of the cases that survive lower court findings of fact in a way that preserves the salient point for appeal.

There are inherent limitations in the test case process, even when the cases are won. Fifteen years after Brown v. Board of Education, there is good reason to believe that integration of schools in the South has been spurred more by the HEW guidelines enforced by the federal funding carrot than by judicial decrees. In some areas of the law, there simply is no assurance that there will be wholesale compliance with the clear implications of a judicial decision by persons who were not parties to the litigation.

Third, the test case approach assumes that the cases will result in victories; but, in fact, the likelihood that radical changes in such areas as landlord and tenant law or consumer protection are going to be accomplished in many states through litigation is remote. The state supreme courts, with a few notable exceptions, are not normally in the vanguard of creative innovation in the law of property or contract. In many states, test cases in these areas would probably be lost. Rather than a nationwide commitment to test cases, a wiser course would be to concentrate test cases in the courts that are most responsive to the concept of law as a

---

194 See Note, Neighborhood Law Offices: The New Wave in Legal Services for the Poor, 80 HARV. L. REV. 805, 814-16 (1967).
dynamic process that must change with the times. A court that applies the law as it finds it is not likely to overturn a century of precedent in landlord-tenant law. It is one thing for a legal services program in New York, the District of Columbia, or California to give priority to test cases; it is another to expect a program in Mississippi or Alabama to do likewise. In states where it can fairly be predicted that test cases will not be successful, there is no reason to press in that direction, except perhaps in the areas in which federal constitutional rights are involved so that there is ultimately an opportunity to find redress in the federal court system.

Despite these weaknesses, it is clear that much can be accomplished in some areas by the test case approach. The experiences of the past three years demonstrate remarkable success in the fields of public housing and welfare. A new bill of rights has been written for tenants in public housing. Many of the most onerous and unconstitutional practices found in the welfare system have been struck down. Of even greater importance are the decisive changes in some agencies produced by the successes in the courts. As previously noted, HUD recognized "increasing dissatisfaction" with a "number of suits" and issued regulations granting notice and hearings for those being evicted long before the decision in Thorpe.100 Similarly, HEW has issued extensive guidelines relating to procedural due process in hearings (including the right to counsel),107 and has announced a new system designed to curtail extensive investigation into the backgrounds of welfare applicants.108 Additional regulations have been issued to curtail the abuses of the "man in the house" doctrine.109 The results of this litigation have clearly worked to the benefit of millions of Americans.

In other areas, test cases have had more limited success and have pointed to the need for a legislative effort to complement the gains that have been realized through litigation. Although there are clear signs that a major decision on the issue of court costs is in the offing, and a reappraisal of present procedures in many jurisdictions likely, no monumental victory has been won. In the consumer area, increased judicial protection is now available, but these decisions will not change the marketing practices of those not directly involved in the individual cases. More-

---

100 See pp. 548-50 supra.
over, if they are to have any effect at all, the consumer must first realize
that he has been wronged and seek the aid of an attorney—an uncommon
event. Thus "test litigation" in this field has not succeeded in assisting a
large number of people. For the most part, cases in the landlord-tenant
area are subject to the same criticism, with the possible exception of cases
voiding leases where, at the time rented, the premises do not conform
to the local housing code. Again, however, relief is available only to
those who seek a court order.

To accomplish more fundamental changes in these areas, a legal
services program must not only litigate; it must be able to develop a
legislative program.

There are provisions in the United States Code that establish a
procedure through which the indigent may bring his case and effectuate
an appeal.200 Over half the states have similar legislation.201 While it
has been pointed out that these statutes are far from perfect, their presence
on the books indicates legislative receptiveness. As previously noted, the
ABA has available extensive research indicating that the fee system fails
to serve the purpose for which it was designed, i.e., to pay for the admin-
istration of the court system.202 Model in forma pauperis provisions have
been drawn that meet many common objections, for example, by curtailing
frivolous and vexatious litigation.203 There is no reason to believe that
state legislatures are not attuned to present injustices or are insusceptible
to common-sense reasoning. There is strong reason for suggesting that
legal services programs, when armed with available material, their own
independent studies, and the handwriting on the wall of recent decisions,
could deal more effectively with the issue of court costs in the state legis-
latures than in case-by-case adjudications.

