LAW, LAWYERING, AND JUSTICE ADMINISTRATION IN INDIA: ACCESS TO JUSTICE THROUGH PRO-BONO LEGAL SERVICES

Reading-cum-Reference Material for the Round-Table Conference

Compiled by

Dr Chanchal Kumar Singh
Dr. Sachin Sharma
Dr Mritunjay Kumar
Mr. Aayush Raj

विधि और न्याय मंत्रालय
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16 MILES, GHANDAL, SHIMLA - 171014

Sl. No.	Details of the Reading Materials	Pg. No.
1.	Marc Galanter and Jayanth K. Krishnan, *"Bread for the Poor": Access to Justice and the Rights of the Needy in India*, 55 Hastings L.J. 789 (2004) *This Article will proceed in the follo* *wing manner: Part I recounts the post-Independence movement to establish village-based courts as a key method of enlarging public access to justice. After discussing the setbacks this movement encountered, we contrast the top-down "public interest litigation" approach that emerged in the wake of the Emergency period (1975-1977). In Part II we focus on how, beginning in the I98os, judges and politicians returned to the captivating idea of settling disputes in an indigenous, traditional manner at the grassroots level. During this time, the concept of the Lok Adalat started gaining significant momentum, and we discuss the reasons why so many supported expanding this alternative dispute institution throughout India. In Part III we present findings from our preliminary observations of several different types of Lok Adalats. We conclude that the claim that this forum offers participants speedy, fair, and deliberative justice needs serious reconsideration.*	01-47
2.	Ludo Rocher, *"Lawyers" in Classical Hindu Law*, 3(2/3) Law & Society Review 383 (1969) *There can be no doubt that parties to a lawsuit in ancient Hindu law had a right to be represented by other persons. The question arises whether or not the representatives referred to in the ancient texts cor- respond to the pleaders, advocates, vakils or attorneys of modem India. In other words, did ancient Hindu law have the kind of legal procedure in which the rights of the parties were safeguarded through the services of a class of experts, as is the case in present day India and in most other modern legal systems?*	48-69
3.	Marc Galanter, *Introduction: The Study of the Indian Legal Profession*, 3(2/3) Law & Society Review 201 (1969) *This issue contains a series of studies of one of the largest of these professional groups-Indian lawyers. These studies were prepared for a Conference on the Comparative Study of the Legal Profession with Special Reference to India, sponsored by the Committee on Southern Asia Studies of the University of Chicago, held at the Moraine-on-the-LakHe otel in Highland Park, Illinois from August 10-12, 1967.* *The study of law in Asia, as nearer home, has been heavily preempted by professional interest in the rules and doctrines promulgated at the upper levels of the system. Rather than viewing the legal system as a body of rules, we*	70-87

	proposed to view it as a body of men-who they are, what they do, how they interact with one another and with other social groups. What is the relation between this body of men and the legal system that they staff, support and produce? We felt that an inquiry of this kind would provide a forum for exchange among lawyers, social scientists, and Indianists whose interests converged on the Indian legal system. We hoped that it would provide an opportunity for examining the linkage between "law" and "society" in a more concrete and detailed way than is possible by concentrating on legal rules.	
4.	Samuel Schmitthener, *A Sketch of the Development of the Legal Profession in India*, 3(2/3) Law & Society Review 337 (1969) *The legal profession as it exists in India today had its beginnings in the first years of British rule. The Hindu pandits, Muslim muftis and Portuguese lawyers who served under earlier regimes had little effect upon the system of law and legal practice that developed under British administration. At first, the prestige of the legal profession was very low. From this low state and disrepute, the profession developed into the most highly respected and influential one in Indian society. The most talented Indians were attracted to the study and practice of law. The profession dominated the public life of the country and played a prominent role in the national struggle for freedom. "There was no movement in any sphere of public activity-educational, cultural, or humanitarian-in which the lawyers were not in the forefront." How- ever, after independence the relative prestige and public influence of the profession declined.* *This paper will attempt to sketch the rise of the profession from its low state during the first hundred years, to explain the sources of its respect and influence, to recount its accomplishments and contributions to the national life and, finally, to suggest some factors leading to its decline.*	88-135
5.	Law Commission of India, *131st Report on Role of the Legal Profession in Administration of Justice*, 1988 This report would be the last link in the chain of reports prepared and submitted by the present Law Commission after the task of reference drawn up by the Government of India for study of judicial reforms is: 'the role of legal profession in strengthening the system of administration of justice'. The term articulates the scope and ambit of the report. Legal profession is one of the most leading professions of intellectuals in this country and as stated earlier, it is multi-dimensional. This present report concerns itself with the role of the legal profession in strengthening the system of administration of justice.	134-166
6.	Richard L. Abel, Law without Politics: Legal Aid under Advanced Capitalism, 32 UCLA L. REV. 474 (1985)	167-336

	This Article, though originally stimulated by the appearance of the books cited above,4 uses a wide variety of other sources in an attempt to explore the following questions. How adequate are the prevailing accounts of legal aid? What criteria do they use to assess legal aid programs? What are the interests and influences of the principal actors-such as the legal profession, legal aid lawyers, clients, the state, capital, labor, and philanthropies-that are involved in the creation and operation of those programs? What has legal aid achieved: What is the quantity and quality of services, who uses it, and for what purposes? Finally, what can legal aid achieve, and what are its limits?	
7.	David B. Wilkins, *Is the In-House Counsel Movement Going Global? A Preliminary Assessment of the Role of Internal Counsel in Emerging Economies*, Wisconsin Law Review 251 (2012) *In this Article, I explore whether some version of the in-house counsel movement is likely to move even further East—and South—to the newly emerging economic superpowers such as Brazil, India, and China. I make these observations on the basis of preliminary research that I and my collaborators are conducting on the changing role of inhouse counsel in emerging markets as part of a wider research initiative that I direct entitled Globalization, Lawyers, and Emerging Economies (GLEE).*	337-390
8.	Mihaela Papa and David B. Wilkins, *Globalization, Lawyers and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession*, 18(3) International Journal of the Legal Profession 175 (2011) *Despite the importance of globalization for Indian lawyers, there have been surprisingly few attempts to integrate the rich scholarship on the processes of globalization with the sociology of the Indian legal profession, and to conceptualize and explain major recent legal developments in India in this context. This article uses three globalization processes – economic globalization, globalization of knowledge and globalization of governance – as lenses for analyzing the Indian legal profession. It argues that understanding these processes and their intersections can help frame a much-needed empirical investigation into the globalization of the legal profession in India, and possibly in other major emerging economies.*	391-427
9.	Marc Galanter, *Justice in many Rooms: Courts, Private Ordering, and Indigenous Law* 13(19) The Journal of Legal Pluralism and Unofficial Law 1 (1981), DOI: 10.1080/07329113.1981.10756257 *This notion of a good match between forum and dispute is set within a framework of presuppositions about disputes and forums. Typically, it is assumed that disputes require "access" to a forum external to the original social setting of the*	428-475

	dispute, a location at which some specialized learning or expertise will be brought to bear. Remedies will be provided as prescribed in somebody of authoritative learning and dispensed by experts who operate under the auspices of the state. The view that the justice to which we seek access is a product that is produced or at least distributed--exclusively by the state, a view which I shall for convenience label "legal central ism," is not an uncommon one among legal professionals. *I submit that this legal centralist model is deficient. For the moment, I want to show how several lines of social research on law lead me to question its descriptive adequacy. I will also suggest the implications of abandoning the legal centralist paradigm for policy designed to improve "access to justice."*	
10.	Richard Abel, *The Paradoxes of Pro Bono*, (78) Fordham L. Rev. 2443 (2009) *Pro bono is a puzzle. It provides high quality legal services to large numbers of clients who would otherwise go unrepresented, thereby helping to fulfill our legal system's promise of "Equal Justice under Law." But what a bizarre way to address a foundational element of liberal legalism. Could we imagine relying on volunteerism to perform other core governmental functions: police (the deputy sheriffs of the frontier are a distant memory), national security (privateers), foreign relations (honorary consuls), education (volunteer parents as the only teachers), or transportation (hitchhiking)? There is something very strange about having privileged lawyers—who earn huge incomes by acting for large corporations and wealthy individuals—constitute a major source of legal representation for the poor and subordinated. The excellent article by Scott Cummings and Deborah Rhode offers an opportunity to reflect on the significance of this striking manifestation of American exceptionalism.*	476-486
11.	Eiji Yamamura, *The Market for Lawyers and Social Capital: Are Informal Rules a Substitute for Formal Ones?* 4(1) Review of Law & Economics 499 (2008) *Prior works have dealt with the lawyer market in the United States from both an economic point of view (Freeman, 1975; Pashigian, 1977; Rosen, 1992; Sauer, 1998) and that of the social condition characterized by, for instance, gender (Abel, 1989), ethnicity and religion (Heinz and Laumann, 1994), and social capital (Kay and Hagan, 1999; Dinovitzer, 2006). Features of socio-economic conditions and the legal system in Japan, which is different from that of the United States, are expected to have an impact on the market for lawyers. Considering the socio-economic characteristics of Japan, a number of researchers have attempted to examine the lawyer market in Japan (e.g., Kinoshita, 2000, 2002; Milhaupt and West, 2004; Nakazato et al. 2006; Ginsburg and Hoetker, 2006). Nevertheless, the existing literature does not analyze any effect of social capital on the lawyer market through regression estimation. With the exception of Ginsburg and Hoetker (2006), presumably because of a lack of data these*	487-505

	reports do not control for unobservable fixed effects, thereby causing an omitted variable bias. The purpose of this paper is to examine the extent to which social capital affects upon the lawyer market under the condition that the number of lawyers is very small, such as in Japan. To this end, I use prefecture-level panel data for Japan from 1989-2001 to control for unobservable fixed effects.	
12.	Lawrence M. Friedman, *Litigation and Society*, 15 Annual Reviews Incorporation 17 (1989) *Litigation, in ordinary speech, refers to actions contested in court; this involves a claim, a dispute or conflict, and the use of a specific institution, the court, to resolve the conflict or dispute. In the past most legal research has consisted of analysis of doctrine and theory about doctrine. But litigation is an important phenomenon in its own right and research lately has shown this. This chapter aims to sketch out a few major areas of research and theory and to add a few brief remarks about the significance of the work thus far. The topics covered include: dispute-centered and court-centered research; quantity of litigation and the so-called litigation explosion; and the impact of litigation on society.*	506-518
13.	Upendra Baxi, *People's Law, Development, Justice* *It is now accepted that development is all ab out distribution. The technocratic approach to development emphasises "technological modernization, managerial efficiency and growth in GNP". Underlying this approach is the assumption that "the system could be made to work if equitable distribution is built into an essentially growth model" (Haque et al., 1 977:12). This has been the prevalent approach so far in India. The results are not all that impressive.* *The other way of looking at development seeks to redefine the processes and objectives of development "into the direction of rapid social change and redistribution of political power". On this approach, development is not just to be measured in terms of technoeconomic variables but rather as development of "the collective personality of the society".* *From this standpoint, the "development" resulting from growth-model (stressing centralized planning, expansion of modernized industrial sector and assistance from developed countries) is really "anti-development". The second model of development judges developmental process by what it does to man; de-alienation, self- reliance and participation are the three crucial components here. Clearly, this is, for India, (as indeed for most "developing" societies) only a statement of preferred future; but it may provide critical bases for devaluation and even delegitimation of the existing liberal-capitalistic growth model.*	519-536
14.	Marc Galanter and Nick Robinson, *India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization*, 20(3) International Journal of the Legal Profession 241 (2013)	537-567

	This article examines a flourishing group of elite litigators, that we call 'Grand Advocates', who practice before the Indian Supreme Court and some of India's High Courts. In a court system marked by overwhelmed judges with little assistance, multiplicity and blurriness of precedent, and by the centrality of oral presentation, the skills and reputational capital of these lawyers enables them to play a central, lucrative, and unique role. Indeed, it is often the Grand Advocates, as much as the judges, who lead and propel forward the Indian judicial system. We argue that our exploration of Grand Advocates provides a counter-example and an analytical framework to understand why the homogenizing forces of globalization may not necessarily lead to a convergence in the structure of the legal professions in different countries.	

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"Bread for the Poor": Access to Justice and the Rights of the Needy in India

Marc Galanter

Jayanth K. Krishnan

Articles

"Bread for the Poor": Access to Justice and the Rights of the Needy in India*

MARC GALANTER† & JAYANTH K. KRISHNAN‡

India is rightly acclaimed for achieving a flourishing constitutional order, presided over by an inventive and activist judiciary, aided by a proficient bar, supported by the state and cherished by the public. At the same time, the courts, and tribunals where ordinary Indians might go for remedy and protection, are beset with massive problems of delay, cost, and ineffectiveness. Potential users avoid the courts; in spite of a longstanding reputation for litigiousness, existing evidence suggests that Indians avail themselves of the courts at a low rate, and the rate appears to be falling.[1] Still, the courts remain grid-

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* Parts I and II of this Article consist of a modified excerpt from Marc Galanter & Jayanth K. Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, *in* BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW, at 104–16 (Erik G. Jensen & Thomas C. Heller eds., 2003).

† Centennial Professor of Law, The London School of Economics, and the John and Rylla Bosshard Professor of Law and South Asian Studies, The University of Wisconsin-Madison.

‡ Assistant Professor of Law, William Mitchell College of Law. For their insights and comments, the Authors thank Upendra Baxi, Rajeev Dhavan, Ken Gallant, Erik Jensen, Julia Eckert, Michael Anderson, Keith Mackiggan, Sally Merry, and Clark Cunningham. The Authors also express gratitude to Ranbir Singh and Ghanshyam Singh as well as to the Department for International Development (United Kingdom), which provided funding for this research.

1. Although reliable data are scarce and the state of record keeping makes collecting them a daunting task, there are some bits to suggest that India is among the lowest in the world in per capita use of civil courts. Some years back, Professor Christian Wollschläger presented a comparison of the per capita rate of filing of civil cases in some thirty-five jurisdictions for the ten-year period between 1987 and 1996. Annual rates of filing in courts of first instance per 1000 persons ranged from 123 in Germany and 111 in Sweden at the high end to 2.6 in Nepal and 1.7 in Ethiopia at the bottom. Since no national figures are available for India, Professor Wollschläger included in his comparison figures on Maharashtra, one of India's most industrialized states, whose capital (Mumbai or Bombay) is India's financial center. Maharashtra ranked thirty-second of the thirty-five jurisdictions with an annual per capita rate of 3.5 filings per 1000 persons. Of course, it is true that Wollschläger looked only at a single state and one ten-year period, and there is a question as to how representative his finding is for

locked.[2] There is wide agreement that access to justice in India requires reforms that would enable ordinary people to invoke the remedies and protections of the law. In this study we focus on an innovative forum, introduced just twenty years ago, which has enjoyed substantial governmental and judicial support and is endorsed and promoted, indeed given pride of place by influential elites, as a promising avenue of access to jus-

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India overall. But there is no reason to think that Maharashtra has less litigation than India as a whole, since the data point to a general correlation of court use with economic development. *See* Christian Wollschläger, *Exploring Global Landscapes of Litigation Rates*, *in* SOZIOLOGIE DES RECHTS: FESTSCHRIFT FÜR ERHARD BLANKENBURG ZUM 60. GEBURTSTAG (Jürgen Brand & Dieter Strempel eds., 1998). Also a recent Asian Development Bank (ADB) comparison of legal institutions in six Asian nations offers rough confirmation both of the absolute level of court use in India and its low comparative rank. Comparing India with China, Taiwan, Korea, Malaysia, and Japan, the ADB study found that in India, the rate of filing cases in the lower civil courts was 1209 per million [1.2 per thousand] population in 1995. This is about one-third as many cases as Wollschläger found, which probably reflects the differences between Maharashtra and India as a whole as well as in the acuity of the researchers. The Indian rate is only slightly higher than the Chinese, but the Chinese figure includes only commercial cases. And the Indian rate is far lower than that of the other countries in the comparison. Malaysia, the country whose legal institutions most resemble those of India had a civil litigation rate in 1990 of 17,850 cases per million [17.8 per thousand] population—roughly fifteen times that of India. India's placement at the bottom of this list is especially remarkable if we recall that Japan (3386.8 civil cases per million [3.4 per thousand of a population containing a much higher proportion of adults]) and Korea (14,713 civil cases per million [14.7 per thousand], excluding family cases) are famously "unlitigious" societies. Obviously, these comparisons are far from exact but, as rough as they are, they put into question the notion that the Indian courts are victims of an excessively litigious population. *See* KATHARINA PISTOR ET AL., THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960–1995, 246 tbl.7.18 (1999). Also consider Robert Moog's work, which has examined litigation rates in Uttar Pradesh from 1951 to 1976. (In 1976 the state stopped issuing these statistics.) He found that per capita civil filings in all district level courts in Uttar Pradesh had fallen dramatically from the early days of Independence, when there were 1.63 per thousand persons in 1951, to 1976 when there were only 0.88 per thousand. *See* Robert Moog, *Indian Litigiousness and the Litigation Explosion*, 33 ASIAN SURV. 1136, 1138–39 tbl. 1 (1993). Going back even further, Oliver Mendelsohn observes that "[t]here is now less litigation in absolute terms than there was in the nineteenth century or first half of the . . . [twentieth] century and, therefore, far less relative to population." *See* Oliver Mendelsohn, *The Pathology of the Indian Legal System*, 15 MOD. ASIAN STUD. 823, 849 (1981). The continuation of this downward trend receives some confirmation from the ADB study which reported that in "1960 [there were] 610.4 court cases in civil matters per million people [0.6 per thousand] . . . but in 1995 there were only 507.9 [0.5 per thousand] civil cases."

This discussion as well as much of the subsequent discussion on the Indian legal system in Parts I and II of the main text draw from a much longer study conducted by the authors. *See generally* Galanter & Krishnan, *supra* note *, at 96. What is presented in Parts I and II below is a modified excerpt from that article. For the full, 20,000 plus word historical discussion consult the article, although note, in that study the authors had not yet collected the original empirical data that are at the heart of this Article and will be presented in Parts III and IV.

2. The courts appear to be heavily used because there are relatively few courts in India. Most common law countries tend to have fewer judges than civil law countries. Consider the table in appendix A. Data we have collected suggests that India has only one-tenth to one-sixth the number of judges per capita that are found in the developed parts of the common law world. *See also* Bibek Debroy, *Losing a World Record*, FAR E. ECON. REV., Feb. 14, 2002, at 23 (noting that there are "23 million pending court cases—20,000 in the Supreme Court, 3.2 million in the High Courts and 20 million in lower or subordinate courts").

tice. This forum is the Lok Adalat, literally "people's court," and as the name suggests it is promoted as having a different source and character than the courts of the state. In fact, the Lok Adalat is a creature of the state, but because of the pretension that it is not, it deserves examination under the rubric of an alternative, non-state justice system. We suspect that a number of the inhabitants of that category bear a similar ambivalent relationship to the state.

This Article will proceed in the following manner: Part I recounts the post-Independence movement to establish village-based courts as a key method of enlarging public access to justice. After discussing the setbacks this movement encountered, we contrast the top-down "public interest litigation" approach that emerged in the wake of the Emergency period (1975–1977). In Part II we focus on how, beginning in the 1980s, judges and politicians returned to the captivating idea of settling disputes in an indigenous, traditional manner at the grassroots level. During this time, the concept of the Lok Adalat started gaining significant momentum, and we discuss the reasons why so many supported expanding this alternative dispute institution throughout India. In Part III we present findings from our preliminary observations of several different types of Lok Adalats. We conclude that the claim that this forum offers participants speedy, fair, and deliberative justice needs serious reconsideration.

I. EARLIER "ACCESS TO JUSTICE" INITIATIVES

A. *NYAYA PANCHAYATS*: A FAILED ATTEMPT TO RECONSTITUTE JUSTICE ALONG "INDIGENOUS" LINES

The Lok Adalat movement is a recent arrival on the "Access to Justice" scene. A movement to restore an indigenous legal system flourished briefly in the years just after Indian Independence.[3] Gandhians and socialists within the ruling Indian National Congress viewed the legal system inherited from the British as unsuitable to a reconstructed India, in which faction and conflict bred by colonial oppression would be replaced by harmony and conciliation. They proposed the displacement of modern courts by restored traditional *panchayats*—a proposal that met with the nearly unanimous disdain of lawyers and judges and the vitriolic scorn of Dr. B.R. Ambedkar, chair of the Constitution's Drafting Committee, who sidetracked the push for *panchayats* into a non-justiciable Directive Principle.[4] As part of the Panchayati Raj [local self-government] policy of

3. Marc Galanter, *The Aborted Restoration of "Indigenous" Law in India*, *in* LAW AND SOCIETY IN MODERN INDIA 38–39 (Rajeer Dhavan ed., 1989) [hereinafter Galanter, *Aborted Restoration*].

4. *Id.* at 40 n.16. Article 40 states that: "The State shall takes steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as

the late 1950s, judicial, or *nyaya*, *panchayats* were established with jurisdiction over specific categories of petty cases.[5]

Although these *nyaya panchayats* derived sentimental and symbolic support from appeal to the virtues of the indigenous system, they were quite different from traditional *panchayats*. They applied statutory law rather than indigenous norms; they made decisions by majority rule rather than unanimity; their membership was chosen by popular election from territorial constituencies rather than consisting of the leading men of a caste.[6] Indeed the focus on the "village" *panchayat* represented an attempt to recreate an idealized version of traditional society that emphasized democratic fellowship and ignored the caste basis of that society and its justice institutions.[7]

Like their traditional counterparts, these official *nyaya panchayats* encountered severe problems of establishing their independence of personal ties with the parties, enforcing their decrees, and acting expeditiously.[8] They never attracted significant support from the villagers in whose name they were established. Their caseloads declined steadily while those of the courts continued to rise. In Uttar Pradesh, civil filings in the *nyaya panchayats* fell from 82,321 in 1960 to 22,912 in 1970—just over four cases per *nyaya panchayat*.[9] During the same period, civil filings in the Subordinate Courts rose from 74,958 to 86,749.[10] One indicator of their demise is found in the experience of a researcher in Uttar

units of self-government." For a classic work on the appeal of "traditional" institutions, see LLOYD I. RUDOLPH & SUSANNE HOEBER RUDOLPH, THE MODERNITY OF TRADITION: POLITICAL DEVELOPMENT IN INDIA (1967).

5. Upendra Baxi & Marc Galanter, *Panchayat Justice: An Indian Experiment in Legal Access*, *in* 3 ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES (Mauro Cappelletti & Bryant Garth eds., 1978); *see also* DR. R. KUSHAWAHA, WORKING OF NYAYA PANCHAYATS IN INDIA: A CASE STUDY OF VARANASI DISTRICT (Dr. L.M. Singhri ed., 1977).

6. KUSHAWAHA, *supra* note 5, at 31–63.

7. Reviewing the literature on *panchayats*, Robert Hayden concludes that there was no such thing as a "village" *panchayat*, but only caste *panchayats* that, if sufficiently powerful locally, might decide matters involving members of other castes as well. *See* ROBERT HAYDEN, DISPUTES AND ARGUMENTS AMONGST NOMADS 83–109 (1999); *see also* LOUIS DUMONT, HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS 170–172 (1970) (noting that "we conclude that on the eve of British conquest, and excepting exceptional cases, there was no village *panchayat* as a permanent institution distinct from caste *panchayats*. There was a *panchayat* of the dominant caste of the village, and there were meetings of *ad hoc* arbitrators or judges, of a temporary nature.").

8. Catherine S. Meschievitz & Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, *in* 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 47–77 (Richard L. Abel ed., 1982).

9. Baxi & Galanter, *supra* note 5, at 369 tbl.1.

10. *Id.* at 371 tbl.2. *See also* KUSHAWAHA, *supra* note 5, at 99 (noting that in his study of Varansi district in Uttar Pradesh, "during the eleven years (1960–70) only 10,449 cases were instituted before 289 Nyaya Panchayat in the whole of the district. This works out at an average of 4 cases per Nyaya Panchayat per year.").

Pradesh in the 1970s, frustrated by the rarity of *nyaya panchayat* sessions, whose villager hosts graciously offered to convene one to facilitate her research.[11]

In little more than a decade, *nyaya panchayats* were moribund.[12] It is not clear whether they withered away because they lacked the qualities of the traditional indigenous tribunals or because they displayed them all too well. We believe that it was most likely because they represented an unappetizing combination of the formality of official law with the political malleability of village tribunals. As Catherine Meschievitz summed it up, "the N[yaya] P[anchayat] is thus a body of men . . . that handles disputes without regard to applicable rules and yet appears to villagers as formal and incomprehensible."[13]

Nevertheless, the *panchayat* idea continued to exert a powerful attraction on legal intellectuals.[14] The 1973 report of the Expert Committee on Legal Aid, chaired by (and consisting of) Justice Krishna Iyer, a report that viewed itself as a radical critique of Indian legal arrangements, speaks glowingly of *nyaya panchayats* as part of a larger scheme of legal aid and access to the courts.[15] *Panchayats* are endorsed as a method of incorporating lay participation into the administration of justice.[16] But it is clear that the justice in mind is "legal justice," the law of the land, and not that of the villagers or their spiritual advisors.[17] *Panchayats* are commended as inexpensive, accessible, expeditious, and suitable to preside

11. Meschievitz & Galanter, *supra* note 8, at 55.

12. *Id.* at 68–70.

13. *Id.* at 66. For a recent study that reviews how *Nyaya Panchayats* functioned in the years following Independence in Rajasthan, Uttar Pradesh, and Karnataka, see S.N. MATHUR, NYAYA PANCHAYATS AS INSTRUMENTS OF JUSTICE 43–77 (1997) (concluding that although *Nyaya Panchayats* had moments of promise, and at times even brought important legal services to those at the local levels, ultimately they were plagued by inconsistent rulings, inept administrators, a weak infrastructure, delay, and a lack of full accountability to the public).

14. The attraction long antedates independent India. For an account of the love affair of reformers with *panchayats*, see CATHERINE S. MESCHIEVITZ, PANCHAYAT JUSTICE: STATE-SPONSORED INFORMAL COURTS IN 19TH AND 20TH CENTURY INDIA 18–21 (Disputes Processing Research Program, Institute for Legal Studies, University of Wisconsin Madison Law School, Working Paper 8:1, 1987).

15. GOVERNMENT OF INDIA, MINISTRY OF LAW, JUSTICE & COMPANY AFFAIRS, DEPARTMENT OF LEGAL AFFAIRS, REPORT OF THE EXPERT COMMITTEE ON LEGAL AID—PROCESSUAL JUSTICE TO THE PEOPLE (1973) [hereinafter REPORT OF THE EXPERT COMMITTEE].

16. *Id.* at 137–45; *see also* D.A. Desai, *Alternative Dispute Resolution Mechanism: Role of Legal Profession, Dispute Commissions and Family Courts and Nyaya Panchayats—Participatory Justice*, *in* ROLE OF LAW AND JUDICIARY IN TRANSFORMATION OF SOCIETY: INDIA-GDR EXPERIMENTS 80 (D.A. Desai ed., 1984) ("Nyaya Panchayats offer a forum for participatory justice. Local village groups fully aware of local problems, local solutions and local environment would tend to resolve the dispute in the spirit of give and take, fairplay and equity.").

17. REPORT OF THE EXPERT COMMITTEE, *supra* note 15, at 145.

over conciliatory proceedings.[18] The *panches* envisioned by the report are not village notables but superannuated judges and retired advocates.

The follow-up report of the Bhagwati Committee, charged with proposing concrete measures to secure access to justice for the poor, endorses a system of "law and justice at the panchayat level with a conciliatory methodology."[19] The argument was that *panchayats* would remove many of the defects of the British system of administration of justice, since they would be manned by people with knowledge of local customs and habits, attitudes and values, familiar with the ways of living and thought of the parties before them.[20] Yet again the proposed *panchayats* do not depart from established notions of law. There was to be a presiding judge having knowledge of law, and the lay members were to receive rudimentary legal training.[21] There would be no lawyers and the tribunal would proceed informally, its decisions subject to review by the district court.[22] What is proposed is an informal, conciliatory, non-adversarial small claims court with some lay participation. This follow-up report—written by distinguished activist judges dedicated to enlarging access to justice—thus registered the appeal of the locally based "indigenous" forum under the guidance of an educated and beneficent outsider.

The catalyst in the formation of the Lok Adalat template was an influential 1976 article by Upendra Baxi, then India's most prominent legal academic, well connected to activist circles within the judiciary. Baxi described a "Lok Adalat" run by Harivallabh Parikh, a charismatic Gandhian social worker in a tribal area of Gujarat.[23] This forum was independent of the official law, both institutionally and normatively, although it bore no evident connection to traditional tribal institutions. As in the Krishna Iyer and Bhagwati reports, the imagery of indigenous justice was combined with celebration of conciliation and local responsiveness under the leadership of an educated outsider. These visions of paternalistic indigenous justice, published during the 1975–1977 Emergency, provided the basis for future developments. The end of Emergency Rule and the return to democracy in 1977 brought great ferment in

18. *Id.* at 139.

19. *See* P.N. BHAGWATI, REPORT ON NATIONAL JURIDICARE: EQUAL JUSTICE-SOCIAL JUSTICE 33–34 (Ministry of Law, Justice & Company Affairs, 1976).

20. *Id.* at 34–40.

21. *Id.* at 36–41.

22. *Id.* at 39.

23. Upendra Baxi, *From* Takrar *to* Karar*: The Lok Adalat at Rangpur—A Preliminary Study*, 10 J. OF CONST. AND PARLIAMENTARY STUD. 52 (1976). Baxi reports that the term "Lok Adalat" was used by participants in Rangpur (correspondence with Baxi, Mar. 13, 2002). His article may well be the source of its wider and official use.

the Indian legal world and inspired hope that institutions and organizations could be fashioned to protect the rights of the powerless.[24]

B. Public Interest Litigation: "Access" Through the Top

In the early 1980s a small number of judges and lawyers, seeking ways to actualize the Constitution's promises of justice—promises that were so starkly unrealized in practice—embarked on a series of unprecedented and electrifying initiatives. These included relaxation of requirements of standing, appointment of investigative commissions, appointment of lawyers as representatives of client groups, and a so-called "epistolary jurisdiction" in which judges took the initiative to respond proactively to grievances brought to their attention by third parties, letters, or newspaper accounts.[25] Public interest litigation, or social action litigation, as these initiatives are now called, sought to use judicial power to protect excluded and powerless groups (such as prisoners, migrant laborers, and the environmentally susceptible) and to secure entitlements that were going unredeemed.[26]

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24. *See generally* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, *in* Judges and the Judicial Power 289 (Rajeev Dhavan et al. eds., 1985); Smitu Kothari, *Social Movements and the Redefinition of Democracy*, *in* India Briefing 141–51 (Philip Oldenburg ed., 1993) (noting that following the Emergency there was an enthusiasm among civil rights and public interest organizations that democracy could be ensured by the rule of law).

25. *See* Carl Baar, *Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary*, 19 Pol'y Stud. J. 140, 142, 147 (1990); P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 Colum. J. Transnat'l. L. 561, 570–75 (1985); Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J. of the Indian L. Inst. 302, 306–08 (1994) [hereinafter Dhavan, *Law as Struggle*].

26. For a recent and comprehensive account, see S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits (2002). The vast literature includes Upendra Baxi, Courage, Craft and Contention: The Indian Supreme Court in the Eighties (1985); Marc Galanter, *New Patterns of Legal Services in India*, *in* Law and Society in Modern India, *supra* note 3, at 279–95 [hereinafter Galanter, *New Patterns*]; Baar, *supra* note 25; Baxi, *supra* note 24; Bhagwati, *supra* note 25; Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?* 37 Am. J. Comp. L. 495 (1989); Clark D. Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experience*, 29 J. of the Indian Law Inst. 494 (1987); Dhavan, *Law as Struggle*, *supra* note 25; Oliver Mendelsohn, *Life and Struggles in the Stone Quarries of India: A Case-Study*, 29 J. of Commonwealth and Comp. Pol. 44 (1991); N.R. Madhava Menon, *Justice Sans Lawyers: Some Indian Experiments*, 12 Indian Bar Rev. 446 (1985); G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 Int'l & Comp. L.Q. 66 (1991); S.P. Sathe, *Judicial Activism*, 10 J. of Indian Sch. of Pol. Econ. 399 (1998); S.P. Sathe, *Judicial Activism (II): Post-Emergency Judicial Activism: Liberty and Good Governance*, 10 J. of Indian Sch. of Pol. Econ. 603 (1998); Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 Wis. Int'l L.J. 57 (1994).

At the same time the government and the bar moved to implement the long-standing commitment to legal aid.[27] A body was established, under the aegis of the Chief Justice of India, to coordinate the implementation of legal aid programs.[28] And, most strikingly, there appeared a number of innovative legal service schemes in which social action groups for the first time sought to use law systematically and continuously to promote the interests of various constituencies.[29] For example, "middle class" organizations, such as the Consumer Education and Research Centre (CERC), emerged which attempted to address pervasive problems of public safety and consumer protection.[30] With support from foreign non-governmental organizations (NGOs), grassroots groups dedicated to protecting the rights of tribal people flourished, like AWARE in Andhra Pradesh[31] and the legal aid program at Rajpipla in Gujarat.[32] These organizations shared the conviction that law could be used effectively to promote the well being of various segments of the population.

These programs pointed beyond the prevailing "service" notion of legal aid as episodic *ad hoc* representation in court by generalist lawyers. Instead these new initiatives envisioned "strategic" operations of a scale, scope, and continuity that enabled lawyers to acquire specialized expertise, coordinate efforts on several fronts, select targets, and manage the sequence and pace of litigation, monitor developments, and deploy resources to maximize the long-term advantage of a client group.[33] The no-

27. Implementation of legal aid before the Emergency was desultory. *See generally* G. Oliver Koppell, *The Indian Lawyer as Social Innovator: Legal Aid in India*, 3 LAW & SOC'Y REV. 299 (1969). Among the many "populist" amendments to the Constitution enacted during the Emergency was a new Directive Principle decreeing "equal justice and free legal aid." *See* INDIA CONST. (Forty-Second Amendment) Act, 1976 sec. 8, 39A.

> The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Id.

28. The Committee on Implementation of Legal Aid Schemes (CILAS) was established in 1980 by the government of India with Supreme Court Justice (as he was then) P.C. Bhagwati as Chair of Budget Activities.

29. *See, e.g.*, Galanter, *New Patterns*, *supra* note 26, at 279–95; CHARLES R. EPP, THE RIGHTS REVOLUTION 97 (1998); D.L. Sheth & Harsh Sethi, *The NGO Sector in India: Historical Context and Current Discourse*, 2 VOLUNTAS 49 (1991).

30. *See* Friedrich Naumann Stiftung, India, Consumer Education and Research Centre (CERC), *at* http://fnf-southasia.org (last visited Jan. 25, 2004)

31. *See* SAKUNTALA NARASIMHAN, EMPOWERING WOMEN: AN ALTERNATIVE STRATEGY FROM RURAL INDIA 75–94 (1999) (describing the history and current activities of AWARE [Action for Welfare and Awakening in Rural Environment]).

32. *See* THE WEEK, *at* http://www.the-week.com (last visited Jan. 25, 2004).

33. Galanter, *New Patterns*, *supra* note 26, at 279–95; Peiris, *supra* note 26.

tion was to relieve disadvantaged groups from dependence on extraordinary, spontaneous personal interventions and thus to enable legal work to be calculating and purposive rather than atomistic.

Public interest litigation has promoted important social changes, raised public awareness of many issues, energized citizen action, ratcheted up governmental accountability, and enhanced the legitimacy of the judiciary.[34] But judicially orchestrated public interest litigation has proved only to be a frail vessel for enlarging access to justice by empowering disadvantaged groups.[35] Among its limitations are an inability to resolve disputed questions of fact; weakness in delivering concrete remedies and monitoring performance; reliance on generalist volunteers with no organizational staying power; and dissociation from the organizations and priorities of the disadvantaged.[36] While affirming and dramatically broadcasting norms of human rights, the courts frequently were unable to secure systematic implementation of these norms.[37]

II. THE SHIFT TO INFORMALISM

A. THE PROPONENTS

Apart from failures of implementation, judicially supported public interest litigation aroused considerable resistance both from those who opposed its program and from those who were discomfited by the recasting of the judicial role.[38] However, there were some judges that avidly promoted public interest law and, as we noted earlier, they too were entranced by the image of informal conciliatory justice brought to the masses by the charismatic or expert outsider. In his 1976 report, Justice

34. In 2002, Professor S.P. Sathe published a detailed study documenting how the environment, the rights of women and minorities, the rights of the ill and poor, and others all received important protections as a result of public interest lawsuits filed by rights-conscious activists. *See* SATHE, *supra* note 26, at ch. 6.

35. *See generally* AGRAWAL, *infra* note 37.

36. *See* EPP, *supra* note 29, at 97–98; GALANTER, *New Patterns*, *supra* note 26, at 279–82; Smitu Kothari, *The Human Rights Movement in India: A Critical Overview*, *in* RETHINKING HUMAN RIGHTS: CHALLENGES FOR THEORY AND ACTION 83, 92–99 (Smitu Kothari & Harsh Sethi eds., 1991); Cunningham, *supra* note 26, at 506–07.

37. For empirical support for these two sentences, see EPP, *supra* note 29, at chs. 5–6 (noting how the public interest litigation docket of the Supreme Court, contrary to the conventional wisdom, failed to increase significantly between 1960 and 1990. Epp argues that the top-down approach in promoting public interest lawsuits only went so far, due to the limited resources grassroots public interest advocates had in bringing such cases in the first place). For an earlier critique of public interest litigation, see S.K. AGRAWAL, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE (1985); ARUN SHOURIE, COURTS AND THEIR JUDGMENTS: PREMISES, PREREQUISITES, CONSEQUENCES (2001); Mendelsohn, *supra* note 26, at 46.

38. AGRAWAL, *supra* note 37, at 10–13 (identifying several Supreme Court judges who have expressed "a not-too-friendly posture to [public interest litigation]").

Bhagwati, the foremost judicial proponent of public interest litigation, proposed one-day forums to settle pending cases.[39]

As the surge of public interest law activity leveled off, the reform energies that had fueled its growth found new channels. Where prominent judges had been patrons and instigators of public interest litigation, their successors have become promoters of Lok Adalats. The dominant themes of "reform" have become informality, conciliation, and alternative institutions rather than vindication of rights through adversary processes in mainstream adjudicative institutions.[40] As the name suggests (again, literally, "people's court"), its sponsors seek to present it as indigenous and traditional.[41] The promoters of the official *nyaya panchayats* in the 1950s were eager to present them as a continuation of the historical panchayat institution. Similarly, the promoters of Lok Adalats stress their indigenous character and "rich tradition," even though they have little resemblance to earlier institutions.[42] (Ironically, Harivallabh Parikh had regarded the Lok Adalat at Rangpur as an innovative rather than traditional forum.[43])

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39. *See* P.N. BHAGWATI, *supra* note 19, at 41–42.

40. *Id.* Part of the appeal of the Lok Adalats to judges may be that it reduces—all but eliminates—the role of lawyers in reform.

41. This institution goes by various appellations in different localities (settlement camp, settlement mela, lok nyayalaya, janata nyayalaya, neeti mela, etc.) but we use Lok Adalat throughout since it is the most common name and the one given official recognition in the Legal Services Authorities Act, 1987 (amended 1994). For a critical assessment, see Sarah Leah Whitson, *"Neither Fish, Nor Flesh, Nor Good Red Herring" Lok Adalats: An Experiment in Informal Dispute Resolution in India*, 15 HASTINGS INT'L & COMP. L. REV. 391 (1992). Empirical accounts of the working of Lok Adalats are rare, but see Robert S. Moog, *Conflict and Compromise: The Politics of Lok Adalats in Varanasi District*, 25 LAW & SOC'Y REV. 545, 552–64 (1991); Gene Kassebaum, ADR in India: The Lok Adalat as an Alternative to Court Litigation of Personal Injury and Criminal Cases in South India 5 (1989) (unpublished manuscript, on file with Authors).

42. *See generally* YOGESH MEHTA, LOK ADALATS AND PUBLIC INTEREST LITIGATION (Ahmedabad: Gujarat State Legal Services Authority, 2000). An extended description of Lok Adalat organization and operations, embedded in a full-blown ideological account of Lok Adalats as a people's movement establishing contemporary versions of ancient popular courts, may be found in SUNIL DESHTA, LOK ADALATS: GENESIS AND FUNCTIONING: PEOPLE'S PROGRAMME FOR SPEEDY JUSTICE (1995). In a similar vein, a team of Indian and American court reformers describe their reforms as "preserving and supporting formal litigation as a means of last resort, while simultaneously restoring and modernizing consensual dispute resolution processes often utilized in pre-colonial society." Hiram E. Chodosh et al., *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, 30 N.Y.U. J. INT'L L. & POL. 1, 58 (1997–1998). Earlier they note that "Lok Adalats resemble the traditional *panchayat* system of five village elders acting as arbitrators for local dispute resolution." *Id.* at 41, n.130. But *panchayats* were not composed of village elders, rather of caste elders; depending on the circumstances they were no more arbitrators than mediators or legislators, and, notwithstanding the name, there were not necessarily five.

43. Interview with Upendra Baxi, Professor of Law, University of Warwick, Warwick, Eng. (May 20, 2003).

B. THE "CHARACTER TRAITS" OF LOK ADALATS

The early Lok Adalats approximated a standard template, although as we shall see there are many new variations. Cases on the docket of a local court (or tribunal) were, with the consent of one or both of the parties, transferred to a Lok Adalat list.[44] At an intermittent one-day "camp," typically on a weekend day, attended by judges and other officials and promoted with considerable hoopla, the cases are called before a mediator or panel of mediators.[45] The mediators are typically retired judges or senior advocates.[46]

The first Lok Adalat was held in 1982.[47] As of March 1996, some 13,061 had been organized nationwide and some 5,738,000 cases were resolved there (about 440 per Lok Adalat).[48] Twenty-one months later the total had risen to some 17,633 Lok Adalats and 6,886,000 cases settled.[49] That means than in the twenty-one–month period, 4572 Lok Adalats were held—some 218 per month or 2600 per year and that approximately 1.148 million cases were resolved (about 251 per Lok Adalat.) Unpublished data from the National Legal Services Authority shows that as of the end of 1999, 49,415 Lok Adalats were held with 9,720,289 cases being settled (about 197 per Lok Adalat).[50] By November 30, 2001, there were 110,600 Lok Adalats that had settled 13,141,938 cases (about 119 settled per Lok Adalat).[51] It is unclear whether this seemingly continuous drop in the number settled per Lok Adalat is due to the increasing number of Lok Adalats, less success in achieving resolution, fewer cases, smaller numbers of mediators, or more difficult and complex cases. There appears to be considerable regional variation. In the state of Gujarat from March 1982 to the beginning of January 2000, 14,766 Lok Adalats were held; nearly 90% of all cases "dealt with" were settled.[52] In contrast, dur-

44. The Legal Services Authorities Act, 1987 (amended 1994). *See also* K. Ramaswamy, *Settlement of Disputes Through Lok Adalat Is One of the Effective Alternative Dispute Resolution (ADR) on Statutory Basis*, *in* ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS 100 (P.C. Rao & William Sheffield eds., 1997); Moog, *supra* note 41, at 554.

45. ROBERT S. MOOG, WHOSE INTERESTS ARE SUPREME: ORGANIZATIONAL POLITICS IN THE CIVIL COURTS IN INDIA 135–38 (1997); Ramaswamy, *supra* note 44, at 98.

46. Ramaswamy, *supra* note 44, at 98.

47. *Id.* at 96.

48. *Id.* at 102.

49. Press Release, Press Information Bureau, Government of India, Annual Report of Ministry of Law, Justice and Company Affairs (July 2, 1998), *available at* http://pib.nic.in/focus/foyr98/foo799/Foco207981.html.

50. Data obtained from the National Legal Services Authority (NLSA), New Delhi, December 2001. We presume that the data are from 1982 onwards; however, no official at the NLSA was able to confirm this point nor give us a reliable starting date as to when the data were first collected.

51. *Id.*

52. THE GUJARAT STATE LEGAL SERVICES AUTHORITY: NYAYA PATH, December 2000, at 114.

ing the first quarter of 2001, 651 Lok Adalats were conducted in Kerala with only 39% of the cases settled. Clearly there is much variability here and a larger empirical examination of these patterns is required before any final conclusions can be made.

What sorts of cases are in Lok Adalats? One set of sophisticated commentators tells us that Lok Adalat cases are "limited to auto accidents and family matters."[53] But the dockets are considerably more varied, including vast numbers of ordinance violations and minor criminal cases. While dockets vary from one place to another, generally they are shaped to capture cases involving the poor. Lok Adalats, says one proponent, "specially cater to the needs of weaker sections of society."[54] They are for "poor people," especially for petty non-contested cases.[55] Many proponents of Lok Adalats see them not as a species of court reform but as a species of legal aid, one particularly suited to the poor, oppressed, and female. Like judicially inspired public interest law, the theme is bountiful caring for the weak, but the movement is centered not around eminent judges and prominent lawyers, but district judges, social workers, and local advocates.

Lok Adalats are typically not able "to attract cases with heavy financial stakes or important civil litigation. Private litigation [has] remained totally outside the ambit of Lok Adalats."[56] The Lok Adalat device has occasionally been used for mass settlement: resolving two separate takings cases where residents of two different areas received approximately 1.5 billion and 186.8 million rupees respectively;[57] and more recently sugar cane growers and laborers were awarded 12 million rupees in a Lok Adalat brokered settlement.[58]

In terms of how frequently it meets, originally the term Lok Adalat was used to refer to a transitory forum, staffed by volunteers and convened from time to time. It has grown to encompass a continuing institution with fixed location and personnel.

> Permanent Lok Adalats [that] have . . . been introduced in the various Government departments that provide services . . . [including] the telephone companies, the electricity board, the municipal corporations, the city development authorities and the insurance companies. . . . Today Lok Adalat-type mechanism is being invoked by Gov-

53. Chodosh et al., *supra* note 42, at 43.

54. P.C. Rao, *Alternatives to Litigation in India*, *in* ALTERNATIVE DISPUTE RESOLUTION: WHAT IT IS AND HOW IT WORKS, *supra* note 44, at 27.

55. Paras Diwan, *Justice at the Door-Step of People: The Lok Adalat System*, 78 ALL INDIA REP. J. 85 (1991).

56. P.C. Rao, *supra* note 54, at 27.

57. Ramaswamy, *supra* note 44, at 97.

58. *Id.*

> ernment Departments and public sector agencies to settle pension and provident fund claims, bank debts, consumer grievances and similar small claims of a civil or revenue nature.[59]

The purpose of these permanent Lok Adalats "is to achieve the resolution of petty disputes between a citizen and such departments before they reach the courts."[60] In Part III, we will discuss permanent "in house" Lok Adalats in more detail.

While proponents of Lok Adalats stress their participatory character, it is clear that the form of participation envisaged for poor claimants or defendants is reception of the guidance of their betters. The tribunal is to consist of "judicial officers of the area and . . . educated social workers, law college teachers and retired judicial officers"[61] They will give the poor "appropriate guidance."[62] This picture seems to be confirmed by the knowledgeable reformers who tell us that in Lok Adalats, resolutions are fashioned by the evaluative views of the mediators, rather than through negotiations by the litigants.[63] Others have sardonically described adjudication in Lok Adalat as "banyan tree justice."[64]

C. Discovery and Award-Settlements

How does the Lok Adalat deal with disputed questions of fact? Early on, one proponent boasted "[t]here will be no necessity for witnesses or examination or cross-examination, to produce legal documents or present case law."[65] Other accounts suggest that controversy about facts, and perhaps about norms, rarely intrudes when Lok Adalats are sitting. Cases may be "already compromised by the persuasion and efforts of judges and advocates alike, for the purpose of being placed before the Lok Adalats."[66] There may be a "pre-Lok Adalat conference in which parties are approached by the legal aid team and discussions about the pros and cons of the case take place."[67]

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59. N.R. Madhava Menon, *Lok Adalat: An Indian Contribution to World Jurisprudence*, Souvenir, at 56, 57.

60. S.P. Barucha, *Keynote Address*, Souvenir at 18–19.

61. K. Gupteswar, *The Statutory Lok Adalat: Its Structure and Role*, 30 J. of the Indian L. Inst. 174, 179 (1988).

62. Mahabaleshwar N. Morje, *Lok Nyayalaya: A Place of Justice for Common Man in Changing Society*, 71 All India Rep. J. 68, 69 (1984).

63. Chodosh et al., *supra* note 42, at 41 n.130.

64. This reference dates back to the early 1980s when it is said that one of the first Lok Adalats took place under a banyan tree in Gujarat. There is even evidence that this tradition has continued. For a recent account of a "banyan tree" Lok Adalat, see Yogindra Gupta, *Mishap Victim Gets Rs. 2.25 Lakhs*, Trib. News Service, Apr. 24, 1999, *available at* http://www.tribuneindia.com/1999/99apr25/haryana.htm.

65. Morje, *supra* note 62, at 68.

66. Virendra Singh Barhat, *Judicial Courts v. Lok Adalats*, 74 All India Rep. J. 5, 6 (1987).

67. Diwan, *supra* note 55, at 87.

Generally, the largest cases in Lok Adalats are claims by accident victims under the Motor Vehicle Act. This is the only type of case counted separately and statistics are compiled of the amount of compensation awarded in these cases. Thus, the Ministry of Law stated at the end of 1997 that some 349,710 motor vehicle accident claims had been resolved by Lok Adalats and some rupees 1160 crores awarded (this is an average award of rupees 33,190).[68] Our data from the National Legal Services Authority show that by the end of November 2001, 825,255 of these cases had settled at an average award of 39,432.[69] Lok Adalats therefore resolved over 10,000 motor accident cases per month during the last four years (475,545 in forty-seven months from January 1998 to the end of November 2001)—and at higher amounts.

Gene Kassebaum's study of Lok Adalats in Karnataka from 1986 to late 1988, found that about sixty-two percent of the cases were motor accident claims.[70] Since the claimants in motor accident cases are typically passengers or pedestrians and the defendants are typically companies or government agencies, these matters "tend to be contests between the relatively rich and the relatively poor, the powerful and the weak."[71] The sessions observed by Kassebaum were organized so that all the cases involving claims against a particular insurer or transport company were placed before the same panel, a considerable convenience to these defendants. The parties in these Karnataka Lok Adalats were represented by advocates—although advocates were excluded in Uttar Pradesh Lok Adalats described by Robert Moog.[72] Most cases were settled after brief,

68. Press Release, Press Information Bureau, *supra* note 49. *See also* The Banyan Tree: Volume II—Bringing Change, Section I: The Basis and Framework of the Legal System in India, *available at* http://healthlibrary.com/reading/banyan2/5section1.html (last visited Jan. 25, 2004), discussing how in the state of Andhra Pradesh, since 1986, claimants have received over Rs. 44 lakhs in payments from automobile insurance companies. *But see* Press Release, Press Information Bureau, Government of India, Performance of Lok Adalats (Feb. 21, 2000), *available at* http://pib.myiris.com/textfile/search/article.php3?&filename=../press/D26581.htm&srch=motor, evaluating the overall performance of Lok Adalats. The site states that between 1985 and 2000 "42,477 Lok-Adalats were organised in different parts of the country where 90,74,971 cases were settled. In 4,88,669 motor accident claims cases, compensation amounting to rupees 2054,56,21,491 has been awarded." However, from this latter site it is unclear if of the 9,074,971 cases, only 488,669 were motor cases, in which cases the actual percentage of all cases being motor accident cases would be seemingly low, or whether there were other motor cases that did not settle.

69. Data provided to Authors by the National Legal Services Authority.

70. Gene Kassebaum, *supra* note 41, at 5. Figures are for all Lok Adalats held in the state from June 1986 to mid-November 1988. Kassebaum observes that "the big cities use the Lok Adalat to dispose of vehicle accident claims, the small towns and taluks use Lok Adalat to settle long pending criminal and other civil cases. The medium size cities do some of each." *Id.* at 16. *See also* Moog, *supra* note 45, at 135–46 (describing Lok Adalats in Uttar Pradesh with dockets made up almost entirely of criminal and revenue cases).

71. Kassebaum, *supra* note 41, at 7.

72. Moog, *supra* note 41, at 554.

often perfunctory, negotiations that focused on the quantum of damages.[73]

The amounts awarded in Lok Adalats are arguably quite small. In the 13,553 cases resolved in Karnataka from 1986 to 1988 (of which 8537 were motor accident cases), the average settlement was rupees 14,758.[74] This is only a small fraction of the arguably inadequate average damages awarded to claimants who persevere to fight their cases through the courts. A sample analysis some years back of the recoveries in motor accident cases reported in the most comprehensive and widely circulated set of Indian law reports, the *All India Reporter*, shows that, at least for 1986, the average recovery in the thirty-one cases for which data was obtainable was rupees 48,376.[75] Of course, the cases that were fought all the way to a High Court could be expected to involve more severe injuries on the average than those brought to a Lok Adalat.

Forums similar to Lok Adalats are conducted by voluntary groups as well as by the courts. For example, the principal activity of the People's Council for Social Justice (PCSJ) in Kerala, is conducting *Neeti Melas* (festivals of justice). Staffed largely by retired judges and court personnel, PCSJ urges people to avoid the courts and avail themselves of its services instead.[76] Rather than a departure from the official norms, it proposes to give disputants' access to a purer, conciliatory, non-adversarial forum for the application of those norms.[77] In fifteen years the PCSJ has conducted 227 *Neeti Melas* and has settled over 8000 motor accident cases.[78]

73. Kassebaum, *supra* note 41 (reporting that fifty-four percent of the cases that appeared at the Lok Adalat reached a settlement).

74. *Id.* at 15, 35.

75. This analysis was performed by Mary Versailles, J.D., University of Wisconsin, class of 1990. In three other motor vehicle cases, recovery was confined to the statutory "no fault" award of Rs. 15,000 for death and Rs. 7500 for permanent disability. If three cases are included, the average recovery is reduced to Rs. 44,769.

76. *See* http://www.councilforjustice.org, which is the website of the organization.

77. *Id.*

78. *Id.*

D. Preliminary (Pre-Fieldwork) Data on Lok Adalats

The motor accident cases that figure so prominently in the caseload at the Lok Adalats, governmental and voluntary, are not cases diverted from the rigidities of ordinary unreformed civil proceedings. Instead they are cases diverted from a "reformed" and "streamlined" sector of the court system,[79] the Motor Accident Claims Tribunals, themselves established to provide expeditious proceedings with no court fees and some compensation available without a showing of fault. This accentuates the point that Lok Adalats should not always be considered as providing additional access to justice: While some of the Permanent Lok Adalats may address claims that have not yet been brought to a court or tribunal, overall the Lok Adalat docket is made up of cases that have already been brought to another forum. Lok Adalats do not provide new facilities for the vast portion of potential claims that are discouraged by court fees, the cost of lawyers, the prospects of delay, and paltry recoveries. More systematic data are needed before any firm conclusions can be drawn, but from the information presently available to us, it appears that the main work of Lok Adalats is to provide a truncated process for some of those few who do attempt to utilize the courts.

Just five years after the judiciary began to sponsor Lok Adalats, Parliament enacted The Legal Services Authorities Act of 1987, which was amended in 1994 and then again in 2002.[80] The Act visualizes a regime of Lok Adalats with jurisdiction over "any matter,"[81] composed of judicial officers and other qualified members,[82] authorized to proceed according to its own procedures, which need not be uniform[83] and to be "guided by the principles of justice, equity, fair play and other legal principles."[84] Rather than an award in accordance with the law, the Lok Adalat is instructed to "arrive at a compromise or settlement."[85] The 1994 amendments to the Act mandate that the compromise "shall be final and binding on all the parties to the dispute, and no appeal shall lie to any

79. Whitson, *supra* note 41, at 426.

80. The Legal Services Auth. Act, No. 39 of 1987, (1995) (amended 1994; amended 2002).

81. *Id.* at § 19(3).

82. *Id.* at § 19(2).

83. *Id.* at § 22(2).

84. *Id.* at § 20(4). This formula bears a striking resemblance to the "justice, equity and good conscience" that was the residual source of law in British India and elsewhere in the empire and remains so today in India and elsewhere. Although the formula was designed to enable courts to appeal to "sources of law other than English common and statute law," in practice its effect was "to introduce conceptions which strongly resemble the general character of English law." J. Duncan M. Derrett, *Justice, Equity and Good Conscience*, *in* Changing Law in Developing Countries 138, 150 (J.N.D. Anderson ed., 1963).

85. Legal Services Auth. Act § 20(3).

court against the award."[86] (The 2002 amendments reiterate this principle under Section 22E.)

Lok Adalats differ sharply from the earlier *nyaya panchayats*. The jurisdiction of Lok Adalats is not confined to specific categories of minor matters, but can extend to "any matter." Instead of the popularly elected panches, Lok Adalat officials are nominees of the state administration. Where the panches could issue decisions, the Lok Adalat panelists—at least until now—can only "determine and arrive at a compromise or settlement."[87] Table 1 summarizes some of the differences between Lok Adalats and various past and present forums for providing access to justice for everyday troubles and injuries.

86. *Id.* at § 21(2). Even with this provision we are uncertain whether "the so-called finality . . . [has] the effect of barring judicial review under articles 226, 227, 32, or 136 of the Constitution." *See* Gupteswar, *supra* note 61, at 181 (writing before the 1994 amendments, arguing that judicial review was still possible).

87. *Id.* at § 19(5).

TABLE 1

SALIENT FEATURES OF FORUMS FOR EVERYDAY JUSTICE IN INDIA

CHARACTERISTIC	TRADITIONAL *PANCHAYAT*	DISTRICT COURTS/ SUBORDINATE COURTS	ARBITRATION	*NYAYA PANCHAYAT*	HIGH COURTS/ SUPREME COURT PUBLIC INTEREST LITIGATION	*LOK ADALATS*
FLOURISHED	Before British rule	Since early 19th Century	1940–	1950–1975	1977–	1982–
PERSONNEL	Communal Notables	Bureaucratically selected career judges	Selected by the parties	Elected by local electorate	Appointed Judges (legal practitioners)	Retired judges, volunteers
NORMS APPLIED	Custom of Caste or Locality	Lex Loci (state law)	Reflection of state law	Statute law	State law with innovative	Not known
SANCTIONS IMPOSED	Fines, Excommunication	Money damages, injunctive relief	Money awards (enforced by the court)	Fines	Money damages, injunctive relief	Enforced by court
ACCOUNTABILITY AND REVIEW	Politics of Reconsideration	Appeal within judicial hierarchy	Enforcement by court	Appeal to the courts	No appeal	No appeal
REPRESENTATION	Self, Factional Spokesman	Lawyers	Lawyers	Self	Lawyers	Self, lawyers

This campaign to institutionalize Lok Adalats comes in spite of (and perhaps because of) the fact that little is known about their performance. One serious issue that immediately comes to mind is whether this "informalism" disadvantages weaker parties. The few available accounts raise a host of serious questions. For example, how genuine is the "consent" by which the parties consign their cases to Lok Adalats? Robert Moog portrays pressures on officials to produce large numbers of cases for Lok Adalats, leading in some instances to the institution of criminal cases for the purpose of having them resolved there.[88] Also, cases that have in effect been resolved in the courts are assigned to Lok Adalats to inflate the total of resolutions there.[89] Clearly, there are career incentives for officials to produce the cases and settlements desired by their superiors. Beyond this, there are questions about the quality of the process: Are the issues salient to the parties ventilated? Are the merits of their cases effectively presented? Can the forum probe and resolve conflicting assertions of fact? Do the resolutions embody legal standards? What is the procedure for enforcing decisions? How regularly are decisions enforced? How do the outcomes compare with the parties' legal entitlements? Are outcomes reasonably consistent with one another?

Apart from these questions about the resolution of specific cases, there are questions about the general effects of the diversion of these claims to Lok Adalats.[90] Does the diversion diminish the deterrent effect of awarding damages? Does it diminish the supply of precedents and impede the development of tort doctrine and expertise that are responsive to India's new industrializing economy? If it relieves the courts to do other things, what do they in fact do? Does it encourage or discourage preventive measures by frequent injurers (e.g., bus companies) and their insurers? Neither those who operate Lok Adalats nor those who promote them have displayed much interest in systematic assessment of the quality of their performance. Such assessment is essential to ascertain whether the results justify the expenditures and commend these initiatives over others.[91] Assessment involves comparing the performance of

88. MOOG, *supra* note 45, at 138–46; Moog, *supra* note 41, at 557–65.

89. MOOG, *supra* note 45, at 138–46; Moog, *supra* note 41, at 557–65.

90. The following set of questions listed in the text presuppose that litigants are economically rational actors. Of course, though, other considerations may also come into play such as family honor or potential opportunities that accompany delay. We are sensitive to these other "non-rational" incentives, but for an overall discussion of "general effects" associated with litigation. *See* Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117–42 (K. Boyum & L. Mather eds., 1983).

91. On the formidable conceptual and methodological problems involved in evaluating alternative methods of dispute resolution see Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

the Lok Adalats with the aspirations their promoters have for them. So far, what is remarkable is how modest these aspirations are.

Proponents of Lok Adalats, like earlier reformers, claim to draw on the legacy of *panchayats*. But as Table 1 summarizes, they are distinct from traditional *panchayats* in virtually every respect: they operate in the shadow of the official courts; they are staffed by official appointees rather than communal leaders; they apply some diluted version of state law rather than local or caste custom; they arrange compromises instead of imposing fines and penances backed up by the sanction of excommunication. Nor can Lok Adalats be viewed as a continuation of the push for *nyaya panchayats* that peaked in the 1950s. The proponents of *nyaya panchayats* sought to provide a convenient, accessible, understandable forum that would encourage popular participation, express popular norms, and promote harmonious interaction. They were unable to deliver on this, but the aim was to provide a system of justice superior to that of India's British-style courts. In contrast, the virtues claimed for Lok Adalats are their expeditiousness and lower processing cost.[92] What commends them is not that they deliver a superior form of justice, but that they represent deliverance from the agony of litigation in a system conceded to be terrible.

The Lok Adalats' achievement, then, is to provide an official process for claimants to secure a portion of their entitlements without the aggravation, extortionate expense, inordinate delay and tormenting uncertainty of the court process.[93] To secure this, they yield up discounts. Assume, for example, a motor accident claimant who would secure Rs. 50,000 compensation [and accumulated interest from date of filing] after an expensive ten-year struggle in the courts. Imagine that this same claimant might be able to get half that amount at a Lok Adalat in just a few months.[94] This is clearly a preferable outcome for the claimant, given the legal costs avoided and given the appropriate discount for the futurity and uncertainty of the court recovery. Thus, the establishment of the Lok Adalat arguably provides a significant benefit for a claimant in this situation.

But, of course, this claimant is entitled not to the discounted future value of his claim, but to the full present value. What makes the delivery of the discounted amount a "benefit" is simply that the full entitlement can be vindicated only by recourse to a disastrously flawed judicial system that, at best, can deliver it in ten years. Thus, the "benefit" conferred

92. *See* Shiraz Sidhva, *Lok Adalats: Quick, Informal Nyaya*, LEX ET JURIS, Dec. 1986, at 36–41.

93. *See* Gupteswar, *supra* note 61, at 174.

94. *But see* Diwan, *supra* note 55, at 85 (claiming that discounts are only five to ten percent of the value of the claim).

by the availability of the Lok Adalat is a benefit only by virtue of the enormous transaction costs imposed by the judicial system.[95] And these transaction costs impact differentially on different kinds of parties. Those who are risk averse and unable to finance protracted litigation are the ones who have to give the discounts in order to escape these costs; those who occupy the strategic heights in the litigation battle are able to command steep discounts.[96] Since the sums awarded by the courts fall far short of fully compensating the injured, the injured are triply under-compensated: first, by the inadequate level of compensation delivered by the courts; second, by the high transaction costs; and finally by the discounts they must yield to avoid the infliction of these costs. And, as the injured are under-compensated, injurers are under-assessed for the costs they impose on society for their risk-creating behavior and under-deterred from persisting in injurious conduct.[97]

The establishment of Lok Adalats represents the use of scarce reform energies to create alternatives that are "better" than the courts; but it is not necessary to be very good to be better than the ordinary judicial system. The flaws of the system serve not as a stimulus to reform it, but as a reason for setting up institutions to bypass it. Reformers take pride in delivering needed compensation more expeditiously to some of the victims. But the features of the system that make this discounted result appear to be an advance go unexamined and unattacked. Lok Adalats are then an instance of a debased informalism—debased because it is commended not by the virtues of the alternative process but by avoidance of the torments of the formal institutional process.

III. VISITS TO THE FIELD

During the latter half of 2002 and early and middle parts of 2003, we observed a sample of Lok Adalats in one of India's most politically and economically important states.[98] In this section, we discuss how our findings compare with the conventional wisdom on these dispute resolution forums.[99] As already stated, the Lok Adalat in India is not a homogenous

95. For purposes of the argument here, transaction costs include lawyers' fees, court fees, bribes and other litigation expenses, uncertainty of outcome and uncertainty of execution if a favorable outcome is obtained.

96. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 119–20 (1974). *See generally* H. LAURENCE ROSS, SETTLED OUT OF COURT (1970).

97. For a general evaluation of how the injured and poor are treated by the Indian legal system, see N.R. Madhava Menon, *Legal Aid and Justice for the Poor*, *in* LAW AND POVERTY: CRITICAL ESSAYS (Upendra Baxi ed., 1988).

98. To protect the confidentiality of the people we observed and interviewed, we purposely withhold the name of the state.

99. Conducting the fieldwork for this study was Jayanth K. Krishnan.

institution. There are many types and the numbers grow by the day. In this section we discuss five particular Lok Adalats: what we might call a General Lok Adalat that usually hears motor accident cases and family law disputes; an Electricity Lok Adalat; a government Pension Lok Adalat; a High Court Lok Adalat; and a Women's Lok Adalat. (Because there was minimal activity at the Women's Lok Adalat the day it was observed, we mainly discuss the activity of the others.) We were furthermore able to collect important (albeit incomplete) quantitative data on the operation of several other types of Lok Adalats. As we shall see, although the subject matter within each of these Lok Adalats is distinct, there are similarities in how these forums function. More evidence is required before drawing any firm conclusions; however, our data thus far confirm our worries that the quality of Lok Adalat justice falls seriously short of the aspirations of "Access to Justice" proponents.

A. Setting the Scene

Most of the observed Lok Adalats took place on a Saturday, beginning around ten in the morning and lasting anywhere from two to seven hours. The Electricity, Pension, High Court, and Women's Lok Adalats were held in moderately maintained, state government buildings, while the first observed General Lok Adalat was conducted in a recently constructed, separate hall located adjacent to the district court. (A second observed General Lok Adalat was held in a district court building.) In most cases, retired justices from the state High Court chaired the judicial panels; in the General Lok Adalats a current, chief district judge served as head of that panel. The Legal Services Authority Act also mandates that judicial panels of Lok Adalats include one social worker and one lawyer or other legal expert and that one of the three members must be a woman. As we discuss below, there was variation regarding adherence to this requirement.

The Electricity, Pension, High Court, and General Lok Adalats each had long lines of claimants who often waited hours before having their cases heard. (The day the Women's Lok Adalat was observed, only seven cases were on the court docket.) The rooms holding the sessions were stuffy, crowded, and lacked air conditioning. Claimants typically sat and listened for their names to be called by a government-employed Lok Adalat clerk before approaching the judicial panel. Standing next to the panel would be a court stenographer who, upon direction of the presiding judge, would write down for the record what the judge believed to be the pertinent information regarding the case. The presence of lawyers representing claimants varied depending on the Lok Adalat. In the General, High Court, and Women's Lok Adalats most claimants came accompanied by lawyers. In fact, as we will explain shortly, in the General

Lok Adalat, there was a situation where the same lawyer represented numerous bus passengers who were victims in a massive traffic accident. In the Electricity and Pension Lok Adalats the vast majority of claimants represented themselves. Most surprisingly, in the Electricity Lok Adalat, another party that was present and advocating a position (usually against the claimant) was the police. We discuss below how police participation impacted this Lok Adalat.

B. Types of Cases Heard and the Process of Adjudication

1. *The Pension and Electricity Lok Adalats*

Although the Pension and Electricity Lok Adalats deal with matters distinct from one another, similar patterns are present in *how* these two forums operate. The Pension Lok Adalat handles cases brought by retired civil servants who are disputing the pension amount allocated to them by the government department for which they worked. The Pension Lok Adalat also hears claims initiated by current civil service workers seeking a promotion or increased monetary compensation. A judicial panel consisting of a retired High Court judge, the General Secretary of the Retired Employees Association, and a practicing lawyer oversee these matters. The Pension Lok Adalat was statutorily created by our selected state in 2001, as a "permanent and continuous"[100] body. According to the presiding judge, "500 cases have been settled in the last year and a half," in which each claimant received the requested amount from the governmental department.[101] This statistic, however, is contrary to the information provided by the Pension Lok Adalat office. According to the official data, as of December 12, 2002, 605 cases had been referred to the Pension Lok Adalat, with only 214 reaching settlements. Three hundred seventy-six cases were adjourned, three were returned to the regular courts, and twelve had yet to be heard.[102]

Irrespective of this disparity, the presiding judge of the Pension Lok Adalat repeatedly expressed hostility towards the presence of lawyers in these forums and noted that were it not for them, the number of settled cases would dramatically increase.[103] "Lawyers are famous," the judge commented to Krishnan, "for dragging on cases."[104] But of the twenty-three cases Krishnan observed only three claimants even came accompanied by lawyers. Moreover, in thirteen cases (none of which had lawyers involved), the party guilty of being unprepared and delaying matters was

100. Language is from the state statute creating this Lok Adalat.
101. Interview with Presiding Judge of Pension Lok Adalat (Dec. 28, 2002).
102. Data were provided to Krishnan during his visit to the Pension Lok Adalat (Dec. 28, 2002).
103. Interview with Presiding Judge of Pension Lok Adalat, *supra* note 101.
104. *Id.*

the government agency. In six consecutive cases, the state's education department representative asked the panel for postponement, prompting the presiding judge to shout, "Why the hell aren't you people ready? Is this how you run things over there?"[105] (Nevertheless, the motion for delay in each case was granted.) And in that morning session, just three cases were resolved, with the remaining postponed to another sitting.

The government's lack of preparedness also could be found in the Electricity Lok Adalat. This forum was established in 2001 to settle disputes between consumers and the state electricity company.[106] According to the presiding judge of the Electricity Lok Adalat, ninety percent of the cases involve billing disputes—mainly claimants accusing the electricity company of excess charges.[107] The remaining matters deal with the company seeking compensation from individuals that the company contends have stolen electrical power. The day that Krishnan observed this Lok Adalat twenty-five cases were on the panel's docket. Thirteen resulted in a settlement while ten were postponed at the request of the company; two cases did not reach any resolution and the parties agreed to litigate these matters in the regular state court.

Aside from the government not being prepared in nearly half of the cases in the Electricity Lok Adalat, there was another curious aspect to this proceeding. Of the twenty-five cases on the docket for that day, three involved the company making theft charges against individual consumers. Assisting the company in the presentation of its case to the two-member judicial panel was the *police*. Krishnan interviewed the police representative at the Lok Adalat who explained the reason for law enforcement's participation. This official stated that typically, when the company lodges a theft complaint against a private individual, protocol requires that a formal report be filed with the police department.[108] A special police division investigates the complaint and if the charges are substantiated, then these findings are released to the company. At that point the company may pursue a civil liability claim in the district court, but if it and the defendant agree, then they may bring the case to the Electricity Lok Adalat for a speedier resolution.[109] (The police reserve the right to file criminal charges against the individual with the city prosecutor.)

But the police's role does not end with the investigation of the theft matter. As Krishnan observed, in the Electricity Lok Adalat the police

105. Presiding Judge, comments during Pension Lok Adalat (Dec. 28, 2002).
106. The mission of this Lok Adalat is similarly set forth in the statute creating this body.
107. Interview with Presiding Judge of Electricity Lok Adalat, location withheld (Jan. 4, 2003).
108. Interview with police official present at Electricity Lok Adalat (Jan. 4, 2003).
109. *Id.*

representative served as the lead advocate for the company. This official would explain the case to the judicial panel, question the defendant on the specifics of his actions, and make penalty recommendations. Meanwhile, none of the defendants/consumers Krishnan observed had legal representation, nor were they able to present adequate responses to the satisfaction of the judicial panel or to the police. As the police representative explained to Krishnan, "because we are familiar with these types of matters, it is quicker and better if we [rather than the company] deal with these cases."[110] These criminal matters in the Electricity Lok Adalat, however, were not the only cases in which the police were involved. In at least a half dozen billing disputes the police representative argued on behalf of the company against the consumer. In the last case of the day, one that happened to be the most heated dispute of all those on the docket, the police official directly denounced the consumer for wasting the panel's time and urged him to pay the bill once and for all, which the consumer ultimately did. Even the presiding judge of the Electricity Lok Adalat conceded in an interview following the proceedings that claimants may, at times, "feel somewhat intimated" with the police being present.[111] The police involvement in the Electricity Lok Adalat is reminiscent of Dr. Julia Eckert's recent description of the Shiv Sena courts in Maharashtra, where police officials there served not just as enforcers but also as interpreters and arbitrators of the law.[112]

2. *General Lok Adalats*

Two different General Lok Adalats in two different cities, where in each setting the respective chief judge served as head of the judicial panel, were observed during the course of the field research. The first General Lok Adalat observed was located in a district about twenty miles outside of the capital city. The morning set of cases involved several divorce matters. Before even going to the Lok Adalat room, couples would enter the presiding judge's private office, where their respective lawyers presented the reasons for the divorce application. In this "pre-Lok Adalat" hearing, the judge explained to the participants that his main goal was to see if the marriage could be salvaged. "Especially if there are children," he explained, "we want to try to do whatever we can to achieve reconciliation."[113]

The expectations of the parties, however, during these pre-Lok Adalat hearings were far different. In the observed cases, formal separation,

110. *Id.*

111. Interview with Presiding Judge of Electricity Lok Adalat, *supra* note 107.

112. Julia Eckert, Legal Pluralism, Legal Reality, and the Changing Modes of Policing in Mumbai 4 (2001) (unpublished manuscript, on file with authors).

113. This comment was made to Krishnan while the parties were in the room (Aug. 17, 2002).

not reconciliation, was the main priority of the parties. In one notable case, a middle-class couple[114] came into the room accompanied by their two young children and almost immediately began screaming at one another as well as to the judge. The wife accused the husband of having an extramarital affair and emotionally abusing her, while the husband sobbed that his wife had made a false criminal complaint against him, which had resulted in his arrest. Throughout this whole episode, which lasted nearly one-half hour, the children sat quietly crying while the lawyers unsuccessfully attempted to calm their clients down.

As this commotion was occurring, the presiding judge chatted with the second author (Krishnan) intermittently about how he had seen this couple now for the third time and how they still refused to try to reconcile.[115] At that point, the husband interrupted, yelling at the judge, "Sir, please, reconciliation is not possible!"[116] Yet, the judge continued to explain that this type of "venting session" was good for the couple's emotional health.[117] He then called the children over to sit next to him and asked how they felt about their parents' fighting. Too nervous to speak, the eight-year-old boy shrugged, while his five-year-old sister held her brother's hand, continuing to weep. In a firm tone, the judge then noted to the parents: "See—is this how you want your children to see you? Is this nonsense you are fighting about really good for them? A boy and a girl need both a mother and father—this fighting is not good at all."[118] With that, the judge ordered the couple to attempt to work their problems out and to return next week if they could not resolve their differences.

As this family left, another family entered into the judge's chambers also for a pre-Lok Adalat hearing. The claimants in this case were the maternal grandparents of a seven-year-old Indian-American boy, whose parents had been killed in a traffic accident near their home in Chicago three years ago. Since the accident, the boy had been living with his maternal grandparents in our selected state, but the paternal grandparents (the defendants) were seeking to establish some set of custodial rights. As opposed to the previous divorce case, here the lawyers for the parties played an active role, each explaining their case to the judge. The claimants' lawyer sought to have the judge issue a decree formally severing all legal ties of the paternal grandparents to the boy. According to this lawyer, the only reason the defendants sought custody was because of a one

114. Both the husband and wife were civil service employees.

115. Interview with Presiding Judge of General Lok Adalat (Aug. 17, 2002).

116. Comment by husband made Aug. 17, 2002.

117. Interview with Presiding Judge of General Lok Adalat, *supra* note 115.

118. Presiding Judge, comments during General Lok Adalat (Aug. 17, 2002).

hundred thousand dollar life insurance policy that the boy had received (in trust) upon his parents' death.

The judge noted to Krishnan that a case of this financial magnitude was unusual for a Lok Adalat, and that this was one of the most emotionally trying matters he had ever seen.[119] But he expressed annoyance at how involved the lawyers were in this case. When the defendants' lawyer attempted to present his case, the judge shouted: "Let me ask you, how many times did your clients visit the boy in the States? Were they even ever a part of his life?"[120] When the lawyer tried to explain that the paternal grandparents were only of modest means and therefore could not afford to travel to the United States, the judge cynically responded, "If this is so, how do they expect to take care of a little boy, now?"[121]

That the judge asked these questions was not so troubling, given that the paternal grandparents admittedly had very little contact with their son since a family rift had occurred some years back. Noteworthy, however, was the level of hostility the judge expressed towards these lawyers who attempted to advocate on behalf of their clients. The judge ultimately proposed a tentative settlement between the parties, whereby the claimants could supervise weekend visits to the defendants' residence while the boy was on summer holidays. But because neither side was comfortable with the proposal, the judge told them to return the following week for another meeting. Later over lunch, the judge stated to Krishnan that the lawyers in this case were the ones who continued to prevent an amicable solution.[122] Had they not been involved, he commented, an agreeable settlement more likely would have been reached.[123]

This disregarding attitude towards lawyers was particularly highlighted during the afternoon session where Krishnan observed a case involving twenty-six claimants who were seeking compensation from a state-owned bus company for injuries they sustained during a violent traffic accident. Assisting the district judge in the adjudication of this matter was a social worker and another judge of that same court. The victims were uneducated, rural villagers who, through their lawyer, accused the bus driver of gross negligence. On one side of a table separating the parties were several bus company officials and their lawyer; on

119. Interview with Presiding Judge of General Lok Adalat, *supra* note 115.

120. Presiding Judge, *supra* note 118.

121. *Id.*

122. Interview with Presiding Judge of General Lok Adalat, *supra* note 115.

123. This resentment towards lawyers was also expressed by a judge from the Women's Lok Adalat. This individual, a prominent lawyer before retiring two years ago, stated that in her Lok Adalat, "lawyers are always up to no good." The Women's Lok Adalat deals almost exclusively with cases of divorce, and as she noted, "things run so much more smoothly" when the parties come on their own without counsel. Interview with Judicial Officer from Women's Lok Adalat (Jan. 5, 2003).

the other side was the line of victims who all were represented by the same lawyer. The claimants' lawyer presented each victim who one-by-one told the three-judge panel of the injuries he/she incurred. The claimants' lawyer then provided to the panel medical reports and in some cases x-rays of each victim's injuries. The panel reviewed the reports and then the chief district judge held each x-ray up to the light and attempted to decipher the seriousness of the injuries. When Krishnan asked if he had medical training to read the x-rays, the judge noted that since he had been involved in many of these types of cases in the past, he had developed a "knack" for this skill.[124]

In terms of the settlements, the negotiations followed a definite pattern. The bus company proposed a figure, the claimants' lawyer (half-heartedly) countered, the bus company then stated another figure, and in three-fourths of the cases observed, the district judge actively supported the company's proposed amount. (In those matters where the judge did not completely endorse the company's offer, he negotiated a settlement where the final figure still came close to the company's second proposal.) Three other observations merit mention. First, when the claimants' lawyer ultimately accepted the settlement, he would do so without even consulting the clients. Second, the bus company's lawyer rarely spoke during any part of the proceeding; the company officials directly engaged in the negotiations. And third, on average, each individual case took anywhere between fifteen *seconds* to two minutes to resolve.

After the proceedings, Krishnan questioned the claimants' lawyer about the assembly-line manner in which he handled these cases. Before answering, the lawyer made it a point to note that professionally he struggles to attract clients and is further hindered by his lack of legal experience.[125] One way he has sought to improve his contacts as well as his professional capital is by working in Lok Adalats. Because Lok Adalats are promoted by people who the lawyer perceives as having the power and the ability to help him professionally, he makes it a point to work in these forums. Eventually, however, he did confess that the powers-that-be, he felt, evaluated his productivity (and that of the Lok Adalat) on the number of cases disposed during a Saturday session.[126]

In July 2003, judges from the capital's Civil (District) Court Complex invited Krishnan to compare how their General Lok Adalat operated with what we just described. While there were some noticeable differences between the two, more striking were the number of similari-

124. *Id.*
125. Interview with claimants' lawyer (Aug. 17, 2002).
126. *Id.*

ties present. In terms of the differences, first, consider the physical setting of the Capital City General Lok Adalat. Unlike in the above example where there was a separate hall dedicated especially for dealing with Lok Adalat cases, the City Civil Complex contained several courtrooms where every Saturday one or more of these would be used for hearing Lok Adalat matters. Litigants would line the walls both inside and outside of the courtroom waiting for a government "caller" to scream out their names to proceed to the Lok Adalat bench. A long table, approximately four feet wide and fifteen feet long, would separate the petitioner from the defendant and at the head of this table would sit the three-judge panel, made up of a social worker, an advocate/lawyer, and civil judge. Although these General Lok Adalat hearings would occur every Saturday, they could also be held several days during the week, if a matter pending in the regular courts that was thought to be close to compromise was diverted into this dispute resolution forum.

Another difference between the urban, General Lok Adalat and the first one observed involves the role played by the chief district judge. We saw that the first judge was hands-on and very micro-managerial. In contrast, the capital city's chief district judge acted more like a supervisor, checking-in now and then to see how the judicial panel was functioning and staying updated on its progress.[127] But even though this chief judge appeared more detached, his impact and presence on the General Lok Adalat remained quite significant. During Krishnan's observations it was common for the judicial panel—minus the chief judge—to work for about an hour or so attempting to settle various disputes. The majority of matters coming before the panel included divorce cases, property disputes, and motor vehicle accident claims. Suddenly in the middle of a case, the chief judge would walk into the room, where everyone then would immediately stand to greet him with great respect.[128] He would go over to the bench, ask for a summary of the case being heard, and then take the lead in trying to bring this matter to a resolution. (The other members of the judicial panel would feverishly change their seats to make sure that the chief judge was front-and-center.)

From there, the chief judge would exhibit what one of the members of the judicial panel told Krishnan was "great leadership."[129] For example, in the first case where he interceded, the chief judge listened to a lawyer representing an injured factory employee state how his client was not receiving worker's compensation because the employer had failed to

127. There were two separate observations made of this capital city General Lok Adalat. The first occurred on July 19, 2003, and the second occurred on July 26, 2003.

128. This type of intervention occurred during both of Krishnan's visits.

129. Interview with Judicial Officer of General Lok Adalat (July 19, 2003).

pay the necessary premiums. The opposing counsel responded that under the law the employer was exempt from having to purchase this particular type of insurance and thus was not liable for injuries suffered by any worker. Visibly frustrated that the case was not being compromised, the chief judge began scolding both parties' lawyers for their role in perpetuating this dispute. Speaking to the worker's lawyer, the judge stated: "You know he [the employer] doesn't have the bloody money to pay what you're asking. So why do you insist on not trying to work with him?"[130] And turning to the employer's lawyer, he declared: "Obviously this poor guy is hurt and this happened at your client's plant. Don't you feel some responsibility to do something?"[131] He then dismissed the parties, ordering them to see if they could settle their case on their own and to return next week if such compromise failed.

After they left the courtroom, Krishnan spoke separately to the lawyers for both sides. The worker's lawyer expressed great frustration that the judge "did not even bother"[132] to look at the receipts of all the medical expenses incurred by his client. He noted that even if his client reduced his financial demands by one-half, there still would be no way the worker could cover these costs on his own. "At least the other judges [i.e., those on the original Lok Adalat panel] were listening to my client's difficulties. We did not even get to make our case here."[133] The employer's lawyer also was dismayed about what had just occurred. "How can he [the employer] settle or reach a compromise if he has no money to give? Why we even bother to come here [to the Lok Adalat], I just don't know."[134]

The resignation expressed by this second lawyer turned out to be a rather common sentiment. Several lawyers stated that while on occasion participating in Lok Adalats did bring about quicker settlements for their clients, in most cases judges refused to take the time to study what often were complex issues, examining, for example, important evidence in a very cursory manner or simply not at all. Indeed, frustrated by what they perceived as the heavy-handedness of the chief judge, four different lawyers interviewed said that they have begun to engage "quietly" in tactics that they hope will eventually undermine the Lok Adalat process.[135] For instance, after being lectured by the chief judge for not having his client present in a property law dispute for now the third time, a reprimanded

130. Chief Judge, comments made in General Lok Adalat (July 19, 2003).
131. *Id.*
132. Interview with worker's lawyer (July 19, 2003).
133. *Id.*
134. Interview with employer's lawyer (July 19, 2003).
135. Interview with separate lawyer present at General Lok Adalat (July 19, 2003).

lawyer pulled Krishnan aside telling him that he purposely instructed his client not to show up at that day's Lok Adalat hearing.[136] Since the Legal Services Authority Act, which governs Lok Adalats, requires that disputing parties sign onto all compromises reached, so long as this lawyer's client continued to refuse to make himself available no pact could be finalized. The ultimate goal, the lawyer indicated, was to put this case back into the regular courts, where he believed his client had the best chances of success.[137]

Another way that lawyers have exhibited this passive resistance[138] is by not showing up themselves to a Lok Adalat hearing. The following week, for example, Krishnan returned to the City Civil Court where he witnessed a divorce proceeding involving a Muslim couple. In India, religious law typically governs family law cases dealing with issues such as marriage, divorce, inheritance, and the like. Thus, Hindu law applies to Hindu couples, Islamic/*Shariat* law applies to Muslim couples, Christian law applies to Christian couples, and so on. Elsewhere we have detailed how this system operates,[139] but for our purposes here it is important to recognize that the Indian state courts are charged with administering the relevant religious law.[140] When a case is brought before a Lok Adalat, the same principle is present; the judicial panel is asked, for example, in the case of a Muslim couple seeking a divorce to apply the norms set forth in the *Shariat*. But oftentimes neither the judges nor the parties are familiar with what can be complex provisions in the *Shariat* regarding divorce. In these situations deference is frequently given to the lawyers who presumably have practiced for years in this area and are more familiar with how the law should be applied. Yet without the lawyers present—as was the case that Krishnan observed involving the Muslim couple petitioning for divorce—the panel and the parties are reluctant to finalize a settlement that may not comport with the traditions of Islamic law. The result

136. Interview with "reprimanded" lawyer (July 19, 2003).

137. *Id.*

138. For a classic, academic discussion of how passive resistance is used, see generally JAMES SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORM OF PEASANT RESISTANCE (1987).

139. Marc Galanter & Jayanth K. Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISRAEL L. REV. 98 (2000).

140. For a complete set of bibliographic resources on personal law in India, see *id.* For a selected sample of citations, see J.D.M. DERRETT, AN INTRODUCTION TO THE LEGAL SYSTEM (1968); GERALD LARSON, RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT (2001); John Mansfield, *The Personal Laws or a Uniform Civil Code?*, *in* RELIGION AND LAW IN INDEPENDENT INDIA (Robert Baird ed., 1993); SWAPNA MUKHOPADHYAY, IN THE NAME OF JUSTICE: WOMEN IN LAW AND SOCIETY (1998); Archana Parashar, *Do Changing Conceptions of Gender Justice Have a Place in Indian Women's Lives? A Study of Some Aspects of Christian Personal Law*, *in* CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA 140 (Michael R. Anderson & Sumit Guha eds., 2000).

then is a postponement of the matter until lawyers for both parties can make themselves available to the Lok Adalat.

Following the adjournment of this Muslim divorce case, Krishnan interviewed first the husband and then the wife. While the husband sidestepped the question of why his lawyer did not appear, the wife directly stated that her lawyer had purposely not attended for fear that the wife would not receive a fair hearing in this forum.[141] According to the wife, her lawyer had little confidence that the judicial panel (particularly if the chief judge was present) would show the lawyer the deference he believed he deserved.[142] The lawyer also apparently stated to the wife that it would be the judge's biased beliefs that would dictate the outcome rather than the principles of equity or law. Since the Lok Adalat lacked any enforcement power to make the lawyer attend, the plan was that eventually the case (after going through several postponements) would be redirected to the regular state courts where the lawyer believed he would have a better shot at obtaining a more favorable outcome for his client.[143] (It seems that the lawyer mentioned to the wife that the regular state courts have over the past few decades expanded the rights of Muslim women in divorce matters, beyond what traditionally has been allowed for by the *Shariat*.[144])

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141. Interview with Muslim wife (July 26, 2003).

142. *Id.*

143. *Id.*

144. For case law supporting this, see Bai Tahira v. Ali Hussain Fissalli, A.I.R. 1979 S.C. 362, 365–66; Fuzlunbi v. K. Khader Vali, A.I.R. 1980 S.C. 1730, 1736; Mary Roy v. State of Kerala, A.I.R. 1986 S.C. 1011, 1014; Mohd. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945, 954. *See also* FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA (1999) (Ullah v. Uttar Pradesh, Writ Pet. 45 1993; Writ Petition 57 1993). For the third case, where a Bombay High Court ruled that Muslim divorced women are entitled to maintenance payments beyond what is prescribed by the *Shari'a*, see Sultan Shahin, *Ulema to Launch Campaign for Personal Law*, TIMES OF INDIA 1999 (Internet edition) (1999). A decision by the Supreme Court in April 2003 illustrates the Court's willingness, at least in an indirect manner, to reenter the debate over women's rights in family law cases. In upholding a family court divorce decree that gave a Muslim woman more property rights than are typically allowed under Muslim personal law, the Court refused to entertain the husband's petition that family courts (which are special courts created under the Family Courts Act of 1984 but are still part of the governmental judicial system and answerable to the Supreme Court) do not have jurisdiction to render such a verdict. For a full discussion of this case, see J. Venkatesan, *Family Courts Can Decide Property Disputes*, HINDU, Apr. 18, 2003, *available at* 2003 WL 18909860. Also, in July 2003, the Supreme Court in overturning a Christian personal law dealing with inheritance, stated in dicta that India should eventually move towards considering a uniform civil code. This statement from Chief Justice Khare resulted in widespread protest by various religious minority communities as well as a host of scholars, academics, and commentators. *See SC Favors Uniform Civil Code*, INDIA EXPRESS (Internet edition), *at* http://www.indiaexpress.com/news/national/20030723-1.html (July 23, 2003). The Chief Justice has commented:

> It is a matter of regret that Article 44 of the Constitution [which calls for the government to endeavor towards a uniform civil code] has not been given effect to. Parliament is still to

That lawyers are strategically acting in this manner is of no surprise to members of the Lok Adalat's judicial panel or to the chief judge. "We are not stupid,"[145] the chief judge told Krishnan. "We know what they are doing and how they are trying to frustrate our efforts, but we do the best we can and try not to bother with them."[146] In fact to illustrate how well the Lok Adalat can function *without* lawyers, the chief judge made it a point to highlight another divorce case that he personally settled. In this matter, a Hindu couple from a rural village came before the Lok Adalat to petition for a divorce. As in the Muslim divorce case described above, neither party's lawyer attended the Saturday session. Nevertheless, the chief judge, determined to broker a settlement, spent nearly twenty minutes listening to the complaints and demands of both the husband and wife.

The main contested issue in this case involved alimony for the wife; she was seeking more than the husband was willing to pay. Confused by her unwillingness to reduce her demands by even one rupee, the judge therapeutically asked the wife why she was so hostile and angry. The wife responded by saying that the husband had flaunted his affair with another woman throughout the village, utterly humiliating the wife. At this point the chief judge had what might be described as a "eureka" moment. He demanded to know from the husband why he had behaved in this manner. "You are having a concubine and you don't even feel ashamed?"[147] he inquired. "What you have done is very wrong, and you need to compensate her [the wife] properly,"[148] the judge stated. After some further cajoling the husband reluctantly agreed to the wife's demands and thereafter the matter was disposed. The judge then, addressing Krishnan as well as about twenty students from a nearby law school who were observing this session as part of their clinical training, emphasized two important morals of this particular episode. First, he said, thanks to the Lok Adalat this case, which would have potentially lasted for years in the regular courts, is now completed and the parties can go on with their lives. Second, this matter was expeditiously resolved mainly because there were no lawyers present. Lawyers, he asserted, would have raised "useless"[149] objections and made time-consuming, irrelevant argu-

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step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.

Id.

145. Interview with Chief Judge of General Lok Adalat, location withheld (July 26, 2003).

146. *Id.*

147. Chief Judge, address to law students (July 26, 2003).

148. *Id.*

149. *Id.*

ments. Keep this in mind, the judge told the students, because they were after all the next generation of India's best and brightest legal minds.

The discord that is present between judges and lawyers within both the General Lok Adalats seems to reflect a deep tension that proponents of this institution to date have not fully acknowledged. In the next section we turn to examining another type of forum, the High Court Lok Adalat, where judge-lawyer hostility has similarly serious implications for the claimants seeking to access justice.

3. The High Court Lok Adalat[150]

The High Court Lok Adalat is an interesting creature. Established in 2000, it meets one weekday a month in a building located next to the High Court that houses the state Legal Services Authority Commission.[151] This particular Lok Adalat seeks to dispose of the thousands of cases that continue to backlog the High Court. The matters that typically come before the High Court Lok Adalat are petty criminal cases that the Indian penal code characterizes as compromise-able, or "compoundable." In American terms, the institution serves to facilitate plea bargains between the state's public prosecutor and the petty criminal defendant. (Where the victim is an individual, the public prosecutor generally consults with the victim before striking any deal.) There is a three-judge panel that presides over the High Court Lok Adalat: a retired High Court judge, along with two advocates.[152] As with the other Lok Adalats, at least one member of the panel must be a woman, but the statutory requirement that the panel include a social worker is not strictly enforced.[153]

On the day that Krishnan traveled to the High Court Lok Adalat, sixteen cases were scheduled for hearing. Yet before the session began, the presiding judge informed Krishnan that he was very skeptical of reaching a settlement in any case. "These damn lawyers are just not showing up,"[154] he commented. "They are following the order of the [state] Bar Council not to come and work in the Lok Adalat."[155] As it turned out, half of the defense lawyers did attend that day's session with their clients, but the proceedings were delayed because the public prosecutor arrived over thirty minutes late—much to the dismay of the presid-

150. The observation of this Lok Adalat by Krishnan occurred on July 30, 2003.
151. Interview with Presiding Judge of the High Court Lok Adalat (July 30, 2003).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

ing judge, who quietly remarked to Krishnan: "These lawyers are all alike, regardless of who they work for. Delay is all they know."[156]

Eventually the session began. The separate defendants had their respective counsel present and the judicial panel called each individual up one-by-one. Six of the cases involved "excise" matters, or otherwise put, state charges against a defendant for selling alcohol without a license. On this issue of excise, the Indian Penal Code is both complex and technical. Under some circumstances excise violations will be compoundable (e.g., when the amount of alcohol sold is under ten liters), while others will not be.[157] In five of the six cases, the violations were found to lie outside of the High Court Lok Adalat's jurisdiction, much to the ire of the presiding judge who scolded the lawyers on both sides for not knowing this beforehand. Yet in every one of the cases that was dismissed, the judicial panel scrutinized the statutes to see if there was any way of fitting the respective cases into one of the compoundable categories. In his eagerness to find a way to resolve more than just one dispute, a judicial officer—not on the bench but who happened to be visiting this session and serving as an active advisor to the panel—stated in an exasperated voice, "I really think if we read the provision this way, we can make this work."[158]

If there was great frustration that almost all of the excise cases failed to meet the penal law's compoundability requirement, then consider how the panel reacted when a different type of case that could be settled, was not. The last case of the day involved two defendants who already had been convicted in criminal court of violating Section 354 of the Indian Penal Code. That provision states that it is a crime to:

> Assault or [use] criminal force to a woman with the intent to outrage her modesty—whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or both.[159]

Both of the defendants had been sentenced to a prison term and ordered to compensate the victim financially, but they were appealing their

156. *Id.*

157. Laws regulating liquor in India date back to 1944, when the pre-Independent state, under the British Raj, passed the Central Excise Act of 1944. Since 1944 some states have viewed the central government's legislation as providing the floor or the minimum regulation, and thus have tightened up restrictions accordingly.

158. Judicial Officer, comments while observing High Court Lok Adalat (July 30, 2003).

159. INDIA PEN. CODE § 354. For a discussion of this matter, see *Review of Rape Laws, March 2000*, LAW COMMISSION OF INDIA (Mar. 25, 2000), *available at* www.lawcommissionofindia.nic.in/rapelaws.htm. The Centre for Social Research, a prominent non-governmental organization in India, has devoted considerable time to evaluating and critiquing the compoundability aspect of Section 354. http://www.csrindia.org/ctogotodo.html.

case to the High Court. On appeal the High Court affirmed the lower court's prison sentence, however it recommended to the public prosecutor and the defense lawyers that they try to hammer out an agreement on the issue relating to compensation.[160]

Also present at this hearing was the assaulted teenage victim and her older, very feeble father. The judicial panel summoned the two, along with the public prosecutor and the defendants' lawyers to the bench. The judges urged the parties to come to some sort of financial settlement so the matter could be disposed. As the prosecutor and defense lawyers began to negotiate, the victim's father requested to speak. He asked: If the lower court's prison sentence was affirmed, why did its original, levied compensation award require any adjustment at all? He explained that his family was poor and struggled to eek out an existence. Lowering the award, even by just a few hundred rupees, would have a significant impact on him, his wife, and his children. The presiding judge tried to explain to the father the bigger picture of why it was important not to clog the High Court with matters that could be easily resolved here in the Lok Adalat. But the father, although timid in the way he spoke, remained resolute. He would not agree to any reduction in compensation and if the case needed to be sent back to the High Court for a final decision, then so be it. Angered that no compromise could be reached, the presiding Lok Adalat judge adjourned the matter and ordered the parties to resolve their dispute in the regular state court.

In spite of the low number of settlements that occurred during Krishnan's visit to the High Court Lok Adalat, state Legal Services Authority officials hastened to point out that this day was an anomaly. According to these officials, 2003 has been a banner year; in particular, between January 1 and May 31 nearly 3000 cases have settled, with total awards reaching over half a million rupees.[161] Moreover, the staff at the Legal Services office proudly displayed to Krishnan the year-by-year total of excise settlements dating back to 2000. Table 2 illustrates the results.

160. For years the courts—despite heavy criticism from women's rights and civil rights groups—have deemed Section 354 as compoundable and thus eligible for Lok Adalat adjudication. This is the reason that, procedurally, the case could come before the High Court Lok Adalat. *Id.*

161. Interview with Legal Services Authority (July 30, 2003).

TABLE 2[162]

YEAR-BY-YEAR TOTAL OF EXCISE SETTLEMENTS DATING BACK TO 2000

YEAR	NUMBER OF EXCISE CASES SETTLED BY HIGH COURT LOK ADALAT	TOTAL AMOUNT OF MONEY AWARDED (RUPEES) BY HIGH COURT LOK ADALAT
2000	44,810	19,373,021
2001	46,332	14,512,905
2002	10,214	2,049,100
2003 (Jan. 1–May 31)	2914	540,635

Upon closer scrutiny the data prove to be quite perplexing. We see that in its first year, 2000, the High Court Lok Adalat settled nearly 45,000 cases, and dispatched almost 20,000,000 rupees in awards. Just two years later though, in 2002, the number of cases settled dropped to about 10,000 and the awards issued fell to slightly over 2,000,000 rupees. If the first six months of 2003 are indicative, this year will be the lowest number of cases settled by the High Court Lok Adalat and the lowest amount of money awarded. Of course because the data from the Legal Services office are incomplete in many ways, we are left with more questions than answers. For example, what percentage of cases that come before this Lok Adalat are actually settled? Could it be that, in 2000, ninety-five percent of the cases were settled, whereas in 2002 settlements occurred only ten percent of the time—or vice versa? Are fewer cases settled today because there are fewer disputes, fewer claimants willing to agree to a settlement, greater lawyer-obstinacy to work within these forums, or something else?

The incomplete nature of the data collection was not restricted to the High Court Lok Adalat. Consider how the records bureau located inside the capital city's Civil Court Complex functions. This office keeps statistics on the activities of other types of Lok Adalats in the capital district. The staff provided Krishnan with access to a variety of records from 2002. For example, according to their data, last year a Criminal Lok Adalat that met 192 times settled 1090 criminal matters.[163] But when asked how many petty criminal cases were *referred* to the Criminal Lok Adalat, no one could provide an answer. Krishnan then went to observe how the Criminal Lok Adalat operated and it became apparent why the records office had no data on case-referrals. For one thing, the Criminal Lok Adalat is a dispute settlement body in name only. In reality all this forum

162. *Id.*

163. Interview with Record Bureau staff (July 24, 2003).

does is to sign off on pre-arranged settlements reached between the state and the charged defendant.[164]

The proceeding takes place in the criminal courthouse, located about three miles away from the capital city's Civil Complex, specifically within the office of a criminal court judge (known as the metropolitan magistrate). The judge is at his desk while a female advocate, who serves as the titular second member of this "judicial panel," sits on the other side. There is no third member present. This Lok Adalat meets up to three times a week where between forty and fifty cases are disposed of in each session.[165] One-by-one, a defendant enters the judge's office escorted by a police officer. A clerk presents the judge with the defendant's file that explains the plea agreement reached with the state. The judge signs off on the matter and the case is reported as "settled." This episode takes just seconds to complete; once the judge signs the necessary forms, the defendant exits (presumably to jail or to pay a fine) and the next defendant comes in and the same process is repeated. That the Legal Services office finds no reason to maintain statistics on the number of cases that are referred to the Criminal Lok Adalat is understandable in view of this forum's one hundred percent "settlement" rate.

As an institution, the Criminal Lok Adalat acts more as an administrative rubberstamp than as a dispute resolution forum. There are no lawyers or prosecutors present. There is no contestation of facts or negotiations regarding the terms of the settlement. Krishnan was informed that meetings between the defendant and the prosecutor obviously do occur prior to the Criminal Lok Adalat judge signing off on the plea agreement.[166] And, furthermore, he was told that not all of the plea-bargaining meetings resulted in compromise. However, the Legal Services Authority office does not keep statistics of what transpires within these plea-bargaining meetings.[167] We do not know, for example, what percentage of compoundable cases is settled beforehand and what percentage is tried. The district Legal Services office only records (and highlights) the supposed success rate of the cases "settled" within the Criminal Lok Adalat.

It is unclear why records for the Criminal Lok Adalat are kept in this manner. In civil matters the record keeping tends to be a bit more detailed but it too remains incomplete. For example, the Legal Services office noted that last year within the capital district 132 out of 283 civil and

164. Krishnan observed the Criminal Lok Adalat on July 26, 2003.
165. Interview with Presiding Judge of Criminal Lok Adalat (July 26, 2003).
166. *Id.*
167. Interview with the Legal Services Authority (July 24, 2003).

family law cases settled in pre-Lok Adalat negotiation meetings.[168] Yet there was no breakdown on the types of civil matters settled or whether any litigants by passed the pre-Lok Adalat meeting and went directly to the Lok Adalat itself. Separately kept statistics for 2002, added more confusion:

> 460 out of 510 divorce cases were settled in the Lok Adalat;
>
> 168 out of 200 motor vehicle accident cases were settled in the Lok Adalat; and that
>
> 142 out of 200 "other civil matters" (mainly property disputes) were settled in the Lok Adalat.[169]

Furthermore, the Legal Services office had other rather puzzling data. In Bank Adalats—dispute resolution forums intended to bring about compromise between customers who have a grievance against the Bank of India—only 181 out of the 800 cases settled in 2002.[170] In contrast, the district's Water Company Adalat, which hears cases from individuals with complaints against the city's Metro Water Supply and Sewage Board, received 152 cases in 2002 and settled 123 of them.[171] The office also noted that thousands of cases have been settled in Jail Adalats—forums that occur in the jail cell of inmates who have been accused of committing a petty criminal offense but who lack the resources to post bail and thus have languished in custody for, in some cases, years.[172] And once every three months the district Legal Services office holds a "mega-Lok Adalat," which is a one day camp organized at the city's central sports stadium where anywhere from 8000 to 10,000 cases are brought. Krishnan was told that, on average, the settlement rate at these mega-Lok Adalats is about fifty percent.[173]

Yet how do we interpret any of these data? Along with the questions raised above, other issues come to mind. For example, how satisfied are the claimants that participate in Bank Adalats, Water Company Adalats, Jail Adalats, or mega-Lok Adalats—even when a settlement is reached? How effectively are the parties' claims being presented? Do lawyers act strategically *vis-à-vis* the judges as we witnessed above? Are judges the dominant figures parsing out justice as they see fit? And perhaps most importantly, has the desire for increasing the number of cases settled so consumed those working within the process that they have lost focus on the substantive, concrete concerns of the average claimant?

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168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*

The evidence we have gathered and the queries we raise do place into question the ultimate fairness of Lok Adalats. As we have found, the Lok Adalat is not a single institution, but a cluster of kindred institutions. Not only are new variants evolving, but, within each, those who operate them are improvising and new patterns are emerging. In spite of the traditionalistic reference of the name, there is little drawing on indigenous practices; in spite of the populist rhetoric, there is no evident community input or participative character to the proceedings. These institutions tend to operate in a top-down fashion—scheduling, location, personnel, and agendas are all decided by the authorities who occupy their positions by virtue of state connections. These forums are dominated by judges both as organizers and presiders. Correspondingly, the role of lawyers is notably diminished compared to the regular courts. With little lawyer input and no recourse to appeal, presiding officers enjoy far greater discretion than in regular state courts. Judges may be paternalistic, overbearing, or perfunctory in dealing with individual parties. They are not, however, necessarily more deliberative. Yet there are those who no doubt will be very critical of our findings and these questions we raise. We sketch our critics' likely rebuttal in the next section. As we conclude, however, this point of view does little to blunt our concern about how Lok Adalats are functioning in modern India.

CONCLUSION

A. "GRUFF" JUSTICE IS GOOD (ENOUGH) JUSTICE . . . IS INDIAN JUSTICE

Since we first began our investigation of Lok Adalats nearly two years ago, we have faced recurrent criticism from their defenders.[174] Critics have accused us of viewing Lok Adalats through a Western, even colonial lens, reminding us that India is not the United States, Britain, or Canada. Applying the standards we would use in the West to the Indian legal system is taken as an indication of insensitivity to cultural dynamics and as evidence of hubris.

According to these defenders, Lok Adalats need to be contextualized within the larger framework of India's legal system. The Lok Adalat was created to restore access to remedies and protections and to alleviate the institutional burden of millions of petty cases clogging the regular

174. It should be noted that our critics' argument, which we set forth in this section, has been expressed to us in verbal fashion. We have presented our findings and hypotheses to judges and lawyers in India and this has been their reaction to our claims. To date, we have not found anything in writing that captures their views that we are presenting here. This section thus is a summary that we hope does justice to our critics' position.

courts.[175] Recall that there are many obstacles within the regular courts—particularly the lower courts—preventing disputants from receiving speedy, accessible justice. The most important aspect of the Lok Adalat is that it offers the aggrieved claimant, whose case would otherwise sit in the regular courts for decades, at least some compensation now. We have to remember, these proponents argue, that in the big picture the cases that come before the Lok Adalats are rather petty. Although to the individual claimant her case has enormous personal significance, in most cases the claims are usually for small amounts of money and involve relatively minor issues.[176]

Even assuming that Lok Adalats throughout India operate as they do in the sites we observed—where cases are reviewed quickly and judges tend to act in a unilateral (if not harsh) manner—this is acceptable. The presiding judge of a Lok Adalat is an experienced adjudicator with a documented record of public service and has legal acumen. So even if the judge happens to address claimants gruffly or to treat the issues before him in a seemingly hurried manner, at the end of the day his decisions are usually on the mark—or at least they are close enough, so that the parties are better off than they were originally. Regardless of how gruff and perfunctory the justice dispensed, Lok Adalats improve the overall legal system. To ignore their contributions is to misunderstand both how justice functions in India and the constraints on the path to greater access to justice in the future.

We appreciate that many in India share a desperate desire to improve the condition of the legal system. But we question our critics' unabashed acceptance that Lok Adalats—even with their flaws—are better for the entire legal system than nothing at all. Lok Adalats consume scarce resources of money, personnel, attention, and energy. These resources might be better employed to address the fundamental problems facing the courts in India. To persist on the Lok Adalat track without critical examination of its costs and alternatives strikes us as manifesting

175. Defenders also credit Lok Adalats with reducing the frequency of "under the table negotiations." Anyone familiar with how things work in India, the argument goes, knows that when a claimant has a grievance against, for example, a governmental electricity company or a similar agency, an easy way to resolve the dispute is quietly to bribe the relevant state official to fix the problem. Although by no means eliminating this behavior, the Lok Adalat provides an opportunity for claimants who disdain such corruption to pursue their cases within a legitimate judicial setting.

176. If the case is financially significant there is always the option of turning to arbitration, which in India is a formal, alternative dispute forum designed to handle large claims where large amounts of money are at stake. But even here, an agreement only goes into effect where both parties agree to the proposed terms set forth by the arbitrator. In 1996, India passed the Arbitration and Conciliation Ordinance, which sought to update the Arbitration Act of 1940. One of the most important aspects of the 1996 law is that it significantly reduces the ability of parties to set aside the arbitration agreement through litigation in the regular state courts.

all unwarranted pessimism about the possibilities for court reform that truly enhances access to justice.

B. Lok Adalats as a Moving Target

We anticipate that there will be further extensions and enlargements of the Lok Adalat cluster and perhaps refinements and cutbacks as well. Within the past year there have been additional statutory initiatives to bolster the Lok Adalat. In 2002, Parliament enacted a new set of amendments to the Indian Civil Procedure Code. Among them, Section 89 enlarges the power of courts to refer cases to Lok Adalats.[177] Section 89 reads:

> (1)Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of the settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for—
>
> (a) arbitration;
>
> (b) conciliation;
>
> (c) judicial settlement including settlement through Lok Adalat; or
>
> (d) mediation.
>
> (2) Where a dispute has been referred—
>
> (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
>
> (b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of Section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
>
> (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 [39 of 1987] shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
>
> (d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.[178]

177. Indian Code Civ. Proc. § 89.
178. *Id.*

Under one plausible reading of Section 89 a court now has the power to steer cases into Lok Adalats, accompanied by the judge's formulation of a resolution, whenever the judge believes that a settlement between the disputing parties is possible, even if the parties do not share this opinion or consent to the transfer. Presumably if a settlement were not arranged in the Lok Adalat, the case would return to the docket of the court. But this understanding is rendered problematic by another new provision, an amendment to the Legal Services Authority Act ("LSAA") added by Parliament in 2002.[179] Section 22D of the LSAA states:

> The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under the Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.[180]

At least some Lok Adalats are thus authorized to go beyond arranging settlements to "decid[e] . . . a dispute on merit," and they are given broad discretion to do this according to their general notions of justice.[181] Even without this extension of the mandate as mediators, Lok Adalat judges already possess power that seems overbearing and coercive to the parties before them—especially poor and unrepresented parties.[182]

The Indian Bar Council has been very critical of 22D particularly for allowing Lok Adalats to rule now on the merits of cases without the agreement of the parties. Further, many Indian lawyers worry that a claimant seeking justice in the regular state courts might end up having her case transferred without her consent to a Lok Adalat (via Section 89 of the Code of Civil Procedure). And once in the Lok Adalat, the claimant may then have a judgment "on merit" issued against her, which un-

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179. C.I.S. Part II-A (2002), Legal Services Authority (Amendment) Act, 2002, Indian Parliament Act No. 37 of 2002, New Delhi, June 11, 2002.

180. *Id.* The invocation of "justice, objectivity, fair play, equity and other principles of justice" is reminiscent of the formula "justice, equity and good conscience" which was the residual source of law in British India. *See* Derrett, *supra* note 84.

181. The new Section 22D formula, "justice, objectivity, fair play, equity and other principles of justice" (again reminiscent of the "justice, equity, and good conscience" formula, *see* Derrett, *supra* note 84) differs significantly from the formula embedded in Section 20(4) of the Legal Services Authority Act which specifies that the Lok Adalat should pursue "a compromise or settlement between the parties" and in doing so "shall be guided by legal principles and the principles of justice, equity, and fair play."

182. The coercive potential of mediation in developing societies has been especially highlighted by Professor Sally Merry some years back. *See* Sally Merry, *The Social Organization of Mediation in Non-Industrial Societies: Implications for Informal Community Justice in America*, *in* THE POLITICS OF INFORMAL JUSTICE, *supra* note 8, at 17. As opposed to the mediators in Professor Merry's study, Lok Adalat judges have wielded—and with Section 22D in effect will probably continue to wield—their power with little to no check.

der Section 22E of the Legal Services Authority Act would be "final and binding"[183] with no appeal.

In December 2002, lawyers across much of India went on strike to protest these amendments.[184] In addition, the protestors filed a writ petition in the Supreme Court seeking to invalidate Section 22D. In a short but confusing judgment the Court dismissed the petition and upheld the amendments as free of any constitutional infirmity.[185] The Court went on to state that the amendments to the LSAA, including Section 22D, would take effect once "Permanent Lok Adalats" were "set up at an early date."[186] What "Permanent Lok Adalats" means is unclear. From reading both the 2002 amendments of the Legal Services Authority Act, as well as the Court's judgment, it appears as though no Permanent Lok Adalats have yet been established in India. Presumably such Permanent Lok Adalats would be confined to matters dealing with public utilities. But this turns out to be a potentially elastic category, including not only transport services, postal, telegraph and telephone services, electric and water services, sanitation, hospital, and insurance services, but also "any service which the Central or State Governments . . . may in the public interest . . . declare to be a public utility for purposes of this chapter."[187] Recall that according to the statute that created the Pension Lok Adalats, these forums were to be a "permanent and continuous body." So, is it possible now for Pension Lok Adalats to issue non-appealable judgments on the merits of a case? Might other Lok Adalats be assimilated to the "Permanent" and "public utility" categories? Judges and lawyers with whom Krishnan spoke expressed differing views on the exact impact of the Court ruling and of the new amendments. Needless to say, more research (and clarification from judges and government officials) is required before knowing how these amendments and this judgment will affect those pursuing legal claims.

These recent events underline the extent to which the scope and powers of Lok Adalats and their relation to other legal institutions remain fluid and unresolved. Such changes represent a series of improvisations by proponents trying to strengthen and extend what they perceive as a promising institutional initiative. At a conference on access to justice in New Delhi in November 2002, Galanter spoke about Lok Adalats with a number of High Court and Supreme Court judges. Almost uniformly

183. Legal Services Authority Act § 22E (2002).

184. For a discussion of this strike, see J. Venkatesan, *Lawyers Defy SC, Strike Work*, HINDU, Dec. 19, 2002, *available at* 2002 WL 104070994.

185. Pandey v. Union of India, Writ Petition 543/2002.

186. *Id.*

187. Legal Services Authority Act § 22A (2002).

they regarded Lok Adalats as a signal success. As one judge put it, in a twist on Marie Antoinette, they are "bread for the poor. Later they can have cake."[188] On the other hand, critics see in these moves portents of a dismantling of legality in favor of paternalistic, intuitive, "*kadi* justice" for the poor.[189] The absence of appeals, the exclusion of lawyers, and the shift of decisional standards from "legal principles" to "principles of justice" suggest a major enlargement of the presiding judge's discretion and a robust faith that the poor have more to gain from benign paternalism than from juristic or popular legality.

Each side the argument relies on assertions about the working of Lok Adalats that are based on supposition rather than investigation. We hope that research of the kind we propose will help to transform the debate, and the further development of the Lok Adalat institution, into an exchange in which aspirations for access to justice are tested by empirical observation and analysis.

188. Interview with judicial officer, New Delhi, India (Nov. 2002).

189. "Kadi justice" here refers not to the actual practice of Muslim kadis (qadis, kazis) but to Max Weber's use of the term *kadijustiz* "to describe the administration of justice which is oriented not at fixed rules of formally rational law but at the ethical, religious, political, or otherwise expediential postulates of substantively rational law." M. RHEINSTEIN, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 213, n.48 (1954). An Indian synonym is "banyan tree justice."

APPENDIX A[190]

NUMBER OF JUDGES, COMMON LAW AND CIVIL LAW COUNTRIES

COMMON LAW COUNTRIES	YEAR	JUDGES[191]	JUDGES PER 100,000 CAPITA
UNITED STATES	1998	28,049	10.4
ENGLAND & WALES	2001	3,518	6.6
CANADA	1991	1,817	6.5
MALAYSIA	1990	274	1.6
INDIA	1995	9,564	1.0

CIVIL LAW COUNTRIES	YEAR	JUDGES	JUDGES PER 100,000 CAPITA
GERMANY	1995	22,134	27.1
DENMARK	1997	653	12.4
FRANCE	1997	6,287	10.7
TAIWAN	1995	1,252	5.7
SOUTH KOREA	1995	1,212	2.7
JAPAN	1999	2,949	2.3

For a discussion of this table, consult footnote 2.

190. All population estimates from the U.S. census bureau web site. U.S. Census Bureau, International Data Base Summary Demographic Data, *at* http://www.census.gov/ipc/www/idbsum.html (data updated July 17, 2003). England and Wales population estimated at eighty-nine percent of United Kingdom population.

191. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, Judicial Appointments, *at* http://www.dca.gov.uk/judapp.htm (as of Dec. 1, 2003) (England and Wales); Debra Cohen & Sandra Longtin, *World Factbook of Criminal Justice Systems*, *at* http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjcan.txt (last visited Jan. 25, 2004) (Canada); PISTOR, *supra* note 1, at 246 (Malaysia, India, Taiwan, and South Korea); European Research Network on Judicial Statistics, Working Papers. Bologna: Edizioni Scientifiche (Germany); UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, Sixth United Survey of Crime Trends and Operations of Criminal Justice Systems, 131 (covering the period 1995–1997), *available at* http://www.uncjin.org/Statistics/WCTS/WCTS6/Publication.pdf (Denmark); Loïc Cadet, *Civil Justice Reform: Access, Cost, and Delay. The French Perspective*, *in* CIVIL JUSTICE IN CRISIS 291, 343 (A.A.S. Zuckerman ed., 1999) (France); THE SECRETARIAT OF THE JUDICIAL REFORM COUNCIL, *The Japanese Judicial System* (July 1999), *available at* http://kantei.go.jp/foreign/judiciary/0620system.html (Japan).

"LAWYERS" IN CLASSICAL HINDU LAW

LUDO ROCHER
University of Pennsylvania

THE CONTROVERSY

THERE CAN BE NO DOUBT that parties to a lawsuit in ancient Hindu law had a right to be represented by other persons. The question arises whether or not the representatives referred to in the ancient texts correspond to the pleaders, advocates, vakils or attorneys of modern India. In other words, did ancient Hindu law have the kind of legal procedure in which the rights of the parties were safeguarded through the services of a class of experts, as is the case in present day India and in most other modern legal systems?

Looking at Hindu law as it became known to the West in the latter half of the 18th century, it did indeed seem as if the question was to be answered in the affirmative. Halhed's *Code of Gentoo Laws* (1777), translating the *Vivadarnavasetu*, did have a section (ch. III, § II) explicitly called "Of appointing a vakeel (or attorney)." Its contents are as follows:

> If the plaintiff or defendant have any excuse for not attending the court, or for not pleading their own cause, or, on any other account, excuse themselves, they shall, at their own option, appoint a person as their *vakeel;* if the *vakeel* gains the suit, his principal also gains; if the *vakeel* is cast, his principal is cast also.
>
> In a cause where the accusation is for murder, for a robbery, for adultery, for eating prohibited food, for false abuse, for thrusting a finger into the *pudendum* of an unmarried virgin, for false witness, or for destroying any thing, the property of a magistrate, a *vakeel* must not be appointed to plead and answer in such cases; the principals shall plead and answer in person; but a woman, a minor, an ideot [*sic*], and he who cannot distinguish between good and evil for himself, may, even in such causes as these, constitute a *vakeel.*

> Except the brother, father and son of the plaintiff and defendant, if any other person, at the time of trial, should abet, and speak for either party, the magistrate shall exact a fine from him: if a brother, a father, a son, or a *vakeel,* should assist, and speak for either party, it is allowed.[1]

As we shall see below, this passage comprises most of the ancient rules connected with representation in court. If the English version gave a faithful rendering of the original Sanskrit, little doubt would remain that the present day vakil had his counterpart in ancient India. The answer to this question must, however, be left open at the moment. The only point we want to stress here is this: from the first translated Sanskrit text onward, scholars were confronted with a picture according to which ancient Hindu law had a system of pleaders similar to the one they were so familiar with in contemporary India.

Such an eminent authority as Julius Jolly went one step further, and drew a conclusion which under the circumstances was perfectly logical: "Instead of appearing in person, each party has a right to be represented at the trial; thus, even today the vakils, i. e., advocates, constitute an unusually numerous professional group in India."[2] In other words, Jolly interpreted the particular attraction on the part of contemporary Indians to the legal profession as the natural outcome of a factor that had its root deep in ancient Indian tradition. In his opinion the legal profession in ancient India was an important one, and one that attracted many recruits. In his classical treatise on *Hindu Law and Custom* Jolly does not refer to lawyers explicitly. But at least one passage of the book,[3] and several statements elsewhere (especially in his translations quoted below) clearly suggest that Jolly firmly believed in the existence of a legal profession in ancient India.

Nothing was more natural than that the ideas of the greatest European specialist on Hindu law were drawn upon by other legal historians who had no direct access to the Sanskrit sources and who used Jolly as their main authority. As a result, Jolly's opinion found its way into other Western publications dealing with Hindu law.[4]

The existence of legal practitioners in ancient India has also been maintained, quite independently of Jolly, by Indian scholars. According

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1. N. B. HALHED, A CODE OF GENTOO LAWS 93 (1777).

2. J. JOLLY, BEITRAGE ZUR INDISCHEN RECHTSGESCHICHTE. ZEITSCHRIFT DER DEUTSCHEN MORGENLANDISCHEN GESELLSCHAFT 44, at 346 (1890).

3. J. JOLLY, HINDU LAW AND CUSTOM 299 (B. K. Ghosh transl. 1928).

4. J. KOHLER, ALTINDISCHES PROZESSRECHT 20 (1891).

to K. P. Jayaswal, for instance, professional lawyers existed at least from the time of the *Manusmrti* and perhaps even earlier:

> Manu, VIII. 169, shows that professional lawyers were already in existence in the time of the Manava Code. The verse says that the people who suffer for the sake of others are witnesses, sureties and the judges, but that those who are benefited by legislation, are the king ("who gets court-fees"), the creditor ("who gets his decree"), the merchant ("the speculator who supplies money for defence to the defendant and acquires his property in return"), and the Brahmin. This Brahmin is the Brahmin who advised each party on law . . . The definition of *vidya-dhana*, with its history going back to the Dharmasutras, presupposes the existence of the profession much earlier.[5]

The viewpoint of the Indian dean of *dharmasastra* is completely different. Concerning the legal profession in ancient times, P. V. Kane says:

> An interesting question arises whether lawyers as an institution existed in ancient India. The answer must be that so far as the smrtis are concerned, there is nothing to show that any class of persons whose profession was the same as that of modern counsel, solicitors or legal practitioners and who were regulated by the State existed.[6]

However, Kane too admits that, "This does not preclude the idea that persons well-versed in the law of the smrtis and the procedure of the courts were appointed (*niyukta*) to represent a party and place his case before the court." His reasons for this restriction are mainly three. First, from a story narrated in Asahaya's commentary on the *Naradasmrti* (1. 4) "it appears that persons who had studied the smrtis helped parties in return for a monetary consideration to raise contentions before the court." Next, there are "some important rules" in the *Sukranitisara.* And, to these two arguments directly derived from the texts, is then added a general consideration: "The procedure prescribed by Narada, Brhaspati and Katyayana reaches a very high level of technicalities and skilled help must often have been required in litigation."

An equally cautious opinion has been voiced by U. C. Sarkar:

> There is no sufficient indication that at the time of the Smritis there was any legal profession in the modern sense of the term. Persons versed in the science of law could give their opinion for the consideration of the king and his councillors. The system was perhaps most analogous to the Responsa Prudentium of the early Romans. The opinions of the legal

5. K. P. JAYASWAL, MANU AND YAJNAVALKYA. A COMPARISON AND A CONTRAST. A TREATISE ON THE BASIC HINDU LAW 288-89 (1931).

6. 3 P. V. KANE, HISTORY OF DHARMASASTRA 288 (1946).

> experts also were not binding on the king. They had no other part to play except giving their opinion.[7]

Others were even much more outspoken. Thus, in P. Varadachariar's opinion: "It is not possible to say anything as to the existence of a legal profession in Ancient India."[8] The same author makes it a point to reject Jayaswal's above mentioned statement according to which the Brahman referred to in *Manusmrti* 8. 169 is "the Brahmin who advised each party on law":

> Mr. Jayaswal thinks that professional lawyers ought to have existed from the days of Manu or at least from the first century A. D. I find it difficult to interpret the reference to *Vipra* in Manu VIII, 169, as a reference to a "Lawyer Brahmin." The commentaries on this verse lend no support to such a reading.

We have quoted opinion about the legal profession in ancient India at some length, mainly to show the degree of confusion to which the problem has led. Various authors working on an identical set of data have been able to draw from them a number of apparently contradictory conclusions. Nothing could be more characteristic in this respect than two passages from an issue of the *Madras Law Journal.* At the yearly "Vakils' Gathering," held in Madras on April 17, 1909, the Advocate-General had this to say:

> The origin of the English Bar is shrouded in the remotest antiquity. It has been traced as far back as Edward I. Turning to the History of India, whether ancient or medieval, you find no glimpses of the existence of the legal profession. For the sake of curiosity, I looked into some of our sacred books. While you find an abundance of rules about causes of action, pleadings, plaints, written statements, burden of proof, rules of trial and judgment, you find no mention whatever of arguments of Counsel.[9]

However, in a discussion of the Advocate-General's address an anonymous author makes the following statement:

> In this the learned Advocate-General would seem to have fallen into an error, and notwithstanding his statement that he had looked into the Sanskrit-books and arrived at that conclusion, we should think there is express authority in the Sanskrit-books the other way. The following passages from the Sukranitisara would clearly show that the Vakils were

7. U. C. SARKAR, EPOCHS IN HINDU LEGAL HISTORY 37 (1958).
8. S. VARADACHARIAR, THE HINDU JUDICIAL SYSTEM 156 (1946).
9. MADRAS L. J. 201 (1909).

not unknown in ancient or medieval India as the Advocate-General would seem to think.[10]

And he adds an English translation of a number of verses from the *Sukranitisara,* to which we shall return below.

We shall now examine the original data. It is hoped that the mere presentation of these data will demonstrate how the opinions cited above could come to be held. We apologize to those readers who are not familiar with Sanskrit. In each case we shall have to start from the original Sanskrit text, to show how these texts lend themselves to different interpretations according to the general context in which one is willing to place them. Finally we shall add a few general remarks and draw conclusions which, it is hoped, will help to place the problem in its correct perspective.

The Textual Data

Narada

A first point to be noted is that representation in a law court is not referred to before the *Naradasmrti.* Truly enough, the earlier texts on *dharmasastra* are not very explicit with regard to law in general and legal procedure in particular. This absence of explicit data allows of a twofold interpretation. Either representation did exist from an earlier time, but Narada was the first one to mention the institution explicitly, or representation did not exist before Narada. We prefer not to go beyond presenting the alternatives. Tentatively, in view of the silence of Manu (like Varadachariar, we cannot follow Jayaswal's interpretation of Manu 8. 169) and of Yajnavalkya we lean slightly toward the latter alternative.

In the *Naradasmrti* we are faced with two *slokas* which definitely refer to representation in the court. The first verse (Introduction 2. 22) is as follows:

arthina samniyukto va pratyarthiprahito 'pi va
yo na bhrata na ca pita na putro na niyogakrt

In Jolly's translation this means:

If one deputed by the claimant, or chosen as his representative by the defendant, speaks for his client in court, the victory or defeat concerns the party [himself and not the representative].[11]

10. *Id.* at 153.

11. J. Jolly, The Minor Lawbooks 29 (Sacred Books of the East 33, 1889).

This is another piece of evidence of Jolly's belief in the existence of a class of lawyers. The words "for his client" are nowhere present in the Sanskrit text; literally the latter says: "for somebody" or "for him," referring thereby to the claimant and the defendant. On the other hand, it is clear that reference is made in the text to two persons who carry on litigation for two other persons, the decision binding the latter and not the former: (1) one who is *samniyukta* by the plaintiff, and (2) one who is *prahita* by the defendant. Both terms are clear without being precise; they refer to persons "appointed," "proposed" by either party.

The second stanza of Narada (Introduction 2. 23) is this:

yo na bhrata na ca pita naputro na niyogakrt
pararthavadi dandyah syad vyavaharesu vibruvan.

Jolly translates:

> He deserves punishment who speaks in behalf of another, without being either the brother, the father, the son, or the appointed agent; and so does he who contradicts himself at the trial.[12]

As in the preceding verse—*yo yasyarthe vivadate*—here too, reference is made to "somebody stating the affair of another" or "somebody speaking for another" (*pararthavadin*). Moreover, among the eventual *pararthavadins* figure: the father, the son, the brother, and the *niyogakrt*. The latter especially is important for our purpose. Jolly, in the light of his idea referred to above, translates: "the appointed agent." We do not dare to go so far, but we do notice that *niyogakrt* ("he who performs *niyoga*") derives from the same verbal root preceded by the same preverb which we already met with in the preceding *sloka:* there it was *samniyukta,* here it is *niyogakrt.* The only, but important, conclusion to be drawn from this is that, according to Narada, a party could give to another person a *niyoga* ("appointment") to speak for him in the court.

Unfortunately, nothing allows us to draw any more specific conclusions. Both verses apparently go together and deal with the same topic, but they have no contextual relation either with the preceding or with the following *slokas.* We would venture to say, with S. Varadachariar, about the first verse: "Such a declaration would be uncalled for if the passages were to refer to a professional class whose profession itself was to represent others." [13]

12. *Id.*
13. VARADACHARIAR, *supra* note 8, at 157.

Before proceeding we must raise an objection to Jolly's translation of the second *sloka,* especially to his final words: "and so does he who contradicts himself at the trial." There is nothing in the Sanskrit text to warrant the inclusion of the conjunction "and"; on the contrary, the grammatical subject of *vyavaharesu vibruvan* is the same as that of *pararthavadi.* However, it is not easy to propose a more correct translation than Jolly's; the point is that *vibruvan* can have two different meanings which give equally different meanings to the verse as a whole. And since no argument can be drawn from the context, the only valid treatment of the passage is to mention both interpretations. Both have found their adherents among the later commentators, but it is not, and never will be, possible to know with certainty, which interpretation was the original one. In the first place, it is possible that the preverb *vi* radically changes the meaning of *bruvan* ("speaking"), so that *vibruvan* means: "speaking wrongly, speaking untruthfully, lying." We ourselves have been tempted by this interpretation, and, when the verse occurred in the *Vyavaharacintamani* (78), we translated: "He who makes false statements in legal procedures while pleading the cause of another person, should be punished, except when he is [the party's] brother, father, son, or express deputy." [14]

We still hold that this is a valid interpretation. However, after having examined the materials which serve as a basis for the present paper, we would prefer terms that are less precise than "pleading the cause" and "express deputy." In any case the verse then indicates that there are two classes of "persons speaking for somebody else," those explicitly enumerated and all others; the former may make false statements in the court without being punished, the others may not. In the second place, it is also possible that the preverb *vi* does not change the meaning of *bruvan; vibruvan* then simply means "speaking." In that case the verse prescribes punishment for anybody who speaks in lieu of a party to a lawsuit, except for the brother, father, son, and *niyogakrt.*

Brhaspati

The *Brhaspatismrti* (1. 142) in its turn contains at least one *sloka* connected with representation:

apragalbhajadonmattavrddhastribalaroginam
purvottaram vaded bandhur niyukto 'nyo 'nyatha narah.[15]

14. L. Rocher, Vacaspatimisra's Vyavaharacintamani 168 (1956).

15. K. V. Rangaswami Aiyangar, Brhaspatismrti (Reconstructed) 23 (Gaekwad's Oriental Series 85, 1941).

Jolly translates:

> For one timorous, or idiotic, or mad, or overaged, and for women, boys, and sick persons, a kinsman or appointed agent should proffer the plaint or answer [as his representative].[16]

Again Jolly uses the term "appointed agent," this time to render the Sanskrit term *niyukta*. We on our side merely notice the use of *niyukta*, a variant form for Narada's *samniyukta* and *niyogakrt*.

Brhaspati's stanza raises, however, a number of questions which are important if one wants to understand what he meant by *niyukta*. First, Jolly's translation omits one word from the Sanskrit text: *'nyo* ("other"). Since we no longer have access to the original context, we cannot a priori reject either of the following interpretations: (1) a kinsman, or another man who is *niyukta, i. e.*, either a kinsman or somebody who is not a kinsman but a *niyukta;* (2) a kinsman or another *niyukta, i.e.*, anybody who had been *niyukta* by the party. In the former alternative *niyukta* might eventually refer to a specific class of representatives; in the latter alternative it could mean no more than "designated" generally.

A second problem raised by Brhaspati's text is connected with a variant reading found in the *Vyavaharacintamani* (no. 74 of our edition) and in the *Viramitrodaya* on *Yajnavalkyasmrti* 2. 6. Here the second line reads: *purvottaram vadet tadvad aniyukto 'thava narah.* That means: "In the same way even a person who has not been deputed may speak first or last for . . ." In this case too, *aniyukta*—and, for that matter, *niyukta*—comes closer to the general "designated" than to the technical meaning of an "appointed agent."

Katyayana

Of all *dharmasastras*, the *Katyayanasmrti* seems to have been most prolific in connection with representation. P. V. Kane[17] collected no less than seven *slokas* on the subject; in his translation[18] he arranged them under the title "Substitutes or recognised agents of parties."

The first two distichs (Katyayana 89-90) are as follows:

samarpito 'rthina yo 'nyah paro dharmadhikarini
prativadi sa vijneyah pratipannas ca yah svayam.
adhikaro 'bhiyuktasya netarasyasty asamgateh
itaro 'py abhiyuktena pratirodhikrto matah.

16. JOLLY, *supra* note 11, at 288.
17. P. V. KANE, KATYAYANASMRTI ON VYAVAHARA (law and procedure) 14-15 (1933).
18. *Id.* at 133-34.

Kane translates:

> A person though other [than the defendant,] if put forward by the defendant before the judge [as defendant] should be regarded as the defendant and he also who is accepted [by the plaintiff] himself [as the defendant]. It is the right of the person charged [to give a reply] and not of another person, since the latter is unconnected [with the dispute]; [but] even a stranger may be allowed [to have the right to defend] if he is put forward [as the defendant] by the person charged [by the plaintiff].

These verses, the original of which is lost, present a number of variant readings in the later commentaries in which they have been quoted. Several Sanskrit words are problematic and might be given different translations from those proposed by Kane. A detailed discussion of all these problems is not relevant here. We must, however, remark that the words "a stranger" used by Kane are definitely too precise and too strong; the Sanskrit words *itaro 'pi* say nothing more than "even another person" without any further specification.

Katyayana 91 does not present any new problem: it corresponds word for word with Narada (Introduction 2. 22). In view of Varadachariar's remarks quoted above, we can hardly agree with Kane's statement that "this verse contains the germs of the modern profession of pleaders." [19]

Katyayana 92 reads as follows:

dasah karmakarah sisya niyukta bandhavas tatha
vadino na ca dandyah syuh yas tv ato 'nyah sa dandabhak,

i.e., in Kane's translation:

> Slaves, menials, pupils, persons deputed, and relatives, these should not be punished when they speak [on behalf of another, their master, etc.]; any one other than these [if meddling in litigation] deserves punishment.

Here we have a clear enumeration of those who may represent a party: (1) *dasah*, (2) *karmakarah*, (3) *sisyah*, (4) *niyuktah*, and (5) *bandhavah*. Thus, a *niyukta* is a specific kind of representative (*vadin* or *prativadin*), along with slaves, menials, pupils, and relatives; all others are excluded.

Katyayana 93-95 deal with the same subject:

19. *Id.* at 133.

brahmahatyasurapanasteyagurvanganagame
anyesu catipapesu prativadi na diyate;
manusyamarane steye paradarabhimarsane
abhaksyabhaksane caiva kanyaharanadusane
parusye kutakarane nrpadrohe tathaiva ca
prativadi na datavyah karta tu vivadet svayam.

Kane's translation is as follows:

> A representative [of plaintiff or defendant] is not allowed in [charges of] brahmana murder, drinking wine, theft, sexual intercourse with the wife of an elder [incest] and in other grave sins. A representative should not be given in man slaughter, theft, indecent assault on another's wife, eating forbidden food, kidnapping of a maiden and intercourse with her, harshness . . ., counterfeiting coins and measures, and also in sedition; but the man himself [the plaintiff or defendant] should engage in the dispute.

The interesting point here is that all representatives (*prativadin*), *i.e.*, including the *niyukta,* are excluded in a number of specific lawsuits. The nature of these lawsuits may have its importance for our conclusions; we shall return to it below.

Vyasa

One of Vyasa's *slokas* comes very close to the one by Brhaspati quoted above:

kulastribalakonmattajadartanam ca bandhavah
purvapaksottare bruyur niyukto bhrtakas tatha.

Although this stanza does not seem to have been particularly popular with the commentators (it occurs only in few medieval compilations), it provides us with a new element: the payment of the representative. Unfortunately, again two interpretations are possible. The representatives "who may speak up for women of good family, children, madmen, idiots, and disturbed persons, concerning the plaint and the defense," are either *bandhava* ("a relative"), *niyukta* whom we have met with above, and *bhrtaka* ("a person receiving a remuneration"), or *bandhava* ("a relative"), and *niyukto bhrtaka* ("an appointed person who receives a remuneration"). In the latter case the relative, who is unpaid, is opposed to the *niyukta* who earns a salary. In our view the more faithful interpretation is: a relative, a *niyukta,* and a *bhrtaka.* In that case we do not learn anything new about the *niyukta,* and about the term *bhrtaka* we can merely say that it is connected with *bhrti* ("salary").

Pitamaha

Finally, we must mention two verses by Pitamaha:

pita mata suhrd vapi bandhuh sambandhino 'pi va
yadi kuryur upasthanam vadam tatra pravartayet;
yah kascit karayet kimcid niyogad yena kenacit
tat tenaiva krtam jneyam anivartyam hi tat smrtam,

which were thus interpreted by Scriba:

> The king should conduct a lawsuit when the father, the mother, a friend, a relative, or a servant appear [as representatives].
>
> Whenever somebody appoints another person to act in his behalf, it is as if the act was done by himself, and it cannot be annulled.[20]

The first *sloka* is unambiguous: the king should allow a party to be represented by his father, mother, friend, or relative. But the second stanza, following after the first, again allows various interpretations. Either it means that any one *of those referred to before,* when acting through *niyoga,* acts in the other person's name. Or it indicates that anybody speaking for anybody else through *niyoga* is his real representative. In that case, *niyoga* does not refer to an "appointment" given to a specific class of representatives, but it suggests that anybody can be anybody's *niyukta.*

Commentaries and Nibandhas

Pitamaha's verses conclude our survey of the available materials on representation as far as the ancient *dharmasastras* are concerned. To these we might now add the medieval materials drawn from the commentaries and *nibandhas.* However, after a careful examination of the Sanskrit texts, we decided not to include these materials, since they do not add any really new data to those already discussed. None of the commentaries or *nibandhas* quotes *all* relevant passages from the older treatises. Even those that cite most of them try to adapt them into a coherent system, a task that was not easy and that led to highly varied results. Inasmuch as we have tried to provide all possible interpretations for the *dharmasastra* passages we are confident that we have included all interpretations proposed by the commentators. The latter would be important for our purpose only if they showed a definite development

20. K. SCRIBA, DIE FRAGMENTE DES PITAMAHA. TEXT UND UEBERSETZUNG (1902).

in one direction or another, *e.g.*, in the direction of gradual recognition of real lawyers. This is not the case; here as elsewhere the commentators did not aim at introducing any novelties. Their sole purpose was a correct interpretation of the ancient texts as such.

Arthasastra

Instead of quoting from the commentaries and *nibandhas,* we shall briefly refer to two *arthasastra* passages. Kautilya has no reference at all to representation in the court. The only text which is partly relevant is this (3. 20. 22):

devabrahmanatapasvistribalavrddhavyadhitanam anathanam
anabhisaratam dharmasthah karyani kuryuh,

i.e., in R. P. Kangle's translation:

> The judges themselves shall look into the affairs of gods, Brahmins, ascetics, women, minors, old persons, sick persons, who are helpless, when these do not approach [the court].[21]

This faithful rendering makes it clear that Sternbach went too far when, in connection with this text, he spoke of the judges as "official legal advisors." [22]

The situation is completely different in the *Sukranitisara.* Here we are provided with a long passage dealing with representation in the court. In G. Oppert's edition (Madras 1882) the text runs as follows:

vyavaharanabhijnena hy anyakaryakulena ca
pratyarthinarthina tajjnah karyah pratinidhis tada. (4. 5. 108)
apragalbhajadonmattavrddhastribalaroginam
purvottaram vaded bandhur niyukto vathava narah. (109)
pita mata suhrd bandhur bhrata sambandhino 'pi va
yadi kuryur upasthanam vadam tatra pravartayet; (110)
yah kascit karayet kimcin niyogad yena kenacit
tat tenaiva krtam jneyam anivaryam hi tat smrtam. (111)
niyogitasyapi bhrtim vivadat sodasamsikim
vimsatyamsam tadardham va tadardham ca tadardhikam; (112)
yatha dravyadhikam karyam hina hina bhrtis tatha
yadi bahuniyogi syad anyatha tasya posanam; (113)

21. R. P. KANGLE, THE KAUTILIYA ARTHASASTRA, PART II 293 (1963).
22. L. STERNBACH, JURIDICAL STUDIES IN ANCIENT HINDU LAW, PART I 324-25 (1965).

dharmajno vyavaharajno niyoktavyo 'nyatha na hi
anyatha bhrtigrhnantam dandayec ca niyoginam. (114)
karyo nityo niyogi na nrpena svamanisaya
lobhena tv anyatha kurvan niyogi dandam arhati. (115)
yo na bhrata na ca pita na putro na niyogakrt
pararthavadi dandyas syad vyavaharesu vibruvan. (116)
manusyamarane steye paradarabhimarsane
abhaksyabhaksane caiva kanyaharanadusane; (119)
parusye kutakarane nrpadrohe ca sahase
pratinidhir na datavyah karta tu vivadet svayam. (120)

B. K. Sarkar's translation of verse 108 reads:

> Representatives have to be appointed by the plaintiff and defendant who do not know the legal procedure or who are busy with other affairs.[23]

One important word in the text remains untranslated: the representative should be *tajjna* ("knowing it"). It is tempting to have *taj°* ("it") refer to *vyavahara* ("legal procedure") in the first line, and to say that whenever a party is not an expert on legal procedure he should be represented by a person who is an expert on such matters. If this is the case, the verse comes very close to describing a class of professional lawyers. Sarkar himself must have had this in mind when he added the following note to his translation: "Pleaders and lawyers are to represent such persons and state their cases as their own." However, we cannot accept that *taj°* refers to *vyavahara*. From verse 118, in which a son is to be accepted as a representative of his father on the condition that he is *tajjna* ("knowing it"), it is clear that *tajjna* means "knowing the circumstances of the case." In other words, the representative, to be acceptable, must have known the party whom he represents intimately enough to be fully aware of the circumstances in which the contested activities took place. This element will be an important one in our conclusions below.

Verses 109, 110 and 111 bring nothing new; apart from a few insignificant variant readings they are identical with the passages from Brhaspati and Pitamaha quoted above.

Much more important are the following four verses (112-115). This is Sarkar's translation:

23. B. K. SARKAR, THE SUKRANITI (Sacred Books of the Hindus 13, 1914).

The lawyer's fee is one-sixteenth of the interests involved (*i.e.*, the value defended or realised).

Or the fee is one-twentieth or one-fortieth, or one-eightieth or one hundred and sixtieth portion, etc.

Fees ought to be small in proportion as the amount of value or interest under trial increases.

If there be many men who are appointed as pleaders in combination they are to be paid according to some other way.

Only the man who knows the law and knows the Dharma should be appointed [as pleader].

The king should punish the pleader who receives fees otherwise.

The pleader is to be appointed not at the will of the king.

If the pleader acts otherwise through greed he deserves punishment.

The only problem in these verses is the expression "who receives fees otherwise" in 114. Sarkar duly states the two possibilities in a note to this translation: "He may be punished if he takes exorbitantly or if he practices without knowing the law, etc." After what has been said in the former half of the stanza, we would be inclined toward the second alternative, with Kane: "if the representative takes wages without knowing these." [24] However, the first alternative should not be excluded either: if 112cd-114ab are a more recent insertion into the text (we shall return to this in our conclusions), the latter part of 114 originally belonged together with the former part of 112. In that case "otherwise" means: "otherwise than one sixtieth part."

Verse 116 is identical with Narada's Introduction 2. 23, and verses 119 and 120 correspond to Katyayana 94-95.

Besides the points which we had become familiar with from the *dharmasastras,* we do find in the *Sukranitisara* a number of new and interesting elements: (1) representatives are appointed by parties who are *vyavaharanabhijna* ("who do not know the rules of legal procedure"); (2) the payment of the *niyojita* or *niyogin* is dealt with in great detail; (3) the *niyogin* is to be appointed by the party, not by the king. It hardly needs to be recalled that these elements played an important part in some of the opinions of modern scholars, quoted in our introductory remarks.

24. KANE, *supra* note 6, at 158-59.

Interpretation

As indicated at the outset, the principal reason for raising the question of the existence of lawyers in ancient India was the awareness of the existence of such a professional class in modern Indian law, and in Western law as well. Consciously or unconsciously, the general background of the investigations on ancient Hindu lawyers—as of many other aspects of research on Hindu law—has been one of defensiveness. Was it possible that such a wonderful legal system as the one depicted by *dharmasastra* did not include the institution of legal practitioners?

An excellent example of this tendency to look for "the germs of the modern profession of pleaders" is P. V. Kane who, notwithstanding his admirably sound approach, when translating Katyayana 91, could not withhold from adding the note cited above. Even Judge S. Varadachariar, who completely denies the existence of a legal profession in ancient India, unwittingly takes up the defense of Hindu law. He cites examples of various other ancient legal systems that did not know a legal profession either. The underlying idea is that we should not really be surprised if ancient Hindu law had no lawyers, since contemporary systems were not more advanced. Characteristically, the enumeration of the other legal systems ends with the following statement: "In England there was no definite legal profession till more than a century after the Norman conquest." [25]

Our approach to the problem is completely different. We maintain that such an apologetic attitude is not at all necessary. In our opinion, the ancient Hindu legal system was such that a legal profession not only did not exist, but that it was not called for and hardly could have existed. The reasons that led us to assume that a legal profession did not exist in ancient India are at least three in number.

First, the only term which might eventually have referred to professional lawyers was *niyogin, niyukta,* or *niyogakrt.* We are not much concerned about the fact that there is no uniformity of nomenclature. There are other examples of well established institutions in ancient Hindu law which did not enjoy a uniform terminology. But we are concerned about the fact that not a single text on *dharma* pays any special attention to the *niyukta* as such. If he had been an important and constant element of the law court, we may be assured that some *dharmasastra* would have elaborated on the qualifications to become a *niyukta—e.g.,* under the heading *niyuktaguna*—and on the disquali-

25. VARADACHARIAR, *supra* note 8, at 158-59.

fications which would have prevented a person from entering the profession. All participants in a lawsuit have been duly enumerated and described in the texts; the authors of the *dharmasastras* would have fallen short of their duty if they had not paid attention to one of these participants, the "lawyer."

Secondly, if the main purpose of *niyoga* had been a more effective presentation of the party's interests than he could normally provide himself, we do not see why *niyoga* was so fiercely opposed in what we may call major criminal cases.[26] Katyayana's three *slokas* (93-95) which deal with this aspect of the problem seem to indicate that, when it came to really serious cases, *niyoga* was prohibited. From this we must infer that *niyoga* was allowed only as long as the case was a less serious one. Whenever a party was unable or unwilling to appear in person, he was allowed to be represented by another person in minor cases; but he had to appear personally in major issues. Such a criterion is hardly compatible with the role of a professional legal adviser as we conceive it today.

This second argument leads us to a third, namely, the existence of a class of professional representatives was not called for in Hindu law. This argument is undoubtedly the most important and most basic one. Administration of justice in ancient India was the concern of the king; it was part of *rajadharma.* Several rules in the *dharmasastras* lay down that the king is responsible for punishing those who deserve to be punished. But it is added that the king is also responsible for the innocent not to be punished. Thus, *e.g.,* Manu 8. 126-128, in G. Buhler's translation:

> Let the [king], having fully ascertained the motive, the time and place [of the offence], and having considered the ability [of the criminal to suffer] and the [nature of the] crime, cause punishment to fall on those who deserve it.
>
> Unjust punishment destroys reputation among men, and fame [after death], and causes even in the next world the loss of heaven; let him, therefore, beware of [inflicting] it.
>
> A king who punishes those who do not deserve it, brings great infamy on himself and [after death] sinks into hell.[27]

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26. L. Rocher, *Ancient Hindu Criminal Law,* 24 J. ORIENTAL RESEARCH MADRAS 15-34 (1955).

27. G. BUEHLER, THE LAWS OF MANU 276 (Sacred Books of the East 25, 1886).

That means that the only person in the court who is responsible for the party's interests being safeguarded is the king, or, in practice, the king's representative: the chief judge. The fact that the parties might not be *vyavaharajna* ("acquainted with legal procedure") and hence unable to defend themselves properly, was no reason why they should be assisted by professional lawyers. The person responsible for the correct course of the case and for safeguarding the parties' interests was the king himself or whoever presided over the court in his name. It is in the light of these considerations that we must also understand the passage from Kautilya quoted above: parties who are unable to appear in person need not, therefore, be represented; the king himself is responsible for their interests.

So, as we see it, professional lawyers did not exist and could hardly have existed. To this we now want to add a restriction. As it so often happens in ancient Hindu law and in Hindu civilization generally, in the case of legal representation too, a certain degree of development must have taken place in the course of the centuries. We are not among those who believe that the more recent *dharmasastras* were composed with the intention to innovate and depart from what had been said by the older ones. On the contrary, we are convinced that the more recent authors tried their very best to maintain the general scheme laid out by their predecessors. But in the meanwhile the actual situation did change, and every now and then authors of more recent *dharmasastras* could not prevent themselves from reflecting some of these changes.

Thus, we believe that at an early date—let us roughly say at the time of the *dharmasutras*—professional lawyers or, to be more precise, specialized *dharmasastrins* could not exist. The Indian sage in those days was a specialist in all of the texts related to a particular Vedic school. His specialized knowledge concentrated on a specific version of the Vedic *samhita* and all its related texts: *brahmana, aranyaka, upanisad, srautasutra, grhyasutra, dharmasutra,* etc. There were no specialists on *dharmasastra,* and, a fortiori, no specialists on law that were part of it.

But the situation changed. The texts on *dharma* grew away from the Vedic schools. Gradually there may have come into being a specialized group of learned men whose main interest was *dharma,* and the various *dharmasastras* as such.

Finally, as the amount of textual material increased, we may assume that certain experts, without detaching themselves completely from other

aspects of *dharmasastra* and from Hindu learning generally, accumulated a very specialized knowledge of one aspect of *dharma: vivada* and *vyavahara,* or, in modern terminology, law. It is very possible that at this stage the nature of legal representation (*niyoga*) also underwent a certain change. We do not want to exclude the possibility that, at that moment, in a number of cases legal competence played a role in the choice of a representative. We are even willing to accept that Vyasa refers to the very special circumstance in which the representative was paid for his services. However, no written source allows us to draw the conclusion that the experts on legal matters ever developed into a professional group whose regular activities consisted in representing parties in the court. The impression which we gather from the texts is that, even in cases where the representative was chosen because of his special competence on legal matters, and, a fortiori, in all other cases, the necessary condition for a person to represent a party was the existence, between the former and the latter, of a certain form of close personal relationship.

In this connection we want again to refer to the categories of *niyukta* enumerated by Narada (Introduction 2. 23): brother, father, son, and by Katyayana (92): slaves, menials, pupils, etc. Some of these terms were vague enough to be interpreted very broadly, and we can very well see how a party who wanted to be represented in the court may have tried to fit into these categories a person who knew the *dharma* rather than one who did not. But the main requisite was the personal relationship stressed by the *dharmasastras,* not the representative's legal competence.

Moreover, our point of view offers an adequate explanation for the passage from Asahaya quoted by Kane and referred to above.[28] Here again, it is true that the representative, Smartadurdhara, is said to be an expert on *dharma,* but nothing points to him as a professional lawyer. On the contrary, he is a friend of the family, and, as such, serves as their adviser. He does represent the party in court, but only after having assured the judge that he is entitled to do so because "he and his ancestors were friends of the family." In other words, he does not act as a professional expert (*vyavaharajna*) but as a personal friend (*suhrd*); the fact that the *suhrd* is *vyavaharajna* is purely coincidental.

Finally, our interpretation is also confirmed by the above quoted passage from the *Sukranitisara,* about which we want to add a few words

28. P. N. K. SAHAY, A SHORT HISTORY OF THE INDIAN BAR 4-6 (1931).

here. There is no doubt that, of all sources examined in this paper, the *Sukranitisara* is the one which most strongly reminds us of the modern legal profession. While commenting on it, Kane went as far as to say:

> The rules of Sukra made a near approach to the modern institution of the Bar and the fees prescribed by Sukra are similar to those allowed by the Bombay Regulation II of 1827 and by Schedule III to the Bombay Pleaders' Act (Bombay Act XVII of 1920).[29]

The main support for this statement is the detailed description of the representative's remuneration (verses 112-114). However, it has been so far overlooked that at least part of these verses (112cd-114ab), although reproduced in Oppert's edition, actually occurred in one manuscript only; they were missing in all four other manuscripts and in the printed version used by Oppert. We would not hesitate to consider them as a very recent addition to the original text. As a matter of fact, the entire *Sukranitisara,* as we have it today, is of recent origin.[30] It seems to us that it is a recent compilation, based upon a number of ancient rules—some of the verses are simply identical with those quoted from the *dharmasastras*—but into which were inserted certain very modern ideas, even ideas belonging to the colonial period. We would not be surprised if the rules about the representative's remuneration belonged to this latter category.

Under the circumstances it is all the more noteworthy, as Varadachariar puts it, "that it provides for the appointment of a 'representative' not only on the ground of the party's ignorance of Vyavahara but also on the ground of his being otherwise busy."[31] Thus, even such a very recent text as the *Sukranitisara,* which seems to have known a real professional class of lawyers and does not hesitate to incorporate it into the classical system of *dharmasastra,* does not exclude the idea that the legal representative and the person represented by him should be linked by a personal tie of blood relationship, friendship, etc. This, more than anything else, shows that this traditional element was a very important one, probably the most important of all in legal representation according to classical Hindu law.

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29. KANE, *supra* note 6, at 290.
30. M. WINTERNITZ, GESCHICHTE DER INDISCHEN LITTERATUR. BAND III 531 (1920).
31. VARADACHARIAR, *supra* note 8, at 157.

CHRONOLOGICAL SURVEY OF SANSKRIT TEXTS[32]

Dharmasutras 600-300 B. C.

Dharmasastras
- Manu 200 B. C.-100 A. D.
- Yajnavalkya 100-300 A. D.
- Narada 100-400 A. D.
- Brhaspati 300-500 A. D.
- Katyayana 400-600 A. D.
- Vyasa 600-900 A. D.
- Pitamaha 600-900 A. D.

Commentaries and *nibandhas*
- Asahaya on Narada 700-750 A. D.
- *Vyavaharacintamani* 1500-1550 A. D.
- *Viramitrodaya* on Yajnavalkya 1615-1645 A. D.
- *Vivadarnavasetu* 1773 A. D.

Arthasastra
- Kautilya 300 B. C.-100 A. D.
- *Sukranitisara* ? [1800 A. D. ?]

32. KANE, *supra* note 6, at XVII-XX.

INTRODUCTION

THE STUDY OF THE INDIAN LEGAL PROFESSION

MARC GALANTER
University of Chicago

THE LAST TWO CENTURIES have witnessed a worldwide movement toward centralized, bureaucratic, professionally-staffed legal systems, sponsored by and closely allied with nation-states. One concomitant of these developments has been the emergence (or growth) of bodies of independent professionals whose members mediate between these systems and the populations they regulate. Thus the "expropriation" of the making and application of law into a purely governmental function has been accompanied by the growth of a corresponding "private sector"—the lawyers. The intimate involvement of lawyers in the emergence of modern nations has been recognized, but there has been little systematic comparative study of them. This issue contains a series of studies of one of the largest of these professional groups—Indian lawyers. These studies were prepared for a Conference on the Comparative Study of the Legal Profession with Special Reference to India, sponsored by the Committee on Southern Asia Studies of the University of Chicago, held at the Moraine-on-the-Lake Hotel in Highland Park, Illinois from August 10-12, 1967.[1]

The conference grew out of a series of conversations about the Indian legal system with my colleague, Bernard S. Cohn, which led to the notion that it might be worthwhile to bring together scholars in various

1. The Editors would like to express appreciation to the Committee on Southern Asian Studies of the University of Chicago for its support of the Conference, and along with the Council for Intersocietal Studies of Northwestern University, for providing facilities for the preparation of this collection; to Mrs. Sara Lindholm for her extraordinarily able work of making the Conference arrangements; to Dr. Kali Bahl of the University of Chicago who helped on the glossary (that falls somewhat short of Indological standards); and to Miss Maureen Patterson, South Asian Bibliographer of the University of Chicago Library for her assistance with sources.

disciplines who shared an interest in Indian lawyers. The study of law in Asia, as nearer home, has been heavily preempted by professional interest in the rules and doctrines promulgated at the upper levels of the system. Rather than viewing the legal system as a body of rules, we proposed to view it as a body of men—who they are, what they do, how they interact with one another and with other social groups. What is the relation between this body of men and the legal system that they staff, support and produce? We felt that an inquiry of this kind would provide a forum for exchange among lawyers, social scientists, and Indianists whose interests converged on the Indian legal system. We hoped that it would provide an opportunity for examining the linkage between "law" and "society" in a more concrete and detailed way than is possible by concentrating on legal rules.

