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SYMPOSIUM: LEGAL SERVICES

GREEN FORMS AND LEGAL AID OFFICES: A HISTORY OF PUBLICLY FUNDED LEGAL SERVICES IN BRITAIN AND THE UNITED STATES

JOAN MAHONEY*

The legal profession developed in England during the Middle Ages as part of the rise of the free market system. A person would hire and pay an attorney for help in resolving a dispute or, later, in avoiding a dispute through legal drafting of wills, contracts, and property transactions. While the government also employed lawyers, primarily for prosecuting criminals, but also to carry out the same services that private parties needed, the state did not provide lawyers to individuals as a government service.

In Britain the exception to the fee for service arrangement was the adoption of the rule stipulating that the loser in civil litigation pay the legal expenses and costs for both parties.¹ This rule was not adopted in the United States, where the usual arrangement was for each party in litigation to pay his or her own costs.² It was many years before either system recognized the need (or, in the United States, the constitutional requirement) to furnish attorneys for the accused in criminal cases.³ It was even longer before the government began

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1. Courts Act, 1971, 26 Eliz. 2, ch. 23, sec. 50 (Eng.).

2. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (affirming the “American rule” that federal courts have no inherent power to award attorney fees to public interest litigants unless authorized to do so by Congress).

3. Defendants in criminal cases in Britain were not, as a rule, permitted to have the assistance of counsel, except in cases of treason, until 1836. *See* J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 417-18 (2nd ed. 1979). Some attorneys were available for poor defendants who could afford a minimal fee, under a system known as the “dock brief”, in which a barrister in court would be appointed to represent the defendant. The first statute providing legal

providing attorneys for those who could not afford to retain counsel in civil cases.

The purpose of this essay is to trace the history in both countries of government funded legal services, looking at the civil, rather than the criminal side, since that is really a different story. In addition, there are attorneys and organizations in the United States and Great Britain that have concentrated on representing individuals, often at no cost to the litigant, to achieve certain social or political ends,⁴ but the focus here is on government support for legal assistance, rather than on public interest practice. Having established the statutory basis for legal services to the poor, the article will then compare the way services operate in the two countries, in order to evaluate which system appears to work best, or, instead perhaps, to look at the strengths and weaknesses of both systems. Having reviewed the past and the present, I leave it to the other participants in the symposium to consider the question of the future.

LEGAL SERVICES IN BRITAIN

A. *The Legal Profession*

The legal profession is divided into two parts in Britain, unlike that in United States. During the Middle Ages, the profession of advocate developed as a separate profession from that of attorneys who served as the personal representative of the client.⁵ That distinction continued into the modern era, with the advocates evolving into the profession today known as the Bar, and attorneys later merging with the newer profession of solicitors.

Currently, most of the trial work in Britain is done by barristers, who are governed by the Regulations of the Senate of the Four Inns of Court.⁶ Every barrister is a member of one of the Inns of Court and most have their offices in the Inns. Although groups of barristers share office space within the Inns, known as sets of chambers, they are each solo practitioners and are precluded from forming partnerships. The Code of Conduct for the Bar of England and Wales⁷ provides that barristers should be separately instructed and remunerat-

assistance to indigent defendants, however, was adopted in 1903. Poor Prisoners Defence Act, 1903, ____ ____, ch. 38, (Eng.). In the United States, representation of indigent defendants was left to the states until the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

4. The two most obvious American examples of public interest litigation groups are the American Civil Liberties Union and the NAACP Legal Defense Fund, although recent years have also seen the development of conservative legal groups.

5. Baker, *supra* note 3, at 134.

6. See 3 Halsbury's Statutes of England 180 (1968).

7. The Scottish legal system is significantly different from that of England and Wales and is therefore outside of the scope of this discussion.

ed for each item of work.⁸ They are not permitted to take a fixed salary, nor to accept a single payment to appear in more than one matter.⁹ In addition, they may not accept a brief or instruction on terms that payment of fees may be postponed or depend upon a contingency.¹⁰ It is, in fact, the prohibition of contingency fee arrangements that is one of the greatest differences between the British and American bar, other than the separation of the two branches of lawyers, that is, and the one that certainly has the greatest impact on the availability of legal services.

Solicitors, on the other hand, are retained directly by clients, generally for the purpose of providing advice, drafting documents, and conveyancing. They may be in solo practice or form partnerships, and they may serve, as barristers may not, as corporate counsel. In most cases in which litigation seems likely, solicitors will seek the advice of counsel, although they are permitted to appear in the lower courts and before administrative tribunals. Like barristers, solicitors are also prohibited from accepting contingency fees.¹¹

Both of the English professions are small by American standards. There were approximately 6,600 practicing barristers in England and Wales in 1990, and approximately 55,000 solicitors.¹² In addition, the professions are divided by class in ways that clearly have an impact on the delivery of legal services. As Maimon Schwarzschild puts it, "The ethos of the Bar is upper class, or as George Orwell might have said, upper upper-middle class. Solicitors, as a group, are more plebeian."¹³ The remoteness of the relationship between the barrister and the client, the fee arrangements, in which the barrister does not directly get involved,¹⁴ and the behavior of barristers toward each other and the court, all derive from the class basis of the profession, which in many ways resembles a gentleman's club.¹⁵ Because of the separation of the Bar from the public, legal assistance to those unable to afford counsel is provided in Britain

8. Code of Conduct, sec. 121. Barristers are retained, or instructed, by solicitors, rather than directly by the client, and the fee arrangement is arranged by the solicitor and the barrister, or, to be more precise, by the solicitor and the barrister's clerk.

