Programs to Supplement Law Offices for the Poor

William Pincus

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My thesis is that we must be concerned not only with the quality of professional legal services but also with the distribution of such services to the American public. The distribution of such services to all segments of the public, including the poor, merits the highest priority at this time, particularly in view of the lack of attention it has received. The philosophy and social concern which have motivated me, as well as others, towards the same ends must become more widely shared among judges, lawyers, law teachers and others if the legal profession and the machinery of justice are to be relevant in America. I come to preach more than to lecture. Although the situation has vastly improved since my initial contact with the Ford Foundation nine years ago, we are only on the threshold of a thorough reform of justice in America. This needed reform involves all citizens but particularly the members of the legal profession and the law schools.

When I arrived at the Ford Foundation to work in its Public Affairs program, one of the assignments I received was to work on what was rather vaguely defined as “law.” As a practical matter, the assignment entailed a review of pending applications for funds, mainly for general support of law schools and their faculties and for research projects to be undertaken by individuals. There was little doubt that the funds requested would have supported the projects or schools involved. Yet as I read and pondered, I began to harbor a feeling that something was missing. What was missing from the applications was any tangible evidence of awareness of service — of the obligation to convey a professional service, based on many years of learning, to all segments of the American public, including those who might not be able to afford the ordinary price of legal services.

The implications of extending legal services led to a jumble of interrelated questions. In one way or another, all of them were related to education, a special concern of big philanthropy. No doubt education had become the democratic ladder of ascent and social mobility in the American system. The professional schools of law were parts of this democratic revolution. The way to professional heaven for a poor boy was the editorship of the law review in one of the so-called national or ivy league law schools. If he achieved this status, or one fairly close to it, a position in a Wall Street law firm, a clerkship to a Supreme Court or other high court judge or some other prestigious position became available. But what of the legal problems of the poor boy’s family or other families in the same — or worse — general circumstances? What about the legal and allied problems of indigent criminal defendants? If well-heeled clients or the government could pay the salaries of these honor graduates, would there also be any future for them if some poor person needed their talents and services? Could a professional school which prides itself on the selection of brains and on the excellence of its technical training, whose diploma is bound

* Program Associate, Public Affairs Program, Ford Foundation.
to be worth large fees or prestigious jobs in combination, also concern itself with other matters—such as the legal and social problems of the poor, the availability of legal services, the economic structure of the profession and criminal justice? How far could a professional school become involved in legal and social reform, even if its graduates have a practical monopoly of the legal processes and are consequently crucial to reform? There was practically no clue in the speeches and written materials then available. Such allusions as there were had been made by a few mavericks years before and had been since passed over or were contained in discussions of "professional responsibility," which too often were concerned with a lawyer's responsibility to an individual client and rarely with a lawyer's duty to the public at large.

In my exploration of this matter the questions I raised with law school deans and faculty members fell into two broad categories. One series of questions related to the neglect of criminal law in the law school curriculum. Why was only one course taught, or at most two, and not always as a required course? Second, why were the noncriminal legal problems of the poor and the less affluent neglected in favor of a heavy emphasis on property rights? Perhaps the answers to these questions were not related in the minds of those responding; they are related in the real world. Criminal law has been neglected because no one could make a living representing the ordinary indigent criminal. Moreover, they said there is no "intellectual content" in the problems of this field. Almost without exception, the same kinds of answers were given concerning the neglect of the civil legal problems of the poor. Legal aid was mentioned with a sneer as drudgery—too much concern with marital, landlord and tenant, welfare and installment buying problems.

I was distressed to find that there was no "intellectual" challenge in the legal problems of the poor or the less affluent. For some of us there seemed to be real intellectual challenge in legal problems which stemmed from the need for social change and reform—by the problem of how everyone could be adequately represented in what purported to be an adversary system. I was challenged by the need to change the rules—if they are so unfair that one party to the adversary proceeding is beaten before he starts.

