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This is an article which all lawyers should read. Its immediate concern is with legal services for the poor, but its thrust goes far beyond the immediate problem; indeed, its true emphasis concerns a fundamental evaluation of the legal profession and its place in our society. To state that it is thought-provoking is to give it little credit. The author is a man whose experience in the field spans almost half a century. The reader may disagree with the conclusions reached, but he must pay deference to the sincerity and sagacity of the views which it expresses.

THIS ARTICLE is concerned not with two, but with three agencies and their interrelationship: "the legal profession," "the legal aid movement," and "the federal government" in its "war on poverty" program.

The significance of the relationship is more evident if we consider "the legal profession" not in the abstract, but as a developing, growing, expanding organism. It renders a spectrum of services to the public, extending from what some people seem to regard as trivia (pedestrian client service) to international activities in which professional statesmanship is required. Similarly, the relationship is more relevant if we think of "the legal aid movement" not merely as an agency which tells a woman how frequently the law allows her

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husband to beat her, but as a factor of tremendous importance in the administration of justice according to law. The legal aid lawyer, after all, has his finger on a very large segment of the public pulse and is knowledgeable in matters of law relating to the poor. Finally, the relationship is emphasized if we think of "the federal government" as a critic, perhaps a rather severe critic. Once the relationship between these three factors is determined, the lesson of this article can be concisely expressed in the words of an old saying: "Two's company—three's a crowd."

I

THE LEGAL PROFESSION

Let us now consider some features of the legal profession.¹ It—or she if you wish—has progressed from a period of infancy, through a stage of adolescence, and has now arrived at what may be described as professional maturity. This growing progress has been marked by ever-increasing specialization, but there is no need to quip that the lawyer is a man who knows constantly more and more about less and less. Rather we should remember that the concept of a problem the solution of which requires the services of a lawyer—a problem consisting of strictly legal elements—is something which appears in the later stages of civilization.

In the early stages, there was merely a need for "help," and the people who did the "helping" were the undifferentiated forerunners of the modern lawyer.² Someone was in trouble and these "helpers" were available. Their motivation might have been friendship; it might also have been a reaction to religious indoctrination.³

During the period of adolescence of the legal profession,⁴ the undifferentiated helpers divided into three groups—the clergy, the

¹ The best account of the development of the professions is contained in CARR-SAUNDERS & WILSON, *THE PROFESSIONS* (1933), which treats lawyers at pp. 7-58. A more recent book, *THE PROFESSIONS IN AMERICA* (Lynn & Daedalus eds. 1965), gives a cross-section of professional growth as of today. See also BLAUSTEIN & PORTER, *THE AMERICAN LAWYER* (1954), a product of the ABA's Survey of the Legal Profession during the 1950's.

² One of the most interesting contemporary accounts of this early lawyer-helper is contained in the Icelandic story of "The Saga of Burnt Njál." See *NJÁL'S SAGA* (Bayer-schmidt & Hollander transl. 1955). See also JENKS, *A SHORT HISTORY OF ENGLISH LAW* 200-01 (4th ed. 1928), for a description of the "champion," a professional pugilist who could be hired for trial by battle.

³ For religious admonitions see, e.g., *Psalms* 82.

⁴ The development in Greece is reported in 2 BONNER & SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE* ch. 2 (1938), and in Rome in Chroust, *The Legal Profession in Ancient Republican Rome*, 30 *NOTRE DAME LAW.* 97 (1954).

physicians and the lawyers—and the problems which each group handled were distinguishable from the special area in which the other professions engaged. The lawyer now had acquired a distinctive name. Lawyers spent more and more of their efforts in this type of specialized helping. In time it was possible to recognize them as something more than individuals—as a “class.” At this early stage their motivation may still have been religious, but in many instances, it had become economic. Lawyers made their living practicing law. Even further, they used their skills to advance themselves into the political arena.

Finally, the class matured into a true profession.⁵ It was no longer an amorphous class. It had basic organization. Its original skills of shrewdness had been supplemented by the acquisition of a body of learning—the law. The public now expected that lawyers would extend and improve this body of law. In the process of doing so, lawyers became a *learned* profession, with traditions, inhibitions, and increased self-consciousness. And now the motivation made another shift. The need to make a living remained with all its implications of self-interest. But there was, and is today, an increasing realization: unless this self-interest is well balanced by a spirit of public service, the profession may be supplanted by some other form of organization which “the man in the street” thinks will serve him better.

Those who have attempted the difficult task of defining a profession generally agree upon three basic characteristics: organization, the pursuit of a body of learning, and a spirit of public service.⁶ For our purposes, this definition is all very well as far as it goes—but it does not go far enough. There is, at least, one other essential element—exclusiveness—with all that the word implies. The emergence of this fourth feature is due in some measure to the increasing process of specialization, of knowing more and more about

⁵ There are several dates which may be selected as indicating the change from “class” to “profession” in the United States. If we give attention primarily to a body of law, the advent of persons like Judge Joseph H. Story and James Kent would seem appropriate. See HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 25-26, 40-50 (1953). We might choose 1878, the occasion of the formation of the American Bar Association. See 1 A.B.A. REP. 21 (1878). Or we might urge that 1908 is the proper date because in that year the first set of Canons of Professional Ethics was adopted by the ABA. See 33 A.B.A. REP. 57-86 (1908).