9. *Id.*

10. *Id.* at sec. 124. A barrister may now accept a conditional fee, in which payment is only made if the case is successful, but contingency fees, in which the amount of payment is based on a percentage of the recovery, are still prohibited. Courts and Legal Services Act, 1990, 35 Eliz. 2, ch. 41, sec. 58 (Eng.).

11. Solicitors Act, 1974, 29 Eliz. 2, ch. 47, sec. 59(2)(b) (Eng.).

12. Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?* 9 CONN. J. INT'L L. 185, 186 (1994).

13. *Id.* at 199.

14. Indeed, barristers are precluded from suing for their fees in the event that the solicitor fails to pay them. *Id.* at 203.

15. See RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 74-6 (1988) (illustrating statistics on the class composition of the English bar).

first through access to a solicitor, and only later, if it is necessary or advisable to litigate the claim, through the services of a barrister.

B. Legal Aid in Great Britain

Unlike the United States, which has traditionally provided legal assistance through the establishment of offices staffed by publicly-funded attorneys, the primary method of providing legal assistance in Britain is through public payment of private attorneys. The earliest form of legal assistance was through the *in forma pauperis* procedure enacted by statute in 1495.¹⁶ The statute allowed poor persons to sue without liability for costs and provided for the appointment of counsel to represent the indigent person free of charge.¹⁷ Because the attorney was not paid by the government, a form of mandatory *pro bono* work was established, rather than what we might consider a system of legal aid today. The statute was repealed in 1883 and was replaced with legal aid administered under the Rules of Court.¹⁸ The procedure continued much as before, with the litigant, whether plaintiff or defendant, entitled to an exemption from court costs and attorney fees upon proof of indigency.

The first modern statutory attempt to provide assistance for those unable to retain a solicitor on their own was through the Legal Aid and Advice Act of 1929, which followed the enormously increased demand for divorces after World War I.¹⁹ The committee that examined the prior law and suggested the changes included two representatives of the Law Society,²⁰ which may be why legal aid, as it developed, was administered through the Law Society.²¹ Like the previous scheme, the statute essentially restricted legal aid to those who were effectively indigent, and did not provide for those who could pay some fees but could not afford the entire amount that would be required.

The statute was revised and replaced by the Legal Aid and Advice Act of 1949, establishing the program that has continued, with some revisions, to the present.²² For the first time, legal aid was available in all of the English courts

16. SETON POLLOCK, *LEGAL AID – THE FIRST 25 YEARS* 10 (1975).

17. In order to be eligible for assistance, paupers had to swear that they were not worth more than £5, excluding their clothes and the matter at issue, and if they lost they might be given the option of paying costs or being whipped, at least until the eighteenth century. *See* A.H. MANCHESTER, *A MODERN LEGAL HISTORY OF ENGLAND & WALES* 99 (1980).

18. Pollock, *supra* note 16, at 12. The assets that a pauper might own were raised from £5 to £25 and provisions were made, for the first time, to provide relief to defendants as well as plaintiffs under the Rules. Manchester, *supra* note 17, at 100.

19. Manchester, *supra* note 17, at 101.

20. The Law Society is the professional organization for solicitors in Britain and serves much the same role that the American Bar Association does.

21. *See* Pollock, *supra* note 16, at 13.

22. Just as the American Legal Services Corporation was created as part of a wholesale statutory attempt to deal with issues of poverty in the United States, *see infra* notes 72 to 114, the British legal aid system was created as part of the expanded provision of social services that fol-

and some tribunals, or administrative proceedings. In addition, the statute distinguished between legal advice and actual representation in proceedings. Finally, the statute outlined a method for determining eligibility for legal aid which requires a contribution from those who can afford it, with the remainder of the costs assumed by the state. What is distinctive about this system, as it was created in 1929, altered in 1949, and continued in subsequent statutes, was that the plan was administered by the Law Society, not by the government, thus assuring the independence of the legal profession from government control. Given the number of cases that are brought against the government on behalf of the poor, this separation makes some sense and may have helped the British avoid some of the controversies about legal aid that the American system provoked.²³

The great expansion of legal assistance came about through the Legal Aid Act of 1974, which provided for advice and assistance

on the application of English law to any particular circumstances which have arisen in relation to the person seeking the advice, and (b) as to any steps which that person might appropriately take (whether by way of settling any claim, bringing or defending any proceedings, making an agreement, will or other instrument or transaction, obtaining further legal or other advice or assistance, or otherwise) having regard to the application of English law to those circumstances.²⁴

Five years later the Legal Aid Act of 1979 expanded the services available for representation in civil proceedings, and in the Legal Aid Act of 1982, the duty solicitor scheme was established, whereby solicitors take turns being on call to represent criminal defendants at magistrate's courts in criminal proceedings. Finally in 1988, the prior statutes were revised and consolidated, and the system as it existed was modified, primarily by replacing the Law Society with a Legal Aid Board as the primary administrator of the system.²⁵

As currently established, there are three types of legal aid available in Britain: legal aid for criminal defendants, including the duty solicitor scheme; civil legal aid, including representation in proceedings; and the so-called "Green Form" scheme of legal advice and assistance. One major difference between these programs and those in the United States, as mentioned above, is the availability of a sliding scale for payments. As in the United States, the indigent can obtain legal aid at no fee, but those whose income or assets put

lowed the election of the Labour government in 1945 and included, among other things, the establishment of the National Health System.