Another aspect of the problem was the need for the future members of a practicing profession to get out of the classroom, to learn to practice with real persons and to experience some of the problems and situations not presented in the law school curriculum, but in which the law and lawyers are involved whether they like it or not—police stations, prisons, prosecutors' offices, correctional institutions, magistrates' courts, marriage counseling agencies, psychiatric wards, etc. There was additional resistance to this idea—the kind that resembles union rules designed to freeze job rights and protect promotional opportunities. Most law schools did not in fact have intellectual pretensions. Regional and local in character, they turned out journeymen lawyers who could pass the bar examination and serve the existing structure of the profession. The relatively few schools which thought of themselves as national could not find room for any expansion of the curriculum in this direction. The premium was on proliferation of highly specialized courses, dependent on the individual professor's
development of his expertise, especially as evidenced through research and publication. Whatever the challenges of the outside world to the law, the best faculties were assuming the image of their university colleagues in other disciplines and in some quarters considering the addition of a fourth year to the curriculum to permit more of this development. Only a few cantankerous souls in the older generation and some foolhardy younger professors had any inclination to come to grips with the difficult problems of the law, those involving reform for greater justice and equality.

The practicing bar was no more aware of the need for change. Only a few leaders of the bar and bench, who proved to be indispensable in the programs which followed, recognized the challenges which the law faced. Literally a handful in each community, these men were active year after year on behalf of legal reform in such areas as legal aid, criminal justice, judicial selection and the international rule of law. Because of their position, temperament and experience, they were bolder in tackling practical and difficult problems. Knowing of the general unwillingness of the schools to change their educational curricula, I turned to these bar leaders who had demonstrated a dedication and capacity for moving the profession ahead. Many of them had long been associated with the organized legal aid movement and were aware of the central problem of bringing better legal services to the less affluent.

To implement these ideas, the late Emory Brownell, then Executive Director of the National Legal Aid Association, and I worked out the outlines of what subsequently became the program of the National Council on Legal Clinics. Funded by the Ford Foundation and conscientiously and vigorously administered by a combination of farseeing individuals from the law schools and the practicing world, the Council's program began to work at eliminating the estrangement between the world of legal education and the social problems confronting the law. Now this program has taken students and professors out of the classroom into the clinics of the real world, primarily through internships with various individuals and institutions which are part of the administration of justice. The funding of this program by the Ford Foundation marked a departure from the traditional general and unquestioning support of higher education. Along with others to come, it manifested an effort to reform an important area of higher education to complement needed social changes.

The next move was more direct intervention in the structure of legal services. Legal education was only one factor in the situation. The society around it needed a reorientation—a reawakening to the fact that the adversary system requires adequately compensated, competent counsel to represent each party and that without this there cannot be administration of justice in the true sense of the term. The gaps in the distribution of legal services were so large that the problem was where to start. This involved a matter of strategy in appealing to the sense and the sensibilities of people whose support was immediately required and, ultimately, of the general public. In planning the strategy, differences of philosophy within the Ford Foundation had to be borne in mind. Certain influential voices gave priority to relatively noncontroversial programs, shying away from responsibility for directly suggesting social reform.
In this situation the provision of legal services for indigents in criminal cases suggested itself as the starting point of a major effort to reform legal education and the machinery of justice—and ultimately to restore balance in society by giving justice a higher place in the current scale of social values. First, everyone felt involved to some extent in the plight of the indigent wretch, confronted by the huge apparatus of the state, mobilized to prosecute and judge him. Psychologically it had social “sex appeal.” Second, the absence of legal services in criminal cases involving indigents was glaring; more than half of all criminal defendants were unable to afford counsel. Thus, this area highlighted the need of the lower classes for legal services. Third, the public was directly involved in this area. Citizens were the prosecutors in proceedings titled “The People v. John Doe,” and they paid the bills for the machinery of justice. Fourth, the need for reform in criminal justice and legal services coincided with and was highlighted by the spreading revolt by Negroes in behalf of their civil rights. Making up a disproportionate number of the poor in America, Negroes in their militancy underscored the plight of the poor generally. They heightened the anxiety about the condition of the poor, in which inequality before the law played an important role. Fifth, certain leaders of the bar had for years been struggling with these problems, their efforts centering in the American Bar Association and the National Legal Aid and Defender Association. They stood ready to do more, as did a few legal educators. Sixth, a few states had begun to recognize their responsibilities. At least one, California, had made fairly extensive improvements in providing public defenders. A few others, notably Illinois, Massachusetts and Connecticut, had made at least fainthearted moves in the right direction.