An identical analysis applies to consumer protection, where strong civil
and criminal laws are needed for the protection of the buying public.
Present state laws are noted for their ad hoc and piecemeal approach.
Protection cannot be guaranteed by federal agencies such as the FTC and
the laws they administer. As stated by Chairman Dixon:

201 For the scope of these provisions, see Silverstein, Waiver of Court Costs
and Appointment of Counsel for Poor Persons in Civil Cases, 2 VALPARAISO L.
Rev. 21, 33-36 (1967).
202 See note 50 supra, and accompanying text.
203 See Silverstein, supra note 200. For application of the federal code to ter-
minate frivolous litigation, see Maloney v. E.I. du Pont de Nemours & Co., 396
F.2d 939 (D.C. Cir. 1967).
By stopping such practices before they grow into problems of interstate proportions, the need for federal action will be minimized, and the people most directly affected will have a telling voice in deciding what constituted unfairness and deception. The more effective the states can be in nipping illegal schemes in the bud, the more energy the FTC can devote to dealing quickly and effectively with problems of regional and national significance.\(^\text{204}\)

The states must enact legislation to give effective consumer protection. Inasmuch as the overreaching merchant preys on others besides the poor, a sound political base exists. A number of model acts have been proposed, including the Uniform Deceptive Practices Act, the Uniform Consumer Credit Code, and the Uniform Consumer Protection Act. Who can better present the feasibility and need for such legislation as demonstrated by actual practices in the local market place than a legal services program?

Finally, we have noted that a channeling of resources for test litigation in the areas of private housing has had only limited effect. Indeed, were all of the test cases won—if covenants in a lease were determined to be dependent, covenants in leases of slum houses were deemed to be contracts of adhesion, retaliatory evictions were voided, rent strikes were permitted, a tort of "slumlordism" were recognized, and a lessor of premises in violation of a housing code were banned from evicting a tenant for nonpayment of rent\(^\text{205}\)—it is doubtful that the condition of the poor in low-cost housing would improve.

Is it likely that landlords will repair their premises, maintain them and still not raise the rent? Or is it more likely that landlords when forced to maintain low-cost housing in harmony with housing codes would divert the property to another, more profitable use? These questions should be explored before a total commitment to the test case approach in housing is espoused. The assumption that giving tenants all the rights that they would like to have will cure the problem of urban low-cost housing seems a bit naïve. The problem must be dealt with in a manner consistent with realistic economics if decent low-cost housing is to be available to the poor. We doubt if increasing the rights of the tenant at the expense of the landlord will by itself do the job. What is needed are legislative proposals that will redirect economic resources to maintain rather than

\(^{204}\) W. Magnuson & J. Carper, supra note 117, at 59.

destroy the housing that poor families require. Profit-making incentives run counter—so far as the maintenance of housing is concerned—to the best interests of the poor. Factors such as municipal property taxes, the capital gains tax, the basis for valuation in condemnation proceedings, and the depreciation allowance must be reviewed in the overall context of slum housing. Legislative changes that will provide an economic incentive for the landlord to provide the kind of housing that the poor have a right to expect is a necessity. Such a task is most difficult, but if legal aid is to provide an effective means of helping large classes of the poor, it must be undertaken.

Finally, there are inherent limitations upon the kind of institutional change that can be accomplished through test cases or legislative reform. The plight of the poor largely results from the absence of political and economic power and social equality. Their disadvantages within the legal system mirror their predicament. Changes in the legal system alone can not accomplish the fundamental reallocation of power that is required if the poor are to be brought into the mainstream of American life. On the other hand, if the poor can achieve economic and political power, it is likely that the legal system will promptly reflect the existence of this power in the manner in which it protects them.

This is not to say that test cases cannot have a substantial effect on increasing the power of the poor by reducing the extent of inequalities in American life. In many areas, however, the impact is more likely to be psychological, by providing proof that the poor as a group can obtain justice, can share power, and require only the exercise of rights available within our system to assert that power. In this sense, the winning of a test case is a catalyst in the process of group organization. The test case may also have a substantial impact upon public opinion in transmitting a sense of injustice to the body politic.