⁶ See, e.g., POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 4-10 (1953). Further definitions are collected in *ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON THE LEGAL PROFESSION* 63-77 (1962).

less and less. But it is also attributable to the increased demands which are made upon the members of the profession by the public. Lawyers, as a group, must know more and more about more and more. Exclusiveness does not mean that he must be permitted to work in some ivory tower. But it does mean that if he is subjected to the competition of the market place, he will be so busy defending himself that he may not give adequate attention to the problems which his clients bring him for solution. An independent, exclusive bar has proven to be not only an effective professional group but one which fits neatly into the traditional concepts of a democratic state.⁷

What claim does the lawyer have to an exclusive field of activity? His claim is supported both by force and purchase. It is supported by force because lawyers discovered their field; they colonized it, made valuable improvements, held it by adverse possession. In other words, they did to it what would be expected of a squatter on real property, who in the course of time finds his claims ripening into a sound legal title. The lawyer's claim is supported by purchase because lawyers have bought their exclusiveness, by the quality and quantity of their service to the public. If the quality in each generation is superior to what the client can obtain elsewhere in the open market, then he will seek professional rather than lay aid in the great majority of cases. But this position lasts only for the current generation. Each new generation must learn the value of the lawyer for itself. Hence each generation of lawyers must expect to give a better account of itself than did its predecessors. A mere negative attitude toward public demands will not result in this continuing purchase. The bar must be positive, creative, resourceful, ready at all times to demonstrate that its services are better than those of the competition. And so it seems to have been from the time when the memory of man runneth not to the contrary.

Exclusiveness immediately invites trespassers to try their luck. To the competitor, the grass looks always greener on the other side of the professional fence. The lawyer, proceeding in the normal fashion of a fee simple owner, has constructed that fence and has turned back the intruders by force. In this country, there have been two large-scale attempts at invasion. Of course there are

⁷ For a collection of material on the obligation of the lawyer to the public, see ASSOCIATION OF AMERICAN LAW SCHOOLS, *SELECTED READINGS ON THE LEGAL PROFESSION* 407 (1962).

constantly recurring instances of individuals who fancy their skill in drawing wills, who try cases in court, and who otherwise poach on the preserves. But these isolated occasions do not cause much concern. Generally the results are disastrous and become, in effect, exhibit-number-one when the profession tells the layman, "Come to me and not to my competitor." But these two large-scale affairs were something different.

In the 1820's, a philosophy swept the country. It was known as Jacksonian Democracy.⁸ It had many excellent ideas and much of the impact it made on existing institutions has remained. But when it took the position that professions were aristocratic, that exclusiveness was incompatible with democracy, it did more harm than good. Bar associations seem to have melted away before this tide of public enthusiasm. Admission to the bar became not much more than a determination that the applicant had good moral character. Law schools were barely emerging but their development was postponed.⁹ If specialization in legal matters had not been a trend, the impact of Jacksonian Democracy on the courts and the profession might have been permanent. The threat was eventually overcome, but it took several generations before the leaders of the bar could rally. Gradually law schools were brought into being and improved their curricula. Gradually, boards of bar examiners were set up and began raising standards. Gradually, bar associations were organized, first for purposes of social intercourse, and later to represent the profession in its contacts with the public.¹⁰ The story is inspiring particularly when one recalls how hard the proponents of improvement had to work and the many setbacks which they experienced.

The second group intrusion into the exclusive legal field occurred in connection with the depression of 1929. Probably the incidence of laymen doing lawyers' work had been increasing long before this time, but at least this was the time when the profession began to take official notice of it. Here the invasion was by various organized businesses.¹¹ Banks drew wills. Realtors searched titles. Justices

⁸ See generally POUND, *op. cit. supra* note 6, at ch. 8.

⁹ See HARNO, LEGAL EDUCATION IN THE UNITED STATES 39-40 (1953).

¹⁰ See POUND, *op. cit. supra* note 6, at 242-43, 249.

¹¹ The Unauthorized Practice News, published annually since 1934 by the ABA's Committee on Unauthorized Practice, gives a blow by blow description of this battle. For a general treatment of the history, see vom Baur, *An Historical Sketch of the Unauthorized Practice of Law*, reprinted in Unauthorized Practice News, Fall 1958, p. 1.

of the peace practiced law. Insurance adjusters made a good thing of it. Then the profession decided that it needed a better fence—a legal fence—around its exclusive field. The fence was begun by new or amended legislation which defined the practice of law and imposed penalties on trespassers.¹² The courts cooperated¹³ and in due course the worst of the invasion was turned back. The lay competitors complained that this was but another indication of self-interest on the part of the lawyers. The latter, however, stoutly maintained that their motivation was to protect unsuspecting clients from being exploited by inadequately trained persons who were not members of the bar. Probably neither group convinced the other. But the fence is there and the reports of appellate decisions record a sizeable number of penalties inflicted on over-bold laymen.