The years 1960 and 1961 were years of preparatory work both inside and outside the Ford Foundation. The scene in America was bleak despite the new interest in Washington under the Kennedy Administration. This interest resulted in the work of the Attorney General’s Committee on Poverty and the Administration of Federal Criminal Justice, the creation of the Office of Criminal Justice and the subsequent enactment of the Criminal Justice Act.1 The outlook in too many American communities, however, remained primitive, even barbaric, in its disregard of social values. In one great American city a defender system supported by public funds had just raised the annual salaries for beginning lawyers from 2,500 to 3,500 dollars—hardly putting them on the same footing as the secretarial help. Those directing the scheme explained that they wished to retain young lawyers for no more than six months to a year. The brief experience gave them invaluable trial practice and, consequently, made them desirable recruits for law firms with much more lucrative civil practices. In other words, they shed their inexperience by practicing on the poor in criminal cases.

I found great moral sustenance at this critical juncture from foreign sources. England on the civil side and Scandinavia on the criminal side were examples of free democratic societies where the provision of legal services had been established as a matter of right, not as a matter of charity. These examples and

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the cooperation and support of interested persons eventually resulted in the approval by the Ford Foundation Trustees in December, 1962, of a substantial appropriation to the National Legal Aid and Defender Association to demonstrate the need for adequate defender services. Additional financial support was granted to the American Bar Foundation for a state-by-state audit of the inadequacy of existing legal services for indigent defendants in criminal cases. Three months later, the announcement of the initial Ford Foundation appropriation was followed within a week by the landmark opinion of the Supreme Court in *Gideon v. Wainwright*. Together with the work of the Attorney General’s Committee, these changes marked a shift of public policy—but not necessarily public sentiment. Important as it was, however, this breakthrough came only in the criminal area. Even so, it caught American society flat-footed. Because of the neglect of the area, it simply was not ready—and still is not—to meet the requirements of equal justice imposed by *Gideon*.

What about the civil side of the law so far as legal services were concerned? In contrast to the criminal side, little or nothing had happened during this same period of time, despite the fact that the poor were particularly disadvantaged in this area. Some of us had been aware of this disparity all along. Awareness and effective action, however, are often far apart. We moved to correct this disparity in connection with other developments in which the Ford Foundation had become involved.

During this same period some of my colleagues in the Foundation had been engaged in another far-reaching development. Together with progressive educators and persons in other fields of social welfare, they planned and developed a coordinated, grassroots attack in various communities on the causes of poverty and the social disabilities and problems of the poor. Focusing on the hard-core areas of central cities, largely inhabited by Negroes and other currently disadvantaged minorities, their work culminated in extremely important programs, the “gray areas” programs, which showed the way for the current Community Action Program of the Office of Economic Opportunity (OEO). In brief, in a few cities, a whole range of social services was strengthened, mobilized and focused anew on the problems of the poor in the neighborhoods where they lived.

Not one of these programs, however, initially had any provision for legal services. The poor, even though enmeshed in legal problems with government agencies, landlords and creditors, did not understand the utility of legal services. Nor did the planners of these programs, mainly educators and social workers, visualize legal services as a useful, let alone necessary social service. I did, and I entered into conversations with Mr. Mitchell Sviridoff, director of Community Progress, Inc., the private corporation funded by the Ford Foundation to administer the “gray areas” program in New Haven, Connecticut. With a promise of extra funds from the appropriation for defender services, Mr. Sviridoff created the neighborhood law office which became a prototype for the Legal Services Program of the OEO.

With the government’s intervention through the Criminal Justice Act and

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subsequently through the Economic Opportunity Act, we come substantially to where we are now. The Criminal Justice Act promises to supply lawyers to indigents in federal courts in criminal cases. The states are enjoined to do likewise under the Gideon ruling. The OEO makes its grants to local agencies to provide legal services for the poor largely in noncriminal matters. Legal aid, supported by charity and sometimes supplemented by public grants, also is traditionally centered in the problems of the poor.

