The Expanding Horizons of Legal Services--II

Monrad G. Paulsen

Columbia Law School

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Criminal Law Commons, and the Legal Profession Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol67/iss4/2

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
The juvenile court movement was designed to rescue young people, who had committed offenses, from the terrible consequences of a criminal adjudication. The founders of the first juvenile courts were shocked to find youngsters of thirteen or fourteen as defendants in the ordinary criminal courts. The reformers hoped to protect children from the stigma of criminality by substituting a civil judgment of delinquency for a criminal conviction. Juvenile courts were to substitute a program of rehabilitation using the most modern scientific techniques, aimed at modifying human behavior, for the degrading experiences of prison life.

The new courts were to use “socialized” procedures rather than those of the ordinary courts hearing criminal matters. An article produced by three of the pioneers in the field makes the point that “the old courts relied upon the learning of lawyers; the new courts depend more upon psychologists and social workers . . . Justice in the old courts was based on legal science. In the new courts it is based on social engineering.” Lawyers as advocates were to have little part in the proceeding because the court would be an agency of help rather than a fearful instrument of appression. A fatherly judge would assume a protective role in informal hearings.

* This article is published in two parts. The first installment appeared in the April issue of the West Virginia Law Review, 67 West Va. L. Rev. 179 (1965). The written product is a slightly revised version of the Edward G. Donley Memorial Lectures, delivered December 7 and 8, 1964, at the College of Law, West Virginia University.

** Professor of Law, Columbia Law School.


[267]
Such dreams have not been realized; partly because in the great American city it is difficult for a highly paid judge to act as a father figure in relation to a child who is an impoverished member of a minority group; partly because of the volume of business in city courts; and partly because unresolved legal and factual issues do arise. If adults, threatened with incarceration, are protected by an elaborate apparatus of procedural safeguards, it will seem right to many that children ought to be afforded similar protections when they are faced with commitment to a training school. The rules forbidding the use of evidence obtained by false arrest, illegal searches and seizures, and improperly taken confessions should be applicable in the juvenile court if the aim of the rules is to restrain the police. Both factual and legal disputes are in need of the clarification that comes from the adversary process and from lawyer’s arguments.

The right to counsel in juvenile court is clearly established in the law at least if the right means that a youngster (or his parents) has the right to employ a lawyer if he can afford to do so. Newer juvenile courts laws, however, provide for the assignment of counsel at public expense in case the youngster or the parents are unable to afford a lawyer. Provisions of that sort are in the California Juvenile Court Act of 19602 and the New York Family Court Act of 1962.3

The range of a lawyer’s roles in juvenile court cases was explored extensively in a National Conference on the Role of a Lawyer in Juvenile Court, held in Chicago in February, 1964, under the joint sponsorship of the National Council of Juvenile Court Judges and the National Council on Crime and Delinquency.4

At the Conference, it was seriously argued that the constitutional requirement of the appointment of counsel in all serious criminal cases5 applied to juvenile court proceedings by a simple extension of the doctrine. The arguments were simple: There is a need for legal guidance in juvenile court cases; facts are in dispute and legal problems require skilled resolution. Some juvenile court matters

2 CAL. WELFARE & INSTITUTION CODE § 634.
3 N. Y. FAMILY COURT ACT §§ 249, 741.
4 See NATIONAL CONFERENCE ON THE ROLE OF THE LAWYER IN JUVENILE COURT, COUNSEL FOR THE CHILD (1964). This collection of material is composed of the position statements and commentaries prepared for the Conference. Hereafter is cited as COUNSEL FOR THE CHILD.
are relatively trivial but the adjudication itself is harmful to the reputation of the youngster; a child may be taken away from his home and placed in a correctional institution even though his offense is not serious. The theory underlying the juvenile court would lead judges to seek a child's benefit in each case, yet as Professor Frank Allen has cautioned, when someone does something for a child by the use of authority he does something to him as well.\(^6\) Merely saying that a juvenile court proceeding is non-criminal does not mean that the child involved or his parents will think of it as anything but punitive. The juvenile court is a court supported by the full power of the state. In such a tribunal the respondent is entitled to be represented by counsel as surely as in a criminal case.

Whatever the ultimate disposition of the constitutional issue may be, the overwhelming majority of those who participated in the Conference, (there were over 40 persons—judges, lawyers, law teachers,) agreed that the presence of counsel is a necessary and helpful part of a juvenile court proceeding.

The late Paul Tappan argued that the vision of the juvenile court as a benevolent parent dealing with an erring child is a "chimerical delusion."\(^7\) The fact that the overwhelming number of youngsters readily admit their involvement in the offense did not persuade him that lawyers were unnecessary. The admissions of children and unreliable. Further, there are, in fact, disagreements about what the precise facts are. The most important aspects of a juvenile court case may well be the degree of involvement on the part of a particular youngster.

To Tappan, if counsel is not present, the judge himself becomes an undesirable combination of prosecutor, defense counsel, and "impartial" arbiter. Probation officers are not capable of defending the rights of children. They are not trained in the law, and they are employees of the court, ill-equipped to perform defense functions.

The conferees identified the significant roles for lawyers at each stage of the juvenile court process. Lawyers can function effectively at the intake stage of juvenile court proceedings by helping to

---


\(^7\) TAPPEN, *Counsel for the Child* 6.
resolve factual disputes and by interpreting the child’s situation to himself and to his parents. A lawyer "can contribute information and perspective relevant to the decision of whether to file a petition or adjust on an informal basis."