There was a brighter side to this conflict. The American Bar Association appointed a series of committees which met with similar committees from the banks, the realtors, the insurance companies, the accountants and the like and drew up declarations of principles,¹⁴ thus delineating a boundary to show how far the lay agency could go without trespass. The best part of the agreements was that each group was expected to stay on its own side of the line. So this second invasion was dealt with realistically and the exclusiveness of the lawyers' professional field was maintained.

We have illustrated how the lawyer has held his field by force of adverse possession. Let us consider a bit further his claim that he has purchased it. We should not expect to start counting cash payments in the transaction, but its equivalent is present in the form of benefits and obligations. The most obvious benefit to the lawyer is that he is assured some degree of quiet in his legitimate efforts to make a living.

In an economic sense there are three groups of clients. Mr. Gotrocks can retain a lawyer full time and pay him fees which fully compensate for the time, effort, and skill contributed. The transaction with Mr. Gotrocks comes out even on both sides. Mr. John Q.

¹² *E.g.*, N.C. GEN. STAT. § 84-4 (1965) (enacted by N.C. Pub. Laws 1931, ch. 157, § 1); PA. STAT. ANN. tit. 17, § 1610 (1962) (enacted by Pa. Laws 1935, No. 271); R.I. GEN. LAWS ANN. §§ 11-27-10 to -11 (1956) (enacted by R.I. Acts & Resolves, Jan. 1935, ch. 2190).

¹³ *E.g.*, State *ex rel.* Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936); Walker v. Kahn, 31 Pa. D. & C. 620 (1938); Creditors' Serv. Corp. v. Cummings, 57 R.I. 291, 190 Atl. 2 (1937).

¹⁴ A statement of these principles is published annually by the ABA. For the latest republishing, see 89 A.B.A. REP. app. 85-102 (1964).

Public¹⁵ is a middle-income man. He cannot pay full fees. He may pay twenty-five dollars for a piece of legal work worth one hundred dollars. He may pay one hundred dollars after the lawyer has expended one thousand dollars worth of effort. Obviously, the lawyer comes out on the short end when dealing with Mr. Public. A single litigation may sweep away his entire life's savings.

But matters are even less financially promising when we come to the third class of clients. These are presently represented by Mr. Joe Doakes, who does not have a penny in his pocket, but who nevertheless does have a pressing legal problem.¹⁶ If the lawyer spent his full professional time helping Mr. Doakes and others of his economic class, the lawyer would soon be in a poorer economic situation than his clients.

If the lawyer were free to pick and choose, and if he had no interest beyond self-interest, we might well find that Mr. Public was served only indifferently and Mr. Doakes not at all. But there is an obligation resting on the lawyer with respect to Public and Doakes. This obligation perhaps rests not on the individual lawyer by himself, but upon lawyers as a class. It is in discharging this obligation that the lawyer pays, in kind, for the right to occupy his exclusive field.

This obligation was a long time in formation in the traditions of Anglo-American law. Its presently familiar formula is "the equal protection of the law." It is to be found in the fourteenth amendment of the federal constitution and in many state bills of rights.¹⁷

When a similar phrase was used in the fortieth chapter of Magna Carta, it probably referred not to *everybody*, but only to the rebellious barons who forced King John's hand. But today it is used in a democratic setting, and it does mean what it says: *everybody*. Mr. Gotrocks, Mr. Public and by no means least, Mr. Doakes.

Constitutional promises do not implement themselves. But since

¹⁵ The plight of the middle-income person in obtaining legal services is the subject of study by the ABA's Committee on Lawyers' Reference Service. See 51 A.B.A.J. 393, 398-99 (1965).

¹⁶ Legal services for the poor have been the subject of great concern in recent legal literature. For example, see the following symposia: *The Availability of Legal Services*, 51 A.B.A.J. 1064 (1965); *The Availability of Counsel and Group Legal Services: A Symposium*, 12 U.C.L.A.L. REV. 279 (1965); *Legal Services for the Poor*, 49 Mass. L.Q. 293 (1964).

¹⁷ *E.g.*, PA. CONST. art. 1, § 11 (1874): "All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law and right and justice administered without sale, denial or delay."

there is a legal profession and since that profession not only claims but is paying for exclusiveness, it is clear that no one can get the equal protection of the law unless he has a lawyer.¹⁸ If we treat Mr. Public with part time concern and if we shrug off Mr. Doakes completely, it is quite clear that, by and large, the constitutional promise will be nothing more than a high sounding phrase.

But if the lawyers as a group—the organized bar—do set up and maintain machinery by which Mr. Public and Mr. Doakes receive the equivalent of what Mr. Gotrocks purchases, then, indeed, the profession has purchased a right to exclusiveness.