Our observations of India suggested two basic perspectives. First, we proposed to examine the lawyer as an intermediary, linking the "higher law" promulgated at the upper reaches of the system with the law as applied at the local level. Second, we wanted to examine the lawyer as the carrier of a nationwide "legal culture" who disseminates official norms while putting them in the service of various groups—as a broker or middleman linking "modern" and "traditional" segments of society.

Southern Asia seemed an auspicious place to undertake the comparative study of lawyers and their role in legal systems. The impact of the British-imposed legal system was of such a scale and intensity that if the impact of the profession were anywhere observable, it should be there. The area is relatively rich in documentation and is relatively accessible to researchers. The common framework of the "British" legal institutions offers a convenient base-line for comparison and the spread of similar formal rules over areas of vastly different culture and condition provides vast scope for comparison within the region.

We originally hoped to address ourselves to the whole of South Asia, but we were unable to find anyone who was studying lawyers in Pakistan or the smaller South Asian countries.[2] Although constrained to narrow our focus to India, we decided that the meeting should not be confined to India hands, old or new. We wanted to place the Indian experience in a broad comparative perspective. We were fortunate in enlisting several scholars who had examined the legal profession elsewhere and who were patient enough to listen to so much India lore. They included

2. We did have available RALPH BRIABANTI's excellent survey of the legal profession in Pakistan RESEARCH ON THE BUREAUCRACY OF PAKISTAN (1966).

students of China (Jerome A. Cohen), Japan (Dan F. Henderson), Egypt (Farhat Ziadeh) and Europe (Mirjan R. Damaska).[3] In addition, Justice Suffian of the Supreme Court of Malaysia contributed his observations on the legal profession in his country. Richard Ellis, Lawrence Friedman, Jerome Skolnick and Alan Swan provided their expertise on lawyers in American society and helped check our tendency to employ an idealized version of the American profession as an implicit standard. When we finally assembled, the company included not only legal scholars and practicing lawyers, but political scientists, historians, anthropologists, sociologists and classicists—including a number who spanned several of these fields.

Apologies are due to Indian lawyers for conferring on them the dubious benefit of our distant and myopic scrutiny with so little participation on their part. Limited funds—the entire conference budget was barely equal to a couple of air-fares from India—were the main reason for this. And much to our regret, several eminent Indian legal scholars, who were scheduled to attend and whose presence would have enriched the proceedings, were unable to come at the last minute. The contribution of Mssrs. Rao, Chaturvedi and Srinivasa Rao was invaluable and we would undoubtedly have benefited from greater Indian participation. We recognize that most of the work of developing understanding of the Indian legal system will have to be done by Indian scholars. The papers point to a vast range of questions, to which our answers are at best inconclusive. They also exemplify the great variety of techniques that can be employed to answer them—from interviews, questionnaire surveys, field observation and participant observation to biographical study, analysis of institutional records, legislative history and textual exegesis. Vast untapped sources await researchers in archives and in the field. We offer this collection as an opening wedge into the subject, in the hope that it will stimulate systematic study of the legal profession in India and elsewhere.

The Conference discussions emphasized the danger of employing the United States as a model and perceiving divergences from the U.S. pattern as deficiencies. We emerged with a sense of the uniqueness of

3. Space did not permit inclusion in this collection of the non-Indian papers, abstracts of which appear at pp. 407-413. Professor Henderson's is part of a chapter in his forthcoming book on FOREIGN ENTERPRISE IN JAPAN (to be published by the University of North Carolina Press). Professor Ziadeh's paper in a slightly modified form will be published as the concluding chapter in a forthcoming book entitled LAWYERS, THE RULE OF LAW, AND LIBERATION IN EGYPT (to be published by the Hoover Institute of Stanford University).

TABLE 1

LAWYERS IN SELECTED COUNTRIES

Country	Population in Millions	Year	Lawyers (1963 Unless Otherwise Noted)	Lawyers per Million Population
ASIA AND MIDDLE EAST				
Israel	2.1	1961	3,200	1,523
Philippines	27.0	1960	c. 27,500	1,018
Lebanon	est. 2.2	1964	c. 1,320	600
Thailand[a]	26.2	1960	c. 6,000	229
Ceylon	10.6	1963	c. 2,000	189
India	est. 410.6	1958	c. 75,000 (1958) *	183
United Arab Republic	26.0	1960	4,608	177
Pakistan[b]	est. 100.7	1964	c. 15,000 (1965) **	149
Japan[c]	93.1	1960	6,490 (1960) ***	70
Korea[d]	24.9	1960	1,649	66
Taiwan	est. 12.0	1964	c. 700	58
Malaysia/Singapore	7.7	1957	c. 270	35
Indonesia[e]	96.3	1961	c. 1,620 (1959) †	17
AFRICA (Sub-Saharan)				
Republic of South Africa	16.0	1960	c. 3,600	225
Sierra Leone	2.1	1963	c. 100	48
Kenya	8.6	1962	c. 380	44
Nigeria	55.6	1963	c. 1,600	29
Malagasay R.	est. 6.1	1964	c. 150	25
Tanganyika	8.7	1957	c. 175	20
Rwanda[f]	2.1	1952	c. 8	4
Ethiopia[g]	est. 22.1	1964	c. 18	1

[a] Includes judges, prosecutors, retired.
[b] Excludes legally-trained not engaged in work "related to their training."
[c] "Practicing lawyers" only.
[d] Only 632 are currently in practice.
[e] Includes judges, prosecutors, only 200-300 "lawyers."
[f] Two judges; 6 legal assistants in administration.
[g] "University-trained" only.
[h] "Active as lawyers."
[i] Avocats and avoues.
[j] Includes government service, educators, retired, etc.

* I LAW COMMISSION OF INDIA, FOURTEENTH REPORT (REFORM OF JUDICIAL ADMINISTRATION) 584-85 (1958).

** R. BRAIBANTI, RESEARCH ON THE BUREAUCRACY OF PAKISTAN 252 (1966).

*** T. Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in LAW IN JAPAN 152 (A. T. von Mehren ed. 1963).

† Based on estimates by Daniel S. Lev, *The Politics of Judicial Development in Indonesia*, 7 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 183, 189 (1965).

TABLE 1 (continued)

LAWYERS IN SELECTED COUNTRIES

Country	Population in Millions	Year	Lawyers (1963 Unless Otherwise Noted)		Lawyers per Million Population
EUROPE					
Norway	3.5	1960	c. 5,000		1,428
Finland	4.4	1960	c. 4,300		977
Sweden[h]	7.4	1960	c. 7,000		945
Italy	49.8	1961	30,000	(1957) ***	602
Denmark	4.5	1960	2,250		500
Switzerland	5.4	1960	c. 2,100		388
Germany	53.1	1961	19,445		366
Austria	7.0	1961	2,350		355
Portugal	8.8	1960	1,800		204
Poland	29.7	1960	5,744		193
Netherlands	11.4	1960	1,976		173
France[i]	46.5	1962	7,713	(1958) ***	165
"OLD COMMON LAW"					
United States[j]	179.3	1960	285,933	(1960) ††	1,595
New Zealand	2.4	1961	c. 2,273		947
Canada	18.2	1961	c. 14,000		769
Australia	10.5	1961	6,704		638
United Kingdom	52.7	1961	c. 26,735		507
LATIN AMERICA					
Bolivia	est. 3.6	1964	c. 2,750		764
Ecuador	4.6	1962	c. 3,500		760
Argentina	20.0	1960	c. 12,000		600
Costa Rica	1.3	1960	723		556
Chile	7.3	1960	c. 4,000		547
Dominican Republic	3.0	1960	c. 1,500		500
Nicaragua	1.5	1963	c. 700		466
Paraguay	1.8	1962	835		464
Haiti	est. 4.5	1964	c. 2,000		444
Peru	9.9	1961	c. 4,000		404
Mexico	34.9	1960	10,000+		286+
Honduras	1.8	1961	c. 305		169

†† STATISTICAL ABSTRACT OF THE UNITED STATES FOR 1967, at 159 (1966).

NOTE: Except where otherwise noted, lawyer figures are taken from AMERICAN BAR FOUNDATION, INTERNATIONAL DIRECTORY OF BAR ASSOCIATIONS (1964). Where the directory gave an estimated range, the middle figure was used. Population figures are from

(Note continued on following page)

the role-cluster found in the United States, where the lawyer is business adviser, negotiator, deviser of regulatory machinery and generally chaperon of enterprise, private and public. Yet, in spite of all the obvious differences, there are seductive parallels between the U.S. and India. Both are large and diverse societies which combine relative institutional stability with high rates of change and high levels of conflict and violence. In both there is a relatively great discrepancy between official law and going social practice; the decentralization of administration dissolves unity of precept into diversity of practice. In both there is heavy reliance on law to settle disputes, forward interests, ameliorate group rivalries, and promote development. In both, public issues are readily transformed into legal controversies. In both, lawyers exist in unusually large numbers and play an extraordinarily prominent role in public life.

The more than 75,000 lawyers in India comprise the second largest body of legal practitioners in the world. The ratio of lawyers to the population in South Asia is considerably higher than in Southeast Asia, East Asia or Africa. It is less than countries of the old Commonwealth, Scandinavia, or Latin America—about the same as much of Western Europe. Given the poverty of the region, one may hazard the guess that in no part of the world is a greater portion of national surplus spent on legal services than in South Asia. A rough indication of the prominence of lawyers in Indian public life is given by the presence in the highest legislative body of a proportion of lawyers second only to that in the United States.[4]

(Note continued from previous page)

the STATISTICAL ABSTRACT OF THE UNITED STATES FOR 1967, at 898-900 (1966). Extreme caution is appropriate in using this table. While it reflects gross differences in lawyer densities, the data on which it is based lend no assurance of comparability in specifying the boundaries of the profession. In some cases figures include nonpracticing law graduates, judges, prosecutors, retired persons; in others they do not. A lag in population figures may add distortion—as may failure to take into account the differing age profile of the populations. It should also be recalled that some of the most radical differences are probably not so much reflections of the legal system as of an educational system, *e.g.*, that contains no separate training in business or the social sciences.

4. Lawyers have continued to comprise over a quarter of the Lok Sabha (see Table 3 below). This is far short of the 60% lawyer membership of the United States Congress, but it is strikingly higher than, for example, lawyer membership of the House of Com-

In spite of the parallels, the papers and the Conference discussions pointed to a cluster of characteristics which seemed to tie together many of our observations about Indian lawyers and which seemed to contrast them sharply with their American counterparts: the Indians' strong orientation to courts (as compared to other legal settings); their orientation to litigation rather than advising, negotiating or planning; the conceptualism in their handling of rules; and their individualism and lack of specialization. The contrast should not be overstated. Even in the United States specialized firm-organized client-caretaker advisers are not the most numerous kind of lawyers. But if we think of these characterizations not as dichotomies but as pointing to a series of continua on which relative positions can be assigned, Indian and American lawyers reveal very different dominant styles or central tendencies.

Public and profession in India concur in visualizing the lawyer in the role of courtroom advocate, rather than business adviser or negotiator, much less social planner. Lawyers see themselves this way and clients typically come to them at a relatively late stage of a dispute, already committed to go to court. Ties with clients (and regulatory agencies other than courts) tend to be episodic, not enduring. This orientation to courts is vividly displayed in spatial terms—lawyers are to be found literally at the court.[5] The office, rarely separate from the home, does not serve as a staging area for operations in various arenas.

Since the lawyer's business is usually at *a* court, he typically spends his working life at a particular level of the system. But in spite of the stratification that this entails, the profession is relatively undifferentiated in character. The profusion of appeals, the tendency to have little nar-

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mons (solicitors and barristers: 19% in 1955), the French National Assembly (avocats, avoues, notaires: 14% in 1951) or the West German Bundestag (jurists, lawyers, notaries and other legal officials: 11% in 1957). Figures taken from John J. McCloy, *The Extra-Curricular Lawyer* (a lecture given at Washington and Lee University, 1958).

5. Physical attachment to a particular court goes back to the earliest days of the Indian legal profession. In the first regulation of vakils in Bengal in 1793, vakils were admitted to practice before only a single court and "Daily and Regular attendance at that court was compulsory." P. N. K. SAHAY, A SHORT HISTORY OF THE INDIAN BAR 24 (1931). In 1814 this rule of attendance was loosened to the extent that it was no longer necessary to obtain the leave of the court in case of absence, but merely to give written notice to the court. In 1853 the requirement of daily attendance was dropped. *Id.* at 33, 39. Sahay points out that this requirement reflected that the early regulation was intended to establish the vakil not as an independent profession but as "an office under the Government." *Id.* at 26.

rowing down of the issues in higher courts, and the latter's broad original jurisdiction lead to courts at all levels dealing with the same kinds of problems. Although those at the higher levels have more prestige and influence, lawyers at each level do much the same sort of thing. Within each level lawyers are stratified by skill, influence, prestige and wealth. But there is little division of labor by specialization (beyond civil-criminal) and little coordination in the form of partnerships and firms. Basically, all lawyers offer the same kind of service under conditions of chronic oversupply. Competitiveness limits solidarity and capacity for corporate action. Prestige and power do not serve to coordinate activity within the profession. Koppell points out that leaders of the metropolitan bar "did not have a following of young lawyers who would implement plans and projects developed by their seniors"—an observation that parallels Morrison's account of the isolation of "leading lawyers."

The emphasis on litigation and the barrister role reinforces lawyers' rule-mindedness. Where the lawyer's task is to win disconnected battles, rather than to pattern relationships, there is little to induce the practicing lawyer to go beyond the kind of conceptualism that is characteristic of much of Indian legal scholarship and that pervades legal education. Writing and teaching are, with significant exceptions, confined to close textual analysis on a verbal level with little consideration either of underlying policy on the one hand or problems of implementation on the other.

Our discussions made us painfully aware of the gaps in the rudimentary picture assembled here. In our picture of this stratified profession, there are many missing strata. We know something of lawyers in district towns from Morrison and Rowe. But what of their big-city counterparts, including those who practice at the High Courts (whose predecessors are discussed by Schmitthener)? And what of their country cousins, the lawyers out in the subdistrict towns? If court-centeredness, individualism, lack of specialization and rule-mindedness characterize all levels, how alike are these men at different levels in social origins, group affiliations, attitudes and operating style? Do they differ in the degree to which they have internalized the principles of the official system or express them in their work? We know little about the networks of professional ties that connect lawyers at one level with those at other levels. And we have only glimpses here of their relations with

the population at large. Who uses lawyers? For what? And how do they contact them? How widespread is the use of touts and other intermediaries? What does their presence connote about the social organization of legal services?

We have some picture of lawyers as they ascended to the higher levels of the legislature (Levy) and the judiciary (Gadbois). But what of their counterparts in lesser legislative and judicial roles? Do lawyers on District and Municipal Boards exhibit the same imprint of professional style and enjoy the same carryover of professional prestige as those in the highest legislative councils? Do lower court judges exhibit the same remoteness from political life as do judges on higher courts?

The papers suggest the need for regional comparisons. There is some evidence of considerable regional variation in the numbers and social origins of the bar. Does this reflect variations in social function and political role? Are there regional variations in the incidence and kind of litigation and in the way that lawyers are used by the public?

TABLE 2

APPROXIMATE NUMBER OF LAWYERS PER MILLION INHABITANTS IN INDIAN STATES, 1958

State	Number of Lawyers*	Number of Inhabitants (in millions) **	Lawyers per Million Inhabitants***
West Bengal	9,198	34.926	263
Bombay	15,516	60.187	257
Kerala	4,199	16.903	248
Mysore	4,541	23.586	192
Punjab	3,500	20.306	172
Madras	5,679	33.686	168
Andhra Pradesh	5,283	35.983	146
Uttar Pradesh	10,554	73.746	143
Bihar	6,186	46.455	133
Rajasthan	2,446	20.155	121
Madhya Pradesh	3,323	32.372	102
Assam	911	11.872	76
Orissa	1,321	17.548	75
TOTAL	72,657	427.725	2,096

* Source: LAW COMMISSION OF INDIA, FOURTEENTH REPORT, 584 (1958).

** Source: I CENSUS OF INDIA, 1961 pt. II-A (i), 182.

*** Calculations rounded off to the nearest whole number.

Comparisons of level and region must be supplemented by comparisons over time. Gadbois' judges were apolitical men whose careers took shape before independence. Are judges who rise through the ranks on the basis of promotion by elected officials going to be equally apolitical? Levy's legislators, too, were men whose careers antedated mass electoral politics. Does their lawyer role remain as salient in this new setting? How prevalent is the movement that Levy discerns from lawyer-scholar to lawyer-politician?

Is the public role of the profession declining, as is commonly believed? There is some evidence of a decline in the preeminence of lawyers in public life since the early 20th century. In 1916, excluding special-interest constituencies, lawyers comprised 54% of elected members of the Indian Legislative Council and 70% of the elected members of the provincial councils, a dominance that inspired the Montagu-Chelmsford Report to suggest that "in framing our new constituencies

TABLE 3

LAWYERS IN THE LOK SABHA

Lok Sabha	Total Membership	Information Available On	Law Degree and Practice, etc.		Law Degree, No Practice		Practice Without Law Degree		Total, Law Trained or Practice	
First, 1952-57 ...	489[a]	467[b]	108[b]	23.1%	46[b]	9.8%	11[b]	2.3%	165[b]	35.3%
Second, 1957-62 ...	494[a]	468[c]	93[c]	19.8%	45[c]	9.6%	9[c]	1.9%	147[c]	31.4%
Third, 1962-67 ...	494[a]	476[d]	99[d]	20.7%	34[d]	7.1%	10[d]	2.1%	143[d]	30.0%
Fourth, 1967— ...	520[a]	505[e]	79[e]	15.6%	49[e]	9.7%	8[e]	1.7%	136[e]	26.9%

Sources: [a] INDIA VOTES 242 (R. Chandidas, Ward Morehouse, Leon Clark, Richard Fontera eds. 1968).
[b] PARLIAMENT OF INDIA, HOUSE OF THE PEOPLE WHO'S WHO 1952 (1952).
[c] LOK SABHA WHO'S WHO 1957 (1957).
[d] LOK SABHA WHO'S WHO 1962 (1962).
[e] LOK SABHA WHO'S WHO 1967 (1967).

Explanation: Based on biographical sketches provided by the members.
Judicial posts were computed as practice.
All percentages are of those for whom information was available.

an important object to be borne in mind is to ensure that men of other classes and occupations find a sufficient number of seats in council." [6] In the indirectly elected Constituent Assembly/Provisional Parliament of 1947-1952, 32% were lawyers.[7] Since 1952 the Parliaments chosen by universal adult suffrage have contained fewer lawyers—but still remarkably many in view of the much smaller portion of the educated that they now comprise. Today more than a quarter of the members of the Lok Sabha are holders of law degrees. However, the numerical continuities may conceal differences in professional standing and experience —as the relative increase in those without careers as practitioners suggests.

The decline may be more precipitous at the state and local levels. For example, it is reported that in the pre-1952 Bombay Legislature, 41% of the combined membership of both Houses were lawyers,[8] but that in the Legislative Assembly of 1952-57 only 18% were lawyers.[9] A 1965 estimate of the number of lawyers in the Maharashtra Legislative Assembly places them at 3 to 5%.[10] And in Madras, the percentage of lawyers in the Legislative Council dropped from 24% in 1957 to 11% in 1962 to 8% in 1966.[11] However, Indian public life as a whole has expanded so greatly since independence that, although the relative share of lawyers has undoubtedly declined, it is difficult to conclude that in absolute terms lawyers exercise less authority and influence than they did before.

Schmitthener's discussion of the role of lawyers in domesticating and disseminating the constitutional style of politics reminds us that lawyers may be political actors in their professional work as well as in office. We have only hints here of the kind of corporate political action by the profession that Ziadeh describes in Egypt or Braibanti in Pakistan. The bar itself as a pressure group or a constituency remains unexplored here. It would be interesting, for example, to ascertain the impact of the bar in bringing about the termination of the 1962-67 state of emergency.

We find little here about the lawyer at work within the government, though we know that there are a large number of legally trained persons at the highest level of the executive and in administrative positions.

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6. REPORT ON INDIAN CONSTITUTIONAL REFORMS 55 (1918).
7. W. H. MORRIS-JONES, PARLIAMENT IN INDIA 120 (1957).
8. L. B. Wilson, cited in *id.* at 128.
9. MORRIS-JONES, *supra* note 7, at 120.
10. JOHN POLLACK, *The New Caste: Political Leaders in Maharashtra* 67 (Mimeo, 1966).
11. MADRAS LEGISLATIVE COUNCIL WHO IS WHO (1957, 1962, 1966).

Legal services within the government seem to follow a pattern much like that of private practice—there is little specific organizational provision for the advising and planning functions. Government tends to view lawyers as either draftsmen or advocates—and much of the latter service it purchases from private lawyers.

Rowe and Merillat discuss the role of the private practitioner in implementing government policy. In the matter of land reform and family law the lawyer not only disseminates and "enforces" government policy, but helps to resist and subvert it; he not only dispels but maintains the discrepancy between official rules and going practice. Do lawyers ordinarily contain and muffle change—at least change as promulgated from the top? Are there spheres in which they amplify change?

In another dimension we see lawyers depicted as influential agents of change. Levy and Rowe point to the prominence of lawyers as organizers and spokesmen of civic and reform groups. They are not only instrumental in the formation of "modern" groups like labor unions, but also in the reorganization of traditional groups along modern lines, as in the formation of caste and sectarian groups along the lines of voluntary associations.[12] Whether the interests and concerns are traditional or modern, lawyers seem to be instrumental in devising modern organizational forms articulated to action in the national world of government policies and plans. The contribution of lawyers to the political and social expression of various groups may differ sharply.[13] We need comparisons of the relation of lawyers to various sectors, groups, and interests in the society.

The purported decline of the profession is not reflected in any numerical attrition. The number of law colleges increased from 19 in 1950-51 to 44 in 1961-62 and their enrollments more than doubled in this period.[14] The picture here, as elsewhere, is one of absolute increase

12. *Cf.* the observations of William McCormack on the lawyers' influence in the development of a unified Lingayat culture. *Lingayats as a Sect* (pt. 1) 93 J. THE ROYAL ANTHROPOLOGICAL INSTITUTE 67 (1963).

13. For example, consider the contrast between India's two largest "minorities" in the matter of legislative representation. Theodore Wright found that of 332 Muslim legislators who served between 1947 and 1962, 32% were Lawyers. *Muslim Legislators in India: Profile of a Minority Elite*, 23 J. ASIAN STUDIES 262 (1964). It seems that a much smaller fraction of Scheduled Caste legislators are lawyers. In the Third Lok Sabha, among the 74 occupants of seats reserved for Scheduled Castes on whom information is available, there were only nine lawyers (12%). LOK SABHA WHO'S WHO 1962.

14. G. K. Ojha in HUMAYAN KABIR, ET AL., THE TEACHING OF SOCIAL SCIENCES IN INDIA (1947-67), at 408 (1968).

and relative decline. The proportion of law students to all university students has fallen throughout the century to 2.1% in 1964-65—a drop that provides a dramatic measure of the shift in opportunities and ambitions in India.[15]

TABLE 4

LAW STUDENTS IN INDIA

	Years	Total University Students	Law Students	Law Students as % of Total
UNDIVIDED INDIA	1906-7	25,168[a]	2,898[a]	11.5%
	1920-21	61,324[a]	5,232[a]	8.5%
	1940-41	153,962[b]	6,362[b]	4.1%
REPUBLIC OF INDIA	1950-51	396,745[c]	13,649[c]	3.4%
	1964-65	1,528,227[d]	32,000[d]	2.1%

Sources: [a] STATISTICAL ABSTRACT FOR BRITISH INDIA FROM 1911-12 TO 1920-21, at 56-57 (288).

[b] STATISTICAL ABSTRACT, INDIA 1952-53. No. 4: 92.

[c] INSTITUTE OF APPLIED MANPOWER RESEARCH, FACT BOOK ON MANPOWER 136 (1963).

[d] REPORT OF THE EDUCATION COMMISSION 1964-66: EDUCATION AND NATIONAL DEVELOPMENT 401 (1966).

Bastedo shows that in Bihar the growth of law student bodies reflects a widening social base of recruitment and suggests that expansion has entailed a lowering of academic quality. Most observers believe these trends prevail generally. The striking dissociation between legal education and the practice of law has been intensified. The practice of law is widely felt to have little dependence (intellectual, practical or social) upon legal education. But of course legal education does not lead only to practice. Our attention was focused on those who go on to practice, yet these are only a fraction of the law graduates (who are in turn only a fraction of those who spend time in the law colleges). Between

15. In Pakistan, with similar educational and legal institutions, law degrees represented 17% of total degrees awarded from 1954-61. RALPH BRAIBANTI, RESEARCH ON THE BUREAUCRACY OF PAKISTAN 249 (1966).

1952 and 1958, the two years in which there was a count of lawyers, the total number of enrolled practitioners increased from 72,425 to 75,309.[16] Yet in the six-year period 1953 to 1958, a total of 34,668 law degrees were awarded.[17] Allowing for replacement of deceased and retired lawyers and the delay of new lawyers gaining admission, it is evident that by far the larger number of law graduates do not go into practice. We have no precise evidence of what they do, although many remain in various clerical jobs, where their degrees help them to obtain promotion.[18] Legal education is evidently a channel of mobility for many, but we remain ignorant of how many of them utilize the skills imparted by their legal training and what kind of impress this training has upon their job-performance.

Was the striking preeminence of lawyers a transitional phenomenon as Schmitthener suggests when he concludes that other groups have now "caught up" with the profession? Or is there, in spite of the relative decline, something in the nature of Indian society that calls forth such a large and prominent legal profession by putting so much reliance on law to handle matters that are dealt with differently in other societies? We come back then to the largely unexplored question of how the legal system is related to its Indian surroundings. To answer this we need to know more about the day to day work of the lawyer—his relationship to the disputes of his client, his influence on the way the client thinks about and conducts his affairs. And we need to know more about the way in which the larger society visualizes the law and these lawyers—including antilawyer sentiment, both popular and among politicians and administrators.

The development of the modern Indian legal system represents a remarkable instance of the virtually total displacement of a major intellectual and institutional complex in a highly developed civilization with one largely of foreign origin or at least inspiration.[19] And, of course, it

16. REPORT OF THE ALL-INDIA BAR COMMITTEE 72-73 (1953); I LAW COMMISSION OF INDIA, FOURTEENTH REPORT (REFORM OF JUDICIAL ADMINISTRATION) 584-85 (1958). Both figures are slightly inflated by the inclusion of Supreme Court practitioners, most of whom are enrolled elsewhere as well.

17. STATISTICAL ABSTRACT OF THE INDIAN UNION 1963 & 1964, at 622.

18. A survey of University of Delhi graduates conducted in 1958-59 indicates that about half of the 1950 and 1954 LL.B.'s who were then employed were employed as clerks. V. K. R. V. RAO, UNIVERSITY EDUCATION AND EMPLOYMENT: A CASE STUDY OF DELHI GRADUATES 13, 43 (1961).

19. *See* Marc Galanter, *The Displacement of Traditional Law in Modern India*, XXIV J. SOCIAL ISSUES 65-91 (1968).

represents the replacement of the savants and practitioners of the older system by a new elite. Rocher and Calkins show that the earlier legal elites were not strictly comparable. Whether there was any carryover at all of style or personnel (beyond the family links noted by Gadbois and whatever continuity is suggested by the prominence of Brahmins) remains unclear in view of the paucity of information about the early British period.

The lawyer as we know him is very much part of the new India—and yet his prominence may owe something to the nature of the older society with its endless subdivision, accompanied by devolution of a broad measure of autonomy to many cross-cutting groups. The weakening by the British of the controls that regulated relations between and within these groups created a widespread demand for intervention by governmental courts and for specialists who could manipulate these new agencies. The new official law displaced but did not destroy traditional law, leaving much of the Indian population legal amphibians, articulated to both official and traditional norms (and in some cases tribunals). The lawyers successfully domesticated and disseminated the official part (and helped to transform the traditional part) so that in spite of the tensions and discontinuities, it too seems wholly indigenous. After analyzing the ethnographic materials on the relation of villages to courts, Cohn concludes that "The inadequacies of procedure, scope for chicanery and cheating, and lack of fit with indigenous jural postulates notwithstanding, the court system is not now an alien or imposed institution but part of the life of the village." [20]

To the lawyer, modern Indian law is "notwithstanding its foreign roots and origin . . . unmistakably Indian in its outlook and operation." [21] There is little sentiment within (or outside) the profession for the revival of "indigenous law." [22] The attempt to revive traditional village justice in the form of *panchayats* had its impetus outside the profession and is, as Rowe shows, ignored and disdained by the lawyers. While lawyers are critical of some features of the present system, they are wholly committed to it. My own observations confirm Rowe's conclusion that lawyers are

20. Bernard S. Cohn, *Anthropological Notes on Disputes and Law in India*, 67 AM. ANTHROPOLOGIST, No. 6, pt. 2, at 108 (1965).

21. M. C. SETALVAD, THE COMMON LAW IN INDIA 225 (1961).

22. The Law Commission repulsed agitation for an "indigenous system" with the observation that "had the ancient system been allowed to develop normally, it would have assumed a form not very different from the one that we follow today." LAW COMMISSION OF INDIA, *supra* note 16, at 30. *Cf.* the conclusions of G. D. KHOSLA, OUR JUDICIAL SYSTEM 67 ff. (1949).

quite unable to visualize any basic change in either the legal system or the organization of professional services.

We know little about the economics of the profession and the legal system. What role does the law play in transferring wealth—and consuming it? Our attention tended to concentrate on the supply side rather than the side of demand from the consumers of legal services. In considering the distribution of lawyers' services we must think not only of those who are served by lawyers but those who are not. Koppell's discussion of legal aid indicates that there are strata to whom lawyers are unavailable. And we lack information about the jobs that lawyers do not do—the intermediary, negotiator, trustee, adviser, and spokesman functions that in other settings gravitate to lawyers. To what extent are those functions performed by clerks and touts, village notables and businessmen, by politicians and administrators? Compared to the protean, expansionist American lawyer, the Indian lawyer remains restricted in his role. It is only a slight exaggeration to think of him as a somewhat enlarged, popularized version of the barrister[23] half of his British counterpart (although in Britain barristers make up less than 10% of the legal profession[24]). But the Indian lawyer lives in a society in which legal regulation is called upon to play a vastly greater role than in Britain where, a recent study observes "'the law' plays a less important role than in almost any other Western country."[25]

India's simultaneous commitments to economic development, a welfare state and democracy imply vast new demands on the legal system—demands for systematic but flexible regulation, for new forms of protection and participation, and for broader distribution of legal resources. Will the Indian legal profession expand its role to meet these new demands? The problem of adapting to broader functions is not primarily a problem of lack of skills or drive, but of lack of appropriate organizational forms for mobilizing skills and channeling them to meet emerging needs. Will lawyers detach themselves from the courts and learn to operate in a wider range of legal settings? Will they overcome their

23. An exception must, of course be made for the solicitors in the cities of Bombay and Calcutta where the divided profession still prevails on the Original Side of the High Courts. In 1958, out of the 75,000 lawyers in India, 1,100 were solicitors. LAW COMMISSION OF INDIA, *supra* note 16, at 584-85.

24. In 1963 there were 2,050 practicing barristers in England and Wales and approximately 20,000 practicing solicitors. AMERICAN BAR FOUNDATION, INTERNATIONAL DIRECTORY OF BAR ASSOCIATIONS 45-47 (1964).

25. BRIAN ABEL-SMITH & ROBERT STEVENS, LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965, at 1 (1967).

individualism to find forms of enduring collaboration that will permit the development of expertise in the substantive problems of those they serve? Will they temper their rule-mindedness into a more flexible and pragmatic problem-solving approach? Such a transformation depends upon the adaptative capacity of the profession and upon the capacity of legal education to impart the needed skills and attitudes. But to an equal extent it requires that the demand for more differentiated, complex and widely distributed legal services be made effective. Here, major initiatives would seem to lie with the government as dispenser of legal regulation, as a major consumer of legal services, and (potentially) as distributor of legal resources. Only informed and imaginative collaboration between government, legal education and the profession can create the conditions under which the profession can provide in full measure its potential contribution to a developed and democratic India.

A SKETCH OF THE DEVELOPMENT OF THE LEGAL PROFESSION IN INDIA

SAMUEL SCHMITTHENER
Bhimavaram, West Godavari District, Andhra Pradesh

THE LEGAL PROFESSION AS it exists in India today had its beginnings in the first years of British rule. The Hindu pandits, Muslim muftis and Portuguese lawyers who served under earlier regimes had little effect upon the system of law and legal practice that developed under British administration. At first, the prestige of the legal profession was very low. From this low state and disrepute the profession developed into the most highly respected and influential one in Indian society. The most talented Indians were attracted to the study and practice of law. The profession dominated the public life of the country and played a prominent role in the national struggle for freedom. "There was no movement in any sphere of public activity—educational, cultural, or humanitarian—in which the lawyers were not in the forefront." [1] However, after independence the relative prestige and public influence of the profession declined.

This paper will attempt to sketch the rise of the profession from its low state during the first hundred years, to explain the sources of its respect and influence, to recount its accomplishments and contributions to the national life and, finally, to suggest some factors leading to its decline.

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Material in brackets has been supplied by Editor Marc Galanter, with permission of the author.

1. K. N. KATJU, THE DAYS I REMEMBER ii (1961).

BEGINNINGS—THE FIRST HUNDRED YEARS

The history of the legal profession in India begins with the establishment of the first British court in Bombay in 1672 by Governor Gerald Aungier.[2] The first Attorney General appointed by the Governor was George Wilcox, who "was acquainted with legal business and particularly in the administration of estates of deceased persons and granting of probate."[3] There was much work of this type at Bombay. Wilcox made provision for parties to be represented by attorneys and fixed the "counciller's fee at a little more than Rs. one."[4]

At the inaugural procession of the Court of Judicature there were "fower [four] Atturneys or Common pleaders on foot."[5] These men were probably Portuguese and Portuguese-Indian,[6] since the Portuguese had ruled Bombay and administered their law there from 1534 to 1668, and Portuguese civil law remained in force under the British until Aungier's administration. One of the four, Simeo Sarrao (Ceron) acted as legal advisor to the Company and dominated the Court since he was the only one who had legal training and experience. "People were forced to use his advice in difficult disputes."[7] He was so learned in law that he confounded the untrained judges with many references and learned opinions which they had no way of verifying.[8] He was finally dismissed by the governor for "Cheats" after a petition had been lodged against him.

Besides these attorneys there were what Malabari calls "a plague of speculative solicitors" in Bombay during Aungier's time. The Governor referred to them in a letter to the newly appointed judge:

> So we would have you take care that vexations [sic] suites and contrivances layed by common Barristers to disturb ye quiet of good people may be discouraged and prevented. And let ye judge know from us that wee expect he maintain gravity, integrity, and authority of his office; and

2. P. B. VACHHA, FAMOUS JUDGES, LAWYERS, AND CASES OF BOMBAY 8 (1962), and C. FAWCETT, THE FIRST CENTURY OF BRITISH JUSTICE IN INDIA 57 (1934), disagree about whether the court functioned before 1677.

3. VACHHA, *supra* note 2, at 8.

4. FAWCETT, *supra* note 2, at 53.

5. VACHHA, *supra* note 2, at 7.

6. FAWCETT, *supra* note 2, at 62. The few Portuguese lawyers who continued under the British were gone before the profession had developed very much, and there is no visible carry-over from Portuguese tradition in later practice.

7. *Id.* at 44.

8. VACHHA, *supra* note 2, at 10.

> that he doth not bring disrepute on the court of Bombay by lightness partiality, self-seeking, or contenancing common Barristers in which sort of vermin they say Bombay is very unhappy.[9]

Malabari correctly noted that the word "Barrister" was a misspelling for the word "barritor," one who stirs up litigation. These common barritors seemed to find plenty of business and probably acted as professional bond writers and drew up sale deeds, leases, and mortgages.[10] In order to control such barritors and attorneys who claimed to have special knowledge of the law, Aungier requested the East India Company to send a Judge Advocate, learned in law. But the Company turned down his request stating that it would do "more harm than good, especially in the stirring up of strife and contention." [11] The Company tried to discourage the growth of the profession because the directors believed that more lawyers would bring an increase in law suits and foment more disputes in the colonies.[12]

The Company's attitude of contempt for the legal profession reflected the disreputable state of the bench and bar in England during the years of the Restoration. The High Court under William Scroggs and Jeffreys had sunk to its lowest depths.[13] The Company not only refused to send a Judge Advocate, but resolved not to send out any attorneys or lawyers' clerks, and instructed the Bombay Council "to encourage litigants to manage their own cases" and "to admit of noe Sollicitors or Atturneys to plead or manage causes in our Courts, but such as you shall first of, upon your knowledge of them to be men of good and honest reputation." [14]

Thus, as early as 1674 we note that attorneys are practicing, that they have a bad reputation, and that their admission (and restriction of their number) is placed in the hands of the Governor and council and not with the court. The usefulness of the profession was not yet recognized, nor was it to be for many years. The charters and rules of the Court of Judicature and the later Mayor's Courts do not mention the profession and so for a hundred years the profession developed haphazardly, without direction, regulation, or proper recognition.[15]

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9. B. M. MALABARI, BOMBAY IN THE MAKING 154 (1910).
10. FAWCETT, *supra* note 2, at 68.
11. VACHHA, *supra* note 2, at 8.
12. FAWCETT, *supra* note 2, at 61.
13. VACHHA, *supra* note 2, at 17.
14. FAWCETT, *supra* note 2, at 61.
15. *Id.* at 171.

The fact that none of the early attorneys had legal training did not add to the prestige of the profession. Some of those who practiced were members of the clerical staff of the court and acted as agents for parties in the court.[16] Other attorneys seem to have been businessmen. Describing the early courts Charles Lockyer wrote, "[l]awyers are plenty, and as knowing as can be expected from broken linen drapers and other cracked tradesmen who seek their fortunes here by their wits."[17] Probably the most competent of these untrained attorneys were Company servants appointed to act as attorneys. Some of them had studied "something both in Civil and common law."[18] "Although they were no more than ordinary covenanted servants in the beginning appointed primarily to the cases of the Company, they took up individual cases beyond the sphere of their official duty. . . ."[19]

The first man with legal training to be sent to India was Dr. John St. John, appointed by the Company in 1684 to be Judge of the Admiralty Court. For a time he also acted as Judge Advocate of the Court of Judicature. There was much disagreement concerning his powers of jurisdiction and his refusal to subject the ideals of justice to the interests of the Company.[20] After two years he was dismissed by Josiah Child from the post of Chief Justice and replaced by John Vaux, a factor who had no legal training.[21] The Company approved this action and issued a statement that judges should hereafter "behave themselves to the satisfaction of our Generall and Council" or to be replaced.[22] Since the bar usually is improved by a strong, well-educated bench, this serious blow to the court in Bombay was detrimental to the development of the legal profession.

As the courts developed, so did the legal profession. In Madras and Calcutta there were no legal practitioners prior to the establishment of the Mayor's Courts in 1726 although two trained lawyers, John Biggs (1687-89) and John Dolben (1692-94), had served as judges.[23] In Madras, there were four attorneys at the Mayor's Court in 1764[24]

16. *Id.* at 191.

17. J. W. KAYE, THE ADMINISTRATION OF THE EAST INDIA COMPANY 322n (1853).

18. VACHHA, *supra* note 2, at 8.

19. B. B. MISRA, THE JUDICIAL ADMINISTRATION OF THE EAST INDIA COMPANY IN BENGAL, 1765-1782 (1961).

20. FAWCETT, *supra* note 2, at 146.

21. *Id.* at 124-26 and MALABARI, *supra* note 9, at 163.

22. FAWCETT, *supra* note 2, at 145.

23. *Id.* at 211.

24. H. D. LOVE, VESTIGES OF OLD MADRAS, 1640-1800, at 139 (1913).

and the same number at Calcutta in 1769.[25] Although a great number of Indians took their legal business to these courts, there were no Indian attorneys during this period.

The Mayor's Courts, established in the three presidency towns, were crown courts with right of appeal first to the Governor in Council and, if necessary, over him to the Privy Council. The Mayor's Courts improved the quality of justice and gave more prestige to the pleading of cases. However, the need to have legally trained judges and lawyers was still not realized by the Company. The lack of law libraries and a properly trained profession was often evident. Describing the court at Madras, Wheeler writes "It puzzles the most celebrated lawyers there to find rules in the statute laws." [26] As the mayor and aldermen who sat on these courts had no legal training, were elected to short terms, and were very busy men, they had neither the skill nor time to gain knowledge of the law.

The attorneys seem to have gained more influence than the bench. The Madras Council explained this situation to the Company in 1791:

> As the colony increased with the increase of commerce and of territory causes multiplied and became more complex. The judges now felt the want of experience, and even of time sufficient to go through their duties. New points constantly arose which required legal as well as mercantile knowledge: men who professed or pretended to this knowledge were therefore introduced as attorneys, and obtained considerable influence in Courts where the judges pretended to no legal skill.[27]

During this period two principles concerning the profession were established. The right of an attorney to protect the rights of his client in spite of opposition from council members or the governor was upheld for attorneys in each of the Mayor's Courts. A Mr. Henry Rumbolt, attorney of the Mayor's Court, Madras, had been ordered home to England after acting in cases against the Governor. The Company allowed him to "return to Madras as a Free Merchant and directed that . . . he should be employed as Attorney in all cases where the Company was concerned." [28] A few years later in 1735 John Cleland, an attorney registered with the court at Bombay, conducted a vigorous suit for

25. MISRA, *supra* note 19, at 137 n.1.

26. J. T. WHEELER, MADRAS IN OLDEN TIMES—EARLY RECORDS OF THE BRITISH IN INDIA 127 (1878). *See* VACHHA, *supra* note 2, at 16.

27. FAWCETT, *supra* note 2, at 226.

28. *Id.* at 221-22.

his client against Henry Lowther, a member of the Governor's Council. In spite of the opposition of council members and a move by the Governor to transfer him to another factory, Cleland stood firm and was supported by the Company which commended him to the Governor: "You must encourage him and all our servants while they behave well in their several places." [29] Several other similar cases occurred. In 1769 Richard Whiteall, attorney at Calcutta, was dismissed by the court without charges or cause. His appeal to the Council was not accepted. But when he appealed to the Company, the directors instructed the Council to hear his appeal. It was heard and accepted.[30]

While upholding the rights of these attorneys the Company did "express their disapproval of the spirit that often led the courts to side against the interests of the Company, 'that affected independency which we are informed has crept in among the young Aldermen and Attorneys in the Mayor's Court.'" [31] Perhaps the most independent of all these attorneys was Charles Bromley of Madras. He was "generally found in opposition to the government." He had opposed the Company's Quit Rent policy.[32] He had aided the commander-in-chief, Sir Robert Fletcher, in deposing Governor Pigot and defended Fletcher and his associates at the trial in 1777.[33] Thus defense of individual rights and an independent, even antigovernment attitude were evident in the profession long before it included any Indians.

The second principle established during the period of Mayor's Courts was the right to dismiss an attorney guilty of misconduct. For example, the Mayor's Court of Madras dismissed Attorney Jones, a troublesome man who had tried to get a monopoly on the fishing trade in Madras and had had his servants assault a competitor. The court charged that he had worked through his employee or *"Dubash"* to encourage litigation, and they took the following action:

> The notoriety of the charges alleged against Mr. Jones, besides his contemptuous Behavior toward the Authority of this Government on a former Occasion, rendered it, in our Opinion, proper to inflict some mark of our displeasure upon him, and at a Court of Appeals held the 19th February We accordingly passed a Resolution incapacitating him from practicing as a solicitor in that court.[34]

29. *Id.* at 221.
30. MISRA, *supra* note 19, at 139.
31. FAWCETT, *supra* note 2, at 223.
32. LOVE, *supra* note 25, at 302.
33. *Id.* at 116.
34. *Id.* at 303.

THE SUPREME COURT ERA OF BRITISH PRACTICE—1774–1861

Dissatisfaction with the weaknesses of the Mayor's Court led to the establishment in 1774 by Royal Charter of a Supreme Court of Judicature at Calcutta. The Supreme Court enjoyed a wide jurisdiction over civil and criminal matters in the city of Calcutta and a more restricted jurisdiction over cases involving inhabitants of the *mofussil*. With certain exceptions for Hindu and Muslim law in family matters, the law to be applied was the law of England. Similar Supreme Courts were established in Madras in 1801 and Bombay in 1823.[35]

The first barristers appear in India after the opening of the Supreme Court in Calcutta in 1774. As barristers began to come into the courts and work as advocates, the attorneys gave up pleading and worked as solicitors and the two grades of legal practice gradually became distinct and separate as they were in England. Many of the first barristers came as judges, not as lawyers. The first barrister in Bombay was the Judge of the new Recorder's Court set up on 1798. By 1807 there were only two barristers working as advocates in Bombay. One was the first Advocate General, Stuart Thriepland.[36] Madras gained its first barrister in 1778 when Mr. Benjamin Sullivan, who was on his way to practice at the Supreme Court Bar at Calcutta, stopped for a visit and was persuaded to stay on as Government Advocate at a salary of 250 Pagodas per month.[37] The salary was doubled in 1780 since he was not allowed to practice privately: 6,000 Pagodas annually (£ 2,400 or Rs19,200).[38]

The establishment of the Supreme Court brought recognition, wealth, and prestige to the legal profession and brought a steady flow of well-trained barristers and solicitors into Calcutta. The charter of the court required that the chief justice and three puisne judges be English barristers of at least five years standing.[39] The legal profession was recognized for the first time. The charter empowered the court to approve, admit, and enroll advocates and attorneys to plead and act on behalf of suitors. It also gave the court authority to remove lawyers from

35. M. P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY (1952).

36. VACHHA, *supra* note 2, at 25.

37. LOVE, *supra* note 25, at 140.

38. *Id.* at 301.

39. THE LAW RELATING TO INDIA AND THE EAST INDIA COMPANY, 2d ed., at 30 (1911).

the roll of the court "on a reasonable cause and to prohibit practitioners not properly admitted and enrolled from practicing in the court." [40]

The court itself provided employment for three full-time lawyers with good salaries:[41]

Advocate General	£ 3,000 per annum with allowance of Rs2,500 monthly	= Rs54,000
Company counsel for suits and prosecutions	£ 4,500	= Rs36,000
Company counsel for contracts and conveyances	£ 3,000	= Rs24,000

Besides these full-time posts there were a number of offices held by attorneys who practiced as solicitors, which brought substantial supplementary income. The Register of the court, who was also allowed to practice, earned £ 7,000 (Rs56,000) a year.[42] Each of the judges and the chief justice had a solicitor acting as his clerk. Hickey, who served as clerk for Justice Hyde, said, "I had a fee upon every process issued . . . I never received less than Rs. 500 a month, frequently Rs. 800." [43] The post of Deputy Sheriff was served by a solicitor.[44] Hickey reported that the most he made from that post in one year was Rs25,000.[45] The sheriffs, who could not be lawyers, did much better, the record being Rs130,000 for one year.[46] There were other paying part-time posts open to attorneys, such as: counsel for paupers, £ 810 or Rs7,200; attorney for paupers, £ 540 or Rs4,800; and examiner, £ 450 or Rs 4,000.[47]

The first barrister to practice as an advocate in Calcutta was Mr. Ferrer, who was admitted by the Supreme Court in October of 1774.[48] He acted as advocate for the defense of Nuncomar in 1775.[49] The

40. E. C. ORMAND, RULES OF THE CALCUTTA HIGH COURT 44 (1940).

41. *Op. cit., supra* note 39, at 32. The allowance was not agreed upon by the London office and was ordered to be refunded after three years, but was not.

42. 4 A. SPENCER, MEMOIRS OF WILLIAM HICKEY 359 (1925).

43. *Id.* at 48.

44. *Id.* at 210.

45. *Id.* at 211.

46. *Id.*

47. MISRA, *supra* note 19, at 202.

48. H. E. BUSTEED, ECHOES FROM OLD CALCUTTA 72 (1897).

49. [*I.e.*, the celebrated trial for forgery of Maharaja Nandakumar (Nuncomar) before the Supreme Court at Calcutta in 1775, leading to his execution and to a controversy, touching all concerned, that has lasted for almost two centuries. Among the recent literature is L. S. Sutherland, *New Evidence on the Nandakumar Trail*, 72 ANTE 348-65 (1957); J. D. M. Derrett, *Nandakumar's Forgery*, 75 ENG. HISTORICAL J. 223-68 (1960); B. N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA (1967).]

counsel for the crown in that case was Mr. Durham, who proved to be so weak that the judges did most of the questioning for the prosecution.[50] However, in a short time the bar became stronger as the great volume of legal business and high fees attracted many to the city. William Hickey reported that when he returned to Calcutta in 1793 there were nine barristers including the Attorney General.[51] In his diary for the period 1790-1809 he mentions seventeen barristers and fifteen attorneys and solicitors (including himself).[52] In Calcutta in 1861 there were thirty-two advocates, and sixty attorneys, proctors, or solicitors of whom four were Indians.[53]

As the other Supreme Courts were opened in Madras (1801) and Bombay (1824) many lawyers came to share in the great opportunities opened to the profession.[54] In Bombay, at the end of the Supreme Court era (1861) there were thirteen advocates and thirty solicitors and attorneys on the rolls of the court.[55]

Besides the British, a great number of Indians made use of the courts, preferring the Royal English justice of the presidency towns to the Company's in the *mofussil*. Fees were very high.[56] Even a new practitioner could begin earning large sums almost immediately. Hickey writes of his first practice "having within a week after I commenced business twelve actions and three equity suits to prosecute or defend." [57] Mr. Farrer, the barrister, retired after four years of practice with a fortune of £ 60,000.[58] Hickey reported that he paid out Rs12,600 for

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50. BUSTEED, *supra* note 48, at 76.

51. 3 SPENCER, *supra* note 42, at 149.

52. 2 *id.* at 127; vol. 3, at 146-49, 311; vol. 4, at 2, 8, 46, 55, 57, 181, 203, 259, 272, 275, 382.

53. MISRA, THE INDIAN MIDDLE CLASSES: THEIR GROWTH IN MODERN TIMES (1961), at 327.

54. Even before the Supreme Court there were two barristers and eleven other legal practitioners practicing in the Recorder's Court at Madras. (J. C. GOPALRATNAM, A CENTURY COMPLETED—A HISTORY OF THE MADRAS HIGH COURT, 1862-1926, at 96 [1962].) One of the barristers, Benjamin Sullivan, became a puisne judge of the Supreme Court; the other, Mr. Ansthruther, became the Advocat General. *Id.* at 88, 97.

55. VACHHA, *supra* note 2, at 29.

56. Regulation VII of 1793 had attempted to limit fees:

Value of Suit (rupees)	Fees	Value of Suit (rupees)	Fees
1,000	5%	25,000	2%
5,000	4%	50,000	1%
10,000	3%	100,000	¾%

57. 2 SPENCER, *supra* note 42, at 134.

58. BUSTEED, *supra* note 48, at 72.

counsel in the defense of his friend, Mr. Hunter.[59] Montreau, a barrister in Bombay, received £3,000 as a retaining fee in the Opium Wager Case.[60] A report in 1823 revealed that fees charged in Bombay were "seven times as great as those usually received in England."[61] The Indian Law Commissioners' Report of 1844 revealed "the rate of bar fees being two, three–five times what it is in England."[62] The average cost of a defended cause for each side was Rs1,200.[63] The commission compared fees for comparable services in India and England on the basis of figures taken from advocates' account books:[64]

Service	England	India
a. Pleading fee showing cause and moving to make rule absolute	£1-3-6 to 2-4-6 2-17-6	£3-8-0 to 5-2-0 8-2-0
b. Consultation	3-10-6	5-2-0
c. Defended cause	2-2-0 to 4-4-0	8-10-0 to 23-16

In reference to the high fees charged the Law Commission noted that whereas in England the legal profession was open and competitive, "here it is a monopoly which officers, barristers, and attorneys mutually endeavored in a former times to make as productive to one another as possible."[65] Besides controlling the amount of fees in this way the senior members of the bar had all the small, incidental business as well, "which in England would go to the junior counsel."[66]

The bar vigorously resisted any attempt to limit or restrict the high fees they earned. In 1823 in Bombay when the new Advocate General, Mr. Norton, tried to introduce an even higher scale of fees, the Recorder, Sir Edward West, decided against him and the barristers, and directed fees be charged as in England, or be decided upon by the Master in Equity, a court official. To this the barristers wrote a bitter memorandum making unfounded libelous attack upon the court. For this improper conduct the five barristers were suspended for a period of six months.[67]

59. SPENCER, *supra* note 42, at 164.
60. VACHHA, *supra* note 2, at 10.
61. F. G. D. DREWITT, BOMBAY IN THE DAYS OF GEORGE IV 63 (1935).
62. 6 CALCUTTA REVIEW 530 (1846).
63. *Id.* at 526.
64. *Id.* at 528.
65. *Id.* at 529.
66. *Id.* at 530.
67. DREWITT, *supra* note 61, at 65.

The bar at Calcutta was more successful in protecting its income. The Supreme Court in 1798 had passed a resolution limiting retaining fee of counsel to only five gold *mohurs* (Rs80) and prohibiting refresher fees. Mr. Burroughs led the bar protest pointing out the unconstitutionality of the action. When he openly told the court that he would ignore the new rules and collect fees as usual, the Chief Justice promised to have his name struck from the advocates' roll of the court if he defied the new rules. After two days the judge backed down and revised the rules so that only attorneys were prohibited from giving or sending to barristers a retainer exceeding five gold *mohurs,* or refresher fees. This simply led to the practice of clients paying fees directly to the advocates instead of through the attorneys as previously.[68]

The legal practitioner cannot be blamed for charging high fees in those days. There was great wealth and trade in all of the factory towns. Traders were making and sometimes losing fortunes. There was a great deal of heavy investment and extensive borrowing and speculation.[69] There were risks, too. Many ships were lost to storms or pirates. There were many very "opulent" Indian traders and moneylenders as well. Promissory notes passed from merchant to merchant as legal tender. In such large trading cities as Calcutta suits often involved very large sums. Fees were high, but the incomes of lawyers were probably no higher than those of the traders. One writer defends the high income of the lawyers as follows:

> Sharing the generous fortune of the society in which they lived, many of our Solicitors like their wealthy clients might lay claim to the title of "Nawab," but although there was possibly no table of fees in existence to limit and control their charges, it is improbable that any of them ever acquired the wealth of our opulent merchants.
>
> They established a tradition, . . . and like their polished and often scholarly clients conducted their business with the lofty dignity of men whose means were generous and ample and who were in a position to regard their honour and their reputation as things of some importance.[70]

The expense of living as a gentleman attorney was often greater than the lucrative income of legal practice. William Hickey gives us a fairly clear record of what it cost him to move with the best society (the judges, councilmen, lawyers, and military officers) of Calcutta. To get

68. SPENCER, *supra* note 42, at 207.

69. C. MOORE, THE SHERIFFS OF FORT WILLIAM, *1775-1926,* at 9 (1926).

70. *Id.* at 248.

established he borrowed Rs40,000 at 12% interest. Carriages and horses cost him Rs6,550.[71] Monthly rent was Rs450, salary for sixty-three servants Rs666[72] and other expenses averaged Rs2,000 monthly. (His average living expense of Rs36,000 a year was equal to a judge's salary.) For fifteen years he was unable to clear off his debts in spite of a very good income.[73] His financial problems were due in part to his clever dishonest *bania* and his careless bookkeeping, and to the repeated misfortune of being responsible for the bad debts of others who had absconded or died. Wishing to retire with a modest fortune he spent his last five years in Calcutta practicing alone, living less lavishly, keeping careful records,[74] and earning much from fees and from his post as clerk of the Chief Justice. Upon retirement he paid all of his debts, extra gratuities to servants, ticket to England, and still had Rs92,000 net balance.[75]

The prestige and income of the solicitors was no less than that of the barristers. Both moved at the same level of society. New solicitors and barristers were invited to dinner at the Chief Justice's and councilmen's homes and invited to numerous dinner parties and breakfasts given by the elite of Calcutta.[76] The prestige of a lawyer depended upon his hospitality, manners, and friends, not upon whether he was an attorney or an advocate. An attorney could earn as much as a barrister. Some barristers, like Solomon Hamilton, found it even more profitable and to their liking to work as attorneys instead of as advocates.[77]

Besides reviewing cases, drafting briefs for advocates, preparing wills, preparing appeals of rich clients to the Privy Council, and handling the estates and business of wealthy merchants,[78] the attorneys' offices provided work and training for attorneys' clerks. Young attorneys fresh from England worked for several years as clerks in the offices of senior attorneys until one of the judges would recommend them to be attorney of one of the courts. Hickey, at one time, had three such clerks, one of whom was recommended by Justice Dunkin to serve as attorney in the Recorder's Court of Madras.[79]

71. 3 SPENCER, *supra* note 42, at 171.
72. 4 *id.* at 36.
73. 3 *id.* at 202.
74. 4 *id.* at 341.
75. 4 *id.* at 397.
76. 2 *id.* at 134-36.
77. 3 *id.* at 146.
78. 4 *id.* at 257.
79. 4 *id.* at 18.

Bench-bar relationships were close. Socially the lawyers were accepted as equals by the judges, all of whom had served as barristers, often in the same courts. Each judge chose one of his close friends from among the attorneys to be his official clerk. They came from the same social class in England and a number of them had been school chums. This close relationship made it possible for the advocates to address the bench quite frankly, and sometimes with great anger, rudeness or defiance.[80] Forthright expression and brilliant humor became established as part of the tradition of the Calcutta court.

The court maintained the right to admit, discipline, and dismiss attorneys and barristers. Attorneys were not admitted without recommendation from a high official in England or a judge in India. Permission to practice in the court could be refused even a barrister.[81, 82] The suspension of barristers in Bombay has already been noted.[83]

The bar and bench of the Mayor's, Recorder's and Supreme Courts were totally English.[84] Except for the four Indian solicitors in Calcutta,[85] the only Indians working in the latter courts were the interpreters and the Brahmin pandits and Muslim kazis who served as law officers or assessors on matters of Hindu and Muslim law. The charters of these courts had been concerned mostly with the qualifications and powers of the judiciary; the bar was left to develop without much formal regulation.

INDIAN LEGAL PRACTITIONERS— THE MOFUSSIL COURTS

From 1772 in Bengal and later in other places, the British undertook to administer justice to the occupants of their territories outside the presidency towns. In each presidency a dual hierarchy of civil

80. 4 *id.* at 174-76.

81. 4 *id.* at 60-63.

82. Robert Morris, an advocate with a bad reputation, was refused permission to practice before the Calcutta Supreme Court. Defying the refusal he appeared the next day in court wearing his gown and wig and claiming his right to practice in any of the King's Courts. He was again refused permission because of the "vile and disgraceful life you have led."

83. The court in Calcutta had a rule that names of attorneys absent for more than one year were to be struck off the rolls. They were readmitted if proper explanation was given.

84. VACHHA, *supra* note 2, at 30.

85. MISRA, *supra* note 53, at 327.

and criminal courts (*adalats*), altered from time to time, for the *mofussil* or back-country, with a *Sudder* (chief) Court at the apex, existed from the late 18th century until they were merged with the Supreme Courts into a unified system after 1860. The law applied in these courts included an admixture of Muslim and Hindu law with the Regulations and the common law. The inferior judges were mostly Indian, but the *Sudder* Courts were staffed by British civil servants. The lawyers were entirely Indian both below and (until 1846) in the *Sudder* Courts. The legal profession in these courts developed with little contact with that in the Supreme Courts in the presidency towns.[86]

In contrast to the courts in the presidency towns, the legal profession in the *mofussil* was established, guided and controlled by legislation soon after its inception. Legal practice as carried on by Indian vakils and agents prior to 1793 was neither recognized nor controlled by the Dewanee courts.[87] Even before 1772 vakils had been appearing for litigants in the *zilla* courts of the Nabobs.[88] There were no laws concerning their qualification, relationship to the court, mode of procedure, or ethics of practice. There was little order; vakils pleaded cases by "simultaneous exchange of questions and answers." Clients would sometimes silence their vakil in the midst of pleadings and act themselves or have another agent take up the argument.[89]

There were two kinds of legal agents: untrained relatives or servants of the parties in court and professional pleaders who had, or claimed

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86. [On the system of *adalats*, *see* JAIN, *supra* note 35, at chs. VI, IX-XIV. On the law applied there, *see* Galanter, *The Displacement of Traditional Law in India*, J. SOCIAL ISSUES (1968).]

87. The rise of the profession is reflected by the evolution of the word "vakil." Vakil is an Urdu word meaning agent. It was first used in Muslim law books in connection with marriage settlement. In the early British period vakil meant a personal representative from a governor or general to the court of a Nabob or Raja. (2 FAWCETT, *supra* note 2, at 363, 375.) It was also used referring to agents of the district collector, a *zemindar*, or high official—either Indian or English (MISRA, *supra* note 19, at 163). In the context of the *zilla* courts under the Nabobs, vakil also meant an agent representing a party in court of law. After regulation establishing pleading as a profession for Indians, vakil means a pleader with legal training, and a license authorizing him to practice.

When the High Courts were formed in 1862 vakil meant one who had studied law in a university and had passed the High Court vakils' examination. Later it came to mean the graduate of a university with an LL.B. degree who as a full-fledged advocate can handle work without the help of counsel on either Appellate or the Original side. (P. S. SIVASWAMI AIYAR, A GREAT LIBERAL 207 [Nilakanta K. A. Sastri ed. 1965].)

88. 5 T. B. SAPRU, ENCYCLOPEDIA OF THE GENERAL ACTS AND CODES OF INDIA 176 (1938).

89. MISRA, *supra* note 53, at 164.

to have, training in either Muslim or Hindu law. The Regulations describe these untrained pleaders:

> Equally with the first description of Vakeels, they were little versed in the laws and Regulations of the country; and not having the protection of a public character, and their situations in the court not being defined by any Regulations of Government, they were subject in the same degree to the intrigues and assumed influence of the ministerial officers of the courts, and unable to protect their employees from oppression and exaction.[90]

As there were no restrictions placed on these pleaders they were able to demand exorbitant fixed salaries and then prolong a case by devious means to draw that salary as long as possible.[91] With the great increase in Regulations, the frequent amendments and deletions, and increasing complexity in the court procedure, it became harder and harder for persons to plead their own cases, so they had to hire vakils who purported to have this knowledge.[92]

Bengal Regulation VII of 1793 brought order and some measure of quality to pleading and endeavored to establish it as a respectable profession:

> It is therefore indispensably necessary for enabling the courts to administer, and the suitors to obtain justice, that the pleading of causes should be made a distinct profession; and that no persons shall be admitted to plead in the courts but men of character and education, versed in the Mohammedan or Hindoo law and in the Regulations passed by the British Government, and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trusts.[93]

The Sudder Dewanee Adawlut was empowered by the Regulation to appoint as many pleaders of the Muslim or Hindu religion as necessary, specifying the court in which they were empowered to plead, and to take oaths from each pleader upon his joining the court. These pleaders were to be selected from among the students of the Mohammedan Madrassa (college) at Calcutta and the Hindu College at Benares and were to be men of good character. They were required to acquaint themselves with the Regulations.

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90. 1 R. CLARKE, THE REGULATIONS OF THE GOVERNMENT OF FORT WILLIAM IN BENGAL 1793-1806 (1854). Regulation VII, pt. 1, §1, of 1793.

91. *Id.*

92. MISRA, *supra* note 53, at 166.

93. CLARKE, *supra* note 90.

To regulate the profession a number of rules were laid down concerning receiving of retainers, execution of *vakalutnama* and amount of fees, the number of lawyers who could be engaged for each case, and distribution of fees. Causes for punishment of legal practitioners by fine, suspension, and dismissal were listed in Regulation VII: disrespect of court, promoting and encouraging litigious suits, fraud, willful delaying of suits, accepting gifts of more than the authorized amount of fees from a client, or dropping a client after receiving a retainer. In cases concerning suspension or dismissal the Sudder Dewanee Adawlut was to take the action only after the charge had been proved. It also made legal agents liable to prosecution by their clients for malpractice.

Besides providing for discipline of the profession the Regulation offered greater opportunities for lawyers by requiring the appointment of Government pleaders. These Government pleaders were to be paid at the same rate, and had the privilege of working as private pleaders in other suits in which Government was not a party.[94]

Subsequent legislation concerning the profession followed the general pattern laid down in 1793. The rather lengthy and detailed Regulation XXVIII of 1814 extended the provisions for licensing, discipline, and removal of vakils to the Provincial Courts. Rules concerning fees, practice, government pleaders, and malpractice were considerably more detailed than before. The new sections of the 1814 Regulation indicate the kind of problems the courts were having with this rising profession. Section VIII stipulated that pleaders must take precaution to ascertain the real names of parties giving *vakalutnama* and would be liable for dismissal if a *vakalutnama* under a fictitious name were accepted. Furthermore, the pleader was warned to study plaints before they were filed and make sure that groundless, irrelevant points were not included, that useless witnesses were not summoned, and that all exhibits were examined previous to being filed. If a vakil continued, after warning, to produce irrelevant exhibits or witnesses he was to be fined Rs20 or made to forfeit his fee. Other provinces passed regulations almost identical to those of Bengal.[95]

Regulations provided that all pleadings were first to be completely written and then read out.[96] Then the court could make inquiries to

94. *Id.*

95. Madras Regulation 10 of 1802, Bombay Regulation 14 of 1802, and Northwest Provinces Regulation 10 of 1803 made the same provision for appointment of vakils as did Regulation VII of 1793. Regulations very similar to Bengal Regulation XVIII of 1814 were passed by Madras (Regulation 14 of 1816) and Bombay (Regulation 2 of 1817).

96. CLARKE, *supra* note 90, Madras Regulation XV, 1816.

clarify issues, and call witnesses if necessary. Richard Temple, who served as a district judge before the Mutiny, described court procedure: "The vernacular proceedings covered reams of country-made paper. These documents were read out by native clerks with a distinctiveness and fluency which I had never known in any European language. I dictated my orders to the clerks which were read out before being initialed by me." [97]

Regarding the quality of the Indian pleaders, Raja Rammohun Roy reported to the Select Committee of the House of Commons in 1831 that: "Many pleaders of the Sudder Dewani Adawlut are men of the highest respectability and legal knowledge, as the judges are very select in their appointment and treat them in a way which makes them feel that they have a character to support." In the *zilla* courts, however, he stated, "Some respectable pleaders we met with, but proper persons for the office are not always carefully selected and in general I may observe that pleaders are held in a state of too much independence by the judges particularly in the interior courts which must incapacitate them from standing firmly in support of the rules of the court." [97a]

Professional respectability was hard to come by in spite of continuous legislation to control procedure and practice. Leaders such as Metcalfe and Elphinstone regarded lawyers as being the most undesirable aspect of a legal system which they believed was as a whole quite unfit for India. Elphinstone refers to "this institution, that mystery that enables litigous people to employ courts of justice as engines of intimidation and which renders necessary a class of lawyers who among the natives are great fomenters of disputes." [98] Macauley described the lawyers of Bengal as "ravenous pettifoggers who fattened on the misery and terror of an immense community." [99] These attitudes were shared by many: "The . . . whole public looked down upon [pleaders] as pests, but they were constantly employed because they were the only available guides in the new legal labyrinth." [100]

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97. R. TEMPLE, THE STORY OF MY LIFE 38 (1896).

97a. R. Rammohun Roy, *Exposition of the Practical Operations of the Judicial and Revenue Systems of India*, in THE ENGLISH WORKS OF RAMMOHUN ROY (Dr. Kalidas Nay and Dabajyoti Burman eds.) (1947).

98. K. A. BALLHATCHET, SOCIAL POLICY AND SOCIAL CHANGE IN WESTERN INDIA 144 (1957).

99. KAYE, *supra* note 17, at 330.

100. P. SPEAR, *Twilight of the Moghuls* 95 (1951).

In 1882 Malabari described the *mofussil* vakil as "a column of vapor issuing from an Ocean of Emptiness. . . . He is brought alive by the Chief Justice, passes the day in the company of *chuprasis,* and . . . vegetates." [101] "His chemical composition is butter, brass and asafoetida." [102] He describes the successful vakil as one who is in the hands of a Marwari broker, who does his business in whispers in the corridors of the courthouse earning fees of Rs3 to Rs30.[103] However, we shall see that some of these humble pleaders rose to be great and highly respected men, and that many of their sons and grandsons became the great barristers, judges, and political leaders of India.

Besides the pleaders there were other legal agents, "employed . . . [as] inferior advisors or agents called *mukhtars* to advise them more or less as solicitors." [104] These men, though not licensed or recognized by the courts, did most of the attorney work. In his report to the Select Committee of the House of Commons in 1832 McKenzie stated that, though they were not included on the fees schedule, many of the *mukhtars* acted as professional men.[105]

William Hickey gives a graphic description of one opulent Memychuru Mulliah, a *bania* who had worked in close association with a number of solicitors for many years. He may be regarded as the prototype of the Indian nonlicensed solicitor:

> This man had acquired an extraordinary efficiency in our laws so much so that he had for many years been the advisor of all those who had anything to do with courts of justice and was competent to tell them whether they had sufficient merits in their cases to justify the commencement of or defence of a suit. He was also perfectly conversant with the distinction between an equitable and a legal title, and was in the practice of sitting every evening in his own house for a certain number of hours to hear the statements of the various persons that attended for the purpose of accompanying him, for which it was said . . . that he made those suitors whose causes he espoused and patronized amply repay him for his trouble and his time by exacting a very high percentage upon whatever the amount recovered or saved might be.[106]

Although pleading before the civil courts was limited to admitted practitioners, the *mukhtars* reaped a rich harvest by practicing in the

101. B. M. MALABARI, GUJARAT AND THE GUJARATIS 178 (1882).
102. *Id.* at 181.
103. *Id.* at 185.
104. MISRA, *supra* note 53, at 171.
105. *Id.*
106. 4 SPENCER, *supra* note 42, at 348.

criminal courts as well as acting as solicitors for the pleaders.[107] The *mukhtars* had enough persistence to survive the many regulations intended by Cornwallis to make them unnecessary,[108] the Legal Practitioners Act of 1846, and the formation of the High Courts with the accompanying rules. The *mukhtars* were recognized and brought under the control of the courts for the first time by Act XX of 1865, called the Pleader, Mukhtar, and Revenue Agents Act.[109] Revenue agents who worked in the revenue offices and courts were also given status as legal practitioners by this Act.[110] They were deemed to be the lowest in grade and did not play a significant part in the development of the legal profession.

Act I of 1846 enabled the barristers to increase their influence and income by extending practice to the *Sudder* Courts. "That every Barrister in any of Her Majesty's Courts of Justice in India shall be entitled as such to plead in any of the Sudder Courts of the E. India Company subject to all the rules in force in the said Sudder Courts applicable to Pleaders, whether relating to the language in which the Court is to be addressed or to any other matter" (§5). The barrister could also practice alongside the pleaders in the Small Cause Court.[111]

THE FOUNDING OF THE HIGH COURTS AND THEIR EFFECT

After the British Government assumed direct control of the territories of the East India Company (1858), the separate systems of the Company's courts in the *mofussil* and the royal courts in the presidency towns were consolidated into a unified judicial system in each of the three presidencies. At the apex of the new system were High Courts, chartered by the Crown, established at Calcutta, Bombay and Madras in 1862.[112]

The High Court bench was designed to combine the Supreme Court and *Sudder* Court traditions, thus uniting the "legal learning and judicial experience of the English barristers" with "the intimate experience of

107. MISRA, *supra* note 53, at 174.

108. *Id.* at 171.

109. 5 SAPRU, *supra* note 88, at 176.

110. *Id.*

111. O. TEMPLE, PRACTICE OF THE CALCUTTA COURT OF SMALL CAUSES 65 (1860).

112. [On the establishment of the High Courts, see M. P. JAIN, *supra* note 35, at ch. XVI.]

Indian customs, usages, and laws possessed by the civil servants." [113] "At least one-third of the judges, including the Chief Justice, were to be barristers of the United Kingdom; another one-third to be recruited from the judicial branch of the Indian Civil Service and the remaining places were made available to members of the subordinate judiciary, and Indian lawyers practicing in the High Court." [114]

Each of the High Courts was given the "power to make rules for the qualifications of proper persons as Advocates, Vakeels, and Attorneys at Bar." [115] The admission of vakils to practice before the High Courts ended the monopoly that the barristers had enjoyed in the Supreme Courts and vastly extended the practice and prestige of the Indian lawyers by giving them opportunities and privileges equal to those enjoyed for many years by the British lawyers. This was not accomplished without a struggle. The commissioners appointed to arrange the *Sudder* Court-High Court merger had advocated that the High Court bench be exclusively British and the bar open only to barristers. Judge Trevelyan, opposing such restrictions, argued that exclusion of Indians from the bench would "nourish . . . class antipathies, and injure . . . at once the state and the individual by depriving the public of the service of the ablest men, preventing wholesome competitions, and unduely exalting some without reference to their personal merits and depressing others." [116] His statement of policy in regard to the bar shows the spirit and intention of the merger was to make possible the full development of the profession:

> . . . At present barristers, attorneys and vakils plead before the Sadr Court while barristers have exclusive audience before the Supreme Court. . . . It would be hard to deprive the natives of the privilege they have long enjoyed of employing a cheap and rapidly improving, though still generally less efficient description of the agency; and I am confident that English barristers do not require exclusive privileges to enable them to maintain their position. They are employed now by all who can afford it and will continue to be so. The same objections exist to this limitation as to that proposed in reference to the eligibility for the bench. We cannot afford the weakness consequent upon social heart burnings. We want, for the improvement of all, the wholesome influence of competition. A native Bar will gradually be formed, but it will be following the lead and imitating the example of our English barristers.[117]

113. VACHHA, *supra* note 2, at 43.
114. *Id.* at 44.
115. ORMAND, *supra* note 40, §9, at 123.
116. 2 B. S. BALIGA, STUDIES IN MADRAS ADMINISTRATION 346 (1960).
117. *Id.*

Practicing side by side with British lawyers, the Indian vakils learned much of law, professional ethics, and standards of practice. Vachha acknowledges the debt owed by the Indian profession to the British.

> It must be admitted that the development of law and the establishment of high standards of professional conduct in the High Court, in the first instance, have been to a large extent due to the example of British barristers who . . . brought with them to India what was most desirable in the practice and traditions of the English Bar.[118]

Gopalratnam shows that this learning of the best British traditions by Indian vakils began a sort of *guru*-disciple tradition:

> Men like Sir V. Bashyam Ayyangar, Sir T. Mulhuswami Ayyar and Sir S. Subramania Ayyar were quick to learn and absorb the traditions of the English Bar from their English friends and colleagues in the Madras Bar and they in their turn as the originators of a long line of disciples in the Bar passed on those traditions to their disciples who continued to do the good work.[119]

Additional High Courts were established in Allahabad (1886), Patna (1916), and Lahore (1919),[120] creating a demand for many more lawyers and stimulating the rapid growth of the profession. The High Courts "affected the legal unity of the country and brought into being a class of legal practitioners patterned alike on a national scale."[121] The High Courts had an upgrading effect upon the district and *mofussil* courts and bars. Many of the High Court judges encouraged leading members of the High Court bar to practice in the *mofussil* courts and aided them by giving adjournments. "This served a double purpose. It not only helped the pleader in promoting his own prestige and practice; but more important, the effect of the presence and the methods of conducting cases of experienced High Court lawyers, in the subordinate courts, would be to improve the standards of practice in these courts."[122, 123]

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118. VACHHA, *supra* note 2, at 53.

119. GOPALRATNAM, *supra* note 54, at 15.

120. E. J. TREVELYAN, THE CONSTITUTION AND JURISDICTION OF COURTS OF CIVIL JUSTICE IN BRITISH INDIA 71, 77, 78 (1923).

121. MISRA, *supra* note 19, at 172.

122. VACHHA, *supra* note 2, at 50.

123. Some High Court judges, *e.g.*, Justice Jenkins of Bombay, took an interest in activating the *mofussil* judiciary and periodically deputed a judge to inspect the *mofussil* courts (VACHHA, *supra* note 2, at 86).

GRADES AND REGULATION OF THE PROFESSION—1862-1962

There were six grades of legal practice in India after the founding of the High Courts; advocates, attorneys (solicitors),[124] and vakils of the High Courts; and pleaders, *mukhtars* and revenue agents in the lower courts. The High Courts set up standards of admission for vakils which were much higher than requirements for the old vakil-pleader of the *zilla* courts. Vakil became a distinct grade above the pleader.[125]

The Legal Practitioners Act of 1879[126] brought all six grades of the profession into one system under the jurisdiction of the High Courts. Together with the Letters Patent of the High Courts the Act formed the chief legislative governance of legal practitioners in the subordinate courts of the country until the Advocates Act of 1961.

To be a vakil, the prospective lawyer had to study at a college or university, master the use of English, and pass the High Court vakils' examination.[127] Admission requirements were gradually raised so that by 1940 a vakil was required to be a graduate with an LL.B. from a university in India in addition to presenting a certificate saying that he had passed in the examinations, read in the chamber of a qualified lawyer, and was of good character.[128]

Though vakils were the lowest rank of the High Court practitioners their position was a most honorable one, and opened the way for promotion and wider practice. After ten years of service in the High Court many vakils were raised to the rank of advocate (*e.g.* Sir Sunderlal, Jogernanath Chaudri, Ram Prasad, and Motilal Nehru of the Allahabad High Court).[129]

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124. Provision was also made for attorneys to practice as advocates. An attorney who had served for ten years in the High Court at Calcutta was entitled to appear and plead. With less than ten years service, an attorney could take an examination which would entitle him to plead, if he had read for one year in the chambers of an advocate. ORMAND, *supra* note 40, 217-23.

125. 4 IMPERIAL GAZETTEER OF INDIA 155-56 (1909).

126. Act XVIII of 1879.

127. For example, Pandit Motilal Nehru never finished his college examinations, but he passed the High Court vakils' examination in 1883 and became one of the most brilliant lawyers of his time. P. SURI & A. PERSHAK, MOTILAL NEHRU 4-6 (1961). Dr. Katju passed the High Court vakil's examination in 1906 after two years of college. He passed the LL.B. examination a year later. KATJU, *supra* note 1, at 6-7.

128. ORMAND, *supra* note 40, at 240.

129. SURI & PERSHAK, *supra* note 127.

In addition to their extensive appellate jurisdiction, the High Courts of the three presidency towns also had an Original Side, whose jurisdiction included the major civil and criminal matters that would earlier have been heard by the predecessor Supreme Courts. On the Original Side in these High Courts, the grades of solicitor (attorney) and advocate (barrister) remained distinct.[130] On the Appellate Side and in the other High Courts, "every lawyer practices as his own attorney."[131] Attorneys and solicitors, therefore, practiced almost exclusively in the three Presidency High Courts.[132] Practice on the Original Side was both lucrative and prestigeous.

In Madras vakils began to practice on the Original Side as early as 1866. However, the barristers were "handicapped" by this success of the vakils and in 1874 challenged their right to do Original Side work. The issue was brought up many times and finally in 1916 this right was firmly established for the vakils.[133] Vakils in Bombay and Calcutta could be promoted as advocates and become qualified to work on the Original Side.[134] By attending the Appellate Side and Original Side courts each for one year a vakil of ten years service in the court was permitted to sit for the advocates' examination. Mr. Setalvad did this and began a successful career on the Original Side in 1906.[135]

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130. Setalvad gives an amusing account of one attempt of an advocate to practice without a solicitor. The hot tempered barrister, Anstey, once insulted a solicitor so rudely that all of the solicitors of Bombay decided not to give him any briefs. He appeared in court having been instructed directly by a client. After two days of argument the judges refused to recognize his right to appear. He, therefore, persuaded a solicitor friend at the Madras High Court to move to Bombay. Because of Anstey's reputation his new solicitor soon had more of the desirable legal business in Bombay than the other solicitors. (C. H. SETALVAD, RECOLLECTIONS AND REFLECTIONS; AN AUTOBIOGRAPHY 9 [1946].)

131. KATJU, *supra* note 1, at 14.

132. Attorneys who had practiced before the Supreme Court of Judicature in England could be directly admitted into the High Courts. Attorneys from Ireland could be admitted after passing an examination. Attorneys from other High Courts were admitted if they had served a period of five years as attorney's clerk, and this was a requirement for fresh candidates as well. A graduate of an Indian university, with five years service as as an attorney's clerk, was admitted after paying a fee and passing the required examination. ORMAND, *supra* note 40, at 124.

133. GOPALRATNAM, *supra* note 54, at 123-24.

134. In Madras a similar provision to this was rejected by the vakils who as a body were struggling for rights and position equal to that of advocates. SIVASWAMI AIYAR, *supra* note 87, at 273.

135. SETALVAD, *supra* note 130, at 18.

The Indian Bar Councils Act of 1926[136] was passed with the two-fold purpose of unifying the various grades of legal practice and providing some measure of self-government to the bars attached to the various courts.[137] The Act required that each High Court constitute a Bar Council made up of the Advocate-General, four men nominated by the High Court of whom two should be judges, and ten elected from among the advocates of the bar.[138] The duties of the Bar Council were to decide all matters concerning legal education, qualification for enrollment, discipline and control of the profession.[139] It was most favorable to advocates as it gave them authority, previously held by the judiciary, to regulate the membership and discipline of their profession.[140] However, these rules had to be in accord with the High Court rules.

After independence, there was a growing opinion that there should be one bar for all of India. This is expressed by Chief Justice Mahajan:

> With the setting up of the Supreme Court and the creation of Supreme Court Bar, the necessity of having an all India Bar was strongly brought home to me. In the good—or bad if you would like to have it that way—old days advocates of one High Court sometimes found it difficult to appear in a case pending before another High Court. I have never been able to reconcile myself either to the distinction between solicitors and advocates or between advocates practicing on the original side and those on the appellate side. The prevailing business sometimes created amusing situations. An advocate entitled to practice before the highest court in the country, the Supreme Court, could easily be refused permission to appear in a lower court, the original side of a High Court. I was keen on the creation of an all-India Bar and advocated its cause whenever I went on . . . tours.[141]

To plan for the formation of an all-India Bar, a committee was appointed in 1951. They recommended that all grades be done away with and that one integrated and autonomous all-Indian Bar be formed.[142] The Advocates Act of 1961 was a great step in this direc-

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136. Act XXXVIII of 1926.

137. Women were allowed to practice as lawyers even prior to 1923. As their right to practice had sometimes been questioned, it was clearly set forth in the Legal Practitioners (Women) Act of 1923. (Act XXIII of 1923.)

138. Act XXXVIII of 1926.

139. SAPRU, *supra* note 88, at 175-76.

140. A. GLEDHILL, THE REPUBLIC OF INDIA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 2nd ed. 364 (1964).

141. MAHAJAN, LOOKING BACK 213-14 (1963).

142. [MINISTRY OF LAW, INDIA, REPORT OF THE ALL-INDIA BAR COMMITTEE (1953).]

tion.[143] It repealed the Legal Practitioners Act of 1879 and stipulated that no more pleaders be enrolled. Those already practicing, who were law graduates, could become advocates by paying a fee of Rs250 to the Bar Council. Even law graduates not practicing as pleaders were given opportunity to take an advocates' examination, pay the fee and receive the grade. Pleaders who could not qualify were allowed to remain practicing as previously.[144]

"Though the Act continues the dual system of advocates and attorneys prevailing in the High Courts of Calcutta and Bombay, elsewhere it recognizes for the future only one class of legal practitioner, advocates."[145] An advocate must have a law degree from an Indian university, or must be a barrister. He must pass a State Bar Council examination and then will be admitted to the bar not by the court but by the bar association made up largely of advocates. Admission, practice, ethics, privileges, regulations, discipline and improvement of the profession as well as law reform are now all in the hands of the profession itself.[146]

EDUCATION

In the early Bengal courts every vakil was required to have studied either at the Hindu College in Benares (founded 1792)[147] or the Calcutta Madrassa (founded 1781). In the Madrassa Arabic, Persian, law, geometry, mathematics, astronomy, logic, rhetoric, grammar, theology, and natural philosophy were taught. For a number of years it was very poorly administered and the standard of education was very low.[148] Regulation XI of 1826 made it possible for students seeking to become lawyers to be educated in any of the public institutions.[149] Until 1826 knowledge of Persian was required of every vakil.[150] English gradually replaced Persian as the language of the courts and many new schools and colleges sprang up in Calcutta and the other presidency towns.

143. Act XXV of 1961.

144. A. C. GANGULY, CIVIL COURT PRACTICE AND PROCEDURES 250 (1963).

145. GLEDHILL, *supra* note 140, at 365.

146. *Id.*

147. N. S. BOSE, THE INDIAN AWAKENING AND BENGAL 57 (1960).

148. Between 1829 and 1851, 1,787 students passed through this institution in Calcutta. S. C. SANIAL (1915), 96. History of the Calcutta Madrassa, VIII, BENGAL PAST AND PRESENT 83-111, 125-50 (1915).

149. B. C. PAL, MEMORIES OF MY LIFE AND TIMES 4 (1932).

150. MISRA, *supra* note 53, at 169.

Fort William College was founded in 1800 to train civil servants. The Hindu College of Calcutta was opened in 1817 by Mr. Hare, with the help of Rammohun Roy and Chief Justice Edward Hyde East.[151] Many famous lawyers and judges at the beginning of the High Court era in Calcutta were educated in this college. Among them were Presanna Kumar Tagore, and Justice Romesh Chunder Mitter.[152]

The standard of law courses taught in the Government schools was not severe. Richard Clarke, an eminent member of the Madras Civil Service, observed:

> . . . it is one of the duties of the college board to prepare vakeels or native pleaders, who are, however, not required to have so thorough a knowledge of the native law as those who are candidates for the office of cauzey [qazi] or pundit; but they are examined in the native law, and are further required to have a sufficient acquaintance with the regulations passed by the Government.[153]

Misra claims that the "anglicization of the indigenous legal profession" had begun by 1832 and quotes Clarke's statement about the education, testing, and granting of *sunnuds* by the college board: "the object of these arrangements was as much as possible to assimilate the native to the European bar, leaving it to the clients to make their own selection of their law advisers."[154] There is little evidence to show that this was the case. Clients had no choice but to engage Indian vakils in the *Sudder* Courts (until barristers began to practice in the *Sudder* Courts after 1846) and English lawyers in the Supreme Court.

Although English and Hindu jurisprudence (Blackstone and Manu) were taught in the ICS College at Fort William,[155] the emphasis in the schools where vakils were trained was on teaching rules and regulations rather than principles of law. A writer in the *Calcutta Review* in 1847 criticized the schools for putting so much emphasis on the regulations. He noted that the regulations as contained in Marshman's Guides "comprised the total library of most native judges and district magistrates and was the main object of study by the Indian lawyer." He warned that unless education stressed principles of law and jurisprudence Indian lawyers would turn out to be "pettifoggers ignorant of everything but

151. BOSE, *supra* note 147, at 61.
152. C. E. BUCKLAND, DICTIONARY OF INDIAN BIOGRAPHY (1906).
153. MISRA, *supra* note 53, at 169.
154. *Id.* at 170.
155. 5 CALCUTTA REVIEW 99 (1846).

rules and forms, acts and regulations and reports—stirring up litigations to make their own fortunes out of it." [156]

In spite of this warning, many of the graduates of this early, inadequate legal education rose to greatness. An outstanding example is Sambhunath Pandit (1820-67) who studied in the Benares Oriental Seminary, worked as a record-keeper in the Sadr Court at Rs20 a month, then became a pleader, junior government pleader in 1853, and senior pleader in 1861. He was called to be professor of law at the Presidency College in 1855 and called to be the first Indian High Court judge in 1863.[157]

Law classes were made a permanent part of the curriculum in Hindu College, Calcutta; Elphinstone College, Bombay; and at Madras in 1855.[158] The University Act in 1857 established study of law as a permanent part of each university and gave scope for eventual full development of legal education.[159]

A high school education was enough for those who wished to practice in the lower courts as pleaders or *mukhtars*. Mahajan, who later became Chief Justice of India, was licensed as a *mukhtar* after he finished high school.[160] Sardar Patel took the district pleaders' examination after he had finished high school.[161] His brother, Vithalbhai, finished high school and studied for a time at Gokhale Law Class in Bombay "which coached students for the District Pleaders' examination." [162] The stress was on passing the examination and the institution where one studied was not very important.

Before there were separate law colleges, law instruction was given in classes attached to the arts colleges. The university law standards were low. The only requirement for entrance was matriculation—*i.e.*, graduation from secondary schools. The arts examinations were more difficult than law examinations. The descriptions of law classes at Lahore, Allahabad, Madras, and Bombay at the turn of the century given by Mahajan, Katju, Aiyar, and Setalvad are much alike. Attendance was marked but not enforced.[163] One student would call present

156. 7 CALCUTTA REVIEW 109 (1847).
157. BUCKLAND, *supra* note 152.
158. MISRA, *supra* note 53, at 173.
159. BOSE, *supra* note 147, at 75.
160. MAHAJAN, *supra* note 141, at 5.
161. S. JAYSREE, THE IRON MAN OF INDIA 36 (1951).
162. G. L. PATEL, VITHALBHAI, PATEL, LIFE AND TIMES 17-18 (1950).
163. SIVASWAMI AIYAR, *supra* note 87, at 226.

for six names and students worked out attendance rotation.[164] Few of the students read law books or took notes. Mehr Chand Mahajan relates that most of his friends studied only the abbreviated pamphlets that enabled them to pass the examinations and "were sarcastic at my preference for reading original books on legal subjects."[165] Katju remembers that "everyone used cribs and aids to scramble through no matter how poor his grounding in legal principles or how meagre his reading of those classics that are the very life blood of our law."[166] "The general College Library contained a law section but was poorly patronized by the students, and during my two years at College I never heard any lecturer recommending the study of a particular legal textbook or precedent."[167]

Teachers were poorly paid. A full professor received Rs400 a month and a lecturer Rs150.[168] The teacher-pupil ratio was 3:400 when Setalvad attended law school. He noted that teachers were appointed "not always on merits but for making provision for young barristers struggling at the Bar."[169]

In Bombay, the university's standards were so low that some of the leading lawyers, Badruddin Tyabji, Nayayan Chandavarkar, Rustom K. R. Cama, and N. V. Gokhale, formed a managing board to found a good law college and secured the services of six competent professors. Their request to Bombay University to open this new school was refused because of opposition by the Government, which feared its teaching might be seditious. However, this effort resulted in the upgrading of the existing law school in line with the aspirations of the board members.[170]

The number of law students as well as practitioners was much greater in Calcutta than in the other presidencies as the following table of Bachelor of Law graduates shows:[171]

	Calcutta	Madras	Bombay
1864-73	704	78	33
1874-82	924	232	156

164. SETALVAD, *supra* note 130, at 161.
165. MAHAJAN, *supra* note 141, at 27.
166. KATJU, *supra* note 1, at 5.
167. *Id.* at 4.
168. *Id.* at 3-4.
169. SETALVAD, *supra* note 130, at 161.
170. *Id.* at 162.
171. MISRA, *supra* note 53, at 325.

Though large numbers (nearly 3,000 a year by 1910) were graduating from the poorly equipped and staffed law colleges, a law degree did not signify a sound preparation in law or professional competence. These assets were more often gained as the young lawyer worked as an apprentice or junior to some well-known, experienced lawyer.[172]

In England where social life and "eating of dinners" were an important part of legal training at the Inns of Court, standards of legal education were not much better.[173] For a time the exams for the barristers were actually easier than the LL.B. and High Court Pleaders' exams in India.[174, 175] This fact and the higher prestige and advantages open to the barristers induced many young men to study for the bar in England.

INDIAN BARRISTERS

Few Indians could afford the long[176] expensive training program for barristers that could be had only in England. The earliest candidates were predominately sons of rich Parsi merchants.[177] One forward looking Parsi leader recognized the potential that barristers would have for leading Indian society and provided funds for this training:

> For some years before this [1864], it was being realized more and more in India that a barrister's profession was a natural avenue for the advancement of India not only culturally, socially and educationally, but as a means of getting her legitimate claims advanced and grievances redressed. The profession which sought justice protected and fought for the rights of a subject in court, was the profession most suited to seek justice, claim protection, and fight for the rights of the people as against the government. In appreciation of this fact and from a sense of patriotism, Mr. Rustomji Jamshedjee Jijeebhoy, who was a highly enlightened and philanthropic man . . . made a trust of Rs. 1,50,000 for the selection of five Indians to proceed to Europe to be called to the Bar. The scholar-

172. KATJU, *supra* note 1, at 19.

173. *Id.* at 5; and G. WIJEYEKOON, RECOLLECTIONS 17 (1951).

174. SETALVAD, *supra* note 130, at 146.

175. When Dr. Katju took the High Court Pleader's examination in 1906 only fifteen out of several hundred passed the examination (KATJU, *supra* note 1, at 6).

176. Requirement for admission as a student to an inn of court was matriculation. Many of the early Indian students studied for the matriculation exam in England for two or three years before studying law and therefore needed four to five years stay in England before being called to the bar.

177. Six of the first ten students admitted by Lincoln's Inn were Parsis (2 LINCOLN'S INN, ADMISSION OF STUDENTS TO LINCOLN'S INN, 1861 TO 1893) at pt. II, 298 [1893]).

> ship was Rs. 30,000 to each of them. The proposal was made for a Parsi, a Hindu, and a Portuguese from Bombay and a Mahomedan and Hindu from East India or Calcutta or Madras.[178]

Sir Jijeebhoy's hopes were amply fulfilled. One of these five students was Womesh Chunder Bonnerji, who had been one of the four Indian lawyers practicing as a solicitor at the Supreme Court in Calcutta.[179] He joined the Calcutta High Court as a barrister in 1868, became president of the Law Faculty at Calcutta in 1880, served as a member of the Bengal Legislative Council, and as the first President of the Indian National Congress in 1885. From 1901 he practiced before the Privy Council in England.[180]

Pherozshah Mehta was another of these first five scholarship students.[181] After practicing for a few years as a barrister of the Bombay High Court he devoted his time fully to politics and reform. He became the most influential member of the Bombay Legislative Council, a member of the university, and a "pillar" in the Indian National Congress and served as the sixth Congress President.[182]

A study of the list of admissions into Lincoln's Inn (one of the four Inns) reveals that from 1861 to 1893 one hundred Indian students studied there to become barristers, increasing from one or two a year at first to five or six annually toward the close of this period.[183] Of these, four already had law degrees from Indian universities, and twenty-two were the sons of pleaders or magistrates.[184]

The biographer of Justice Tyabji (the first Muslim to become a barrister) describes the work required by the student at an inn of court:

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178. H. B. TYABJI, BADRUDDIN TYABJI; A BIOGRAPHY 22 (1952).

179. MISRA, *supra* note 53, at 327.

180. BUCKLAND, *supra* note 152.

181. TYABJI, *supra* note 178.

182. BUCKLAND, *supra* note 152; and VACHHA, *supra* note 2, at 40.

183. High caste Hindu barristers found that when they returned from England they had to go through a *prayaschit* (purification) ceremony. Mahajan refers to three young men from the Punjab who after being admitted to the bar in England, had to undergo this humiliating ceremony in order to satisfy their orthodox relatives. MAHAJAN, *supra* note 141, at 36. Motilal Nehru, who visited England in 1899, refused to submit to the *prayaschit* and was excommunicated. His spirited defiance helped to end this strict orthodoxy. B. R. NANDA, THE NEHRUS 39-40 (1963).

184. The lists include the names of several English lawyers who had been vakils at the Madras High Court and wished to return to India as barristers. LINCOLN'S INN, *supra* note 177, at 349.

> He now resumed his terms reading in the chambers of the barristers. Here he devoted himself to learning the routine of legal proceedings, the work of a common law barrister, then an equity lawyer and a conveyancer. He attended also the offices of Mr. John Morris the solicitor . . . and drew pleadings, wills, conveyances, mortgages, deeds of trust, petitions. . . . He attended the law courts and studied the conduct of cases by eminent lawyers. When thus equipped a friendly solicitor entrusted him with some briefs and reported that he conducted the cases creditably.[185]

The first Indian barristers to practice in the High Courts were disappointed to find that they could not make a success of practicing on the Original Side, where the lucrative commercial cases were. Work on the Original Side could only come to a barrister through a solicitor. The solicitors' firms were all British, and they did all of the work for the Government departments and the great shipping and industrial firms. They did not want to patronize an untried Indian barrister. Nor did the few individual Indian solicitors who were struggling to expand their practice wish to risk the blame that would come upon them if some inexperienced Indian barrister mishandled a case.[186] Tyabji, who joined the Bombay High Court in 1867, was the first to win success on the Original Side:

> He had one advantage over the others. He had the support of his own brother who was an eminent solicitor. Immediately on Badruddin being admitted an advocate, he received from his brother Camruddin a brief of two gold mohors, for drawing a written statement. . . . In the very first year of his practice in 1868, he received a good deal of drafting work, mostly from his brother but also from four Hindu solicitors and an English firm Manisty and Fletcher. His work was skillfully done. He was then tried with a ten mohors case, and he justified their expectations. Henceforth, it was only a question of time and experience.[187]

Even after Tyabji's success a number of other prominent Indian advocates failed to establish themselves on the Original Side. Not only British firms, but also Indians preferred to be represented by British solicitors and advocates—perhaps because it was believed they would have more influence with the English judges.[188] The preference for

185. TYABJI, *supra* note 178, at 23.

186. *Id.* at 28-29.

187. *Id.* at 29.

188. Katju has pointed out that it is not uncommon for Indian clients to select a lawyer who is of the same caste or community as the judge, for much the same reason. KATJU, *supra* note 1, at 33.

English practitioners was widespread. Vachha reports that due to confidence in their impartiality and inaccessibility to extend pressures "throughout the 19th century the inhabitants of Bombay preferred to trust their legal business, including the administration of estates, to the British solicitors, and to refer their disputes to the arbitration of English barristers." [189] After Tyabji, Telang was the first barrister to overcome these prejudices against Indian lawyers and to work successfully on the Original Side.[190]

After 1900 vakils who had been promoted to be advocates were enabled to work on the Original Side. After attending the Appellate Side courts for one year and the Original Side for another year a vakil could be permitted to sit for the advocates' examination, a most difficult one.[191] Setalvad was one of the first to accomplish this, but experienced the usual prejudice that made establishing Original Side practice difficult. However, these attitudes changed:

> When one evening in 1906 Craigie of Craigie, Lynch & Owen, a leading firm of solicitors, walked into my chamber and delivered to me a heavy brief in a case that lasted two months before Justice Beaman and marked the fees I mentioned, I realized that the ghost of racial prejudice had been buried once for all at least as far as the legal profession was concerned.[192]

The bench gave much more encouragement to the barristers and helped them gain equality with the British practitioners. Many Indian lawyers in their memoirs or autobiographies mention some British judge who gave encouragement, help, and honor to new, inexperienced lawyers.[193] Lawyers such as Telang showed the whole country that Indians could achieve the same eminence in the profession as could Englishmen. He was "head and shoulders above all of his Indian contemporaries" and one of the foremost practitioners, including the many experienced Englishmen, at the bar. He was promoted to the bench at the age of thirty-two in 1889 but died less than three years after this appointment.[194]

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189. VACHHA, *supra* note 2, at 14.

190. SETALVAD, *supra* note 130, at 18-19.

191. *Id.* at 18.

192. *Id.* at 19.

193. One such judge was Justice Sargent of Bombay. "He was free from political and racial bias, and encouraged young rising Indian advocates like Tyabji and Telang, the latter whom he raised to the Bench regardless of his absurdly youthful age." VACHHA, *supra* note 2, at 72.

194. *Id.* at 81.

Professional equality was achieved by Indian advocates asserting their rights in court and by able demonstration of professional competence. Indian lawyers learned to defend their positions as assertively as did their British colleagues. Barrister Kali Mohan of Calcutta once had charges framed against him for arguing with Judge Jackson: "I am surprised, my Lord, that though you have been a District judge for so many years I cannot make you understand what even a student of law can very easily follow." The full bench of the High Court dismissed the charges against Mohan as they judged that the principle he had been maintaining was correct.[195] When Indian barristers won cases against famous English lawyers (as C. R. Das successfully defended Aurobindo against Mr. Eardly Norton) they proved that the English barristers no longer had an insuperable advantage.[196] The bringing together of the talent, learning, and tradition of Indians and Englishmen on the bench as well as the bar of the High Courts gave legal practice a color and scope that it had never had before.

The only profession preferred to that of barrister was the civil service. As it was extremely difficult for Indians to pass the examinations and be accepted into the civil service, the great majority of the young Indians trained in England were called to the bar and returned to India "transformed into English gentlemen."[197]

INCOME AND PRESTIGE

The great volume of legal business, high fees, and the prestige conferred by the High Courts combined to make the practice of law the most important of the professions in late 19th century India.[198] In 1881 there were 1.6 million civil suits valued at 16.54 *crores*. By 1901 there were 2.2 million suits. Some areas, notably where the *zamindari* system was in force, had an extremely high incidence of litigation.[199, 200] This volume spurred the growth of the profession.

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195. P. C. RAY, LIFE AND TIMES OF C. R. DAS 2 (1927).

196. *Id.* at 58-64.

197. NANDA, *supra* note 183, at 37.

198. MISRA, *supra* note 53, at 307.

199. *Id.* at 325.

200. Hunter maintained that this mass of litigation from the villages represented the opening of an avenue of redress for the accumulated injustices of many years. "That the litigation is beneficial is proven by the fact that out of 108,559 original suits, 77,979 were decided in favor of the plaintive." He pointed out that before 1790 only one out

The charging of high fees, which had been part of the pattern of Supreme Court practice, continued in spite of attempts at control. In spite of the often-revised fee tables,[201] very high fees could be earned by the more skilled lawyers. Bepin Chandra Pal reported that his father, a pleader in the district court, earned Rs200-300 a month, "quite a high income in those days—a man generally counted rich Rs. 100 a month."[202] Mahajan reported that his first fee was Rs300. In those days (1913) when courts were held in different places as the collector toured, a lawyer could make "good money" as "fees for going on tour were substantial."[203] Lawyers' fees were much higher than the salaries of most police officials; in 1901 a police subinspector received less than Rs75 a month.[204]

The biggest earners were men like C. R. Das and Motilal Nehru. By 1886, in his thirties, Motilal was averaging Rs2,000 a month and after ten more years he was earning *lakhs*.[205] He lived like a prince, had the first cars in Allahabad and a palatial house. In the famous *Damraon Case* which he lost to C. R. Das he cleared two *lakhs* in eight months.[206] C. R. Das did even better. From 1917 to 1919 he earned three *lakhs* a year. In 1920 his earning was Rs50,000 every month. In January of the following year he gave all of this up and joined Gandhi's noncooperation movement.[207]

Though few lawyers earned as did these nabobs of law, many of them earned a good living. In 1914 a good lawyer could be retained for Rs20 in an appeal case and for Rs50 in a civil suit.[208] Mahajan averaged Rs300 to 500 a month and hoped for the day when he could earn Rs1,000 a month as did the leading lawyer of the Gurdaspur Bar.[209] After five years of practice, by 1914, Katju was making Rs400-500 per month, yet could not afford a carriage and went to court on a bicycle.[210]

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of 10,000 inhabitants dared to use the courts, but by 1864 one out of every 260 inhabitants was using the courts. HUNTER, ANNALS OF RURAL BENGAL (1868) 342-43.

201. The Legal Practitioners Act of 1879 (Act XVIII of 1879) specified that the High Court should "fix and regulate fees and that table of fees should be published in the local official gazette." These fee tables were often revised.

202. PAL, *supra* note 149, at 22.

203. MAHAJAN, *supra* note 141, at 34.

204. MISRA, *supra* note 53, at 316.

205. NANDA, *supra* note 183, at 27.

206. *Id.* at 176.

207. RAY, *supra* note 195, at 66.

208. MAHAJAN, *supra* note 141, at 40.

209. *Id.* at 40-41.

210. KATJU, *supra* note 1, at 44.

One reason that fee income was so high was that an average case moved very slowly. Cases were (and are) not heard on consecutive days but at wide intervals and only a fraction of the day was given to each hearing. Cases often lasted a generation. In 1955 the average duration of first appeals in the Allahabad High Court was 2,145 days.[211] For this reason clients sometimes asked for a lump sum agreement. Mavalankar reported that his first case was the defense of a bigamist. His client asked for a lump sum agreement. Thinking it would last no more than three sittings he agreed to Rs15 (Rs5 a sitting being the low rate for cases in the lower court in those days). It lasted twenty.[212] Another reason for high fees is the insistence of many litigants on having the most eminent counsel and the frequent unwillingness to compromise, even when urged to do so by counsel and judge.[213]

There was little specialization at the Indian bar. Many advocates handled criminal and civil work, trial and appellate cases, commercial law and Hindu law at the same time, "switching off from one subject to another."[214] Dr. Katju delighted in the variety of practice that challenged the Indian advocate and himself won famous cases concerning Hindu law, inheritance, business, and criminal matters.[215]

Besides the prospects of making a good living, the prestige and honor shown to the successful members of the legal profession encouraged many to study law. Leading counsel of the High Courts received many honors and promotions. The possibilities of rising in the profession were almost limitless. Mahajan, who as a college student had practiced as a *mukhtar*, became an LL.B. in 1912 and practiced as a vakil in the district court, then as a vakil in the High Court at Lahore, judge of the High Court in 1943, Federal Court judge in 1948 and Chief Justice of the Supreme Court in 1954.[216] The highest position of honor and responsibility open to an Indian during British rule was a cabinet post in the Viceroy's Council. In 1910 Mr. Satyendra Prasanna Sinha, a leading barrister of Calcutta, was appointed as Law Member of the Viceroy's cabinet. This "opened all positions of honour and dignity in the State to Indians of ability and integrity."[217]

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211. GLEDHILL, *supra* note 140, at 13.
212. G. V. MAVALANKAR, MY LIFE AT THE BAR 15 (1955).
213. SETALVAD, *supra* note 130, at 156.
214. *Id.* at 157.
215. KATJU, *supra* note 1, at 43, 44, 49, 247.
216. MAHAJAN, *supra* note 141, at 209-15.
217. RAY, *supra* note 195, at 73.

As the profession that drew the elite of the country into its ranks the legal profession "dominated all public life." [218] Lawyers "organized and managed philanthropic and educational institutions and charitable societies. Socially, membership of the profession conferred status and dignity." [219] The wealth, prestige, style of living, and influence on society of the Indian lawyers during the first years of the 20th century attracted great numbers to the profession just as the opportunities for the British lawyer in 19-century India had attracted a flood of lawyers from Britain.

GROWTH OF THE PROFESSION

Before 1920 more students studied law than all the other professions put together, as shown by the following table:[220]

	Law Students	Students of Other Professions
1911-1912	3,036	3,135
1916-1917	5,426	4,595
1921-1922	5,234	6,755
1931-1932	7,151	7,954
1939-1940	6,749	10,378
1949-1950	9,464	31,170

As more territory was annexed by the British, the judicial system was extended and more and more lawyers were needed to practice in the newly opened courts and to advise the people in these new territories who had little knowledge of Anglo-Indian law and court procedure. In the Punjab in 1866 there were only eleven practicing lawyers but in that same year there were 166,000 suits in the Punjab courts.[221] By 1910 there were 1,277 lawyers to share in this volume of legal work and by 1918 Punjab had 1,837 lawyers. There were different evaluations of this phenomenal growth. Spain refers to the lawyers of the Punjab as a horde of half-trained men who promoted litigation and kept the feuds of the Pathans alive.[222] The editor of the *Lahore Law Journal* on the

218. KATJU, *supra* note 1, at 13.
219. *Id.*
220. MISRA, *supra* note 53, at 333.
221. I LAHORE L.J. xvii.
222. J. W. SPAIN, PATHANS OF THE BORDERLAND 114 (1963).

other hand attributed the growth of the profession to the lawyers' hard work, honesty, sympathy with the public, and usefulness to the people of the Punjab.[223] Both views give only a partial picture. As great numbers came to be lawyers the most outstanding and capable of the ethical practitioners won great prestige for the profession at the same time that the unscrupulous promoters of litigation caused the "lawyer to be regarded as a parasite feeding on society."[224]

Numerically India has the second largest legal profession in the world (after the United States). It has proportionately more lawyers than other non-Western countries.[225] The great appeal of the profession which created this phenomenal growth in numbers very early led to overcrowding and unemployment at the bar. After 1890 the phrase "briefless barrister" described the grim reality experienced by young lawyers.[226] As brilliant a lawyer as C. R. Das, who joined the bar at Calcutta in 1893, spent the first fifteen years of his career experiencing the "daily round of almost hopeless waiting at the Bar library in company of more than a hundred equally hopeless members of the learned brotherhood."[227] He took to writing to keep busy, fell into debt of Rs40,000 and was declared bankrupt by the court. He did not make a success of legal practice until he won sudden fame for his defense of Aurobindo in the *Alipore Bomb Case* in 1908.[228] The more important the court, the more crowded was the bar.[229] Although Madras presidency had twenty-six district courts, nearly half of the advocates in the presidency were practicing in Madras City.[230] The chances of starting practice in the villages at the taluk courts were very poor.[231] An ambitious young lawyer could learn and progress in his profession only by working in close association with an experienced senior lawyer, and these men were found only at the district and High Courts.

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223. I, LAHORE L.J. xv.

224. MAVALANKAR, *supra* note 212, at 15.

225. *See* Galanter, Introduction to this issue, Table 1.

226. NANDA, *supra* note 183, at 26.

227. RAY, *supra* note 195, at 24.

228. *Id.* at 64.

229. Setalvad complained in 1946 that there were between three hundred and four hundred advocates practicing just on the Original Side of the High Court of Bombay. SETALVAD, *supra* note 130, at 147.

230. The Madras High Court Bar was reported to have been crowded from 1897 when there were more than one hundred lawyers in the Vakils Association. By 1938 there were 3,790 advocates registered in the Madras presidency of whom 1,600 were practicing in Madras City. SIVASWAMI AIYAR, *supra* note 87, at 276.

231. *Id.* at 278.

As the profession grew bar associations, libraries, and law journals were established at each of the High Courts. Bar associations were founded for each grade of lawyer.[232] Each association had its own library and facilities.[233] At every district and High Court the library was used as a gathering place for the fraternity. Cases and judgments were discussed. Young lawyers were especially interested to hear what was being said about their work in the law library gossip sessions.[234] Setalvad conveys to us the atmosphere of the bar association library:

> The Bar library is one spot where I find it delightful to pass my time whenever I can. It is a place to which laws of libel, slander, and sedition do not apply, and judges, practitioners, and the government and their measures are freely discussed without any restraint.[235]

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232. The associations at Lucknow are a good example. The Oudh Bar Association founded in 1901 was for advocates only. Membership fee was Rs200, there was a good library, 131 members were registered. The Central Bar Association founded in 1908 was open to any legal practitioner not below the rank of pleader. Membership fee was Rs50, there was a library, 175 members were registered. The District Bar Association founded in 1935 is open to students training to be vakils. Admission fee is Rs15, there were 88 members. The Lucknow Lawyers Association founded in 1928 is open to any legal practitioner. There is a library, membership fee is Rs5 and there were 74 members. 37 UTTAR PRADESH DISTRICT GAZETTEER 284-85 (1959).

233. *E.g.*, the Vakils Association of the Madras High Court raised enough subscriptions to build a library of more than 30,000 volumes. The library and reading room are housed in the High Court building at Madras. SIVASWAMI AIYAR, *supra* note 87, at 272. The tradition of bar libraries at the courts goes back to that established at the Supreme Court in Calcutta in 1825. George W. Johnson, a Calcutta barrister, gives the following account of its founding:

> I may observe here, for the guidance of immigrating barristers that there is a law library connected with the Supreme Court. This useful collection of books was founded chiefly through the exertion of one of the advocates, Mr. Languerville Clarke, in June 1825—the bar then was composed of ten barristers and they, with the officers of the court, subscribed Rs. 100 each toward the purchase of a professional library which was offered to them. The valuation amounted to Rs. 5,928 and the balance left due was gradually to be liquidated by the annual subscription of each member, fixed at two gold mohurs (64 shillings) (Rs. 25) per term. Justice Buller obtained for the proposed library a room opening into the Supreme Court and the books by purchase and donations have gradually accumulated into a nearly complete series of reports ancient and modern and in a respectable though more deficient collection of text books. There is a difftree (native librarian) continually in attendance to find the required volumes and take receipts for such as are borrowed from the library . . . . 1 G. W. JOHNSON, THE STRANGER IN INDIA OR THREE YEARS IN CALCUTTA 91-92 (1843).

234. KATJU, *supra* note 1, at 27.

235. SETALVAD, *supra* note 130, at 158.

FAMILY TRADITION

From the early days of the profession the practice of law became the traditional occupation of many families. We have already noted that one-fourth of the Indian barristers who passed through Lincoln's Inn in the 19th century were sons of lawyers and judges. Among the famous families that have a legal tradition of several generations are Chimanlal Setalvad, Mahajan, and Nehru. Further research would reveal that many more famous Indian families have this tradition. Nehru's great-grandfather had served as a vakil of the East India Company in Delhi before the Mutiny.[236] His paternal uncle, Bansi Dhar, was a judgment writer in the Sadar Diwani Adalat at Agra, and his father Motilal, a leader at the bar of the Allahabad High Court.[237] The Setalvad family has a tradition of judicial and legal practice for the last four generations.[238] The family of C. R. Das was totally involved in the profession. His grandfather, two paternal uncles, father, he himself and his younger brother (whom he educated) all practiced law.[239]

The advantages of being raised as the son of a judge or lawyer are quite evident. Traditions of the profession were absorbed in the home. The friends and guests who frequented the home were lawyers, judges and leading men of the community. Conversation and discussion concerned interesting legal cases, politics, and social reform. When a son of a vakil or advocate began to practice in the court many members of the bar and bench were old friends of the family.

Without the help of a practicing family member or relative many a well-trained talented new lawyer had little chance to show what he could do to succeed at the bar. A well-known vakil of Madras, Sivaswami Aiyar, referring to the very crowded conditions at the Madras bar writes, "Unless a beginner has influential relations or connections or can get the chance of devilling to appreciative and generous leaders in the Bar, he has no means of making himself known to the client world or to the judges in the Courts."[240] The failure of C. R. Das to get a good start as a barrister in the High Court of Calcutta is attributed to the retirement of his solicitor father which made it impossible for

236. NANDA, *supra* note 183, at 18.
237. *Id.* at 21.
238. SETALVAD, *supra* note 130, at 3.
239. RAY, *supra* note 195, at 16.
240. SIVASWAMI AIYAR, *supra* note 87, at 277.

his father to see that legal business came his way.[241] A practicing father, interested in his son's legal career could spell the difference between failure and success at the bar.

Mahajan was more fortunate than Das. Although his father was only a *mukhtar* he had wide experience and knowledge of law and a busy practice. He trained a clerk in his office to be ready to serve his son when he finished his legal education. During law school vacations Mahajan worked in his father's office and learned how to accept and refuse briefs. He writes of his father, "He taught me drafting of plaints, pleadings and petitions and made me draw out conveyancing documents."[242] For the first few months he worked as apprentice to his father and attended cases when his father was too busy to appear. In this way his ability came to be recognized by the bench, bar and the public and his career was successfully begun.

Families with long and rich legal tradition supplied the Indian bar with an abundance of highly trained talented leaders who maintained high professional standards and won great honor for the bar.

POLITICAL LEADERSHIP

A glance at any listing of leaders of the Indian national independence movement will reveal a predominance of lawyers and men who had had legal training. The bars of every section of the country supplied a number of great national leaders. Gujarat is a good example: "Of five great men that the sacred soil of Gujarat created in recent years, four were lawyers and were called to the bar in England: Mahatma Gandhi, Mohammed Ali Jinnah, Sardar Patel, and Vithalbhai Patel."[243]

Lawyers strove for the cause of nationalism in several ways. They worked through the courts for rights and equality between Indians and Englishmen; they gained membership and power in the provincial legislative councils; and they founded and built up the Indian National Congress. Only the lawyers had the knowledge of the individual rights to which an Indian was entitled, the mastery of the English language, skills, and independence which enabled them to "stand up to the bureaucracy of the day."[244] Lawyers were in a better position to work

241. RAY, *supra* note 195, at 24.
242. MAHAJAN, *supra* note 141, at 31.
243. JAYSREE, *supra* note 161, at 25.
244. KATJU, *supra* note 1, at 13.

for the cause of nationalism than were other men of their educational level who were in Government or Government aided services. Their income and positions were independent of Government pressure.[245]

Political events stirred even busy lawyers who were not directly involved in public life. When a leading Calcutta barrister, Mr. Branson, led the Anglo-Indian fight against the Ilbert Bill,[246] he created a great deal of hard feeling among the lawyers. The Indian solicitors at the High Court refused to send him any more briefs, ruined his practice, and forced his early retirement to England.[247]

The growing power and leadership of lawyers in the provincial councils and municipalities was viewed with alarm by many Englishmen. Andrew Frazer regarded the lawyers as having a "disastrously undue influence" on all local governments and quoted a friendly pro-British rajah as saying, "You have thrown all power into the hands of the pleaders. They rule the courts, they have all the power of the local bodies, they have a practical monopoly on the legislative councils, we cannot oppose them." [248] This influence of the lawyers, disparagingly referred to as Vakil-Raj, was repeatedly denounced in Anglo-Indian literature. "Throughout the country there is a growing distrust in what is called Vakil-Raj. This power of the Bar is regarded by people generally as a power which undermines the prestige and diminishes the beneficience [sic] of British rule." [249]

Fearing that a separation of the judicial and executive branches of the government would endanger the security of the country and strengthen the power of the lawyers, Sir A. T. Arundell wrote that this "would be a concession to the large number of native vakils scattered throughout the country who are the prime movers in political agitation

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245. Only a few men in government service had the courage to openly support nationalism. One of these was Justice Ranade. When he was a judge in Poona he used his position and influence to awaken political consciousness in that area. Chief Justice Westropp of Bombay warned him that his writings were standing in the way of his promotion. He answered, "I am grateful to you, Sir. So far as my wants are concerned, they are few and I can live on very little. Concerning my country's welfare, what seems to me true, I must speak out." SETALVAD, *supra* note 130, at 141.

246. [In the early 1880's the Ilbert Bill's proposal to empower Indian judges in the *mofussil* to try criminal cases involving European defendants provoked the fierce opposition of the resident British community. A watered down version, known as the Ilbert Act, was passed in 1884, providing for mixed Indian and European juries in such cases.]

247. RAY, *supra* note 195, at 120.

248. A. H. L. FRASER, AMONG INDIAN RAJAHS AND RYOTS 65 (1912).

249. *Id.* at 64.

and who welcome any change that furthers the interests of themselves and their class." [250]

At the founding of the Indian National Congress in 1885 W. C. Bonnerjee, a barrister of Calcutta, was elected President. Other important leaders there were the Bombay lawyers Pherozeshah Mehta, Telang, Chandavarkar and Ranade. Chandavarkar was one of the delegates chosen by this first Congress to represent the cause of the Indian people to the people of England.[251] Many of the great lawyers of the late 19th and early 20th centuries were representatives in their regional legislative councils and also members of the National Congress.[252] During this time an increasing number of men with legal training entered into the political life of the country. Legal training was regarded as the best preparation for a political career.[253, 254]

For the first twenty years the Congress program was moderate, and concerned with limited constitutional reforms. Extremism was growing within the ranks during this period, but the moderates had firm control of the party as a whole. The political control of the party was in the hands of Pherozeshah Mehta[255] and the popular exponent of reform by constitutional agitation was Gokhale, a disciple of Ranade. The leaders with their Western educations and legal training understood parliamentary procedure and constitutional methods. They had confidence in the British sense of justice and were confident that the Irish members in Parliament and their own member, Dr. Dadabhai Naoroji, would be a great help to their cause.[256] His biographer describes Motilal Nehru, then a moderate who had little patience with the extremists, as believing that "able advocacy was as sure to succeed at the bar of British opinion as at the bar of the Allahabad High Court." [257]

The extremists under the leadership of Bal Gangadhar Tilak, Lala Lajpat Rai and Bepin Chandra Pal had grown very strong by 1905 and split off from the Congress in 1907, to remain separate until after Gandhi had entered the Indian political scene. Two of these leaders, Tilak and

250. 2 B. S. BALIGA, STUDIES IN MADRAS ADMINISTRATION 5 (1960).

251. BUCKLAND, *supra* note 152.

252. A reading of all the lawyer biographies in Buckland's DICTIONARY OF INDIAN BIOGRAPHY reveals that most of them were quite active politically.

253. MAVALANKAR, *supra* note 212, at 8.

254. Mavalankar relates how Pherozeshah Mehta, D. E. Wachla, Gokhale and Balchandra Krishna all advised him to study law with a view to enter politics. *Id.*

255. V. J. MAHAJAN, THE NATIONALIST MOVEMENT IN INDIA AND ITS LEADERS (1962), at 76.

256. *Id.* at 9.

257. NANDA, *supra* note 183, at 59.

Lala Lajpat had been trained as lawyers. Tilak had never practiced before a court but Lajpat Rai had left a very successful practice at Lahore when he turned to public life.

When Gandhi began his work for the cause of national independence in India he found many lawyers who were willing to spend much of their time to help. As he began his first great project, the Champaran investigation, he spoke to a gathering of vakils at Patna:

> I shall have little use of your legal knowledge. I want clerical assistance, and help in interpretation. It may be necessary to face imprisonment, but much as I would love you to run that risk you would go only so far as you feel yourselves capable of going. Even turning yourselves into clerks and giving up your profession for an indefinite period is no small thing . . . we cannot afford to pay for this work. . . . It should all be done for love and out of a spirit of service.[258]

A number of vakils volunteered to make themselves available. For more than a year they toured the Champaran in teams using their skill at cross examination to obtain statements (Gandhi stressed the need for truthful statements) from more than 22,000 *kisans* (peasants) who were being exploited by the indigo planters.[259] This *satyagraha* broke the grip of the planter on the peasants of the area and proved to the country what great public service could be achieved by well-motivated lawyers working together for the cause of human rights. Rajendra Prasad describes the great effect this work had on the legal profession of that area:

> Most of us who joined Gandiji in Champaran were lawyers and not one had joined him with the idea of giving up the profession. But when we started working in Champaran, our whole outlook changed. We found it impossible, once we had undertaken it, to go back to our avocations without completing the task in hand . . . people who went there for a few days remained for months. When we had finished the work in Champaran, we returned home with new ideas, a new courage, and a new programme. . . . We could feel and realize that if the public life of Bihar was to be at all effective, some of us would have to devote ourselves to it to the exclusion of everything else.[260]

Gandhi commanded the respect of the profession. When he established the Satyagraha Sabha following the Rowlatt Bills,[261] some of the

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258. M. K. GANDHI, THE STORY OF MY EXPERIMENTS WITH TRUTH 409 (1950).

259. R. PRASAD, AUTOBIOGRAPHY 91-92 (1957).

260. *Id.* at 100.

261. [The Rowlatt Acts, passed in 1919, gave Government broad emergency powers (*e.g.*, abolition of juries in political cases, internment without trial). The Acts were deeply resented and became a rallying point for nationalists.]

lawyers of the Bombay High Court, including barristers Varajrai Desai and Vallabhai Patel, signed the *satyagraha* pledge. They were warned by Justice Macleod, but no definite action was taken against them.[262]

The massacre at Jallianwalla Bagh at Amritsar in 1919 brought the leading lawyers of the country to the forefront of the struggle for independence.[263] Motilal immediately went out to defend those who had been arrested under martial law and who were in danger of receiving the death penalty. When refused permission to enter the Punjab he cabled directly to Lord Montagu, Secretary to India and to Lord Sinha who was residing in London, and received permission to go to Amritsar over the head of General O'Dwyer and the Viceroy Chelmsford. He was able to save the Congress leader Harkishenlal and was instrumental in shortening the period of martial law. Motilal neglected his own practice and used all of his influence and the facilities of his own solicitors in London to bring the appeals of those who had been condemned up to the Privy Council.[264] Gandhi, C. R. Das, M. R. Jayakar, Abbas Tayabji (Tyabjee), and Motilal Nehru were chosen by the Congress to be a committee of inquiry into the Amritsar situation.[265] By working in close association with Gandhi these leading lawyers of the day came to respect him and regard him as their leader.[266]

Finally the time came when Gandhi called for a boycott of titles, honorary offices, law courts, legislatures, foreign goods, and Government owned or aided schools and colleges. Motilal Nehru, C. R. Das, Rajagopalachari and many other lawyers gave up their princely incomes, resigned from their respective legislative assemblies, and began to live simple, austere lives.[267] The requirements of leadership were so great

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262. SETALVAD, *supra* note 130, at 153-54.

263. [*I.e.*, the firing by British troops on an unarmed crowd at Amritsar on April 13, 1919, in which 379 Indians died and 1,200 were wounded. For a full account, *see* RUPERT FURNEAUX, MASSACRE AT AMRITSAR (1963).]

264. NANDA, *supra* note 183, at 59.

265. Jayakar gives a graphic description of this committee at work:

> Gandhi invariably assumed the role of the stern judge in sifting the chaff from the substance. He took infinite pains to see that what was to be put before the public was the quintessence of truth. The occasions were not infrequent when we differed violently as to what was the truth . . . Das and I advocated our view with great insistence; Das often thumped the table with a vigorous gesture which was his favorite habit when putting forward his point of view. Motilal did the same but with great restraint. Gandhi often stood alone against all this fusillade. 1 M. R. JAYAKAR, THE STORY OF MY LIFE 322 (1958).

266. NANDA, *supra* note 183, at 170.

267. *Id.* at 184; and RAY, *supra* note 195, at 66.

that it was perhaps a good thing for the future of the country that practicing lawyers who had been only part-time leaders of the national movement now gave all of their time and energy to the task. C. R. Das and Motilal Nehru would no longer "cross swords in the court room during the day and discuss poetry and politics over a bottle of whiskey in the evening" as they often had during their last year of practice.[268] Both C. R. Das and Motilal were to enter the legislative assemblies again in opposition to the view of Gandhi and many of the Congress leaders. By setting up the Swarajist Party and successfully obstructing the functioning of the legislature they paralyzed the functioning of dyarchy government, especially in Bengal, and laid the ground for its abolition.[269] They did this as full-time political leaders.

After Gandhi's leadership became the most dominant force in Indian politics, practicing lawyers no longer led the national movement. From 1920 "Lawyers still led everywhere, but they were no longer practicing lawyers. Many great leaders of the day were lawyers no doubt—lawyers renowned in their generation—who had sacrificed their careers and devoted themselves to national service as whole time servants." [270] The activities of these great leaders from 1920 to the present day is beyond the scope of this paper; their activity concerns the nation as a whole but not specifically the development of the profession of law. During the 1930's the national movement had an adverse effect upon the legal profession by discrediting the courts and competing for the interest of the young men of the country.

CONCLUSION

In view of the impressive history of the legal profession, the place it holds in postindependence India is disappointing. It is an active and essential profession, but it no longer has the limelight. By the time of independence, widespread unemployment among the legally trained caused university graduates to seek training in other professions such as teaching, medicine, and engineering. No longer did the most talented men of the country study law. The prestige of the profession has greatly diminished. Katju, regretting this decline in the quality of the profession, has observed that previously only members of the higher classes,

268. NANDA, *supra* note 183, at 181.

269. RAY, *supra* note 195, at 200-3.

270. KATJU, *supra* note 1, at 13.

coming from families with a tradition of learning, studied for this profession. Now, however, students of law are drawn from all of society and often study law only because they cannot get seats in the other, more preferable professions.[271]

The legal profession no longer offers the most honored and profitable work that can be attained in India. It no longer draws the best students, and it no longer dominates the social and political life of the country. The monopoly it had on the leadership of the country for over a century is now gone. In a way the rest of society has caught up with the profession.

Still it can play a vital role in upholding individual rights, promoting more efficient and widespread justice, and acting as an integrating force in national life. It has great traditions on which to build. It now has a unified bar and controls the quality of its education, requirements, and ethical standards. It has an extensive literature and a great deal of experience. It is part of a "modern legal system" which "provides both the personnel and the techniques for effecting national unity."[272] The responsibility of this profession to the society of such a developing nation is indeed great, as has been its history.

271. 1 ALL INDIA RPTR. (1965).

272. M. Galanter, *Hindu Law and the Development of the Modern Indian Legal System*, mimeograph, Chicago, University of Chicago (1965).

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LAW COMMISSION OF INDIA

ONE HUNDRED THIRTY-FIRST REPORT

ON

ROLE OF THE LEGAL PROFESSION IN ADMINISTRATION OF JUSTICE

1988

Tel. No. 384475

विधि आयोग
LAW COMMISSION
भारत सरकार
GOVERNMENT OF INDIA
शास्त्री भवन,
SHASTRI BHAWAN,
नई दिल्ली
NEW DELHI

D. A. DESAI
Chairman

August 31, 1988.

D.O. No. 6(2)(6)/87-LC(LS)

Shri B. Shankaranand,
Minister for Law and Justice,
Government of India,
Shastri Bhavan,
NEW DELHI.

Dear Shri Shankaranand,

This is the journey's end. By the letter dated February 17, 1986, your predecessor, the then Law Minister Mr. A.K. Sen, conveyed a decision of the Government of India to the Law Commission that the task of studying and recommending judicial reforms, for which a separate commission was mooted, is assigned to the present Law Commission. The reference also contained a request to give top priority to it because of the day-to-day deteriorating situation in the system of administration of justice. The Law Commission rescheduled its work accordingly.

I have great pleasure in informing you that all the terms for the proposed Judicial Reforms Commission which were forwarded to us have been duly taken into account and a report, or, where necessary, more than one report, has been submitted covering each term of reference. Among the terms of reference, term No. 6 was with regard to 'the role of legal profession in strengthening the system of administration of justice'. That was reserved for the last report.

I am happy to forward to you the 131st Report covering this term and by sheer coincidence, this is the last report of the present Law Commission.

I am sure that all these reports would be expeditiously implemented with a view to reclaiming the system before someone has to call 'Amen' to it.

With kind regards,

Yours sincerely,

Sd/-
(D.A. DESAI)

Encl : A Report

CONTENTS

CHAPTER I

INTRODUCTORY

1.1. While responding to the inaugural address of the President of India at the Fourth Commonwealth Law Conference on January 4, 1971, Lord Hailsham of St. Marylebone, Lord Chancellor of Great Britain said : "Sir, you have been very generous about our profession. But we cannot altogether conceal from ourselves the fact that lawyers, whom I am here to represent, are a race not universally popular; nevertheless, I believe, they are universally found to be indispensable. How can they be universally popular when it stands to reason that in all contested litigation one party at least must go away disappointed, and is usually readier to blame his own lawyer, or his adversary's or, perhaps, shocking as it may seem, even the Judge, rather than his own conduct, or the weakness of his case ? ... we lawyers are profoundly proud of our calling. Whatever other people may think of us, we regard ourselves as being in the service of mankind."[1] Reserving the opinion on the cause assigned for lack of popularity referred to in Lord Chancellor's speech, the position of the Bar *vis-a-vis* administration of justice is here neatly summed up. And the authority of the maker of the statement is unquestionable because he combines in his person the Judge, the Minister, the legislator and the lawyer rolled into one. The legal profession has acquired a high visibility profile and consequently has held multi-disciplinary attention of many sociologists of law.[2] This led a jurist unfairly accused of pathological dislike for the profession to assert that 'if little sociology leads one away from the law, much sociology (in a generic sense) returns one to the study of the law'[3]. A number of sociological studies of legal profession have recently appeared.[4]

1.2. Legal profession is multi-dimensional in character. This report does not purport to study and analyse the legal profession with reference to all dimensions or its structure, organisation and functioning, nor does it purport to be the sociometry of the relationship of legal profession to various groups, such as litigants, Judges, politicians, academics and even amongst themselves. The limited scope of the report may be articulated viz. role of legal profession in strengthening the system of administration of justice.

1,3. This report would be the last link in the chain of reports prepared and submitted by the present Law Commission after the task of studying judicial reforms was assigned to it. One of the terms of reference drawn up by the Government of India for study of judicial reforms is : 'the role of the legal profession in strengthening the system of administration of justice'. The term articulates the scope and ambit of the report. Legal profession is one of the most leading professions of intellectuals in this country and, as stated earlier, it is multi-dimensional. The present report concerns itself with the role of the legal profession in strengthening the system of administration of justice. It is, therefore, necessary to prescribe the parameters of this report.

1.4. The present system of administration of justice owes its origin to the advent of the British rule in India. In its structure and organisation, the administration of justice in India as at present in vogue has the stamp of 'Made in U.K.'. The British system of justice is inconceiveable without the barristers and solicitors being integral part of the same. When the British rulers by gradual doses introduced the institution of British justice in India, simultaneously the institution of legal profession came along with it. Came the barristers and solicitors also. The form and organisation in which the institution of legal profession exists today has no relevance or connection with the period of Indian history prior to the advent of British rule in India. A research in this behalf has

revealed that while some researchers maintain that the litigants in pre-British rule or even in ancient India had rights to delegate the representation of their claims to some other person sustaining the belief that lawyers did exist in ancient India,[5] the contrary assertion is that lawyer never existed as a distinct category within the legal system of ancient India on the plea that, as per scriptures, it was the duty of the King or the Judge to sift the evidence and do justice.[6] In the pre-British period, the system of administration of justice did not acquire the overtones of adversarial system with the result that the profession of lawyers was hardly needed in the said cultural context to assist the litigant or his delegates argue their cases before the King who, as stated earlier, was supposed to analyse the evidence and arrive at the truth directly personally. The same situation obtained throughout the Mughal period which ended just before the British appeared on the scene.

1.5. The entry of the British in India towards the middle of the 18th century ushered in a very significant development resulting in several systematic changes. As part of a systematic process of consolidation of the empire, English common law and British statutory laws were to be made a part of the Indian legal system. Towards that end, members of the British Bar were recruited as Judges. Conversant with the British law and the common law, they interpreted the textual law, whatever it was, giving it the overtones of common law. This needed a Bar able to assist in this transformation. Macaulay did the rest of it while codifying laws in India. In the earlier period of the history of Supreme Court and Sadar Courts, the legal profession largely consisted of British Barristers and solicitors. The upshot of all these developments was the inescapable emergence and development of legal profession in the country which had an automatic relevance in the context of court-based rational legal system of administration.

1.6. It was the Charter of 1774 which empowered the then existing courts to approve, admit and enrol advocates and attorneys to plead and act on behalf of the suitors, simultaneously conferring power on the courts to remove lawyers from the roll of the courts 'on a reasonable cause and to prohibit practitioners not properly admitted and enrolled from practising in the court'.[7] The Royal Charter of 1774 was, in course of time, extended to other two presidencies—Madras and Bombay—which also came to have their own Supreme Courts in 1801 and 1823 respectively. All this indeed provided a great boost to the legal profession which now stood as statutorily recognised. With this, the lawyers now not only came to enjoy the tremendous prestige but also had handsome earnings—a fact, which has been reported by Samuel Schmitthener[8] rather dramatically.

1.7. It must, however, be briefly made clear that the legal profession continued to be fragmented in two different court-settings, that is, Mofussil (comprised of two-tier system of courts, i.e., Mofussil and Sadar Courts) and the Presidency Courts. Broadly stated, the Presidency Courts followed the law, codified by the British in India, or formulations of common law, and the Mofussil Courts by and large followed Hindu and Mohammedan Law. Further, as against the completely British composition of the profession at the Presidencies, the profession at the Mofussil Courts, at least till 1846, was exclusively Indian, that is, Hindus and Muslims. This divergence between two co-existent variance of professions at two levels continued till 1858 when the British Government superseded the Company and took direct charge of the colony. First, the British brought about a consolidation of the Royal Courts with the Company's Mofussil Courts. They established High Courts which were at the apex of the new system. With the expansion of the Empire and larger areas being brought under the Queen's Domain, High Courts were established at Allahabad (1880), Patna (1916) and Lahore (1919). The whole point in detailing the evolution of legal profession in India during the British time is meant to underscore that the said unification greatly helped in universalising the professional ethos and also lent a certain

collective character to the legal community. A number of Indians were attracted to this profession. Indian lawyers could henceforth practise side by side with their British counterparts and thus imbibe from them such norms of professional conduct and practice as the latter had brought with them as part of the British legal system.

1.8. The Indian legal profession proliferated as the western legal system struck deeper roots in India. More and more Indians adopted law as their career and started performing as well as their British counterparts did. Barrister's qualification had the respectability of its own. A large number of Indians started going to Britain to get themselves trained as barristers and then returned to practise in Indian courts.

1.9. Apart from the barristers and solicitors qualified in England, a provision was made for appointment of *vakils* or native pleaders in the Court of Civil Judicature. The Bengal Regulation VII of 1793 regulated the appointment of *vakils*. It contained an extraordinary provision whereby only Muslims and Hindus could be enrolled as pleaders. Later on, this discrimination between various communities was waived. Under the Punjab Chief Courts Act, 1866 a provision was made that 'Any person duly authorised by the Secretary of State for India-in-Council to appear, could plead or act on his behalf'.[9]

1.10. Although the establishment of the Indian legal profession was originally a case of 'transfer of a western institution' brought about by a foreign power to meet the exigencies of its administration in India, it soon assumed the leadership of national struggle for independence. The profession played a stellar role in the movement for independence. It acquired its awareness because of its connection with British democratic institutions through legal literature. The Indian National Congress which led the movement for independence became the rallying ground for the legal luminaries of the time, such as Gopal Krishan Gokhale, Lokmanya Bal Gangadhar Tilak, Mahatama Gandhi, the Father of the Nation, Motilal Nehru, Chittaranjan Das, Dr. Rajendra Prasad, Sardar Vallabhai Patel, Vithalbhai Patel, Pandit Jawaharlal Nehru and many others. Most of them who survived occupied positions of eminence in independent India.

1.11. It is uncontroverted that the members of the Indian legal profession occupied a vantage position in freedom movement. Members of the legal profession acquired the respectability of being leaders of thought and society. Participation of the members of the legal profession in the then socio-political stream was also evidenced by growing participation of Indians in the administration of various Provincial Legislative Councils under the British Government's policy of granting limited Provincial autonomy. Till the advent of freedom, it cannot be gainsaid that the members of the legal profession occupied a vantage position.

1.12. Is that position maintained till today ? In the post-independent era, has the legal profession maintained and augmented its position as leaders of thought and society ? If it has not, the causes of decay and deterioration will have to be objectively analysed, not by the approach of a hostile or carping critic but a sympathetic friend who was also a member of the legal profession and who, by introspection, would like to find out the causes and suggest remedies for restoration of the position to that place of eminence and acquire its pristine glory. That, however, would require an extensive research and that is beyond the scope of this report.

1.13. The report will concern itself with the role of the legal profession *vis-a-vis* administration of justice. As pointed out earlier, British system of justice is adversarial in character and that system survives till today. Adversarial system renders the position of a Judge to a passive listener, a sort of an umpire in a game of cricket, denying him the active participation in unravelling the truth. The members of the legal profession in adversarial system enjoy a position of absolute indispensability.

If the adversarial system is to continue since it is here for over 200 years for a further period of trial and error, the role of the legal profession in making the adversarial system functionally operational in the process of rendering justice will have to be fully appreciated and if any infirmities and drawbacks have developed, they have to be eliminated so that the legal profession would render assistance in strengthening the system of administration of justice.

1.14. This approach needs to ascertain the role of the legal profession in trial by adversarial system in contradistinction to inquisitorial system and that of the Judge operating the same system with a view to rendering justice. Mr. Warran Burger has set the goal for both by saying that 'Our constant purpose must be to keep in mind that the duty of lawyers and function of Judges is to deliver the best quality of justice at the least cost in the shortest time'.[10] This is the respective role of the lawyers and Judges. If role assigned to each is properly, adequately, sincerely and efficiently performed, the adversarial system against which pungent criticism has been offered can still be retained only on the ground of antiquity, extending over two centuries. However, as the criticism can be said largely to be well-merited, the defects, deficiencies and imperfections have to be cured before a fresh lease of life can be imparted to it.

1.15. As some of the ugly features of the present justice delivery system, namely, prolixity, high formality, dilatoriness and expensiveness, surfaced, those connected with the system attempted to unravel the causes which generated these festering sores. Undoubtedly the whole system came under pungent criticism. When a system is criticised, its imperfections and deficiencies are highlighted. Once they are highlighted, the search turned towards unravelling the causes for the same. Amongst the causes now preferred for the decay and stratification of the justice delivery system, some are attributable to the foreign nature of the system. But the fact should not be lost sight of that the system is in vogue for over two centuries in this country. To some extent also it can be said to be indigenized, though its overall picture remains British and, therefore, foreign. Even the profession which developed as an integral part of the system has also retained in its approach, sartorial significance, mode of addressing the court and the colleagues, and the way of ascertaining the truth as in vogue in United Kingdom. Till very recently, even the designations were imported, such as 'Barristers' and 'Solicitors'. The language of the superior courts is unquestionably English. Common law formulation are looked upon with reverence. Therefore, a sizeable body of opinion has developed that some of the ills of the system are attributable to adversarial system. Even in the land of its birth, serious doubts are raised about the efficiency of the system.

1.16. Sir John Foster Q.C. reflected upon the English legal system. Says he :

> "I think the whole English legal system is nonsense. I would go to the report of it—the civil case between two private parties is a mimic battle in which the Champions are witnesses chosen by each side but who are not necessarily people who know the facts. And the battle is conducted accordingly to medieval rules of evidence. There is no need for a Q.C. to always have plumber's mate. The use of juniors should be tailored to the demands of the case. And legal aid is so vastly expensive because the system is so silly—you have to have everybody in court on the same day ..... It is too easy to persuade an English Court that black is white; it would be less easy if the arguments were presented in writing".[11]

Lord Devlin, speaking about the legal methods in England, made a cryptic observation :

> "If our business methods were antiquated as our legal methods, we should be a bankrupt country. There is need for a comprehensive inquiry into the roots of our procedure, backed by a determination to adapt to fit the conditions of the Welfare State".[12]

1.17. Justice Krishna Iyer, a former Judge of the Supreme Court of India, evaluated adversary system as under :

> "The adversary regime, a legacy of Anglo-American legal culture, is splendid in principle in many respects and is a victory in practice for human rights, viewed historically with Star Chamber memory, but is hostile to the actualisation of court justice unless operational innovations to conscientize, sensitize and radicalize current judicial methodology be creatively and crusadingly undertaken".[13]

'In the final third of this century, we are still trying to operate the courts with fundamentally the same basic methods, the same procedures and the same machinery' ... Roscoe Pound said, 'were not good enough in 1906. In the supermarket age, we are trying to operate the courts with crackerbarrel corner grocer methods and equipments—vintage 1900'.[14] There is a body of opinion that of all the ugly features, the two most important being prolixity and expensiveness are attributable to the role of legal profession. This is not said in any derogatory sense but with a view to pointing out where reform is possible.

1.18. While examining the role of legal profession in strengthening administration of justice, these benchmarks will have to be kept in view.

CHAPTER II

THE DEBATE

2.1. Ordinarily a group, class or category generally tries to safeguard and defend its image and interests, nevertheless, in order to have a comprehensive view of the problems related to profession, the Law Commission considered it desirable to explore profession's own perceptions on various issues, including its role in strengthening judiciary. The Law Commission accordingly prepared a Questionnaire, annexed at *Appendix I*, and gave wide criculation to it. Every attempt was made to send the Questionnaire to the organisations of the members of legal profession, such as Bar Councils and Bar Associations. Anyone interested in the subject was invited to call for a copy of the Questionnaire. The Questionnaire was also sent to each High Court requesting the Registrar to bring the same to the notice of the Chief Justice and Judges of High Court so as to obtain a cross-sectional view. The questions were devised to focus attention on various facets of legal profession, such as :

(i) the state of profession and its public image;

(ii) profession's attitude towards the policy of social change intended under the Constitution;

(iii) the functioning of the Bar Councils and the question of disciplinary jurisdiction;

(iv) the strike by lawyers, its implications and fall out;

(v) the question of hobnobing between the Bar and politicians, between the Bar and the Judiciary;

(vi) regulation and standardisation of fees chargeable by the members of the profession in relation to the monopolistic character of the profession.

2.2. Before the response to the Questionnaire is tabulated, the inadequacy of the response of the organised Bar may be adverted to here. If the Bar Council of India, the apex body of the organized Bar, had responded to the Questionnaire and had shown willingness to have debate and dialogue, the Law Commission would have extended every facility for the same. In fact, Secretary of the Bar Council Trust, who was an expert assisting the Law Commission in the matter of assessing, evaluating and, if need be, reforming the role of legal profession in strengthening the administration of justice, suggested that the Bar Council of India, if some financial assistance is forthcoming, would be willing to organise a representative seminar to discuss the topic. The Law Commission seized upon this opportunity and agreed to extend financial help within the parameters of its overall policy decision in this matter. Earlier, a suggestion had also emanated from the Indian Law Institute, New Delhi, to organise a seminar on the same subject in collaboration with the Law Commission. So when the Secretary of the Bar Council Trust mooted the idea of a seminar, the Law Commission suggested to him whether all the three, namely, the Law Commission, Bar Council of India and Indian Law Institute, can jointly organise the seminar. He said that it would be the best thing to do. Accordingly, the Indian Law Institute was informed to be a co-sponsor of the seminar. Later on, the Bar Council of India had some reservations about the participation of academics represented by the Indian Law Institute and suggested that the Indian Law Institute should not be a co-sponsor. The Bar Council of India also suggested that it would alone organise a seminar without the financial contribution of the Law Commission. The dates of the seminar were fixed. The Law Commission had sent its contribution also. Ultimately, the Bar Council of India, for the reasons which need not be elaborated here, returned the contribution made by the Law Commission, postponed the seminar and never convened it. It also failed to submit its response to the Questionnaire. The loss, of course, is of the Law Commission and the Indian legal fraternity.

2.3. Total respondents to the Questionnaire were 36. A list of persons/ bodies who responded to the Questionnaire is annexed at *Appendix II* to this report. The tabulation is as under :—

Legal Practitioners	Bar councils/ Associations etc.	High Court Admn.	Judges	Voluntary bodies/ consumers of justice	Academics
7	11	2	6	6	4

Before the views expressed by the respondents are summarised, the grievances against the Questionnaire may be summed up to avoid an unmerited criticism that critique of the Questionnaire is not highlighted. The *Bombay Bar Association,* while forwarding its responses to the Questionnaire, expressed its chagrin at the language and tenor of the questions, feeling that 'the queries were framed in a populist manner with a pronounced bias against the legal profession. It appears on a perusal of the questions that the draftsman had already pre-determined some of the issues therein. Some of the questions themselves were unclear, some had built-in assumption and some were illogical'. In order to appreciate the merit of this criticism, the Law Commission has annexed the Questionnaire as *Appendix I* to this report. Without commenting on the views expressed, because the Law Commission cannot enter into polemics with the Bombay Association as it started the debate to ascertain the views, the Law Commission would leave it to the readers to look at the questions and make their own assessment. One can only say that the criticism lacks merit. Only one assertion may be made that the truth hurts. But that is inevitable if introspection is a primary necessity for salvaging the situation in which the profession *vis-a-vis* the society is viewed. The *Ahmedabad Bar Association,* while responding to the Questionnaire, expressed the feeling of the majority of the members that 'the innuendo emanating from the language and the frame of the questions is despicable and hence resented'. On the other hand, the *Bihar Bar Council* expressed the opinion that, 'the Questionnaire is thought provoking and if answers are forthcoming and are implemented, can accelerate the pace of fulfilment of the goal of social change. It further stated that, 'it is true that contemporary legal profession has fallen in the popular estimation, mainly because lawyers have grown up participating in public activities. They have now become too self-centred and have concentrated on earning money alone'. Further, it is stated that it is not 'denied that the image of the legal profession in the country has gone down. The factors contributing to the lowering of the image are manifold—some are printable and some are not printable'. Bar Council of a State represents the Bar of the State and one of its representative also sits on the Bar Council of India. *Muzaffarpur Bar Association* in the State of Bihar has expressed itself on this point by saying that 'the contemporary legal profession has fallen in the popular estimation because the economical gain and benefit has become their first goal due to economic upheaval and devaluation of money, and their main role to assist in the administration of justice has become subordinate to the said first goal'. On the other hand, the *Bar Council of Punjab and Haryana* has stated that 'legal profession has not fallen in the estimation of the general public. It may have fallen in the estimation of the State as it may not have toed the line of the State when it felt endangered'.

2.4. One Bar Council expressed an opinion that there is all round deterioration about the image of every limb of Government and 'the primary responsibility for this rests with the Executive which does not provide sufficient Judges and staff and does not enforce law or itself indulges in lawlessness'. It was also stated that 'the fall of legal profession in the popular estimation has its roots in overcrowding at the Bar, delay in disposal of court cases and inaction and apathy on the part of the Bar Council of India in observing its statutory duties towards legal profession'.

2.5. Before one adverts to the views expressed by persons other than members of legal profession, it must be stated that even amongst the bodies representing the legal profession there is a feeling that the legal profession has suffered devaluation in the estimation of the public. Of course, members of the legal profession would hesitate to accept this impalatable fact. And obviously while stoutly denying this universally accepted fact the organisation of the legal profession would cast aspersions on the Questionnaire which provoked the assertion. That is how the *bonafides* of those who drew up the Questionnaire have been questioned by at least two bodies which have been specifically set out hereinabove.

2.6. The non-professional voluntary bodies have a different tale to tell. One respondent stated that 'people are openly saying that the legal profession is no longer service-oriented that it is only profit-oriented, and that the lawyers are out only to squeeze the clients to the maximum extent possible'. Another voluntary body devoted to providing legal aid to the needy women, opined in a similar reframe that 'the contemporary legal profession has fallen in the popular estimation because of the greed for money, lengthening of the case for years together for small reasons and even changing their loyalty to the other party for the sake of money only. Sometimes, lawyers of both sides join hands to make both the parties compromise even if the clients have to suffer the loss. Majority of the lawyers harass their clients for more and more fees, false bills while not taking the required interest in the case'.

2.7. Some Judges of the High Court found time from their busy schedule to respond to the Questionnaire. By aptitude and temperament, they generally chart the middle course. Thus, even though recognizing that 'to some extent the present day profession has moved far from the primary function of the legal profession to assist in rendering justice', it was maintained in the same breath that 'though we cannot go to the extent of saying that its present role is counterproductive, but a timely introspection and proper change are of immediate necessity'. By and large Judges were of the opinion that certain modifications in the Advocates Act are desirable and should be carried out on the basis of responses to the Questionnaire received.

2.8. The academics in general tend to perceive the problem of declining standards of professional conduct, not as an isolate but in relation to other problems of society, polity and legal system. It is said :

> "Legal profession by itself cannot be an impediment to the administration of justice. It operates as one of the components of the justice system and is subject to stresses and strains generated by other components. Technically speaking, dilatoriness and prolixity cannot be brought about by profession alone; other factors, such as attitude of the Judiciary, complexity of procedural and substantive law, deficiencies in the system of legal education, equally impinge upon the functioning of the system'. 'It is rather the failure of the State to regulate the profession than the grow quick rich propensities of the members of the profession which has been responsible for the existing state of affairs".

2.9. Still another academic states :

> "We cannot say that legal profession is an impediment to justice. The complex, technical and formal approach is mainly to seek justice because the justice is filtered through procedures and the consumer gets it clean and unbiased. It is not only the profession but mainly it is Government which is responsible for delays because it keeps the Judiciary understaffed".

2.10. While suggesting measures necessary for restoring the lost self-esteem and public image of the profession, the academics repeatedly emphasise the necessity of—(i) uplifting standards of legal education, (ii) cautious selection of advocates on the part of Bar Councils; and (iii) the role to be played by the academic lawyers. On the last of these three suggestions, one academic remarks :

> "New modalities need to be devised for interaction between academic lawyers and members of the profession. The Legal Education Committee of the Bar Council of India should be reorganised. Representatives of the Committee should be selected from institutions well-known for excellence as also from outstanding academicians who have made contribution to legal education".

2.11. Strike by lawyers has become a nauseatingly recurring phenomenon. It is of recent origin. Strong views are held on either side whether members of the legal profession can go on strike or not and if they can, what would be the justifying and compelling reasons and for what length of time. In the Questionnaire issued by the Law Commission, part of question No. 4 and question No. 5 referred to recent strikes by the members of the legal profession in different parts of the country. Members of the organised Bar with one voice supported the right to strike. On the other hand, a number of voluntary organisations, judges of High Court and individuals expressed the opinion that the lawyers have no right to go on strike.

2.12. The High Court of Orissa expressed the view that members of legal profession should not go on strike, nor should they resort to strike in support of their demands or ventilating their grievances. Some Judges of the High Courts in their individual capacity responding to the Questionnaire clearly expressed themselves against a strike. The Bombay Bar Association was of the view that the Bar should follow other means of protest in keeping with its dignity and resort to strike only if no other solution is possible. On the other hand. Ahmedabad Bar Association clearly expressed itself in favour of legal profession going on strike in support of the ends coveted by the Bar. In between these extreme views, opinions for and against strike were expressed by lawyers responding in their individual capacity. Voluntary organisations and others expressed an opinion that ordinarily members of the legal profession should not resort to strike because strike in the long run undermines the administration of justice.

2.13. A local journalist in his column stated that :

> "Lawyers are the most organised community in the country with statutory Bar Councils, voluntary Bar Associations and a host of legal societies well-oiled with funds derived from their licensed monopoly to run the legal business market provided by courts and tribunals. All this power is of awesome proportions for the ordinary citizen in Delhi. ... their strike raised some troublesome questions".[1]

The lawyers' strike with reference to the incidents that occurred at Tis Hazari Court in January-February 1988 led a journalist writing in Statesman to remark that 'lawyers' strike is delaying justice."[2] By and large, the print media showed little sympathy for the cause of the strike or for the strike itself. A Jurist has expressed himself that 'the members of the Bar proceeded on strike for maintaining the *status quo*'.

2.14. Some causes of the strike may be examined in view of the claim that there are justifying and compelling causes for which the Bar, if it does not resort to strike, would be failing in its duty. The Gujarat High Court Bar was on long strike on the ground that the acting Chief Justice was not confirmed. The entire Bar in the State of Gujarat went on strike for a couple of months on the ground that some of the persons recommended for elevation to the Bench by the Chief Justice of the High Court were not appointed by the Government. The Delhi High Court Bar Association went on strike on the ground that the acting Chief Justice should have been appointed in a permanent capacity. The repeat performance was when a district judge was elevated to the High Court

over the head of his senior. The Allahabad High Court Bar Association resorted to strike for a period of about 13 days in May 1980 when the then Chief Justice initiated several reforms in the administration of the High Court, accusing the Chief Justice of 'massacring justice'. In November 1987, the members of the Delhi High Court Bar Association went on strike in protest against the decision of the High Court to raise its pecuniary jurisdiction to five lakh rupees in respect of civil suits. This strike dislocated the work in the High Court to the extent that more than 20 civil suits which were either to be decided or had been listed for recording of evidence on the first two days of the strike would most probably be coming up for hearing around 1991-92.[3] In January-February, 1988 advocates practising in all courts in the capital went on strike protesting against handcuffing of a lawyer by police and the two subsequent incidents in which police allegedly resorted to lathi charge. Sometimes the Bar so dominates the Bench as to subvert both the spirit and the text of law seeking to achieve a modicum of expedition in trial.[4] About a few days back, lawyers practising in Tis Hazari Courts in the capital revived their strike which led Hindustan Times to comment editorially that the lawyers, by their over reaction, have put the public into much inconvenience and they seem to be reluctant to change their line of action. The paper exhorted the people to resist this attempt to dictate because, according to it, lawyers in Delhi are setting a bad example to their community in the rest of the country.[5] The members of the Criminal Court Bar Association, Ahmedabad, went on strike on the ground that the powers under sections 107 and 151 of the Code of Criminal Procedure are being withdrawn from the Executive Magistrates and are being conferred upon Commissioner of Police wherever a Police Commissioner is appointed for an area. Taking cue from their learned friends in Delhi over 17,000 advocates in Bombay and adjoining Thane district abstained from courts to protest against police assault on a lawyer and his reported handcuffing.[6] It will thus appear that the causes which have provoked strike would leave one bewildered.

2.15. Analysing the responses, the first thing that strikes us is that by and large the members of the legal profession individually or through organisations were unwilling to abdicate the right to strike which is fiercely and self-righteously claimed. The right to strike is claimed as a fundamental right, being a non-violent means of expressing protest to the unjust and improper actions of the authorities. It was claimed that if the right to strike is taken away from the lawyers, it will make the lawyers impotent which will jeopardise Indian democracy. The contrary view expressed in the debate needs mention :

> "The lawyers, as a class, have come to believe that they are entitled to special consideration distinct from ordinary citizens because they have an access to courts and deal with the Judges direct, from day to day. A succession of strikes which ended with the acceptance by Government or the courts of their demands, has in effect, provided them with a clout, which they are now in a position to wield to bring the judicial system to halt".