We conclude that the dogmatic insistence that all legal services programs adopt a test case approach is not desirable. Nevertheless, some test cases are clearly desirable. Some will arise without planning. Others should be brought in judiciously selected forums in which there is a reasonable chance of success. In most programs, priority should be given to meeting the needs of the poor who have no place to go for legal services. The advantages and limitations upon the test case approach should be understood, and efforts at legislative reform should be intensified.
Fortunately, there are some problems that will not be as important in the seventies as they have been in the sixties. It is expected that community education programs sponsored by legal aid offices will be explicitly permitted by the new canons of ethics.\textsuperscript{206}

One ethical problem, however, may become more significant as more indigents obtain representation accompanied by a commensurate power in legal aid lawyers to utilize docket delay as a partisan tactical device. The bar and the courts have done very little to stop the filing of sham defenses by insurance companies in personal injury litigation for the purpose of delaying the ultimate settlement of cases. Virtually nothing has been done to require truthfulness in pleading in such fields as antitrust. The law in most jurisdictions makes it unethical for counsel to file a pleading containing allegations that he knows to be unjustified.\textsuperscript{207}

This problem may reach crisis proportions in legal aid cases. Assertion of an issue of fact in an eviction proceeding may entitle a tenant to a jury trial, jamming the docket in courts that traditionally handle thousands of eviction proceedings summarily. It is no more justified to file a sham defense for an indigent than for a corporation or an insurance company.


A lawyer may accept employment that results from participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are operated or sponsored by:

(a) A legal aid office or public defender office:

(i) Operated or sponsored by a law school approved by the American Bar Association.

(ii) Operated or sponsored by a bona fide, non-profit organization.

(iii) Operated or sponsored by a governmental agency.

(iv) Operated, sponsored, or approved by a reputable bar association.

(b) A military legal service office.

(c) A professional association, trade association, labor union, or other bona fide, non-profit organization which, as an incident to its primary activities, furnishes, pays for, or recommends lawyers to its members or beneficiaries.

(d) A lawyer referral service operated, sponsored, or approved by a reputable bar association.

(e) A reputable bar association.


It is likewise no less justified to file a defense on the merits when the attorney has reason to believe that a valid defense exists. The advent of more counsel for defendants in routine cases, which already clog our metropolitan courts, will require the bar and bench to engage in more effective action to avoid the use of sham pleadings for the purpose of tactical advantage.

Suits Against Public Agencies

Presumably we will no longer be faced with the curious notion that although it is permissible for a legal aid lawyer to represent an indigent in a suit against another indigent (or against any other private party), there is something reprehensible in an indigent receiving counsel in litigation involving a public agency. The defeat of the Murphy Amendment hopefully has killed this peculiar concept of equality before the law.

Complementary Methods of Providing Legal Services

In the seventies, it will be necessary to consider alternative complementary techniques of providing legal services. Hopefully, the percentage of our population that is unable to afford a lawyer will decrease. Nevertheless, it is clear today that, like the poor, a good part of the middle class cannot afford a lawyer. It is unreasonable to expect the middle class to use their tax dollars to provide legal aid to the poor when they themselves need similar assistance. The bar must consider the use of more para-legal personnel, the standardization of more transactions, and the acceptance of the concept of group legal services in order to provide lawyers to the middle class.

The Future--A Model Proposal

The preceding sections of this paper have attempted a general evaluation of the existing legal aid system in the United States and the challenges that it is facing. From time to time we have indicated preferences concerning methods for meeting these challenges. In this section, we propose a model system for the administration of legal aid with the recognition that local variations will necessarily be required to deal with the Indian reservations, rural areas, and other specific problems.

We start with the assumption that the provision of legal services requires massive federal funding. The increase in funding will have to be

208 E. Cheatham, A Lawyer When Needed (1963).
substantial. We have suggested the figure of 400 million dollars as a speculative estimate of needs by the end of the decade.

National Level

All federal funding for legal aid should be administered by one department. Which agency administers the national program is less important than the necessity of insuring that (1) the program is independent, and (2) competition between programs sponsored by different agencies is avoided. The federally sponsored legal services program must be independent from community action programs, from the welfare establishment, and—to the extent possible—from political influence at the national, regional, and local level.