23. See *infra* notes 72 to 114.

24. Legal Aid Act, 1974, 29 Eliz. 2, ch. 4, sec. 2 (Eng.).

25. Legal Aid Act, 1988, 43 Eliz. 2, ch. 34, sec 3-7 (Eng.). The Legal Aid Board is funded by the government, along with the contributions from those assisted persons who are capable of contributing some of the cost and from the amounts awarded as costs and fees to successful litigants. *Id.* at sec. 6.

them somewhat above the guidelines can still obtain legal aid upon payment of a portion of the fee, depending upon their income. The guidelines differ based on the type of assistance sought.

Legal advice and assistance is the simplest aid to obtain. The applicant first chooses a solicitor from among those who participate in the legal aid system, which many do. If the applicant does not know a solicitor, a list of those who participate may be obtained from the Law Society. In addition, virtually every town in England has a Citizen's Advice Bureau, funded by the local government and staffed by both volunteers and salaried workers, who may, among other things, give assistance in obtaining solicitors.²⁶ Once a solicitor has been obtained, the individual merely fills out an application, called the Green Form. The solicitor can then tell the person seeking help whether he or she qualifies and how much of a contribution will be required, if any. As a rule, if money or property is recovered as a result of the advice or assistance of the solicitor, it will go toward the payment of the fee.²⁷ The solicitor can then act for the applicant until the charge reaches £90 (although more is allowed in the case of an undefended divorce or judicial separation). Thereafter, the solicitor can only continue to aid the individual with the authority of the Legal Aid Board.²⁸

Both civil and criminal legal aid involve a more complicated process, requiring an application to the Legal Aid Board. The application is approved on the basis of the applicant's income, as well as a determination that representation would be reasonable under the circumstances.²⁹ Applications for civil legal aid must first go through the Department of Health and Social Security, where the income determination is made, and then to the Legal Aid Board, where the reasonableness of the application is determined. In the interim, a solicitor may seek emergency legal aid, if the need is pressing. Civil legal aid is available for all the courts of general jurisdiction, whether at the trial court level or on appeal, and in most of the courts of limited jurisdiction.³⁰ Legal aid is generally not available for proceedings before tribunals, except the employ-

26. There are over 700 Citizens Advice Bureaux (CABX) in England. BOB ROSHIER & HARVEY TEFF, *LAW AND SOCIETY IN ENGLAND* 197 (1980). The CABX also provide assistance to applicants for welfare, housing, and the like, and are thus in a good position to make a threshold determination that legal assistance is needed, as well as making the referral.

27. Legal Aid Act, 1988, *supra* note 25, at sec. 9. The rule is not applicable if payment would cause great hardship or if the property obtained is not suitable for use as payment.

28. Legal Aid Act, 1988, *supra* note 25, at sec. 4.

29. Applications for both criminal legal aid and civil legal aid are now covered by the Legal Aid Act, 1988. In addition, schedules for the determination of income and eligibility were added by the Legal Aid Act, 1989.

30. This includes the House of Lords, the High Court, the Court of Appeal, Crown Court, County Courts, and the magistrates' courts, for cases regarding marriage and family law matters, although the latter are normally handled by resort to the Green Form scheme.

ment appeal tribunal and the lands tribunal, although advice regarding those proceedings is available under the provision for Legal Advice and Assistance. Finally, either a solicitor or barrister who agrees to represent a claimant pursuant to the legal aid program is prohibited from seeking or accepting payment other than that provided by the schedule of fees.³¹

In addition to the availability of legal aid, there are also a number of law centers offering assistance to the residents of a particular geographic area, and which closely resemble the federally-funded legal services offices in the United States. Like the Citizens Advice Bureaux, they are usually funded by the local government, although the solicitors in the offices are also eligible to be paid with legal aid funds. The first law center opened in North Kensington in 1970, and as of 1984, approximately forty law centers operated in the United Kingdom.³² Solicitors in the law centers may represent clients who do not qualify for legal aid, either financially or because their case was not deemed to be "reasonable", and they tend to specialize in particular areas of law, such as housing, immigration, or welfare. They are more likely than other solicitors to be willing to take cases that raise novel issues of law that might not be considered "reasonable" for legal aid purposes.³³ Nonetheless, the majority of legal services were delivered through the private attorney model, with less than one percent of the government spending on legal services going to the law centers as of 1980.³⁴

Several criticisms of the Legal Aid Program have been voiced by the Bar and others, aimed at both the insufficiency of funding and the increase in the threshold level of income making fewer people eligible for assistance. According to a publication of the General Council of the Bar, when the program first went into effect, in 1950, over 80% of the population was eligible for assistance based on income, while by 1988 just over 50% of the population met the income guidelines.³⁵ In addition, there are a large number of tribunals in which representation is not available under the program.³⁶ Finally, the amount of re-

31. Legal Aid Act, 1988, *supra* note 25, at sec. 31. The schedule of fees payable under the program was revised in the Legal Aid Act, 1994.