It was maintained by the members of the legal profession that the strike is not against the court but against the actions of the Government. But it was further claimed that if a member of the Judiciary is unfairly treated, the Bar has a duty to show its resentment by resorting to strike.

2.16. Individuals who had something to do with the court and voluntary organisations by and large adversely commented upon the strike by lawyers. It was said that it is not at all proper for the members of the Bar to go on strike for any reason, including an unfair treatment of a member of the Judiciary by the Government. It was generally maintained that the strike by lawyers caused irreparable and irreversible harm only to litigants and, in the long run, weakens the system of administration of justice.

2.17. To recall, the Law Commission is examining the role of legal profession in strengthening the system of administration of justice. What is the fallout of this recurring strike ? Available figures indicate that even if the strike, may be, from the point of view of the legal profession, was wholly justified and for a compelling reason, it had at least the dubious

distinction of piling up the arrears and the victims are the consumers of justice, namely, litigants, whose cases could not be listed for hearing and would not be listed for years to come. This can be substantiated by statistical information with regard to the piling up of arrears in the Supreme Court of India and the Delhi High Court between 31-12-1987 and 30-6-1988, during which period the lawyers almost in all courts in the capital were on strike for a fairly long period. The pendency as on 31-12-1987 in the Supreme Court of India was 1,75,748.[7] The pendency as on 30-6-1988 in the Supreme Court of India is 1,85,950.[8] There is thus an increase of 10,202 in the backlog of cases in a period of six months. If previous graph of increase in pendency yearwise[9] is compared to the present graph, what stares into the face is that this sudden rise is purely attributable to the strike of the lawyers even in the Supreme Court of India. Similarly, in Delhi High Court where the lawyers were on strike, the pendency on 31-12-1987 was 77,444 and it rose to 82,712 on 30-6-1988.[10] Latter figure does not include cases which, though filed, were awaiting registration. Can a claim that the strike is for strengthening the administration of justice be entertained in the face of these stark facts ? The irreducible minimum which flows from this situation is that while not strengthening at any rate the strike of lawyers weakens the system of administration of justice.

2.18. The next subject that elicited a ferocious debate with entrenched positions being taken on either side is with regard to the disciplinary jurisdiction of the Bar Council over the members of the legal profession. Question No. 11 of the Questionnaire invited a debate on the disciplinary jurisdiction over the members of the Bar. The question was framed keeping in view the accountability of the profession to the consumer of its service. A view was expressed that the transfer of disciplinary jurisdiction to the Bar Council has weakened the control over the members of the Bar and, therefore, attempt must be made to examine whether the jurisdiction should be retransferred to the High Court.

2.19. Before Chapter V of the Advocates Act, 1961 came into force, the disciplinary jurisdiction over the members of the Bar vested in the High Court under the repealed sections 10 to 13 of the Indian Bar Councils Act, 1926. There was a demand for what is called Peer's justice which led to the conferment of disciplinary jurisdiction on the Bar Council, simultaneously extinguishing the jurisdiction of the High Court. The debate revealed irreconciliable positions between those who are enjoying the jurisdictions and those who desire a change. The Bar Councils generally were wholly opposed to any change in disciplinary jurisdiction; on the other hand, the Judges strongly felt that disciplinary jurisdiction of the High Courts should be restored. The individuals who responded to the Questionnaire and some voluntary organisations were in favour of restoring the disciplinary jurisdiction of the High Courts. One voluntary organisation asserted that, 'most of the matters pending before the Disciplinary Committees of the Bar Councils are the complaints by the litigants against their advocates. That such complaints are at present evaluated and decided by the professional brothers of the accused is by itself ironic and strange'. One reason why Bar Councils are not geared up, the way they ought to be, is that, 'criticisms of the Bar Councils and Bar is absent because people are afraid of this pressure group, even Judges are afraid of them, then how can any individual dare to do it'. This was the view expressed by another voluntary organisation. A suggestion was made by a third voluntary organisation that in order to confer credibility on the Disciplinary Committee of the Bar Council, the complainant should be empowered either to be a member of the Disciplinary Committee or to nominate his representative on the Disciplinary Committee.

2.20. The Law Commission had the expert assistance of an academe who, for long number of years, was closely associated with the Bar Council of India. His view is :

> "Closely related to the above issue is the lack of adequate enforcement of professional discipline and standards of ethical conduct. Very few people outside the profession are aware of the existing system of punishing erring advocates. Peer Group Justice has not been a success if one were to go by the statistics of violations and

the extent of indiscipline often noticed among the advocates. Punishments had to be corrected by the Supreme Court.[11] The cases are not publicised and the public are in dark about the misdeeds of many lawyers on whom they depend for their life, liberty and property. A number of unholy practices, such as 'Bench fixation', fee sharing, etc., are not even recognised as unethical conduct inviting disciplinary jurisdiction. Besides, strike and boycott of courts at State and local levels have become a regular feature with the advocates who are getting unionised on political and regional grounds. The fond hope of the All–India Bar Committee for an integrated Bar with high professional standards is steadily being eroded by the actions and omissions of a certain section of the advocates themselves ..... The situation call for a revision of the rules of professional conduct and etiquettes keeping in mind not only the interests of the members of the profession but also those of the litigating public ..... Supervisory role of the High Courts on disciplinary matters may have to be revived at least in a limited manner to enforce accountability from recalcitrant members of the Bar".

2.21. It is undoubtedly true that section 38 of the Advocates Act confers appellate jurisdiction on the Supreme Court of India over the decision of the Disciplinary Committee of the Bar Council of India at the instance of any person aggrieved by the same or at the instance of the Attorney General of India or the Advocate General of the concerned State, as the case may be. The appellate jurisdiction inheres the power to vary the punishment which has been interpreted to include the power to enhance the punishment also. It is for consideration whether this jurisdiction is sufficient to allay the apprehension of the litigating public about the outcome of peer's justice. It is equally necessary to examine this aspect from the point of view of the accountability of the profession, amongst others, to the litigants.

2.22. One more facet of the debate which needs to be examined has reference to the mounting cost of litigation which litigants have to bear at present.[12] In the present context, the aspect is examined with regard to only one limb of it, namely, lawyer's fees. Question No. 14 in the Questionnaire was whether it was desirable to have a standardised schedule of fees that would be charged by the lawyers from the clients. If the view favours such a standardisation, a request was made for suggesting a method for enforcing the same.

2.23. The trend is not in favour of standardisation of fees. The view varied from it being desirable but not practicable 'because the cost of living and the standards of living differ not only from man to man but from locality to locality also', on the other hand, it was stated that, 'the need to have a standardised schedule of fees that may be charged from clients is being largely felt but it is important to arrive at a schedule of fees and to enforce it'. One State Bar Council was of the opinion that such a measure, if adopted, would give rise to greater corruption and encourage the growth of black money. Voluntary organisations, on the other hand, suggested that they or para-legal bodies should be given due encouragement to appear in the court to render assistance to the needy for legal services. The voluntary bodies working in the field of legal aid to the needy favoured standardisation of fees payable to lawyers. In fixing the schedule of fees, it was recommended that it must be done after consultation with the organised bodies of legal profession. There should be a committee to which alone the fee will be paid and the committee will render account to the lawyer.

2.24. Though it is difficult to quote any single specific instance, the fees charged by some senior advocates are astronomical in character. And it so happens that the corporate sector is willing to retain talent at a very high cost. The payment thus develops into a culture and it permeates down below. Undoubtedly a schedule of fees has been drawn up by the Bar Council of India but the views expressed to the Law Commission would reveal that nobody takes note of it. It is not merely the attempt to prescribe standardisation of fees but the enforcement machinery that would become more relevant.

CHAPTER III

CONCLUSIONS AND RECOMMENDATIONS

3.1. Legal profession enjoys on the one hand uninhibited eulogy and on the other hand no holds barred condemnation. Free from either, objectively and dispassionately, the role of legal profession may be examined with a view to making its role justice and people oriented.

3.2. Socialists and analysists have found something in the atmosphere of the law schools which tend to produce a finished product which is impervious to change. Charles Reich in this context said :

> "Finding themselves in law school..... (students) discover that they are expected to become 'argumentative' personalities who listen to what someone is saying only for the purpose of disagreeing; 'analytic' rather than receptive people, who dominate information rather than respond it; and intensely competitive and self-assertive as well. Since many of them are not this sort of personality before they start law school, they react initially with anger and despair, and later with resignation..... In a very real sense, they 'become stupider' during law school, as the range of their imagination is limited, their ability to respond with sensitivity and to receive impressions is reduced, and the scope of their reading and thinking is progressively narrowed."[1]

3.3. This led George Bernard Shah to quip that, "All professions are conspiracies against the laity..... In a society where justice, in theory at least, is held up as the highest ideal, lawyers", it is said, "are always looking for technical and sometimes dubious means of bending the law to their advantage."[2] The criticism against the profession is as old as the profession itself. William Shakespeare said that 'the first thing to do, let us kill all the lawyers'.

3.4. Abjuring this criticism, in our country, the role of legal profession has to be assesed in the context of the constitutional mandate as set out in article 39A of the Constitution. It is the duty of the State to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.[3] The role of legal profession in strengthening administration of justice must be in consonance with the intendment underlying article 39A. In other words, in an adversary system as in vogue in law courts being the fulcrum of administration of justice, the role of legal profession must ensure equal opportunity to all litigants in search of justice. In the process, opportunity for securing justice should not be denied to any citizen by reason of economic or other disabilities. Legal profession is expected to ensure that anyone who has not the economic wherewithal to seek justice must not turn away from law courts on the only ground that he is unable to incur necessary expenditure for securing justice. Equally important is the fact that social disabilities should not deny access to centres of justice of which legal profession is an integral and inseparable adjunct. The State, which has conferred a monopoly on the legal profession by permitting it to regulate its own admission, qualification for admission and be the regulator of its own internal discipline, should so conduct itself as affording every facility for securing jutice. To discharge this obligation, the legal profession must make its services available to those needy who otherwise cannot afford to pay the cost of legal services. Costs as also their other social disabilities may not come in the way of legal profession assisting such persons from securing justice. The profession must develop its own public sector.

Briefly stated, ways and means must be devised so that the profession plays a meaningful role in promoting the quality of justice and to bring about such changes in society as are in consonance with the egalitarian goals, to which we are committed both constitutionally as also as our policy objectives. Within these parameters, the role of legal profession in strengthening administration of justice must be spelt out.

3.5. Monopoly is resented by the society because consumers of the monopoly can be held to ransom in the absence of availability of alternative services. A monopoly without a liability of accountability is likely to lead to tyranny. It is unquestionable that legal profession is monopolistic in character. This does not need elaboration. If the profession is monopolistic in character, it must be accountable to the consumers of its services and let the consumer class be not narrowed down only to litigants. Even the court system of which it is an integral part can be said to be the consumer of its service. Therefore, apart from the wider concept of accountability of monopolistic profession to the society at large, there must be ways and means of making the legal profession accountable to the litigants and the court system.

3.6. The legal profession continues to be central to the socio-political domain of the Indian society, its structure as well as process tend either to change or sustain the existing order of things. Members of the legal profession constitute the single largest group in Parliament which is vested with the task of taking the most vital decisions affecting the present and future of the Indian nation. It can, therefore, be stated with confidence that they do exercise the single largest influence over the national life. The members of the legal profession can, therefore, have a decisive voice in law-making. Therefore, they can also promote the quality of justice by so shaping the laws as would advance justice. It is true that the professional bodies of the members of the legal profession are sensitive to criticism because some of them viewed the Questionnaire of the Law Commission as motivated. Even in the matter of strike, the members of the profession asserted that right to strike is beyond question. An impression is likely to be formed that the members of the profession are keen to guard their own interests notwithstanding the fact that by their attitude sometimes public good is impaired. The profession must maintain the difference between profession and guild or business.

3.7. Therefore, the question must be posed : What can the organised profession do at their level individually and collectively to promote the quality of justice ? The answer lies in the intendment underlying article 39A.

3.8. It is unquestionable that in any organised profession, there are bound to be some persons who are unable to maintain the high standard of profession. In some cases, evidence reveals a sordid state of affairs in lawyer-client relationship. This itself cannot be sufficient to condemn the profession as a whole but this aspect cannot be ignored also. It is here the question of accountability of the profession to the litigant and system comes to fore. The leaders of the Bar must show a deliberate concern with the fate of the poor and the indigent by volunteering to take up their cases in courts of law. They must also take up the role of questioning the credentials of persons who do not maintain high professional standards, its accountability by introspection or by internal regulation of the profession. It must submit itself to social audit. It is too much to expect a litigant coming from rural areas to understand what is expected of his lawyer and to complain against him if he feels cheated and thereafter to prosecute his complaint before the Bar Council. It is for the profession to provide a self-regulating mechanism whereby it takes notice of an errant lawyer and deals with him without anyone coming forward to lay a complaint. This would be its first and foremost task, namely, to perform its duties both towards the profession and the wider society. Maintenance of the irreducible minimum standards of profession cannot be left to members of the society complaining against anyone. That is a tall order. Accountability can be provided for by a self-regulating mechanism. This must also include an improper or unprofessional behaviour in the court that would be impairing the system.

3.9. The foremost requirement of the present day is to reclaim the glory of the profession. No doubt there are some sociologists who believe that the prestige of the legal profession since the independence has not declined. It is said that "a perusal of facts available suggests that the public position of Indian lawyers has not declined after independence."[4] Of course, he reaches this conclusion by asserting that the "lawyers had prestige in the context of anticolonial struggle *not* as professionals but as freedom fighters. Not that some of them did not enjoy lucrative practice; but they were venerated by the people precisely for *giving up* the same, for altruism they demonstrated."[5] On the other hand, the role of the profession in independence movement is eulogised by asserting that the profession had pragmatic and dynamic participation in the socio-political history of the past two centuries but as against this backdrop, the present times present a picture of contrast.[6] In the year 1958, a finding was based on the evidence collected by the Law Commission that "There is a fall in efficiency and standards at the Bar. The recent recruit to the profession is said to be inferior in his legal equipment, less pain-staking and in a hurry to find work".[7] Three decades after, a leading Gujarati daily described the members of the legal profession in its editorial columns as *kajiya dalals* (dispute brokers).[8] The editor went on to state that the members of the legal profession have been encouraging litigation more and more by giving impetus to disputes.

3.10. By a concerted action to be taken by the organisation of legal profession, a serious attempt should be made to erase this picture of the profession even if it is in the minds of few. Every step has to be taken to restore the respectability and credibility of the profession not only in the eyes of the society but even the litigating public.

3.11. Therefore, the first step that is required to be taken is not to encourage litigation but to reduce litigation. The role of the legal profession is to resolve disputes and only in the last resort the matter should be permitted to go to court. "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser-in fees, expenses and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man. There will be business enough."[9] The role of the lawyer is clearly spelt out here. From the accusation that the lawyers perpetuate disputes, the members of the profession must undertake discouraging litigation, persuade parties to compromise, and impress upon the parties how futile is the litigation. There could not have been a better summing up of the role of lawyers.

3.12. This very aspect has been put in a different form when it is said that the slogan of the members of legal profession should be 'arbitrate, don't litigate'. Undoubtedly, there is a body of opinion that arbitration proceedings may be disastrous in character.[10] This extreme statement even about arbitration proceedings need not discourage the members of the legal profession because arbitration as a mode of resolution of disputes by a Judge of the choice of the parties was considered preferable to adjudication of disputes by courts. Viewed from this angle, it has already been recommended that as soon as a notice making a claim is served, the other side should nominate a lawyer and both the lawyers should meet and try to resolve the dispute or narrow down the area of conflict and this will be their both statutory and professional obligation.[11] And this approach enhances the role of the legal profession and affords it a vital role at the most preliminary stage even before the courts step in to resolve the dispute and thereby to eliminate litigation.

3.13. There is widespread belief, both among the litigating public and legislators, that intervention of lawyers in court proceedings have the built-in tendency to delay the disposal of cases. In other words, the dilatoriness and prolixity of the proceedings in the court are being attributed to the members of the legal profession. Expeditious resolution of disputes is one of the fundamental requirements of any effective and efficient system of administration of justice. Today, unquestionably, the

3.16. For a positive check, while deciding the cost quantum to be pointing out that the cases in the Supreme Court are pending from 1968 onwards and in this year they have become two decades old. Even criminal appeals of 1975 are pending in the Supreme Court. Similarly, in the 18 High Courts, 30,970 civil cases and 615 criminal cases over 10 years old are pending as on 1-1-1987.[12] Can anyone be expected to wait for a generation in search of justice ? Any system which delays disposal of cases or resolution of disputes over decades can be said to have outlived its utility. The system may need basic changes but, without minimising and law were raised, the same must enter the verdict and quantify the time spent in resolution of disputes.

3.14. It is an oft-repeated suggestion that the lawyers must be excluded from appearing before certain tribunals and certain types of cases. This is sought to be justified by reference to a provision like sub-section (3) of section 36 of the Industrial Disputes Act, 1947, which provides that no party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceeding under the Act or in any proceeding before a court. There are similar provisions in some other statutes, more especially statutes dealing with agrarian reforms. The Law Commission does not subscribe to this view. Appearance of the members of the legal profession provides a healthy check on the angular behaviour of the presiding Judges. The presiding Judges may be able to control the members of the legal profession and *vice versa*. The role is complementary. The experience of excluding members of the legal profession from appearing in certain proceedings has neither contributed to the expeditious disposal of cases nor to a more satisfactory solution of disputes. Therefore, exclusion is not the answer. The accountability of the members of the legal profession, while appearing in proceedings and dealing with the same, will provide a healthy check on the possible dilatory tactics sometimes resorted to in some need-based litigation, such as a position of a tenant under the Rent Act who is under a threat of eviction or the position of an employer when a dismissed employee is likely to be reinstated. Even here, the dilatory tactics should be completely eschewed. And, for this purpose, the hands of the presiding officers should be strengthened by appropriate provisions so that this tendency to delay the disposal of the cases may be effectively controlled.

3.15. Another tendency which has become very recently visible, especially where pleadings are drawn up for Mofussil Courts, is to raise all and sundry, frivolous and untenable points of facts and law. It would be difficult to come across a single pleading in the Mofussil Court where a dispute as to court fees and as to limitation is never raised. They are the standard defences. This is attributable to excessive dependence on seniors as well as para-professionals by the new entrants into the profession who are trained in the old worn out methods of drawing up pleadings. 'In the first case it is often oppressive and in the second case it is invariably degrading to the new entrants. In either event, to become independent from this occupational cobwebs, the new entrant into the legal pofession has to have a long gestation period.'[13] Longer the gestation period, the fear that he will absorb all the worn out techniques of the profession becomes real. It is, therefore, necessary for the Bar Council to provide for a training period before being enrolled as a lawyer for the new entrants to the profession in subjects of drafting, cross-examination, court manners and making precise and accurate statements before the court.[14] Some of those subjects meant for training of judicial officers can be well adopted for training the new entrants to the profession.

3.16. For a positive check, while deciding the cost quantum to be awarded one way or the other, the presiding Judge must also certify whether untenable and frivolous defences were raised, necessitating framing of the issues on which parties were at variance and the time spent in recording decisions on them. If the presiding Judge is satisfied that such frivolous and totally untenable defences with regard to facts and law were raised, the same must enter the verdict and quantify the costs to be awarded.

3.17. Recording of oral evidence consumes too much time. It is often noticed that large number of witnesses are examined on the same point, the cross-examination is prolix, rambling, partaking the character of a fishing expedition. Multiplicity of witnesses on the same point, coupled with cross-examination by way of rambling fishing inquiry, accounts for consumption of court s valuable time to a considerable extent. This area is referred to here because the members of the legal profession in adversary system can contribute in not only improving the situation but removing the malaise. A duty must be cast on lawyers, if need be by a statute, to decide how many witnesses are required to be examined. Equally the cross-examination must be pointed and limited to specific inquiry. One more improvement can be made by lawyers in this area by agreeing to get the evidence recorded by a Court Commissioner. How can this be achieved has been fully examined earlier and it is not necessary to reproduce the approach of the Law Commission in this behalf.[15]

3.18. The next point that the members of the legal profession can assist effectively is the stage where summing up of the case is undertaken after the evidence is recorded. Oral arguments are heard for days on end. Once the argument is adjourned to another day, repetition becomes unavoidable. Again this stage consumes valuable time of the court. And it is avoidable. The arguments must be addressed on specific points which must be submitted to the court in advance; only minor elaboration may be permitted; time for listening the arguments on each side can be fixed in advance; both the parties must be given right to submit written submissions and this is the area where lawyers alone can contribute to the speedy and expeditious disposal of trial. An innovation in this behalf, if need be by a provision in the Code of Civil Procedure, is overdue.

3.19. The last stage where the lawyers can contribute effectively is the exercise of the right to appeal. There is a feeling that sometimes the party which loses the action is encouraged by the lawyer out of his deflated ego on account of loss to prefer an appeal. In fact, the lawyer of the losing party is the best Judge whether there is any merit in his case and whether the Judge of the trial court has committed a reversible error and that appeal will advance the cause of justice. He has to examine this aspect dispassiontately and he must honestly and sincerely advise whether to appeal or not to appeal. If he opines that the case is not good for appeal, any other member of the profession, if approached, should enquire from the trial lawyer what opinion he has given. If the other lawyer differs, he should have valid grounds in support of his conclusion Otherwise, the client must be discouraged from preferring an appeal.

3.20. The features of the trial herein discussed are those in which apart from the litigants, the lawyers alone have a role to play. Therefore, while examining the role of legal profession in strengthening administration of justice, these features are referred to here. If the lawyers play a positive, constructive and creative role in the areas herein discussed, they would be establishing their accountability both to the litigant and to the system.

3.21. As pointed out earlier, a time has come when, as the system is under such a stress that it is likely to collapse, alternative modes of resolution of disputes must be seriously explored. One such mode which the Law Commission has examined and already recommended is pre-trial conciliation proceedings. It is the lawyers appearing on either side who can encourage the client to agree to refer the matter to the Conciliation Court. The Law Commission has already recommended setting up of such Conciliation Courts in all urban areas. A Conciliation Court scheme has been devised by the Chief Justice of the Himachal Pradesh High Court. The same has been anneexd as Appendix V to the earlier report of the Law Commission.[16] Further, the whole scheme has been discussed in detail.[17] The success of the scheme wholly depends upon the members of the legal profession assisting the parties in adversarial system.

3.22. It has been pointed out repeatedly that legal profession is monopolistic in character. A monopoly tends to be impervious to the consumers of its service. Why the profession is called a monopoly profession need not be discussed here; only two salient features which make it a monopoly may be referred to. The members of the profession have a power to regulate admission to the profession and they alone, save in rare cases where the court permits someone else to appear and plead in courts, have the right to appear and plead cases in courts. It can decide charges for its services. Therefore, it cannot be gainsaid that the profession is monopolistic in character.

3.23. Monopolies are generally frowned upon. Monopoly abjures competition. Absence of competition tends to adversely affect the services rendered by the monopoly. Competition in a market economy guarantees both the price and the quality. Monopoly foreswears competition.

3.24. Article 19(1)(g) guarantees to a citizen the right to practise any profession, or to carry on any occupation, trade or business. This right is subject to the reasonable restriction that can be imposed under clause (6) of article 19. As clause (6) was originally drafted, a question arose whether the Union or the State Legislature was competent to pass law in regard to commercial and industrial monopolies. The State of U.P. set up a monopoly of transport for operating bus services under the name and style of 'Government Roadways'. This action was challenged and the Allahabad High Court struck it down as unconstitutional, holding that such a monopoly totally deprived the citizens of their rights under article 19(1)(g). By the Constitution (First Amendment) Act, 1951, clause (6) of article 19 was amended to confer power on the State, either by itself or by a Corporation owned and controlled by the State to carry on any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. After this amendment, it was again contended before the Supreme Court that the amendment made in clause (6) has not the effect to exempt the law passed from creating a State monopoly from application of the rule prescribed by the first part of article 19(6).[18] Upholding largely the validity of the legislation, namely, Orissa Kendu Leave (Control of Trade) Act, 1961, the Court observed that the essential attributes of the law creating a monopoly will vary with the nature of the trade or business in which the monopoly is created. They will depend upon the nature of the commodity, the nature of commerce in which it is involved and several other circumstances. The purpose of this discussion is to point out that monopoly has the inbuilt tendency to abuse its position. If legal profession is monopolistic in character, as it unquestionably is, provision has to be made to free it from the possible abuse. Accountably would be check on abuse.

3.25. What constitutes accountability especially in or in relation to legal profession? Ordinarily, accountability is confined to professional ethics, discipline and professional regulation. There is, however, a body of opinion that accountability of legal profession has a broader spectrum than mere ethics, discipline and regulation. It inheres public perception of professional responsibility and professional response to such public perception. It also concerns itself with public expectation aroused by professional services. In the context of legal profession, constitutional goals and the role of legal profession in achieving the same would also constitute a parameter of accountability. In short, the determinant is the involvement of professional interest with public interest and their ultimate coincidence.[19] In thus specifying the parameters of accountability, it was noticed that 'the movement of all professions, hitherto has been from chaos to organisation, organisation to consolidation and consolidation to autonomy and monopoly'. On achieving the monopolistic status, a general outcry against it is heard. 'It is said that they are execlusive; they are elitist; they do not represent the people; they show no concern even for the basic problems of the people. Their contribution to society is minimal. Lawyers and Judges, doctors and surgeons, working and non-working journalists, teaching and non-teaching teacher from

a holy alliance to intimidate any layman presumptuous or foolish enough to enter into a dialogue with them..... People are slowly fed up of the professions and there has now emerged a demand for accountability."[20] Recalling the famous statement of Jimmy Carter, the former President of United States of America, that 'lawyers as a profession have resisted both social change and economic reform', it was said that 'the Bar must remember that its members must make out a *Prima facie* case for the monopoly it enjoys and reorganise the profession into a public sector which ensures human rights and remedies against human wrongs to the weakest and the protestant. Public law demands of public profession public commitments in public interest and disrobes it of its mistakes.'[21]

3.26. To some extent, disciplinary jurisdiction over the errant members of the profession may provide a corrective against monopoly. As pointed out earlier, disciplinary jurisdiction, till Chapter V of the Advocates Act, 1961 came into force, vested in the High Court under sections 10 and 13 of the Indian Bar Councils Act, 1926. While discussing the debate, it has in terms been pointed out that the peer's justice system is far from effective. That is not only the view of the consumers of services of legal profession but even some experts closely associated with the functioning of the Bar Council of India. It is, therefore, time to have a second look at the disciplinary juristiction enjoyed by the members of the profession itself. Without attempting to introduce any far-reaching change, the High Court must be invested with *suo motu* power to review the decisions of the Disciplinary Committee of the Bar Council of State. Either the High Court should be invested with jurisdiction to do it *suo motu* or at the instance of the complainant. An appeal to the Bar Council of India and a further appeal to the Supreme Court of India is beyond the reach of many indigenous litigants. Therefore, a step of minor significance should be taken by investing jurisdiction in the High Court *suo motu* to review the decision of the Disciplinary Committee of the Bar Council of the State or the power must be exercised at the instance of the complainant or at the instance of the Advocate General of the State.

3.27. On the vexed question of strike, having given earnest considerstion to all the arguments for and against, it can be said that the members of the legal profession not in general but with specific reference to ventilate their grievances or in support of some causes held dear by them. At any rate, any strike on the supposed ill-treatment of a member of the Judiciary must be wholly avoided because it has the pernicious tendency of eating into the vitals of the independence of the Judiciary. It is too obvious to need spelling out. One may spellout a rare cause on which the strike is justified but it must be treated as the weapon of last resort. If the administrative side of the court creates serious difficulties in the way of the members of the legal profession practising in the court and these are remediable, the members of the profession practising in the court should highlight the difficulties and bring them to the notice of the presiding Judge, informing him that these are remediable problems. On such information being laid with the presiding Judge, immediate steps should be taken to convene a meeting of the representatives of the Bar and of the presiding Judge and to undertake deliberations and dialogue to find out the solution. If the presiding Judge or the administrative side of the court turns deaf ears to the difficulties experienced by the members of the profession which have been brought to the notice of the administration, an intimation may be given that, as a matter of last resort, strike would be resorted to. Save this exceptional area, the strike by the members of the legal profession on the ground of their dispute with police, other administrative departments or some other grievances not attributable to the court administration must be wholly eschewed. This is suggested in the larger interest of the consumers of the service of legal profession the harassed victims of the strike

3.28. No one can seriously question, though evidence of a concrete nature is hard to come by for reasons not difficult to foresee, that the fees charged have reached astronomical figures. There may be a class of litigants who can afford the same. But that microscopic minority class need not destroy the culture of legal profession nor the market of fees. If legal profession enjoys a monopoly through a statute passed by Parliament, it is the duty of the Parliament to prescribe fees for the services rendered by members of the legal profession. The profession cannot merely have privileges and no obligations. It is time, therefore, to take a first step to prescribe the floor and ceiling in fees. The organised Bar must have administrative department where the client can go, pay the prescribed fees and seek the assistance of a lawyer. Therefore, there is no negotiation for fees and nothing more is payable. It is not for a moment suggested that some revolutionary suggestion is being pressed into service. Look around and there are countries where this system is in vogue.[22]

3.29. An additional limb in support of the recommendation that the fees chargeable by the members of the legal profession for their services must be standardised within the floor and the ceiling is that, according to the representatives of the organised profession, a large number of lawyers are unable to earn minimum to keep body and soul together. The representatives of the organised Bar approached the Government of India for enacting a legislation to set up Advocates Welfare Fund.[23] The Government of India appointed a Committee under the chairpersonship of retired Judge of the Supreme Court of India and Member of the Rajya Sabha, Mr. Justice Baharul Islam. The Committee has submitted its report recommending setting up of the Fund as well as the method of funding the Fund. The Committee has also drawn up a model Bill that may be moved in the Parliament. If this is the assistance which members of the legal profession seek from Parliament, it is equally their duty to accept the power of the Parliament to prescribe fees, beyond which no one can charge.

3.30. Closely allied to the question of prescribing the floor and ceiling in fees chargeable by members of the legal profession for rendering service to litigants is the question of providing totally free service to a class of litigants who are unable even to pay the minimum of fees. The philosophy underlying article 39A of the Constitution has to be translated into an action-oriented programme. Even if the ceiling and floor in fees are prescribed, there will still be members of our society who would suffer denial of justice because they can ill-afford the fees payable to the legal profession. The fee would be a barrier to access to justice. Article 39A was a promise to them, when it was said that the State shall ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. If such seekers of justice who cannot even afford to pay the minimum fees would suffer denial of justice on account of economic disability, article 39A would stand violated. To make effective the intendment underlying article 39A, the legal profession has to gear up to provide service to such seekers of justice. The legal profession is, to all intents and purposes, in private sector. The medical profession is also in private sector but free public hospitals have been set up where anyone can get medical service without the obligation to pay any fees. The poorest can have access to such hospitals. Unfortunately, till today, there is no public sector in legal profession. It is the duty and obligation of the organised legal profession to set up its public sector unit where the services of its members would be available to those needy who cannot afford to pay the fees for their services. Legal aid scheme operated by the Government of India to some extent helps in this behalf. However, concrete measures have to be taken to set up public sector clinics, operated by members of the legal profession, where anyone who is needy and cannot afford to pay the fees of the private sector can walk in and not only get advice but even initiate proceedings for seeking justice. This is an overdue measure which the legal profession must undertake. To some extent this will also resolve the problem of accountability.

3.31. That brings us to the last limb of our examination. The approach herein indicated flows from the monopolistic character of the profession. If, as stated earlier, accountability is a check on the abuses of monopoly, equally social audit of the profession is a positive check on possible abuses of a monopoly. That needs us to spell out what is social audit. This term has been made current by the sociologists and is very much in vogue when sociology of professions is examined. The Law Commission uses it in a limited sense. As pointed out earlier, a complaint by an aggrieved litigant against a member of the legal profession is hard to come by for the fear that the concept of Peer's justice would permit probing of the charge by the compatriots of the delinquent lawyer himself. Social audit must be done by a body which does not inhere preponderance of the members of the legal profession. And the audit, to be effective, must be by a body representing persons who would otherwise claim to be aggrieved. Two institutions can effectively jointly undertake social audit of the profession. That consists of the members of the Judiciary who day in and day out have directly to deal with the members of the legal profession. And the other body consists of consumers of justice. They know where the shoe pinches. Therefore, the Law Commission is of the opinion that the social audit of the errant members of the legal profession as well as of the profession as a whole must be undertaken by a body to be statutorily constituted by introducing adequate provisions in the Advocates Act, 1961, to consist of retired Judges and consumers of justice. A methodology will have to be devised to give representation to the consumers of justice. The constituency must be of those who had to go to the court and had an unfair treatment at the hands of the members of the legal profession. It is, therefore, for consideration that legal profession must individually and collectively be subject to social audit by a body herein indicated.

3.32. If all the steps herein indicated are taken, the role of the legal profession in strengthening the system of administration of justice would be fully appreciated and the situation, both qualitatively and quantitatively, change for the better.

3.33. The Law Commission recommends accordingly.

CHAPTER IV

ACKNOWLEDGMENTS

4.1. The role of legal profession in strengthening the system of administration of justice has been examined. To repeat, this report does not concern itself with examining the role of legal profession in all its dimensions. This report concerns itself with the limited task of examining the role of legal profession in strengthening the system of administration of justice. Therefore, the parameters of the report may be viewed and understood in this context.

4.2. Legal profession is very vocal. It would not suffer any criticism of it. It is very sensitive to criticism. In fact, it resents criticism. This will be clear to any reader of this report. It is, therefore, necessary to specify clearly that apart from the Debate set out in Chapter II of this report, the Law Commission was assisted in preparing this report by Dr. Madhava Menon, Director of the Law School at Bangalore and for years Secretary of the Bar Council of India Trust and even now the editor of the Indian Bar Review, the mouthpiece of the Bar Council of India Trust. Unfortunately, Mr. Menon submitted his expert advice only on points he found time to deal with. On the other hand, Dr. J. S. Gandhi, Prof. of Sociology, Jawaharlal Nehru University, was requested to assist the Law Commission as an expert to examine, analyse and evaluate the role of legal profession from the point of view of a sociologist. He helped the Law Commission with his findings. The Law Commission acknowledges with thanks the assistance received by it from Dr. Madhva Menon and Dr. J. S. Gandhi.

(D. A. DESAI)
Chairman

(V. S. RAMA DEVI)
Member Secretary

NEW DELHI,
August 31, 1988.

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APPENDIX *I*

LAW COMMISSION OF INDIA

QUESTIONNAIRE

ON
THE ROLE OF THE LEGAL PROFESSION IN STRENGTHENING THE SYSTEM OF ADMINISTRATION OF JUSTICE

26

LAW COMMISSION OF INDIA

The terms of reference drawn up for the proposed Judicial Reforms Commission were assigned to the Law Commission. One of the terms in the context of studying judicial reforms is 'the role of the legal profession in strengthening the system of administration of justice.' The Law Commission is now poised to deal with this term of reference. The role of the legal profession ordinarily should not resort to strike either to strengthening the system of administration of justice may have to be examined from different angles. One such angle is: what role the legal profession in India can play in promoting and accelerating the process of social change through the instrumentality of legal justice system. The desired social change is in the direction of building-up the egalitarian and equalitarian society as envisaged by the Constitution.

The institution of legal profession is an old one. Its present structure and format have been shaped during the Raj days. Following the Queen's proclamation in 1857, when the Crown assumed direct responsibility for the governance of India leading to the setting-up of the High Courts in three principal towns, English Barristers and Solicitors came over to India by their training and tradition shaped the legal justice system on British model. The Barristers became the symbol of status. Numerous Indians went to U. K. for becoming Barristers and acquired the British training and culture and tradition and on return to India transformed the indigenous legal profession into the British model. Even the division in the profession Solicitors-Barristers was on the same lines. Undoubtedly, because of the knowledge of the English language and their contact with British justice system, some of the Barristers of those days participated in the independence movement and played a pioneering role in it. However, on the advent of Independence, the legal profession in India failed to transform itself from one serving the colonial legal justice system into the system suited for the republican India to be governed under the liberty-oriented Constitution. The profession persisted with the out-dated and wornout legal formulations of the Raj days and for this purpose, the Court of Appeal and the House of Lords became their source of inspiration. This had led considerably to the present malaise. The most glaring reason being that a system suited to a highly literate elitist society could hardly be effective for a society with high percentage of illiteracy and poverty.

With the spread of education, more and more people turned to legal profession as it became very lucrative in course of time. Its fall-out is that the element of service has totally disappeared and the profession is wholly profit-oriented willing to squeeze the maximum profit. All undesirable tendencies unequivocally have entered the profession.

Every institution has to be socially useful for the purpose of transforming the society in which it is operating. The role of legal profession, it being a powerful vocal institution has to be examined in the context of its assistance in achieving the goals of the Constitution, the most important being amongst others to secure that the operation of the legal system promotes justice on the basis of equal opportunity, and shall, in particular, provide free legal aid, and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

It is a moot point whether the legal aid movement both voluntary and State-backed came into being on the failure of the legal profession to discharge its social obligations. It cannot be questioned that many in search of justice failed to invoke the jurisdiction of the court for want of wherewithal to pay the lawyer. Legal profession is wholly monopolistic in structure and functioning and it is now necessary to enquire whether the evils of monopoly have overtaken the profession. This is not in the spirit of criticism but introspection to find out solutions.

The Law Commission proposes to examine the role of the legal profession primarily for strengthening the system of administration of justice. The Law Commission has been in touch with the Bar Council of India and also with the bar councils at the State level on various connected issues. These bodies represent the institutional format of the organised Bar. But the society as a whole is interested in the role of the legal profession. The injustice ridden teeming millions of India are the largest body of consumers of justice and they may be given an opportunity to articulate their views. They may have a grievance syndrome against the legal profession. There are voluntary organisations, activists, protagonists of social action litigation and several others, who may make a useful contribution in analysing, examining and evaluating the role of legal profession. It is to them the Law Commission approaches by this small questionnaire and invite them to participate in the debate. The Law Commission would be interested in responses to the following questions :

1. Is the feeling rampant throughout the people who have to deal with the legal profession, that legal profession is an impediment, roadblock and obstruction to justice because of its dilatory, prolix, technical and formal approach, valid ?
2. One of the primary function of the legal profession is to assist in rendering justice. It it true that the present day profession has moved far from it and its present role is clearly counter-productive ?
3. Law is an instrument of social engineering. Its two most important limbs are the Judiciary and the legal profession. And obviously for achieving the goals, their role must be complimentary to each other. Is it true that instead of becoming complimentary, a sort of a confrontationist situation has developed between the organised profession and the Judiciary ?
4. If the answer to the last question is in the negative, how, would you assess and evaluate recurrent strike by the legal profession ?
5. The concept of strike came from the World of industrial relations. It subsumes that the one, who is in a position to meet or satisfy the expectations of the other, fails to do so, and by direct action can be made to act in consonance with notions of justice and fairplay. If this assumption is valid, a strike by the legal profession absenting from the court cannot in most of the cases help in introducing notions of fairplay and justice, because the strike is for extraneous reasons such as where police and lawyers came in conflict in some remote city and members of the Bar in the capital went on strike. It it proper for the members of Bar to go on strike in support of their belief that a sitting member of the Judiciary has been unfairly treated by the Government ? Would it in the long run not impair the Independence of Judiciary coveted by the Bar ? Can the Bar go on strike ? If yes for what cause and with what justification ?
6. How would you view the disinclination of the senior members of the Bar to accept Judgeship.
7. If causes which have in fact impeded and obstructed social change in the society such as resistance to agrarian reforms, resistance to bank nationalisation, abolition of privy purses and related items, would it not reflect on the legal profession that it impedes movement towards transformation of society as contemplated by the Constitution ?
8. In what sense—if at all, the contemporary legal profession has fallen in the popular estimation ? How would you evaluate the movement amongst consumers of justice for inclusion of lawyers appearing in tribunals and courts set up under socially beneficient legislations ?

9. What can be done to restore the lost image or esteem of the legal profession in the country ? Among various steps that may be recommended for this purpose, can we also think of some modifications, minor or major, in the existing Advocates Act ? Or, can we think of new Act to replace the present one. If so, what can be its general outline ?

10. Should the professional bodies such as Bar Council of India or State Bar Councils only confine themselves to "entering" lawyers on their rolls as of now ? Should they not lay down specific norms such as the ones lawyers should follow with regard to the poor and indigent clients ?

11. Formerly, disciplinary jurisdiction over the members of the Bar vested in the High Court. A demand for Peer's justice led to the profession in the Advocates Act which abolished the jurisdiction of the High Courts and vested it in the Disciplinary Committee of the Bar Council at the State and National level. Has it improved the situation ? Would a mere appeal under section 38 of the Advocates Act to the Supreme Court of India, be adequate in restoring the balance ?

12. What measures may be taken to curb or contain the alleged hobnobbing and intimacy between :—
    (i) The Members of the Bar and Judiciary;
    (ii) The Members of the Bar and prosecuting officers.

13. Is it necessary to prevent a tie-up between professional bodies on the one hand and politicians and political parties on the other ?

14. Is it desirable to have a standardised schedule of fees that may be charged from the clients ? If so, how should it be arrived at ? How would it be enforced ?

15. What can possibly be done to tone down monopolistic character of professional business ? It is possible to think of some norms for distributing case-load among seniors in the bar and those who are relatively juniors ?

16. Is it not now opportune to devise a system by which indigenous litigants must be in a position to appear before courts and tribunals on their own and be assisted by voluntary agencies and para-legal bodies ?

APPENDIX II

List of persons/bodies who responded to the questionnaire.

1. HIGH COURTS

   1. High Court of Orissa
   2. High Court of Karnataka

2. JUDGES

   1. Justice Jayachandra Reddy, Andhra Pradesh High Court
   2. Justice Y. V. Anjaneyulu, Andhra Pradesh High Court
   3. Justice S. T. Ramalingam, Madras High Court
   4. Justice S. M. Daud, Bombay High Court
   5. Justice Tipnis, Bombay High Court
   6. Shri Sanjeev Dutta, Trainee Judge Morena, M. P.

3. BAR COUNCILS/BAR ASSOCIATIONS

   1. Shri Gobardhan Pujari, Member, Orissa State Bar Council
   2. Shri K. A. Palanishwami, Member, Bar Council of Tamil Nadu District
   3. Shri Satender Narayan Das, Bar Council, Madhubani, Bihar
   4. Shri G. D. Panda, Secretary, Lawyers' Association, Parlakhemundi District, Ganjam
   5. Shri P. C. Biswas, Secretary, Shillong Bar Association
   6. Bombay Bar Association
   7. Ahmedabad Bar Association
   8. Bihar State Bar Council, Patna
   9. Bar Association, Muzzafarpur, Bihar
   10. Bar Council of Maharashtra and Goa
   11. Bar Council of Punjab and Haryana, Chandigarh

4. ADVOCATES

   1. Mrs. M. Sharma, Advocate, Shillong
   2. Shri Koka Raghava Rao, Advocate, Hyderabad
   3. Shri T. V. S. Dasu, Advocate, Hyderabad
   4. Shri R. Rama Krishnayya, Advocate, Tenali, Guntur
   5. Shri L. Ramanandha Rao, Advocate, Tenali, Guntur
   6. Shri R. K. Bhatt, Advocate, Ajmer
   7. Shri Ranjit D. Chaudhari, Advocate, Nagpur

5. ACADEMICS

1. Shri D. N. Saraf, Ahmedabad
2. Shri K. P. Singh Mahalwar, M. D. University, Rohtak
3. Shri P. C. Juneja, M. D. University, Rohtak
4 Shri O. P. Shukla, Indian Law Institute

6. VOLUNTARY ORGANISATIONS/CONSUMERS OF JUSTICE

1. Shri D. B. Mane, Nyaya Sudhar Sangathan, Sangli, Maharashtra
2. Shri H. D. Shourie, Common Cause, New Delhi
3. Legal Aid Centre for Women, New Delhi
4. Shri R. N. Vasudeva, New Delhi
5. Shri Harish Uppal, New Delhi.
6. D. M. I. Furtado, Goa.

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LAW WITHOUT POLITICS: LEGAL AID UNDER ADVANCED CAPITALISM

Richard L. Abel*

Give me where to stand, and I will move the earth. [1]

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* Professor of Law, University of California, Los Angeles. B.A., Harvard College, 1962; J.D., Columbia Law School, 1965; Ph.D., University of London, 1974. I am grateful to the Legal Action Group and the Law Centres Federation for material; the Law Department of the London School of Economics and the Department of Legal Studies at La Trobe University, Melbourne, for hospitality in 1982 and 1983; Frederick H. Zemans for sharing with me the papers presented at the VIIth International Congress on Procedural Law, Wurzburg, 1983; Carrie Menkel-Meadow for her comments on an earlier draft; Heleen F.P. Ietswaart for statistics on French legal aid; and the UCLA Law School Dean's Fund and the Law and Social Sciences Program of the National Science Foundation for financial support (grants SES 81-10380 and 83-10162). A greatly abbreviated version of this Article was presented to the Conference on Critical Legal Studies in Washington, D.C., March 16–18, 1984.

1. Archimedes of Syracuse commenting on the powers of the lever. PAPPUS OF ALEXANDRIA, collection, bk. VIII, prop. 10, § 11.

INTRODUCTION

Civil legal aid has displayed phenomenal growth in the last three decades. Britain was the first nation to accept it as a governmental responsibility in 1949, followed by the Netherlands in 1957, and then by other leading capitalist states, including the United States, Canada, Australia, New Zealand, France, Sweden, Finland, and Germany. During the 1960's and the 1970's, budgets often doubled from year to year. Yet a number of states in the capitalist world make only the most rudimentary provisions for civil representation of indigents—for instance, Italy, Spain, Japan, and Belgium. And even those countries most enthusiastic about their programs have seen outlays stagnate or fall in recent years. What explains both the rise and the decline of legal aid? What does it signify for the improvement of procedural justice, the legitimacy of the legal system, the promotion of social justice, the amelioration of class oppression, racism and sexism, and the advancement of political democracy?

These questions have attracted much scholarly attention. Several recent books provide extensive case studies of particular legal aid offices, histories and surveys of national legal aid programs, and comparative and theoretical reflections.[2] Indeed, scholars may have devoted excessive attention to legal aid, which nowhere represents more than a tenth of the total national expenditure on legal services and rarely more than one percent. But if some of the reasons for this overemphasis are well known—the preference for studying down rather than up and the liberal politics of many legal scholars[3]

2. ACCESS TO JUSTICE AND THE WELFARE STATE (M. Cappelletti ed. 1981) [hereinafter cited as ACCESS]; J. COOPER, PUBLIC LEGAL SERVICES: A COMPARATIVE STUDY OF POLICY, POLITICS AND PRACTICE (1983); B. GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR: A COMPARATIVE STUDY OF RECENT DEVELOPMENTS IN LEGAL AID AND IN THE LEGAL PROFESSION (1980); INNOVATIONS IN THE LEGAL SERVICES (E. Blankenburg ed. 1980) [hereinafter cited as INNOVATIONS]; J. KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION (1982); PERSPECTIVES ON LEGAL AID: AN INTERNATIONAL SURVEY (F. Zemans ed. 1979) [hereinafter cited as PERSPECTIVES].

3. Z. BANKOWSKI & G. MUNGHAM, IMAGES OF LAW 106–09 (1976); Cain, *Rich Man's Law or Poor Man's Law?*, 2 BRIT. J.L. & SOC'Y 61 (1975).

and social scientists—this bias also illuminates the hopes and expectations aroused by legal aid.

This Article, though originally stimulated by the appearance of the books cited above,[4] uses a wide variety of other sources in an attempt to explore the following questions. How adequate are the prevailing accounts of legal aid? What criteria do they use to assess legal aid programs? What are the interests and influences of the principal actors—such as the legal profession, legal aid lawyers, clients, the state, capital, labor, and philanthropies—that are involved in the creation and operation of those programs? What has legal aid achieved: What is the quantity and quality of services, who uses it, and for what purposes? Finally, what can legal aid achieve, and what are its limits?

I. APOLITICAL ACCOUNTS OF LEGAL AID

Much of the writing on legal aid is flawed by its insistence on divorcing law from politics. That is hardly surprising: The prevailing ideology of advanced capitalism—liberal legalism—is grounded on that very premise.[5] The institution of legal aid itself attempts to fulfill the promises of liberal legalism without first effecting any change in fundamental political relationships. The underlying purpose of this Article is to show the inherently political nature of legal aid (as of all law) and to offer a more adequate account of its rise and decline, promise and limitations.

One way scholars ignore politics is by presenting legal aid legislation as though it were self-effectuating.[6] Such accounts tend to overlook the dependence of legal aid programs on the amount of money appropriated, the number of staff hired, the willingness of private lawyers to work for the fees paid by the state, the interest of clients in bringing their problems to lawyers, etc. They fail to mention, or to confront, the trivial levels of legal aid actually delivered

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4. *See supra* note 2.

5. This is the ideal of "autonomous" law, but it also characterizes proposals for "responsive" or "reflexive" law. *See generally* P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978); Teubner, *Substantive and Reflective Elements in Modern Law,* 17 LAW & SOC'Y REV. 239 (1983).

6. *E.g.,* 1 ACCESS TO JUSTICE: A WORLD SURVEY (bk. 3) (M. Cappelletti & B. Garth eds. 1978); M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES § 2 (1975) [hereinafter cited as M. CAPPELLETTI]; COMMITTEE ON LEGAL SERVICES TO THE POOR IN DEVELOPING COUNTRIES, LEGAL AID AND WORLD POVERTY: A SURVEY OF ASIA, AFRICA AND LATIN AMERICA (1974); Boman, *Scandinavia,* in PERSPECTIVES, *supra* note 2, at 243. Several critics have analyzed the symbolic significance of this exaggerated attention to statutory provisions. *E.g.,* M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964); J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) [hereinafter cited as SOCIAL MOVEMENTS].

in many schemes: for example, the approximately 4000 cases in all of South Africa in the three-year period between 1971 and 1973;[7] or the four cases in the entire city of Florence during the year 1977–1978 (see Tables 1, 2, and 4).[8] There is a tendency to identify legal aid with the waiver of court costs[9] or with relief from potential liability for an adversary's legal fees,[10] but the real obstacle the poor encounter is their inability to hire a lawyer. Voluntary schemes in which legal aid is made available solely through the charity of private lawyers—virtually the only source of representation before World War II and still prevalent today in many advanced capitalist nations such as Belgium[11]—are confused with state subsidization of lawyers' services.[12] The facile conclusion drawn from such a superficial enquiry displays naive optimism: "We can now say with some confidence that every indigent criminal defendant in the United States who wants a lawyer gets one."[13]

The conflation of rules and practice is merely a symptom of more fundamental flaws in the conceptualization of law in society. Sometimes these are explicit. For instance, in an exercise in proph-

7. Gross, *South Africa,* in PERSPECTIVES, *supra* note 2, at 288, 292. In 1981 the total expenditure of the South African government on legal aid was R 2,000,000, or about $1,600,000. F. Kentridge, Report on Recent Trends in the Organisation of Legal Services in South Africa 11 (May 4, 1982) (unpublished manuscript).

8. Cooper, *Legal Services for the Poor in Italy,* 130 NEW L.J. 143 (1980), *cited in* Blankenburg & Cooper, *A Survey of Literature on Legal Aid in Europe,* 2 WINDSOR Y.B. ACCESS TO JUST. 263, 290 (1982). In 1958 there were 5768 applications for appointment of defense counsel in criminal cases throughout Italy, a fifth of which were rejected. Ten years later the number had dropped to less than half that total. In the Court of Cassation (the highest court) the average number of requests for court-appointed counsel between 1964 and 1969 was fewer than three. In civil matters in the appellate court of Milan in 1972, counsel was appointed in 188 cases. V. Pocar & V. Olgiati, The Legal Profession in Italy 13 (1984) (unpublished manuscript). In Spain in 1982 there were 9175 legal aid cases in Barcelona (with a population of two million), and 15,025 in Madrid (with a population of four million). C. Viladás-Jené, The Legal Profession in Spain 20 (1983) (unpublished manuscript). In Belgium, where state financed legal aid began only in 1984, the per capita expenditure in the first year of the program was $ .08. L. Huyse, Belgian Lawyers 20 (1983) (unpublished manuscript).

9. *E.g.,* König, *Austria,* in PERSPECTIVES, *supra* note 2, at 76, 78; Oñate Laborde, *Mexico,* in *id.* at 213, 217; Wengerek, *Socialist Countries: Eastern Europe,* in *id.* at 272, 279–81.

10. Kötz, *Public Interest Litigation: A Comparative Survey,* in ACCESS, *supra* note 2, at 85, 90, 95.

11. Breda, *Legal Aid in Belgium,* 4 NIEUWSBRIEF VOOR NEDERLANDSTALIGE RECHTSSOCIOLOGEN, RECHTSANTHROPOLOGEN EN RECHTSPSYCHOLOGEN 360 (1983).

12. *Compare* Baumgarten, *Germany,* in PERSPECTIVES, *supra* note 2, at 150 (exaggerating legal aid in Federal Republic of Germany), *with* Blankenburg & Cooper, *supra* note 8, at 282–84 (realistic assessment of legal aid in Germany).

13. Shapiro, *Access to the Legal System and the Modern Welfare State: American Continuities,* in ACCESS, *supra* note 2, at 273, 287. *But cf.* R. HERMANN, E. SINGLE & J. BOSTON, COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA 153–66 (1977) (empirically grounded skepticism about criminal defense) [hereinafter cited as R. HERMANN]; N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 56–60 (1982) (same).

ecy, grandiosely entitled *The Justice System of the Future: Four Scenarios for the Twenty-First Century,* Earl Johnson concedes, "I have not attempted to reproduce the total society of the twenty-first century, only the justice system. Thus, I have assumed the profile of problems to be processed by the justice system will remain relatively stable."[14] But donning the blinders of legalism can be dangerous, even if they are put on only for heuristic purposes. Other authors blithely describe the formal guarantees of legal representation for the indigent without once acknowledging that the country in which these operate has a totalitarian government whose respect for law, and for its inhabitants, is problematic in the extreme[15]—South Korea, for instance, or many of the countries of Africa or Eastern Europe.[16] Sometimes commentators dispense with politics by treating members of oppressed categories like Ralph Ellison's invisible man.[17] Writing about access to law in the nineteenth century, Martin Shapiro asserts, "[F]or that relatively large share of Americans who owned their own farms or small businesses, courts were close by and closely woven into the life of the community," and "in the new states even more than in the old, the social distance between judges and litigants was relatively slight." Shapiro acknowledges, however, that neither generalization applied to the poor or to slaves or former slaves (and he says nothing about women or Indians).[18] A similar tactic of liberal social science explains a legal institution by attributing it to a "social, economic, or political 'need' shared in common by the countries involved."[19]

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14. Johnson, *The Justice System of the Future: Four Scenarios for the Twenty-First Century,* in ACCESS, *supra* note 2, at 183–84. Since changes in judicial case loads—mainly increases in prosecutions and divorces—engendered the rise of legal aid in the mid-20th century, it seems plausible that further changes might affect its shape and size in the 21st century.

15. Zemans notes, without comment, that Indira Gandhi launched a program of legal aid and even obtained an amendment of the Indian Constitution:

> The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid by suitable legislation or scheme or in any other way, to ensure that opportunities for securing justice are not denied to any citizens by reasons of economic or other disabilities.

INDIA CONST. amend. 42, art. 39A, *cited in* Zemans, *Recent Trends in the Organization of Legal Services,* in EFFEKTIVER RECHTSSCHUTZ & VERFASSUNGSMÄSSIGE ORDNUNG 373, 412 (W. Habscheid ed. 1983). Zemans disregards that Gandhi initiated the program during the Emergency of 1975–1977, when most civil liberties were suspended. Of course, that is one way to equalize access to law—deny it to everyone.

16. *See, e.g.,* Reyntjens, *Africa—South of the Sahara,* in PERSPECTIVES, *supra* note 2, at 12; Sang Hyun Song, *Korea,* in PERSPECTIVES, *supra* note 2, at 204; Wengerek, *Socialist Countries: Eastern Europe,* in PERSPECTIVES, *supra* note 2, at 272.

17. R. ELLISON, INVISIBLE MAN (1963).

18. Shapiro, *Access to the Legal System and the Modern Welfare State: American Continuities,* in ACCESS, *supra* note 2, at 273, 276–77.

19. Cappelletti & Garth, *Access to Justice and the Welfare State: An Introduction,* in ACCESS, *supra* note 2, at 1, 6.

Once politics has been excluded from social analysis, it also is ignored in prescription. The decline in access to law is portrayed as the inevitable byproduct of progress:

> Litigation had also become terribly expensive. No one decided, deliberately, to raise the price of law. This simply happened or evolved over the years. The reasons hardly matter. Access to the courts for relief against mistakes and injustices of the state became very, very costly. . . . Quality, of course, is always expensive. A well-trained, professional body of judges costs money. . . . The legal profession is now highly professional, as well. . . . Good lawyers have become extremely expensive.[20]

The information necessary to participate actively in state decision-making, whether over land use planning or welfare benefits, simply "became" technically complex, another example of Whig history.[21]

The solution, then, is to provide the disadvantaged with lawyers and information "to insure parity between litigants."[22] Legal aid tries to do this, but it suffers from defects. Some, such as limitations on the quantity of assistance caused by economic constraints, are remediable. Even structural obstacles can be reduced greatly, if not eliminated—the location of solicitors, psychological barriers, ignorance of legal rights, the education and background of lawyers.[23] Another problem is the locus of control over legal aid. The solution most commonly proposed is "independence,"[24] which apparently means that no one would control legal aid—the logical extension of an apolitical analysis. Since this obviously is impossible, "independence" is equated with "a secure base of government funding not subject to legislative or executive interference."[25] "[P]olitical insulation" is to be secured through "an overall structure that insulates the programme from political interference from those who are no part of the operation except as providers of funds."[26] This not only

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20. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS, *supra* note 2, at 251, 258. Of course, the price of law did not just "happen" to rise, and the reasons for its rise are vitally important. Following M. LARSON, THE RISE OF PROFESSIONALISM (1977), I have argued that the increase was a deliberate, and partly successful, attempt by lawyers to control the market for their services. *See generally* Abel, *The Rise of Professionalism,* 6 BRIT. J.L. & SOC'Y 82 (1979); Abel, *Toward a Political Economy of Lawyers,* 1981 WIS. L. REV. 1117.

21. Street, *Access to the Legal System and the Modern Welfare State: A European Report from the Standpoint of an Administrative Lawyer,* in ACCESS, *supra* note 2, at 295, 299, 307.

22. Johnson, *The Justice System of the Future: Four Scenarios in the Twenty-First Century,* in ACCESS, *supra* note 2, at 183, 185.

23. Partington, *Great Britain,* in PERSPECTIVES, *supra* note 2, at 158, 166–67.

24. B. GARTH, *supra* note 2, at 25.

25. Johnson, *The Justice System of the Future: Four Scenarios in the Twenty-First Century,* in ACCESS, *supra* note 2, at 183, 186.

26. J. COOPER, *supra* note 2, at 262 (emphasis omitted). Ontario has constructed an extremely elaborate structure to insulate legal clinics from political interference by funding agencies, which seems to work quite well. Mossman, *Community Legal Clinics*

is politically naive—public funds cannot be exempt from political processes—but it also confuses "independence" and "insulation" with dominance by lawyers, whose political role is obscured.

When an explanation is offered for why legal aid assumes a given form in a particular society at a specific point in time, it tends to be couched in an idealist discourse that conceals the underlying political forces. Cappelletti has popularized the metaphor of three "waves" in the access to justice movement: legal aid for the indigent, public interest law for diffuse and fragmented interests, and alternatives to formal courts.[27] The image, a frequent one in literature,[28] inevitably suggests the absence—indeed, the futility—of human design. The next "wave" will purify social reform of any residual taint of politics through "the development of transnational European rights, transnational litigation, and other means of enforcing new social rights in this European setting"[29]—in other words, law will become pure idea, without any state to constrain it.[30] Friedman, too, associates the rise of legal aid with changes in conceptions of justice:

> The problem [of unequal justice] is new because the idea of equal justice is itself fairly new. . . . People learn about rights, and about equality of rights. When they believe what they learn, they come to expect a certain level of fulfillment. Most societies in human history have had no such notion of equality or of rights. Indeed, most societies took quite the opposite idea for granted.[31]

These ideas are seen as effective by themselves. Shapiro observes that "[t]he constitutional thrust toward equality is bound to move the whole legal system toward greater equality of access."[32] He

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in Ontario, 3 WINDSOR Y.B. ACCESS TO JUST. 375, 381–84, 389–93 (1983); F. Zemans, Community Legal Clinics in Ontario 21 (1983) (unpublished manuscript).

27. Cappelletti & Garth, *Access to Justice and the Welfare State: An Introduction,* in ACCESS, *supra* note 2, at 1, 4.

28. King Canute is an example, foolishly seeking to turn back the tide, as is the notion of "swimming against the current," or the sense of eternity in the waves in Matthew Arnold's poem *Dover Beach* or Virginia Woolf's novel, THE WAVES (1931).

29. Cappelletti & Garth, *Access to Justice and the Welfare State: An Introduction,* in ACCESS, *supra* note 2, at 1, 24.

30. Cappelletti, Garth & Trocker, *Access to Justice: Variations and Continuity of a World-Wide Movement,* 46 RABELS ZEITSCHRIFT 664, 671–79 (1982). Earl Johnson also has sought to ground civil legal aid in the Constitution—an effort that, not surprisingly, has had no effect. Johnson & Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants* (pt. 1), 11 LOY. L.A.L. REV. 249 (1978). For extensive references to cases and articles about this issue, see Breger, *Legal Aid for the Poor: A Conceptual Analysis,* 60 N.C.L. REV. 281, 290 n.42 (1982).

31. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS, *supra* note 2, at 252–53.

32. Shapiro, *Access to the Legal System and the Modern Welfare State: American Continuities,* in ACCESS, *supra* note 2, at 273, 289; *cf.* Cahn & Cahn, *The War on Poverty: A Civilian Perspective,* 73 YALE L.J. 1317, 1345 (1964) ("Legal theories are, in short, a form of discourse which can on occasion have a force equivalent to that which

notes further:

> [T]he pace at which access to justice is enlarged will be determined far less by self-conscious assessments by legislatures of the need for welfare services than it will be by assertions of constitutional rights in the courts. Thus, the pace of change will be determined in good part by the accidents of what persons are appointed to the higher reaches of the courts.[33]

Legal aid does not express the aspirations or fears of concrete, parochial, self-interested social categories; instead, "[r]eforms that enhance 'access' can be inspired by varying political philosophies, from the most conservative to the most radical."[34] To the extent that divisions are acknowledged at all, they quickly are subsumed within an ever-expanding social consensus. Boundaries and loyalties progressively lose their salience as members are absorbed into anonymous mass society: "[T]oday more people than ever before take part in the official legal system, in one way or another, and whether they want to or not. In the past, most people stood outside formal law. . . . Most people in western countries belong to that great amorphous group, the middle class."[35] This homogenization of society obscures and minimizes differences. The often bitter conflict between the organized legal profession and social reformers over whether legal aid should be provided by private practitioners or full-time salaried poverty lawyers is transformed into a shared "recognition that the virtues of judicare and staff systems should be combined in a 'mixed system' of delivery," relegating "the perplexing question of how much funding to devote to each . . . [to] a fair and responsible decision-making body."[36] Reform is contingent on "[t]he willingness of the middle classes to enhance the political power of the poor."[37] The absence of consensus explains the inability of some countries to establish a system of legal aid—Belgium,

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inheres in organization, status or wealth."). But the force of constitutionalism is culturally specific. For more than 35 years the Italian constitution has guaranteed the "right of action and defense" and the "right of poor persons to be assured, by appropriate institutions, the means to plead and defend themselves before any judicial jurisdiction," ITALY CONST. art. 24, paras. 1–3, but Italy still has no legal aid system. V. Varano, Recent Trends in the Organization of Legal Services in Italy 3 (n.d., approximately 1983) (unpublished manuscript).

33. Shapiro, *Access to the Legal System and the Modern Welfare State: American Continuities,* in ACCESS, *supra* note 2, at 273, 292.

34. Cappelletti & Garth, *Access to Justice and the Welfare State: An Introduction,* in ACCESS, *supra* note 2, at 1, 20.

35. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS, *supra* note 2, at 251, 254–55.

36. Cappelletti & Garth, *Access to Justice and the Welfare State: An Introduction,* in ACCESS, *supra* note 2, at 1, 7–9. The decision-making body, presumably, would be apolitical. Judicare is a legal aid program that pays private lawyers to represent and advise needy clients.

37. Shapiro, *Access to the Legal System and the Modern Welfare State: American Continuities,* in ACCESS, *supra* note 2, at 273, 292–93.

for instance, with its internal divisions along lines of language, culture, and religion.[38] Religion as a system of ideas sometimes is given explanatory force: Protestant countries (Britain, the Netherlands, Sweden, the United States, Canada, and Australia) establish legal aid because they cannot tolerate the gap between the ideal of justice and social reality; Catholic countries (France, Italy, Spain, Belgium, Greece, and Ireland) are not troubled by this tension.[39] If this approach seems characteristically Weberian,[40] another of Weber's concepts also has been influential—the notion that the bureaucratic state, like the capitalist economy it serves, requires a high degree of predictability.[41] "Government programs call for planning, continuity, forecasting, technical services of all sorts. Government must run its affairs like a business . . . ."[42] And government must be internally balanced: "[T]he enormous growth in recent decades of the executive and legislative branches of government makes necessary a corresponding growth of the judicial branch."[43] Finally, because legal aid is an idea, it spreads by imitation: Australia copied Britain; Canada emulated the United States.[44]

Such idealist explanations simply raise further questions: Why did the "idea of equal justice" emerge only recently; why is it that constitutional provisions adopted several hundred years ago now have been given new meanings; why is the "idea" of legal aid imitated in some countries and not others, at particular times, and why is one model chosen among many? The explanations also are empirically untenable. More people may be affected by law today than in the past, but only as objects. The bureaucratic state substantially antedates legal aid, and many bureaucratic states still have not engendered such programs. The most fundamental objection to the idealist model is that legal aid does not represent a consensus—those in power do not willingly relinquish some of it to the disenfranchised. Rather, it is the outcome of political struggle, which sometimes surfaces in explicit, even violent, conflict. Legal aid in the United States was vigorously opposed by local branches of the

38. Blankenburg & Cooper, *supra* note 8, at 280; Breda, *supra* note 11, at 361.

39. Schuyt, Groenendijk & Sloot, *Access to the Legal System and Legal Services Research*, 1977 EUR. Y.B. L. & SOC. 98, 117 [hereinafter cited as Schuyt]. In 1984, the Belgian state will initiate a legal aid program with a budget of $800,000. L. Huyse, *supra* note 8, at 20.

40. *See generally* M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1958).

41. *See, e.g.*, Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

42. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State*, in ACCESS, *supra* note 2, at 251, 257.

43. Cappelletti & Garth, *Access to Justice and the Welfare State: An Introduction*, in ACCESS, *supra* note 2, at 1, 13.

44. B. GARTH, *supra* note 2, at 85, 105.

organized legal profession and local chambers of commerce, which often mobilized local and even state governments to veto projects.[45] The election of conservative governments in Australia, Britain, the Netherlands, and the United States has brought with it budgetary reductions and political restraints on legal aid.

If liberals would like to believe that everyone agrees about the value of legal aid, conservatives know better. President Reagan, as governor of California, and Spiro Agnew, as vice-president under former president Nixon, both sought to destroy the legal services program.[46] Howard Phillips, the director of the Conservative Caucus and previously a director of the Office of Economic Opportunity under former president Nixon, attacked the Legal Services Corporation (LSC), charging that it had opposed prayer in the schools, challenged the authority of parents to intercept mail addressed to their children, sought to compel the New York City Transit Authority to hire former heroin addicts, and supported boycotts of states that had not ratified the Equal Rights Amendment (together with twenty similar allegations).[47] The *St. Louis Post-Dispatch* found every claim to be false.[48] The Heritage Foundation, a con-

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45. *See, e.g.*, H. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF THE LAW chs. 6–7 (1975); *see also infra* Part III.A. A study of 201 legal aid programs in the United States in 1970 found that public officials in 11% of the communities were openly hostile to the program, and those in another 79% were neutral or apathetic. Twelve percent of the programs encountered major attempts to constrain their activities, and 62% experienced some constraints. Seven percent of the programs experienced major difficulties with local bar associations, and 55% experienced occasional difficulties. A. CHAMPAGNE, LEGAL SERVICES: AN EXPLORATORY STUDY OF EFFECTIVENESS 23, 26 (3 Sage Professional Papers in Administrative and Policy Studies, Series No. 03-028, 1976).

46. *See* Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A. J. 930 (1972); Bennett & Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1 (1972); Falk & Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599 (1973); Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971).

47. Earlier, Phillips had written to members of the Conservative Caucus in an even more uninhibited vein:

> Some legal services projects employ avowed Marxists like Staughton Lynd. Leaders in the program are committed to the implementation of a radical social and political agenda which has included:
>
> —organization of . . . prison convicts . . . ;
>
> . . . .
>
> —representation of radical Iranian student protesters;
>
> —expansion of the food stamp program to college students . . . ;
>
> —instigation of lawsuits to force the U.S. government to surrender American territory to radical Indian activists;
>
> —lawsuits promoting racial quotas in education and employment
>
> . . . .

Letter from Howard Phillips, Chairman, The Conservative Caucus, Inc., to Dear Friend (Jan. 12, 1981).

48. POVERTY L. TODAY, Fall 1981, at 6. Almost 10 years earlier, vice-president Spiro Agnew had accused the program of being "a federally-funded system manned by

servative think tank, asserted that the LSC "has sustained the power and credibility of thousands of self-styled representatives of poor people, minorities, consumers, and other groups of Americans thought to be exploited by the private sector" and that it and the Community Services Administration and ACTION "are the principal federal instrumentalities by which the 'left' has been financed" and are "principally devoted to financing full time corps of idealogues [sic] whose impact has been profound."[49] Phyllis Schlafly, the conservative antifeminist, accused the LSC of "creating clients, initiating class-action suits, litigating and lobbying, to restructure society according to their own radical notions."[50] David Stockman, Director of the Office of Management and Budget in the Reagan administration, has asserted, "I don't believe that there is any entitlement, any basic right to legal services or any other kind of services and the idea that's been established over the last ten years that almost every service that someone might need in life ought to be provided, financed by the government as a matter of basic right, is wrong."[51] In Britain, the Conservative Deputy Mayor of Hillingdon described the local Law Centre as "anti-establishment, anti-constitutional and extreme left" and as "a festering abscess on the extreme left rump of the Borough."[52]

Occasionally, verbal attacks degenerate into physical violence. A farm labor contractor stabbed and seriously injured a staff attorney with Camden Regional Legal Services in New Jersey when the attorney tried to collect unpaid wages owed to migrant farmworkers whom he represented; an employee of Farmworkers Legal Services

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ideological vigilantes, who owe their allegiance not to a client, not to the citizens of a particular state or locality and not to the elected representatives of the people, but only to a concept of social reform." J. KATZ, *supra* note 2, at 77; *cf.* R. HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS (1965). In Australia, the Minister for Aboriginal Affairs suspended federal support for Aboriginal Legal Services when it was accused of participating in a demonstration against the government in 1974. Ross & Mossman, *Legal Services in New South Wales—Politics and Policies*, 47 AUSTL. Q. 6, 20 (1975).

49. *Conservative Think Tank Recommends LSC Be Abolished*, LEGAL SERVICES CORP. NEWS, Nov.-Dec. 1980, at 2, 2-3.

50. *Senate Subcommittee Hears From Foes and Supporters of LSC*, POVERTY L. TODAY, Summer 1981, at 6.

51. R. EVANS & R. NOVAK, THE REAGAN REVOLUTION 134-35 (1981).

52. J. COOPER, *supra* note 2, at 268. Four other local Tory councillors agreed:

> What we are dealing with in the law centre is an organisation that seeks to undermine law and order—[Councillor] Watts.
>
> We will not provide rate payers' funds for political activities—Councillor Woolf.
>
> My real fear is that the extreme leftists are using these centres as yet another base on the soft underbelly of democracy to destroy Britain as we know it today—Councillor Lally.
>
> I am simply against the law centre for political reasons and I don't care who knows it—Councillor 'Buzz' Bowen.

Id. at 269 (footnotes omitted).

of North Carolina also was assaulted by a farmowner.[53]

II. VALUE INCOHERENCE

The denial, or neglect, of the inescapably political nature of legal aid is accompanied, if also subverted, by the incoherence of the values legal aid purports to promote. For legal aid to rise above politics, its proponents (if not its adversaries) would have to agree on a clear conception of its goals. But it is painfully obvious that there is no such consensus concerning the criteria by which legal aid programs should be evaluated, or the categories of people the programs should serve.[54]

At various times and in different environments legal aid has been justified as advancing values that are not only divergent but often fundamentally inconsistent. In some of its earlier manifestations, prior to World War II, legal aid was endorsed as a means of reducing conflict: "[F]requently the result of the advice given is to show that what has been felt as a grievance is not really a grievance at all."[55] The Final Report of the (British) Committee on Legal Aid for the Poor, from which the previous quotation is taken, distinguished sharply between advice and litigation:

> It is undoubtedly desirable to encourage the giving of good legal advice to the poor; it is not desirable, speaking generally, to encourage litigation. There are many cases where, though there may be some violation of a legal right, it is neither prudent nor advisable to litigate, and we believe that any scheme which might tend to make people more litigious should be deprecated.[56]

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53. *Lawyer Stabbing Prompts Corporation to Seek More Migrant Protection*, LEGAL SERVICES CORP. NEWS, July–Aug. 1979, at 1, 9.

54. For an analysis of criteria and methods for evaluating legal aid, see P. HANKS, EVALUATING THE EFFECTIVENESS OF LEGAL AID PROGRAMS: A DISCUSSION OF ISSUES, OPTIONS AND PROBLEMS (1980).

55. LEGAL AID FOR THE POOR COMM., CMD. 3016, FINAL REPORT, 5 (1928) [hereinafter cited as FINLAY]. This also was the purpose of the Edinburgh Legal Dispensary, the oldest legal advice centre in Scotland, established in 1900. It remained the view of the Law Society of England and Wales almost 25 years after the legal aid scheme was enacted:

> The Council take the view that the new Advice Scheme will lead initially, and probably for some time to come, to an increase in legal aid for litigation, but that in the long run, it will tend to have the opposite effect. If the public can be encouraged to take their problems to a solicitor at an early stage much needless litigation could be avoided through timely advice and assistance.

LEGAL AID ANN. REP. 3 (1973/74), *quoted in* Paterson, *Legal Advice and Assistance—Where do we go from here?*, 34 SCOLAG (The Bulletin of the Scottish Legal Action Group) 105 (1979).

56. FINLAY, *supra* note 55, at 7. In 1943, when the New South Wales (Australia) legislature debated the creation of a Public Solicitor—a staffed office to represent poor litigants in civil matters—one legislator objected, "[T]his measure will encourage the spirit of litigation within the community. If it does, it will encourage one of the most

One reason why local Law Societies were urged to establish Poor Man's Lawyers was that they would drive out of business lawyers who were engaging in ambulance chasing and taking personal injury cases on a contingent fee basis.[57] Legal Aid bureaus in the United States from the First World War until the 1960's shared a similar attitude toward conflict.[58] There are striking parallels to both Weimar and Nazi Germany:

> In our economy, which has been badly damaged by political turmoil and *continuous strikes*, all struggle and quarrels have to be avoided as much as possible. To heal the sick body of the people [Volkskörper] all disturbances and excitement should be fended off wherever they come from. The public legal aid office can and shall participate in serving the peace of law and preventing trials and the inevitable struggle and agitation. They shall work toward social harmonization and the consolidation of the public sense of order . . . and thus create the urgent moral rebirth of the nation.[59]

Nor has this view been abandoned today. Those who defended the Legal Services Corporation against the attacks of the Reagan administration repeatedly attributed to it the capacity to divert into legal channels conflict that otherwise might take to the streets.[60]

Legal aid can be valued for another, very different reason: It enhances "access" to law. Successive British reports on the subject illustrate the tension between the two viewpoints. The Finlay Committee, which was appointed in 1925 and reported in 1928, heard testimony urging

> that provision should be made for legal aid being given to all persons insured under the National Health Insurance Acts. This suggestion depends really upon a supposed analogy between medical advice in the case of sickness or accident and legal advice. This analogy is in our opinion fallacious. . . . [T]he suggested analogy between medical benefit and the proposed legal benefit does not exist. . . .
>
> . . . [W]e deprecate, as we have already said, the supposed analogy which is sought to be set up between law and medicine. It is manifestly in the interests of a State that its citizens should be healthy, not that they should be litigious.[61]

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senseless, useless, and time wasting things that any man can possibly engage in." R. SACKVILLE, LEGAL AID IN AUSTRALIA 78 (1975) (quoting Mr. Drummond).

57. FINLAY, *supra* note 55, at 6.

58. J. KATZ, *supra* note 2, at 38–45 (legal aid sought to avoid conflict).

59. Reifner, *Individualistic and Collective Legalization: The Theory and Practice of Legal Advice for Workers in Prefascist Germany*, in 2 THE POLITICS OF INFORMAL JUSTICE 81, 108 (R. Abel ed. 1982) (quoting Huttner); *see also* Blankenburg & Reifner, *Conditions of Legal and Political Culture Limiting the Transferability of Access-to-Law Innovations*, in ACCESS, *supra* note 2, at 217.

60. *E.g.*, *Butler Voices Concern*, POVERTY L. TODAY, Fall 1981, at 5 (quoting Congressman M. Caldwell Butler).

61. FINLAY, *supra* note 55, at 9–10.

Only seventeen years later, the Rushcliffe Committee, whose report laid the foundation for the first state-supported legal aid scheme, asserted, "[T]here appears to be a consensus of opinion that the great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance."[62] Previously, legal aid had been rationed stringently; now it was to be available liberally—indeed, more than eighty percent of the British public were eligible when the program was launched in 1949.[63] Previously, legal advice had aimed to discourage potential litigants; now it sought to place everyone on a plane of equality before the law.

The image of legal aid as equal access to law (embodied in courts) probably is the dominant conception today.[64] Sometimes it is expressed in tones of resignation: "[A]n effective legal services programme can contribute only marginally to eliminating the poverty of lower income groups; . . . its contribution is, rather, towards distributive justice—the non-discriminatory operation of institutions with which citizens deal."[65] More often it adopts the triumphalism of a false naivete: "All those who receive legal services are entitled to expect the same standard of legal service irrespective of their personal circumstances";[66] "[T]he board [of the Legal Services Corporation] intends . . . to ensure that the poor

62. LEGAL AID AND LEGAL ADVICE IN ENGLAND AND WALES COMM., CMD. 6641, REPORT 23 (1945) [hereinafter cited as RUSHCLIFFE]. Explaining its proposal, the Committee stated:

> It is a feature of the scheme that assistance should be given not only to those totally unable to afford to litigate but also to those who have the means to contribute partially. Once they become aided litigants it is our aim that they should be in all respects placed in the same position as those who are able fully to pay the costs involved.

Id. at 38.

63. ROYAL COMM'N ON LEGAL SERVS., CMD. 7648, FINAL REPORT 113 (1979) [hereinafter cited as ROYAL COMM'N].

64. Zemans, for instance, introduces his book with a long quotation from Kafka's *The Trial* about the "doorkeeper [who] stands before the Law." Zemans, *Introduction,* in PERSPECTIVES, *supra* note 2, at 1 (quoting KAFKA, THE TRIAL (1956)). A survey of private practitioners in Melbourne found that they conceive of the poor as people who are "down on their luck" or "temporarily unable to cope." J. FITZGERALD, POVERTY AND THE LEGAL PROFESSION IN VICTORIA 5–8 (1977). Indeed, these are the kind of people who ask lawyers to provide *pro bono* services in the United States. Lochner, *The No Fee and Low Fee Legal Practice of Private Attorneys,* 9 LAW & SOC'Y REV. 431, 448–55 (1975). It is not clear that removing the barriers to access substantially would alter patterns of litigation. A study of legal insurance in Germany (where it is very widespread) found that most claims are for consultation with lawyers or out-of-court activities, and not litigation. Nor did legal insurance alter the kinds of disputes litigated. Blankenburg, *Legal Insurance, Litigant Decisions and the Rising Caseloads of Courts: A West German Study,* 16 LAW & SOC'Y REV. 601 (1981–1982).

65. Reyntjens, *Africa—South of the Sahara,* in PERSPECTIVES, *supra* note 2, at 12, 13.

66. 1 ROYAL COMM'N, *supra* note 63, at 51.

receive the same quality and range of service that is provided to the rich."[67] In either case, concern focuses on the many possible obstacles to equal access.[68] The problem may be identified as geographic: Lawyers are located downtown, near courts and government offices and the business clients who furnish most of their work, while residences have dispersed to the suburbs.[69] Or rural population densities may be so low that they cannot provide a sufficient market for a lawyer.[70] The difficulty may not be regional inequities. Some countries simply have very few lawyers in comparison with their populations: Japan has one for every 15,000 people; Korea has one for every 43,000; and the ratios in African countries are even higher.[71] Regardless of geographic location, lawyers may be inaccessible to working men and women who cannot take time off during the day,[72] although there is some evidence that office hours are not a significant barrier.[73] Even if lawyers are physically available, there may be psychological impediments to their use. People are afraid of

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67. Cramton, *The Task Ahead in Legal Services,* 61 A.B.A. J. 1339, 1342 (1975) (author was then chairman of the board of the Legal Services Corporation); *see also* Bamberger, *The Legal Services Program of the Office of Economic Opportunity,* 41 NOTRE DAME LAW. 847 (1966); Cramton, *Why Legal Services for the Poor?,* 68 A.B.A. J. 550 (1982); Keeton, *The Need for Legal Services to the Poor,* 29 TEX. B.J. 351 (1966). This is an old refrain: "The service should be equal in quality to that of the private law offices of the community." E. BROWNELL, LEGAL AID IN THE UNITED STATES 121 (1951).

68. *See, e.g.,* R. SACKVILLE, *supra* note 56, at 3, ("Legal aid schemes must be concerned to educate people who have little knowledge of law and no experience of consulting lawyers.").

69. 1 ROYAL COMM'N, *supra* note 63, at 46–48; Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 46; Zemans, *Introduction,* in PERSPECTIVES, *supra* note 2, at 1, 5. Half of all Australian solicitors are located in the central business districts of its seven capital cities and 80% within 25 kilometers of the centers. NEW SOUTH WALES BUREAU OF CRIME STATISTICS & RESEARCH, TERRITORIAL JUSTICE (1974).

70. Foster, *The Location of Solicitors,* 36 MOD. L. REV. 153, 156–57 (1973). Even when staffed offices are established, they may be unable to achieve equal access. In Oregon, a rural legal services program was unable to achieve a ratio better than one lawyer to every 2136 eligible clients or less than a third the national average. J. COOPER, *supra* note 2, at 206. This ratio, however, is twice the Legal Services Corporation's goal of providing two attorneys for every 10,000 poor people. *Expansion of Legal Services in 1979,* LEGAL SERVICES CORP. NEWS, July–Aug. 1979, at 3, 3.

71. Kojima, *Japan,* in PERSPECTIVES, *supra* note 2, at 191–92; Reyntjens, *Africa—South of the Sahara,* in PERSPECTIVES, *supra* note 2, at 12, 14–15; Sang Hyun Song, *Korea,* in PERSPECTIVES, *supra* note 2, at 204, 205; *cf.* Abel, *The Underdevelopment of Legal Professions,* 1982 AM. B. FOUND. RESEARCH J. 871, 874 & n.23. There are only one-third as many lawyers per capita in Australia as in the United States. Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 46. In Germany, there are many fewer lawyers per capita, in part because there are many more judges. Blankenburg, *Some Conditions Restricting Innovativeness of Legal Services in Germany,* in INNOVATIONS, *supra* note 2, at 201, 203–04.

72. Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 49.

73. *See generally* B. ABEL-SMITH, M. ZANDER & R. BROOKE, LEGAL PROBLEMS AND THE CITIZEN 203 (1973) [hereinafter cited as B. ABEL-SMITH].

law and lawyers.[74] Perhaps most important, they are ignorant of their rights, of the location of lawyers' offices, of the cost of lawyers' services, and of the identity of a particular trusted lawyer.[75] The conceptualization of legal aid as providing access carries with it the notion of "legal need" and engenders studies designed to show that such need is unfulfilled.[76] I will examine below whether legal aid has been successful in overcoming these obstacles. Here I want to argue simply that the concern—indeed, the obsession—with access rests on the value premise that it is desirable that everyone be equally entitled to consult a lawyer or to approach a legal institution directly.[77]

Such a viewpoint, not surprisingly, has stimulated strong opposition. Some feel it is too expensive.[78] Others contend that there is

74. B. GARTH, *supra* note 2, at 158; H. GENN, MEETING LEGAL NEEDS? AN EVALUATION OF A SCHEME FOR PERSONAL INJURY VICTIMS 24 (1982); Morris, Cooper & Byles, *Public Attitudes to Problem Definition and Problem Solving: A Pilot Study,* 3 BRIT. J. SOC. WORK 301, 310–11 (1973) [hereinafter cited as Morris]; Zemans, *Introduction,* in PERSPECTIVES, *supra* note 2, at 1, 5.

75. B. ABEL-SMITH, *supra* note 73, at 189, 191, 201–02; Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 58; Falke, Bierbrauer & Koch, *Legal Advice and the Non-Judicial Settlement of Disputes: A Case Study of the Public Legal Advice and Mediation Center in the City of Hamburg,* in 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS (bk. 1) 103, 136, 139 n.40 (M. Cappelletti & J. Weisner eds. 1978) [hereinafter cited as Falke]. A sample of private practitioners in Melbourne ranked the public's ignorance of lawyers as the most important reason for its failure to seek legal advice. Ignorance, together with fear of lawyers and the legal system, constituted 54% of responses. J. FITZGERALD, *supra* note 64, at 19. Poor people in Sydney, by contrast, ranked expense both first and second. Together, these responses accounted for nearly 51% of all responses. M. CASS & R. SACKVILLE, LEGAL NEEDS OF THE POOR 72 (1975).

76. The concept of "legal need" has been used as a rhetorical device by legal aid proponents ever since the publication of Reginald Heber Smith's JUSTICE AND THE POOR in 1919. It was reiterated, together with "empirical" data, in J. BRADWAY & R. SMITH, GROWTH OF LEGAL AID WORK IN THE UNITED STATES (1936). Many of the same explanations found in contemporary analyses were advanced long ago to explain increases in legal "need"—for example, family breakdown and social complexity. *See* E. KOOS, LAW, MEDICINE AND THE UNSTABLE FAMILY (1949); E. KOOS, THE FAMILY AND THE LAW (1949). *See generally* E. BROWNELL, *supra* note 67, at 16–20, 31–32. For a brief history of the way in which the Legal Services Corporation constantly inflated the amount of "unmet need" in order to justify budget increases and consciously generated and used social science "data" for this purpose, see Dooley, *Legal Needs of the Poor,* in RESEARCH ON LEGAL SERVICES FOR THE POOR AND DISADVANTAGED: LESSONS FROM THE PAST AND ISSUES FOR THE FUTURE 63 (B. Garth ed. 1983).

77. *But see* Galanter, *The Duty* Not *to Deliver Legal Services,* 30 U. MIAMI L. REV. 929 (1976).

78. Tunc, *The Quest for Justice,* in ACCESS, *supra* note 2, at 315, 353:

> I spent a full day in the Crown Court [in Cambridge, England], attending the trial by jury of a petrol-station employee accused of having stolen coupons in the value of 80 pence [about $2]. The trial started, I think, at about 9:30 a.m. By 6 p.m., the judge opened the instruction to the jury by stating that the honor of the employee was at stake, exactly as if he were accused of having stolen £80 million. This is, of course, a wonderful

too much law, and that the United States, in particular, has proceeded too far down the slippery slope of litigiousness. De Tocqueville often is quoted: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[79] On the other hand, empirical evidence does not indicate an explosion in litigation rates in the United States.[80] Nevertheless, some feel that any expansion of access to lawyers or courts simply increases the dependence of the powerless on professionals.[81] Marc Galanter eloquently sums up the problem with the idealization of access: "Is the utopia of access to justice a condition in which *all* disputes are fully adjudicated? . . . Do we want a world in which there is perfect penetration of norms downward through the pyramid so that all disputes are resolved by application of the authoritative norms propounded by the courts?"[82] Yet if the answer to these questions can only be negative, it is not clear that the present distribution of access to lawyers or formal courts is necessarily the best of all possible worlds.[83]

Discontent with the simplistic notion of access has prompted attempts to formulate the goals of legal aid more precisely: "Access

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> approach to justice. England may pride itself on having produced not only "the best car in the world," but also the best system of administration of justice in the world. Should we, however, maintain such a luxury? Does this type of administration of justice deserve the investments in time, money and talent it requires? For the sake of justice, could we not make better use of our time, money and talent? I would be inclined to think that we could and should make better use of our resources. Perfection is unattainable. We have a saying in France: *"le mieux est l'ennemi du bien."*

Cf. Calabresi, *Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class,* in 3 ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES 169 (M. Cappelletti & B. Garth eds. 1979).

79. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (1945), *quoted in* Kötz, *Public Interest Litigation: A Comparative Survey,* in ACCESS, *supra* note 2, at 85, 115.

80. *See* Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS, *supra* note 2, at 251, 265; *cf.* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4 (1983).

81. Zemans, *Introduction,* in PERSPECTIVES, *supra* note 2, at 1, 9; *cf.* I. ILLICH, I. ZOLA, J. MCKNIGHT, J. CAPLAN & H. SHAIKEN, DISABLING PROFESSIONS (1977) (all professions encourage dependency [hereinafter cited as I. ILLICH]. Legal need studies also have been criticized for suggesting that social problems are solved by increased access to lawyers. *See* Griffiths, *A Comment on Research into "Legal Needs",* in INNOVATIONS, *supra* note 2, at 29; Lewis, *Unmet Legal Needs,* in P. MORRIS, R. WHITE & P. LEWIS, SOCIAL NEEDS AND LEGAL ACTION 73 (1973); Marks, *Some Research Perspectives for Looking at Legal Need and Legal Services Delivery Systems: Old Forms or New?,* 11 LAW & SOC'Y REV. 191 (1976).

82. Galanter, *Justice in Many Rooms,* in ACCESS, *supra* note 2, at 147, 150–51.

83. *See* Reyntjens, *Africa—South of the Sahara,* in PERSPECTIVES, *supra* note 2, at 12, 32–33. Reyntjens advocates the formation of smaller basic jurisdictions in Africa where litigants, without representation, could resolve small civil matters. This system would help ensure that the judges have better knowledge of local customs, local circumstances, and the language of area.

to where? Where is the justice that we want to admit people to?"[84] One conception focuses on substantive rather than procedural justice. The opposition between these two ideals, which have been characterized as the "welfare" and the "individual" models of justice, has a lengthy pedigree.[85] Proponents of legal aid continue to disagree strongly, as the following two quotations indicate:

> Social justice through civil justice is the goal of all reforms which, beginning with the English *Legal Aid and Advice Act* of 1949, have shaped the recent development of legal assistance in modern states.[86]
>
> The primary function of a legal aid organization is to provide legal assistance to indigents. It is not a legal aid organization's function to attempt to create an alternative society.[87]

Even those who maintain that the purpose of legal aid is to pursue substantive goals cannot agree on what those goals should be. Some see the ideal of justice as synonymous with the legal rights the welfare state creates.[88] Others advocate the creation of new rights, often through the application of very general constitutional values to novel fact situations. The quantity of test cases or the extent of law reform activities—in the United States, the number of cases appealed to the Supreme Court—then becomes the measure of efficacy.[89] The antipoverty strategy of the Legal Services Corporation

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84. Galanter, *Justice in Many Rooms,* in ACCESS, *supra* note 2, at 147, 148.

85. Schuyt, *Dilemmas in the Delivery of Legal Services,* in INNOVATIONS, *supra* note 2, at 53, 53–56.

86. Denti, *An International Overview on Legal Aid,* in PERSPECTIVES, *supra* note 2, at 346, 348; *see also* Denti, *Accessibility of Legal Procedures for the Underprivileged: Legal Aid and Advice,* in TOWARDS A JUSTICE WITH A HUMAN FACE 167 (M. Storme & H. Casman eds. 1978).

87. Gross, *South Africa,* in PERSPECTIVES, *supra* note 2, at 288, 296. It is significant that the author is an apologist for the South African regime. But champions of this view can be found even in such unlikely places as the executive directorship of the National Legal Aid and Defender Association in the United States:

> What do I mean by a system which provides effective representation? I do *not* mean assistance with a reallocation of resources in American society. Even assuming that to be a desirable result—and it may or may not be—such changes are not likely to occur through effective legal services. . . . To me the issue remains nothing more than assuring that legal claims are effectively handled and resolved. While sometimes that might require legislative advocacy on behalf of clients or the filing of class actions, most often it will not.

Eisenberg, *Legal Assistance to the Poor: The Issues in the '80s,* in RESEARCH ON LEGAL SERVICES FOR THE POOR AND DISADVANTAGED: LESSONS FROM THE PAST AND ISSUES FOR THE FUTURE 55, 59 (B. Garth ed. 1983).

88. "This inspiring force can be summarized in the idea of the 'welfare state', i.e., the need for a promotional, activist state to make the new 'social rights' effectively accessible to all, while recognizing, and indeed reinforcing, the ideal of private, individual freedom and initiative." Cappelletti, *Forward,* in ACCESS, *supra* note 2, at v, vi; *see also* Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS, *supra* note 2, at 251, 252.

89. E. JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 189 (1974); Huber, *Thou Shalt Not Ration Justice: A His-*

was a mixture of the welfare rights and the law reform strategy,[90] although both now seem to have been displaced by an access model of legal aid. Finally, some declare explicitly that the goal must be to enhance the power of those who previously have been relatively powerless.[91] If this is to be acknowledged, then legal aid's success should be measured by the magnitude of the adversaries it engages and defeats.[92]

Another way of assessing the coherence and clarity of the ideals that inspire legal aid is to see how programs define their clienteles: who are to be assisted and whom they are opposing. Once again the inescapably political nature of legal aid is revealed in the lack of consensus on these issues and, indeed, the failure to devote explicit, sustained attention to resolving them. Some definitions of legal aid clients simply are circular: "[W]e must consider the underprivileged to be those people who experience physical, psychological or financial difficulties in attempting to assert a right, make a claim, or present a defence."[93] Marc Galanter's notion of the "haves"[94] and my own reference to "advantaged" and "disadvantaged" clients[95] both suffer from the same problem: We define the category in terms of its members' relationship to a particular social institution, and then we assume that they share other traits, without examining what those traits are. Some allow their attachment to pluralism to trivialize the task of defining the oppressed, stressing the endless sources of disadvantage in our society, for instance, "the overweight, or ugly."[96]

Nevertheless, given the enormous demand and limited resources, statutes must set eligibility requirements, and programs must establish priorities. Several criteria have been adopted widely. Recognizing the prevalence of racial discrimination, many countries have sought to provide legal services to racial or ethnic minorities.

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tory and Bibliography of Legal Aid in America, 44 GEO. WASH. L. REV. 754, 761 (1976).

90. J. KATZ, *supra* note 2, at 179.

91. "It is too late in the day to claim that we are simply talking about whether to supply legal services to the poor as we might talk about providing health services or transportation services. Everyone in the game knows we are talking about access to political power." Shapiro, *Access to the Legal System and the Modern Welfare State: American Continuities,* in ACCESS, *supra* note 2, at 273, 292.

92. J. KATZ, *supra* note 2, at 174.

93. Zemans, *Introduction,* in PERSPECTIVES, *supra* note 2, at 1, 5. The error is in assuming that people have a "need" for law rather than a desire to pursue other goals, for which law may or may not be a valuable instrument. *See supra* note 81.

94. Galanter, *Why the "Haves" Come Out Ahead: Reflections on the Limits of Legal Change,* 9 LAW & SOC'Y REV. 95, 103–04 (1974).

95. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?* 1 LAW & POL'Y Q. 5, 8 (1979).

96. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS, *supra* note 2, at 251, 259.

Indeed, the plight of European immigrants at the end of the nineteenth century stimulated some of the first legal aid programs in the United States.[97] Lawrence Friedman has argued that it was the growing distance between urban courts and the increasingly heterogeneous populations they served that created the need for legal aid.[98] Erhard Blankenburg has pointed to a contemporary parallel: Legal aid grew most rapidly in those Western European countries that experienced significant immigration in the 1950's and 1960's—Britain, the Netherlands, and France.[99] Some programs have focused their energies on ethnic minorities: legal clinics in Canada,[100] legal services offices in the United States serving migrant workers and Native Americans,[101] the legal aid scheme introduced in France in 1972,[102] the "juss bus" in Norway,[103] judicare attorneys in the Netherlands,[104] and Aboriginal Legal Services in Australia.[105] Nevertheless, some minorities continue to avoid contact with the legal system even when offered legal aid. This seems particularly

97. J. KATZ, *supra* note 2, at 34–36; LEGAL SERVICES CORP., 1978 ANNUAL REPORT 18–31 (1978); *cf.* Shapiro, *Access to the Legal System and the Modern Welfare State: American Continuities,* in ACCESS, *supra* note 2, at 273, 280–81 (municipal judges drawn from immigrant communities informally administered familial style of justice).

98. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS, *supra* note 2, at 251, 257–59.

99. Blankenburg, *Why Historical Precedents of the "Access to Law" Movement in Germany Were Not Followed Up,* in INNOVATIONS, *supra* note 2, at 233, 235–36. Sweden could be added to this list. But, like so many generalizations, there are numerous counterexamples. In the following pairs, each country experienced roughly similar levels of labor migration, but only the first enacted a legal aid scheme: the Netherlands/Belgium; France/Germany; Sweden/Norway.

100. P. HAVEMANN, THE REGINA NATIVE COUNSEL PROJECT: A LEGAL SERVICE FOR NATIVE ORGANIZATIONS, GROUPS AND SOCIETIES IN THE CITY OF REGINA (1980); Zemans, *Community Legal Clinics in Ontario: 1980. A Data Survey,* 1 WINDSOR Y.B. ACCESS JUST. 230, 241–45, 252–57 (1981); *Native People and Justice in Canada,* 5 (2 & 3) CAN. LEGAL AID BULL., Apr. & July 1982.

101. LEGAL SERVICES CORP., 1976 ANNUAL REPORT 13 (1976) (10 programs serving migrant workers; 8 serving Native Americans). The Legal Services Corporation, in response to the congressional mandate in 42 U.S.C. § 2996f(h) (Supp. 1984), produced a report, Legal Service Corp., Special Legal Problems and Problems of Access to Legal Services of Veterans, Migrant and Seasonal Farm Workers, Native Americans, People with Limited English-speaking Ability, and Individuals in Sparsely Populated Areas (1979), which focused attention on the legal needs of these groups.

102. Pradel, *France,* in PERSPECTIVES, *supra* note 2, at 134, 136. But even though the statute specifically included aliens, they are underrepresented among legal aid clients in comparison to their proportion of the population. *See* M. VALÉTAS, AIDE JUDICIAIRE ET ACCÈS À LA JUSTICE 14 (1976).

103. B. GARTH, *supra* note 2, at 127.

104. Groenendijk, *The Working Group on Legal Aid for Immigrants: A Public Interest Law Organization in the Netherlands,* in INNOVATIONS, *supra* note 2, at 165, 166.

105. Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 44; *see also* R. SACKVILLE, *supra* note 56, at 105–07. Concern also has been directed at recent immigrants to Australia, especially those from non-English speaking countries. *See generally* A. JAKUBOWICZ & B. BUCKLEY, MIGRANTS AND THE LEGAL SYSTEM (Law & Poverty Series, 1975).

true of indigenous peoples such as Indians in Mexico[106] and gypsies in Spain.[107] Some countries persist in denying that racial discrimination affects access to law. A South African lawyer asserts, "Indigent whites are at as much of a disadvantage in enforcing or defending their rights in civil legal proceedings as are coloureds, Asians or Bantu who are unable to pay the costs of civil litigation."[108] Yet four pages later the same author presents statistics showing that fifty-four percent of all civil legal aid between 1971 to 1973 was granted to whites, thirty percent to Asians and coloureds, and only fifteen percent to Bantu,[109] although in 1970 whites were only eighteen percent of the population, Asians and coloureds twelve percent, and black Africans seventy percent.[110]

Geoffrey Hazard has argued that a liberal legal system can be mobilized against racial discrimination and other categorical injustices but that the American Constitution offers no redress against inequalities of wealth or income.[111] Nevertheless, most legal aid programs see the alleviation of poverty as their mission and consequently define their target populations in economic terms. The problem with this approach is that eligibility criteria necessarily create a dichotomy at some arbitrary point along the continuum of wealth and income, a boundary that inevitably becomes a focal point for political struggle.[112] Ideological enemies of legal aid programs and adversaries of those whom they assist seek to restrict eligibility to the most destitute—recipients of state benefits in the United States[113] or the poorest ten percent of the Australian population.[114] Proponents of legal aid try to expand eligibility in order

106. Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 241–42 n.52.

107. Miguel y Alonso, *Spain,* in PERSPECTIVES, *supra* note 2, at 302, 303–04.

108. Gross, *South Africa,* in PERSPECTIVES, *supra* note 2, at 288, 288.

109. *Id.* at 292. In 1980, whites received 30% of legal aid, coloureds 43%, and blacks 27%; these groups were 18%, 14%, and 67% of the population, respectively. Zemans, *supra* note 15, at 417 n.115.

110. *South Africa, Republic of,* in THE NEW COLUMBIA ENCYCLOPEDIA, at 2568 (1975). Coloured and Black South Africans are grossly overrepresented among those receiving criminal convictions, death sentences, and imprisonment. On the other hand, blacks are underrepresented in legal aid applications or referrals to attorneys when compared with their proportion of the population and, even more so, when compared with those subjected to criminal prosecution. Whites are overrepresented in applications for and grants of civil legal aid. One reason may be that less than three percent of attorneys in South Africa (75 out of about 2800) and little more than one percent of advocates (about 10 out of 700 are black). F. Kentridge, *supra* note 7, at 8.

111. Hazard, *Social Justice Through Civil Justice,* 36 U. CHI. L. REV. 699, 705–11 (1969).

112. On the indeterminacy and pliability of the concept of poverty, see G. HIMMELFARB, THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE (1983).

113. In 1981 the Legal Services Corporation eligibility ceiling by family size was: 1 — $5388; 2 — $7113; 3 — $8838; 4 — $10,563, etc. *Poverty Level Raised,* POVERTY L. TODAY, Summer 1981, at 7.

114. Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 43.

to broaden the constituency who support the programs[115] and allow the poor to form political alliances with more powerful groups.[116] Of course, the danger is that middle class clients will consume a disproportionate share of this social benefit[117] as they do all others. In Japan, where eligibility standards are flexible, legal aid is mobilized primarily by plaintiffs in tort, family, real property, and debt cases.[118] In Austria, the new Legal Aid Act of 1973 extended assistance to corporations because "the public interest requirement . . . was discriminatory and thus incompatible with the constitutional guarantee of equality before the Law."[119] These extensions not only divert resources that should be concentrated on the most disadvantaged, but they also paper over the irreconcilable conflicts that divide the appropriate legal aid beneficiaries from their adversaries. Thus, legal aid programs in Britain, Canada, and Sweden deny legal aid to businesses, creditors, or landlords even when they qualify on economic grounds.[120] These largely symbolic gestures cannot resolve the fundamental difficulty. The category of beneficiaries defined by economic indices has no organic coherence, no necessary unity. This was less true at the end of the nineteenth century when legal aid was directed at an emergent industrial working class confronting unscrupulous capitalists who withheld wages or engaged in usurious lending practices.[121] But ritual references to a "developing proletariat" in Mexico[122] or "the poor as a class" in the United States[123] will not restore a vanished unity. Legal aid advocates are reduced to referring to " 'haves' and 'have-nots,' *however such classes are defined*," when the definition of the class is precisely the central issue.[124]

Other conceptualizations of the objects of legal aid supplement

115. 1 ROYAL COMM'N, *supra* note 63, at 120–21, urged the elimination of any ceiling on eligibility for civil legal aid, although larger contributions would be required from those with greater means.

116. B. GARTH, *supra* note 2, at 201–02 n.16.

117. In the Netherlands, the clients of the legal aid buro are disproportionately male, employed, and better educated compared with the clients of citizens advice bureaux, which are less aggressive in pursuing client interests. *See* van de Beek, Engbersen & van der Veen, *Participant Observation in Advice Bureaux*, 4 NIEUWSBRIEF VOOR NEDERLANDSTALIGE RECHTSSOCIOLOGEN, RECHTSANTROPOLOGEN EN RECHTSPSYCHOLOGEN 307, 318–19 (1983).

118. Kojima, *Japan*, in PERSPECTIVES, *supra* note 2, at 191, 197–200.

119. König, *Austria*, in PERSPECTIVES, *supra* note 2, at 76, 79.

120. Boman, *Scandinavia*, in PERSPECTIVES, *supra* note 2, at 243, 249 (Sweden); Zander & Russell, *Law Centres Survey*, 73 LAW SOC'Y'S GAZETTE 208 (1976) (Great Britain); Zemans, *supra* note 100, at 238–39 (Canada).

121. J. KATZ, *supra* note 2, at 35.

122. Oñate Laborde, *Mexico*, in PERSPECTIVES, *supra* note 2, at 213.

123. B. GARTH, *supra* note 2, at 171–202.

124. *Id.* at 231 (emphasis added). The problem is that neither the poor nor the have-nots is a class as the concept is used by Marxists; each simply is a category within bourgeois stratification studies.

the two dominant categories of ethnicity and poverty. As new groups have struggled against oppression, they have turned to legal instrumentalities. The exploitation of women stimulated some of the first legal aid programs,[125] and violence against women continues to be a focus of concern.[126] Special efforts are directed toward children, the elderly, and the physically or mentally disabled.[127] Finally, geography defines eligibility in the United States, Canada, Australia, Britain, and the Netherlands, not just because the programs must ration scarce resources, but also because the programs' proponents believe, or at least hope, that contiguous residence defines a category—neighborhood or community—that should benefit from legal aid and that can be mobilized politically.[128]

The unanswered question in all these attempts to conceptualize the legal aid clientele is whether the target population is a category or a group. Some of the characteristics discussed above suggest a potential for collective action—ethnicity, gender, and community, for instance. Others, like poverty or residence, merely define parallel circumstances. The only thing that some recipients of legal aid share is a common legal problem—the inadequate level of welfare benefits, for instance, or arbitrariness in their administration. "[W]e are not talking about the creation of a political party or a broad coalition for social change. The groups being considered, at least as targets for organisation, are clearly tied to the legal issues generated by welfare state legislation."[129] Unfortunately, that is a weak foundation for organizing. The legal representation of similarly situated individuals, even when it takes the form of a "class" action,[130] tends to substitute for, rather than foster, organization and would be described more accurately as a "categorical" action:

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125. J. KATZ, *supra* note 2, at 34–35.

126. Some commentators, however, believe that the "woman" problem will disappear miraculously in the future:

> [M]ost child custody and financial support issues have been rendered moot. With rare exception, both parents are employed (25 hours a week on the average), and from the age of six weeks children spend their days in government-funded child care centers. Women and men earn equal incomes (on the average), and neither is required to serve a custodial role that interferes with employment.

So runs Earl Johnson's sanguine view of the 21st century. Johnson, *The Justice System of the Future: Four Scenarios for the Twenty-First Century,* in ACCESS, *supra* note 2, at 183, 197.

127. 13 LAW CENTRES' NEWS, Autumn 1982, at 3; B. GARTH, *supra* note 2, at 127; 10 LAW CENTRES' NEWS, Winter 1981–1982, at 2.

128. As indicated by the titles of three leading studies: B. GARTH, *supra* note 2; M. ZANDER, LEGAL SERVICES FOR THE COMMUNITY (1978); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor,* 80 HARV. L. REV. 805 (1967).

129. B. GARTH, *supra* note 2, at 190.

130. On the lack of coherence within the class, see generally Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective,* 77 NW. U.L. REV. 492 (1982); Rhode, *Class Conflicts in Class Actions,* 34 STAN. L. REV. 1183 (1982).

Lawsuits on behalf of shareholders[131] or consumers[132] are well-known examples. Nor are the characteristics of their adversaries likely to stimulate collective action among legally aided clients. We are far removed from the historical confrontation that produced trade unions: the struggle of workers, in daily intimate contact with each other, against an identifiable opponent, the employer, from whom concrete concessions could be won.[133] To the extent that capital is the opponent, the lumpen bourgeoisie predominate—the shady periphery of loan sharks, crooked merchants, and slumlords.[134] But many commentators concur that the principal adversary is no longer capital but the state: "In the modern welfare state, most citizen complaints reflect *subject* interests. They are complaints against large organizations, including the state."[135] That it is infinitely more difficult to organize the recipients of welfare benefits to take collective action against the state than it is to organize factory workers against a capitalist is shown by the failure of the welfare rights movement.[136]

The inescapable conclusions, however reluctant we may be to draw them, are that the clientele of legal aid does not lend itself to organization, and that the offer of legal assistance actually may undermine collective action. This gloomy assessment seriously challenges the apolitical conception of legal aid as simply another means of fostering liberal pluralism. In that view, state-subsidized lawyers correct the underrepresentation of certain interests in the political process of Western democracies. Therefore, any activity that furnishes representation to the unrepresented is both an unconditional good and an adequate solution to the imperfections of the political process:

> Arguably, however, the distinction between "traditional" litigation and "public interest" litigation is more illusory than real. An individual who sues . . . [may be] motivated solely by

131. Kötz, *Public Interest Litigation: A Comparative Survey,* in ACCESS, *supra* note 2, at 85, 100.

132. Trubek & Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States,* in ACCESS, *supra* note 2, at 119, 135–36.

133. As Karl Klare has shown, the legalization of this struggle deradicalized it. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941,* 62 MINN. L. REV. 265 (1978).

134. LEGAL SERVICES CORP., 1978 ANNUAL REPORT 28 (1978) (early litigation against loan sharks); *cf.* P. SCHRAG, COUNSEL FOR THE DECEIVED: CASE STUDIES IN CONSUMER FRAUD (1972) (tactics of fraudulent merchants); Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls,* in 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 59, at 119 (litigation against landlords).

135. Falke, *supra* note 75, at 129; Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State,* in ACCESS, *supra* note 2, at 251, 270; Tunc, *The Quest for Justice,* in ACCESS, *supra* note 2, at 315, 337.

136. *See generally* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1977).

> his desire to protect his personal rights. Even in these cases, however, bringing the action may be said to be in the public interest. A plaintiff who is awarded a judgment for damages or an injunction demonstrates to the public that breaking a contractual promise or engaging in illegal conduct will not go unpunished by the courts.[137]

The ultimate extension of this vision is the hypertrophy of the state, a macabre inversion of the Marxist hope that it will wither away: "[P]eople have fewer grievances because people and institutions behave better, especially business enterprises. 'They know they can't get away with overcharging or shoddy merchandise . . . because if they do something like that, their customers will have them in court next day.' "[138] Only a lawyer suffering from a terminal case of *déformation professionelle* could dream such a vision. Litigation thus joins the invisible hand of the market and the mythical consensus engendered through democratic pluralism in a new trinity promising secular salvation. But if the pluralist millenium is unattainable, as it certainly is through the mechanism of litigation, then once again we are forced to grapple with the essentially political nature of legal aid and to offer an explanation of why it took particular forms in different environments, as well as an analysis of what it can accomplish.

III. THE POLITICS OF LEGAL AID

A political account must be organized around those actors who have the most to gain or lose from legal aid.[139] Of course, each will seek to disguise his selfish interests beneath the trappings of some generalized ideal. Capital and state, which oppose legal aid because it threatens them economically and politically, insist that the institution remain "apolitical" (*i.e.*, they want to establish the constraints under which it operates). The legal profession, which is in the contradictory position of seeking economic benefits while resisting state interference, argues for "equal justice" and "independence" (*i.e.*, the organized profession should exercise control). And specialized legal aid lawyers advocate "access" and the vigorous advocacy of "client interests" (*i.e.*, they require greater resources and sole authority to interpret client interests). The purpose of this sec-

137. Kötz, *Public Interest Litigation: A Comparative Survey*, in ACCESS, *supra* note 2, at 86.

138. Johnson, *The Justice System of the Future: Four Scenarios for the Twenty-First Century*, in ACCESS, *supra* note 2, at 183, 193. Compare Galanter's response, *supra* text accompanying note 82.

139. Jeremy Cooper also adopts this perspective, focusing on such protagonists as central and local government, national lawyer organizations, local lawyers, statutory advice/help agencies, the client community, and staff. J. COOPER, *supra* note 2, at 4–6.

tion is to unmask these pretensions in order to discern the actual interests of the relevant actors and how they have shaped legal aid.

A. *The Legal Profession*

The legal profession is not monolithic; lawyers disagree about legal aid, often vehemently. Hostility is most pronounced among those who view it as an immediate economic threat. In a sample of older American solo practitioners, forty-five percent said that legal services had hurt their practices.[140] When the Office of Economic Opportunity (OEO) Legal Services Program first was established, the professional organizations dominated by solo and small firm lawyers were the most uncompromising in their resistance.[141] These attitudes persist today. The General Practice Section of the American Bar Association was a principal lobbyist for legislation requiring the Legal Services Corporation to divert funds away from salaried lawyers in staffed offices and into judicare fees for the private profession.[142] By contrast, leaders of the national professional organizations—highly successful lawyers who usually belong to large corporate firms on which legal aid has no economic impact—strongly support legal aid.[143] Lawyers' political orientations also affect their enthusiasms: The Society of Labour Lawyers in Britain was an early proponent of law centres, even before the first one was opened in 1970.[144] But the most consistent advocates have been law students and teachers.[145] Law students in the Dutch town of

140. B. GARTH, *supra* note 2, at 33; *cf.* Champagne, *Lawyers and Government Funded Legal Services,* 21 VILL. L. REV. 860, 867–70 (1976) (discussing opposition of solo practitioners to legal aid generally).

141. E. JOHNSON, *supra* note 89, ch. 4; H. STUMPF, *supra* note 45, ch. 6; Stumpf, Schroerluke & Dill, *The Legal Profession and Legal Services: Explorations in Local Bar Politics,* 6 LAW & SOC'Y REV. 47 (1971).

142. POVERTY L. TODAY, Fall 1981, at 4.

143. E. JOHNSON, *supra* note 89, ch. 3. Thus, the professional association in the state of Victoria, Australia (the Law Institute) has supported legal centres and even lists them in the Law Institute Diary "as one of the profession's contributions to the community." Neal, *Ten Years After: The Victorian Law Centres,* in ON TAP, NOT ON TOP: LEGAL CENTRES IN AUSTRALIA 1972–1982, at 6, 11 n.3 (D. Neal ed. 1984) [hereinafter cited as ON TAP, NOT ON TOP].

144. J. COOPER, *supra* note 2, at 22. Similarly, the conservatism of lawyers in the American South, and their hostility to federal support for civil rights, may explain the slow growth of legal services programs in that region. But notwithstanding the conservative image of American lawyers, a study of lawyers in Chicago found that the largest political category was "independent Democrat" (40.2% were Democrats, more liberal and reformist, sympathetic to the presidential candidacy of George McGovern but opposed to the Daley machine) and only 10.1% were Republicans. J. HEINZ & E. LAUMANN, CHICAGO LAWYERS 111–14 (1982).

145. Clinics that served both to render legal aid and to teach law students were established first at Harvard in 1913 and subsequently at Yale, George Washington, Ohio State, Wisconsin, Cornell, Colorado, University of Southern California, Duke, Tennessee, Texas, Nebraska, and Willamette law schools. E. BROWNELL, *supra* note 67, at 13, 107–09. More than one-third of second-year students at the University of

Tilburg set up the first law shop in 1969, and the idea quickly spread to all the other university towns, stimulated partly by an influential issue of the national law student journal *Ars Aequi*.[146] Law students also took the initiative in Belgium,[147] Australia,[148] Canada,[149] South Africa,[150] Mexico,[151] Colombia,[152] and India.[153] The combination of general political orientation, commitment to the ideology of liberal legalism, and lack of any direct economic stake makes law students a natural constituency for legal aid. At the same time, they are marginal, powerless, and transient.

Most of the legal profession is concerned with two disparate, and often divergent, dimensions of legal aid: economics and politics. If economic considerations dominate today, they long were

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Wisconsin Law School indicated an interest in practicing "public interest" law. Erlanger & Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 LAW & SOC'Y REV. 11, 28–29 (1978); *see also* Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students*, 1979 AM. B. FOUND. RESEARCH J. 791; Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551 (1973). The demand for jobs in legal services and public interest law firms far exceeds the number of positions available. Erlanger, *Young Lawyers and Work in the Public Interest*, 1978 AM. B. FOUND. RESEARCH J. 83. In France, young *avocats*, especially *stagiaires* (apprentices), supported state intervention in the provision of legal aid because, until the state began paying lawyers, it was the apprentice or recently qualified lawyer who was required by the court to represent indigent litigants without fee. A. BOIGEOL, LES AVOCATS ET L'AIDE JUDICIAIRE 102 (1977). In England, the Bar Students for Legal Advice created the Free Representation Unit in 1972.

146. J. COOPER, *supra* note 2, at 45–48; B. GARTH, *supra* note 2, at 119–20; Bruinsma, *Towards a Standstill of the Legal Services for the Poor: A National Report on the Legal Services in the Netherlands*, 4 NIEUWSBRIEF VOOR NEDERLANDSTALIGE RECHTSSOCIOLOGEN, RECHTSANTROPOLOGEN EN RECHTSPSYCHOLOGEN 326, 328–29 (1983).

147. *Boutiques*, following the Dutch model of law shops, are staffed primarily by students, with assistance from young lawyers. B. GARTH, *supra* note 2, at 125; Blankenburg & Cooper, *supra* note 8, at 280; Breda, *supra* note 11, at 360.

148. R. SACKVILLE, *supra* note 56, at 86; Neal, *Introduction*, in ON TAP, NOT ON TOP, *supra* note 143, at 3, 4; Smith, *Clinical Legal Education: The Case of Springvale Legal Service*, in *id.* at 49.

149. Zemans, *Canada*, in PERSPECTIVES, *supra* note 2, at 93, 104 (law student involvement at Saskatoon Legal Assistance Clinic); Zemans, *supra* note 100, at 230–31 (students provide legal services).

150. Gross, *South Africa*, in PERSPECTIVES, *supra* note 2, at 288, 292 (students provide free services and management); F. Kentridge, *supra* note 7, at 12 (law schools operate clinics with student counsellors).

151. Oñate Laborde, *Mexico*, in PERSPECTIVES, *supra* note 2, at 213, 228, 236–37 n.30 (Free Legal Offices, established by the Federal District, are staffed by students).

152. D. LYNCH, LEGAL ROLES IN COLOMBIA 101 (1981) (governmental executive decree that law schools establish legal clinics offering free legal assistance to indigents has met with limited success).

153. Pande, *The Administration of Beggary Prevention Laws in India: A Legal Aid View-point*, 11 INT'L J. SOC. L. 291, 292 (1983). Private practitioners unsuccessfully sought a court order against the students. *Id.* at 298–99.

subordinate to political concerns.[154] In Britain, the first country to establish state-funded legal aid (in 1949), lawyers resisted the idea throughout the 1920's and 1930's. They were preoccupied with developing their monopolies of litigation and conveyancing. Legal aid, then virtually synonymous with divorce, was considered to be both dirty work and unremunerative.[155] Although the profession sought to protect and enhance its image by suppressing "speculative solicitors" (those who sought personal injury cases on a contingent fee basis), it strongly preferred that such suppression be effected through charitable programs.[156] But the services that lawyers donated without remuneration under the Poor Persons Rules never were adequate to meet the demand, and the disparity eventually became intolerable as a result of two interrelated developments: the rise in the divorce rate (accelerated by World War II) and the decline in the number of solicitors (wholly caused by the war). As early as 1927, only 580 of the 5000 solicitors practicing in London even placed their names on the rota to accept poor clients; although this grew to 857 out of 5750 in 1938, it dropped drastically to 350 out of 4238 in 1943.[157] The number of barristers willing to take cases declined even more precipitously, from 602 in 1938 to 110 in 1943, out of approximately 2000 in practice.[158] Commentators noted with embarrassment that when an indigent criminal defendant asked the judge to appoint a barrister in the courtroom to take a "dock brief," most of the lawyers quickly disappeared before the appointment could be made.[159] Even prior to the War, the Associated Law Societies of Wales resolved to take no more cases under the Poor Persons Rules unless they were paid, local courts were given jurisdiction, and the opposing party was made liable for costs.[160] But the war made the charitable scheme truly unworkable. The number of practicing solicitors declined from 17,000 in 1938 to

154. In France, many lawyers continued to oppose legal aid after it was introduced in 1972, and even those who supported the reform were concerned to protect their "independence." A. BOIGEOL, *supra* note 145, at 96.

This concern may be well grounded. In Sweden, the schedule of payments in legal aid cases under the judicare program has been extended to all cases, even when the client is sufficiently well off that the contribution of the state is minimal or even nil. Muther, *The Reform of Legal Aid in Sweden*, 9 INT'L LAW. 475, 492 (1975).

155. Alcock, *Legal Aid: Whose Problem?*, 3 BRIT. J.L. & SOC'Y. 151, 166–67 (1976).

156. R. EGERTON, LEGAL AID 10–11 (1945); Alcock, *supra* note 155, at 166–67.

157. R. EGERTON, *supra* note 156, at 16–17.

158. *Id.* at 17. The census gives the number of barristers as 2966 in 1931 and 3084 in 1951; however, many of these did not actually practice, and a significant proportion of practitioners had chambers outside London. In 1953, there were 1456 barristers in practice in London. SENATE OF THE FOUR INNS OF COURT, ANNUAL STATEMENT (1953).

159. R. EGERTON, *supra* note 156, at 20.

160. *Id.* at 17; Alcock, *supra* note 155, at 168.

7000 in 1945,[161] and the backlog of applications under the Poor Persons Rules grew from 1600 in 1940 to 10,000 in 1942.[162] Legal professions in other countries were no more forthcoming in underwriting private legal aid programs. In the United States, charitable contributions by lawyers accounted for only about ten percent of the total legal aid budget in the 1950's and 1960's, when it still was financed almost entirely by private philanthropy.[163] The enormous changes wrought by the war in Europe made it almost impossible to revive the philanthropic impulse. The Bureau van Consultatie, which had rendered *Pro Deo* services in the Netherlands, was re-

161. RUSHCLIFFE, *supra* note 62, at 5. The Annual Reports of the Law Society give the figures as 16,899 solicitors in 1938 and 12,979 in 1945, but many of the latter may have been in the armed forces, though they still continued to renew their practicing certificates. LAW SOCIETY, ANNUAL REPORT (1945); *id.* (1938).

162. Alcock, *supra* note 155, at 173.

163. B. GARTH, *supra* note 2, at 19. In 1947, bar associations and lawyers throughout the United States contributed an estimated $78,500—8% of the total budget and an average of $.40 per lawyer. For the budget figures, see E. BROWNELL, *supra* note 67, at 232–33. For the 1950 estimate of the number of lawyers, see Segal & Fei, *The Economics of the Legal Profession: An Analysis by States,* 39 A.B.A. J. 110, 114 (1953). By 1959, the contribution of the profession had grown to $264,032—12% of the total and an average of $.93 per lawyer. E. BROWNELL, SUPPLEMENT TO LEGAL AID IN THE UNITED STATES 62–63 (1961) [hereinafter cited as SUPPLEMENT]; B. SIKES, C. CARSON & P. GORAI, THE 1971 LAWYER STATISTICAL REPORT 6 (1972). The following table presents the fragmentary data on lawyer and bar association contributions to legal aid. The absolute contribution rose rapidly, although the contribution per lawyer increased somewhat more slowly. But the relative significance of lawyer contributions declined dramatically with the creation of the OEO Legal Services Program in 1965, which provided two-fifths of civil legal aid funds the following year and four-fifths after five years. NATIONAL LEGAL AID & DEFENDER ASS'N (NLADA), Statistics of Legal and Defender Work in the United States and Canada, 1970, at iv (1971); 1966 N.L.A.D.A. PROC. 303 (1966). Without subsequent data, we cannot know whether absolute contributions also declined as lawyers looked to the government to finance legal aid.

Year	Contribution by Lawyers and Bar Associations	Percentage of Total Legal Aid Budget	Average Donation (Contribution Divided by Total Number of Lawyers)
1947	$ 78,500	8	$ .40
1959	264,000	12	.93
1960	448,245	15.3	1.57
1961	490,398	14.8	
1962	501,992	14.5	
1963	581,786	15.3	1.97
1965	891,823	16.6	
1966	967,419	8.4	3.05
1968		4.0	
1970	2,058,772	3.3	5.80

Sources: NLADA, STATISTICS OF LEGAL AID AND DEFENDER WORK IN THE UNITED STATES AND CANADA, 1970, at iv (1971); 1969 N.L.A.D.A. PROC. 3; 1967 *id.* at 275; 1966 *id.* at 46; 1964 *id.* at 29; 1963 *id.* at 27; 1962 *id.* at 13; 1961 *id.* at 14; R. Abel, American Lawyers, Table 3 (1982) (unpublished manuscript).

placed by a state-supported scheme,[164] and the Poor Man's Lawyer declined with the emergence of legal aid in Britain.

Once state subsidies became inevitable, professional suspicions about "officialism" rapidly dissolved and economic considerations gained dominance.[165] Private lawyers had two objectives: to increase state funding for their own legally aided work (judicare), and to minimize the state funds available to salaried lawyers (staffed office programs). The legal professions in the United States,[166] Britain,[167] the Netherlands,[168] Canada,[169] Germany,[170] Belgium,[171]

164. Blankenburg & Cooper, *supra* note 8, at 276. In France, the number of clients assisted through the charitable efforts of lawyers fell from 41,790 in 1950 to 28,639 in 1970, two years before the state-funded legal aid program was created. A. Boigeol, French Lawyers 27 (R. Abel trans. 1984) (unpublished manuscript).

165. The profession has benefited enormously from state intervention. In South Australia, the legal aid scheme established in 1933 was essentially charitable. Solicitors could seek contributions from their clients, but otherwise the most they could claim from the Legal Assistance Fund operated by the Law Society was less than 20% of usual fees. In 1969, passage of a new law authorized the use of interest from solicitors' trust funds and increased the rate of reimbursement to about 40%. In 1973, the state government began to finance the scheme, and the rate reached 50%. Finally, when the federal government entered the picture in 1973–1974, solicitors began to receive 80% of their usual fees. R. SACKVILLE, *supra* note 56, at 36.

166. J. COOPER, *supra* note 2, at 294; H. STUMPF, *supra* note 45, chs. 6–7; POVERTY L. TODAY, Fall 1981, at 4. When the Legal Services Corporation launched its Delivery Systems Study, it found the legal profession particularly interested in participating in judicare and prepaid plans but quite uninterested in the voucher model, in which private practitioners would compete with staffed offices for poor clients. LEGAL SERVICES CORP., THE DELIVERY SYSTEMS STUDY 42–43 (1980). Motivated by the same desire to spread business and avoid competition, the profession attempted to favor open- over closed-panel prepaid legal services plans and was thwarted only by threats of antitrust prosecution. L. DEITCH & D. WEINSTEIN, PREPAID LEGAL SERVICES 21–22 (1976). Similarly, the profession sought to obstruct legal clinics, which cut prices and serve a mass clientele. Downey, *The Price is Right—For Everyone But the California Bar,* JURIS DR., June 1974, at 31, 31–33.

167. J. COOPER, *supra* note 2, at 30; B. GARTH, *supra* note 2, at 55–56. Although the Law Society and the Rushcliffe Committee originally endorsed a parallel scheme of salaried lawyers, and the 1949 Act provided for one, it never was funded. Within 10 years, the Law Society had reversed its position and strongly opposed salaried lawyers. *Compare* B. ABEL-SMITH & R. STEVENS, LAWYERS AND THE COURTS 336 (1967) (opposition of Law Society) *with* Pollock, *Legal Aid as a Social Service—The Cobden Trust Report,* 67 LAW SOC'Y'S GAZETTE 399 (1970) (claim of Law Society support). After 20 years of the Legal Aid and Advice Act of 1949, the President of the Law Society responded to the proposal of the Society of Labour Lawyers for neighborhood law centres with unqualified opposition. "Such a plan would be the thin end of the wedge. It would mean the loss of the independence of the profession and could lead to a total Nationalized Legal Service." Sargent, *Inaugural Address of the President of the Law Society,* 65 LAW SOC'Y'S GAZETTE 654 (1968), *quoted in* Fennell, *Solicitors, Their Markets and Their "Ignorant Public": The Crisis of the Professional Ideal,* in ESSAYS IN LAW AND SOCIETY 9, 17–22 (Z. Bankowski & G. Mungham eds. 1980) [hereinafter cited as Z. BANKOWSKI].

168. B. GARTH, *supra* note 2, at 121–22; Blankenburg & Cooper, *supra* note 8, at 277–78; Griffiths, *The Distribution of Legal Services in the Netherlands,* 4 BRIT. J.L. & SOC'Y 260, 262 (1977); *see also* J. COOPER, *supra* note 2, at 148–49 (discussing profession's desire for majority control over legal aid buro).

Norway,[172] and Australia[173] strongly and consistently have endorsed judicare and denigrated staffed office programs. Lawyers justify this preference in the name of cost effectiveness—even though judicare costs twice as much as staffed offices—and client choice—even though eighty-six percent of clients in Quebec, where both programs operate, apparently preferred staffed offices.[174] The organized profession asserts this view, although it is not shared by most practitioners.[175] Nor do professional associations attempt to conceal their self-interest. The Law Society in Britain refused to grant an essential waiver to a law centre in Hillingdon because, the Society claimed, there already were enough private lawyers in the area willing to accept legal aid work.[176]

Where the profession has been unable to halt the establishment of staffed offices entirely, it has sought a division of labor allocating the more remunerative work to private practitioners. It insists that salaried lawyers abstain from fee-generating cases and observe strict financial eligibility limitations that exclude any client who might be able to pay a private lawyer's fee.[177] In the Netherlands, the state-

169. F. ZEMANS, COMMUNITY LEGAL SERVICES REPORT 42 (1972); Zemans, *Canada,* in PERSPECTIVES, *supra* note 2, at 93, 99–100, 107. The Law Society of Upper Canada (LSUC), the professional association of Ontario, was so incensed when Osgoode Hall Law School proposed to open Parkdale Community Legal Services as part of its clinical education program that it threatened to strip the school of its name, which also was the name of the LSUC headquarters building where the school had been housed earlier when it was operated by the professional association. Gathercole, *Legal Services and the Poor,* in LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES 407, 431 n.21 (R. Evans & M. Trebilcock eds. 1982).

170. Falke, *supra* note 75, at 113.

171. Blankenburg & Cooper, *supra* note 8, at 280.

172. The Norwegian Advocates Association successfully opposed a proposal to introduce a staffed office program in 1980, and legal aid is furnished exclusively by the private profession, with the exception of the offices and Jus Bus operated by the law faculty of the University of Oslo. J. Johnsen, Lawyers in Norway 21 (1982) (unpublished manuscript).

173. B. GARTH, *supra* note 2, at 107. In New South Wales, the Law Society's judicare scheme was reserved for middle-income wage-earners, who could pay substantial contributions. The poorest clients were left to the staffed office Public Solicitor. R. SACKVILLE, *supra* note 56, at 7.

174. Zemans, *Canada,* in PERSPECTIVES, *supra* note 2, at 93, 100, 107. Clients in Meriden, Connecticut also expressed a preference for staffed offices in disputes with the government, although they took their divorces to private practitioners. Cole & Greenberger, *Staff Attorneys vs. Judicare: A Cost Analysis,* 50 J. URB. L. 705, 707–08 (1973). Clients in the London borough of Newham clearly preferred the Newham Rights Centre to the services offered by solicitors under the legal aid scheme. A. Byles, A Community Approach to Socio-Legal Services: The Newham Rights Centre, ch. 4, at 7–11 (1975) (unpublished manuscript).

175. J. COOPER, *supra* note 2, at 28.

176. *Id.*

177. J. KATZ, *supra* note 2, at 40–41 (United States); *see also* B. GARTH, *supra* note 2, at 113 (discussing federal plan providing for substantial representation of organized Australian legal profession on Legal Aid Commission which determine policies for referring clients to private lawyers). Emory Brownell states, "No Legal Aid organization

supported Buro voor Rechtshulp cannot represent clients in higher courts but must refer them to private lawyers; for a while, it was not even allowed to write letters for those seeking information.[178] Often, the division of labor is formalized in a jurisdictional agreement very similar to those that lawyers associations conclude with competing professions.[179] The waiver agreement that the Law Society has signed with the Law Centres Federation prohibits the members of the latter from handling conveyancing, commercial matters, divorce, probate, and adult crime.[180] Similar agreements exist in Scotland,[181] Australia,[182] and Germany.[183] Even then, tensions persist. A significant proportion of staffed offices report continuing hostility from the private bar in the United States,[184] Canada,[185]

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handles cases which will attract competent attorneys on a contingent-fee basis," *i.e.*, personal injury cases.

> A unique practice here illustrates the fear many attorneys hold that Legal Aid may compete with private practice. In the beginning, every applicant, as a prerequisite to service was required to go to a lawyer in private practice for an interview and be certified by him, on a form provided, as being a proper subject for Legal Aid. In recent years this has applied only to cases requiring litigation.

E. BROWNELL, *supra* note 67, at 75, 105.

178. Blankenburg & Cooper, *supra* note 8, at 277–78.

179. Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 184–87, 489 (1967); Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions,* 34 STAN. L. REV. 1, 6–10 (1981).

180. B. GARTH, *supra* note 2, at 74; Partington, *Great Britain,* in PERSPECTIVES, *supra* note 2, at 164; Zander, *Public Policy for Legal Services,* in INNOVATIONS, *supra* note 2, at 77, 89; Zander, *The First Wave,* in ACCESS, *supra* note 2, at 27, 32. The Australian Legal Aid Office is expressly prohibited from engaging in conveyancing or handling probate matters. Ross & Mossman, *supra* note 48, at 18.

181. ROYAL COMM'N ON LEGAL SERVICES IN SCOTLAND, CMD. 7846, REPORT 38 (1980) [hereinafter cited as SCOTTISH ROYAL COMM'N]; 9 LAW CENTRES' NEWS, June 1981, at 2. Scottish law centres cannot take matters involving conveyancing, personal injury, matrimony, testate or intestate succession, small claims, or any criminal proceedings (except pleas in mitigation), although they may perform such work for an existing client.

182. The waiver agreement between the Western Region Community Legal Centre Ltd. in the suburbs of Melbourne and the Law Institute of Victoria prohibits the former from handling more than 36 conveyances per year or 20 personal injury cases (excluding automobile accidents) or any wills or commercial matters. In addition, the centre cannot open more than one office, hire additional lawyers without consent, or perform more than 40% of its work under the legal aid scheme. Bell, *Poverty Law Practice (Pt. 2): Breaking Through Legal Restrictions,* 8 LEGAL SERVICE BULL. 78, 79–80 (1983). For a detailed narrative of local practitioners' efforts to contain the economic threat posed by a proposed practice dedicated to serving the poor, see Bell, *The Politics of Reforming the Legal Profession in Australia: A Case Study of the Western Region Community Legal Centre Ltd.,* 7 LAW & POL'Y 143 (1985). For an overview of Australian legal centres, see Basten, Graycar & Neal, *Legal Centres in Australia,* 7 LAW & POL'Y 113 (1985).

183. Falke, *supra* note 75, at 113. The agreement between the German Law Society and the Association of Nonprofit Legal Advice Centers dates from 1932.

184. J. HANDLER, E. HOLLINGSWORTH & H. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 64–65 (1978) [hereinafter cited as J. HANDLER]. One-fifth

and the United Kingdom.[186] Where staffed offices and judicare programs coexist, the former are pressured to decline routine legal aid work[187] and, ironically, to focus instead on political cases[188]—a nice example of the profession's economic self-interest overcoming its political conservatism.

Most lawyers, however, have realized that staffed offices, rather than taking work away from private lawyers, actually generate additional business[189] and provide useful training in new areas of law—complaints about spousal abuse, for instance.[190] The private profession then turns its efforts to ensuring that it derives the maximum benefit from state expenditures. Staffed offices are discouraged or prevented from advertising,[191] while the organized

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of a sample of legal services lawyers said that bar associations hindered their work; almost half said their offices had been criticized for ethical violations having to do with soliciting clients or client eligibility; four-fifths said they personally had received objections about the cases they handled or the way they handled them. *See also* H. STUMPF, *supra* note 45, ch. 6.

185. Zemans, *supra* note 100, at 241–45. Twelve offices reported hostility, 19 did not.

186. Zander & Russell, *supra* note 120, at 209. Five centres reported hostility, three some hostility, and seven none.

187. *Law Centres and Legal Aid,* LAW CENTRES' NEWS, Winter 1981, at 8.

188. B. GARTH, *supra* note 2, at 60.

189. 1 ROYAL COMM'N, *supra* note 63, at 79; B. GARTH, *supra* note 2, at 70–71. The Brixton Community Law Centre referred 1173 cases out of 6732 to private solicitors in 1980 and 760 out of 4750 in 1981. BRIXTON COMMUNITY LAW CENTRE LTD., 1980–1981 ANNUAL REPORT 22 (n.d.). The Small Heath Community Law Centre referred 319 cases out of 1580 to private solicitors between 1978–1979. SMALL HEATH COMMUNITY LAW CENTRE, 1978–1979, 3RD ANNUAL REPORT app. A (n.d.). The Camden Community Law Centre referred 863 cases out of 2153 to private solicitors between 1977–1978. CAMDEN COMMUNITY LAW CENTRE, 1977–1978 ANNUAL REPORT AND 5 YEAR REVIEW 19 (n.d.). The Newham Rights Centre referred 97 cases out of 663 to private solicitors in 1974. NEWHAM RIGHTS CENTRE, 1974–1975 REPORT AND ANALYSIS OF A COMMUNITY LAW CENTRE 91 (n.d.). Although the legal profession greeted the Manchester Law Centre with distrust, the centre referred between four and six cases a day to private firms, with the result that two firms recently opened just across the road from the centre. MANCHESTER LAW CENTRE, 1977–1978 ANNUAL REPORT 4 (n.d.). The Law Society now has abandoned its animosity to the law centres, noting that private practices have been established near the centres in North Kensington and Hampstead and four practices each near the centres in Camden and Islington. LAW SOCIETY, EVIDENCE TO THE ROYAL COMMISSION ON LEGAL SERVICES memorandum 3, pt. 1, at 216 (1977). The Duty Solicitor Scheme in New South Wales apparently increased the proportion of defendants represented in criminal cases but without any detriment to the case loads of private practitioners. Cashman, *Legal Representation in Magistrates' Courts,* in RESEARCH AND THE DELIVERY OF LEGAL SERVICES 159, 174 (P. Cashman ed. 1981).

190. *Law Centres and Legal Aid,* LAW CENTRES' NEWS, Winter 1981, at 8.

191. J. COOPER, *supra* note 2, at 32; REPORT OF THE MANCHESTER LAW SOCIETY TO THE NUFFIELD FOUNDATION ON COOPER & PEARSON, EXPERIMENTAL PRACTICE (1981) [hereinafter cited as COOPER & PEARSON]; C. MENKEL-MEADOW, THE 59TH STREET LEGAL CLINIC: EVALUATION OF THE EXPERIMENT 18–19 (1979). In both Manchester and Philadelphia, the clinics were established by the organized profession.

profession engages in expensive campaigns to promote judicare.[192] Considerable effort is devoted to spreading legal aid work as broadly and evenly as possible within the profession. There seems to be an implicit belief that the recipients of this particular form of government largesse, like the beneficiaries of other pork barrel programs, should share it equally. In Britain, the Duty Solicitor Scheme and the Citizens Advice Bureau distribute criminal and civil legal aid work.[193] In the Netherlands, the lawyer-dominated board of the Buro voor Rechtshulp requires the Buro to refer both civil and criminal clients to private practitioners according to a strict rota, although the staff would prefer to take competence into account.[194] There is deep resentment against any arrangement that might favor private practitioners who specialize in legal aid work. The Royal Commission on Legal Services recommended against a guaranteed minimum income for solicitors who establish practices in underserved areas;[195] in the Netherlands, private practitioners demanded and obtained advance payment from the state before they would do legal aid work because legal collectives, which subsist entirely on legal aid, had secured such an arrangement.[196]

In those countries where judicare is dominant, because it was the first delivery system established, the profession has developed a significant economic stake in its preservation and expansion. In the Netherlands, legal aid accounts for one-fourth to one-third of the total revenue of the profession: 3000 out of the 3500 lawyers participate, 2000 of them to a considerable degree. Many lawyers earn

192. BETTER PROVISION OF LEGAL ADVICE AND ASSISTANCE ADVISORY COMMITTEE, REPORT, CMD. 4249, at 9 (1970) (Cmnd. 4249) [hereinafter cited as GARDINER]; D. PODMORE, SOLICITORS AND THE WIDER COMMUNITY 73 n.12 (1980); M. ZANDER, LAWYERS AND THE PUBLIC INTEREST 213–14 (1968); Fennell, *Advertising: Professional Ethics and the Public Interest,* in LAW IN THE BALANCE: LEGAL SERVICES IN THE EIGHTIES 144 (P. Thomas ed. 1982). Although the evidence is somewhat conflicting, it seems to indicate that institutional advertising has little effect on awareness of the legal aid scheme and even less on use. Any gains tend to be short-lived. M. ZANDER, *supra* note 128, at 44–45.

193. GARDINER, *supra* note 192; 1 ROYAL COMM'N, *supra* note 63, at 69–76; Thomas & Smith, *The Duty Solicitor Scheme: Distribution of Criminal Work,* 128 NEW L.J. 324 (1977). For a general discussion of the empirical impact of the duty solicitor scheme, see M. KING, THE EFFECTS OF A DUTY SOLICITOR SCHEME (1976)

194. J. COOPER, *supra* note 2, at 148, 150, 153. The profession also seeks to ensure an equal distribution of business where the state is not footing the bill, as in prepaid plans and lawyer referral services. *See* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 173–204 (1970); *cf.* F. MARKS, R. HALLAUER & R. CLIFTON, THE SHREVEPORT PLAN 67–70 (1974) (suggesting "channeling" to certain attorneys may be inevitable, even without direct influence, because of nature of the legal insurance plan).

195. 1 ROYAL COMM'N, *supra* note 63, at 181–82.

196. J. COOPER, *supra* note 2, at 50 n.22. They also insisted that lawyers wishing to form a collective first obtain the permission of the local bar. A. Klijn, On Development and Prospects of Social Advocacy 9 (1983) (Oxford University seminar paper, Mar. 22–25, 1983).

more than half their income from legal aid, and about ten percent rely entirely on that source.[197] In Britain, 13,360 out of 21,672 solicitors were on the legal advice panels in 1966, and 8159 out of 29,850 solicitors received payment from legal aid between 1975 and 1976.[198] Furthermore, the Bar receives more than half its income from legal aid—though the degree of dependence is inversely related to experience.[199] Even in the United States, where judicare remains a small fraction of state expenditure on legal aid and an insignificant proportion of the overall market for legal services, private lawyers fear they will be called upon to render *pro bono* services in millions of cases if federal funds are terminated, and many support staffed offices as a means of avoiding that obligation.[200] Consequently, it is not surprising that such a broad spectrum of the organized profession opposed the Reagan administration's threat to eliminate the Legal Services Corporation: state and local bar associations in every state, the American Bar Association and fifteen of its past presidents, the Association of Trial Lawyers of America, associations of Black and Chicano lawyers, more than 1000 judges, and 143 law school deans.[201]

If the legal profession now embraces legal aid, it does so on its own terms: not just economic benefits but also political control.[202] Fear of losing control motivated the British profession at first to oppose state intervention as a form of "officialism."[203] American

197. J. COOPER, *supra* note 2, at 80; B. GARTH, *supra* note 2, at 124; Bruinsma, *supra* note 146, at 346 n.3. Klijn estimates that legal aid represented 20–30% of the case load and income of the profession in 1979. A. Klijn, supra note 196, at 8.

198. B. ABEL-SMITH, M. ZANDER & R. BROOKE, *supra* note 73, at 25; Zander, *Public Policy for Legal Services,* in INNOVATIONS, *supra* note 2, at 77, 81.

199. 2 ROYAL COMM'N, *supra* note 63, at 596; SENATE OF THE INNS OF COURT AND THE BAR, SUBMISSION NO. 13 TO THE ROYAL COMMISSION ON LEGAL SERVICES IN ANSWER TO QUESTIONNAIRE SECTIONS, at XII-XXI, XIX-6 (1977).

200. J. COOPER, *supra* note 2, at 295; *see also Draft ABA Opinion Says All Lawyers Responsible,* POVERTY L. TODAY, Fall 1981, at 1 (draft opinion of ABA Standing Committee on Ethics and Professional Responsibility suggests all attorneys have duty to accept pending legal services cases if offices are closed because of reduced funding).

201. *Bar Associations From Every State Support LSC,* POVERTY L. TODAY, Fall 1981, at 1; *ABA, State, Local Bars Lobby Congress,* POVERTY L. TODAY, Summer 1981, at 4; *Law School Deans Support LSC,* POVERTY L. TODAY, Summer 1981.

202. In Ontario, the Law Society of Upper Canada obtained control of the judicare program in 1967 and has retained it ever since. F. Zemans, *supra* note 26, at 5 n.17. The Bristol Law Society insisted on 50% representation on the Board of the Bristol Legal Services Agency. 1980 LAG BULL. 54. But in Sweden, the legal aid board that decides whether or not to grant an application for representation or advice under the judicare scheme is composed of a judge-chairperson, two attorneys (one in private practice and the other in the public sector), and two laypersons. Muther, *supra* note 154, at 491 (1975).

203. FINLAY, *supra* note 55, at 14; R. EGERTON, *supra* note 156, at 12; Alcock, *supra* note 155, at 167. In Australia, the organized profession states, "[G]overnment participation in legal aid should be principally devoted to assisting well-established professional bodies to carry legal aid to all areas of the community." Law Society of the

lawyers were even more suspicious when presented with the example of British legal aid.[204] The Rushcliffe Committee, whose report established the first legal aid program in Britain, recommended unanimously that legal aid be administered by lawyers.[205] The Law Society threatened a boycott unless laypersons were excluded from the local and area committees that had authority to grant or deny legal aid.[206] Similarly, the organized legal profession in the United States, having learned from physicians that die-hard opposition to Medicaid only undermined professional influence, embraced the new Legal Services Program launched in 1965, with the result that about half the initial grants went to existing legal aid programs that the profession already dominated.[207] Furthermore, the Program created a National Advisory Committee, which guaranteed the American Bar Association a role in governance,[208] and ensured lawyers a majority (later two-thirds) on the governing boards of every quasi-autonomous local program.[209]

Of course, these structures of professional dominance were not

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Australian Capital Territory, Newsletter No. 12, Apr. 1974, *quoted in* Ross & Mossman, *supra* note 48, at 18. The Council of the Law Society of New South Wales, which regulates legal aid through a subcommittee, exercised its control to reject 36% of legal aid applications in the first year of operation (1971–1972), 24% in the second, and 26% in the third by taking into account the "merits" and subject matter of the petitioner's case. R. SACKVILLE, *supra* note 56, at 14, 18. Law Society schemes in other states asserted their view that divorce is a low priority item, rationing the number of divorces handled (in Queensland) and requiring substantial contributions from all clients, even the poorest, for handling a divorce (Queensland, Tasmania, and South Australia). *Id.* at 32–33, 37, 75. In Victoria, "quite a lot of applications are rejected . . . because the applicant is trying to use the Legal Aid Committee to help him stall his deserving creditors." *Id.* at 52.

204. Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100, 101, 103 (1951) (author was former president of ABA), *quoted* in E. JOHNSON, *supra* note 89, at 18.

205. RUSHCLIFFE, *supra* note 62, at 24.

206. J. COOPER, *supra* note 2, at 25–26. Local law societies still seek, and sometimes gain, control over the recently established law centres. *Id.* at 128. It is interesting that professional organizations apparently also dominate legal aid programs in Eastern Europe, actually choosing the particular lawyer who will represent the eligible client. See Wengerek, *Socialist Countries: Eastern Europe*, in PERSPECTIVES, *supra* note 2, at 272, 280–81.

207. J. COOPER, *supra* note 2, at 62; B. GARTH, *supra* note 2, at 49 n.10; E. JOHNSON, *supra* note 89, ch. 4; Pious, *Congress, the Organized Bar, and the Legal Services Program*, 1972 WIS. L. REV. 418, 418–23; Pye & Garraty, *The Involvement of the Bar in the War Against Poverty*, 41 NOTRE DAME LAW. 860, 865–70 (1966).

208. E. JOHNSON, *supra* note 89, at 411.

209. B. GARTH, *supra* note 2, at 43. When the Legal Services Corporation established a variety of pilot projects to experiment with alternative methods of delivering legal services to poor people, a number of the projects refused to comply with the requirement that one-third of the governing board be clients. Two *pro bono* projects insisted that compliance "would hurt their attorney recruitment efforts" by undermining "the legitimacy needed to attract lawyer volunteers." LEGAL SERVICES CORP., *supra* note 166, at 59–60. Local bar associations now control appointment of the boards of governors of LSC programs.

justified by overt demands for power. In both the United States and Britain, lawyers sought control by arguing that they had to be "independent," especially of those who might be their clients' adversaries. Since government at all levels was the most frequent adversary of the poor, legal services programs had to be insulated from it. In the United States, the Legal Services Program went even further, insisting on separation from the local agencies (Community Action Programs) that administered the War on Poverty.[210] In the end, there was no one left to administer the scheme except the lawyers themselves. The demand for "independence" was taken to such extremes in both Australia and the Netherlands that lawyers employed by the state to staff legal aid offices were excluded by the organized profession from engaging in litigation.[211]

B. *Legal Aid Lawyers*

If the legal profession experiences a tension between the pursuit of economic self-interest through the expansion of legal aid and fear of dependence on and control by the state that funds it, lawyers who specialize in legal aid confront different dilemmas. First, they must reconcile their commitment to improving the lot of their clients (their original motive for becoming legal aid lawyers) with a desire for career advancement (an inescapable concomitant of their professional status). The divergence between these two goals was less pronounced in the early days of legal aid in the United States, when political commitment to the program was minimal and many women and minority lawyers took such jobs because they were the only ones available. Jack Katz presents the startling statistics that, as late as 1955, Chicago Legal Aid was 50% female, 14% Black, and 14% Black female, although the Chicago bar in 1950 was only 3% female, 2.5% Black, and 0.1% Black female. Legal Aid employed 0.1% of all lawyers in Chicago but 33% of all female Black lawyers.[212] Between 1965 and 1973, however, the proportion of women in Legal Aid dropped to 12%.[213] Other changes in personnel were equally pronounced. The proportion of lawyers who had been

210. B. GARTH, *supra* note 2, at 26–28, 36.

211. *Id.* at 109; Blankenburg & Cooper, *supra* note 8, at 277–78. Although employed barristers in the United Kingdom do not have a right of audience, those employed in law centres have been granted a waiver that allows them to appear in court. 1 ROYAL COMM'N, *supra* note 63, at 232–39.

212. J. KATZ, *supra* note 2, at 48. Law centres in England and Wales have had too *few* minority lawyers (and staff), especially when contrasted with minority representation in the client population. The Law Centres Federation self-study of racial discrimination encountered considerable opposition, with only about half of the centres responding. Within this sample, Blacks were 43% of the clients, 27% of the local population, 23% of the management committees, and 18% of law centre staff. *The Interim Report: Summary,* LAG Bull., July 1982, at 3.

213. J. KATZ, *supra* note 2, at 71. But Blacks were 13% of legal services lawyers in

law review members or who had graduated with honors increased from none to more than one-third; the proportion from major national law schools increased from 11% to 25%; the proportion from nationally prestigious colleges increased from none to 18%; and the proportion of former law firm associates, federal judicial clerks, and law teachers increased from none to 18%.[214] It is not that legal aid lawyers had become "new professionals" whose characteristics differentiated them markedly from the rest of the profession. Rather, they previously had been drawn disproportionately from the most disadvantaged categories within the profession and now were more representative.[215] Their one distinguishing feature was youthfulness. Eighty-three percent of Chicago Legal Aid lawyers between 1965 and 1973 were thirty or younger; 92% percent of a sample of law centre lawyers in Britain were similarly young.[216] Sixty-three percent of a sample of lawyers in OEO Legal Services in 1967 had graduated from law school after 1960, compared with only 25% of the profession as a whole.[217] Thus, they belonged to the generation of the 1960's, sharing its ideals and expectations.[218]

The political commitment that young lawyers bring to legal aid, reinforced by daily encounters with deprivation, oppression, and injustice, quickly engenders intense frustration. Legal aid lawyers constantly confront insignificance and failure. "[C]ivil lawyers for the poor repeatedly experience discontinuity within cases; discontinuity between cases; and continuity in pressures to limit the significance of cases to the people immediately involved."[219] Because their efforts are not cumulative, they gain neither competence nor victory. Legal aid lawyers lose cases they believe they should

1967 compared with only 1% of the legal profession; women were 14% compared with only 3%. J. HANDLER, *supra* note 184, at 138.

214. J. KATZ, *supra* note 2, at 71.

215. Erlanger, *Lawyers and Neighborhood Legal Services: Social Background and the Impetus for Reform,* 12 LAW & SOC'Y REV. 253, 257–64 (1978). R. Meadow & C. Menkel-Meadow, The Origins of Political Commitment: Background Factors and Ideology Among Legal Services Attorneys, table 1 (1982) (unpublished manuscript) (prepared for presentation at the Law and Society Ass'n Annual Meeting, Toronto, Canada, June 3–6, 1982), found a somewhat higher proportion of legal aid lawyers who were women or minorities and had radical politics, perhaps because they studied a somewhat later cohort. Handler found that legal services lawyers were slightly more likely than other lawyers to have a father who was liberal, a mother who was Jewish, and to have been involved in reform politics. J. HANDLER, *supra* note 184, at 140–42. That more than half of the Reginald Heber Smith fellows in 1970 were Black and one quarter were Spanish-speaking shows the Legal Services Program's concern to recruit minority lawyers. M. CAPPELLETTI, *supra* note 6, at 497 (citing AUERBACH CORP., FINAL REPORT: OFFICE OF LEGAL SERVICES INDIVIDUAL PROJECT EVALUATIONS (Oct. 31, 1971)).

216. J. KATZ, *supra* note 2, at 71; Zander & Russell, *supra* note 120, at 209.

217. J. HANDLER, *supra* note 184, at 137.

218. R. Meadow & C. Menkel-Meadow, *supra* note 215, at 4; *cf.* J. KATZ, *supra* note 2, at 72–76; Erlanger, *supra* note 215, at 254.

219. J. KATZ, *supra* note 2, at 18.

win because the law generally is unfavorable, clients bring cases at the last moment when little can be done,[220] and adversaries enjoy greatly superior resources. Legal aid attorneys respond to these reversals and defeats in several ways. First, they seek to endow their efforts with significance, to structure and define their work so that its meaning reaches beyond the narrow client request that initiated the matter.[221] The fact that legal aid lawyers (unlike their contemporaries in law firms) control client contact allows them to shape strategy in this fashion.[222] Katz stresses the apparent paradox that "reform activities have functioned systematically as a means of maintaining involvement, not the other way around. Over the last 15 years, reform activity has remained a sought-after, essential condition for making work in LSPs intrinsically compelling . . . ."[223]

Therefore, legal aid lawyers thrive on adversity—both the particular tragedies of their individual clients[224] and the collective opposition and hostility of their adversaries.[225] Unlike most earlier legal aid lawyers, for whom work was simply a means of earning income, many legal aid lawyers refuse to segregate their work from the rest of their lives.[226] One reason for the unanimity and vehemence with which salaried legal aid lawyers oppose judicare schemes is that not only do they divert scarce government funds from overextended programs, but they also soften the confrontational posture of legal aid work. The struggle for significance also leads legal aid lawyers to seek allies among those similarly embattled: both other legal aid lawyers with whom they can work on particular matters and from whom they can gain direct emotional support[227] and associations of lawyers sharing common goals. Dutch lawyers formed a legal aid association that now has 600 members.[228] Private practitioners in Britain who do significant

220. *Id.* at 21.

221. *Id.* at 105–13. Lawyer satisfaction in OEO Legal Services Programs varied directly with involvement in law reform. J. HANDLER, *supra* note 184, at 63–64.

222. J. KATZ, *supra* note 2, at 111.

223. *Id.* at 105.

224. Stephen Wexler notes the twisted way in which legal aid lawyers equate "good" cases with the seriousness of their clients' predicaments. Wexler, *Practicing Law for Poor People,* 79 YALE L.J. 1049, 1062 (1970). The same distortion afflicts the personal injury plaintiff's bar. *See generally* J. GOULDEN, THE MILLION DOLLAR LAWYERS 13–21, 64–98 (1977); J. O'CONNELL, THE LAWSUIT LOTTERY (1979); Bernstein, *The Million-Dollar Men of the Inner Circle of Advocates,* JURIS DR., Feb. 1978, at 44.

225. J. KATZ, *supra* note 2, at 115. Legal aid programs probably exaggerated the level of political opposition they encountered, partly because the controversy enhanced the significance of their work.