II

THE LEGAL AID MOVEMENT

The legal aid movement is the name given to the efforts during the past century in this country to come up with some practicable device for giving Mr. Doakes the equal protection of the law.¹⁹ It is only fair to say that in the development of legal aid, the word "equal" as used in the phrase "equal protection," is perhaps not entirely accurate. When Mr. Gotrocks gets into trouble with the criminal law, he may expect a million dollar defense. So can unpopular persons whose individual political status has a highly dramatic color.²⁰ The typical Mr. Doakes is not dramatic. His legal problems tend toward the routine. But when he runs afoul of the criminal law, something less than a million dollars is expended in his behalf. Mr. Gotrocks may have trouble with his wife. Divorce and substantial property settlement are quietly arranged, and each goes a separate way. Mr. Doakes also has trouble with his wife; but frequently there is no property settlement. Not infrequently, there is not even enough money to pay for a divorce. Mr. Doakes unobtrusively disappears, and it is not thought worthwhile to try to bring him back under court order to support his children. Presently, space is lacking to consider the analogous plight of Mr. John Q. Public. But we shall be justified in explaining briefly the development of the ma-

¹⁸ Protection is constitutionally afforded to criminal defendants, of course, by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁹ For discussions of legal aid work, see generally BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951); R. SMITH, *JUSTICE AND THE POOR* (1919); SMITH & BRADWAY, *THE GROWTH OF LEGAL AID WORK IN THE UNITED STATES* (U.S. Bureau of Labor Statistics, Bull. No. 398, 1926); *Legal Aid Work*, *Annals*, March 1926.

²⁰ See generally TREBACH, *THE RATIONING OF JUSTICE* 95-106 (1964).

chinery by which Mr. Doakes gets a degree of protection of the law, even though it may not be "equal."

The first thing to remember about legal aid work is that it is practicing law in bulk. The law office can get along comfortably with a dozen new clients a month; the legal aid office may have as many as a dozen in an hour. Practicing law in bulk is quite different from private practice.

When the private law office attempts to assume its share of legal aid cases, it usually finds the chore difficult and time-consuming. The legal aid society, through specialization, can do the job much more easily. Even if there were enough willing private lawyers to handle all the legal aid cases, the extent of the problem could not be measured by asking each practitioner to keep a record of those he serves without a fee. The problem seems to lie rather with Mr. Doakes. Too often he does not realize that the problem which plagues him might be alleviated or even completely solved by the skills of the lawyer. So he takes matters up with his lay friends. Even if he does think of it, too often he does not realize that lawyers generally are quite ready and willing to aid him; or if he does know this in a general way, he hesitates to knock on a specific strange door and sit in an unfamiliar waiting room beside Mr. Gotrocks. Therefore, when we talk about the legal aid movement, we have in mind a definite law office for poor people—a society or bureau—which specializes and is known to specialize in this type of client. It has a sign over the door.

It was not until 1876 in this country that such an organization emerged. Its advent is interesting.²¹ In 1876 there was a society in New York City dedicated to helping German immigrants through the first perils of their efforts to get settled in this new country. Among the supporters of this generalized movement were several lawyers. To these discriminating persons it soon became apparent that unless the resources of the field of law were made available to the immigrant, his road would be a hard one. So an agency was set up which devoted its attention to the legal problems of the German immigrant. It was proprietary and it was not sponsored by the bar association.

Two steps forward were made in the next fifteen or twenty years. The doors were opened wider to admit not only German

²¹ For a history of the first 50 years of the New York Legal Aid Society, see MAGUIRE, *THE LANCE OF JUSTICE* (1928).

immigrants, but any poor person with a legal problem. And the society changed its name to The Legal Aid Society.²²

The next city to recognize this need was Chicago.²³ In the early 1880's an organization was set up there which in due course became the Legal Aid Bureau of the United Charities of Chicago. There is something important in the fact that those legal aid societies which followed the New York plan considered themselves to be essentially law offices. Those which sprang up under the inspiration of the Chicago Bureau thought of themselves as social agencies.

The first period of organized legal aid work came to its end in the last years of the century. There were still only two organizations in operation.

The second period runs from 1901 to 1911. The movement spread to Boston, Philadelphia, and elsewhere. By 1911 there were enough agencies to warrant the calling of a national conference. Viewed in retrospect it was a small gathering. But for those of us who came later into the field, it was staffed by giants. All of these pioneers were prodigious workers. All of them were tremendously excited over the work they were doing and its possibilities. Zeal shines forth from every one of the meager pages which record their efforts.²⁴ They set up a National Alliance of Legal Aid Societies which held conferences in New York in 1912 and in Cincinnati in 1914.

Then came the First World War. Public attention was directed into other areas which were regarded as more urgent, and the legal aid movement came nearly to a standstill.

Immediately after the war, there were several vigorous steps forward. In 1919, Reginald Heber Smith published his book entitled *Justice and the Poor*.²⁵ In it he set down in concrete terms a statement of the movement, of the variety of the organizations which implemented its ideas, and, most importantly, of its philosophy. He made it clear that these agencies were engaged in the great task of administering justice according to law. Prior to this time, interested and curious people had to go to the office of the local society to

²² See *id.* at 59.

²³ For the development of the Chicago Legal Aid Bureau, see Garipey, *The Legal Aid Bureau of the United Charities of Chicago*, *Annals*, March 1926, p. 33.

²⁴ See the proceedings of the meeting. There are two deposits of material on this early period of the legal aid movement. Up to 1919, see the collection at the library of the Harvard University Law School. For the period ending about 1940, see the collection in the library of the Duke University Law School.