32. Jeremy Cooper, *The Delivery Systems Study: A Policy Report to the Congress and the President of the United States. The Legal Services Corporation, June 1980*, 44 MOD L. REV. 308-309 (1981).

33. Because England has no provision for class actions, law reform issues must be litigated on a case by case basis.

34. Cooper, *supra* note 32, at 318.

35. GENERAL COUNCIL OF THE BAR, *QUALITY OF JUSTICE: THE BAR'S RESPONSE* 66 (1989). The publication was a response to a proposal from the government for a major change in the structure of the legal professions in Britain, much of which was abandoned as a result of the opposition from the Bar in particular. See generally Schwarzschild, *supra* note 12.

36. *Id.* at 67.

muneration prescribed by the government is so low that many solicitors in particular are refusing to continue their participation in the program.³⁷

LEGAL SERVICES IN THE UNITED STATES

If the legal system in Britain is complicated by the divided bar, the American system is infinitely more complicated by federalism. Until the first federal legal services program was established by statute in 1964, all legal aid was provided for locally and, even today, assistance in criminal cases is governed by state and local government. Further, federally-funded legal services offices often either co-exist with offices established by the states or the offices are jointly funded by both the federal and local governments.³⁸ To make things even more complicated, of course, the United States has a written constitution that has been interpreted to require certain legal assistance to the poor, while Britain's program has been essentially statutory.

A. Constitutional Requirements of Legal Assistance

Unlike the British system, which did not recognize the right to counsel in criminal cases until well into the modern era, the United States wrote the right to counsel into the Sixth Amendment to the Constitution. The Sixth Amendment provides that in all criminal prosecutions, the accused shall have the right to the assistance of counsel. Nonetheless, it was not until 1963 that the Supreme Court held that the Sixth Amendment required the appointment of counsel for defendants who could not afford to hire an attorney in state as well as federal prosecutions.³⁹

Because the Sixth Amendment does not apply to civil proceedings, any argument for a right to counsel in civil proceedings must be based on either an equal protection or due process argument. On the one hand, in *Boddie v. Connecticut*,⁴⁰ the Supreme Court held that due process required that indigent litigants in divorce cases be permitted access to the courts without payment of the \$45 filing fee. On the other hand, in *United States v. Kras*,⁴¹ the Court refused

37. *Id.* at 68-69.

38. Even the terminology of legal assistance to the poor is complicated in the United States. As a rule, offices funded by state or local government, or, in some cases, by local charities, were called Legal Aid Offices, although some provided assistance in criminal cases and some in civil cases. The federal agency, described more fully below, established as part of the War on Poverty, set up a network of Legal Services Offices, although in some places, in which the federal funds went to agencies that were already established, the term Legal Aid continued. For example, in Missouri, the Legal Aid office is the recipient of both federal and state funds and is the sole public provider of legal assistance to the poor, while in New York, legal aid offices and legal services offices may exist in the same jurisdiction.

39. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

40. 401 U.S. 371 (1971).

41. 409 U.S. 434 (1973).

to extend the *Boddie* principle to the mandatory filing fee in bankruptcy cases, distinguishing between the constitutional right to access to a divorce, which is implicit in the due process protection of marriage and the family, and the merely statutory right to discharge one's debts in bankruptcy.⁴²

Again, because of the constitutional importance of family relationships, the Court held in *Lassiter v. Department of Social Services*,⁴³ that due process does not require the appointment of counsel for indigent parents in every proceeding to terminate parental rights but that counsel might be required in a particular case, depending on, for example, the complexity of the issues involved.⁴⁴ Similarly, the Court held that a state must provide an indigent individual with the record in the appeal of a proceeding to terminate parental rights if he or she would otherwise be unable to proceed.⁴⁵

B. Statutory Attorney Fees

The general rule in the United States is that each party to litigation is responsible for his or her own attorney fees.⁴⁶ Nonetheless, the availability of the contingent fee arrangement, which is permitted for American lawyers,⁴⁷ sometimes allows litigants who could not afford to retain counsel to initiate a lawsuit, at least in circumstances in which there is a likelihood of substantial recovery. In addition, partly in response to *Alyeska Pipeline*,⁴⁸ Congress passed the Civil Rights Attorney's Fee Awards Act in 1976.⁴⁹ The Act provides that the court may award "a reasonable attorney's fee as part of costs" in "any action or proceeding to enforce" §1983 and other civil rights statutes.⁵⁰

Although the Act speaks in terms of the prevailing party,⁵¹ awards under the statute are, as a rule, made only to prevailing plaintiffs and are awarded to defendants only when the plaintiff's action was deemed to be "frivolous, unreasonable or without foundation."⁵² It is not necessary for the plaintiff to

42. *Id.* at 444-46. Similarly, in *Ortwein v. Schwab*, 410 U.S. 656 (1973), the Court rejected a challenge to mandatory filing fees in appeals by welfare recipients of adverse administrative decisions.

43. 452 U.S. 18 (1981).

44. *Id.* at 32-33.