226. J. KATZ, *supra* note 2, at 125.

227. *Id.* at 114–15.

228. J. COOPER, *supra* note 2, at 149, 160–63.

amounts of legal aid work organized in 1981.[229] Dutch lawyers who share a concern with immigration problems meet regularly to exchange information.[230] Other groups exist in Britain,[231] the United States,[232] Australia, and Canada.[233] Legal aid lawyers also were one of the first sectors of the profession to unionize.[234]

Legal aid lawyers seek to create a culture of significance not only to express their politics but also because other forms of personal growth are thwarted. The usual career progression that renders the professions so attractive is drastically truncated in legal aid. Salaries of legal aid lawyers are low: law centre lawyers in Britain in the mid-1970's earned £2500 to £3500;[235] OEO legal services lawyers in the United States in 1973 earned about forty percent of the salaries of their counterparts in private practice.[236] Although sala-

229. A year later, the organization had 500 member firms containing more than 2000 solicitors. LAG BULL., June 1982, at 4.

230. Groenendijk, *The Working Group on Legal Aid for Immigrants: A Public Interest Law Organization in the Netherlands,* in INNOVATIONS, *supra* note 2, at 165, 167.

231. The Legal Action Group, which publishes a monthly bulletin, engages in training and acts as a lobbyist for poverty lawyers and their clients. The Law Centres Federation performs similar functions specifically for the law centres.

232. The National Legal Aid and Defenders Association and the Project Advisory Group within the Legal Services Corporation are examples; the National Lawyers Guild has much broader political objectives, though many of its members are legal aid lawyers.

233. The recently formed Australian Legal Workers Group models itself on the National Lawyers Guild. A National Association of Legal Centres was founded in 1982 and the Legal Services Bulletin provides information for poverty lawyers. In Canada, the Law Union in Ontario and similar groups in other provinces perform informational and political functions. *See* Martin, *The Law Union of Ontario,* 7 LAW & POL'Y 51 (1985).

234. For the United States, see Kiersh, *Seeking a Better Deal: Why Legal Staffs Are Organizing,* JURIS DR., Feb.–Mar. 1979, at 26; *Public Attorneys Sing the Union Song,* L.A. LAW., Apr. 1979, at 10 (unionization of public prosecutors and defenders). For the United Kingdom, see *Unionization of Solicitors Firms,* 17 HALDANE BULL. 10 (1983). The working conditions of salaried legal aid lawyers—heavy case load, relatively poor pay, and intense prolonged contact with each other—explain both their readiness to unionize, a form of association that other professionals shun, and their political militancy compared with private lawyers paid under a judicare scheme.

235. Zander & Russell, *supra* note 120, at 208. In November 1976, the median salary of all salaried partners and assistant solicitors was £4346; those who had been admitted less than three years earned £3980; those admitted four to six years earned £5108. 2 ROYAL COMM'N, *supra* note 63, at 466.

236. M. CAPPELLETTI, *supra* note 6, at 500 (citing AUERBACH CORP., FINAL REPORT: OFFICE OF LEGAL SERVICES INDIVIDUAL PROJECT EVALUATIONS (Oct. 31, 1981)) (directors earned $15,000 to $20,000 a year and staff lawyers $8000 to $12,000 at a time when the *starting* salary of law firm associates was $16,000); Cole & Greenberger, *supra* note 174, at 715–16 (salaried lawyers earn at best little more than half the income of private practitioners); Komesar & Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis,* in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 83 (B. Weisbrod, J. Handler & N. Komesar eds. 1978) [hereinafter cited as PUBLIC INTEREST LAW]. In 1973, average salaries were $19,000 to $20,000 for a private sector lawyer; $15,000 to $20,000 in public defender offices; $20,000 in other government positions; but $11,500 in the OEO Legal Services Program. Speaker,

ries in Canadian legal clinics were roughly comparable to those of other public sector lawyers, they were less than half of those in the private sector.[237] This disparity becomes a source of greater tension as an increasing proportion of legal aid lawyers possess the credentials—good grades from elite law schools—that could command high salaries in law firms. Perhaps even more troubling than the low starting salaries (which increased toward the end of the 1970's) is the lack of a career structure: Legal aid lawyers reach their highest pay levels in a few years (unless they are willing to become administrators), but private lawyers pursue an earning curve that does not peak until they are in late middle age.[238] The problem is aggravated for private practitioners who are trying to build a legal aid practice under a judicare scheme. Because levels of remuneration deliberately are depressed (to protect the public treasury, stigmatize clients, and keep legal aid at a competitive disadvantage with respect to the private sector), lawyers must accept an extremely low living standard or else compromise their principles either by taking an excessive number of legal aid clients (so that the quality of service declines) or by relinquishing legal aid for paying work.[239] An experimental two-person legal aid firm, set up with foundation money in Manchester, lost £1000 during the first year and earned its two partners only £7800 in the third.[240] Legal aid work paid only £10 to £15 an hour, compared with £18.59 for conveyancing, and the profit rate declined as more time was invested in complex matters.[241] Court-appointed criminal defense attorneys in the United States are paid much less than counsel with private clients. In Los Angeles, they earn an average of $35 an hour and $250 a day for trials, while private counsel require an initial retainer of $1000 to

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Funding the New Legal Services Corporation, 2 ALTERNATIVES: LEGAL SERVICES & PUB. 3, 4 (1975). In the late 1940's, the average salary for legal aid lawyers was only about one-half to two-thirds that of their counterparts in either the public sector or private practice. E. BROWNELL, *supra* note 67, at 211–16. In 1966, executive attorneys earned between an average of $9375 and $15,000 (depending on the size of the program); assistant attorneys averaged between $7500 and $10,000. 1967 N.L.A.D.A. 304.

237. Zemans, *supra* note 100, at 234–35.

238. Barrister income peaks between ages 40 and 65. 1 ROYAL COMM'N, *supra* note 63, at 536–41.

239. Bindman, *Solicitors' Costs, or Virtue Unrewarded*, 1978 LAG BULL. 253; Hodge, *Starting a Legal Aid Practice—The First Year*, 1979 LAG BULL. 32; *Is a Legal Aid Practice Possible?*, 1978 LAG BULL. 205; Soar, *Setting Up a Legal Aid Practice*, 129 NEW L.J. 911, 935, 979, 1007, 1031, 1055 (1979) [hereinafter cited as *Setting Up*]; Soar, *Setting Up a Legal Aid Practice (Post Wilkinson)*, 130 NEW L.J. 1123 (1980) [hereinafter cited as *Post Wilkinson*]; *The Economics of a Legal Aid Practice*, 1976 LAG BULL. 269.

240. COOPER & PEARSON, *supra* note 191, at 9. An experimental legal clinic sponsored by the American Bar Association and directed toward paying clients from the working class also failed for lack of income. *See* C. MENKEL-MEADOW, *supra* note 191, at 7–8.

241. COOPER & PEARSON, *supra* note 191, tables V, VI.

$2000 and then bill $75 to $100 an hour for additional time. In New York, appointed counsel are paid $10 an hour for out-of-court work and $15 for in-court representation.[242] In Britain, barrister income varies inversely with the proportion of earnings derived from legal aid work.[243]

Legal aid lawyers could have responded to this situation by accentuating pay and status differences within their offices, creating an internal hierarchy to mask their low status in the larger profession. Instead, many programs have done the opposite. They have made the personal—the internal organization of their offices—an issue of political principle and sought to equalize pay, status, and decision-making authority and to reduce or eliminate the division of labor to the extent that it perpetuates or exaggerates those differences. Most British law centres and Dutch legal collectives (*advokatenkollektief*) pay all members equally. Each lawyer does his or her own support work (*i.e.*, typing), and tasks such as reception, answering the telephone, or cleaning up are rotated.[244] But such a response is not universal: Legal clinics in Canada[245] and the Dutch Buro voor Rechtshulp[246] are organized conventionally; American legal services offices maintain a rigid differentiation between lawyers and staff in pay and functions, accentuated by the overrepresentation of women and minorities within the latter category.[247] Furthermore, hierarchy tends to reappear even in those offices that rejected it initially.[248] Nevertheless, the attack on traditional professional work structures, like the involvement of legal aid lawyers in reform activities, helps to sustain commitment by demarcating legal aid lawyers from the larger profession; intensifying their sense of adversity and deprivation; strengthening solidarity among the

242. R. HERMANN, *supra* note 13, at 37, 77. In Washington, D.C., in 1970, fees were raised from $15 and $10 an hour for in-court and out-of-court time to $30 and $20. *Id.* at 127.

243. 2 ROYAL COMM'N, *supra* note 63, at 596–97, 601.

244. J. COOPER, *supra* note 2, at 50, 116–18, 129; Zander & Russell, *supra* note 120, at 210. *But see 'The unofficial history of North Kensington Law Centre,'* LAW CENTRES' NEWS, Summer 1980, at 4 (North Kensington Law Centre follows traditional model of law practice). The Wellington Street chambers, a set of progressive barristers, most of whose work is paid for by legal aid, have adopted an internal structure that approximated these ideals as closely as the rules of professional conduct permit. Legal collectives in the United States, which subsist on private fees, also have sought to eliminate hierarchy and division of labor. *See* J. HANDLER, *supra* note 184, at 116–23; Harris, *The San Francisco Community Law Collective,* 7 LAW & POL'Y 19 (1985); Sager, *Radical Law: Three Collectives in Cambridge,* in CO-OPS, COMMUNES & COLLECTIVES 136, 139–40 (J. Case & R. Taylor eds. 1979) [hereinafter cited as J. Case]; Santa Barbara Legal Collective, *Is Anybody There? Notes on Collective Practice,* 50 DEN. L.J. 513 (1974).

245. Zemans, *supra* note 100, at 234.

246. J. COOPER, *supra* note 2, at 151.

247. *Id.* at 185–90.

248. *Id.* at 116, 118.

staff, and, perhaps, offering a consolation for substantive legal defeats in the prefigurative creation, within the law office, of an image of the society they are struggling to build outside.[249]

Notwithstanding the solutions that legal aid lawyers have devised to the problems of insignificance, defeat, and career frustrations, they still find it difficult to preserve their commitment. When it fails, lawyers leave.[250] The "problem" of turnover in legal aid is not a new one. Even in the early 1900's staff lawyers stayed an average of less than two years at Chicago Legal Aid,[251] and that period remains the median tenure of legal services lawyers in the United States today.[252] In the Dutch Buro voor Rechtshulp, lawyers serve an average of about three years;[253] in British law centres, the average tenure is thirty-two months.[254] Length of service correlates with success in sustaining commitment. The lawyers who founded the Brent Law Centre promised each other they would stay five years, and all adhered to the commitment.[255] Law centres seem to inspire greater loyalty, perhaps because they renounce internal hierarchy. Those American legal services offices that have kept case loads low in order to stress quality and law reform also have lower turnover rates.[256] Yet if turnover is a problem for an office, it is not

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249. *Cf.* Starr, *The Phantom Community,* in J. Case, *supra* note 244, at 245.

250. The most frequent reason why lawyers in the United Kingdom leave or think about leaving law centres is "the lack of opportunity for personal growth, and 'burn out,' the latter being variously described as fatigue, need of change, boredom, and decrease in caring for the clients and their problems." This may have been aggravated, rather than relieved, by some of the responses discussed above: "self-servicing" (*i.e.,* reduction in the division of labor), specialization, and collective decision-making. F. STEVENS, LAW CENTRE STAFF RESEARCH PROJECT 11–14 (1983). Indeed, length of tenure was *inversely* related to prior involvement in reform politics, suggesting that lawyers leave because their impossibly high expectations of political efficacy are unfulfilled. J. HANDLER, *supra* note 184, at 151 (United States); *see also* Rees, *Coping with Burnout,* 6 LEGAL SERVICE BULL. 80 (1981) (Australia). But departure may not be related to disillusionment. Only one-third of legal services lawyers stated that they had intended to remain in the job when they entered. In a sample of those who graduated from law school between 1965 and 1967, those who entered legal services left after an average of three years, while those who took other positions left their first jobs after an average of 3.8 years. J. HANDLER, *supra* note 184, at 66–67.

251. J. KATZ, *supra* note 2, at 46–47.

252. *Id.* at 131, 166. Among lawyers who served in Legal Services in 1972, those who left between 1973 and 1974 had an average tenure of 2.3 years; those who still were with the program had served 3.2 years. Among lawyers who served in the program in 1967, the average tenure was 3.9 years. J. HANDLER, *supra* note 184, at 66.

253. J. COOPER, *supra* note 2, at 160.

254. The figures were based on a sample of 112 lawyers who had left law centres by 1982; the average tenure of the 93 lawyers who remained was 31 months. F. STEVENS, *supra* note 250, at 8–9.

255. J. COOPER, *supra* note 2, at 101.

256. Oregon Legal Services, where attorney turnover was only five percent a year and staff turnover only 10 to 20%, is an example. *Id.* at 188. Katz also demonstrates the connection between commitment and turnover. *See* Katz, *Lawyers for the Poor in Transition: Involvement, Reform, and the Turnover Problem in the Legal Services Pro-*

necessarily a problem for the lawyer or the social movement.[257] The legal aid attorney may be following the modal career path of all young lawyers, who frequently leave a first job after a few years.[258] More important, lawyers are not lost to the "movement" when they leave legal aid: The vast majority continue to work for social change in other capacities.[259]

Legal aid practitioners experience a second tension between their role constraints as lawyers and their goals as activists. Katz vividly describes the ways in which legal aid lawyers consistently adopted an ethic of "reasonableness," limiting both their goals and their tactics.[260] Sometimes their motives were career-oriented—like their counterparts in regulatory agencies, they had an eye on the private sector jobs they hoped to land. But the pressure to be "reasonable" usually originated with the more senior administrators, who expected to remain in legal aid indefinitely. Their concern was to overcome the low status that inevitably accompanied their poor clients, paltry salaries, and insignificant cases and to earn the respect of judges and adversaries.[261] Although Katz contrasts legal services lawyers with their legal aid predecessors in this respect, there are important continuities in the constraint of role. Lawyers naturally have sought to use their unique technical skills in working for social change. On the one hand, they enlarged the opportunities for routine services by means of legal need studies, which characterized the failure of some people to secure legal assistance in situa-

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gram, 12 LAW & SOC'Y REV. 275, 283–86 (1978). The relationship is confirmed by public defender offices. *See* R. HERMANN, *supra* note 13, at 124–25. *But see* J. HANDLER, *supra* note 184, at 67 (finding no relationship).

257. *See generally* Katz, *supra* note 256, at 290–97. Indeed, the *absence* of turnover may be the problem if dedication and vigor decline as the lawyer's tenure lengthens, and he or she comes to accept routine and compromised dispositions. Zemans, *supra* note 15, at 425 n.140 (citing Oñate Laborde's description of students in Mexican legal aid clinics).

258. *See* J. HEINZ & E. LAUMANN, *supra* note 144, at 194.

259. *E.g.,* J. KATZ, *supra* note 2, at 171 (clinical teaching). J. HANDLER, *supra* note 184, at 156–65, found that those who left legal services were more likely than others in their age cohort of the profession to be in the public sector, teaching, or smaller firms, to spend more time on individual and minority clients, to do more *pro bono* work, and to do it for individuals and reform-oriented groups. Among lawyers who left British law centres, four out of seven stayed in legal rights work or went back to the university; two returned to private practice; and one became a manual worker. Zander & Russell, *supra* note 120, at 209. Of 112 lawyers who left law centres in the United Kingdom, 20 went to another law centre, 5 to academic positions, and 3 to a local authority. Many of the 55 who went into private practice or a "better job" continued to represent poor people under the legal aid scheme. F. STEVENS, *supra* note 250, at 8.

260. J. KATZ, *supra* note 2, ch. 3.

261. In this sense, their accommodation to the interests of adversaries and authorities is similar to that of other courtroom regulars: criminal defense attorneys, *see generally* Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession,* 1 LAW & SOC'Y REV. 15 (1967), and personal injury lawyers, *see generally* D. ROSENTHAL, LAWYERS AND THEIR CLIENTS: WHO'S IN CHARGE? ch. 4 (1974).

tions in which others did so as evidence of an "unmet" legal need.[262] On the other hand, they stressed the legal dimension of social movements, which quickly became identified with test case litigation.[263] Therefore, it is not surprising that law reform activity survived the decline of social movements in the United States in the 1970's. Indeed, the increase in both quantity and quality suggests strongly that such activity expresses a dynamic of professionalism—the valuation of skilled work for its own sake, an elevation of technique over extrinsic goals.[264] At the same time, there is evidence that structural reform, which views law simply as one weapon in a larger armory, thrives only when lawyers are subordinated to other political activists.[265]

The internal strains that each legal aid lawyer experiences are reproduced in interpersonal and group conflict within the programs, between lawyers seeking to confer significance on their working lives and a central bureaucracy pursuing inconsistent objectives: cost containment, uniformity, hierarchical control, etc. Autonomy has not only instrumental but also intrinsic meaning for street-level lawyers as an expression of their opposition to hierarchy.[266] The Project Advisory Group, which represented a majority of Legal Services Corporation lawyers,[267] resisted centralization as a form of elitism.[268] The law centres in England and Wales jealously preserve their independence of the central government, voluntarily joining in the Law Centres Federation but vigorously attacking proposals for national coordination.[269] A significant motivation for unionizing lawyers in both the United States and the Netherlands is the need to develop countervailing power in the confrontation with national bureaucracy.[270] Training also has been a constant object of struggle between staff lawyers, who see centralized initiatives as a threat to their autonomy, and administrators

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262. *See* B. GARTH, *supra* note 2, at 1.

263. For the emphasis on litigation in public interest law, see generally PUBLIC INTEREST LAW, *supra* note 236. For a theoretical account of legalism in the pursuit of social change, see generally S. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE (1974); Hazard, *Law Reforming in the Anti-Poverty Effort,* 37 U. CHI. L. REV. 242 (1970).

264. J. KATZ, *supra* note 2, at 69, 161–62.

265. The only team in the Manchester Law Centre engaged in pursuing structural change contained no lawyers. J. COOPER, *supra* note 2, at 131.

266. F. Zemans, *supra* note 26, at 25.

267. J. COOPER, *supra* note 2 at 71.

268. J. KATZ, *supra* note 2, at 167.

269. LAW CENTRES FED'N, A RESPONSE TO THE ROYAL COMMISSION ON LEGAL SERVICES 24 (1979).

270. J. COOPER, *supra* note 2, at 161 (study of the Netherlands); J. KATZ, *supra* note 2, at 169–70 (study of Chicago Legal Services lawyers). *See generally* Schorr, *Unionization in Legal Services: Beginning the Discussion,* 14 CLEARINGHOUSE REV. 836 (1980).

who are concerned to achieve not only higher quality but also greater uniformity in legal services.[271] This is not to argue that line and staff always are in conflict; the one goal they clearly share is expansion. Indeed, line organizations have been more aggressive, if anything, in pushing for larger budgets.[272] But it does suggest that the relative lack of hierarchy in legal aid organizations[273] may be a strength rather than a weakness. Allowing lawyers the autonomy they seek has stimulated more vigorous and imaginative lawyering.[274] The success of the relatively less bureaucratic legal services programs in eclipsing the far more hierarchical legal aid offices in the United States evidences the instrumental efficacy of local autonomy in reform organizations.[275]

C. *Clients*

It may seem strange, given my insistence on the centrality of politics, that I did not begin with the interests of those most obviously affected by legal aid—the clients—especially because the identity of particular clienteles sometimes has been decisive in the development of these programs. As far as I am aware, no one has noted that legal aid was established in Britain, the United States, and Australia[276] as a result of concern for the morale of the armed

271. J. COOPER, *supra* note 2, at 224, 230–31, 250.

272. The Project Advisory Group requested budgets of $403.04 million in fiscal year 1981, $600 million in fiscal year 1982, and $800 million in fiscal year 1983. *Bradley Urges 3-year Authorizaton and Removal of Restrictions in LSC Act,* LEGAL SERVICES CORP. NEWS, Sept.–Oct. 1979, at 8 (1979).

273. The total expenditure on central administration never has exceeded 10%, and, though it rose in the 1970's, it was the first item to be cut when the Reagan administration slashed the Corporation's budget in 1981, as the following table shows.

Percentage of Legal Services Corporation Budget Devoted to Central Administration

Year	Training	Program Development and Evaluation	Research Institute	Administration	Total
1976	2.5	2.1	0.2	2.4	7.2
1977	2.2	2.7	0.2	2.9	8.0
1978	3.0	3.4	0.3	2.4	9.1
1979	3.0	3.2	0.4	2.4	9.0
1980	2.4	1.8	0.2	2.0	6.4
1981	2.9	1.7		1.5	6.1

Source: LEGAL SERVICES CORP., ANNUAL REPORTS (1976–1981).

274. J. KATZ, *supra* note 2, at 109–10. Staff are less likely to inhibit the autonomy of lawyers in line positions as the social distance between them decreases. *Id.* at 45. In the Netherlands, lawyers in the Buro voor Rechtshulp pressed for more resources for law reform against the opposition of the Ministry of Justice. J. COOPER, *supra* note 2, at 154, 301.

275. J. KATZ, *supra* note 2, at 136.

276. For Australia, see Armstrong, *Labor's Legal Aid Scheme: The Light That Failed,* in 2 PUBLIC EXPENDITURES AND SOCIAL POLICY IN AUSTRALIA: THE FIRST FRASER YEARS, 1976–1978, at 220, 223 (R. Scotton & H. Ferber eds. 1980).

forces. In Britain, state-supported, salaried legal aid lawyers first emerged in the Services Divorce Department, created in 1942 to handle the enormous increase in marital breakdown experienced by soldiers and sailors. It was feared that these marital disruptions would render servicemen less effective in combat.[277] Similarly, the American military founded in 1943 what was by far the largest legal aid program in the United States until it was overshadowed by the expansion of the Legal Services Corporation thirty years later.[278] Between March 1943 and the end of 1948, the military program handled more than ten million cases.[279]

Nevertheless, although clients have been the object of paternalistic concern by others, rarely have they actively been involved in creating legal aid programs. Certainly they had no role, at either the national or the local level, in the formation of the OEO Legal Services Program or its successor, the Legal Services Corporation. Nor were clients much more prominent in founding law centres in England and Wales, where four were initiated by community activists, one by a foundation, one by law students, and nine by lawyers or the local authority.[280] When President Reagan threatened to abolish the Legal Services Corporation, the legal profession vigorously opposed him, but clients were singularly silent.[281] Yet there are exceptions to this generalization: Twenty out of twenty-seven legal clinics in Canada were launched by the community,[282] and local trade union councils, residential associations, and church groups are instrumental in establishing law centres in Britain today.[283] Furthermore, when the Conservatives gained control of the Wandsworth Borough Council in South London and stated their intention to eliminate the three local law centres, the community quickly mobilized a massive resistance campaign, gaining 26,000

277. RUSHCLIFFE, *supra* note 62, at 5–6; B. ABEL-SMITH & R. STEVENS, *supra* note 167, at 315–24.

278. *See generally* M. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN (1951); F. MARKS, MILITARY LAWYERS, CIVILIAN COURTS, AND THE ORGANIZED BAR (1972).

279. In 1949 the Navy Department's Legal Assistance Branch was handling one case for every five naval personnel each year; in the first six months of 1949, the Air Force was handling almost one for every three. E. BROWNELL, *supra* note 67, at 82.

280. Zander & Russell, *supra* note 120, at 208. A lawyer founded the first law centre, in North Kensington. *See* A. BYLES & P. MORRIS, UNMET NEED: THE CASE OF THE NEIGHBOURHOOD LAW CENTRE 9 (1977); B. GARTH, *supra* note 2, at 58. Even Brent, one of the most politically active law centres, was established by lawyers. J. COOPER, *supra* note 2, at 99. But a community group began Adamsdown, another activist centre. *Id.* at 136.

281. Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's*, 22 OSGOODE HALL L.J. 29, 61 (1984); *cf.* J. KATZ, *supra* note 2, at 92 (ABA support for creation of OEO Legal Services Program).

282. Zemans, *supra* note 100, at 241–45.

283. J. COOPER, *supra* note 2, at 136; C. GRACE, COMMUNITY NEED AND LAW CENTRE PRACTICE: AN EMPIRICAL ASSESSMENT 5–6 (1978); 13 LAW CENTRES' NEWS, Autumn 1982, at 7; 11 LAW CENTRES' NEWS, Spring 1982, at 4.

signatures in the process, though ultimately their efforts failed.[284]

Client indifference to the creation, and especially the preservation, of legal aid is disturbing but hardly surprising. One reason for legal aid is that its recipients are incapable of pursuing their own interests effectively. Furthermore, law has low salience for those who suffer social or economic deprivation or political oppression, perhaps rightly so.[285] They fail to use lawyers not because they suffer an unmet legal need but because they correctly conclude it is unlikely they will get what they want from legal institutions.[286] They experience law only as constraint, not power, and therefore are reactive and fatalistic. When they cannot avoid the law, they seek to minimize their losses, pursuing short-term, expediential aims.[287] They quickly fall prey to professional dominance. In one study, less than half the clients served knew what they wanted from a lawyer;[288] in another, many clients wanted the lawyer to take charge and make decisions for them.[289] The poor, especially those

284. *Wandsworth Council to Cut 3 Law Centres,* LAW CENTRES' NEWS, Summer 1979, at 7; *Wandsworth Law Centres: Still Battling On,* LAW CENTRES' NEWS, Autumn 1979, at 8; *Wandsworth: Out of the Ashes,* LAW CENTRES' NEWS, Summer 1980, at 2.

285. This is true even in a revolutionary situation, in which either legal change has a low priority, *see generally* Spence, *Institutionalizing Neighborhood Courts: Two Chilean Experiences,* in 2 THE POLITICS OF INFORMAL JUSTICE, *supra* note 59, at 215, or law is used as a focus for resisting the old order rather than creating a new one. *See generally* Santos, *Law and Revolution in Portugal: The Experiences of Popular Justice After the 25th of April 1974,* in 2 THE POLITICS OF INFORMAL JUSTICE, *supra* note 59, at 251.

286. *See generally* Griffiths, *supra* note 81.

287. C. GRACE, *supra* note 283, at 16; Katz, *supra* note 256, at 279–80. Marc Galanter argues that litigants generally want immediate, concrete relief, not principled vindication. Galanter, *Delivering Legality: Some Proposals for the Direction of Research,* 11 LAW & SOC'Y REV. 225, 243 (1976).

288. C. GRACE, *supra* note 283, at 14. Legal aid lawyers, by contrast, think they know what clients ought to want. *See generally* Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality,* 26 SOC. PROBS. 599 (1979). Maureen Cain has suggested that this "translation" is characteristic of lawyer interaction with private paying clients. *See generally* Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception,* 7 INT'L J. SOC. L. 331 (1979). Sometimes lawyer dominance is built into the scheme by professional rules:

> An applicant must accept the advice of the assigned practitioner. If, in a criminal matter, the applicant is advised to plead guilty, he should accept the advice. . . . In like manner, it [the scheme] is not to be used as an instrument of oppression by the putting forward of unmeritorious civil claims . . . . The advice or opinion of the practitioner must also be accepted on such issues as whether, in divorce action [sic], the Court would exercise its discretion in favor of a guilty plaintiff.

SOUTH AUSTRALIAN LAW SOCIETY, INFORMATION FOR GUIDANCE OF SOLICITORS 4 (1972), *quoted in* R. SACKVILLE, *supra* note 56, at 46. Nor is the lawyer-client privilege respected by the Law Society. R. SACKVILLE, *supra* note 56, at 45–46.

289. M. VALÉTAS, *supra* note 102, at 111, 114. " '[I]n private practice the client *tells* you what to do because he is paying; clients at the Centre *ask* you what to do.' " A. BYLES & P. MORRIS, *supra* note 280, at 21 (emphasis in original).

in rural settings, often are intensely conservative and suspicious of both lawyers and the changes they can effect.[290] Individual apathy and feelings of impotence can be overcome through organization and collective action, but again there are obstacles. The catchment area of a legal aid office may not coincide with the geography of natural social groupings—it may be too large or too diverse.[291] And groups of poor people invariably are created and held together by leaders who pursue their own, often divergent, interests.[292] Many of these problems reappear when the question is not whether clients create or defend legal aid but whether they participate in its administration.[293] Here, too, the impetus for involvement comes not from the clients but rather from the legal aid program and frequently from its central bureaucracy.[294] Such involvement can take several forms. Clients might participate in evaluating the services they receive, though this suggestion never has been implemented,[295] and the persistent complaints about quality that researchers elicit from legal aid clients[296] suggest that lawyers are likely to oppose such a mechanism. A more extensive form of participation has been adopted by Aboriginal Legal Services in Australia: Clients (*i.e.*, aborigines) staff the office in every capacity except as lawyers.[297]

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290. J. COOPER, *supra* note 2, at 200.

291. In the United Kingdom, one law centre served populations of 15,000 or fewer; five served between 16,000 and 80,000; and seven served 140,000 or more each. Zander & Russell, *supra* note 120, at 209. It is virtually impossible to engage in community organizing at the upper end of this range; one of the law centres most effective in organizing the community also served one of the smallest constituencies. *See* J. COOPER, *supra* note 2, at 136. *See generally* C. GRACE, *supra* note 283. Administrators typically favor larger jurisdictions for reasons of "rationalization" and cost-effectiveness; line personnel prefer small communities. *See* J. COOPER, *supra* note 2, at 127–28.

292. J. KATZ, *supra* note 2, at 84–86, 95.

293. In a study of 201 communities in which legal aid offices were established by OEO in 1970, 50% had few or no organized groups and a fragmented poverty community; another 41% had some groups oriented toward poverty issues and capable of influencing change. A. CHAMPAGNE, *supra* note 45, at 27.

294. J. COOPER, *supra* note 2, at 174–75, 177, 180. But not all programs encourage community control. Law shops in the Netherlands reject it. *Id.* at 47–48. So do many of the law centres in the United Kingdom: North Kensington had no community involvement at first, Newham had none for two years, and Holloway had none for five. Stephens, *The Law Centre Movement: Professionalism and Community Control*, in Z. BANKOWSKI, *supra* note 167, at 127, 128. The legal profession, of course, also opposes any subordination of lawyers to laypersons.

295. J. COOPER, *supra* note 2, at 244.

296. R. HERMANN, *supra* note 13, at 41–52, 89–99, 135–42; D. ROSENTHAL, R. KAGAN & D. QUATRONE, VOLUNTEER ATTORNEYS AND LEGAL SERVICES FOR THE POOR: NEW YORK'S COMMUNITY LAW OFFICE PROGRAM 53–68 (1971) [hereinafter cited as D. ROSENTHAL]; Falke, *supra* note 75, at 142, 144–45. For a discussion of quality, see *infra* notes 661–95 and accompanying text.

297. Epstein, *Australia*, in PERSPECTIVES, *supra* note 2, at 42, 62–63. Injured workers who have successfully claimed compensation assist others to do so at the Injured Worker's Consultants in Ontario. F. Zemans, *supra* note 26, at 6.

Only one mechanism has obtained widespread acceptance: the inclusion of clients on the governing boards of legal aid programs. The Legal Services Corporation Act, for instance, originally required that at least one-third of the governing board of each local program be composed of those eligible to be clients.[298] But this rule is ambiguous. Who is to participate in governance—prior clients, present clients, or anyone eligible to be a client in the future?[299] Should they be individuals or representatives of groups?[300] Should there be a deliberate effort to recruit from underrepresented categories, such as ethnic minorities, women, the disabled, or the elderly? How are they to be chosen? Local elections are likely to be no more successful than they were in the War on Poverty.[301] Only one hundred of the 9000 residents served by the Adamsdown Community Law Centre in Cardiff, Wales paid the nominal membership fee that entitled them to vote.[302] In Oregon, the local client advisory councils elect client members of the board at their annual meetings, but these attract no more than fifty or sixty people and often only a handful.[303] If, instead, community organizations nominate the board, inevitably it is dominated by local influentials who are unrepresentative of the client population.[304] Once client representatives have been chosen, they tend to be outnumbered and, in any case, dominated by the other board members, who are more articulate, better educated, of higher status, and often legal professionals.[305] Finally, the boards themselves frequently defer to the staff for major decisions.[306] It is not surprising, therefore, to find that many of the boards mandated by law are paper institutions. Only a

298. J. COOPER, *supra* note 2, at 173.

299. B. GARTH, *supra* note 2, at 209–10.

300. Brent Law Centre, for instance, reserves a number of places for the nominees of community, ethnic, and labor organizations. J. COOPER, *supra* note 2, at 100, 105, 110–12, 197.

301. *See generally* D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1969).

302. J. COOPER, *supra* note 2, at 136, 138.

303. *Id.* at 174–75, 177, 180.

304. *Id.* at 136, 138; B. GARTH, *supra* note 2, at 213–17.

305. Section 1007(c) of the Legal Services Corporation Act of 1974 required that at least 60% of the governing bodies of each local program be state bar members. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996f(c) (1982). The Reagan administration went one step further and gave "majority bar associations" the right to appoint 51% of the membership of the governing boards of legal services programs. 48 Fed. Reg. 36,820–36,822 (1983) (to be codified at 45 C.F.R. pt. 1607) (proposed Aug. 15, 1983). Zander & Russell, *supra* note 120, at 210, found that members of the local law society and local council sit on at least 13 out of 15 law centre boards. *See* B. GARTH, *supra* note 2, at 29, 92, 206; Stephens, *supra* note 294, at 137. *Compare* Zemans, *Canada,* in PERSPECTIVES, *supra* note 2, at 93, 102–03 *with* Zemans, *supra* note 100, at 246–51.

306. This is true in Cardiff, Wales, J. COOPER, *supra* note 2, at 139; in Oregon, *id.* at 174–75, 177, 180; and elsewhere in the United States, B. GARTH, *supra* note 2, at 207; but apparently not in Canada, Zemans, *supra* note 100, at 246–51.

quarter of the legal aid offices in Quebec had advisory committees, and just seven percent were active.[307] The governing boards of ten out of fifteen law centres in England and Wales in 1975 were considered unimportant or only somewhat important.[308] The Advisory Council of the North Kensington Neighbourhood Law Centre did not meet during the first twenty months the centre was open, and after three poorly attended meetings, it lapsed into inaction.[309] Thus, efforts to involve the recipients of legal aid in creating, preserving, or managing the programs that serve them have proved largely unsuccessful.[310]

D. *The State*

In one sense, the state is the most critical actor in the political configuration I am exploring, for it creates, controls, and can abolish legal aid. Yet if state interests shape legal aid, the state does not act autonomously but rather in response to other interested actors. Furthermore, the "state" is a reified label, concealing the great diversity of interests among various government officials. First, there are the differences that follow function. Judges, confronted daily with the visible plight of poor litigants, especially those accused of crimes, tend to be more supportive of legal aid than legislators. Indian judges have encouraged public interest litigation in the absence of enabling legislation,[311] and American judges have awarded fees to public interest and criminal defense lawyers only to have the legislature refuse to appropriate the money to pay those fees.[312] On the other hand, judges also can obstruct statutory schemes. The Birmingham Magistrate's Court has refused to grant legal aid certificates to clients represented by law centre solicitors because the lat-

307. B. GARTH, *supra* note 2, at 92, 206; Zemans, *Canada,* in PERSPECTIVES, *supra* note 2, at 102–03.

308. B. GARTH, *supra* note 2, at 210–11; Stephens, *supra* note 294, at 128, 133–34, 137; Zander & Russell, *supra* note 120, at 210.

309. A. BYLES & P. MORRIS, *supra* note 280, at 16–17.

310. *See* Champagne, *The Internal Operation of OEO Legal Services Projects,* 51 J. URB. L. 649, 660–62 (1974).

311. M. Galanter, New Patterns of Legal Services in India 16 (1982) (unpublished manuscript) (prepared for Conference on the Career and Prospects of Law in India, University of Wisconsin, June 7–10, 1982).

312. Trubek & Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States,* in ACCESS, *supra* note 2, at 119, 129. The California Supreme Court has ruled that a trial judge properly held the Imperial County Auditor in contempt for refusing at the insistence of the County Board of Supervisors to pay a $13,000 bill for jury analysts and special investigators used in the defense of an accused charged with murder. Morain, *Court Backs Payment of Indigent's Defense Bill,* L.A. Times, July 6, 1984, § 1, at 3, col. 6. But many American judges initially were hostile to legal services. *See generally* Stumpf & Janowitz, *Judges and the Poor: Bench Response to Federally Financed Legal Services,* 21 STAN. L. REV. 1058 (1969).

ter are salaried.[313] And Conservative British judges long opposed the legal aid scheme created by a Labour-dominated Parliament.[314] Paradoxically, other agencies that deal directly with the poor and the oppressed also may support legal representation. The agency's official solicitude for its clients may overcome the structure of adversariness; lawyers may be useful in processing the fractious and the ignorant.[315] Both the Justice Department and the Immigration and Naturalization Services unsuccessfully opposed the Reagan administration's proposal to prohibit the Legal Services Corporation from representing aliens.[316] Similarly, officials in the foreigners section of the Dutch Ministry of Justice found that challenges by private lawyers enhanced the department's status and entitled it to a larger budget, though such challenges also limited official discretion.[317] The opposite reaction may be more common: Street-level bureaucrats may identify legal aid lawyers with their clients and lump both together as enemies—as when police obstruct prisoners' access to a duty solicitor scheme.[318]

A second salient difference is the level of government. Commentators often have observed that the larger and more remote the jurisdiction, the more it tends to identify with a "public" interest

313. *Law Centres and Legal Aid,* LAW CENTRES' NEWS, Winter 1981, at 8. Inner London Magistrates' Courts vary enormously in their willingness to grant legal aid in summary proceedings, from a 42% rejection rate in Highbury Corner to 3% in Hampstead. 1 ROYAL COMM'N, *supra* note 63, at 157; *see* Bridges, *Legal Aid League Tables—New Data, Wider Discrepancies,* LAG BULL., June 1982, at 8.

Similarly, I know from having worked as a lawyer for New Haven Legal Assistance Association that judges often discriminate against legal aid lawyers by demanding the production of a written retainer or by asserting authority to administer the program's own eligibility criteria, etc.

314. The Lord Chief Justice wrote:

> [T]here is very little gratitude among persons who get aid . . . . I am beginning to believe that it would be far better to leave many of these people to defend themselves. . . . It appeared to be another development of the welfare State that persons who had nothing that they wanted to say to the Court yet appeared before it as assisted persons, and their costs had to be taxed and paid by the State.

B. ABEL-SMITH & R. STEVENS, *supra* note 167, at 331–32 (quoting Lord Goddard).

315. Judges and agencies must expend considerable energy in responding to petitions by those who represent themselves. *See generally* Ziegler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts,* 47 N.Y.U. L. REV. 157 (1972). For an argument that the public defender was introduced in the United States in order to facilitate greater control over the accused, see generally Barak, *In Defense of the Rich: The Emergence of the Public Defender,* 3 CRIME & SOC. JUST. 2 (1975). The use of a "duty welfare officer" in county courts in Great Britain to assist defendants with problems concerning housing and indebtedness also seems designed to facilitate judicial processing. Davies, *The Work of the Duty Welfare Officer in Birmingham County Court,* LAG BULL., June 1982, at 12, 13.

316. J. COOPER, *supra* note 2, at 302 n.5.

317. Groenendijk, *The Working Group on Legal Aid for Immigrants: A Public Interest Law Organization in the Netherlands,* in INNOVATIONS, *supra* note 2, at 165, 173.

318. M. KING, *supra* note 193, at 14–15; Ross & Mossman, *supra* note 48, at 14.

and the less susceptible it is to capture by powerful private interests.[319] Attitudes toward legal aid are consistent with this generalization. In the United States, the legal aid program established by the federal government in 1965 was opposed at the local level, vetoed by the governors of California, Arizona, Connecticut, Florida, Louisiana, Missouri, North Dakota, and South Dakota, and fought by mayors in New Orleans, Los Angeles, and Dallas.[320] Ronald Reagan, who vetoed the federal program as governor of California, has tried to undermine it as President by proposing that legal aid be supported through block grants to states, knowing full well that many states will refuse to use any of that money for legal aid.[321] The government of Queensland refused to accept a grant from the Australian federal government to support the Caxton Street Legal Centre.[322] In England and Wales, where law centres were created by local initiative, the level of political activity correlates with the extent to which the centre is supported by central rather than local government.[323] But the central government will not protect law centres from local attack,[324] and local authorities have succeeded in restricting the kinds of work the centres do and have managed to abolish some entirely.[325] This tension between national and local governments is visible in Australia,[326] Canada,[327] and the Netherlands.[328] Even national governments have been subordinated to supranational treaties and courts that may require the establishment of legal aid programs.[329]

Finally, perhaps the most obvious division within the state sim-

319. *E.g.*, I. GOUGH, THE POLITICAL ECONOMY OF THE WELFARE STATE 100 (1979); Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663, 705 n.24 (1980) (local government has greater difficulty controlling private-sector institutions than does central government).

320. J. COOPER, *supra* note 2, at 263–64; B. GARTH, *supra* note 2, at 38.

321. *Butler Voices Concern*, POVERTY L. TODAY, Fall 1981, at 5. Former president Nixon sought to regionalize legal services in 1970 for the same reason. B. GARTH, *supra* note 2, at 38. The actions of both Nixon and Reagan demonstrate that hostility to legal aid is not limited to local governments. *Id.* at 41–42.

322. Boccabella, *Swimming Against the Tide: Legal Centres in Queensland*, in ON TAP, NOT ON TOP, *supra* note 143, at 17.

323. *Id.* in ON TAP, NOT ON TOP, *supra* note 143, at 65.

324. J. COOPER, *supra* note 2, at 270–71.

325. *Id.* at 132, 267–69; *see also* B. GARTH, *supra* note 2, at 59, 69; *Rubbishing in Gloucester*, 5 LAW CENTRES' NEWS, Spring 1980, at 7 (local authorities rejected proposal to establish law centers, one council member terming them " 'a school for scroungers and professional protestors' ").

326. Epstein, *Australia*, in PERSPECTIVES, *supra* note 2, at 42, 48.

327. Zemans, *Canada*, in PERSPECTIVES, *supra* note 2, at 93, 96.

328. J. COOPER, *supra* note 2, at 272.

329. Denti, *An International Overview on Legal Aid*, in PERSPECTIVES, *supra* note 2, at 346, 348; König, *Austria*, in PERSPECTIVES, *supra* note 2, at 76, 78. Italy's failure to furnish legal aid has been criticized by the European Court of Human Rights, although the latter has no enforcement powers. V. Varanno, *supra* note 32, at 4.

ply reflects the alternating dominance of the major political parties. Those left of center create and expand legal aid programs; those on the right restrict or eliminate them. The Labour Party initiated the Australian Legal Aid Offices; the (conservative) Liberal Party abolished it.[330] The Democratic Party founded the OEO Legal Services Program in the United States and increased its funding to the highest levels; Republicans sought to dismantle it and, failing that, to limit it quantitatively and qualitatively.[331] Labour Lord Chancellors in Britain have supported the law centre movement;[332] Conservative local authorities have attacked the law centres within their jurisdictions.[333] The Labour Party's current program proposes an increase from the present forty law centres to between 100 and 200, a higher ceiling for the means test, expanded criminal legal aid, representation before tribunals, free interviews, duty solicitor schemes in every criminal court, and a change in the rule regarding costs in public interest cases.[334] Nevertheless, the generalization that conservatives attempt to restrict or abolish legal aid programs is not

330. Armstrong, *supra* note 276, at 220–21; Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 61–62. *See generally* Hawkes, *The Rise and Fall of the Australian Legal Aid Office,* in DECISIONS: CASE STUDIES IN AUSTRALIAN PUBLIC POLICY 60 (S. Encel, P. Wilenski & B. Schaffer eds. 1981). In the four years following the ouster of the federal Labour government in 1975, the federal contribution to legal aid increased from 12 to 12.6 million dollars, or 5%. COMMONWEALTH LEGAL AID COMM'N, 1978–1979 SECOND ANNUAL REPORT 13 (1979). During that period, the consumer price index increased from 180.2 to 269.6, or approximately 50%. *Id.* In other words, in real dollars the budget was cut by almost half. In 1983, when Labour regained control of the federal government, it proposed a 23.5% one-year increase in the budget (15% in real terms). 4 LEGAL AID CLEARINGHOUSE BULL. 98–100 (1983). At the same time, the federal Attorney General, Gareth Evans, made clear his attitude toward the organized legal profession and its dominance of legal aid: "[W]hatever else legal aid is, it is not a form of industry assistance for the legal profession." *Id.* at 110.

331. The Chairman of the Legal Services Corporation, Clark Durant, has stated that the corporation could get half its present budget from charitable contributions and surcharges on court filing fees. N.Y. Times, Jan. 26, 1985, at 7, col. 6. But the experience of the past four years has shown that those sources can provide only a fraction of the existing budget. In any case, President Reagan again recommended zero funding of the Legal Services Corporation in his 1986 budget, as he did in each of the four budgets of his first term. N.Y. Times, Feb. 2, 1985, at 8, col. 2. One nongovernmental source of financial support, in which some placed considerable faith—interest on lawyers' trust accounts—raised only about $20 million in 1984, less than 10% of the LSC budget. Taylor, *Legal Funds Plan for the Poor Gains in U.S.*, N.Y. Times, Nov. 13, 1984, at 17, col. 1.

332. B. GARTH, *supra* note 2, at 62–63; *cf.* SOCIETY OF LABOUR LAWYERS, JUSTICE FOR ALL (Fabian Research Series No. 273, 1968) (support for law centres).

333. J. COOPER, *supra* note 2, at 267–71; *Rubbishing in Gloucester . . . and Devon,* LAW CENTRES' NEWS, Spring 1980, at 7; *Wandsworth Council to Cut 3 Law Centres,* LAW CENTRES' NEWS, Summer 1979, at 7. *See generally* CONSERVATIVE POLITICAL CENTRE, ROUGH JUSTICE (1968) (opposition to law centres).

334. 1982 LABOUR'S PROGRAMME 184–85 (1982). The Thatcher government allowed no increases in the means test in either 1980 or 1981, the first years it had been held constant since 1973. LAG BULL., Jan. 1982, at 5. For a comparison of the positions of the four major British parties on legal services, see LAG BULL., May 1983, at

without exceptions. Before his resignation, one of President Nixon's last acts was signing the bill creating the Legal Services Corporation. Similarly, Conservative local authorities in England have helped establish law centres.[335]

One of the most puzzling aspects of the state's role in creating and administering legal aid is that often the state is the adversary of legal aid recipients. Indeed, the paradox can be framed even more sharply. The inception of legal aid is roughly contemporaneous with the emergence of the welfare programs that render the poor dependent on the state in ways that parallel the dependence of labor on capital.[336] In each instance, the dominant member of this unequal relationship has created and funded the institutional structure that gives the subordinate partner legal representation through which to assert legal claims against the dominant member. At the end of the nineteenth century, philanthropic capitalists founded and supported charitable legal aid offices representing workers and their families against employers, landlords, and creditors.[337] By contrast, the state-supported programs established after World War II have imposed restrictive eligibility criteria that exclude almost all but the unemployed poor, who have claims only against the state (for welfare benefits) and not against private capital (either as producers or as consumers).

Why would the state want to confer the resource of legal representation upon potential adversaries? It is vital to recognize that the state has not always supported legal aid. Prior to World War II, the state provided no funds for legal aid and explicitly rejected responsibility to furnish counsel in noncriminal cases.[338] One explanation for the change in attitude is that the growth of welfare benefits is not merely contemporaneous with state subsidization of legal aid but also actually demands the latter. Several commentators have suggested that legal aid is an essential means of rationalizing the chaotic and often arbitrary welfare bureaucracy.[339]

10–13 (four separate articles discussing views of Labour, Conservative, Liberal, and Social Democrat parties).

335. J. COOPER, *supra* note 2, at 298.

336. Marris and Rein call this phenomenon "the brave paradox of government programs which challenge government." P. MARRIS & M. REIN, DILEMMAS OF SOCIETY REFORM 230 (1972), *quoted in* Garth, *A Comparative View of Legal Services Delivery Systems—The Role of Research,* in RESEARCH ON LEGAL SERVICES FOR THE POOR AND DISADVANTAGED: LESSONS FROM THE PAST AND ISSUES FOR THE FUTURE 176, 191 (B. Garth ed. 1983) [hereinafter cited as RESEARCH ON LEGAL SERVICES].

337. J. KATZ, *supra* note 2, at 34–37; *see also* Reifner, *supra* note 59, at 105.

338. Alcock, *supra* note 155, at 165–68; *see also* FINLAY, *supra* note 55, at 10. In Finland, the state refused to finance legal aid before World War II even though the organized profession wanted the state to pay when the clients could not. Nousiainen, *On Legal Expertise and Cost-free Legal Aid in Finland,* 8 INT'L J. SOC. L. 165, 168 (1980).

339. *E.g.*, J. KATZ, *supra* note 2, at 186–87.

Indeed, the welfare state is the "adversary" of the poor in name only. After all, it is dedicated to helping the poor, and many employees of the welfare bureaucracy genuinely want to do so. They fail because of excessive demands on their time and energy, inadequate resources, or inertia. Therefore, employees of the welfare bureaucracy may welcome litigation that compels them to perform their statutory or constitutional obligations.[340] Unlike capital, which may find legal rules constraining and irksome,[341] the liberal state acts only by promulgating and following rules, whose precise content often is a matter of relative indifference to the bureaucrats themselves.

Other explanations for state investment in legal aid complement rather than controvert the above. The most invariant feature of all legal aid programs—their preoccupation with family matters—suggests one explanation.[342] Legal aid may be an attempt by the capitalist state to respond to the crisis of reproduction posed by the dissolution of the extended family and the breakdown of the lifelong parental union. The state administers divorce law, broadly conceived as including the welfare benefits that sustain the fragmented family, so that single-parent and composite families can continue to perform their reproductive function. Some writers argue more generally that the state introduces legal aid when it fears social unrest, perhaps following the growth of urban slum populations composed of immigrants experiencing discrimination and economic deprivation,[343] or when political turmoil threatens.[344]

Perhaps the clearest motive for state intervention is its urge to control any program of legal representation for the poor. Often the state reacts to earlier private initiatives by trying to co-opt and control them through the offer of funds.[345] Weimar, and later Nazi

340. *Cf.* SOCIAL MOVEMENTS, *supra* note 6, at 21 (social reform groups often receive sympathetic information from intermediate levels because of internal political conflict characteristic of large bureaucracies). In a variety of other highly dissimilar situations one party may prefer to be sued rather than to appear to acquiesce voluntarily in a course of conduct: for instance, when an insurance company confronts a very large claim, H. ROSS, SETTLED OUT OF COURT 220–24 (1970), or a state enterprise in a socialist economy fails to meet its performance criteria, Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract,* 11 LAW & SOC'Y REV. 507, 514 (1977).

341. *See generally* Macaulay, *Non-Contractual Relations in Business: A Preliminary Study,* 28 AM. SOC. REV. 55 (1963). The successful contemporary attack on regulation confirms this attitude. *See generally* E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).

342. *See infra* notes 560–69 and accompanying text.

343. Blankenburg & Reifner, *supra* note 59, at 219–20.

344. M. Galanter, *supra* note 311, at 2–3.

345. The state's interest in legal aid in Latin America can be explained in part by a desire to control the inflow of foreign funds (from foundations, governments, and churches) to potentially radical organizations. F. Rojas, Descriptions Towards Typolo-

Germany took over the legal aid programs of the trade unions and churches;[346] the Dutch government offered subsidies to the law shops initiated by law students and young practitioners during the 1970's and established the Buro voor Rechtshulp that marginalized the law shops;[347] and the Royal Commission on Legal Services in Great Britain recommended that law centres be centrally funded and controlled.[348] The insistence on control, however, is even more visible in programs that the state establishes. The fears of both private and public lawyers that he who pays the piper calls the tune seem all too warranted.[349] South Africa offers a cautionary example. Legal Aid is administered by a board appointed by the Minister of Justice, who may, "if in his opinion there are good reasons for doing so, at any time terminate the period of office of any appointed member."[350] The recipient of legal aid must meet not only a means test but also the following criteria:

> If a legal aid officer is satisfied that an applicant is unemployed without sound reasons, or that he leads a dissolute or dishonest life, or that [he] is as a result of his own misconduct or neglect unable to bear the legal costs himself, no legal aid shall be rendered to him.[351]

The state also denies legal aid if "the applicant's claim is of a trivial or vexatious nature" or if "no real or substantial benefit will be attained by the rendering of legal aid."[352]

South Africa is an extreme example of politicization, but all states, whether totalitarian or liberal, capitalist or socialist, demand control over legal aid. Often the political objective is explicit: to ensure that the program does not threaten the regime. In South

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gies & Analysis of Legal Aid Trends in Latin America 3–4 (June 1982) (unpublished manuscript).

346. Reifner, *supra* note 59, at 110–17; *see also* Falke, *supra* note 75, at 110 (discussing Weimar Germany). The private programs subordinated in this fashion were very substantial. In Germany in 1912, the 916 legal aid offices conducted 1,841,364 interviews and took written action in 468,028 cases. Blankenburg, *Why Historical Precedents of the "Access to Law" Movement in Germany Were Not Followed Up,* in INNOVATIONS, *supra* note 2, at 233, 243.

347. J. COOPER, *supra* note 2, at 49. The highest civil servant in the Ministry of Justice commented, "We regularized the social unrest and the law shop movement into public legal services, which became part of the existing legal system." Bruinsma, *supra* note 146, at 332.

348. 1 ROYAL COMM'N, *supra* note 63, at 85.

349. A problem arises if both the state and the profession try to call the tune. The local council for Salford, a deprived part of Manchester, insisted that it be given a majority of the places on the management committee of a proposed law centre before it would provide financial support. The Law Society then refused a waiver to the law centre on the ground that the management committee must be independent of the funding agency. LAG BULL. Jan. 1981, at 34. The likely result is no law centre.

350. Gross, *South Africa,* in PERSPECTIVES, *supra* note 2, at 288, 290 (quoting Legal Aid Act 22, § 4(3)(c) (1969).

351. *Id.* at 290–91 (quoting Legal Aid Act 22, ¶ 13.2 (1969)).

352. *Id.* at 291 (quoting Legal Aid Act 22, ¶ 13.2 (1969)).

Korea, the Minister of Justice has promulgated rules regulating lawsuits against the state.[353] The Minister of Justice also wields a veto over the appointment of attorneys in legal aid cases. The attorneys must submit copies of complaints and answers to the district office and report on the status of their cases whenever requested; they can be dismissed if regarded as unsuitable for the job.[354] In Bulgaria, legal aid is available only to promote "governmental and social interests"; in Yugoslavia, it cannot be used for "illegal goals," and a state lawyer will initiate litigation only if "a social interest demands it."[355] Although the United States is more subtle about political interference, legal aid lawyers are prohibited from offering legal advice or representation in cases concerning desegregation, abortion, or selective service,[356] presumably because asserting rights in these areas would not advance the "social interest."

Often the limitations on legal aid lawyers are framed in terms of permissible tactics rather than acceptable subject matters. The Legal Services Corporation Act, in addition to limiting the filing of class action suits, prohibits attorneys from engaging in or encouraging strikes, pickets, boycotts, or public demonstrations; seeking to influence legislation, initiatives, referenda, or executive orders; or participating in voter registration or community organization.[357] In Britain, the Attorney General retains control over "relator" actions brought by private individuals claiming to represent a public interest.[358] In the Netherlands, the Minister of Justice determines how much time the Buro voor Rechtshulp should allocate to service work, thus limiting the amount of law reform activity that the Buro can undertake.[359] Client eligibility rules also may be designed to promote political ends and not just to conserve limited resources,[360] as when the Legal Services Corporation Act forbids the representation of the "voluntary" poor, minors without parental consent, or aliens.[361] Apparently innocent technical issues like training and

353. Sang Hyun Song, *Korea,* in PERSPECTIVES, *supra* note 2, at 204, 212 n.6.

354. *Id.* at 207–08.

355. Wengerek, *Socialist Countries: Eastern Europe,* in PERSPECTIVES, *supra* note 2, at 272, 281.

356. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996(b)(8)–(10) (1982). An unsuccessful effort, the Murphy amendment, was made to prohibit all lawsuits against the state. B. GARTH, *supra* note 2, at 36–37. In Britain, local authorities have not hidden their displeasure when law centres they fund have the temerity to sue them. J. COOPER, *supra* note 2, at 133.

357. Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996e(d)(4)–(5), 2996f(a)(6), 2996f(b)(4)–(6) (1982); *see also* J. COOPER, *supra* note 2, at 302 n.5.

358. Kötz, *Public Interest Litigation: A Comparative Survey,* in ACCESS, *supra* note 2, at 85, 102–04.

359. J. COOPER, *supra* note 2, at 301.

360. *Id.* at 302 n.5.

361. Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996f(a)(2)(B)(iii),

quality also can be vehicles for political influence.[362] Finally, the state's political concern may be fiscal restraint. If the object is to control the amount of legal aid rather than the content, staffed office programs are strongly preferred to judicare because there is a fixed budget, mainly salaries, rather than an open-ended commitment to reimburse lawyers for rendering an indeterminate quantity of services.[363]

The state controls the deployment of subsidized legal services through two central mechanisms: the powers of appointment and the purse. The state generally selects the governing bodies, and sometimes even the lawyers, in legal aid programs. Although the official justification for creating the Legal Services Corporation was to insulate the program from political influence, the President still appoints the Board of Directors who in turn choose the Corporation's president.[364] President Reagan's appointees have been openly hostile to the goals and achievements of the last two decades.[365]

2996f(b)(4) (1982). An unsuccessful attempt was made to prohibit the representation of homosexuals.

362. J. COOPER, *supra* note 2, at 228–29, 237–38, 252.

363. *Id.* at 200. This may explain why Ontario increasingly shifted resources from judicare to staffed office programs as the total state budget grew from Can.$7 million between 1968 and 1969 to Can.$17 million between 1974 and 1975. J. GARTH, *supra* note 2, at 99. Similarly, the recently elected Commonwealth (federal) Labour government in Australia has been distressed that annual expenditures on legal aid payments to private practitioners increased from A$14,679,000 in 1979–1980 to A$32,426,000 in 1982–1983 (64% in real terms), although the number of cases increased only 28% during that period. Furthermore, the 1983–1984 budget of A$40,144,000 represents an increase of 82.1% in real terms since 1979–1980. In response, the Government imposed a mandatory, uniform fee scale for family matters, which constituted almost two-thirds of all Commonwealth legal aid payments. Statement of Mr. Lionel Bowen, Minister for Trade, in Hansard (Oct. 6, 1983), *reprinted in* 4 LEGAL AID CLEARINGHOUSE BULL. 148, 149 (1983).

364. B. GARTH, *supra* note 2, at 43.

365. Clark Durant, LSC chairman, has described President Reagan's proposal to eliminate federal legal services as a "courageous act" that should stimulate "good faith debate." Taylor, *Legal Aid on a Thin Ideological Rope,* N.Y. Times, Apr. 6, 1985, § 1, at 8, col. 3. One of President Reagan's appointees, Michael B. Wallace, opposed extension of the Voting Rights Act, supported tax exemptions for racially segregated schools, and sought to prevent federal inspectors from entering Mississippi jails. Another, Robert Valois, opposed efforts to unionize the employees of J. P. Stevens. Silverman, *Legal Aid Nominees Under Fire in Session,* L.A. Times, Nov. 3, 1983, § 1, at 25, col. 1. Immediately following his reelection, President Reagan made recess appointments of 11 Board members, thereby avoiding the need for Senate confirmation. The deputy White House press secretary stated that this was "the most efficient way" for the Board to operate. N.Y. Times, Nov. 24, 1984, at 10, col. 6. Legal services lawyers resisting administration efforts to cut their programs have been subjected to Justice Department investigations. Taylor, *Conservatives Press Fight to Curb Legal Aid,* N.Y. Times, July 31, 1983, at E5, col. 1. They have been forbidden to deal with "special interest groups" or to engage in "survival activities" or "network building." In a memorandum dated September 7, 1983, Joshua Brooks, deputy director of the LSC's office of field services, stated, "regional offices shall disenfranchise themselves of [sic] any contact with elected officials or members of the press/media.'" Ostrow, *Legal Services Offices Told Not to*

The President of South Korea appoints the central committee of its Legal Aid Association.[366] Local councillors often serve on the governing bodies of the law centres they fund.[367] Appointive powers sometimes extend even further. The Polish Bar Association, itself far from independent of the state, determines who will represent a legally aided client.[368] Control also can be exercised through other subordinate institutions. For instance, trade unions in Poland can assist their members in making complaints, but in 1975 only seventeen complaints were filed throughout an area representing one-sixth of the country;[369] in Czechoslovakia, only the national council can institute proceedings.[370] But if appointment is the means by which the state directs ongoing legal aid programs, fiscal controls are the ultimate weapon for restraining or even eliminating disobedient programs. Once again, the Legal Services Corporation is illustrative. Though nominally protected from political interference, the President and Congress fix its budget. Although President Reagan was unable to eliminate the Corporation as he had wished, he did cut its budget by more than one-third.[371] Local funding allows even more leverage.[372]

Deal with Press, Elected Officials, L.A. Times, Sept. 14, 1983, § 1, at 13, col. 1. The Legal Services Corporation recently made a grant of $337,000 to the "Constitutional Law Center" in Cumberland, Virginia, headed by James McClellan, who has "denounced many Supreme Court decisions of the past 30 years as violations of states' rights," argued that "state governments are not bound by the Bill of Rights," and deplored the failure of the Reagan Administration to accomplish the "demolition" of the Civil Rights Commission and the Legal Services Corporation.

366. Sang Hyun Song, *Korea,* in PERSPECTIVES, *supra* note 2, at 204, 206.

367. There were three councillors on the board of the Manchester Law Centre. When the Council was asked to support a second centre, it demanded half of the seats on the board in return. J. COOPER, *supra* note 2, at 127, 144 n.24. In 1978 the Birmingham City Council unilaterally informed the Small Health Community Law Centre that it was going to "nominate" three city councillors to the managing committee. The Law Centre had no choice but to accept. SMALL HEALTH CARE COMMUNITY LAW CENTRE, 1978–1979 3RD ANNUAL REPORT 2 (n.d.).

368. Wengerek, *Socialist Countries: Eastern Europe,* in PERSPECTIVES, *supra* note 2, at 272, 280–81. State control is even more direct in the United States, where the legal profession prides itself on its independence. In Los Angeles, judges have virtually unlimited discretion in selecting which private attorneys will represent accused criminals when the public defender has a conflict of interest. *See* R. HERMANN, *supra* note 13, at 34–36.

369. Wengerek, *Socialist Countries: Eastern Europe,* in PERSPECTIVES, *supra* note 2, at 272, 286 n.12.

370. *Id.* at 283.

371. *See* Table 6. The budget fell from $321 to $241 million at a time of significant inflation. At the same time, central government support for British law centres was cut. B. GARTH, *supra* note 2, at 76.

372. Even though the federal government funds most legal aid in the United States, it requires a significant local contribution. By withholding that contribution, local governments may not only reduce programs but actually terminate them. J. COOPER, *supra* note 2, at 264–65; *cf.* J. KATZ, *supra* note 2, at 93 (Mayor Daly conditioned funding for agency administering Chicago Legal Services on an agreement limiting suits against the

E. *Capital*

The attitude of capital towards legal aid, like the attitude of the state, is both paradoxical and complex. Just as the state created legal aid after World War II to provide its "adversaries" with legal advisors and advocates, so capital at the turn of the century was instrumental in establishing charitable legal aid institutions that assisted those asserting claims against capitalists. The Bureau of Justice in Chicago was founded in 1888 by "reform-minded members of the Ethical Cultural [sic] Society of Chicago, primarily businessmen."[373] Groups of prominent citizens created legal aid societies in Boston in 1900 and in Cincinnati in 1907.[374] Yet often the target of reform in these early years was the rapacious conduct of capital: employers who failed to pay their workers and various forms of loan sharking and usury, including wage assignments, salary loans, chattel mortgages, and overbearing collection practices.[375] How should we understand what appears to be disinterested behavior, at the very least, and possibly even class treachery? The answer, of course, is that capital was no more monolithic than the state or the legal profession. The "prominent citizens" who founded legal aid societies were representatives of large, successful enterprises, often the precursors of monopoly capital. Their object was to discipline rogue capitalists, the lumpen bourgeosie who were tarnishing capital's reputation and creating an environment in which the state might seek to regulate the economy more aggressively.[376] Like the legal profession and the state, capital also exacted a high price for its support of legal aid; clients were refused assistance in filing for bankruptcy or strongly discouraged from doing so, and debtors were helped to reorganize their budgets to repay their obligations.[377]

The same intraclass division persists today. Monopoly capital

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city and representation of community groups). In Britain, local authorities provide a larger proportion of the law centres' funds; although this limits the Tory government's ability to eliminate them, it does mean that the centres must engage in an endless series of debilitating struggles with dozens of local bodies in order to retain adequate support.

373. J. KATZ, *supra* note 2, at 35.

374. LEGAL SERVICES CORP., 1978 ANNUAL REPORT 21, 24 (1978).

375. J. KATZ, *supra* note 2, at 35–37; LEGAL SERVICES CORP., 1978 ANNUAL REPORT 28 (1978).

376. For descriptions of the shady practices of the fringe capitalists who prey on the poor, see generally D. CAPLOVITZ, THE POOR PAY MORE: CONSUMER PRACTICES OF LOW INCOME FAMILIES (1967); P. SCHRAG, *supra* note 134; Whitford & Kimball, *Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin,* 1974 WIS. L. REV. 639. For a skeptical view, suggesting that the adversaries of legally aided clients may be dispersed widely within the business community, see FIOCCO, WALLACE & CARTWRIGHT, *Legal Aid Research: An American Experience,* in RESEARCH AND THE DELIVERY OF LEGAL SERVICES, *supra* note 189, at 129, 135–36.

377. E. BROWNELL, *supra* note 67, at 73–74; E. JOHNSON, *supra* note 89, at 10, 87,

consistently has supported legal aid, from the launching of the OEO Legal Services Program through President Reagan's attack on the Legal Services Corporation. Its endorsement has been expressed indirectly—through large law firms and national and state bar associations whose senior partners and leaders represent large capital. The vigor with which capital has attacked trade unions and has fought government intervention on behalf of consumers, the environment, or worker health and safety amply demonstrates that such support does not signify altruism or an inability to perceive and pursue class interests.[378] Large capital supports legal aid because its clients are not employees, personal injury victims, or a significant proportion of consumers. By contrast, slumlords, ghetto retailers, farmers using migrant labor, sweatshops employing undocumented workers, loan companies—the fraction of capital that does depend on legally aided clients—has intensified its opposition to legal aid. For legal aid confers on the poor the advantages of "repeat players" in confrontations with petty bourgeois adversaries and their lawyers, whose ignorance of, and inability to manipulate, technical bodies of law like federal truth-in-lending statutes or even the procedural niceties of eviction relegates them to the position of "one-shotters."[379] Furthermore, given the smaller profit margins in the competitive sector, the concessions won by legal aid can mean the difference between entrepreneurial success and failure. Competitive capital expresses its hostility directly through chambers of commerce and membership on legal aid boards but also indirectly through the lawyers who represent these interests, solo and small firm practitioners, and the local bar associations they dominate.[380] Thus, the division between monopoly and competitive capital closely parallels the divisions between the elite and the base within the stratified legal profession and between the higher levels of government (federal and state) and more local jurisdictions.

Perhaps the most important, if superficially surprising, aspect

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107; J. KATZ, *supra* note 2, at 44. Some programs also rejected workers compensation claims.

378. *See, e.g.*, Kötz, *Public Interest Litigation: A Comparative Survey*, in ACCESS, *supra* note 2, at 85, 107–08; Trubek & Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States*, in ACCESS, *supra* note 2, at 131. Consider the last hundred years of the labor movement and the Reagan administration's attacks on the Consumer Product Safety Administration, state products liability laws, the Environmental Protection Agency, and the Occupational Health and Safety Administration.

379. *See generally* Galanter, *supra* note 94. For the strategic advantages of legal aid lawyers in landlord-tenant disputes, see generally Lazerson, *supra* note 134; Note, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 YALE L.J. 1495 (1973). For a similar confrontation in the area of house purchases (although the lawyers were private), see generally FitzGerald, *The Contract Buyers League and the Courts: A Case Study of Poverty Litigation*, 9 LAW & SOC'Y REV. 165 (1975).

380. *See generally* H. STUMPF, *supra* note 45.

of this entire relationship is the lack of interest that capital displays in the existence, size, or direction of legal aid. This relative indifference contrasts markedly with the passions aroused within the legal profession, among legal aid lawyers, and even among politicians and bureaucrats. One important reason was suggested above: The beneficiaries of legal aid rarely enter the private economy within which capital buys labor, sells goods and services, and negotiates over externalities. Another reason, to be explored below, is that most legal aid work concerns intraclass conflict: family matters, of course, but also crime. Finally, and perhaps most significantly, legal aid does not threaten the hegemony of capital because it channels conflict into legal forms that may exact particular concessions but do not challenge basic power relations.

F. *Labor*

If the fractions of capital are divided in their attitudes toward legal aid, labor is ambivalent. In many countries, including the United States, Great Britain, Germany, the Netherlands, Belgium, Italy, and Mexico, trade unions always have provided their members with significant amounts of legal assistance, either through lawyers employed by the union or through referrals to outside counsel who work for little or no fee so that they can retain the union's paying business.[381] Because this service has become an important source of member loyalty, however, trade unions are hostile to state legal aid programs that threaten to supplant the unions' functions. Thus, the labor movements in Britain, the Netherlands, and Italy actively opposed the establishment or expansion of state legal aid.[382] And in Germany, the new legal advice law of 1980 allows the

381. *See generally* RUSHCLIFFE, *supra* note 62, at 16 (Great Britain); Latta & Lewis, *Trade Union Legal Services,* 12 BRIT. J. INDUS. REL. 56 (1974) (Great Britain); Blankenburg & Cooper, *supra* note 8, at 290 (Italy); Blankenburg & Reifner, *Conditions of Legal and Political Culture Limiting the Transferability of Access-to-Law Innovations,* in ACCESS, *supra* note 2, at 217, 228–31 (Germany); Breda, *supra* note 11, at 361 (Belgium); Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 236, 237 n.30 (Mexico); Segal, *Labor Union Lawyers: Professional Services of Lawyers to Organized Labor,* 5 INDUS. & LAB. REL. REV. 343 (1952) (United States). In the 1960's and 1970's, a number of American trade unions created prepaid legal service plans for their employees and negotiated tax-free employer contributions. *See generally* L. DEITCH & D. WEINSTEIN, PREPAID LEGAL SERVICES: SOCIOECONOMIC IMPACTS (1976). In the Netherlands, as of 1973, there were 25 full-time and 32 part-time lawyers working for the three main trade unions. Griffiths, *supra* note 168, at 263. In Great Britain, union lawyers collect £50 million a year in damages in personal injury cases for members, and they represent clients in 10,000 tribunal proceedings. Zander, *Public Policy for Legal Services,* in INNOVATIONS, *supra* note 2, at 77, 86–87. In 1966, the Transport and General Workers Union settled 4800 personal injury claims for a total of £1 million through its regional offices, 1500 claims for another £1 million in its London office, and referred 600 to 700 claims to outside lawyers, who litigated approximately 160 of them. B. ABEL-SMITH, *supra* note 73, at 86–87.

382. J. COOPER, *supra* note 2, at 159–60 (The Netherlands); Partington, *Great Brit-*

Länder (state legislatures) to deny assistance in social welfare and labor law matters. Those Länder dominated by the Social Democrats have done so; those controlled by the Christian Democrats have not.[383] When legal aid programs pose no threat to union loyalties, organized labor can be strongly supportive. For example, local and district trades councils in Britain have been instrumental in establishing a number of law centres.[384] But such support presupposes that workers and their families are eligible to use legal aid programs. In the United States, where low financial ceilings have restricted the clientele to those dependent on state benefits, conservatives have turned a large fraction of the working class against legal aid by describing it as a haven for welfare cheats and scroungers.

G. *Philanthropy*

Even though charitable institutions derive most of their income from business, money which they repay by granting donors positions on their governing boards, charities do retain some autonomy and pursue independent goals. Private philanthropy was the moving force behind the creation of legal aid at the end of the nineteenth century. Furthermore, this innovation was part of a much broader movement for social reform that emerged at about the same time in countries as diverse as the United States, Britain, and Germany, although naturally it took different forms in each. In the United States, legal aid offices were dedicated to serving particular oppressed categories: The Chicago Woman's Club founded the Protective Agency for Women and Children in 1886 to prevent sexual exploitation; the German Society of New York City established the Deutsche Rechtsschutz Verein in 1876 to assist German immigrants.[385] In Britain, the Poor Man's Lawyer was introduced by the settlement houses: Toynbee Hall and Cambridge House in East and South London, and the Manchester University Settlement.[386] In Germany, churches helped organize legal aid.[387] In Latin America, where legal aid today resembles the situation in Europe and the United States a century ago, the Roman Catholic Church

ain, in PERSPECTIVES, *supra* note 2, at 158, 169 (Great Britain); Vigoriti, *Italy,* in PERSPECTIVES, *supra* note 2, at 177, 186 (Italy).

383. Blankenburg & Cooper, *supra* note 8, at 283.

384. *Cleveland steering group,* LAW CENTRES' NEWS, Autumn 1979, at 6; *Law Centre for North Devon?,* LAW CENTRES' NEWS, Autumn 1979, at 7; *New Centre in Bassetlaw,* LAW CENTRES' NEWS, Autumn 1980, at 3; *Trades Union Initiatives,* LAW CENTRES' NEWS, Spring 1979, at 8.

385. J. KATZ, *supra* note 2, at 34–35; LEGAL SERVICES CORP., 1978 ANNUAL REPORT 19 (1978); Huber, *supra* note 89, at 755.

386. Leat, *The Rise and Role of the Poor Man's Lawyer,* 2 BRIT J.L. & SOC'Y 166, 171 n.18 (1975).

387. Reifner, *supra* note 59, at 104.

and Protestant European churches play a significant part.[388] In each case, the offices have attacked the causes of poverty and oppression, rather than limit themselves to responding to the routine crises of daily life. Thus they have fought rape and child molestation, usury, poor housing, and dangerous working conditions.[389]

Private philanthrophy repeatedly has stimulated significant innovations in legal aid. The National Council of Social Service created the Citizens Advice Bureau in Britain at the beginning of World War II to help civilians cope with the dislocation of the war and the state's increased role.[390] The Ford Foundation supported some of the earliest experiments in legal services in the United States[391] and, together with other foundations, has been the primary source of funds for public interest law.[392] The Nuffield and other British foundations helped launch many law centres.[393] A variety of religious philanthropies sponsor the more innovative legal aid programs in India today.[394]

Yet there are inherent limits on the legal activism of philanthropies. First, like any other donor, they expect to control the services rendered. Sometimes they impose restrictions on subject matter: Church-sponsored programs strongly discouraged divorce in the early twentieth century and have opposed abortion rights advocacy in recent decades.[395] If private philanthropy appears too radical, this perception may endanger its funding and perhaps its privileged status as a tax-exempt charity. Therefore, the reformist energies of charitable legal aid programs have tended to decline into routine casework.[396] Perhaps the greatest drawback is the internal dynamic of philanthropic bureaucracies, which constantly must discover new causes to champion.[397] After about 1920, lawyers, rather than philanthropists, initiated legal aid offices in the United

388. Zemans, *supra* note 15, at 422 n.131. *See generally* Thome, *New Models for Legal Services in Latin America,* 6 HUM. RTS. Q. 521 (1984); F. Rojas, *supra* note 345.

389. J. KATZ, *supra* note 2, at 35–37; Leat, *supra* note 386, at 172–74; Reifner, *supra* note 59, at 94–95.

390. RUSHCLIFFE, *supra* note 62, at 20.

391. E. JOHNSON, *supra* note 89, at 21–23.

392. *See generally* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA (1976); FORD FOUND., THE PUBLIC INTEREST LAW FIRM: NEW VOICES FOR NEW CONSTITUENCIES (1973); FORD FOUND. & AMERICAN BAR ASS'N SPECIAL COMM. ON PUBLIC INTEREST PRACTICE, PUBLIC INTEREST LAW: FIVE YEARS LATER (1976).

393. B. GARTH, *supra* note 2, at 61; A. Byles, *supra* note 174, ch. 2, at 1.

394. M. Galanter, *supra* note 311, at 17.

395. E. BROWNELL, *supra* note 67, at 72–73; E. JOHNSON, *supra* note 89, at 188, 336 n.14; J. KATZ, *supra* note 2, at 147–48; Silverstein, *Eligibility for Free Legal Services in Civil Cases,* 44 J. URB. L. 549, 574–80 (1967) (21 of 159 offices refused divorce cases, and 80 imposed conditions).

396. J. KATZ, *supra* note 2, at 38; Reifner, *supra* note 59, at 104–10; *see also* J. COOPER, *supra* note 2, at 132.

397. *See generally* Trubek & Trubek, *Civic Justice Through Civil Justice: A New*

States.[398] And the foundations that launched neighborhood legal services, law centres, and public interest law firms soon expected these organizations to find other sources of support.[399]

H. *Recapitulation*

This brief, and therefore superficial, survey of the leading actors' interests at least should justify my insistence that a political analysis of legal aid is indispensable to understanding the phenomenon. Those interests are sharply (if sometimes erroneously) defined, strongly embraced, and widely divergent. Although the legal profession initially fears competition, eventually it learns to view legal aid as a means of creating business and concentrates on increasing the budget, spreading the work as evenly as possible, and resisting the demand for accountability that inevitably accompanies the expenditure of public funds.[400] Legal aid lawyers struggle to imbue both the content and structure of their work with significance in the face of client problems that all too easily come to be defined as routine and trivial, working conditions vastly inferior to those of their peers in the private sector, and limited career prospects.[401] Both the organized profession and legal aid specialists strenuously resist external control. Clients remain passive and uninterested for precisely the reasons that convinced reformers to create legal aid in the first place, and efforts to involve them in governance are relatively unsuccessful.[402] When clienteles already are organized (in trade unions and, to a lesser extent, consumer, tenant, and community groups), the organizations may render legal services to their members but may fear the loss of that function to outsiders and challenges to group leadership by activist lawyers.[403] Both state and capital (in its own right and through organized philanthropy) paradoxically endorse the provision of legal assistance to clients who appear to be potential adversaries. But in doing so they help to rationalize their own operations: the welfare bureaucracy and the still chaotic and undisciplined sector of competitive capitalism.[404] Not surprisingly, this elicits strong opposition from those whose behavior actually is challenged—local politicians and small businessmen.[405] At the same time, state and capital demand and obtain

Approach to Public Interest Advocacy in the United States, in ACCESS, *supra* note 2, at 127.

398. LEGAL SERVICES CORP., 1978 ANNUAL REPORT 19–31 (1978).
399. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 392, at 13.
400. *See supra* notes 154–211 and accompanying text.
401. *See supra* notes 212–33 and accompanying text.
402. *See supra* notes 280–310 and accompanying text.
403. *See supra* notes 381–83 and accompanying text.
404. *See supra* notes 40–379.
405. *See supra* note 380 and accompanying text.

extensive control over legal aid programs as the price of their support.[406]

In delineating the interests of these various actors, I do not mean to endorse a pluralist model. Their power and political efficacy differ enormously; one may not recognize the legitimacy of the others; and the outcome is not a "compromise" accepted by all. Because the result is historically specific and therefore constantly changing, I now analyze legal aid itself.

IV. WHAT IS LEGAL AID?

A. *How Much Legal Aid is There?*

An obvious starting point for any attempt to trace the impact of political forces on the contours of legal aid is to convey some sense of the magnitude of the institution. Because this magnitude has changed dramatically over time, my approach must be historical. I will focus on Britain (for which the data are most extensive), with briefer treatments of the United States and the Netherlands, and passing references to other nations.

Until 1949, civil legal aid in Britain was provided through two programs: the Poor Persons Procedure, administered by the national and local law societies with minimal state support, and the Poor Man's Lawyers, established by practitioners, settlement houses, churches, and other social agencies. Both schemes were entirely charitable: Solicitors (and less often barristers) donated their services. The Poor Man's Lawyers dates from the end of the nineteenth century and grew rapidly until World War II. The twenty-seven such centers in London in 1928 doubled during the next ten years; by 1938, there were another seventy centers elsewhere in England and Wales.[407] They handled about 30,000 cases that year, with very few leading to litigation.[408] The subject matter was fairly diverse and usually was oriented towards social reform. Although family matters typically were most common, they did not dominate the case load, partly because divorce still was difficult to obtain. But the altruism and commitment necessary to operate these centers could not be sustained after the war, especially once the state began to support legal aid, and the centers quickly atrophied.[409]

406. *See supra* notes 336–79 and accompanying text.

407. RUSHCLIFFE, *supra* note 62, at 17; J. JONES, FREE LEGAL ADVICE IN ENGLAND AND WALES: A REPORT ON THE ORGANISATION METHODS AND FUTURE OF POOR MAN'S LAWYERS 13–14 (1940).

408. This is my estimate based on the data in J. JONES, *supra* note 407, *passim.*

409. Volunteers also had been an important source of legal aid in the early programs in the United States. But they, too, seem to have succumbed to social change. By 1949 volunteers handled only three percent of all cases; ten years later the percentage was even lower. Brownell also notes an inverse correlation between city size and reliance on volunteers. E. BROWNELL, *supra* note 67, at 100, 109–22; SUPPLEMENT, *supra* note

The experience of the Poor Persons Procedure was quite different. In 1914, the Supreme Court issued rules that waived filing fees for indigent plaintiffs. The Treasury offered very meagre financial support for central and local administration of the scheme: about £3000 a year during the 1920's and 1930's, gradually increasing during the war to a peak of £15,000 a year just before its abolition in 1950.[410] Nor was the profession much more enthusiastic: 857 solicitors nominally were on the London rota in 1938 (15% of the 5750 who held practicing certificates that year); the war caused that number to drop to 350 in 1943 (8% of the 4238 practicing certificates).[411] The local law societies that administered the scheme strictly applied the eligibility requirements, rejecting about half of those who sought assistance (see Table 2). Unlike the Poor Man's Lawyer, this program was devoted almost exclusively to matrimonial problems. In 1928, 80% of all cases concerned divorce. The percentage gradually decreased to about two-thirds in the 1930's but then rose to 90-95% in the 1940's following the 1937 liberalization of the divorce law.[412] The 150% increase in applications and the 140% increase in grants of legal assistance in 1937–1938 reflect the impact of that reform (see Table 2). The interaction of easier divorce with the strain that the war placed on marriage, superimposed on solicitors' reluctance to donate their services, rapidly enlarged the backlog from less than one-third of a year's case load before 1938 to more than a year's case load in 1941, and to nearly two years' case load in 1944 (see Table 2 (London)). I will return to the breakdown and transformation of charitable legal aid in Britain below.[413]

In other countries, private legal aid was even more limited and has remained the only source of assistance for much longer. Programs established by philanthropists and lawyers in the United States in the last quarter of the nineteenth century had spread to

163, at 34, 48. On the other hand, legal advice centres staffed by volunteers proliferated in the United Kingdom in the 1960's. Of 56 centres identified by a LAG report in 1972, 43 had been established after 1967: 19 in 1971 and 14 in the first half of 1972. L. BRIDGES, B. SUFRIN, J. WHETTON & R. WHITE, LEGAL SERVICES IN BIRMINGHAM 207 (1975) [hereinafter cited as L. BRIDGES]. It was estimated that in the 1960's Poor Man's Lawyers (PML) in London and Birmingham were seeing as many clients as private practitioners were representing under the Legal Aid and Advice Act. *Id.* at 206. But the case load at the Birmingham PML declined from 80 per week in the late 1940's to 40 per week in 1967, and then to less than 20 per week in 1971. The service closed in 1974. *Id.* at 210.

410. R. EGERTON, *supra* note 156, at 16; LAW SOCIETY, 1942 ANNUAL REPORT 77 (1942). *See generally* LAW SOCIETY, ANNUAL REPORTS.

411. R. EGERTON, *supra* note 156, at 17; LAW SOCIETY, 1943 ANNUAL REPORT (1943); 1938 *id.*

412. LAW SOCIETY, 1951 ANNUAL REPORT 100 (1951); LAW SOCIETY, 1940 ANNUAL REPORT 70 (1940).

413. *See infra* notes 427–28 and accompanying text.

forty-one cities by 1916, employing sixty-two full-time and 113 part-time lawyers and handling 117,201 cases that year, at a cost of $181,408.[414] Thereafter the budget for civil matters grew slowly: $442,865 in 1933; $538,640 in 1938; $567,107 in 1943; $1,002,486 in 1948; $2,782,992 in 1959 (see Table 5). And the number of full- or part-time lawyers increased from 194 in 1947 (the equivalent of 146 staff attorneys) to 292 in 1959.[415] By 1964, the year before the federal government established its legal services program, there were 150 legal aid societies employing 600 lawyers with a total annual budget of four million dollars.[416] But even at its height, private legal aid in the United States constituted less than 0.2% of total expenditures on legal services and employed little more than 0.1% of practicing lawyers.[417] In the Netherlands, prior to the establishment of state legal aid in 1957, lawyers donated their services in 13,000 to 17,000 cases a year.[418] But elsewhere there was hardly even a pretense of assisting civil litigants who could not pay. In no country for which statistics are available were more than seven percent of all civil litigants represented by legal aid (see Table 1). The absolute number of cases handled also was trivial, given the populations involved (see Table 1). In Mexico in 1972, fourteen civil public defenders served nearly eight million people.[419] In Brazil in 1982, there were 753 lawyers involved in legal aid in eleven states with more than thirty-seven million people, or a ratio of one lawyer to 50,000 people.[420] In light of the paucity of facilities, it is not surprising that even today ten percent of legal aid applicants in Japan are rejected by a screening committee, and many more withdraw their applications, so that only forty percent actually are accepted.[421] Finally, most countries waive court costs but fail to pay lawyers for representing clients.[422] Even in recent years, a sig-

414. R.H. SMITH, JUSTICE AND THE POOR 152, 192 (1919).

415. E. BROWNELL, *supra* note 67, at 172, 209–11; SUPPLEMENT, *supra* note 163, at 47, 63.

416. Bellow, *Legal Services to the Poor: An American Report,* in ACCESS, *supra* note 2, at 49, 50. In 1962 there were 236 legal aid organizations employing 400 full-time lawyers. Ninety-three of the programs, however, had no paid staff. 1962 N.L.A.D.A. PROC. 13, 93 (1962).

417. E. JOHNSON, *supra* note 89, at 290–93; Bellow, *supra* note 416, at 50.

418. J. COOPER, *supra* note 2, at 161.

419. Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 227.

420. J. Falcão, Lawyers in Brazil 25 (1984) (unpublished manuscript).

421. Kojima, *Japan,* in PERSPECTIVES, *supra* note 2, at 191, 194–97. In Tokyo, for example, some applicants are satisfied with the advice they receive in the initial interview and then withdraw their applications.

422. *E.g.,* B. GARTH, *supra* note 2, at 125 (Belgium before 1970). *See generally* Blankenburg & Cooper, *supra* note 8, at 389; König, *Austria,* in PERSPECTIVES, *supra* note 2, at 76, 77, 82 (court fees are waived in Austria; bar associations sponsor programs in which attorneys provide free preliminary information); Miguel y Alonso, *Spain,* in PERSPECTIVES, *supra* note 2, at 302, 309–10 (until 1975, attorneys were not indemnified for supplying free legal services); Oñate Laborde, *Mexico,* in PERSPEC-

nificant portion of the expansion of legal aid has depended on lawyers donating their time: for example, law shops in the Netherlands,[423] community law centres in Australia,[424] and legal advice centres in Britain.[425]

State intervention in providing legal aid represents a dramatic break with the past. This is most evident in Britain, where it occurred first. The growing number of legal problems caused by the dislocations of war—largely, though not exclusively, family matters—and the declining number of lawyers available or willing to handle those problems produced the crisis in the Poor Persons Procedure mentioned earlier.[426] In response, the Law Society created the Services Divorce Department in 1942; by 1944, that Department had a full-time staff of sixty. Then, during World War II, the Army and the Royal Air Force (together), and later the Navy (separately), established Command Legal Aid Sections at home and overseas.[427] They employed salaried lawyers and paraprofessionals, although the Command Legal Aid Sections ultimately forwarded to the law societies cases to be litigated under the Poor Persons Procedure. These staffed offices quickly dwarfed the output of the still charitable Poor Persons Procedure. In eight years, the Services Divorce Department handled nearly one-half as many cases as the earlier procedure had in twenty-five years, and the Command Legal Aid Sections processed nearly one-and-a-half times as many (see Table 2). The end of the war did not eliminate the factors that had generated the need for legal aid. The divorce rate continued to increase, and state intervention in the economy and society greatly multiplied the occasions on which welfare recipients might want to challenge state action. Furthermore, the willingness of lawyers to

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TIVES, *supra* note 2, at 213, 217 (theoretically public defense is free, although attorneys often charge their clients); Reyntjens, *Africa—South of the Sahara,* in PERSPECTIVES, *supra* note 2, at 12, 25–26 (in Ghana indigents may receive free legal aid and counsel may be paid modest fee); Sang Hyun Song, *Korea,* in PERSPECTIVES, *supra* note 2, at 204 (attorneys fees are statutory, but waiver of fees is possible); Vigoriti, *Italy,* in PERSPECTIVES, *supra* note 2, at 177, 184–85 (attorneys asked to represent poor clients receive no fees unless client succeeds and costs are recovered from losing party); Wengerek, *Socialist Countries: Eastern Europe,* in PERSPECTIVES, *supra* note 2, at 272, 279–81 (socialist countries typically waive costs; provision for counsel's fees, if any, varies).

423. B. GARTH, *supra* note 2, at 119–20 (law shops staffed by student volunteers, "socially oriented" lawyers, and professors to meet "unmet needs").

424. Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 64–65.

425. There probably were well over 200 centres in 1978. M. ZANDER, *supra* note 128, at 55. In 1977, in addition, nonlawyer volunteers staffed 95% of the 710 citizens advice bureaux, which provided frontline advice and were the primary source of referrals to lawyers. *Id.* at 302–04.

426. *See supra* notes 410–13 and accompanying text.

427. RUSHCLIFFE, *supra* note 62, at 4–6; R. EGERTON, *supra* note 156, at 18–19. *See generally* LAW SOCIETY, 1944 ANNUAL REPORT (1944); 1943 *id.* (1943); 1942 *id.* (1942).

render charitable services appeared to decline, especially as the state assumed more and more functions. When the Rushcliffe Committee reviewed the situation in 1945, it concluded:

> [T]he total of all the existing free facilities is inadequate to meet the present demand. We think that it would be impossible to expect any extension of gratuitous professional services, particularly as there appears to be a concensus [sic] of opinion that the great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance.[428]

Nevertheless, it took years, even decades, before most countries initiated state-supported legal aid schemes: Britain in 1949, the Netherlands in 1957, the United States in 1965, Ontario (Canada) in 1967, France and Sweden in 1972, Finland in 1973, Australia in 1974, and Germany in 1981.[429]

When the change occurred in Britain, it was quantitatively as dramatic as might have been predicted from the wartime experience. In its first year, the new scheme granted civil legal aid to nearly four times as many people as had been served by the Poor Persons Procedure in its last full year (see Tables 2, 3). The rejection rate also declined from over half of all applicants under the old scheme to about one-quarter under the new.[430] As other countries followed suit, they experienced similar increases. In the Netherlands, the number of civil legal aid cases nearly doubled within eight years after the state began paying private lawyers to handle them (see Table 9).[431] In France, the number of litigants légally aided grew 35.6% in the first year of the new program (1972–1973), 27.3% in 1974, and 31.3% in 1975—it more than doubled in three years.[432] In Finland, expenditures on legal aid for cost-free trials grew from two million dollars in 1971, before the plan was introduced in 1973, to six million dollars five years later.[433] In Canada, over seventy million dollars were spent on legal aid for the year 1976–1977; seven years earlier, public funds expended on legal aid

428. RUSHCLIFFE, *supra* note 62, at 23. In France, though the state did not intervene to subsidize legal aid, the number of cases assisted by lawyers acting *Pro Deo* fell from 41,790 in 1950 to 28,639 twenty years later. A. Boigeol, Les Avocats en France 31 (1984) (unpublished paper).

429. Nousiainen, *supra* note 338, at 169 (Finland). The other Canadian provinces and territories followed Ontario: Newfoundland (1976); Nova Scotia (1977); New Brunswick (1972); Quebec (1972); Manitoba (1972); Saskatchewan (1974); British Columbia (1975); Yukon (1975). F. Zemans, *supra* note 26, at 4 n.10.

430. B. ABEL-SMITH, *supra* note 73, at 14–15.

431. Griffiths, *supra* note 168, at 262.

432. P. LAROCHE DE ROUSSANE, RAPPORTS ANNUELS SUR LE FONCTIONNEMENT DE L'AIDE JUDICIAIRE (1972/1973–1975); Pradel, *France,* in PERSPECTIVES, *supra* note 2, at 134, 145 n.1; *see also* Table 16. A higher proportion of applicants were granted aid than under the charitable system. M. CAPPELLETTI, *supra* note 6, at 46 n.145.

433. Nousiainen, *supra* note 338, at 171.

outside of Ontario totalled less than one million dollars.[434] In Quebec, prior to the introduction of legal aid in 1972, slightly more than a million dollars were expended through a voluntary program. The 1974–1975 budget was 14.25 million.[435] The Swedish Legal Aid Act of 1972 about doubled the number of offices.[436] In Australia, the federal government spent more than ten million dollars in 1974–1975, compared with the less than four million dollars spent by law societies and states in 1972–1973.[437] Perhaps the most dramatic change occurred in the United States, where the budget increased fourfold in one year as a result of the federal program, and the number of civil cases almost tripled between 1964 and 1970 (see Table 5).

State intervention also initiated a period of expansion in legal aid that many at the time thought would be as open-ended as the apparently unlimited demand for legal services.[438] Britain, as always, led the way. The number of legal aid cases began to increase in the 1960's, growing almost sevenfold between 1959 and 1970. The program handled almost as many civil legal aid cases in the single year of 1968 as the Poor Persons Procedure had done in its entire twenty-five years (see Tables 2, 3). Once the "green form" scheme for legal advice came into effect in 1973, the total number of clients served in civil and criminal matters exceeded one-half million annually. The budget, which prior to the War never had reached even £10,000, in 1973 was more than £50,000,000. In the Netherlands, the expansion was greater. The number of cases tripled in the first fourteen years of the program (1958–1972), and by 1972 legal aid matters represented one-half the civil case load (see Table 9).[439] The first law shop established in 1970 multiplied to ninety shops by 1976 (see Table 9). As a result, according to unofficial estimates, 3000 of the 3500 advocates in Holland participated in the legal aid plan, 2000 to a significant degree; the Bar derived one-

434. Zemans, *Canada,* in PERSPECTIVES, *supra* note 2, at 93. In 1971, expenditures on legal aid in Ontario were approximately $12 million. *Id.* at 122 n.2.

435. Cooper, *Report on the Quebec Legal Aid System,* in M. CAPPELLETTI, *supra* note 6, at 614, 618.

436. Boman, *Scandinavia,* in PERSPECTIVES, *supra* note 2, at 245.

437. R. SACKVILLE, *supra* note 56, at 160, 166.

438. Cappelletti and Garth predicted that the Report of the Royal Commission on Legal Services "will probably do much to increase the proportion of funds that go to the 'public sector' in British legal services." Cappelletti & Garth, *Access to Justice and the Welfare State: An Introduction,* in ACCESS, *supra* note 2, at 8. In fact, the Report was forgotten almost as soon as it was published, and the proportion of funds devoted to the public sector has declined. Michael Zander was equally sanguine: "I would expect the public sector to grow in England in the next decade from 30 or so to 100 or more law centres." Zander, *The First Wave,* in ACCESS, *supra* note 2, at 27, 41. The number seems to have stabilized at about 40, and some law centres have been eliminated as a result of funding cuts by central and local government.

439. B. GARTH, *supra* note 2, at 119; Schuyt, *supra* note 39, at 99.

quarter to one-third of its total revenue from this source; and about ten percent of the profession worked full time in the "social Bar."[440] In Ontario, where the first community legal clinic opened only in 1970, there were thirty-four a decade later, and their total budget increased fivefold between 1976 and 1980–1981.[441] In the United States, although there was no expansion during the Nixon years, the creation of the Legal Services Corporation in 1975 followed by the Democratic administration from 1977 to 1981 saw the budget grow more than sixfold and the number of lawyers reach a peak of more than 6000 (see Table 6). The Australian Commonwealth government spent A$271,000 in the first year of the program, 1971–1972. Twelve years later, expenditures had reached A$70,023,000 (see Table 7). In Norway, free legal advice was offered to approximately 300 people in 1964, several years after the program was initiated; twenty years later, 17,514 people received advice.[442]

Yet this growth did have economic and political limits. As the rate of inflation rose in the late 1970's, legal aid in the United Kingdom suffered a decline, as did many state benefits (see Table 3). Because eligibility levels were not adjusted for inflation, the proportion of the population satisfying the means test shrunk from an estimated sixty-four percent of all British households in 1964 to about twenty-five percent by 1978, and from seventy percent of the Dutch population to fifty percent in 1981.[443] In 1976, when divorce and ancillary matters constituted eighty-five percent of all legal aid in England and Wales, coverage was withdrawn for undefended divorces; although this was justified as a way of broadening eligibility, the increase was slight, it was delayed for three years, and the promise of additional funds for law centres never was fulfilled.[444] One reason for this shrinkage is that state welfare budgets rarely keep pace with the rate of inflation when the latter is high. What appeared to be a fairly constant sum of money allocated to the OEO Legal Services Program between 1970 and 1975 (see Table 6) actually represented a forty percent loss of spending power.[445] For simi-

440. J. COOPER, *supra* note 2, at 80, 83; Blankenburg & Cooper, *supra* note 8, at 279.

441. Zemans, *supra* note 100, at 232, 233 n.9. In 1982–1983 the budget had grown to almost Can.$7 million a year, funding 41 clinics. F. Zemans, *supra* note 26, at 10.

442. J. Johnsen, Professionalization of Legal Counselling in Norway 34 (1984) (unpublished paper) (presented to legal professions meeting, Bellagio, Italy, July 16–21, 1984).

443. *See* 1 ROYAL COMM'N, *supra* note 63, at 113; J. COOPER, *supra* note 2, at 27, 80 & n.19. In the United States, eligibility kept pace with inflation during the Carter years, but perhaps only because the income limits were extraordinarily low from the beginning: $3000 for an individual and $5800 for a family of four in 1977; $3925 and $6475 in 1978; and $5388 and $10,563 in 1980. LEGAL SERVICES CORP., 1980 ANNUAL REPORT 8 (1980); 1978 *id.* at 8 (1978); 1977 *id.* at 8 (1977).

444. J. COOPER, *supra* note 2, at 29.

445. *Id.* at 66–67.

lar reasons, legal aid in the Netherlands is expected to do no more than hold its own over the next decade despite a growing budget.[446] And Canadian programs experienced substantial reductions in 1982–1983.[447]

These reductions also were political. President Nixon deliberately starved the Legal Services Program and appointed an acting director of OEO who stated that the Program was "rotten and it will be destroyed."[448] Conservative administrations in many countries remain hostile to the political objectives of legal aid. In Australia, when the (conservative) Liberal Party took over the federal government following the 1975 ouster of Gough Whitlam, the Labour Prime Minister, it cut eligibility[449] and held the Commonwealth legal aid budget constant during a period of rapid inflation (see Table 7). The Royal Commission on Legal Services recommendations for major expansion of the British program have been ignored entirely by the Thatcher government.[450] Michael Zander's prediction of rapid growth to one hundred law centres seems far too sanguine. Instead, centres in Birmingham, West London, Lambeth, Leeds, Newcastle, and South East London are suffering budgetary cuts or may not obtain grant renewals.[451] The Conservative Government closed sixty percent of the state-funded Consumer Advice Centres in 1980[452] and introduced a requirement that clients contribute to criminal legal aid.[453] Although President Reagan lacked legislative support for eliminating the Legal Services Corporation, he cut its budget by one-third during a period of ten percent inflation. The result was a loss of 1773 lawyers between 1981 and 1982 (twenty-eight percent of the professional staff) and 2860 other staff (thirty-one percent).[454] The lawyers who left often were those with the most experience and who enjoyed the best job opportunities

446. *Id.* at 299–300.

447. Nova Scotia cut the budget 25%. British Columbia cut its budget 7.5%, imposed a user fee, and curtailed services. Saskatchewan granted no legal aid certificates for three months. F. Zemans, *supra* note 26, at 1 n.2.

448. B. GARTH, *supra* note 2, at 41 (quoting Howard Phillips).

449. Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 62; *see supra* note 330.

450. LORD CHANCELLOR'S DEP'T, THE GOVERNMENT RESPONSE TO THE REPORT OF THE ROYAL COMMISSION ON LEGAL SERVICES (1983).

451. LAW CENTRES' NEWS, Winter 1982–1983, at 2.

452. J. COOPER, *supra* note 2, at 78.

453. Hansen, *New Criminal Legal Aid: Questions Remain,* LAG BULL., July 1983, at 3. The new right-center government in the Netherlands also intends to require a contribution from *all* legally aided clients. A. Klijn, *supra* note 196, at 16.

454. L. SIEGEL & D. LANDAU, NO JUSTICE FOR THE POOR: HOW CUTBACKS ARE DESTROYING LEGAL SERVICES 8 (1983) (ACLU Public Policy Report) [hereinafter cited as L. SIEGEL]. For the 1984 fiscal year, President Reagan requested zero funding for the Legal Services Corporation, but the House Judiciary Committee voted $296 million, a $55 million increase over the previous year. L.A. Times, May 13, 1983, § 1, at 9, col. 1.

outside legal aid.[455] Three hundred of the 1475 field offices were closed, and most of the 900 lawyers who had ridden circuit in rural areas have ceased doing so.[456] The seventeen national and forty state backup centers, which provide technical expertise to the neighborhood offices, are threatened with closure.[457] The Legal Services Corporation almost had reached its stated goal of two lawyers for every 10,000 poor people (compared to two lawyers for approximately every 1000 clients who can pay), but now each remaining legal aid lawyer serves 15,909 eligible clients in Miami and 14,333 in El Paso.[458] Without belittling the magnitude and significance of these cuts, it is important to remember that legal aid never was a generous program. Expenditure per eligible recipient in the United States, presently $6.20 a year, reached a peak of $8.23 in 1981; in 1976, ten years after the federal program began, it was only $3.64.[459]

There is a real possibility that we are witnessing a long-term retreat from state support for legal aid. President Reagan repeatedly has insisted that these services should be administered by the state or locality and that ideally they should be rendered charitably—knowing full well that many jurisdictions and many lawyers will do nothing at all. His then special assistant, Edwin Meese III (now Attorney General), has asserted that the legal needs of the poor could be handled adequately by law students supervised by volunteer attorneys.[460] The Legal Services Corporation has taken

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455. Menkel-Meadow, *supra* note 281, at 55.

456. L. SIEGEL, *supra* note 454, at 11. A more recent source stated that 400 offices were closed. Chen, *The Poor Still Go Begging for Legal Help,* L.A. Times, Feb. 19, 1984, § 1, at 8, col. 2. In 1976, there were 11.2 lawyers for every 10,000 in the population who could pay for their services. LEGAL SERVICES CORP., 1976 ANNUAL REPORT 14 (1976). Today there are 649,000 lawyers for a population of 230 million, or 28.2 lawyers per 10,000 people. B. Curran, American Lawyers in the 1980s, at 1 (1984) (unpublished paper) (presented to Law and Society Association meeting, Boston, June 6–9, 1984).

457. Donald P. Bogard, President of the Legal Services Corporation, wrote the Western Center on Law and Poverty on January 4, 1984, that a preliminary decision had been made to terminate funding. The Center has sued Bogard and the Corporation to enjoin the cutoff. Blake, *Poverty Law Center Sues U.S. Agency,* L.A. Times, Feb. 8, 1984, § 1, at 3, col. 6.

458. L. SIEGEL, *supra* note 454, at 6, 10. Nationwide, there now is only one lawyer for every 10,000 poor people. Chen, *supra* note 456.

459. L. SIEGEL, *supra* note 454, at 6. If the denominator in this ratio is the total number of poor people rather than just those served by existing programs, then the expenditure in 1976 was only $2.16 per person. Huber, *supra* note 89, at 758 n.28. In Canada, it is approximately Can.$3.36. Zemans, *Canada,* in PERSPECTIVES, *supra* note 2, at 93, 122 n.6.

460. *Law Deans Challenge Meese on Legal Services Remarks,* POVERTY L. TODAY, Summer 1981, at 4. The Legal Services Corporation has begun to implement this idea, setting aside one million dollars for law school programs that would deliver legal services to the poor. Office of Program Development, Legal Services Corp., A Brief Overview of the Law School Clinical Program (n.d.). This has met with widespread

these exhortations seriously. In 1979, it planned to spend over two million dollars to encourage *pro bono* activities,[461] and ninety-six of its programs had a *pro bono* component in 1981.[462] Nevertheless, the experiments have not been encouraging. Low-income volunteers used as lay advocates require extensive training and supervision and have a high turnover. Retired attorneys are not available in sufficient numbers and often lack the requisite expertise.[463] Although former Legal Services Corporation president Dan Bradley hoped that each of the more than one-half million private practitioners would accept one case a year, no more than a tiny minority of the profession ever has responded to such pleas.[464] Private attorneys have taken only a small fraction of the cases that the reduced legal aid programs have had to turn away.[465] The bar of Montgomery County, Maryland, raised only $23,000 for legal aid; the Nebraska bar raised only $16,000.[466] Nor have the states been any more forthcoming in assuming the responsibility abdicated by the federal government. Although Florida enacted legislation in 1981 giving legal aid programs the interest earned on clients trust funds, the Greater Miami Legal Services program, which had lost $600,000 in federal funds, received only $27,000 from the state.[467] It seems

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opposition from clinical teachers. *See, e.g.*, draft letter from 14 clinical law professors (Mar. 23, 1984); letter from Professor Anthony G. Amsterdam to Peter Broccoletti, Director, Office of Program Development, Legal Services Corporation (Sept. 23, 1983).

461. *Plans Made to Increase Pro Bono Efforts of Private Lawyers*, LEGAL SERVICES CORP. NEWS, Mar.–Apr. 1979, at 1.

462. *Opinion*, POVERTY L. TODAY, Fall 1981, at 2.

463. *Retired Attorney Involvement Studied*, POVERTY L. TODAY, Nov. 1981, at 5.

464. *Bradley Visits with Programs, Clients, Bar Leaders*, LEGAL SERVICES CORP. NEWS, July–Aug. 1979, at 2. Several empirical studies document that the private profession never has made a significant *pro bono* contribution, *e.g.*, J. HANDLER, *supra* note 184, at 91–110; D. MADDI & F. MERRILL, THE PRIVATE PRACTICING BAR AND LEGAL SERVICES FOR LOW-INCOME PEOPLE 14–15 (1971); D. ROSENTHAL, *supra* note 296, at 149–57, 163–67; Lochner, *supra* note 64, at 439 n.16, 456–59.

465. For example, private attorneys took only one percent of the cases rejected by legal aid in Eastern Michigan. L. SIEGEL, *supra* note 454, at 23.

466. *Bar Associations Move to Fill Gaps*, POVERTY L. TODAY, Winter 1982, at 4.

467. L. SIEGEL, *supra* note 454, at 24. In Minnesota, however, legal aid expects to receive $1.3 million a year. *Civil Filing Fees to Fund Legal Services*, POVERTY L. TODAY, Spring 1982, at 4. But such sources of funding are contingent on factors unrelated to the legal needs of the poor, such as fluctuations in the economy. California enacted such a program in 1981, to begin in March 1983, which expected to generate six million dollars a year. But before the first payments were made in April 1984, several lawyers filed suit to enjoin the program, arguing that it was unconstitutional. A San Diego judge upheld the statute, but only by construing lawyer participation as voluntary, a construction that would have destroyed the program. The case is being appealed. Chen, *Release of $4 Million in Legal Aid Funds Delayed*, L.A. Times, Feb. 29, 1984, § 1, at 3. Even if the program survives, it will not replace the ten million dollars a year lost as a result of Reagan's cuts. Chen, *supra* note 456, at 8., col. 2. Participation also is voluntary in Florida, and only 10% of lawyers chose to join in the first year, producing only $423,000. Matthews, *IOLTA, Princess of Newfunda: Interest on Lawyer Trust Fund Accounts, Revisited*, 39(1) N.L.A.D.A. BRIEFCASE, Fall 1982, at 32.

highly unlikely that either private philanthropy or local government will be able to provide anything like the level of legal aid that national governments furnished during the 1960's and 1970's, or even the level attained before national governments took responsibility.[468]

B. Who Uses Legal Aid?

At the outset, it is essential to recognize that individuals consult lawyers, not just legal aid lawyers, for nonbusiness purposes very infrequently. Even in the United States, which has a reputation for being lawyer-ridden and lawyer-dependent, one-third of the population never see a lawyer during their lifetimes, less than thirty-seven percent see a lawyer more than once, and only twenty percent do so more than twice.[469] In England and Wales, as one would expect, the proportions are even lower: In 1977 forty-three percent of people over eighteen never had seen a lawyer, only one in three had seen a lawyer within the past five years, and less than one in seven have done so during the previous year.[470] In Scotland, sixty-one percent never have seen a lawyer, another fourteen percent have not seen one within the previous five years, and only fifteen percent have seen a lawyer more than once.[471]

Is this pattern repeated for legal aid? On the one hand, because lawyer use by fee-paying clients varies directly with income and wealth,[472] I would expect poor people to use lawyers less often. On the other, to the extent that nonuse is attributable to the cost of legal services, legal aid might increase recourse to legal remedies. The actual data are mixed. In the Netherlands in 1976, thirty percent of the population eligible for free legal aid had seen a lawyer at least once, compared with only eighteen percent of those required to contribute to the cost of legal aid.[473] In three poor London boroughs, where most of the population in the early 1970's would have been eligible for legal aid, nearly four-fifths never had seen a solicitor and approximately only four percent had seen a lawyer more than once, irrespective of need.[474] Thus, lowering the financial ob-

468. When the Reagan administration cut the grant for legal services in Massachusetts from $6.9 million in 1982 to $4.5 million in 1983, the state sought to make up the difference by imposing an additional five dollar fee in all civil cases (two dollars in small claims court), by which it hoped to raise $1 million to $1.2 million per year, or less than one-half the amount cut. N.Y. Times, Oct. 30, 1983, § 1, at 21.

469. B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 185, 190 (1977).

470. 2 ROYAL COMM'N, *supra* note 63, at 180–85.

471. 2 SCOTTISH ROYAL COMM'N, *supra* note 181, at 57–58.

472. B. CURRAN, *supra* note 469, at 188–89. *See generally* Griffiths, *supra* note 168, at 263; Mayhew & Reiss, *The Social Organization of Legal Contracts,* 34 AM. J. SOC. 309 (1969).

473. Schuyt, *supra* note 39, at 106.

474. B. ABEL-SMITH, *supra* note 73, at 157. The survey classified seven types of

stacles to legal advice and representation does not appear to induce people to abuse the privilege and consult lawyers unnecessarily.[475]

The characteristics of those who use legal aid are limited by eligibility criteria phrased largely in terms of income and wealth,[476] and sometimes citizenship.[477] Within this population, actual use displays marked variation. Consultation with a lawyer appears to vary inversely with income, perhaps because those who are less impoverished are required to make a contribution.[478] In Britain between 1975 and 1980, two-thirds of those granted legal aid were exempt from contributions; in Sweden in 1974, only eighteen percent of those aided paid more than the minimum contribution;[479] and in France, about sixty-two percent of the users in 1974 were exempt from contribution.[480] As a result, legal aid has become strongly identified with welfare recipients as simply another benefit consumed by those already dependent on the state: Forty-seven

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cases as "not in *need of advice*." These included the making of wills, and problems with defective goods, installment arrears, and social security. *Id.*

475. In an English scheme designed to encourage accident victims to seek legal advice by advertising the availability of a free initial interview, 80% of the solicitors consulted took some action to obtain compensation, and compensation was secured or still was being negotiated in 83% of the claims made. H. GENN, *supra* note 74, at 3, 27–31. Similarly, when a German population covered by legal insurance was compared with the population of litigants generally, the former did not assert risky claims more often. They settled most cases (excluding traffic cases) as often, and they did not appeal more often. Blankenburg, *supra* note 64, at 610–22.

476. Charitable legal aid programs antedating the present state schemes were even more restrictive. In the 1930's in England, the Poor Man's Lawyer would not accept anyone from a family earning more than £4 a week, J. JONES, *supra* note 407, at 15–16.

477. *LSC funded at $241 Million through Nov. 20,* POVERTY L. TODAY, Fall 1981, at 1 (United States). The House Judiciary Committee recently recommended relaxing the restrictions against representing noncitizens, L.A. Times, May 13, 1983, § 1, at 9, col. 1. In Germany, aliens are eligible only if their own countries grant reciprocal privileges to German residents. Scholler, *The New Concept of Financial Assistance for Litigants in the Federal Republic of Germany,* 2 WINDSOR Y.B. ACCESS JUST. 253, 259 (1982). In France, the 1972 law establishing legal aid extended it to resident aliens. Pradel, *France,* in PERSPECTIVES, *supra* note 2, at 134, 136. Four years after the Legal Aid and Advice Act came into operation in the United Kingdom, a High Court judge, hearing a case between two legally aided Iraquis, complained to counsel, "Do you and I subscribe for people who are not English to litigate, and do we pay for their litigation in English courts?" B. ABEL-SMITH & R. STEVENS, *supra* note 167, at 332.

478. In the United Kingdom in January 1979, 14% of those offered legal aid for a contribution of less than £50 declined, but one-third did so when the contribution was more than £50. 1 ROYAL COMM'N, *supra* note 63, at 119; *see also* L. BRIDGES, *supra* note 409, at 95, 113 (legal advice in nonmatrimonial problems sought by very poor rather than "working" poor; unskilled manual workers overrepresented in civil legal aid). But the use of neighborhood offices instead of a legal aid bureau located at the courthouse did increase the number of clients with lower incomes and less education. K. FISHER & C. IVIE, FRANCHISING JUSTICE: THE OFFICE OF ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM AND TRADITIONAL LEGAL AID 1–2, 6–9 (1971).

479. Schuyt, *Dilemmas in the Delivery of Legal Services,* in INNOVATIONS, *supra* note 2, at 53, 74.

480. M. VALÉTAS, *supra* note 102, at 32.

percent of those assisted in France are unemployed,[481] fifty-seven percent in Japan in 1977 were public charges,[482] and in the United States, according to the Legal Services Corporation, only 21.7% of the clients in a sample LSC funded program had "employment" as their major source of income.[483] The association between poverty and legal aid persists even when no contribution is required from those better off, partly because the latter prefer private lawyers[484] and partly because programs deliberately may target the most deprived.[485] At the same time, evidence suggests that higher socioeconomic status and more education increase the likelihood that an individual will seek legal advice.[486] A second significant variable is age. Both the young and the old are underrepresented in comparison to their proportions of the eligible population.[487] So are ethnic minorities.[488]

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481. *Id.* at 15.

482. Kojima, *Japan*, in PERSPECTIVES, *supra* note 2, at 191, 196.

483. LEGAL SERVICES CORP., 1979 ANNUAL REPORT 14 (1979).

484. B. ABEL-SMITH, *supra* note 73, at 89, 91; *cf.* R. HERMANN, *supra* note 13, at 168 (preference of accused for private counsel over public defenders).

485. Schuyt, *Dilemmas in the Delivery of Legal Services*, in INNOVATIONS, *supra* note 2, at 53, 70. Sometimes overrepresentation of the very poorest results from the failure of government to adjust the means test to reflect changes in the standard of living. In New South Wales, Australia, the means test for the Public Solicitor was increased only twice in the more than 30 years between the creation of the program in 1943 and 1975. R. SACKVILLE, *supra* note 56, at 79. In the United Kingdom, there was no adjustment in the legal aid means test during the high inflation years of 1980 and 1981. *Legal Aid—Screw Tightens in 1982*, LAG BULL., Jan. 1982, at 5.

486. B. ABEL-SMITH, *supra* note 73, at 155, 159 (United Kingdom); Falke, *supra* note 75, at 125 (Germany).

487. L. BRIDGES, *supra* note 409, at 109–10; M. VALÉTAS, *supra* note 102, at 15 (France); Breger, *supra* note 30, at 306 n.130 (United States); Falke, *supra* note 75, at 127 (Germany); Neal, *Delivery of Legal Services—The Innovative Approach of the Fitzroy Legal Service*, 11 MELB. U.L. REV. 427, 436 (1978) (Australia). In the United States, less than 15% of clients are over 60. LEGAL SERVICES CORP., 1981 ANNUAL REPORT 16 (1982); 1980 *id.* at 10 (1980); 1979 *id.* at 14 (1979).

488. The following table shows the ethnic breakdown of the clientele of OEO Legal Services (in percentages).

	1967	1972	1979	1980	1981
Black	41.9	34.5	29.7	26.3	25.9
White	35.9	40.9	56.9	54.8	57.4
Hispanic	22.2	24.6	10.1	16.6	13.7
Native American				1.6	2.1
Asian/Pacific Islander			3.2	0.7	0.8

J. HANDLER, *supra* note 184, at 63 (1967, 1972); LEGAL SERVICES CORP., 1981 ANNUAL REPORT 16 (1982); 1980 *id.* at 10 (1980); 1979 *id.* at 14 (1979). *But see* Neal, *supra* note 487, at 441 (more than one-third of community legal centre clients were immigrants to Australia). It is interesting that the proportion of whites has been increasing every year since the OEO Legal Services Program was initiated while that of blacks has been decreasing. In France, aliens constituted about six percent of the population in 1972 and presumably a much higher proportion of those eligible for legal aid. Herzog & Ecolivet, *The Reform of the Legal Professions and of Legal Aid in France*, 22

Perhaps most striking is the disproportionate number of women among legal aid clients. In France, two-thirds of all recipients are women, although men are overrepresented among litigants generally.[489] In the United States, the proportion is even higher, although again men more frequently use private lawyers.[490] In Britain, women constitute more than three-quarters of legal aid clients but less than half of all users of lawyers' services.[491] In the Netherlands, a slightly higher proportion of women than men have been to law shops, although this proportion is reversed for clients who consult private lawyers and notaries.[492] Furthermore, in a study at a German clinic, women disproportionately used legal aid even though men characterized problems as legal ones twice as often as women, and women felt more strongly that one should not consult a lawyer except as a last resort.[493] Two factors contribute to this pattern. The first is the feminization of poverty: Women, especially single mothers, constitute a growing percentage of the poor.[494] The second, which I will explore further below,[495] is that family matters dominate legal aid.[496] It is only in this area that women are overrepresented as clients, at least in Germany,[497] France,[498] and Britain.[499]

The pattern of legal aid use reflects the interaction of social

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INT'L & COMP. L.Q. 462, 485 n.116 (1973). They were 11% of a sample of those legally aided. M. VALÉTAS, *supra* note 102, at 14.

489. *Compare* M. VALÉTAS, *supra* note 102, at 15 (legal aid recipients) *with* Y. BARAQUIN, LES JUSTICIABLES FACE À LA JUSTICE CIVILE 18 (1974) (private litigants).

490. *Compare* LEGAL SERVICES CORP., 1979 ANNUAL REPORT 14 (1979) (women are 68% of legal aid clients) *with* B. CURRAN, *supra* note 469, at 186 (women are 50% of all clients).

491. *Compare* L. BRIDGES, *supra* note 409, at 104 (women were 76% of civil legal aid applicants in Birmingham) *with* B. ABEL-SMITH, *supra* note 73, at 82 (slightly more than one-half of clients were men) *and* 2 ROYAL COMM'N, *supra* note 63, at 194 (53% of legal service users were men). *Cf.* 2 SCOTTISH ROYAL COMM'N, *supra* note 181, at 57 (higher proportion of men than women have used lawyers at least once).

492. Schuyt, *supra* note 39, at 106.

493. Falke, *supra* note 75, at 135.

494. M. HARRINGTON, THE NEW AMERICAN POVERTY (1984); Ehrenreich & Piven, *The Feminization of Poverty*, 31 DISSENT 162 (1984); *cf.* M. VALÉTAS, *supra* note 102, at 13–15 (disproportionate number of divorced persons are legal aid clients).

495. *See infra* notes 560–62 and accompanying text.

496. Where this is not the case, as in the Fitzroy Legal Service in Melbourne, women are only one-third of the clientele. Neal, *supra* note 487, at 435 (the number of male clients may be overstated because the man's name is recorded when a couple seeks assistance); *accord* A. BYLES & P. MORRIS, *supra* note 280, at 33–34 (North Kensington Neighborhood Law Centre).

497. Falke, *supra* note 75, at 126.

498. M. VALÉTAS, *supra* note 102, at 29.

499. L. BRIDGES, *supra* note 409, at 91, 104. In Birmingham, women represented 89% of applicants for legal advice in matrimonial matters but only 56% in others; 83% of applications for civil legal aid in matrimonial and family matters but only 34% in others.

structural variables, the nature of the legal system and of substantive rights, and the procedures through which the state makes such assistance available. The last of these factors remains important, in part because legal aid programs continue to stigmatize applicants in ways reminiscent of Victorian notions of charity. True, a legally aided plaintiff who loses a case no longer is whipped and placed in the pillory, as during the Elizabethan age.[500] Nevertheless, a nostalgic fondness for the "deserving poor" may be discerned in the will of the benefactor who created the office of Public Attorney in San Diego: "I hereby subscribe to the view that persons who have saved a little money or other property, and who are in danger of losing it, are more worthy of help to preserve what they have laid by, than persons who have not had the foresight or self-control to lay by savings."[501] This tone still prevails today, despite the Rushcliffe Committee's assertion:

> An outstanding characteristic of expenditure on legal matters is that people may be involved in litigation through no fault of their own, and the costs of that litigation may be far beyond their financial circumstances. Many people of moderate means, who in the ordinary way would not contemplate seeking aid from the State may suddenly find themselves in urgent need of help for this special purpose. In our view people in this position should be able to get the help they need without being treated as "poor persons."[502]

The primary mechanism by which legal aid stigmatizes recipients is the means test. The ceiling tends to be very low,[503] thereby branding all legal aid clients as impoverished, and it is framed in demeaning language: for instance, a requirement that payment for legal services must cause serious harm to the family.[504] Broad administrative discretion permits the test to be administered unfairly.[505] Certain categories of potential recipients are especially suspect: petty bourgeois—farmers and small businesspersons—or women who are cohabiting.[506] The investigation of financial means also can threaten the confidentiality of the lawyer-client relationship.[507] The stringency of the means test appears to be a function of

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500. R. EGERTON, *supra* note 156, at 7.

501. LEGAL SERVICES CORP., 1978 ANNUAL REPORT 25–26 (1978).

502. RUSHCLIFFE, *supra* note 62, at 27; *see also infra* text accompanying notes 513–17.

503. In Italy, for instance, the maximum annual income was $356 in 1977. Vigoriti, *Italy,* in PERSPECTIVES, *supra* note 2, at 177, 186.

504. König, *Austria,* in PERSPECTIVES, *supra* note 2, at 76, 78.

505. Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 57.

506. M. VALÉTAS, *supra* note 102, at 41, 76; Pradel, *France,* in PERSPECTIVES, *supra* note 2, at 134, 138.

507. *Client Confidentiality Supported by Health and Human Services,* LEGAL SERVICES CORP. NEWS, May–June 1980, at 5. When I was a lawyer with New Haven Legal Assistance Association, Inc. in 1971 to 1972, the opposing counsel and the bench con-

how compelling the state views the applicant's claim to legal services. Legal advice may be offered without any means test at all,[508] but legal representation in an appeal may require the client to file a new application.[509] Closely related to the means test is the requirement that all but the totally destitute contribute. Because the contributions may cost as much to collect as they are worth,[510] the purpose, apparently, is to discourage applications and to make those granted seem more meritorious; the purpose is *not* to generate revenue. Similarly, some jurisdictions seek to recover part or all of the cost of legal aid from the recipient after the fact.[511] Those formally entitled to legal aid also may be deterred from applying by the fear that, if they lose, they will be liable for their adversaries' costs as well.[512]

The denial of certain services also stigmatizes potential clients. In the past, the poor often were not entitled to representation in divorce,[513] at least not when they were at "fault."[514] Although a client who pays his own lawyer can initiate any lawsuit without hin-

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stantly challenged us to prove the eligibility of our clients, although neither bench nor bar had any legitimate interest in the matter.

508. RUSHCLIFFE, *supra* note 62, at 36–37 (United Kingdom); J. COOPER, *supra* note 2, at 157–58 (Netherlands).

509. Pradel, *France,* in PERSPECTIVES, *supra* note 2, at 134, 140. In the United Kingdom, there was no possibility of assistance in an appeal until 1774 and possibly later. R. EGERTON, *supra* note 156, at 8. Even today, all jurisdictions are far more generous in granting legal aid for criminal than for civil matters, and for the definition of civil status (*e.g.,* divorce) and private property than for the determination of entitlements to government benefits (*i.e.,* administrative hearings).

510. Schuyt, *Dilemmas in the Delivery of Legal Services,* in INNOVATIONS, *supra* note 2, at 53, 74 (suggesting need for cost-benefit analysis); *cf.* Boman, *Scandinavia,* in PERSPECTIVES, *supra* note 2, at 243, 252 (Sweden) (if client's cost contribution is greater than counsel's fee, counsel is responsible for paying balance to state). In England and Wales in 1977–1978, contributions recouped about nine percent of the cost of civil legal aid, four percent of the cost of legal advice, four percent of the cost of criminal legal aid in Magistrates' Courts, and two percent in higher courts. 1 ROYAL COMM'N, *supra* note 63, at 56–57. The Supplementary Benefits Commission, which administers the means test for civil legal aid and advice, spent £3.3 million to collect £3.65 million in 1977 through 1978. *Id.* at 137. The Conservative government introduced means-tested contributions as a prerequisite for criminal legal aid in the United Kingdom in 1982. Hansen, *Law Society Shakes Civil Servants,* LAG BULL., Mar. 1982, at 3.

511. Kojima, *Japan,* in PERSPECTIVES, *supra* note 2, at 191, 202 (Japan); König, *Austria,* in PERSPECTIVES, *supra* note 2, at 76, 80 (Austria); Partington, *Great Britain,* in PERSPECTIVES, *supra* note 2, at 158, 161 (United Kingdom); San Hyun Song, *Korea,* in PERSPECTIVES, *supra* note 2 at 204, 208 212 n.7 (Korea). In the United States, a convicted indigent was required to pay a portion of his court-appointed attorney's fees as a condition of probation. State v. Barklind, 12 Wash. App. 818, 532 P.2d 633 (1975).

512. Pradel, *France,* in PERSPECTIVES, *supra* note 2, at 134, 144 (France); Scholler, *supra* note 477, at 457 (Germany); *cf.* Kötz, *Public Interest Litigation: A Comparative Survey,* in ACCESS, *supra* note 2, at 85, 90–95.

513. J. KATZ, *supra* note 2, at 44; LEGAL SERVICES CORP., 1978 ANNUAL REPORT 26 (1978).

514. LAW SOCIETY, 1940 ANNUAL REPORT 70 (1940) (Poor Persons Procedure in

drance, legally aided litigants must demonstrate that their claims possess legal merit and a reasonable chance of success.[515] In Britain, until 1930, an accused criminal had to disclose his defense before being granted legal aid; even later, the strength of that defense might affect the decision to grant aid.[516] A person fortunate enough to be a client of the British Army Legal Aid scheme in the 1940's, who was injured by his lawyer's negligence, might have been denied the right to seek damages for malpractice, a right every paying client enjoys.[517] I will discuss below the tactics that legal aid lawyers can and will use on behalf of poor clients and the quality of services rendered—both of which may influence the decisions of those eligible to seek such assistance.[518]

C. *Which Lawyers Do Clients Use?*

In discussing the principal actors involved in shaping the institution of legal aid, I mentioned the conflict over allocating clients to lawyers. Stated briefly, the legal profession wants to distribute state-subsidized demand as broadly and equally as possible; legal aid lawyers want to monopolize that demand; and potential clients want to retain the best qualified lawyer while expending the least effort possible in a situation of highly imperfect information.[519] We can watch this struggle unfold as mechanisms develop for distributing clients. The first issue, of course, is the choice between judicare and staffed office programs. The profession has been extraordinarily successful in channelling state funds to the former, which is the exclusive form of legal aid in many countries including France, Finland, Germany, Austria, and Japan, and the dominant form in almost every other (including England and Wales, Scotland, the Netherlands, Canada, Australia, New Zealand, Norway, and Sweden).[520] Even in the United States, criminal defense long was domi-

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the United Kingdom). Even today, poor couples in France must submit to an attempt at reconciliation. M. VALÉTAS, *supra* note 102, at 39.

515. König, *Austria,* in PERSPECTIVES, *supra* note 2, at 76, 80; Partington, *Great Britain,* in PERSPECTIVES, *supra* note 2, at 158, 160 (United Kingdom); Pradel, *France,* in PERSPECTIVES, *supra* note 2, at 134, 137. In France, 20% of the applicants are rejected, 22% of those for lack of a meritorious claim. M. VALÉTAS, *supra* note 102, at 50.

516. RUSHCLIFFE, *supra* note 62, at 25.

517. *Id.* at 22 (Army Legal Aid Schemes).

518. *See infra* notes 590–693 and accompanying text.

519. *See supra* notes 140–310 and accompanying text.

520. *See generally* PERSPECTIVES, *supra* note 2. In England and Wales, the 75 law centre solicitors were projected to receive about £2 million a year. In 1977–1978, the state spent £85 million on legal aid payments to 34,000 private solicitors and 4000 barristers. J. COOPER, *supra* note 2, at 79. In the Netherlands in 1979, the law shops budget was 210,000 guilders, but the state spent 12 million guilders on the Buro that referred clients to private lawyers who were paid 130 million guilders. *See* Table 9. In Ontario, Canada, in 1981–1982, the clinic budget was Can.$5,469,935 out of a total

nated by court-appointed private counsel, [521] and representation increasingly is being diverted from staffed offices to private practitioners.[522] This achievement is all the more striking because almost every other significant actor opposes it. The state prefers staffed offices because budgets can be controlled and services rendered more inexpensively.[523] Salaried legal aid lawyers naturally do not

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legal aid budget of Can.$56,241,045, or less than 10%. F. Zemans, *supra* note 26, at 10 n.41. In Australia, federal government support for the community legal centres barely exceeds one percent of the federal budget for legal aid payments to private practitioners. Bell, *Funding Legal Centres: The Political Dimension,* 7 LEGAL SERVICE BULL. 265, 266 (1982). In 1980–1981, federal and state governments spent A$55,504,000 on legal aid but only A$366,616 on community legal centres. Richardson, *Funding Community Legal Centres,* 7 LEGAL SERVICE BULL. 209, 210–11 (1982). In 1982–1983, total federal and state expenditure on legal aid was A$96,253,000, whereas federal grants to all community law centres in 1983 totalled A$505,500, or slightly over one-half percent. 5 LEGAL AID CLEARINGHOUSE BULL. 3, 6 (1984). In 1984, the total federal contribution to community legal centres had risen to A$1,000,000, and the states contributed another A$733,586. *Id.* at 9–10. The Australian Legal Aid Office had more than 376 employees in June 1975 but lost staff in the following years. By 1976–1977, it spent almost twice as much on referrals to private practitioners (A$9,550,000) as on its own staff (A$5,468,000). Armstrong, *supra* note 276, at 222, 235, 237; *see* Table 8. In 1982–1983, the major legal aid programs in Australia spent A$21,882,000 on salaries of lawyers and support staff but A$62,282,000 on payments to private practitioners—almost three times as much. 5 LEGAL AID CLEARINGHOUSE BULL. 4 (1984). Scotland's only staffed office, founded in 1979, is the Castlemilk Advice Centre (combining a Citizens Advice Bureau and Law Centre). 1 SCOTTISH ROYAL COMM'N, *supra* note 181, at 38. New Zealand has only the Grey Lynn Neighborhood Law Office, founded in Auckland in 1977. Muir, *Community Legal Services in New Zealand,* 6 LEGAL SERVICE BULL. 177, 178 (1981); Huni, McIntyre, Ruthe & Tuisamoa, *Community Legal Services in NZ: A Reply,* 7 LEGAL SERVICE BULL. 66 (1982).

521. In 1964, 2900 out of 3100 counties used court-appointed counsel. I L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 15 (1965). Even in fiscal year 1976, expenditures for court-appointed counsel were $11,950,000, but expenditures for public defender and community defender programs were only $5,100,000 and $2,000,000 respectively. D. Saari, The Financial Impacts of the Right to Counsel for Criminal Defense of the Poor 6 (1979) (unpublished manuscript) (prepared for the Law and Society Association Conference, San Francisco, Cal., May 10–11, 1979).

522. Starting in 1982, the Legal Services Corporation has been required to spend 10% of its budget on private lawyers. LEGAL SERVICES CORP., 1981 ANNUAL REPORT 11 (1982); *see also* 46 Fed. Reg. 61,017–19 (1981).

523. The relative cost of staffed office and judicare programs has been debated hotly, especially since budgets have been cut and cost-effectiveness emphasized. Considerable evidence supports the common sense expectation that salaried lawyers are cheaper because they are paid very poorly and their offices enjoy economies of scale and efficiencies of specialization. The Services Divorce Department, established in the United Kingdom during World War II, was expected, at full efficiency, to be able to complete a divorce for three guineas. R. EGERTON, *supra* note 156, at 19. Although the comparison obviously requires qualification, it is noteworthy that in 1978–1979 the Citizens Advice Bureaux in Scotland handled each enquiry at a cost of £1.50, while solicitors in Scotland offering advice under the Legal Advice and Assistance scheme charged an average of £26 per case. 1 SCOTTISH ROYAL COMM'N, *supra* note 181, at 69–70. In Scotland, and in the American judicare plan described by Cole & Greenberger, *supra* note 174, at 709–16, private lawyers apparently charged the maximum amount allowed by the state (£25 in Scotland), regardless of the complexity of the matter. Studies com-

paring public defenders and court-appointed private counsel have found the former to be less expensive, at least in larger jurisdictions, Etheridge, *Lawyers Versus Indigents: Conflict of Interest in Professional-Client Relations in the Legal Profession,* in THE PROFESSIONS AND THEIR PROSPECTS 245, 258–59 (E. Freidson ed. 1971). *See generally* R. HERMANN, *supra* note 13, at 37, 77–78, 125, 127–28.

In Quebec, where both systems operate, judicare is 50% more expensive. Cooper, *Report on the Quebec Legal Aid System,* in M. CAPPELLETTI, *supra* note 6, at 617–18; Schuyt, *Dilemmas in the Delivery of Legal Services,* in INNOVATIONS, *supra* note 2, at 53, 64. The cost of judicare in Quebec varied from 20% to 166% more than the cost of staffed office service (depending on the subject matter) and was 110% more on average. Commission des Services Juridiques, Evaluation de l'Aide Juridique 35–56 (1982). On the other hand, a comparison of the two programs in British Columbia found no significant difference. P. BRANTINGHAM & P. BURNS, THE BURNABY, BRITISH COLUMBIA EXPERIMENTAL PUBLIC DEFENDER PROJECT: AN EVALUATION (1981) [hereinafter cited as P. BRANTINGHAM]. In Ontario, judicare was estimated to cost nearly four times as much per case as staffed offices. L. TAMAN, THE LEGAL SERVICES CONTROVERSY: AN EXAMINATION OF THE EVIDENCE 61 (1972). The Montreal legal aid office found that the expenditure of Can.$7166 provided services for which the scale fees would have been Can.$57,550. Merricks, *Quebec's New Plan,* 122 NEW L.J. 853 (1972); *see also* Zemans, *supra* note 15, at 400–02 (no significant difference between judicare and staffed office costs of criminal defense in British Columbia, but salaried lawyers less than half as expensive as private in Quebec). Because judicare is both more expensive and its budget less easily controlled, Ontario is considering shifting cases to clinics. F. Zemans, *supra* note 26, at 15.

A study by the South Australian Legal Services Commission concluded that staffed office lawyers could do the same work for less than half the cost of private practitioners in family and other civil matters and for less than one-third the cost in criminal cases. Armstrong & Verlato, *Can Legal Aid Afford Private Lawyers?,* 5 LEGAL SERVICE BULL. 88, 89 (1980). Another study, although acknowledging that the Armstrong and Verlato article, as well as three other comparisons in New South Wales, had found the staffed office about half as expensive as judicare, criticized their methodology, concluding, on the basis of other data, that one program was not cheaper than the other overall, although there were cost differences. G. MEREDITH, LEGAL AID: COST COMPARISON—SALARIED AND PRIVATE LAWYERS 7–8, 15–30 (1983); *see also* R. SACKVILLE, *supra* note 56, at 163 (the New South Wales Public Solicitor is estimated to cost A$199 per case compared with A$223 per case under the New South Wales Law Society judicare scheme).

In the United States, there is considerable evidence to the same effect. S. BRAKEL, JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE 113–22 (1974); M. CAPPELLETTI, *supra* note 6, at 522 (citing Goodman & Feuillan, Alternative Approaches to the Provision of Legal Services for the Rural Poor: Judicare and the Decentralized Staff Program (Bureau of Social Science Research, Jan., 1972)); LEGAL SERVICES CORP., *supra* note 166, at 90–104; Cole & Greenberger, *supra* note 174, at 715–16. Recent experiments with retaining private law firms to provide criminal defense for the poor have suggested that cost increases rapidly and quality declines. Spanenberg, Davis & Smith, *Contract Defense Systems Under Attack: Balancing Cost and Quality,* 39(1) N.L.A.D.A. BRIEFCASE 5, 8, 12 (Fall 1982) [hereinafter cited as Spanenberg]. *See generally Government Goes Private: The Costs of Contracting Out,* DOLLARS & SENSE, Feb. 1984, at 13 (other government services). In 1978, the provincial government of Saskatchewan required the staffed office legal aid program to accept more routine cases because they handled them more cheaply than judicare. As a result, the number of criminal legal aid cases handled by private attorneys dropped from 2562 to 505 and the number of civil cases from 281 to 120. Gathercole, *Legal Services and the Poor,* in LAWYERS AND THE CONSUMER INTEREST, *supra* note 169, at 407, 415–16. The recently elected right-center government in the Netherlands is considering shifting from a delivery system dominated by judicare to one that makes greater use of contracts

want to lose funds to the private profession.[524] In certain areas of dispute, clients clearly prefer staffed offices when given a choice.[525]

The profession not only has persuaded the state to favor judicare programs, it also has structured those programs so that they spread demand evenly among lawyers.[526] It justifies this distribution in the name of client choice—the ideology of consumer supremacy in a "free" market that legitimates capitalism generally.[527] But to prevent consumer preferences from concentrating demand among a few lawyers, the profession deliberately denies potential clients the information they would need to make informed choices. Individual lawyers are not allowed to advertise, which discourages practices from specializing in legal aid cases, even though the profession engages in institutional advertising to stimulate the

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with lawyers to deliver a fixed number of cases per year for a fixed remuneration. A. Klijn, *supra* note 196, at 17. For the relative budgets and rates of growth, see Table 9.

On the other side of the political spectrum, the new Labour government in Australia is concerned that payments to private practitioners increased 64% in real terms between 1979–1980 and 1982–1983, although the number of cases handled increased only 28% during that period. 4 LEGAL AID CLEARINGHOUSE BULL. 149 (1983) (quoting Mr. Lionel Bowen, Minister for Trade, in Hansard, Oct. 6, 1983). And in France, state expenditure on legal aid payments to private practitioners increased 119% between 1976 and 1979 (from 39.2 million francs to 85.7 million francs), but the number of cases handled increased only 20% (from 110,747 to 133,108). *See* Table 16.

524. B. GARTH, *supra* note 2, at 35. The directors of 37 staff attorney programs expressed generally favorable opinions about the pilot projects using private practitioners established by the Legal Services Corporation as part of the Delivery Systems Study. However, those who directed the pilot programs were most favorable, those who cooperated with them were generally less favorable, and those who merely observed them were distinctly unfavorable. Furthermore, directors were more enthusiastic about programs with a staffed office component than they were about pure judicare or prepaid plans. Finally, their endorsement was predicated on the use of private practitioners primarily for routine individual casework, especially in rural areas where the population is dispersed. LEGAL SERVICES CORP., *supra* note 166, at 83–85.

525. Falke, *supra* note 75, at 136 n.36. Clients in Quebec can choose one of the 62 offices and five clinics staffed by 205 salaried lawyers or one of the 1750 private practitioners (out of 3200 in the province) who signed up under the judicare scheme. In the year following April 1, 1973, 77% chose the staffed office. The subject matter breakdown revealed client beliefs about the relative strengths of the two categories. Clients chose staffed offices in 67% of matrimonial problems, 74% of criminal cases, and 89% of other civil matters. Cooper, *Report on the Quebec Legal Aid System,* in M. CAPPELLETTI, *supra* note 6, at 614, 616–17.

526. The President of the South Australian Law Society wrote, "[A]ssignments are made by the legal officers in strict order of rotation. . . . Indeed, the method of assignment is at the very core of the Scheme. Unless the work was spread in a satisfactory manner the goodwill of the profession could be largely destroyed." C. Thomson, Commentary on Draft Working Paper 12–13 (Sept. 11, 1974) (unpublished manuscript), *quoted in* R. SACKVILLE, *supra* note 56, at 41 n.65.

527. B. ABEL-SMITH, *supra* note 73, at 46 (United Kingdom); S. BRAKEL, *supra* note 523, ch.4 (United States). Quebec takes the ideology seriously and gives the client a choice of private practitioner, but the client who fails to name a particular practitioner is served by a staffed office. Cooper, Report on the Quebec Legal Aid System, in M. CAPPELLETTI, *supra* note 6, at 614, 615.

aggregate demand for such work.[528] Indeed, to prevent concentration, limits may be placed on the amount of judicare work that can be performed for a single client or by a single law office.[529] Clients, painfully aware of their ignorance, readily abdicate the "choice" forced on them and seek guidance wherever it is offered.[530]

The effort to spread demand does not stop with discouraging specialization.[531] The profession has established lists of lawyers willing to take legal aid matters—and more than half of all British solicitors have signed up.[532] Although firms are asked to indicate any experience in subject matter areas of particular concern to poor clients, they tend to claim competence in every area listed.[533] Staffed offices in the Netherlands are required to refer clients to private lawyers on a strict rota basis.[534] In Britain, duty solicitor schemes place a rota of lawyers in criminal courts to advise and

528. *See supra* notes 191–92 and accompanying text. On the difficulties of operating a legal aid practice without advertising, see Hodge, *Starting a Legal Aid Practice—The First Year,* LAG BULL., Feb. 1979, at 32.

529. The first, experimental judicare program in the United States prohibited any law firm from billing more than $300 per case or $3000 per year without special authorization. S. BRAKEL, *supra* note 523, at 145; J. COOPER, *supra* note 2, at 90 n.49; *cf.* R. HERMANN, *supra* note 13, at 127 ($18,000 a year limit on court-appointed criminal defense attorneys in Washington, D.C.).

530. Among the pilot programs established by the Legal Services Corporation, several emphasized client choice: judicare, contracts with law firms, and the voucher model. "The study found, however, that most demonstration projects referred clients to the next attorney in rotation because clients did not frequently exercise their option to choose an attorney. . . . [C]lients rarely knew of any local attorneys and therefore had no preferences." LEGAL SERVICES CORP., *supra* note 166 at 52, 55. An attempt to create an "open-panel" prepaid legal services plan discovered that the officials of the union that sponsored the plan inevitably became the most frequent source of suggestions about which lawyer to use. F. MARKS, *supra* note 194, at 68.

531. When the Legal Services Corporation established pilot programs to experiment with the provision of legal services to the poor by private practitioners, it prohibited the latter from accepting any "fee-generating" cases unless virtually all local attorneys participated in the program: "Corporation funds should not be used to support referral systems that give participating private attorneys a monopoly over fee-generating cases among the eligible client population." LEGAL SERVICES CORP., *supra* note 166, at 62.

532. In 1979, the list included 7286 out of the estimated 13,000 solicitors firms in the United Kingdom. Domberger & Sherr, *Economic Efficiency in the Provision of Legal Services: The Private Practitioner and the Law Centre,* 1 INT'L REV. L. & ECON. 29, 30 (1981).

533. Duncanson, *Legal Need in England and Wales in the Sixties and Seventies: A Retrospect,* 4 U. NEW S. WALES L.J. 113, 118 & n.31 (1981). Eighty-two percent of all British solicitors firms declared their willingness to offer one half-hour interview for not more than £5. LAW SOCIETY, ANNUAL REPORT 13 (1978–1979). In Scotland, of the approximately 900 solicitors firms, 97% hold themselves out as competent to do conveyancing, 89% to do matrimonial or personal injury, 88% to do wills and estates, 79% to do traffic offences, 76% to do employment law or landlord-tenant problems, 73% to do consumer matters, 67% to do administrative hearings or criminal defense, and 50% to do social security and welfare benefits. The only area in which many were diffident was agriculture and crofting law, where less than one-quarter claimed competence. 1 SCOTTISH ROYAL COMM'N, *supra* note 181, at 27.

534. J. COOPER, *supra* note 2, at 150, 153.

represent everyone arrested.[535] Their counterpart in civil matters, the Citizens Advice Bureaux, have been the primary source of referral for legal aid matters since at least 1966.[536] They received nearly five million inquiries in 1981–1982[537] and now have private lawyers staffing nearly 300 rota schemes.[538] These mechanisms constantly are expanded and elaborated: The City of Southampton has a twenty-four-hour telephone answering service, referring one-third of its callers to legal aid; its County Court routinely sends out a legal aid leaflet with every eviction notice.[539]

But the resources and ingenuity invested in distributing legal aid work seem unable to overcome the pressures for concentration. Like all attempts to restrain competition, this one opposes the self-interest of the participants. Lawyers can handle legal aid work profitably only through mass production. As early as 1918, four years after the creation of the Poor Persons Procedure, one London solicitor processed 523 matters in a single year and another processed 401, presumably extracting a small fee from each applicant, although officially this was forbidden.[540] In a sample of

535. The first scheme was established in 1972. By 1975, they were found in 36 of the 90 courts that received more than 800 legal aid applications a year. Now there are 127 programs. The profession explicitly devised and supported the scheme to break the monopoly on criminal legal aid work that a few firms had secured through contacts with key court personnel. Z. BANKOWSKI & G. MUNGHAM, IMAGES OF LAW 50–60 (1976); J. COOPER, *supra* note 2, at 34; M. KING, *supra* note 193, at 33–36; Morris & Zander, *The Allocation of Criminal Legal Aid in Magistrates' Courts—A Study in London Courts,* 70 LAW SOC'Y'S GAZETTE 2372 (1972); Zander, *Public Policy for Legal Services,* in INNOVATIONS, *supra* note 2, at 82. But the profession also is concerned to protect the interests of the lawyer already retained by a client subsequently interviewed by a duty solicitor. Recently, therefore, it proposed to require the latter to inform the former and to require the client to discharge the retained solicitor in writing before the duty solicitor will act. Hansen, *Law Society Conflict Over Duty Solicitors,* LAG BULL., Aug. 1983, at 3. In a 1980 postal survey of all schemes then operating, less than one-half of the 87 schemes responding required even six months experience in advocacy before a solicitor could be registered, although the Law Society recommended that requirement. Bridges, Carter & Gorbing, *The Impact of Duty Solicitor Schemes in Six Magistrates' Courts,* LAG GROUP BULL., July 1982, at 12, 15. Those firms enjoying a disproportionate share of criminal defense vigorously, and sometimes successfully, opposed the introduction of a scheme. Hansen, *The Dynamics of Self-Interest,* LAG BULL., Oct. 1982, at 9.

536. B. ABEL-SMITH, *supra* note 73, at 27.

537. NATIONAL ASS'N OF CITIZENS ADVICE BUREAUX, ANNUAL REPORT AND ACCOUNTS 3 (1981–1982).

538. J. COOPER, *supra* note 2, at 34. The first rota was established in 1972. Zander, *Public Policy for Legal Services,* in INNOVATIONS, *supra* note 2, at 82. By 1979, the Law Society had granted waivers to 275 schemes, enabling solicitors in them to take cases back to their own offices. In addition, a number of Citizens Advice Bureaux employ salaried lawyers. M. ZANDER, THE STATE OF KNOWLEDGE ABOUT THE ENGLISH LEGAL PROFESSION 12–13 (1980).

539. Zander, *Public Policy for Legal Services,* in INNOVATIONS, *supra* note 2, at 83.

540. R. EGERTON, *supra* note 156, at 13; H. KIRK, PORTRAIT OF A PROFESSION 164 (1976).

twenty-two law firms in three impoverished London boroughs in the 1960's, eleven had handled no legal aid matters in the previous fortnight, nine had taken less than five, one between five and ten, and one had fifteen to twenty.[541] In Vusimaa province, which contains Helsinki, a dozen offices received more than one-third of all cases.[542] In a sample of private practitioners in Melbourne, Australia, 47% spent less than 5% of their time working for poor clients, but 11% spent more than one-quarter of their time.[543] In New South Wales, only 10% of solicitors signed up for the legal aid panel.[544] Civil and criminal legal aid work in Britain today is performed disproportionately by a small number of firms who depend on it for the majority of their income.[545] Less than 10% of the lawyers on the panel for court-appointed criminal defense work in Washington, D.C. handled 46% of the cases; 14% of the lawyers handled 61%.[546] In Australia, almost two-thirds of all lawyers received no requests for low-fee legal assistance, and 87% received less than thirteen requests a year. But 7% of lawyers received more than twenty-four requests a year, and 3% received more than eighty. Similarly, almost one-third do no legal aid work and almost two-thirds do less than thirteen cases a year, while nearly one-quarter do more than twenty-five.[547] In British Columbia, three-quarters of the profession handled no criminal legal aid cases; half

541. B. ABEL-SMITH, *supra* note 73, at 28.

542. Nousiainen, *supra* note 338, at 171.

543. J. FITZGERALD, *supra* note 64, at 26.

544. R. SACKVILLE, *supra* note 56, at 10 n.41.

545. In 1980–1981, almost one-quarter of barristers earned less than £250 from legal aid, almost half earned less than £4000, and only two percent earned more than £8000. Half of all solicitors' firms that year received a total of only six percent of all legal aid payments to solicitors, while the five percent of firms specializing in legal aid garnered one-third of all payments. LORD CHANCELLOR'S OFFICE, LEGAL AID ANNUAL REPORT 16 app. (1980–1981). Among 161 firms studied in Birmingham in 1972, 11 did a high volume of legal aid work (more than half of all summary jurisdiction and one-third of general matrimonial matters), 30 did a significant volume (one-quarter and one-third), and the remaining 120 did little or none. One firm alone did approximately 19% of all summary jurisdiction and 15% of general matrimonial work. L. BRIDGES, *supra* note 409, at 12, 117–21. Legal aid work in the Netherlands is concentrated among younger lawyers, women lawyers, and legal collectives. *See* A. Klijn, *supra* note 196, at 10, 12.

546. R. HERMANN, *supra* note 13, at 127. State payment of private professionals inevitably seems to lead to judicare mills that resemble the medicare mills physicians have made notorious. A recent investigation by the Los Angeles County Board of Supervisors disclosed that within a recent 16 month period three lawyers billed the county for $352,000, $301,000, and $278,000 respectively. One lawyer billed an average of 77.7 hours per week during this period, an average of 101 hours per week for nine weeks within that period, and a high of 128.75 hours for a single week. Some judges were authorizing payments of $140 an hour, although other judges were ordering payments of $61.50 for these same lawyers. Stewart, *County to Probe Payments to Court-Appointed Attorneys,* L.A. Times, Jan. 9, 1985, § 2, at 1, col. 1.

547. J. FITZGERALD, *supra* note 64, at 38, 46. The number of legal aid cases appears to be significantly inflated.

the lawyers who handled any represented no more than five defendants a year; but twelve lawyers (0.3%) represented twelve or more defendants a month; and five lawyers (0.1%) represented fifteen to twenty-two per month.[548] In the City of Sudbury in Ontario, 69% of all lawyers accepted criminal defense legal aid cases, but only 9% handled more than three cases a month; whereas a mere 7% of the lawyers handled 59% of all criminal legal aid matters.[549] Not surprisingly, a lawyer's legal aid work varies inversely with the lawyer's status in the professional heirarchy: In Toronto in 1976, 15% of the work of solo practitioners was devoted to legal aid but only 4% of the work of lawyers in firms of ten or more.[550] Furthermore, the very mechanisms created to distribute work also concentrate it. Those lawyers who staff the rota in a Citizens Advice Bureaux may keep the incoming cases: 4000 lawyers conducted 80,000 interviews in 1976 and garnered about 25,000 cases.[551] Referral agencies may express their preferences for particular lawyers either because the agencies are loyal to client interests and believe those lawyers are better qualified,[552] or because the lawyers have reciprocated in cash or kind.[553] Finally, efforts to distribute business in a random manner fail because clients are resistant, and the ideology of consumer freedom cannot be ignored entirely. Consumers of personal services—and legal advice and representation is one of the most personal—invariably and strongly prefer a friend's recommendation to

548. P. BRANTINGHAM, *supra* note 523, at 26.

549. Ribordy, *Les Services d'Aide Juridique a Sudbury,* 5(4) CANADIAN LEGAL AID BULL. 18, 27–28 (No. 4 1982).

550. S. COLVIN, D. STAGER, L. TAMAN, J. YALE & F. ZEMANS, THE MARKET FOR LEGAL SERVICES: PARAPROFESSIONALS AND SPECIALISTS 87 (1978) [hereinafter cited as S. COLVIN].

551. Zander, *Public Policy for Legal Services,* in INNOVATIONS, *supra* note 2, at 83. On the other hand, in those Poor Man's Lawyers that have survived, solicitors volunteering their services may not represent the client under the legal aid scheme if more than advice is needed; the PML refers the case, using a rota made up of all volunteer solicitors. L. BRIDGES, *supra* note 409, at 208. Similarly, solicitors in Western Australia who volunteer for the legal advice centre cannot refer those they advise to their private practices. R. SACKVILLE, *supra* note 56, at 113. But the lawyers who staff the rota in the more than 200 British legal advice centres have been granted a waiver by the Law Society to keep the cases they handle. M. ZANDER, *supra* note 128, at 55. The legal advice centres in Birmingham used to give clients the name of a single solicitor; after discussions with the Birmingham Law Society, the centres began to give clients three different names. L. BRIDGES, *supra* note 409, at 220.

552. Some Citizens Advice Bureaux favor law centres with their referrals, Stephens, *supra* note 294, at 132, and hospitals and trade unions have their favorite solicitors, B. ABEL-SMITH, *supra* note 73, at 58–60. The union official, consulted by members of a prepaid legal services plan that the union had established, not surprisingly referred them to the lawyer who had represented the union and its official in the past. F. MARKS, *supra* note 194, at 68.

553. Nousiainen, *supra* note 338, at 171; *cf.* J. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO 123–54 (1962).

reliance on some impersonal bureaucracy or list.[554] This preference is visible in the source of referrals to law centres,[555] legal aid practices,[556] the ÖRA in Hamburg,[557] legal advice services,[558] and the Legal Services Corporation.[559]

D. *When Is Legal Aid Rendered?*

The answer to this question is unambiguous and simple: Legal aid is rendered in family matters.[560] Although I will qualify this

554. 2 SCOTTISH ROYAL COMM'N, *supra* note 181, at 63 (more than two-thirds personal knowledge or recommendation); J. COOPER, *supra* note 2, at 32–33; Campbell, *Lawyers and Their Public,* 1976 JURID. REV. 20, 32 (three-quarters of clients in Scotland find their solicitors through personal contact); Ladinsky, *The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients,* 11 LAW & SOC'Y REV. 207 (1976). Reviewing a variety of sources, Michael Zander found that in the vast majority of cases in Scotland, clients relied on prior contact or personal recommendations in obtaining a lawyer for divorce, in seeking a criminal lawyer, and in choosing all lawyers. M. ZANDER, THE STATE OF KNOWLEDGE ABOUT THE ENGLISH LEGAL PROFESSION 52–54 (1980); *see also* 2 ROYAL COMM'N, *supra* note 63, at 211–14; S. BRAKEL, *supra* note 523, at 40 (54% percent of judicare clients knew lawyer or were referred by friend); M. CASS & R. SACKVILLE, LEGAL NEEDS OF THE POOR 78 (1975) (55% recommended by friend or relative; 23% had consulted the lawyer before or knew him personally); Lochner, *supra* note 64, at 434–42. Two private legal aid agencies in France found similar patterns of referral. Le Groupement d'Action Juridique received 60% of its clients from relatives; SOS Defense (Savoir Organiser Sa Défense) received 75%. Bonafe-Schmitt, *Deux structures informelles de défense: le GAJ et SOS Défense,* 34 ACTES 51, 58 (1981–1982).

555. The Adamstown Community Law Centre received 70% of its cases through personal referrals. J. COOPER, *supra* note 2, at 142 n.48.

556. Hodge, *supra* note 528, Table 2. The firm created by the Manchester Law Society found that its referrals were about equally divided between drop-ins, the Citizens Advice Bureaux, and third parties or previous clients. COOPER & PEARSON, *supra* note 191, Table 8.

557. The ÖRA received 41.5% of its cases by personal referral; 51.3% of clients said they would ask a friend to recommend a lawyer in the future. Falke, *supra* note 75, at 139.

558. B. ABEL-SMITH, *supra* note 73, at 74.

559. One-quarter of the cases were from previous clients, another quarter were referred by friends, 13% by social services, and only 22% came through advertising. LEGAL SERVICES CORP., 1979 ANNUAL REPORT 14 (1979).

