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LEGAL AID IN RETROSPECT AND PROSPECT

LANE SUMMERS*

In complying with the request for comment on the recently published book by Emery A. Brownell, entitled *Legal Aid in the United States*,¹ I may appropriately quote from others writing on the same subject since the author largely uses that method of stating basic principles which, put together, prescribe legal aid as a social medicine.

The foreword of the book, by Harrison Tweed, President of the National Legal Aid Association, takes words from Chief Justice Hughes who declared:

Whatever else lawyers may accomplish in public affairs, it is their privilege and obligation to assure a competent administration of justice to the needy, so that no man shall suffer in the enforcement of his legal rights for want of a skilled protector, able, fearless, and incorruptible.

The introduction to the work was prepared by Reginald Heber Smith, author of *Justice and the Poor*, who says:

Legal Aid is an essential part of the administration of justice in a democracy; and the primary responsibility for the establishment and maintenance of an adequate number of legal aid officers and committees in all parts of the nation is one of the cardinal obligations of the legal profession.

Much the same thought was expressed in the introduction by quoting from the President of Carnegie Foundation who in 1919 wrote that: An autocracy can exist without law, but a free democracy cannot. The very existence of free government depends upon making the machinery of justice so effective that the citizens of the democracy shall believe in its impartiality and fairness.

While recognizing the right of the individual to equality in the protection of the law, the introduction also recognizes the necessity of an independent legal profession which is free to think and speak in all directions at any time. On this, the introduction says:

The first proposition—which is far more important than the American people yet realize and which indeed is axiomatic—is that an independent bar is just as essential to the preservation of freedom as is an independent judiciary or the Bills of Rights in our federal and state constitutions.

Out of his wide experience as an active practitioner, as adviser to presi-

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¹ Lawyers Co-operative Publishing Co., Rochester, New York, 1951, \$4.50.

dents and others in positions of high trust, and as Secretary of War in World War II, the late Henry L. Stimson chose these words for the Introduction to his autobiography:

"I came to realize that without a bar trained in the traditions of courage and loyalty, our constitutional theories of liberty and justice would cease to be a living reality. I learned of the experiences of those many countries possessing constitutions and bills of rights similar to our own, whose citizens had nevertheless lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the writs of habeas corpus and certiorari. So I came to feel that the American lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. I felt that if the day should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed."

The second proposition is that there is the ever-present danger that a grant of governmental money will be followed by governmental control. To put it succinctly, if the government becomes the lawyer's paymaster, it may soon become his master. As expressed in that fount of political wisdom, *The Federalist*, in Paper No. 79 written by Alexander Hamilton:

"In the general course of human nature, a *power over a man's subsistence amounts to a power over his will.*"

One reason the average American citizen does not realize that an independent bar is essential to the preservation of his liberties is that he still thinks of litigation in the courts as consisting overwhelmingly of suits between private parties. If it is an automobile accident, the case is John Smith against a private insurance company; if it is divorce, the case is Mary Roe against Richard Roe; if it is a dispute about a contract the case is William Doe against Blank Manufacturing Company.

That is only part of the picture. Government is steadily looming larger and larger in the role of being a *party* to the litigation. In all criminal cases, the state is a party because it is the prosecutor. In all tax cases the government is a party and may be either plaintiff or defendant. Governmental commissions and bureaus, both federal and state, have proliferated in recent years. Many are necessary; but they all enforce their rules, regulations and decisions by going into court as the complainant party.

Whenever the government, or one of its officers or bureaus, is a party to litigation in the courts, its lawyer is paid out of the public treasury. If lawyers for all the poor are to be paid out of the public treasury, will the next step be that all persons of moderate means shall be supplied with lawyers paid, in part at least, out of the public treasury? And if we got that far, could an independent bar survive? Or, to put the question in more dramatic form,—if a citizen sues the government and the lawyers for *both* parties are paid by the government, will the citizen get that fearless and

resolute representation by his counsel which history proves is essential to the proper administration of justice?