At the Conference, an advocate's role at a juvenile court fact-finding hearing was generally accepted as appropriate. A lawyer has the special skill and training which enables him to test evidence and to assert points of law effectively.

More controversy was expressed over the lawyer's function at the time of disposition. Here a lawyer is often in direct conflict with a probation officer who has investigated and learned something about the youngster's background, his home situation, his experiences at school. The probation officers are likely to regard a lawyer as an interloper who has nothing useful to contribute at this point. They will regard their own recommendations as the product of intensive study, of their concern for the child's welfare, and of their own expertise in the diagnosis of human ills. For them, the lawyer's role, whatever it may be in helping to resolve questions of fact or questions of law, has been played out at that point. It is then time for the experts in human relations to guide decision.

In contrast of this kind of opinion, Judge Lindsay Arthur of Minneapolis, speaking at the Conference, strongly argued that lawyers have an important place at the dispositional hearing. He pointed to the fact that the judges and the probation staff may well come too close together. The staff may seek to fit their recommendations into the judge's idiosyncracies or, on the contrary, the judge may become uncritically reliant upon staff recommendations. A lawyer, he said, can compensate for these factors by taking a view of the situation from the child's point of view. A lawyer can also make certain that the juvenile court's proposed action is lawful under the existing statutes. A lawyer can take steps to test the recommendations of experts. He can form an opinion whether or not a given recommendation is justified by a psychological report and make argument based upon that opinion. He can insure the completeness of social investigations. He can make certain that the dispositional recommendations are based upon factual data which are accurate and impartially set forth. He can point out

---

8 Skoler, Counsel for the Child 21.
Factors which the probation recommendation may not have taken into account. Other resources for treatment may exist which have not been uncovered by the probation staff.

Finally, a lawyer can present the point of view of the family as to disposition. Universally, juvenile court statutes require that notice be given to parents when a youngster is taken into juvenile court. Great importance is attached to the notice requirement. Failure to meet it invalidates the court proceedings unless the parents have actually participated. Why this insistence upon the possibility of parental participation? It must be based upon the assumption that natural parental affection will move parents to protect the child against harmful treatment. It is assumed they will participate in the proceedings as a kind of advocate caring for the youngster's interest. Unfortunately, in a great number of cases, the parents of juvenile respondents are inarticulate persons of low educational levels and low achievement. In the juvenile court of a big city the typical parent passively stands by as an observer of the proceeding rather than as a participant. A lawyer can serve as the parent’s voice by learning the point of view of the youngster and parents in conferences before the dispositional hearing. He can determine whether the family has an alternative plan to the one recommended by the probation staff and the merits of the family’s plan can be articulated to the judge.

Obviously, after a dispositional decision there are still opportunities for a lawyer's service in the juvenile court. If an appeal is to be taken, it must be done with the help of the lawyer. If probation is revoked for subsequent conduct, legal assistance may be necessary to make certain that the revocation was lawful and based upon sound evidence. All in all, the list of law tasks in juvenile court is a long one.

Perhaps the best single statement of the lawyer's place in the juvenile court has been written by a distinguished New York attorney, Mr. Jacob L. Isaacs, who has interested himself in the juvenile court movement for a long time.10 Mr. Isaacs identifies three different kinds of roles for lawyers. First, the lawyer is an advocate. The lawyer is, as Mr. Isaacs describes him, “the ardent defender of his client’s constitutional and legal rights.” Secondly,

the lawyer is a "guardian" and as such, he is concerned not merely with the legal rights of a youngster but also with the child's personal welfare. A lawyer who conceives his function in juvenile court in this way would not press every advantage which his client might possess under the law. He might think it best to persuade his client that the court's resources should not be resisted. Obviously, difficult problems of professional responsibility are created for the lawyers who appear in juvenile court and the ethical guidelines are not the same as those appropriate for criminal work. Careful lawyering undertaken from the point of view of the respondent and his interest seen in a long range perspective, is the best way to make certain the judge understands exactly what kind of a case he has before him. Thirdly, Mr. Isaacs reminds a lawyer in juvenile court that he is an officer of the court and therefore has the important duty to interpret the court and its objectives to the child and his parents; a duty to inform his colleagues of the practices and needs of the court and to disclose to the court all facts in his possession which bear upon the proper disposition subject only to the restrictions imposed by the confidentiality of the lawyer-client relationship, and finally, a duty to work in close cooperation with the probation service of the court and to help in gaining the family's acceptance of the disposition plan.

As we have seen, the New York Family Court Act had made provision for counsel in juvenile court cases. The act contains a legislative finding, "that counsel is often indispensable to a practical realization of a due process of law and may be helpful in making reasoned determinations of fact and proper order of disposition."11 To implement this finding the act establishes a system of supplying lawyers (called "law guardians" in the act) to those who are not able to obtain a lawyer "by reason of inability to pay other counsel or other circumstances."

The New York Family Court may provide a law guardian by assigning lawyers from a panel designated by the appropriate Appellate Division of the state, by assigning lawyers employed by a legal aid society having a contract with the Appellate Division, or by assigning a lawyer who himself (or with a group) has entered into an agreement with that court to provide law guardian services.12

11 N.Y. FAMILY COURT ACT § 241.  
12 N.Y. FAMILY COURT ACT § 213.
The pattern of providing guardians varies throughout the state. In most counties the entire bar has been designated as the panel from which a selection of an individual lawyer may be made. In three areas a contract has been executed with legal aid. Of those only in New York City does more than one legal aid attorney attend the court.