560. Here, as throughout this Article, I concentrate on civil legal aid, which is preceded everywhere by criminal legal aid—in the Netherlands about 1890, Griffiths, *supra* note 168, at 260, for instance, and in the United Kingdom through the Poor Prisoners Act of 1903. *But see* 1 SCOTTISH ROYAL COMM'N, *supra* note 181, at 84 (civil preceded criminal in Scotland). Expenditures on criminal defense, although initially lower than those for civil advice and representation, have exceeded the latter in recent years. *See* Table 6. In 1981, the total expenditure for public defender systems of all kinds in the United States was $435,869,000. Spanenberg, *supra* note 523, at 5, 12. That year the Legal Services Corporation budget for civil legal aid was $321.3 million. *See* Table 6. Criminal legal aid also is far more dominant within the criminal justice system than civil legal aid is within civil courts, both because eligibility rules tend to be more liberal and because a higher proportion of criminals are poor. In the United Kingdom Crown Court in 1977, legal aid paid for 97% of the representation of those tried on indictment and 99% of the proceedings relating to sentence. 1 ROYAL COMM'N, *supra* note 63, at 156. Even in Japan, which has no civil legal aid, half of all criminal defendants are

below, the generalization is more important than the exceptions. It remains true over time and across countries, and even survives changes in substantive law. As always, Britain offers the best evidence. Family matters dominated the Poor Persons Procedure from its inception in 1914 until its abolition in 1950. The program established by the Legal Aid Act of 1949 has preserved this pattern until the present (see Table 10). The dominance of matrimonial matters persisted through dramatic changes in the law of divorce, which became far more accessible in 1938 and again in 1969, and even through the Lord Chancellor's decision to withdraw legal aid from uncontested divorces in 1976.[561] This dominance also prevails in a wide variety of countries (see Table 11): South Africa, Ger-

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assisted by the state in obtaining representation. Kojima, *Japan,* in PERSPECTIVES, *supra* note 2, at 191, 193–94.

Family matters were the largest single category of cases (compared with economic, property, and other matters) in 30 of 52 legal aid programs in the United States in 1947. E. BROWNELL, *supra* note 67, at 175. Ten years later, as divorce rates increased and programs dropped their prohibition on handling such cases, the proportion rose further. In 1959, family matters were the largest category in 61 programs, the second largest in nine, and ranked third in only two. SUPPLEMENT, *supra* note 163, at 35–37. They represented an average of 42% of all cases, compared with 28% economic, 15% property, and 15% other. They were more than half the case load in 28 programs, including those in larger cities like Los Angeles, Oakland, Miami, Atlanta, Boston, Rochester, Syracuse, Akron, Providence, Dallas, Houston, Salt Lake City, and Milwaukee. In Ontario in 1978, 41% of the legal aid budget was devoted to criminal cases and 27% to divorce and other civil matters; administrative appeals, by contrast, represented only 2% of all civil cases. Gathercole, *supra* note 523, at 410. The obvious explanation is that matrimonial disputes have been more thoroughly legalized than any other problem. In both the United States and Australia, a higher proportion of disputants involved in a controversy following divorce used a lawyer than in any other controversy. J. FitzGerald, A Comparative Empirical Study of Potential Disputes in Australia and the United States 49 (1982) (University of Wisconsin Law School, Disputes Processing Research Program Working Paper No. 1982-4). FitzGerald concludes that "by far the most powerful explanatory factor for the various aspects of disputing is the actual type of grievance involved." By contrast, prior use or knowledge of a lawyer and demographic characteristics such as age, sex, income, education, occupation and home ownership have little effect. *Id.* at 62–63. Perhaps in recognition of the dominance of family matters, the civil legal aid scheme introduced in New Zealand in 1970 simply excluded divorce. Evans & Ross, *Legal Aid in New Zealand and Abroad,* 5 N.Z.U. L. REV. 1, 12 (1972).

561. J. COOPER, *supra* note 2, at 29. Eighty-seven percent of civil legal aid certificates in 1975–1976 related to matrimonial and family matters. In 1977–1978, when legal aid no longer was granted for undefended divorces, 74% of civil legal aid certificates still concerned matrimonial or family matters. 1 ROYAL COMM'N, *supra* note 63, at 107. In October 1978, the Australian Legal Aid Office withdrew legal aid from divorce unless it is " 'imperative that the marriage be dissolved and the applicant is in a position of special hardship.' " COMMONWEALTH LEGAL AID COMM'N, 1978–1979, SECOND ANNUAL REPORT 13, 14 n.1 (1979). In addition, it required payment of the A$100 court fee (which had been waived in legally aided cases) except in cases of " 'substantial hardship.' " *Id.* at 14. Prior to that date, about one-quarter of all divorces were legally aided and exempt from payment. In the period October 30, 1978 through June 30, 1979, in Victoria and New South Wales, legal aid was granted in only 3.3% of cases and waiver of the court fee in another 5.3%. *Id.* at 14 n.1.

many, Canada, Finland, Sweden, Italy, Australia (see Table 12), France, the Netherlands, Norway, and the United States (see Table 13).[562] To put the same point slightly differently, when the state intervenes to lower the cost of legal services, but everything else remains constant, those services are mobilized in family matters. This occurs even though the legal aid program changes shape, as when the Poor Persons Procedure was replaced by the Legal Aid Act of 1949 and when the so-called "Green Form" scheme for legal advice was introduced in 1972.[563] Yet program structure affects the subject matter mix, as we can see by making some crude comparisons. Advice services that do not appear in court are not dominated by family matters (because the advisers cannot conduct divorces) but rather tend to stress consumer and housing problems, as well as welfare benefits, employment, and personal injury (see Table 14).[564] Legal aid offices specializing in law reform litigation also emphasize the latter areas to the relative neglect of family law.[565] The most dramatic variation, however, is between judicare schemes that reimburse private lawyers on a piecework basis and staffed office programs that employ full-time, salaried poverty law specialists.[566] These differences are visible if we compare legal aid and law centres

562. Armstrong, *supra* note 276, at 233 (40% of interviews and 80% of referrals in the Australian Legal Aid Office for family members); Blankenburg & Cooper, *supra* note 8, at 282; Blankenburg & Reifner, *Conditions of Legal and Political Culture Limiting the Transferability of Access-to-Law Innovations,* in ACCESS, *supra* note 2, at 217, 223; Bruzelius & Bolding, *An Introduction to the Swedish Legal Aid Reform,* in M. CAPPELLETTI, *supra* note 6, at 561, 564 n.16 (half of judicare case load in 1971); COMMONWEALTH LEGAL AID COMM'N, 1978–1979 SECOND ANNUAL REPORT 13 (1979) (80% of referrals in 1977–78, 70% in 1978–1979); Gross, *South Africa,* in PERSPECTIVES, *supra* note 2, at 288, 292 (South Africa); 4 LEGAL AID CLEARINGHOUSE BULL. 149 (1983) (quoting Mr. Lionel Bowen, Minister for Trade of Australia, to the effect that 63% of Commonwealth-funded legal aid in 1982–1983 was for family law matters); *see also* V. Pocar & V. Olgiati, The Legal Profession in Italy 13 (1984) (unpublished manuscript) (65% of appellate cases in Milan in 1972 were family matters). *See generally* Table 7. Where family matters are not legalized, as in Japan and Korea, other equally conventional subjects preoccupy legal aid, such as tort. Kojima, *Japan,* in PERSPECTIVES, *supra* note 2, at 191, 197–98; Sang Hyun Song, *Korea,* in PERSPECTIVES, *supra* note 2, at 204, 209.

563. 1 ROYAL COMM'N, *supra* note 63, at 103–04; J. COOPER, *supra* note 2, at 30–31, 41 n.29.

564. In Great Britain, compare the Poor Man's Lawyer with the Poor Persons Procedure, *see* Table 14, or Legal Aid with the Citizens Advice Bureaux, *see id.* In France, compare Le Groupement d'Action Juridique with legal aid, *see* Table 11.

565. Compare LSC test cases with LSC general case load, *see* Table 13. A number of Australian legal centres have specialized in particular subjects: for example, the Tenants Union, the Women's Legal Resources Project, the Public Interest Advocacy Centre, the Welfare Rights Centre, and the proposed Environmental Defender's Office. Petre, *Specialisation: The Sydney Push. Legal Centres in New South Wales,* in ON TAP, NOT ON TOP, *supra* note 143, at 12, 14.

566. For the division of labor between judicare and staffed offices in Ontario, see F. Zemans, *supra* note 26, at 13.

in England and Wales (see Table 14),[567] legal aid in the Netherlands with the Amsterdam Buro or the law shops, judicare and staffed offices in Quebec,[568] German judicare and the ORA in Hamburg,[569] or Belgian Pro Deo practice and law shops (see Table 11), judicare and staffed offices in Meriden, Connecticut (see Table 13), or Australian judicare and Fitzroy Legal Services (see Table 12).

We can explore the reasons for this recurrent pattern by looking at the various actors who might influence the subject matter of legal aid. Clients are an obvious starting point, especially in those programs adhering to an "open door" policy in which neither the lawyer nor the state appears to set priorities.[570] But if clients choose whether or not to seek legal aid, they do so within the structure of existing laws and remedies, as numerous legal need studies have shown.[571] They are influenced strongly by their belief in the efficacy of law to solve the particular problem they are experiencing, which in turn is colored by previous success or failure in using legal means to resolve conflicts, either their own or those of acquaintances.[572] Thus, a Welsh population expected law to be effective in matters concerning housing and welfare benefits but not for consumer grievances or environmental concerns.[573] The residents of three poor London boroughs sought advice (usually legal advice) when buying a house, seeking to evict a tenant, defending against a claim of debt, seeking compensation for an accident, or dealing with a matrimonial problem, but not when confronted with defective goods, arrears in an installment debt payment, social security benefits, estate planning, encounters with juvenile court, lease negotiations, or housing repairs.[574] Two samples of German legal aid

567. This also is true of the Brent Law Centre. J. COOPER, *supra* note 2, at 119.

568. The contrast holds true in Ontario as well. B. GARTH, *supra* note 2, at 100.

569. Experimental judicare programs in the United States display the same differences from staffed office programs. LEGAL SERVICES CORP., *supra* note 523 at 75–77; *LSC Judicare Effort Works in Vermont,* LEGAL SERVICES CORP. NEWS, Nov.–Dec. 1980, at 4. Similar differences distinguished the more traditional legal aid offices in Chicago from the more innovative legal services programs initiated with federal funds. J. KATZ, *supra* note 2, at 162. They were found in Finland, Nousiainen, *supra* note 338, at 171, but not in Sweden, Schuyt, *Dilemmas in the Delivery of Legal Services,* in INNOVATIONS, *supra* note 2, at 53, 65.

570. The Manchester Law Centre and the Dutch Buro voor Rechtshulp provide examples. J. COOPER, *supra* note 2, at 129–30, 151.

571. *See supra* note 471 and accompanying text. *See generally* Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980–1981); Levine & Preston, *Community Resource Orientation Among Low Income Groups,* 1970 WIS. L. REV. 80.

572. An interesting before-and-after study revealed that a prepaid legal services plan could affect the beliefs of plan members about when a lawyer would be helpful in resolving various problems. F. MARKS, *supra* note 194, at 49, 79.

573. C. GRACE, COMMUNITY NEED AND LAW CENTRE PRACTICE: AN EMPIRICAL ASSESSMENT 39 (1978).

574. B. ABEL-SMITH, *supra* note 73, at 154.

clients expected more help in family matters than in consumer problems or controversies with employers or the government.[575] When a Norwegian sample of 111 households in the northern city of Tromsö were asked about problems that might require a legal solution, one-quarter of the responses concerned welfare, and two-thirds concerned problems with the government.[576] When clients act collectively to shape a legal aid program that they control, rather than functioning as passive individual consumers who merely choose among remedies structured by others, they express priorities very different from the subject matter distribution in most legal aid programs. The client-dominated management committee of the Brent Community Law Centre emphasized housing matters; the local advisory council in an Oregon Legal Services office stressed housing, health, government benefits, community education, and senior citizens rights.[577]

Lawyers also structure the content of legal aid simply by offering poor people the same services they provide paying clients.[578] English solicitors who set out to serve a legal aid clientele quickly found themselves saddled with a thoroughly conventional case load dominated by family matters, criminal defense, conveyancing, and probate.[579] Sometimes, they naively blamed this case load composition on the clients' failure to ask for help with employment or social security problems.[580] But there are other reasons as well. Legal aid pays so poorly that even a dedicated firm has to take private clients in order to make ends meet.[581] The administration of the plan also favors certain matters: It grants a higher proportion of legal aid applications in family or matrimonial problems than in some other civil matters, especially the less common varieties.[582] By contrast,

575. Falke, *supra* note 75, at 135; F. Tiemann & E. Blankenburg, Working Paper on the Evaluation of a Legal Need Survey in West Berlin 3 (Aug. 1979) (report prepared for International Institute of Management).

576. J. Johnsen, Legal System and Individuals in a Welfare State, 19–20 (1975) (unpublished manuscript).

577. J. COOPER, *supra* note 2, at 119, 181. When asked what they would like a legal services office to do, clients of another program emphasized housing, health, family problems, and unemployment, even though these were not the problems they actually took to the office. *Legal Aid Service of Orange County,* LEGAL SERVICES CORP. NEWS, July–Aug. 1980, at 7 (Orange County, California).

578. For a discussion of the interrelationship among problems experienced, legal rights, professional structures, and requests for legal services, see Appendix.

579. J. COOPER, *supra* note 2, at 31, 42 n.58; COOPER & PEARSON, *supra* note 191, at 11–12 & table I; Hodge, *supra* note 528, table 2; *see* Table 14.

580. B. ABEL-SMITH, *supra* note 73, at 27.

581. In one firm, legal aid work represented 77% of the files but only 65% of the profits; conveyancing represented 12% of the files but 20% of the profits. Hodge, *supra* note 528, Table 3–5; *see* COOPER & PEARSON, *supra* note 191, at 15. *See generally Setting Up, supra* note 239; *Post Wilkinson, supra* note 239.

582. L. BRIDGES, *supra* note 409, at 134–49 (United Kingdom); M. VALÉTAS, *supra* note 102, at 48–49 (France). Some British legal aid committees have been refusing to

staffed offices operate under different constraints, as shown by comparing the case load of the Manchester Law Centre with that of the Manchester law firm of Pearson & Cooper, established by the Nuffield Foundation to serve a mix of legal aid and paying clients (see Table 14). In the pilot projects established by the Legal Services Corporation as part of its Delivery Systems Study, one pure judicare program handled twice as much divorce, three times as many wills, and only half as much income maintenance work as the staffed offices. Another did three times as much divorce, a third as much housing, and only a fifth as much income maintenance. A prepaid plan did three times as much divorce, a third as much housing, and a quarter as much income maintenance.[583] Salaried lawyers' priorities may reflect the preferences of their funding sources for whatever is politically salient at the moment, such as the rights of minorities, women, or the disabled, or the problem of hunger.[584] But even when lawyers establish their own guidelines they may ignore these preferences. One LSC program declared an interest in education, employment, and police misconduct but did virtually no work in these areas.[585] It is extremely difficult, of course, both morally and practically, to close the doors of a legal aid program and to turn people away because they have the wrong problem.[586] Moreover, staffed offices operate under constraints established by the legal profession[587] and the state.[588] Even salaried lawyers may pre-

allow claims for legal advice about welfare matters on the ground that these do not raise issues of law. *Green Form Fact and Law,* LAG BULL., Sept. 1983, at 3; *id.* at 1; *id.* at 5.

583. LEGAL SERVICES CORP., *supra* note 166, at 75–76 (United States). Nevertheless, the last study mysteriously concludes, "Even though differences were found in individual types of cases for certain model types, none of the private bar models expected to provide a full range of services had more than one case type that showed statistically significant differences from the average staff attorney project caseload." *Id.* at 74.

584. J. KATZ, *supra* note 2, at 172. Similar choices must be made when funding is reduced; LSC offices chose to eliminate family matters, consumer complaints, and social security disability claims when President Reagan cut the budget in 1982. L. SIEGEL, *supra* note 454, at 18–20.

585. C. Menkel-Meadow & R. Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities,* 5 LAW. & POL'Y Q. 237, 248–49 (1983); R. Meadow & C. Menkel-Meadow, Personalized Justice in Legal Services: Nonbureaucratic Models of Professional Decision Making 14 (1981) (unpublished manuscript). Nearly nine-tenths of LSC programs gave the highest priority to income maintenance, health, and housing. Breger, *supra* note 30, at 331 n.267. Yet the actual distribution of LSC case load shows that these priorities were not observed in practice. *See* Table 13.

586. J. COOPER, *supra* note 2, at 61. If lawyers do not set priorities explicitly, they simply accede to the priorities implicit in the structure of the legal profession and legal system. B. GARTH, *supra* note 2, at 224; Stephens, *supra* note 294, at 130–31.

587. The waiver agreements between the Law Centres Federation and the Law Society prohibit the former from handling conveyancing, commercial or company matters, adult crime, personal injury, and matrimonial work. Domberger & Sherr, *supra* note 532, at 31.

588. Legal Services Corporation offices are forbidden to handle matters concerning

fer to act where they feel they can operate most efficiently because legal rights are clear and legal procedures well charted, thus favoring family matters over consumer complaints.[589]

E. *What Do Legal Aid Lawyers Do?*

The choice of tactics is just as important as the subject matter of legal aid cases. Again it is possible to generalize (while acknowledging the need for qualifications): Legal aid lawyers handle their cases in a routine fashion, with the least possible expenditure of effort. We can see this by constructing a continuum from the most routine disposition to the most innovative and energetic, examining the frequency with which each is chosen and the reasons why.

In the early years of legal aid, when it depended largely on the charitable impulses of private lawyers, most requests for assistance—and sometimes all—were answered by advice alone. The 1928 Finlay Report expressed this preference clearly.[590] The Poor Man's Lawyers established by settlement houses and churches in Britain in the late nineteenth and early twentieth centuries followed the same principle.[591] A revealing incident suggests the connection between structure and function. When one of the oldest and best established PMLs, the Cambridge House Legal Advice Centre, hired a salaried lawyer for the first time during World War II, he did far more negotiating and letter writing than the Centre had done in the past.[592] The disjunction between advice and representation has the same effect today. The ÖRA in Hamburg still gives only advice in two-thirds of all inquiries,[593] and the Lawyer Referral and Information Service in Washington, D.C. "screens cases to find out if legal services are actually required or if the problem can be resolved through some informal means. . . . [M]inor problems or misunderstandings between clients and creditors, landlords, auto repair shops, or the courts can sometimes be resolved just through

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abortion, homosexuality, desegregation, and voter registration, among others. *House Approves 1981 Appropriation,* LEGAL SERVICES CORP. NEWS, July–Aug. 1980, at 1; *LSC Funded at $241 Million Through Nov. 20,* POVERTY L. TODAY, Fall 1981, at 1.

589. F. Tiemann & E. Blankenburg, *supra* note 575, at 3–4. In France, applications for legal aid are rejected least often in family matters. M. VALÉTAS, *supra* note 102, at 59. American lawyers turn down a high proportion of clients with consumer complaints because the lawyers are unfamiliar with the law and pessimistic about the likelihood of success. Macaulay, *Lawyers and Consumer Protection Laws,* 14 LAW & SOC'Y REV. 115, 130–31 (1979).

590. FINLAY, *supra* note 55, at 5; *see also supra* text accompanying notes 558–69; *cf.* E. BROWNELL, *supra* note 67, at 187: "It is always an aim to avoid litigation whenever possible and Legal Aid offices are notably successful in this."

591. The Bentham Committee's Poor Man's Lawyer gave only advice in 43% of all cases in 1938–1939. J. JONES, *supra* note 407, at 17.

592. RUSHCLIFFE, *supra* note 62, at 19.

593. Falke, *supra* note 75, at 111, 115–16.

phone calls . . . ."[594] The absence of a qualified lawyer virtually ensures an emphasis on advice. The Citizens Advice Bureaux created in Britain at the beginning of World War II did little more than give advice until a few years ago, when they began establishing rotas of private volunteer lawyers and even considered hiring lawyers as employees.[595] Legal Advice Centres in Britain also do just what their name implies: give advice in fifty-six percent of all cases, write letters in fourteen percent, make telephone calls in sixteen percent, and refer clients to lawyers for further action in only about ten percent.[596] Similarly, the law shops first established by students in the Netherlands in 1969 are limited to advice and occasional litigation in the lowest courts.[597] Even qualified lawyers who are paid for their services may prefer to handle cases by rendering advice. Courts and bar associations in Austria have established programs that provide only advice.[598] In Finland, half of all legal aid applications, and more than three-quarters of all legally aided family matters,[599] are disposed of with advice. In Sweden in 1971, staffed legal aid offices litigated less than one-fifth of all their matters.[600] More cases are handled by legal advice in Britain than are dealt with through the legal aid scheme.[601] Even in the United States, where the Legal Services Corporation has a reputation for vigorous action, more than one-third of all cases are concluded with advice.[602]

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594. *Washington's Lawyer Referral and Information System: Making It Easier for Clients,* LEGAL SERVICES CORP. NEWS, May–June 1979, at 5.

595. NATIONAL ASS'N OF CITIZENS ADVICE BUREAUX, 1981–1982 ANNUAL REPORT 8 (n.d.).

596. B. ABEL-SMITH, *supra* note 73, at 75. There were about 130 volunteer legal advice centres in the United Kingdom in 1979, but the Royal Commission foresaw their ultimate displacement by the Citizens Advice Bureaux and law centres, 1 ROYAL COMM'N, *supra* note 63, at 76–77. *See generally* M. ZANDER, *supra* note 128, at 55. The four legal advice centres in Birmingham in the early 1970's wrote a letter on the client's behalf in about one-quarter of all cases. Two of those centres closed almost two-thirds of their cases on the day the client came in. And two centres closed cases before the adviser had learned the outcome. L. BRIDGES, *supra* note 409, at 211–12, 216–17. The first legal advice centre in Scotland, the Edinburgh Legal Dispensary, was established in 1900. Today there are about 40 of these centres but only a single law centre. 1 ROYAL COMM'N ON LEGAL SERVICES IN SCOTLAND, REPORT 36–38 (1980).

597. B. GARTH, *supra* note 2, at 119–20.

598. König, *Austria,* in PERSPECTIVES, *supra* note 2, at 76, 81–82.

599. Nousiainen, *supra* note 338, at 172–73.

600. Bruzelius & Bolding, *An Introduction to the Swedish Public Legal Aid Reform,* in M. CAPPELLETTI, *supra* note 6, at 561, 564 n.16.

601. There were twice as many in 1977–1978, 1 ROYAL COMM'N, *supra* note 63, at 106–07, and almost four times as many in 1981–1982, *see* Table 3.

602. The figures were 40.6% in 1970, 42% in 1971, about 36% in 1979, and 31.7% in 1981. E. JOHNSON, *supra* note 89, at 293; LEGAL SERVICES CORP., 1981 ANNUAL REPORT 13 (1982); 1979 *id.* at 20 (1979); NATIONAL LEGAL AID & DEFENDER ASS'N, *supra* note 163, at iv. Yet two-thirds of a sample of OEO Legal Services lawyers in 1972 reported that they spent more than 20% of their working time in court, and about the same proportion spent at least as much time dealing with administrative agencies. Both proportions had increased since 1967. J. HANDLER, *supra* note 184, at 59–60.

If the client remains dissatisfied after the lawyer has rendered advice, the latter may try to negotiate a settlement through letters or telephone calls. This is the next most common tactic, and, together with advice, it concludes most cases.[603] In 1947, 58% of the cases accepted by legal aid in the United States were handled by a single consultation and another 17% by referral to a private lawyer or social agency; twelve years later, the proportions were 54% and 22%.[604] A study of lawyers employed by the Legal Services Corporation in the 1970's found that negotiation disposed of one-quarter of the cases.[605]

One reason for this preference is case load pressure. In one sample, Legal Services Corporation lawyers devoted an average of twenty-eight minutes to each discrete task they performed and actually concluded one-quarter of all tasks in five minutes or less;[606] such spasmodic efforts virtually dictate negotiation rather than litigation. One-third of a sample of legal aid clients in Britain spent less than twenty minutes speaking to a lawyer.[607] The law firm of Cooper & Pearson, set up by the Manchester Law Society to handle legal aid cases, disposed of most matters in less than three hours.[608] The Groupement d'Action Judiciaire, created by activist lawyers in France to work for social reform, found itself giving legal advice and settling ninety percent of its cases amicably.[609] Half the cases handled by legal aid in Japan are settled, two-thirds in Mexico, and three-quarters in South Korea.[610] Even in the United States, the Legal Services Corporation settles one-tenth to one-fifth of all cases.[611]

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603. The Bentham Committee's Poor Man's Lawyer settled 31% of its matters in 1938–1939. J. JONES, *supra* note 407, at 17.

604. E. BROWNELL, *supra* note 67, at 184; SUPPLEMENT, *supra* note 163, at 44.

605. LEGAL SERVICES CORP., 1979 ANNUAL REPORT 17 (1979); *cf.* R. Meadow & C. Menkel-Meadow, *supra* note 585, at 11 (negotiation accounted for 2.1% of tasks performed, but each task occupied a different amount of time). In addition to the 40.6% of cases that were disposed of with advice only in 1970, 18.2% were referred, 16.7% were completed without court action, and 4.6% were withdrawn—a total of four-fifths. NATIONAL LEGAL AID & DEFENDER ASS'N, *supra* note 163, at iv.

606. R. Meadow & C. Menkel-Meadow, *supra* note 585, at 11, 13.

607. B. ABEL-SMITH, *supra* note 73, at 82.

608. COOPER & PEARSON, *supra* note 191, table 4. The exceptions were criminal cases and those matters that lie outside legal aid, namely conveyancing and commercial matters.

609. Blankenburg & Cooper, *supra* note 8, at 288; Bonafe-Schmitt, *supra* note 554, at 55. Another organization, SOS Défense (Savoir Organiser Sa Défense) devoted half an hour or less to 38.3% of inquiries, an hour or less to 72.9%, and less than an hour and a half to 88.6%; 61.4% of those seeking help came only once. *Id.* at 52 n.9.

610. Kojima, *Japan*, in PERSPECTIVES, *supra* note 2, at 191, 196; Oñate Laborde, *Mexico*, in PERSPECTIVES, *supra* note 2, at 213, 227; Sang Hyun Song, *Korea*, in PERSPECTIVES, *supra* note 2, at 204, 208.

611. Approximately 17% in 1971, 9% in 1979, and 11% in 1981. E. JOHNSON,

Thus, most matters never reach litigation.[612] When they do, the great debate within legal aid concerns the relative emphasis that should be given service work (*i.e.*, the routine handling of individual cases) and law reform. In light of the above, it is not surprising that routine services dominate the dockets of legal aid offices. Legal aid in the United States was notorious for this: No case was appealed to the Supreme Court before the creation of the OEO Legal Services Program in 1965.[613] An average of only ten percent of working time was spent on "law study" (*i.e.* research).[614] The innovations of the last two decades did not change the pattern dramatically. Most community legal clinics in Ontario are preoccupied with individual casework,[615] as are more than half of the law centres in Britain.[616] Legal Services Corporation lawyers devote little time to the research necessary to transform routine cases into occasions for law reform. They conduct no research in approximately four-fifths of their cases[617] and devote only five percent of their total working time to research.[618] More than half of all attorney time is devoted to individual services.[619] Only ten to twenty percent of all matters ever go to court or to administrative agencies.[620] Most matters are

supra note 89, at 293; LEGAL SERVICES CORP., 1981 ANNUAL REPORT 13 (1982); 1979 *id.* at 20 (1979).

612. Only nine percent of the problems taken to the Bentham Committee's Poor Man's Lawyer in 1938–1939 were litigated. J. JONES, *supra* note 407, at 17. In 1947, five percent of legal aid cases in the United States were litigated, E. BROWNELL, *supra* note 67, at 187; twelve years later, the figure was six percent. SUPPLEMENT, *supra* note 163, at 44. About one-third of these lawsuits ultimately were settled.

613. E. JOHNSON, *supra* note 89, at 189. In France today the legal aid scheme still discourages appeals to the highest courts. It grants legal aid to more than two-thirds of all applicants in trials and first appeals and to about two-thirds in administrative hearings but to only one-third in appeals to the Conseil d'Etat and to about one-quarter in appeals to the Cour de Cassation. *See* Table 16.

614. The figures were only two percent in Denver and three percent in Cincinnati. E. BROWNELL, *supra* note 67, at 182–83.

615. Zemans, *supra* note 100, at 234, 241–51.

616. Zander & Russell, *supra* note 120, at 210.

617. LEGAL SERVICES CORP., 1979 ANNUAL REPORT 17 (1979).

618. R. Meadow & C. Menkel-Meadow, *supra* note 585, at 11. In this, legal aid lawyers resemble sole practitioners. *See* J. CARLIN, LAWYERS ON THEIR OWN 77 (1962).

619. Champagne, *An Evaluation of the Effectiveness of the OEO Legal Services Program*, 9 URB. AFF. Q. 466, 477 (1974). Legal services lawyers spend almost three-quarters of their court time in state trial courts. J. HANDLER, *supra* note 184, at 60.

620. Seventeen percent went to court in 1971, 15% in 1979, and 11% in 1981. Two percent were handled by administrative agencies in 1971, four percent in 1979, and six percent in 1981. Thus, there is a shift from courts to agencies as well as a decline in the two categories taken together. E. JOHNSON, *supra* note 89, at 293; LEGAL SERVICES CORP., 1981 ANNUAL REPORT 13 (1982); 1979 *id.* at 20. A prepaid legal services program handled 85% of its inquiries without litigation, many by telephone calls. *National Resource Center for Consumers of Legal Services*, LEGAL SERVICES CORP. NEWS, July-Aug. 1979, at 6. These proportions are not very different from those of the Poor Man's Lawyers before World War II, *see* J. JONES, *supra* note 407, at 17.

disposed of much too quickly to permit any exploration of their larger implications: four-fifths within six months, more than ninety percent within a year.[621]

There are many reasons for this cursory treatment. The usual explanation is case load,[622] although one study found no relationship between case load, law reform, and program quality.[623] Certainly, high case load correlated with low litigation rates (and, a fortiori, with low law reform rates) in American legal aid offices prior to 1965. In the late 1950's, lawyer case loads ranged from 460 to 2533 a year: Lawyers handling 900 cases litigated an average of six percent or more; those with 1250 litigated between three and six percent; and those with 1540 cases litigated less than three percent.[624] Forty-eight legal aid lawyers in Chicago in 1972 handled 48,803 active cases, litigating less than ten percent and using paraprofessionals even in those.[625] Why are case loads so high? It is hard for a legal aid office to turn clients down when it knows that it represents the last resort, particularly once the office has established an open door policy.[626] There also is no market operating to

621. Family cases take the longest but are handled routinely. LEGAL SERVICES CORP., 1979 ANNUAL REPORT 16–18 (1979). Even at one of the more activist law centres in the United Kingdom, most contacts with clients lasted only a few weeks, C. GRACE, *supra* note 573, at 19.

622. B. GARTH, *supra* note 2, at 60, 93 (United Kingdom, Quebec); Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 62. Staff in the New South Wales Public Solicitor's office had a live case load of about 200 superior court matters. R. SACKVILLE, *supra* note 56, at 152; *cf.* J. KATZ, *supra* note 2, at 18 (discontinuity in litigation results from case load pressures in American legal aid and from the frustrated personal aspirations of young legal aid attorneys).

623. J. HANDLER, *supra* note 184, at 61.

624. SUPPLEMENT, *supra* note 163, at 50–51; *see also* E. BROWNELL, *supra* note 67, at 223–24. In 1966, 34 legal aid offices with attorney case loads under 750 (average 451) litigated 12.6% of their cases; 18 offices with attorney case loads between 750–999 cases (average 873) litigated 10.3%; and 15 offices with attorney case loads of 1250 or over (average 1833) litigated 5.8%. (For reasons that are not explained, four offices with case loads between 1000 and 1250 (average 1105) litigated 28.3%, but the numbers are so small as to be statistically unreliable). 1967 N.L.A.D.A. PROC. 304.

625. J. KATZ, *supra* note 2, at 17. LSC lawyers are estimated to handle about 400 cases a year (median 415, mode 475—although some have put the figure at 800)—100 at any one time—compared with the 50 to 100 a year handled by a private lawyer. J. HANDLER, *supra* note 184, at 60, 62; Carlin & Howard, *Legal Representation and Class Justice,* 12 UCLA L. REV. 381, 417 (1965) (more than one-half of the private lawyers in New York City handle no more than 50 cases a year).

626. Stephens, *Law Centres, Citizenship, and Participation,* 7 LAW & POL'Y 77 (1985). Sometimes the difficulty in rejecting clients has a very mundane explanation. The Newham Rights Centre began in a single room; once clients entered, they could see staff who appeared unengaged and who therefore could not claim that there was no one available to discuss their problems. A. Byles, *supra* note 174, ch. 3, at 5. To make scarce resources stretch as far as possible in serving needy clients, programs may rely heavily on paraprofessionals. It is interesting that community legal clinics in Ontario employ twice as many paraprofessionals as staff lawyers; in the United States, the ratio is reversed. Zemans, *supra* note 100, at 237. This can allow lawyers to engage in more innovative work, but it also may allocate an even higher proportion of energies to rou-

increase the supply of legal aid as the demand rises, although staffed offices and private lawyers may feel the need to take more cases in order to generate income for their offices or themselves, because the rate of pay is so low.[627] The state also may favor high case loads as a means of rationing legal aid (long delays and poor service discourage and stigmatize applicants) and as an index of output and "efficiency."[628]

In addition to case load, there are other, more subtle pressures toward routinization. Clients themselves are reactive, often bringing cases to lawyers so late that there is little to be done except minimize the damage.[629] Offices eager to engage in group work may have to render extensive services to individuals so that they can secure the group's loyalty.[630] Private lawyers simply may render legal aid clients the same low level of routine services that they provide their paying clients.[631] Finally, lawyers may anticipate political attack and seek to neutralize it by appearing apolitical.[632] Self-

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tine processing. An experimental program using paralegals to represent the elderly in claiming welfare benefits in rural Wisconsin was very successful in individual case processing, but led to the initiation of only one class action suit in five years. Greenley, Kennedy, Porter & Trubek, *Towards a Model of Legal Services Delivery for Elderly and Handicapped Persons,* in RESEARCH ON LEGAL SERVICES, *supra* note 336, at 109, 118–19.

627. *Law Centres and Legal Aid,* LAW CENTRES' NEWS, Winter 1981, at 8.

628. J. COOPER, *supra* note 2, at 154, 300.

629. J. KATZ, *supra* note 2, at 21; Falke, *supra* note 75, at 131.

630. The Brent Law Centre, which has a well-deserved reputation for its devotion to structural change, nevertheless received 6000 inquiries by individuals in 1979, initiated 600 cases, and spent 25% of its time on these matters. J. COOPER, *supra* note 2, at 102, 119–20. From 1979 to 1982, it received 3000 inquiries per year, gave full diagnostic interviews in 300 cases, and undertook legal representation in another 300 cases per year, for periods averaging a year. BRENT COMMUNITY LAW CENTRE, LEGAL SERVICES IN THE INNER CITY (Rep. 83) 1 (1983).

631. This is particularly true where both judicare and staffed office programs operate. An informal division of labor may emerge, with judicare performing routine services and staffed offices engaging in more innovative work. J. COOPER, *supra* note 2, at 8, 13; B. GARTH, *supra* note 2, at 100 (Ontario); LEGAL SERVICES CORP., *supra* note 166, at 130–43.

632. B. GARTH, *supra* note 2, at 38, 66. Consider the following statement by the Chair of the Management Committee of the Middlesborough Law Centre, which was seeking funding from a Conservative borough council: " 'We are determined to be efficient and we do not think that law centres are controversial. Now we must make this apparent, so that all Councillors will be keen to continue our funding after 1986.' " *Middlesborough: Centre to Open Next Year,* LAW CENTRES' NEWS, Winter 1982–1983, at 8. The chairman of the Clinic Funding Committee in Ontario has expressed concern about "political activities by clinics." F. Zemans, *supra* note 26, at 30 n.85 (quoting Roger D. Yachetti).

Both private practitioners and judges favor routine individual representation over law reform and are least tolerant of group representation. J. HANDLER, *supra* note 184, at 64–65; H. STUMPF, *supra* note 45, chs. 5–6; Champagne, *Lawyers and Government Funded Legal Services,* 21 VILL. L. REV. 860, 865, 872 (1977). In a study of legal services programs in 1969, 62% of the governing boards were either actively hostile to, or, at best, reluctantly tolerant of, law reform activities. E. JOHNSON, *supra* note 89, at

conscious about their low professional status, legal aid lawyers may adopt higher ethical standards than the private bar, refusing to advocate "dubious" cases and embracing an ethic of "reasonableness" in dealing with adversaries.[633]

These observations do not deny that legal aid lawyers engage in important law reform work, converting individual grievances into cases that attack the structural roots of problems.[634] Here, as elsewhere, the most significant difference is between salaried lawyers and private practitioners. The single most unambiguous finding of

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172. Under the Reagan administration, the Legal Services Corporation has circumvented Congress, which continues to support legal services, and has inserted in its grant conditions to the backup centers (which were involved in many of the most important test cases) a prohibition against spending more than 10% of their funds on "networking, direct representation (. . . in judicial, administrative, and legislative forums) and written or oral legislative or administrative testimony." 48 Fed. Reg. 54,305 (1983).

The Los Angeles Public Defender enjoyed widespread political support as long as it stuck to vigorous defense; when it *initiated* three lawsuits against the criminal justice system—challenging the juvenile hall, the sheriff's practice of reading all prisoner mail (including that from their lawyers), and racial bias in jury selection—there was direct political interference in its management. *See generally* B. Bohne, The Public Defender as Advocate: A Study in Administration, Politics, and Criminal Justice 28–34 (1977) (University of Wisconsin, Institute for Research on Poverty, Discussion Paper 414-77). Law centres in the United Kingdom may avoid "political" activity because it jeopardizes their status as a registered charity (which may be necessary to obtain foundation funding) or because the management committee opposes it. A. BYLES & P. MORRIS, *supra* note 280, at 10, 15–16.

The General Accounting Office of Congress, at the behest of Senator Orrin Hatch of Utah and Representative James Sensenbrenner of Wisconsin, investigated Alan Rader, director of the Western Center on Law and Poverty. Rader had made efforts to oppose a proposition initiated by Howard Jarvis, which would have cut the state income tax in half, with disastrous consequences for the poor of California. Jackson, *Lawyer Hit for Use of U.S. Funds Against Prop. 9,* L.A. Times, Sept. 22, 1983, § 1, at 8, col. 1. Two months later Jarvis sued the Center and the Legal Aid Foundation of Los Angeles on the same ground. Morain, *Jarvis Suit Accuses Legal Aid Groups,* L.A. Times, Dec. 21, 1983, § 1, at 3, col. 4. Since then, Donald P. Bogard, President of LSC, has threatened to cut off all funds to the Western Center for 1984, and the Center has responded by suing Bogard and the Corporation to prevent the cutoff. Blake, *Poverty Law Center Sues U.S. Agency,* L.A. Times, Feb. 8, 1984, § 1, at 3, col. 6. The Australian Minister for Local Government insisted that the Parks Legal Service in South Australia amend its constitution to delete any reference to law reform or other impact activities as a prerequisite to receiving further aid. Graycar, *Legal Centres in the Festival State,* in ON TAP, NOT ON TOP, *supra* note 143, at 20, 22.

633. J. KATZ, *supra* note 2, at 43–44, 57; *see also* Breger, *supra* note 30, at 299 nn. 83–85 (citing examples of extreme caution in championing interests of poor clients). Sometimes the state consciously encourages this posture; the recently elected center-right government in the Netherlands introduced a new fee schedule in 1983 that would pay lawyers better when they rendered advice than when they litigated. A. Klijn, *supra* note 196, at 16.

634. J. COOPER, *supra* note 2, at 119, 200–01; E. JOHNSON, *supra* note 89, ch. 8; LAW CENTRES FED'N, *supra* note 269, at 15–20; *North Kensington Law Center Wins £500M Test Case,* LAW CENTRES' NEWS, Autumn 1980, at 1. Lawyers in OEO Legal Services in 1967 estimated that they spent 25% of their time on law reform, and their offices spent 21%; those in the program in 1972 estimated these percentages at 31.2% and 24.6%. J. HANDLER, *supra* note 184, at 54–55.

the Legal Services Corporation's Delivery Systems Study was that private practitioners do little or no "impact" work. They did none at all in the five prepaid plans and in five of the seven pure judicare plans; and in the plans combining private practitioners and salaried lawyers, the latter did most of the impact work.[635] Some staffed offices adopt the tactics of large law firms, using computers to analyze immense bodies of data[636] and combining litigation with lobbying, publicity, and economic pressures.[637] Indeed, as Katz has shown, an internal dynamic in the legal aid lawyer's role strongly motivates the occupant to engage in law reform. Lawyers seek to confer significance on their work, despite the poverty of their clients and the small amounts of money at stake.[638] They cherish the autonomy to define their own work and tactics so much that they preserve this self-image even in the face of strong evidence that bureaucratic superiors, clients, and the press of business actually determine how they allocate their time.[639] For this reason, attempts to create legal aid programs devoid of law reform work have failed.[640]

Nevertheless, law reform activity may persist precisely because it is so marginal.[641] Service work and nonlitigated solutions to problems dwarf law reform activity in every legal aid program. We have seen already how case loads compel this result. In order to forestall criticism, some programs justify law reform in apolitical terms, as a more efficient expenditure of scarce resources, and this justification may become a self-fulfilling characterization.[642] Even the Legal Services Corporation, which has a reputation for law re-

635. LEGAL SERVICES CORP., *supra* note 166, at 130–43. On this basis, the Corporation concluded that pure judicare and prepaid plans were unsatisfactory. *See also* M. CAPPELLETTI, *supra* note 6, at 513–20 (quoting the BSSR study which compared three staffed office programs with Wisconsin Judicare). *But see* S. BRAKEL, *supra* note 523, ch. 6. There are similar contrasts between private practitioners working under the English legal aid scheme and law centres (although there are differences among the latter as well). *See generally* Grace & Lefevre, *Draining the Swamp*, 7 LAW & POL'Y 97 (1985); Leask, *Law Centres in England and Wales*, 7 LAW & POL'Y 61 (1985); Stephens, *supra* note 626.

636. J. COOPER, *supra* note 2, at 202; J. KATZ, *supra* note 2, at 82.

637. J. KATZ, *supra* note 2, at 36–37. *See generally* SOCIAL MOVEMENTS, *supra* note 6.

638. J. KATZ, *supra* note 2, at 107–08.

639. C. Menkel-Meadow & R. Meadow, *supra* note 585, at 251–52.

640. For instance, the Wandsworth Local Authority was unable to establish an apolitical law centre. J. COOPER, *supra* note 2, at 192–93 n.36, 268–69.

641. One study found that only 14% of LSC offices were involved in substantial law reform. Champagne, *The Internal Operation of OEO Legal Services Projects*, 51 J. URB. L. 649, 653 (1974). Legal aid programs also are more effective when they routinely process individual cases than when they engage in law reform or community development. A. CHAMPAGNE, *supra* note 45, at 9.

642. *House Committee Receives Report on Corporation*, LEGAL SERVICES CORP. NEWS, July–Aug. 1979, at 9.

form, devoted only a fraction of its budget to the backup centers that assisted in most of the major cases.[643] Appellate test cases, an idiosyncracy of common-law jurisdictions, are unique to the United States. On the Continent, civil litigation plays a much smaller role in social change. Judges dominate the proceedings; the pace of adjudication is very slow; government decision-makers strive to involve those who might object rather than wait for them to challenge a decision already made; and political parties are much more active in reform campaigns.[644]

The remaining tactics are notable primarily by their absence.[645] The Legal Services Corporation devoted less than five percent of its time to lobbying in 1979,[646] and Congress subsequently prohibited LSC lawyers from participating in any activity designed to influence legislation.[647] The obstacles to community organizing are even greater. Legal aid lawyers in the United States have done hardly any organizing,[648] preferring litigation because of its higher visibility, quicker results, and greater legitimacy; in addition, their professional skills are more obviously indispensable in the courtroom.[649]

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643. *LSC-Funded Support Centers Doing Job, Report Says,* LEGAL SERVICES CORP. NEWS, Nov.–Dec. 1979, at 4 (5.5% in 1975, 2.5% in 1979).

644. Blankenburg, *Some Conditions Restricting Innovativeness of Legal Services in Germany,* in INNOVATIONS, *supra* note 2, at 201, 206–08; Blankenburg, *Why Historical Precedents of the "Access to Law" Movement in Germany Were Not Followed Up,* in INNOVATIONS, *supra* note 2, at 233, 241. *See generally* Groenendijk, *The Working Group on Legal Aid for Immigrants: A Public Interest Law Organization in the Netherlands,* in INNOVATIONS, *supra* note 2, at 165, 171.

645. British law centres do engage in organizing and lobbying. *See generally* BRENT COMMUNITY LAW CENTRE, 1975–1981 ANNUAL REPORTS (1975–1981); NEWHAM RIGHTS CENTRE, 1974–1975 REPORT AND ANALYSIS OF A COMMUNITY LAW CENTRE (1975). Several also conduct extensive community education through inexpensive pamphlets that are widely distributed. MANCHESTER LAW CENTRE, 1978–1979 ANNUAL REPORT 6 (1979). *See generally* TOTTENHAM NEIGHBOURHOOD LAW CENTRE, 1981 ANNUAL REPORT 30 (1982); TOTTENHAM NEIGHBOURHOOD LAW CENTRE, SCHOOL-LEAVER: "THIS IS YOUR LIFE" (1978); TOWER HAMLETS LAW CENTRE, CLAIM-IT-YOURSELF GUIDE TO COMPENSATION (1979).

646. LEGAL SERVICES CORP., 1979 ANNUAL REPORT 17 (1979).

647. *House Agrees on $241 Million Level . . . Adds Restrictions,* POVERTY L. TODAY, Summer 1981, at 1. Recently the House Judiciary Committee recommended a relaxation of these restraints in situations in which lobbying could be justified by client interests. L.A. Times, May 13, 1983, § 1, at 9.

648. M. CAPPELLETTI, *supra* note 6, at 506–10; B. GARTH, *supra* note 2, at 179; J. KATZ, *supra* note 2, at 97; Hazard, *Law Reforming in the Anti-Poverty Effort,* 37 U. CHI. L. REV. 242, 255 (1970); *cf.* Zander & Russell, *supra* note 120, at 210 (English law centres do more individual than group work). Half of a sample of OEO Legal Services lawyers in 1972 did no community work. Of those who did any, the average amount reported was 17 hours per month (a decline from 1967), of which half was for counselling existing groups, and only 4.5 hours was devoted to organizing. J. HANDLER, *supra* note 184, at 58.

649. J. KATZ, *supra* note 2, at 102–03; Kötz, *Public Interest Litigation: A Comparative Survey,* in ACCESS, *supra* note 2, at 85; *cf.* Komesar & Weisbrod, *supra* note 236, at 89–96 (legalistic strategies preferred by public interest lawyers).

Litigation not only may substitute for organization but actually may undermine the latter. This happens when an individual is selected to represent the group interest,[650] or a class action is brought because no organized group exists.[651] In some jurisdictions, community organizing actively is discouraged;[652] in others, groups have very limited standing to engage in litigation on behalf of their members.[653] Legal aid is not available to groups in the United Kingdom.[654] If it is difficult to work for an existing organization, efforts to create new groups pose even greater political risks.[655] Existing groups constantly disintegrate, and their leadership changes. Hostility to lawyers may become an organizing tactic, and the group may develop its own, in-house legal capability.[656] Often the group services that lawyers offer, such as citizen education,[657] appear irrelevant because the poor respond to crises and do not use law facilitatively to secure prospective advantage.[658] Thus, whatever community organizing does occur tends to be initiated by those who represent individual and group clients on the governing bodies of legal aid offices[659] and by lay community organizers employed by those offices.[660]

F. *How Good Is Legal Aid?*

Any answer to this question must compare state-subsidized legal services with either the solution achieved by someone who confronts a similar problem and is unable to retain a lawyer, the

650. Trubek & Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States,* in ACCESS, *supra* note 2, at 119, 137–39.

651. J. KATZ, *supra* note 2, at 102–03.

652. B. GARTH, *supra* note 2, at 103 n.8 (Quebec). Recent regulations significantly restrict the ability of Legal Services Corporation lawyers to represent groups that advocate the interests of the poor or to assist the poor to form groups of their own. 45 C.F.R. §§ 1611–1612 (1984).

653. Kötz, *Public Interest Litigation: A Comparative Survey,* in ACCESS, *supra* note 2, at 85, 108 (France & Germany).

654. 1 ROYAL COMM'N, *supra* note 63, at 106.

655. B. GARTH, *supra* note 2, at 187–88, 191.

656. J. KATZ, *supra* note 2, at 100–02.

657. *Housing Law,* LAW CENTRES' NEWS, June 1981, at 8 (Newham Law Centre).

658. B. GARTH, *supra* note 2, at 194 *passim.*

659. *Id.* at 67; Zemans, *Canada,* in PERSPECTIVES, *supra* note 2, at 93, 104; *cf.* Reifner, *Types of Legal Needs and Modes of Legalization: The Example of the Berlin Tenants Initiative,* in INNOVATIONS, *supra* note 2, at 37, 38–39, 42 (the powerless prefer community action). For descriptions of successful assistance to activist groups, see Bachmann, *Bachmann & Weltchek: ACORN Law Practice,* 7 LAW & POL'Y 29 (1985); Pitegoff, *Organizing Worker Cooperatives,* 7 LAW & POL'Y 45 (1985).

660. The more extensive and sophisticated use of paraprofessionals by law centres in the United Kingdom as compared to their use by the Legal Services Corporation in the United States may explain why there is more community organizing in the United Kingdom. B. GARTH, *supra* note 2, at 185–86, 201 n.15; *see also* Johnstone, *Paralegals in English and American Law,* 2 WINDSOR Y.B. ACCESS JUST. 152 (1982) (discussing greater use of paraprofessionals by private solicitors).

services rendered by the lawyer hired by a paying client, or some ideal to which legal aid aspires and which it sometimes achieves. Performance may be measured in terms of input, process, and outcome. Although the latter may be of greatest interest, difficulties of scaling outcomes have diverted attention to the other indices.

Training and experience are two of the most common input measures. Salaried legal aid lawyers in staffed offices used to be drawn disproportionately from students who had performed poorly in law school or who had attended law schools of lower quality, or both.[661] Today, however, legal aid lawyers are at least a representative cross section of the profession, and many are the best graduates of the best schools.[662] On the other hand, academic education does not prepare them for legal aid work, most have no other experience, and often there is little or no training on the job.[663] Staffed office lawyers who specialize in poverty law clearly are more experienced than their counterparts in private practice who take such cases only occasionally through a judicare scheme.[664] Furthermore, private law firms tend to assign legal aid work to the most junior staff members.[665] Those private lawyers who do legal aid work (at least in Australia) tend to be younger and of lower status: They may be immigrants or from working-class backgrounds, and they represent individuals rather than businesses.[666] On the other hand, staffed of-

661. J. KATZ, *supra* note 2, at 52–56; *see also supra* notes 212–13 and accompanying text.

662. J. HANDLER, *supra* note 184, at 142–43; Erlanger, *supra* note 215, at 257–64; *see* R. Meadow & C. Menkel-Meadow, *supra* note 215, table 1; *see also supra* notes 214–15 and accompanying text.

663. R. SACKVILLE, *supra* note 56, at 80, 98–99 (New South Wales and Victorian Public Solicitors); Bellow, *Turning Solutions into Problems: The Legal Aid Experience,* 34 N.L.A.D.A. BRIEFCASE 106, 117–18 (1977). *But see* R. HERMANN, *supra* note 13, at 33, 74 (many public defenders now receiving extensive training). In a sample of law centre lawyers in England and Wales, 68 had been qualified an average of 36 months at the start of their employment with the law centre, and another 10 were newly qualified. F. STEVENS, *supra* note 250, at 8. Law centres have had considerable difficulty recruiting solicitors with three years experience, who alone are allowed to practice without supervision and are able to supervise less experienced solicitors. *Where Have All the Lawyers Gone?,* LAW CENTRES' NEWS, Spring 1982, at 1.

664. COOPER & PEARSON, *supra* note 191, at 5. In Belgium, for instance, the state provides compensation for *Pro Deo* work only to young lawyers serving their apprenticeships. In France, the level of compensation is so low that only the most inexperienced or unsuccessful lawyer would accept it: The maximum, which was 1080 francs when the program was created in 1972, has increased to only 1300 after a decade of high inflation. Cappelletti, Garth & Trocker, *supra* note 30, at 672–73.

665. Half of all legal aid clients are not seen by partners, even at very small solicitors firms. B. ABEL-SMITH, *supra* note 73, at 82.

666. J. FITZGERALD, *supra* note 64, at 27–29, 48–50. When asked if they would accept cases referred by the New South Wales Public Solicitor, only about seven percent of city solicitors and nine percent of suburban solicitors answered affirmatively, compared to nearly 21% of those practicing in the country. R. SACKVILLE, *supra* note 56, at 81. To the extent that firm size is a surrogate for the quality of legal services, it is

fices have been forced by mounting case loads and inadequate budgets to rely heavily on paraprofessionals and lay advocates.[667] And high rates of turnover among salaried legal aid lawyers tend to eliminate the most experienced.[668]

Input also can be measured indirectly. Legal aid lawyers, especially those in staffed offices, confront large case loads[669] that pressure them to handle work routinely, expending the least possible resources in disposing of clients' problems. One study estimated that the Buro voor Rechtshulp in the Netherlands provided poor service in a third of their cases for this reason.[670] Even when legal aid lawyers strive to maintain quality, the administrative agencies with which they deal may be so overwhelmed that they insist on rapid disposition.[671] On the other hand, though higher case loads reduce quality, they afford some legal advice and representation to clients who otherwise would have gotten none. As noted earlier, the amount of time invested in each case, another indirect measure of quality, is very small.[672] With budget cutbacks, it is being reduced still further: Offices are handling an even larger proportion of cases by telephone and mail, paring the time invested per case to

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significant to note that 15% of the income of solo practitioners in Toronto was earned from legal aid matters but only four percent of the income of law firms with 10 lawyers or more. S. COLVIN, *supra* note 550, at 87. The list of lawyers willing to accept legal aid referrals in Sudbury, Ontario in 1981 contained only 39% of lawyers called to the bar before 1969 but 92% of those called subsequently. Ribordy, *Les Services d'Aide Juridique à Sudbury,* 5(4) CANADIAN LEGAL AID BULL. 28 (1982). In both France and Belgium until recently, *Pro Deo* representation of poor people fell on the shoulders of apprentices. When the governments in both countries established legal aid programs, these apprentices continued to handle much of the work. A. Boigeol, *supra* note 428, at 32; L. Huyse, *supra* note 8, at 20.

667. *Demonstration Projects Involve Clients in Legal Services Delivery,* POVERTY L. TODAY, Nov. 1981, at 4.

668. Katz, *supra* note 256, at 286. In 1976, 1000 out of the 3300 LSC lawyers left the Corporation. LEGAL SERVICES CORP., 1976 ANNUAL REPORT 11 (1976). In 1977 a third of all staff attorneys left; 80% stay less than three years. LEGAL SERVICES CORP., 1977 ANNUAL REPORT 20 (1977). Yet in Quebec, staffed office lawyers averaged 6.8 years in 1977–1978 and 8.5 in 1980–1981. Commission des Services Juridiques, Evaluation de l'Aide Juridique 35–36 (1982).

669. The Public Defender Service in Washington, D.C., widely recognized as one of the best in the country, maintains its high quality by taking only about 15% of the criminal cases in the District, leaving the rest to court-appointed counsel, many of whom are of low competence. R. HERMANN, *supra* note 13, at 123–35.

670. Blankenburg & Cooper, *supra* note 8, at 277; Bruinsma, *supra* note 146, at 337–38; *cf.* M. KING, *supra* note 193, at 38 (poor quality of representation under duty solicitor scheme); Zemans, *supra* note 15, at 422 n.130 (poor quality in Honduras, Mexico, and Venezuela).

671. Bellow, *supra* note 663, at 117.

672. M. KING, *supra* note 193, at 38; *see supra* notes 593–611 and accompanying text. A duty advocate scheme established in a Supplementary Benefit Appeals Tribunal by solicitors at the Wandsworth Legal Resource Project often had no more than ten minutes to prepare cases. Wadham & Page, *Tribunal Duty Advocates,* LAG BULL., Oct. 1983, at 9, 13.

just a few hours.[673] Although salaried lawyers devote less time to each case than do private practitioners under judicare, they apparently achieve equivalent results.[674]

Cost, another measure of input, closely relates to case load and time. It seems plausible to posit a rough correlation between cost per case and quality, although there may be economies of scale. This assumption does not apply to staffed offices. Salaries are low—perhaps half what the same lawyer would make in private practice[675]—but legal aid still appears to attract qualified, dedicated staff whose motivation is undiminished by poor pay, although turnover may be high. But if private lawyers are reimbursed inadequately for taking legal aid cases, either they will curtail the time and resources they invest in each matter (to increase their case loads or to devote more energy to paying clients), or judicare will fall to those lawyers at the bottom of the profession who can get no other business. There is ample evidence that rates of pay are low. Often they are set at a fraction of what private lawyers can charge their fee-paying clients.[676] When hourly rates are established, they may be set at

673. In Maine, the Legal Services Corporation offices experimented with the use of toll-free lines and almost doubled the number of clients served. Houseman, *Legal Services to the Poor and Disadvantaged in the '80s: The Issues for Research,* in RESEARCH ON LEGAL SERVICES, *supra* note 336, at 17, 27–27.

674. R. HERMANN, *supra* note 13, at 154–55; Domberger & Sherr, *supra* note 532, at 40–46. *But see* Zemans, *supra* note 15, at 426 n.143 (longer sentences in Venezuela).

675. R. HERMANN, *supra* note 13, at 33, 74, 125 (salaries of public defender); Komesar & Weisbrod, *supra* note 236, at 83–84; Zander & Russell, *supra* note 120, at 209 (law centres in United Kingdom paying £2600–£3600); Zemans, *supra* note 100, at 234–35 (Canadian law center lawyers receive half the salaries they would earn in private sector); *Law Centre Funding: Here to Stay (or Are They?),* LAW CENTRES' NEWS, June 1981, at 1 (Adamstown Law Centre paying less than £5000); *National Resource Center for Consumers of Legal Services,* LEGAL SERVICES CORP. NEWS, July–Aug. 1979, at 6 (low salaries for lawyers in prepaid plans); *see also supra* note 236.

676. RUSHCLIFFE, *supra* note 62, at 35 (85% in the United Kingdom, subsequently raised to 90%); Blankenburg & Cooper, *supra* note 8, at 282; Blankenburg & Reifner, *Conditions of Legal and Political Culture Limiting the Transferability of Access-to-Law Innovations,* in ACCESS, *supra* note 2, at 223 (Germany); *National Resource Center for Consumers of Legal Services,* LEGAL SERVICES CORP. NEWS, July–Aug. 1979, at 6 (lawyer participants in prepaid plan offer 30% discount to client members); Zemans, *Canada,* in PERSPECTIVES, *supra* note 2, at 93, 111 (75% in Ontario).

Court-appointed criminal defense counsel in New York City in the mid-1970's earned $15 an hour in court and $10 an hour out of court, with an upper limit of $500 in felonies and $300 in misdemeanors. A private lawyer would charge $1000 to $1500 as a retainer in an uncomplicated felony and at least $2000 if the case were tried. R. HERMANN, *supra* note 13, at 77. Pilot projects initiated by the Legal Services Corporation paid private practitioners less than the going rate and noted:

> Data on cost indicate that a program that pays attorneys in private practice "usual and customary fees" would be too expensive to be practical. Economical utilization of private attorneys requires a willingness on their part to participate at a reduced fee, in order to keep costs reasonable. Most of the demonstration projects were able to find attorneys and law firms willing to do so.

LEGAL SERVICES CORP., *supra* note 166, at iii. Earlier judicare plans had paid attor-

one-half to two-thirds of the market rate.[677] The average amount paid per case strongly suggests the cursory nature of the representation provided: less than £20 to defend a criminal in Magistrates' Court or in a summary trial in a Crown Court in Britain in the 1960's.[678] Certainly, lawyers complain vehemently about inadequate reimbursement and long delays in obtaining payment.[679] Some respond by illegally charging legal aid clients—requiring payments under the counter before they will take or complete a case.[680]

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neys $16 an hour, which then was 53% of the state bar minimum. M. CAPPELLETTI, *supra* note 6, at 513 (quoting BSSR Report). Yet in another important recent case, the Supreme Court has held that lawyers entitled to court-awarded fees in civil rights cases under federal law must be paid at the "prevailing market rates" rather than at the cost of providing those services, as the Reagan administration has argued. In Blum v. Stenson, 104 S. Ct. 1541 (1984), the Court upheld an award based on an hourly rate of $95 to $105 an hour for lawyers with a year and a half of experience. In the early 1970's, legal aid fees in Germany ranged from 90% of the normal fee for the smallest matters to 58% or less for the larger ones. M. CAPPELLETTI, *supra* note 6, at 49 n.149. In New South Wales, Australian lawyers are paid 80% of the normal fee, but they complain that this "normal" fee also is scaled down. J. FITZGERALD, *supra* note 64, at 45.

In Ontario, the legal aid payment for a divorce dropped from $400 in 1972 to $320 in 1973 and was raised to $420 only in 1979, even though this was a period of rapid inflation. Zemans, *The Non-Lawyer as a Means of Providing Legal Services,* in LAWYERS AND THE CONSUMER INTEREST, *supra* note 169, at 263, 295 n.9.

677. Legal aid in the United Kingdom paid £12 an hour at a time when a solicitor representing a client in a condemnation proceeding was collecting £200 an hour in costs from the state. Bindman, *supra* note 239, at 254–55. In Vermont, court-appointed criminal defense counsel were paid $15 an hour, lawyers representing civil clients earned $20 an hour under judicare, but the same lawyers charged their private clients $30 an hour. POVERTY L. TODAY, Feb. 1981, at 3–5.

678. See generally LAW SOCIETY, ANNUAL REPORTS for the 1960's. In the mid-1970's, the average matrimonial proceeding cost the legal aid program about £150, other civil cases in the County Court cost between £100-£150, and civil cases in the Magistrates' Courts cost less than £50. LAW SOCIETY, MEMORANDUM NUMBER 3: REPLIES BY THE COUNCIL TO THE REQUEST FOR EVIDENCE BY THE ROYAL COMMISSION ON LEGAL SERVICES (pt. 1) 201 (1977); *cf.* 1 ROYAL COMM'N, *supra* note 63, at 107. Lawyers are expected to continue representing their clients on a *pro bono* basis after the legal aid limits have been reached. *The Economics of a Legal Aid Practice, supra* note 239, at 270. Cost per case also may be an index of the resources devoted by staffed offices. In 1949, these costs ranged from $1.40 in St. Louis to $12.47 in Erie, Pennsylvania. E. BROWNELL, *supra* note 67, at 240; SUPPLEMENT, *supra* note 163, at 54–55. Ten years later, they ranged from $5.52 in Elizabeth, New Jersey to $23.24 in St. Paul, Minnesota. Cost also correlated with the proportion of cases litigated. E. BROWNELL, *supra* note 67, at 240; SUPPLEMENT, *supra* note 163, at 54–55. By 1966 they ranged between an average of $19.20 and $32.39 (varying with the size of the community), probably an actual drop in expenditure per case when adjusted for inflation. 1967 N.L.A.D.A. PROC. 306 (1967).

679. B. ABEL-SMITH, *supra* note 73, at 28 (United Kingdom); M. CAPPELLETTI, *supra* note 6, at 49 n.149 (Germany); M. VALÉTAS, *supra* note 102, at 62 (in 1973, the maximum amount paid in France was 600 francs); Herzog & Ecovilet, *supra* note 488, at 487 n.131 (France); Hodge, *supra* note 528 (United Kingdom).

680. R. EGERTON, *supra* note 156, at 12–13 (United Kingdom); Kojima, *Japan,* in PERSPECTIVES, *supra* note 2, at 191, 195; Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 221; Sang Hyun Song, *Korea,* in PERSPECTIVES, *supra* note 2, at 204, 206.

Process values overlap with input measures but generally are more elusive.[681] Sometimes the criteria are fairly clearcut. Substantive legal errors obviously indicate poor quality: During World War II, a lawyer, counseling hundreds of matrimonial clients at a free legal advice centre in Britain, apparently was unaware that a divorce could not be obtained within the first three years of marriage.[682] Delay also is measured easily: Clients unable to obtain a divorce in Britain in less than two years during World War II[683] or forced to wait two to three months in France in the 1970's before learning whether they even were eligible for legal aid[684] understandably were dissatisfied with the services offered.[685] The skimpy amount of research performed suggests the routine nature of representation, which is aggravated by discontinuities within each case and between clients and cases.[686] Despite the ideal of client autonomy, legal aid lawyers strongly dominate the relationship.[687] Salaried lawyers compare poorly with private practitioners in maintaining personal contact with clients and in keeping them informed of the progress of their cases.[688] A final measure of quality combines process and outcome: Does the lawyer settle the case or litigate it? Although the data are imperfect, they tend to confirm the widespread impression that legal aid lawyers settle most matters;[689] on the other hand, the mere intervention of a lawyer, no matter how cursory, improves the client's situation—decreasing the

681. An attempt to establish a process measure by asking poverty groups, private practitioners, and judges to rate the performance of OEO legal services lawyers produced favorable evaluations. Champagne, *supra* note 619, at 479–86. But there is no evidence that these evaluators used the same criteria or had an adequate opportunity to observe performance. On the difficulty of establishing process measures, see generally Carlson, *Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come,* 11 LAW & SOC'Y REV. 287 (1976); Rosenthal, *Evaluating the Competence of Lawyers,* 11 LAW & SOC'Y REV. 257 (1976).

682. R. EGERTON, *supra* note 156, at 29; *cf.* Bellow, *supra* note 663, at 123–25 (discussing errors by LSC lawyers).

683. R. EGERTON, *supra* note 156, at 18. In the 1970's, delays of two to three months were common. L. BRIDGES, *supra* note 409, at 121–25.

684. M. VALÉTAS, *supra* note 102, at 67; Pradel, *France,* in PERSPECTIVES, *supra* note 2, at 134, 142.

685. M. VALÉTAS, *supra* note 102, at 93.

686. J. KATZ, *supra* note 2, at 18.

687. *See generally* Bellow, *supra* note 663; Hosticka, *supra* note 288. This dominance is particularly detrimental because the client often must push the lawyer to keep working on the matter. M. VALÉTAS, *supra* note 102, at 99–100; *cf.* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 111, 173 (1974) (paying clients in personal injury cases).

688. Domberger & Sherr, *supra* note 532, at 46 (United Kingdom); POVERTY L. TODAY, Nov. 1981, at 1; *cf.* S. BRAKEL, *supra* note 523, at 98–102 (United States) (study indicating that judicare clients are more satisfied than staffed-office clients); R. HERMANN, *supra* note 13, at 95–96 (comparing public defenders and private defense lawyers).

689. *See supra* notes 603–05 and accompanying text.

number of guilty pleas in criminal cases, for instance.[690]

Litigation versus settlement may be a surrogate measure of outcome quality since other data indicate that litigated outcomes are more favorable to the client.[691] Beyond this, evidence about the quality of outcomes is ambiguous. The few empirical studies comparing salaried legal aid lawyers, private lawyers handling cases under a legal aid scheme, and private lawyers working for fee-paying clients found little difference between the three categories, although fee-paying clients apparently obtain the best results and judicare clients the worst.[692] The similarity in outcome contrasts sharply with the substantial variation in client evaluations, which tend to favor private, fee-earning counsel.[693] Clients appear to be influenced strongly by those process variables that they readily can judge—delay, the availability of lawyers, courtesy, and whether

690. M. KING, *supra* note 193, at 10–11, 20–21; *see also* B. ABEL-SMITH, *supra* note 73, at 167–78 (United Kingdom); Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 226–27; Wadham & Page, *supra* note 672, at 9 (29% success rate for Supplementary Benefit Appeals Tribunal applicants represented by Duty Advocate; 32% for other represented claimants; 18% for unrepresented); Chen, *supra* note 456, at 8, col. 6 (85% of legally represented tenants win eviction proceedings, only 10% of unrepresented). *See generally* Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs,* 62 CORNELL L. REV. 989 (1977) (United States); Vinson & Homel, *Legal Representation and Outcome,* 47 AUSTL. L.J. 132 (1973) (Australia). It also increases the frequency of bail. M. KING, *supra* note 193, at 23. M. ZANDER, *supra* note 554, at 47–51, reviewing several studies of legal representation in England, found that it had no clear impact on the likelihood of obtaining bail but tended (1) to diminish the proportion of guilty pleas; (2) to increase the proportion of those seeking a trial at the Crown Court; and (3) to increase the likelihood of acquittal. Furthermore, *any* representation (whether by a solicitor, friend, or trade union representative) significantly improved the outcome of tribunal hearings. *See also* 2 ROYAL COMM'N, *supra* note 63, at 91–101. Compared with unrepresented defendants, accused represented by duty solicitors at initial hearings pleaded guilty less often. Duty solicitors also were slightly more successful in obtaining bail than were other solicitors. M. KING, *supra* note 193, at 23–25. A longitudinal study of the disputing process found that claimants who consulted lawyers were more successful. Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture,* 15 LAW & SOC'Y REV. 525, 560 (1980–1981).

691. *See generally* J. BALDWIN & M. MCCONVILLE, NEGOTIATED JUSTICE (1977) (evaluating bargained pleas in criminal cases); D. ROSENTHAL, *supra* note 687, at 78–79 (evaluating negotiated settlements in personal injury cases).

692. R. HERMANN, *supra* note 13, at 153–54; Domberger & Sherr, *supra* note 532, at 42–44. LEGAL SERVICES CORP., *supra* note 166, at 116–29, found no significant differences among programs in terms of quality. Nevertheless, more of the private practitioner models had below average and less than satisfactory ratings. *Id.* A comparison of staffed office and judicare programs for criminal defense in British Columbia found that the former pleaded their clients guilty more often but obtained the same conviction rate overall and fewer prison sentences. P. BRANTINGHAM, *supra* note 523.

693. R. HERMANN, *supra* note 13, at 41–52, 89–99, 135–42; Etheridge, *supra* note 523, at 258–59. But the most thorough investigation to date found no significant difference between client satisfaction with salaried lawyers and with state-reimbursed private practitioners. LEGAL SERVICES CORP., *supra* note 166, at 105–15; *see also* S. BRAKEL, *supra* note 523, at 100–02 (finding clients preferred judicare experiences over nonjudicare experiences).

they are kept informed.[694] Furthermore, satisfaction varies with outcome,[695] and fee-paying clients may secure better outcomes not because the quality of representation is higher but because they have stronger cases.

V. How Should We Understand Legal Aid?

A. *Why Does Legal Aid Emerge When and Where It Does?*

I offer a number of complementary, and perhaps inconsistent, responses to this question because I find no single explanation satisfactory. On the one hand, legal aid does develop in most advanced capitalist societies, suggesting the two may be linked. On the other, it appears at very different times, is absent in some, and is found in the socialist and third worlds as well, suggesting that concrete historical circumstances are decisive.[696] Furthermore, legal aid is a composite of many different state activities—defending the criminal accused, administering divorce, disciplining capital, regulating bureaucracy—and a single explanation would obscure these differences. I organize the alternative explanations in terms of the interested parties discussed in Part III.

Because legal aid is a creation of the state, *raison d'état* is an obvious starting point. Erhard Blankenburg associates legal aid with the appearance of what, in the nineteenth century, would have been called "dangerous classes."[697] These are the working class and lumpen proletariat created by capitalist industrialization and urbanization and the growing ethnic and racial minorities produced by regional or international migration. These phenomena seem to be roughly contemporaneous. The earliest legal aid associations in the United States, founded at the end of the nineteenth and beginning of the twentieth centuries, were directed at European immigrants in major cities such as New York and Chicago (albeit to women—a subcategory rarely characterized as dangerous). On the other hand, the passage of legal aid legislation in Britain in 1949 and the Netherlands in 1957 anticipated by more than a decade the wave of

694. B. Abel-Smith, *supra* note 73, at 180. Clients also may feel responsible for the quality of their private lawyers when they "choose" those lawyers themselves. In some settings, clients appear equally dissatisfied with the impersonal treatment, long waits, and hurried consultations they receive in staffed offices and with the superficial handling and lack of interest they experience in judicare programs. Falke, *supra* note 75, at 142, 145.

695. B. Abel-Smith, *supra* note 73, at 180–81.

696. Ian Gough argues that although there are convergent trends among the advanced capitalist states in the provision of social security and other welfare services, each state also must be examined in its concrete historical and social context and in its relation to the world economy. I. Gough, *supra* note 319, at 57–58, 68.

697. Blankenburg, *Why Historical Precedents of the "Access to Law" Movement in Germany Were Not Followed Up*, in Innovations, *supra* note 2, at 233, 235. *See generally* G. Jones, Outcast London (1971).

immigration from their former colonies. However, the growth in the 1970's of law centres in Britain and law shops, legal collectives, and legal aid Buro in the Netherlands does coincide with that migration. The founding of OEO Legal Services in 1965 might be seen as a response to the migration to northern cities of Blacks from the southern United States and Latinos from the Caribbean and Latin America. A similar relationship may exist between the ethnic diversification of relatively homogeneous populations in Canada and Australia in the 1970's and expansion of legal aid. Nevertheless, large-scale migration does not always stimulate legal aid schemes. Both Germany and Sweden have absorbed significant numbers of guest workers during the last two decades, yet only Sweden created a legal aid program.[698] Although France experienced a substantial immigration from its former colonies in North and West Africa and Southeast Asia in the 1960's, it introduced even a minimal legal aid program only in 1972.

Another approach examines behavioral changes that appear to invite or require state intervention. Industrialization, urbanization, and migration generally contribute to social disorder. At the same time, capital demands a more disciplined labor force. If the state responds by criminalizing behavior, increasing the number of persons prosecuted, and imposing more severe penalties, it may have to legitimate this highly visible expansion of coercion by an equally conspicuous affirmation of due process. One manifestation is the provision of legal representation to all accused. But this correlation is even weaker. Britain's penal system had been experiencing a progressive liberalization for more than a hundred years before the 1949 Legal Aid Act was passed. The Netherlands, with one of the most comprehensive legal aid systems, has one of the least repressive criminal justice systems in the world, whether measured in terms of the number of arrests or prison sentences or the length of those sentences. If there is any relationship, causality appears to be reversed: The introduction of legal aid invites more prosecutions. But whichever direction the causation, it cannot explain why and when the state begins to offer assistance to civil litigants and applicants to tribunals.[699]

Changes in family structure provide a more promising explanation. The assumption that marriage signified a lifetime union between a male breadwinner and a female child rearer or homemaker

698. Blankenburg attributes this to Germany's retention and use of the power to expel workers when their jobs ended. Blankenburg, *Why Historical Precedents of the "Access to Law" Movement in Germany Were Not Followed Up*, in INNOVATIONS, *supra* note 2, at 233, 240; Bruzelius & Bolding, *supra* note 600.

699. In most countries, criminal legal aid precedes civil and is consistently more generous—a recognition of the greater coerciveness of the criminal process. But in Scotland and France, the sequence appears to have been reversed.

was substantially undermined during World War II and the decades that followed. Although there continues to be a disagreement about the cause—the entry of women into employment, an increase in the ratio of women to men, changes in cultural norms—there is no doubt that divorce laws were liberalized and divorce rates increased.[700] In Britain, this increase was intimately related to the state's decision to take fiscal responsibility for legal aid, and everywhere family matters represent the single largest category in civil legal aid programs.[701] Furthermore, the centrality of divorce perhaps explains the correlation that Kees Schuyt has noted between the presence and absence of legal aid, on the one hand, and the division between Protestant northern Europe (and North America and Australia) and Catholic southern Europe (and Ireland and Latin America), since the latter countries, until recently, have not permitted divorce.[702] Perhaps, then, legal aid helps to ensure reproduction of the labor power essential to capitalism by preserving family obligations after divorce, albeit in altered form. Granting women custody of children affirms and enforces their continuing responsibility for nurturance. Requiring an ex-husband to support his former wife and children places the cost of reproduction on labor, rather than allowing it to fall entirely on the state.[703] Terminating the marriage when it has failed frees the parties to enter into new marriages.[704]

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700. *See generally* M. GUTTENTAG & P. SECORD, TOO MANY WOMEN? THE SEX RATIO QUESTION (1983); M. RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE, & THE LAW (1972).

701. *See* Tables 10–14.

702. Thus, in Italy, there were 71,555 separation cases in 1978 but a total of 462,288 civil cases filed in the preture in 1979, so that separation represents only about 15% of civil cases. V. Varano, *supra* note 32, at 20 & n.23.

703. Requiring child support has proved to be unsuccessful. *See generally* D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT (1979); Chambers, *Men Who Know They Are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support,* 75 MICH. L. REV. 900 (1977); Lempert, *Organizing for Deterrence: Lessons from a Study of Child Support,* 16 LAW & SOC'Y REV. 513 (1981–1982).

704. This Marxist interpretation of divorce should not obscure the role of these laws in preserving patriarchy. The divorce rate increased dramatically following each of the World Wars, as the following table shows. But the correlation between the creation of legal aid and either the absolute divorce rate or the increase in that rate is weak or nonexistent. True, the United Kingdom experienced the most rapid increase, but only because of its low rate prior to World War II. The rate in the Netherlands was declining at the time legal aid was enacted in 1957 and was much lower than that in France, which did not create a plan until 1972. In Italy, the divorce rate nearly doubled between 1972 and 1978 (from 41,391 to 71,555), with the liberalization of divorce laws, but the government did not enact legal aid. V. Varano, *supra* note 32, at 20.

Divorce Rate Per Thousand Marriages in Selected Western Countries, 1900-1960*

Country	1900	1910	1920	1930	1940	1946	1950	1956	1960
United States	75.3	87.4	133.3	173.9	165.3	274.4	231.7	246.2	259.0

It is possible to generalize the last observation. Since World War II, the welfare states of advanced capitalism have assumed ever greater responsibility for the reproduction of labor. "Informal ways of insuring against life risks are increasingly replaced by institutional ones."[705] One problem with this explanation is the enormous variation in the size and shape of the welfare apparatus in different countries and the divergent dates at which the numerous provisions were introduced. Furthermore, legal aid is much less closely connected with the reproduction of labor than are health, housing, education, nutrition, and the maintenance of unproductive populations.[706] Nevertheless, the relationship between legal aid and the growth of the welfare state cannot be gainsaid. First, once the state assumes some burdens, it invites other demands. The success of the Services Divorce Department in Britain during World War II contributed to the legal profession's reluctance to resume representing indigent clients without payment. The growth of the Legal

									(1959)
Germany	17.6	30.2	40.8	71.4	125.7	125.5	145.8	89.2	88.7
Switzerland		55.8	64.1	84.7	95.2	110.9	114.3	106.0	111.9
England and Wales		2.2 (1911)	8.0	11.1	16.5	77.3	86.1	74.4	69.5
New Zealand	14.5	18.6	47.1	55.9	60.7	103.9	98.9	82.6	87.2
Australia	13.5	12.9	22.6	41.7	41.9	91.0	98.2	90.4	88.9
Belgium	11.9	18.5	20.6	34.8	50.5	62.2	70.8	62.8	70.4
Norway	12.6 (1901-1905)	22.6 (1906-1910)	33.0 (1916-1920)	46.4 (1926-1930)	43.3 (1936-1940)	69.5	85.4	82.3	88.5 (1958)
Denmark		30.0 (1901-1910)	44.0 (1911-1920)	79.4	98.5	186.3	176.8	193.0 (1955)	186.1
Yugoslavia			42.8 (1921)	42.1	57.4	101.6 (1947)	96.1	123.6	131.4
Sweden	12.9	18.4	30.5	50.6	65.1	116.0	147.7	175.4	174.6 (1959)
France	26.1	46.3	49.4	68.6	80.3	207.2	106.2	100.5	82.4 (1959)
Netherlands		21.5	41.8	48.2	46.3	147.5	77.7	60.1	57.7 (1958)

* Data from official sources.

Reprinted from W. GOODE, WORLD REVOLUTION AND FAMILY PATTERNS 82 (1970). The number of divorces in the United Kingdom rose from 25,400 in 1961 to 39,100 in 1966, 74,400 in 1971, and 126,700 in 1976. M. ZANDER, *supra* note 128, at 42 n.70. In the United States, the number increased from 385,000 in 1950 to 393,000 in 1960, 708,000 in 1970, and 1,181,000 in 1979. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1982–1983, at 82 (1982).

705. Blankenburg, *Why Historical Precedents of the "Access to Law" Movement in Germany Were Not Followed Up*, in INNOVATIONS, *supra* note 2, at 233, 237. Of course, the state intervenes even more persuasively in the realm of production through fiscal and regulatory measures, but legal aid plays a relatively insignificant role in these areas.

706. Sweden has an elaborate legal aid program, but Denmark, with a similar welfare apparatus, does not have a comparable scheme. Blankenburg, *European Experience in Innovating Legal Services*, 2 WINDSOR Y.B. ACCESS JUST. 247, 248 (1982).

Services Corporation in the United States has led the organized profession to oppose a Reagan administration proposal to devolve the legal problems of the indigent onto *pro bono* activities.[707] Second, during the 1960's and early 1970's, the welfare apparatus embarked on a period of growth in which it sought new forms of state action through which to wage a war on poverty.[708] Last, and perhaps most relevant, the state needs ways to control and discipline the sprawling welfare apparatus, especially the street-level bureaucrats at the periphery, in the local offices of national government, and in state and local government itself. Legal aid provides an important regulatory mechanism.[709]

I began my analysis of the politics of legal aid by arguing that the legal profession had the greatest interest in such programs.[710] That interest developed gradually: The profession did not initiate proposals to establish legal aid but only reacted to them, although it quickly demanded a major voice in shaping and controlling such programs. Lawrence Friedman has suggested that the changes in the legal system that rendered it less accessible to the mass of the population and required mediation by professionals also contributed to the emergence of legal aid.[711] But the declining accessibility and the growing professionalization of the legal system antedated by many decades the creation of significant legal aid programs. A similar lack of chronological correspondence troubles two other possible linkages. I have argued elsewhere that legal aid is one expression of the professional project of creating demand to which the lawyers turn when their control of supply is significantly eroded.[712] But legal aid emerged in Britain, the Netherlands, and the United States at times when supply control appeared extremely secure. Indeed, in the United Kingdom in the 1940's and 1950's, the Law Society was concerned about a shortage of solicitors, not an overabundance (see Table 15). The enormous increase in the production of lawyers in those countries began only in the late 1960's and early 1970's, by which time legal aid was firmly established,

707. In its recent revision of the Rules of Professional Conduct, the American Bar Association flirted briefly with requiring *pro bono* service but quickly substituted a bland and unenforceable exhortation to render "public interest legal service." Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 684 & n.247 (1981).

708. Between 1960 and 1981, social expenditure in the major West European countries increased from 14.5% to 26.3% of their gross domestic product; in the United States it increased from 11% to 21%. Markham, *Europe, Too, Feels the Social Program Pinch*, N.Y. Times, Feb. 19, 1984, at E3, col. 1.

709. Legal aid also assists state regulation of the private economy by allowing the poor to mobilize public and private law remedies.

710. *See supra* notes 140–211 and accompanying text.

711. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State*, in ACCESS, *supra* note 2, at 258.

712. *See supra* note 20.

although budgets experienced substantial growth roughly contemporaneous with expansion of the profession.[713] Furthermore, third world countries like Brazil and Venezuela and European countries like Belgium and West Germany experienced dramatic growth in the number of lawyers in recent years without the introduction of legal aid systems (see Table 15). And though the French legal profession has grown explosively in the last decade (see Table 15), French lawyers have been reluctant to accept legal aid cases, with the result that the case load has grown very slowly (see Table 16). Furthermore, although almost every professional organization ultimately endorsed judicare programs as a means of stimulating demand, staffed offices create little business for private practitioners (even if they do not take it away, as once was feared). On the other hand, if lawyers do not create legal aid, legal aid may increase the demand for and thus the number of lawyers. Such a hypothesis is consistent with the fact that major legal aid programs in the United States, Canada, England and Wales, Scotland, the Netherlands, and France have been followed by often dramatic increases in the rate of professional growth. By contrast, Italy has one of the few relatively static legal professions and also is the largest industrialized European country without any legal aid scheme (see Table 15). It is possible to argue (as I will below) that legal aid programs help to legitimate the profession, but there is little evidence that lawyers perceived legal aid as a significant source of legitimation before the programs were created, or that lawyers embraced them for that reason.

Two other categories of actors deserve mention, although their roles have been less significant than one might expect. First, capital, in the guise of philanthropy, was instrumental in establishing some of the earliest legal aid programs in the United States. But its contribution dwindled after World War II, and its role has been eclipsed by that of the state. Second, social movements of the oppressed occasionally turned to law as an instrument of social change: the Workers Offices in Germany at the turn of the century,[714] the NAACP in the United States starting in the 1930's.[715] In each instance, they found a committed core of lawyers eager to champion their causes. But once again these causes have been either taken over by the state or rendered relatively marginal to state programs.

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713. *See supra* notes 430–41 and accompanying text. Ever since the establishment of legal aid in 1949, the Law Society diligently has sought to expand its scope and increase the remuneration available to solicitors. *See generally* S. POLLOCK, LEGAL AID—THE FIRST 25 YEARS (1975).

714. *See generally* Reifner, *supra* note 59, at 88–104.

715. COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE 34–40 (1976).

Finally, the impact of external events is critically important. World War II was central to the British experience because it undermined family stability and fostered the penetration of the state throughout daily life. The coincidence of the civil rights and antiwar movements in the United States in the 1960's helped create a generation of students dedicated to social activism.[716] The tenure of particular administrations—Democratic in the United States, social democratic in the United Kingdom, the Netherlands, and Australia—is associated closely with the rise and fall of legal aid. These concrete historical events help explain the diversity among nations that share many common characteristics.

B. *What Is the Significance of Legal Aid?*

Like all welfare programs, legal aid is the product of two very different processes. First, it is an object of class struggle. True, legal aid has a lower priority for the poor, the working class, and other oppressed categories than do social services like housing, health, education, or income maintenance, because beneficiaries view it more as an instrumental than an ultimate good. Despite what lawyers might wish, people are interested less in procedural justice than in what they can win or avoid through law.[717] Nevertheless, legal aid is valued to the extent that law is considered an important, or at least an indispensable, instrument to achieve desired ends. The ferocious attacks on legal aid waged by the petty bourgeoisie and their spokespersons in the legal profession and in politics dispel any doubts about the appropriateness of a class analysis. Yet this perspective tends to be overshadowed by one that sees legal aid, like other welfare programs, as essential to the maintenance of capitalism. I adverted to the latter view above when I suggested that criminal legal aid is a necessary concomitant of increased state coercion,[718] and that civil legal aid, which is largely matrimonial, serves to reconstruct the family, thus ensuring the reproduction of labor.[719] In analyzing the significance of legal aid

716. J. HANDLER, *supra* note 184, at 135–53; Erlanger & Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns,* 13 LAW & SOC'Y REV. 11, 18–19 (1978); R. Meadow & C. Menkel-Meadow, *supra* note 215, at 4.

717. Galanter, *supra* note 287, at 243–44. John Griffiths has stressed that people do not have "legal needs" but needs that law, at most, makes an instrumental contribution toward satisfying. Griffiths, *A Comment on Research into "Legal Needs,"* in INNOVATIONS, *supra* note 2, at 29, 30. Of course, it is plausible to say that a person who is made a legal object as a criminal or civil defendant "needs" a lawyer. There are situations in which people look to law as an ultimate, a source of principled vindication—oppressed groups demanding equal treatment, for instance.

718. *See supra* note 699 and accompanying text.

719. *See supra* notes 700–04 and accompanying text.

below, I try to sustain the tension between these two perspectives.[720]

One inspiration for legal aid is the implicit presupposition that, because legal rights appear to have been instrumental in the rise of capitalism, they must be equally salient in subsequent class struggles. But the analogy is badly flawed and therefore misleading. Certainly the proletariat has secured important protections through legal guarantees such as the regulation of wages, hours, working conditions, and, most importantly, the right to organize. Yet workers obtained these gains through collective action by withholding their labor power, forming political parties, and sometimes threatening violence. The primary beneficiaries of legal aid—women, children, the disabled, and the elderly—have no labor power to withhold, have been unable to organize politically, and pose no threat to social order.[721] The analogy is deficient in other ways. E.P. Thompson has cautioned radical critics of bourgeois law against derogating the civil rights that oppressed classes have won at enormous cost.[722] But granting the force of this warning, we must not assume that because some can invoke law as a shield against state power others can wield it as a sword to alter fundamental class relations. The assumption is false not only because of the essential difference between resisting state power and seeking to mobilize it (which I discuss further below),[723] but also because the form of bourgeois law is not equally appropriate to protect all interests. Charles Reich presupposed this universality in his landmark article on the "new property."[724] Ever since, legal aid lawyers have tried to clothe welfare benefits in the same legal protections that the bourgeoisie secured for capital and the proletariat for labor power. But, as Richard de Friend has argued forcefully, welfare "rights" are not the equivalent of legal rights in capital or in labor power, and giving them the same name only obscures the fundamental differences.[725] Labor and capital are created by the action of private

720. *See* I. GOUGH, *supra* note 319, at ix.

721. *See generally* J. KATZ, *supra* note 2, at 98; F. PARKIN, MARXISM AND CLASS THEORY: A BOURGEOIS CRITIQUE 84–86 (1979); F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL ch. 5, at 264 (1977); Roach & Roach, *Mobilizing the Poor: Road to a Dead End,* 26 SOC. PROBS. 160 (1978).

722. E.P. THOMPSON, WHIGS AND HUNTERS 264–69 (1975).

723. *See infra* note 763 and accompanying text.

724. *See generally* Reich, *The New Property,* 73 YALE L.J. 733 (1964).

725. *See generally* de Friend, *Welfare Law, Legal Theory and Legal Education,* in WELFARE LAW AND POLICY: STUDIES, PRACTICE AND RESEARCH 43 (M. Partington & J. Jowell eds. 1979). This may be another reason why private practitioners have shown so little interest in poverty law, even under judicare schemes that would reimburse them for their work. It also may explain why poverty law courses failed to secure a permanent place in most curricula, although they overcame the original hostility of law faculties. There is an ongoing debate in the United Kingdom whether legal aid should be extended to administrative tribunals. Both the Royal Commission and the Labour Party have advocated this, although the Thatcher Government remains un-

individuals, welfare benefits by state action. There is a market for the former (hence the need to embody them in legal form) but not for the latter. Capitalism is said to require the certainty and predictability conferred by the legal form,[726] but the welfare state requires the greatest possible flexibility.[727] Welfare recipients have no "right" to their benefits. The state grants, modifies, and withdraws them at will, as when it denies abortions to poor women. The only recourse available is collective political action. All the law offers is a guarantee that certain procedures will be followed in determining whether an applicant is entitled to a particular benefit.

One irony of legal aid, therefore, is that it was becoming obsolescent even as it was being established. Legal rights may have served the bourgeoisie well in overthrowing feudalism and still may be salient to the proletariat in its struggle with capital, but legal aid opposes neither of these adversaries. Instead, legal aid lawyers typically confront the state when they face a class adversary at all, rather than a client's spouse. The importance of this shift in focus cannot be exaggerated. In its early years, legal aid served a still unorganized and relatively impoverished working class that capital exploited as both workers and consumers. Lawyers pursued wage claims, challenged usurious loans, and fought slumlords.[728] Today, however, most legal aid recipients do not belong to the work force and, partly for that reason, consume public rather than private

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moved. 1 ROYAL COMM'N, *supra* note 63, at 173–74; LABOUR'S PROGRAMME 1982, at 185. The proportion of appellants presently represented is very low (20% or less before most tribunals) even though evidence suggests that representation significantly increases the likelihood of success. In the absence of legal aid, landlords are represented far more often than tenants before rent tribunals and committees. A. PATERSON, LEGAL AID AS A SOCIAL SERVICE 44–51 (1970). However, it is not clear that lawyers are more effective than trade union representatives, social workers, or even friends. For a summary of the empirical studies, see LEGAL ACTION GROUP, LIFE WITHOUT LAWYERS 44–53 (1978). For an orthodox Marxist critique of the legalization of poverty, see Fraser, *Sackville, Poverty and The Law,* 42 ARENA 3 (1976): "Treating such entitlements as a right makes it possible to create for poor people and welfare recipients the same zone of privacy available to those holding other forms of property." *Id.* at 6. "The task of radical legal theory, then, is to grasp the connection between the 'economic' logic of capital accumulation and the legal expression of the same logic, according to which 'poor people' have no legitimate claim to full participation in the productive life of the community." *Id.* at 9.

726. *See generally* A. KRONMAN, MAX WEBER (1983); Trubek, *supra* note 41. Whether or not this was true of capitalism during its competitive period, it is less clear that law contributes significantly to the certainty and predictability required by monopoly capital.

727. *See generally* N. LUHMANN, THE DIFFERENTIATION OF SOCIETY (1982); Teubner, *supra* note 5, at 239. The Reagan Administration's determination to devolve welfare to the states through block grants inevitably will increase the discretion of program officials in dispensing benefits. Dooley & Houseman, *Legal Services in the 80's and Challenges Facing the Poor,* 15 CLEARINGHOUSE REV. 704 (1982); Houseman, *supra* note 673, at 34–35.

728. *See generally* J. JONES, *supra* note 407; J. KATZ, *supra* note 2, at 35–37.

goods—in the areas of health and housing, for instance. The state is a peculiar adversary in that its interests are not opposed to those of welfare recipients in the way that capital confronts labor. Not only is welfare intended to benefit its recipients (as the name implies), but welfare officials actually may welcome the challenges legal aid files, both as a source of political leverage to increase the welfare budget and as a means of disciplining low-level bureaucrats who violate substantive and procedural norms out of incompetence, inertia, local pressure, or lack of sympathy. What the state does demand is efficiency—the lowest possible unit cost per case. Just as the criminal justice system finds it far easier to process accused who are represented by counsel,[729] so legal aid lawyers weed out unqualified welfare claimants, remonstrate with those who cause trouble, and get all the papers in order.[730] Legal aid does not threaten the welfare bureaucracy but rather becomes an indispensable adjunct, another instance in the infinite regression of paternalistic institutions created to benefit the powerless. Just as the regulatory agencies established to protect consumers from the economic and physical hazards of capitalism were captured by the industries they regulated, thus stimulating the emergence of public interest lawyers,[731] so welfare bureaucracies spawn legal aid programs. But in each instance, the small cadre of lawyers representing powerless clienteles extracts only marginal concessions from either capital or the state.[732] Like the epicycles of the Ptolemaic universe, the process of adding further layers to the regulatory-*cum*-welfare state appears endless.

Legal aid is at least consistent with, and arguably supportive of, capitalism in several other respects. Because it necessarily seeks to enforce legal rights, it forces grievances into a legal, that is, individual, form.[733] Eligibility criteria define the legal aid clientele as a

729. Some police have expressed enthusiasm about the duty solicitor scheme in the United Kingdom because it avoids remands and postponements by providing every accused with a lawyer from the time of arrest. M. KING, *supra* note 193, at 33–34.

730. J. KATZ, *supra* note 2, at 193–94. On the other hand, legal aid lawyers introduce an element of adversariness in what might otherwise be a negotiated settlement. An empirical study in Britain recently found that legally aided matrimonial cases were less likely to be settled. Davis & Bader, *Can In-Court Mediation Work?,* LAG BULL., July 1983, at 10, 12.

731. Kötz, *Public Interest Litigation: A Comparative Survey,* in ACCESS, *supra* note 2, at 85, 98; Trubek & Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States,* in ACCESS, *supra* note 2, at 119, 130–32; Tunc, *The Quest for Justice,* in ACCESS, *supra* note 2, at 315, 342. *See generally* PUBLIC INTEREST LAW, *supra* note 236; S. LAZARUS, THE GENTEEL POPULISTS (1974).

732. SOCIAL MOVEMENTS, *supra* note 6, at 156–62.

733. Abel, *The Contradictions of Informal Justice,* in 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 59, at 267, 288–90. The Citizens Advice Bureaux in the United Kingdom keep a record of all those against whom complaints are made—retailers, landlords, government agencies, employers, etc. But this information is not available to the

collection of individuals sharing common characteristics—indigence, residence, perhaps nationality—rather than as a group.[734] Legal aid programs create bonds, but among lawyers, not clients.[735] Clients share few experiences except those inherent in the amorphous status of poverty; they are not even united by a visible common enemy.[736] In both respects, they contrast markedly with trade unions, ethnic associations, the feminist movement, even environmentalist groups. Although legal aid clients may be treated as a category for purposes of litigation, this does not build an ongoing collectivity but merely provides a temporary surrogate. Therefore, it is not surprising that efforts to institute community control of legal aid programs generally fail, for they presuppose precisely what is missing and what legal aid is unable to create—meaningful community. Indeed, programs often curtail or prohibit efforts to organize groups, although such restrictions seem superfluous since lawyers lack both the skills and the inclination to attempt that task. In extreme situations, the state consciously uses legal aid to undermine collective action by offering individual grievants legal advice designed to foster "peace through law"—as in Weimar and later in Nazi Germany.[737]

Legal aid clients not only are individualized, they also are unusually reluctant and reactive litigants. Of course, no one wants to litigate. But most people shun litigation because they can pursue their goals in other ways—through the market or politics.[738] The poor, by contrast, avoid the law for the same reason that they take no other action: out of despair, resignation, fatalism, a recognition of their powerlessness, and a fear of retaliation.[739] For instance, when the military offered to review the three million veterans in the United States who hold less than honorable discharges and to consider upgrading those discharges, fewer than one out of a thousand

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public, and the bureaux make no use of it to launch campaigns. L. BRIDGES, *supra* note 409, at 175.

734. *See supra* notes 121–24 and accompanying text.

735. J. KATZ, *supra* note 2, at 114–15. Bellow, *supra* note 663, at 108 n.4, shows how legal aid preserves the atomization of the individual client.

736. The elusiveness of the enemy may explain why, when the poor finally express their anger, they direct it toward conspicuous symbolic targets: police and fire department personnel, schools (through vandalism), public transportation (through graffiti)—as visible manifestations of the state—and ghetto stores as the only accessible embodiment of capitalism.

737. Reifner, *supra* note 59, at 108.

738. *See, e.g.*, Blankenburg & Reifner, *Conditions of Legal and Political Culture Limiting the Transferability of Access-to-Law Innovations*, in ACCESS, *supra* note 2, at 217, 226 (use of political parties by the environmental movement in Germany); Street, *Access to the Legal System and the Modern Welfare State: A European Report from the Standpoint of an Administrative Lawyer*, in ACCESS, *supra* note 2, at 295, 297–98 (lobbying).

739. B. ABEL-SMITH, *supra* note 73, at 181–87.

exercised that right.[740] Marc Galanter's powerful generalization that litigation typically is a claim by a repeat player against a one-shot defendant[741] has been confirmed by studies in other countries that find banks, finance companies, and landlords suing debtors, consumers, and tenants.[742] In its early days legal aid represented a significant number of plaintiffs; today it defends most cases.[743] Its poor clients apparently feel that law not only is a last resort but also one to which they will submit only under duress. Can we say they are wrong? The remedies that law offers rarely are responsive to these clients' felt needs.[744] Moreover, they may be in a stronger position as defendants resisting state power than as plaintiffs mobilizing it. For one thing, the procedural safeguards—which is all that law offers them in most instances—are valuable primarily as obstruction.[745] For another, the very poverty that inhibits offensive action itself may be a powerful defense.[746]

The influence of legal aid is circumscribed not only because it must respond constantly to crises in the lives of poor individuals but because that is all it does: It is yet another instance of the segregation of the poor.[747] This is true not only of staffed office programs but of judicare as well, for specialization is the inevitable response

740. *"Bad Paper" Veterans Sought,* LEGAL SERVICES CORP. NEWS, Nov.–Dec. 1980, at 3.

741. Galanter, *supra* note 94, at 95, 103–04; *see also* Galanter, *Afterword: Explaining Litigation,* 9 LAW & SOC'Y REV. 347 (1975); Wanner, *The Public Ordering of Private Relations: Part One: Initiating Civil Cases in Urban Trial Courts,* 8 LAW & SOC'Y REV. 421 (1974).

742. *See generally* Blankenburg, *Studying the Frequency of Civil Litigation in Germany,* 9 LAW & SOC'Y REV. 307 (1975); Jettinghoff, *Clients of the Courts,* 4 NIEUWSBRIEF VOOR NEDERLANDSTALIGE RECHTSSOCIOLOGEN, RECHTSANTROPOLOGEN EN RECHTSPSYCHOLOGEN 283 (1983); Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 240 n.46; 9 LAW CENTRES' NEWS, June 1981, at 4 (United Kingdom).

743. J. KATZ, *supra* note 2, at 40.

744. The law gives tenants a right to repairs, but it offers nothing to the homeless. *See* Reifner, *Types of Legal Needs and Modes of Legalization: The Example of the Berlin Tenants Initiative,* in INNOVATIONS, *supra* note 2, at 37, 38.

745. SOCIAL MOVEMENTS, *supra* note 6, at 22–25. *See generally* Lazerson, *supra* note 134. The examples chosen by Bellow, *supra* note 663, at 123–25, to illustrate his critique of routine lawyering are telling in this regard. In one, he argues that the legal aid lawyer could have defended his tenant client more effectively against eviction and a claim for back rent, though he could not have kept the tenant in the apartment. *Id.* at 123–24. In the second, the client's son was placed in a special education program without any intervention by the lawyer; the latter, at most, could defend the son against suspension and expulsion. *Id.* at 124–25.

746. The poor are judgment proof against most civil claims and can declare bankruptcy. Impoverished welfare recipients cannot be compelled to return "undeserved" benefits; delinquent fathers cannot be made to pay child support. In Hirschman's terms, the poor still have the option of exit, even if they lack the political strength to voice their grievances or the economic clout to withhold their loyalty as consumers. *See generally* A. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

747. J. KATZ, *supra* note 2, at 91.

to the technical complexity of poverty law and the mass processing required to make a profit, given the inadequate levels of remuneration.[748] Indeed, the nature of poverty in advanced capitalism segregates legal aid, not only by class but also by race, gender, age, disabilities, date of immigration, and place of origin.[749] State welfare programs do not have to be segregated in this fashion. Health care is available to all in western Europe, and, even in the United States, medicare, social security and education are offered to and accepted by almost everyone. Nor is law itself wholly privatized. The state assumed full responsiblity for criminal prosecution in the nineteenth century rather than leaving it in the hands of the aggrieved individual.[750] Moreover, the state subsidizes much of the cost of the judiciary.[751] That most legal services are delivered through the market as a private consumer good and that only a tiny fraction of those services is provided to the poor through discrete programs must be seen for the political choice that it is. Of course the legal needs of the poor differ from those of the rich; but the same is true for health and education. Legal services could be nationalized.[752] The decision not to do so leaves legal aid in an exposed position, politically vulnerable and economically shortchanged.

In summary, legal aid is a social reform that begins with the solution—lawyers—and then looks for problems that it might solve rather than beginning with the problem—poverty, oppression, discrimination, or alienation—and exploring solutions. The early legal need studies, which assumed that people who were using lawyers less often than others, or for different purposes, had an unfulfilled "need" for law, are an extreme example of this perspective. The demand is always for more of the same: more laws, more lawyers,

748. The location of legal aid lawyers and the nature of referral networks also reinforce specialization.

749. J. FITZGERALD, *supra* note 64, at 6–7.

750. J. KATZ, *supra* note 2, at 4; Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 274 (1979).

751. A recent study estimated that state and federal governments contribute over two billion dollars a year to the operation of civil courts, in addition to the costs borne by the litigants themselves. J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES 82 (1983). Erhard Blankenburg argues that judges and lawyers are to some extent functional equivalents: Germany has a higher ratio of judges to population, and they play a more active role; the United States has a higher ratio of lawyers to population, and they play a more active role. State subsidization of lawyers through American legal aid resembles state subsidization of judges in Germany. Blankenburg, *Some Conditions Restricting Innovativeness of Legal Services in Germany*, in INNOVATIONS, *supra* note 2, at 201, 203–04.

752. *See generally* Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 LAW & POL'Y Q. 5 (1979).

more courts, and now more alternatives to court.[753] This further illustrates what Ivan Illich has criticized as the creation of false needs.[754] It is not surprising that lawyers succumb to the temptation to create the need for legal services, although they may be driven less by material incentives than by the desire to feel that their expertise is valuable to society.[755] Regardless of their motivation, lawyers persist in seeking political significance through legal forms, and public interest law exemplifies this trap. Its theoretical justification is not a concrete social evil but a failure of process: the nonrepresentation of inchoate interests within the regulatory apparatus.[756] The very concept of "public interest" law proclaims the lack of substantive content, since that concept can be appropriated by conservative "public interest law firms" trying to hide their partisanship beneath a disguised neutrality by assuming the name of regions rather than of interest groups.[757] Criminal defense also illustrates the subordination of substance to form: Socially conscious lawyers represent criminal defendants, the most oppressed litigants, in the belief that they thereby imbue their work with progressive

753. See generally the four-volume collection, ACCESS TO JUSTICE, (M. Cappelletti ed. 1978–1979); NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (L. Nader ed. 1980); the two-volume collection, THE POLITICS OF INFORMAL JUSTICE, *supra* note 59; J. SCHWARTZKOFF & J. MORGAN, COMMUNITY CARE CENTRES: A REPORT ON THE NEW SOUTH WALES PILOT PROJECT, 1979–1981 (1982); Abel, *Delegalization: A Critical Review of Its Ideology, Manifestations, and Social Consequences,* in 6 ALTERNATIVE RECHTSFORMEN UND ALTERNATIVEN ZUM RECHTS 27 (E. Blankenburg, E. Klausa & H. Rottleuthner eds. 1980).

754. *See generally* I. ILLICH, *supra* note 81.

755. Some lawyers also are fearful that legal aid will encourage dependency among clients. *E.g.,* B. GARTH, *supra* note 2, at 231; Bellow, *supra* note 663, at 108; Trubek & Trubek, *Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States,* in ACCESS, *supra* note 2, at 121.

756. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis,* in PUBLIC INTEREST LAW, *supra* note 236, at 4, 17–20; Weisbrod, *Problems of Enhancing the Public Interest: Toward a Model of Government Failures,* in PUBLIC INTEREST LAW, *supra* note 236, at 30. Not everyone sees it this way. Most, perhaps all, public interest lawyers are strongly partisan. So are "private interest" lawyers. When the prominent Baltimore firm of Piper & Marbury opened a branch office to serve poor people, one of the partners "objected to the branch's bringing class actions" because he "felt that Piper & Marbury was in business primarily to serve established interests. He did not believe that the branch office could effectively take on litigation which would threaten those interests." A. ASHMAN, THE NEW PRIVATE PRACTICE 46 (1972). Paying clients of private lawyers also expect fidelity; they prefer that the lawyer represent only people like themselves, not potential adversaries. B. ABEL-SMITH, *supra* note 73, at 205.

757. The Pacific Legal Foundation, Southeastern Legal Foundation, Gulf Coast and Great Plains Legal Foundation, Capital Legal Foundation, Mountain States Legal Foundation, Mid-Atlantic Legal Foundation, Mid-America Legal Foundation, and finally the progenitor of them all, the National Legal Center for the Public Interest, are all examples. *See* K. O'Connor & L. Epstein, Rebalancing the Scales of Justice: Assessment of Public Interest Law 12–14 (1983) (unpublished manuscript). A leading conservative periodical even appropriated the title: *The Public Interest.*

political content, even though these lawyers remain wholly confined within the legal form.[758]

That form has severe and inescapable limitations for those seeking social change. To the extent that legal aid alters the balance of power, it does so only within the judicial or quasi-judicial arena, namely the administrative agency.[759] It assumes that the most significant conflicts within society have been translated into a legal form and ignores those that are not or cannot be.[760] Substantive rules give powerless groups and individuals significant leverage within the judicial arena, but those rules also establish limits. More importantly, powerless groups and individuals cannot change the rules, except by appealing to higher rules, nor can they resist rule changes sought by others. Even within the courtroom, equality remains an unattainable chimera. The criminal prosecution often is portrayed as a battle in which a single courageous dedicated lawyer protects the accused against the awesome power of the state by invoking procedural safeguards. But there are several problems with this image. First, even when due process and the rule of law prevail, the state has enormous advantages.[761] Second, the accused and the defense lawyer exercise no control over the substantive rules that shape the prosecution.[762] Third and most important, civil litigation and criminal prosecution are not analogous. The accused always is resisting state coercion, with the tactical advantages that posture offers; in many civil cases, especially those with the greatest potential for social change, the legally aided litigant is asserting a

758. Consider the dominance of criminal defense law and lawyers generally in M. GARBUS, READY FOR THE DEFENSE (1971); C. GARRY & A. GOLDBERG, STREETFIGHTER IN THE COURTROOM (1977); M. JAMES, THE PEOPLE'S LAWYERS (1973); A. KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER (1983); W. KUNSTLER, DEEP IN MY HEART (1966); RADICAL LAWYERS (J. Black ed. 1971); THE RELEVANT LAWYERS (A. Ginger ed. 1972); Hakman, *Old and New Left Activity in the Legal Order: An Interpretation,* 27 J. SOC. ISSUES 105 (1971). For a self-conscious attempt to escape the legal form while mounting an effective criminal defense, see generally Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law,* 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982–1983).

759. Abel, *supra* note 752, at 13–16.

760. Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 230.

761. *See generally* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960).

762. It is instructive to contrast economic regulation, in which the rule-making agency tries diligently to "carry the industry" with it. W. CARSON, THE OTHER PRICE OF BRITAIN'S OIL 152 (1982). Imagine if the legislature consulted with professional criminals before enacting criminal statutes! The same solicitude extends to penalties. A Los Angeles Municipal Court judge recently ordered a company found guilty of "midnight dumping" of carcinogenic chemicals to take an advertisement in the Wall Street Journal announcing that its vice-president was sentenced to jail for 120 days. Sounds tough. But in fact, the defendant is going to be placed on work furlough to allow him to retain his job! Imagine if a burglar were placed on probation so that he could continue burgling. Stein, *Polluting Firm Ordered to Advertise Its Offense,* L.A. Times, Jan. 31, 1984, § 1, at 1, col. 1.

claim and seeking to compel action. In civil litigation, legal aid clients face adversaries who have structured transactions with an eye toward future legal consequences; the latter enjoy advantages of experience, information, and credibility, possess infinitely greater resources, and can benefit from economies of scale.[763] When legal aid lawyers do win cases, especially test cases, they may secure only paper victories: Some commentators have estimated that enforcement rates vary from fifty percent to as low as ten percent.[764] Yet how could it be otherwise? How could anyone have expected a few dozen, or even a few thousand, lawyers to effect fundamental social change? The illusion shows the enormous power of the myth of rights in liberal ideology.[765]

When social institutions fail to fulfill their declared purposes, social scientists frequently attribute the existence of those institutions to the need for legitimation. That is one of several objections to the concept: It preserves the tautological quality of the functionalist paradigm. Everything in capitalist society is driven by the same dynamic; therefore, if a behavior does not accumulate, it must legitimate.[766] There are additional problems with seeing legal aid as legitimation. What does it legitimate? the program itself, the legal profession, the legal system, the welfare apparatus, social inequality, capitalism, the state? In whose eyes do the institutions gain legitimacy? Those of actual clients, potential clients, the legal profession, judges, the public? Why is legal aid needed for legitimation now? How do we know whether it succeeds or fails?

The available evidence casts considerable doubt on what seems the most plausible hypothesis: that legal aid legitimates the legal system in the eyes of the population most directly affected, clients and potential clients.[767] First, most of the eligible population is ig-

763. Lawyers' fees dramatically document economies of scale. In Germany, the cost of litigation drops from 100% of the amount in controversy at DM 200 to 5% at DM 1 million. Falke, *supra* note 75, at 106 n.2. In Italy, lawyers' fees are 160% if the amount in controversy is less than 100,000 lire, but eight percent if it is more than one million lire. Vigoriti, *Italy,* in PERSPECTIVES, *supra* note 2, at 177, 182. In Mexico, lawyers refuse to handle cases worth less than $454 unless they receive a fee of at least 35%. Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 227.

764. *E.g.,* J. KATZ, *supra* note 2, at 180.

765. *See generally* S. SCHEINGOLD, THE POLITICS OF RIGHTS (1974).

766. Hyde, *The Concept of Legitimation in the Sociology of Law,* 1983 WIS. L. REV. 379, 418 (quoting Joel Rogers). This is the best critical account of the elusiveness and sloppy usage of the concept of legitimacy.

Radical lawyers often share the view of liberal social scientists, although they reverse the moral valuation. They characterize law as mystification and seek to counter its power. *See generally* Anderson, *Demystifying Demystification: A Study of the Radical Bar,* 5 CONTEMP. CRISES 227 (1981).

767. A scheme in Manchester, England, offered personal injury victims a free interview with a solicitor and vigorously disseminated information about this assistance. The response of users was enthusiastic:

norant of the availability of legal aid.[768] An institution cannot af-

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> I must say not having been for an interview before I was struck by the helpfulness of the solicitor. My workmates, family and friends are totally ignorant of aspects of the law. I now know that legal aid or legality is open to all, not just the rich, but the lowly as well.

H. GENN, MEETING LEGAL NEEDS? 24 (1982).

> The scheme is excellent as it helps people find out about their rights. People who would be afraid to pursue a claim because of the cost involved now have the opportunity to carry on. The law applies to rich and poor alike and lack of funds is no excuse. I would not have gone to see a solicitor. I would have been afraid to be left with no compensation plus all the costs to fund with no resources.

Id. at 44.

768. In the United States in 1949, 420 low income families were questioned about legal aid in Rochester, New York, which had had a program for more than 25 years. Three-fifths "either had no idea that the service existed or knew of it only in a vague way. Fewer than one-half of the others recognized the service by name." E. BROWNELL, *supra* note 67, at 176–77 (quoting E. KOOS, THE FAMILY AND THE LAW 10 (1949)). Sixty percent of a 1960's sample of those eligible for legal aid had never heard of the program, although there had been an office in the city in question for 10 years. Levine & Preston, *supra* note 571, at 105. In 1978, 13 years after the establishment of federally funded legal services, a survey of 1260 eligible poor persons found that 60% never had heard of legal services, and only 20% knew anything about the services available. GENERAL ACCOUNTING OFFICE, FREE LEGAL SERVICES FOR THE POOR—INCREASED COORDINATION, COMMUNITY LEGAL EDUCATION, AND OUTREACH NEEDED 19–23 (1978), *cited in* Breger, *supra* note 30, at 339 n.316. In a survey of an eligible population in the poorest boroughs of London in 1967–1968, slightly more than half said that a poor person could get free or cheap legal advice. But only one-quarter had heard of the legal aid scheme established 18 years earlier, and only five percent knew how to get assistance. B. ABEL-SMITH, *supra* note 73, at 194–99. Half of a random sample of local residents never had heard of the North Kensington Neighbourhood Law Centre and another 14% did not know what it did; most of the remainder had only the vaguest conception. A. BYLES & P. MORRIS, *supra* note 280, at 44. Two-thirds of the clients of the centre claimed to know about legal aid, but only one-third of these (two-ninths of the total) could give a coherent account. *Id.* at 48; *see also* Morris, *supra* note 74, at 308, 311. On the other hand, more than four-fifths of the respondents to the Royal Commission's Users Survey said they had heard of the legal aid scheme, and three-fifths associated it with low-income people. 2 ROYAL COMM'N, *supra* note 63, at 265. Yet only one-quarter of the public was aware of the "Green Form" legal advice scheme in March 1973, less than a fifth of the poorest stratum. Despite an extensive publicity campaign that temporarily increased awareness, name recognition of the scheme had fallen to 27% a year later. M. ZANDER, *supra* note 128, at 44–45. In a survey of personal injury victims, the authors found that

> of those who actually *had* made contact with a solicitor, only one-quarter knew of the legal advice scheme, while fewer than one-half knew of the legal aid scheme. It seems reasonable to assume that the level of knowledge about those services would have been even lower amongst the very large group of victims [86 percent] who did not seek any legal advice after their accident.

D. HARRIS, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 67 (1984).

In Scotland, although 92% of a sample claimed to have heard of legal aid, one-third admitted that they knew nothing about it, and more than three-quarters of the sample either thought they were not entitled or did not know whether they were entitled. On the other hand, 59% knew nothing about the legal advice scheme, and the remainder knew little. 2 SCOTTISH ROYAL COMM'N, *supra* note 181, at 78, 80, 82. An earlier study found that "a majority of the population of Scotland did not know how to get, or did not know of, legal aid—even though statutory legal aid had been available,

fect the attitude of those who are unaware of it. Second, even the knowledgeable may prefer not to use legal aid: More than one-tenth of the respondents in three poor London boroughs declared they would never go to a solicitor for any reason.[769] Because willingness to seek legal aid correlates directly with socioeconomic status in most countries,[770] those whom we might expect to be most skeptical about the legal system also are least likely to be persuaded otherwise by the existence of legal aid. Third, the experience of invoking legal aid appears to impair, rather than enhance, the legitimacy of the legal system. Users find the process slow and incomprehensible; they are unimpressed by their lawyers; and they resent the monetary contributions.[771] Legal aid clients lose their

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when the research was carried out, for over 20 years." Campbell, *Lawyers and Their Public,* 1976 JURID. REV. 20, 30. In Australia, just over half of a sample of the eligible population, but less than one-third of non-British immigrants within that sample, believed legal aid was available. Furthermore, only slightly more than half of those claiming knowledge were correct or partly correct in their understanding. M. CASS & R. SACKVILLE, *supra* note 75, at 68–70. In Mexico, most people either thought that the public defender was limited to criminal defense (the program also engages in civil representation) or were wholly ignorant of the institution. Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 227.

769. B. ABEL-SMITH, *supra* note 73, at 204–05. Others were equally vehement in their rejection of legal aid:

> I think that the legal aid that you get is very poor, because my contention is that anything you get for nothing is not worth a lot.
>
> As far as I'm concerned, with legal aid you may get the rubbish lawyers, because you don't always get the lawyers of your choice.
>
> If we were in trouble, we'd go to a *proper* solicitor.

Morris, *supra* note 74, at 311.

770. 2 ROYAL COMM'N, *supra* note 63, at 265 (knowledge of Law Society which runs legal aid varies with socio-economic group in United Kingdom); 2 SCOTTISH ROYAL COMM'N, *supra* note 181, at 79, 84 (knowledge of, and belief in entitlement to, legal aid correlates with socioeconomic status); B. ABEL-SMITH, *supra* note 73, at 192–96; M. CASS & R. SACKVILLE, *supra* note 75, at 69 (knowledge of legal aid correlates with education in Australia); Levine & Preston, *supra* note 571, at 94; Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 233 n.14. In Norway, where legal aid covered half the population in 1980 and a third in 1983, lawyer use still was very biased: 27% of men had consulted lawyers but only 13% of women; those with more than high school education brought 26 cases per 1000 population per year, whereas those with only a primary school education brought only 11 per 1000; those with incomes of more than $6000 a year brought 24 cases, whereas those with less than that figure brought 13; the Oslo elite brought 34 cases, whereas farm workers brought only 5. J. Johnsen, *supra* note 442, at 28–29.

771. A. PATERSON, *supra* note 725, at 71; (57% of CAB clients referred to solicitor were satisfied; 32% were dissatisfied); M. VALÉTAS, *supra* note 102, at 92–93 (France); Falke, *supra* note 75, at 140, 141 n.43 (Germany); Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 233 n.14, 227; Reifner, *Types of Legal Needs and Modes of Legalization: The Example of the Berlin Tenants Initiative,* in INNOVATIONS, *supra* note 2, at 39 (Germany); Wood, *Consumer Research into Legal Services: Problems and Potentials,* in RESEARCH AND THE DELIVERY OF LEGAL SERVICES, *supra* note 189, at 213, 220–21. Legal aid schemes tend to raise the hopes of users but rarely deliver what they promise. *See, e.g.,* H. GENN, *supra* note 767, at 38–40. Not surprisingly in a capitalist society, clients believe that you get what you pay for and therefore prefer

cases with disproportionate frequency; not surprisingly, those who lose are further disillusioned.[772] The significant proportion of applicants denied legal aid because they are ineligible do not gain a more favorable impression of the legal system.[773]

These conclusions are entirely consistent with studies of other encounters with the legal system: Familiarity breeds contempt.[774] Legal aid actually may delegitimate the legal system in the eyes of the poor, many of whom apparently embrace the cynical belief that justice is available only to the rich.[775] Why should we have expected anything else? The theory of legitimation rests on the patronizing assumption that the poor somehow are fooled by legal aid—an institution that we social scientists know can improve their

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private counsel. R. HERMANN, *supra* note 13, 41–52, 89–99, 135–42. Clients of New York Legal Aid, for instance, complained:

> When you pay, you can ask a man for something. . . . You can't ask Legal Aid. They can say, "You don't pay me; why should I work for you?"
>
> They stink. They know they get their salary whether they do the job or not. They don't do their best.
>
> A street lawyer is best. They're with you all the way. He's getting paid by the client. Legal Aid won't give a f–k. He knows he's got his job.

Id. at 95. The evidence strongly suggests that the quality of legal aid performance actually is considerably higher than that of private lawyers.

772. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment,* 12 LAW & SOC'Y REV. 237, 246 (1978); *cf.* Reifner, *Types of Legal Needs and Modes of Legalization: The Example of the Berlin Tenants Initiatives,* in INNOVATIONS, *supra* note 2, at 37, 44, 46. Most paying clients in England and Scotland appear to be quite satisfied with their legal representation, especially when they are using the law proactively (*e.g.,* for conveyancing). But a study of those convicted of crimes (almost all of whom would have been legally aided) found that twice as many would not recommend the lawyer to another as would do so. M. ZANDER, *supra* note 554, at 55–58.

773. M. VALÉTAS, *supra* note 102, at 92–93; *cf.* H. GENN, *supra* note 767, at 33–35. *But see* D. GOLLEY, EVALUATING ELIGIBILITY CRITERIA: A STUDY OF THE LEGAL SERVICES COMMISSION OF SOUTH AUSTRALIA 54–55 (1982) (favorable attitude among 500 rejected applicants).

774. M. CASS & R. SACKVILLE, *supra* note 75, at 86; B. CURRAN, *supra* note 469, at 234–37; Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence,* 11 LAW & SOC'Y REV. 427, 437 (1977).

775. M. CASS & R. SACKVILLE, *supra* note 75, at 82–88 (Australia); B. CURRAN, *supra* note 469, at 234, 250–54 (United States); B. GARTH, *supra* note 2, at xviii–xix; M. VALÉTAS, *supra* note 102, at 102–06 (France); Morris, *supra* note 74, at 313–14 (United Kingdom); Oñate Laborde, *Mexico,* in PERSPECTIVES, *supra* note 2, at 213, 233 n.14. *See generally* S. SHAW, THE PEOPLE'S JUSTICE (1982) (United Kingdom). Compare Ehrenreich & Ehrenreich, *The Professional-Managerial Class,* in BETWEEN LABOR AND CAPITAL 5, 43 (P. Walker ed. 1979):

> The activities which the PMC (professional-managerial class) performs within the capitalist division of labor in themselves serve to undermine positive class consciousness among the working class. The kind of consciousness which remains, the commonly held attitudes of the working class, are as likely to be anti-PMC as they are to be anti-capitalist—if only because people are more likely, in a day-to-day sense, to experience humiliation, harassment, frustration, etc., at the hands of the PMC than from members of the actual capitalist class.

lives only marginally.[776] It is as though the saying, "If you're so smart, why aren't you rich," has been turned upside down—"If they're so poor, they must be dumb." The acquiescence of the poor in the legal system need not be secured by their belief in its legitimacy. They comply with its dictates because they are compelled to do so, just as economic necessity, political powerlessness, and social disorganization ensure their acceptance of the social order.

Perhaps the theory of legitimation expresses the universal desire of oppressors to believe that they are loved by the oppressed. Legitimation then becomes an effort by those who enjoy the privileges of wealth, power, and status to convince themselves that those privileges are justified or, better yet, that they have no privileges. Legal reforms are one such means: a declaration of rights or a prescription of behavior that simultaneously parades as description, an implicit assertion that such rights or behavior actually exist. Welfare programs are another example: the amelioration of some particularly egregious inequality that serves to distract attention from the overwhelming inequality that remains. In this sense, "abuses" of the proferred benefit by "scroungers" and welfare "cheats" serve the indispensable function of showing that the program is working too well, that its beneficiaries are not needy, and that further reforms are not only unnecessary but unwise.[777] Thus, the "litigation explosion" shows that we have granted people too many rights.[778] Trivial, rigid regulations show that the state has interfered too much in economic activity.[779] When those who patently are "guilty" of crime escape prosecution or punishment, we must be coddling criminals. A huge matrimonial settlement for a Saudi Arabian sheikha shows that divorce law is too generous to women. Mammoth tort judgments show that it pays to be injured.[780] And legal aid shows that we have achieved procedural justice. Test cases and the representation of ineligible or unpopular clients (groups, homosexuals, hippies, racial minorities, aliens) are the necessary

776. *Cf.* E.P. THOMPSON, *supra* note 722, at 262: "[P]eople are not as stupid as some structuralist philosophers suppose them to be. They will not be mystified by the first man who puts on a wig."

777. *See generally* M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964); Edelman, *Symbolism in Politics,* in STRESS AND CONTRADICTION IN MODERN CAPITALISM (L. Lindberg, R. Alford, C. Crouch & C. Offe eds. 1975). This, of course, is Durkeim's theory of the social function of deviance in strengthening norms. *See generally* K. ERIKSON, WAYWARD PURITANS (1966).

778. Galanter, *supra* note 80, at 4, 61–69.

779. *See generally* E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).

780. For instance, a trial court awarded a $40.5 million judgment (subsequently set aside as excessive) against Allstate Insurance Co. for wrongful refusal to honor a $31,000 claim. Oliver, *Judge Nullifies Record Insurance Case Award,* L.A. Times, Jan. 10, 1984, § 2, at 1, col. 4.

"abuses" of legal aid that demonstrate that we've gone about as far as we can go.

This interpretation is consistent with the apparent paradox that legal aid programs are created by the adversaries of those whom they serve. The state established the earliest legal aid programs to defend the criminals it prosecuted.[781] At the turn of the century, capitalist philanthropists encouraged legal aid to protect workers exploited by capitalist employers and money lenders. The enormous expansion of legal aid after World War II largely represented a grant of assistance by male legislators to women who were seeking divorces and child custody and support from men who had mistreated or abandoned them. Finally, in the last few decades, the welfare state has provided lawyers to enable its beneficiaries to assert claims against the state. And capital, through the major foundations it endows, has created public interest law firms to represent the consumers of products or environmental amenities against the very enterprises that are overcharging, selling unsafe products, or destroying the environment. I suggested earlier that such apparently disinterested behavior reveals cleavages within the dominant category: monopoly versus competitive capital, the national state versus local government, high-level policy-makers versus street-level bureaucrats.[782] The theory of legitimation suggests another perspective. Legal aid is an attempt by those who enjoy state power, ownership of capital, and patriarchal domination to convince themselves that those privileges are not being abused through arbitrary action, exploitation, violence, or irresponsibility, and that any abuses are redressed promptly.[783]

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781. Even today, there is a correlation between the degree and visibility of state coercion in criminal proceedings and the prevalence of legal aid. In the United Kingdom, the following are the proportions of criminal accused represented by legal aid, in descending order: Crown Court sentencing—98%; Crown Court trial—96%; Court of Appeal, Criminal Division—86%; Magistrates' Court committal proceedings—73%; Crown Court Appeals—62%; Magistrates' Court adult trial of indictable offenses—57%; Magistrates' Court juvenile proceedings—22%; Magistrates' Court trial of non-indictable offenses—2%. M. ZANDER, *supra* note 554, at 42. In Scotland, less than 10% of those subjected to summary prosecution are awarded legal aid. 1 SCOTTISH ROYAL COMM'N, *supra* note 181, at 102–03 & n.1.

782. *See supra* notes 319–29, 339–41, 376 and accompanying text.

783. It is almost trite to point out that a great many poor people have never been made aware of the rights they enjoy under our laws. . . . The clinics, located in, and run by, local communities, can reach out to advise people of their rights. They take the law to the people. . . . In doing all of this, the clinics help convince the poor that they have a stake in this society.

F. Zemans, *supra* note 26, at 1 (quoting R. Roy McMurtry, Attorney-General for Ontario).

VI. CONCLUSION

The difficulty of understanding legal aid is attributable only partly to inadequacies in our analytic apparatus. The phenomenon itself, like the welfare state of which it is a part, is internally contradictory. Ian Gough highlights the tension. Is welfare an "agency of repression, or a system for enlarging human needs and mitigating the rigours of the free-market economy? An aid to capital accumulation and profits or a 'social wage' to be defended and enlarged like the money in your pay packet? Capitalist fraud or working-class victory?"[784] The analytic problems are aggravated because legal aid, unlike such welfare benefits as housing, education, medical care, or income maintenance, is not at the center of class struggles; at most, it is an instrumental good of little salience to its ostensible beneficiaries. Yet there can be no doubt that legal aid secures real gains for the oppressed; it only need be threatened by conservative enemies to resolve any doubts among its advocates. At the same time, political support of legal aid must be informed by an awareness of its real and inherent limitations. I try to maintain this balancing act in the analysis that follows.[785]

A frequent pitfall in assessing legal aid is the tendency to focus on the periphery rather than the core—on law reform litigation and community organization rather than routine servicing of individual cases. Whether the observer renders a positive evaluation by stressing the size of the judgment[786] or a negative one by dismissing it as merely a paper victory,[787] this perspective misses the point. It is as though the activities of private lawyers were assessed by looking only at their *pro bono* activities, which some exaggerate and extol and others deprecate and dismiss. Or, to take the analogy to its logical extreme, it is as though the significance of multinational cor-

784. I. GOUGH, *supra* note 319, at 11.

785. In previous articles, I stressed the limits of legal aid without adequately acknowledging its very real contributions. In Abel, *supra* note 752, I gave a negative answer to the rhetorical question, without discussing how such redistribution can *promote* significant change. In Abel, *Toward a Political Economy of Lawyers*, 1981 WIS. L. REV. 1117, 1131–49, I explained legal aid as a mechanism by which the profession creates demand for its services, without saying anything about the benefits of these efforts for the clients served. In Abel, *The Underdevelopment of Legal Professions: A Review Article on Third World Lawyers*, 1982 AM. B. FOUND. RESEARCH J. 871, 891 n.146, I characterized legal aid as a mode of legitimation, without crediting the very real sacrifices many third-world lawyers make in representing unpopular clients against repressive states and oppressive capital. I have been criticized properly for this negativism, which the following conclusion is intended to redress. For criticisms, see *Abogados del Tercer Mundo*, PORTAVOZ [Colombia] Aug. 1983, at 3; *Abogados del Tercer Mundo*, PORTAVOZ, May 1983, at 3; 2 PORTAVOS 3 (August 1983); G. Palacio & F. Rojas, Resena Critica sobre "El Subdesarrollo de la Profession Legal," una resena de Los Abogados del Tercer Mundo de Richard L. Abel (1983) (unpublished manuscript).

786. E. JOHNSON, *supra* note 89, at 230–33.

787. J. KATZ, *supra* note 2, at 180.

porations was assessed by the number of operas they sponsor. Legal aid must be judged by what most of its lawyers do most of the time, not by what only a few do occasionally. The core of legal aid consists of three main areas: reproducing labor power, disciplining capital and the welfare bureaucracy, and mitigating state coercion. I will discuss them in sequence.

Family law dominates all legal aid programs. It represents as much as ninety percent of the work of private practitioners under judicare schemes, and even in staffed offices it frequently is the single largest topic. This is neither surprising nor likely to change. Indeed, legal aid lawyers who complain about such dominance are both ahistorical and ungrateful, for civil legal aid might never have been created but for the dramatic rise in the divorce rate in the last half century. In part, the mix of cases simply results from legal aid lawyers' inability to perform several of the functions that preoccupy private practitioners. They cannot transfer, protect, or invest property because their clients have none, and they cannot redress civil wrongs because of the jealousy of private practitioners.[788] The dominance of family matters also reflects the growing role of the state within the domestic sphere. All societies must devise ways to support those members who are not directly involved in production because they are too young, too old, or too disabled, or are caring for such a person, and who therefore cannot appropriate the resources they need. Most societies rely on kinship obligations for this purpose, but private relationships no longer perform that function adequately under advanced capitalism. The state therefore creates a variety of legal rights and remedies so that "nonproductive" members of society may claim support from those held responsible: the elderly from their descendants[789] and especially wives and children from husbands and fathers.[790] Because the party who is socially, economically, and politically weaker is asserting a claim against one who is stronger, the state also furnishes the claimant with legal representation. As long as a sexual division of labor continues to characterize the performance of essential tasks of nurturance, state intervention will be a necessary adjunct of social reproduction. There can be no doubt that state support for the legal

788. In Britain, these reasons are reversed. Eligible clients take personal injury problems to unions rather than private lawyers. Although the legal aid lawyer can transfer property, the profession insists that conveyancing be handled outside the legal aid scheme.

789. *See, e.g.*, Van Houtte & Breda, *Maintenance of the Aged by Their Adult Children: The Family as a Residual Agency in the Solution of Poverty in Belgium*, 12 LAW & SOC'Y REV. 645 (1978).

790. *See generally* D. CHAMBERS, *supra* note 703, at 37–68; Van Houtte & De Vocht, *The Obligation to Provide Maintenance Between Divorced Husband and Wife in Belgium*, 16 LAW & SOC'Y REV. 321 (1981–1982).

representation of wives and mothers makes a significant contribution toward equalizing the conflict between estranged spouses.

Yet the limitations of this function also must be recognized. First, we know very little about how lawyers actually enforce support obligations and what difference it makes to their clients.[791] Second, although I do not wish to underrate the importance of redressing sexual inequalities, providing women with legal representation in family matters at most effects a horizontal or intraclass transfer of resources without altering class differences. Indeed, dividing the already inadequate resources of working class families between two households may aggravate income inequalities. Third, the state, not the wife (or descendant), actually seeks redress from the defaulting husband (or ascendant) because it is the state that has advanced welfare benefits and wants to recover them. Finally, there is some danger that alleviating a wife's dependency on her former husband through the intervention of a (usually male) lawyer may subtly reinforce sexual stereotypes. These last two reservations require further thought. What is the desirable relationship between spouses and between parents and children after divorce? How could women assert legal claims without relying on lawyers?[792]

A second function of legal aid is to discipline both capital and the welfare bureaucracy. Because market failure arguably is more common in the provision of goods and services to the poor, the state has sought to regulate capital, for instance, in transactions involving rental housing or credit. And because regulations are not self-enforcing, lawyers must assert claims on behalf of the poor. But it is the state that responds to market failure, primarily by taking direct responsibility for redistributing income and for distributing goods and services in kind. The bureaucracy that delivers these benefits is vast and highly decentralized. Although the federal government finances welfare, it relies on state and local officials, private philanthropy, entrepreneurs, and professionals to deal with the ultimate recipients. Legal aid is just one of many mechanisms—including internal hierarchy and external review by ombudsmen, politicians, and the media—that promote adherence to rules.[793] Certainly legal

791. The few empirical studies of the divorce lawyer's role tend to focus on obtaining divorce and on problems of custody and visitation rather than on support. *See generally* W. GOODE, AFTER DIVORCE 137–71 (1956); O. MCGREGOR, L. BLOM-COOPER & C. GIBSON, SEPARATED SPOUSES: A STUDY OF THE MATRIMONIAL JURISDICTION OF MAGISTRATES' COURTS (1970); M. MURCH, JUSTICE AND WELFARE IN DIVORCE 26–27 (1980); H. O'GORMAN, LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE 119–64 (1963).

792. For a possible solution, see Joselson & Kaye, *Pro Se Divorce: A Strategy for Empowering Women*, 1 LAW & INEQUALITY 239 (1983).

793. *Cf.* Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629 (1980) (discussing mechanisms of appellate review).

aid lawyers secure real and significant economic benefits for their clients: better housing, greater security of tenure, less usurious credit, relief from debts, higher welfare benefits, etc. Perhaps as important, they help poor people assert these rights with greater dignity. Yet again, there are serious limitations. Lawyers enforce existing private and public law rights. They may be able to compel a landlord to render an apartment habitable, but they cannot make him lease it at a rent that poor people can afford; they can prevent a lender from discriminating on grounds of race or gender, but they cannot make him lend to people who are bad credit risks by reason of their poverty.[794] They can require the welfare system to grant benefits mandated by law, to desist from unconstitutional discrimination, and to observe due process, but they cannot determine the amount and content of welfare entitlements. As in family matters, there is some danger that what is gained for one poor person may be taken from another.

There also are problems with the limited goals that lawyers can pursue. First, since lawyers cannot assert every legal claim that the poor conceivably might make against capital and the state, the disciplinary effect of the claims they do assert must depend on some theory of deterrence: the belief that the particular capitalist or public official whose conduct is challenged will observe the law in the future and that others will do so as well for fear of being challenged. But this assumption is implausible and unsubstantiated. Joel Handler has analyzed incisively what he calls the "bureaucratic contingency" and has demonstrated the numerous obstacles to implementation of rules.[795] Clearly the legal order—statutory, regulatory, or judicial—is just the beginning of the enforcement process, not the end. The likelihood is infinitely small that subsequent deviance by that actor or another will be sanctioned. To the extent that legal aid lawyers seek to discipline public rather than private bureaucracies, they cannot even mobilize the profit motive as a source of leverage. Legal aid lawyers cannot translate the promises of the regulatory/welfare state into reality because these promises never were intended to be fulfilled. From the point of view of both capital and the state, paying off would be far too expensive—an enormous vertical transfer of surplus that would reduce capital accumulation

794. This issue is canvassed in Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969), and in the debate between Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194 (1973); Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); and Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973).

795. SOCIAL MOVEMENTS, *supra* note 6, at 18–22. *See generally* Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47 (1983).

and fuel inflation.[796] Therefore, when poor people begin to assert legal rights with greater frequency (even if nothing like that of their middle-class counterparts), we hear complaints about "litigiousness" and a "rights explosion."[797] Legal rights under capitalism are luxury goods, which are cheapened when everybody has them.[798]

Resisting state coercion is the third major task of legal aid. Although criminal defense falls outside the scope of this Article, it requires some mention since it is the forerunner of civil legal aid and remains something of a model. Just as the high visibility of coercion in criminal prosecutions explains why the accused is the first "litigant" to be granted legal aid, so it also explains why criminal defense attracts dedicated practitioners. The assertion of rights within the family,[799] regulatory enforcement, and the claim of welfare benefits rarely generate comparable drama. Every criminal defense reenacts the bourgeois revolution in miniature by asserting the citizen's right under the rule of law to be protected against state coercion.[800] When that right is denied or begrudged—when success is most difficult, for example, in countries that repudiate liberal ideals or curtail them if the defendant is unpopular by reason of race, political belief, or the acts of which he is accused—then defense is truly heroic. Indeed, at certain moments, collective identification with and defense of an accused assumes revolutionary

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796. I. GOUGH, *supra* note 319, at 105.

797. *See* Galanter, *supra* note 80.

798. The problem here resembles that of "positional scarcity." *See* F. HIRSCH, SOCIAL LIMITS TO GROWTH 19–26 (1976). To illustrate the notion that an entitlement is liberating when it is the exclusive privilege of a few but loses its value and becomes a source of constraint when it is shared by the many, it is instructive to reflect on the following description of the pleasures of car ownership and driving in England in the 1920's from the perspective of the urban car driver today—especially one stuck on the freeways of Los Angeles.

> Yes, the motor is turning out the joy of our lives, an additional life, free & mobile & airy to live alongside our usual stationary industry. We spin off to Falmer, ride over the Downs, drop into Rottingdean, then sweep over to Seaford, call, in pouring rain at Charleston, pass the time of day with Clive—Nessa is at Bodiam—return for tea, all as light & easy as a hawk in the air. Soon we shall look back at our pre-motor days as we do now at our days in the caves.

3 THE DIARY OF VIRGINIA WOOLF, 1925–1930, 151 (A. Bell ed. 1980) (entry for Wednesday, Aug. 10, 1927).

799. Except when this is the right to kill in self-defense. *See* H. YGLESIAS, SWEETSIR (1981).

800. If only by reflection, defense lawyers enjoy some of the aura of the criminal as romantic hero, celebrated by radical criminologists in the 1960's. For a critical view of that perspective, see generally Cohen, *Criminology and the Sociology of Deviance in Britain: A Recent History and a Current Report,* in DEVIANCE AND SOCIAL CONTROL 1 (P. Rock & M. McIntosh eds. 1974); Cohen, *Footprints in the Sand: A Further Report on Criminology and the Sociology of Deviance in Britain,* in CRIME AND SOCIETY: READINGS IN HISTORY AND THEORY 220 (M. Fitzgerald, G. McLennan & J. Pawson eds. 1981).

significance.[801]

Yet the actual practice of criminal defense rarely exhibits these qualities. The lawyer may long for a principled confrontation that tests the state's commitment to formal justice, but the client rarely wants anything more than an acquittal or a light sentence. Lawyers actually pursue and obtain the same gains for their criminal clients that they seek for their civil clients: a somewhat better deal than the client would get without a lawyer. Although in some countries legal aid represents the majority of accused (compared with a much smaller fraction of civil litigants), it does so only at trial, not during the preliminary interaction with police or during the subsequent incarceration. Furthermore, just as due process and equal protection can tolerate inadequate family budgets, poor housing conditions, and low welfare benefits, so they can tolerate long sentences, atrocious prison conditions, and a prison population composed disproportionately of ethnic minorities.

Thus far I have dealt with the strengths and weaknesses of legal aid as they pertain to the particular tasks that legal aid lawyers commonly perform. Some of the limitations are generic. Contrasting the conditions under which lawyers act for individual paying clients provides one method of uncovering the limitations. By virtue of the professional monopoly that lawyers have secured and defend, they are able to charge very high fees. They can extract those fees only when the amounts at stake are sufficiently large to justify and absorb such an expense. Thus, lawyers make their services useful, indeed indispensable, in situations concerning the aggregate resources of many people (*i.e.*, a business) or those resources that an individual has accumulated over time. Lawyers are involved in the preservation and transfer of property (both *inter vivos* and intergenerational), including residences, trusts, marital dissolution, and estate planning and administration; on the other hand, they rarely handle residential tenancies because the property interest is temporally limited rather than aggregated and thus insufficiently valuable. Similarly, lawyers assert and defend personal injury claims that aggregate labor value (lost wages), experience outside work (pain and suffering), and medical expenses over time, but lawyers are less involved in workers compensation cases, in which payments are periodic and there is no remedy for pain and suffering. As long as the profession exercises control over the market for legal services, the cost will disproportionately outweigh the monetary value of poor people's problems. Therefore, it is inevitable that private lawyers will be reluctant to undertake legal aid work for the

801. *See generally* de Sousa Santos, *Law and Revolution in Portugal: The Experiences of Popular Justice after the 25th of April 1974*, in 2 THE POLITICS OF INFORMAL JUSTICE, *supra* note 59, at 251, 251–60.

poor, and the state will be equally reluctant to spend scarce resources on salaried lawyers.

That poor people react to law rather than use it facilitatively, just as they react to life, also constrains legal aid. I do not mean to invoke the justly criticized concept of a culture of poverty.[802] I am arguing, instead, that the poor use their only resource, their poverty, as a source of strength.[803] In politics they are apathetic; this simultaneously undermines democratic ideology (in 1980, President Reagan was endorsed by less than a quarter of the total electorate) and conveys the implicit threat that their vote, if ever exercised, would significantly alter the configuration of power. This fear is evidenced by President Reagan's concern about the hostility of minority voters and Democratic efforts to register them. In the market, poverty signifies underconsumption and the problems that underconsumption creates for capitalist economies; when the poor do buy, they buy on credit, threatening to default on particular debts and to declare bankruptcy for the totality. In law, their modal response again is exit. The legal system would collapse if the poor claimed all the rights to which they are entitled.[804] In the meantime, they respond to legal demands with passive noncompliance—for example, failing to pay alimony and support, or to repay welfare benefits, or to appear in response to a summons—knowing that the cost of enforcement usually outweighs the benefit to the claimant.

Even if lawyers were prepared to work for poor clients at price levels commensurate with the matters at stake and if clients were eager to employ them, legal aid still would encounter significant obstacles. Law and lawyers are most effective in mediating interaction among strangers, severing existing relationships, and shaping arm's length transactions in anticipation of future rupture: consider property transactions, contract formation or breach, torts, and estates. When people are involved in an ongoing relationship they typically use political, economic, social, or psychological means to adjust it and to resolve conflict. But legal aid clients lack those other sources of influence and are forced to use law *within* ongoing relationships: within the family (before it has been formed, while it is intact, and

802. For a critique of the culture of poverty, see C. VALENTINE, CULTURE AND POVERTY: CRITIQUE AND COUNTER-PROPOSALS (1968).

803. This theme can be found in such diverse literatures as the African folktales about the trickster hero, D. MUHANDO, HADITHI ZA KIAFRIKA ZA KIKRISTO (1939), who becomes Brer Rabbit in the Uncle Remus stories, and Herman Melville's "Bartleby," who "prefers not to." H. MELVILLE, BILLY BUDD SAILOR AND OTHER STORIES 103 (1981). In psychology, the passive-aggressive personality who derives strength from vulnerability also illustrates this theme.

804. At one time, this was a conscious strategy of welfare rights organizations. *See* Cloward & Piven, *The Weapon of Poverty: Birth of a Movement*, 204 NATION 582 (May 8, 1967).

after dissolution), and between landlord and tenant, creditor and debtor, state and welfare beneficiary. Perhaps most important, legal aid operates almost entirely within the sphere of reproduction and exchange—the family, the market, and public distribution of goods and services—leaving relations of production wholly untouched. Most of those eligible for legal aid are not productive workers; among the few who are, many look to unions, not legal aid, for support in workplace struggles. Thus, legal aid contributes to an image of legal equality in the only sphere where such a myth is credible, just as money conveys the appearance of freedom and equality in the market, and the vote does so in politics, while all three preserve unaltered the central source of inequality—relations of production.[805]

If legal aid is limited in what it can do, it also is constrained by the specter that it might be too successful. One manifestation is the anticipated letdown at the coming of the millenium, so well captured by that scion of utilitarianism, John Stuart Mill. In his autobiography Mill asks himself, " 'Suppose that all your objects in life were realized; that all the changes in institutions and opinions which you are looking forward to, could be completely effected at this very instant: would this be a great joy and happiness to you?' And an irrepressible self-consciousness distinctly answered, 'No!' "[806] Another is the aversion to using law to promote otherwise attractive ends, epitomized in Grant Gilmore's statements:

> As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved.
>
> . . . .
>
> Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the worse law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.[807]

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805. Two qualifications are necessary immediately. Some legal aid programs, especially law centres in Britain, do handle employment matters, but I suspect that most of these cases involve the severance or restoration of the employment relationship. I recognize that other equally important inequalities—such as gender and race—do not originate in the workplace even if they figure importantly there. Although legal aid may redress particular instances of sexism and racism, it does little to eliminate the causes of either.

806. J. MILL, AUTOBIOGRAPHY 133–34 (1873). The dominant ideology of legal aid is utilitarian, despite recent efforts to ground it in a theory of rights. *See, e.g.*, Breger, *supra* note 30.

807. G. GILMORE, THE AGES OF AMERICAN LAW 109–11 (1977). This passage represents a peculiar inversion of the oft-quoted remark that the quality of a society

This highly conservative position—a resentment that law, once the exclusive province of the elite, now is claimed by the masses—also has its echoes in the radical attack on law in the name of the community.[808] The diverse and often antagonistic ideas inspiring this latter movement are embodied in the creation of "alternatives" to legal and judicial institutions, alternatives offering the poor therapy, negotiation, and mediation in place of rights and adjudication in family conflict, landlord-tenant disputes, small claims courts, the administration of welfare benefits, tort claims, and criminal prosecutions.[809]

The enthusiasm for alternatives expresses not only an aversion to conflict and the legalistic assertion of rights (if an aversion that is highly selective) but also the pressures of an ever-increasing and apparently limitless case load. Of course, case overload is not peculiar to legal aid or even the legal system;[810] it afflicts all public sector delivery of goods and services. In the private sector, increased demand signifies success, stimulating a responsive increase in supply through the reinvestment of retained surplus, technological innovation, enhanced productivity, and the entry of new producers. In the public sector, increased demand portends disaster.[811] The satisfaction of some demands stimulates the expression of others, both by new clients seeking conventional services and by old clients seeking new ones. But this demand does not elicit a comparable increase in funding: Welfare budgets almost never grow as fast as the rate of inflation. Nor do gains in productivity make up the difference. All service providers have been slow to adopt new technology, and public legal service providers have been slower still. The constant pressure on welfare programs to display heightened "efficiency" through lower unit costs can be satisfied only by lowering quality. But lawyers as professionals seek intrinsic rewards from their work and therefore resist such a solution. This tension between the state's obsession with "efficiency" and professional concern with "quality" is an inescapable predicament of welfare services.

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may be judged by the state of its prisons. Law is transformed from the foundation of Cardozo's "ordered liberty" into Weber's "iron cage" of constraint. A. MITZMAN, THE IRON CAGE: AN HISTORICAL INTERPRETATION OF MAX WEBER (1970).

808. *E.g.*, R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 234–37 (1976). *See generally* Diamond, *The Rule of Law Versus the Order of Custom*, 38 SOC. RESEARCH 42 (1971). The notion that law and custom vary inversely also finds expression in D. BLACK, THE BEHAVIOR OF LAW 107–11 (1976).

809. I have criticized these programs at length in Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 59 at 267.

810. *Cf.* Sykes, *Cases, Courts and Congestion*, in LAW IN CULTURE AND SOCIETY 327 (L. Nader ed. 1969).

811. Falling demand also indicates impending disaster; therefore, case overload is partly an artifact of a political system that punishes bureaucracies for declining case loads by cutting their budgets.

Given the structural constraints on legal aid—a series of tasks that must be performed within the limitations inextricably associated with publicly funded lawyers—does the experience of the last thirty years offer any lessons about how programs should be structured? I will suggest three. A number of commentators have argued that legal aid would be strengthened by extending its eligibility ceiling to include the middle class.[812] Welfare programs that serve a middle class constituency as well as the poor attract broader political support and thus enjoy higher levels of funding: Compare public education (especially the tertiary sector) or social security in the United States, or the National Health Service in Britain, or highways anywhere, with food stamps, or public housing, or AFDC in the United States, or prisons anywhere. The legal aid programs that have secured the most generous funding are those that serve a majority of the population, such as those in Britain, the Netherlands, and Sweden. These programs also may elicit and sustain greater lawyer enthusiasm because the clientele is more diverse, lawyers find it easier to identify and communicate with middle-class clients, and the problems of the latter appear more significant because they involve larger amounts of money. Yet there are dangers associated with this strategy, whether it succeeds or fails. The middle class always consumes more than its share of public services, diverting resources away from the poor. On the other hand, if the middle class views the quality of public services as inadequate, it will buy private substitutes (as is happening in primary and secondary education in the United States and in medicine in Britain),[813] quickly changing a supportive constituency into rebellious taxpayers. Because the middle-class clientele no longer appears to be truly "needy," the program may be attacked as inviting abuse by "welfare scroungers." Finally, to the extent that the legal problems of the poor diverge from those of the middle class, lawyers who serve both may gain variety at the expense of specialized expertise.[814]

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812. *See* J. KATZ, *supra* note 2, at 180–81 (discussing present legal aid system as segregation of poor and institutionalization of poverty); Sparer, *Legal Services and Social Change*, 34 N.L.A.D.A. BRIEFCASE, Dec.–Jan. 1976–1977, at 58. All Dutch litigants in the lower half of the income range receive legal aid, and the vast majority of those in sixth, seventh, and eighth deciles do so as well; only in the top two deciles are most lawyers privately paid. A. Klijn, *supra* note 196, at 5–6.

813. Private providers may prefer middle class to poor clients when both seek to purchase the same services (the latter assisted by state subsidies). There is evidence of such discrimination in housing voucher schemes. Boyd, *"Vouchers"—Key to Housing the Poor?*, N.Y. Times, Feb. 19, 1984, § 4, at 4, col. 3. There is fear that similar discrimination would occur were vouchers to be available for primary and secondary private education. Eleven percent of school-age children in the United States presently attend private schools, an increase over the previous decade. Hacker, *The Schools Flunk Out*, 31(6) N.Y. REV. BOOKS, Apr. 12, 1984, at 35, 39.

814. State welfare services range along a continuum from those where all strata and classes have similar needs to those where such needs vary. Medical services fall at the

A second strategic decision is the choice between staffed office and judicare legal aid programs. Throughout this Article I have insisted that staffed offices produce legal services of a higher quality, more closely attuned to the particular concerns of poor people, with greater potential for structural change, and at lower unit costs.[815] If the political climate were sympathetic to further expansion of staffed office budgets, I would oppose any diversion of public resources to private practitioners. But given the recent turn to the right in a number of leading capitalist states (the elections of Ronald Reagan in the United States, Margaret Thatcher in Britain, Helmut Kohl in Germany, Ruud Lubbers in the Netherlands, and Poul Schluter in Denmark), I think a qualified case can be made for a mixed system. There is evidence that clients prefer to use private lawyers for many of their most common legal needs, such as divorce and its aftermath, residential land transactions, wills and estates, and criminal defense. Even if the basis for this preference is suspect—private lawyers are not technically more competent but rather display a better "bedside manner" because they enjoy lower case loads and have an economic incentive to seek business—I see no reason to deny private practitioners the chance to compete with staffed offices for clients. Their success, to whatever extent, would free salaried lawyers from the routine drudgery and case overload that contribute to burnout and would allow them to work on matters with greater potential for structural change. A mixed program also would enable salaried lawyers who leave staffed offices for private practice to continue representing poor clients, thereby retaining and using their accumulated expertise. Such a program also stands a better chance of enlisting and retaining the organized legal profession's support; indeed, some concession to judicare may be a precondition to the higher eligibility levels advocated above, which otherwise would engender intolerable jealousy among private practitioners. Perhaps because judicare potentially involves and implicates the entire legal profession, it is subject to many fewer political constraints than staffed offices.[816] Allowing private practitioners to

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former extreme (although collective preventive public health care may diverge more than individual curative medicine); educational or cultural services tend toward the latter (consider the three tiers of California tertiary education or the BBC's three programs).

815. *See supra* notes 519–59 and accompanying text.

816. The extent to which a particular occupational category is dependent on state funds seems to correlate with the stringency of limitations placed on its political activity: Government employees are barred from any partisan political activity by federal and state Hatch acts; physicians serving some medicare patients suffer no restraints whatsoever. A nice illustration of this relationship is the recent controversy between William E. Brock, United States Trade Representative, and Philip Caldwell, chairman of Ford Motor Corporation. Brock criticized the bonuses paid to Ford executives, which he called "unbelievable" in light of the fact that automobile sales were artificially

advertise and thus generate the mass clientele that permits economies of scale may alleviate the tension between price and quality. Judicare harnesses professional self-interest in creating demand for legal services in order to expand the representation of poor clients.

Yet the dangers and drawbacks of judicare should not be overlooked. If private lawyers handle the kinds of legal problems that the poor share with the middle class, this practice may reduce the sense of urgency to provide additional services for problems unique to the poor. Furthermore, the routine services furnished by private practitioners are unlikely to identify recurrent problems that might be handled best by law reform litigation, legislative lobbying, or community organization. Regardless of the relative quality of the legal services offered by private and salaried lawyers, clearly there is less control over the quality of the former: little hierarchical supervision or selectivity in hiring and even less scope for the play of market forces. There is real danger, therefore, that low levels of remuneration combined with freedom to advertise will produce judicare mills that provide services of very poor quality and simultaneously defraud the state. If judicare offers the possibility of enlisting private lawyers as legal aid supporters, it is a tenuous alliance. Most practitioners earn too little from the program to have a significant financial stake in its welfare.[817] On the other hand, those specializing in legal aid matters are concerned only with judicare; they see staffed offices as irrelevant, at best, and as rivals when the two delivery systems compete for business. Private lawyers reimbursed by legal aid may suffer fewer political constraints, but they seem to make little use of their greater freedom to challenge the state. Though private lawyers may have an economic incentive to enlarge the scope of legal services rendered under legal aid, there is no guarantee that these additional activities will benefit their clients.

A third innovation also seeks to increase the legal resources of the poor. In the United States at present, more than half of all legal services are devoted to advising and representing businesses rather

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inflated by quotas imposed by the United States government on cars imported from Japan. Caldwell rejected the suggestion that Ford was dependent on the government, or that the latter therefore had a right to influence its policies. He invoked the right of a business in a system of free enterprise to pay its employees whatever it wishes. Risen, *Ford Chairman Defends Bonuses,* L.A. Times, May 5, 1984, § 1, at 1, col. 4. Caldwell's salary for the year was $1.5 million, and he exercised stock options worth $5.8 million. N. Y. Times, May 6, 1984, § 4, at 2, col. 2. Ford also increased its dividend by a third. Risen, *General Motors Declares 25% Increase in Dividend,* L.A. Times, May 8, 1984, § 4, at 1, col. 5.