²⁵ R. SMITH, *JUSTICE AND THE POOR* (1919).

get an idea of what was going on. Since that time it has been possible to sit comfortably in one's library and read about it. Plenty of people who did not find it convenient to make a visit were quite willing to read this dramatic presentation.

In 1920, legal aid was discussed at a meeting of the American Bar Association. There were four distinguished speakers.²⁶ After they had delivered their messages a motion was presented and passed calling for the creation of an American Bar Association Committee on Legal Aid.²⁷ There is a rumor that some of those present at the meeting were not favorably impressed with the idea of involvement by the ABA. But the written record does not record the nature of or the extent of the dissent. With this action legal aid work swung into the orbit of the American Bar Association. Legal aid became a co-worker with the bar associations. It was now possible to say: "Two's company."

In 1923, the National Alliance was streamlined into the National Association of Legal Aid Organizations.²⁸ This body and its successors²⁹ have held the movement together, have increased the field of its operations, and have taken their place beside other national humanitarian organizations.

There are two achievements of this body which are presently relevant. One of them saw a resolution of the question of whether a legal aid society was a law office or a social agency. After a great deal of debate, the answer agreed upon was that legal aid is a bridge between the two. This was based on the idea that a water-tight-compartment theory of the social sciences, including law as one of them, would not produce the close inter-professional cooperation necessary for the public to be properly served.³⁰

²⁶ See 45 A.B.A. REP. 217-58 (1920). The speakers were Reginald Heber Smith; Charles Evans Hughes, recently the President of the New York Legal Aid Society; Ernest L. Tustin, Director of Public Welfare of the City of Philadelphia; and Ben B. Lindsey.

²⁷ The record of the proceedings in 45 A.B.A. REP. 19-89 (1920) does not show any evidence of this motion. However, "Legal Aid" is listed as one of the special committees for 1920-1921. See 45 A.B.A. REP. 147 (1920).

²⁸ See NATIONAL ASS'N OF LEGAL AID ORGANIZATIONS, RECORD OF PROCEEDINGS, FIRST ANNUAL MEETING 8, 37 (1923).

²⁹ The name of the organization was changed to "National Legal Aid Association" in 1949 (see NATIONAL LEGAL AID ASS'N, COMMITTEE REPORTS AND PROCEEDINGS, 27TH ANNUAL CONFERENCE 3-4 (1949)), and to "National Legal Aid and Defender Association" in 1958 (see NATIONAL LEGAL AID & DEFENDER ASS'N, SUMMARY OF PROCEEDINGS, 36TH ANNUAL CONFERENCE 33 (1958)).

³⁰ See NATIONAL ASS'N OF LEGAL AID ORGANIZATIONS, RECORD OF PROCEEDINGS, SEVENTH ANNUAL MEETING 43-45 (1929); NATIONAL ASS'N OF LEGAL AID ORGANIZA-

The other achievement concerned the setting of standards for all legal aid societies. A Committee on Standards was established by the National Association in 1930, and, after an extended amount of work and discussion, it evolved a workable set of guidelines which provided considerable impetus for the societies to improve and maintain the quality of their work.³¹ The legal aid agencies now had a framework within which to build a bulk law practice while preserving the goal of equal protection. It became possible to proclaim to the legal profession and to the public that something was being done for Mr. Doakes. And the place to look for that something was not the orthodox law office, but the specialized legal aid society.³²

Before we close this portion of the article, two other items deserve mention. One of them is the objections often registered against the operation of legal aid societies. These objections come mainly from lawyers. They are based on an assumption that every once in a while in the line waiting for legal aid service can be found Mr. John Q. Public or even Mr. Gotrocks—someone who can pay a fee. These objections, naturally, do not come very often from the more successful law offices; but there is and always has been an undercurrent of professional disapproval based on this assumed competition.

There are two answers to this type of complaint. First, if the objector will take the trouble to visit the legal aid society for a substantial period—perhaps even for a week—he will convince himself that the great majority of applicants there cannot pay a fee. He will also see that people who can pay are turned away. Of some of those that remain, reasonable men may reasonably differ. But if the objector wants to take away any of those doubtful cases to handle in his own office, the legal aid society will not object. It takes no fees anyway, and here is at least a slight lightening of its heavy load of cases. But it does want to be sure that a person thus turned away gets equal protection.

The other answer to this objection was given by the societies when they determined to reject certain types of cases which seemed

TIONS, REPORTS OF COMMITTEES 1927-1928, at 61-62 (1928). See also *Law and Social Welfare*, Annals, Sept. 1929, pt. 1.

³¹ For an excellent summary of the Committee's work, see NATIONAL ASS'N OF LEGAL AID ORGANIZATIONS, REPORTS OF COMMITTEES 1933-1934, at 65-68 (1934).

³² For a consideration of some of the further ramifications of legal aid work, see *Frontiers of Legal Aid Work*, Annals, Sept. 1939.

to cause controversy.³³ Thus, divorce cases generally are rejected on the theory held by some people that divorce is a luxury. There are, of course, some people who take the position that divorce is not a luxury. But when the issue was whether to close the society's doors entirely or to recede on a particular issue, it seemed better policy not to fight a battle which promised to end in defeat.