The extent to which law guardians have been used varies a great deal depending upon the attitudes of the judges. In some counties they are appointed in almost every case, in some law guardians are rarely used.

The New York City experience is the most interesting. There over a dozen attorneys are at work during every day of court. Over 75% of the youngsters who respond to delinquency petitions or are the subject of neglect petitions have guardians appointed. In indigency standards are not rigid. The child of any family making less than $85.00 per week will be given legal assistance.

13 New York Judicial Conference, The Report on the Family Court, July 1, 1963—June 30, 1964, 17-18 (1965): “The law guardian program is authorized for neglect, delinquency and supervision proceedings. Law guardians afforded representation in almost 60% and private counsel in almost 10% of the nearly 24,000 such proceedings. There was no representation at all, however, in about 30%.

“Geographically, there was a substantial difference in practice between counties within and without the City of New York. Within the City, law guardians represented juveniles in 10,240 (79%) of 13,020 proceedings; private counsel did so in 901 (7%). Outside the City, law guardians represented juveniles in 3,457 (32%) of 10,725 proceedings and private counsel did so in 1,337 (13%). Put differently, there was no representation outside the City in 55% of the juvenile proceedings compared with 13% within the City.

“These statistics shed light on the cost figures discussed above. The law guardian program in New York City cost $108,707.10 and produced representation in 10,240 proceedings, an average of little more than $10.00 per case. Outside New York City, it cost $114,102.51 and produced representation in 3,457, an average cost of about $33.00 per case. This difference in cost probably reflects the difference between the contract system used in New York City and the panel system used in all but two counties outside the City.

3. Differences in Proceedings. The law guardian program was used most extensively in person in need of supervision proceedings, where the conflict between parent and child makes it unlikely that the parent will disinterestedly represent the child.

**Representation By Law Guardian in Different Juvenile Proceedings, 1963-64**

<table>
<thead>
<tr>
<th>Proceedings</th>
<th>New York City</th>
<th>Other Counties</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Supervision&quot;</td>
<td>91%</td>
<td>39%</td>
<td>66%</td>
</tr>
<tr>
<td>Delinquency</td>
<td>76%</td>
<td>29%</td>
<td>55%</td>
</tr>
<tr>
<td>Neglect</td>
<td>71%</td>
<td>35%</td>
<td>54%</td>
</tr>
<tr>
<td>All Proceedings</td>
<td>79%</td>
<td>32%</td>
<td>58%</td>
</tr>
</tbody>
</table>

Disseminated by The Research Repository @ WVU, 1965
Generally, the lawyers who do this work in New York City are young; most of them come from the less well-known law schools. In generally they were not near the top of their class at school; over half of them are women. Without question they are zealous, dedicated lawyers, although the skill they now possess is largely the product of on-the-job training. Few of them had much experience of any sort before being taken on for this employment. Those who had experience generally had it in another field. They were paid a little over 5,000 dollars per year when they began.

In New York City a youngster who appears before the judge will be asked whether he has counsel and, if not, whether he would like a law guardian to represent him. As we have seen, the number of affirmative responses to this question is high.

A law guardian, thus appointed immediately prior to the “fact-finding” hearing, interviews the respondent hurriedly in an attempt to get the child’s version of the events. The guardian cross-examines witnesses and presents defense testimony in the usual way. Under a unique provision of the New York law, a child has a statutory right to remain silent in juvenile delinquency hearings. The practice of New York City law guardians is to give effect to the youth’s choice, a practice which some of the judges think undesirable. At the close of the case the law guardian will seek a dismissal if he feels the evidence has not established the allegations of the petition by a preponderance of the evidence. An acknowledgment by the youngster to his law guardian that the petition is correct does not normally change any of these procedures. In short, at the fact-finding hearings in New York City the law guardians behave in much the same manner as ordinary lawyers seeking to protect their clients from official action.

---

"4. Differences Between Sexes. Law guardians were more often appointed to represent girls than boys, especially in supervision proceedings. The difference disappears in neglect proceedings, which generally involve children who have not reached puberty.

<table>
<thead>
<tr>
<th>Proceedings</th>
<th>Boys</th>
<th>Girls</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervision</td>
<td>61%</td>
<td>72%</td>
</tr>
<tr>
<td>Delinquency</td>
<td>55%</td>
<td>58%</td>
</tr>
<tr>
<td>Neglect</td>
<td>54%</td>
<td>53%</td>
</tr>
<tr>
<td>All Proceedings</td>
<td>56%</td>
<td>62%</td>
</tr>
</tbody>
</table>
If a law guardian has been assigned for a fact-finding hearing, a law guardian will appear at the time of disposition, though not necessarily the same one. It is here that the probation staff in New York City and the guardians have experienced some friction. The lawyers generally share a low opinion of state training schools. They feel that the schools are little different from prisons in that the program is limited largely to carrying out a custodial function. Further, some of the guardians believe that the probation staff uses the training schools as "dumping grounds," i.e. that the staff makes recommendations for commitments not because the training school would be beneficial to the child but because no other way of dealing with a troublesome youngster has come to mind. As a result the law guardians often resist recommendations for training school commitments with vigorous advocacy. Other sources of friction have also appeared such as the lawyer's insistence that he is free to look behind any sort of placement recommendations and make suggestions of his own. These sore spots have been the subject of several conferences designed to eliminate them.