If Legal Aid attorneys receive their salaries from the public treasury (either directly or as staff members of a public bureau), will that—despite its innocent and appealing appearance—be the first step, the entering wedge, leading to ‘socialization’ of the legal profession? That the risk is grave and the danger imminent is the considered judgment of Chief Judge Orie L. Phillips, Chief Justice Arthur T. Vanderbilt, Dean Robert G. Storey, and Herbert W. Clark, Esq., who have asked that their strong feeling as members of the Council be recorded in this Introduction.

It is historically true, as Dean Storey has pointed out in addresses to the State Bar of California and the Georgia Bar Association that the totalitarian governments of Germany and Russia were unable to proceed very far until they had either destroyed the whole legal profession including the judges, or had corrupted it by bribery in the form of salaries, jobs, and other emoluments.

What makes the issue a sharp and thorny one is the line of argument that starts from a wholly different basic premise. Judge Learned Hand has stated it in just seventeen words. On February 16, 1951, speaking at the 75th Anniversary Dinner of The Legal Aid Society of New York he said:

“If we are to keep our democracy, there must be one commandment:
Thou shalt not ration justice.”

Inasmuch as Legal Aid is essential to an impartial administration of justice, what is to happen if private support of Legal Aid should falter or fail? Are we forced to the conclusion that the lesser of the two evils would be to let Legal Aid languish and die?

Answering his own question the introductory writer, as expected, reaches the conclusion that while legal aid need not rely on public funds, it is best organized and best administered when it becomes a “*community enterprise*.” Amplifying this expression he quotes from a resolution adopted in 1950 by the House of Delegates of the American Bar Association:

Legal Aid is unquestionably best off, and best managed, when it becomes a *community* enterprise, with its roots deep in the community from which it draws its support.

Responsibility for the lawyerlike conduct of a Legal Aid office and for the selection of a competent staff must rest on the legal profession. And unquestionably lawyers ought to give, and easily could give, more money to support Legal Aid in their own communities than they have done in the past—with a few notable exceptions.

Following this introduction it is not surprising that the author defines his subject as follows:

Legal Aid, essentially, is the organized effort of the bar and the com-

munity to provide the services of lawyers free, or for a token charge, to persons who cannot afford to pay an attorney's fee and whose cases are unremunerative on a contingent fee basis.

In the author's words adequate legal aid service requires:

- (1) A definite, convenient and well-publicized place where the service may be applied for;
- (2) Definite office hours;
- (3) A definite person in whom confidence may be reposed who can give executive direction; and
- (4) A supervisory policy-making group to assure sound administration in the interests of the clientele, the community, and the bar.

With implied approval Brownell lists the earlier findings made by Smith in *Justice and the Poor* as to the difficulties of progress in legal aid as follows:

- (1) Lack of funds for operation;
- (2) Frequent change in professional personnel;
- (3) Absence of centralized authority among legal aid organizations;
- (4) Insufficiency of propaganda for education inside and outside the Bar;
- (5) Lack of coordination in legal aid activity;
- (6) Absence of accumulated data covering legal aid experience.

According to the author's classification, efforts to render legal aid under different circumstances by different groups have developed various types of organizations:

(1) The Society—an independent entity, being a charitable corporation or association employing professional personnel to administer legal aid under the supervision of a governing board.

(2) The Social Agency Department—a legal aid operation as one aspect of a larger whole comprising several welfare functions in charge of a general secretary.

(3) The Public Bureau—an office for legal aid, supported by tax funds, maintained as a function of local government.

(4) The Bar Association office—the administration of legal aid in an office operated and controlled wholly by a Bar Association, regardless of the source of financial support.

(5) The Law School Clinic—any legal aid service directly controlled by and connected with a law school.

As appraised by the author the work of these organizations results in benefits to the legal profession:

- (a) By assisting individual attorneys in matters with which legal aid specialists are familiar;
- (b) By contributing to the training of law students;
- (c) By helping uncover violations of professional ethics;
- (d) By dispelling distrust of lawyers;
- (e) By relieving individual lawyers of personal services in legal aid.

On the theory that benefits received raise reciprocal obligations, the author joins Smith in his *Justice and the Poor* by asserting that the Bar owes the debt to legal aid of supplying constructive leadership, careful supervision, and financial support. In connection with these duties resting on the Bar the author further quotes Smith as saying that: "To know nothing about legal aid work, to care nothing about it, and to do nothing for it, is to doom it as effectively as by open opposition."