Similarly, legal aid societies do not accept personal injury cases. The theory here is that if the case presented by the client has legal merit, some lawyer will take it on a contingent fee basis. If it has no legal merit there is no value in litigating. Again there are some people who argue that occasionally if a lawyer would diligently explore the facts of a personal injury claim which at first looked hopeless, it might turn out to be reasonably promising. But again, if insisting that a specific case was within legal aid jurisdiction meant risking the closing of the society doors, the policy that half a loaf is better than none seemed the wiser course.

There are those who sincerely believe that legal aid work is the humanitarian plank in the public relations program of the organized bar.³⁴ A profession without a public relations program ceases, under our definition, to be professional, and a public relations program without a humanitarian plank is on an insecure foundation. When the public relations value of legal aid work is more fully recognized by the bar, objections of the sort referred to above will hopefully diminish.³⁵

The other point which should be mentioned here is the quality of the legal aid staffs. We have noted the superior quality of the pioneers. The present staffs are worthy successors. If Joe Doakes were so minded, he might well raise to them a monument of gratitude and respect.

And so much for the bar which has prestige and the legal aid group which has know-how. Mr. Doakes may not get exactly the type of justice according to law which is available to Mr. Gotrocks, but what he does get is not too bad.

³³ See NATIONAL ASS'N OF LEGAL AID ORGANIZATIONS, RECORD OF PROCEEDINGS, SIXTH ANNUAL MEETING 47-55 (1928); NATIONAL ASS'N OF LEGAL AID ORGANIZATIONS, RECORD OF PROCEEDINGS, FOURTH ANNUAL MEETING 200-01 (1926).

³⁴ The writer is among them. See BRADWAY, THE BAR AND PUBLIC RELATIONS ch. 5 (1934).

³⁵ The picture, however, is not quite as black as the foregoing paragraphs might suggest. See BRADWAY, THE WORK OF LEGAL AID COMMITTEES OF BAR ASSOCIATIONS (1938), which points up the understanding and sympathy on the part of the profession which existed even thirty years ago.

III

THE FEDERAL GOVERNMENT

Now the third agency in our article makes its appearance. It is, as we have said, the federal government. During the last two years it has concerned itself with Mr. Doakes in general under the War on Poverty program.³⁶ In particular it has decided that Mr. Doakes is not presently receiving the equal protection of the law.³⁷ This conclusion is a criticism by implication of all the agencies of a voluntary or local nature which have been helping Mr. Doakes. The federal government has become a critic. In fact, the Government is so concerned that it proposes to roll up its sleeves and participate. It is respectfully suggested that the federal government in the role of a critic is admirable. As a representative of the collective public, it can be a much better critic than can the people as individuals. It speaks with impersonal authority. It is listened to. But whether it should participate is another matter entirely.

In its role as critic the federal government can have a field day with the entire legal profession. It can ask embarrassing questions and require responsive answers. It can—through a congressional committee, perhaps—ask boards of bar examiners how many fields of law are covered in the examination before the young lawyer is licensed to practice in all fields, including those in which he has not been examined. It can ask the law schools why it is that the public flocks to the offices of young doctors, but stays away in crowds from the doors of young lawyers. It can ask the bar associations why its members spend so much time trying to be placed on committees and so comparatively little time in carrying out committee assignments.

But these questions merely scratch the surface. It can inquire: To what extent are legal ethics actually implemented in practice? Can lawyers actually do a better job than their lay competitors?

³⁶ The present situation is set forth specifically in Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821 (1965); Shriver, *The OEO and Legal Services*, 51 A.B.A.J. 1065 (1965); *American Bar Draws Plans to Help OEO Implement Legal Program of War on Poverty*, *The American Bar News*, Nov. 1965, p. 1. See also Silverstein, *The Continuing Impact of Gideon v. Wainwright on the States*, 51 A.B.A.J. 1023 (1965).

³⁷ The Office of Economic Opportunity, under the authority of title 2, part A of the Economic Opportunity Act of 1964, 78 Stat. 516, 42 U.S.C. §§ 2781-91 (1964), has instituted a legal services program to provide aid to the poor. For a general discussion of the program, see Berry, *The Role of the Federal Government*, 51 A.B.A.J. 746 (1965); Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROB. — (1966).

In which group are the greater number of mistakes made? It can inquire into why the legal profession has ceded so many activities to the business world when it might have set up its own trust companies, title companies,³⁸ accident investigation companies, collection agencies and others. With greater present relevance it might content itself with asking the profession: Why is it that Mr. Doakes does not always receive the equal protection of the law?

If this procedure of inquiries by the federal government on behalf of the public should result in due process, great results could be anticipated. There is another old saying applicable here: There is no limit to the amount of good a man can do in this world, provided only that he does not care who gets the credit.

Criticism is one thing. Participation is something else.

IV

THE INTERRELATIONSHIP

At this point two questions should be asked. Is this governmental step necessary? Is governmental participation wise?

A. *Is the Step Necessary?*

There is reason to argue that participation by the federal government in the legal rights of Mr. Doakes is not necessary. Consider for a moment the factors which are most essential for the success of a legal aid program. They are, in the order of their importance: a uniquely qualified staff; confidence of the client group; generous understanding by the organized bar; and a moderate amount of money. Money is the least important item, yet money is the only thing which the Government can give.