The advocate's role which the New York City law guardians play at the fact-finding hearing has been bothersome to policemen who are frequently witnesses in the court. As a result the police department has assigned some of its lawyers to work in the busiest courts. There they play a kind of prosecutor's role in cases in which a police officer is a witness or a petitioner.

Thus the New York system has made a juvenile court hearing a kind of adversary proceeding. Some may dispute the wisdom of a movement in this direction. On November 18th, 1964, the Chief Juvenile Court Judge of the District of Columbia, Morris Miller, announced that no more Georgetown University Law Interns would be appointed to represent juveniles in delinquency matters. He reportedly said, "In numerous cases, the appearance of a lawyer in Juvenile Court breeds contempt, rather than respect for law." The fear expressed is the fear that youngsters will get the idea that a "mouthpiece" can secure their release irrespective of their involvement in an offending act.

Judge Miller has a point, but I predict public support for using lawyers in juvenile court will grow. It is perhaps worth noting that the Ford Foundation has just appropriated a substantial sum of money to the National Council of Juvenile Court Judges, in part to
establish demonstrations projects in Cleveland and Newark, in which several full-time lawyers will represent children in the juvenile courts.

In 1963 the Committee on Juvenile Delinquency of the American Bar Association asserted that attorneys should be encouraged to participate in juvenile court proceedings, although the committee was also plainly fearful that the lawyers who appear might not understand the "true nature and philosophy of the juvenile court" and might "misconstrue and subvert the role of attorneys in the juvenile court."

The juvenile court deals with a conflict situation which no label can hide—a situation in which a lawyer is a desirable helper. The New York system which provides for continuing appearances by good lawyers is a system which will bring specialization and its accompanying excellence. The fears of the A.B.A. committee might be dispelled by this arrangement. Such lawyers can learn to know the court, its purposes and its ways. Some youngsters may see the law guardian as a "mouthpiece;" others may see him as the first law figure who has performed a helpful function. The later experience may be of great value in the city where most of the respondents in delinquency cases come from underprivileged homes.

Firm and imaginative advocacy on behalf of the poor holds the promise of persuading them that law in a democracy need not be a threat but can be a helpful tool to them. To give their children a lawyer's aid in the juvenile court may be a step in the process of persuasion.14

NEW WAYS OF SERVING THE MIDDLE CLASSES

In his important book, A Lawyer When Needed, Professor Elliott E. Cheatham argues that the growing middle classes do not receive the legal services they need. He sets forth the reasons as he sees them.

"One reason is ignorance—ignorance of the need for and value of legal services, and ignorance of where to find a lawyer and whom to choose. A second reason is fear—fear of overcharging and overreaching by the lawyer, and fear of the law's processes

---

and delays. These reasons are of long standing, as the unpopularity of lawyers reveals. Ignorance may be corrected by information. Fear must be replaced by confidence. It is no accident that the largest area of unauthorized practice of law is the middle classes. Laymen go to unauthorized practitioners who are accessible, whose charges they do not fear, and whose dependability they rely on because of connections with familiar institutions they trust....

"Another powerful reason is inertia of the bar coupled with fear of change. Successful lawyers are successful and effective under the system they know. It requires an uncommon effort to contemplate, much less support, a changed professional system, and old convictions give way very slowly before new evidence."  

Professor Cheatham discusses ways of righting the imbalance between the supply of lawyers and the need for them in the middle class. The development of lawyer referral services has made it easier for lawyers and laymen to be introduced to one another. The Philadelphia Neighborhood Law Office Plan which encouraged setting up independent offices permitted to advertise in ways not generally approved, provides another model for action. Most importantly, Professor Cheatham calls attention to the development of group legal services as a principal means to supply the middle class with skilled service. "Group legal services" is a term referring to ways of organizing legal practice whereby a labor union, a trade association, or any other group establishes a plan for prepaid legal services available to individual members. Sometimes the term refers to a situation in which the organization selects, but does not pay lawyers. In return for the recommendation, the lawyers agree to work for lower fees. These modes of organizing the practice have found difficulty in securing acceptance from lawyers. The Canons of Legal Ethics stand in the way if they themselves are constitutionally applicable to group practice arrangements.

The model of law practice generally assumed by professional canons is a model of an individual lawyer or law firm who is sought out by an individual client without employment of any intermediary set up for the purpose of bringing lawyer and client together. It is unprofessional to seek professional employment by advertise-

\[15\text{ CHEATHAM, A LAWYER WHEN NEEDED, 63-63 (1963).}\]
ments, through touters or by aggressive personal communication. Even indirect advertisements such as stirring up newspaper publicity offend the traditions of the profession. Only the use of "reputable law lists" or "simple professional cards" are approved. Furthermore, it is unprofessional for a lawyer "to volunteer advice to bring a lawsuit except in rare cases where ties of blood relationship of through trust make it his duty to do so." The Canon prohibiting the use of intermediaries is so important that it should be set forth:

"The professional services of a lawyer should not be controlled or exploited by any law agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

"A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs."\(^{16}\)