817. The Legal Aid Practitioners Group in Britain was created precisely because those lawyers with significant legal aid practices found that their interests diverged from those of the Law Society.

than individuals.[818] In countries with judicare systems, the vast majority of private practitioners do little or no work under the legal aid scheme. In countries with staffed office programs, salaried lawyers comprise less than one percent of the profession. Furthermore, most of them leave the program after two or three years. This minimal involvement in legal aid contrasts sharply with findings that a substantial proportion of law students—considerably more than half according to some studies[819]—choose law as a career because they want to help people, especially the disadvantaged and oppressed. They abandon this ideal only because they cannot find jobs in which to pursue it.[820] Some have suggested that these altruistic impulses were an artifact of the temporary imbalance between supply and demand for lawyers in the 1960's, combined with the political ferment of that period, but the commitment to legal aid work has a much longer history. Law students have volunteered to work in legal aid clinics throughout the last seventy-five years, and I see an increase in social commitment today, undoubtedly connected with the greater proportions of women, minority, and mature students.[821]

How can we tap this reservoir of idealism? First it is necessary to accept burnout as an inevitable concomitant of the conditions of full-time salaried legal aid work: high case loads, great emotional intensity, and repeated defeats. Legal aid programs share these characteristics with other occupations displaying high turnover, such as elementary and secondary school teaching, nursing, and social work (although these traditionally female occupations also in-

818. *Cf.* J. HEINZ & E. LAUMANN, *supra* note 144, at 40 (discussing lawyers in Chicago). The figures are 71% if personal and small business matters are added. Personal plight accounts for less than 25%.

819. *See generally* Erlanger & Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns,* 13 LAW & SOC'Y REV. 11, 18–21 (1978); Hedegard, *Causes of Career-relevant Interest Changes Among First-Year Law Students: Some Research Data,* 1982 AM. B. FOUND. RESEARCH J. 789, 801–07; Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students,* 1979 AM. B. FOUND. RESEARCH J. 791, 841–48; Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes, and Values of Law Students,* 44 TENN. L. REV. 85, 93–96 (1976); Stevens, *Law Schools and Law Students,* 59 VA. L. REV. 551, 578–86 (1973).

820. *See generally* Erlanger, *Young Lawyers and Work in the Public Interest,* 1978 AM. B. FOUND. RESEARCH J. 83; Stover, The Impact of Law School on the Supply of "Public Interest" Attorneys: An Economic Analysis (1981) (unpublished manuscript). A 1981 survey of the 44 law centres in Britain found that of the 21 which responded only two expected to have the funds to hire any articled clerks in the next two years. 1981 LAG BULL. 175–76.

821. In the Netherlands, women lawyers are significantly overrepresented in the areas of family and social insurance law; lawyers with less than four years of experience are overrepresented in the areas of criminal, housing, labor, and social insurance law. A. Klijn, *supra* note 196, at 11–12.

flict on their work forces the tension between job and family). Widespread turnover is not an unalloyed benefit, for it undermines the accumulation of expertise. But the greater dedication of law students and recent graduates more than offsets their relative inexperience. Therefore, I would like to see law schools require every student to take a clinical course in poverty law; even the reluctant student may be influenced by what is likely to be his or her first contact with the legal problems of poor people. A postgraduate internship should follow, in a staffed office legal aid program or a private practice that handles legal aid work under a judicare scheme and meets minimum requirements of quantity and quality; this should be mandatory or at least encouraged by strong incentives (for instance, loan forgiveness).[822] The requirement is amply justified by the nineteen years of free or heavily subsidized education that every law graduate has received.[823] Of course, most lawyers would leave such a practice at the end of their internship. But some who otherwise never would have considered this work might join staffed offices or continue to represent poor clients under a judicare scheme. All lawyers would acquire greater sensitivity to the legal problems of the poor, inevitably making these lawyers more sympathetic to legal aid programs.[824] And the enormous cohort of students and new entrants to the profession involved in these programs would increase the resources of legal aid severalfold.

Legal aid cannot eliminate patriarchy within the family before or after divorce, but it can alter the balance of power between men and women. It cannot transform capitalist relations of production, but it can regulate the market and discipline the welfare state that capitalism generates. It cannot eradicate the pain inflicted by the criminal process, but surely it mitigates that pain. Legal aid will be most effective in promoting these vitally important, though limited, goals if it draws upon the best features of the national programs we have examined. Eligibility ceilings should be raised to include the bulk of the population, thus ending the segregation of the poor and

822. Both requirements can draw support from Chief Justice Burger and other judges who have argued that young lawyers lack sufficient preparation in advocacy. *See* R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 238–39 (1983).

823. Others have argued that the privileges of the profession warrant the imposition of mandatory service. *E.g.*, F. MARKS, K. LESWING & B. FORTINSKY, THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY, 288–93 (1972) (proposal for a draft of lawyers); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.1 (Discussion Draft 1980) (proposal for mandatory *pro bono*; dropped in final draft).

824. Lawyers and others who have worked on behalf of the poor and disadvantaged often retain a lifelong commitment to social change, although they frequently change the institutional setting in which they carry it out. See the biographies and autobiographies in Neal, *Interviews: Some Founding Mothers and Fathers,* in ON TAP, NOT ON TOP, *supra* note 143, at 54.

creating a politically powerful legal aid constitutency. Programs should combine staffed offices with judicare: The former should be increased wherever there is the political will (as in Australia under the new Labour government); if this is not possible, the latter should be expanded in order to recruit the legal profession as an ally against conservative administrations eager to cut state funding (as in the United States). The idealism that inspires lawyers everywhere, because it is inherent in law, should be mobilized by making exposure to legal aid an intrinsic part of professional socialization.

APPENDIX
EXPLAINING PATTERNS OF LAWYER USE

A number of studies in a variety of countries over the last few decades independently have arrived at the conclusion that the single most powerful determinant of which problems poor people take to lawyers is the configuration of problems that lawyers handle routinely for the general population. This is hardly surprising. The poor everywhere represent a minority of legal clients—and a minority that only recently began consulting lawyers. Lacking significant market power, the poor have no alternative but to choose from among the services lawyers have succeeded in marketing to middle-class individuals. Thus, there is a marked disparity between the problems that the poor themselves define as most pressing and those that they take to lawyers; the intervening variable is the social construction of the inventory of "legal" problems through interaction between lawyers' expertise and monopoly and the problems most salient to their predominantly middle-class clientele.[825]

One of the first American studies of "legal need" documented this disparity thirty-five years ago. Earl Koos asked low income families in six American cities to list their problems and found that 38% were economic, 35% dealt with property, and 25% concerned family matters. But when he looked at the legal aid case load, he found that 31% concerned family matters, 26% were economic, and 25% dealt with property.[826]

The most comprehensive investigation of this subject[827] offered a much more detailed breakdown of the annual number of problems taken to lawyers per 1000 of the general population in the United States (in decreasing order of frequency): real property—31, estate planning—30, marital—10, torts—10, consumer—5, governmental—5, estate settlement—2, juvenile—2, constitutional rights—1, job discrimination and wage collection—less than 1 each.[828] The study also found, however, that the mean discretionary family income of those consulting lawyers about estate planning, real property, governmental and consumer matters was about $10,000 a year in 1973,[829] placing them squarely in the middle class and thus ineligible for legal aid. Since legal aid is not permitted to handle torts or estate matters because both are fee-generating, marital problems dominate the case load.

825. *See* Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401 (1975); Mayhew & Reiss, *supra* note 472.

826. E. BROWNELL, *supra* note 67, at 44 (quoting E. KOOS, THE FAMILY AND THE LAW (1949)).

827. B. CURRAN, *supra* note 469.

828. *Id.* at 260.

829. *Id.* at 198.

A student project has reanalyzed the study's data and confirmed that encountering a situation in which lawyers commonly are consulted provides the single most powerful explanation of actual lawyer use, accounting for twenty percent of the variation. By contrast, among the other variables showing significant correlation with lawyer use (at the 0.01 level), property ownership (itself a component of the previous factor) explained eleven percent of the variation, prior contact with lawyers explained six percent, and respondent income, belief about the price of legal services, and attitude toward lawyers and the legal system each explained only one percent.[830] Miller and Sarat conducted a longitudinal American study of the process by which a perceived grievance is transformed into a consultation with a lawyer.[831] At every stage they found that the nature of the grievance was far more important than the characteristics of the party in explaining the decision to carry the matter forward. For instance, 95% of those owed a debt asserted a claim but only 29% of those who had suffered discrimination did so; 87% of the claims between divorced couples led to the next stage—a dispute—but only 24% of claims following a tort resulted in dispute. The decision by those engaged in disputes to consult a lawyer (central to the present analysis) resembles the pattern described above, with some significant differences. In descending order of frequency, the following percentages of disputants consulted lawyers: postdivorce—77%, torts—58%, consumer—20%, debt—19%, property—19%, landlord-tenant—15%, discrimination—13%, government—12%.[832] Miller and Sarat conclude that the structural variable dominating the process of transformation is "the availability and kind of institutionalization of remedy systems."[833]

In Great Britain, too, a subset of the problems experienced by the middle class has been legalized and dominates lawyer use. People take the following problems to lawyers (in decreasing order of frequency by percentage of total problems): property—35%, wills and estates—21%, family—12%, consumer—11%, crime (including "motoring offenses")—7%, injury—7%, landlord-tenant and neighbor—3%, employment—1%, taxation—1%.[834] In Scotland, the proportions are similar: conveyancing—32%, wills and estates—17%, personal injury—9%, criminal—8%, landlord-tenant—7%, matrimonial—6%.[835] Therefore, it is not surprising that when British solicitors offer free legal advice under the "Green

830. Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 140–45 (1980).

831. Miller & Sarat, *supra* note 690.

832. *Id.* at 537.

833. *Id.* at 563.

834. 2 ROYAL COMM'N, *supra* note 63, at 198.

835. 2 SCOTTISH ROYAL COMM'N, *supra* note 181, at 62.

Form" scheme, the subject matter composition does not change significantly: family matters—60%, criminal—15%, landlord-tenant—5%, hire purchase and debt—3%, personal injury—3%, employment—2%.[836]

When advice services are structured differently, they elicit a very different set of problems. The Citizens Advice Bureaux in Scotland received the following enquiries in 1978–1979: consumer, trade, and business—22%, housing, property, and land—16%, family and personal—14%, social security—10%, employment—9%, administration of justice—8%, national and international—6%, travel and transport—4%, health—4%, taxes—3%, leisure activities—2%, education—2%, communications—1%. The Dundee Legal Advice Centre received the following enquiries in October through December 1978: consumer, other contracts and debt—19%, family—19%, housing—16%, employment—13%, criminal—10%, social security—9%, tort—5%, wills and succession—4%, taxation—1%.[837] The Manchester Accident Leaflet Scheme, which actively sought to encourage tort claims, reached a different clientele with a different set of problems. Compared with accident victims generally, its clients were more likely to be female (55% versus 27%), older (48% versus 32%), and unemployed (50% versus 25%). As a result, they were more likely to have suffered their injuries somewhere other than on the road or at work (40% versus 10%).[838]

Two Australian studies also reveal the interaction of felt "needs" and the structure of lawyers' services. A sample of poor people experienced "legal" problems in the following proportions: landlord-tenant—24%, accidents—24%, consumer—14%, conveyancing—13%, criminal—9%, money problems—9%, family—7%.[839] All clients (both paying and legally aided) brought problems to lawyers in the following proportions: conveyancing—26%, accidents—15%, wills—12%, family—11%, commercial advice—11%, litigation other than accidents—10%, criminal—7%, consumer—4%, landlord-tenant—2%.[840] Lawyers do not handle many of the "legal" problems of the poor, and the poor do not experience many of the problems lawyers have defined as "legal." The following represents percentages of total problems presented to a sample of lawyers in Victoria, Australia by poor clients: family–56%, accident—33%, criminal–32%, consumer—25%, landlord-tenant—21%, wills—20%, other litigation—13%,

836. 1 ROYAL COMM'N, *supra* note 63, at 106.

837. 1 SCOTTISH ROYAL COMM'N, *supra* note 181, at 33, 37.

838. H. GENN, *supra* note 74, at 8–16.

839. M. CASS & R. SACKVILLE, *supra* note 75, at 9, *discussed in* J. FITZGERALD, *supra* note 64, at 33.

840. J. FITZGERALD, *supra* note 64, at 34.

conveyancing—10%, money—5%, social services—3%, filling in forms (welfare?)—2%, problems with bureaucracies—1%.[841]

841. *Id.* at 32.

TABLES

1. CIVIL LEGAL AID AS A PROPORTION OF ALL CIVIL LITIGATION

Country	Percent of All Civil Cases Legally Aided (Year)	Number of Civil Cases Legally Aided (Jurisdiction and Year)
Australia	3.6 (Victoria 1974-1975)	
Italy	0.57 (1966), 0.49 (1967)	4 (Florence 1977/78)
Japan	1 (1977)	2556 (1977)
France	6.7 (1964-1966)	
Zambia	3.27 (1970)	45 (1970)
Poland	0.5	
Spain	2.5 (1972)	1522 (1972)
Austria		400-450 (Salzburg 1976) 237 (Tyrol 1975)
Korea		5253 (1972-1976)
South Africa		4312 (1971-1973)
Bulgaria	0.003	
Sweden	40.9 (trial courts 1968) 55.3 (appellate courts 1968)	
Germany	11.2-23.6 (Landgerichte 1968) 6.9-11.4 (Amstgerichte 1968)	

Sources: M. CAPPELLETTI, *supra* note 6, at 36 n.112 (Italy); *id.* at 44 n.138 (France); *id.* at 52 n.164 (Germany); Bruzelius & Bolding, *An Introduction to the Swedish Public Legal Aid Reform,* in M. CAPPELLETTI, *supra* note 6, at 561, 563 n.13 (Sweden); Epstein, *Australia,* in PERSPECTIVES, *supra* note 2, at 42, 57 (Australia); Gross, *South Africa,* in PERSPECTIVES, *supra* note 2, at 288, 292 (South Africa); Klauser & Riegert, *Legal Assistance in the Federal Republic of Germany,* 20 BUFFALO L. REV. 583, 598–99 (1971) (Germany); Kojima, *Japan,* in PERSPECTIVES, *supra* note 2, at 194–95 (Japan); König, *Austria,* in *id.* at 76, 90 (Austria); Miguel y Alonso, *Spain,* in PERSPECTIVES, *supra* note 2, at 302, 303 (Spain); Reyntjens, *Africa—South of the Sahara,* in PERSPECTIVES, *supra* note 2, at 12, 28–29 (Zambia); Wengerek, *Socialist Countries: Eastern Europe,* in PERSPECTIVES, *supra* note 2, at 272, 281 (Bulgaria, Poland).

2. LEGAL REPRESENTATION OF THE POOR IN GREAT BRITAIN BEFORE 1950

	Poor Persons Procedure						Services Divorce Department		Naval Legal Aid Scheme	Army and RAF Legal Aid Scheme	
	London		Provinces		Backlog Year-End						
Year	Applications Received	Applications Granted	Applications Received	Applications Granted	London	Provinces	Military	Civilian		Home Command	Overseas Command
1918[a]	4101[a]	2215[a]									
1924	1,180		2077								
1925					1599[a]						
1926	4284[a]	2147[a]			624[a]						
1927	1540	757			114	685					
1928	1784	742	2719	1358	140	751					
1929	1921	864	2896	1451	116	688					
1930	1974	889	3114	1569	146	733					
1931	2275	1037	3331	1779	178	716					
1932	2372	1048	3596	2004	228	732					
1933	2531	1117	3835	2114	264	718					
1934	2655	1112	4074	2205	368	790					
1935	2792	1166	3993	2219	422	950					
1936	2690	1292	4038	2279	271	914					
1937	2947	1221	4503	2289	381	1223					
1938	6737	2873	11,866	5611	928	2954					
1939	3833	1965	6723	3795	520	2760					
1940	3161	1068	5501	2314	973	3301					
1941	3849	1274	6052	2294	1605	3448					
1942	7507	2623	5520	2280	4407	3227	1749				
1943	7646	4502	4991	1913	4696	3050	3424	990	c.2000	c.30,000	
1944	11,137	4694	4981	2070	9175	1964	3782	726	5501	c.40,000	
1945	16,340	7301	6042	2416	15,629	2402	3998	741	6607	54,256	
1946	12,990	18,534	7625	3030	6900	2728	13,879	734	4118	32,361	
1947	7222	8555	3898	1909	1216	2371	12,247	2585	1748	12,478	7325
1948	6387	5154	8046	4241	558	1680	2692	3881	1459	7664	2477
1949	7144	5224	8503	4570	517	1416	2346	5363	1266	6528	2203
1950[b]	4935	3636	5593	3036	477	1694	1361	4161	1065	5516	
TOTAL	251,404[a,c]	139,711[a,c]					45,478	19,181	23,764	188,803	12,005

a. London and Provinces combined.
b. First nine months.
c. 1926-1950
Sources: R. EGERTON, *supra* note 156, at 12–16; LAW SOCIETY, ANNUAL REPORTS (1925–1951).

3. LEGAL AID IN GREAT BRITAIN, 1951-1981

	Civil Legal Aid			Criminal Legal Aid				
Year[a]	Application	Certificate Issued	Legal Advice	Civil Legal Aid and Advice Budget (£000s)	Magistrates' Courts	Crown Courts	Criminal Legal Aid Budget (£000s)	Number of Law Centres
1951	53,610	37,772						
1952	51,807	32,305						
1953	47,354	27,636						
1954	43,423	25,042						
1955	39,958	23,218						
1956	41,020	23,159						
1957	36,869	20,663						
1958	36,927	20,631						
1959	40,520	23,910	c. 13,000					
1960	57,746	39,824	c. 26,000					
1961	105,224	77,530	46,284					
1962	123,553	92,800	57,731					
1963	131,399	98,407	61,354					
1964	137,795	100,591	57,941					
1965	148,406	107,641	58,588					
1966	158,434	113,299	63,196	10,448	26,192		549	
1967	176,348	129,442	72,619	10,108	35,317		791	
1968	189,490	137,098	76,090	11,795	51,574		1205	
1969	206,629	148,882	82,936	13,010	68,699		1867	
1970	236,920	159,664	c. 86,000	14,424	88,320		2749	1
1971	265,291	202,220	c.112,000	17,888	101,967		3379	2
1972		187,441	c.110,000	21,141	117,430		4364	3
1973		179,789	100,298	23,124	139,272		6209	7
1974	288,674	196,580	180,695	29,388	171,567		9445	9
1975	306,540	203,908	254,558	35,654	213,894		14,371	12
1976	307,751	207,106	291,961	26,147	222,726		16,300	20
1977		179,024	304,343	30,498	297,000	97,000	20,206	23
1978	246,298	190,528	365,772	33,460	242,059		24,306	26
1979	294,343	152,606	438,519	37,197	243,703		29,451	30
1980	258,099	170,625	531,512	53,906	275,276		40,773	35
1981	266,596	168,911	649,496	74,175	296,134		47,999	44

a. April 1 of this year to March 31 of next.

Sources: 1 ROYAL COMM'N, *supra* note 63, at 106–07; LAW SOCIETY, MEMORANDUM NUMBER 3 TO THE ROYAL COMMISSION ON LEGAL SERVICES 198–200 (1977); LORD CHANCELLOR'S DEP'T, 31ST LEGAL AID ANNUAL REPORT 49 (1980–1981); LAW SOCIETY, ANNUAL REPORTS.

4. LEGAL AID IN THE UNITED STATES (CIVIL AND CRIMINAL COMBINED), 1876-1959

Year	No. of Cases	Cost of Operation
1876	212	$1060
1877	750	1519
1878	856	1570
1879	1903	1816
1880	2122	2248
1881	2832	2622
1882	3413	2715
1883	3400	2838
1884	3640	2817
1885	3802	2870
1886	3462	3820
1887	3870	5005
1888	5624	8739
1889	7611	10,425
1890	9316	11,953
1891	10,282	12,781
1892	10,656	15,122
1893	11,166	11,365
1894	15,427	14,597
1895	16,128	14,312
1896	15,017	13,450
1897	12,115	14,734
1898	12,399	13,654
1899	16,189	16,030
1900	20,896	21,669
1901	23,366	28,885
1902	23,544	29,086
1903	28,358	33,333
1904	34,156	38,829
1905	33,352	42,734
1906	37,603	53,347
1907	42,596	62,620
1908	50,944	66,534
1909	48,212	72,170
1910	52,644	76,602
1911	60,950	97,250
1912	77,778	119,705
1913	87,141	133,609
1914	109,048	160,189
1915	111,719	166,701
1916	117,201	181,408
1917	108,594	153,559
1918	99,192	167,307
1919	102,289	195,595
1920	96,034	226,079
1921	111,404	282,359
1922	130,585	328,651

1923	150,234	331,326
1924	121,177	348,290
1925	143,653	408,576
1926	152,214	369,264
1927	142,535	387,331
1928	165,817	461,557
1929	171,961	464,420
1930	217,643	546,803
1931	227,471	538,199
1932	307,673	596,941
1933	331,970	481,756
1934	306,262	566,259
1935	272,723	524,731
1936	260,400	566,220
1937	247,248	573,848
1938	267,417	687,544
1939	273,971	630,625
1940	286,619	706,687
1941	296,895	704,003
1942	231,987	598,458
1943	185,488	726,717
1944	241,391	754,532
1945	266,651	928,800
1946	301,628	1,033,812
1947	348,548	1,472,966
1948	344,616	1,519,076
1949	257,601	1,598,832
1950	258,604	1,718,383
1951	263,328	1,938,946
1952	255,911	2,011,559
1953	286,448	2,300,857
1954	345,440	2,412,379
1955	367,761	2,733,458
1956	410,580	3,188,733
1957	391,619	3,687,207
1958	456,556	4,152,307
1959	447,096	4,592,560

Sources: *Reprinted from* E. BROWNELL, *supra* note 67, at 167–68; SUPPLEMENT, *supra* note 163, at 46.

5. Legal Aid in the United States (Civil and Criminal Disaggregated)

	Civil				Criminal			
	Number of Cases	Agencies Reporting	Budget ($)	Agencies Reporting	Number of Cases	Agencies Reporting	Budget ($)	Agencies Reporting
1933	235,502	41	442,865	37				
1938	215,432	46	538,640	39				
1943	167,279	52	567,107	44				
1948	200,642	65	1,002,486	58				
1949			1,072,000	59			527,000	19
1955	291,866	132	1,858,441	106	183,352	36	864,546	32
1956	311,683	170	2,101,610	171	186,926	43	1,087,124	39
1957	315,815	180	2,111,004	117	225,964	62	1,576,204	57
1958	365,118	234	2,554,590	131	91,438	64	1,597,718	53
1959	350,635	224	2,782,992	135	96,518	60	1,809,569	49
1960	366,607	233	2,925,796	147	115,188	70	2,052,566	54
1961	382,679	238	3,303,168	153	141,719	92	2,654,571	76
1962	397,942	253	3,465,403	160	154,111	80	3,277,123	74
1963	422,569	227	3,795,302	165	167,891	96	3,989,287	84
1964	380,384	147	4,352,453		205,931	113	4,938,114	
1965	426,457	286	5,375,890	187	244,845	144	6,343,199	131
1966	491,746	291	11,563,799	222	334,009	204	11,393,581	185
1968	996,638	347	46,510,262		526,949	221	21,397,222	
1969	1,024,492	362	54,858,546	362	584,140	230	30,415,916	230
1970	1,127,706	354	62,986,680	354	720,377	235	39,600,135	235

Sources: E. BROWNELL, *supra* note 67, at 170–72; NATIONAL LEGAL AID AND DEFENDER ASS'N, *supra* note 163, at iv–vi; 1968 N.L.A.D.A. PROC. 4 (1969); 1965 *id.* at 46–47 (1966); 1963 *id.* at 29 (1964); 1962 *id.* at 27 (1963); 1961 *id.* at 14 (1962); 1960 *id.* at 14 (1961); 1959 *id.* at 12 (1960); 1958 *id.* at 17 (1959); 1957 *id.* at 21 (1958).

6. OEO Legal Services/Legal Services Corporation

	Programs	Offices	Lawyers	Paralegals	Matters (000,000)	Budget ($000,000)	Total Public Criminal Defense Budget ($000,000)
1966						20	
1967	170				.29	25	20
1968						38	
1969						42	
1970	293		2200		.5	50	
1971		616			1.19	55	178
1972			2534		1.2	61	
1973						61	
1974						61	
1975						51	
1976	300	700	3300	1000	1	92.3	331.1
1977	320	700	3700	1500		125	403
1978	335	850	4620		1.4	205	
1979	335	1200	5000	2500		270	
1980	323	1450			1.5	301	
1981	323	1450	6200	3000	1.5	321.3	
1982						241	
1983							
1984							
1985						305	

Sources: E. JOHNSON, *supra* note 89, at 293, 369 n.234; LEGAL SERVICES CORP., 1981 ANNUAL REPORT (1982); 1980 *id.* (1980); 1979 *id.* (1979); 1978 *id.* (1978); 1977 *id.* (1977); 1976 *id.* (1976); H. STUMPF, *supra* note 45, at 137; L.A. Times, Aug. 31, 1984, § 1, at 2. col. 1; D. Saari, The Financial Impacts of the Right to Counsel for Criminal Defense of the Poor (unpublished manuscript) (prepared for the Law and Society Association Conference, May 10–11, 1979, San Francisco, Cal.).

7. Expenditures on Civil and Criminal Legal Aid in Australia (A$000)

		State or Territory										
Year		New South Wales	Victoria	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	Other	Total	Commonwealth and State Total
1971-1972	C	0	0	0	0	0	0	14	0	257	271	
1972-1973	S	616	1187	249	338	173	82	0	0		2645	2916
	C	0	0	0	0	0	0	108	0	258	366	
1973-1974	C	731	558	296	187	166	62	120	60	368	2547	
1974-1975	C	1444	1023	567	569	397	336	349	175	767	5627	
1975-1976	C	3882	2783	1648	747	968	737	923	336	503	12,528	
1976-1977	C	6808	4282	3380	1583	2290	918	980	1016	580	21,837	
1977-1978	C	6908	4789	3749	1856	3085	1041	1087	1016	538	24,067	
1978-1979	C	6917	5327	4126	2363	3007	1128	1289	1156	885	26,198	
1979-1980	C	6923	5487	4922	2414	3816	1217	1397	1597	913	28,685	
1980-1981	S	12,913	7254	4109	1376	1206	250	179	33		27,320	
	C	7437	6779	3844	2721	3289	1763	1511	818		28,162	55,482
1981-1982	S	17,272	9139	5023	1126	1502	210				34,272	
	C	9515	9182	4162	3695	5005	2225	1796	996		36,576	70,848
1983-1984	C	13,510	17,879	8449	7711	5153	2840	1942	1239	11,300	70,023	

Notes: C = Commonwealth
S = State and Other

Sources: COMMONWEALTH LEGAL AID COUNCIL, 1981–1982 ANNUAL REPORT, Tables 1 & 2 (1982); R. SACKVILLE, *supra* note 56, at 160; 4 LEGAL AID CLEARINGHOUSE BULL. 83a, 98–100 (1983); 2 *id.* 47–48 (1981).

8. Number of Civil and Criminal Legal Aid Cases in Australia Handled by Salared Lawyers/Private Practitioners

	State or Territory									
	New South Wales	Victoria	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	Total	Grand Total
1971-1972	3565/210	535/5553	728/4017	0/4017	0/1173	0/1625			4828/16,657	21,485
1972-1973	2720/522	813/8561	807/4623	0/4262	0/2197	0/2047			4340/22,400	26,740
1973-1974	3735/2420	793/9158	0/6149	0/5214	0/2773	0/2235			4528/28,049	32,577
1980-1981	11,022/19,168	2674/23,313	1089/10,618	2020/8079	2020/6874	1533/3916	842/958	1573/460	22,165/73,386	95,551
1981-1982	10,156/20,001	1901/26,695	1129/11,971	1927/738	1561/6928	1695/4697	787/1170	678/637	19,834/62,837	82,671
1982-1983	8844/13,071	4068/17,120	1217/15,280	2769/8265	1993/6787	1927/4514	910/1170	707/646	22,435/86,853	109,288

Sources: COMMONWEALTH LEGAL AID COUNCIL, 1981–1982 ANNUAL REPORT, Tables 5 & 6 (1982); R. SACKVILLE, *supra* note 56, at 130–35, 138–39, 160; 5 LEGAL AID CLEARINGHOUSE BULL. 2 (1984).

9. LEGAL AID IN THE NETHERLANDS

	Civil Legal Aid Cases	Total Budget Civil & Criminal Legal Aid[a]	Buro voor Rechtshulp Budget[a]	Number of Clients Amsterdam Buro	Number of Law Shops	State Budget for Law Shops (guilders)[a]
1958	20,000					
1965	23,100					
1966						
1967	31,000					
1968						
1969					1	
1970	44,300	15,000,000				
1971						
1972	61,600				13	
1973					28	
1974	80,000				54	
1975	75,000			5737	60	
1976					90	
1977		88,500,000	3,750,000			130,000
1978		110,000,000	8,400,000	13,588		170,000
1979		130,000,000	12,000,000	15,799		210,000
1980		156,000,000	25,000,000			
1981	186,300					
1982		222,000,000				

a. In March 1985, the Dutch guilder was worth $.26

Sources: J. COOPER, *supra* note 2, at 48, 82, 158, 300; B. GARTH, *supra* note 2, at 119; Griffiths, *supra* note 168, at 262; Blankenburg & Cooper, *supra* note 8, at 276; A. Klijn, *supra* note 196, at 5, 8.

10. Percentage of Civil Legal Aid in Great Britain Concerned with Matrimonial and Family Matters, 1951-1981

1951	80	1967	83
1952	78	1968	85
1953	76	1969	85
1954	77	1970	87
1955	76	1971	77
1956	71	1972	80
1957	71	1973	
1958	69	1974	80
1959	69	1975	79
1960	64	1976	79
1961	77	1977	59
1962	79	1978	62
1963	81	1979	61
1964	82	1980	59
1965	82	1981	62
1966	83		

Source: LORD CHANCELLOR'S DEP'T, LEGAL AID ANNUAL REPORTS.

11. SUBJECT MATTER OF LEGAL AID CASES, BY COUNTRY AND PROGRAM (PERCENTAGES)

Country/Program	Family	Housing	Employment	Welfare	Consumer	Criminal	Number of Cases
Netherlands							
Legal Aid (J)	65						
Amsterdam Buro (S)	28	22	28			5	
Law Shops (S)	20		40		20		
France (J)	83	10					
Groupement d'Action Judiciaire and Savoir Organiser Sa Défense (S)	10.5	35	5.2	3.1	15.4	8.6	648
Canada							
Saskatchewan (S)	21					43	
Ontario (S)	30					50	
Quebec (S)	26					31	
Quebec (J)	47					34	
Finland (S)	32	7		12.5		10	
Germany (J)	72						
ÖRA (S)	32.7	17.3	12		19	5.4	
Belgium (1980)							
Pro Deo (J)	54	12		10			371
Public Welfare Agency (S)	40	22		17			151
Law Shops (S)	22	37		15			306
Norway (J)	59	11	3	3	6		17,514

Notes: S = Staffed Office
J = Judicare

Sources: B. GARTH, *supra* note 2, at 120; M. VALÉTAS, *supra* note 102, at 22–23; Bonafé-Schmitt, *supra* note 554, at 51, 57; Falke, *supra* note 75, at 123, 144 n.47; Griffiths, *supra* note 168, at 262; Nousiainen, *supra* note 338, at 172; Schuyt, *supra* note 85, at 65; Zemans, *Canada*, in PERSPECTIVES, *supra* note 2, at 93, 108; J. Breda & A. Stevens, Legal Services in Belgium: An Exploratory Analysis of Some Recent Developments 8 (1980) (unpublished manuscript); J. Johnsen, *supra* note 442, at 35.

12. Subject Matter of Legal Aid Cases in Australia (Percentages)

	Family	Housing	Employment	Welfare	Consumer/ Personal Injury	Other Civil	Criminal	Number of Cases
Law Society Schemes								
1971-1972								
Victoria	61					29	10	5553
Queensland	79					21	0.3	4017
South Australia[a]	42					11	32	4079
Western Australia	67					19	15	1173
Tasmania	64					15	21	1625
1972-1973								
Victoria	61					29	11	8546
Queensland	80					0.6	20	4623
South Australia	44					22	34	4264
Western Australia	76					16	8	2197
Tasmania	62					17	22	N/A
1973-1974								
New South Wales	75						25	2420
Victoria	60					25	15	9158
Queensland	75					25	0.6	6149
South Australia	43					23	34	5214
Western Australia	79					12	9	2773
Tasmania	68					11	21	N/A
Victoria Legal Aid Committee 1978	52	—	2.2	—	15%	27		
Fitzroy Legal Services 1978	21.6	10.6	4.3	1.3	30		22.9	
1982	18	6	2	1	34	13	27	187
Redfern Legal Centre 1982	22	12	2	3	33	15	17	175
Caxton St. Legal Centre 1982	20	9	2	3	25	25	16	3098

Sources: R. Sackville, *supra* note 56, at 130–35, 138–39, 160; Neal, *Delivery of Legal Services—The Innovative Approach of the Fitzroy Legal Service*, 11 Melb. U.L. Rev. 427, 444 (1978); *The Bottom Line: Statistics and Other Information*, in On Tap, Not on Top, *supra* note 143, at 26.

13. SUBJECT MATTER OF LEGAL AID CASES IN UNITED STATES

OEO/LSC	Family	Housing	Employment	Income Maintenance	Consumer	Number of Cases
1967	30.4%	18.2%	2.9%	6.2%	24.1%	
1970	40.0	14.8	16.0[a]	8.8	16.0[a]	
1971	32.7	14.2		11	15.6	
1972	21.7	23.3	5.3	12.2	21.6	
1973	28	30	11[a]	13	11[a]	
1977	29.2	17.5		17.6	13.9	
1978	31	18	3	19	14	
1979	33.7	18.3	2.8	13.4	12.1	
1980	30.3	17.6	3.1	17.2	13.7	
1981	29.5	17.8	2.9	18	13.7	
Legal Aid Fndn. Los Angeles 1980	17	51	1	12	6	24,886
Meriden, Conn. 1969-1972						
Staffed Office	20	17		34	17	829
Judicare	67	8		8	11	320
59th St. Legal Clinic[b]	55.7	20.4	0	0	1.4	440

a. Combined figure employment and consumer
b. Client's problems identified in interviews.

Sources: J. HANDLER, *supra* note 184, at 52; E. JOHNSON, *supra* note 89, at 296, LEGAL SERVICES CORP., 1981 ANNUAL REPORT (1982); 1980 *id.* (1980); 1979 *id.* (1979); 1978 *id.* (1978); 1977 *id.* (1977); 1973 *id.* (1973); 1972 *id.* (1972); 1971 *id.* (1971); 1970 *id.* (1970); 1967 *id.* (1967); Cole & Greenberger, *supra* note 174; *Closed Case Statistics on Client Problems in 1981*, POVERTY L. TODAY, Winter 1982, at 7; Huber, *supra* note 89 at 761 n.41; NATIONAL LEGAL AID & DEFENDER ASS'N, *supra* note 163, at vi; R. Meadow & C. Menkel-Meadow, *supra* note 215, at 24.

14. Subject Matter of Legal Aid Cases in Britain (Percentages)

	Family	Personal Injury	Housing	Employ.	Welfare Benefits	Debt/Consumer	Criminal/ Juvenile	Immig./Discrim.	Conveyancing	N
Poor Persons Procedure										
1918	96									
1928	80									
After 1938	90-95									
Poor Man's Lawyer										
Chesterfield 1938	31	11	24							138
Birmingham 1938	29	6	13	8		13				4328
1971	38	17	10			16	9			504
Birmingham										
Legal Aid 1969	86	9	0.3	0.3	0	2				
Legal aid practice										
London	31	3	10		5		23		12	
Manchester	32		1	2	2	4	24		12	
Law Centres										
N. Islington										
Evening Advice 1977			59	18			12			195
1978			49	21			11			473
1979			60	17			5			313
Brixton 1980	13	3	29	8	10	7	10	2		7018
1981	14	5	22	8	10	8	12	8		5113
Tottenham 1979	7		37	10	8		20	2		530
Paddington 1973-1974	5	7	49	3	2	8	18			1202
1974-1975	2	8	47	8	2	8	21			822
1975-1976	3	5	48	7	2	7	21			7018
1976-1977	1	7	38	7	5	7	23			443
1977-1978	3	5	34	4	2	2	38			676
Hillingdon 1977	17	8	15	20	6	5	2			1452
Manchester 1977-1978			30	11.3	31		11.5	5		770
1978-1979	2		35	14	30	1	2	13		2601
Telephone Enquiries 1979	15	2	23	7	12	16	8	2		2601
Personal Enquiries 1979	13	4	19	9	19	6	9	2		1083
Small Heath 1978-1979	1		34	7	24	8	2	6		1126
Tower Hamlets 1978-1979		3	31	30	5	3	14	7		299
W. Stepney Legal Advice 1978-1979	14	9	21	10	3	12	16	2		577

	Family	Personal Injury	Housing	Employ.	Welfare Benefits	Debt/Consumer	Criminal/ Juvenile	Immig./Discrim.	Conveyancing	N
Stepney Green Legal Advice 1978-1979	20	10	18	7	1	11	20	1		864
Camden 1977-1978	8		44	9	6		27			819
Evening Advice 1977-1978	13	3	37	25			10	1		1653
Brent 9/71-6/72	15	9[a]	59	6		9[a]	12			
7/72-12/72	21	21[a]	41	4		21[a]	12	.7		
1/73-8/73	14	23[a]	47	4		23[a]	11	1.2		
9/73-12/74	5	24[a]	50	8		24[a]	12	1		
1976	5	29[a]	41	12		29[a]	12	.2		
1978	7	28[a]	35	17		28[a]	10			
79-80	4	6	39	11	3	11	9			500-600
80-81	5	4[a]	30	14	3	11	10	8		500-600
81-82	6	4	29	13	6	8	7	13		500-600
Newham 1974 & 1-3/75	8	2	38	5	9	19	8	1		663
N. Kensington 1973	8	1	45	11	11	12	3	1		153
Adamsdown			48		35					
Advice Services										
London	12	7	27	8	5	6				
CAB 81/82	13		15	10	17	18				
Birmingham										
CAB 1971	31	5	15	5	3.4	20	3	0.4		
Same-Tel. Enquiry 1971	16		13	6	2					
Settlement 1968	32	10	5	4		29	4			
1971	20	9	12	3		30	2			
Mount Pleasant 1971	27	12	10	6		21	2	1		
The Lane 1971	25	4	17	2	5	17	12	1		

a. Combined figure

Sources: BRENT COMMUNITY LAW CENTRE, LEGAL SERVICES IN THE INNER CITY: REPORT 83, at 30 (1983); BRENT COMMMUNITY LAW CENTRE, 1978 REPORT app. xiii; 1976 *id.* at iii; 1975 *id.* at 45; L. BRIDGES, *supra* note 409, at 91, 103, 181, 183, 209, 214; BRIXTON COMMUNITY LAW CENTRE, 1980–1981 ANNUAL REPORT 21; A. BYLES & P. MORRIS, *supra* note 280, at 33; CAMDEN COMMUNITY LAW CENTRE, 1977–1978 ANNUAL REPORT 19; COOPER & PEARSON, *supra* note 191, at 9; HILLINGDON COMMUNITY LAW CENTRE, 1977 ANNUAL REPORT 22; HODGE, *supra* note 528; J. JONES, *supra* note 407, at 25–27, 30; LAW SOCIETY, 1940 ANNUAL REPORT 70; MANCHESTER LAW CENTRE, 1978–1979 ANNUAL REPORT 31–36; NATIONAL ASS'N OF CITIZENS ADVICE BUREAUX, 1981–1982 ANNUAL REPORT; NEWHAM RIGHTS CENTRE, 1974–1975 REPORT AND ANALYSIS OF A COMMUNITY LAW CENTRE 94–95; NORTH ISLINGTON LAW CENTRE, 1978–1979 ANNUAL REPORT 40–41; PADDINGTON ADVICE AND LAW CENTRE, 1976–1978 ANNUAL REPORT; SMALL HEALTH COMMUNITY LAW CENTRE, 1977–1978 ANNUAL REPORT app. A, at i; TOTTENHAM NEIGHBOURHOOD LAW CENTRE, 1979 ANNUAL REPORT 31; TOWER HAMLETS LAW CENTRE, 1978–1979 ANNUAL REPORT 30; A. Byles, *supra* note 174, app. A, Table IV.

15. Size of Legal Profession (Average Annual Change in Percent)

	Scotland	Belgium	West Germany	Ontario, Canada	Netherlands	France
1983			41,489 (5.0)			
1982	5,502 (5.7)	22,100 (5.3)				15,351 (−2.3)
1981				15,294 (6.5)		15,715 (3.6)
1980			36,081 (6.6)		3,726 (9.6)	15,170 (4.8)
1979						14,480 (3.7)
1978						13,959 (12.5)
1977						
1976				11,542 (9.2)	2,694 (5.8)	12,408 (4.5)
1975				10,572 (5.5)		11,869 (6.3)
1974			25,851 (2.9)	10,025 (8.1)		10,365 (24.8)
1973				9,277 (7.0)		8,307 (4.6)
1972				8,668 (13.9)		7,941 (2.4)
1971	3,387 (0.3)			7,610 (−0.7)		7,756
1970		13,463 (1.8)		7,666 (3.9)	2,000 (0.3)	
1969				7,381 (8.3)		
1968						
1967				6,327 (3.1)		
1966				6,136 (3.3)		
1965				5,942 (1.6)		
1964	3,308 (0.0)			5,850 (3.5)		
1963				5,651 (2.7)		
1962				5,501 (3.5)		
1961		11,554 (0.2)	18,720	5,316 (3.5)		
1960					1,947 (2.2)	
1959						
1958						
1957						
1956						
1955						
1954	3,406					
1953						
1952						
1951			11,818 (5.8)	3,932 (3.6)		
1950						
1949						
1948						
1947		8,143			1,509	
1946						
1945						
1944						
1943						
1942						
1941						
1940						
1939						
1938						
1937						
1936				2,556		
1935						
1934						

	England and Wales						
	Barristers	Solicitors	Italy	Venezuela	Norway	United States	Brazil
1983						622,000 (4.5)	
1982	4,864 (3.8)	41,738 (4.9)		15,000 (1.8)		595,107 (4.6)	
1981	4,685 (2.1)	39,795 (5.2)				569,000 (4.9)	
1980	4,589 (4.0)	37,832 (11.0)	46,620 (1.5)		6,572 (2.7)	542,205 (5.8)	98,460 (11.4)
1979	4,142 (3.5)	34,090 (3.7)					
1978	4,263 (4.6)	32,864 (0.2)		14,000 (10.4)			
1977	4,076 (5.0)	32,812 (5.0)				462,000 (5.7)	
1976	3,881 (6.4)	31,250 (4.7)					
1975	3,646 (8.3)	29,850 (3.9)					
1974	3,368 (7.4)	28,741 (5.0)					
1973	3,137 (7.5)	27,379 (4.0)					
1972	2,919 (7.4)	26,327 (3.8)				358,920 (0.5)	
1971	2,714 (5.0)	25,366 (3.9)		8,102 (9.0)			
1970	2,584 (5.6)	24,407 (3.5)			5,188 (−0.2)	355,242 (4.0)	46,036 (3.5)
1969	2,448 (2.9)	23,574 (3.5)					
1968	2,379 (2.0)	22,787 (2.5)	39,415 (2.1)				
1967	2,333 (4.2)	22,223 (2.5)				316,856 (1.8)	
1966	2,239 (3.5)	21,672 (2.5)	37,800				
1965	2,164 (2.2)	21,255 (2.0)					
1964	2,118 (2.2)	20,683 (2.8)					
1963	2,073 (5.5)	20,269 (2.0)				296,069 (1.2)	
1962	1,964 (2.4)	19,790 (2.5)					
1961	1,918 (−0.1)	19,438 (1.8)		4,256 (9.4)			
1960	1,919 (−0.2)	19,069 (1.9)			5,206	285,933 (3.0)	34,047 (7.8)
1959	1,923 (−1.2)	18,740 (1.8)					
1958	1,947 (−1.1)	18,522 (1.1)					
1957	1,968 (−0.3)	18,344 (1.0)				262,320 (2.9)	
1956	1,973 (−1.7)	18,165 (1.0)					
1955	2,008 (−0.1)	18,143 (0.1)					
1954	2,010 (5.4)	17,831 (1.7)				241,514 (3.0)	
1953	1,907	17,687 (0.3)					
1952		17,628 (1.3)					
1951		17,396 (2.1)				212,605 (1.8)	19,177
1950		17,035 (4.4)		2,087 (13.1)			
1949		16,318 (4.8)					
1948		15,567 (1.4)					
1947		15,348 (9.1)					
1946		12,979 (−0.6)					
1945		13,063 (−2.1)					
1944		13,340 (−3.6)					
1943		13,835 (−4.1)					
1942		14,430 (−9.1)		957		179,567	
1941							
1940		15,884 (−7.1)					
1939		17,107 (1.2)					
1938		16,899 (2.6)					
1937		16,478 (1.1)					
1936		16,299 (1.0)					
1935		16,132 (1.2)					
1934		15,941 (1.0)					

Sources: R. Abel, American Lawyers, at Table 3 (1982) (unpublished manuscript); R. Abel, Lawyers in England and Wales, at Barristers Table 13, Solicitors Table 9 (1983) (unpublished manuscript); A. Klijn, *supra* note 196, at 3–4; A. Boigeol, *supra* note 428, at 8, 33; J. Falcão, Lawyers in Brazil 15 (1984) (unpublished manuscript); V. Pocar & V. Olgiati, *supra* note 8, at 1; A. Paterson, The Legal Profession in Scotland 22 (1983) (unpublished manuscript); L. Huyse, *supra* note 8, at 22; J. Johnson, *supra* note 442, at 4; U. Schultz, *Images of a Unified Legal Profession: The German Rechtsanwalt,* LAW SOC'Y'S GAZETTE, September 29, 1982, at 1210, 1222; Yachetti, *The Views of the Practising Bar,* 6 CAN.-U.S. L.J. 103, 106 (1983); S. COLVIN, *supra* note 550, at 77; B. Curran, 1984 Lawyer Statistical Report: A Profile of the Legal Profession in the United States (draft 1984).

16. Legal Aid in France, 1974–1984

Number of Cases (Percentages)

	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984
Trial Courts and Court of Appeal[a]											
Applications	113,743	140,468	156,122	171,009	177,716	180,410					
Granted	69,069(61)	90,725(65)	109,688(70)	117,997(70)	127,388(71)	131,414(73)					
With Contribution	16,971(15)	13,557(10)	20,814(13)	24,478(14)	27,943(16)	32,171(18)					
Without	52,098(46)	77,168(55)	88,874(57)	93,519(56)	99,445(56)	99,243(55)					
Cour de Cassation											
Applications		2782	3072	3460	2614	2950					
Granted		478(17)	476(15)	512(15)	650(25)	830(28)					
With Contribution		103 (4)	103 (3)	92 (3)	129 (5)	208 (7)					
Without		375(13)	373(12)	420(12)	521(20)	622(21)					
Conseil d'Etat and Tribunal des Conflits											
Applications		891	660	655	712	823					
Granted		343(38)	237(36)	227(34)	213(30)	353(43)					
With Contribution		13 (1)	7 (1)	9 (1)	5 (1)	25 (3)					
Without		330(37)	230(35)	218(33)	208(29)	328(40)					
Administrative Tribunals											
Applications		436	562	592	764	782					
Granted		261(60)	346(61)	373(63)	475(62)	511(66)					
With Contribution		13 (3)	40 (7)	58(10)	94(12)	90(12)					
Without		248(57)	306(54)	315(53)	381(50)	421(54)					
Total Applications	113,743	144,577	160,416	175,716	181,806	184,965					
Total Granted		91,807(64)	110,747(69)	119,109(68)	128,726(70)	133,108(72)					
With Contribution		13,686 (9)	20,964(13)	24,637(14)	28,171(15)	32,494(18)					
Without		78,121(55)	89,783(56)	94,472(54)	100,555(55)	100,614(54)					
State Expenditure (francs 000,000s)			39.2	56.7	73.7	85.7	92[b]				
Payments to Lawyers (francs 000,000s)	33				39	63	92	108	143	171	181

a. Only metropolitan France; excludes overseas territories
b. Projected

Sources: L'Organisation Judiciaire en France 129–130 (1977); Aide Judiciaire, Commission du Rapport Annuel, Cinquième Rapport Annuel sur le Fonctionnement de L'Aide Judiciaire 4, 19, 21 (1978); *id.* Sixième Rapport 4, 18 (1979); *id.* Septième Rapport 2, 15, 18 (1980).

IS THE IN-HOUSE COUNSEL MOVEMENT GOING GLOBAL? A PRELIMINARY ASSESSMENT OF THE ROLE OF INTERNAL COUNSEL IN EMERGING ECONOMIES

DAVID B. WILKINS*

INTRODUCTION

In 1989, the American legal scholar Robert Eli Rosen wrote an important article chronicling the dramatic growth in the size, prestige, and influence of internal legal counsel in large U.S. corporations.[1] In fewer than twenty years, these lawyers had gone from a position of marginality and subservience—think "house counsel," as in "house pet"—to being "General Counsel," playing a pivotal role in both defining and serving the legal needs of their powerful corporate clients.[2] This "in-house counsel movement," as Rosen aptly labeled this

* Lester Kissel Professor of Law, Vice Dean for Global Initiatives on the Legal Profession, and Faculty Director of the Program on the Legal Profession and Center on Lawyers and the Professional Services Industry, Harvard Law School. I'd like to thank Vikram Khanna, Mihaela Papa, Erik Ramanathan, David Trubek, and the participants in the *Wisconsin Law Review* Symposium for their helpful comments on earlier drafts. Monet Brewerton and Sarah Davis provided excellent research and editorial assistance.

1. Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989).

2. *See* Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 294 (1985); Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1057–59 (1997).

transformation to signal the key role that internal lawyers themselves were playing in furthering their growing economic power and professional standing, was in turn producing an important transformation in the structure, norms, and practices of the bar as a whole.[3]

In the more than two decades since Rosen's article, the apparent power and prestige of in-house lawyers in the United States has only continued to grow. Internal legal departments routinely employ dozens of lawyers, with many large U.S. companies having general counsel offices that rival the size of large outside law firms.[4] These lawyers now regularly perform legal work traditionally done by outside counsel.[5] Specifically, today's general counsel (GC) routinely act as both "diagnosticians" of their company's legal needs, and as the primary "purchasing agents" deciding whether those needs will be served by an inside lawyer or by an outside firm—and if the work is sent outside, which firm will receive the business.[6] As a result, the number of lawyers employed by in-house legal departments in the United States has expanded dramatically.[7]

In-house legal departments in the United States now also rival large law firms as a destination of choice for talented lawyers. Although most GC offices do not recruit directly from law school,[8] they

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3. *See, e.g.*, Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 913–15 (1990).

4. *See* John C. Coates, Michele M. DeStefano, Ashish Nanda & David B. Wilkins, *Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 LAW & SOC. INQUIRY 999, 1006 (2011) (describing the size of in-house counsel offices in S&P 500 companies).

5. *See* Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 499 (2008) ("In-house lawyers may now be performing work as high in quality as outside lawyers and . . .the reputational value of outside lawyers may be significantly diminishing.").

6. *See* Gilson, *supra* note 3, at 889–90, 893.

7. George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1654 (2006) ("Corporate legal departments have exhibited significant growth since the early 1980s and have continued this trend in recent years. Between 1998 and 2004, the 200 largest in-house legal departments grew from a total of 24,000 to 27,500 lawyers." (footnote omitted)). Although the growth of the in-house segment of the bar has been impressive, particularly given the low status of these positions prior to the 1980s, it is important to note that the overall rate of growth in the number of internal counsel has been slower than the expansion of the bar as a whole. *See* Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407, 420 (reporting that while the number of in-house lawyers grew by nearly forty percent between 1980 and 2000, the bar as a whole grew by almost one-hundred percent).

8. In an additional sign of the growing importance of these positions, even this traditional practice is beginning to change as some companies such as Pfizer now hire a small number of lawyers directly from law school. *See* Martha Neil, *Some Corps*

now have their pick of talented mid-level associates and junior partners from the best law firms, with senior in-house lawyers frequently recruited from the top-ranks of the partnerships of outside firms.[9] Indeed, in a move that would have been unthinkable just a few years ago, outside law firms have begun to recruit partners laterally from in-house legal departments in order to acquire their experience and connections, strengthen relationships with existing clients, and to recruit new ones.[10] All of this has profoundly restructured traditional mobility patterns and prestige hierarchies within the U.S. legal profession.

This restructuring is also evident in the increasingly important role that internal counsel now play in policy debates, both within the bar and in broader discussions about law and legal institutions. In the 1990s, for example, the Association of Corporate Counsel (ACC) was a driving force behind the effort to get the American Bar Association (ABA) to change its rules regarding multidisciplinary practice.[11] Although that effort ultimately proved unsuccessful, ACC has emerged as a force to be reckoned with within the bar and is currently flexing its muscles in a variety of debates over the structure and ownership of law firms, professional regulation, and legal education. Similarly, both individually and collectively general counsels now routinely weigh in on important public policy debates on everything from free trade to human rights to corruption.[12]

Cut Costs by Hiring Law Grads to Work In-house Instead of Using BigLaw Associates, A.B.A. J. (Aug. 11, 2011), http://www.abajournal.com/news/article/some_corps_cut_costs_by_hiring_attorneys (describing Pfizer's program and quoting the general counsel of HP as saying that such hiring was likely to be "the wave of the future").

9. *See* RONIT DINOVITZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RES. & EDUC., AFTER THE JD II: SECOND RESULTS FROM A *NATIONAL STUDY* OF LEGAL CAREERS 26, 27 tbl.3.1 (2009) (indicating that in-house counsel positions were the preferred destination of lawyers who had started their careers in large law firms).

10. *See, e.g.*, James Swift, *Covington Hires Partner from BAE Systems*, LAWYER (Aug. 19, 2010), http://www.thelawyer.com/covington-hires-partner-from-bae-systems/1005339.article.

11. *See* ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, REPORT TO THE HOUSE OF DELEGATES (2000), *reprinted in* ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 637, 647 (4th ed. 2002) ("The American Corporate Counsel Association has adopted a resolution urging that the ethical barriers to the establishment of multidisciplinary partnerships be dismantled."). *See generally* Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced into the United States, What Could or Should Be the Role of General Counsel?*, 9 FORDHAM J. CORP. & FIN. L. 1 (2003).

12. *See* Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 465 (2008) ("Corporate counsel organizations, such as the Association of Corporate

This heightened public profile has, in turn, helped to cement the general counsel's standing as a member of the company's senior leadership team. Indeed, many top in-house lawyers have traded in the legal sounding title of "general counsel" for the more corporate sobriquet Chief Legal Officer (CLO) in order to clearly signal that they are a part of the "C" suite of top executive officers in the company.[13] In addition to their responsibilities as legal diagnosticians and purchasing agents, many CLOs now oversee a variety of related functions, including government relations, public relations, human resources, compliance, and corporate social responsibility.[14] Many also participate either formally or informally in high-level discussions about general corporate strategy and policy. The fact that several CLOs have ascended to the CEO seat in recent years has only served to cement the image of these former low-status line functionaries as powerful members of the corporate elite. [15]

Although the in-house counsel movement has therefore been remarkably successful in the United States, until quite recently the status of internal lawyers in most other jurisdictions remained similar to what it had been in the United States prior to the 1970s. Since the turn of the twenty-first century, however, there are a number of signs that the in-house counsel movement has crossed the Atlantic. The rise in status and influence of internal counsel is easiest to see in the United Kingdom, where a number of top U.K. companies boast large and

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Counsel, routinely survey their members to determine what issues are pressing and develop a shared agenda for action.").

13. *See* Rees Morrison, *What's the Difference between General Counsel and Chief Legal Officer?*, L. DEP'T MGMT. (Mar. 22, 2006), http://lawdepartmentmanagement.typepad.com/law_department_management/2006/03/whats_the_diffe.html ("CLO also elevates the legal leader to the so-called C-Suite, the titular peer of the Chief Financial Officer (and why not the 'General Bookkeeper'?), Chief Marketing Officer, and Chief Technology Officer (so where is the Chief Human Officer?) and others in the executive teepee.").

14. *See id.* ("Chief Legal Officer connotes to me a broader portfolio, such as compliance, risk management, ethics, lobbying and the like."); *see also* Coates, DeStefano, Nanda & Wilkins, *supra* note 4, at 1029 (discussing other functions reporting to the CLO).

15. To name only two prominent examples, until recently the CEOs of two of the largest U.S. drug companies had both previously spent time in the general counsel seat in their respective organizations. *See* David Lat, *Skaddenfreude: In-House Salaries, Please*, ABOVE L. (Nov. 1, 2006, 9:58 AM), http://abovethelaw.com/2006/11/skaddenfreude-in-house-salaries-please/ (reporting on Jeff Kindler at Pfizer and Ken Frazier at Merck). The fact that Pfizer's Jeff Kindler was recently and rather unceremoniously deposed after only a brief tenure in office provides a cautionary note (to both GCs and boards) about how far this trend is likely to go. *See* Peter Elkind et al., *Inside Pfizer's Palace Coup*, CNNMONEY (July 28, 2011 5:00 AM),http://features.blogs.fortune.cnn.com/2011/07/28/pfizer-jeff-kindler-shakeup/.

sophisticated in-house legal teams.[16] But there is also increasing evidence of the growing power and prestige of general counsel among large European companies.[17]

In this Article, I explore whether some version of the in-house counsel movement is likely to move even further East—and South—to the newly emerging economic superpowers such as Brazil, India, and China. I make these observations on the basis of preliminary research that I and my collaborators are conducting on the changing role of in-house counsel in emerging markets as part of a wider research initiative that I direct entitled Globalization, Lawyers, and Emerging Economies (GLEE).[18] GLEE is a multinational and multidisciplinary empirical research initiative that seeks to understand how globalization is transforming the market for corporate legal services in important emerging economies—particularly Brazil, India, and China ("BIC countries")—and how this transformation is in turn reshaping other key sectors of the legal service industry in these countries, and the global market for legal services generally.[19] To date, most of the attention both by academics and in the popular press concerning the development of a sophisticated corporate legal services market in the BIC countries has been focused on the growth of large commercial law firms in these jurisdictions, and the resulting competition between these new entrants and global law firms based in the United States and United Kingdom who are also seeking to serve these markets.[20] If the U.S. experience is

16. *See infra* text accompanying notes 47–54.

17. *See infra* text accompanying notes 49–51.

18. In each of the three jurisdictions in which I am currently working, I have the privilege of conducting this research with other scholars who are far more familiar with the local legal market than I am: Vikramaditya Khanna (India); Yan Lao and Tiezheng Li (China); and Fabiana Luci de Oliveira (Brazil). Each of these scholars has contributed significantly to the preliminary ideas presented here.

19. See *Globalization, Lawyers, and Emerging Economies*, HARV. L. SCH., http://www.law.harvard.edu/programs/plp/pages/glee.php (last visited Feb. 9, 2012), for more information on the GLEE project. Other topics GLEE is investigating include: the growth of elite corporate law firms in emerging economies and the resulting competition with global law firms; the rise of new legal service providers such as legal process outsourcing companies; cross-border M&A, and particularly the shift from in-bound investment into emerging economies to outbound capital flows from these jurisdictions into both developing and developed markets; the regulation of legal practice both domestically and globally; the transformation of legal education and public interest practice; and the manner in which governments and business interests are using the emergence of the new corporate legal elite to build legal capacity to represent their public and private interests in the institutions of global governance such as the WTO, IMF, and commercial and investment arbitration.

20. *See, e.g.*, Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 LAW & SOC'Y REV. 771 (2008). Professor Liu is a key member of the GLEE team overseeing research on the development of large law firms in all three of our primary research sites.

any indication, however, how this competition is ultimately resolved, as well as the shape of the corporate legal services market in emerging economies generally, will be greatly influenced by whether some version the in-house counsel movement takes hold in the BIC countries. We have therefore made investigating this question a central objective of the GLEE project.

On the basis of preliminary research, including conversations with over one-hundred general counsels of both "local" and "foreign" companies in the BIC countries, we have determined that there are already important indications that the in-house counsel movement is indeed "going global" to these emerging economies. At the same time, this preliminary evidence also suggests that the processes by which this largely U.S.-inspired model is diffusing in the BIC countries is likely to produce important differences in the way that internal counsel conceive of and operationalize their roles both within and among these important jurisdictions.

The remainder of this Article fleshes out these preliminary observations and describes the factors we intend to study to investigate the role that general counsel are playing in the BIC countries, and what this new role may portend for some of the core beliefs of the in-house counsel movement. Part I briefly explores why the in-house counsel movement took hold in the United States and why it has been spreading, albeit with some important differences, in the United Kingdom and Europe. Part II then uses Kathryn Hendley's excellent study of internal lawyers in Russia (the "R" in the more familiar BRIC acronym) to present a snapshot of what in-house counsel offices have typically looked like in emerging economies.[21] Although there are some features of Hendley's account that are undoubtedly unique to Russia, and even more specifically Russia in the 1990s, our preliminary work in Brazil, India, and China suggests that the portrait she paints is generally representative of the traditional role of internal counsel in these countries as well—a portrait that suggests caution about assuming that the in-house counsel movement will automatically take root just because the BIC countries have liberalized their economies. Part III then examines why notwithstanding Hendley's cautionary tale we might expect to find a different model of in-house lawyering in the BIC countries at the beginning of the second decade of the twenty-first

21. *See* Kathryn Hendley, *The Role of In-House Counsel in Post-Soviet Russia in the Wake of Privatization*, 17 INT'L J. LEGAL PROF. 5 (2010) [hereinafter Hendley, *In-House Counsel*]; *see also* Kathryn Hendley, Peter Murrell & Randi Ryterman, *Agents of Change or Unchanging Agents? The Role of Lawyers within Russian Industrial Enterprises*, 26 LAW & SOC. INQUIRY 685 (2001) [hereinafter Hendley, *Unchanging Agents*].

century than Hendley found in Russia in the 1990s. Specifically, I examine three forces identified by globalization scholars that are likely to spread the in-house counsel movement to the BIC countries and other important emerging economies around the world. These forces, I will argue, are largely responsible for spreading the movement to the United Kingdom and Europe, and are likely to play a similar role in the BIC countries in the coming years. Indeed, because these forces of globalization are increasing in intensity, it is plausible that the diffusion of the in-house counsel movement's basic commitments and practices could be even more rapid in these new jurisdictions than it was in the United Kingdom and Europe.

Part IV then sets out how we intend to investigate whether or not these three forces of globalization are in fact producing an in-house counsel movement analogous to what has taken place in the United States and other Western jurisdictions. Specifically, we will be investigating six areas where one might expect to see dramatic changes in the work, characteristics, and functions of internal counsel if the in-house counsel movement has indeed taken hold: the size of in-house legal departments; the credentials and demographics of the lawyers employed in these offices; the division of authority between inside and outside lawyers; the internal status and responsibilities of internal counsel; their external status within the bar; and the extent to which in-house lawyers actively participate in public policy debates at the national and global levels. Although the in-house counsel movement in the West (particularly the United States) made progress in all of these areas, I will suggest that the metrics for gauging this success are more complex than generally understood—and are likely to be even more so in the BIC countries, particularly in light of the large scale forces that are currently reforming the global market for corporate legal services generally. Finally, the Article's Conclusion will discuss what difference all of this is likely to make for the larger goals of the in-house counsel movement, the legal profession, and the broader public purposes of law.

Before beginning, however, a note of caution is in order. As indicated above, the GLEE project in general, and our work on general counsels in particular, is still in its early stages. Moreover, as will become clear from the discussion, events on the ground in the BIC countries are changing so rapidly that it is very difficult to predict what will happen in any one country—or even in a single company—let alone how something as fluid as the role of in-house counsel may be transformed across all three of the BIC countries. What follows, therefore, should be viewed as an attempt to stimulate conversation rather than an effort to resolve the question posed by the title to this Article.

I. THE RISE OF IN-HOUSE COUNSEL IN THE UNITED STATES, UNITED KINGDOM, AND WESTERN EUROPE

A hallmark of the success of the in-house counsel movement in the United States is that it is difficult to remember a time in which general counsels of major companies were not considered powerful and respected members of the bar. Although this history is well documented,[22] it is nevertheless worth pausing briefly to remember the in-house counsel movement's central claims and how these claims succeeded in sweeping the field, first in the United States and then throughout much of the Western world.

As Rosen documents, beginning in the 1980s general counsels in large companies began to make three distinct claims about the contemporary market for corporate legal services that collectively justified increasing the power, authority, and standing of those who held these positions.[23] The first was strictly *economic*. As legal fees paid to outside firms continued to skyrocket, GCs argued that they were in the best position to help companies control legal costs, both by taking work inside and by reigning in unnecessary and abusive practices (e.g., unnecessary and duplicative work, exorbitant expenses for Xeroxing and travel, running the meter with no strategic direction) that many business leaders believed were endemic to most law firms.[24] As a result, companies like General Electric (GE), whose legendary General Counsel Ben Heineman would become the face of the in-house counsel movement,[25] built up internal legal departments that were as large (or in GE's case larger) than many of the large law firms that continued to serve them.[26] At the same time, these increasingly sophisticated internal lawyers sought to break up the long-standing relationships that tended to exist between companies and law firms by requiring firms to compete for every new piece of significant business and choosing the winner based on some combination of price and perceived expertise of the particular lawyers who would be working on the matter. "We hire the lawyer, not the law firm" became the rallying cry of the day, with

22. For my own take on this history, see David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010).

23. *See* Rosen, *supra* note 1, at 487.

24. *See generally* Daly, *supra* note 2, at 1059–60.

25. The banner headline over the cover story in *Corporate Counsel* magazine in which Heineman describes his role during this period captures Heineman's pride of place: "In the Beginning." *See* Ben W. Heineman, Jr., *In the Beginning*, CORP. COUNS., Apr. 2006, at 63. In the interest of full disclosure, Heineman is a Senior Distinguished Fellow at the Harvard Law School Program on the Legal Profession.

26. *Id.*

long-standing relationships with outside firms relegated to the graveyard of history.[27]

As the movement gathered steam, however, many general counsels began to supplement this economic argument with a *substantive* justification for taking work away from outside counsel—and, even more importantly, for giving internal lawyers more power and authority inside the company. Not only are inside lawyers cheaper than their external counterparts, proponents of the inside counsel movement began to declare, but the advice they give corporate managers is likely to be better as well. Traditionally, companies looked to outside counsel to play the role of "trusted advisor" who could guide them through the web of complex problems at the intersection of law and business.[28] But precisely because the long-standing relationships that gave rise to this traditional role for outside lawyers were being systematically dismantled, inside counsel could credibly claim that even senior partners in law firms were no longer in a position to provide this kind of advice. Instead, general counsels asserted, it is the inside lawyer located inside the corporate hierarchy who is in the best position to understand the company's business and to engage in the kind of risk assessment and preventative counseling that managers need to survive in an increasingly complex and turbulent legal environment.[29] As a result, it is the general counsel who should be entrusted with the role of being both a "partner" to the business in achieving its objectives and the "guardian" of the company's long-term reputation and values.[30]

Finally, this substantive claim furthered a third *professional* argument for increasing the standing and prestige of internal counsel. As the pejorative sobriquet "house counsel" underscored, internal counsel traditionally labored under the assumption that their employed

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27. *See, e.g.*, Daniel J. DiLucchio, *'We Hire the Lawyer, Not the Law Firm'—Really?*, LEGAL INTELLIGENCER (Jan. 29, 2009, 12:00 AM), http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202427822427 ("This statement has been used for years, and will probably continue to be used . . .. [because t]his is what the general counsel want you to believe . . .."). As DiLucchio's use of "Really?" at the end of his title implies, he is skeptical about whether this oft-repeated claim is in fact true. I return to his skepticism below.

28. *See* Robert W. Gordon, "*The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 51–67 (Gerard W. Gawalt ed., 1984) (discussing how Wall Street lawyers came to occupy this role in the post-Civil War period).

29. *See* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955 (2005).

30. Not surprisingly, Heineman has been the most vocal and articulate spokesperson for this view. *See* Ben W. Heineman, Jr., *Caught in the Middle*, CORP. COUNS., Apr. 2007, at 84 (arguing that general counsel must be both "partners" and "guardians").

status made them less independent—and therefore less professional—than their external law firm counterparts. Reversing this second-class status was a major goal of the in-house counsel movement. To accomplish this goal, these lawyers employed a version of what Professor Eli Wald has termed in a different context "the flip side of bias."[31] Rather than being ashamed of the fact that they practice law from within corporations, the new breed of general counsel claimed that their status as corporate insiders gave them a unique perspective from which to give advice that was every bit as independent as the "wise counselors" who the bar had always assumed populated prestigious outside law firms.[32] Indeed, in an age in which many critics believe that law firm partners have abandoned their traditional ideal of law as an independent and public profession for a slavish devotion to power and profit, some commentators have gone so far as to suggest that internal lawyers can best fulfill the gatekeeping role of ensuring that companies comply with both the letter and the spirit of the law that their counterparts in large law firms have largely abandoned.[33]

As indicated above, by the end of the twentieth century these three central tenets of the in-house counsel movement had taken on the aura of accepted orthodoxy in the United States. This is not to say that the legal departments of even the largest American companies are functionally identical. To the contrary, as I will document below, there remains more variation in the size, structure, and functioning of in-house legal departments than many commentators generally acknowledge. Nevertheless, the *ideology* of the in-house counsel movement is now broadly accepted throughout the U.S legal profession. Thus, by the late 1990s, general counsel in the model of Ben Heineman—indeed many literally Heineman's protégés—occupied important positions in virtually every major company in the United States.[34] These sophisticated lawyers, and the increasingly credentialed and experienced lawyers they have hired into their legal departments, had taken over much of the work that had previously been sent to

31. *See* Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2276–86 (2010) (describing how stereotypes about women can "flip" from having negative to positive contexts in certain circumstances).

32. As Rosen notes, internal lawyers gravitated to the appellation "corporate counsel" because "[t]his name has a denotation that extends beyond members of corporate legal departments" and includes elite law firm practitioners who serve on corporate boards. Rosen, *supra* note 1, at 532.

33. *See* ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 283–84 (1993) (speculating that in-house lawyers may be able to carry on the lawyer-statesman ideal that outside counsel are no longer capable of performing).

34. *See* DeMott, *supra* note 29, at 960.

outside lawyers while also taking control over the process by which legal work that continued to go to firms was sourced, priced, and managed.[35] Indeed, in most instances it was fair to say that the general counsel has become the client of the outside law firm—leaving the top business people to be represented by in-house lawyers.[36]

In addition to exercising their role as sophisticated legal purchasing agents, most U.S. general counsels had also embraced some version of the in-house counsel movement's claim to substantive expertise and professional independence. Although there has been relatively little systematic study of the actual work of in-house lawyers, what evidence there is suggests that these lawyers believe that they are better situated to give their clients both effective and independent advice than outside firms. Thus in a qualitative study of general counsel conducted in the late 1990s, the socio-legal scholars Robert Nelson and Laura Beth Nielsen concluded that even the least active members of their sample acted as "cops" whose responsibility was to act as "gatekeepers" who "polic[ed] the conduct of their business clients."[37] As an informant who exemplified this paradigm explained, the company had brought him in from a prestigious law firm so that it would have the benefit of having someone who could be "independent within the corporate environment."[38] Although the lawyer conceded that the management of legal cost and legal risk was a "major" part of his job, he insisted that the essence of what he did was to provide the kind of "independent professional judgment that is so essential" to the company.[39]

More importantly, those who viewed themselves solely as "cops" constituted only 17% of Nelson and Nielsen's sample.[40] The overwhelming majority of the respondents in their study went even further in embracing the in-house counsel movement's claim to provide both *better* and *more professional* advice than outside firms. Thus 50% of Nelson and Nielsen's sample saw themselves as "counselors" who built on their legal knowledge and functions to act as "consigliere" for senior executives giving advice on matters at the intersection of business and law.[41] And a third—nearly double the number who saw themselves only as cops—considered themselves to be "entrepreneurs,"

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35. *See generally* Daly, *supra* note 2.

36. *See* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 58 (1988).

37. Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 463–64 (2000).

38. *Id.* at 463.

39. *Id.*

40. *Id.* at 468.

41. *Id.* at 465, 468.

who viewed their legal role as "not merely a necessary complement to corporate functions," but as one of a number of ways in which these lawyers can further the business interests of the company.[42] Indeed, the authors report that even those lawyers who saw themselves primarily as "counselors" "often speak in entrepreneurial terms."[43] As a result, the authors conclude, "in the contemporary period corporate counsel have taken on an explicitly entrepreneurial orientation."[44] And yet notwithstanding this orientation, the authors also found that "the salience of business concerns did not detract from [corporate counsel's] self-identification as lawyers" for even the most entrepreneurial general counsel—precisely the orientation that one would expect from lawyers who had fully internalized the ideology of the in-house counsel movement.[45] The fact that on many of the issues that are most associated with professionalism today—e.g., diversity, pro bono, and civility—general counsel are widely seen as being the leaders who are attempting to push recalcitrant law firms into upholding the profession's core commitment to equality, access to justice, and the rule of law.[46]

Given how thoroughly and completely the in-house counsel movement had triumphed in the United States by the late 1990s, it is surprising how little the role of internal counsel had changed elsewhere in the world by that time, even in other industrialized nations. In many European countries, for example, "employed" lawyers were prohibited from being members of the bar and were required to surrender their law licenses if they joined an in-house legal department.[47] Even in

42. *Id.* at 466, 468.

43. *Id.* at 487.

44. *Id.*

45. *Id.* at 489. As the authors go on to state, they are "less sanguine" than others about whether this dual identification will lead in-house lawyers to perform the independent gatekeeping functions trumpeted by the in-house counsel movement to promote the public good. *Id.* at 490. I return to this question in the Conclusion.

46. *See, e.g.*, PRACTICING LAW INST., PRO BONO SERVICES BY IN-HOUSE COUNSEL: STRATEGIES AND PERSPECTIVES (David P. Hackett, ed. 2010); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556–58 (discussing the role of general counsel in pushing for diversity in the legal profession).

47. In France, for example, in-house attorneys are referred to as "juriste d'enterprise" who are not allowed to be members of the French bar and generally may not appear in court. *See The Role of In-House Counsel: Global Distinctions*, ASS'N CORP. COUNS. (Sept. 18, 2010), http://www.acc.com/legalresources/quickcounsel/troicgd.cfm; *see also* LINDA S. SPEDDING, TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES (1987); Jean Van Houtte, *Law in the World of Business: Lawyers in Large Industrial Enterprises*, INT'L J. LEGAL PROF., Mar. 1999, at 7 (reporting on the low status and credentials of in-house lawyers in most countries in Europe and around the world).

common law jurisdictions such as the United Kingdom where in-house counsel did not suffer from any of these formal restrictions, these positions remained relatively low status throughout the 1990s.

Since the turn of the twenty-first century, however, the in-house counsel movement has come to the United Kingdom and Europe. This trend is easiest to see in the United Kingdom, where general counsels of large British companies have begun a conscious campaign to assert their authority both within their organizations and in the wider public policy arena.[48] But even in Europe where the formal status of in-house lawyers remains largely unchanged, there is evidence of the growing power and influence of general counsel, particularly in large companies.[49] Given the European Union's complex legal landscape of centralized directives which are implemented by decentralized laws enacted by member states many European companies have begun to develop increasingly large and sophisticated internal legal departments to help them understand and navigate these differing—and often competing—standards.[50] In recent years, this trend has been reinforced by corporate scandals such as Enron, WorldCom, and Parmalat, and the new regulatory requirements that have followed in their wake, which have further convinced many European companies of the value of a robust in-house legal department that can anticipate and help to avoid these regulatory pitfalls.[51] To be sure, the recent decision by the European Court of Justice affirming that internal lawyers are not entitled to the benefit of the attorney-client privilege underscores that the professionalism project of in-house lawyers in Western Europe is

48. *See* MARIE SAKO, GENERAL COUNSEL WITH POWER? (2011) (arguing that key forces of globalization similar to the ones I identify below are transforming general counsels in the United Kingdom into "agents of change"). Indeed in 2005, the general counsels of the United Kingdom's largest companies formed a new organization called the GC100 in order to better project their status within the profession and to exert influence on important regulatory debates. Michelle Madsen, *Corporate Counsel: High-Profile but Low-Key—Has GC100 Lived Up to Its Promise?*, CORP. COUNS., Jan. 29, 2008. As the title implies, the author raises questions about how successful the new group has been at promoting the latter objective.

49. *See* ASS'N OF CORP. COUNS., THE ROLE OF THE GENERAL COUNSEL IN EUROPE: LEADING PRACTICES IN LAW DEPARTMENT MANAGEMENT (2009). *See generally* Richard Stock, *The Future for In-House Counsel*, INSIDER CORP. LEGAL, June 2008, at 1 ("In-house legal departments were the fastest-growing 'legal services sector' around the world over the last five years. In some markets, the growth reflects a compound increase of 15% per year.").

50. ASS'N OF CORP. COUNS., *supra* note 49, at 45.

51. *Id.* at 11. The fact that this is a publication of the leading corporate counsel association in the United States is itself a product of the kind of global knowledge transfers discussed below.

far from complete.[52] The widespread criticism of this decision, however, demonstrates just as powerfully how far the in-house counsel movement has taken hold in Europe over the last decade.[53]

Given the overall direction of the global market for legal services, it is not surprising that the in-house counsel movement has increasingly migrated east to the United Kingdom and Europe in the first decade of the twenty-first century. During the preceding two decades, a good deal of the U.S. model of law firm organization and practice—dubbed "Cravathism" for its emphasis on large, full-service law firms filled with entrepreneurial lawyers closely tied to business interests—crossed the Atlantic as well.[54] To be sure, one can debate whether there are still significant difference between U.S., or more generally Anglo-American, corporate practice and a distinctly "European mode of production of law," representing a hybrid blend of Cravathism and norms and practices traditionally found in many European countries.[55] Nevertheless, it is clear that U.S.-style large law firms now hold a dominant position in much of Europe.[56] It is therefore understandable that lawyers and clients increasingly steeped in the American model of lawyering in the law firm context would be open to incorporating the American model of in-house lawyering as well.

It is against this background that the GLEE project plans to investigate whether similar changes are taking place in the BIC countries and other emerging economies. Although there are many differences between these countries and the United Kingdom and Western Europe that are likely to affect how ideas about legal practice diffuse across borders, there are important similarities as well. Thus, notwithstanding the absence of the kind of similarities in legal structure (unlike the United Kingdom, both China and Brazil are civil law jurisdictions), political accountability (the state plays a much larger role in the economy in all three BIC countries than in the United Kingdom and most of Europe), regional coordination (there is no equivalent of the European Union pushing harmonization), and cultural affinity (even India has not had particularly close connections to the United States for

52. *See* Marcia Coyle, *European Court Limits Attorney-Client Privilege for In-House Counsel*, NAT'L L.J., Sept. 14, 2010.

53. *See, e.g.*, Robert J. Anello, *Preserving the Corporate Attorney Client Privilege Here and Abroad*, 27 PENN ST. INT'L L. REV. 291 (2008).

54. David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of the Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994).

55. *Id.* at 426.

56. *See* John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, INT'L J. LEGAL PROF., Mar. 1996, at 169.

much of its history) that arguably facilitated the migration of the American mode of the production of law to the United Kingdom and Europe, we have nevertheless seen the development of many large U.S.-style law firms in each of the BIC countries.[57] It is reasonable to ask, therefore, whether like their U.K. and European counterparts these jurisdictions are also likely to import the U.S. model of internal lawyering championed by the in-house counsel movement.

Before discussing how we plan to conduct this investigation, however, it is helpful to review what we know about what happened to internal counsel in the first of the "emerging economies" to attract the attention of the global market for legal services.

II. THE RUSSIAN EXPERIENCE

As indicated above, there is very little systematic research about how in-house counsel have been affected by globalization, particularly in emerging economies.[58] The best study to date is by the political scientist Kathryn Hendley. In 1997, Hendley and her team of researchers conducted a survey of 328 Russian enterprises to see how these companies were using internal legal expertise in the eight years since the fall of communism.[59] In 1998, Hendley followed up her survey with in-depth case studies of six of the companies in her sample, including direct observation of the work being done by the internal lawyers at each firm.[60] To Hendley's surprise, both the 1997 survey and the subsequent case studies demonstrated that almost a decade after the opening of the Russian economy and the introduction of significant market reforms, in-house counsel continued to occupy a marginal position inside Russian companies.[61]

Specifically, Hendley and her collaborators found that far from being the influential senior advisors portrayed in the in-house counsel movement, Russian internal counsel worked almost exclusively on low-level routine work and were almost never consulted about important

57. For the growth of large law firms in countries such as China, India, and Brazil, see, for example, Liu, *supra* note 20; D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Future Study*, 14 IND. J. GLOBAL LEGAL STUD. 5 (2007); Jennifer Moline, *Merger Creates India's Largest Law Firm*, NAT'L L.J., July 26, 2006.

58. *See* Daly, *supra* note 2, at 1067 ("Unfortunately, scholarly writers and researchers have paid very little attention to the combined effect of the growth in number, prestige, and power of in-house counsel and the globalization of the business and capital markets.").

59. Hendley, *Unchanging Agents*, *supra* note 21, at 688.

60. Hendley, *In-House Counsel*, *supra* note 21, at 6–7.

61. *Id.* at 7.

business decisions, even when those decisions clearly involved legal inputs or could result in significantly adverse legal consequences.[62] Indeed, rather than being considered an important part of the legal team, Hendley reports that senior managers treated internal counsel as largely irrelevant, adding no real value.[63] Many companies dispensed with lawyers altogether, and even those that had a separate legal function often had non-lawyers perform important legal work.[64] Adopting Nelson and Nielsen's typology, Hendley found that internal counsel in Russia were "reluctant to exercise" even the basic gatekeeping role of being a "cop," and that she and her researchers "saw nothing that even remotely approached the entrepreneurial function that Nelson and Nielsen found to be a growing trend among American in-house lawyers."[65] In the final analysis, Hendley concludes that the role of internal counsel was little changed from what it had been in the former Soviet Union under Communism.[66] Given the tremendous legal changes facing Russian enterprises during this period, Hendley finds this state of affairs both surprising and potentially troubling.[67]

Hendley offers a number of possible explanations for the continuing marginality of Russian in-house counsel even in the face of the important changes taking place in the Russian economy. Her first explanation is structural. In Russia, as in many other civil law countries, in-house counsel continued to be members of a separate "profession" with different and clearly less rigorous entry requirements.[68] This professional deficit, Hendley argued, was also accompanied by a political one—and a reinforcing demographic one as well. As Hendley documents, in-house lawyers were far less likely to have been members of the communist party during the Soviet era, and

62. Hendley, *Unchanging Agents*, *supra* note 21, at 688.

63. *Id.* at 696.

64. Hendley, *In-House Counsel*, *supra* note 21, at 10 ("[Russian managers] failed to appreciate the potential contribution that a *iuriskonsul't* might make. In the most extreme cases, managers saw no need to have a legal department or to consult with outside lawyers.")

65. *Id.* at 7. For Nelson and Nielson's typology, see Nelson & Nielson, *supra* note 37, at 460.

66. Hendley, *In-House Counsel*, *supra* note 21, at 27–28.

67. *Id.* at 30 ("The transition away from a planned economy towards a market economy in Russia had a profound influence on enterprise management. . .. Law provided the building blocks for this transition, yet *iuriskonsul'ty* got let out.").

68. *Id.* at 8–9 (describing the difference between *advokatoy*, who are entitled to appear in court and must meet rigorous educational and licensing requirements, and *iuriskonsul'ty*, who work inside industrial enterprises and face far less entry barriers).

far more likely to be women.[69] Both statuses reinforced the low prestige of the position within the bar, and within Soviet society generally.

Finally, Hendley cites the fact that the former Soviet Union had no real legal tradition and no real use for lawyers, particularly in the commercial area, where the sole responsibility of companies was to make their production quotas.[70] Although the creation of a market economy and privatization introduced many new laws, the basic skepticism toward law and legal solutions remained. Indeed, the economic courts where most "business to business" litigation occurred continued not to require that litigants be represented by lawyers.[71] Moreover, given backlog and delays, companies preferred to use bartering and self-help to resolve disputes, seeking to preserve contractual relationships rather than maximize short-term gain.[72] Management therefore considered contract disputes to be nothing more than business risks that business owners were capable of resolving themselves. As a result, Russian companies did not use outside law firms much either, viewing them as expensive and even less trustworthy than internal counsel—particularly foreign law firms.[73] As a result, more than a decade after privatization had begun the Russian corporate legal market was still underdeveloped. Given this environment, it is not surprising that the in-house legal market was particularly so.

Hendley's analysis provides a valuable snapshot into the traditional role of in-house counsel in emerging economies as well as an important caution to the claim that opening markets or privatization alone will necessarily produce a role for internal counsel that looks anything like the one portrayed by the in-house counsel movement. As Hendley herself is careful to note, her conclusions may only apply to Russia—and indeed Russia at a particular time in that country's history.[74] The 1990s were a time of particular turbulence in Russia. As the Russian government has stabilized over the last decade (although given the unrest surrounding the disputed return of Vladimir Putin to Russia's presidency, few would argue that the country is fully stable), there has been an explosion in legal and administrative regulation of business enterprises that could very well give rise to the demand for the kind of sophisticated internal legal advice championed by the in-house counsel

69. Hendley, *Unchanging Agents*, *supra* note 21, at 694–95.

70. *Id.* at 709.

71. *Id.* at 706.

72. Hendley, *In-House Counsel*, *supra* note 21, at 11–12 (providing examples of bargaining and self-help).

73. Hendley, *Unchanging Agents*, *supra* note 21, at 697–99.

74. *See id.* at 708–11

movement.[75] Notwithstanding these changes, however, Hendley remains cautious about whether internal counsel are likely to seize the opportunities presented to them by Russia's growing market economy.[76] This caution seems equally prudent when examining the claims that are increasingly being made about the in-house counsel movement's spread to the BIC countries.

Like Russia, prior to liberalization Brazil, India, and China had very little need for commercial law. The situation in China is, not surprisingly, the most analogous to Russia in that there was both a planned economy and a conscious attempt to prevent lawyers from becoming too powerful.[77] But even in India and Brazil, which had much more established legal traditions, there was very little in the way of corporate law.[78] The economy of each of these countries was almost as tightly controlled as Russia's and China's, and there was very little internal competition or foreign investment.[79] As a result it is not surprising that the largest law firm in each of these countries had only a handful of lawyers.[80]

The status of internal counsel in these jurisdictions was even worse. Once again, China is the most analogous, with internal lawyers holding a separate (and inferior) professional distinction.[81] Thus,

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75. *See id.* at 711.

76. Hendley, *In-House Counsel*, *supra* note 21, at 30 ("Lawyers have traditionally been tolerated rather than lionized in Russia.").

77. *See* William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China*, *in* RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 287, 290–91 (William P. Alford ed., 2007).

78. *See* Ronald J. Gilson et. al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 482 (2011); Nicholas Calcina Howson & Vikramaditya S. Khanna, *The Development of Modern Corporate Governance in China and India*, *in* CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 513, 557–58, 567–69 (Muthucumaraswamy Sornarajah & Jiangyu Wang eds., 2010).

79. *See* David M. Trubek, *Introduction* to LAW, STATE AND DEVELOPMENT IN LATIN AMERICA (David Trubek et al. eds., forthcoming 2012) (noting that Brazil had a "closed economy" until the late 1990s); Dani Rodrik & Arvind Subramanian, *From "Hindu Growth" to Productivity Surge: The Mystery of the Indian Growth Transition* 3–4 (Int'l Monetary Fund, Working Paper No. WP/04/77, 2004) (noting the same state of affairs in India prior to liberalization).

80. *See, e.g.*, Christine Garg, *Affiliations: Foreign Law Firms' Path into India*, 56 N.Y.L. SCH. L. REV. 1165, 1169–70 (2012) (noting that after liberalization there has been a significant increase in the number of Indian large law firms); Michael E. Burke IV et al., *China Law*, 36 INT'L LAW 815, 847 (2002) (noting a similar increase after liberalization in China); Oscar Vilhena Vieira, *Public Interest Law: A Brazilian Perspective*, 13 UCLA J. INT'L L. & FOREIGN AFF. 219, 256 (2008) (noting a similar change in Brazil).

81. Indeed, as Professor Liu notes elsewhere in this volume, the Chinese model for regulating state-owned enterprises was expressly patterned after the one used

lawyers working for Chinese state-owned enterprises (SOEs) do not have to be qualified as attorneys. Instead, beginning in 1997 these "corporate legal consultants" have had to pass a special qualifying examination separate from the bar examination for Chinese lawyers.[82] Although the relevant regulations recommend that these legal consultants have some legal training before taking the exam, it is not actually required.[83] Moreover, because SOEs in China remain firmly under governmental control, the lawyers who work in these organizations have traditionally thought of themselves more as government bureaucrats than as members of the legal profession. Indeed, it is not uncommon for senior in-house lawyers at important Chinese SOEs to be promoted to other high-level leadership positions elsewhere in government—for example, becoming a mayor or governor—after leaving their service as the company's chief corporate legal consultant.[84]

The traditional situation in Brazil and India was very similar. Although Brazil does not have a separate qualification for in-house counsel, the lawyers who traditionally worked in the large legal departments of state-owned companies have typically had more in common with low-level state bureaucrats than the lawyers who work in private law firms.[85] Similarly, in Indian state-owned companies, in-house lawyers were essentially low-level bureaucrats, as they were in Russia and China. To the extent that companies had important legal work, it went to outside law firms.[86] Even in private Indian companies, the legal function was often under the express or de facto control of the company secretary, a statutorily mandated position in public companies with responsibility for preparing and signing various legal documents, and for issues of corporate governance generally.[87] As many of our

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in the former Soviet Union. *See* Sida Liu, *Palace Wars over Professional Regulation: In-house Counsel in Chinese State-owned Enterprises*, 2012 WIS. L. REV. 547.

82. *Interim Regulation on Corporation Legal Consultant Qualification Examination, 1997*, CHINALAWINFO.COM, http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=18862 (last visited May 2, 2011) (in Chinese).

83. For example, applicants are permitted to have majored in economics "or other relevant subjects," or "have worked in either the field of law or economics." *Id.*

84. Confidential Interview with the CLO of a Chinese SOE (June 2011).

85. Confidential Interview with a Brazilian CLO who works closely with Brazilian SOEs (Aug. 2011) (noting that although Brazilian SOEs had large legal departments, the lawyers working inside these offices earned low wages and had low prestige within the Brazilian bar).

86. Confidential Interviews with Indian CLOs (Oct. 2011). This trend was identified in several interviews with CLOs in both SOEs and private companies in India.

87. *See generally* THE INST. OF CO. SECRETARIES OF INDIA, ROLE OF COMPANY SECRETARIES: A NEW PERSPECTIVE (2010).

interviewees in India stressed, those who occupied this function were not required to have legal training.[88]

As indicated above, since 2000 Brazil, India, and China have all opened their markets significantly to global competition. Consequently, each country has adopted an enormous number of new statutes, procedures, and rules regulating everything from securities, to competition, to consumer protection.[89] Given that these changes did not produce a corresponding change in the function of internal counsel in the "R" in the BRIC countries, however, it is legitimate to ask why one should expect things to be different with respect to the countries that represent the other three letters in this new economic fearsome foursome?

In addition to raising an important caution to the far too common assertion that liberalization will inevitably produce institutions in the new world that are identical to those that are currently found in the old world, however, Hendley's excellent analysis also offers some important clues as to why the evolution of the corporate legal market in general, and the role of in-house lawyers in particular, might be different in Brazil, India, and China in the first decades of the twenty-first century than it was in Russia in the last decade of the twentieth. Specifically, as Hendley makes clear almost none of the companies that she studied had any significant contact with companies, markets, or law firms outside of Russia, except as potential competitors.[90] Although this competition had driven many traditional Russian companies out of business—and had made those who survived become leaner by cutting unnecessary costs, including tellingly the size of their internal legal departments to the extent that they had one at all[91]—it had not changed the way that most Russian firms did business, even in Moscow and other commercial centers. In other words, although the Russian business market had opened to foreign competition, the Russian *legal* market remained relatively insulated and closed.

Ironically, this is not because Russia attempted to keep out foreign lawyers. To the contrary, in this respect Russia's rules of foreign legal practice are far more liberal than its fellow BIC compatriots, resulting,

88. Confidential Interviews with Indian CLOs (Oct. 2011).

89. *See, e.g.*, Vivia Chen, *The Great Leap In-House*, CORP. COUNS., June 2006, at 92, 92 ("China is cranking out more laws and regulation to govern all that business activity, especially in the media and internet sector.").

90. Hendley, *In-House Counsel*, *supra* note 21, at 28 ("[M]ost Russian enterprises, including my case study enterprises, have few (if any) contacts with Western law firms or with Western investors.").

91. Hendley, *Unchanging Agents*, *supra* note 21, at 693 (noting that a large number of Russian companies decreased the size of their in-house legal staff after liberalization).

as Hendley points out, in there being several international law firms with large offices in Moscow.[92] But paradoxically, the very presence of these firms has arguably served to isolate the Russian legal market even further. As they do in most jurisdictions, foreign firms serve almost exclusively the interests of their foreign clients. But because there were few restrictions on the entry of these global players, there was little to stop them from acquiring the kind of domestic expertise that allowed these sophisticated firms to market themselves as offering a full range of services to foreign firms interested in the Russian market, leaving little room for local competitors to develop their own expertise by tapping into the lucrative cross-border market. As a result, at the time Hendley did her work, very few Russian large corporate law firms had developed to feed the domestic market.[93]

The situation is very different in the BIC countries. Both because these countries started the process of globalization a decade later than Russia, and, more controversially, because Brazil, India, and China placed significant restrictions on the entry of foreign law firms, the corporate legal services sectors in all three of these jurisdictions has been significantly affected by globalization. Given these important differences in the overall corporate legal market, we might expect to see differences in the role of in-house counsel as well.

III. THE PROCESSES OF GLOBALIZATION

Although legal scholars tend to talk about globalization as a single and largely economic process, those who study this phenomenon have demonstrated that there are actually several interrelated processes at work.[94] As my co-author Mihaela Papa and I have argued elsewhere, three of these processes—economic globalization, globalization of knowledge, and globalization of governance—are likely to play a particularly significant role with respect to the globalization of the

92. *Id.* at 697. For a description of the unusual openness of the Russian legal market as compared to other emerging economies, see Andrey Goltsblat, *Regulation of Russia's Legal Market Is Again on the Agenda*, LAWYER, May 23, 2011, *available at* http://gblplaw.com/news/articles/57742/ (noting that Russia is "one of the few legal markets with no real regulation governing legal practice" and that "as far as the legal profession is concerned it's about as liberal as it could be" (internal quotation marks omitted)).

93. Hendley, *In-House Counsel*, *supra* note 21, at 28 ("[T]he explosion of corporate law firms that has accompanied the economic boom in China has yet to be replicated in Russia, at least outside of Moscow and St. Petersburg." (citations omitted)).

94. *See, e.g.*, JAN AART SCHOLTE, GLOBALIZATION: A CRITICAL INTRODUCTION (2000); MANFRED B. STEGER, GLOBALIZATION, A VERY SHORT INTRODUCTION (2003).

market for legal services.[95] Each has been accelerating in the last decade, and each is likely to spur the dissemination of the in-house counsel movement to the BIC countries and other emerging economies, including Russia.

Consider, for example, the process of economic globalization, by which scholars simply mean the increasing interdependence of national economies across the world and their progressive integration into the global economy through trade, investment, and capital flows.[96] As indicated above, the reason why India, China, Brazil, and other countries have "emerged" in recent years is that they have each adopted a series of regulatory reforms that have more or less opened their respective economies to the global market.[97] As a result, multinational companies based in the United States, United Kingdom, and Western Europe are concentrating a rapidly expanding share of their manufacturing, sales, service, and acquisition energies in emerging markets in general, and the BIC countries in particular.[98] Although Russia has also received its share of foreign investment over the years, the amount of foreign direct investment in the BIC countries is already far greater than what has happened in Russia and is likely to continue to be so for the foreseeable future.[99]

Given the greater penetration of foreign investment in Brazil, India, and China it would not be surprising to see greater penetration of the in-house counsel movement in these jurisdictions as well. As foreign companies locate more of their resources in the BIC countries, it is likely that these sophisticated players will increasingly want in-house lawyers who will support these operations in the same way that

95. Mihaela Papa & David B. Wilkins, *Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession*, INT'L J. LEGAL PROF. (forthcoming 2012).

96. *Id.*

97. *See* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 64–65, 97 (2004).

98. PRICEWATERHOUSECOOPERS, GROWTH REIMAGINED: PROSPECTS IN EMERGING MARKETS DRIVE CEO CONFIDENCE 4 fig.2 (2011) (reporting that 92% of Western CEOs expect to grow their operations significantly in Asia and emerging markets, and 86% expect significant growth in Latin America, as compared to only 55% who expect significant growth in the North America and 48% who expect it in Western Europe).

99. *See* PRICEWATERHOUSECOOPERS, *supra* note 98, at 4 fig.2 (reporting that only sixty-seven percent of CEOs of North American companies were optimistic about growth prospects in Eastern Europe); Ira Iosebashvili, *Russia's $88 Billion of Foreign Investment Not Such Great News*, WALL ST. J. (Aug. 25, 2011, 6:00 PM), http://blogs.wsj.com/emergingeurope/2011/08/25/russia%E2%80%99s-88-billion-of-foreign-investment-not-such-great-news/ ("[F]oreign investment was never Russia's strong point—investors were always wary of government interference, high inflation and competition from government controlled monopolies, among other things.").

the companies' existing operations are supported in more established markets. As a commentator recently observed about the change in the role of general counsel for multinational companies in emerging markets in recent years: "With so many U.S.-based Fortune 500 corporations targeting non-U.S. markets for sustainable growth, and courting non-U.S. consumers for products, the global general counsel must recognize limitations imposed by both U.S. and non-U.S laws in devising and executing go-to-market strategies."[100] To accomplish this goal, these global GCs are looking to their in-country GCs to play an increasingly important role in overseeing the company's business in emerging markets. As another observer reports, in-house lawyers for many multinationals are no longer "the redheaded stepchild" of their company but instead "find themselves at the core of the business and valued in a way that was not the case a few years ago."[101]

Moreover, as the national—and increasingly multinational—companies based in India, China, Brazil, and elsewhere seek to capture the shift in economic globalization toward emerging markets, it is plausible that these companies will look to the model of in-house counsel currently employed by the established Western companies with whom they are competing for guidance about how to set up their own internal counsel. As the Indian general counsel of a private equity firm described the process of diffusion:

> I think the major shift happened post-1995 when the liberalization actually took off with telecom, power and information technology sectors opening up. With a lot of American joint ventures and business houses being established in India, the concept of an 'in-house' counsel gained credence. Today, it is an integral and inevitable part of any organization- big or small- with some large business houses boasting of large in-house teams. At Future, for example, I have a team of about fifteen lawyers. Typically, practice groups like compliance, legal structuring and planning and transaction advisory form the expectations and part of the deliverables for these teams. Today with myriad legal and

100. June Eichbaum, *Globalization and General Counsel*, DIVERSITY & B., July/Aug. 2008, at 48, 49, *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1757.

101. Mahalakshmi Kurunathan, *Resisting Change?*, 8 ASIAN-COUNSEL SPECIAL REPORT: INDIA 30, 32 (2010), *available at* http://www.inhousecommunity.com/article.php?id=N98888N-NNBBBB8-88JBBBZ-ZZGGGGL.

> complex compliance requirements the need for dedicated in-house counsels cannot be undermined.[102]

Needless to say, given Rosen's initial observation that self-promotion has always been a key part of the in-house counsel movement,[103] one should be cautious about taking these pronouncements by general counsels in emerging markets at face value. Nevertheless, the fact that internal counsels in India and elsewhere are even claiming to play a key strategic role in their company is already a move away from the unquestioned and easily admitted powerlessness that Hendley reports articulated by the Russian in-house lawyers she interviewed in the late 1990s. The fact that economic globalization is shifting from an emphasis on "inbound" investment into emerging economies to "outbound" investment by companies and investors based in Brazil, India, and China is only likely to bolster these claims—and the reality of the need for a new form of sophisticated legal advice by companies that seek to profit from this trend.

Unlike the period Hendley studied in Russia, many companies in emerging markets are beginning to look beyond their own borders. As Frank Aquila and Sergio Galvis recently reported with respect to Brazil, this shift is already quite dramatic:

> If anyone continued to doubt Latin American M&A prowess, there was no need to look further than the recently-announced acquisition of the US fast food chain Burger King. Burger King's suitor? None other than 3G Capital, the private equity firm controlled by three of Brazil's savviest investors. Coming only weeks after Lan Airlines and Brazil's TAM announced their intention to combine, it is clear that Latin American dealmaking is now truly world class. As the global economy improves, the pace and size of its M&A deals will surely grow.[104]

As the authors go on to explain, this shift in economic activity has important implications for the role of the general counsel in Latin American companies:

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102. Vinaya Natarajan, *P.M. Devaiah: General Counsel, Future Capital*, BAR & BENCH (Aug. 15, 2009), http://barandbench.com/brief/4/12/pm-devaiah-br-general-counsel-future-capital.

103. Rosen, *supra* note 1, at 490–91 (cautioning that claims about the inevitability of in-house counsel's self-reported "age of enlightenment" should be treated skeptically).

104. Frank Aquila & Sergio Galvis, *New Rules of Engagement for LatAm's Corporate Champions*, LEGALWEEK.COM (Sept. 22, 2010), http://www.legalweek.com/legal-week/opinion/1734722/new-rules-engagement-latams-corporate-champions.

> Latin American dealmakers are quickly realising that international acquisitions present a range of issues that are more complex than those in domestic transactions. Legal advisers are counseling their clients that early identification of key issues is the hallmark of successful deals. A few topics are of critical importance in most cross-border acquisitions: Public disclosure. . .. [l]itigation potential. . .. [r]egulatory approvals. . .. [t]rading considerations. . .. [m]ultinational co-ordination. . .. [and] [c]orporate governance.[105]

Although outside law firms are providing some of this early identification in the BIC countries, the same pressure to lower costs and increase the integration between business and legal advice that led many U.S. companies to supplement—and in some cases replace—outside counsel with more sophisticated internal counsel are now persuading companies operating in emerging economies to turn to U.S.-style in-house lawyers to fulfill this crucial early advising role. Indeed, some companies based in emerging markets have even gone so far as to hire U.S.-trained lawyers as general counsel to prepare the way for doing business in the United States and other highly regulated markets.[106]

The processes associated with the globalization of knowledge are likely to accentuate this trend. Every country has its own set of formal and informal understandings about what it means to be a lawyer and how law should be practiced. But in an increasingly interdependent world, these norms inevitably come into contact with norms and practices from other jurisdictions, which interact with—and often transform—indigenous understandings.[107] A key source of transmission is the formal education system itself, especially when combined with the movement of people. A growing number of the lawyers working in companies based in India, Brazil, and China have been educated in the United States, United Kingdom, or Western Europe.[108] Along with

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105. *Id.*

106. *See* Chen, *supra* note 89, at 95 (reporting a Chinese company hiring a U.S. GC to teach the company how to comply with Sarbanes Oxley "with an eye to an overseas stock market listing"). Significantly, the GC reports that he "had a tough time teaching employees about the merits of SOX" since there was "nothing like it in China" and "[c]ode of conduct rules, antifraud provisions and whistle-blower programs are all new stuff for Chinese companies." *Id.*

107. *See* David Held & Anthony McGrew, *Introduction: Globalization at Risk?* to GLOBALIZATION THEORY: APPROACHES AND CONTROVERSIES 1 (David Held & Anthony McGrew ed., 2007).

108. Carole Silver has been the most important legal scholar documenting growing importance of LLM programs in the United States and elsewhere. *See* Carole Silver, *Local Matters: Internationalizing Strategies for U.S. Law Firms*, 14 IND. J. GLOBAL LEGAL STUD. 67, 82–84 (2007); Carole Silver, *Educating Lawyers for the Global Economy: National Challenges*, KYUNG HEE U. L. REV. (forthcoming)

learning about U.S. securities law and other substantive issues, these students are also likely to have absorbed at least something about the ideology of the in-house counsel movement during their time in the West as well.[109] As the foreign trained GC of a Brazilian company summed up proudly:

> [I]n-house counsel are more qualified and more sophisticated than they have been in the past. . .. General counsel are taking the reins and saying: "we are going to decide how and when we are going to use firms. . .." It is that new mindset that I'm seeing a great deal because in-house counsel have stepped into the role of trusted adviser to the business that outside counsel used to occupy.[110]

The fact that this ideology is also consistent with the quest for recognition and status that many in-house lawyers bring to their new roles is only likely to make the lessons taught in the United States and United Kingdom about the in-house counsel movement that much more appealing.

Formal education, however, is only one mode for the dissemination of knowledge—and arguably not the most important when it comes to lawyers. As many commentators have noted, while law school may teach students how to "think like a lawyer," lawyers actually learn the norms and practices of their profession well after they leave school.[111] Though much of this process of professional socialization takes place "on the job," professional associations, the legal press, and day-to-day interactions with professionals from other organizations also play a crucial role. In each of these various arenas,

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(Georgetown Public Law Research Paper No. 1519387, 2009), *available at* http://ssrn.com/abstract=1519387.

109. It is important not to exaggerate the amount of specific information about the general counsel's role that the typical LLM student in the United States or United Kingdom is likely to absorb. As others in this symposium have observed, notwithstanding the triumph of the in-house counsel movement there is very little actual discussion of the role of internal counsel in American law schools. *See* Wald, *supra* note 7. Nevertheless, even if students do not learn much about what in-house lawyers actually do, even my first-year law students now understand that these are important—and for many students—desirable positions in the U.S. legal services industry.

110. *In the Driving Seat*, LATIN LAW., Nov. 2010, at 10, 14 (quoting Pamela Woldow, Partner & General Counsel, Edge International).

111. For a general review of the literature about the relationship between law school and other forms of professional socialization, see, for example, WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007). For my own take on this connection, see David B. Wilkins, *Professional Ethics for Lawyers and Law Schools: Interdisciplinary Education and the Law School's Ethical Obligation to Study and Teach about the Profession*, 12 LEGAL EDUC. REV. 47 (2001).

in-house counsel in emerging economies are likely to encounter proponents of the in-house counsel movement.

As Rosen documents, these forms of informal knowledge dissemination and socialization played a key role in promoting the in-house counsel movement in the United States.[112] Consider, for example, the ACC. Founded in 1982, as the in-house counsel movement was just getting underway, this new bar organization was expressly designed to create a new identity for the lawyers formerly known as "house counsel."[113] As one of the organization's founding members recalls in a statement that can still be found on ACC's web site: "[We needed] a national organization, especially one that would help raise the sights of in-house counsel and provide a unified voice for our profession."[114] In the three decades since the organization's founding, ACC has tirelessly fought to build the status and visibility of corporate counsel both among its members and with other relevant constituencies, including in traditional bar organizations—to demonstrate, in the words of the first principle of its operating philosophy, that in-house attorneys are "full and equal members of the legal profession."[115] In order to accomplish this goal, ACC and other in-house counsel organizations have trumpeted their involvement in issues such as pro-bono—and more recently diversity—that are often considered at the heart of traditional professional ideals that define law as a public profession in the United States.[116]

Given how important globalization is for many of the companies in which ACC lawyers work, it should not be surprising that the organization itself has also gone global. As it proudly proclaims on its website, ACC now has members from at least seventy-five countries, with many boasting their own chapters, including India, China, and Brazil.[117] Predictably these branches are attempting to engage in the same kind of status and visibility-enhancement projects for internal counsel in these jurisdictions as the ones that have proven so successful in the United States. Although ACC's efforts initially concentrated on targeting the overseas general counsels of U.S. companies, in recent

112. Rosen, *supra* note 1, at 497–98.

113. *History of ACC*, ASS'N CORP. COUNS., http://www.acc.com/aboutacc/history/index.cfm (last visited Mar. 1, 2012).

114. *Id.*

115. *Mission and Vision*, ASS'N CORP. COUNS., http://www.acc.com/aboutacc/missionandvision.cfm (last visited Mar. 1, 2012).

116. *Id.* (listing "[p]romote diversity and inclusiveness within ACC and the in-house community as a whole" and "[e]ncourage public and pro bono service" as core operating values). For a recent example of the emphasis that is currently being placed on pro bono services for in house counsel, see PRACTISING LAW INST., *supra* note 46.

117. *History of ACC*, *supra* note 113.

years the organization has stepped up its efforts to recruit the growing number of in-house lawyers working in Indian, Chinese, and Brazilian companies. As more internal counsel from companies based in these jurisdictions join ACC, the organization's ideas about the proper role of a general counsel are likely to diffuse even further.

Moreover, ACC has already spawned fledgling competitors in each of the three BIC countries. Thus, in both India and Brazil there are new organizations specifically designed to provide the kind of education, networking, and status-building services to in-house lawyers that ACC and other similar international organizations also seek to provide.[118] Even in China, where there does not appear to be a formal local in-house counsel association, an energetic young Chinese general counsel for a multinational company has begun to organize informal meetings in Shanghai for GCs from both foreign and domestic companies operating in China.[119]

A new legal press is also springing up in these of jurisdictions—including both targeted "Asian" and "Latin American" offerings of Western publications such as *The American Lawyer*, and the United Kingdom's *The Lawyer*, and new magazines and websites based in these new economies.[120] Although all of these publications concentrate primarily on law firms, each has begun to devote significant attention to in-house lawyers.[121] Once again, these organizations are likely to spread the gospel of the in-house counsel movement.[122] As Katheryn Hendley wisely observed with respect to the Russian *iuriskonsul'ty* in her sample, "[t]he reality is that people are unlikely to aspire to what they have never witnessed."[123] By trumpeting examples of in-house legal departments who have absorbed the tenets of the in-house counsel movement, these new professional associations and publications are likely to counteract this lack of vision.

The last process of globalization I will address—the globalization of governance—is likely to help drive home the value of this new vision, both to in-house lawyers and to the managers and shareholders

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118. *See, e.g.*, *The Latin American Corporate Counsel Association*, LATIN LAW., http://www.latinlawyer.com/lacca/ (last visited Mar. 1, 2012).

119. Confidential Interview with Chinese general counsel (July 2010).

120. *See, e.g.*, LEGALLY INDIA, http://www.legallyindia.com/ (last visited Mar. 1, 2012); LATIN LAW., http://www.latinlawyer.com/ (last visited Mar. 1, 2012).

121. *Latin Lawyer*, for example, has a separate listing on its home page for stories about in-house counsel. *See In-House*, LATIN LAW., http://www.latinlawyer.com/inhouse/ (last visited Mar.1, 2012).

122. *See* Sebastian Perry, *A Slice of the Action: Sebastian Perry Talks to the In-House Team of Mexico's Groupo Bimbo about How It Feels to Be Calling the Shots*, LATIN LAW., March 2010.

123. Hendley, *In-House Counsel*, *supra* note 21, at 28.

these lawyers serve. As many scholars have observed, international and transnational regulation increasingly plays a key role in governing the affairs of companies that compete in the global economy.[124] At the same time, just as in the case of the European Union, these supra-national regulations interact and compete with a growing proliferation of national laws that regulate similar conduct. All of this is likely to increase the demand for the kind of knowledge about law, regulation, and the institutions of national, regional, and global governance that in-house lawyers credibly claim to possess and deploy.

One can already see this development in the United States with respect to the qualities that companies are beginning to look for in the chief legal officers who they want to head their increasingly global operations. As a leading head-hunter who helps companies find their dream GC explains, "In the mid to late 1990s, a period characterized by the dot-com boom and high-flying markets involving mergers and acquisitions (M&As) and initial public offerings (IPOs), general counsel were the prototypical Wall Street or Silicon Valley M&A lawyers who had prior experience at the table with investment bankers."[125] But as that era came crashing to a close with scandals like Enron and WorldCom ushering in a new wave of regulation:

> CEOs who couldn't sleep for worrying about the Securities and Exchange Commission (SEC), anti-money-laundering laws, Foreign Corrupt Practices Act (FCPA) inquiries, and back-dating stock options required a general counsel who could proactively identify and defuse risk, and who knew how U.S. regulators thought and what they cared about. These reshuffled CEO priorities meant that the most sought-after lawyers were trained in Washington at the SEC, Justice, Treasury, or a similar high-profile federal agency, in addition to a world-class law firm.[126]

Today, this knowledgeable insider suggests, CEO priorities are being reshuffled again. In the new age of economic globalization—and the concomitant interplay between global, regional, and national law and governance—"experience in London, Hong Kong, or Dubai may soon replace experience in Washington as the sine qua non for the next generation of general counsel."[127]

As much as this kind of global fluency is important for the global general counsel of a U.S. multinational, it is arguably even more

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124. *See, e.g.*, DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES (2007).

125. Eichbaum, *supra* note 100, at 50.

126. *Id.*

127. *Id.*

important for the in-house lawyers for these companies who are operating on the ground in the new emerging economies.[128] Given the interplay among the explosion of new national laws in these jurisdictions on subjects ranging from foreign investment, competition, and corruption, the wave of new financial regulation in the United States and Europe following the global financial crisis, and the proliferation of transnational dispute-processing institutions such as the WTO and bilateral investment treaties, companies operating in these jurisdictions face enormous legal complexity and risk. As Neeta Sanghavi, former India country counsel for UBS explained:

> It is enormously complex to sift through the complex web of several laws and regulations in India and overseas, while assisting a company to take it to the public. Adherence to law is enormously complex. It's enormously complicated to assess your risks, what kinds of risk abatement processes you're going to have and all the points where the law intersects with those processes.[129]

As a result, companies are likely to look for internal lawyers capable of engaging in the kind of sophisticated analysis about the interplay of legal and non-legal solutions and the opportunities for regulatory arbitrage or damage control that typify the style of internal lawyering trumpeted by the in-house counsel movement.

The situation is likely to be just as complex for companies based in these new emerging economies—particularly when these enterprises venture out beyond their borders. Consider the complex array of interconnected laws, regulations, and standards that fall under the general heading of corporate governance. Companies in emerging markets are well aware that they need to understand the full range of laws in this area even if some of these restrictions do not immediately apply to their operations in their home jurisdiction. As the scholars Roman Tomasic and Jian Fu have noted, Chinese companies, for example:

> are well aware of the importance of the corporate governance debates going on around them, although these debates do not always play themselves out as one might expect from the

128. *See* Catherine Dunn, *Corporate Executive Board Report Highlights "Five Forces that Will Change Legal"*, CORP. COUNS., Aug. 2011 ("[A]s companies expand into emerging markets to capitalize on growth opportunities, risks will follow. . .. It's going to be more important for those risks to be managed locally." (internal quotation marks omitted)).

129. *Neeta Sanghavi*, *Country Counsel, UBS*, B. & BENCH (June 14, 2010), http://www.barandbench.com/brief/4/784/neeta-sanghavi-country-counsel-ubs.

> rhetoric of corporate governance that is to be found in China and more widely.
>
> In part this is due to the size of the problem of change and the social and political obligations that have been accumulated by these companies. The desire to protect these large companies and position them for the next stage of global expansion by Chinese companies has meant that the state has had much greater influence over them than might otherwise be considered appropriate.
>
> Laws and legal institutions have had difficulty keeping up with the changes that have been taking place in China's corporate sector and China's regulatory institutions are still at an early stage of development.[130]

Once again, this regulatory complexity between the global and the local levels arguably places a premium on a certain kind of internal legal expertise. As another observer asserts in a similar context: "As the scale and severity of regulatory oversight in the US increases across the board, Latin American GCs are facing the next significant compliance challenge—conducting rigorous internal investigations which don't cost the earth."[131] This emphasis on both the complexity and cost of regulatory compliance plays to the strength of the in-house counsel movement.

Indeed, the fact that emerging-market multinationals are just as likely to expand into other emerging economies as into the more developed markets of the West and North is only likely to make the growing globalization of governance even more salient. The rapid expansion of Chinese companies into Africa is a case in point. These investments have drawn a barrage of criticism from a variety of sources, often claiming that Chinese companies are violating local laws and regulations.[132] But even when local laws have not been violated (since in many jurisdictions there are few local laws in place), Chinese companies are increasingly accused of violating international norms of corporate social responsibility. These norms are increasingly being

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130. Roman Tomasic & Jian Fu, Regulation and Corporate Governance of China's Top 100 Listed Companies: Whither the Rule of Law? 29 (presented at the Research Committee on the Sociology of Law Annual Conference, Paris, July 11–13, 2005), *available at* http://www.reds.msh-paris.fr/communication/docs/tomasic-fu.pdf.

131. Clare Bolton, *Internal Investigations: "The Next Big Challenge for In-House Resourcing"*, LATIN LAW., Aug. 16, 2010.

132. *See, e.g.*, *Trying to Pull Together*, ECONOMIST, Apr. 23-29, 2011, at 73, 73 ("Chinese expatriates in Africa come from a rough-and-tumble, anything-goes business culture that cares little about rules and regulations. Local sensitivities are routinely ignored at home, and so abroad.").

backed up by a variety of global reporting and compliance mechanisms.[133]

Although initially disdainful of such "voluntary" reporting mechanisms, Chinese companies have come under increasing pressure to join these regulatory schemes.[134] Thus Chinese officials recently issued regulations requiring state-owned enterprises to release corporate social responsibility reports.[135] Highlighting the multilevel complexity that all of this presents for Chinese companies, President Hu Jintao in a 2008 speech to the Asian-Pacific Economic Cooperation summit directed the Chinese to "establish the concept of global responsibility, include social responsibility in their business strategy on their own, abide by the laws in the country where the enterprises operate and international common business practices, improve their management models, and pursue unity of economic returns and social results."[136]

Once again, in-house lawyers are likely to claim that they are the ones who can best help corporate leaders to navigate through the complexity of putting together a "business strategy" that includes "social responsibility," while complying with both "the laws in the country where the business operates" and "international common business practices." As an Indian general counsel who has been schooled in the ways of the in-house counsel movement both through receiving an LLM in the United States and in working for both Indian and multinational companies—and who for the last two years has been hosting a monthly discussion group for other Indian in-house lawyers from both Indian and multinational companies—summed up his understanding of his role:

> [A]s an in-house you are working closely with your business colleagues, understanding their challenges and

133. *See* Galit A. Sarfaty, Regulating through Numbers: A Case Study of Corporate Sustainability Reporting (Aug. 23, 2011) (unpublished manuscript) (on file with the author).

134. *See* Simon Zadek et al., *Responsible Business in Africa: Chinese Business Leaders' Perspectives on Performance and Enhancement Opportunities* 32–36 (Corporate Soc. Responsibility Initiative, Working Paper No. 54, 2009), *available at* http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_54_zadeketal.pdf (reporting that Chinese companies are increasingly participating in these regulatory initiatives and that as of 2003, 5064 Chinese companies had been certified under the ISO environmental management system standards, more than five times the number of Brazilian and Indian companies to participate in this program). Of course, whether these companies are actually complying with these and other standards remains very much an open question. *See* Sarfaty, *supra* note 133, at 23–25 (discussing the difficulty of determining whether companies that sign sustainability pledges are actually complying with their requirements).

135. Zadek, *supra* note 134, at 33.

136. *Id.* (internal quotation marks omitted).

> finding creative ways of achieving business objectives in a legal and ethical way. The in-house lawyer must take on a leadership role, take calculated risks and stick his or her neck out by giving clear and insightful guidance to the business. . .. You many times end up crisscrossing between thinking like a business person and a lawyer in dealing with this challenge.[137]

Needless to say, there is certainly no guarantee that economic globalization, the globalization of knowledge, and the globalization of governance will *necessarily* produce sophisticated in-house counsel, let alone that the general counsel that do emerge from these new environments will look exactly like their U.S. counterparts. To the contrary, there are likely to be significant differences between the model of internal counsel that develops in these new economies and the one that the United States produced—as well as differences among these countries as a result of particular market conditions and history. Nevertheless the processes of globalization already appear to be changing the role and function of in-house lawyers in all of these new countries. It is therefore worth asking what we should look for in assessing the extent of this change and what its implications might be for the market for legal services in countries such as Brazil, India, and China, and for lawyers, clients, and the social purposes of the legal system generally.

IV. DIMENSIONS OF CHANGE

To determine whether the three forces of globalization identified in the previous Part are indeed helping to foster an in-house counsel movement in the BIC countries, we intend to examine six related aspects of the structure and work of internal lawyers in these jurisdictions: the size of in-house departments; the credentials and demographics of the lawyers working inside these departments; the relationship to, and degree of control over, outside counsel; the internal standing, jurisdiction, and authority of in-house lawyers within their organizations; the professional standing of internal counsel in the profession as a whole; and the participation and influence of general counsel in larger public policy debates, both nationally and internationally. Each of these issues was a major objective of the in-house counsel movement in the United States, and each is a symbol of that movement's success. But as I will indicate, assessing the movement's success on each of these dimensions is also more

137. *See* Kurunathan, *supra* note 101, 32–33 (quoting Suresh Kumar, principal legal counsel (Asia), Thomson Reuters Markets Division).

complicated than might at first appear even with respect to internal legal departments in the United States. These complexities are likely to be even more salient in the context of emerging economies. The following Sections provide some preliminary thoughts on each of these topics.

A. Size Matters—But in Complex Ways

One obvious way to measure the importance attached to internal counsel is to look at the size of the average in-house legal department. Not surprisingly, many commentators point to the fact that many U.S. legal departments grew rapidly during the 1970s and 1980s as proof of general counsel's increasing power and prestige.[138] The fact that some of the larger companies in the BIC countries now have internal law departments that rival the size of their Western counterparts suggests that something similar may be happening here as well. For example, the Tata Group in India has over 400 in-house lawyers working to serve its many business interests around the world, led by a dynamic and highly influential general counsel.[139] Similarly, China's Huawei has over 400 in-house professionals.[140] In addition to these giants, private companies with more modest legal departments in China appear to be growing rapidly.[141] The fact that at least some in-house legal departments are expanding rapidly is an important indication of the growing importance of internal counsel in these new economies.

Nevertheless, even in the United States size remains an imperfect measure of prestige and power. Thus, even though the overall size of the in-house bar has grown rapidly since the 1980s, the size of even the legal departments of the largest U.S. companies remains surprisingly varied. Thus, in a recent study of general counsel offices of S&P 500 companies, we found that the median legal department employed thirty-five lawyers, but that the range in size was quite significant, with some companies having almost completely outsourced their legal function and others maintaining legal departments of over 1000 lawyers.[142] A recent study of large U.S. and U.K. companies by Marie Sako and Richard

138. Daly, *supra* note 2, at 1059–61.

139. Interview with Bharat Vasani, General Counsel of the Tata Group (Oct. 2011).

140. Interview with General Counsel of Huawei (Apr. 2011).

141. See Chen, *supra* note 89, at 92 ("While a dozen-plus lawyers for a company with $200 million in revenue is hardly startling, consider this: Just over a decade ago, in-house lawyers in China were almost nonexistent . . .. [C]ompanies in China—both domestic and multinational—are no longer rushing to costly international law firms for help every time a question comes up.").

142. Coates, DeStefano, Nanda & Wilkins, *supra* note 4, at 1006.

Susskind reaches a similar conclusion, finding that "the absolute size of the legal department varies enormously, ranging from a small department with only a couple of lawyers to a globally distributed legal function with over 1000 lawyers at some banks."[143]

This difference in size affects the legal department's functioning, although once again less than one might expect. Even with respect to the displacement of outside law firms, the size of a company's general counsel office is an important—but not determinative—indication of the split between the amount of money spent on outside lawyers versus the percentage of the legal budget that is spent on in-house counsel. To be sure, in our survey of U.S. companies, those with a very small legal budget sent almost all of their work to outside firms.[144] But above a certain size there is much less correlation between size and outside spend. Indeed, the five largest legal departments in our sample spent a higher percentage of their legal budget on outside law firms than average.[145] Similarly, Sako and Susskind found that the size of the legal department and the inside-outside split in spending was an imperfect measure of the degree of control that a given legal department exercised over outside firms. Although Sako and Susskind found a wide variation in the percentage of the total legal department budget spent on outside firms, they also report that there is substantial variation among departments of various sizes.[146] Some small legal departments, who outsource most of the company's legal work, exercise a high degree of control over outside law firms while others do not. Similarly, larger departments were also arrayed along a continuum with respect to their commitment to the importance of having a strong in-house legal function.[147]

Nor is size a perfect proxy for the importance of the work that is done by internal counsel, or their importance within the corporate hierarchy. Financial services firms tend to have some of the largest in-house departments, yet much of the work done by these lawyers relates to the routine processing of transactions and other compliance related

143. *See* SAKO, *supra* note 48, at 4.

144. Coates, DeStefano, Nanda & Wilkins, *supra* note 4, at 1008.

145. *Id.*

146. *See* SAKO, *supra* note 48, at 6 (reporting a range of twelve percent to ninety-three percent).

147. *Id.* at 6–7. Sako and Susskind distinguish two types of "externalizers." The first are companies with small internal departments who nevertheless exercise a high degree of control over outside firms, and the second are those who exercise relatively little control and are often "bypassed" by the CEO in favor of outside counsel. *Id.* They also compare "mid-rangers," including some with quite large departments, who take a "balanced" approach to managing the legal function with "internalizers," who aggressively promote the value of in-house lawyers. *Id.* at 7.

matters.[148] Tellingly, the general counsels of these organizations were less likely to report directly to the CEO than those of other companies, implying a less important position in the corporate hierarchy.[149] Indeed as Sako and Susskind report, some general counsels in this area do not view having work done by internal counsel as key to the legal department's functioning at all.[150]

The relationship between size, function, and authority is likely to be even more complex with respect to legal departments in emerging economies. For example, in China, India, and Brazil many state-owned enterprises have traditionally had very large in-house legal departments. Until recently, however, these lawyers were very much like the Russian *iuriskonsul'ty* Hendley describes—low-level bureaucrats with very little status either within the company or in the legal profession as a whole.[151]

The situation with respect to private companies in emerging markets is similarly complex. Although as indicated above, there are some very large in-house departments in the BIC countries, and others are growing rapidly, available evidence suggests that the typical in-house legal office in these jurisdictions is still relatively small. A recent report of Brazilian in-house departments, for example, found that the overwhelming majority (63%) had between one and five lawyers, and only 8% had more than thirty lawyers.[152]

Notwithstanding their size, however, the overwhelming majority of these relatively small departments claim to follow the primary dictates of the in-house counsel movement. Thus 75% of the Brazilian general counsels surveyed claimed to have authority for hiring outside counsel, while 96% asserted that they at least shared responsibility with outside counsel for handling "complex and recurrent" matters for their company—with 30% asserting that they took primary responsibility for

148. *See id.* at 4 (reporting that the legal departments in financial services companies grew enormously until 2007); *id.* at 7 (reporting that much of the work done by lawyers in these departments consists of documenting sales and trading transactions).

149. Coates, DeStefano, Nanda & Wilkins, *supra* note 4, at 1008 (reporting that sixty percent of financial services GCs report to the CEO compared to ninety-four percent for the sample as a whole).

150. *See* SAKO, *supra* note 48, at 7 (quoting the general counsel of a large legal department in a financial services firm as saying that "nothing" necessarily has to be done in-house, and that "we can hire another 200 lawyers and bring more of the work in-house, or we can fire all in-house lawyers and . . .manage all the outside counsel").

151. Confidential Interviews in Brazil, India, and China about the traditional role of lawyers in SOEs.

152. GONÇALVES & GONÇALVES MKTG. JURÍDICO & LEXISNEXIS MARTINDALE-HUBBELL, BRAZILIAN STUDY ON THE RELATIONSHIP BETWEEN LEGAL DEPARTMENTS AND LAW FIRMS 10 (2010) [hereinafter GONÇALVES & GONÇALVES], *available at* http://community.martindale.com/legalgroups/Geography/brasilia_lawyers/m/brasilia_lawyers-mediagallery/17050.aspx.

such issues.[153] And a significant percentage of these companies expect the size of their legal department to grow in the next few years.[154]

Although such statements echo the claims of the in-house counsel movement, there are also indications that the reality on the ground may not yet live up to these bold pronouncements. Thus, 11% of the Brazilian GCs in the survey cited above—the second-highest percentage for any topic—admitted to being worried about the long-term careers and salaries of in-house lawyers, with another 11% and 9% (the number three- and four-ranked issues) concerned about budget and limited resources and participation in board and management decision making, respectively.[155] Investigating the interplay between the confident assertions and the underlying concerns of these in-house lawyers will be central to gaining an understanding of whether these internal counsels will be able to achieve the status and influence of their counterparts in the West.

B. But So Do the Credentials and Identities of the Lawyers

As Hendley documents with respect to Russia, in-house lawyers have often suffered from two distinct and mutually reinforcing disadvantages. First, the lawyers who have traditionally worked inside corporate counsel offices have typically had inferior professional credentials to those working in law firms and other private practice settings. Second, these lawyers are often members of groups with relatively less status in society—in the case of Russia, women and those who were not members of the communist party—than their counterparts in outside firms. This low demographic status has played a key role in reinforcing the relative powerlessness of internal counsel, both within their own organizations and within broader professional, legal, and policy circles.

Our preliminary research in Brazil, India, and China provides some evidence that something similar may be going on in these jurisdictions as well. As discussed in Part II, in-house counsel in China have traditionally been considered "corporate legal consultants" and have not had to qualify as lawyers. From our preliminary discussions, it appears that internal counsel in Chinese SOEs are particularly likely only to have this inferior credential. Similarly our initial interviews underscore that lawyers for state-owned companies in India and Brazil have frequently not been full members of the bar, or if they have had

153. *Id.* at 15, 17.

154. *Id.* at 10 (reporting that 38% expect the size of their legal department to increase).

155. *Id.* at 26.

professional credentials, have typically been the graduates of lower-ranked law schools. Even in many private Indian companies, the legal function has traditionally been under the jurisdiction of the company secretary, who was not required to have formal legal training.

Our research also suggests, however, that this situation is changing rapidly in each of the BIC countries. Even with respect to SOEs, there has been an effort in each jurisdiction to raise the credentials of internal counsel. For example, in 2002 the Chinese Ministry of Justice issued an interim advice on "Carrying out the Pilot Work on In-House Lawyers" which for the first time specifically required those providing legal services to SOEs to be qualified as lawyers.[156] Although it is not clear how widely this directive has been followed in practice, in 2008 the State Owned Asset Administration announced six GC candidates for large SOEs under its supervision. All six were licensed as "corporate legal consultants"—but five of the six were also qualified as lawyers.[157] Similarly, while the rank and file lawyers employed by Petrobras, Brazil's largest SOE, continue to enjoy relatively low status within the Brazilian bar, the top lawyers in this company have assumed a level of prominence that rivals the status and influence of their counterparts in the United States. In a roundtable discussion with general counsels from ABESPETRO, an association of general counsels of companies that provide support for Petrobras, it was perfectly clear that this company's general counsel wielded significant power and authority in the marketplace—and that the general counsels of these supporting institutions, many of which were subsidiaries or divisions of international companies such as Halliburton and Schlumberger, were seeking to play a similar role both internally in their own companies and externally with respect to the management of outside counsel. The fact that Petrobras may soon become the one of the world's largest companies is only likely to accelerate this trend.[158] The status of in-house lawyers in state-owned, or controlled, enterprises in India also appears to be improving rapidly, with these companies now able to

156. *See Interim Regulation*, *supra* note 82.

157. *Open Announcement of SASAC on the Candidacy of Central Government SOEs General Counsels*, STATE-OWNED ASSETS SUPERVISION & ADMIN. COMMISSION STATE COUNCIL (Dec. 29, 2008), http://www.sasac.gov.cn/n1180/n20240/n7290826/11864502.html.

158. Ricardo Geromel, *Will Petrobras Become the World's Largest Company? Brazilian Giant's Q2 Profits Jump 32%*, FORBES (Aug. 18, 2011, 9:16 AM), http://www.forbes.com/sites/ricardogeromel/2011/08/18/will-petrobras-become-the-worlds-largest-company-brazils-giant-reports-q2-profits-rises-of-32/.

recruit highly credentialed and experienced lawyers away from private companies and even law firms.[159]

The credentials of the lawyers working inside private companies in these jurisdictions have arguably improved even more dramatically. This is most evident with respect to the lawyers working inside the local divisions of multinational companies. These lawyers, like their counterparts in the local offices of international law firms, increasingly hold dual qualifications from prestigious local law schools and international LLM programs, and have frequently had practice experience in top domestic or foreign law firms—or both—before assuming their in-house position. But even companies based in these emerging markets are also beginning to recruit lawyers with high status credentials. For example in 2010, more than twenty percent of all of the graduates from India's three top National Law Schools accepted jobs in corporate legal departments.[160]

Whether this increase in status in the lawyers joining in-house legal departments constitutes the kind of elevation in the role of internal legal counsel trumpeted by the in-house counsel movement, however, remains to be seen. Given the small number of top private law firms in India, for example, it is not clear whether those going into in-house positions are choosing these jobs because they find them more attractive than law firms, or simply because working in-house is their best option in a world in which their realistic alternative is joining a low paying traditional litigation practice.[161] Entry-level salaries in corporate law offices remain significantly lower than they are in top law firms, and it is not clear whether the tradition of paying senior in-house lawyers at the level of law firm partners—let alone their counterparts in top

159. Confidential Interviews with general counsel of Indian SOE (Oct. 2011). Indeed, the general counsel of one prominent Indian SOE is currently working with a top Indian law school and a prominent international law professor to develop a training program for lawyers interested in working in the area of his company's business so that he can obtain top recruits.

160. *37.7% Choose Law Firms, 20.9% Choose In-house and 9.8% Choose Lit: Career Paths of NLSIU, NALSAR and NUJS Graduates*, B. & BENCH (June 28, 2010), http://barandbench.com/brief/9/809/377-choose-law-firms-209-choose-in-house-and-98-choose-lit-career-paths-of-nlsiu-nalsar-and-nujs-graduates. Although this percentage was about half of those who initially joined law firms, it was more than twice as high as the percentage of graduates who went into traditional litigation practice. *Id.*

161. *See* Papa & Wilkins, *supra* note 95, at 14 (reporting that the traditional pay packages at Indian litigation firms is only $3300 per year as compared to $20,000 in top law firms). As indicated below, in-house legal jobs fall between these two ranges.

management—has taken hold in any of these emerging economies.[162] Indeed, even in the United States it is not clear whether the movement of lawyers in-house is due to the inherent attractiveness of these positions—or to the growing unattractiveness of being an associate in a large corporate law firm. As the corporate law firm market matures in the BIC countries—both internally through the growth of indigenous law firms, and more controversially, externally by the entry of foreign firms recruiting top talent—it will be interesting to see whether in-house jobs continue to grow in status and prestige in these jurisdictions.

One indication of this maturation process may be the demographic characteristics of the lawyers employed in internal legal departments. In the United States, for example, a disproportionate number of women lawyers have moved from law firms to in-house legal departments in recent years.[163] This overrepresentation is due in part to the well-documented fact that law firms have not fostered a particularly hospitable environment for female lawyers. But it is undoubtedly also due to the fact that in-house legal jobs have been considered less prestigious than law firm jobs, and therefore less attractive to highly qualified male applicants. Traditionally, this "feminization" of internal counsel would be expected to depress the status of these jobs even further.[164] As Hendley's research documents, this has certainly been the case in Russia, where the high percentage of women *iuriskonsul'ty* further depressed the status and influence of this position with corporate managers.

In the United States, however, the situation has been more complex. Because female lawyers entered into corporate legal departments at the beginning of the in-house counsel movement, these positions have actually risen in power and prestige as they have become more feminized. Indeed, female general counsels have used their growing influence over legal purchasing decisions to press for gender equity (and to a lesser extent other forms of diversity) in the profession as a whole.[165] Thus, the feminization of the in-house legal sector has

162. For a description of the move to pay at least senior in-house lawyers compensation packages (including stock options) that equal or exceed what these lawyers might make in private practice, see Lat, *supra* note 15.

163. *See, e.g.*, Wald, *supra* note 7, at 420 (noting that women accounted for almost seventy-nine percent of the increase in size of in-house legal departments between 1980 and 2000); DINOVITZER ET AL., *supra* note 9, at 65 (noting that women were more likely than men to leave large law firms to join in-house legal departments). As Wald goes on to note, however, it is far from clear that women are actually more likely to succeed in-house than they are in large law firms. *See id.* at 420–23.

164. *See* EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK (1986) (making this argument).

165. *See* Wilkins, *supra* note 46, at 1556–57.

arguably resulted in an increase in the status of women lawyers throughout the profession. The fact that the percentage of women entering the profession— particularly from top law schools—was also increasing significantly during this period undoubtedly has contributed to this effort. Nevertheless, it is important to recognize that men continue to occupy the overwhelming majority of top positions inside corporate legal departments.[166]

The situation is likely to be similarly complex in the BIC countries and other emerging economies. In each of these jurisdictions, the percentage of women entering the legal profession is even higher than it is in the United States.[167] Moreover, the women who have moved into corporate counsel positions in recent years not only have the benefit of tapping into the in-house counsel movement, but are also the beneficiaries of efforts by in-house lawyers from the United States and other Western countries to improve the status of women working in both internal legal positions and in law firms. For example, during a recent trip to Brazil, I was told about a new organization entitled "General Counsels with Skirts" comprised of female GCs dedicated to pushing companies and law firms to hire and promote more female lawyers. Not surprisingly, the woman who created this organization is the female general counsel for Brazil of a major U.S. corporation. Although it remains to be seen whether similar efforts spring up in other jurisdictions, it indicates that GCs in emerging markets are beginning to take seriously their power over outside firms.

C. Who's the Boss?

Arguably the key feature of the in-house counsel movement in the United States is the effort by general counsel to wrest control over the core legal functions of the corporation away from outside counsel. Even in the United States, however, the evidence is mixed as to whether internal counsel has succeeded in doing so. Notwithstanding a significant investment in building up in-house capacities, many companies discovered that outside spending on law firms continued to escalate throughout the 1990s and into the first decade of the twenty-

166. See *MCCA 2009 Survey of Fortune 500 Women General Counsel*, DIVERSITY & B., July/Aug. 2009, at 14, 16, *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewPage&pageID=1931 (reporting that 85 of the general counsels in the Fortune 500 were female); *see also* Wald, *supra* note 7, at 420.

167. Although it is difficult to get accurate information on the gender composition of law students in these jurisdictions—or even the overall number of students—when I have asked faculty at particular schools in these emerging markets about the percentage of female students at their institution, they have offered perentages that range from sixty percent to as high as seventy-five percent, even in top schools.

first century.[168] Nor were all of the resources being devoted to monitoring and controlling law firms resulting in increased levels of client satisfaction.[169] Finally, in the wake of the Enron-related scandals in 2001, companies found themselves facing a new and more challenging regulatory environment in which enforcement officials were increasingly skeptical about the ability of all corporate officers—including general counsel—to detect and deter misconduct by their peers.

The result has been that even U.S. general counsel steeped in the in-house counsel movement had less control over outside counsel than the movement's rhetoric would lead one to believe. Thus, in our study of corporate legal purchasing decisions, we found that even large U.S. companies were unlikely to terminate important law firm relationships. Only about 20% of GCs from S&P 500 companies reported terminating such relationships "frequently" within the last three years, while over 30% had never done so, with another almost 50% having done so only once or twice.[170] In the words of one GC, terminating an important law firm relationship is a bit "like turning the Titanic"—something that takes an enormous amount of time and energy to accomplish and runs the risk of creating an even bigger disaster in the process.[171] Ironically, companies in our sample with very large legal departments were no more likely to attempt this tricky maneuver than companies with relatively small departments—with medium size departments of twenty-six to one hundred lawyers showing the greatest willingness to exercise this ultimate method of control.[172]

Although the popular depiction of GCs riding roughshod over outside counsel and employing the kind of "spot contracting" model for the purchase of legal services that companies employ for other kinds of commodity vendors is therefore exaggerated even with respect to lawyers who have fully absorbed the teachings of the in-house counsel movement, there nevertheless has been a dramatic shift in the degree of control that internal counsel exercises over both the amount of work

168. *See* Gina Passarella, *Survey Shows Corporate Law Depts. Hired More and Spent More in 2005*, LEGAL INTELLIGENCER, Sept. 26, 2006 (reporting a survey by the consulting firm Altman Weil finding an average growth in outside legal expenses of 5.5% among responding companies notwithstanding a 19% increase in hiring in-house lawyers).

169. Janet L. Conley, *GCs 'Can't Get No Satisfaction' from Outside Counsel*, CORP. COUNS., Mar. 16, 2006 (reporting a senior consultant from BTI Consulting Group as stating that "[s]atisfaction with outside law firms is 'particularly low' right now").

170. Coates, DeStefano, Nanda & Wilkins, *supra* note 4, at 1017.

171. *See* Wilkins, *supra* note 22, at 2104.

172. *See* Coates, DeStefano, Nanda & Wilkins, *supra* note 4, at 1024 fig.3.

that is given to particular firms, as well as the manner in which that work is assigned, evaluated, and compensated. The relevant question, therefore, is whether GCs in emerging jurisdictions are also using their power over corporate purchasing decisions to restructure the relationship between companies and their outside law firms and to drive changes in the internal structure and operation of firms.

At the most basic level, it is clear that something like this is already going on. Indeed, the very growth of the large law firm sector in countries such as India, China, and Brazil is a testament to the influence that domestic and foreign corporate clients have exerted on the corporate legal professions in these jurisdictions. Moreover, in conversations with both international and domestic firms competing for this business, there is significant anecdotal evidence that many of the techniques employed by GCs in the United States and elsewhere to drive down costs and increase control—beauty contests, panels of "preferred providers," discounts and alternative billing arrangements (including flat fees, value billing, and risk sharing), and direct oversight on issues ranging from team composition to documents filed in court— are also being employed by GCs operating in emerging markets.[173] Indeed, several informants from international firms have reported that one of the largest impediments to expanding their business in emerging markets— especially China—is the ruthless cost pressure that Chinese clients have placed on fees. And virtually all respondents believe that these pressures are likely to increase as GCs in private and state-owned companies in these markets become more sophisticated about international transactions and have more exposure to international companies where GCs are already steeped in the ideology and techniques of the in-house counsel movement.

Indeed, given the risky business environment in these new emerging markets, the relative lack of sophistication of some of the domestic law firms, and restrictions on the practice of foreign law firms, it is plausible that international companies will decide to take an even greater percentage of work in-house than these same entities are already doing in more developed markets. Thus, in published reports several general counsels of multinational corporations consider it a "point of pride" to do everything in house.[174] As a recent report on China observed: "Most in-house department heads seem to agree

173. *See, e.g.*, GONÇALVES & GONÇALVES, *supra* note 152, at 16 (reporting that 46% of Brazilian general counsels reported requiring law firms to employ "fixed or previously agreed price[s]," and another 19% reported using "success fee[s]," while only 3% reported using "unlimited price-per-hour" fees).

174. Dan Walfish, *In-House Counsel in China: Understand How They Think*, 14 CHINA L. & PRAC., Sept. 2000, at 58, 59.

implicitly with one in-house lawyer who says, 'My personal idea is if you have a law department in China you should do everything yourself unless you really don't know what you're talking about.'"[175] This is particularly true in matters that companies view as "business critical." As a general counsel in India asserted: "[T]here has been a shift in India 'moving drastically from external to in-house.' The majority of larger legal departments try to handle as much of the business-critical legal work themselves as possible."[176] And even if the work isn't taken entirely in-house, many companies report that they intend to decrease the number of law firms that they employ in the coming year.[177]

Although cost is clearly a significant factor in motivating general counsel to take work inside,[178] as the quote from the general counsel above underscores, there appears to be an element of "pride" as well. This pride has both a positive and a negative dimension. Positively, in-house lawyers in emerging markets are taking pride in the fact that they "understand[] . . .the business dynamics and the effective necessities of the company" far better than outside firms.[179] But there is also a deep resentment of what these in-house lawyers perceive to be the condescending attitude of many of the outside lawyers with whom they have traditionally had to interact. As a general counsel in Brazil explained:

> We do not believe in [hiring] law firms. We believe in lawyers and people who exceed themselves day after day. . .. There is also a lot to do with personal relationships in this scenario. It is worthless to be brilliant but to think too highly of oneself to dispatch a petition or to be present at meetings here in the company. It is not worth feeling offended about revisions or suggestions. Exceptional yes, stellar no.[180]

In our preliminary interviews with the general counsels of Indian companies, we have been surprised by how often we have encountered

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175. *Id.*

176. Kurunathan, *supra* note 101, at 33.

177. GONÇALVES & GONÇALVES, *supra* note 152, at 13 (reporting that twenty-eight percent of companies intend to reduce the number of law firms that they employ).

178. Although there is very little empirical evidence about the fees charged by law firms in emerging markets—one of the key issues that GLEE project intends to study—what studies there are suggest that these costs are escalating, and that these pressures are fueling the desire of many general counsel to bring work in house. *See* Sida Liu & Xuyeao Li, Chinese Law Firms after the Financial Crisis: The Case of Shanghai (Mar. 5, 2010) (unpublished manuscript), *available at* http://www.law.georgetown.edu/LegalProfession/documents/LiuLi_Georgetown2010_draft1.pdf.

179. GONÇALVES & GONÇALVES, *supra* note 152, at 21.

180. *Id.* at 23 (internal quotation marks omitted).

this sentiment—and how vehemently it has been expressed. While our interviews with in-house counsel in the United States also uncovered evidence that these lawyers sometimes feel "offended" by what they perceive as arrogance by outside lawyers, the level of resentment seems far higher in India. Although we are still at the preliminary stage of understanding this phenomenon, the fact that a few corporate lawyers in India have had a virtual monopoly on sophisticated corporate work and the hierarchical nature of business relationships in India—a hierarchy reinforced by caste, religion, region, and social class—appear to play a significant role. The fact that an increasingly sophisticated group of general counsels in India and other emerging economies are now finding themselves in a position to turn the tables on outside counsel, who used to make them wait submissively in the lobby for hours before deigning to answer their questions, may end up being an important catalyst that fuels the in-house counsel movement in these new jurisdictions.

The fact that at least some of these internal counsels are also becoming more influential internally within the corporate hierarchy within the organizations in which they work is only likely to accelerate this trend.

D. The Relationship with the Boss

Although the most visible manifestation of the in-house counsel movement in the United States is the increasing control that GCs exercise over outside counsel, in many respects the most important outcome of the movement has been the growing power and visibility of internal lawyers within the hierarchies of corporate decision making. As indicated above, U.S. GCs have accomplished this goal by persuading corporate managers that in addition to controlling legal costs by internalizing work and exercising greater control over outside firms, they can also provide legal services that are *better* than those that can be rendered by even the best outside firm. The key to this successful reversal of perception in the value of internal legal services has been the claim by general counsels that precisely because they are located close to the organization's business operations, they can provide the kind of integrated business and legal advice that companies increasingly need to succeed in the global marketplace. As a result, GCs assert that they should be involved in a wide range of strategic decisions that go far beyond the actual provision or oversight of legal services.

In developed markets, this argument has largely succeeded. Thus in many companies, general counsels—or CLOs as many now like to be called in order to signify that they have the status of other "C" suite officers—now routinely sit on a variety of strategic and policymaking

committees within the organization. The overwhelming majority of the GCs in our study of the legal purchasing decisions of S&P 500 companies, for example, report directly to the CEO.[181] Many also oversee other related corporate functions, such as public relations, government affairs, human resources, and compliance.[182] And virtually all are engaged in an active attempt, as one prominent GC of a U.K. company told me, to convince corporate leaders that they and their departments must play a central role in helping their company move beyond a culture of "legal compliance" to one in which the goal is to create a "legally astute organization" where legal and business considerations are integrated at every level of the organization. As indicated above, the fact that a number of CLOs have made the transition to CEO in recent years is a testament to the importance that even corporate boards now place on the skills and dispositions that internal counsel bring to corporate management.

Whether or not there will be a similar increase in the status and visibility of internal counsel within corporate hierarchies in emerging economies remains an open question. On the one hand, one can easily find examples of GCs who occupy an even more central role in corporate decision making than even the most powerful U.S. CLO. These internal lawyers tend to work for family-owned companies or groups and have a very strong relationship, often cemented by social or familial bonds, with the controlling shareholder. As a result, these lawyers function more as trusted business advisors or consigliere than as traditional lawyers, often leaving the latter function to more junior lawyers situated within the various businesses—or in many cases, to outside counsel.

At the same time, even general counsel for multinational businesses operating in emerging economies often spend as much time mediating between these businesses and state officials as they do providing or overseeing legal services. The fact that the Chinese general counsel of a large U.S. company recently left his position to become the head of government relations for an even larger company—a position to which the general counsel of the latter company reports—is an indication of the relative importance of political sophistication and contacts versus legal competence for companies seeking to do business in China and other jurisdictions where the state continues to play a significant role in the economy. Indeed, as the general counsel of a

181. Coates, DeStefano, Nanda & Wilkins, *supra* note 4, at 1008 (reporting that eighty-nine percent report directly to the CEO).

182. *See* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259 (2009).

large SOE recently confided to me, his biggest challenge is to convince his managers, all of whom are senior government officials, that legal restrictions have to be taken as seriously as political ones in operating the company.

Although the exact mix of legal, business, and political capital required to be a significant member of the senior management team in companies operating in emerging economies therefore remains unclear, those companies that seek to do business outside of these markets are likely to find that their need for straightforward legal advice will increase significantly. As the recent scandal involving the Chinese SOE Sino-Forest underscores, when the new emerging-market multinationals list on U.S. or European stock exchanges, or buy U.S. or European assets, they are also bringing themselves under the jurisdiction of U.S. or European regulatory schemes—schemes that are likely to be far less amenable to the kind of legal, business, and political practices that may continue to be perfectly acceptable in their home jurisdiction.[183] This greater scrutiny seems likely to increase the demand for the kind of sophisticated legal advice that lawyers steeped in the in-house counsel movement claim that they are the best at providing—a fact that GCs engaged in the kind of status building, and risk-awareness raising, projects that have played a central role in the in-house counsel movement in the United States are undoubtedly likely to point out.

E. The Professionalism Project

In her path-breaking book *The Rise of Professionalism: A Sociological Analysis*, the sociologist Magali Sarfatti Larson argued that professionalism is less about the inherent functionality of particular occupations or roles, and more a function of the ability of certain groups to wage a successful professionalism project designed to improve their status and income.[184] Whether or not one believes that such projects explain all of professionalism, there can be little doubt, as Rosen documented that such a project has been at the heart of the in-

183. *See Sino-Forest Unit Plunges on Resuming Trade in HK Despite Reassurances*, DOW JONES FACTIVA (Sept. 27, 2011, 4:09 AM), *available at* http://www.dollar-rate.org/2011/09/sino-forest-unit-plunges-on-resuming.html ("Sino-Forest is one of the best-known of many overseas-listed Chinese businesses that have faced intense media and investor scrutiny amid allegations of fraud and other improprieties, with trading in several stocks listed in the U.S., Canada and Hong Kong still suspended.").

184. MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); *see also* RICHARD L. ABEL, AMERICAN LAWYERS (1989) (applying Larson's analysis to the U.S. legal profession).

house counsel movement in the United States.[185] At the core of this project is the claim that notwithstanding the fact that internal counsel are employed by their non-lawyer corporate clients they are nevertheless just as capable—in fact as I indicated in Part II, even *more* capable—of exercising independent professional judgment than lawyers working in outside law firms.[186] As with other aspiring professional groups, including the bar itself whose professionalism project included the founding of the ABA in 1871, one of the first things that general counsel in the United States did to raise their status and visibility was to found ACC. As I have already indicated, this organization has been very successful in raising the status of in-house counsel.

Even in the United States, however, the claim that in-house counsel are capable of exercising the kind of independent professional judgment required to detect and deter corporate misconduct is not without detractors. In the wake of Enron and other related corporate scandals, some academic commentators have begun to challenge whether internal counsel are too dependent on their corporate employers to act as independent gatekeepers responsible for ensuring compliance with the securities laws and other public-regarding legal rules when compliance would conflict with corporate profits.[187] Indeed, some have gone so far as to argue that to become truly independent, general counsels should be removed from the control of corporate managers and report only to an independent committee of the company's board.[188]

Moreover, as general counsel have attempted to spread the movement's gospel to jurisdictions where the status of in-house lawyers has traditionally been even more tenuous than in the United States, resistance to the professionalism claims of internal counsel has been even more pointed—and successful. Despite years of lobbying, in-house lawyers have still not been able to convince the European Court of Justice and other regulatory authorities that they are entitled to the attorney-client privilege with respect to discussions with their corporate

185. Rosen, *supra* note 1, at 481–90.

186. *See id.*

187. *See* JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006) (arguing that inside lawyers are not sufficiently independent to act as effective gatekeepers to prevent corporate misconduct). As I discuss in the Conclusion, this is part of a broader critique that the manner in which in-house lawyers are currently used in companies makes them less likely even to see themselves as independent gatekeepers.

188. *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1053–55 (2005).

employers.[189] At the core of this decision is a fundamental doubt about whether "employed" lawyers can ever truly be "independent."[190]

Such doubts may be even more pointed in the BIC countries and other emerging economies. As indicated above, in many of these jurisdictions in-house lawyers have traditionally had a distinct—and distinctly inferior—professional qualification to the one held by "independent" lawyers. It is not surprising, therefore, that those who are members of the bar in these jurisdictions—who in many cases are still struggling to assert their own status and power (to clients, policymakers, and the public)— have resisted giving professional status to internal counsel who do not even have full professional credentials.[191] Nor is it surprising that regulatory officials in emerging economies have often credited these claims.[192]

Nor is it clear that professional organizations dedicated to promoting the in-house counsel movement's professional goals will be as successful in these new markets as they have been in the United States. As indicated above, ACC and other international organizations are trying to replicate their professionalism project in the emerging economies. Yet, notwithstanding their stated goal of promoting the development of in-house counsel abroad, it is not clear whether ACC will even accept members who are not qualified as "lawyers" in these jurisdictions—a group that as we have already seen constitutes an important part of the internal counsel community.[193] Even if domestic corporate counsel organizations are not similarly limited to licensed members of the bar, these fledgling groups are still likely to find it difficult to put together all of various kinds of professionals who work as internal counsel—across all of the various kinds of domestic and international organizations in which these counsel work—to create an association that can effectively promote the professional interests of all

189. *See* Coyle, *supra* note 52.

190. *Id.*

191. *See* Liu, *supra* note 81, at 558 (quoting the founding partner of one of China's largest law firms as saying that he "personally do[es] not agree with the corporation lawyer reform" designed to encourage the use of in-house counsel in state-owned enterprises, and that "there is no need for corporation lawyers, and all corporate legal work should be done by law firms").

192. *Id.* at 557 ("[E]nterprise legal advisors have some natural weaknesses, because they do not have the independence of lawyers and have to do whatever the enterprises ask them to do." (quoting a senior Ministry of Justice official)).

193. The organization's website says that membership is restricted to "attorneys who practice law as employees of private sector organizations and who do not hold themselves out to the public for the practice of law," but does not explicitly state that these "attorneys" must also be licensed members of the bar. *See Membership*, ASS'N CORP. COUNS., http://www.acc.com/aboutacc/membership/eligibility.cfm (last visited Feb. 12, 2012).

of these diverse constituents. Whether or not either international or domestic general counsel organizations are able to bridge these traditional divides will go a long way toward determining whether internal counsel within these countries achieve the kind of professional status enjoyed by their counterparts in the United States. Given the role that these organizations in the United States have played in amplifying general counsels' political clout, whether this project succeeds is also likely to play an important role in determining whether in-house counsel in these jurisdictions will play an important role in broader policy and legal debates.

F. Lawyers, Lawyer-Lobbyists, and Lawyer-Statesmen

Finally in addition to projecting influence in the profession, the in-house counsel movement in the United States has also been very much about projecting the influence of general counsels in the wider world of public policy and law. Once again, one can plainly see this ambition on ACC's website. Under the heading "advocacy" the site proudly proclaims that "ACC is the voice of the in-house bar, fighting for both our members' professional rights and their clients' representational needs before courts, media, government agencies, legislatures and bar groups."[194] In recent years, ACC has exercised its voice with increasing vigor, weighing in on a range of policy issues ranging from the permissibility of multidisciplinary and multijurisdictional practice by lawyers in the United States to the whistleblowing provisions of the new Dodd-Frank financial regulatory reform.

Moreover, in addition to intervening in specific controversies, general counsels—particularly those in large multinational companies—are often in the position of deciding key public policy issues themselves. On many important public policy questions facing global companies—for example, establishing a company's policy on child labor standards to be followed by third party suppliers in countries such as India and China—relevant legal standards are likely to be ill-defined, under- or over-inclusive, or contradictory. In such cases, it is often up to the general counsel to craft a policy within these broad constraints that is consistent with both the company's economic interests and its values.[195] As a practical matter, how the general counsel crafts this kind

194. *Advocacy*, ASS'N CORP. COUNS., http://www.acc.com/advocacy/index.cfm (last visited Feb. 12, 2012).