Not every lawyer is qualified to serve on the staff of a legal aid society. Similarly, not every judge seeks service on the bench of domestic relations and juvenile courts. If it were merely a matter of indiscriminate designation of power, the federal government could employ X number of lawyers and let them give Mr. Doakes his protection. But the goal requires *equal* protection. Equal protection implies quality. Confidence by the client in the legal aid society comes as the result of experience and not of propaganda. The bulk of legal aid clients are unorganized, little, humble people. They are

³⁸ For an interesting trend in the opposite direction, see Yelen, *Lawyers' Title Guaranty Funds: The Florida Experience*, 51 A.B.A.J. 1070 (1965).

afraid to tell their troubles to just anyone. Only gradually do they pluck up enough courage to apply.

The boisterous, litigious client needs no prodding, whether or not he has money. But those who especially should be reached require patience, understanding, and the sort of empathy which not all lawyers possess. Legal aid work demands much from its staffs—in some ways more than does serving Mr. Gotrocks. If the organized bar would accord to legal aid societies the chance to take an occasional divorce case or to investigate an occasional personal injury case before turning it over to some lawyer for a contingent fee, and would otherwise relax the area of operations permitted to legal aid societies, some cases which are presently marginal could be accepted as legal aid cases. And once the pressure is eased, it is probable that the profession can provide these legal aid essentials better than can the Government. In the matter of money, not very much is needed. When one thinks of the budgets of some social agencies, the amount required to operate a modest legal aid society is of no serious import.³⁰

But even if money is a problem, there is no reason to assume that the only source from which it must be derived is the federal government. In fact there is apprehension in some quarters that government money is synonymous with government control, and a project which might have been maintained by local pride and voluntary contributions becomes merely an added make-weight for raising taxes. Money is useful in legal aid work, but private money is more useful than government money. It has fewer strings.

In other words, it is not necessary to go to the federal government for a solution of the legal problems of Joe Doakes. If the Government insists upon participation, it lays itself open to the criticism that the benefits of the program are more likely to inure to the Government than to Mr. Doakes.

B. *Is the Step Wise?*

This question should be considered from two viewpoints: that of the legal profession and that of the federal government.

³⁰ In terms of expense, one should consider the amount of the community chest dollar which is allocated to the legal aid society and compare it with the portion of the government dollar which is channeled to the Judicial Department. It costs a great deal more to give people material relief than to supply them with justice according to law.

1. The Viewpoint of the Profession

It is no simple matter for the legal profession—which for so long has had and has fought for exclusive occupancy of the field—to find that it must now adjust to a condition of co-existence. Co-existence, co-tenancy, tenancy in common, or whatever form the program may take still requires ideological adjustment. For example, the legal aid movement will have to get used to two masters. Even if both masters usually agree, there will always be occasions when professional thinking calls for one type of policy and political opportunism requires something else. The result may be a series of compromises which tend to shift with the inauguration of each new administration in Washington.

There are at least three positions which the profession may take: It may point with pride; it may sigh with relief; or it may view with alarm.

Pointing with pride seems somewhat inopportune. There is nothing here to call for pride. The federal government has decided that our handling of Mr. Doakes' legal problems has been so unsatisfactory that it feels compelled to step in on its own account.

To sigh with relief would indicate that the profession did not realize what was going on. True, Mr. Doakes and his legal problems do not pour fees into the pockets of the lawyer. But by serving Mr. Doakes, as we have pointed out above,⁴⁰ the profession buys its right to exclusive possession in the field of law practice; the *obligation* to Mr. Doakes is a benefit. Take away Mr. Doakes this year; and next year someone will take away Mr. John Q. Public. Then our only hold on the field of law practice will be by force. Whether or not we can hold it by force against competing laymen is a good question. But it is a question which we should be slow to raise or to have raised. It may very well be that some future administration in Washington may come to the conclusion that we have not served Mr. Gotrocks properly. In that event, the legal profession appears likely to end up as a governmental bureau in which policies will contain a measure of political expediency and opportunism as well as professional experience.

It would seem then that there is no alternative for the profession other than to view with alarm. Note that the word is "alarm," and not "panic." We can accept the dictum of the federal government

⁴⁰ See pp. 317-18 *supra*.

that Mr. Doakes is not obtaining the equal protection of the law. But there is no reason for us to agree that governmental participation is the best possible solution. Indeed, it does not appear that governmental participation will improve the position of either Mr. Doakes or the legal profession. Perhaps there is some way in which we could represent to the federal government courteously, but firmly, that too many cooks have a way of spoiling the broth. The plight of Mr. Doakes is a problem for the legal profession and the legal aid movement. Three's a crowd.

2. The Viewpoint of the Federal Government

Any participation is a venture. If the venture turns out well then there is glory and credit enough for all. If it fails or produces an indifferent result then there is a period when each joint proponent tries to lay the blame on someone else. The present field is so complicated that the chances of unfavorable results run high. They will run even higher, since there are two groups trying to work out joint controls—controls which do not operate solely in the ordinary legal channels but rather include the balancing requirements of democracy and its resultant headaches.