After paying deserved tribute to Smith's pioneering work, the author proceeds to show that since it was written in 1919, legal aid organizations have increased numerically and spread geographically, particularly in the last few years; but that with many localities still unserved and with population growing in general and shifting after industry, the demand for legal aid continues far ahead of the supply at present.

In discussing the kinds of services available in and needed from legal aid offices, the author observes: (a) That most of the problems presented to the legal aid attorney require no court proceeding but are resolved by consultation (with or without investigation) or by referral elsewhere; (b) That benefit to the individual client and others involved is given by advice which in nature is preventive rather than remedial; (c) That good is derived from careful clarification for the layman as to the functions of lawyers in their practice along with explanation of their standards of fees and Canons of Ethics.

On the question of what persons shall be deemed qualified for free professional help, the author states that to avoid competition with private practice, existing legal aid organizations strictly observe the policy of confining their services to those who from poverty are unable to procure assistance otherwise. However, appreciating the elasticity of this test he approves of its interpretation for local application by a supervisory body with a measure of discretion being left to the attorney in charge.

Reviewing legal aid as presently administered, the author lists some 32 societies having salaried attorneys, 13 departments of social agen-

cies, 6 public bureaus, 20 bar offices, and a number of law school clinics.

As to the societies, which seem to receive his full favor, he attributes their superiority in large part to their independence which allows them "to develop in close cooperation with the Bar," and yet to stand against some shortsighted attitudes of its narrow factions, and also to resist pressure for subordinating legal service to dominating welfare considerations.

From his examination of legal aid departments within social agencies, he finds reflections of difficulties over matters of policy between representatives of the profession and the sponsors or administrators of welfare work.

Analyzing the next category, the author notes that the "average public bureau excels all others in the number of persons served"—a finding naturally to be expected as to an administration operated under the influence of politics and financed upon tax money. However, he concedes that "the history of the development in this country of public bureaus for civil matters has not been encouraging."

Considering bar association offices which have recently increased in number from 3 in 1916 to 20 in 1949, he quite rightly attributes this improvement to an awakening within the profession largely due to the stimulation coming from cooperative efforts of the Legal Aid Committee of the American Bar and the National Legal Aid Association. The author looks upon this type of effort as a "beginning form of organization" which is rather ineffective and perhaps temporary under the handicap of insufficiency of financial support.

The author deals but briefly with law school clinics since their emphasis is upon the training of the future lawyers and not upon the rendition of legal aid to the indigent.

Concerning legal aid by "volunteers," their efforts having proved to be inadequate for congested communities, it is the author's opinion that their useful contribution is limited to towns where the very few local lawyers are known to most of the residents.

Evaluating legal aid attempts and favoring the society type of organization, the author advocates strength in the governing body as the key to successful administration, since such a body should choose a competent lawyer as director; influence financial support; give sponsorship and prestige; determine broad policies; and interpret the work to the public. To carry these responsibilities, the author recommends a board rather large in number, the majority being lawyers (with per-

haps a judge), the minority being representatives of special groups—social welfare, business, labor, medicine and press.

In the author's thinking the effectiveness of a legal aid organization depends upon the extent to which it obtains and observes what he calls "*minimum essentials*," to-wit:

1. The service should be equal in quality to that of private law offices generally in the community.
2. The scope of the service and the test of eligibility should be clearly defined to avoid competition with those in private practice.
3. The office should be well publicized and conveniently located.
4. The office should be kept open during definite business hours.
5. The person in immediate charge should be reasonably constant for better knowledge of the clients and for their greater confidence in the service.
6. The supervisory group should be such as to inspire the trust of the clients, advance the interest of the profession, and educate the public about the work.

After considering the local organizations actually rendering services in legal aid, the author devotes a chapter to the national organization, the history of which started in 1911 when a number of societies grouped together "to bring about cooperation and increased efficiency in their work, and to encourage the formation of new societies." This first body was recast in 1922 becoming the National Association of Legal Aid Organizations, which was designed as a federation, "still leaving the local societies and bureaus free and independent." Although during a three year period late in its life 18 new legal aid offices were established, this second association was in turn reorganized in 1949, becoming The National Legal Aid Association, and acquiring power to employ a permanent staff "to undertake the full scale, nation-wide promotional steps" demonstrated to be "both feasible and necessary." In the opinion of the author, who is its Executive Director, "among the more important functions of The National Legal Aid Association is the formation of standards of operation." As promulgated, these "standards" require a local organization to "maintain an active membership in The National Legal Aid Association, accepting proportionate responsibility for the support of its program."