In January, 1963, the Supreme Court decided a case involving the National Association for the Advancement of Colored People and the NAACP Legal Defense Fund.\(^{17}\) These organizations sought to enjoin the enforcement of certain statutes of champerty and maintenance by the Commonwealth of Virginia. The Virginia Code forbade solicitation of legal business by an agent for a corporation which retains lawyers in connection with legal action to which it is not a party and in which it has no pecuniary interest. This legislation vitally affected the NAACP. The NAACP financially assists litigation aimed at ending racial segregation in the schools. The Virginia Conference of the NAACP maintained a legal staff of fifteen attorneys who were paid sixty dollars a day while working on a case plus out of pocket expenses. A litigant who wishes the service of an NAACP staffer may apply to the Virginia Conference or to

\(^{16}\) Canon 35, American Bar Association, Code of Ethics.  
the legal staff itself. Quite often, however, in school litigation, a local NAACP branch will meet a group of parents hoping to find plaintiffs willing to bring a suit. At such meetings printed forms are available which parents sign, authorizing the legal staff to take action. The forms may or may not give authority to a specific attorney at the time they are signed. Clearly, the technique encourages litigation; it seeks to persuade parents to bring litigation. The NAACP also serves as a lay intermediary, through with Negro plaintiffs are given access to legal assistance.

The Supreme Court held that the NAACP practices are "modes of expression and association protected by the First and Fourteenth Amendment which Virginia may not prohibit." "Solicitation" was said to be within the area of freedom protected by the First Amendment. The First Amendment protects vigorous advocacy against governmental intrusion. The litigation involved "is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts." The NAACP activities did not offend Virginia's interest in regulating the traditional illegal practices of barratry, maintenance and champerty. Presumably the NAACP litigation was undertaken without malicious intent. The object was to enforce a constitutional right. The lawyers were not moved by a motive of private gain or the oppression of others.

It is important to note that the Court spoke of litigation against government as the protected activity. Obviously the opinion does no consider the constitutional protections which may or may not exist when litigation is directed against private interests. It is conceivable that the case may have had a different outcome if the NAACP-supported litigation had been directed at the owners of public accommodations or landlords.

Access to a lawyer through the mediation of nonlawyers was given further constitutional protection in April 1964. The Brotherhood of Railroad Trainmen is a union which not only seeks the normal objectives of a trade union, but provides a great many other benefits

---

18 Id. at 429.
for members such as insurance and financial aid to sick and injured members and assistance in achieving safer working conditions.

The Federal Employer's Liability Act passed in 1908, supported by the union, provides that an injured railroad worker may recover damages for negligence without the cause of action being subject to the common law defenses of contributory negligence, fellow servant, and assumption of risk. In making claims under the act, injured workmen often found that they settled for small, inadequate sums. Frequently the employees had no way to find competent, honest lawyers who could match the experts appearing for the railroads. Recognizing that it is difficult for an ordinary workman to find skilled legal talent the Brotherhood set up a Legal Aid Department, since renamed the Department of Legal Counsel. It is now standard Brotherhood practice to advise their members not to settle with the railroad after an accident in the absence of legal advice, and to recommend a lawyer to their members. Under the plan, in each of sixteen regions across the United States, the Brotherhood has selected a lawyer or a firm with a high reputation for honesty and for skill in carrying on personal injury litigation.

The Virginia State Bar sought to enjoin the Brotherhood from carrying on the activities which have been described above. Once more the state's attempt to interfere with the operation of an intermediary who arranges for legal advice failed on First Amendment grounds. Mr. Justice Black's opinion said, "It cannot be seriously doubted that the First Amendment's guarantee of free speech, petition and assembly, give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them" under certain federal legislation. Virginia's attempt here was said not to involve a prohibition of commercialization of the legal profession. The Court indicated that the Brotherhood's conduct was not "ambulance chasing" nor were the railroad workers themselves engaged in the practice of law by recommending lawyers. For union members, Mr. Justice Black said, "to associate together to help one another to preserve and enforce rights granted under federal laws cannot be condemned as a threat to legal ethics."

The NAACP and Brotherhood cases are widely viewed as an encouragement that the Bar reconsider its objections to group legal

20 Id. at 5.
services. The Brotherhood case is especially significant because, in contrast to civil rights litigation, the personal injury suits involved in the case are productive of large fees. It is not possible to see the Brotherhood case as having mainly to do with freedom of political expression. The importance of the cases is underscored by the fact that forty-eight state and local bar associations joined with the American Bar Association in an unsuccessful petition for a rehearing in the case.

In mid-1964 the State Bar of California's Committee on Group Legal Services published a report which has received nationwide attention. In its conclusion the report states, "We have started with the assumption that our primary concern is that the public be provided legal services where they are needed. We are convinced there is such a need and that group legal services provide a vehicle which, subject to the restrictions we have urged, can properly fill this need." Is there an alternative to the development of group legal services if the middle class is to receive the legal assistance appropriate to the needs of its members? In England there is a tax-supported scheme of legal aid and advice which could possibly supply a model for us.

Fundamental to the English system is a recognition of a right to legal service, a right to legal advice and a right to legal assistance in litigation if litigation prove necessary. The English Legal Aid and Advice System establishes the right and seeks to implement it. Public funds are made available for the vindication of the right to legal advice and assistance, thus the operation of the English system is freed from dependence upon charitable contributions. The reorganization of professional traditions required by group legal services is also obviated by the system.