Consider for a moment the effect of joint control. If the item given Mr. Doakes were in the form of material relief, such as food, clothing, or shelter, surely all would agree that distribution should be handled by the executive department of the Government; the judicial branch has no expertise in such matters. But the administration of justice according to law is not a material commodity. The federal government may find some support for a program which distributes material commodities, but its arguments are not so persuasive when the subject is justice *according to law*. If the Government wants to participate in *this* program, its action should emanate from the Supreme Court. Decisions of that body would have their effect on the courts of last resort in the several states, and eventually on the bar associations. The members of the legal profession are, after all, officers of the court—a quasi-public body. Such an approach by the federal government would work through the customary channels. While separation of powers may irk those who want immediate results, it seems unnecessarily complex—indeed unwise—to propose a program which substitutes executive for judicial initiative. An executive concept bypassing the judicial influence may emerge variously colored.

There is a difference in motivation between a retained lawyer and an employed lawyer. The retained lawyer has more independence, and independence is essential to equal protection. The employed lawyer may be just as good a lawyer technically, but when it comes to making policy he must too often conform to the department head whose task it is to make policy. Even if the department head is a lawyer, somewhere in the top echelons of government there will be one or more laymen. One has sympathy in such cases for the employed lawyer.

The relation between retained lawyer and client is status. Implicit in it are such matters as confidentiality, a fiduciary atmosphere, a highly personal relationship. When the lawyer is employed, the frame of reference is altered. The lawyer is an agent not only of the client but of his employer. There are constant conflicts of interest. There is too often the feeling on the part of the client that the files of the office are open to inspection by various people. This may not be so in fact, but if the client believes it is so his willingness to disclose information and to rely upon the advice of his lawyer is somewhat less dependable. The retained lawyer and his client are like two sides of a door. A client and an employed lawyer are like two sides of a pyramid.

But perhaps the most complicated matter of all concerns what we may call "democratic balance." In every form of government there are various basic groups. At times they have been called "estates." If the government is so operated that there is a minimum of encroachment by each of these basic groups upon the grounds of the others—if there is a "balance" between them—the community prospers, at least internally. If there is imbalance, particularly unnecessary imbalance, all sorts of adjustments must be made and internal turmoil is inevitable.

During the Middle Ages in England, the form of government was a monarchy, containing four basic groups: the king, the commons, the lords spiritual, and the lords temporal. Today, under a democratic society it can be contended that we still have four basic groups: the government, the people, the press, and the professions. The freedom of the government to act in its sphere needs no discussion. In recent times, freedom of the people has had much publicity, represented by a program for civil rights. Freedom of the press has been a democratic "must" since the trial of Peter

Zenger. Now it is time for someone to proclaim the need for freedom of the professions. This freedom, as we have suggested, means not freedom from criticism, but freedom for each profession to develop its own technical field.

One cannot predict the specific difficulties into which the present program is likely to run. Time alone will tell. But it does not take much imagination to perceive that the risk of confusion following government participation is great and that the consequences may well be less than successful.

In other words, it would be wise for the federal government to look before it leaps any further.

CONCLUSION

These problems border on the theoretical. Let us end this article with reference to a specific illustration of what happened to one publicly supported legal aid agency. It should be interesting to those who believe that governmental participation can bring only beneficial results.

In 1902, the Philadelphia Legal Aid Society launched its program as a proprietary organization supported by voluntary contributions. By the early 1920's it had a case load of some 6,000 matters per year. It was gradually gaining the confidence of the class of people it served. The city fathers then decided that they wanted a municipal legal aid bureau. They went forward forthrightly and set up a bureau, employed a staff, gave publicity, and opened its doors. In the first week some one hundred Joe Doakeses applied for aid; the case load soon soared to about 10,000 a year. In the meantime the private society, which had received little or no consideration in the matter, quietly and with dignity completed its case work, stored its office furniture, and closed its doors.

For a decade or so the municipal bureau flourished, although other cities were not too eager to follow its lead. Most of them preferred the privately supported society, making its way with less publicity, but gradually gaining the confidence of its clients. Then one New Year's Eve, the Philadelphia city fathers decided that they were no longer in a position to maintain a municipal legal aid bureau. They closed its doors by using a simple expedient: they cut off its appropriation. The action was taken with a minimum of warning. There were at the time somewhere in the neighborhood of 10,000 clients whose legal problems were being processed.

But there was no office and no money to pay the staff. All that remained was the former staff, now out of jobs, and a large number of filing cabinets crammed with the legal matters of Joe Doakes and many more like him.

The chief counsel of the bureau at the time was the late George Scott Stewart. He should be remembered as the man who carried the main burden. The leaders of the local bar were contacted. The private society was taken off the shelf, dusted up a bit, and put back into operation. But there was an interim during which it was not certain that the story would have a happy ending. What happened to all the cases which required immediate attention can be imagined, rather than described in detail. This is an example of political opportunism.

The city fathers no doubt had compelling reasons, but our immediate concern is with the equal protection of Joe Doakes.

This sort of thing could happen again.