There must be strong national leadership without destruction of local control over legal aid projects. The American bar is an institution rooted in the states, in structure and in attitude. There has been a clear tendency in recent years by OEO to diminish local control by threats of refusal to fund or to cut back funding. There is a giant task to be performed, and it can be done only if there is a recognition that a diversity of approaches must be utilized if our goals are to be achieved.

We think that the combination of national leadership and local control can best be achieved by block grants to the states to finance integrated programs of legal services to the poor. To qualify for a block grant a state itself would be required to finance an effective system of representation in criminal cases at all stages. Federal funds would then be available to finance legal services in civil cases.

The federal funding agency should have the authority to place reasonable restrictions upon its grants in order to assure that representation is available in all kinds of civil cases, that designated funds are used for purposes such as law reform and community evaluation, that the state system provides counsel at every level of criminal proceedings, and that records are maintained and funds accounted for in accordance with acceptable procedures. The agency should also have the power to refuse to

---

210 The Economic Opportunity Act provides that “[i]n order to promote local responsibility and initiative, the Director [of OEO] shall not establish binding national priorities on funds authorized by this section, but he shall review each application for financial assistance on its merits.” 42 U.S.C. § 2808(e) (1967).

211 The concept of block grants to the states for financial assistance in providing needed services, supplemented by federally controlled funds for research and demonstration projects, has many counterparts. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, June 19, 1968.
fund judicare proposals where services could be provided more econom-
ically and effectively by a staffed office or a mixed system.

In addition to block grants to the states the agency would have a
reasonable amount of its budget available to provide 100 percent funding
for research, training and demonstration grants in civil and criminal
cases. It would be expected that a substantial part of the test case litiga-
tion and legislative proposals for reform would originate in these special
programs. Law schools would be encouraged by grants to study pervasive
problems of poverty and the legal process. Demonstration programs such
as California Rural Legal Assistance would be relieved of service responsi-
bilities in order to litigate test cases.

State Level

In each state there would be an agency, board, or authority, created
by the state bar or the courts to assume responsibility for developing an
integrated program of legal services for the state. It would evaluate the
needs and performance of local programs and prepare an overall state
budget. It would serve as a spokesman to the state government con-
cerning the needs for representation in criminal matters and report to
the state government on the operation of the state-wide program. It
would administer the federal funds by grants to local communities. In
addition to the board of directors, each state program would have a center
with a director and staff able to provide expertise in specialized areas to
local programs and to serve as an advisory and coordinating body for
research and legislative reform proposals from local programs and the
law schools. The state center would be capable of performing functions
such as these: the preparation of memoranda and drafting of pleadings
and briefs on request; the preparation of specialized material such as
manuals and studies to assist attorneys working in areas of law affecting
the poor; and the provision of a legislative reference and research division
capable of reviewing existing statutory provisions and drafting proposed
legislation with respect to those laws that adversely affect the poor. The
center should also provide a central file for all legal memoranda and briefs
from past cases. Finally it should establish computer and uniform report-
ing facilities through which the entire case intake of the state could be
channeled in such form as to relieve legal services offices of reporting
difficulties currently experienced. In addition to providing up-to-date
information, this system would also provide needed empirical data concern-
ing the poor and thus provide a basis for projecting their future legal needs.

Local Level

We think that legal aid should be administered at the local level by a combined staff attorney-judicare system operated under the supervision of the organized bar. Civil and criminal legal aid should be merged in order to provide an integrated program of legal services for the poor.

The development and supervision of a program for legal services in local communities should be entrusted to a board of trustees composed of lawyers chosen by the local judges or through the normal processes of the state bar. In some communities, it might be desirable to have the poor represented on local boards. In other areas, it might prove more desirable to have advisory committees of the poor in order to get a feedback on whether the services being provided are the kind that they want, and whether they are provided in a manner acceptable to the recipients.