The great need today is to move away from an exclusive concern with the poor and to confront the fact that everyone, including the poor, requires legal services. This has radical implications for legal education, the legal profession, the machinery of justice, the social conscience of America and, most important, for the public finances which are already strained to meet the growing pressure for more and better social services. A focus on the poor is a good starting point in expanding legal services since their needs are most immediate and most urgent. I focused on the poor in my efforts because of the urgency and obvious social justification inherent in such an approach. Now our concern about legal services must be broad enough to include those not so poor — and ultimately everybody. If this is not done, even the services for the poor will deteriorate. No system built to serve only the poor can sustain the public support necessary to guarantee quality service. "Separate but equal" has been shown to be an impossible approach. In backing a neighborhood law office and organized defender services, the Foundation did not expect to freeze this particular pattern of legal services on America. Who is "poor" and thereby deserves special assistance? Only somebody who is so impoverished as to be an object of pity rather than concern? This approach lands us right back in a charity context, removing representation from the category of "right" which is so central to our system of justice, human dignity and freedom. Without a feeling of right, there is no sound psychological basis for individual self-affirmation, self-advancement or initiative.

The central concept is the one of right. My thesis is that every individual has a right to legal services as an inherent ingredient of his legal rights and as an inherent part of the process which determines his correlative legal duties. If I could, I would retitle my assigned subject as "programs needed to replace law offices for the poor — not merely to supplement them." Legal services for the poor need to be integrated into a total system of legal services and administration of justice in both criminal and civil matters. The needs for legal service by those who need a subsidy in whole or in part should be met through a system which involves a continual flow of young zealous persons, serves legal education and offers high quality legal service. A subsidized legal service should be wedded to legal education and should involve practicing members of the profession who serve clients not in need of subsidy.

What might be done? Each of the states, acting as the administrative units, should enact a statute recognizing legal services in civil and criminal matters as an indispensable part of the administration of justice. The statute should provide a system of subsidy, consisting partly of grants and partly of mandated local contri-

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butions to be met by local taxes. In present circumstances legal services might be fully subsidized for a family of four with an annual income of no more than $5,000. The same family with an annual income between $5,000 and $7,500 might be expected to contribute part of the cost of legal services on a sliding scale adjusted to income. The statute might also set forth other standards of eligibility.

A scheme of subsidized legal services under a state statute might include the following features: A Council on Legal Services should be created in one or more counties as the local governing body for the scheme on legal services. In addition to promulgating rules and regulations and hearing appeals from the local administrator, the Council would approve the annual budget for local legal services. The funds for such a budget would then be mandatorily included in the county or municipal general governmental budget, just as court support is now included by state law in some local budgets. Part of the cost of the local budget would then be reimbursed by state grant. Since legal services are a necessary social service of broad public concern, the local council should have a general public membership, like a school or hospital board, with members of the legal profession in the minority on the council. Such council should have a full-time administrator, with additional staff as necessary, depending on the size of the community to be served. The administrator might also have an advisory committee of lawyers.

The local councils would function differently in areas within a fifty-mile radius of a law school than in other areas. In the areas away from law schools, a council would concern itself only with summertime participation by law students, providing stipends and expenses for them. Where law schools are nearby, a council would be concerned with direct law school operation of certain legal service facilities and with student and faculty participation on a year-round basis.

In a non-law school area, the council and administrator would be responsible for setting and issuing guidelines to the profession and to the public. An individual aware of his legal problem could go to any individual practitioner, to lawyer referral, or to a legal aid office. If he is unaware of any legal problem, he might initially contact a social agency, a union office, etc. However he becomes aware of the need for legal services, any individual falling within the eligibility range would be entitled to wholly or partially subsidized service. The administrator would advise the attorney, private or in legal aid, of his determination of eligibility and subsidy. The attorney would then proceed to render his service, collecting his fee in whole or in part from the council, with the remainder paid by the client. Lawyer referral would play an active role in such a scheme. Voluntary organizations such as unions, churches or lodges might also provide reference services. Voluntary organizations outside legal aid organizations should also be able to provide legal services to their members or supplement the services subsidized under the state plan. A trade union or church group, for instance, might arrange for legal services for its members, paying for services not subsidized under the state plan. It might do this through staff or contract attorneys or through contract arrangements with a bar association's lawyer referral.