It is a fundamental of the English system that each person is entitled to choose his own lawyer. The lawyers, both solicitors and

---

22 Id. at 728.
23 See Parker, Development of Legal Aid in England Since 1949, 48 A.B.A.J. 1039 (1962); Matthews, The English System—A Native View, 22 BRIEF CASE 71 (1963). Much of the material which follows is based on the author's personal observations of the English system and conversations with English lawyers during a visit in the Spring of 1964. Other information was obtained from the reports of the Law Society on Legal Aid and Advice laid before Parliament each year in pursuance of Section 13 (3) of the Legal Aid and Advice Act of 1949.
barristers, proceed with the case just as they would for any other client. The English system, seeking to imitate for those of modest means the rights of those with wealth, carries out its theory by making legal assistance available in all stages of a proceeding providing each succeeding step is reasonable to take. A client who is eligible has a right to press his case through to an appeal provided it is reasonable to do so.

Another key principle of the English system is that legal advice should be made available quickly, easily and cheaply so that legal troubles are not compounded by delay; so that legal assistance in litigation may be timely. A publication which publicizes the system urges early consultation with a solicitor: “Now that everyone can afford to consult a solicitor at the outset it is only common sense to obtain professional advice at the earliest opportunity. The proverb, 'a stitch in time saves nine' applies just as much to legal problems as it does to repairing your clothes. It is just as important to consult a solicitor when a problem first arises as to consult a doctor when you first feel pain.”

The Legal Aid and Advice System is participated in by substantially all practicing barristers in England. Over two-thirds of the solicitors participate in the legal assistance system and around one-half are involved in the legal advice scheme.

Conferences for legal advice between clients and solicitors who are on the legal advice panel are offered without charge for anyone who receives National Assistance (welfare) and who does not have over 350 dollars in “disposable capital.” Under the advice scheme a person with a wife and two children who makes less than thirty-five dollars a week and who does not have more than 350 dollars in savings may consult a solicitor on the legal advice panel for a fee of approximately thirty-four cents. To supplement the statutory scheme the Law Society itself has set up a voluntary system participated in by almost all its members. Under the voluntary scheme a solicitor will give anyone a half hour of oral advice for a fee of one pound or two dollars, eighty cents. A great deal of the business in the legal assistance scheme is generated from legal advice clients.

In order to receive legal assistance for defending or initiating litigation, two tests, one legal, the other financial, must be met under the English system. The financial test is administered not by lawyers but by the National Assistance Board. An important fact stands
out. The English system does not apply only to the poor but also to working class people and the members of the lower middle class. The financial test permits legal assistance to a married man with three children who has a savings ("disposable capital", a phrase which does not include the value of a home or workman's tools) of less than 2,000 dollars and an income of approximately 4,500 dollars a year.

Legal assistance is not paid for wholly by the state. The National Assistance Board determines the amount that each assisted person should contribute using a statutory formula. Some contribute nothing, others contribute a considerable proportion of the total cost. Only about fifty per cent of the cost of the system is borne by the government.

An assisted person must also satisfy a legal test. The legal test is administered by practicing lawyers sitting in committee, reviewing applications for legal assistance. The committee is charged with applying a test of merit. The issue to be resolved has been expressed in the following way: "If the applicant were a private client possessed of means sufficient to pay his own cost and if he were consulting me privately in my own office, what advice would I give him," This test leads not only to rejection of a claim on the ground that it is without substance but also to rejection on practical grounds. A claim for damages may have merit but the defendant may be indigent.

The committee not only decides whether the application is meritorious but also exercises power to limit the amount of assistance offered. For example, a committee may say, "Let us authorize a certificate to obtain the advice of counsel on this question," or "This certificate of assistance authorizes proceedings in the County Court but not in the High Court." Certificates once given are subject to withdrawal, limitation or extension.

Most petitions for legal aid are drawn by solicitors, quite often as an outcome of a visit by a client under the legal advice scheme. During the year 1963 the Law Society was billed for approximately 6,000 instances of legal advice. There were obviously many more conferences because many bills are not sent and others become part of the solicitor's total bill at the end of a case included in his fee for instructions for brief.
Approximately fifty per cent of all important litigation in England is legally aided today. The lawyers, both barristers and solicitors make their contribution to the system by taking a fee more modest than usual. They are allowed only ninety per cent of the normal fee available in an ordinary case.

English lawyers seem to be well satisfied with the scheme. The principal complaint is that the fees are not large enough. Specifically, solicitors have complained of the ten per cent reduction from normal fees as a hardship upon them. This ten per cent is not ten per cent of the solicitor's personal earning, but ten percent of his total fee, a sum covering many costs. Every office must bear ordinary office costs such as rent, the wages of employees, and the purchase of books. Obviously, solicitors cannot reduce office costs by ten per cent when handling a legal assistance matter and therefore the ten per cent reduction becomes a much larger portion of personal earnings of lawyers.

A second complaint has to do with costs of litigation. In England the loser usually bears the costs of an action including the cost of counsel. One rarely, however, can recover costs against an unsuccessful, but assisted litigant. Thus the public purse helps one side in litigation and in doing so, puts an expense on the other, winning side. Unless costs can somehow be recovered by the victorious party who is not legally assisted, the legally assisted person is in a very good position to bargain for a settlement.

A statutory instrument has recently been put into effect which provides compensation to those who prevail against assisted litigants. The instrument leaves a part of the problem unresolved, however, because it permits recovery of costs from governmental funds only if the winner is "unassisted." The winner may be partially assisted and hence unable to recover under the instrument.