45. *M.L.B. v. S.L.J.*, 117 S.Ct. 555 (1996).

46. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

47. *See* Model Rules of Professional Conduct, Rule 1.5(c).

48. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

49. 42 U.S.C. §1988 (1976).

50. *Id.* at §1988(b).

51. *Id.*

52. *See, e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (Title VII action providing that attorney fees award to the defendant should only be made when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978) (using the same standard for Title VII action and Section 1988).

achieve all the relief that was sought, and an award of attorney's fees may be made to the plaintiff when a case is settled.⁵³ If, however, the plaintiff is successful on only one ground for relief and not on others, the court should take that into account and should generally award a fee only for the work on the ground that succeeded.⁵⁴ In addition, attorney fees should not be awarded under the statute for work in optional state administrative proceedings unless some "discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation."⁵⁵

Just as solicitors employed by law centers in Great Britain may receive awards of fees in successful proceedings, or, to be more precise, the centers may receive the fees, so may legal aid lawyers in the United States obtain fee awards under §1988. In *Blum v. Stenson*,⁵⁶ the Supreme Court upheld the award of attorney fees to a legal services law office, holding that the award should be based on the prevailing hourly charge in the vicinity, rather than the amount actually paid to the attorneys on an hourly basis.⁵⁷ Given the low salaries generally among public interest attorneys, had the decision come out the other way, public officials sued by legal services offices would have saved considerably in the payment of attorney fees when they lost.

C. Early Forms of Legal Assistance

The *in forma pauperis* procedure that was in use in Britain starting in the fifteenth century was also adopted by the federal government and some states. A federal statute allows indigent litigants in both civil and criminal cases to either sue or defend and to appeal in federal courts without prepayment of official charges, auxiliary expenses, and security for costs.⁵⁸ Because the statute is discretionary, a judge must decide both that the applicant is indigent and that the case is not frivolous before relief is granted.⁵⁹

Whereas some states adopted an *in forma pauperis* procedure by statute,⁶⁰ others, such as California, construed their common law to allow litigants to

53. *Maier v. Gagne*, 448 U.S. 122, 129 (1980).

54. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

55. *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234, 243-45 (1985).

56. 465 U.S. 886 (1984).

57. *Id.* at 895.

58. 5428 U.S.C. §1915 (1998). It was this procedure that allowed Clarence Earl Gideon to file his writ for certiorari with the Supreme Court pro se, after which the Court appointed Abe Fortas to represent Gideon. See generally ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

59. See, e.g., *Williams v. Field*, 394 F.2d 329 (9th Cir. 1968), cert. denied, 393 U.S. 891 (1968).

60. See, e.g., Ark. Stat. Ann. §27-402 (1947); Haw. Rev. Laws §229-8m (1955).

proceed *in forma pauperis*.⁶¹ That power, according to the California Supreme Court, extends to the appellate courts as well as the trial courts.⁶² Nonetheless, whether provided by statute or common law, this procedure merely allows the indigent litigant access to the courts and does nothing to resolve the question of access to an attorney.

Starting in the late nineteenth century, largely in response to the perceived need of the poor, and particularly those who were immigrants, for legal representation, charitable organizations formed to provide lawyers for the poor.⁶³ The first such group was Der Deutsche Rechtsschutz Verein, founded in New York City in 1876, which was specifically established to furnish legal protection for newly-arrived German immigrants.⁶⁴ Another type of charitable organization, the Protective Agency for Women and Children, was founded in Chicago by the Chicago Women's Club in 1886.⁶⁵ The Club staffed the agency with social workers from its membership and hired a lawyer, and though it started with the idea of protecting young women from sexual exploitation, the scope broadened to include more general representation of the urban poor.⁶⁶

The modern period of legal assistance is generally thought to begin with the founding of the Boston Legal Aid Society in 1914, directed by Reginald Heber Smith, then a recent Harvard Law School graduate.⁶⁷ With funding from the Carnegie Foundation, Smith studied Legal Aid societies throughout the United States.⁶⁸ In 1919, he wrote a very influential book, *Justice and the Poor*, in which he argued for the commitment of more support for legal aid, specifically from the Bar.⁶⁹ Many cities opened Legal Aid offices, funded by charitable organizations. There was certainly concern from the Bar, if not from elsewhere, that providing free legal services to the poor would encourage frivolous litigation, to which Smith's response was to emphasize the role of the lawyer as an officer of the court.⁷⁰ Over the years, city and county governments joined in funding local legal aid offices, but the total funding for these institutions was only \$4 million in 1965.⁷¹

61. See, e.g., *Martin v. Superior Court*, 168 P. 135 (Cal. 1917); *County of Sutter v. Superior Court*, 53 Cal. Rptr. 424 (Cal. App. 1966).

62. *Ferguson v. Keays*, 484 P.2d 70, 71 (Cal. 1971).

63. Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1560 (1995).

64. *Id.*

65. JACK KATZ, *POOR PEOPLE'S LAWYERS IN TRANSITION* 34-35 (1982).

66. *Id.* at 35.

67. Feldman, *supra* note 63, at 1560.

68. *Id.*

69. *Id.*

70. Katz, *supra* note 65, at 42.

71. Richard L. Abel, *United States: The Contradictions of Professionalism*, in *LAWYERS IN SOCIETY, VOLUME ONE: THE COMMON LAW WORLD* 186, 214 (1988).