195. Heineman, the former general counsel of General Electric, has been the most articulate defender of the role of the company's senior in-house lawyer in this kind of decision making. *See* BEN W. HEINEMAN, JR., THE GENERAL COUNSEL AS LAWYER-STATESMAN (2010), *available at* http://www.law.harvard.edu/programs/plp/pdf/General_Counsel_as_Lawyer-Statesman.pdf.

of private ordering—and what kinds of enforcement mechanisms he or she puts in place to see that the company's policies are being complied with on the ground—is likely to have as much or more effect on whether and under what conditions children work than many other kinds of formal legislation. The fact that the United Nations and other global regulatory bodies are increasingly attempting to enlist general counsels in creating larger corporate commitments to observe and protect human rights norms underscores just how important in-house counsel have become in the overall public regulatory system.[196]

It is not clear, however, that general counsels in emerging countries view either lobbying or socially conscious private ordering as a core part of their mission—at least not formally. But beneath the surface, the situation may be more complex. As indicated above, the government sector is arguably even more important to the corporate legal market in countries such as China, India, and Brazil than it is in the United States. Although general counsels as a group have yet to display much interest in pushing for legislative change in these jurisdictions, we have already heard anecdotal reports of individual GCs exercising their influence over public policy debates in a more private manner.[197] Similarly, as companies based in emerging economies themselves become multinationals operating in countries in Asia, Latin America, and Africa that have yet to emerge, it is likely that the in-house lawyers working within these organizations will also find themselves creating private ordering schemes that may affect issues of public concern.

Of course, even if general counsels in emerging markets decide to play this kind of role, it is far from clear whether they will be able to do so effectively. It is quite possible, for example, that the influence of ACC and other similar organizations in the United States is as much a function of America's highly legalistic culture as it is of the power of in-house lawyers. The fact that U.K. GCs have been far less successful at pushing their regulatory agenda than their U.S. counterparts is at least an indication that context may play a key role in the success of this last platform of the in-house counsel movement.[198] If this is the case, than one might expect in-house lawyers to be even less influential in

196. *See* John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L. 819, 819–20 (2007).

197. In one particularly striking example, the general counsel of a prominent company based in one of our primary research sites reported that he had been intimately involved behind the scenes in drafting an important piece of business legislation and that he had begun spending about half of his time in the country's capital city where he regularly meets with lawmakers and regulators.

198. *See* Madsen, *supra* note 48 (reporting that GCs in the United Kingdom have not been particularly successful in pushing their agenda).

shaping policy debates in countries such as China which have very little history of lawyers of any kind being influential in this arena.[199] All of this makes it especially crucial that any project to understand whether the in-house counsel movement is going global remain attuned to the overall political, social, and economic context in which these lawyers operate.

CONCLUSION

By conducting systematic, qualitative, and quantitative empirical research on each of these six topics, the GLEE project hopes to shed light on the extent to which the in-house counsel movement has emerged as an important force in the BIC countries and other emerging economies—and to the extent that it has, how the role played by internal counsel may differ in (and among) these jurisdictions to the one the movement claims for general counsel in the United States. In conclusion, however, it is important to note a certain irony about the manner in which I have framed this inquiry. The question whether the "in-house counsel movement is going global" appears to assume that the movement's claims about the importance and status of inside lawyers are unquestioned here in the United States. Yet even within the context of this symposium, which is dedicated to celebrating the importance of lawyers being "in the house," there are important dissenting voices that would challenge this basic premise.[200]

Indeed, to pile irony on top of irony, one of the most articulate and forceful of these dissenting voices is none other than Robert Rosen himself. In an article published in 2002, Rosen revisited many of the legal departments he had studied for his initial article chronicling the in-house counsel movement and found that several of "those that had been transformed in the 1980s and whose inside counsel were management's trusted advisors, have been re-engineered" in a manner that significantly altered their work—and more importantly, their self-image.[201] In response to the demand that they demonstrate their value to

199. Whereas lawyers have always played a significant role in government in the United States since the founding of the Republic, most of China's leaders have been economists and engineers.

200. This conclusion is dedicated to the memory of Larry Ribstein, whose tragic death shortly after the symposium, where these papers were first presented, sadly prevented him from completing a manuscript forcefully making this point. *See* Larry Ribstein, *Delawyering the Corporation*, 2012 WIS. L. REV. 305. His strong and articulate voice on these issues—and so many others—will be deeply missed.

201. Robert Eli Rosen, *"We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 661 (2002).

the company, Rosen argues that many legal departments have been redesigned to integrate in-house lawyers into functional project teams within the organization in order to work more closely with business units. Although this development may make it easier for business leaders to see the value of legal advice, Rosen submits, it may also affect how inside lawyers understand the kind of legal advice they are supposed to be giving. Thus, lawyers who come to identify too closely with business teams may begin to "approach managing legal risks with non-compliance as a viable option."[202] As a result, they may come to value the "appearance of 'independence'" as opposed to any real commitment to public purposes or detachment from client aims.[203] Rather than being the independent counselors trumpeted by the in-house counsel movement, Rosen concludes, internal lawyers in the twenty-first century are in danger of becoming just another "consultant" with no more independence or distinctiveness than any other corporate employee.

Some observers have gone even further in forecasting the demise of the core premises of the in-house counsel movement. Building on the growth of "smart" technology that is increasingly allowing companies to develop process-based solutions to many standard legal problems, Professor Larry Ribstein argues "in-house lawyers ultimately may find their own power eroded by products and services that replace customized legal advice with standardized technology."[204] As a result, Ribstein claims, "in-house legal departments" may be replaced "by law-trained people dispersed throughout the organization."[205] Although perhaps not signaling "the end of lawyers," as another prominent commentator highlighting the growing importance of information technology to legal practice has posited,[206] this replacement of "lawyers who have been inculcated with traditional professional norms to business people with legal expertise" nevertheless poses a significant challenge to the fundamental tenets of the in-house counsel movement.[207]

Needless to say, these are large and difficult questions, and I do not intend to address them fully here. Suffice it to say that any investigation of the evolving role of in-house counsel in emerging

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202. *Id.* at 660.

203. *Id.* at 649. Donald Langevoort makes a similar point in his contribution to this issue. *See* Donald C. Langevoort, *Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 493.

204. *E.g.*, Ribstein, *supra* note 200, at 311.

205. *Id.*

206. *See* RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES (2008).

207. Ribstein, *supra* note 200, at 330.

economies will have to take these critiques seriously. Indeed, given that we might expect companies in emerging economies such as India and China to be even more open to incorporating new technologies—technologies that have, after all, contributed significantly to the rise of these countries as important economic powers—it is certainly possible that corporations in these jurisdictions may be even more willing to look for "smart" solutions that allow them to turn to relatively inexpensive "law-trained" employees rather than to develop the kind of powerful and independent in-house lawyers contemplated by the in-house counsel movement. When coupled with the fact that norms of professional independence are much less well developed in some of these jurisdictions than they are in the United States, it could easily be that the move to integrate in-house lawyers into self-managing functional teams in Chinese companies, for example, could lead these internal counsel to adopt an understanding of their role that strays far from the kind of "counselor" who acts as an independent gatekeeper pushing the company toward legal compliance.

Nevertheless, one should also not automatically assume that these larger forces will prevent general counsel in the BIC countries from emerging as influential and independent advisors. As I have argued elsewhere, reports of the demise of lawyers as independent professionals are significantly exaggerated for both in-house and outside counsel in the United States.[208] Although the pressures Rosen and Ribstein identify are certainly real and important, both lawyers and clients have reason to push against them in order to realize the benefits that they can both only receive if the legal profession credibly maintains its status as an "independent" profession.[209] Moreover, the growing complexity of the global legal, political, and social environment in which companies increasingly operate is likely to put a premium on gaining access to the kind of integrated business and legal advice that sophisticated in-house lawyers claim to offer. How the increasingly sophisticated lawyers who fill these positions in companies around the world respond to this demand and attempt to balance the complex and often conflicting demands between their role as partners to their business clients and members of senior management teams, with their identity as lawyers connected to traditions of professionalism and independence is exactly what we hope to learn in this research.

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208. *See* Wilkins, *supra* note 22, at 2132.

209. *Id.* at 2117 n.207 (discussing the "paradox of professional distinctiveness").

Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession

By
Mihaela Papa (1) and David B. Wilkins (2)

(1) Postdoctoral Research Fellow
Program on the Legal Profession
Harvard Law School
23 Everett Street, G26; Cambridge, MA 02138
E-mail: mpapa@law.harvard.edu
Phone: 617-495-9134; Fax: 617-496-8489

(2) Lester Kissel Professor of Law, Vice Dean for Global Initiatives on the Legal Profession, and Faculty Director of the Program on the Legal Profession and Center on Lawyers and the Professional Services Industry
Program on the Legal Profession
Harvard Law School
1575 Massachusetts Avenue; Hauser Hall #312; Cambridge, MA 02138
E-mail: dwilkins@law.harvard.edu
Phone: 617-495-0958; Fax: 617-496-8489

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Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession

Abstract. Despite the importance of globalization for Indian lawyers, there have been surprisingly few attempts to integrate the rich scholarship on the processes of globalization with the sociology of the Indian legal profession, and to conceptualize and explain major recent legal developments in India in this context. This article uses three globalization processes – economic globalization, globalization of knowledge and globalization of governance – as lenses for analyzing the Indian legal profession. It argues that understanding these processes and their intersections can help frame a much-needed empirical investigation into the globalization of the legal profession in India, and possibly in other major emerging economies.

1. Globalization and the legal profession in India

"With changes in a country's stage of development come new challenges, which have to be met via a reform process… The legal profession must rise to the new opportunities that come about as a result of India moving to take her rightful place among the leading nations of the world… India deserves to be a leader in the global legal industry – this is our faith, our belief and our vision."

Dr. M. Veerappa Moily, India's Minister for Law and Justice, 2010[1]

It is by now common knowledge that globalization is transforming virtually every sector of the world's economy, and that this transformation has important implications for the rapidly globalizing market for legal services. At the same time, as economic power shifts, India, China and other emerging economies are becoming central players in this market. While scholars studying the legal profession have been increasingly interested in the globalization of the profession in general, there has been little debate about the effects of various globalization processes – economic and noneconomic - on the Indian legal profession, and recent scholarly attention to legal developments in India has largely focused on legal process outsourcing and foreign law firm entry.[2] These studies have laid a solid foundation for thinking about the integration of the Indian legal market in the world economy and about the growing interactions between the Indian legal community and legal communities in the US and other advanced economies. However, the analytical field is ripe for theoretical expansion driven by inquiry into how globalization changes the broader architecture and dynamics of the Indian legal profession.

In the pages that follow, this article draws together globalization literature with the scholarship on the sociology of the legal profession, situates the Indian legal profession at the center of globalization debates and demonstrates how its structure and characteristic

activities are constantly being negotiated in ways that echo the processes of globalization generally.[3] More specifically, this article argues that conceptual frameworks from the rich scholarship on the processes of globalization provide a new lens through which to analyze economic, political and social transformations occurring in the Indian legal profession.

As we demonstrate below, India is an ideal site to study the effects of globalization on lawyers. Since liberalizing its markets in 1991, India has emerged as one of the fastest growing economies in the world.[4] This economic development has been actively supported and directed by a set of government initiatives designed to promote legal innovation in the form of new laws and procedures, and in recent years, innovation in the legal profession itself. The Indian legal profession today consists of approximately 11 lakh (1.1 million) registered advocates (BCI 2010). Most of them represent clients in courts and other judicial bodies, working as solo practitioners or in a family-run concern. Since the 1990s there has also been a rapid growth of a new breed of Indian corporate lawyers who serve the expanding commercial sector, both domestic and international. They comprise over 150 larger law firms (the five largest of which now have more than 200 lawyers each) operating mostly from the major business centers (e.g. Mumbai, Delhi, Bangalore) and providing advice on transactions and other related services to Indian and multinational corporate clients. There is also a rapidly expanding "in-house counsel" sector, comprised of Indian lawyers working in the legal departments of domestic and foreign companies.

Although constituting no more than a tiny fraction of the Indian legal profession as a whole, this new corporate elite is nevertheless already at the center of many important legal developments in India. Thus, Indian corporate lawyers currently wield considerable influence in debates within India about legal education, professional regulation, legal process outsourcing and other innovative forms of legal practice, pro bono and public interest initiatives, and the role of law and legal institutions in Indian society. To protect and expand this influence, the Indian corporate bar works assiduously to restrict access to the Indian market by a range of foreign competitors who aim to integrate the Indian corporate sector into their existing global networks. As is often the case with globalization in other industries, the growth of the Indian corporate legal sector is likely to have a profound effect on the entire Indian legal profession.

Indeed, given the increasing importance of India's large law firms and corporate legal departments, it is fair to ask whether the Indian legal profession, like its US counterpart, is no longer a single profession at all but rather an amalgamation of two distinct and largely mutually exclusive "hemispheres," the first focused almost exclusively on serving the interests of Indian and foreign corporations, and the second comprised of the lawyers who represent the overwhelming majority of Indian individuals (Heinz and Laumann 1982; Heinz et al. 2005).[5] Although there are clearly many important differences between the Indian and the US context – not the least of which is the much larger size of the US corporate sector, there are, as we demonstrate below, already indications that many Indian lawyers and policymakers outside of the corporate world fear that this newly emerging corporate legal elite threatens the "essential" nature of the Indian legal

profession. The outcome of the debate over this and other similar issues regarding the structure and proper role of India's corporate bar, we submit, is likely to have important implications for India's overall legal, economic and political development – and given India's growing importance in the world economy, on the development of the global market for legal services generally.

Given the central role that we give globalization in our account, it is important that we be clear at the outset about how we are using this contested concept. For purposes of this analysis, we take globalization to mean "the closer integration of the countries and peoples of the world, which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and people across borders."[6] Unlike some scholars who work in this field, however, we view this phenomenon as a multidimensional set of social processes, rather than as a single process focused solely on a narrow set of actors or purely on economic activity (Steger 2003; Scholte 2000). Specifically, we will argue that three social processes commonly identified by globalization scholars in other areas help to explain the changes currently taking place in the Indian legal profession: economic globalization, globalization of knowledge, and globalization of governance. While there are arguably more globalization processes affecting the legal profession, we believe that these three capture the key challenges affecting the evolution of the Indian legal profession.

The first of these frameworks, "economic globalization," will be the most familiar to legal profession scholars. This framework refers to the increasing interdependence of national economies across the world and their progressive integration into the global economy through trade, investment and capital flows. At the heart of economic globalization is the case for free trade, which rests on the efficiency of the market-determined allocation of resources and on the opening of economic opportunities to the many (Bhagwati 2004). The opening of the legal services markets in emerging economies around the world, one of the final frontiers of globalization, is occurring amidst a crisis of neoliberal global capitalism and criticisms of unregulated corporate political power, unrestricted profit maximization and social justice (Cavanagh and Mander, 2009). These concerns are currently playing out in the intense debate about the opening of the Indian legal services market and concerns within India about the ways to protect the domestic industry and help it evolve.

Scholars studying the Indian legal profession have paid less attention to contests over the second two frameworks we discuss, namely the globalization of knowledge and the globalization of governance. As an analytical framework, globalization of knowledge refers to the global interchange and transformation of knowledge traditions. As new consensual knowledge emerges, local knowledge traditions globalize while global diffusion of new bodies of knowledge occurs (Held and McGraw, 2007, 133; 2003). In every country, the legal profession contains a set of cultural understandings about legal knowledge, how lawyers are educated, and what legal practice means. Since the founding of India's National Law Universities in the late 1980s, the Indian government has acknowledged that promoting the effective creation and use of legal knowledge is crucial

for development. The subsequent debates over the direction and content of legal education among public, private, domestic and foreign educational providers exemplify the knowledge production, transmission and transformation challenges in a globalizing world. These challenges are complicated even further by India's colonial history that focuses added attention on the provenance of ideas as well as their content. As the following analysis illustrates, in the process of transforming the legal profession, Indians have attempted to attract and domesticate foreign knowledge while simultaneously building on India's indigenous knowledge and imagination.

The final framework, globalization of governance, focuses on the transformation of the state's regulatory power when international and transnational regulation increasingly governs many policy arenas and non-state actors become more engaged in policy decisions (Drezner 2007; Karns and Mingst 2004). This framework, as we argue below, is becoming increasingly important to lawyers as the traditional idea of a single domestic regulator of the legal profession is challenged by a diverse set of institutions with a stake in its regulation. While lawyers in some parts of the world are affected by regional regulation such as the rules of the European Union or the North American Free Trade Agreement, for now, India's engagement within the South Asian Association for Regional Cooperation in Law (SAARCLAW) seems to be focused on building a common legal community among the association's members rather than pursuing joint regulation of the profession.

However, India is also a member of the World Trade Organization (WTO), which is working toward removing the barriers to trade in legal services and has enforcement powers that could potentially limit the scope of national policy. While the Indian government so far has not been eager to support the global regulation of lawyers, it is likely to be affected by these developments. At the same time, India's ambitions in other areas of global governance have increased, creating a demand for legal capacity building and strategizing to redesign global institutions. As globalization progresses, the regulatory performance of both Indian and global institutions will be tied to efforts to make those involved in governance more accountable. Since globalization produces vast inequalities, this process will give Indian lawyers the opportunity – and perhaps the responsibility – to address the social costs of globalization and advocate for its losers.

The next three parts of this article analyze these three processes in more detail. Before proceeding, however, it is important to emphasize the preliminary and largely theoretical nature of our inquiry. Given the speed with which events in this area are unfolding, there is very little in the way of systematic data on most of the topics we discuss. We therefore draw on a wide range of publicly available sources such as legal cases, government statements and reports, and articles in the legal and popular press. Our hope is that by helping to develop a theoretical synthesis of the insights developed by globalization scholars and those studying the sociology of the legal profession that this article can help to frame a more extensive, systematic and definitive empirical investigation into the way that the processes of globalization are reshaping the market for legal services in India and how these developments will affect lawyers in developed economies and the global market for legal services generally in the future.

2. Economic globalization

"The demand for opening legal services sector in India does not come from Indian businesses or professionals or even foreign multinational companies. Strangely, the demand comes from foreign lawyers and particularly those from the UK. It is obvious that the UK is witnessing a negative growth so far as legal profession is concerned. Accordingly, India and China offer good prospects—but the problem is that, in India, legal profession is not a business and it is not up for sale."

Lalit Bhasin, President of the Society of Indian Law Firms, 2009[7]

"I would rather fight someone openly than have to deal with surrogate outfits. You can give it any sort of euphemism, but foreign firms are already here."

Somasekhar Sundaresan, J Sagar Associates (in Vasani 2007, 15)

Globalization is already molding the legal landscape in emerging economies and blurring the boundaries between global and local. Global law firms spread their operations through corporate groups to expand to fast-growing markets, and local firms are altering their structures and products to globalize – although the extent to which these firms truly conform to global standards remains an open question (see, e.g., Liu 2008). Both international and domestic law firms find themselves in competition with other legal service providers, including legal process outsourcing companies, flexible staffing organizations such as Axiom Legal Services, accounting and consulting firms packaging legal and other professional services in multidisciplinary partnerships, and large and sophisticated in-house legal departments (Flood 2010). All of these global players must compete in markets where the vast majority of lawyers are solo or small-firm practitioners, and in a world where lawyers can potentially play – and in countries like India, have a strong tradition of playing – a crucial role in the maintenance of national identity and sovereignty, access to justice, and the rule of law.

The Indian legal market exemplifies all of these trends. India's impressive economic growth has led to a correspondingly impressive increase in the demand for legal services. Thus in 2010, RSG Consulting predicted that the top 100 Indian companies would spend $479m in legal fees that year, with the average Indian company expected to spend $2.5m and foreign clients $1.3m on India-related work.[8] India's large corporations, such as the Tata Group, Essar Group and Wipro top the list of corporate legal spending, by some estimates paying out approximately $50m, $15m, and $12m respectively in legal fees over the last two years (ibid). Furthermore, the overwhelming majority of top Indian corporations expect their legal spending to increase by as much as 11% annually (ibid). Although the Indian legal industry is still a relatively small part of the global legal services market, once the cost of in-house lawyers is added to legal spending, the total amount at stake in the Indian corporate legal market reaches well over $1bn annually, and this still does not include the revenue of the India's LPO sector, which has grown over ten years to rival the size of India's traditional corporate legal services market.[9] Although all of these figures may very well be overstated – consultants and other market participants have obvious incentives to inflate their projections – few doubt that the market for corporate legal services is both large and growing rapidly.

Although economic globalization has therefore transformed the demand for corporate legal services in India, it has not produced free trade in this sector of the economy. Notwithstanding continual efforts by foreign law firms to open offices in India since liberalization, the Indian market remains formally closed to their entry despite India's general open-door policy to multi-national corporations and foreign companies. As a result, many foreign firms have responded by establishing an indirect presence in the Indian market through liaison offices or other informal means. At the same time, Indian corporate law firms have strengthened and expanded. These trends highlight three different aspects of economic globalization of the legal profession in India: the debate over the liberalization of the legal services market; the actual competition between domestic and foreign law firms notwithstanding formal barriers to entry; and, India's evolution as the major center for legal process outsourcing.

Liberalization of the Legal Services Market: Legal Milestones and Political Arguments

Foreign law firms began showing interest in expanding to India in the early 1990s shortly after liberalization. Three firms (Ashurst, Chadbourne & Parke and White & Case) were granted liaison licenses, which allowed them to set up offices in India for liaison reasons, such as information gathering and dissemination. However, in 1995, the Lawyers Collective, a Mumbai-based public interest organization specializing in human rights advocacy, legal aid and litigation brought a lawsuit against these firms in the Bombay High Court, claiming that the firms exceeded the terms of their licenses and provided consultancy legal services through their offices. The lawsuit alleged that the presence of foreign lawyers in India was a violation of domestic law.[10] After almost 15 years, in December 2009 the Bombay High Court ruled that the original grant of licenses to the foreign firms had been done in violation Indian law. Specifically, the court held that both litigation and non-litigation work conducted by foreign lawyers in India was prohibited by the Advocates Act. As a result of the ruling, all three firms closed their liaison offices.

The Advocates Act of 1961 upon which the Bombay High Court based its ruling regulates all legal practice in India. The Act prohibits anyone other than an Indian citizen from practicing law in the country, even if the foreign lawyer in question has a degree from an Indian law school and confines his or her work to issues relating to their "home country" law.[11] As such, it makes the Indian regulatory regime one of the most restrictive in the world for foreign lawyers.[12]

Foreign law firms are now facing another legal challenge in India. In March 2010, a practicing advocate named A.K. Balaji filed suit in the Madras High Court against nearly thirty foreign law firms, including such global powerhouses as Allen & Overy, Clifford Chance, Linklaters and Freshfields Bruckhaus Deringer, as well as against Integreon, one of India's most prominent LPO providers. The lawsuit claims that all of these entities are illegally practicing law in India and seeks to ban them from engaging in both litigation and corporate transactional work.[13] The Bar Council of India (BCI), a statutory body created by Parliament to regulate and represent the Indian bar, filed a counter-affidavit which said that it had decided not to relax the restrictions prohibiting foreign lawyers

from practicing because it considered that this issue had been settled in the 2009 Lawyers Collective case. In an important decision in February 2012, the Madras High Court allowed foreign lawyers and law firms to participate in international arbitration proceedings in India and advise clients on foreign law on a "fly-in fly-out" basis, but foreign lawyers and law firms are still not allowed to practice in India, whether in litigation or non-litigation. Although a victory for foreign lawyers, the ruling has been criticized by the Bar Council of India and is currently being appealed.

Legal cases against foreign law firms are deeply intertwined with the active political debate over the processes and merits of economic globalization.[14] Liberalization advocates argue that market opening is better for both firms and clients. Since the number of transnational deals is increasing, those in favor of liberalization argue, everyone can profit; deregulation leads to the overall professionalization of the industry, increases efficiency, provides access to foreign expertise; and works to promote in-country expertise and retention of legal talent. Liberalization, according to these advocates, further enables clients to get a broader selection of law firms and better prices, and that it is only fair to allow foreign law firms to practice in India because Indian law firms may practice in other jurisdictions (including the US and UK).

Indeed, in recent years various parts of the Indian government have appeared to cast their weight on the side of those pressing for liberalization in this area, in part by procuring the services of foreign lawyers. For example, the Karnataka state government engaged the UK firm CMS Cameron McKenna to advise it on privatizing the state-owned electricity distribution system. In 2007, Indian law minister HP Bhardwaj said that foreign law firms should be allowed to practice their respective country's law in India and pushed for a consensus on the issue, although one has yet to materialize.[15] In a move that many considered a partial recognition of the fact that India would eventually have to open its legal market to the same extent as it has already opened its product and capital markets, the Indian Parliament passed the Limited Liability Partnership Act 2008. This Act allows foreign law firms to register, establish a place of business in India, and offer consultation services. It does not, however, allow foreign law firms to practice law. Not surprisingly, the boundary between these two professional domains – between foreign lawyers offering "consultation services" and engaging in the unauthorized practice of law remains highly contested. Thus, the petitioner in the most recent Madras High Court case explicitly challenged the mode of entry of foreign lawyers in India, alleging that they were operating out of five-star hotels and violating taxation and immigration laws – a charge, which the challenged foreign law firms vehemently deny.

While the decision of the Madras High Court provides an important opening for those in favor of liberalization, the forces arrayed against the entry of foreign law firms remain strong. One of the most vocal of these has been the Society of Indian Law Firms (SILF), which was established in 2000 as an independent organization apart from the Bar Council (which has formal regulatory jurisdiction over the profession) to provide a forum for the exchange of ideas among India's emerging corporate law firms and to provide a platform for their joint action. The SILF president Lalit Bhasin argues that India's legal profession "has a unique harmony based on a well-developed ethos, culture, tradition and a very

noble heritage"[16] and should not be treated as a commodity. Anti-liberalization advocates such as Bhasin worry that once foreign lawyers are allowed to practice, they would undermine this ethos and interfere in the workings of the Indian legal system. Regardless of the empirical basis for such claims, this kind of rhetoric underscores the important normative implications that the debate over economic globalization in the context of corporate legal services has for many participants.

These often expressed normative concerns, however, stand alongside a far less frequently articulated concern that allowing foreign lawyers to enter the Indian legal market would shrink the business opportunities available to domestic lawyers, particularly with respect to the high-end transnational work which constitutes the most lucrative part of the corporate legal services market. Those few who are willing to voice this concern openly often bolster their claim by pointing to the fact that Indian law firms continue to face a number of regulatory restrictions – including limitations on partnership size, advertising, contingent fees, and partnership with non-advocates – that would make it more difficult for Indian corporate lawyers to compete directly with foreign firms which are not subject to some or all of these restrictions. Although the Limited Liability Partnership Act of 2008 began to address such constraints and removed the restriction on the number of partners, significant challenges remain. For example, Indian law firms are still prohibited from maintaining a web site or distributing brochures that describe the firm's areas of practice and personnel. Needless to say, it is far from clear how much these remaining regulatory restrictions would actually impede the ability of Indian firms to compete with potential foreign competitors. From the standpoint of economic globalization, however, the important point is that the fate of these domestic regulatory restrictions has now become a part of a broader debate over the way that the Indian legal profession will respond both normatively and structurally to the pressures of the global marketplace.

Indeed, debates about foreign law firm entry are often embedded in broader debates about the nature of economic globalization generally. Thus, one of the most sensitive elements of the debate is the foreign (particularly UK) pressure on the Indian government to open the market. Many top UK law firms actively engage in the UK-India Joint Economic and Trade Committee, UK India Business Council and TheCityUK to push for the opening of the Indian legal services market. Although US firms have historically displayed less interest than UK firms in trying to serve the Indian market from afar, blockbuster deals such as the Taj Group's acquisition of the Pierre Hotel in New York City are likely to encourage more US firms to look for ways to access India-related legal opportunities. The fact that the president of the American Bar Association wrote an open letter urging President Obama to discuss the restrictions on foreign lawyers practicing in India during the President's 2010 state visit to India is an indication of just how seriously the US legal profession is beginning to consider this issue.[17] Anti-liberalization advocates are critical of foreign pressure and have deemed this neo-colonialism. The fact that Indian lawyers face barriers to practice such as licensing tests and immigration restrictions in the UK and the US, only underscores these opponents' concerns about equity and fair trade practices (Krishnan 2010).

Indirect Presence of Foreign Law Firms and the Rise of Indigenous Elite Law Firms

The fact that until the Madras High Court's recent "fly-in fly-out" decision the Indian legal market was formally closed to foreign firms, however, has not meant that these global players were not doing India related legal work. On the contrary, long before this recent opening, foreign law firms had already gained a foothold inside India through a wide range of associations and other relationships with Indian firms. Examples include Linklaters' "best friends" agreement with Mumbai-based Thawar Thakore & Associates; Allen & Overy's referral, training and joint - marketing relationship with India's Trilegal; Jones Day's associate relationship with P&A Law Offices in New Delhi; Clyde & Co.'s referral relationship with ALMT Legal; and White & Case LLP association with Mumbai's India Law Services. Relationships with Indian partners could potentially lead to formal contracts, mergers, or acquisitions. Clifford Chance and AZB & Partners, however, recently dissolved their two-year relationship because of the lack of tangible benefits, which suggests that this result is far from certain.

More importantly, whether or not international law firms have a presence *in* India, many of them actively work *on* India-related transactions from their London, Washington, Singapore or Hong Kong offices (Russell 2010). This is particularly true for UK law firms; virtually every "Magic Circle" law firm, and a significant number of the "Silver Circle" as well, has an "India desk" that employs dozens of lawyers. Many of these lawyers are hired directly from India's top law schools, and their full-time jobs are to serve Indian clients and conduct India-related transactions.

As foreign law firms attempt to profit from India's growth, Indian lawyers are not standing still. Before 1991-1992, conventional corporate legal activities such as project finance, investment law, intellectual property protection and environment regulation, were almost unknown in India and there was practically no market demand for junior or senior lawyers for any assignment coming from outside the country (ICRIER 1999). Since then, there has been tremendous growth in the number of lawyers working on corporate legal activities both within corporate law firms and as in-house legal departments in India-based corporations. For example, the prestigious Indian law firm Amarchand & Mangaldas did not have more than twelve senior and junior lawyers in 1991; now it is reported to have approximately 500 lawyers.[18] Another law firm leading the Indian market, AZB & Partners, had a similar growth spurt. Most top Indian law firms now spend a large percentage of their time on international work. For firms such as J.A. Sagar & Associates, Luthra & Luthra, Desai & Diwanji, and Nishith Desai & Associates, up to 70% of their overall work is now international.[19]

Furthermore, Indian law firms have started venturing abroad to capitalize on the inflow and outflow of investment. For example**,** Nishith Desai & Associates has offices in Palo Alto and Singapore, mainly to support its technology and venture capital clients. Another firm, Fox Mandal Little, is positioning itself to compete as an international law firm with its office in London. Indian firms seek to use these foreign offices both to assist UK, US and other multinational companies regarding their investments into India and to advise Indian companies on setting up in North America and Europe.

As India continues to face increasing pressure from the forces of economic globalization, two of the central challenges in the future development of the Indian legal services market will be allowing for the evolution of domestic law firms and clarifying the legality of foreign law firms' presence. The most recent case against foreign lawyers further complicates the situation by claiming that foreign law firms illegally practice in India under the guise of legal process outsourcing, which is a major growth area in India's service exports. Although the Madras High Court rejected this argument, finding that LPOs do not constitute "non-litigious legal practice" and may continue to provide this service to foreign and Indian clients, that ruling is under appeal.

India as a Major Legal Process Outsourcing Destination

India is one of the world's most important destinations for legal work from abroad. Legal process outsourcing - sending legal work traditionally handled inside a company or firm to an outside (in this case Indian) contractor for performance - is possible because of the disaggregation of legal services into separate component parts and sophisticated information technology. Outsourcing can provide substantial benefits to big law firms, in-house counsel, mid-size firms, and solo practitioners because it saves both money and time. Outsourcing firms charge one-tenth to one-third what a traditional Western law firm charges per hour.[20] The average client cost savings are 44%, which is higher than for any other outsourced function (PwC 2009, 15). Outsourcing also potentially saves time because traditional lawyers can focus on the value added to the final product, instead of on routine tasks like electronic document management and review, legal research, and due diligence services. Law firms do not need to train junior lawyers to do these menial tasks, and they can also benefit from time zone differences, which make 24-hour workflow possible.

India has assumed a dominant position in the LPO market for several reasons. First, India has a vast pool of educated, English-speaking lawyers and paralegals, and it utilizes a common law system, similar to the one practiced in the US, UK and Australia. The government also promotes the industry by giving LPO entrepreneurs financial incentives such as generous tax breaks and subsidies on commercial property (see Krishnan 2007). Perhaps most important, the Indian LPO sector is embedded within a larger world of Indian service-led growth. After great success with low-end business process outsourcing (BPO) of back-office functions such as administrative and support work, India became a destination for knowledge process outsourcing (KPO) as companies started outsourcing higher-end work on intellectual property, market research and data management, equity and finance, and analytics. As Agarwal and Nisa (2009) argue, India has the potential to become a world leader in KPO: "The growth rate in this sector is very high, 45% in KPO as compared to 26% growth rate of BPO. In 2003-04, the KPO business was worth $720 million out of the total BPO work of $3.6 billion." By 2010, KPO is expected to grow to $12 billion, while the entire outsourcing industry will be worth $18 billion" (ibid, 85). While the current size of the LPO market in India is debated, analysts agree that the LPO industry is growing rapidly.

The future trajectory of the LPO industry will be affected by the strategic positioning of LPO providers in the legal services market and by the evolution of the normative context

in which outsourcing takes place. Indian LPO providers compete in different niches of the legal services market and employ various strategies: some capture profit by competing on scale and efficiency, while others compete by climbing up the legal services value chain or by delivering multi-disciplinary professional services (Sako 2009). Indian LPO providers that aim to capture profit through cost of work per hour and process efficiency face competition from companies headquartered in other English speaking jurisdictions such as the Philippines (PwC 2009, 6). Those that compete by climbing up the value chain face a different challenge: they rely on in-house legal knowledge, so they need to find and retain talented workers. Although the bulk of LPO work is low end, higher-end (associate level) services are common in areas of practice such as intellectual property. This owes partly to the fact that many global corporations already have research and development centers in India where they file patent applications, trademarks, copyrights, etc. Finally, as the LPO industry becomes more competitive, some LPO industry players aim to profit from delivering multi-disciplinary professional services. Big business process outsourcing companies such as Wipro, as well as auditing and advisory companies like KPMG, are positioning themselves in the LPO market and challenging smaller providers.

Moreover, the market for LPO services, like all processes of economic globalization, is embedded in the larger normative context, where the ethics of outsourcing is extensively debated. Many stakeholders raise concerns about client confidentiality, conflicts of interest, unauthorized practice of law by non-lawyers, disclosure, supervision, discipline, malpractice, and tort liability (Pollak 2006; Fischer 2010). The American Bar Association has formally held that "there is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the 'legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation…'"(ABA 2008). Nevertheless, many US lawyers continue to view the phenomenon with suspicion. Much of this suspicion stems from issues beyond professional ethics or even the technical competency of LPO providers to deliver quality service. For many LPO opponents, the real concern is over the structural implications of outsourcing, such as the potential loss of American jobs and the effect that sending lower level work to India could have on the training and development of the junior associates in US and UK law firms (Owen 2008). Although there is little hard empirical evidence on either count – and it is equally pluasible that performing lower level work more efficiently offshore will actually increase demand for higher end legal services in the US (e.g., by decreasing the overall cost of litigation and thereby increasing the willingness of companies to go to court), and may even improve the lives of junior associates (by freeing them from the drudgery of low end work) – it seems clear that in the coming years the LPO debate will be shaped by the same concerns about the effects of globalization on US employment that have come to characterize debates over economic globalization generally.

Indeed, there is mounting evidence that the process of economic globalization in the LPO sector is following patterns similar to those seen in other parts of the economy in which developments initiated by established global players to take advantage of the low cost structure in developing countries end up creating new global players in those countries

whose practices in turn diffuse to transform more developed markets. Thus, while concerns certainly exist that the more widespread outsourcing becomes, the more likely it will devalue and thus reinforce the North-South developmental divide, outsourcing is not necessarily a one-way process with primarily US users engaging Indian providers.[21] Major LPO providers like CPA Global, Pangea3 and Integreon increasingly operate directly in established markets such as the US, Europe and Australia, each of which now contribute a significant amount to their revenues. In addition in each of these markets, the success of these Indian companies has now spawned a number of domestic "nearshoring" competitors seeking to offer similar cost savings to corporate clients by locating in economically depressed areas in the US and UK and by hiring lawyers who either cannot get – or do not want – the kind of high paying, but high pressure, legal jobs offered by traditional elite law firms.[22]

The analysis of the Indian legal profession from the economic globalization perspective illustrates the difficulty of controlling globalization of firms when markets, including the market for corporate legal services and LPO, have already globalized. Given that foreign lawyers are primarily interested in advising clients on international commercial transactions and most of the India's lawyers are engaged in domestic practice, there are significant opportunities for building consensus. The polarization of the debate and the need to reform regulation to protect indigenous industry are major barriers to moving forward. In the long term, however, India will have difficulty sustaining its position on foreign lawyers because of both the internal politics of the profession and external political pressure.

Internally, it is difficult to sustain arguments about keeping out foreign law firms based on traditional ideals of the Indian legal profession and its nobility when the newly emerging corporate "hemisphere" of the profession is rapidly developing norms and practices that are distinct from those of traditional Indian practitioners – and that increasingly resemble those of the foreign firms that they seek to exclude. And even if established law firms continue to proclaim their allegiance to traditional ideals, there is a growing generation of younger and more entrepreneurial Indian corporate lawyers (often from families who have not been a part of India's traditional legal elite) who are eager to take advantage of the new opportunities provided by liberalization. Finally, the existence of a booming LPO sector which employs the members of the same "profession" in roles that appear to have little to do with the practices of traditional Indian lawyers – in organizations that are frequently owned and operated by non-lawyers – is likely to place even greater internal stress on arguments that seek to exclude foreign law firms on the ground that they are inconsistent with domestic ideals. Indeed, this potential incoherence helps to explain the otherwise seemingly odd inclusion of an Indian LPO firm as a defendant in the lawsuit described above filed by A.K. Balaji against "foreign" lawyers practicing in India. As the Madras High Court's decision suggests, Integeron, like virtually all Indian LPOs, works almost exclusively for US and UK clients, providing document and other basic support to these foreign companies with respect to matters pending outside of India, making it difficult to argue that these companies are practicing law in India. But the fact that Integreon and other Indian LPOs are an increasingly important employer of Indian lawyers, create opportunities for Indian legal education providers, and enjoy the Indian government's support given the country's larger

outsourcing ambitions makes the tension between this undeniably "new" and "global" model of legal practice and the one that implicitly underlies the argument that the Indian legal market should remain closed to avoid the "commercializing" influence of foreign providers even more severe. As a result of these trends toward specialization within the Indian legal profession and the competing interests of its stakeholders, arguments based on domestic interest and professional nobility are likely to be increasingly more difficult to defend.

With respect to the external political dynamics, India as a signatory of the General Agreement on Trade in Services (GATS) is under pressure to engage in the progressive removal of trade barriers and to liberalize services markets generally. The fact that the Indian government maintains a generally pro-free-trade attitude further highlights the difficulties of legal protectionism (Government of India 2006). As India develops a greater stake in, and dependence on, other legal markets (either through the expansion of Indian law firms or through outsourcing) and demands that other countries pursue liberalization in sectors related to India's interest, it will necessarily become more vulnerable to foreign influence and more willing to open its legal market. As this debate plays out, Indian lawyers are immersed in another globalization process where boundaries are even less clear: the globalization of knowledge.

3. Globalization of knowledge

"If we are to have a society... where the common man and common woman gets speedy and affordable access to justice, if we are to have in our country the turbulence in effect of the rule of law, if we are to have an economic environment where contracts are easily enforceable, then we must ensure that our law teachers, practicing advocates, corporate luminaries, legal advisors, judicial officers and legal facilitators are indeed men and women of very high intellectual caliber."

Prime Minister Manmohan Singh, 2010[23]

As globalization increases the flow of people and information across borders, it inevitably leads to the interchange of knowledge traditions. This process has important implications for law and its affiliated institutions and practitioners. As economies and legal markets adapt to globalization, law can no longer be constrained within national boundaries. Legal systems influence each other; civil, common and religious laws mix; the public/private distinction blurs; and international law extends its coverage to more subjects. More foreign lawyers work with and in India, and Indian lawyers are more affected by foreigners: some work abroad, while others work from India for foreign companies or international institutions. This dynamic process of exchange and adaptation has important implications for the sociology of the legal profession in emerging markets such as India.

Specifically, the globalization of knowledge is already reshaping key debates about the formal structure of legal education, the content and progeny of legal norms, and the informal processes through which formal rules and norms are interpreted and diffused throughout real institutions and practices. Many argue that Indian lawyers need

innovative programs of integrated interdisciplinary legal learning, as well as expertise in areas such as comparative law, intellectual property, corporate governance, human rights, international trade and investment, and alternative dispute resolution (e.g., Ahmad 2009). Yet this adaptation to the globalizing world also illuminates the need to go beyond producing new "legal technicians" for a range of legal markets and to enable lawyers to respond "holistically and meaningfully" to contemporary challenges (Baxi 2007). This section discusses India's ambitious attempts to reform legal education and considers how the globalization of knowledge raises many questions about the nature of legal knowledge and models of development of the legal profession. As we will see, the fact that India is a postcolonial country with significant legal needs, and is therefore highly sensitive to the extent of foreign influence in the production of knowledge and to the transformations of the role of lawyers in society, complicates this analysis even further.

Educating Indian Lawyers to Work in a Globalizing World: Modernization and Reform of Legal Education

In the 1980s, even before liberalization, the Indian government had embarked on an ambitious campaign to modernize and improve legal education. It was dissatisfied with the poor quality of Indian law schools, especially when compared with India's engineering and medical schools. To rectify this situation, the government began creating a small number of very selective National Law Universities (NLUs) that would do for the legal profession what the Indian Institutes of Technology was already accomplishing for the engineering profession. These NLUs were expressly designed to be centers of excellence that would train graduates to be both technically competent and socially conscious and engaged. Few dispute that the NLUs have met the first of these objectives: the quality of these schools is exceptionally high and students benefit from integrating the study of law with another degree of their choice, and from the engagement of dedicated teachers and high-level legal practitioners. With respect to emphasizing social engagement, however, the evidence is considerably more mixed (Krishnamurthy 2008; Ballakrishnen 2009).

A recent study of the 2010 graduates from the three highest ranked NLUs in Bangalore, Hyderabad and Kolkata (n=244) indicates that the overwhelming majority chose careers either in corporate law firms, both Indian and international (44.2%), or in legal and business positions in large companies (20.9%).[24] Less than 5% of the graduates of these institutions joined the Indian civil service, and less than 1% began their careers with an NGO or public interest organization – the same percentage as joined an LPO. Even joining the chambers of a senior advocate or assuming another similar position in the traditional Indian litigation bar, the traditional destination for Indian lawyers prior to liberalization, accounted for less than 10% of graduates. Although many factors undoubtedly contribute to this distribution of career choices, the most obvious is compensation. Annual pay packages at litigation offices can be as low as $3,300 compared to around $20,000 in law firms.

The fact that these patterns appear similar to what one might see at a top US law school is further evidence that the Indian legal profession, like its US counterpart, may be dividing

into separate – and self-replicating – hemispheres, in which one of the primary functions of elite law schools is to feed students into the expanding corporate arena.[25] Needless to say, this was not the government's intent when it created the NLUs. Indeed, the government has launched new initiatives aimed at increasing interest in public sector jobs, such as the recent initiative that NLUs nominate exceptional candidates for internships in the Ministry of Law and Justice. However, since economic globalization will create more opportunities in the corporate sector, encouraging top students from top NLUs to take jobs in the litigation and public service sectors is likely to remain a major challenge.

To be sure, even if these hiring trends persist, the fact that the NLUs graduate only a tiny fraction of the total number of Indian lawyers will mean that it will take a very long time for the Indian corporate sector to approach the overall size of the "personal plight" (to use Heinz and Lauman's original evocative phrase) sector of the Indian bar where most Indian law graduates continue to be employed. But even if the overall size of the corporate sector remains relatively small in relation to the Indian bar as a whole, the pattern of elite replication suggested by these placement patterns from the NLUs is still significant (Katz et al. 2011). The fact that similar placement patterns in the US have persisted since at least the 1920s notwithstanding concerted efforts by legal reformers to encourage American law students to pursue public interest careers, illustrates the difficulties of changing this dynamic (Reed 1921, Granfield 1992)

The pursuit of better legal education and social awareness is now fueling another wave of reform efforts in this area spearheaded by the Ministry of Law and Justice and the Bar Council.[26] The reform effort, as explained by the then Law Minister Dr. Veerappa Moily, rests on three pillars: "expansion, inclusion, and excellence."[27] Among the reforms being considered are the creation of four regional level "centers of excellence," establishing a NLU in every state, and evaluating each of the country's existing law schools for quality and integrity. In addition, the Indian government has promised to create a national law library and an online legal e-learning network, to increase scholarships and fellowships for potential students in disadvantaged sections of society. It also aims to focus on attracting quality faculty through better service conditions and remuneration and establishing a global standard research tradition. In proposing these reforms, the government aims not only to create and nurture a pool of talent, but also to focus on social responsibility and a strong professional ethic.

The Bar Council has pushed to go even further. As of 2010, there were approximately 500,000 law students in India, with approximately 60,000 graduates joining the legal profession after successfully completing either three or more years of exclusively legal study or a five-year integrated bachelor and law degree.[28] The Bar Council proposed to change this system by phasing out three-year LLBs (making the five-year LLB degree the norm and allowing three-year programs only if they focus on specialized areas of law), introducing benchmarking of law colleges, standardizing the academic calendar, creating a new national curriculum and improving teaching and continuing education (BCI 2010). Indeed, the former head of the Bar Council recently proposed slashing the number of Indian law schools by more than 80%, from 913 to 175.[29]

Although it remains to be seen how many of these reforms will be fully implemented, the Bar Council and the Ministry of Law and Justice have already pushed through one significant change that is likely to have an important impact both on legal education in India and on the Indian legal profession as a whole – a mandatory bar examination. It is too early to tell whether the new bar examination, or any of these other proposed reforms, will lead to an increase in the quality of Indian legal education, or whether these measures will simply decrease the overall supply of Indian lawyers in a manner that primarily benefits the incomes and prestige interests of established practitioners. If the history of similar efforts to improve US legal education by imposing heightened accreditation requirements on law schools (resulting in the closure of many night and part-time programs) and instituting a mandatory bar examination at the turn of the twentieth century is any indication, the lasting effect is likely to be a complex mix of both (Auerbach 1976). What is certain, however, is that these legal education reforms in India are strikingly different from those undertaken in the1980s. India's greater integration into the world economy has increased the number and diversity of stakeholders in the legal education debate, which in turn is likely to produce a very different kind of reform.

The perceived need to respond to globalization by improving India's access to and production of world-class knowledge has also spawned several private law schools. These new players have captured different niches of the legal education market. Some law schools, like the Amity Law School in Delhi (founded in 1999), aim to promote a broader, multidisciplinary analysis of socio-legal problems. Others, such as the corporate- and energy law- focused UPES College of Legal Studies in Dehradun emphasize specialized legal education. Still others, such as the Jindal Global Law School, emphasize global curriculum and legal research. In addition to private law schools, India houses a growing number of for-profit companies offering education, certification, and placement services for the expanding LPO sector. Such programs provide future LPO employees with a basic understanding of LPO work, the nature of US and UK legal systems, and US and UK ethics requirements. For example, Mumbai-based talent management firm Rainmaker and Indira Gandhi National Open University have partnered to offer a one-year course for lawyers and final-year law students. The course leads to a post-graduate diploma in LPO.

Finally, foreign universities may also open their own campuses in India. As a result, Indian students can obtain foreign degrees without having to go abroad. However, despite the fact that all foreign law schools may establish branches in India, only the degrees in law from some universities abroad enjoy recognition by the Bar Council of India – other universities need to go through often complex negotiations. Still, the diversity of educational initiatives has the potential to increase competition and the quality of education, but the extent to which it will increase the engagement of ordinary Indians and improve their access to legal services remains to be seen.

Whose Knowledge? India's Consumption and Production of Legal Knowledge

Indians generally value foreign education very highly: India accounts for 4% of the world's overseas students, and they spend around $3bn on higher education overseas annually (ICRIER and CII 2007). However, India is wary of becoming an importer rather than a producer of knowledge and of undergoing cultural homogenization. Foreign influence on the Indian legal system is a controversial topic, especially given the weight of India's colonial past. The contemporary legal system is built on the foundations of the system constructed during the British colonial rule, which puts legal educators in a peculiar position: on the one hand, they teach principles of law passed on from the colonial encounter, and, on the other, they need to conceptualize their relationship to the Indian legal system before the British (Subbanarasimha 2007). During their rule, the British were also successful in establishing a legal elite in India that believed in the English legal system (Dezalay and Garth, 2010). This elite continued to seek legal education and to practice in the UK, and exercised intellectual and political influence upon its return to India. Some of the most important historical figures in India's political and legal landscape like Mahatma Gandhi or Jawaharlal Nehru were British-educated lawyers. Even today, some of the most important members of the country's legal elite, including the current Law Minister Salman Khurshid, have obtained law degrees from Britain.

American influence, however, has become increasingly relevant with the advent of Indian independence. This influence has been channeled through several sources, including: legal precedent (e.g., in the field of constitutional law); Indian students in the US and US scholars in India; and, through US funding to study India and create new institutions such as the Indian Law Institute (Dhavan 1985). The initial attempt by US funders, especially the Ford Foundation, to transplant US institutions and models to India was largely unsuccessful. As scholars of this initial period now widely acknowledge any real improvement had to come from Indians, not outsiders, so only after Ford abandoned its work in this area did substantive reforms occur (see Krishnan 2005). For example, N.R. Madhava Menon championed the reforms and incorporated several of the suggestions made by the US consultants, but imbued the reforms with a distinctively Indian character (ibid). Subsequent projects attempted to shift the conceptual paradigm from exporting knowledge to implementing a model of collaboration, which encourages interaction for mutual exchange of experiences and mutual benefit (see, e.g., Schukoske 1999; Maisel 2008). As Marc Galanter has demonstrated, increased emphasis on empirical legal scholarship in the US has enhanced the paradigm shift and the sensitivity to the Indian context.[30]

Indian attitudes toward legal knowledge have also undergone a dramatic transformation. Several decades ago, as Dhavan (1987) argued, the Ministry of External Affairs equated the professions of tailoring and law as subjects unworthy of government support. It dismissed legal study as little more than vocational training compared to nationally significant pursuits like science and technology. The situation has changed dramatically. The National Knowledge Commission, constituted in 2005 as a high-level advisory body to the Prime Minister of India, explicitly acknowledged the need for original legal research to generate ideas that will help meet the challenges of globalization in a manner responsive to India's needs and its constitution (NKC 2007, 45).

While there has therefore been a clear transformation in the attitude toward legal research, prioritizing and funding research remains a challenge in Indian universities. A ICRIER and CII (2007, 15) study reports that expenditure on R&D in India is 0.81% of GDP compared to 2.6% in the US, and that India has 119 researchers per million people, as compared to 4,484 in the US. Furthermore, the Times Higher Education World University rankings of 2010 based on teaching, research, citations and industry income do not feature a single Indian university among top 200 universities in the world (China has six, Hong Kong four and Singapore two, see THE, 2011). Given that English is used for teaching and research in India, however, India's legal knowledge should be able more easily to penetrate global knowledge production. This creates an important opportunity for Indian academics.

Newly established law schools are well aware of the importance of promoting legal research. This is the case with both public and private institutions. The NLU in Orissa, established in 2009, for example, expressly aims to create conditions conducive to incubating scholarly activity, including creating specialized research centers and linking legal research to socially relevant issues. On the private front, the establishment of the Jindal Global Law School (JGLS) in 2009 was a watershed event in terms of the strategic promotion of legal research. As its name implies, the mission of JGLS is to train lawyers to a global standard and to become a center of legal thought and knowledge creation in the same league as top US and UK law schools. In addition to recruiting Indian faculty who have graduated from top international universities –a practice that is now common at top NLUs – JGLS has also taken the much more unusual step of hiring several non-Indian professors on its permanent faculty. The school also offers a strong global curriculum, multiple research programs, and emphasizes publishing through its annual JGLS Law Review. These virtues, however, come at a steep price that few can afford. Tuition at JGLS is Rs 6 lakhs ($12,500) per year – around three times more than the most expensive NLU and around twenty times more than non-elite law schools.[31] However, this investment in Indian legal research may enable India to raise its profile in legal scholarship and export some of its original ideas.

Tacit Knowledge and Professional Socialization: Changing Notions of the Legal Profession and the Practice of Law

As much contest as there is over the globalization of knowledge with respect to the formal educational system and the competition between foreign and domestic sources of legal theory and materials, it is in the area of the tacit diffusion of new ideas about the appropriate norms and practices of lawyers that the globalization of knowledge has proven most controversial in India. As ideas about law and lawyering cross borders and technological developments make new ways of lawyering possible, traditional understandings of the legal profession in India are being challenged. These traditional ideals have been largely court-centered, since the majority of Indian lawyers appear regularly in court. Indeed, the practice of law is more synonymous with litigation in India than arguably in any other jurisdiction in the world (Mendelsohn 2006). As a result, for many Indian lawyers and policymakers, the key norms of the legal profession should

revolve around improving the administration of justice, which in the eyes of many, forms "the back bone of society, because it enables society to function avoiding conflicts and confrontations as far as possible" (Gupta 2006, 35).

Even in this traditional arena, however, the pressures of economic globalization are diffusing new expectations about the proper role and functioning of the judicial system. In part because of their increasing contact with, and knowledge of, other judicial systems, a growing number of Indian lawyers and policymakers are reconsidering their approaches to judicial delays. Delays are a significant problem in India because they deny the common man access to justice, decrease the morale of and respect for legal professionals, and impede India's growth. Data suggests that Indian judiciary would take 320 years to clear the backlog of 31.28 million cases pending in various courts, including the High Courts.[32] Indeed, as we indicated above, even high profile cases like the one brought against foreign law firms can take more than 15 years to resolve. The economic cost of the delay has been estimated at 2% of India's GDP.[33] The government aims to reduce the pendency from 15 years to three years, and parties themselves try to prevent their disputes from reaching the courts in the first place and turn to alternative dispute resolution. Some forms of traditional mediation such as Panchayats have persisted to the present day, and new traditions such as lok adalat (people's court) are spreading (Galanter and Krishnan 2003). While the development of various forms of mediation in India seems to hold promise, it faces significant challenges, including the availability of trained mediators, judicial evaluation schemes, or lawyer compensation methodologies (Chodosh 2003; Xavier 2006).

Similarly, arbitration has emerged as a crucial dispute settlement method for businesses operating in India and companies doing business with Indian firms. During the economic reform periods, India enacted the 1996 Arbitration and Conciliation Act, which took the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration as its model. While Indian legal elites, including the former Law Minister Moily, had the ambition to turn India into a world-class arbitration center, doing so would require developing a culture of arbitration. This would include changing the attitude towards arbitration, improving the enforcement of arbitral awards, defining the extent of involvement of the Indian judiciary and encouraging specialized study and research in this field. Online dispute settlement is also being tested in India. Only a tiny percentage of total disputes employ this method, but it assists greatly in small business disputes when the parties are in disparate locations, and it has been used in National Internet Exchange quite effectively (Agarwal 2006).

As important as these changes to traditional normative understandings and practices have been for Indian litigators, the potential shift in the world view of Indian corporate lawyers resulting from the globalization of knowledge could end up being even more significant. Many in the Indian bar fear that foreign firms will "alter the profession at its roots and create a much more commercial, even mercenary, approach to the business of law in India"[34] As we indicated above, this charge is increasingly in tension with the realities of the Indian corporate bar, where many firms have adopted norms and practices that look very similar to those of the foreign firms that this argument seeks to criticize.

Nevertheless, although the globalization of knowledge is likely to ensure that aspects of US and UK style law practice continue to diffuse through the Indian corporate legal market, this does not mean that India's large law firms will adopt norms and policies that are identical to those that have come to define their counterparts in the developed world. In the 1990s, for example, many important European law firms resisted the diffusion of aspects of the "Cravathist" model of the production of law based on large, multi-purpose, commercially-oriented law firms tied to the business world that had already come to dominate the Anglo-American corporate legal landscape (Trubek, et al 1994). Instead, these firms retained important features of a more traditional "European mode of production of law" (ibid) which placed far greater emphasis, for example, on academic interpretation of codes and rules, arguably better reflecting the way the legal system was structured in Europe. Similarly, it is possible that many uniquely Indian aspects of the legal norms and practices of the Indian corporate bar will survive globalization. For example, notwithstanding their tremendous growth in size and profitability, virtually all of India's important law firms retain an important element of family ownership and control. More importantly, the globalization of knowledge, like economic globalization, is a two-way street. Thus, if global law firms are ever allowed to open offices in India, it is likely that their ultimate structure and culture will borrow heavily from the prevailing norms and practices of Indian law firms. Certainly, this has been the case in China, where US and UK law firms have gone from filling their offices in Shanghai and Beijing with expatriates trained in the Cravath model of law practice to native-born Chinese lawyers (Liu 2008).

Whether cultural differences will ultimately amount to a distinctive Indian "mode of production of law" and whether this mode can be sustained in light of the increasing pressures of globalization remains to be seen. There is little doubt that the number of European law firms that have been successful in resisting the pressures of Cravathism has declined significantly since the mid-1990s primarily because of the ability of Ango-American firms to "merge" – or more accurately buy – important, but less profitable, European firms (or lure away their top partners) following the liberalization of their respective legal markets. But even if economic globalization is likely to make it increasingly difficult to maintain purely "Indian" (or any other purely "national" style of legal practice, it is not at all clear that these national models will simply be replaced by a single Anglo-American one based on the traditional Cravath system. In Australia, for example, several US and UK firms have taken advantage of that country's relatively liberal rules of foreign entry to establish offices, often by acquiring local Australian firms. But the most anticipated merger in Australia is the rumored integration of Mallesons, arguably Australia's most prestigious law firm, with the Chinese law firm King & Wood. The fact that King & Wood is also rumored to be in talks with a major South African law firm – which would make it one of the largest law firms in the world – stands as an important signal that in a world in which the US and the West no longer dominate economically, alternative models of corporate legal practice emanating from emerging economic powers such as China and India may also become dominant. This is particularly true as the "Cravathist" model of legal practice is undergoing its own internal transformation in the US and UK – a transformation fueled in large part by the forces of

economic globalization and the globalization of knowledge described above (Susskind 2008).

Given all of these dynamics, it is not surprising that we observe contradictory – and to a certain extent counterveiling – developments in India. India wants to modernize its legal education system to adapt to the new context, while continuing to advance the knowledge of law based on distinctly Indian problems and perspectives. In this way, India is hedging its bets between those who claim that the nature of law is predominantly local, and law does not converge around a uniform standard, and those who assert that Indian law schools cannot afford to limit their focus to teaching and research on issues relating to Indian law, but need global courses, global programs, global curriculum, global faculty and global interaction (Kumar 2009; Silver 2009). New legal coursework and some corporate law practices may converge around Western models, and new international styles of practice such as "virtual" lawyering are now emerging. Yet local traditions of legal practice globalize in their own ways and are debated in the context of indigenous legal needs. The resulting "glocalization" leads to increasing diversity, competition and innovation in legal education and legal practice and has the potential to increase the quality of legal professionals. Yet, globalization also makes it more difficult for legal professionals to distinguish between global and local, preserve their predominately court-centered identity and define clear boundaries of their profession. This discussion brings us to the third process of globalization affecting Indian lawyers - the globalization of governance, which looks more closely at the regulatory changes in the context of globalizing Indian legal profession.

4. Globalization of governance

"We share the perception that the world is undergoing major and swift changes that highlight the need for corresponding transformations in global governance in all relevant areas. We underline our support for a multipolar, equitable and democratic world order, based on international law, equality, mutual respect, cooperation, coordinated action and collective decision-making of all States."

BRIC (Brazil, Russia, India, China) Summit Joint Statement 2010

Globalization places great stress on existing patterns of governance, but it also presents new opportunities for actors and institutions in the legal industry. Traditionally, sovereignty meant that a state had exclusive jurisdiction over its territory. Law and lawyers were the exemplars of this territorially bounded world. States, and sometimes sub-state units and even municipalities in countries such as the US and Germany, were the only regulator of the legal profession and were able to control the development of law. Today, sovereignty is much more complex. States coexist with a myriad of other non-state actors, including international institutions, transnational corporations and non-profit organizations. These actors engage in law-making, redefine their roles, and potentially constrain the power of the state, which raises concerns that state sovereignty is eroding or disaggregating (see Jayasuriya 1999; Slaughter 2004).

Globalization of governance presents three major challenges for the legal profession. Given that the roles of domestic regulatory institutions are evolving, the first challenge is to understand who regulates the legal profession. Second, as international institutions and global governance architectures become more relevant and India transforms into a world power, the country needs lawyers that can support its rise and shape the global legal order the way India sees fit. Finally, the regulatory performance of both Indian institutions and global governance mechanisms will be tied to efforts to make governance more responsible and address the social costs of globalization.

Who Regulates the Indian Legal Profession?

Traditional accounts of the sociology of the legal profession invariably begin with the assumption that in order to be considered a "true" profession, lawyers must exercise the power of self-regulation (Parsons 1954). To be sure, in most jurisdictions the legal profession's claim to be self-regulating has been as much ideology as fact. Even in the US, for example, where the ideology of self-regulation is deeply ingrained in the legal profession's self-understanding, lawyers have always been subject to a variety of forms of external regulation and control from the judiciary, state actors, private litigants, and, of course, the market (Wilkins 1992). Although the question of which entities actually do – and should – regulate lawyers has therefore always been both complex and contested, the processes of globalization are raising both the complexity and the stakes dramatically. As economic globalization underscores the importance of having a well-functioning and globally competitive legal profession, governments around the world are moving to exert greater control over the standards, size, qualification, and discipline of legal practitioners. Perhaps nowhere has this process of state intervention been more comprehensive, or more symbolically important, than in the UK. In 2007, the UK enacted a series of reforms that essentially transferred plenary control over the legal profession from professional bodies such as the Bar Council and the Law Society to a governmental agency headed by a non-lawyer. As of October 2011, these and other similar reforms are now in effect (SRA 2011). Given the UK's importance in the globalizing market for legal services, it is not surprising that this new approach to "professional" regulation is being diffused through the processes of the globalization of knowledge to emerging economies such as India.

One can see this complex process of diffusion – and resistance – in the battles currently being fought over who should regulate the Indian legal profession. Currently the Bar Council of India along with the state bar councils govern and supervise the legal profession. However, in November 2010, the Indian Ministry of Law and Justice proposed a new "super-regulator" that would exercise supervisory jurisdiction over all bar councils, including the BCI. This new body, the Legal Services Board, is modeled expressly after the Legal Services Board that has assumed this function in the UK. And like its UK model, the proposed Indian governmental agency's goal is to improve the standards of the profession by assuming plenary oversight over everything from legal education to professional discipline to imposing new standards for the provision of mandatory legal aid. Not surprisingly, the government's proposal has generated intense resistance among many Indian lawyers and within the BCI itself. While most Indian

observers acknowledge the need to improve the current system of professional regulation, many dispute whether superimposing a new regulatory authority on the regulatory mechanism currently in place will be more effective than amending the existing provisions.

However this internal turf war is resolved, the globalization of governance suggests that in the coming years the regulation of the Indian legal profession is unlikely to be solely – or perhaps even primarily – a matter for domestic decision-making. Indeed, Indian lawyers already face regulation from multiple sources as various international actors aim to establish principles and standards for lawyers operating across borders. Precisely because there is not now, nor likely to be in the foreseeable future, a single global government that can regulate transnational legal practice, new legal forms have emerged through dispersed rule setting to fill the void (Quack 2007, 644). For example, the International Bar Association (IBA) has promulgated a Code of Ethics to deal with problems relating to professional privilege; information relating to fees; specialization and advertising; and protecting the legal services consumer. The IBA's standard-setting aspirations position it as a representative of the global legal profession. The challenges in some areas of global legal practice, such as the impartiality of arbitrators may feed into its ambitions as they provide the rationale for creating global regulatory oversight over arbitrators and/or certification requirements for their appointment (Rogers 2005, 120). While such regulation is likely to be formally voluntary, the norms propagated by international bodies may become mandatory for Indian lawyers seeking to participate in the important institutions of global governance, and may, through the globalization of knowledge, influence the thinking and rulemaking of government officials who do have regulatory power over Indian lawyers.

This dynamics is even more pronounced with respect to one of the most powerful institutions of global governance, the WTO. As lawyers everywhere are beginning to find out, one of the major long-term challenges to the regulatory power of the state over legal services in the WTO's legal services negotiations. The Indian government clearly does not want to lose its current level of control over the regulation of its legal services industry. But it also needs to fulfill its obligations under the General Agreement on Trade in Services and engage in "progressive liberalization" of trade in services (Article XIX of the GATS). GATS put the issue of regulation of legal services on the international stage and has kept it alive thereby reinforcing the view that the legal profession is like other WTO regulated services and not a unique profession entitled to its own regulations (see e.g., Terry 2008). As liberalization progresses, the WTO might regulate lawyer licensing and multidisciplinary practices, and define what domestic bar rules constitute unnecessary barriers to trade in services. Given that the WTO has enforcement powers, it could impose trade sanctions in case of noncompliance. While the pace of such developments remains uncertain, WTO negotiations clearly present an opening for a regulatory power shift away from the government.

India's Rise and Global Regulation: Toward Legal Mobilization?

The second aspect of globalization of governance considers India's role in changing the global legal order. As the BRIC quote at the beginning of this section illustrates, India, together with other major emerging economies, has serious ambitions to change the current system and become a major player in global governance. The country has pursued diplomatic initiatives such as lobbying for a permanent seat on the UN Security Council, pushing for innovation and equitable burden-sharing in climate negotiations; and, taking a prominent stand against perceived discrimination in the nuclear proliferation regime. As India emerges as a new power, it needs top international lawyers to both create a vision of the future legal order to India's advantage and to pursue that vision in a proactive and strategic manner. India's international lawyers need to understand legalization as well as the new modes of global governance as they assume multiple roles as judges, legal advisers, legal scholars and diplomats.

India has already shown that it can mobilize legal resources to advance its interests, even in settings as difficult as WTO dispute settlement, where it faces powerful opponents such as the US and the EU and where its engagement has a significant impact on its economy and regulatory practices. As Davis and Bermeo (2009) demonstrate, once India managed to overcome the fixed costs related to institutional capacity and knowledge, it became an active user of the WTO's dispute resolution mechanism. Thus, from 1995 to 2007, India initiated 17 cases and even filed four cases in one year. Initially, India used the Advisory Centre on WTO Law in Geneva for support, but in recent years it has begun investing in its own in-house capacity. As a result, there are now several domestic law firms that have specialized expertise in WTO issues.[35] Similar public-private mobilization is now taking place in other issue areas such as climate change, as India takes an increasingly active role in addressing global governance challenges.

Indeed, as India rises as a power, its perception of international law is shifting. Traditionally, India experienced international law as an instrument of Western domination during the British rule, and has considered preserving sovereignty a paramount concern ever since. As a result of this mindset, it established itself as a leader of developing countries in advancing policy initiatives such as the Non-Aligned Movement, the Group of 77, and the New International Economic Order. It has been at the forefront of articulating a Third World approach to international law and has contributed greatly to different branches of international law (Chimni 2010; Singh 2010). India's current transformation into an important world power presents an opportunity to redesign the legal order that it has criticized for favoring Western powers such as the US and the UK. Ironically, this transformation may lead India's interests closer to Western interests over time in areas, for example, like the protection of foreign investors, as outbound Indian investment becomes increasingly important. At the same time, India has been under growing pressure to assume greater responsibilities internationally in various cooperative schemes including climate cooperation. The recent call for India and the other BRIC countries to contribute to the bailout of the old-world PIGS – Portugal, Italy, Greece, and Spain – whose default threatens to bring down the global economy is just the latest manifestation of the new role that India is now being asked to play on the world stage (La Monica 2011).

Although India may eventually strike the right balance between its diplomatic legacy and its interests as a new power, it cannot sustain its rise if massive domestic problems including poverty and collapsing state provision for the middle and lower classes remain unattended (Narlikar 2007). It is to this last crucial issue that we now turn.

Indian Lawyers' Roles in Addressing the Social Costs of Globalization

India, like all emerging economies, has an important stake in how globalization will affect the deep social and economic problems the country faces. It is "characterized by obscene wealth in the hands of a few billionaires (…), existing side by side with appalling poverty where more than 78 percent of the population lives on less than twenty rupees (or forty-five cents) per day (Bhushan 2009)." Neo-liberal policies are often criticized for increasing corporate political power and working against socio-economic and environmental rights, especially against the interests of impoverished members of society. As advocates for both the instruments of globalization and for those who are affected by its processes, lawyers inevitably play an important role in addressing the social costs of globalization. Whether their influence will ameliorate globalization's adverse consequences or accentuate them will depend upon how both the state and the bar view their respective roles, and upon their ability to mobilize in pursuit of social causes at different levels of governance.

Indian lawyers' engagement in promoting social justice has been most visible in politics and in the role of the country's unusually activist judiciary (see also Krishnan 2006; Galanter 1989). Many of the leaders of India's national movement, including Mohandas Gandhi, Jawaharlal Nehru and Sardar Patel, were lawyers. More recently, the Indian legal profession, especially the country's judges, have played a key role in promoting social activism through India's unique system of public interest litigation (PIL). PIL was introduced in the 1980s to ensure that litigation for the protection of the public interest could be introduced in a court of law by the court itself or by any private party (Balakrishnan 2009; Upadhyay 2007). Its existence "offers a ladder to justice to disadvantaged sections of society, provides an avenue to enforce diffused or collective rights, and enables civil society to not only spread awareness about human rights but also allows them to participate in government decision making" (Devea 2009). Although not everyone in India believes that every PIL action lives up to this lofty potential, there is widespread agreement that this form of action has served a valuable role in pressuring the Indian state to live up to the obligations of good governance. PIL is likely to further increase in importance as public interest law emerges as a global institution and as a governance tool to advance human rights and promote social causes in conflict with corporate interests and influence (Cummings and Trubek 2008).

A strong domestic public interest constituency and infrastructure is crucial for the evolution of social movements that use law to address globalization's discontents. India has been a focal point for such globalization battles, which significantly contributed to the global public policy discourse on development and had repercussions far beyond the domestic sphere. A potent example is a multi-level public interest advocacy effort against a massive World Bank – funded river development scheme along the Narmada River,

which would result in flooding thousands of acres of farm and tribal lands across Gujarat, Maharashtra and Madhya Pradesh, and lead to significant displacement of persons and environmental destruction. A transnational coalition comprised of both domestic and foreign lawyers and activists was formed in the early 1980s to fight the development scheme. The Narmada Valley struggle lasted for two decades and resulted in the pull-out of the World Bank from the project in 1993, though the actual construction of the dams has continued with domestic resources (Rajagopal 2005). While the struggle had a moderate impact at the domestic level (raising awareness and limited policy change), its international repercussions were highly significant. It led to the establishment of the Complaints Panel at the World Bank in 1993, a new information policy at the World Bank to improve transparency, and the formation of the World Commission on Dams in 1998, which comprised civil society actors and dam building companies and produced a report offering comprehensive guidelines for planning, building and assessing dams (ibid). The resulting improvements in resettlement and rehabilitation policies increased the standards of treatment of displaced people and strengthened the global rule of law.

While such examples of lawyers' efforts to improve domestic and global governance are significant, serious concerns exist that globalization has harmed the rule of law in India. Many believe that Indian judiciary has grown more corrupt and that corporations have become a law unto themselves.[36] The fact that Chief Justice of India SH Kapadia asked politicians not to protect corrupt judges and advised judges to avoid socializing with lawyers, litigants and politicians reflects the seriousness of such concerns.[37] The increasing wealth of elite corporate law firms and senior advocates has also drawn attention. Although India's corporate law firms generally do not have organized *pro bono* practices, such practices have started growing. For example, Amarchand Mangaldas, has helped empower rural Indian communities through low-cost technology and community health projects (Pro Bono Institute 2008). The diffusion of pro bono practices via the globalization of knowledge – and the fact that having a distinct pro bono program (albeit defined in a broad variety of ways) has become a hallmark of globally competitive law firms – is only likely to increase this trend toward Indian lawyers assuming an important role in addressing the social dimension of globalization.

Even the traditional elite of the Indian bar is being reformed by this process of globalization. For example, in a recent case, the sky-high fees typically paid to senior advocates have come under attack when the Orissa government's paid Rs. 25 lakh ($55,000) per day to Mukul Rohtagi to defend a PIL filed against illegal mining in the state. When the size of the fee was disclosed local lawyers filed a separate PIL challenging the government's actions. Those objecting to the fee claimed that the government had caused a "huge financial loss to the public exchequer" by engaging Rohtagi.[38] As the Indian legal industry grows and is subjected to increase domestic and international scrutiny, even such traditional bastions of professional privilege as senior advocates will be called on to justify their actions in ways that pay express attention to issues of social responsibility. Although it is too soon to tell what the consequences of this heightened scrutiny will be, it is possible that this greater social awareness will increase pressure within India for more regulatory changes that promote public interest, place greater emphasis on clinical education, and potentially lead to an increase in corporate philanthropy.

This discussion of the globalization of governance illustrates that the regulation of the legal profession is in flux because of multiple regulatory developments at the domestic and international levels. While domestic regulatory institutions transform, greater integration of the legal services markets raises additional questions about regulating cross-border legal practice. The evolution of global regulation, in which India aims to play a major role, may very well constrain domestic legal actors. However, it also affords these participants the opportunity to redesign and recreate the global legal order. India's growth and global power ambitions will both be tested against its ability to make governance more accountable, and improve the livelihoods of the disadvantaged members of society.

Conclusion

The analysis presented in this article demonstrates that the globalization of the Indian legal profession is by no means an automatic or a simple phenomenon. Instead, it comprises multiple carefully negotiated and highly complex processes at the intersection of the local and global realms of legal activity. Three of these processes – economic globalization, globalization of knowledge and globalization of governance – help analyze crucial economic, intellectual and regulatory changes that affect Indian lawyers. These processes are deeply intertwined. As we have tried to demonstrate, examining these three processes together provides insights into the globalizing juridical social field and the changing structures of the Indian legal profession, particularly in the evolving corporate hemisphere of practice. For example, the desire to capture new economic opportunities in the LPO sector generates demand for the knowledge needed to develop the industry as well as a demand for transnational regulation. Similarly, international negotiations on the liberalization of legal services challenge the concept of the legal profession as a unique and learned profession that is fundamentally distinct from other kinds of professional services that can be purchased, evaluated, and regulated like any other necessary commodity on the global level. This in turn has profound implications for the legal profession's self-understanding, for the maintenance and legitimacy of entry barriers into the profession, and the overall competition in the legal services market. These examples illustrate that focusing on the intersections of different globalization processes may provide new insights and raise new questions about the evolution of the profession.

Greater synthesis of globalization studies and the sociology of the legal profession would produce benefits for both fields. Scholars and practitioners have vigorously debated the advantages and disadvantages of globalization in different areas of study. The globalization of the legal profession represents a new frontier for globalization scholars, and acts as a test case for applying the lessons learned over the past decades. As such, it would benefit from a greater integration into the mainstream globalization literature and policy debates. Indian debates on market opening, shaping legal education or reforming regulatory frameworks illustrate that concerns about globalization's discontents are very

much alive, and that there is an ongoing search for innovative solutions. Insights from the sociology of the legal profession can help globalization scholars set the stage for more vigorous and nuanced empirical studies on the globalizing Indian legal profession. The results of these studies would in turn shed important light on the tension between the economic opportunities created by globalization and questions of equality, inclusion, and the rule of law studied by socio-legal scholars (Wilkins 2011).

The evolution of the legal profession in the context of globalization presents a very exciting research frontier for the study of lawyers. The Indian legal profession is an area where transformations of the social world rapidly occur and multiple forms of domestic social capital are acquired, exchanged, and converted into other forms of capital that can be deployed on the global stage. As Indian corporate lawyers pursue their roles as architects of globalization, they are becoming a part of the new legal elites that form, sustain and propagate their conceptions of law. Given the growing economic power of India and other emerging economies – by 2040, India, Brazil, Russia and China will collectively produce more GDP than the current G6 nations combined (Nayyar 2010) – how India's newly emerging corporate bar pursues this agenda is likely to have a profound impact on the global market for legal services generally. Developments in India's corporate legal sector, together with developments in other emerging economies will have implications for the domestic and global rule of law and will also affect the way lawyers conceptualize, teach and practice law in the US and other advanced economies.

This article has laid out some of the major developments and debates in India – the growth of the domestic corporate bar, the debate over foreign lawyers, concerns about the commoditization of the profession, and the growing realization of the need for legal capacity to reshape the global legal order and the need for global expertise – that have already accompanied India's rise as a global power. Although many of the specifics of these issues are unique to the Indian context, the three globalization processes introduced in this article are simultaneously affecting other important emerging economies whose legal professions are at a similar stage of the development. Determining whether debates in these other jurisdictions will follow similar lines as those outlined here – and indeed determining whether debates in India will continue to follow their current trajectory – will require more detailed empirical study, to which we hope to contribute.[39] By underscoring the theoretical potential that can be gained by integrating globalization studies and the sociology of the legal profession, we hope this article has begun to lay the foundation for the important empirical work that needs to be done.

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Notes

[1] Quoted in "The reformer: Dr M Veerappa Moily and the new Indian legal system." *New Legal Review*. July 26, 2010.

[2] The path-breaking work on the globalizing legal profession and conceptualizing the dynamics of the Indian legal profession in the globalizing era is Dezalay and Garth (2010), who conceptualized hw former colonial powers shaped law but did not consider globalization processes and their intersections in the current context. Indian scholars Deshta and Dadwal (2006) offer a brief but insightful discussion of the topic. Our literature review has revealed over twenty law journal articles written within the past few years on India's LPO sector and numerous accounts of foreign law firm entry. The second section on economic globalization cites the most representative of these articles.

[3] Legal professionals, as understood here, are members of the juridical social field, an area of structured, socially patterned activity, which is both disciplinarily and professionally defined (Bourdieu 1987); see Carruthers & Halliday (2006) for negotiating globalization.

[4] Rodrik and Subramanian 2004 trace India's growth to India's liberalization program of the 1980s and the economic reforms that began in 1991. India and China are the two fastest growing economies in the world.

[5] Although the hemispheres thesis continues to be enormously influential in defining the sociology of the US legal profession, the boundary between corporate lawyers and the rest of the profession is blurring (Wilkins, forthcoming 2011), and it will be interesting to see how this boundary will develop in India and other emerging economies.

[6]There are many definitions of globalization and ways to conceptualize it. This Stiglitz (2003, 9) definition is used here as a middle ground between pro- and anti- globalization scholars. It highlights the idea of progressive integration along multiple dimensions. For further discussion of the concept see Scholte (2000).

[7] Bhasin, L. "Indian legal profession is not for sale." *The Economic Times,* April 2, 2009.

[8] Data from RSG study from Arackal, P. "Legal eagles eye $479m fee pie of India Inc." *The Times of India*, March 17, 2010.

[9] The authors found varying figures on the value of the Indian legal services market in 2010, ranging from anywhere between half a billion to one billion US dollars. The reasons behind LPO growth are elaborated in Sako 2009 and Regan 2010. While LPO numbers again vary, the LPO market is estimated around $400-500 million in 2010 and its growth rate around 30-40%.

[10]Lawyers Collective v. Bar Council of India and Others, W.P. No. 1526, 1995 A.I.R. (Bombay); see discussion in Krishnan 2010 and Vena 2011.

[11]As per Section 29 of the Advocates Act, 'advocates' are the only recognized class of persons entitled to practice law in India. The Advocates Act in Section 24 provides that only an Indian Citizen has the right to practice and be enrolled as an advocate in India. Foreign lawyers are not permitted to practice in India, but there are some exceptions: a national of a foreign country may be admitted as an advocate, if citizens of India are permitted to practice law in that other country; and, foreign law firms can represent their clients during arbitration proceedings.

[12] In Brazil and China foreign firms can open offices and offer advice on international law, but they cannot provide legal representation in local courts (except for Hong Kong where foreign lawyers can take local bar exams). Japan and Singapore go even further: in Japan, foreign firms can set up partnerships employing Japanese lawyers, and Singapore allows certain foreign firms to practice domestic law in some areas if they have locally-qualified lawyers.

[13] A.K. Balaji v. Union of India, W.P. No. 5614, 2010 (Chennai High Court, filed March 18, 2010)

[14]Arguments for and against market opening are elaborated in Vasani 2007; Chanda et al. 2010; Krishnan 2010; Vena 2011; Equations 2006.

[15] Velaigam, M. "Indian government says 'yes' to foreign law firms." *The Lawyer*, September 25, 2007.

[16] "International conference on "The New Business Laws Of India" culminates into a grand debate." *Thaindian News,* May 11, 2008. Similar arguments have been used in other countries such as France and Japan before their markets opened.

[17] Sloan, K. "ABA seeks Obama's help in fight for reciprocity with India." *National Law Journal*, November 11, 2010. The trade in legal services was eventually dropped from the President's agenda for the

visit because of other priorities. Contrary to the US President's approach, when UK Prime Minister David Cameron visited India in July 2010, discussing trade in legal services was one of his highest priorities.

[18] Amarchand now has 59 partners and roughly 500 lawyers and plans to become a 1,000 lawyer, 100 partner firm by 2017. Ganz, K. "3 Women, 2 Men Enter Amarchand Side Equity as BCG Says: Grow to 1,000 by 2017 with 11 Practice Heads." *Legally India*, October 16, 2011.

[19] Based on RSG Consulting data from Indian law firm profiles, split of work category. Available at from http://rsg-india.com/indian-law-firms accessed September 2, 2010

[20]Timmons, H. "Outsourcing to India draws Western lawyers." *New York Times*, August 4, 2010

[21] On LPOs and developmental divide see Secholler 2008, 244; Arrighi et al. 2003; Lamont, J. & Leahy, J. "US matches Indian outsourcing costs." *Financial Times*, August 17, 2010.

[22] Rampell, C. "At well-paying law firms, a low paid corner." *The New York Times*, May 23, 2011.

[23] "India's legal education system needs dramatic reform: PM." *IndiaServer.com*, May 1, 2010.

[24] "*37.7% choose law firms, 20.9 % choose in-house and 9.8 % choose lit: career paths of NLSIU, NALSAR and NUJS graduates*." *Bar&Bench,* June 28, 2010. All data cited in this paragraph are drawn from this source.

[25] It is illustrative to note a US study that followed a representative sample of over 4000 lawyers who entered the bar in 2000 through the first ten years of their careers. Fifty two percent of elite law school graduates work in law firms with more than 100 lawyers compared to only 17% of graduates from urban law schools (Wilkins et al. 2007, 450).

[26] In September 2009 there was a turf war over legal education reform between the Minister of Human Resources and Development and the Minister of Law and Justice. The former, Mr. Kapil Sibal, himself a lawyer, had the initiative for a roundtable on reforms in legal education, but the Law Minister Veerappa Moily made it clear that introducing reforms in legal education was the task of the Ministry of Law and Justice. Both of the ministers were critical of the Bar Council's role in legal education, and Mr. Moily argued that legal education should be taken away from the BCI. According to the BCI Rules, Section 7 (1) (h), the Bar Council now lays down standards of legal education in consultation with the universities in India imparting such education and the State Bar Councils.

[27] The major aspects of the reform are briefly explained in the rest of the paragraph based on "Dr . M. Veerappa Moily presented Vision statement for second generation reform in legal education." *India Education Diary*, May 2, 2010.

[28] The BCI 2010 is the source of data on the total number of students and graduates, but to the best of our knowledge, the BCI does not have – at least accessible to the public - systematically collected data on the exact number of students in each of the 900 universities. The fact that the BCI notes such a small number of graduates joining the legal profession may be because not all graduates enroll with a state bar council, particularly those who are not taking jobs as lawyers or those who look for jobs abroad.

[29] Ganz, K. "Interview: BCI chief Subramanium plans to consolidate 700+ law schools, overhaul ethics as part of 30-year-old reform dream." *Legally India,* July 13, 2010.

[30] See Vol. 71 of the 2008 *Law and Contemporary Problems* journal for a discussion of his work.

[31] See also Ganz, K. "Jindal law school to redraw map of legal education." *Legally India*, August 11, 2009. These are rough estimates. Major categories of law schools include NLUs, law faculties at major universities and private law schools. The tuition in each category varies significantly from school to school within each category.

[32] "Courts will take 320 years to clear backlog cases: Justice Rao." *The Times of India*, March 6, 2010.

[33] The economic cost is mainly because of the inordinately long time - an astounding 425 days taken to enforce a contract in India. See "Unclog the courts." *The Times of India*, October 27, 2009.

[34] Lalit Bhasin quoted in "International conference on "The New Business Laws of India" culminates into a grand debate." *Thaindian News,* May 11, 2008.

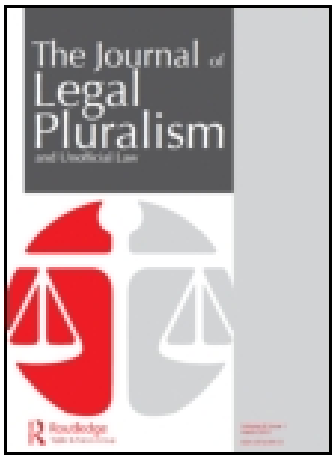
[35] Interestingly, despite the fact that India and Brazil faced similar legal capacity building challenges, Brazil had a significantly different approach to the WTO: a major domestic mobilization of the government, civil society and the business sector led to Brazilian victories. See Shaffer (2008).

[36] Kumar, P. "Corporate mafia fuelling corruption: Prashant Bhushan (Interview)." *Thaindian News,* January 31, 2011.

[37] "Don't protect corrupt judges: Chief Justice of India to politicians." *Hindustan Times*, April 16, 2011.

[38] "High fees: Orissa lawyer files a PIL against Government paying 25 lakh per day to Senior Advocate Mukul Rohtagi." *Bar & Bench*, March 28, 2011.

[39] Harvard Law School Program on the Legal Profession introduced a major new research initiative - Globalization, Lawyers and Emerging Economies, which is committed to such research. See http://www.law.harvard.edu/programs/plp/pages/glee.php for more information.



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Justice in many Rooms: Courts, Private Ordering, and Indigenous Law

Marc Galanter
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JUSTICE IN MANY ROOMS: COURTS, PRIVATE ORDERING, AND INDIGENOUS LAW*

Marc Galanter

The flow of cases into the courts figures prominently in current discussion of the state of American law. Fears of courts being overwhelmed by swollen caseloads are accompanied by distress at disputants' too ready resort to the judicial process and courts' too ready intrusion into unsuitable areas. (Pound Conference 1976; Rosenberg 1972; Barton 1975.) On the other hand there is concern to provide "access to justice" to groups and interests that have found it difficult to obtain a judicial hearing (for an overview, see Cappelletti and Garth 1978). Notwithstanding sharp differences about which cases should be in the courts, these contrasting viewpoints share an emphasis on the centripetal movement of cases into the courts and a tendency to define the problem as one of matching cases and forums: courts should get the number and kind of cases they can handle, and cases should find appropriate forums in which they can be resolved.

This notion of a good match between forum and dispute is set within a framework of presuppositions about disputes and forums. Typically it is assumed that disputes require "access" to a forum external to the original social setting of the dispute, a location at which some specialized learning or expertise will be brought to bear. Remedies will be provided as prescribed in some body of authoritative learning and dispensed by experts who operate under the auspices of the state. The view that the justice to which we seek access is a product that is produced--or at least distributed--exclusively by the state, a view which I shall for convenience label "legal centralism,"[1] is not an uncommon one among legal professionals.

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[1] An attempt to explicate the "paradigm" that is here labelled legal centralism is found in Galanter 1974a, 1976; Trubek and Galanter 1974. The label is borrowed from Griffiths (1979), who suggests that the state-centered view of legal phenomena is a kind of legal Ptolmaism. Our habit of describing all legal phenomena in relation to the state Griffiths finds "essentially artibrary...the state has no more empirical claim to being the center of the universe of legal phenomena than any other element of that whole system does..." (id. at 48).

 See page 47 below for acknowledgments.

19 Journal of Legal Pluralism (1981).

I submit that this legal centralist model is deficient. For the moment, I want to show how several lines of social research on law lead me to question its descriptive adequacy. I will also suggest the implications of abandoning the legal centralist paradigm for policy designed to improve "access to justice."

I. THE CENTRIFUGAL PERSPECTIVE: BARGAINING AND REGULATION "IN THE SHADOW OF THE LAW"

A convenient place to start is with a crude map of the landscape of dispute processing, a map drawn from several decades of social research on law in the United States. My recklessness in drawing generalizations about the United States is aggravated by implying that this map might be usable in other societies as well. Furthermore, for convenience I shall use the term court to include all official forums, including various bodies that would not be considered courts in local terms.

Most disputes that, under current rules, could be brought to a court are in fact never placed on the agenda of any court.[2] This includes criminal as well as civil matters. Many of these disputes are "resolved" by resignation, "lumping it," "avoidance," "exit" or "self-help" by one party.[3]

Of those disputes pursued, a large portion are resolved by negotiation between the parties, or by resort to some "forum" that is part of (and embedded within) the social setting within which the dispute arose, including the school principal, the shop steward, the administrator, etc. Negotiation may range from that which is indistinguishable from the everyday adjustments that constitute the relationship to that which is "bracketed" as a disruption or emergency. Similarly, embedded forums may

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[2] On the contours of inaction see Macaulay (1963); Ennis (1967); Mayhew and Reiss (1969); Hallauer (1972); Best and Andreason (1977); Curran (1977).

[3] On these unilateral responses, see Felstiner (1974); Hirschman (1970). Merry (1979) points out that exit and avoidance may be the goal as well as the sanction in the dispute process. A disputant may, for example, threaten resort to a court in order to effectuate a desired exit (1979:894). On the other hand, the presence of exit as a credible sanction may be important to the working of other remedies; that is, the threat of resort to exit may create a "bargaining endowment" (see page 6 below) just as does the threat of resort to adjuciation. A remedy for one party may be a sanction to the other, and the threat of sanction may induce remedial action.

range from those which are hardly distinguishable from the everyday decision-making within an institution to those which are specially constituted to handle disputes which cannot be resolved by everyday processes.

Of those disputes taken to a court (official forum), the vast majority are disposed of (by abandonment, withdrawal, or settlement) without full-blown adjudication, and often without any authoritative disposition by the court. (Nims 1950; Zeisel, Kalven and Buchholz 1959; Ross 1970.) Of those cases that do reach full authoritative adjudication by a court, a large portion do not involve a contest. They are uncontested either because the dispute has been resolved (as often in divorce) or because only one party appears. (Cavanagh and Sarat 1980; Friedman and Percival 1976.)

We should not assume that courts are places where cases enter and (subject to attrition) proceed normally and typically to a trial with genuine adversary contest and a decision according to formal rules. Instead we should see courts as arenas in which various kinds of dispute (and non-dispute) processing take place (cf. Mohr 1976). Courts are the site of administrative processing, record-keeping, ceremonial changes of status, settlement negotiations, mediation, arbitration, and "warfare" (the threatening, overpowering and disabling of opponents), as well as of adjudication. Indeed, in most courts most moves into the formal adjudicatory mode are for purposes other than securing an adjudicated outcome. The principle determinants of these processes must be sought in the goals, resources and strategies of the parties (including, for this purpose, the court personnel). This does not mean that the "law" and the courts as institutions are unimportant, for the parties' strategic options and resources (and even goals) are to some extent supplied by the law and the institutions which "apply" it.

To sum up, courts resolve only a small fraction of all disputes that are brought to their attention. These are only a small fraction of the disputes that might conceivably be brought to court and and an even smaller fraction of the whole universe of disputes.

What are we to make of this crude map? Should we regard it as an exposure of scandalous deficiencies? Do we wish to have more disputes enter the official system and proceed further toward definitive resolution? Is the utopia of access to justice a condition in which all disputes are fully adjudicated? Surely not, for we know enough of the costs (financial, relational, psychic) of litigation to suspect that such a condition would be monstrous. But are costs the only problem? Suppose we could reduce them to a tolerable level. Are the benefits so appealing to us? Do we want a world in which there is per-

fect penetration of norms downward through the pyramid so that all disputes are resolved by application of the authoritative norms propounded by the courts? We know enough about the work of courts to suspect that such a condition would be monstrous in its own way.

Two recent works dramatize this point forcefully. Noonan (1976) shows how our most esteemed courts and judges failed to be responsive to personal needs or social interests when they allowed "masks" (i.e., formal classificatory concepts) to conceal the complex human and social realities in the cases before them. Analyzing some well-known contracts cases, Danzig (1978) traces the implications of the inevitable shortages of resources, limitations of skill and knowledge, and infirmities in the process of capturing the facts, that attend adjudication even at its best. He depicts even craftsmanlike and thoughtful judges making decisions that fall far short of either the satisfactory resolution of the controversy at hand or the establishment of viable controls over the area of social life in which it arose. Such accounts imply that imperfect joinder between judging and social setting afflicts not only the hidebound or the unimaginative judge, but also the heirs (even the patron saints) of a more expansive style of judging.

In many instances the participants can devise more satisfactory solutions to their disputes than can professionals constrained to apply general rules on the basis of limited knowledge of the dispute. (Cf. Eisenberg 1976:658ff.; Mnookin and Kornhauser 1979:956ff.; Enker 1967; Dunlop 1975.) The variability of preferences and of situations, compared to the small number of things that can be taken into account by formal rules (cf. Kennedy 1973) and the loss of meaning in transforming the dispute into professional categories suggest limits on the desirability of conforming outcomes to authoritative rules.

Apart from these practical objections, the ideal of perfect penetration of official norms is subject to the even more fundamental objection that it is a mirage, a chimera. For it attributes to rules propounded in the lofty setting of the legislature or the appellate court a single determinate meaning when "applied" in a host of particular settings.[4] But most authoritative norms are ambiguous; variant readings are possible in any complex system of general rules; uniformity of meaning across time and space is

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[4] Feeley 1976:500. Cf. Damaska's (1975:528) observation that "there is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decisionmaker's freedom. Contradictory views can plausibly be held, and support found for almost any position."

an achievement purchased at substantial cost.[5]

A program of subordinating all variation of the "law in action" to the uniformity of formal law is like a program of making all spoken language an exact replica of written language. No one would deny the utility or importance of written language, but it does not invariably afford the best guidance about how to speak. We should be cautioned by the way that our tendency to visualize the "law in action" as a deviant or debased version of the higher law, the "law on the books," parallels folk beliefs about language usage. Ferguson (1971:222-23) observes that:

> ...writing almost never reflects speech in an exact way, written language frequently develops characteristics not found in the corresponding spoken language.
>
> ...the use of writing leads to the folk belief that the written language is the 'real' language and speech a corruption of it. This attitude seems to be nearly universal in communities which have attained the regular use of writing. (Emphasis in original)[6]

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[5] On the presence of variant local versions of a single official law, see e.g., Jacob 1969; Goldstein and Ford 1971; Wilson 1968. On contrasting local legal cultures, see Levin 1977; Church, et. al. 1978. "In seeking legal services, what a person is often buying is sophisticated prediction by a professional concerning how judges in a local jurisdiction will probably apply vague legal standards to the circumstances of the particular case." Mnookin 1979:29-30. For a general discussion, see Galanter (forthcoming).

[6] Ferguson's conclusions about the effect of this "folk belief" on language policy suggest further parallels with the concentration of law reform energies on improvement of the written law and elimination of the 'gap' between the law on the books and the law in action (id. at 224):

> The importance of this folk belief for language development lies in the way it limits the kind of conscious intervention in the form of language planning that the community will conceive of or accept. Much time and effort is often spent on questions of orthography and language reform, in the tacit assumption that changes in the written language will be followed automatically by changes in speech. Some reforming zeal is also expended on bringing pronunciation in line with existing written norms. Insofar as these various efforts are part of a standardization process which responds to the communication needs of the speech

The incommensurability of law in action with the law on the books should not be taken as a condemnation of the status quo. Nor should the observation of the limited role of courts in the decisive resolution of disputes be taken as an assertion that courts are unimportant in social ordering.

The contribution of courts to resolving disputes cannot be equated with their resolution of those disputes that are fully adjudicated.[7] The principle contribution of courts to dispute resolution is providing a background of norms and procedures against which negotiations and regulation in both private and governmental settings take place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute, but possible remedies, and estimates of the difficulty, certainty, and costs of securing particular outcomes.

The courts (and the law they apply) may thus be said to confer on the parties what Mnookin and Kornahuser call a "bargaining endowment," i.e., a set of "counters" to be used in bargaining between disputants. In the case of divorce, for example:

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community, they may result in actual change, especially if they do not conflict with the basic phonological and grammatical structure of the language, but often the efforts fail, at least in part because the beliefs do not correspond to the realities of the written-spoken relationship.

[7] Lempert (1978:99-100) usefully distinguishes various ways in which courts contribute to dispute settlement:

(1) courts define norms that influence or control the private settlement of disputes; (2) courts ratify private settlements, providing guarantees of compliance without which one or both parties might have been unwilling to reach a private settlement; (3) courts enable parties to legitimately escalate the costs of disputing, thereby increasing the likelihood of private dispute settlement; (4) courts provide devices that enable parties to learn about each other's cases, thus increasing the likelihood of private dispute settlement by decreasing mutual uncertainty; (5) court personnel act as mediators to encourage the consensual settlement of disputes; (6) courts resolve certain issues in the case, leading the parties to agree on the others, and (7) courts authoritatively resolve disputes where parties cannot agree on a settlement.

> ...[t]he legal rules governing alimony, child support, marital property and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law would impose if no agreement is reached gives each parent certain bargaining chips--an endowment of sorts. (1979:968)

Similarly the rules of tort law provide bargaining counters which are used in a process of negotiating settlements. (Ross:1970) The gravitation to negotiated outcomes in criminal cases is well-known. One astute observer concludes that "the actual significance of the sophisticated adversary process before the jury" in American criminal cases is "to set a framework for party negotiations, providing 'bargaining chips.'" (Damaska 1978:240) The negotiating dimension is found in the most complex as well as in the most routine cases; thus in "extended impact" cases, the involvement of the courts supplies standards and the setting for negotiations among the parties. (Cavanagh and Sarat 1980: 405-07; Diver 1979.)

Negotiations may involve protracted and explicit bargaining or tacit reference to established understandings. The terms of trade may be fixed rather than established ad hoc. Thus Feeley (1979:462) observes that

> Discussions of plea bargaining often conjure up images of a Middle Eastern bazaar, in which each transaction appears as a new distinct encounter, unencumbered by precedent or past association. Every interchange involves higgling and haggling anew, in an effort to obtain the best possible deal. The reality of American lower courts is different. They are more akin to modern supermarkets, in which prices for various commodities have been clearly established and labeled in advance.

And Ryan and Alfini (1979:502) describe a setting in which the expectations of participants are grounded in the known upper and lower limits of the judges.

The bargaining endowment which courts bestow on the parties includes not only the substantive entitlements conferred by legal rules, but also rules that enable those entitlements to be vindicated--for example, rules excluding evidence favorable to the other party or jeopardizing the claim of the other party (e.g., contributory negligence.)[8] But rules are only one part of the endowment conferred by the forum: the delay, cost and uncertainty of eliciting a favorable determination also con-

fer bargaining counters on the disputants.[9] The meaning of this endowment, of course, is not fixed and invariable, but depends on the characteristics of the disputants: their preferences,[10] negotiating skill, risk averseness, ability to bear costs and delays, etc. A different mix of disputant capabilities may make a given endowment take on very different significance.

Mnookin and Kornhauser refer to the bargaining between the parties as occurring "in the shadow of the law." But this is not the only kind of "private ordering" that takes place in the law's capacious shadow.[11] We can extend the notion of the bargaining endowment to imagine the courts conferring on disputants a "regulatory endowment." That is, what the courts might do (and the difficulty of getting them to do it) clothes with authorizations and immunities the regulatory activities of the school principal, the union officer, the arbitrator, the Commissioner of Baseball and a host of others.

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[8] Of course this is in addition to the other functions of rules--to guide courts in adjudicating cases and to guide parties in planning, in defining their expectations, etc. Qualities that commend a rule for one purpose may make it a disaster for another. Mnookin and Kornhauser (1979:980) give the example of joint custody as a rule that "may have good characteristics as a background rule for private ordering but may nevertheless be unacceptable as a standard for adjudicating disputed cases."

[9] Delay, cost and uncertainty are partly a product of rules--e.g., a discretionary standard involving balancing of many factors requiring detailed proof is more costly, time consuming and uncertain in application than a mechanical rule. But cost, delay and uncertainty also result from such non-rule factors as the number and organization of courts and lawyers, the variability of judges, etc.

[10] Mnookin and Kornhauser's suggestive analysis is both illuminated and limited by the special characteristics of divorce disputes. For the most part, the disputants display a lack of interest in general effects, such as precedents, new rules, etc. So the "preferences" of the parties lack a dimension that is present in other kinds of disputing by parties who anticipate and plan for a series of comparable disputes over time. (See Galanter 1974b.)

[11] An earlier use of the shadow imagery is in Shapiro (1975:329), who refers to "legalized bargaining under the shadow supervision of an available court." And a much earlier use is found in Tocqueville (1953:I,140) who observed in 1838

> It is a strange thing, the authority that is accorded to the intervention of a court of justice by the general opinion of mankind! It clings even to the mere formalities of justice, and gives a bodily influence to the mere shadow of the law.

The shadow metaphor is attractive because it captures other

The distinction between negotiation and regulation is a relative one. The continuity between them is displayed, for example, in the continuing relations between a university and its food service contractor, where the process of monitoring performance and negotiating adjustments partakes of (or may be interpreted as) both. (V. Goldberg 1976) Plea bargaining strikes me as another example of the overlap of bargaining and regulation. And of course regulation may involve an important element of bargaining--as in agency "notice and comment" rulemaking or in the relations of guards to prisoners described by Sykes (1958). Perhaps we should think of bargaining and regulation as the ends of a spectrum, along whose length we can find many intermediate (and alternating) instances. (See Eisenberg 1976.)

Courts bestow regulatory endowments in many ways. First, the courts provide models (norms, procedures, structures, rationalizations) for such regulatory activity. Second, there are explicit authorizations and immunities conferred by the courts (and the law) on an immense variety of regulatory settings--the school teacher and principal, the prison warden, the agricultural cooperative, the baseball league, the union leader. Such authorizations may be explicit rulings about the regulatory activity--as in judicial doctrine about the authority of arbitrators, school officials and church bodies.[12] Or it may be implicit in rules of jurisdiction, standing and other procedural doctrine that denies admittance to cases involving certain kinds of regulatory activity.

Finally, there are the implicit authorizations and immunities that flow from the general conditions of overcommitment and

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similarities. The shape of shadows bears a lawful relationship to the original, but the proportions are changed and features can be effaced or transformed. And, the object that casts the shadow is not the energizing source of the image.

12 The most elaborate and self-conscious current discussion of deference to, and control by, private forums is in connection with labor arbitration. See Edwards 1977; Getman 1979. On judicial oversight of the very different institution of commercial arbitration, see G. Goldberg 1977:65ff. On judicial response to church authority, see Wisconsin Law Review 1977: 904. On judicial monitoring of the exercise of disciplinary authority by school officials, see Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975); Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992 (1975); Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401 (1977); and the analysis of Kirp 1976. It is not suggested that regulatory activity in these forums corresponds to legal doctrine. See, e.g., Verkuil 1976 on the impact of judicial intervention on informal adjudication by agencies of the United States Government.

passivity. Courts are reactive; they do not acquire cases on their own motion, but only upon the initiative of one of the disputants. Thus there is delegation to the disputants to invoke the intervention of a court. The expense, delay and cumbersomeness of securing such intervention insulates all regulators by raising barriers to challenging them in the courts. Public agencies which might monitor such regulatory activity are typically overcommitted. Like courts, they have more enforcement responsibilities than resources with which to carry them out. So like courts they tend to be reactive, responding only to complaints. And in deploying their scarce resources they understandably tend to be most responsive to the more organized and attentive of their constituents. Thus the regulation exercised by hospitals on patients and their families, by landlords on their tenants, by universities on their students, by unions on their members, by manufacturers on their customers are rarely subject to challenge by public agencies or in public forums. By a kind of legal alchemy, the expense and remoteness of the courts and the overload and lethargy of other agencies are transformed into regulatory authority which can be exercised (sometimes through adjudicatory forms) by a host of institutions. Thus the reactivity and overcommitment of the official legal system maintains and nourishes various kinds of ordering outside its precincts. (These are taken up in part II below.)

The disputes that courts process originate elsewhere and may undergo considerable change in the course of entering and proceeding through the courts. Disputes must be reformulated in applicable legal categories. Such reformulation may entail restriction of their scope: diffuse disputes may become more focussed in time and space, narrowed down to a set of discrete incidents involving specified individuals. Or, conversely, the original dispute may grow, becoming the vehicle for consideration of a larger set of events or relationships. The range of normative claims may be narrowed or expanded; the remedy sought may change. The dispute that emerges in the court process may differ significantly from the dispute that arrived there as well as from disputes in other settings. (Engel 1980:434; Mather and Yngvesson forthcoming.)

The relation of courts (official forums) to disputes is, in short, multidimensional. Decisive resolution, while important, is not the only (nor, I submit, the principal) link of courts and disputes. Disputes may be prevented by what courts do--e.g., by enabling planning to avoid disputes or by normatively disarming a potential disputant. Courts may foment and mobilize disputes, as when their declaration of a right arouses and legitimates expectations about the propriety of pursuing a claim; or changes in rules of standing suggest the possibility of pursuing a claim successfully. Further, courts may displace disputes into various forums and endow these forums with regulatory power.

Finally, courts may transform disputes so that the issues addressed are broader or narrower or different than those initially raised by the disputants. Thus courts not only resolve disputes: they prevent them, mobilize them, displace and transform them.

It follows that the effects of courts (or any forum) on dispute behavior cannot be equated with the dispositions of the cases that come before them.[13] To appreciate the variety of radiating effects of judicial action (or inaction), it is helpful to distinguish between "special effects" and "general effects." "Special effects" are the effects produced by the impact of the forum's action on the behavior of the specific actors who are the subject (or target) of the application or enforcement of the law. They include not only the effects of sanctions imposed by the court (incapacitation, deterrence, reformation and so forth) but ancillary impacts of court proceedings such as effects on parties' credit rating, insurability, employment, licensing, business reputation and standing in other forums. (Engel and Steele 1979:316.) And of course such effects are produced not only by the decision of the forum, but by the costs (including benefits foregone) and timing of that decision (or its absence).

The work of courts affects not only those immediately subject to it, but others as well. The effects of what courts do ramify in various ways: for example, as others react to the changed behavior of those directly affected, or as the aggregate distributional consequences empower some groups and disable others (cf. Galanter 1975). Many sorts of "general effects"[14] result

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[13] Cf. Lempert's (1978:92ff) critical reanalysis of Friedman and Percival's (1976) data, emphasizing the distinction between (a) the functions of courts in the sense of what courts do and (b) their functions in terms of their effects on the larger society.

[14] This notion of "general effects" takes off from the very helpful discussion of the general preventive effects of punishment by Gibbs (1975:Chap. 3) as usefully elaborated by Feeley (1976:517ff). It is simply a generalization from the illuminating and now familiar (if not entirely serviceable, as Gibbs points out) distinction between special deterrence and general deterrence introduced by Andenaes (1966). Theory about these general effects is still inchoate. In a review of the now sizeable literature on deterrence, Gibbs (forthcoming:45) observes that since deterrence research has proceeded without controls for other general effects, "all previous reported tests of the deterrence doctrine...were really tests of an implicit theory of general preventive effects; and that will remain the case as long as nondeterrent mechanisms are left uncontrolled."

from the communication of information by/about the forum and its behavior and the response of others to such information. General effects resulting from communication (e.g., general deterrence) need not presume or require any change in the moral assessment of particular sorts of behavior; behavior may be affected simply by the acquisition of more information about the costs and benefits that are likely to attach--information about the certainty, celerity, and severity of sanctions, for example. The actor can hold to Hart's (1961) "external point of view," treating law as a fact to be taken into account rather than as a normative framework that he is committed to uphold or be guided by. The information that induces the changed estimation of costs and benefits need not be accurate: what the court has done may be inaccurately perceived; indeed the court itself may have inaccurately depicted what it has done.

On the other hand, communication of the existence of a law or its application by a court may change the moral evaluation by other actors of a specific item of conduct. There is suggestive evidence to indicate that at least some segments of the population are subject to such effects. (Berkowitz and Walker 1967; Colombatos 1969.)[15] Less dramatically, perceiving the application of law may maintain or intensify existing evaluations of conduct. (See Gibbs 1975.)

Courts also produce facilitative effects: legal applications may be taken neither as facts to be adapted to, nor as norms to be adhered to, but as recipes to be followed. Law may be used as a cookbook from which we can learn how to bring about desired results--disposing of property, forming a partnership, securing a subsidy.

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[15] Other studies provide suggestive but contrasting hypotheses about the conditions under which such enculturation takes place and its relation to the coercive aspects of the law. Thus Muir (1967) and Dolbeare and Hammond (1971) both examine the reaction of local school boards to decisions of the United States Supreme Court banning officially-sponsored prayer in classrooms. Muir finds substantial compliance and substantial enculturation associated with low perceived coerciveness of the legal setting; Dolbeare and Hammond, finding little compliance, attribute the dissociation of practice from legal doctrine to the absence of coercive pressure.

Judicial work produces effects at the level of disputing behavior as well as at the level of the underlying transaction or relationship. Thus, litigation may have powerful mobilizational or demobilizational effects. It may provide symbols for rallying a group, broadcasting awareness of grievance and dramatizing challenge to the status quo. On the other hand, concentration on litigation may undermine an organization's ability to employ other political means (Scheingold 1974). Or success in litigation may defuse a drive for wider legislative change.

General effects need not be intended (or perceived) by the forum (or the disputants). Modifications of behavior in response to a perceived pattern of particular instances of forum activity would qualify as a general effect even if the forum did not call attention to that pattern and even if the forum itself did not perceive it. The forum may attempt to enhance certain of its effects by cultivating a particular public persona (e.g., of severity or of evenhandedness) or by deliberately projecting an image of its general patterns of response. Of course, no matter what it tries to project, transmission by the forum is only part of the process. Effects will also depend on the reception side: Who gets what messages? Who can evaluate and process them? Who can use the information?

The impact of courts on disputes is to an important extent accomplished by the dissemination of information. Courts produce not only decisions, but messages. Their product is double: what they do and what they say about what they do. Messages about both are mediated through various channels to different audiences. These messages are resources which parties and others use in envisioning, devising, pursuing, negotiating and vindicating claims (and in avoiding, defending and defeating them). Similarly, courts produce messages which can be used as resources by some actors in order to regulate others (or to resist such regulation). Since courts, like other legal institutions, have far more commitments than resources to carry them out, their capacity to conduct full-blown adjudications is limited to a fraction of the potential cases. The social effects they produce by communication must be far more important than the direct effects of the relatively few decisions they render. Law is more capacious as a system of cultural and symbolic meanings than as a set of operative controls. It affects us primarily through communication of symbols--by providing threats, promises, models, persuasion, legitimacy, stigma, etc.[16]

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16 The appreciation of courts as cultural backdrop rather than operating control is connected, I suspect, with the tendency for such institutions to look better from afar. Those who experience courts first-hand tend to be less satisfied with them. Sarat 1977:439, 441 Yankelovitch et. al. (1978:11, 18) found that unfavorable evaluations of state courts increased

Just how potential disputants and regulators will draw on the resources provided by courts is powerfully affected by their culture, their capabilities and their relations with one another. Audiences have different capacities to receive and evaluate messages received from courts.[17] They differ, for example, in their ability to make a sophisticated assessment of what a court really does--i.e., what their bargaining chips really are.[18] Thus while naive amateurs may generalize from one area

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with both knowledge about courts and experience with them. Cf. Curran (1977:236) on the more critical assessment by multiple users. Comparable responses have been found in widely different settings. Kidder (1973:134) reports that Indian litigants were disillusioned with the courts they had encountered

> [but]...everyone interviewed believed that the courts above those they had directly experienced would be free of the complications they had found in their own experience....This 'grass is greener' phenomenon was as true of recent winners as it was of recent losers and showed up in [experienced] 'courts birds' as predictably as in the newest novice.

The gap between use and estimation appears even in the community-based Social Conciliation Commission described by Kurczewski and Frieske (1978:328) where those who think best of the SCC are higher status groups with little direct experience of their operation.

> The SCC's are favored to a much lesser degree, on general criteria, by those who have actually used them as disputants--even though these former SCC users are largely satisfied with, and assess positively, the performance of the SCC in their own particular cases--and these former parties tend to be persons with characteristics of lower status.

17 Thus Macaulay (1979) found that the organization of legal services was such as to deliver information about their opportunities under consumer legislation to businesses and to wealthy consumers, but not to ordinary consumers. The failure of legal information to filter through to major segments of the population (and the attitudinal obstacles to extraction of bargaining endowments from that information) are helpfully surveyed by Sarat (1977). Cf. Edelman's (1967:Chap. 2) description of the tendency for diffuse remote publics to receive symbolic reassurance while attentive organized groups enjoy access to a flow of tangible benefits.

18 Cf. Ross's (1970) account of the shift in bargaining stances when the knowledgeable lawyer replaces the inexperienced claimant as the bargaining partner. But the lawyer's sophistication may not always be placed at the disposal of the naive client. Feeley (1979:464-65) describes how criminal defendents

of judicial activity to another, sophisticated professionals who "make relevant distinctions and...put the message into a refined context" will be able to extract more specific and accurate information from the judicial message. (Geerken and Gove 1975:507.) Where courts exert influence through communication, the results will be powerfully influenced by the information-processing capacities of the recipients--and by the disparities in their capacities.[19]

When we discussed courts as sources of bargaining (and regulatory) endowments, the point of view was that of the disputants. In talking of general effects our stance is more detached. The time frame shifts from the strategic present to the retrospective or predictive. Calculations are probabilistic rather than prudential. Judgments are aggregate rather than distributive. The point of view is that of the detached observer or the remote manager of the system, not of a participant interested in specific transactions. But both idioms (endowments and effects) project a vision of legal action as a centrifugal flow of symbols, radiating beyond the parties immediately involved. Both lead us to focus on the disputants as receivers of this

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receive routine offers made to appear as exceptional deals:

> It is the salesman's stock in trade to represent a 'going rate' as if it were a special sale price offered only once. The gap between theoretical exposure and the standard rate allows defense attorneys and prosecutors to function in much the same way. Together, prosecutors and defense attorneys operate like discount stores, pointing to the never used high list price and then marketing the product as a 'special' at what is in fact the standard price.

19 Cf. Dwyer's (1979) account of systematic differences in the way in which men and women in southern Morocco perceive law and legal practices and extract support in their ongoing struggle over the subordination of women.

Without some knowledge of the (presumably differentiated) reception process, one cannot specify the policy implications of the insight that courts are important symbolic transmitters. For example, Ball (1975) calls for cultivating and cherishing the theatrical "live performance" of courts--as dramatic embodiments or presentations of a normative image of legitimate society--dramatizing the seriousness, importance, dignity, rights and duties of citizens, surrounding them with ceremonious deference. But he neglects to say who these messages are communicated to--do they really reach a wider audience? Does it matter that we have more or fewer trials? Juries? Newspaper coverage? T.V. in courtrooms? Do these effects differ by size of locality, etc.?

symbolic radiation. The patterns of general effects that we attribute to the courts depend on the endowments that actors extract from the messages that radiate from the courts. And the "endowments" that courts confer depend on the capabilities of actors to receive, store and use them, capabilities that reflect their skills, resources and opportunities.

These capabilities are not immutable qualities intrinsic to the actors, marking the irreducible end-points of analysis. Disputant capabilities derive from, and are relative to, structures of communication and structures for organizing action. (Galanter 1974). Capabilities depend, for example, on location on a network that carries information about rights and remedies and on proximity to remedy institutions or "exit" alternatives. The process of distributing and extracting endowments is framed by the larger structures of social life. As these structures undergo change, the character of the centrifugal flow of effects from the courts will change too. For example, changes in political structures and communication systems may bring in their train a shift from reliance on special effects (impinging directly on disputants) to emphasis on general effects (worked by communication about such impingements). Thus Abel (1979:193) suggests that compared to litigation in the tribal setting, modern litigation in Africa involves fewer courts with larger jurisdictions, prosecution of a smaller proportion of wrongs, and imposition of sterner punishments, shifting from the earlier reliance on special deterrence to reliance on general deterrence.[20]

We might expect the mix and the relative prominence of these radiating effects to vary across space as well as over time. For example, the role of general effects of court action compared with direct effects on the disputants, may be relatively greater in the United States, which maintains a relatively small judicial plant[21] (see Johnson et. al. 1977; Johnson and Drew 1978) but a very large number of lawyers. More than in many places, law in the United States is a private sector business[22] and pri-

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20 What Friedman and Percival (1976) label the declining role of two California courts in dispute settlement is interpreted by Lempert (1978) as a decline in direct impositions of resolutions on the parties before them, compatible with an increase in judicial contribution to dispute settlement by other means, both direct and indirect.

21 Their small numbers and passive role mean that judges in the United States are management rather than production workers. Cf. Engel and Steel (1979:311ff) on the patterns of delegation and supervision that characterize judicial processing of cases.

22 Cf. Selznick's (1969:229) observations on the pervasive privatization of labor and welfare regulation in the U.S.

vate ordering is a prominent part of the legal universe.

II. THE LAW IN THE SHADOW OF INDIGENOUS ORDERING

We have shifted from the centripetal image (implicit in the idea of "access to justice") of courts as resolvers of those disputes which come before them, to a centrifugal image of courts as one component of a complex system of disputing and regulation. In that system, courts (and other official institutions) are not the only sources of normative messages, just as they are not the only arenas in which controls are directly applied. We must examine the courts in the context of their rivals and companions. To do so we must put aside our habitual perspective of "legal centralism," a picture in which state agencies (and their learning) occupy the center of legal life and stand in a relation of hierarchic control (cf. Mayhew 1971:208) to other, lesser normative orderings such as the family, the corporation, the business network.[23]

Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. People experience justice (and injustice) not only (or usually) in forums sponsored by the state but at the primary institutional locations of their activity--home, neighborhood, workplace, business deal and so on (including a variety of specialized remedial settings embedded in these locations).

The enunciation of norms and application of sanctions in these settings may be more or less organized, more or less self-conscious, more or less consensual and so forth. For convenience I shall use the terms "indigenous ordering" and "indigenous law" to refer to social ordering which is indigenous--i.e., familiar to and applied by the participants in the everyday activity that is being regulated.[24] By indigenous law I refer not to some diffuse folk consciousness, but to concrete patterns of social ordering to be found in a variety of institutional settings--

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[23] See note 1 above.

[24] The notion of "indigenous" law as regulation by the participants engaged in an activity invites comparison with a whole battery of kindred notions. Its ancestor is Ehrlich's (1936 [1913]:38 and passim) "inner order of the associations." I found suggestive Kidder's (1978) contrast of "external" and "internal" law in India, drawing on Li's (1971) distinction of external and internal models of law in modern China. Moore's (1973) discussion of "semi-autonomous social fields" suggests how this indigenous law is entwined with official law.

in universities, sports leagues, housing developments, hospitals, etc.[25] "Legal centralism" has impaired our consciousness of "indigenous law."[26]

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[25] The term "indigenous" is used here as a relative one. Since indigenous systems frequently incorporate cultural elements from the official law and since their sanctioning systems are often entwined with the official ones, no dichotomous distinction can be made. (Fuller [1969a] points out the customary element in the working of state legal institutions.) One should imagine a scale with pure types at either end. At the official "exogenous" end might be formal written rules remote from everyday understandings, enunciated by trained specialists, enforced by governmental coercion. At the indigenous end would be simple (?) rules, close to everyday perceptions, applied by non-specialists, internalized by the participants and enforced by diffuse social pressure.

Location on such a scale cannot be ascertained from institutional labels. Consider arbitration in the United States: labor arbitration in a setting of continuing relations and applying "the law of the shop" is closer to the indigenous end than commercial arbitration by ad hoc arbitrators from the American Arbitration Association and the latter is closer to indigenous than arbitration of tort cases under the auspices of a court. See Getman 1979.

[26] Social life is full of regulation. Indeed it is a vast web of overlapping and reinforcing regulation. How then can we distinguish "indigenous law" from social life generally? Consider for example the kinds of regulatory order that are involved in dating, the exchange of Christmas gifts, behavior in elevators and in classrooms. In each there are shared norms and expectations about proper behavior; violations are visited with sanctions ranging from raised eyebrows to avoidance to assaults, reputational or physical. Clearly there is some sort of regulation going on here. In spite of the continuities, it may be useful to have a cut-off point further "up" the scale to demarcate what we want to describe as "law" of any sort, indigenous or otherwise. (Even though, as Nadel [1953] points out, the operative controls at any point on the scale are likely to be the internalization and reciprocities that characterize the less organized end of the scale.)

The scale that I visualize is one of the organization and differentiation of norms and sanctions. As we move up, we get standards that are more explicit, more deliberation about their application, eventually some kind of procedure for deliberation about norms and their application that can be identified as distinct from the ordinary flow of activity in the field. This procedural separation may range from barely distinguishable bracketing of activity to elaborated provision for tribunals which are separate in time, place, personnel, and formality from the ongoing activity. (Cf. Abel 1974). This separation is associated with the appearance of "extrinsic"

One of the striking features of the modern world has been the emergence of those institutional-intellectual complexes that we identify as national legal systems. Such a system consists of institutions, connected to the state, guided by and propounding a body of normative learning, purporting to encompass and control all the other institutions in the society and to subject them to a regime of general rules (Galanter 1966). These complexes consolidated and displaced the earlier diverse array of normative orderings in society, reducing them to a subordinate and interstitial status. (Cf. Weber 1954:140ff.)

Of course, these other orderings continue to exist. Counterparts or analogs to the institutions, processes and intellectual activities that are located in national legal systems are to be found at many other locations in society. Some of these lesser legal orders are relatively independent, institutionally and intellectually, of the national legal system; others are dependent in various ways. That is, societies contain a multitude of partially self-regulating spheres or sectors,[27] organized

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controls (i.e., the presence of rewards and punishments apart from those intrinsic to the primary activity) (cf. Spiro 1961). The differentium is the introduction of a second layer of control--of norms about application of norms--along the lines of Hart's (1961) identification of law with the union of primary and secondary rules and Bohannan's (1965) identification of law with the reinstitutionalization of norms. (The present view departs from Bohannan by including as law secondary controls that appear without removal to a separate institutional location.) Although the principle seems to me a coherent one, it does not lead to a specification of what "is" and what is not law, for the features that we refer to exist across a whole spectrum of intermediate cases, like the transition from blue to purple. Just where to draw the line depends on the particular purpose at hand. Because the point in this section is the pervasive presence of formidable controls located within the activity being regulated by the official law, I have used the term indigenous law in a more sweeping fashion than would be appropriate for other purposes.

27 Social research on law contains a number of conceptual formulations which contribute to our ability to visualize the relationship between the public official legal system and the lesser, partially self-regulating orderings. We distinguish law and morals, public and private spheres, formal and informal processes. Each of these formulations illuminates something of this relationship; none is entirely serviceable. The distinction of law from custom or morality carries in its train a history of conceptual struggles over the meaning of law. Discussions of private as opposed to public legal systems (Selznick 1969; Evan 1962) contain valuable insights, but the

along spatial, transactional or ethnic-familial lines ranging from primary groups in which relations are direct, immediate and diffuse to settings (e.g., business networks) in which relations are indirect, mediated and specialized.

The mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been characterized by a repeated rediscovery of the other hemisphere of the legal world.[28] This has entailed recurrent rediscovery that law in modern society is plural rather than monolithic,[29] that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation.[30] The

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public-private distinction invites us to categorize where we need to measure variation. Much of the same may be said of the frequently invoked and rarely defined distinction between formal and informal, which collapses into an amorphous mass a vast and changing array of processual and structural characteristics.

Moore (1973:720) uses the term "semi-autonomous social field," to refer to an area of social life that

> can generate rules and customs and systems internally, but that...is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce compliance; but it is simultaneously set in a larger matrix which can, and does, affect and invade, sometimes at the invitation of persons inside it, sometimes at its own instance.

This formulation usefully points to the study of the lesser normative orderings, not as isolated and independent units, but as parts of a larger, complex legal order, with which they interact.

28 This rediscovery is often associated with Ehrlich 1936 [1913]. See also Weber 1954 [1922]:16-20, 140-49.

29 The plural or multiple character of law in a given society has been noted by Fuller (1969b:123ff.) and by Pospisil (1971: 343). The latter assumes that legal regulation is isomorphic with group structure. I submit that it is important to regard the relation of groups and legal regulation as problematic.

30 The secondary, derivative "back up" character of law is suggested by Bohannan (1965), but his identification of law with the reinstitutionalization of norms seems to posit a constant relationship between primary and secondary controls. Again, I think it is important to regard the relation between primary and secondary controls as problematic. Cf. H.L.A. Hart's (1961) notion of law as the union of primary and secondary rules.

relations between the big (public, national, official) legal system and the lesser normative orderings in society that I have called "indigenous law" are obscured by the portrayal of the big system as all-encompassing, uniform, exclusive and controlling.[31] But this notion of official law as a comprehensive monolith--and indeed as a "system"--are not descriptions of it but rather part of its historic ideology. Legal regulation in modern societies, as in others, has a more uneven, patchwork character (cf. Tanner 1970).

The legal centralist disdain of these lesser orderings is matched by the view that they have been so attenuated by the growth of the state and/or the development of capitalism that their presence is vestigal or confined to backwaters.[32] But indigenous and official ordering may not be mutually exclusive (or historically serial): modern society proliferates both.[33] Indeed, institutions of official regulation themselves become the site of indigenous ordering--e.g., the informal rules of the government enforcement agencies studied by Blau (1963), which determined which official rules were enforced and to what extent.

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[31] The difficulty of seeing how these parts are related is compounded by our tendency to view them as related in evolutionary sequence. The evolutionary view is that lesser, dispersed and informal regulatory elements are displaced or transformed by the growth and elaboration of the centralized bureaucratic legal system (cf. Parsons 1964). Curiously Diamond's (1971) depiction of state law relentlessly exterminating custom provides a mirror image of the evolutionary view with the value signs reversed.

[32] That indigenous law has been effaced and the implications of that for the centrality of official law and the leadership of legal professionals is argued by Sawer (1965:186).

[33] I find suggestive Stinchecombe's (1969:185ff.) challenge to the intellectual cliche that communal relations deteriorate with the increase of formal, impersonal and technical social regulations. He argues that community (defined in terms of solidarity, socialization and "a tendency to solve disputes within the group by standards of justice and need rather than standards of game theory" [1969:186]) is enhanced rather than undermined by formal organization.

> ...[T]he solidarity of communal groups is intimately dependent on their degree of formal organization. Formal organizations aid in making the environment of primary groups homogeneous, protect small-group integrity, and aid in preserving their solidarity by normative control of exploitation. They can be agents of the groups as a whole whose fate can be interpreted as group fate, they organize supralocal socialization experiences, and they provide support for cultural elites of the group. (1969:191)

The survival and proliferation of indigenous law in the contemporary United States is attested by a literature that displays the immense profusion and variety of "semi-autonomous social fields" existing within a single society.[34] Indigenous law in the contemporary United States remains concealed from those who are looking for an inclusive and self-contained gemeinschaft, unsullied by formal organization, which enfolds individuals and integrates their whole life experience. What we find instead is a multitude of associations and networks, overlapping and interpenetrating, more fragmentary and less inclusive. For the most part they are, as Danzig and Lowy observe (1975:681), "socio-economic networks rather than bounded groups." Such partial communities, linked by informal communications and sometimes by formal communication devices as well, provide much of the texture of our lives in family and kinship, at work and in business dealings, in neighborhood, sports, religion and politics. There are varying degrees of self-conscious regulation, varying degrees of congruity with the official law and varying degrees of reliance on the support provided by official institutions.[35] This is a realm of interdependence, regulated by tacit norms of reciprocity and sometimes by more explicit codes. The range of shared meanings is limited but the cost of exit is substantial. If we have lost the experience of an all-encompassing inclusive community, it is not to a world of arms-length dealings with strangers, but in large measure to a world of loosely joined and partly overlapping partial or fragmentary communities. In this sense our exposure to indigenous law has increased at the same time that official regulation has multiplied.

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[34] The existing literature includes reports on self-regulation in a variety of business settings such as shopping centers (MacCollum 1967); trade associations (Mentschikoff 1961); heavy manufacturing (Macaulay 1963); textiles (Bonn 1972a, 1972b); the garment industry (Moore 1973); movie distribution and exhibition (Randall 1968); autodealers' relations with manufacturers (Macaulay 1966) and with customers (Whitford 1968). In addition, there are reports on self-regulation within religious groups (e.g., Columbia Journal of Law and Social Problems 1970) and ethnic communities (e.g., Doo 1973); intentional communities (e.g., Zablocki 1971); professional associations (e.g., Akers 1968); athletics (e.g., Cross 1973); workplaces (e.g., Blau 1963).

[35] See the discussion of "regulatory endowment," p.8 above. Cf. Galanter 1974b:126ff. on the variation of private remedy systems from those "appended" to official institutions to those independent of official law in personnel, location, sanctions, and norms.

Mnookin and Kornhauser's analysis of "bargaining in the shadow of the law" in divorce cases helps us to put aside the centripetal view and to focus on the movement of law out from the forum into the realm of private ordering. The policy lesson they draw is that the "primary function of the legal system should be to facilitate private ordering and dispute resolution." (1979:986) The divorce example imparts a highly individualistic coloring to the analysis: private ordering is equated with the parties "making law for themselves" in the light of their "preferences" and "the law." But our discussion of indigenous law suggests that private ordering may involve more than disputants devising an ad hoc legal regime for themselves. The parties may not constitute an isolated dyad, but be embedded in (or adhere to) a group or network with its own rules and standards. Making claims on the basis of what is acceptable quality in a trade, invoking "academic freedom," or submitting a dispute to an arbitrator, are not comfortably subsumable under the notion of "making law for themselves." Each of these is as much an act of affiliation as of legislation; it is a reference to some existing normative structure, not a proposal to erect a new one. Working out a corpus juris and constituting a legal establishment are relatively infrequent kinds of behavior (and rarely begin from scratch); most of our justice-seeking is by adhesion.

Where bargaining and regulating take place in the settings of patterned norms and sanctions that we have called "indigenous law," we may be inclined to characterize the whole system somewhat differently. Mnookin and Kornhauser's image of "bargaining in the shadow of the law" suggests that the law is there and the disputants meet in a landscape naked of normative habitation (or in which such structures are subsumed into their "preferences"). Instead I visualize a landscape populated by an uneven tangle of indigenous law. In many settings the norms and controls of indigenous ordering are palpably there, the official law is remote and its intervention is problematic and transitory. (E.g., the businessmen described by Macaulay [1963] or a typical dispute within a university.) In such settings the relation might be better depicted as "law in the shadow of indigenous ordering."[36]

The relation of official law to indigenous ordering is not invariably a matter of mutual exclusion (where the former

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[36] This indigenous ordering in turn may be a derivative of bargaining. Getman (1979:917) observes that

> Collective bargaining shapes labor arbitration and gives it power.... It is only when unions are powerful, well established and responsive to the needs of their members that labor arbitration works successfully.

In this setting we get "law in the shadow of [collective] bargaining."

ousts the latter), nor one of hierarchic control (where the latter is conformed to or aligned with the former). Judicial intervention to apply official standards does not necessarily weaken indigenous controls. For example, Zald and Hair (1972:66) suggest that the judicial erosion of the doctrine of charitable immunity and the exposure of hospitals to liability for negligence provided enlarged "incentives and sanctions...to governmental and private standard-setting bodies such as the Joint Commission [on Accreditation of Hospitals] to induce compliance with standards on the part of hospitals." Similarly Macaulay (1966) shows that official intervention in the relation between automobile manufacturers and their dealers led to a growth of internal regulation rather than its attenuation. Randall's (1968) study of movie censorship reveals how the elaboration of internal controls within the movie industry was a reflex of actual (and potential) control by the official law. Just as the character of indigenous regulation may be affected in unanticipated ways by developments in the official law, so the presence of indigenous regulation may transform the meaning and effect of the official law.

The effects of indigenous tribunals, like those of official courts, are not confined to the cases which they handle. The work of these tribunals may radiate norms, symbols, models, threats and so forth. In indigenous law, too, the shadow reaches further than its source. What kinds of bargaining and regulatory endowments actors extract from the messages depends on their capabilities. Community standing, seniority, reputation for integrity or formidability may confer capability in the indigenous setting that does not translate into capability in the official setting. Indeed, indigenous law may be insulated from external controls precisely by its constitutents' lack of capability in the official setting (cf. Doo 1973). Acquisition of such capability may lead to erosion of indigenous law (cf. Galanter 1968). On the other hand, an equalizing of capabilities in the official setting may lead to its abandonment and the development of indigenous tribunals, as in the labor-management field.

The complexity of the interface between external and indigenous controls (cf. Katz 1977) is demonstrated in the observation that the official system is frequently used to induce compliance with a decision in an indigenous forum. Thus Ruffini (1978) describes the use of threats to invoke the official system among Sardinian shepherds to force resort to the indigenous system of settlement and to enforce the terms of such settlements. In the Brazilian squatter settlement described by Santos

> The official legal system is presented not as a forum to which a litigant may appeal from an adverse decision under Pasargada law but as a threat aimed at reinforcing

> the decision of the RA [Resident's Association] under that law. (Santos 1977:79)

Similar accounts in which the cost, delay, aggravation, and risk of being subjected to the official system becomes a resource of indigenous regulators are found in accounts from India (Meschievitz 1979:46) and Lebanon (Witty 1978).

Courts may also be used directly to secure outcomes in line with indigenous norms, even when these are not officially recognized. Indian villagers found ways of using courts to vindicate claims for caste preference deemed non-justiciable by the Anglo-Indian law. Similarly, Americans have used courts to effectuate widespread norms of divorce for marital incompatability which were unrecognized in the official law (see Engel 1980). In many ways, then, adjudication in official courts may serve to promote the application of norms that lie outside the official law by which they are guided.

I am not trying to turn legal centralism upside down and place indigenous law in the position of primacy. Instead I suggest that the relation of official and indigenous law is variable and problematic. Nor do I mean to idealize indigenous law as either more virtuous or more efficient than official law. Although by definition indigenous law may have the virtues of being familiar, understandable and independent of professionals, it is not always the expression of harmonious egalitarianism. It often reflects narrow and parochial concerns; it is often based on relations of domination; its coerciveness may be harsh and indiscriminate; protections that are available in public forums may be absent.

The persistence of indigenous law has sometimes been taken as reason to redouble our efforts to project official legality into all corners of social life. But growing awareness of the costs and limitations of such programs of legalization has inspired attempts to replace or supplement official law by (improved or purified) indigenous law. There is an abundance of schemes in both developing and industrialized countries to (re)-constitute tribunals that give genuine expression to community values and that operate in a way that is familiar and accessible.

At least some of these schemes turn out to be dismal failures: thus the nyaya panchayats promoted by India in the 1950s and 1960s seem to be moribund (Baxi and Galanter 1979; cf. Meschievitz and Galanter forthcoming). This may be due to problems of design and execution rather than to any defect in the fundamental conception. But the failure of many "alternative" forums to recruit cases (other than by diversion from coercive official agencies) suggests that there may be formidable problems of design-

ing a tribunal that meshes with community needs.[37] But rather than dwell on losers, let us consider a success story. The Polish Social Conciliation Commission studied by Kurczewski and Frieske (1978) presents an attractive instance of a tribunal that is used by its constituency, operates without coercion, and gives expression to community values. This example of "self government in justice," as the authors call it, is as good an instance of officially-sponsored "indigenous law" as we are likely to see. But even with the SCC experience in mind, it is evident that indigenous law, like other law, has problems of effectiveness.

Indigenous law, like other law, has the problem of connecting effective sanctions to its determinations. Where coercive powers are renounced (as by the SCC), the indigenous tribunal faces the problem of obtaining leverage over those who are impervious to community opinion, getting them to submit to its jurisdiction or to comply with its decisions. This is compounded where the setting is culturally heterogenous. Those who share a common location or common interests (e.g., as workers or students) may not share a common culture. Ideas about deference, noise, work performance, child rearing and so forth may differ among those who interact frequently. The thrust of community law is limited when moral communities are plural and cross-cutting, not self-contained and reinforcing. And the most crucial disputes may not be within the community, but with entities that are separated not merely by pluralism, but by difference in form and scale. The most significant transactions may be with corporate entities--government departments, corporations--that are not amenable to community persuasion or sanc-

[37] Thus the San Jose Neighborhood Small Claims Court, which attempted to reach out by means of attractive hours, location, publicity and informality, produced only 60 filings in a six-month period. (Beresford and Cooper 1977:190). The much-studied Dorchester mediation project produced fewer referrals from all sources than the forty cases per month anticipated by its planners (Snyder 1978:761). Although observers blame the low rate of referrals from official sources on such problems as police fear of losing overtime benefits associated with court appearance (McGillis and Mullen 1977:98), the scanty intake is reminiscent of the disappearing caseload problem that besets other "alternative" tribunals. Thus Baxi and Galanter (1979:368ff.) found that the filings in the nyaya panchayats in Uttar Pradesh fell to a tenth of their original number in the course of twenty years. Bierbrauer, et. al. (1978) depict a similar decline in the civil proceedings heard by the Schiedesmann. Cf. Bloomfield's (1976:57ff.) account of dissatisfaction with an arbitration experiment in Massachusetts in the 1780s. The lessons of shrinkage and desuetude remain to be drawn.

tions.[38] Indeed, a defining characteristic of our age is the extent to which transactions and disputes are between units of different scale.[39] As the cultural and structural span of indigenous law increases, we might expect that the messages transmitted by indigenous tribunals will increasingly be subject to all the vagaries of communication and of the differential ability to extract endowments which obtain in the case of the courts.

III. EXPLORING THE SHADOWS

In Part I, I argued that the most significant legal traffic was the centrifugal flow of legal messages, rather than a centripetal flow of cases into official forums. In Part II, I argued that these messages radiate into spaces that are not barren of normative ordering; instead the social landscape is covered by layers and centers of indigenous law. What then are the implications for inquiry and action of such a world of centrifugal flows and indigenous orderings?

One implication is that any major advance in our understanding of how official legal regulation works in society depends on knowing more about indigenous law and about its interaction with official law. Our professional habits of mind disincline us to take indigenous law seriously.[40] But the relation of law to other normative orderings has been central to many thoughtful explorations of social order from ancient times to the present. Every legal system has to address the problem of the autonomy and authority of the various other sorts of normative ordering with which it coexists in society. The big legal

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[38] Eovaldi and Gestrin (1971:306) identify this as the "most serious flaw in the concept of 'informal' dispute-settlement procedures" for consumer grievances.

[39] See Coleman 1974; Moore 1978:Chap. 3. On the dominance of official dispute institutions by cases between units of different scale, see Galanter 1975; Wanner 1974. On the effects of this disparity on disputing, see Galanter 1974b; 1975.

[40] Indeed our habits may prevent us from seeing it all, as Fuller (1969a:540) suggests:

> ...it is not a question of our being unfamiliar with customary law, but of our being quite unable to draw on our own experience...[i]n part...because we do not know we have it. For it is characteristic of customary rules of action that they disappear from view precisely when they are most effective. When they appear not as rules at all, but simply as apt responses to an immediate reality, as part of "the way things are."

system faces the question of how to recognize or supervise or suppress the little systems. Legal centralism is one style of response to this generic question of legal ordering, and its exhaustion suggests the need for reflection on other models. (Griffiths 1979).

Historical and comparative study can help us to visualize the phenomena in which we are embroiled. Some disparate examples from my own experience suggest themselves. The self-conscious appraisal and design of the relation between competing normative orders is most vividly apparent in the relation of the state to religion, where the law's rival may be a corporate institution with its own learned tradition expounded by its own specialists (and even with its own doctrines about its relationship to state law). In Western tradition, the theme of "church and state" is the locus classicus of thinking about the multiplicity of normative orders. There is an abundance of prescriptive theories about how religious law should be treated by the state's legal system [41] (and vice versa) and a rich literature depicting instances of conflict and co-existence.

Other legal systems have conceived the relationship of their components very differently from the legal centralist conception. Classical Hindu law, to take an example that I happen to have encountered, can be read as a contrasting method of combining the most refined and professional elements with lay and unlettered ones. Not only did the textual law lay down different rules for different kinds of persons, but it incorporated and certified many bodies of rules not found within its pages. Every aggregation of people--corporations of traders, guilds of artisans, castes, families, sects, villages--was entitled to formulate and apply its own customs and conventions. When matters concerning such groups came before the royal courts, they were to be decided in accordance with the usage of the group. (Such custom was not necessarily ancient, nor was it unchangeable. The power of groups to change custom and create new obligatory usage was generally recognized.) The king is advised that in cases of disputes among traders, artisans, husbandmen, sectarians and so forth, it is impossible for outsiders to give correct decisions: those who understand their conventions should be invited to render a decision (Kane 1946:III, 264). Provision is

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41 These range from state suppression of religious law, through various forms of intervention, limitation, recognition, and application, to religious control over state law. An example of contention among these modes in contemporary India, accompanied by a sketch of some of the dimensions involved in creation of such a taxonomy, is found in Galanter 1971.

made for cases to be decided outside the king's court by assemblies of the guild, locality, caste, etc. Each group was entitled to receive royal recognition and enforcement of its usages and the more refined and concededly elevated textual law was applied where disputants were not covered by some common body of customary law. (Kane 1946: III,283).

Hindu rulers traditionally enjoyed and sometimes exercised a general power of supervision over all these lesser tribunals. But there was no systematic imposition of "higher law" on lesser tribunals. There was a general diffusion by filtering down (and occasionally up) of ideas and techniques, and by conscious imitation. The relation of the "highest" and most authoritative (textual and royal) elements of the legal system to the lesser (local and customary) elements was not one of bureaucratic superior to subordinate. It was perhaps closer to the relations that obtain between high fashion designers and American department store fashions or between our most prestigious universities and our smaller colleges than to the hierarchic control we associate with law.[42]

The example of Hindu law is not invoked to point to some preferred state of affairs but to suggest that not every elevated and complex body of law sees itself as superseding and displacing lesser orderings; styles (and theories) of co-existence vary. Since our tradition has tended to neglect indigenous law, attention to otherwise remote historic and comparative instances may provide useful leads for our understanding and help us to visualize some of the possibilities that surround us. To dispel any sense that the question is esoteric and is not found at the heart of modern law, I want to give a final example from contemporary American commercial law.

The drafting of the Uniform Commercial Code was a self-conscious attempt (by Karl Llewellyn) to synthesize formal law and commercial usage: the formal law would incorporate the best commercial practice and would in turn serve as a model for the refinement and development of that practice.[43] The Code's

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[42] Derrett 1968:Chaps. 6, 7; Galanter 1968. On different readings of this Hindu tolerance of the lesser legal orders, see Derrett 1968:Chap. 7 and Lingat 1973:176ff.

[43] Thus the Code announces among its underlying purposes:

> to permit the continued expansion of commercial practices through custom, usage and agreement of the parties [§1-102(2)(b)].

Usage of trade is embraced as a source for interpreting agreements (§1-205) and custom is viewed as supplementing the law rather than derogating from it. See e.g., Comment 4 to Sec. 1-205.

broadly drafted rules would be accessible to businessmen and would provide a framework for self-regulation which would in turn furnish attentive courts with content for the Code's categories. Thus the Code would serve as a vehicle for business communities to evolve law for themselves in dialogue with the courts, operating not as interpreters of imposed law but as articulators and critics of business usage.[44] There has been no evaluation of the Code's attempt to institute such a synergistic relationship.[45] (I admit to some skepticism on the ground that this attempt seems based on a misreading of the character of commercial litigation [ignoring, e.g., the extent to which it is shaped by non-rule elements like costs and the relations between the parties] and its relation to business usage.[46])

The insights afforded by historical and comparative study have to be linked to an enlarged understanding of the working of indigenous regulation in contemporary American society. In spite of a profusion of pertinent studies, the data base is thin and uneven. There is a major problem of comparability among studies done in diverse settings and by diverse methods. This is a problem which flows in part from the immense variety of fields; but it is compounded by the lack of communication and of shared concepts among researchers. Although the literature contains a variety of testable hypotheses, the establishment of

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44 On the linkage between this and Llewellyn's jurisprudence, see Twining 1973:Chaps. 11-12. Twining notes (1973:312) that "Llewellyn's attitude to commercial usage has echoes in Ehrlich," by whom he had been influenced during his early sojourn in Germany. A fascinating parallel may be found in Llewellyn's contemporaneous (c. 1947) draftsmanship of an even more purely customary code for the Santana Pueblo, reprinted by Twining at 1973:549.

45 One attempt by White (1977) to evaluate the working of Art. 2 does not identify this as goal. Although it does not go beyond the reported appellate cases for data on impact, it suggests a profound dissociation of appellate judicial doctrine from business practice. It does present one finding that might be interpreted as an indication of success in these terms: a decrease in appellate litigation in an area where the older law turned on intricate determinations of title that were alien to business understanding and "the drafters of the Code gave legal meaning to the symbols [C.I.F., etc.] routinely used by businessmen." (1977:275) Llewellyn's notions about the relation of decisional styles of courts to commercial practice were explored by Carpenter (1977). An admittedly small and unsystematic sample of appellate cases under the U.C.C. failed to reveal any noticeable shift toward incorporation of merchants' views in judicial doctrine.

46 See Macaulay 1963; Friedman 1965; Friedman and Macaulay 1967.

grounded theory awaits the adaptation (or development) of adequate methods for the comparative study of these fields.

Systematic exploration of "indigenous" law requires that we ask under what conditions and in what locations does self-regulation emerge? What are the features that it displays? Is there explication of norms, formality of procedure, broad or narrow participation, etc.? The social settings in which such regulation takes place are not independent self-contained units, but interact with a larger complex legal order. How then is indigenous regulation related to the regulation projected by the big legal system? What is the relationship between official law and the indigenous regulatory activity? Does the latter rely on or borrow from the norms, sanctions and style of the official law? Study of the spheres of indigenous ordering leads to exploration of their interface with official forums. How do courts (and other official agancies) attempt to supervise and control bargaining and regulation in various social settings?

We can thus envision a kind of "impact" research that would depart from the earlier generation of impact research in several important ways.[47] Traditional impact research starts from the doctrinal pronouncements of appellate courts and asks about congruence between that doctrine and the practices of other agencies (lower courts, school boards, police, etc.) and the behavior of the public. We are interested in the effects not only of doctrinal pronouncements, but of court routines, costs, remedies, delay, uncertainty, legitimation, stigma and all of the other components of the total message transmitted by the courts, including trial courts as well as appellate courts, and including informal mediation and private bargaining as well as adjudication. The product of the court is not doctrine with a mix of impurities, but instead a whole set of messages that can be used as resources in making (or contesting) claims, bargaininf (or refusing to bargain) and regulating (or resisting regulation).[48]

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[47] This literature is usefully surveyed in Wasby (1970). On the limitations of this genre, see Feeley 1976:498ff.

[48] Such impact research would make it possible for courts to educate themselves about the consequences of their patterns--of discovery, settlements, costs, remedies--as well as of their doctrinal production. What are the general effects of court routines as well as the occasional dramatic ruling? Such findings would provide the cognitive underpinning for a deeper, more responsible consequentialism in which courts were supplied with some capacity for systematic monitoring of their effects.

A fascinating example of an attempt at such self-education is found in Renfrew et al. (1977). A federal judge, attuned

Through the wrong end of the telescope, the work of courts is seen not primarily as the resolution of disputes in official settings, but the projection of bargaining and regulatory endowments into a world unevenly occupied by indigenous regulation, a world in which the influences that emanate from courts mingle with those from other sources. This might be thought to imply a centrifugal variant of the legal centralist picture of courts as agencies of hierarchic control, securing the penetration of official norms and the corresponding alignment of social activity--a variant emphasizing the dissemination of messages rather than the pronouncement of authoritative decisions and the application of sanctions. Such a picture might seem to invite a strategy of control by management of images rather than by determination of cases. From appreciation of the "Potemkin village" aspect of the law it is a short step to devise ways to build more imposing and convincing facades.

For several reasons this model of courts as engineers of control through deliberately projected images is as illusory and partial as that of courts as authoritative resolvers of disputes. First, the contours of interaction between the different sorts of general effects that we have identified remain to be mapped. We might imagine them often to be reinforcing and cumulative, but to some extent they may undercut and undo one another. For example, the coerciveness that promotes deterrence may be incompatible with the sense of volition that promotes enculturation (cf. Muir 1967).

More generally, the messages disseminated by courts do not carry endowments or produce effects except as they are received, interpreted and used by (potential) actors. Therefore the meaning of judicial signals is dependent on the information, experience, skill and resources that disputants bring to them. The ability of courts to calibrate the endowments they distribute

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to the primacy of maximizing communication of anti-trust norms to other businessmen, sentenced anti-trust violators to a regimen of giving speeches about their offenses to audiences of their peers. The judge then conducted a survey to gauge the effects.

Of course such judicial messages are only part of the whole complex of messages radiating from official (and other) sources and the context may impart to a judicial message a meaning different from that it appears to carry when considered in isolation. Cf. McCormick's (1977) argument that token enforcement and non-stigmatizing sanctioning of anti-trust violations have neutralized public reaction against these violations and thus helped legitimate "prohibited" business practices.

or the effects they produce is limited by their ability to predict the distribution of capabilities among actual and potential disputants. These capabilities may change due to factors remote from the courts and in ways not readily knowable by courts. For example, those who become sophisticated about crime may read judicial deterrence messages differently; claimants who become organized may find elaborate procedure and the need for expensive experts transformed from liabilities to assets; and so forth.

The indeterminacy of the courts' educational effects is compounded by the fact that the courts (and the official law generally) are not the only source of such messages. All of the lesser normative orderings (family, workgroup, church, and associations and networks of various sorts) disseminate messages about norms, infractions, remedies, etc. The messages of the courts may be amplified, cancelled or transformed by the presence of these indigenous norms and controls in ways that are beyond anticipation or control by the courts.

The variability introduced by disputant capabilities and by indigenous ordering is augmented by some of the characteristics of the overall legal setting. The messages broadcast by the courts do not impinge on potential users by traversing some transparent neutral medium. Typically disputants do not encounter these messages floating freely, but in the context of a local legal culture. By this I refer to the complex of enduring understandings, concerns, and priorities shared by the community of legal actors (and significant audiences) in a given locality. This "culture" prescribes the appropriate content and style of various legal roles and processes: it defines the uses of the preliminary hearing and the pre-trial conference, the role of the judge in plea bargaining and settlement negotiations, the proclivity to resort to the courts and to invoke various procedural rights, the pace of litigation, appropriate dispositions for particular offenses by particular sorts of offenders, etc. Judicial messages are reworked and combined with a whole set of understandings and concerns. The meanings of what courts do and the kinds of endowments that disputants can extract from them vary with these cultures.

Local variation in legal culture is entrenched by the chronic overcommitment of law in the American setting. All legal agencies have more authoritative commitments to do things than resources to carry them out. This overload of commitments results in a massive, covert delegation of power from peak agencies (e.g., legislatures and appellate courts) to agencies and groups below to decide which commitments should be fulfilled and how much to fulfill them. "Selective enforcement" is chronic and pervasive. The abundance of unfilled commitments forms a great reserve pool of claims that could be mobilized. Incumbents, responding to their own evaluations and to their agencies' "system

maintenance" requirements, develop priorities that may diverge from the estimations of concerned (or potentially concerned) publics (cf. Becker 1963:161). Changing conditions and new awareness produce new potential demands. Interest groups, media and individual crusaders may challenge existing patterns of enforcement and interpretation, bringing about new understandings of the meaning of the law promulgated by courts and legislators. (Galanter, et. al. 1979)

The differing effects of local culture and disputant capabilities are amplified by the scale and complexity of the legal system. In a large complex legal system like that of the contemporary United States, the messages broadcast by (and to) courts are less determinate and precise than may at first appear to be the case. There is a lot of law (in the sense of authoritative normative learning)--more than can be encompassed by any single intelligence, no matter how capacious. New law pours forth from legislatures and even more is promulgated by an ever-increasing array of agencies, stimulated by a general climate of regulatory interventionism. The multiplicity of norms of varying levels of authority and of generality; the inevitable ambiguities, overlaps and conflicts among them; the fragmentation of law making and regulatory powers among myriad agencies with overlapping mandates and jurisdictions; the dispersion of powers of innovation and interpretation among weakly co-ordinated agencies with little hierarchic supervision--all of these combine to render the messages of legal authorities indeterminate, often obscure and sometimes malleable. If the stakes warrant and the pocketbook permits, the indeterminate malleable quality can be enhanced by the investment of skill and resources. (As a recent study of lawyers puts it: "the discovery of a unique issue is likely to be a function of the amount of time that lawyers devote to a case and thus of the amount of money that the client spends on lawyers." [Heinz and Laumann 1978:1117])

The notion of comprehensive judicial control through calculated projection of symbols is thus an idle conceit, as is the notion of judicial control by coercive imposition. Courts (and other official agencies) comprise only one hemisphere of the world of regulating and disputing. To understand them we must learn how they interact with the other normative orderings that pervade social life. To fulfill our commitment to enlarge justice requires that we embark on research that will illuminate the complex relations between official forums and indigenous law. Such research cannot answer the intractable questions of doing justice, but without it we are less likely to identify the real problems and the real choices that confront us.

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The Paradoxes of Pro Bono

Richard Abel

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Connell Professor of Law Emeritus, UCLA.

THE PARADOXES OF PRO BONO

*Richard Abel**

Pro bono is a puzzle. It provides high quality legal services to large numbers of clients who would otherwise go unrepresented, thereby helping to fulfill our legal system's promise of "Equal Justice under Law." But what a bizarre way to address a foundational element of liberal legalism. Could we imagine relying on volunteerism to perform other core governmental functions: police (the deputy sheriffs of the frontier are a distant memory), national security (privateers), foreign relations (honorary consuls), education (volunteer parents as the *only* teachers), or transportation (hitchhiking)?[1] There is something very strange about having privileged lawyers—who earn huge incomes by acting for large corporations and wealthy individuals—constitute a major source of legal representation for the poor and subordinated. The excellent article by Scott Cummings and Deborah Rhode offers an opportunity to reflect on the significance of this striking manifestation of American exceptionalism.

Like other services to the poor—poor houses, orphanages, soup kitchens, and hospitals—legal aid began as a charitable activity, performed initially by religious groups (indeed, such representation is still called "Pro Deo" in civil law countries) and then by voluntary associations (often motivated by solicitude for fellow immigrants).[2] In 1965, however, the U.S. Office of Economic Opportunity (OEO) launched the Legal Services Program, expanding the nation's annual expenditure on civil legal aid from less than $5 million to more than $300 million in fifteen years.[3] U.S. Supreme Court decisions in 1963 and 1972 gave accused indigent criminals a constitutional right to free representation.[4] In other countries—notably England, Canada, and Australia in the common-law world, and the Netherlands, Germany, and the Scandinavian countries in the civil-law world—the state accepted responsibility for legal aid earlier and more comprehensively.[5] In the United States, pro bono persisted in the form of noninstitutionalized acts of

* Connell Professor of Law Emeritus, UCLA.

1. Richard L. Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 295, 297–99 (Robert Granfield & Lynn Mather eds., 2009).

2. *See* Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 492–94 (1985).

3. Abel, *supra* note 1, at 296.

4. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

5. *See* Abel, *supra* note 2, at 475.

individual generosity (and sometimes self-interest), largely by solo and small-firm practitioners.[6]

Recent decades have seen a striking and surprising reversal of this social democratic trend. In the United States, conservative political attacks on legal aid succeeded in cutting real dollar expenditures by one-third from the 1980 highpoint—and expenditures per poor person by much more—while drastically restricting who could be represented in what kinds of matters using what strategies.[7] At the same time, large firms have greatly increased and rationalized their pro bono activities, whose value now exceeds that of the federal program.[8] Indeed, the two trends may be related: Australian governments have pointed to the growth of pro bono as a justification for cutting the legal aid budget.[9] By contrast, civil-law countries with fewer large firms and much less robust pro bono programs generally have sustained levels of legal aid.[10]

I want to use the rich data and analysis presented by Cummings and Rhode to reflect on the consequences of relying on private philanthropy to serve more than half the interests that cannot obtain representation through the private market. The dramatic expansion of pro bono reflects the very low baseline from which it began. Although I do not want to deprecate or discourage the contributions of large firms, it is important to place them in perspective. Only forty percent of lawyers in the 200 most profitable firms contribute twenty or more hours a year.[11] Assuming (realistically) that large-firm lawyers bill 2000 hours annually, even this civic-minded minority is contributing just one percent of its labor. Despite Americans' strong antitax sentiments, the marginal tax rate at the higher brackets is a quarter to a third of income. Would we not obtain a larger and more reliable stream of resources for legal representation through taxation?

Some law firm donations to public interest entities seem related to the latter's willingness to refer pro bono cases to the firms; is this the best way

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6. *See* JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 104–07 (1978); Abel, *supra* note 1, at 296; *cf.* Philip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 LAW & SOC'Y REV. 431, 442–48 (1975).

7. Abel, *supra* note 2, at 532–33. *See generally* BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER (2000).

8. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 18–25 (2004).

9. *See* NAT'L PRO BONO RES. CENTRE, SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE INQUIRY INTO LEGAL AID AND ACCESS TO JUSTICE 3 (2003), *available at* http://www.nationalprobono.org.au/ssl/CMS/files_cms/senateinquiry.pdf.