The program should have a staff of attorneys and investigators whose salaries are paid from public funds. No attempt should be made by the staff to represent all indigent defendants. Representation of a substantial percentage of both civil and criminal defendants should be provided by assigned counsel in private practice, who would be compensated by court order or through a judicare system which makes reference to a fixed fee schedule. Staff attorneys should be used in a large number of civil cases where advice and negotiation are required and litigation is unlikely; in criminal cases when immediate representation is needed, such as at preliminary hearings and lineups; in lengthy cases in which appointment of private counsel would constitute an unreasonable imposition; in cases where representation is likely to be a formality, as in mental competency hearings in many jurisdictions; and in a large percentage of routine misdemeanor cases. In addition, staff attorneys would handle some cases that are recognized as test vehicles requiring special expertise and more than usual time in preparation. They would also have the responsibility of community education concerning the rights and responsibilities of the

212 This structure is patterned after the organization of the Legal Aid Agency of the District of Columbia, established by statute, D.C. Code Ann. § 2-2202 (1967), and supplemented by support for private counsel assigned by the court to represent indigents pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1968). In the District of Columbia counsel is provided only in criminal cases by this method.
poor and be responsible for the preparation of proposals for legislative or administrative reforms.

The board would have the duty of allocating cases between the staff attorneys and the private attorneys, of fixing the fees of the private attorneys and the salary scales of staff attorneys, and of appointing the staff lawyers. It would also prepare and present the annual budget to the funding authority.

In small cities, there might be one downtown office, which would house the staff and handle the general administration of the program. In larger cities, there should be a decentralization of offices, which should be located throughout the city in impacted poverty areas. The neighborhood offices should have the principal responsibility for initially processing clients, providing counseling, conducting negotiations with landlords, creditors, and police at the precinct level, and representing clients before administrative offices and boards. In addition, there should be a central office located in proximity to the courthouse, which would provide representation in civil and criminal matters in court, and a competent staff with responsibility for community education and law reform. The central office would also provide logistical assistance to private counsel who undertake indigent cases, by maintaining files of previously prepared memoranda, pleadings, and briefs, and would furnish the attorney with the assistance of staff investigators.

A case beginning in a neighborhood would be transferred either to the downtown trial staff or to a practicing attorney if litigation proved necessary; the neighborhood lawyer would associate himself with the trial counsel. Such a system would provide for the promotion of neighborhood lawyers to the litigation staff or to supervisory positions, and at the same time provide training for young attorneys and employ experienced trial lawyers to represent clients in litigation. It would relieve the practicing bar of the responsibility of interviewing a substantial number of people who do not have claims suitable for litigation, yet utilize its expertise where it can best be used—in the courtroom.

This system proceeds upon the assumption that the practicing bar has a large role to play in legal aid, that its members should be compensated for their efforts, but that they cannot, by themselves, do all that is necessary to be done. A judicare proposal by itself, except in rural areas where there may be no other alternative, is an inefficient and expensive manner of handling cases, and raises substantial problems of how
to evaluate the performance of the system. It is also unlikely that many practicing lawyers would be able to handle lengthy cases aimed at institutional change for the kind of fee that would probably be available. Volunteer services and charitable contributions would be utilized to provide needs that cannot be met by the combined state-federal budget.

In the operation of this combined staff attorney-judicare system, an appropriate role should be found for law students. There is a national movement to permit law students under proper supervision to handle minor court cases, either by rule of court or by statute. A number of progressive states have acted to modify their statutes dealing with the unauthorized practice of law in recognition of both the need for more clinical training if young lawyers are to fulfill the responsibilities placed upon them when they join the bar and the substantial number of cases for which funds are not available to provide experienced counsel in which students can adequately provide representation. There is no danger of encroachment on the private practice of law if such programs are limited in terms of the kinds of cases in which students may appear, and there is no danger to the indigent if there are intelligently administered standards of supervision.

CONCLUSION

The program suggested would require substantial changes by local legal services programs, the bar, state governments, and federal funding agencies. We think that changes are necessary if the poor are to be provided with the best possible legal assistance. Legal aid may not develop along the model we suggest, but its expansion seems inevitable. In its expansion, there must be consideration of the perspectives of the bar, the indigents, and the government if legal services are to be made available throughout the country.

For too long we have been content to allow legal services to play a backstage role; for too long we have permitted dogmatism and friction to preclude the kinds of programs that we need. The seventies may prove to be the decade when the challenges of legal aid are met.

218 In 1966 the Association of American Law Schools approved in principle the promulgation and adoption by rule of court or by statute of provisions permitting senior law students to appear in court under adequate supervision of members of the bar on behalf of indigents or the prosecution in both criminal and civil matters.