D. Legal Services

Legal Aid offices suffered from inadequate funding and a philosophical disposition to limit the kind of work in which they engaged. Or perhaps because the offices were funded by city and county governments as well as local charitable organizations, the tendency to limit the kinds of cases that the organization took on was an extremely wise political decision. As Jack Katz describes it:

In a national pattern, Legal Aid judiciously qualified its adversarial posture.

Percentage of cases litigated were pointedly reported as low; the implication was that relevant outsiders might otherwise criticize the agency as too aggressive. In the same defensive vein, Legal Aid was characterized as a court of last resort for the poor. The lawyer's relation with clients was styled as judicial and mediating, rather than partial and militant. In this, as in most ideological matters, Smith formalized the rhetoric that became standard in the Legal Aid community.⁷²

By the mid-1960s, there was widespread dissatisfaction with the legal services available to the poor. As Lyndon Johnson was formulating the package of legislation known as the "War on Poverty," Jean and Edgar Cahn wrote an article that appeared in the *Yale Law Journal* and argued for a series of "neighborhood law firms", funded by the federal government as part of the overall approach to poverty issues.⁷³ Largely as a result of the article, and Edgar Cahn's association with Sargent Shriver, the director of the Office of Economic Opportunity (OEO),⁷⁴ a legal service program was created under the community action provisions of the Economic Opportunity Act. Jean Cahn was appointed to administer it.⁷⁵

The political struggle regarding legal services offices began almost immediately. The American Bar Association (ABA), under the leadership of future Supreme Court Justice Lewis Powell, expressed concern about the adherence by OEO attorneys to prevailing ethical norms.⁷⁶ After a series of meetings between Sargent Shriver and bar leaders, Jean Cahn was removed and E. Clinton Bamberger, a partner in Baltimore's largest law firm, was appointed as the first national director of the program,⁷⁷ which was formally established by the 1965

72. Katz, *supra* note 65, at 41.

73. Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317, 1334-52 (1964).

74. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 269 (1976).

75. *Id.* at 269.

76. *Id.* at 270.

77. Feldman, *supra* note 63, at 1564.

amendments to the statute.⁷⁸ In addition to influencing the choice of the director of the program, the ABA participated in the creation of and appointment to the National Advisory Committee to the legal services program.⁷⁹

One of the characteristics of the program established in the United States, which distinguishes it from the British program, is the restriction imposed on the clientele. From the beginning, Legal Services was intended to service the poor, not the members of the working class or lower middle class who might also find themselves unable to afford legal assistance. For that reason, eligibility levels were set quite low. The current standards require each office to establish a maximum annual income level for recipients of assistance, but stipulate that the level set may not exceed 125% of the official Federal Poverty Income Guidelines,⁸⁰ except for limited circumstances in which an individual recipient's income may exceed the maximum, so long as it does not exceed 150% of the national eligibility level.⁸¹ These standards have been essentially the same throughout the history of the Legal Services program.

The program did not establish legal services offices directly, but made grants to local offices, some of which were existing Legal Aid Societies and others of which were new programs.⁸² By the end of the first fiscal year, the Legal Service program had awarded approximately 155 grants totaling over \$25 million.⁸³ Despite some controversy about how radical these offices were,⁸⁴ Legal Services lawyers saw themselves as different from their Legal Aid predecessors and undertook a different kind of work. As Jack Katz describes it,

In its reform goals, Legal Services represented a sharp break from the Legal Aid precedent; in the resources used in its reform strategies, Legal Services was diffusely integrated into a social-movement milieu. . . . The location of Legal Services in a broad movement for social change was reflected in the structure of programs; in the perspectives brought in by staff; and in early controversies over aggressive advocacy.⁸⁵

Despite the emphasis on law reform, even within Legal Services offices the bulk of the work involved representing individual clients in routine legal matters such as consumer debt issues, landlord/tenant disputes, and family law

78. Economic Opportunity Amendments of 1965, Pub. L. No. 89-253, §11, 79 Stat. 974 (1965).

79. Feldman, *supra* note 63, at 1564.

80. 7545 C.F.R. §1611.3 (1996).

81. *Id.* at §1611.4.

82. Feldman, *supra* note 63, at 1568. Approximately 50% of the first grants went to existing Legal Aid Societies.

83. *Id.* at 1567.

84. *See generally* Feldman, *supra* note 63 and Auerbach, *supra* note 74.

85. Katz, *supra* note 65, at 65-66.

matters.⁸⁶ Legal Services offices also undertook an enormous number of cases aimed at changing the legal relationship of the poor to landlords,⁸⁷ the government,⁸⁸ and creditors.⁸⁹ In addition, *Boddie v. Connecticut*,⁹⁰ establishing the right of access to courts in divorce actions for those unable to pay a filing fee, was a Legal Services case. It was this kind of case, combined with lobbying and organizing efforts on behalf of the poor, that led to the charges that the program had become politicized and led to opposition to the program by conservatives.⁹¹

The first significant change in Legal Services was the move during the Nixon administration from the umbrella of OEO programs to the establishment of the Legal Services Corporation (LSC).⁹² The Legal Services Corporation was established “for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.”⁹³ The Board of Directors of the Corporation was to be appointed by the President, with the advice and consent of the Senate, but to preserve the non-partisan nature of the organization, of the eleven members of the Board, no more than six were to be from the same political party.⁹⁴ Although the majority of members were required to be members of the bar “of the highest court of any State,” by 1978 the Board was also to include eligible clients, “and to be generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public.”⁹⁵

In addition to establishing the Legal Services Corporation as a free-standing entity, with a Board appointed by the President, Congress imposed certain restrictions on the program, including a requirement that class actions

86. *Special Project: The Legal Services Corporation: Past, Present, and Future?* (New York Law School Law Review ed.), 28 N.Y.L. SCH. L. REV. 593, 618 (1983).

87. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. 1968) (allowing tenant to withhold rent when landlord violated housing regulations); *Perez v. Boston Hous. Auth.*, 400 N.E.2d 1231 (Mass. 1980) (class action case against local housing authority that led to the appointment of a receiver).

88. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring a hearing prior to termination of welfare benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down state residency requirements for welfare); *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down state laws that disqualified individuals for state benefits based on foreign birth).

89. *Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (striking down a Wisconsin garnishment statute that did not require judicial supervision); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (requiring a hearing prior to repossession).

90. 401 U.S. 371 (1971).

91. Gerald M. Caplan, *Understanding the Controversy Over the Legal Services Corporation*, 28 N.Y.L. SCH. L. REV. 583, 585 (1983).

92. 42 U.S.C. §2996b (1974).

93. *Id.*

94. 42 U.S.C. §2996(c) (1976).

95. *Id.*

could not be filed without the express approval of project directors.⁹⁶ Additionally, and probably more importantly, Congress imposed restrictions on the kinds of cases that Legal Services attorneys could handle that altered the approach to social change under the Act, prohibiting representation in cases involving desegregation, nontherapeutic abortion, or the selective service.⁹⁷

Despite some conservative concern about the focus of the program, including opposition from Ronald Reagan when he was governor of California,⁹⁸ with the support of the ABA, it continued to grow through the Carter administration. By 1980, the budget had grown from \$5 million to \$321 million, and there were 6,000 lawyers employed by the program.⁹⁹ In addition, some of the restrictions imposed in 1974 were lifted in the revisions to the Act in 1977, including allowing program attorneys to provide legal advice in certain desegregation matters,¹⁰⁰ and allowing representation of persons who maintained they were wrongfully classified under the Military Selective Service Act.¹⁰¹

On the other hand, when Ronald Reagan became President, he did his best to destroy the program. He cut funding by one-third and appointed his choices to the Board of Governors, “whose declared goal is to return the program to the status quo prior to 1965, providing only individual representation in routine matters such as divorce.”¹⁰² As Nan Aron describes it:

The political philosophy of the Reagan Administration called for a drastic reduction in the domestic role of the federal government. Reagan Administration officials wanted to limit social spending, reduce government regulation, and cut programs for disadvantaged groups. They disapproved of many of the social initiatives of the sixties and seventies and were openly hostile to the public interest organizations that had been instrumental in achieving those initiatives.¹⁰³

Some of the funds that were lost during the Reagan administration were replaced by money provided by Interest on Lawyers' Trust Accounts (IOLTA). Lawyers are required to place client funds temporarily held in escrow into trust accounts. Because these amounts tend to be small, and the period for which they are held is short, any interest that accrued went into the costs of administration. Beginning in Florida, however, bar associations discovered that if the amounts were aggregated, they would earn sufficient interest to amount to a significant figure, and most states put this money, or the bulk of it, into fund-

96. *Id.* at §2996(d)(5).

97. *Id.* at §2996(b).

98. Auerbach, *supra* note 74, at 274.

99. Abel, *supra* note 71, at 214.

100. 42 U.S.C. §2996(b)(7), amended by Pub. L. No. 95-222, 91 Stat. 1619, 1622 (1977).

101. 42 U.S.C. §2996(b)(9), amended by Pub.L.No.95-222, 91 Stat. 1619, 1622 (1977).

102. Abel, *supra*, note 71, at 215.

103. NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 14 (1989).

ing legal services for the poor.¹⁰⁴ The Washington Legal Foundation, however, challenged this use of IOLTA, arguing that it constitutes a taking of property in violation of the Fifth Amendment and that it violates the free speech rights of lawyers and their clients.¹⁰⁵ The Fifth Circuit upheld the claim,¹⁰⁶ and the Supreme Court granted certiorari.¹⁰⁷ In June, the Supreme Court upheld the Fifth Circuit.¹⁰⁸ Applying state law to the question of whether the interest belonged to the clients, the Court found that “interest follows principal,”¹⁰⁹ and therefore the interest is the private property of the owners of the principal.¹¹⁰ The Court did not, however, rule that the property had been “taken”, nor how much. If any, “just compensation” was due.¹¹¹ The case was remanded for a determination of those issues.

Depending on the resolution of the taking and just compensation questions, IOLTA funds may still be available to legal services. If not, then the various legal services offices that receive much of their funding through IOLTA will either close, scale back their programs, or find another source of funds. Some state bar associations have encouraged attorneys to contribute to legal aid programs,¹¹² but it is not likely to happen in every state.