Of course, in preparing his book as a comprehensive coverage of the subject of legal aid in its various aspects, the author discusses its appli-

cation to criminal cases and its relation to public defenders. However, since this review is written for lawyers in the State of Washington, which has enacted a statute designed to provide attorneys for defendants without means to employ their own counsel, I shall refrain from comment on that phase of Brownell's work upon the momentary assumption that if the statute is too restricted as to scope or too inadequate as to compensation, the legislature will pass remedial amendment.

Most diligently the author has gathered and tabulated a mass of material which has been reduced to statistics and published both in the text and in the appendix, undoubtedly and naturally, for the purpose of supporting his appraisals and proposals. While the presence of these figures is noted as an aid to any desired research, their analysis is impractical within the limits of brevity of this article. The writer desires only to discuss the merits of the book and of the Legal Aid Bureau in Seattle, with possible criticisms of the methods in use nationally and locally and with recommendations for future guidance in Washington.

Half of this dual goal can be fittingly approached by quoting Brownell. He says:

Only in Seattle and Wilmington does the bar attempt to finance as well as control the Legal Aid service. The Seattle office as a result of this policy is laboring with insufficient funds and is unable to cope with the present needs. Social agencies have asked that the service be strengthened and the Community Chest has indicated its willingness to help without asking the bar to relinquish control. The Bar Association, however, has continued to cling to a belief, fast disappearing in the profession generally, that the responsibility of the bar for Legal Aid extends to financing as well as to management and control. Among all of the bar offices with paid staffs, Seattle had the lowest case-rate in 1947—1.2 clients per thousand population.

With the statement that the legal aid effort of the Seattle Bar Association "is laboring with insufficient funds," I agree.

In response to the assertion that local "social agencies have asked that the service be strengthened," I am able to report that in my memory no such complaint has ever been conveyed to me from any such source during the whole of my chairmanship of the Legal Aid Committee since the office was opened with a salaried attorney in 1939.

Concerning the statistical appraisal that of all "Bar offices with paid staffs, Seattle had the lowest case-rate in 1947 (1.2 clients per 1000 population)," the statement, like many conclusions based on exact figures to reflect uncomparable facts and unknown conditions, is rather

misleading and hardly fair—for several reasons, including the following:

1. The author used for his calculation the year 1947 with a case load of 782 cases, although he could have used the year 1948 with a case load of 844 cases shown by his published statistics (Table XIX, p. 171).

2. His statement, being intended to imply that only 782 applicants were served in 1947 because of insufficiency in funds, is unwarranted, since during the first year of operation in 1939, on much less money, the Bureau served many more applicants, 1438 being the number.

3. A further explanatory factor, subject to no statistical measure, is that over a time too long for administrative efficiency the Bureau, on humanitarian considerations, continued to employ as Director an experienced but ailing attorney who died in office of heart trouble.

Elsewhere, the author's text contains an unestablished generalization. He says:

Lawyers cannot alone bear the financial burden of adequate Legal Aid service any more than the medical profession can carry the cost of necessary free services in the field of health. Where lawyers have tried, they have failed to raise enough money, despite the fact that the work, when understood, makes a strong appeal to the bar. . . . In Seattle the bar association has made a vigorous and determined effort over a period of eleven years to finance the Legal Aid Bureau through its own membership. It has done well to raise nearly \$6,000 a year, considering the fact that lawyers are called upon to respond to other charitable appeals as well. But this sum is less than half enough to support the service which ought to be provided.