It is of interest to consider the business of a legal aid committee on a certain day. A meeting of the London Local Area Committee took place at 2 P. M. on June 11, 1964, to consider twenty-three cases. Of these, four involved simply a report that the applicant was ineligible for assistance on economic grounds. In one case the certificate was refused because of lack of cooperation on the part of the applicant; he had failed to answer letters of inquiry concerning his cause. Six were petitions to begin divorce actions, four of which were granted and two were refused. One was a petition
to defend a divorce action; it was granted. Six cases involved matters relating to the rental of real estate, all six of which were granted. One approved case involved fraud in the purchase of a business. Another was an installment contract problem but assistance was refused. A petition in a wrongful death case was granted. Assistance to a proceeding which charged a wrongful dismissal from employment was also granted and, finally, a suit to overturn a criminal conviction was refused. The large number of divorce cases reflects the general pattern. It is estimated that over half of the legally assisted cases are matters of matrimonial litigation.

The English system has advantages in serving the poor as well as the middle class which the English are quick to point out. A perceptive observer, Mr. E. J. T. Matthews, an under-secretary of the Law Society in England, has remarked that in the United States we have the same law for the rich and the poor but we are satisfied to have one lawyer for the rich and another one for the poor; we offer, he has said, “legal soup kitchens.” He criticizes our system of legal aid on the ground that we set up offices that are devoted wholly to the problem of the disadvantaged. He points out that under our system the individual client does not have a choice of attorney. In the ordinary legal aid society, clients are likely to present the same kind of problem over and over again to the lawyers working with the organization. Matthews believes that this constant repetition dulls the lawyer’s sense of involvement in the individual case. Advice can become institutionalized, routinized, made commonplace. A client seems to be “next-in-line” rather than an individual with a specific problem requiring a personal approach. The routinization, he feels, offsets the expertise which institutional lawyers may obtain in dealing with specific problems in a specific area of the law.

Mr. Matthews is also concerned about what our legal aid system does to the law itself, to the criticism of the law and to law reform. We have isolated the problems of the poor into the hands of a special group of people. The great bulk of American lawyers are totally unacquainted with the problems of the poor because they are rarely assigned to do any legal work for poor persons. Ordinary solicitors, ordinary barristers are constantly called to action in cases involving poor persons by the English legal aid and advice system.

Mr. Matthew’s criticism of our way of dealing with the legal problems of the poor is reminiscent of a central complaint concern-
ing the way Americans have dealt with the issue of poverty in the
1960's. The disadvantaged have been left outside the American
stream of life; they do not really participate in the common life
of our community. Matthew's insists that we have contributed to
this alienation by isolating ourselves from knowledge of the legal
problems of the poor persons and consigning that knowledge to a
few specialists.

Matthew's criticism points to other problems which have not
been fully explored in the United States. What happens when the
practice of law is institutionalized, Are there not significant ways
in which legal representation by legal aid societies is compromised
for reasons other than the client's interest itself? Are there not
many examples every week of legal aid lawyers acting in ways dif-
f erent from the ways they would act for private clients? Is it pos-
sible to approximate for everyone the kind of legal service that is
available to those with means? Is it possible to create a system in
which a poor man is dealt with by a private lawyer and thus to
abandon a system in which poor clients are referred to a specialized
organization which deals with their problems?

Obviously, the English system must have a way of handling the
problem presented by the aggressively litigious. Under regulation
8 of the governing rules, those who have applied for and have been
refused a certificate on more than four occasions cannot apply
again until a year has elapsed. In 1962 six applicants were the
subject of orders under regulation 8.24

The English system has been well publicized. It is likely that the
workings of the system and its opportunities are widely known
throughout the realm. England is a small country of concentrated
centers of population in which information is easily dispersed. There
has been a widespread program of public education. Over 500,000
copies of a small pamphlet, Legal Aid and Advice, describing the
services offered by legal aid have been distributed by the Law
Society. Furthermore, many persons are accustomed to using the
offices of the Citizen's Advice Bureau to seek all sorts of advice, but
especially to consult with respect to legal, economic or social
problems. The Citizen's Advice Bureaus, widely dispersed through-
out England, can easily refer a person to a list of the solicitors on the

24 Report of the Law Society on Legal Aid and Advice 1962-1963,
p. 12.
Legal Aid Panel. The solicitor approached immediately provides a point of contact with legal assistance system and is likely to assist in obtaining the benefits of the English system.

The very dispersion of the English legal profession in England helps to publicize legal aid and advice and to make it readily available to the people of the country. Law firms are smaller in England than in America and a great many law firms have branch offices in neighborhoods and in smaller towns. This means that the lawyer in the branch office has the benefit of a downtown partner who specializes, has the advantage of access to a great library, and yet may have the kind of practice which keeps him in close touch with the man on the street. For clients in the hinterlands or in outlying neighborhoods, a skilled lawyer is available without a long trip downtown.

There are some interesting side effects of the English system. A great many law questions are now resolved which would never be raised without legal assistance, especially points of law of interest to poor persons. Two famous divorce cases, making new decisional law and a landmark law labor case are among the recent products. Not only does the system contribute to the clarification of the law, but it permits litigation displaying the existence of certain social and economic problems which might never be brought to public attention in any other way.

It is probable that the British legal aid system has spurred law reform in England in still another way. Inadequacies in the law of procedure are now of special interest to the government. The British Home Office, which has responsibility for the introduction of legislation respecting law reform, has become exceedingly interested in streamlining procedure. It is responsible for paying a good bit of the bill caused by legal clumsiness.