Where a program is operating within a fifty-mile radius of a law school,
the plan should include these same general features as well as direct involvement of the law school. In such areas the law schools themselves should take over responsibility for operation of legal aid and neighborhood law offices, with faculty-practitioners supervising the work of students in the law offices. Work in these offices should be a regular requirement of a law school curriculum and a statutory requirement for admission to the bar. Funds for law school participation should come from a special part of the budget for the overall legal services plan. Many of the faculty-practitioners would be young attorneys, serving for a short period before entering private practice.

Hopefully, a good part of this legal services work may eventually be shifted to individual practitioners at the individual client's option. A difficult but necessary task would be the assignment of students to work with private practitioners who take subsidized cases. On the criminal side, student and faculty participation should be extended to public defender and prosecutor offices, police stations and prisons. Additional types of work might also qualify as service in a legal service plan. For evening students, who usually hold full-time jobs, the summers should be utilized as much as possible. Such students should spend at least two summers working on approved assignments in a legal services plan with a reasonable stipend.

The scheme I have suggested involves a radical change in American legal education as well as in other institutions and their procedures. In preparing future members of an important profession, law schools must have concern for more than pure intellectual capacity. The law schools will have an opportunity to use faculty and student participation in legal services plans to assess the student as a total person in professional situations. New teaching techniques will have to be developed. Perhaps new categories of law teachers with special aptitudes for supervising clinical or field operations will have to be recognized.

For the student, a properly supervised experience in a legal services plan can mean a higher appreciation of legal education and education in general. After four years of college and several years of professional school the mature student wonders what the connection is between more and more school and the actual practice of a profession. Too often today the student considers the last years of his professional education as a necessary evil, a formal prerequisite for admission to his profession. Law school participation in this legal services scheme can help to overcome some of these deficiencies.

The most important aspect of a subsidized legal services plan is that it must be attached to the machinery which serves all of society. Only in this way will it continue to have high standards and public support. Group legal services should grow in strength with the adoption of legal services plans. Unions, lodges, churches and other voluntary associations can bring important help to legal services plans. First, they can serve as a source of screening and referring cases for initial or additional legal services. Second, they can supplement publicly subsidized legal services with services paid for by the association, through arrangements with members of the bar or through staff attorneys. Third, such associations can allocate tasks in legal controversies between professionals and
nonprofessionals to save the time of lawyers. Fourth, voluntary associations can bring lawyers into closer relations with groups of the population.

A trade union, for example, may have neighborhood offices to perform a variety of services for its members. The staff in such offices consists of union members who volunteer their services in the evenings as well as semiretired members who are available during the day. The union member bringing a problem to the office may not regard it as a legal problem at the beginning, unless he has already been served with legal process. More likely than not, he knows only that he has a housing problem, a controversy with his landlord. His first contact is with a fellow union member who, through continued experience, has become an expert on housing problems. In the vast majority of cases, he will be the only person the complainant will have to deal with. Using his own closeness to the members and his ability to talk their language, the nonprofessional becomes adept at eliciting facts and establishing a relationship of confidence. Coming to their own union office in itself predisposes union members to have trust and confidence in the process. The staff members also gain enough knowledge of procedure, agencies and law to give reliable advice and to carry a case up to the point of settlement or to the kind of frustration which may require the talents of a lawyer.

On a pragmatic basis, this process allocates work between nonprofessionals and professionals, producing more effective utilization of each. Although this system may be anathema to some in the legal profession, from a social point of view it is immediately desirable. In the long range, the legal profession will benefit by having more matters brought to its attention which in fact require professional talent. The entire level of law practice should be lifted as a consequence.

Law offices operated by law schools or legal aid societies should also adjust their procedures to approximate those of a union neighborhood office. Students and individuals with nonlegal training should be utilized for the initial screening and handling of cases, thus conserving the lawyer’s and student’s time for strictly legal matters. A neighborhood office of a voluntary association should be free to refer cases to a bar association, lawyer referral service, staff attorneys, individual lawyers or a combination of these. Such arrangements would comprehend more than just the publicly subsidized portion of legal services. The voluntary association would sooner or later decide to supplement the subsidy payment for their members by either paying for or providing legal services not covered for certain income ranges.