With the author's speculation that "lawyers cannot alone bear the financial burden of adequate Legal Aid service any more than the medical profession can carry the cost of necessary free service in the field of health," I am in discord. Unlike the charity work of the physicians which requires use of costly ambulances, instruments, supplies, medicines, laboratories, equipment and hospitals, the legal aid of attorneys involves relatively insignificant expense. Even while applying his own standards, the author virtually concedes that in Seattle the sum of "nearly \$6000" raised annually among the lawyers represents about "half enough to support the service which ought to be provided." In my opinion it is mere pessimism to assert that the sum of \$12,000 "cannot" be collected yearly for legal aid from 1200 or 1300 members of the Seattle Bar. That total could be met on the basis of dues taking from each attorney only \$10 or less in addition to the dues currently

paid. Several years ago in inducing the Washington State Bar to increase its dues I ascertained that many classes of workers must pay more for membership in their labor unions. The fact that the \$12,000 aggregate has not been raised in the past proves nothing as to the future.

However, I confess that failure heretofore in attaining an entirely ample budget for legal aid in Seattle reflects that during some intermediate periods in the Bureau's history my supervision of its affairs has erred by less than frequent repetition of stimulation within the profession between drives to solicit funds—a fault for which remedy has been started and will be continued.

At another place the author's text rather ambiguously asserts that the Seattle Bureau is "not integrated with other welfare services in the community." If this statement means that legal aid in Seattle is neither administered by the Society type of organization nor financed by funds from the Community Chest, then it is true. But, if this statement means that the Bureau, either through inability or unwillingness, does not actively and effectively work in cooperation with other charity agencies, then it is untrue.

In respect to the merits of the author's book, I view it as a worthy work which has been much needed and which should be widely read. While it contains many sets of statistics collected with arduous effort—perhaps too many to attract some readers—these figures have value for research, despite the inaccuracies which are inevitable and inherent in all statistics involving necessarily so many intangible elements and so much discretionary classification.

The book is good reporting on legal aid in general and also able advocacy for the author's theories in particular. In the former aspect the statistics are entirely acceptable as such. In the latter aspect they unfortunately tend to convince even the author that his asserted conclusions are advanced with authority. To the extent that his book (sometimes frankly, sometimes subtly) insists that the Bar Office type of effort is only a "beginning form of organization" destined to be replaced; that the lawyers alone cannot finance the charity obligation of their profession; that adequate service in legal aid cannot be rendered except by the Society type of organization; that all local organizations are under some compulsion to conform to the program of The National Association—to those degrees, at least, lawyers reading the book should remember the observation in its foreword which relates

that the author's whole professional life since graduation from law school has been confined to legal aid, and should note that his salaried career has connected him with the National Association as its Executive Director. In other words, the author is strictly a specialist whose appraisals and proposals must be weighed accordingly with care.

In respect to The National Legal Aid Association, it can and will be an instrument of momentous influence with ultimate effects either constructive or destructive upon the legal profession. Hence, its activities and its aims should be kept under constant consideration not only by the Legal Aid Committee but also by the other leaders of the American Bar Association. In this particular I regret that in recently succeeding the earlier National Association of Legal Aid Organizations, less apparent emphasis is given to "leaving the local societies and bureaus free and independent" as a matter of general policy.

This comment on legal aid in the nation suggests a word about legal aid in Washington wherein I hope the reactivated Legal Aid Committee of the State Bar will succeed in promoting a service at Spokane and Tacoma as recommended by my survey report published September, 1939, in the American Bar Association Journal (25 A.B.A.J., 750).

About legal aid in Seattle, during the entire existence of the Bureau it has substantially satisfied most of those operating principles characterized by the author as "minimum essentials" already outlined in this article.

Having just resigned as Chairman of the Seattle Bar's Legal Aid Committee I am unable officially to chart the Bureau's future course. However, personally, I favor: (1) continuation of its doubly valuable collaboration with the University Law School in the use of senior students as assistants to the Director; (2) additional or different efforts to stir local lawyers by their regular dues and/or voluntary subscriptions to raise the budget of the Bureau to a really adequate amount; (3) careful consideration of Brownell's recommendation respecting the size and composition of the Legal Aid Committee as the supervisory board; and (4) unrelenting retention by the Bar of the Bureau's complete independence both from outside support and outside dictation.

Concluding, I quote the book under review which concedes that: "Traditionally and inherently legal aid is a moral responsibility of the Bar." For this very inescapable reason legal aid is not, as defined in the book, a "community enterprise." Legal aid is a PROFESSIONAL enterprise—it is a professional obligation and opportunity.