In addition to reducing funding, further restrictions were placed on the activities in which Legal Service attorneys could participate and the kinds of cases that could be handled. LSC employees are prohibited from engaging in lobbying, broadly speaking, including “representation before legislative bodies or other direct lobbying activity, grassroots lobbying, participation in rulemaking, public demonstrations, advocacy training, and certain organizing activities.”¹¹³ Attorneys are also prohibited from initiating or participating in class actions,¹¹⁴ providing legal assistance to undocumented aliens,¹¹⁵ from representing residents of public housing who are being evicted because of charges of illegal drug activities,¹¹⁶ litigating on behalf of prisoners,¹¹⁷ or participating

104. Frank Askin, *Brother Can You Spare IOLTA?*, LEGAL TIMES, Jan. 5, 1998, at 17.

105. *Id.*

106. *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 106 F.3d 640 (5th Cir. 1997).

107. *Phillips v. Washington Legal Found.* 117 S. Ct. 2535 (1997).

108. 118 S. Ct. 1925 (1998).

109. *Id.* at 1931.

110. *Id.*

111. *Id.* at 1934.

112. Richard C. Baldwin, “*Rethinking Professionalism—And Then Living It!*”, 41 EMORY L.J. 433, 447 (1992) (citing the example of the Oregon Bar, which encouraged its members to contribute \$200 each to support legal services for the poor).

113. 45 C.F.R. §1612.1 (1996).

114. *Id.* at §1617.1.

115. *Id.* at §1626.1.

116. *Id.* at §1633.1.

117. *Id.* at §1637.1.

in welfare reform.¹¹⁸ In other words, given the restrictions on class actions and the kinds of cases that may be undertaken, LSC attorneys may participate in the representation of individual clients but may not participate or litigate in law reform efforts.

COMPARISONS AND CONCLUSIONS

Despite the obvious similarities in their legal systems, the approach taken by the United States and Great Britain to the provision of legal services in civil cases has been markedly different. The most pronounced difference is that in Britain, legal assistance is provided largely through private attorneys, whether solicitors or barristers, while in the United States, it is provided through government funding of offices established exclusively for that purpose. As Richard Abel has written:

Because the legal profession initially opposed state payments to private practitioners, fearing that this would compromise their autonomy, the American legal aid program is the only one in the world in which virtually all services are provided by salaried lawyers.¹¹⁹

In addition, the American system provides assistance only to the truly poor, those who are perhaps by today's standards not altogether different from the indigents entitled to *in forma pauperis* relief under the old statutes. Because the eligibility level is set so close to the poverty line, most of the working poor are denied representation under the statute and recipients of legal assistance are limited primarily to those who are eligible for Social Security, Supplemental Security Income, or welfare. Although legal aid in the United States is provided through salaried lawyers in a clinic-like setting rather than through payments to private attorneys, it is like Medicare in that eligibility is sharply restricted.

The British system, on the other hand, operates on a sliding scale for income level and allows a contribution by the applicant who is not poor enough for total assistance but would otherwise be unable to handle the full costs of representation. Indeed, the British statute has recently been criticized because the eligibility levels have been reduced so that only somewhat over 50 percent of the population is eligible for coverage.¹²⁰ The British Government has not gone as far as providing legal assistance to everyone, in the way that the National Health System provides universal medical care, but despite the reductions in availability, some help is available to a considerably broader portion of the population than it is in the United States.

118. *Id.* at §1639.1.

119. Abel, *supra* note 71, at 214.

120. *See supra* note 33.

The British approach does not seem to have generated the controversy that the Legal Services Corporation did. Because the class action lawsuit is not available in Britain, and because most assistance is provided through local solicitors, British lawyers did not use Legal Aid for law reform purposes, by and large, with the possible exception of the law centers, and because they are locally, rather than nationally funded, they are not likely to achieve the kind of notoriety that Legal Services attorneys did. Indeed, even the law centers provide largely individual assistance, although it may be focused on a specific area of the law, like landlord/tenant cases or immigration. But the courts are not seen as the agents for social change in England the way they are in the United States¹²¹ The British tend to see the legislature, not the courts, as the avenue for reform, presumably because of the absence of a judicially-enforceable constitution.

If the purpose of legal assistance is to achieve law reform, then the American system has been a qualified success, at least in the early days. Many of the most important cases of the 1960s and 1970s, cases that arguably opened the legal system to participation by previously excluded groups and provided legal protections that were previously unavailable, were brought as Legal Services cases.¹²² On the other hand, it was the success of the Legal Services movement at achieving social change that led to the opposition to the organization and attempts to remove the funding entirely. Because of the restrictions imposed during the Nixon and Reagan administrations, Legal Services lawyers in the United States are now restricted largely to individual legal needs, as the British system has been all along.

If the purpose, on the other hand, is simply to meet the legal needs of those unable to afford such assistance on their own, then the British system appears clearly superior in that a much larger proportion of the population is able to have access to legal assistance. Even in Britain, however, there seems to be an unwillingness to fund the program sufficiently to meet all the needs that exist, but perhaps that is a problem endemic to the late twentieth century, and not specific to legal assistance.

121. Schwarzschild, *supra* note 12, at 197.

122. *See supra* notes 87 to 90.