In these circumstances there would be tremendous opportunities for revitalized lawyer referral services in bar associations. Lawyer referral must become more than the present lip-service promise that the local bar association will refer a member of the public to a qualified lawyer upon request. Properly viewed, lawyer referral is at the crossroads where all the developments in legal services should meet. Some forward-looking leaders of the bar have recognized this and are beginning to do something about it.

What is needed is an active vigorous lawyer referral system, concerned with bringing legal services to the greatest possible number of people. It must
view all reasonable developments to extend legal services as a gain for the public and for the profession, bringing as many practicing lawyers as possible into affiliation with it. For example, an alert progressive lawyer referral service should capitalize on the interest of groups such as unions in legal services for their members. Referral arrangements with these groups would involve such problems as maximum reasonable fees, rather than minimum fees. Voluntary groups, especially if they are to supplement public subsidies, will be very much concerned with the cost of legal services. Yet sensible arrangements should provide a financial base for the law practice which it has never enjoyed in the United States, resulting in higher standards in the legal profession.

Lawyer referral services have to extend across the board, and their revitalization can start now. There are already groups with which arrangements can be made — for instance, legal aid. Whenever a legal aid program cannot service an individual because of income limitations, lawyer referral should guarantee adequate service to him. This necessitates a basic change in the nature of lawyer referral, from a service for the profession to a service for the public as well as the profession. It must be financed and staffed so as to comprise one of the major functions of the bar in each locality. It may also have to take on some unpleasant tasks, such as the follow-up and evaluation of the results of the service.

The earlier part of this article gave attention to some of the problems of reform in legal education. There are other significant problems which sociologists, economists and others should be studying and writing about to educate the public and the profession and to lay the foundation for the details of new public policy. Only a few sociologists have begun to study the structure of the legal profession and its relation to the provision of legal services. Already their writings underscore an accumulation of experience with the extension of legal services for the poor. The legal profession is not a monolith — the interests of the leaders of the bar in each community are not necessarily coincidental with those of other members of the profession. Negligence and courthouse lawyers live in a world apart from corporation lawyers. The lawyer in the large law firm has an economic security and a training never achieved by his colleagues in solo practice or in smaller firms. Living on contingent fees is quite different from having a guaranteed income plus participation in a partnership.

These are basic and important matters. Lack of concern for legal services has meant a concomitant splintering of the bar into very different segments, each of which caters to diverse elements in the population. Thus, while top Washington law firms lend leadership to the extension of legal services, several Negro lawyers challenge in court what they view as a threat to their livelihood in the poorer areas. A related case study could be written about local bar opposition in New Haven, Connecticut, to the extension of neighborhood legal services, an opposition which had to be overcome at the state bar level. We must understand and face up to all of these factors in framing intelligent public policies.

Even members of the judiciary have had reservations about the effects of extending legal services. Raised in the narrow confines of existing tradition and
practice in the legal profession, many judges do not see the need for changes. More important, they are fearful of the effects of change on their fixed ways of operating. Some have already been overruled through appeals taken by zealous young lawyers. This has only confirmed their vague fears and made the threat to the status quo a reality. Believing that they know what is best for the public without outside interference and that the professional interest is the public interest, judges are often prone to substitute the welfare of their former colleagues at the bar for the public interest. The current concern for more legal services and equal justice has shaken this mode of thinking, and greater changes yet to come will have still greater effects on the judicial machinery. Here too we must understand and face up to the facts. To the honor of the legal profession, the freedom of the practitioner has often involved taking a stand unpopular with the judge as well as with the public.

Perhaps the greatest area in need of radical reform is the public budget, which incorporates our social values in concrete terms. Is the American public ready to pay the price in tax dollars for more legal services and greater justice? There will be a struggle of major proportions. Beset by demands for better social services, the taxpayer is becoming reluctant. Sputnik and its aftermath have focused the public budgets on better education. Similarly, the civil rights revolution and other developments have upped budgets for better housing, health services, transportation and other social services. These items have increased a budget already burdened with large appropriations for foreign aid and national defense.

There seems to be no limit to the need for improving American society—in the face of the fact that by and large we have a society that has done more for more persons than has any other society. Yet the better the society, the more intolerable the faces of poverty. Now we must add another category to the public budget to provide for that most ancient of man's quests—justice. There will be opposition; there will be faint hearts. But I believe it will be done. America has never failed.