Legal Service for the Indigent*

By JOHN S. BRADWAY

The legal aid society is an instrument of justice—doing what it is not practicable for lawyers to do individually on any large scale. The legal profession owes it to itself that wrongs do not go without a remedy because the injured has no advocate. The legal profession owes it to itself to assure the maintenance of an institution which intelligently, and without waste of friction, meets this need and accomplishes through competent organization what lawyers would be glad to accomplish, if it were feasible, through their individual efforts. Does the lawyer ask, who is my neighbor? I answer—the poor man deprived of his just dues.—*Charles E. Hughes.*

MY TOPIC this morning is "Legal Service for the Indigent." There are two words in that topic deserving a brief comment. The word "indigent" refers to the client and not to the lawyer. The word "service" is my starting point. A lawyer may render service on at least three levels. He may have motives of pure selfishness; of enlightened self-interest; or of idealism. My acquaintances among the legal profession are gentlemen. I cannot bring myself to believe they are like a pack of dogs fighting over a bone. I assume that their motives are in the fields of enlightened self interest and idealism. The rewards to a lawyer for rendering legal service to the indigent are of a sort which will not interest a selfish man. But for many people the non-material values in law practice are the ones which make life worth living.

Legal aid is a service which lawyers render to clients who, because of their financial condition, are unable to pay a fee. I will ask you to follow me for a few moments while I consider the question as to whether "legal aid" is a novel and therefore a shocking concept or whether it is a deeply ingrained tradition of the legal profession. Historically, legal aid work was rendered by the Roman bar as a civic duty and privilege. The relation between patron and client was in the nature of a status rather than a contract.[1] During the middle ages, under the guidance of an ecclesiastical bar, legal aid work became applied Christianity.[2] St. Yves, the patron saint of lawyers, who died about 1300, was celebrated for his legal aid service. Upon his death an inscription was placed on his tombstone as follows:

"He was a lawyer, but not a robber—a matter of amazement to the people."[3]

In English legal history legal aid work is not so much a civic or religious duty as a professional obligation arising from historic pronouncements in a long line of bills of rights. A satisfactory starting point is the year 1215 when in the fortieth chapter of Magna Charta, we find the promise: "to no one will we sell; to no one will we refuse or delay, right or justice." To interpret this principle and apply it has become a tradition of the English bar.[4]

In the United States in colonial days lawyers, as a class, rose slowly to a position of leadership; but by 1776 they had reached a point where some said that the American Revolution was a war between the American bar and the English Crown.[5] Out of that struggle came our federal and state constitutions in which the promise of legal aid was made in words like the following:

"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

*Address delivered before the University of Tennessee Law Institute on Nov. 16, 1940; published in the Tennessee Law Review, February number, 1941, to which Review thanks are due for permission to reprint.

†The Author is Professor of Law at Duke University and has been known for a number of years as one of the outstanding leaders in the field of Legal Aid.

1. John M. Maguire, Legal Aid, *Encyclopedia of the Social Sciences*, IX, p. 319.

2. John M. Gest, *The Old Yellow Book* (1927), p. 39 et seq. Mayer C. Goldman, *The Public Defender* (1919), p. 9.

3. *Encyclopedia Brittanica*, "Yves, Saint of Brittany," Vol. 23, p. 427 (14th Edition).

4. "Poor Persons' Procedure," *Report of the Law Society*, London. Annually 1931-1939.

5. Charles R. Beard, The Rise of American Civilization, Vol. I, p. 233.

of law, and right and justice administered without sale, denial or delay."[6]

In the federal constitution the phrase "the equal protection of the law" is used. So it is well within reason to claim that legal aid service to the indigent by the legal profession is a professional tradition and the practical application of two fundamental American principles: (1) that justice, in a democracy, is a matter of right, not of grace; and (2) that in a democracy, before the law all men must be equal. The responsibility of the bar today to perform such service arises from a sense of *noblesse oblige;* from the obligation assumed upon entry into the profession;[7] and from the exclusive control over the practice of law insisted upon in the unauthorized practice acts[8] which forces the bar in return for a monopoly to see that all public business in the field is cared for.