There is a sharp difference between the changes in the law which may come because of the English legal aid system and the kinds of changes which might be wrought by aggressive American legal assistance. The English plan hardly affects public law at all because the ordinary British Courts handle many fewer matters in this area than do American Courts. The English judges do not review the constitutionality of legislation. They infrequently sit in judgment upon official acts. Complaints about housing, welfare planning, and the like, are handled in the appropriate ministries and
their tribunals. Legal aid does not extend to representation before these administrative agencies, nor would one expect an extension of the legal assistance program in this direction. The British are far more interested in the Scandinavian institution of the Ombudsman—an official who investigates complaints of arbitrary and illegal administrative action.

The English plan has been gradually extended in respect to court matters. Only three years ago was legal assistance given in litigation before the magistrates' courts. A new proposal, set forth in the 1962-63 Report of the Law Society made pursuant to the Legal Aid and Advice Act, recommends that legal aid be extended to children and their parents in certain court cases.

"The lack of legal aid is apt to place both children and their parents at a grave disadvantage in some of these cases, which are, of course, of great importance to them, since the court's decision may result in families being permanently or temporarily broken up, a circumstance which may have grave consequences to the family. Both children and parents in these cases are, owing to their poor education or agitated state of mind, sometimes quite incapable of properly putting their case. It follows that, in some cases, if a party is not represented, an important piece of evidence or argument may be missed; but, quite apart from that, in certain cases, if a party is not represented, it may at least appear to him, if not the court and to the children's officer who usually appears against the parents in these proceedings, that justice is not being done."25

Some important English lawyers, including Under-Secretary Matthews, believe that the costs of all litigation should be shared between the taxpayers and the litigants immediately involved. The financial limits on the legal assistance program have been raised substantially since the program began, and these English lawyers believe the limits should be abolished entirely. Under the present, a man who has a dollar less than the maximum can receive legal assistance although, to be sure, he will make a contribution according to his means. However, the government will share in the expenses and if the cost is very great, the state's share will be correspondingly large. On the other hand, a man with a dollar more than the maximum, will receive no assistance, yet may have legal

25 Id. at 47.
expenses, reasonably incurred, which will amount to a great deal of money. It is argued that there are only two issues to be faced. First, does a litigant have a reasonable legal claim or defense? This question should be answered by lawyers looking at the litigant's problem from a lawyer's point of view. The second inquiry resolves itself into two questions. How much will litigation cost and how much can the litigant be fairly called upon to contribute?

The general movement in England toward recognizing a public responsibility for bearing the cost of litigation is further underscored by a memorandum in the 1963-64 Report of the Council of the Law Society. The Council stated that, irrespective of the financial ability of the litigants, a state subsidy should be available to pay for certain kinds of litigation.

"[I]t is unjust for the litigants to share or the loser to meet the whole of the costs arising in proceedings where—(a) a new or doubtful point of law requiring judicial decisions governs the determination of the case; (b) the construction of a Statute or Statutory Instrument governs the determination of the case; (c) upon appeal, it appears that the Inferior Court or Courts were mistaken as to law or precluded from reaching a just determination by reason of the doctrine of judicial precedent."\(^{26}\)

In such cases the parties in the case are by no means culpable for bringing the litigation. Indeed, the Council saw them as performing a public service by resolving a doubtful question of law. In the Council's view the cases listed involved matters especially worthy of subsidy because the issues in these cases are likely to prove expensive to resolve. There will be a greater need for research on the part of legal advisors. The lack of clarity in the law will lead a litigant's opponents to press his contentions more vigorously and to seek review in a higher court.

The Council was aware of such a system in the Australian state of New South Wales where a portion of court fees is set aside to indemnify an appellee who loses the appeal on a question of law.\(^{27}\)

In addition to the costs in the listed cases the Council identified another class of expense which might fairly be borne by the state:


\(^{27}\) *Id.* at 79.
those costs which arise by reason of "a failure or omission by the Court itself." The Council had in mind the financial burden due to delay when a case has been set down for argument and when the court is unable to deal with it at the appointed time. It is the kind of cost which can be minimized by effective court administration. In summary, the Council would safeguard litigants against outlays which are incurred because of defects of the law and of the system of the administration of justice.

For all the merit of the English experiment we are unlikely to imitate it. For one thing our large, diversified legal profession does not discipline its members vigorously and discipline is required in the English scheme. The Law Society's role of administering legal assistance is a key factor in its success. America possesses no equivalent institution. Another point is that in the United States lawyers' fees are not set by the court so the level of cost is hard to control.

There is even a matter of jurisprudence which separates us from the English. I believe English lawyers are much more comfortable than American lawyers would be in sitting and deciding that this case has legal merit but that case does not. "Law" has much more certainty to the average English lawyer than it does to his American counterpart.

I may be wrong. The English experience is available for study and for copying if we wish to do so, yet I believe that some form of specialized, publicly supported law practice will supply legal services to the poor. For the middle class the development of group legal services seems to offer the best practical hope for better, less expensive service.

Our profession is changing rapidly and moving toward providing more services, more efficiently, and that is good. Law is a profession aimed at helping people with troubles. What assistance lawyer's training can give to hard-pressed persons should not be barred by reason of lack of money or of the organization of the profession itself.