But why is it necessary that the responsibility rest upon any one? Why is it not enough merely to state the principle? The answer lies not in the substantive law, but in the administrative machinery by which justice is brought home to the individual who has a legal right. If the individual has money he can walk into any of your law offices and get a very fine brand of justice. If he does not have money there are two sorts of practical obstacles confronting him. In the first group are such matters as: delay of court procedure;[9] expense of court costs and fees;[10] expense of and need for counsel.[11]

In the second group are such matters as: how is the legal aid client to know what his rights and legal position are or whether he has a problem that should in his own interest be brought to the attention of a lawyer; how is he to know that lawyers are willing to aid him without cost; how is he when he knows no member of the bar to secure one whose training and experience qualifies him to handle the particular type of case. Too often the legal aid client with a meritorious case, through ignorance or timidity, fails to make contact with a lawyer who might be willing to help him. The wrong is unredressed and the client sometimes with and sometimes without justification may develop a sense of frustration about justice in a democracy and contend that there is one law for the rich and another for the poor. Unless something is done to lift the legal aid client over these two types of obstacles the constitutional guarantees, in a realistic sense, are too often unavailing and injustice results. Legal aid work is the task of helping the individual to surmount these obstacles so that he may receive that equal justice to which in a democracy he has a right. It is your privilege and mine, as members of the bar, to do our part in furthering legal aid work as an integral part of the administration of justice.

But someone says: Is it respectable? Is it an activity in which a lawyer may safely engage without tarnishing his reputation? There is a wealth of authority on this point.[12] Since 1920 the American Bar Association has had a standing committee on legal aid work.[13] Some twenty state bar associations have committees on legal aid work. All these committees are satisfied that legal aid work is respectable. Many judges have expressed themselves in similar fashion; as have leading members of the bar.[14] In the last twenty years legal aid work has risen from obscurity. Participation in it is now, as it always has been, an honor-

6. Constitution of Tennessee, Declaration of Rights, Article I, Section 17. Adopted February 23, 1870.

7. The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the Oath of Admission to the Bar formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other states of the union—duties which they are sworn on admission to obey and for the willful violation of which disbarment is provided. "I will never reject from any consideration personal to myself the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So help me God." 62 Rep. A.B.A. 1122 (1937).

8. Hicks and Katz, *Unauthorized Practice of the Law* (A.B.A. 1934), p. 15, et seq.

9. Esther Lucile Brown, *Lawyers and the Promotion of Justice* (1938). 198 ff.

10. Robert E. Stone, On What Basis Should Court Filing Fees Be Fixed, *Social Work Technique* (1938), Vol. 3, p. 182; Goodhart, A. L., *Costs,* 38 Yale L. J. 849 (1929).

11. Reginald Heber Smith, *Justice and the Poor,* Chapter VI; The Third Defect—Expense of Counsel (1919).

12. Many of these are collected in John S. Bradway, *The Work of Legal Aid Committees of Bar Associations* (A.B.A. 1938), p. 1 ff.

13. The most recent report now published is 64 Rep. A.B.A. 226 (1939).

14. Bulletin No. 84 of the National Association of Legal Aid Organizations containing addresses by Harrison Tweed, "What Legal Aid Means to America's Poor"; Charles Evans Hughes, Jr., "Meeting the Need for Legal Aid to the Poor." Bulletin No. 94 containing address by John W. Davis, "Legal Aid Work." *Legal Aid Review* (April, 1926), containing address by Charles Evans Hughes, "The Poor Man and the Law."

able activity. A lawyer need not hesitate. He may take pride in a service which brings prestige to the bar and to himself.

LAWYERS FACE CRITICAL TEST

Someone else says: is there any reason for us to be disturbed about legal aid work at the present time? There are at least two. The interest of the whole country is centered, at the present time, upon the problem of national defense. As far as enemies from without are concerned the problem is for the military rather than for the civil establishment. But in this war we are testing whether this nation or any nation conceived in and dedicated to a republican form of government can long endure. When the question arises as to whether democracy can prevail against other forms of government the lawyer, as much as anyone, has an opportunity to provide an answer. If the administration of justice, as we conceive it, fails then the whole structure may crash in ruins about us. If the time should ever come when the door to the temple of justice, in this country, can be opened only by a golden key, the people may exercise their constitutional right to adopt a new form of government.

Already voices are heard contending that the bar has failed to accomplish the objective for which it was established and urging that it be replaced by a socialized agency,[15] perhaps under the control of laymen. What does the public think of the lawyer? If the newspaper headlines, the motion picture and the comic strip are to be believed, the public thinks more sympathetically of the doctor than of the lawyer, and yet the Federal Government has prosecuted the American Medical Association.[16] Will the Bar find itself next on someone's list?

Public speeches about the glory of the profession and action by courts and legislatures will not long sustain the legal profession if public opinion is against it. One quiet, unostentatious, but very practical and effective way to inform the public of the true worth of the legal profession is through legal aid service. There is no more splendid page in the history of the legal profession than the unwritten record of the unorganized legal aid which individual lawyers have rendered to individual clients without the payment of a fee. There have been few, if any, law offices in this country from which a client with a meritorious claim will be turned away merely because he cannot pay a fee. There is no finer professional tradition than this, but the question remains whether unorganized work is enough in the face of the present emergency and the problems confronting the legal profession as a whole. While the answer necessarily depends in large part upon local conditions in the particular county under consideration it is nevertheless true that in many centers some organization is necessary. The word need not alarm anyone. As used here an informal voluntary committee of a county bar association is an organization just as much as is the New York Legal Aid Society which handles 30,000 cases a year. The term is flexible and is used in the sense of an effort to fix responsibility.

RESPONSIBILITY JOINT AND SEVERAL

There are several definite reasons for organized legal aid work. The problem of administering justice rests not so much upon the individual lawyer as it does upon the legal profession. Individual lawyers do the work, but no one need feel the entire obligation any more than the individual physician should expect to shoulder the health program of a given community. By sharing the load each one does his bit and no one is over-burdened. The creation of even a formal organization does not interfere with any charity work a lawyer may desire to do on his own account. The legal aid committee or society, as the case may be, takes only those matters which individual lawyers do not or cannot handle. Many lawyers find it a relief to be able to send such cases to an organization.

An organization is often more effective than the individual lawyer because it is easier for the client to know about and to reach; it keeps records of its work comparable to the public health statistics which are so valuable to the medical profession; it becomes more or less expert in a field of law in which few lawyers find

15. F. Lundberg, *The Legal Profession, A Social Phenomenon*, 178 Harpers, pp. 1-14 (1938); F. Lundberg, *Priesthood of the Law*, 178 Harpers, pp. 515-26 (April, 1939); F. Rodell, *Woe Unto You Lawyers* (1939); Robinson, *Law and Lawyers* (1935).

16. "Practice of Medicine and the Sherman Anti-Trust Law," Science NS. 91: 257-8 (March 15, 1940); Rosenbeck, "The American Medical Association and the Anti-Trust Laws," 8 Fordham L. R. 82-102 (1939); "The Sherman Act and the Medical Profession," 34 Ill. L. R. 602-7 (1940).

occasion to specialize and can save time in many routine recurring situations. But the most persuasive argument is that in many counties the task, if it is to be done properly, is far too large to be cared for by individual voluntary aid. Unless part of the task is to be slighted or the work done on an inferior scale, in such areas an organization, however simple, is necessary.

In Durham, North Carolina, a city of some 60,000 population, where my own legal aid organization operates, about 400 cases a year come for attention. Since Knoxville is larger, one may assume, till further facts are available, that there probably are more cases here. The individual lawyers in either city would find such a charitable load difficult, if not impossible, to carry, when his duty to his family requires that he spend most of his time on cases from which fees are available. But even in smaller communities the fact that the bar association has a legal aid committee, even if its duties are purely nominal, is notice to the public that the legal profession is prepared to do its bit. Such a committee at the end of the year can make a report of its work and the newspapers will carry the report even if the names of the committee members are eliminated. The public will know that the bar is conscious of its obligation in this respect. A legal aid organization, even a simple, informal one, has advantages which cannot be achieved by individual service and it does not interfere with individual service.

Assuming that an "organization" exists, what sort of legal aid problems may be anticipated? If you will pardon a personal reference I shall discuss the matter from the standpoint of my own organization because I can be more definite about it. Applicants to my office may be listed under any one of several categories.

First is the man who can pay a fee. Into every legal aid organization come people who can pay a fee. They have various reasons and each one must be dealt with on his own merits. There is no reason why such people should not come to a legal aid organization; the question is as to what is to be done about them and their cases. Let me tell you of several rules we make and enforce.

PRACTICAL RULES OF OPERATION

1. We will not take cases or clients where a fee or a contingent fee can be paid or where, as a result of the proceedings, a sum is likely to be raised up out of which a fee could be paid.

2. We will investigate every case and every applicant to see whether the matter lies within our jurisdiction and the final decision on this point is not made at any time while we are handling the matter.

a. When the applicant calls we inquire from him facts about his financial background, such as: whether or not he is employed; what are his wages; what rent does he pay; what dependents has he; does he have a bank account, real estate, an automobile. On the basis of his answers we may reject the matter.

b. Even if we accept the case the action is tentative. We reserve the right to withdraw from it at any time that it appears a fee will be available. At the time of such withdrawal we give the applicant plenty of opportunity to secure another attorney and we turn over to that attorney the results of any work we may have done on the case.

c. We have a standing invitation to the members of the local bar to come to our office and go over the facts of any case in our files in which they may have an interest. We will withdraw if they think we should not handle the matter.

d. Most cases are either clearly in or outside our jurisdiction. When a marginal case appears we usually phone the President of the Bar Association or some other prominent attorney, lay the facts before him and abide by his decision.

3. When it appears that a case is outside our jurisdiction we do not refer to any particular lawyer. At the suggestion of the local bar association we give the applicant a telephone directory and let him pick his own counsel. Whatever the applicant may think of such a plan, we at least, have complied with an agreement not to refer the case to any particular lawyer.

One result of this rather elaborate system of separating legal aid from non-legal aid clients we believe is to educate a number of persons who otherwise might never have sought the services of a lawyer to appreciate the value of such aid. The bar has profited from some of their fees.

The second type of applicant is the man who wants advice. He does not ask to accomplish

anything. He merely wants to know, to talk matters over, to clarify his own thinking. Perhaps in fifty percent of the cases the applicant falls in this category. May I give you two examples:

ADVICE IS VALUED

Some years ago a lady and gentleman came into my office and announced that they wanted a divorce. With a view to determining whether a reconciliation was possible I inquired the cause of the difference. They replied that they had had a terrific quarrel and that it was over a question of law. They wanted to know, as a matter of law, whose duty it was to get up first in the morning and close the windows. You gentlemen in Tennessee, no doubt, know the answer to the legal question, so I need not pursue it further. But note the opportunity which a lawyer has in such a matter to act the part of a conciliator. Incidentally, I might remark that my office takes few divorce cases, and then only when the client supplies me with a letter from the County Superintendent of Public Welfare indicating that he has examined the situation and recommends a divorce for the best interests of the family.

Some years ago a little, red-faced, white-haired old farmer came in. He told me he had hitch-hiked one hundred and fifty miles to see me. When I asked him what the trouble was he said, "I am going to commit a murder and I wanted to talk to you first." Usually I am flattered when someone regards me as an expert. In this instance there was a very serious job to be done. If the man actually committed the murder after talking to me I could think of several headlines in the newspapers which would give me more publicity than I desired. Here was an opportunity. I hope my efforts were successful. As far as I know the murder never took place. A third type of client is the man who wants a case adjusted out of court. My illustration here is of a woman, a cook. She came in one fall and told me that she had had a dispute with a dressmaker regarding the style of her dress. It seemed that the preceding spring her dress being out of the prevailing style, she had taken it to the dressmaker with instructions to bring it up to date. The price agreed upon was one dollar. The cook went away in the summer with the family for which she was working and returned in the fall to find the dress altered in accordance with the spring styles. Unfortunately during the summer the styles had changed again so the dress was still out of style. A dispute developed as to whether the dressmaker had followed instructions and when the parties could not agree the cook came to me pondering legal action.

I persuaded both parties to come in for a conference and on the afternoon designated I heard a great noise in the waiting room. On investigation I found that each party had brought with her fifteen or twenty witnesses and the witnesses were already making clear which cause they championed. Fearing that the matter might come to a point where I should have to arbitrate a question of styles, I hurriedly invited both principals into my private office. I asked the cook if she would give 50 cents for the dress in its present condition. She said she would. I asked the dressmaker if she would part with the dress for 50 cents. She said she would. The parties exchanged 50 cents and the dress; shook hands and went out the side door, apparently the best of friends. They left me to spend the balance of the day trying to persuade the witnesses that, in spite of appearances, justice had been done.

You will note the opportunity here for the lawyer to aid in adjustment of difficulties. Amusing as these illustrations may seem to us, it is well never to forget that, to the people involved, such matters are of the most serious significance. We can hardly measure their magnitude. All of them are legal aid problems and clients. If there had been no organized legal aid service these matters might never have come to light. Certain it is that a legal aid office provides no incentive to litigation. If time permitted I could cite you cases which have been fought up to the appellate courts[17] on behalf of legal aid clients and other matters which have warranted presentation of the facts to the legislatures for redress. The presence of organized legal aid work insures adequate inspection of problems of this sort so that if litigation or legislation is necessary it may be some definite person's responsibility to see that appropriate action is taken, but there is every inducement to amicable settlement.

17. An example of a legal aid case taken to the Supreme Court of the United States is Bountiful Brick Co. v. Giles, 276 U. S. 97, 72 L. ed. 483, 48 Sup. Ct. 221 (1928).