10. *See* Richard L. Abel, *Lawyers in the Civil Law World*, *in* 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 1, 18–20 (Richard L. Abel & Phillip S. C. Lewis eds., Beard Books 2005) (1988) (describing the divergence in practice structure between the common-law world and the civil-law world).

11. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2376 (2010) (citing Aric Press, *In-House at The American Lawyer*, AM. LAW., July 2008, at 13).

to fund public interest organizations, and should charitable donations be able to influence who handles which cases? The business cycle—whose wide swings were recently exemplified by the dot-com boom and bust and the current recession—dramatically influences the willingness and ability of large firms to do pro bono. (Tax revenues also fluctuate with economic activity, but governments can cushion that effect through rainy-day funds and by borrowing.) Sometimes an economic contraction has improbable effects: because large law firms constantly must replenish their pool of associates, particularly following the departures of those ineligible for or uninterested in partnership, they have paid law graduates to work in public interest for a year while waiting for an economic recovery. This creates its own problems: rich firms using underresourced public interest entities to train future associates at the expense of poor clients; newly minted graduates in public interest entities earning more than experienced career employees, only to leave at the end of a year and more than double their salaries; associates entering firms at the end of their public interest year with political beliefs and competences shaped by that experience, rather than as *tabulae rasae* law graduates. At the same time, firms have become increasingly reluctant to commit resources to large in-house pro bono projects.

Although the United States rightly boasts of having the strongest commitment to the "free" market of any nation, it also exhibits a surprising amount of charitable activity—perhaps reflecting the equally fierce antipathy to government. Alexis de Tocqueville's often repeated observation of American enthusiasm for voluntary associations remains true,[12] despite Robert Putnam's overblown claim that we are now "bowling alone."[13] Fraternal organizations raise money and do good works. Boy Scouts do good deeds. The Church of the Latter Day Saints expects men to do missionary service and families to tithe. Other churches circulate collection boxes at Sabbath services. The Peace Corps and Teach For America (to name just two examples) have sustained a strong tradition of public service, especially among recent college graduates. Museums, music, dance, theatre, and individual creative artists depend heavily on charity. "High society" is defined by its lavish fundraisers. Kol Nidre is an occasion for competition in conspicuous donation. Donors to secular beneficiaries are encouraged by "naming opportunities" in cultural, medical, and academic institutions—even benches and trees in parks. Universities court alumni. NGOs solicit contributions through direct mail, over the Internet, and at annual award dinners, where donors can buy tables and advertise in programs. Public radio and television have pledge drives. The Salvation Army collects at Christmas. Employers encourage employees to donate to the Community Chest. Students at every American

12. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 215–23 (Arthur Goldhammer trans., Library of America 2004) (1835); 2 *id.* at 604–09.

13. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

law school raise money for summer public interest fellowships; those with law firm jobs often pledge a portion of their earnings.

In light of this, it is less surprising that large firms have emulated their corporate clients by institutionalizing giving. How have nonmaterial incentives shaped pro bono activity? Let me start with those outside the firm. Public interest entities (which receive money and pro bono services) and bar associations make awards to firms and individuals.[14] The American Bar Association publishes the names of firms that meet its pro bono challenge.[15] But the most influential, by far, has been *The American Lawyer* ranking.[16] This reflects our passion for lists.[17] The *U.S. News & World Report* ranking of law schools, as well as undergraduate programs and graduate schools, has powerfully affected (many would say distorted) their behavior.[18] The emergence of a relatively small number of large law firms, known to each other and their corporate clients, has facilitated the emergence of a prestige hierarchy, as in London's "Magic Circle" firms. Globalization may, paradoxically, inhibit pro bono activity, which is much less well institutionalized outside the common-law world.[19] We could use more research on why firms care where they rank, whether some care more than others, and if a firm's rank influences decisions by corporations to retain it and law students to work for it.

The second set of influences operates within the firm. Partners can encourage or discourage pro bono activity by associates, who perform almost all of it and depend on partners for advancement within the firm or placement outside it. We need a better understanding of law firm economics: how the interplay between associate salaries (and benefits) and billable hours and rates affects the firm's short-term bottom line (and partnership draws), and the long-term payoff from investments in human capital. I have never seen a convincing answer to the critical question: when do associates begin to generate the surplus value that accounts for much of partners' income? As firms have grown dramatically in size and dispersed across the world, they have inevitably become more bureaucratized, creating specialized departments to handle a multitude of functions: recruitment, training, benefits, publicity, information technology—and pro bono. The same differentiation is visible in law school administrations. Emulation and competition have rapidly disseminated the coordinator role. Cummings and Rhode demonstrate that

14. *See* Cummings & Rhode, *supra* note 11, at 2369–70.

15. *See id.* at 2369–72.

16. *See id.* at 2371–72.

17. DAVID WALLECHINSKY & AMY WALLACE, THE NEW BOOK OF LISTS, at xix (2005).

18. Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1, 24–33 (2007); Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 210–12 (2006); Michael Sauder & Wendy Nelson Espeland, *The Discipline of Rankings: Tight Coupling and Organizational Change*, 74 AM. SOC. REV. 63 (2009).

19. *See* Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 749–50 (1994).

pro bono coordinators wield significant influence, whether or not they are partners, although nonlawyers exercise much less.[20] Large firms obtain pro bono cases through symbiotic relationships with the larger, more established public interest law organizations, which lack the resources to handle their agendas alone (especially larger projects).[21] This mutual dependence privileges public interest entities in the few major cities where large firms are concentrated, at the expense of those in smaller cities and rural areas.

The third set of influences is individual. It may not be coincidental that pro bono expanded at the same time that women grew to constitute half of new associates, since women are greatly overrepresented in public interest lawyering generally.[22] The interest of lawyers in particular pro bono causes waxes and wanes. The Lawyers Committee for Civil Rights Under Law attracted hundreds to work in the South in the 1960s;[23] young British barristers were eager to take death penalty appeals to the Privy Counsel from Commonwealth countries starting in the 1990s;[24] large firms have represented hundreds of Guantánamo Bay detainees in the last decade.[25]

The historical and organizational factors that have produced the dramatic expansion of American large-firm pro bono activity are likely to persist. What are the consequences? A half century ago, when governments first became concerned about addressing "unmet [legal] need,"[26] many studies compared the variety of newly emerging legal services delivery mechanisms.[27] What do Cummings and Rhode tell us about how pro bono

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20. *See* Cummings & Rhode, *supra* note 11, at 2377–79 & tbl.2.

21. *See* Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2070 (2008).

22. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 120–29 (2d ed., Univ. of Ill. Press 1993) (1981); Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923, 932 (2002); *cf.* Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 44–45 (Austin Sarat & Stuart Scheingold eds., 1998) (describing research on the motivation of women who become cause lawyers).

23. Thomas Miguel Hilbink, Constructing Cause Lawyering: Professionalism, Politics, and Social Change in 1960s America 69–157 (May 2006) (unpublished Ph.D. dissertation, New York University) (on file with the Fordham Law Review).

24. The Death Penalty Project, http://www.deathpenaltyproject.org (last visited Mar. 19, 2010).

25. *See generally* THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).

26. BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 9 (1977).

27. *E.g.*, 1 ACCESS TO JUSTICE (Mauro Cappelletti & Bryant Garth eds., 1978); JEREMY COOPER, PUBLIC LEGAL SERVICES: A COMPARATIVE STUDY OF POLICY, POLITICS AND PRACTICE (1983); LEGAL SERVS. CORP., DELIVERY SYSTEMS STUDY: A RESEARCH PROJECT ON THE DELIVERY OF LEGAL SERVICES TO THE POOR (1977); G. G. MEREDITH, LEGAL AID: COST COMPARISON—SALARIED AND PRIVATE LAWYERS (1983); DOUGLAS E. ROSENTHAL, ROBERT A. KAGAN & DEBRA QUATRONE, VOLUNTEER ATTORNEYS AND LEGAL SERVICES FOR THE POOR: NEW YORK'S CLO PROGRAM (1971); Michael McConville & Chester L. Mirsky,

differs from state-supported legal aid and philanthropically supported public interest organizations? Decision making in legal aid is highly centralized: the Legal Services Corporation sets priorities, constrained by Congress; individual programs—many of them very large—refine these.[28] By contrast, pro bono case selection is decentralized, shaped by referrals from legal aid and public interest entities and the preferences of pro bono coordinators and individual large-firm partners and associates.[29] The original OEO Legal Services Program gave equal emphasis to serving individual clients, law reform (impact cases), and community organizing. By contrast, the highest priority of pro bono programs is individual legal service.[30] The list of substantive areas handled by large-firm pro bono lawyers, in descending order of frequency, is consistent with this: immigration, children and family, economic development, criminal defense, veterans, human rights, and special education.[31] With the exception of economic development (transactional work resembling other corporate practice), these share a focus on individual matters, which can be completed expeditiously and do not threaten the firm's paying clients. This bias is confirmed by the areas avoided because they are likeliest to create conflicts of interest: employment/labor and mortgage foreclosure.[32] Environmental matters also are rare.[33] Others have noted that positional conflicts—e.g., between representing a poor client seeking to heat a home and a utility company that wants to cut off deadbeat subscribers—can constrain pro bono activity.[34]

Training associates is the second reason for doing any pro bono and the strongest reason for selecting particular cases. Training became even more significant when the recession forced firms to pay greater attention to their balance sheets. Criminal defense and asylum work are valued for offering trial experience otherwise unavailable to large-firm associates. Law school clinics, like hospital residencies, must balance the tension between training and service.[35] Just as solo and small-firm practitioners tended to prefer pro bono clients who resembled their paying clientele,[36] so large firms reject individual clients who might present challenges, e.g., the mentally ill homeless. The economic contraction increased pressures to choose matters that could be resolved with predictable and limited resources. Efforts by

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Criminal Defense of the Poor in New York City, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1987).

28. *See* Cummings & Rhode, *supra* note 11, at 2367–68.

29. *See id.* at 2391–92.

30. *See id.* at 2385–86 & tbl.5.

31. *Id.* at 2385.

32. *See id.* at 2393.

33. *See id.*

34. *See* ALLAN ASHMAN, THE NEW PRIVATE PRACTICE: A STUDY OF PIPER & MARBURY'S NEIGHBORHOOD LAW OFFICE 42–47 (1972); SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE 166–68 (2002).

35. *See* ATUL GAWANDE, COMPLICATIONS: A SURGEON'S NOTES ON AN IMPERFECT SCIENCE 22–25 (2002).

36. *See* Lochner, *supra* note 6, at 456.

law firms to monitor pro bono activities seemed to focus on controlling the number of hours invested, perhaps because the inexperienced young associates handling these cases often performed inefficiently. *None* of the pro bono coordinators sought to evaluate the social change consequences of their programs. In its early days, all OEO projects, including the Legal Services Program, were directed by Congress to seek "maximum feasible participation" by the constituencies they served—something Senator Daniel Patrick Moynihan ridiculed as "maximum feasible misunderstanding."[37] Representatives of the poor served on governing boards of legal services programs, sometimes constituting a majority. But clients played *no* role in evaluating the work of their pro bono lawyers; even the public interest referral sources were not asked for feedback. By contrast, corporate clients, assisted by in-house counsel, closely scrutinize the work of their large-firm lawyers, often mandating beauty contests and competitive bids for new work.

Cummings and Rhode end their article by calling for further research on the advantages and disadvantages of large-firm pro bono services.[38] I would second that and add two observations. This research should explicitly compare pro bono with legal services offices and public interest law firms. And it also should address the following questions:

1. Lawyer career paths. What kinds of expertise in the problems of poor and other underserved clients do lawyers accumulate over time: not just technical legal information but also knowledge about the needs of those clients, the identity and behavior of their adversaries, the courts and other fora in which the lawyers appear, means of publicizing the issues, and the larger political environment in which these struggles occur?

2. Strategizing. Are the lawyers proactive or reactive?[39] When are they first seized of the problem? Do they engage in long-term planning, linking cases together?

3. What political influences shape these lawyers' activities? For large-firm pro bono, these are primarily the (political and economic) interests of partners and paying clients. For legal services lawyers, these are the constraints already imposed by Congress and the threat of additional limitations. For public interest lawyers, these are the priorities of their donors, primarily foundations but also individuals.

4. Who are the lawyers? How does their gender, race, and class background—especially in relation to the clients—affect their performance?

Large-firm pro bono has played an essential role in realizing the promise of "Equal Justice under Law" and will continue to do so. Given severely limited public and private resources, it is important to understand the

37. DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY (1969).

38. *See* Cummings & Rhode, *supra* note 11, at 2431–33.

39. *See* JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 26–33 (1982).

relative strengths of different delivery mechanisms in order to deploy them most efficiently and effectively.

The Market for Lawyers and Social Capital: Are Informal Rules a Substitute for Formal Ones?

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The Market for Lawyers and Social Capital: Are Informal Rules a Substitute for Formal Ones?

EIJI YAMAMURA*
Seinan Gakuin University

Japan's prefecture-level panel data is used to examine how the demand for lawyers is affected by social capital after controlling for economic conditions. The main findings from a fixed effects model are: (1) The demand for lawyer is smaller when people live close and cohesively. (2) Conflicts generated by bankruptcies cause people to seek legal resolutions, thus relying on lawyers. Nevertheless, the elasticity of demand in Japan is small, reflecting a feature of Japan that the norm is to settle a matter informally.

1. INTRODUCTION

A number of researchers have been concerned with the transition from informal institutions to the formal ones underlying economic developments (e.g. Boerner and Ritschl, 2002; Greif 1993; 1994; 2002; Hayami, 1998; North, 1991; Okazaki, 2005). Legal enforcement institutions must play an important role in economic efficiency by supporting impersonal exchanges. The Coase theorem suggests that the initial allocation of legal entitlements does not matter for economic efficiency as long as the transaction cost is zero (Coase, 1960). Hence, low transaction costs result in an efficient allocation of resources. The cost of settlement of a matter is considered as a kind of transaction cost. Lawyers are considered to serve as transaction cost engineers to economize transaction costs in a modern society where economic activity is impersonal (Gilson, 1984). Putnam (2000), however, indicates that social capital is defined as the features of social organization, such as networks and norms, and that social trust facilitates coordination and cooperation. Accordingly, large stocks of social capital economize transaction costs, leading to improvements in economic efficiency.

* I have benefited from useful comments on an earlier version of the paper by two anonymous referees and the editor.

In the modern society of the United States, for better or worse, we rely increasingly – we are forced to rely increasingly – on formal institutions, and above all on the law, to accomplish what we used to accomplish through informal networks reinforced by generalized reciprocity – that is, through social capital (Putnam, 2000:147).[1] In contrast to the United States, the supply of lawyers in Japan is small and thereby a constraining factor on the supply of judicial services (Kinoshita, 2000, 2002).[2]

Under the conditions found in Japan, from an economics viewpoint, the transaction cost is high if one resorts to formal rules to resolve conflicts. Hence, one tends to settle the matter without resorting to legal avenues.[3] If a conflict occurs and there are various ways of resolving conflicts, one will normally choose the most efficient method. The market condition related to judicial services has an important effect on the costs for a formal settlement, while the amount of social capital also has a critical influence on the costs for an informal settlement. One is likely to settle a matter without resorting to legal processes, if bringing a matter to trial has a cost higher than the money one would pay to settle a matter out of court.

Consider the *ex ante* condition. The likelihood that a dispute or conflict occurs depends upon the stock of social capital. If someone behaves badly in public such as by striking another person, and people around them indicate disapproval or even occasionally vocalize their opposition to that action, the offending person may feel embarrassed. Thereby the psychological cost of engaging in bad behavior is generated. The psychological cost of bad behavior depends on the social capital comprised of social norms, namely informal rules that are shaped by local interactions (Funk, 2005). Furthermore, apprehension of bad behavior such as criminal acts depends on the watchfulness of citizens (Huch and Kosefeld, 2007). Neighborhood watch is likely to be more effective if the community members are

[1] Yamamura (2005) provides empirical evidence that social capital shaped by long-term local interaction results in the growth of firms in Japan. Yamamura (2008) found that social capital enhances the collective action in Japan.

[2] It should be noted that, besides lawyers, there are many others who provide legal services; for example *shiho shoshi* (legal scriveners), *benrishi* (patent agents) as well as unlicensed graduates of law faculties (Ramseyer and Nakazato 1999:10-12, Nakazato et al. 2006:3-4).

[3] To account for a choice between a pretrial settlement and a trial, various theoretical models are presented (Cooter and Rubinfeld, 1989). The classical rational litigation model was developed in which the prosecutor's and defendant's transaction costs are incorporated as a cost of the settlement (Landes, 1971; Posner, 1973). This model shows that, subject to budget constraints, the decision to settle or go to trial mainly depends on the probability of conviction and trial versus settlement costs. Some researchers point out the importance of a rational litigation model underlying the reason for the reluctance of Japanese to sue (Ramseyer 1988; Ramseyer and Nakazato, 1989, 1999). According to this model, if plaintiffs and defendants would in advance agree on the expected litigated outcomes in order to avert risk stemming from uncertainty, they prefer settlement to litigation. When I pay attention to transaction cost, the smaller a transaction cost of a settlement becomes, the more likely a settlement is to take place.

more closely related. Thus the social capital that bans community members from bad behavior will be stronger in a more cohesive community. In the long run, an entire community will come to ostracize those who break such informal rules (Posner and Rasmusen, 1999). The informal rules reinforced by social capital appear to have, to some extent, influenced the occurrence of conflicts in Japan.[4] Hence social capital reduces the likelihood of conflict, thereby reducing lawyer demand.

Prior works have dealt with the lawyer market in the United States from both an economic point of view (Freeman, 1975; Pashigian, 1977; Rosen, 1992; Sauer, 1998) and that of the social condition characterized by, for instance, gender (Abel, 1989), ethnicity and religion (Heinz and Laumann, 1994), and social capital (Kay and Hagan, 1999; Dinovitzer, 2006). Features of socio-economic conditions and the legal system in Japan, which is different from that of the United States, are expected to have an impact on the market for lawyers.[5] Considering the socio-economic characteristics of Japan, a number of researchers have attempted to examine the lawyer market in Japan (e.g., Kinoshita, 2000, 2002; Milhaupt and West, 2004; Nakazato et al. 2006; Ginsburg and Hoetker, 2006). Nevertheless, the existing literature does not analyze any effect of social capital on the lawyer market through regression estimation.[6] With the exception of Ginsburg and Hoetker (2006), presumably because of a lack of data these reports do not control for unobservable fixed effects, thereby causing an omitted variable bias.[7] The purpose of this paper is to examine the extent to which social capital affects upon the lawyer market under the condition that the number of lawyers is very small, such as in Japan. To this end, I use prefecture-level panel data for Japan from 1989-2001 to control for unobservable fixed effects.

[4] Recently in Japan "in the mix of formal and informal rules that govern Japanese firms and set the incentive structure, formal rules are gaining in importance" (Milhaupt and West, 2004:241).

[5] Kawashima (1963) focused on the cultural preference for informal mechanisms of dispute resolution in Japan and asserted that the harmonious nature of Japanese society discouraged people from litigating. Haley (1978) asserted that judges and lawyers are not sufficiently supplied, because of the institutional incapacity of the legal system, resulting in an increase in the cost of litigation. Considering traffic accidents, Ramseyer and Nakazato (1999:ch. 4) argued that in spite of the consensual nature of Japanese society, and notwithstanding any costs involved in Japanese litigation, heirs do not ignore the law and do not eat their losses.

[6] Ginsburg and Hoetker (2006) do not find supporting evidence for the hypothesis that cultural factors play a major role in Japan. Nevertheless, they do not closely examine the social capital effect on litigation by regression estimation.

[7] Ginsburg and Hoetker (2006) attempted to ascertain the determinants of litigation by using balanced panel data for each of Japan's 47 prefectures during the period 1986-2001.

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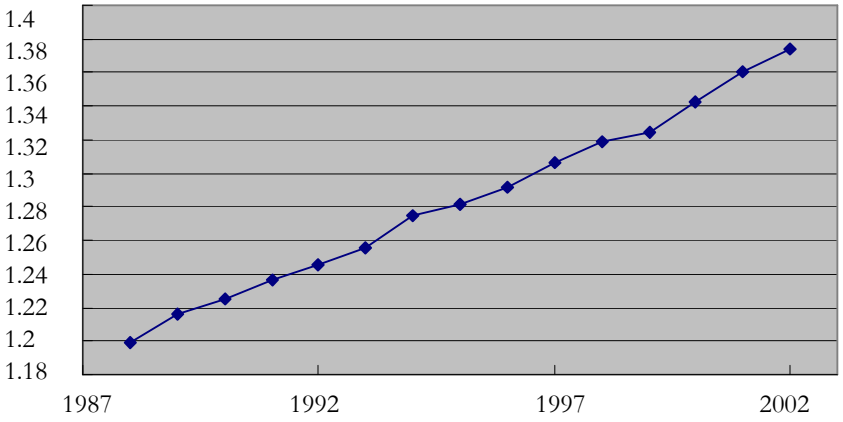
Figure 1: Coefficient of variation of the number of lawyers per population among prefectures in Japan



Note: Author's calculation. *Source:* Minryoku (2004)

The organization of this paper is as follows: Section 2 surveys the demand for lawyers in Japan and advances a testable hypothesis. Section 3 presents a simple econometric framework. Section 4 discusses the results of the estimations. The final section offers concluding observations.

2. REVIEW OF THE DEMAND FOR LAWYERS IN JAPAN

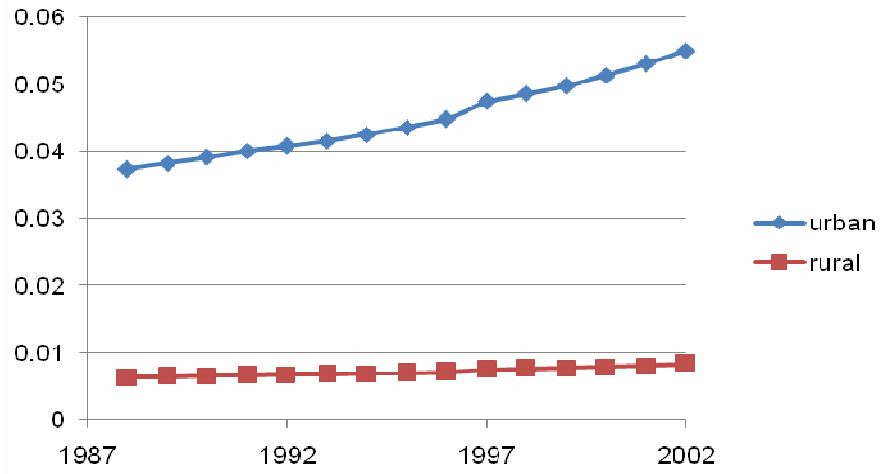
2.1. OVERVIEW

This section begins with an analysis of the figures that outline the current state of the market for lawyers in Japan. A cursory examination of Figure 1 demonstrates the transition of the coefficient of variation of per capita lawyers among prefectures in Japan. From this it is clear that the coefficient of variation of lawyers has risen constantly over time, implying that the distribution of lawyers has become more uneven as time has passed. Subsequently, Figure 2 illustrates the average per capita lawyers by prefecture for both urban and rural areas.[8] Looking at Figure 2 shows, as expected, that per capita lawyers in urban areas is a larger number than that in rural areas. Furthermore, the per capita number of lawyers in urban areas increases while it is unchanged in rural areas, so that the gap between the two types of area gradually widens. Taking Figures 1 and 2 into

[8] Urban includes the Tokyo and Osaka metropolitan areas, while rural includes the rest of Tokyo and Osaka.

account shows that the per capita lawyer number has a tendency to increase only in urban areas, leading to the distribution of lawyers being more uneven. In the period of this research, the regulation, strictness and difficulty of the bar examination limited the number passing the exam to 500 until 1995 and thereafter to about 1000; hence, the exam is used to constrain the supply of lawyers.[9] Additionally, in Japan, contrarily to the United States, the law is common across prefectures and lawyers can work anywhere once qualified. Therefore, the supply of lawyers is not constrained to the area where the exam was passed. Accordingly, in this interpretation, the constantly broadening gap among the areas is largely related to the demand side than to the supply side.

Figure 2: Lawyers as a percentage of population (%)



Note: Urban includes Tokyo and Osaka, rural constitutes all prefectures except Tokyo and Osaka.
Source: Minryoku (2004)

[9] Before the introduction of the new bar examination, the pass rate for the bar examination was around 2-4% in Japan; on average, a university graduate takes seven more years to pass the exam after graduation (Kinoshita, 2000). As Kinoshita (2002) asserted, increasing legal services bring considerable gains to the Japanese economy and national welfare. Thereafter, for the purpose of increasing the supply of lawyers, a new examination system was inaugurated. Under this system, law schools, similar to those in the U.S. that specialize in training lawyers, were established in 2004. The pass rates for the first, 2006, and the second, 2007, new bar examinations were 48.3% and 40.1%, respectively.

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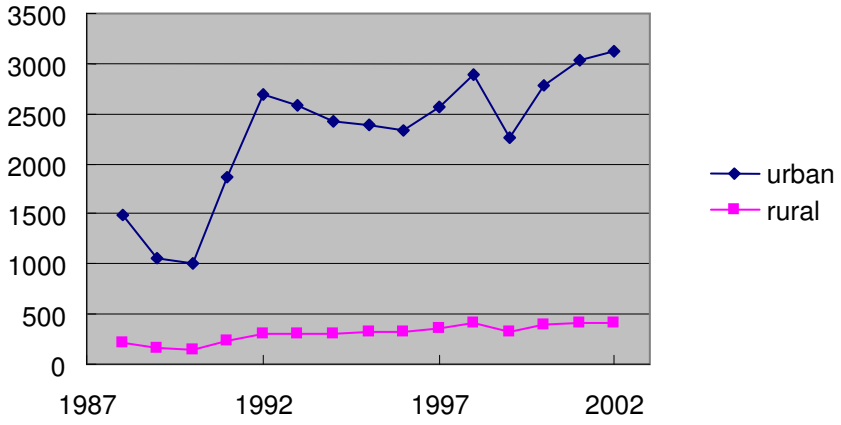
For a closer investigation, the different features of urban and rural areas are now discussed. Fig. 3 shows the average number of business bankruptcies; there is a steep rise at the beginning of the 1990s and then a slight increase in urban areas, while it is almost steady at a low level in rural areas. As a result, a remarkable difference in the numbers of bankruptcies can be observed between urban and rural areas, especially after the 1990s. This seems to reflect the depression period after 1991 having a larger influence in areas where commercial economic activity was more vital when the prosperity of the bubble economy came to an end in Japan.[10]

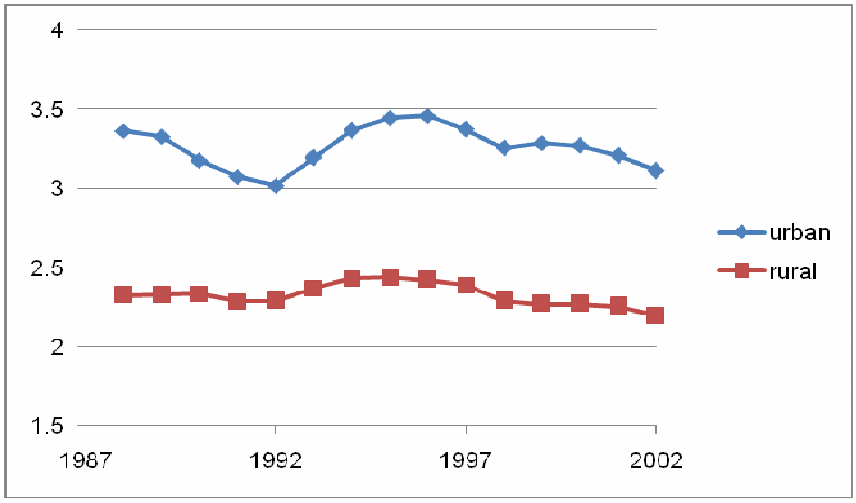
Figure 3: Average number of bankruptcies



Note: Urban includes Tokyo and Osaka, rural constitutes all prefectures except Tokyo and Osaka.
Source: Minryoku (2004)

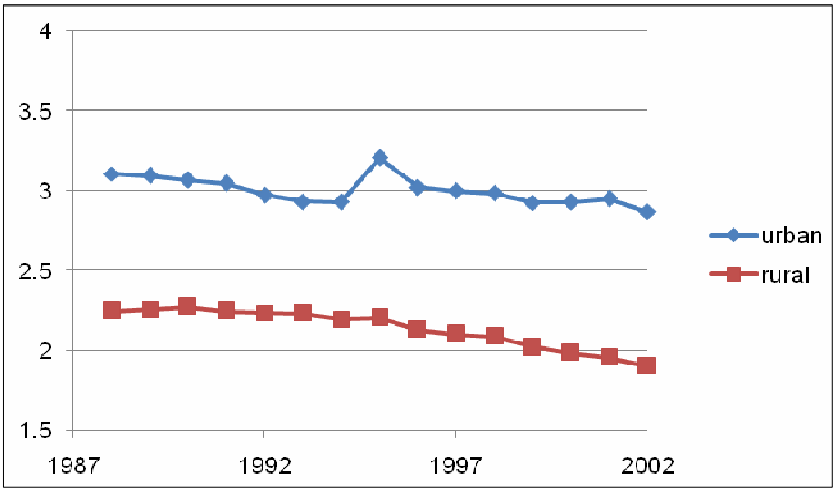
[10] The prosperity from mid 1980 to the beginning of the 1990s is generally called the "bubble economy."

Figure 4: Population turnover as a percentage of population



Note: Urban includes Tokyo and Osaka, rural constitutes all prefectures except Tokyo and Osaka. Turnover means that the population moves within a prefecture. *Source:* Minryoku (2004)

Figure 5: Immigrants as a percentage of population



Note: Urban includes Tokyo and Osaka, rural constitutes all prefectures except Tokyo and Osaka. Immigrant refers to residents who have moved from other prefectures. *Source:* Minryoku (2004)

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With respect to socio-economic conditions, the average level of population turnovers within a prefecture is set out in Figure 4. The level for urban areas is higher than that for rural ones and the trend is steady; leading to the difference between them becoming stable over time. Figure 5 sets out the average number of native immigrants (residents who have moved from other prefectures in Japan); telling us that the value for urban areas is larger than that of rural ones but that both decline gradually over time. Consideration of Figures 4 and 5 together indicates that the population mobility of Japanese society is more remarkable in urban than rural areas, and that public places where people can interact are reducing in urban areas compared with rural ones. This implies that personal interaction within rural areas is less interrupted than that within urban areas. From this, the argument is derived that the cost of being against a social norm in rural areas is higher than in urban ones, on the assumption that the psychological cost of conduct against social norms is shaped by local interactions (Funk, 2005).

To sum up the evidence presented above, the recent augmentation of lawyer numbers in urban areas is attributable not only to economic activity but also to a decay of social capital. Difficulties arising from economic sluggishness as well as the low cost of being against social norms in urban areas cause people to resort to services of lawyers, leading to increases over time in the demand for lawyers.

2.2. HYPOTHESIS

Greif (1993) suggests that the informal private organization is a substitute for formal public organizations for the purpose of contract enforcement, by studying the coalition of Maghribis traders from a historical perspective.[11] As argued by Posner and Rasmusen (1999), the sanctions for violating norms are often too weak to deter all people from committing offenses, causing laws to replace the normative enforcement pressure. Social capital appears to be positively associated with such sanctions. Inevitably, the cost of breaching norms depends upon social capital. When a scarcity of social capital causes benefits from breaching norms to outweigh the cost, the law plays a critical role in regulating society instead of a norm.[12] Accordingly, the following hypothesis is proposed concerning the relationship between social capital and the demand for lawyers.

---

[11] Okazaki (2005) provided the historical case study in Japan that the private organization called "Kabu nakama" played the role of contract enforcers in a society where the public system of third-party enforcement was immature and imperfect.

[12] Opinions of scholars vary as to the nature of the relationship between formal law and informal norms. Posner (1997) discussed that law both complements and substitutes for norms. Some existing reports argue that social norms are a substitute for law (e.g., Ellickson, 1991; Huang and Wu, 1994, are in line with this research). Others argue that formal law complements informal norms by facilitating self-enforcement (e.g., North, 1990; Lazzarini et al., 2004).

Hypothesis: *A tightly-knit society has a lower demand for lawyers than a society without a high level of social capital.*

3. MODEL

3.1. DATA

Data used in the regression estimation as independent variables were collected from the Asahi Newspaper (various years). The structure of the data is a panel consisting of 47 prefectures and spanning 13 years (1989-2001). Hence the raw data set includes various prefecture-level data on several variables. Table 1 sets out the descriptive statistics for all of the variables used in the regression estimation.

Table 1: Descriptive statistics

Variables	*Definition*	*Mean*	*Std. Dev*
CHLAW	Change of number of lawyers	9	37
DSC1	Number of population turnovers within a prefecture [a]	71.9	85.8
DSC2	Number of immigrants from other prefecture [a]	63.6	79.7
SC	Number of community centers per prefecture	377	277
HC	Number of people who graduated from university [a]	272	388
DTBANK	Amount of debts divided by bankrupt firms [b]	203	904
OPCOST	Real regional gross domestic product of Service Sector divided by the number of its employees. [c]	7.66	1.15
INCOM	Regional real income [c]	82,300	93,000
CHINCOM	Change in per capita income	13	105
FIRM	Total number of firms [a]	54.5	84.9
ACCI	Number of traffic accident (thousands) [a]	16.5	16.0

Note: [a] In 1000s, [b] In Billions of Yen, [c] In Millions of Yen. *Source:* Minryoku (2004)

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3.2. ECONOMETRIC FRAMEWORK

To test the hypotheses raised in the previous section, I explore how demand and supply for lawyers is affected by social norms as well as by economic and social conditions.

The estimated function takes the following form:

$$CHLAW_{I,t+1-(t)} = \alpha_1 DSC1_{it} + \alpha_2 DSC2_{it} + \alpha_3 SC_{it} + \alpha_4 HC_{it} + \alpha_5 DTBANK_{it} + \alpha_7 OPCOST_{it} + \alpha_8 INCOM_{it} + \alpha_9 CHINCOM_{i,(t)-(t-1)} + \alpha_{10} FIRM_{it} + \alpha_{11} ACCI_{it} + \nu_i + e_t + u_{it},$$

where $CHLAW_{it}$ represents the dependent variable in prefecture i and year t. α's represents the regression parameters. *CHLAW* is the change of number of lawyers between year $t+1$ and year t. e_t, ν_i, u_{it} represent the unobservable specific effects in the t th year (a fixed effect time vector), the individual effects of i's prefecture (a fixed effects prefecture vector) and an error term, respectively. e_t represents the year specific effects and ν_i holds the time invariant feature, while u is an error term. The structure of the data set used in this study is panel. Special attention needs to be paid to the omitted variable bias stemming from unobservable individual specific effects. With the aim of controlling for it, fixed effects estimation is employed. Year dummies were also incorporated to subdue e_t, which represents the conditional and structural changes at the macro level that could affect the demand for lawyers.[13]

3.3. PROXIES FOR SOCIAL NORMS

The demand for lawyers might be affected by the extent to which formal or informal rules deter people from committing bad behavior. The social norms that encapsulate informal social pressure on bad behavior are now characterized. The cost of annoying others depends on social norms, which are shaped by local interactions (Funk, 2005). Individuals are more apt to annoy others because of the decrease in the expected cost of annoying surrounding people such as community members or workplace colleagues if the community is disorganized and social norms are weak. According to the view of Putnam (2000), social disorganization can be regarded as the engine of rude behavior. Such disorganization undermines the social capital and marks urban areas where population turnover is high, one's neighbors are anonymous, and local organization is rare. The degree to which one

[13] Year dummies can capture the effect of institutional change, such as the 1991 revision of the National Bar Examination Act.

is integrated into one's community depends on the community's condition. To borrow an argument from Putnam (2000), frequent movers have weaker ties within the community, and so mobile communities seem to have less interactivity among neighbors than more stable ones. To put it differently, the more mobile a community is, the weaker the connectedness within it becomes. Hence, *DSC 1* and *DSC2,* denoting the number of population turnovers within a prefecture and the number of immigrants from other prefectures, respectively, can be considered as proxies for the decay of social capital.[14] Accordingly, these coefficients are predicted to take a positive sign.

The following independent variable is used as a proxy for social capital. A community center is considered to provide a place to meet neighbors and form social capital. People can get acquainted with neighbors and generate a social network. Therefore, the number of community centers per prefecture can serve as a proxy for social capital. Therefore, the signs of the coefficient for *SC* are expected to be negative.

3.4. CONTROL VARIABLES

In addition to social capital, the demand for lawyers seems to in part depend on the degree of education, that is, human capital. Social norms seem to be formed through long-term and frequent interaction with neighbors. Time spent in such community-based closed relationships is considered as an opportunity cost. It becomes relatively higher for more educated people. More educated people thus tend to resort to formal litigation. As a consequence, the sign of *HC*, which is measured by the number of people who graduated from university, is predicted to become positive.[15]

Economic activity causing litigation or requiring lawyer services is also focused on. According to previous reports (Pashigian, 1977), increases in the level of economic activity raise the number of transactions between consumers and firms and among firms; therefore, increasing the demand for lawyers.

[14] It seems plausibly argued that people leave prefectures that are in recession, and move to prefectures that are booming. If this is true, *DSC1* and *DSC2* can capture not only the decay of social capital but also the measurement of economic activity. Changes in per capita income can capture economic recession and booming. As mentioned in subsection 3.4., in the estimation model, various proxies for economic activity are included so that the economic features of *DSC1* and *DSC2* are already controlled for. *DSC1* and *DSC2* should thus be regarded as only the decay of social capital.

[15] Human capital is also thought to influence the supply of lawyers. Lawyers in Japan are permitted to practice anywhere regardless of the place where they passed the examination. Lawyers, however, are apt to work in urban areas such as Tokyo and Osaka (Nakazato et al., 2006), or return to their home prefecture. It thus seems plausible that the number of university graduates from a prefecture positively affects the lawyer supply there. Consequently, the sign of human capital becomes positive.

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Consumers and firms are the latent users of a lawyer's service. Hence, several additional proxy variables have been incorporated to identify transactions between firms and consumers.

In the case where a bankruptcy occurs, a lawyer plays an important role in settling the matter. Furthermore, the larger the scale of the bankruptcy, the higher the demand for a lawyer becomes. Their effects upon the demand for lawyers should be considered. This is why, as discussed earlier, Japan has experienced a long recession after the beginning of the 1990s and this inevitably induces bankruptcies. *DTBANK* should be included in the function; these stand for the amount of debts of bankrupt firms. The signs of the coefficients are expected to be positive. However, legal assistance is called for when one files for bankruptcy. Inevitably, the more lawyers become available in a given prefecture, the higher the proportion of business failures that will yield a bankruptcy filing. This variable is thus considered to bring about an endogenous bias in the estimation results. Accordingly, the Fixed Effects 2SLS method is employed, which allows me to control for the endogenous bias.

The opportunity cost of a lawyer is now considered. The wages of other jobs is regarded as an opportunity cost. Services of a lawyer belong to the service sector and therefore, the wage level of the service sector is especially appropriate to the opportunity cost. However, data for the wage level was not obtained. Instead of wages, due to the lack of data, per capita gross domestic product of the service sector denoted as *OPCOST* was used as a proxy for opportunity cost. If the opportunity cost for working as a lawyer is high, one has less inclination to work as a lawyer. Consequently, high opportunity cost reduces the supply of lawyers and hence the sign of *OPCOST* appears to become negative.

Transactions among firms create a demand for legal services. The volume of the transactions among firms in a market will be positively associated with the size of that market. Hence, the larger a market becomes, the larger the demand for lawyers becomes. Real income and the number of firms are represented as *INCOM* and *FRIM,* respectively. They are convincingly considered to measure the size of the market, and therefore they are taken as proxies for market size. As discussed above, their coefficients are expected to take a positive sign. In addition, changes in per capita income, which are represented as *CHINCOM*, are incorporated to capture the dynamic facets of economics such as recessions and booms. According to reports exploring litigation in Japan, "… litigation is countercyclical, as bad times mean more broken contracts and a willingness to break relationships" (Ginsburg and Hoetker, 2006:51). If this is the case, the demand for lawyers increases when incomes decline. Necessarily, the sign of the coefficient becomes negative. On the other hand, extending economic activity

clearly requires legal services, resulting in an increase in the demand for lawyers. If this holds true, it takes a positive sign.

It is known that a large proportion of litigation cases in modern society are concerned with traffic accidents.[16] Hence, the number of traffic accidents represented as *ACCI* is incorporated to capture it.[17] It is predicted to take a positive sign.[18]

3.5. INSTRUMENTS

Whether a firm becomes bankrupt in part depends on the changes of economic circumstance, because a firm's performance can be affected by such conditions. To capture the changes in economic circumstance, I use the changes in per capita income as an instrument for *DTBANK*. In Japan, "The regulatory environment has historically encouraged the use of collateral in corporate finance. A crucial aspect of a bank's credit decision is thus its assessment of the value of collateral offered by a potential borrower. Firms with marketable assets get loans" (Milhaupt and West, 2004:154). Since the Plaza Accords in 1985, asset inflation, mainly through appreciation of land and stock prices, led to a so-called bubble economy in Japan. After the initial signs of recession in 1991, financial distress deepened and the collapse of asset prices such as land price exacerbated corporate performances. Inevitably, changes in land prices affected the likelihood of a bankruptcy. Therefore, I also use the changes in land prices as an instrument. I use lagged values to clarify the causality.[19]

[16] Traffic accidents are regarded as the most common category of torts (Ramseyer and Nakazato 1999:90-91).

[17] The dependent variable in the regression is the change in the number of lawyers, which is taken as a measure of flow. On the other hand, some of the independent variables are considered as measures of stock. The combination of flow and stock measures calls for special attention when the estimation results are interpreted.

[18] Debt collection disputes also constitute a large proportion of litigation cases (Ginsburg and Hoetker 2006:51). As for the influence of debt collection, I cannot take it into account due to the scarcity of appropriate data in Japan; so special attention is required for the omission of the debt collection variable.

[19] It should be noted that the instruments for *DTBANK* are all functions of local economic activity. Therefore, there is the possibility that the instruments cannot sufficiently control for any bias.

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Table 2: Determinants of the number of lawyers
(Fixed Effects Model and Fixed Effects 2SLS Model)

	(1) Fixed	(2) Fixed	(3) Fixed 2SLS	(4) Fixed 2SLS	(5) Fixed 2SLS	(6) Fixed 2SLS
DSC1	4.15**	3.95**	4.75**	4.91**	4.66**	4.58**
	(4.80)	(4.61)	(4.39)	(4.04)	(4.49)	(4.39)
DSC2	8.65**	8.40**	4.10*	2.86	4.73**	4.78**
	(7.61)	(7.48)	(2.20)	(1.02)	(2.38)	(2.40)
SC	-0.72	-0.81	-0.62	-0.59	-0.63	-0.67
	(-0.97)	(-1.10)	(-0.69)	(-0.60)	(-0.73)	(-0.78)
HC	2.25*	2.19*	2.33*	2.35	2.31*	2.29*
	(1.95)	(1.91)	(1.66)	(1.52)	(1.72)	(1.72)
DTBANK	0.07**	0.05*	0.52**	0.64**	0.46**	0.44**
	(2.60)	(2.12)	(3.62)	(2.60)	(2.86)	(2.57)
OPCOST	0.80	0.51	-2.36	-2.35	-1.92	-1.92
	(0.36)	(0.24)	(-0.82)	(-0.94)	(-0.68)	(-0.69)
INCOM	-1.67	-2.69*	1.72	2.65	1.25	0.80
	(-1.34)	(-2.09)	(0.94)	(1.07)	(0.67)	(0.38)
CHINCOM		0.03**				0.01
		(3.15)				(0.75)
FIRM	8.08**	8.34**	5.35**	4.61*	5.73**	5.90**
	(4.98)	(5.06)	(2.51)	(1.77)	(2.72)	(2.74)
ACCI	1.88**	1.85**	-2.34	-3.50	-1.76	-1.64
	(2.56)	(2.54)	(-1.50)	(-1.41)	(-1.04)	(-0.95)
Sample	611	611	611	611	611	611
Groups	47	47	47	47	47	47
Year Dummy	Yes	Yes	Yes	Yes	Yes	Yes
R-square	0.49	0.50	0.25	0.10	0.31	0.10
Over-identification test			Chi=0.56 p<0.45			

Note: Numbers in parentheses are t-statistics. * and ** indicate significance at 5 and 1 percent levels respectively (one-sided tests). Numbers are the elasticity which is evaluated at the sample means values of the variables. In each estimate, year dummies are included, but not reported to save space. The instrument for *DTBANK* is changes of land price (the total estimated value of land /habitable area) in columns (3),(5),(6) and changes of per capita income in columns (3),(4).

4. RESULTS

Table 2 presents the results of the fixed effects and the fixed effects 2SLS estimations. First, the results of the fixed effects estimation that appears in columns (1) and (2) are discussed.

As for social norms, in accordance with the expectations, the signs of *DSC1* and *DSC2* are positive and statistically significant at the 1 % level; while their

magnitudes considered as elasticity are about 4 and 8, respectively. This tells me that one percent increases in *DSC1* and *DSC2* result in 4 % and 8 % rises, respectfully, in the numbers of lawyers. On the other hand, *SC* produces the expected negative sign, despite failing to be statistically significant. Furthermore, *SC* is far smaller in absolute values than *DSC1* and *DSC2,* meaning that *SC* is less elastic than *DSC1* and *DSC2*.[20] Considering the results regarding social norms together, population mobility (*DSC1* and *DSC2*) has greater effects than community centers (*SC*) on the demands for lawyers. These results clearly support the hypothesis put forward in the prior section.

Turning to *HC,* as predicted, it yields a significantly positive sign. Its coefficient value is slightly larger than 2, reflecting the fact that *HC* has a large effect on the demand for lawyers. With respect to finance, *DTBANK* takes positive signs and is statistically significant at the 1 % level, although its value is smaller than 0.1, which is in accordance with the anticipation. Nevertheless, this result might suffer from an endogeneity problem and hence requires special attention. The fact that *OPCOST* and *INCOM* become positive and negative signs, respectively, is out line with the expected result. The significant positive sign of *CHINCOM* reflects that economic growth leads to an increase in the demand for lawyers, which is contrary to Ginsburg and Hoetker (2006). The positive significant signs of *FIRM* and *ACCI* are consistent with previous expectations.

I now proceed to discuss the Fixed Effect 2SLS results presented in columns (3)-(6), where the endogeneity problem stemming from *DTBANK* is controlled for. Both changes of per capita income and changes of land prices are used as instruments in columns (3); therefore, an over-identification test is required. The result, as shown in the bottom row, suggests that the specification of column (3) passes the test and is therefore valid. For the purpose of assessing the robustness of the result in column (3), changes of per capita income are used in column (4) and changes of land price are the changes in (5) and (6), as an instrument.

With respect to variables concerning social norms, looking at *DSC1, DSC2*, and *SC* reveals that their results are equivalent to the results appearing in column(1). The signs and magnitudes of *HC* are very stable. This implies that they are robust under different specifications, supporting the previously raised hypothesis when alternative estimations are conducted.

The coefficient of *DTBANK* continues to be positive and statistically significant at the 1% level. Furthermore, it is interesting to observe that its magnitude becomes from 7 to 9 times larger than in column (1); revealing that the endogeneity problem causes a downward bias.

[20] Community centers are built by local governments, which can result in a short supply. This might be one reason why the coefficients of community are small.

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In terms of opportunity cost and income, contrary to column (1), *OPCOST* consistently yielded negative signs, although they fail to become statistically significant. This is consistent with the expectation and indicates that improvements in employment opportunities in the service sector lead to a reduction in the number of lawyers. The signs of *INCOM* become consistently positive. *CHINCOM* and *FIRM* continue to take significantly positive signs, although *CHINCOM* becomes statistically insignificant. I derived from the results of *INCOM*, *CHINCOM* and *FIRM* that the expansion of the size of an economy increases the number of transactions, a fraction of which require consumers to use the services of lawyers. As opposed to the anticipation, *ACCI* become a negative sign.

All things considered, the results of the estimations are consistent with the expectation and support the hypothesis raised in the prior section.

5. CONCLUSIONS

Human society is ruled not only by the formal rule of laws, but also by informal rules reflected as norms. In a modern and developed society, formal rules seem to be required to have more crucial roles than informal ones, partly because society becomes anonymous accompanying economic development. Demand for lawyers thus tends to be increased because of economic development. Then, does the role of informal rules disappear in highly developed and anonymous societies such as that in Japan? This paper was concerned with this question and attempted to examine the extent to which social capital reinforcing social norms can be effective and substitute for formal laws through an examination of the determinants of the demand for lawyers. The main findings using a fixed effects and dynamic panel model controlling for unobserved prefecture-specific fixed effects are as follows:

(1) Demand for lawyers is smaller when people live closely and cohesively. A high stock of social capital where society is tightly knit results in a reduction of any demand for a lawyer.

(2) Conflict generated by bankruptcies and debts causes people to seek legal resolutions, and thus need to rely on lawyers. The increase in the number of firms reflecting vital economic activity brought about a rise in the demand for lawyers.

Overall, this empirical study provides evidence that an informal rule sustained by a social norm is a substitute for a formal rule; such that the demand for lawyers is determined not only by economic conditions but also by social capital. People belonging to a tightly knit society can thus resort to rather formal, or to informal, measures to reduce the cost of settling a conflict. In other words, the social interaction among community members continues to play a crucial role for resolution of any conflicts even in a modern society.

Some independent variables used to capture social norms and bankruptcy could cause estimation biases, because they are all functions of local economic activity. Although I attempt to control for this by employing Fixed Effects 2SLS estimation, the assumption that instruments are exogenous is, to some extent, dubious. It will thus be necessary to use more appropriate variables when conducting estimations in further research. As well, this research is based upon data aggregated at a prefectural level; therefore; the individual characteristics of lawyers, such as proxies of their ability and quality are not considered. Lawyer quality seems to have a tremendous effect upon the demand for that individual, and therefore can be critical when the relationship between formal and informal rules is investigated. Put differently, the importance of social norms depends relatively on lawyer quality. Hence, a future direction for this study will be to use individual level data to examine how lawyer quality affects the lawyer market.

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LITIGATION AND SOCIETY

Lawrence M. Friedman

Law School, Stanford University, Stanford, CA 94305-8610

Abstract

Litigation, in ordinary speech, refers to actions contested in court; this involves a claim, a dispute or conflict, and the use of a specific institution, the court, to resolve the conflict or dispute. In the past most legal research has consisted of analysis of doctrine and theory about doctrine. But litigation is an important phenomenon in its own right and research lately has shown this. This chapter aims to sketch out a few major areas of research and theory and to add a few brief remarks about the significance of the work thus far. The topics covered include: dispute-centered and court-centered research; quantity of litigation and the so-called litigation explosion; and the impact of litigation on society.

INTRODUCTION

Only in the last decade or so has there been substantial research on litigation, or theorizing about the social meaning and impact of litigation, even among law and society scholars and those who identify themselves as sociologists of law. To be sure, legal scholarship in common law countries has always been obsessed with appellate litigation; but what jurists considered "research" consisted mostly of analysis of doctrine, and theory about doctrine, all quite formalistic and never quantitative or empirical. In other countries, legal scholars have had even less interest in conducting systematic research on litigation. For their part, social scientists have tended to neglect litigation as well. This was perhaps originally a reaction against the tendency of legal research to act as if the law was nothing but formal process. Sociology, then, took as its domain *informal* processes—law-related behavior that took place outside the courtroom setting.

But litigation is an important phenomenon in its own right, and this has become very obvious in the last two generations. The school desegregation

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cases, and in general the activities of the United States Supreme Court under Earl Warren, suggested the potential for social change through litigation. More recently, the so-called "litigation explosion" (Galanter 1983) has led to speculation about the harmful social effects of litigation, real or imagined. The discussion is by no means confined to the United States, although the United States is usually seen as the worst offender.

In one sense, to be sure, the large literature on courts, judges, juries, litigants, and the like, in sociology, criminology, legal history, political science, psychology, economics, and anthropology, is all relevant to the problem of litigation; but I work here with a somewhat narrower and more manageable concept of the field. My aim has been to sketch out a few major headings of research and theory, and to add a few brief remarks about the significance of the work thus far. We therefore ignore many of the cognate questions and fields of research—for example, the truly vast literature on the jury, and on the dynamics of jury deliberation and decision-making (for an overview, see Hans & Vidmar 1986).

Litigation Defined

No definition of litigation commands general agreement; indeed, most of the literature on courts makes no attempt to define litigation at all. Litigation, in ordinary speech, refers to actions contested in court. The core meaning thus implies three distinct elements: first, a *claim,* that is, an active attempt to attain some valued end; second, a *dispute* or conflict, in other words, resistance to the claim; and third, the use of a specific institution, the *court,* to resolve the conflict or dispute.

This definition may seem banal, but there are subtle choices implicit in the formulation. The phrase "action contested in court" implies that the *contest* takes place inside the courtroom. But courts have other functions besides litigation. In the life cycle of many disputes, the final act of the drama, or its (apparent) resolution, takes place inside the courtroom; and yet the court stage is (arguably) not true litigation.

For example, only a court can grant a divorce; and parties to a divorce are often in serious dispute over the division of property rights, support payments, or custody of children. But the *courtroom* phase may range all the way from bitter and protracted battles to perfunctory and routine paper-shuffling. Indeed, in the *typical* case, the problems are worked out, usually with the help of lawyers, long before any of the actors appears before the judge. What is presented to her honor is a package of agreements already settled; she merely rubber-stamps these prior agreements. Under our definition, divorces of this type, though judicial statistics report them as "cases," are not litigation, because they are not contested *in* court. Since the case-loads of many trial courts are dominated, quantitatively, by completely uncontested divorces, to

consider such cases "litigation" would seriously distort the figures on litigation rates. These cases, in the aggregate, may demand time and effort; but they do not seriously overburden the system as the more complex cases do, which are actually tried.

Dispute-Centered and Court-Centered Research

There are at least two distinct approaches to the study of litigation. Some scholars are primarily interested in *disputes* themselves, as a social phenomenon—their causes and cures. For them, litigation is only of interest as a phase in the life-cycle of disputes. Other scholars are primarily interested in courts as institutions. They are thus not directly concerned with conflicts and disputes that never reach the courts, except insofar as court decisions have an impact on such disputes, for example, by influencing the terms of settlements (see Ross 1970).

Research on *disputes* suffers from the difficulties of defining and measuring disputes. Court statistics are, on the whole, quite poor; statistics on the population of disputes are worse, or non-existent. Although it is not easy to count defamation cases, for example, it is thoroughly impossible to measure the population of insults, or the population of disputes in society that arise out of insults. Sometimes there is data on the number of *potential* disputes—for example, data on serious railroad or automobile accidents—which give a kind of base-line for measuring possible lawsuits (see Friedman 1987, Munger 1987). *Victim* studies in recent years have provided base-line data for measuring the relationship between criminal acts and the number of arrests, charges, and cases (see Hindelang et al 1976). But these are exceptions.

In recent years, a start has been made in studying the life-cycle of disputes, from their beginnings in the social field, to the point where a few of them "ripen" into lawsuits. The most ambitious attempt has been the Civil Litigation Research Project (CLRP) at the University of Wisconsin. CLRP used the dispute as its unit of analysis (Trubek 1980–1981), in order to link the work of courts with the social context out of which disputes arise. The researchers did not confine themselves to disputes that ended up in court. They also drew a random sample of households and organizations to identify disputes that never got as far as court (Kritzer 1980–1981).

Dispute-centered research asks why some situations produce disputes, and what happens to these disputes. What are the switching devices (so to speak) that shunt some disputes onto a court track, while others disappear or are diverted into alternative modes of resolution? Logically prior to the study of litigation, then, is study of the "transformation" of "injurious experiences" into legal claims. Felstiner et al (1980–1981; see also Fitzgerald & Dickins 1980–1981) describe a three-stage process of transformation. First, in-

dividuals perceive themselves as undergoing an "injurious experience" (they call this "naming"); next, the experience becomes a grievance ("blaming"); the third stage is "claiming," that is, the process of turning to the responsible party and asserting a demand for remedial action. At this point, a *dispute* has emerged, which, if not settled or arranged beforehand, may end up as actual litigation.

One theoretical and empirical issue is why such "transformations" occur or do no occur. Clusters of factors can be isolated. One cluster is substantive (based on "rules of law" or "doctrines"). In Paraguay, the law does not allow absolute divorce; this is a *substantive* barrier, which keeps many kinds of marital dispute out of court. Other factors are *institutional* or *procedural:* the expense of lawsuits, or the steps that make litigation simple or difficult, whether courts are accessible or not, formal or informal, and so on.

These various structural and procedural factors are often quite obvious. It is more difficult to demonstrate or assess *cultural* factors. It is, however, commonly assumed that culture (and personality) factors are critical in explaining why (for example) the Japanese seem to litigate very little, and Americans a great deal. That is, "litigiousness" is posited as a specific cultural trait, a matter of custom, tradition, and way of life; the Japanese (it is said) prefer compromise and interpersonal arrangements; Americans are individualists—battlers and sticklers for rights. Needless to say, there is very little hard research on such issues. In fact, it is not clear whether cultural factors best explain varying rates of litigation, or whether structural and substantive barriers should be invoked (see Upham 1987, Fitzgerald 1983). Most probably, litigation rates are the product of multiple factors—including the sheer difficulty and expense of litigation. Doctrinal and structural barriers, after all, are not generated out of thin air, but are durable or permanent patterns formed out of "softer" cultural phenomena.

In one sense it is misleading to talk about "barriers" to litigation; this assumes that it is normal or natural for a dispute to end up in litigation. In fact, most people do not pursue their grievances at all. Claims-consciousness is related to class—better educated, more articulate people are more apt to insist on their rights (Caplovitz 1963, Best & Andreasen 1977). Even when grievances mature into "disputes," they do not necessarily become lawsuits. Most disputes disappear or are settled long before the trial stage, and this has apparently been true for at least a century (see Daniels 1985, Friedman & Percival 1976). From one theoretical standpoint, indeed, every trial is a mistake in calculation. It is almost always in the interests of the parties to settle; trials are socially disruptive, and people in continuing or community relationships tend to avoid them (Macaulay 1963, Engel 1984, Ellickson 1986). Moreover, trials are costly affairs, and in civil disputes, there is usually a zone of settlement or range of values at which both parties are better

off if they settle (see Ross 1970). Trials result when parties seriously misjudge the likely outcome of a trial or insist on litigation in order to establish some principle.

The dispute that ends up in court has been transformed in another way, too. It has been, necessarily, translated from raw, lay norms and descriptions, into legal categories; it has been encoded and reworked to fit the traditions and the habits of internal legal culture (on this concept, see Friedman 1975:223). In the process, the dispute itself has been subtly or not so subtly altered. Lawyers, then, who do the translation in this and most modern societies, exercise control over disputes and their outcomes by virtue of their command of the language and the traditions which the legal system legitimates and to which it assigns a privileged place. There has been, unfortunately, very little systematic work on this process of translation and transformation (but see Mather & Yngvesson 1980–1981). It is clear, however, that the practice can be more or less "participatory" or autocratic; and that the style of lawyering makes a difference to the outcome of cases (see Rosenthal 1974).

Whether disputes end up in court also depends on the definition of a court (see Shapiro 1981). Institutions called "courts" in this society perform tasks other than dispute-settlement. They have administrative responsibilities, for example—probating estates, or formalizing name changes. On the other hand, many institutions imitate the courts, or use courtlike processes, without the name or the official status.

To begin with, in some societies there are "tribunals" which exist apart from the formal court system. In many societies, too, *arbitration* is a common process, substituting for "regular" judicial progress. Arbitration differs from "litigation" chiefly in that the arbitrator is only a temporary judge—usually selected by the parties—rather than a state official. The spread of "due-process" within institutions, government agencies, and other large organizations, in addition, has meant that internal dispute-settling or grievance procedures exist throughout society, institutionally very much like courts; in some instances, the parties may even use lawyers to help them prepare or argue their "case" (Macaulay 1987).

The court system in the United States, and in most modern nations, is exceedingly complex. There are civil and criminal courts, sometimes run as separate institutions; petty courts, trial courts, and intermediate appellate courts (in most states), and state supreme courts (see Kagan et al 1978); there is also the three-tier system of federal courts (see, for example, Howard 1981). Each level can be a separate object of study. There are also specialized courts—in Europe, labor courts and administrative courts are quite prominent; and there are supra-national courts, in the European Economic Community, for example. In each society, courts occupy a specific position in the structure of government and have a distinct role in and impact on society. There is also

a great deal of interest in "alternative dispute resolution"—modes of dealing with conflict and dispute that avoid the formal (state-run) courts. Arbitration has already been mentioned. "ADR" was not only a field of research; in the 1970s it became something of a social movement—a reaction against the formal court system, in the interests of efficiency and greater access to justice, especially for the poor (see Abel 1982).

Court Centered Research: The Quantity of Litigation and the So-Called Litigation Explosion

It is commonly assumed that the United States is a highly litigious society and that litigation rates have been rising rapidly in recent periods. This rough hypothesis appears in popular literature, in the press, and in the speeches of judges and politicians. It is also assumed that the effect of the explosion of lawsuits, especially tort lawsuits, is harmful to the economy, if not to the very make-up of society (Rabin 1988). Fear of litigation stifles innovation, and leads to conservative, "defensive" strategies in business and medicine; municipal liability has led to the closing of playgrounds, the cancelling of programs, and even to urban bankauptcy. But these effects are difficult to demonstrate empirically (see below).

A number of studies have tried to measure American litigation rates over fairly long timespans (often a century or more). These studies have, on the whole, failed to document the "litigation explosion." Thus McIntosh (1981) studied courts in St. Louis, Missouri, between 1820 and 1977. Litigation rates dropped in the last half of the nineteenth century, then rose and fell and rose in the twentieth century, but hardly dramatically. The "litigation rate" in the 1970s was higher than it had been a century before; but 45% of McIntosh's cases were family law cases, almost all of them uncontested divorces. "Litigation" in the sense of actual contests in courts in fact was perhaps lower in proportion to population in the 1970s than in the 1850s (see also Friedman & Percival 1976, Munger 1988). On the whole, those who have studied litigation rates tend to agree that there are no signs in state courts of a *quantitative* explosion (for the literature, Galanter 1983; a dissenting note is Marvell 1987). Filings in *federal* court, however, are an exception; there is no question that the number of such cases has been increasing far faster than has population size (see Clark 1981). But the overwhelming majority of cases filed—over 90%—are filed in state courts. It is the state courts that handle almost all cases of family law, personal injury, and criminal justice, and the overwhelming bulk of ordinary commercial matters. No increase on the federal scale can be documented for state courts. Gifford & Nye (1987), examining recent data, found evidence that litigation rates in Florida were rising more rapidly than population rates. The Florida data, however, thus far seem exceptional.

The federal data do point toward a more interesting and promising issue: changes in the *type* of case over time. The increase in federal filings is not difficult to understand, in light of the increased role of the central government in economy and society, relative to the states. It reflects the dominance of federal regulatory and welfare law; it also reflects the activism of the federal courts—and, what is often forgotten, the activism of Congress. There are thousands of civil rights cases in federal courts; 50 years ago there were virtually none. Though some of these cases invoke constitutional rights, or post-Civil War legislation, the vast bulk of them arise under the Civil Rights statutes passed by Congress in the 1960s. Unfortunately, despite the enormous literature on civil rights, empirical research on civil rights *litigation* is rare (but see Eisenberg 1982).

The federal courts, too, are the home of the preponderance of large, complex "public law" cases (Chayes 1976), which contrast so strongly with traditional private litigation. In these "public law" cases the issues go far beyond the parties, and the court frames broad remedies and maintains continuing jurisdiction. The major school desegregation cases are examples; or the long struggles to reform prison systems through litigation. There have been examples of "public law" cases in the United States since the nineteenth century; but there is no question that cases such as Chayes describes are more frequent today than before. Unfortunately, there is no agreed-on definition to mark off the boundaries of this case-type, and thus no data on the precise number of such cases. However, their importance is beyond dispute. It is also likely that they account for a good deal of the time and effort spent on litigation. The legal profession has been growing very rapidly in the United States—there were perhaps 60,000 lawyers in 1880, about 104,000 in 1900 (Friedman 1985:633), and over 650,000 in 1985 (Curran et al 1986:1); the number continues to increase steadily. Law firms have been getting very much larger as well (Nelson 1988:2); the largest firm today, Baker & MacKenzie, has over 1,000 lawyers on its staff; and a greater share of the effort of the large firms seems to be devoted to litigation (Galanter & Rogers 1988). "Public law" cases, along with a few giant private cases (antitrust, for example), account for much and perhaps most of this effort.

Longitudinal studies of state trial courts have also looked at changes in the mix of business that courts handle (see, for example, Friedman & Percival, 1976). Compared to the nineteenth century, commercial cases and ordinary property cases account for a lesser share of the caseload of the state courts. Personal injury cases. family law cases, and public law cases have increased in number and percentage. Courts have been spending less of their time on market-oriented disputes, and more on disputes that have an expressive, personal element. The only large-scale quantitative study of state appellate litigation came to a similar conclusion. This was a study of sixteen state

supreme courts between 1870 and 1970. For 1870–1900, debt, contract, and real property cases made up 55% of the case-load. More "personal" issues—tort, criminal law, and family issues—added up to less than 30%. For the period 1940–1970, these proportions were reversed; debt, contract, and property had fallen to 25.9%, but tort, crime, and family issues now aggregated 52.3%. However, there has been something of a resurgence of contract and business litigation in recent years, at least in federal court (see Galanter & Rogers 1988, Nelson 1988).

How can one make sense of these various developments? The longitudinal data, to begin with, render extremely doubtful the assumption that there is a simple, linear relationship between litigation and economic development. In a path-breaking study, Toharia (1974) analyzed the work of the Spanish courts between 1900 and 1970. He found that there was, in fact, an inverse relationship between economic development and the volume of litigation. Litigation in the formal courts actually *declined* in the period he studied; the decline was most pronounced in the most economically advanced sectors of the country. Studies in other European countries generally confirmed Toharia's findings, for the period in question (Blegvad et al 1973, Rottleuthner 1985).

It is possible to connect these results with empirical and theoretical discussions of why individuals and businesses do or do not litigate. Individuals and businesses with ongoing relationships avoid litigation, which is inherently disruptive. This is the theme of the classic article by Macaulay (1963), which studied the behavior of Wisconsin businessmen. Thus the recent upsurge of contract cases, as noted by Galanter & Rogers (1988; see Friedman 1989), suggests changes in the nature of business relations themselves—more volatility, rougher competition, and less emphasis on continuing, quasi-personal relationships among principals of firms. Study of this new phenomenon seems promising, since it supplements the research on disputes by exploring models and devising theories to explain why firms and individuals do or do not go to court.

Research on the *outcomes* of cases, oddly enough—as opposed to the quantity of litigation, or the subject matter, or the motivation—is comparatively thin, although most of the longitudinal studies present at least *some* data bearing on outcomes. One starting point for research is the well-known article by Marc Galanter, suggesting reasons why the " 'haves' come out ahead" in trial court litigation (Galanter 1974). To a certain extent, the reference to "haves" is misleading. The argument is that "repeat players"—those who use the courts constantly—tend to win out over "one-shot" litigants. "Repeat players" are usually, though not always, the richer and more powerful parties—the government, or big business; accident victims are typical "one-shotters."

Galanter's thesis is essentially structural. It is the organizational strength of

"repeat players" that accounts for their success. Ideology or simple class bias are not put forward as critical variables. Wheeler and associates have recently presented findings on winners and losers in state appellate courts, 1870–1970 (1987). There the results are also favorable to the "haves," that is, large organizations and government entities, though not overwhelmingly by any means. Recently, too, the Rand Corporation has run important studies of jury verdicts, mostly in personal injury cases. Their data suggest the need to reexamine the usual assumption that plaintiffs consistently win at trials (see, for example, Shanley & Peterson 1983; for a historical study that points in the same direction, see Friedman 1987).

The Toharia study raised questions about the much discussed issue of the "autonomy" of the legal system, specifically, the autonomy of courts and litigation rates. Toharia did not suggest that the legal system was, as a whole, "autonomous" in the sense of unconnected and independent of social forces in society; but his findings could be interpreted to mean that at least the *formal* courts of Spain were increasingly irrelevant to economic life. Presumably, these courts were locked into a tough and relatively rigid tradition, which rendered them incapable of adjusting rapidly to social change and the demands of modern business litigants. As a consequence, these courts were increasingly by-passed by economic institutions and perhaps by ordinary citizens as well. These were important findings, and very fruitful in stimulating other research, much of which tended to confirm Toharia's findings. Of course, it is by no means clear that the situation described can be generalized across cultures, or to other times, places, and institutions. Certainly, the work of American courts in at least *some* areas—civil rights and civil liberties, product liability, and medical malpractice—hardly suggests rigidity; there may be parallel changes taking place in Europe as well. Certainly, the explosive growth of judicial review, in West Germany for example, suggests a more "American" model of court use (see Bryde 1982). And when Toharia returned to his subject, a decade or so after his first study had been published, he found that the workload of the Spanish courts had risen sharply since the early 1970s (Toharia 1987).

The Impact of Litigation on Society

This is largely uncharted territory, as far as systematic study is concerned. One of the "impacts" of litigation, especially in a common law system, is the creation of the basic legal norms themselves. This "impact" is so fundamental that it is often taken for granted; and in a sense most of the legal literature, and a good deal of the social science literature on particular fields of law, concerns this impact. Much less common are theoretical or empirical attempts to speak generally about the mode in which courts frame and devise rules, and the nature of the rules which they are likely to frame (but see Friedman 1967). A

few legal scholars, in the 1970s, advanced the thesis that litigation in common law courts tends to evolve in the direction of "efficient" rules (see Priest 1977); this thesis is, however, not generally accepted.

There are also studies of how litigation in particular courts affects the community in which the court sits; this is a theme, for example, of much of the literature in legal anthropology. Courts in many societies serve the function of restoring harmony and balance; they are concerned less with "law" and "rights" than with repairing ruptures in ongoing relationships (see Nader 1969). This is not necessarily the outcome in Western societies. Merry (1979) studied the efficacy of a lower court in an American urban neighborhood, for example, and concluded that the court was not an effective institution of dispute-settlement. Rather, the court was used in this community "as a sanction, a way of harassing an enemy," as a "weapon marshalled by disputants to enhance their power and influence," rather than "as a mode of airing and resolving disputes" (Merry 1979:919). Thus, the court does not repair broken ties; it may even exacerbate a tense situation. Tactical use of law to hurt an enemy may be particularly characteristic of colonial situations, where the law is an alien intrusion (Cohn 1965).

There is a considerable literature, too, made up of so-called "impact" studies (Wasby 1970, Johnson & Canon 1984)—studies of the consequences of particular court decisions, for example, the Supreme Court decisions banning prayers from public schools (Muir, 1967) or on abortion (Hansen, 1980), or state decisions extending tort liability (see Givelber et al 1984). These studies focus on whether officials obey such decisions, and why, or whether the decisions have an influence on behavior among various affected publics. Such studies raise conceptual and methodological difficulties (see Rabin 1979); and, in any event, data about the *aggregate* or cumulative impact of courts and litigation is not easy to come by. Litigation has both direct and indirect effects; and the indirect effects can be subtle and difficult to measure. Fears of losing or hopes of winning influence the course of out-of-court-bargaining, as we have noted. Judicial actions have what Galanter has called "radiating effects" (Galanter 1987:215)—they ripple outward into the larger society.

There is, to be sure, a popular literature of invective about the evil results of the "litigation explosion." Litigation itself is undoubtedly expensive. It is possible to gather rough figures to show how much businesses and individuals spend on litigation each year. It is not clear how one would go about measuring the more remote and consequential costs. How is one to know whether litigation is, or is not, stifling "innovation?" It is commonly stated that medical malpractice suits have led to an increase in wasteful, "defensive" medicine. No doubt, there have been *some* effects, but the studies do not agree on how much (Zuckerman et al 1986; 107–10; Tancredi & Barondess 1978). Thus no one can be sure whether (say) excessive tests and lab work

offset the possible gains from more cautious doctoring. With regard to other alleged costly consequences of litigation, there are serious problems of cause and effect. Even assuming that one can make concrete so vague a notion as "decline of trust," it is possible that "decline of trust" is the *cause* of certain forms of litigation, rather than the effect (see, in general, Friedman 1985).

Moreover, it is striking that popular opinion and scholarly critiques alike put so much emphasis on hidden costs and side-effects, and show so little concern for hidden benefits. The benefits, to be sure, are often quite intangible and immeasurable: social justice; expanded opportunities for women and minorities, expansion of civil liberties, fair procedures within institutions, limits on government (see Galanter 1986:28–37). Who would deny that these are significant gains? Whether they are worth the costs is a question that models and equations cannot answer.

The determinants of litigation are complex. Perhaps the key fact is that "litigation" is not a unitary phenomenon, and thus it would be vain to try to relate litigation as a process to any *general* sociological theory; or even to general theory in the sociology of law. There is no reason why the same theoretical apparatus would explain quantitative and qualitative aspects of the various types of litigation: "ordinary" litigation—boundary disputes between landowners, squabbles over custody, breaches of sales contracts—as well as giant public-law cases, mass tort cases (for example, the literally thousands of asbestos suits, or the "Agent Orange" cases; see Schuck 1986), civil rights test cases, huge private anti-trust cases; not to mention, at the other extreme, routine eviction and repossession cases, and neighborhood disputes, in small claims or neighborhood courts. It is by no means clear that all of the giant "modern" lawsuits constitute a single phenomenon in themselves.

Judicial statistics are poorly kept, and the compilation of data sets for state (Kagan et al 1977) and federal cases (Carp & Rowland 1983) has only recently begun. But perhaps what is needed most of all is intensive, small-scale study of lawsuits in different courts, at different stages of the life-cycle of disputes. Out of this might emerge a *typology* of disputes and litigious occasions; and at that point meaningful hypotheses might be framed about the many forms and shapes of litigation.

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PEOPLE'S LAW, DEVELOPMENT, JUSTICE

By Upendra Baxi

I INTRODUCTION: LAW AND "DEVELOPMENT"

1. Conceptions of "Development"

The law is resorted to almost talismanically for initiating and implementing social change decisions by the elite of the "developing" (or more accurately impoverishing) societies. In this sense, the law (as a body of rules and precepts, as a group of social institutions making, applying and enforcing rules and precepts, and as a carrier of ideologies, values) is an important resource for, and adjunct to, development or directed social transformation. Notoriously, most change-oriented laws designed to further social and economic transformation turn out to have rather limited efficacy, at least in the not too short run. They do not bring about optimum behavioural compliance, much less changes in attitudes and values. This, in turn, affects the symbolism of the law and its processes generally; and threatens to erode, in the long run, the legitimacy not merely of the law but of its makers and upholders as well. A related aspect, well worth recalling, is that the attempt to use the law to initiate and accomplish planned change is, in basic respect, a "bootstrap operation" for the "developing" societies. Glib talks of law's potential for development simply overlook that substantial economic and social costs have to be borne in order to make the law an effective instrument of social change. Resources have to be constantly and consciously allocated to the making of law (which is not just a matter of copycat drafting but of relating change aspirations to obdurate social realities by a painstaking grasp), its dissemination, creation of supportive structures (mobilization through public opinion), favoured interpretation systems (courts, tribunals), adequate implementation/enforcement systems, continuing social audit of the law's operations and ongoing repair and reform jobs. All this requires a rather substantial investment of manpower and money. Typically, however, the net outlays of national budgets for administration of justice, legal enforcement, supportive structures is low and even miniscule. Very often, political elites want just this: a veneer of change over the substance of status quo. Most changes sought to be ushered in by the law are such that they only nominally, if at all, affect the dominant patterns of distribution, and management of distribution, of power in society. But even for elites, who somehow manage to transcend their class base, and for whom recourse to law for social change may not be chicanery and ritualism, the problem of the use of law for developmental purposes may well be an aspect of underdevelopment itself. In other words, even where the fundamental drive of developmental effort may be to reduce poverty, such effort itself continues to be affected by the very context of poverty and scarcity at every level (Baxi, 1976a: 38 – 94). We thus have to ask in contexts like India not merely whether the law can affect changes in the lives of the poor but also how far poverty itself affects initiation and accomplishment of ameliorative legal changes.

In order to understand the relevance of law to development, we need at the outset a clear understanding of both the notions. What is "development"? The many conceptions of "development" floating around in the massive literature are, I suspect, by themselves a means of exploitation. But this is a subject by itself. Let me point out one or two ambiguities and then move on. It is said that "development" may be looked upon as the process of planned or directed social change. But the real questions are: Development for whom? development of what? development through what? development from whom? These are very crude ques-

tions: so crude that very few social scientists pause to ask these. For me in my relative lack of scientism these are the questions which matter. Undoubtedly, in most countries the Gross National Product has increased. But Gross National Poverty (the other GNP) has also simultaneously increased. That is why I am more comfortable with the expression "impoverishing" societies than "developing" societies. From the notorious, and somewhat nefarious, scholarly concern with "development" in the fifties and sixties we have arrived, in the seventies, with a more engaging and promising concern with "another development". One might say, with some risk of overgeneralization, that the literature of the sixties revealed, in essence, a hegemonial, unilinear, eurocentric model of "development"; it was, notably, the work of Western scholars. Concurrent with the model of development were certain preferred strategies for it, which were either emulated by or imposed upon the elites of the developing societies (Inaytullah, 1975). The quest for "Another Development" in the seventies has arisen out of the realization that development is a multilinear, history and culture specific process and is conditioned by the nature of international political and economic orders.

It is now accepted that development is all about distribution. The technocratic approach to development emphasises "technological modernization, managerial efficiency and growth in GNP". Underlying this approach is the assumption that "the system could be made to work if equitable distribution is built into an essentially growth model" (Haque et al., 1977: 12). This has been the prevalent approach so far in India. The results are not all that impressive. This approach in any case relies on the "classical" conditions of capitalistic accumulation such as frugality, innovativeness, access to home market, and the political and military power to create international markets conducive to industrial growth at home" (Haque et. al., 1977: 13). The realities do not support these assumptions.

The other way of looking at development seeks to redefine the processes and objectives of development "into the direction of rapid social change and redistribution of political power". On this approach, development is not just to be measured in terms of technoeconomic variables but rather as development of "the collective personality of the society". The processes of development are, on this view, designed to foster a "collective" sprit ("a sense of belonging to a society, pride in national achievement, fulfillment in helping one's distressed neighbours"), creation of "aspiration frontiers" (dissemination of appropriate values), generation of self-reliance and "participatory democracy". The latter is one way of eliminating "consciousness gap" between leaders and masses (Haque et. al. 1977: 12, 15 – 19). Ultimately, these processes should lead to de-alienation.

From this standpoint, the "development" resulting from growthmodel (stressing centralized planning, expansion of modernized industrial sector and assistance from developed countries) is really "anti-development". The second model of development judges developmental process by what it does to man; de-alienation, self- reliance and participation are the three crucial components here. Clearly, this is, for India, (as indeed for most "developing" societies) only a statement of preferred future; but it may provide critical bases for devaluation and even delegitimation of the existing liberal-capitalistic growth model.

2. Law, Legitimation and Development

Where and how do we place law on the debate concerning development? The current development literature is devoid of any critical thought on law's relation to social organization

and change. Nor are the mainstream social scientists much bothered to understand the nature and function of modern law. This was not of course the manner in which the founders of modern social theory regarded law. Durkheim, Marx and Weber gave sustained attention to law as a social form and process in arriving at the understanding of social development. The recent serious attempts made by lawmen (ILC, 1974; Trubek, 1972; Unger, 1976; Trubek & Galanter, 1974; Trubek, 1977; Balbus, 1977; Hurst, 1950, 1964) to provide some theoretical basis for relation of law to development have still to be related to the current debate on alternative conceptions of development.

The simplest way in which law is often approached in the context of development is through an emphasis on its instrumental and technocratic dimension. Law is regarded as a technique for ordering of social relations. It is also seen as a conversion technique, i.e. public and positive law norms convert social, political and economic choices into a system of binding rules and precepts. Law is also regarded, in this view, as facilitating organization of choice and enterprise. In this sense, law is no more than a manual of instructions for people who want certain things done. The instrumentalist notion of law also included a concern with forms of conflict resolution provided under the auspices of the legal system. In this conception, law is merely seen performing certain jobs felt necessary from time to time to keep society as a "going concern". Karl Lewellyn called these the "bare bones" law jobs, whose task is to make group living possible (1940, 1368 – 70). On such a conception, law may not appear to be of any fundamental significance in understanding of social change, and even planning of it. The entire social technology that is law is here reduced merely to a kind of toolkit.

A wider conception of law, both as an aspect of social consciousness and of social organisation, gets us closer to understanding its linkages with social change. Law is not just social technology; it is an aspect of culture (or ideology, if you please). Law as a system, reflects, reinforces and often mutates and innovates values and ideals: whether these be of the dominant groups in society or ascribed to people at large. Law is also to be viewed as a social system – a system of social relations, roles/statuses and institutions. Interaction, through a network of institutions of law having their own "subcultures", between and among the makers, interpreters, onforcers, compliers, breakers, and beneficiaries of law constitutes law as a social system. Law, thus conceived, performs important legitimation functions in a society. A prime function of law is to establish, maintain and justify distinctions between permissible and proscribed uses of force in social relations. Legal systems, more or less, appropriate unto themselves the domain of legitimate force in society. This appropriation function is among the key functions of law in society. But because law appropriates force, it also accustoms us to its exercise according to legally ordained procedures. We think of and feel the legal application of force in purely normative rather than existential terms. Above all, and here lies the danger, the institutionalization and routinization of use of force continually reinforces the authority of law, indeed to a point where the mere existence of a rule prescribing behaviour becomes self-justifying. The intervention of law inhibits the fundamental question: what are the good reasons for the state's continuing appropriation of force? Thus, it contributes to the legitimation of law and the power of its makers.

Normative and social systems of law tend to "institutionalize class conflict" (Dahrendorf, 1957) by providing certain adjustments of conflicting interests and a vast repertoire of conflict-resolution techniques and institutions. Law functions in this manner to sustain existing patterns of distribution and management of distribution of power in society. This too is among the principal legitimation functions of law.

Finally (without being exhaustive) there is the notion of the "rule of law", a heavily overworked notion which performs certain legitimation functions for those who hold power in

any society. In one sense, it simply means conformity with the lawyers' law, that is due observance of the procedures prescribed. This is not the most significant aspect of the notion as such conformity is consistent with the grossest inequity. The other and the more important aspect of the notion "imports both a minimal justness of rules and a dynamic responsiveness of substantive law to the needs of social and economic development" (Stone, 1966: 621). In this sense, the rule of law signifies a complex of standards of redistribution and justice; and in this sense it is a highly variable achievement. Such, however, is the symbolic appeal of the notion "rule of law" that it prevents fundamental questions concerning justice from arising at all: For whom, and for what purposes, and to what extent does the "rule of law" (conceived primarily as an attainment of a modicum of justice through legal processes) exist? Can it be claimed with integrity that it exists for most, let alone, all people in society? Indeed, by solely addressing its constraints to the exercise of public power, the rule of law notion diverts attention from the very real violations of minimal justice in social relations by those who wield extensive "private" power. (The problem in India is precisely of this nature: the state is not the most significant holder of power). Moreover, is the "critical premise" of the doctrine of rule of law that rules can make power impersonal and impartial "not" fictitious? (Unger, 1976: 180). Indeed, as Unger points out, "the very assumptions of the rule of law ideal appear to be falsified by the reality of life in liberal society. But, curiously, the reasons for the failure of this attempt to ensure the impersonality of power are the same that inspired the effort in the first place: the existence of a relatively open, partial rank order, and the accompanying disintegration of a self-legitimating consensus. The factors that make the search necessary also make its success impossible. The state, a supposedly neutral overseer of social conflict, is forever caught up in the antagonism of private interests and made the tool of one faction or another. Thus, in seeking to discipline and justify the exercise of power, men are condemned to pursue an objective they are forbidden to reach. And the repeated disappointment accentuates still further the gap between the vision of the ideal and the experience of reality" (Unger, 1976: 181). And yet this experience of "gap", which is a structural property of legal system, does not serve to delegitimate power. Balbus has recently argued that "the legitimation of the legal order is not primarily a function of its ability to live up to its claims" but "rather of the fact that its claims . . . are valued in the first place". Thus, for example, the notion of the formal equality of men before the law has been so firmly entrenched as to make unproblematic the substantive equal treatment of unequals. The law of theft and the punishment for theft is the same, for example, for the rich and the poor; and in fact the punishment actually awarded may be much less stringent for the former rather than the latter. The equality before the law argument does not countenance the claim that the rich, who should have no reason to commit the crime, should be more severely punished as compared with the poor. To allow such questions would be to initiate delegitimation of the legal order, a "fundamental break with the values and (formal) mode of rationality of the legal form itself". Balbus urges that an adequate theory of "legitimation and/or delegitimation would have to explain why the logic of the legal order . . . is ordinarily accepted as unproblematical, and is not called into question in the name of a radically different logic" (Balbus, 1977: 581–582).

In outlining the wider notion of law, we have already seen how law is itself a form of social consciousness, in which are embedded certain ideals of justice, equality, authority. A mere technocratic/instrumental view of law would not have taken us this far. We may briefly turn to the understanding of law as social structure to complete the picture. Max Weber, in his rich and seminal analysis of the organization of authority in society, was the first to insist on the relative autonomy of the legal order. He was concerned to show that while the development of law was intimately related to certain socio-economic formations, law as such cannot

be reduced to be a mere reflection of relations between classes. Thus, he recognizes that "the alliance of monarchical and bourgeois interests was one of the major factors which led toward formal legal rationalization", and gave rise to a calculable and predictable system of rules based on the principles of formal legal equality. The specific forms of rationalization in law cannot be explained wholly by taking capitalism as a "decisive factor" in the process (Weber, 1954) Weber clearly saw that law was autonomous at four distinct levels, now sharply formulated by Roberto Unger (1976: 52–54). Law is substantively, institutionally, methodologically and occupationally autonomous. Law is substantively autonomous when its norms "cannot be persuasively analyzed merely as statement of any identifiable" set of economic, political or religious beliefs. Law is institutionally autonomous "to the extent that its rules are applied by specialized institutions whose main task is adjudication". Methodological autonomy of law can be seen by special types of reasoning and justification adopted by legal institutions as compared with other social institutions. Finally, a legal order is occupationally autonomous when a specialized group of people (legal notables to use Weber's expression) – legal profession – "defined by its prerogatives, and training manipulates the rules, staffs the legal institutions, and engages in the practice of legal arguments" (Unger, 1976: 53).

Weber pointed out that a legal order, thus seen, differed from politics and administration by its objectives of generality and uniformity of application: there is a belief that the law "consists essentially in a consistent system of abstract rules" uniformly applied in "particular cases". Obedience is accorded to rules and to legal authority and not to persons occupying office as they too do so, and act, on the basis of obedience to rules in the first place (Weber, 1964: 330). The abstract character of law was favoured by all those interest-groups "to whom the stability and predictibility of legal procedure was of very great importance". It was equally important to those "who on ideological grounds attempt to break down authoritarian controls" (Weber, 1954: 229). Clearly, an autonomous legal order in this sense was a crucial component in the development of liberal capitalist societies in the West (Trubek, 1972). Indeed, it has been argued that while the legal order may be autonomous in the sense that it is "autonomous from the preferences of actors outside this order", it would be wrong to say therefore that it is "autonomous from the capitalist system" (Balbus, 1977: 272). In this brilliant analysis Balbus goes further to show that there is an essential identity between the "legal form and the very 'cell' of capitalist society, the commodity form").

A tolerably clear corelation between legalism and state authority structure thus emerges from the work of, and since, Weber. Weber stressed that "legalism, while seeming to constraint the state really strengthened class domination" (Trubek, 1972: 53). The system of formal justice, Weber maintained, "legalizes" unequal distributions of economic and political power by "guaranteeing maximum freedom for the interested parties to represent their formal legal interests" (Weber, 1968: 812) Whether or not growth model of development is viable, or constitutes "anti-development", legalism is a very crucial aspect of that model and no understanding of it can be complete without some grasp of the nature and relationship of law to social formations.

The same is indeed true when we move away from the technocratic growth model of development to the broadly humanistic model articulated earlier in this part. How would legal systems be related to the essential tasks of fostering "collective spirit", creating new "aspiration frontiers", and a movement towards new forms of social order enhancing participation, self-reliance and de-alienation? Would not all this require major transformations in law as social consciousness and social organization? Given the existing forms of law and social orderings, and the nature of their relations, would it be at all possible to meaningfully decen-

tralize power, escalate participation and restore human autonomy and dignity for the masses? These indeed are no strange questions for the Indian mind. Gandhi raised them eloquently on the eve of constitution making (Baxi, 1967). Jayprakash Narayan raised them again, not just at the level of ideology but of political action, in the mid-seventies. The contemporary increasingly feeble "dialogue" between the neo-Nehruites and neo-Gandhians is an aspect of the same quest.

II PEOPLE'S LAW, DEVELOPMENT, JUSTICE

1. People's Law: Problems of conceptualization:

One way in which we can begin towards a new consciousness of law (especially in a country like India) is to relate "people's law" to "state" law. One factor contributing to the vicissitudes of the law as an instrument of directed social change is simply that most ex-colonial societies of the Third World were (and remain) multilegal, possessing more than one legal system and legal "culture". The imported western legal systems interacted in different ways with indigenous systems of administration of justice. Initially, the imported/inherited western based legal systems were alien both historically and existentially to the people at large. This alienness may still persist after most of these countries have become independent and yet have continued to operate with the received systems of law and justice whether as a matter of deliberate choice (in terms of the maxim "what is good for the elite is good for the masses") or as historical hangover. There are close parallels here between the European "reception" of the Roman law (Stone, 1966) and the ongoing crisis of legality in the newly independent societies which have twice received the European law.

Of course, it is now being discovered all over again (there is no commandment in social sciences forbidding the reinvention of the wheel!) that all societies including those which are highly developed are multilegal, an insight unforgettably proffered sometime ago by Otto von Gierke, Eugen Ehrlich, Max Weber and others. The sociological literature of the sixties and seventies celebrates the return to this theme. It not merely stresses the inadequacies and inhumanities of the state law's "assembly line" justice but also highlights the comparatively superior qualities of non-state, informal, people's law. All this indeed has come to a point that one hears of the "peaceful uses of anthropology" (Lowy, 1973: 205) and creation of African type moots in the suburbs of San Francisco (Danzing and Lowy; 1975: 685)! Interesting too is the semantic distinction (manipulation?). The Asian/African societies have "tradition" and "custom". The same phenomenon is described for the developed societies differently as: "private government", private sectors of law and justice, "informal law", "living law", "people's law".

To return to the main point: the theme of plurality and multiplicity of legal systems is now well worn, although it is differentially assimilated by sociologists and jurists. But the central perplexities remain. Can we describe group ordering of social relations, and group handing of social conflicts, outside the dominating frameworks of state authority and power as law? Too much intellectual energy has been dissipated over this question; but not over the counterquestion: why not? One suspects all this is highly ideological. The liberal democrats who have all along urged political pluralism as their fighting faith have forgotten their own message when they come to the law. The state (behaviourally, the bureaucracy and army) is only one of the many social groupings, howsoever imperious and dominating it may be. If the

state, for its operations, needs a technique of social ordering, social control and institutionalization of conflict – namely, the law – so do the other non-state groups. I do not deny (who can?) the increasing power of state over all other groupings. But the latter exist; nay, sometimes they are even resilient. To refuse to conceptualize their regulatory systems as law (in any significant usage of that term) is to commit a kind of genocide by definition. If not that, at least, it is a goodbye to pluralism.

That hurdle over, arise the more vexing ones of further conceptualization. Thought has moved here in dichotomous pairs: we hear of "state law" and "people's law", "official law" and "living law", "formal law" and "informal law", "private" and "public" legal systems, "national" and "local" law ways, and finally "high culture" and "low culture" law. Bases for classification here vary: in terms of origin (state/people), qualities (formal/informal), scope (national/local), social acceptance (living/enforced) and cultural foundations (high culture/low culture). One clear basis of differentiation is the presence of state power and authority (which is not omnipresent, witness for example the vicissitudes of the "state action" doctrine in the American Constitutional law). This gives us two main types of legal systems in any society: those organized under the auspices of the state and those organized under the auspices of social groups other than the state. The state legal system (hereafter SLS) – itself a large bundle of hundreds of state legal systems – simplified and abstracted, provides a kind of reference group for the conceptualization of non-state legal systems (NSLS). The NSLS in any society would have higher demographic presence than SLS. Anyway, pending this kind of census enterprise, it is possible at least to say that NSLS display substantial variations in origins, development, structure, process, efficiency and viability and values (Pospisil, 1979: 97–126). Inter se relations, and comparisons between (and among) NSLS still represent an uncharted arena of investigation, both theoretically and empirically. When such investigations develop, a search for conceptual tools and organizing principles other than those furnished by the presence or absence of state power and authority may well become imperative.

2. Perspectives für The Study of Interaction between SLS & NSLS

The study of interaction between NSLS and SLS is of prime importance at least, for sociologists of law in the "developing" countries. But it is equally important to prevent such study from becoming dogenerate factology. Perhaps, an identification of perspectives may be useful. May we not study this interaction from social system, social actor, and social development perspectives? Each needs some explaining.

On the social system perspective, the configuration call "law" will now look different. Our universe becomes overpopulated, even congested. We would need to bring some order: identify the main "types" of NSLS; their relation to social structures (roles, statuses, role-sets, status-sets, "culture"). Having done that, we would need to re-explore the SLS in the same manner. Then only we may begin the task of correlating preferred SLS types with NSLS types. And this will need typification of interaction patterns. Jargonistic, all this; but necessary. SLS/NSLS may be symbiotically co-existent; this is conceivable, though not likely. Or they may be related in terms of collaboration, reciprocity or the relation may be of antagonism. A relation of complementarity would exist when NSLS performing the very same law-jobs (which Karl Lewellyn so seminally identified) which the SLS strive to perform. (See Baxi, 1976b: 93–95). On the other hand, the NSLS may be in active antagonism with the SLS. The antagonism or conflict may be at the level of values as well as of interests. Conflict may be so acute as to generate hegemonial drives - NSLS may seek to eclipse or oust SLS or vice

versa. There may be loot and plunder – also disaster, as when state laws coopts the features, even institutions of non-state law through statutory adoption in an effort at hegemony (the state attempts to statutorize community dispute institutions through Nyaya Panchayats in India afford one striking example of this: See Baxi, 1976a: 411-30, Baxi & Galanter, 1979: 341). Alternatively, there may be a "mix" of complementarity and conflict in the relations between NSLS and SLS. This mix may well be a kind of division of social labor between state and people. In a given law-region, the NSLS may do all social control jobs save those of dealing with major crimes (e.g., murder), though theoretically there is no inherent reason for this division. What is all this, one may ask, but a saga of social change?

The social actor perspective wants, rightly, us to look at human beings not just as systems. Curiously, or perhaps not so, man disappears almost altogether in social system/structure analysis; the actor, it is said, becomes the receptacle. He is at the "receiving end of the system", never at the giving end (Dawe, 1970: 207). Even if that be not so, it is true that social systems interact only in the dark night of social scientist's soul; in real world, only people, human beings, interact. Berger and Luckmann have reminded us (1966: 72): "The institutions, with its assemblage of 'preprogrammed' action, is like the unwritten libretto of drama. The realization of the drama depends upon the reiterated performance of its prescribed role by living actors." Take the man into account and the picture begins to look different. Now we find human beings in time and place using the norms, processes, institutions of SLS and NSLS for their choicemaking and social action. The actor's values and interests (not these of the institution's or system's) guide our understanding here. Just one example should do here. Recourse to the court-system of SLS by Indians, villagers particularly, does not necessarily imply any acceptance of the values of SLS or signify any bankruptcy of the resources and values of NSLS (say, Panchayats). Court recourse may merely be a strategy for conflict-handling (an input for more favourable outcome in extra-judicial handling of conflict). It may also be motivated by the desire to correct status-asymmetries in village society (Epstein, 1962: 123–24): or to wage status competition, not quite permissible within the NSLS networks (Rudolph and Rudolph; 1967: 36–66). The results of such recourse may not signify any fundamental departure from the hierarchical, sacral value system of the Hindu society or any confirmity with the "modernistic", secular-rational goals of the constitutionally desired social order. This must remain an open question. What is not open to question, however, is the observation: that from the actor's perspective, adjudication may be "just one of the many contingencies in what is essentially a process of negotiation in a changing social environment" (Kidder, 1973: 137).

We identify the third perspective as developmental. We may proceed here both from the standpoint of the top-down technocractic model of development and from that of the humanistic development model. From the former standpoint, we identify the development inspiration in terms of the constitutionally stated values and aspirations, relation of these with the political elites policies and programmes and the translation of these bureaucratic formulations and implementation. Identification of the normative conceptions of elite espoused notions of development and of development achievement (which may involve, in the stream of time, dialectically, reformulation not merely of the strategies but goals as well) will then provide the foci of the study of development. If the blood group of aspiration and achievement compare well, we have development. If not, we have problems: what went wrong? unintended effects? lack of legitimacy? lack of political will? lack of social learning? (Development is indeed, identifiable, with a process of social learning in the direction of espoused values). If we want to look at development from this standpoint, the study of NSLS in interaction with SLS, or indeed by themselves, would be of considerable help. The NSLS

may reflect the tenacity of social formations and values, these in turn displaying the "folk" notions of development, as distinct (and even opposed to) the elite notions. Where these notions coincide, we may discover different institutional pathways for the attainment of the same set of goals and values. Either way, we would be reaching a reappraisal of both types of legal systems (SLS and NSLS) in their development profiles.
On the other hand, we may wish to study the NSLS in terms of the values of the humanistic or "Another Development" approaches. To what extent the NSLS reflect or preserve a movement towards forms of social order erhancing participation, self-reliance and community? To what extent the NSLS foster dealienation? What are the fundamental presuppositions involved in the structure and functioning of the NSLS concerning the nature of man, state and conflict? Do these presuppositions diverge substantially or radically from the values of the SLS? In other words, what is the delegitimation potential of NSLS for the SLS? What, on the other hand, is the scope and impact of the spread of the culture of SLS in the NSLS and vice versa?

3. Village Law and Justice in India

Let me plunge now into specifics of the Indian situation. Insofar as the study of village law and justice is concerned, we have in India instead of cross-fertilization across disciplines the situation of cross-sterilization. Juristic preoccupation with the SLS has generally led to the belief that NSLS are wayside relics, of marginal importance and destined to disappear in the great March to Progress. Indeed, the general tendency has been to subsume studies of NSLS (dispute institutions) under the rubric "cultural" or "legal" anthropology, an exotic field for a few specialists which a busy judge, lawyer, or legislator finds of little immediate relevance. On the other hand, even legal anthropology has yet to win recognition in India as an integrated discipline. Social anthropologists have studied "village" life; but in the proliferating studies the facus is on kinship, caste, and now-a-days "class". It is incomprehensible but true that very little attention is paid to social conflicts and their management outside (or indeed even within) the main frames of caste and class. Law as a category of structural analysis is virtually absent. The state of art qualifies what follows by way of an overview of literature. There seem to be three main types of NSLS in rural India. Very generally, these are caste-based NSLS; community-based NSLS; innovative, reformist NSLS. The distinction between caste and community NSLS is (as we will shortly see) relative. It is based on the view that "most individuals in rural India have two sets of predominate social relations, one that ties them to a village community which may be viewed as a vertical set of ties and one that connects them horizontally to their biradari and jati (subcaste)". Each set of social relations has "norms that can be considered legal and 'individuals and groups possessing the socially recognized' authority to apply physical force to enforce them within the local communities" (Cohn, 1965:82). The community NSLS extend beyond the caste to the village unit itself, though patterns of caste dominance – or of power distribution – here intrude, sometimes to a point that a village panchayat becomes the very extension of dominant group government. The innovative/reformist NSLS are dispute institutions like the "People's Court" (Lok Adalat) at Rangpur which are sponsored by acculturating agents or agencies, with the ideologies which centre upon the principle of generation of Lokshakti or people's power for social transformation, and which deny, or circumscribe, the state power (Baxi: 1976b).
The dominant form of the organisation in each case is a set of dispute institutions (cf. Abel, 1973: 217) called panchayats. Panchayats normally are a group of five people who hear and

decide disputes mostly when they are summoned to do so but frequently on their own. However, in each type of NSLS, the subject matters vary. Very generally, caste (jati) panchayats deal with conflicts of interests and values within jati-groups, including factional alliances within those groups. Village or territorial panchayats deal with conflicts of interest cutting across caste factors, though those very factors may play often a crucial role in the "resolution" of a particular conflict.

Jati panchayats vary enormously in structure and scope. Bernard Cohn has insightfully grouped the structure and scope of jati panchayats in terms of territorial units as well as patterns of caste dispersal and domination. His classification yields three types of jati NSLS:

(a) villages with a small population of a single caste;

(b) multi-caste villages with single head (authority figure);

and

(c) multi-caste village with a dominant caste (Cohn, 1965: 83–98; see also Srinivas, 1962: 118–9).

It is clear that jati NSLS may have wide territorial reach in terms of aggregation of jati circles, so that it is not unusual to find as many as fifty villages falling within the scope of jati NSLS. The limits of the territorial reach are conditioned only by "the means and the speed of transportation" and "by the kinship radius of the convenors" (Mandelbaum, 1966; 281). There is equally clearly a federal component in jati NSLS and different levels of hierarchy e.g., Cohn, 1959). The nature of the conflict or its importance to jati solidarity patterns may, however, involve the use of the highest collectivity of jati NSLS (panchayats comprised by as many as 20–25 villages). Jati panchayats also show interesting variations in organization of power and authority. While these remain to be systematically studied, a mix of any of the following variables offers some clue to authority and sources of legitimation. The close correlation between age and wisdom provides one mix – the panchayats are often led, even composed, by such men. Esteem, reputation, integrity, and charisma provide another mix. Economic base, as related to social status (Weber's analysis of status-groups as distinct from class is still, despite its seminality, largely ignored in Indian studies) also invests power and authority in certain men. So does the status of being a faction leader. Although not so prevalent now, we cannot altogether ignore the hereditary or royal allocations of role and authority (Cf Cohn, 1965: 85–90).

Jati NSLS primarily involve disputes and conflicts which are related to the maintenance of jati ranking (in terms of ritual axis and of pollution and purity) and solidarity. Ritual lapses, marital relations, commission of polluting acts, sexual deviance, inter se land disputes, credit transactions, patron-client (jajmani) relations – all these fall typically within the range of jati NSLS. As in SLS, the jati NSLS involve application of pre-existing norms (See Srinivas 1962: 118–19. Contra: Cohn, who says "there is, apparently, little question of what 'the law' is in panchayat proceedings" 1965: 91) as well as instant norm creation and norm innovation. (The distinction between norm-creation and norm-interpretation is, in most decisional processes, never so sharp as some wish it to be.) The breach of pre-existing "customary" law is always a major gradient in the convening of jati panchayats: indeed, jati NSLS sometime make law prior to occasions of adjudication. For example, it has been frequently noted that untouchable jati groups, in their desperate bid for social uplift, have adopted regulations "for whole sections of a caste forbidding practices believed to be responsible for their low status . . . Chamars are prohibited from removing dead cattle" (Cohn, 1965: 108 and the literature there cited).

There is general agreement that the processes of dispute handling, howsoever complex, in jati and village panchayats share common features of informality, flexibility, democraticity, and

decision-making (at least always in style if not in substance) by consensus. The state law strives to attain justice inter partes through "impartial" judges and elaborate procedures for ascertaining "truth". Indigenous dispute institutions promote justice with notorious informality through village notables who know disputants personally. The adversary systems (broadly speaking) of state law seek to individualize justice: village law and justice seek collectivized justice. Village law and justice seek social, group harmony through consensus, where both sides engage in give and take: whereas state law, followed to its end, rests on "winner-take-it-all" principle. The flexibility of jati and village panchayats consists in a wider sense of relevance, not the straitjacket notion of relevance. The village elders, it is often observed, assembled to hear one dispute will "discuss another which lies behind it" (Cohn, 1959: Rudolph and Rudolph: 1966). This is partly a function of democraticity – that is freewheeling public participation in the hearing process – of the proceedings – indeed an element fast disappearing in state law systems. Indeed, the democraticity has not been confined to random public "say" but it has a distinctly egalitarian character. Mandelbaum observes, at least in relation to jati panchayats: "The egalitarian aspect of the traditional panchayat seems to pose a paradox. The need for unanimous consent and the right of every man to be heard appear dissonant to the leitmotif of hierarchy . . . The answer seems to be that most define a jati council as a council of peers . . . even a poor man will speak if he feels moved to do so (1966: 291)." While the substance of this account is correct, it remains ideal typical. The prevalence of the so-called tradition of consensus in India needs very critical examination. On most vital issues, the appearance of consensus may well be a mask for domination. They style of consensual decision-making, cleverly manipulated, may legitimate a decision which, in substance, only serves dominant interests. One may assume that in most situations consensus would be "prefabricated", "contrived" or "manipulated". Yet, all in all, in most of the foregoing respects, the ideology of the professional justice, its structure and process are thus at fundamental variance with those of the lay justice.

The jati and village panchayats have a repertoire of sanctionswhich include fine, public censure, civil boycott, ostracism, and varied public opinion pressures by village notables and sometime by predominant groups in the area. The jati panchayats, additionally, have the very potent sanction of "outcasting" and "excommunication". Andre Beteille in his study of cheri panchayat (village panchayat) in Tanjore district village describes the range of sanctions thus: "Fines are levied for a wide variety of offences. For petty thefts, cash fines of small amounts are levied. Higher fines are levied for adultery and other sexual offences. Rape is regarded as a very serious offence and a special punishment is imposed in addition to fines. The culprit has his face smeared with soot, a bucket containing mud is placed on his head, and he is made to go around the cheri (area) in this guise, while a drum is beaten along the route. This is considered the most degrading form of punishment (Beteille, 1969: 63–64)." Primitive? Strange? May be. But social stigmatising is the essence of all sanctions: here it takes a culturally specific form, which is also highly functional. (Similar adaptations of social censure as sanction are to be found in the Russian law – e.g., the famous "windows of satire".) Apart from stigma, public expression of penitence, self-correction assurances also serve as sanctions.

One striking example of a new kind of sanction is provided by the Lok Adalat at Rangpur. When disputants are sent an "invitation" to join the meeting of the Adalat, the last paragraph of the notice reads: "You surely know (appreciate) that expensive and frequent visits to law courts are not in the interests of us poor farmers". One may conceptualize this kind of admonition as a sanctioning device itself. Indeed, in the inter-subjectivities of the villagers, such a statement might imply that if a party does not even appear before the Lok Adalat, the

Adalat itself may encourage court action or, at any rate, it may not discourage such action. Conceptually, then, the threat of recourse to the instrumentality of the state legal system is itself stressed and apperceived as a sanction, whose very probability generates compliance. This is a rather unique phenomenon wherein the non-state legal system appropriates the intimidating paraphernalia of the state legal system to sustain and enhance its continual efficacy, viability, legitimacy and even hegemony. Of course, parallel processes may be perceived in conflict resolution through out-of-court settlement, private arbitration and other forms of mediation. But the striking peculiarity of the Lok Adalat summoning procedure is that it directly employs the threat of formal litigation as a self-conscious sanctioning process to an extent that the range of choices for alternate means of resolution is endeavoured to be effectively eliminated or at least minimized. This indeed is the very definition of "force". To the extent the threat to recourse to litigation actually operates to reduce parties' choice of action, we have surely an operation of sanction (Baxi, 1976b: 83–86).

The effectivity of sanctions is an empirical question, which has not been closely examined in relation to NSLS. Recalcitrance is both conceivable and likely: its incidence is however unknown. Isolated examples also suggest that the dominant group members or resourceful persons can by acts of defiance occasion changes or bypassing or even momentary collapse of sanctioning processes. But overall, the strength of collective conscience or sentiment in the village (and caste) contexts cannot be gainsaid.

4. Conflicts of values and interests

The NSLS (especially the jati and village systems) no doubt reflect distinctive patterns of social organization and consciousness. The constitutionally desired (proclaimed) social order seeks to foster (in part) through the operation of the legal system the value of equality: whereas the Hindu caste system is based on the principles of hierarchy, religiously and "culturally" sanctified and legitimated. The Hindu society, in Andre Beteille's evocative words, is a harmonic system where inequality exists and is perceived to be legitimate whereas the constitution ushers in a disharmonic system: inequalities exist but they are no longer legitimate (1974: 196) Bernard Cohn has maintained this sort of contrast insistently: "The adversary system has developed to equalize persons in court. To an Indian peasant, this is an impossible situation to understand. The chamar knows that he is not equal to Thakur . . . the Thakur cannot be convinced in any way that the chamar is equal, but the court acts as if the parties to the dispute were equal" (Cohn, 1959).

It would be too much to say that equality is a new concept for Indian culture, as the foregoing sets of contrast do ultimately suggest. What is distinctive about the constitutional vision of equality is in fact a total assault on the pervasive principle of social stratification based on status (and, therefore, mobility) ascribed at birth in a particular jati. The constitution abolishes untouchability, makes discrimination based on untouchability an offence: it forbids sex, caste, religion based discrimination and assures equality of opportunity in public employment. All this is done by way of assurance in the nature of justiciable fundamental rights. Opposed to all this, of course, are the myths and philosophies of an old social order which (not unnaturally) continue to persist. As has been often observed, neither the untouchable in the village nor his high-caste Hindu master can really understand how they can be equal with each other. Discrimination, ex-communication and outcasting continue. Women continue to be treated as being of inferior status to men, markedly in the rural areas, although there are laws guaranteeing more or less equal succession rights for Hindu women, or

prohibiting bigamy, or proscribing dowry. Wage-discrimination based on sex is notorious. The values of a resilient "culture" are in constant struggle for hegemony over those of the constitution.

But conflicts of value go even deeper than those contrasts between state and non-state law indicate. Professor R. S. Freed has presented one aspect of such conflicts in his study of village life in North India through the case of Maya. Maya, a married but illicitly pregnant girl, was killed by her father because he believed that his Dharma qua father obligated him to do so for the spiritual well-being of her soul. The sooner her sinful phase in the cycle of births and deaths was terminated, the better would her prospects be in the endless cycle of birth and rebirth. He reasoned also that Maya, if allowed to live, will be ex-communicated from the village sbciety and end up as a cheap urban prostitute, a life full of unmitigated misery. Everybody in both her in-laws' and his village agreed – so much so that two of the kinsmen of Maya's father who were police constables did not do anything to activate legal process. The police visited the village twice but did nothing. Village law was here in sharp antithesis to state law: and the latter, more or less yields to the former (1972: 423–435). Dharma thus conceived, is the legitimating principle of this NSLS which diverges sharply from the democratic belief system sustaining the SLS.

Not all experiments in local law and justice raise perplexing philosophical conflicts as the case of Maya. Some illustrate merely unredressed forms of lynch-justice as the well documented case of the cowherd illustrates. The cowherd committed two "sins": one of covertly cohabiting with a Brahmin's young third wife and his compounding this offence by leaving Brahmin's house by the front door (instead of the back door, as befitted his status). He was first castrated and then killed for this "sinful" behaviour; no official action followed (Gough, 1955; 40; Cohn, 1965: 90). Examples of lynch-justice abound. These indicate the countervailing power of caste and local notables over the state legal system.

On the other hand, well-organized local legal systems may often almost altogether "oust" the state legal system and provide an almost idyllic alternative as is shown by Lok Adalat (People's Court) in Rangpur, North Gujarat – a tribal belt of about 10,000 villages mostly irradiated by the Sarvodaya (Lit. uplift of all) ideology of bhoodan and gramdan (Voluntary gifts of lands and villages for redistribution of common use). Almost all disputes in the region are referred to the Lok Adalat. In the last 25 years, it has settled more than 25,000 disputes. The very fact that the case is brought before it is often enough a valid ground for adjourning proceedings in official courts. Adjudication is done with substantial public participation: each session is attended by 300–400 villagers. The Court's decisions are rarely disobeyed. This is because of their intrinsic fairness and community involvement. In some ways, this Court achieves a quality of justice still sought for by the state legal system: for example, it more effectively protects women's equal rights of inheritance, matrimonial property, etc. The Court's criminal justice system already provides for effective compensation for the victims of crime which is still on the legislative anvil. Its rehabilitative techniques are much more advanced in some respects: a murderer is "punished" to look after the widow and minor children of the victim for a term of years under close supervision of the local community whereas his imprisonment in the official legal system would have rendered both families destitute. The Lok Adalat experiment also illustrates other dimensions of relationship between the state and non-state legal systems. Often, dispute institutions generale and sustain broad based leadership patterns which promote developmental activities – both economic and social. It was through his role as a mediator in village disputes that the leader of the Lok Adalat, Shri H. Parikh (an eminent Sarvodaya worker) attained legitimacy, and a degree of charisma. In turn, he used Lok Adalat to translate his vision of socio-economic reform by making it a

vehicle of reform-oriented adult education. He made the adjudicatory occasions into educational ones, both through actual decisions and plain preaching on many themes – family planning, ill-effects of overconsumption of alcoholic drinks, honesty in credit transactions, civil liberties, irrationality of belief in witchcraft, equality of women, agricultural innovation, etc. Today, the area of about 1000 villages has witnessed remarkable socio-economic changes partly forstored and sustained by this kind of didactic adjudication. In this sense, perhaps more has been achieved by mobilization of lay justice for development than by insistence on adoption of professional justice, as is illustrated by the state's abortive attempts at formalizing village justice through the statutory nyaya panchayats (See Baxi, 1976a). The Lok Adalat is not an isolated phenomenon, although it may be in several respects, unique. On a lesser scale, quite a few such experiments exist. Moreover, not too dissimilar functions (of promoting welfare, development, status mobility) have been and are being performed by jati panchayats (caste dispute institutions) as noted by several sociologists and anthropologists. When they perform such functions, as they increasingly do, both in adjudicatory and other contexts, the jati panchayats supplement the role of state in bringing about social change, although they do so on the basis of caste loyalty and patronage.

It would be misleading to assume the conflicts between state and local legal orders are merely conflict of values; there are also conflicts of interests. Adoption of constitutional values naturally calls for sacrifice of personal or group interests, which are clearly not acceptable to those in positions of higher class, status or power. Some would even say that what are spoken of as values are nothing more than rationalizations of interests of vested interest groups. Cohn's approach – or generally the cultural approach – is ultimately an aspect of social system perspective towards the NSLS. The actor approach, stressing interests rather than values, is steadfastly pursued in the Indian context by Robert Kidder. Of course, his universe of study is not comparable to Cohn's (Cohn studied villagers in North India; Kidder's focus is on "outlying districts" of Banglore in South India). But the overall contrast holds. Kidder is certainly correct to the question Cohn's assertion that Indians recourse to the court system of SLS demonstrates "manipulation", use of courts not "to settle disputes but to further them" (Cohn, 1959: 155). Such a view, according to Kidder (and I agree) misjudges "the importance of constructive force in social interaction". It also ignores "the opportunity structure which is created by systems of formal adjudication" (Kidder, 1973). This opportunity structure arises from "the failure of adjudicative ideal". The administration of justice in India is shot through with delays (Kidder notices average delay in civil suits in Banglore Courts in 1967–67 to be slightly over 17 years). Paradoxically, this delay, and frustrations attendant upon it, are utilized by the adversaries to wage a war of attrition in which the idea is not so much to win the case but to maximize the opportunities for a substantially favourable compromise outcome, outside the SLS, and perhaps mostly through NSLS. Manipulation of delay is being regarded by those affected as being the "intentional product of a shrowd adversary". To the extent this aspect becomes the folklore of state law systems, the NSLS may well persist as alternate opportunity structures. But the capital point here is that the cultural approach helps us overlook mobilization of state law in the pursuit of material interests and of dominance. (For the recurrence of this theme in a related context of legal anthropology, see Sally Falk Moore, 1966: 615–24.)

Be that as it may, we must also note that the limits of state power, authority and law are not set just by values and interests but also (and perhaps no less decisively) by the level or organization of efforts. Most "developing" countries are poor (appallingly so, as in the case of India, where a large number of people do not have means of bare subsistence) we immediately perceive that the level of poverty affects adversely the reach of state law and the

quality of its justice. Investment in administration of law and justice is not (and probably cannot be) a high priority item in national budgets of poor societies at the very time when they have to resort to the machinery of law to initiate the foster social change. This is one among the many paradoxes of social change in developing societies. All this means, of course, that there are not enough courts, constables and lawyers – carriers of official law – in poor societies. Thus, for example, in India (according to one estimate) there are only 183 lawyers per one million of the population as against 507 lawyers in the United Kingdom, 1595 in the U.S.A. 947 in New Zealand, 638 in Australia and 769 in Canada. Indeed, some areas in India have no lawyers at all; and inter se distribution of lawyers within India reveals even striking disparities (Galanter, 1968–69: 201). As regards police, in 1971, according to the official estimates, there was one policeman for every 800 persons in India; but the distribution is uneven between the rural and urban centres. The average jurisdiction of a police station is about 200 square miles covering 100 villages and a population of approximately 75,000 persons. It was estimated in 1950s that police stations were, on the average, about 8 miles from any village (Bayley, 1969: 79–80). The state legal system, pervasive in urban areas, is only slenderly present in rural areas. The low visibility of state legal system, and its slender presence, renders official law (its values and processes) inaccessible and even irrelevant for people. Other factors (such as the language of the law, which is alien to about 95 % of the people) compound the distance between the state's law and people.

5. Evaluation of NSLS

Ideological compulsions – leaping before looking – have often led to evaluations which characterize most NSLS as problematic in terms of their justicity (that is, values of due process, reasoned elaboration and substantive justice values). Lack of hard data in relation to the NSLS may be irrelevant to cafeteria or armchair evaluations but it is an obstacle to informed and thoughtful judgment. The latter kind of judgment was arrived at by Professor D. F. Honderson after a close study of the institution of Choetei and general conciliation processes in Japan: "... the excessive use of conciliation stunts the growth and refinements of the body of rules necessary to sustain complex community life; it dulls the citizens' sense of right, essential to the vindication of law. It may also allow old rules and social prejudices which new legislation has sought to abolish, to influence the outcome of disputes; or it may allow a new regime to ignore the law in favour of its policy ... In other words, conciliation is neither conservative nor progressive in principle; it is simply unprincipled. It may favour the powerful over the weak, in the name of bargaining; it ordinarily forces the plaintiffs to discount their claims; it may operate to compromise large scale group interests which might be better handled by forthright reform legislation. In short, conciliation is only an adjunct to, not a substitute for, legal order; and if relied upon excessively, it is not merely nonlegal – it has antilegal results ... It takes a legal framework to protect the voluntary character of conciliation and if it is not voluntary, conciliation will likely become in practice simply a standardless use of force" (Henderson, 1965: 241).

The foregoing sort of appraisal is common enough in discussions of most NSLS. The basic ideal-typical contrasts between most NSLS and the SLS are that the non-state law and dispute institutions may allow room for "prejudiced" rather than "principled" decisions; the NSLS may be swayed by power differential between parties; that in some ways NSLS are "antilegal". At this level, the case for cribling and even annihilating (if that were ever possible) most "dysfunctional" NSLS becomes impressive, if not compelling.

But such a comparison needs to be made at the same level. What usually happens is that the normative models of SLS are compared with the operative models of NSLS; this "dacoit track" no doubt yields preferred conclusions. But suppose we check this conclusion with accentuation of different aspects (behavior rather than value, reality rather than myth) of SLS. At the behavioral level, the picture begins to look more or less the same. Are the judicial (and legislative) decisions preeminently grounded in "principles" rather than "prejudice"? (Withess the inconclusive controversy over "reasoned elaboration" and "neutral principles" in relation to American judicial process). Are the SLS "law-ways" substantially free from "old prejudices" cancelling the objectives of social change through law? Do no power differentials between parties affect legal initiations and outcomes? Does not the volume of out-of-court settlements in civil cases, and of plea-bargaining in criminal matters, contrast sharply with the adjudicative adversary ideal? Does not the actually operative Crime Contral Model (as against the normative Due Process Model) involve fairly high incidence of "standardless use of force"? These are, no doubt, big questions; but the outlines of answers, in the available sociological literature, having already begun to point out the great gap between rhetoric and reality, between the proclaimed objectives and dysfunctional results. The lesson to draw from these ongoing explorations is not that there are no significant differences between NSLS and SLS but that these differences are of degree rather than of kind.

In conclusion, one must reiterate that the interaction between SLS and NSLS, and the context for it, is thus complex and many sided. Insofar as the NSLS derive their legitimation from belief systems sharply incongruent from those investing SLS with legitimacy, the multiplicity of NSLS may well pose limits to the legitimation of state power and authority. The resilient people's law may divert and even frustrate the goals of planned development articulated and pursued through the law. On the other hand, nation-building elites and "promoters" of "development" in the Third World need a sophisticated awareness of the undoubted potential of NSLS in achieving social transformation.

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India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization[1]

Marc Galanter[2] and *Nick Robinson*[3]

Abstract: This article examines a flourishing group of elite litigators, that we call 'Grand Advocates', who practice before the Indian Supreme Court and some of India's High Courts. In a court system marked by overwhelmed judges with little assistance, multiplicity and blurriness of precedent, and by the centrality of oral presentation, the skills and reputational capital of these lawyers enables them to play a central, lucrative, and unique role. Indeed, it is often the Grand Advocates, as much as the judges, who lead and propel forward the Indian judicial system. We argue that our exploration of Grand Advocates provides a counter-example and an analytical framework to understand why the homogenizing forces of globalization may not necessarily lead to a convergence in the structure of the legal professions in different countries.

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[2] John & Rylla Bosshard Professor Emeritus of Law and South Asian Studies, University of Wisconsin—Madison.
[3] Research Fellow, Program on the Legal Profession, Harvard Law School. Visiting Fellow, Centre for Policy Research.

Introduction

An observer of the legal scene in contemporary India quickly becomes aware of the presence of a stratum of legal superstars—advocates based at the Supreme Court and some of the High Courts who are very much in demand and widely known. These 'Grand Advocates,' as we call them, are the most visible and renowned legal professionals in present day India. Stories abound of their strategic acumen, their preternatural articulateness (speaking for hours and days without notes), their esoteric quirks and outsized incomes, and their contributions to the 'rule of law.' This elite handful of lawyers is involved in almost every high-profile case in what is one of the most active and powerful higher judiciaries in the world (Rajamani & Sengupta: 2010; Robinson: 2009). Their clients include India's new uber-rich, major multinational corporations, and the country's political class.

We argue that Grand Advocates (GAs) have not only survived, but flourished in the age of globalization – benefiting from, while resisting absorption by, the rising law firm sector. A series of structural features of litigation and the judiciary in India have played a dominating role in perpetuating this unique set of lawyers, and the culture they inhabit. Litigation in India tends to be less about money (as there are fewer deep pockets, judges rarely grant large monetary compensation, and it is difficult to collect an award), and more about control. Given the backlogged courts, cases may drag on for years and so it is necessary to secure beneficial interim orders as they relate to the ownership of property, command over an organization, or the validity of government regulation. To achieve these ends, Grand Advocates use the extensive human capital they have developed within the court system and their nuanced knowledge of both formal and informal judicial procedure. These assets are in many ways positional goods–particularly their reputational capital before certain judges–that are difficult to share with juniors or partners. They are also assets that can be used in a wide range of cases, thus lessening the pressure to specialize amongst this select group of lawyers, who are still largely generalists.

We know of no close parallels to Grand Advocates amongst lawyers in other countries, at least outside South Asia. Unlike the venerated French or Brazilian jurists, who flourish in a system where judicial precedent is less decisive, the GAs are not based in or linked to academic institutions, nor do they produce books or concepts (Sweet: 1992: 30-35). They are not "authorities" whose intellectual products are considered authoritative like the eminent British barristers who furnish "opinion of counsel" memoranda (Niles: 1963: 86). Like the increasingly exclusive US Supreme Court bar whose lawyers' name recognition increases the chance their clients' cases are granted *certiorari*, Grand Advocates in India are known for securing hearings for their clients (Sundquist: 2010). However, the US Supreme Court bar handles far fewer cases than the Grand Advocates and does not wield the same dominating influence in their relationship with judges.

The Grand Advocate's relative uniqueness when compared to their potential peers elsewhere is worth noting as one of the central debates in comparative law is the degree to which legal systems around the world are converging. For example, scholars have examined whether and to what extent constitutions are converging (Tushnet: 2009; Posner & Dixon: 2010), or whether convergence is occurring between civil law and common law traditions (Merryman: 1987; Mattei & Pes: 2009). Meanwhile, few

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systematic comparative studies of the legal profession have been undertaken (Dias et al.: 1981; Abel & Lewis: 1988; Burrage: 2006; Dezalay and Garth: 2010; Halliday and Karpik: 2011) and much less attention has been paid to the question of whether the structure of the legal profession is converging. If globalization is creating increasingly similar laws, regulations, and adjudicatory proceedings one might expect the legal profession to also become more alike across countries as lawyers adapt to increasingly analogous contexts.

Answering this larger question about whether the structure of the legal profession is converging across countries is beyond the scope of this chapter. Instead, we provide a counter-example to the convergence thesis and, by detailing how Grand Advocates shape and are shaped by distinct features of the legal system in which they operate, show how unique forms of legal practice may be perpetuated even in the face of potentially homogenizing forces.

We begin our study, which is based on interviews with more than fifty legal professionals in Delhi, Mumbai, and Madras, by analyzing the structure of the legal system and the Indian bar in which Grand Advocates flourish.[4] We then turn to examine the type of work Grand Advocates do, the arc of their careers, and the impact they have on the legal system. Although the structure of this section of the bar has witnessed notable continuity, we conclude by finding that a new set of demands from clients, judges, and other lawyers may in the future fundamentally alter the space Grand Advocates currently occupy. This will likely not erase the distinctiveness of the Grand Advocates, but will certainly shape their evolution.

I. Background

Pre-British India had learned specialists in law, but nothing that corresponded to the legal professions of the modern world, which are made up of qualified practitioners who earn a living by representing clients before courts and tribunals and designing transactions that are affected by legal rules (Rocher 1968-69; Calkins 1968-69). Today's Indian legal profession is a product of the complex of British-style legal institutions imposed on India in the 18th and 19th centuries (Setalvad 1960), but lawyers in India developed along different lines than their counterparts in Britain or elsewhere in the common law world.[5]

The professional pattern as it crystallized in the late 19th century was a composite, drawing upon two main streams: (1) the royal courts in the Presidency towns (Bombay, Madras, and Calcutta), which were ruled by the British crown and English law administered by British judges and there was a dual profession, with barristers briefed by solicitors. (2) Until 1857 most of India (i.e., the mofussil or interior) was ruled by the East India Company, which operated courts staffed by civil servants and which licensed indigenous vakils (a Persian word that earlier referred generally to an agent or emissary) to represent clients in those courts. The two systems

[4] Interviewees are kept anonymous in this article. Many of the interviewees would themselves be considered Grand Advocates. We also interviewed younger litigators, advocates-on-record, law firm partners, general counsel, and other legal professionals with knowledge of these advocates.

[5] The reference to India here is inclusive of all of British India. To a considerable extent our observations about Indian lawyers apply to Pakistan and Bangladesh, whose legal institutions also derive from those of colonial India.

of courts were merged when the British government displaced the East India Company after the 1857 rebellion (Derrrett: 1963).

Recruitment to the profession was through multiple sources: British barristers arrived from the UK to enjoy the higher fees that could be earned in India; elite Indians went to the Inns of Court in London to secure qualification; others acquired on-the-job training at the Indian courts; and (after the establishment of Universities in India starting in 1857) these were joined by those who had attended law courses in India (Galanter: 1968-69; Gandhi: 1988).

There was not a single hierarchy of courts in British India. Instead, there was a hierarchy within each province, culminating in a High Court (or in a few cases, a Court of the Judicial Commissioner). Appeal from these courts lay to the Privy Council in London and was expensive and rare. In 1935, under the Government of India Act, a federal court was established with a narrow jurisdiction over all of British India (Gadbois 1963: 19). After Independence in 1947, the Constitution (1950) brought unification into a single hierarchical system of courts, headed by a Supreme Court with an expansive jurisdiction and wide powers of judicial review.

With the passage of the Advocates Act (1961) all the old grades of practitioners (vakils, barristers, pleaders of several grades, and mukhtars) were abolished and consolidated into a single body of advocates who enjoy the right to practice in courts throughout India. The only *formal* distinctions that remain within this body of advocates are:

(1) Lawyers can be designated as senior advocates by the Supreme Court or any of the 21 High Courts. This is an elite stratum along the lines of the British Queen's Counsel (QCs). But the Indian distinction is far more selective: QCs make up almost 10% of British barristers, while senior advocates are less than one percent of Indian lawyers (The Bar Council: 2013). Senior advocates enjoy priority of audience; they cannot appear without a separate "briefing" advocate (or, in the Supreme Court, an Advocate on Record). Seniors are foreclosed from doing pleadings, drafting, and conveyances (Bar Council of India Rules 2009, part 6, ch. 1). We estimate that there are about a thousand senior advocates, including some four hundred designated by the Supreme Court (Supreme Court of India). A senior advocate designated by one court is recognized as a senior in other courts as well. Senior advocates may be attached to firms, not as partners or employees, but on retainers or fee arrangements. Few of the most prominent are so attached.[6]

(2) The requirement that an advocate on the Original Side of the Bombay and Calcutta High Courts be briefed by a solicitor was abolished in 1976, but it is still possible to qualify as a solicitor. This requires an extended apprenticeship as an articled clerk and passing an examination. Of those who seek this qualification only a small portion (5 or 10%) pass the examination. For example, in 2010 in Bombay only 11 of the 171 candidates (and none of the 30 first-time takers) passed (Ganz: 2010). Some elite advocates in Bombay still insist on being briefed by a solicitor (Int32), but this is a mandate of custom rather than law.

[6] There is no specific prohibition of a partnership between a firm and a senior counsel, except many senior counsel argue that if a firm they were part of met with a client it would be perceived as them meeting with a client thus violating provisions under the Advocates Act barring seniors from meeting directly with clients.

(3) The Supreme Court early on enacted rules requiring that all matters at the Supreme Court be filed by an Advocate on Record (AOR). AORs can argue matters, but frequently they serve in a solicitor-like role, briefing advocates. In all cases they perform the various formalities of registration and scheduling of the case. One becomes an AOR by passing an examination administered by the Supreme Court.[7] In 2011 there were some 1872 AORs. Estimates of the number actively engaged in practice range from 400-500 to 1000 (Shrivastava: 2012).

The number of persons admitted to practice law in India has increased from about 70,000 at time of Independence in 1947 to some 1.2 million today. No one knows how many of these are actually engaged in the practice of law. Our guess is that at least one-third and possibly one-half are *not* practicing law.

Table 1
The Lawyer Population

Number of Practitioners Enrolled with the State Bar Councils	
Year	Number
1952	72,425
1985	290,676
1999	626,603
2011	1,273,289

Source: Report of the All-India Bar Committee (1953), Institute of Developing Economies: 2001: 72; Ganz (2013)

Less than 1% of these advocates are admitted to practice at the Supreme Court. As of 2013 the Supreme Court Bar Association lists 6806 active resident members, 908 active non-resident members, and 2701 temporary members.[8] The fraction of these with a substantial practice at the Supreme Court is not known.

II. The "Basic Structure" of the Indian Legal Profession

Most of the old categories and grades of practitioners have been abolished, but new forms of diversity amongst lawyers have emerged. Lawyers may be found in firms, as in-house counsel (Wilkins: 2012), and in legal process outsourcing (Weiss: 2008). All of these have proliferated in the last twenty years, but the great bulk of India's lawyers

[7] An AOR must practice as an advocate for four years, train with a senior AOR for one year, then appear for an examination conducted by the Supreme Court. An AOR must maintain a registered office within 16 kilometers of the Supreme Court building. Supreme Court of India Rules, Order IV (2010)
[8] Supreme Court Bar Association Members Directory, *available at* http://scbaindia.org/Web/aspx/directory.aspx

remain attached to the dominant model of professional life – the free-standing advocate who practices mainly, if not exclusively, at a single court. This model, formed in colonial times, was firmly institutionalized by the early 20th century. In spite of the vast political and social change India has undergone, if we were to go around India in 2013 and observe lawyers, we would find a set of distinctive and characteristic features of professional life that are surprisingly similar to what we would have found in 1913.

We might think of these features as the 'basic structure' of the Indian legal profession. A schematic portrait of the modal organization of legal services in India, then or now, would include:

- Individualism: lawyers practice by themselves, usually assisted by clerks, and sometimes by juniors in a casual and temporary apprenticeship arrangement. There are few firms or other enduring units for coordination and sharing among lawyers. Firms are proliferating but still involve only a tiny fraction of practicing lawyers—perhaps 2 or 3%—and the larger firms are rarely focused on litigation.
- Lawyers are oriented to courts (and other court-like forums) to the virtual exclusion of other legal settings. The orientation to courts is displayed spatially: lawyers spend much of their working day at a particular court. They typically see clients in home offices or in chambers near or attached to the court, or simply at the verandah or a corridor of the court. The identification of the lawyer with a particular court goes back to the earliest days of British rule (Sahay: 1931: 24, 26, 33).
- The performance of the lawyer is overwhelmingly oral rather than written. With occasional exceptions, advocates focus on courtroom advocacy rather than advising, negotiating or planning. That is, they are *de facto* barristers who operate in a setting in which the 'solicitor' functions of advising are far less developed. Judges frequently cite oral argument in their judgments and advocates feel little constraint in making arguments that were only partially developed in the written submissions, or that were not mentioned at all. The dominance of the barrister model is displayed in, and reinforced by, the structure of remuneration. Lawyers are typically paid by the "appearance"—that is, for court work in a particular case on a given day. (Moog: 1992: 26)
- Lawyers are relatively unspecialized. Although some advocates have a special expertise in tax or criminal matters, few lawyers limit themselves to one area of law.

One significant consequence of the thick and continuous interaction of lawyers at the court premises is that the lawyers at each court form a guild with a capacity for collective action. This was displayed dramatically in the resolute and persistent actions of the Pakistani lawyers – who occupy a social world similar to that of their Indian counterparts – who struck and demonstrated when judges of the Pakistan Supreme Court were removed by President Musharraf in November 2007 (Ghias: 2010). The Indian examples of lawyers' strikes and boycotts are generally less inspiring. The first such assertion of lawyer muscle at the Supreme Court took place in 1982, when the Supreme Court Bar Association staged a strike in response to a judicial memorandum that suggested eliminating oral argument in certain categories of cases (Dhavan: 1986: 55-56). The strike action was called off when the judges reassured the lawyers that the

suggested changes, which would have undercut a major source of income for lawyers, were merely proposals (Hindustan Times: 1982). In 2012, the district court in Delhi was brought to a halt by lawyers protesting a rule that placed a monetary limit on cases that could be heard by the district courts (IBNLive: 2012). In the same year lawyers in Karnataka boycotted courts across the state after a police attack on lawyers at the civil courts complex in Bangalore, where lawyers had attacked journalists covering a politically important trial, claiming that the journalists had portrayed them poorly in connection with earlier encounters (Daily News and Analysis: 2012).

While Grand Advocates frequently hold bar offices, they are remote from involvement in such direct action. They typically disapprove of exercises of lawyers' street power although as we will see the bar's militant opposition to reform helps to preserve many features of the setting in which the Grand Advocates flourish.

III. Steep Hierarchy

The pre-eminence of the Grand Advocates is a contemporary expression of a long-standing and pervasive pattern of steep hierarchy at the bar. At every level, the provision of legal services was (and is) dominated by a small number of lawyers with outsized reputations, who have the lion's share of clients, income, prestige, standing and influence.

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This pattern has been noted by a number of observers of the Indian legal scene over the last half-century. For example, in his late 1960s study of a district bar of about a hundred lawyers in Haryana, Charles Morrison (1968-69: 261) identified "five or six" who are "recognized as 'leading lawyers." In his (late 1970s) study of a district court in the Punjab, J.S. Gandhi (1982: 79) reports that the 12 "specialist" lawyers (in a bar of over two hundred) "handled among themselves at least fifty percent or more of the total practice." Robert Moog (1997: 73-74)in his mid- 1980s account of the Varanasi bar describes how, of the over 3000 advocates in Varanasi, "[a]pproximately two dozen senior advocates…dominate the civil practice…. It is not unusual for members of this elite group to have as many as twenty-five matters scheduled in court on one day." In his 1991 study of lawyers in a Haryana District, Hans Nagpaul (1994: 59) found that 10% of the 300 lawyers enjoyed some 75% of the legal business.

Upon the establishment of the Supreme Court of India in Delhi in 1950, lawyers were drawn to the new court from cities where there were existing High Courts. At first these lawyers commuted to Delhi to argue their cases. Later many shifted to the capital-- as prominent lawyers at the High Courts have continued to do. Before long, the Supreme Court had its own steep hierarchy of practitioners headed by an entourage of 'leading lawyers', much along the lines familiar in High Courts and district courts throughout the country.

We estimate that the number of pre-eminent seniors – those we are calling Grand Advocates—at the Supreme Court today is something on the order of 40 to 50. If we add those of comparable status at the High Courts, there are at most a hundred that make up what one observer refers to as the "giants and legends of the litigation

system."[9] This shape—very steep hierarchy, with a concentration of prestige, authority, and prosperity in a narrow group of senior lawyers—has been a constant feature of law practice in India in colonial times and after Independence, in the highest courts and in local courts, when the bar was flourishing and when it went through difficult times.

Back in 1983 T.K. Oommen (1983), a leading sociologist, provided a shrewd assessment of the profound consequences of the steep and pervasive professional hierarchy in the Indian bar. The concentration of business in a few hands, he observed, underlies a culture of postponement in the judiciary. Judges give postponements to eminent lawyers, who are constantly juggling more courtroom obligations than they can possibly attend, meaning that cases are dealt with in disconnected bits over a long period of time. As one young lawyer observed —this was almost thirty years later—, "There is a cartelization of litigation by the senior counsel. They take on more cases than they can deal with. This leads to delays in the courts because the seniors don't make it for appearances. . . . As a result, the quality of litigation suffers overall and it gets more expensive."[10]

Oommen (1983:24) concluded his study by remarking that "most importantly, the leading lawyers rather than the judges, emerge as norm-setters and value-givers in the Court system. Interpreted meanings provided by the lawyers in support of their clients rather than interpretations by judges assume importance in the application of law." Oommen made these observations about the dominant position of the top lawyers compared to the judges in the 1980s, before liberalization. But this sense of the dominance of the top lawyers is if anything more pronounced today. One leading lawyer observed: "The judges are almost irrelevant. We all know some man has to do it. It's good if they are good, but [it is] not expected. The counsel have learned to treat them with kid gloves. To guide them. I think the judges have a deep rooted inferiority complex."[11] As this suggests, at least some Grand Advocates perceive themselves as positioned further up in the hierarchy than most judges. This sense of superiority may be reinforced by the social backgrounds of many of the Grand Advocates and judges. While Grand Advocates are almost always from a cosmopolitan background and well versed in English, judges come from a variety of settings, with many raised in non-English speaking households in more provincial settings.

We might think of the dominance of the lawyers as an instance of regulatory capture (Bernstein: 1977), in which the agenda and decisions of an agency (the courts in this instance), established to regulate an industry (here, litigation) in the light of external standards, instead reflects the perspective of the industry it is supposed to regulate (especially in relation to courtroom management). This is especially likely where, as here, the agency decision makers are recruited from among the regulated.

But the capture metaphor may lead us to overlook a more fundamental point. Thomas Reed Powell (1880-1955), a Harvard law professor, is credited with the observation that "If you think you can think about a thing that is inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." (Simpleman: 1986: 545) In this spirit we can appreciate the artificiality of thinking about the institution of the Grand Advocates without thinking of the judicial setting in which they flourish. Indeed, we might imagine the Grand Advocates and

[9] Email from Nikhil Chandra, 12 Apr. 2012.
[10] Interview 18
[11] Interview 23

India's higher courts as the inextricably attached parts of the same creature. In a setting where oral presentation overshadows written submission and where the judges have insufficient time and resources for independent research, the GAs enjoy the esteem of the judges, who give them more "face time" to argue and who rely on their accounts of the law and the facts. The GAs play an oversized role and their presence thus helps to maintain the acephelous system in which similar legal questions are decided in slightly different ways by multiple small benches of judges of the Supreme Court and High Courts.

As far back as 1977, Rajeev Dhavan (1977: 415) observed the phenomenon of "different judges deciding the same point of law as part of differently constituted Benches [of the Supreme Court] reach[ing] different results." Since then, departure from uniformity has been aggravated by the multiplication of judges and benches and the reduction in the number of larger benches (Robinson: 2013a: 173). When the Supreme Court was established in 1950 there were just eight judges. In the 1950's they sat on five-judge or larger benches for 13% of published decisions, and otherwise regularly sat on three judge benches. By the first decade of the 2000's the designated strength of the Court had grown to 26 justices, increasing to 31 in 2008. Some 40,000 admission matters are now heard on admission days (nowadays Monday and Friday) by over a dozen division benches that typically consist of just two judges each. Similarly, the 5,500 or so regular hearing cases (heard on Tuesday, Wednesday, or Thursday) are decided by these smaller division benches. (Robinson: 2013b; Robinson: 2011: 28).

The presence of so many benches, and the resulting pervasive (though mild) indeterminacy of precedent, increases the chances that representation by a GA may make a difference in outcome. At least it is perceived to possibly make a difference by significant numbers of clients with deep pockets engaged in controversies where the stakes make irrelevant the size of legal fees. The standing of GAs with the judges is a positional good in limited supply (Hirsch: 1976)—there can only be so many top lawyers familiar to the judges and so lawyers with reputations of being top lawyers have enhanced value to many clients. We might think of litigation in India as a kind of fabulous beast guided by modest and quickly-replaced judicial forelegs and driven by powerful Grand Advocate hind legs. The outcomes are, as Dhavan observed, "technically unpredictable" (Dhavan: 1977: 461) and invite investment in high end advocacy to further destabilize the results.

IV. The Seniority Factor

Seniority is a major theme that surfaces at many points in our scan of the profession. Seniority works differently for judges than for lawyers. On the bench, adherence to seniority in promotion (senior judges of the High Courts are generally elevated to the Supreme Court) is combined with a rigid and early retirement age, 65 on the Supreme Court, 62 on the High Courts, and 60 in the lower courts. Seniority makes retirement and promotion predictable and means that most judges will not serve on the Supreme Court for more than five years (Chandrachud: 2012).[12]

[12] Although it is a matter of custom rather than law, the power of the seniority norm was enhanced by the "supercession" of three more senior Supreme Court Judges in 1973. A succinct account is found in Lee 2010. During the Emergency (1975-77), Indira Gandhi superseded Justice HR Khanna who was next in line to become Chief Justice after he dissented in *ADM Jabalpur v. Shukla* A.I.R.1976 S.C. 1207 which held that because of the Emergency citizens did not have a right to petition the courts for their habeas corpus

Some distinguished advocates decline to ascend to the bench, many because of the money, but others because compulsory early retirement diminishes the attraction. One GA told us that he turned down a judicial appointment because he could predict that he would eventually be Chief Justice of India for but one year (Int32). For those on the bench seniority is a wasting asset that affords standing, influence and a privileged lifestyle but then suddenly disappears. The forcibly-retired judge is then dependent on political figures who can bestow appointments to commissions, tribunals, etc. or on private parties—including at times Grand Advocates—who can then engage the former judge for lucrative arbitration assignments. It is difficult for retired judges to serve, even as volunteers, with their former courts, for it is not clear how they are to be placed on the all-important seniority ladder.

For the GAs, on the other hand, seniority brings with it not only enhanced standing, but an enlarged fund of human capital in the form of contacts, experience and reputation. Often Supreme Court judges are not only younger than the senior advocates who argue before them, but the judges may have looked up to these advocates when they themselves were young lawyers. The judge almost undoubtedly has had his post for less time than the GA has been practicing in the Court meaning that the GA may feel more at home in the institution than the judge.

By tradition, senior advocates enjoy a right of pre-audience according to seniority, defined by the date they became senior—that is, they are entitled to be heard before those junior to them. If two advocates are briefed on a matter and they must meet for a conference tradition dictates the junior lawyer should go to the senior lawyer's office. Punctiliousness about seniority may limit collaboration. In a famous instance, in Mrs. Gandhi's 1975 election case, "she wanted [famed advocate Nani] Palkhiwala to come to Allahabad to represent her" but Satish Chand Khare, her senior counsel objected. "He said that Palkhiwala was junior to him and he would withdraw from the case if Palkhiwala was brought in. Since Khare had been involved from the very beginning and was familiar with all the facts, Mrs. Gandhi did not want to run the risk of his withdrawing and dropped the idea of bringing Palkhiwala to Allahabad." (Bhushan: 2008: 131) After she lost at the High Court in Allahabad, Palkhiwala did represent her on appeal to the Supreme Court.

V. Grand Advocates' Clients

Jawaharlal Nehru's father, Motilal Nehru, became one of the wealthiest men in Allahabad litigating the disputes of the zamindars (wealthy aristocratic landowners).[13] After independence, the zamindars disappeared with land reform, but other clients, like industrialists and banks, multiplied. Compensation remained high for top advocates, but given the sluggish pace of national growth and the government's large hand in the economy, fee increases remained tempered. In fact, law was seen as one of the least attractive career choices for promising young students, who instead flocked to more

rights. When he was not made Chief Justice, Khanna resigned in protest. With the end of the Emergency, Indira Gandhi and many of her policies, including her political manipulation of the judiciary fell into disrepute. Since then the government had adhered faithfully to the seniority norm.

[13] Advocates in India have long been paid at high rates. Indeed, part of the appeal for British barristers to come from England to India was the higher rate of compensation. Schmitthener 1968-69: 346.

desirable professions like medicine, engineering, or the civil service.[14] However, this changed as liberalization opened up abundant new revenue streams for lawyers – multi-national corporations began to eye India as a prime global site for investment, India minted thousands of new millionaires and billionaires, and law firms rose to prominence to cater to the businesses that were helping drive the country to the 7 to 9% growth rates it witnessed in the first decade of the 2000s.

As a result, today's top counsels' fees are exceptionally high. As of 2012, leading advocates not infrequently charged 500,000-600,000 Rupees per appearance ($10,000-12,000) at the Supreme Court. In the Supreme Court's hallways, Grand Advocates can be seen moving briskly from court room to court room with a flock of juniors, clerks, and clients in tow as they proceed from argument to argument. This is a business plan in action. On an admission day at the Supreme Court, sometimes referred to amongst top lawyers as "harvest days", an advocate is often able to appear in as many as five to eight arguments. Many of these arguments may last just a few minutes, allowing the advocate to reap substantial monetary rewards in the course of just a few hours. On regular hearing days, advocates usually have far fewer matters, which they argue at greater length and more substantively, although counter-intuitively they charge about the same for these matters as for the shorter admission hearings. To prepare for admission and regular hearing arguments lawyers hold conferences with their clients for which they charge an hourly fee. Otherwise, all preparation costs are incorporated into the appearance fee. It should be emphasized that the earnings of these advocates do not derive from their ownership interest in a business (i.e., a law firm) with salaried workers, but are payment for services rendered by them personally. Unlike the partners in law firms they do not collect payments for leasing their reputational capital to subordinates who can then command enhanced fees (Galanter & Palay: 1991). Instead, they pay their juniors, clerks, and other staff out of their own pockets for the marginal contribution of the latter to the bundle of services delivered to clients by the senior advocate.

Top advocates in India enjoy incomes that rival the most highly remunerated lawyers anywhere in the world.[15] Abhishek Manu Singhvi, who along with being a top litigator is also a member of the Rajya Sabha, reported his annual income at 50 crore (about $10 million) in 2010-2011. Ram Jethmalani, another leading lawyer who is a member of the Rajya Sabha, reported his at 8.4 crore ($1.7 million) (Dhawan 2011). Shanti Bhushan, a leading advocate who was on a public committee to design a new anti-corruption agency, disclosed an annual income of 18 crore ($3.6 million) (Hindu 2011). Both Jethmalani and Bhushan are well over 80 and no longer litigate as much as they once did. One advocate estimated that top Supreme Court lawyers are generally earning between 10 and 50 crore a year (i.e. $2-10 million annually) (Int25). Leading lawyers that appear before the Bombay and Delhi High Courts have comparable fees, while those elsewhere in the country usually charge considerably less.

[14] As Schmitthener noted in the late 1960s "The legal profession no longer offers the most honored and profitable work that can be attained in India. It no longer draws the best students, and it no longer dominates the social and political life of the country. The monopoly it had on the leadership of the country for over a century is now gone. In a way the rest of society has caught up with the profession." Schmitthener 1968-69: 47

[15] See Sahgal and Bamzai 2010; Bar & Bench News Network 2010.

Despite their high rates, client demand for these select lawyers is robust. Most of the leading advocates we interviewed conceded that their fees were exorbitant, but justified continuously raising fees as a mechanism to keep their workload manageable. As one Supreme Court lawyer explained, "Lawyers like me charge the sky. It is a way of filtering clients." (Int14)

Risk aversion often brings cases to senior counsel, especially those with big names. As one lawyer who worked at a distinguished law firm stated, "The head of legal at a large corporation wants to ward off blame. They first hire a large firm like Amarchand so they can say 'Amarchand told me.' The firm doesn't want the responsibility so they then hire a grand advocate so they can say they had the best. Everyone just keeps passing on risk." (Int24) On a similar note, explaining why 10% of the lawyers got 90% of the work, a top Supreme Court lawyer noted, "When the stakes are high you get the best surgeon. It's the same in law."[16]

Under the Advocates Act, senior counsel are not permitted to have their own clients. Instead, they must be approached by a briefing counsel who is retained by the client and who actually files the case. Briefing counsel are often solo practitioners who argue smaller matters themselves, but for larger cases enlist a senior counsel. Other times briefing counsel are attached to law firms. Senior counsel are traditionally not attached to law firms, and some senior counsel interpret the law as barring them from being a part of a law firm.[17] One prominent lawyer at the Indian Supreme Court estimated that about 70% of his work came through individual advocates, while about 30% came from law firms (Int10). Most large law firms in India do not have extensive litigation practices, perhaps in part because they anticipate senior counsel would take up too much of the firm's profit margins.

Clients who have had positive experiences with certain seniors commonly request their briefing counsel to hire those seniors. At the Supreme Court, clients from particular regions of the country often seek out top advocates from their region. Other times, clients request a top advocate who is from the same region as the judge hearing the case or is otherwise perceived to have a particularly good rapport with the judge. Some leading advocates seem to cultivate relationships directly with clients, although under the Advocates Act and Bar Council Rules (Part VI, Ch. 1) they cannot deal with clients directly. As one top Bombay lawyer suggested, "If a senior has a good client – say Reliance [a major Indian Corporation] – they aren't going to let them go away, so they will keep a junior as an AOR for that client." (Int21) In-house counsel frequently demand that their briefing counsel ensure certain senior advocates argue their cases, and more generally work with these senior advocates on their matter. As a leading lawyer noted, "The growth of in-house counsel has been positive. Often the associate of the law firm is clueless and you get your real briefing from the general counsel." (Int10)

Firms and briefing counsel often have a strong role in guiding clients towards their favorite seniors. As a partner in a leading solicitor firm in Bombay explained,

[16] Interview 9; In the US context, Frank and Cook have commented that top lawyers receive salaries far higher than their social value would justify because everyone wants the "best" lawyer, particularly for high stakes litigation. Frank and Cook, 16 (1995)

[17] There is no specific prohibition of a partnership between a firm and a senior counsel, except many senior counsel argue that if a firm they were part of met with a client it would be perceived as them meeting with a client thus violating provisions under the Advocates Act barring seniors from meeting directly with clients.

"There are 7 to 8 top arguing counsel in Bombay that I would trust a brief with. At the Supreme Court, to be honest, it is only 5 to 6. In the Delhi High Court it is larger. I judge a good counsel on (1) competence level (2) how much time we can get with the senior (3) their face value, particularly for [admission matters] in the Supreme Court where at most you will have 10-15 minutes in front of the judge." (Int20) One well known High Court lawyer estimated 75% of his work came from 20-25 law firms and briefing counsel, who kept returning to him for work. He described how ""Each senior counsel has favorite briefing firms. Particular law firms use "x" or "y" as senior counsel." (Int8)

Top senior counsel are notoriously inaccessible and this is one of the largest complaints from briefing counsel and clients. As a lawyer at a solicitor's firm in Bombay lamented, "Half my job is chasing senior counsel." (Int19) Some firms are known to designate young lawyers to follow seniors while they argue matters in court so that the firm can keep track of where the senior is and remind him to attend their client's hearing.

Indeed, seniors will frequently miss hearings because they are arguing another case in a different courtroom. This results in part from the unpredictability of a chronically backlogged and poorly managed judicial system. In this context, judges will often allow advocates (or their juniors) to reschedule matters, requesting a "passover" if the senior is either not available or inadequately prepared. As a top senior in Bombay explained, "It's fair when clients complain that we aren't there for hearings, but I think we make reasonable estimates about what matters the judges will and will not reach."(Int21) Another argued, "When I have 5-6 matters on a day I think only one or two will go forward meaningfully. The system allows this. There is no penalty from the court or client if I miss a hearing. There isn't good scheduling so there is the possibility to have a lot of flexibility." (Int23) Other seniors countered that their colleagues booked too many matters, and even charged for hearings that they actually missed. A handful of leading advocates have a reputation for taking fewer cases, despite the loss in income, because they feel taking too many matters would be unfair to the interests of their clients.

Since at least the 1980's, litigants with deep pockets have used "blocking" or "negative retainers" to disqualify the major top advocates from being engaged by opponents (Int10). Back in 1986 a distinguished academic reported that "Resourceful clients, especially big corporations and universities make it a practice to offer a retainer to expert lawyers, not so much with a view that they will act in the case but with the view that their services do not become available to the other side….Wholesale buying of legal services in this way is now a standard strategy for corporate clients…." (Baxi 1986: 459) These litigants identify the top lawyers in the court who would be ideal for their case and then "block" them, usually by paying them for a conference to discuss the case. Since the advocate has been retained by one party he can then not appear for the other side, limiting the talent the opposition has to choose from. This practice is controversial and some lawyers will back out if they feel they are being used for blocking, or will require that they be given the first chance to argue. Others view it as an acceptable form of business and will accept a negative retainer without even holding a conference or insisting that they argue part of the matter. In a major case, it is not uncommon for a litigant to block, or attempt to block, five or six lawyers.

For large matters, litigants frequently retain more than one senior, not only to "block" the other side, but because there is no assurance that their counsel will actually

be available for the hearing, given lawyers' propensity to overbook and the unpredictability of the Court's scheduling.[18] Some sought after lawyers are even rumored to charge a double rate to guarantee their appearance. One Supreme Court lawyer recalled a joke told about Ashok Sen (a very prominent Supreme Court advocate and one-time Law Minister who practiced up until his death in 1996) that Sen required a triple fee – "one for the case, one for the promise to appear, and the third to keep the promise." (Int27)

One of the largest sources of litigation work is the Government. Top Supreme Court lawyers will often serve as an Additional Solicitor General, Solicitor General, or Attorney General at some point in their careers, taking a sharp cut in their income to do so. A handful of top lawyers are also closely related to political parties. For example, Ram Jethmalani and Shanti Bhushan were law ministers, Abhishek Manu Singhvi is a Rajya Sabha member, Arun Jaitley is the leader of the opposition in the Rajya Sabha, Kapil Sibal is Minister of Communications and Technology, and P. Chidambaram is Finance Minister.[19] Some leading advocates also engage in lobbying work, but most official lobbying is done by law firms.

VI. Grand Advocates' Work

Advocates at the Supreme Court have strikingly wide-ranging practices. As one quipped, "We are all generalists here." (Int12) GAs almost all have a portfolio that includes a substantial amount of corporate work, but usually also some combination of tax, constitutional law, intellectual property, government employment law, property, and criminal law. Leading lawyers tend to be focused in the Supreme Court or one High Court, but will travel to other cities to argue in another court for their client, charging a much higher rate to do so. Work before tribunals–such as the securities appellate tribunal, the competition appellate tribunal, the national green tribunal, the income tax appellate tribunal, the central administrative tribunal, and appellate tribunal for electricity–has made up a growing portion of these lawyers work as these forums have multiplied and gained prominence post-liberalization. Some top advocates we interviewed also reported that they now spend 5 to 15% of their time on arbitration. Indian Supreme Court and High Court judges often serve on tribunals or as arbitrators post-retirement so it is not surprising that litigants seek out Grand Advocates, who have established reputations before these judges, to represent them.

Most of the Grand Advocates' work at court is dominated by more procedural aspects of law. For example, one leading Supreme Court lawyer speculated that 70% of his work came from admission day (Int10). Pleading for stays and interim relief accounts for a substantial part of these advocates' work in court. During these shorter hearings, top lawyers face-value is at a premium. One lawyer explained, "Face value matters in matters like SLPs [i.e. admission hearings] at the Supreme Court where a decision is made in a minute. A man that regularly appears will matter to that judge. That lawyer will know what that judge considers worth hearing." (Int16) For the actual full hearing clients will

[18] Interview 12 ("Here you have to engage at least two seniors to make sure you'll have one. . . . This is because in the Supreme Court everyone keeps papers as you never know when the case will reach. It can be about to reach for three months. The system accommodates you if you have a conflict.")

[19] Note that Jaitley, Sibal and Chidambaram cannot currently practice before the Court because of their political positions.

frequently enlist another, less expensive, lawyer who will go into the details of the case. A top advocate's chief asset in many ways is the time and sustained attention he can obtain for the client before a congested and otherwise impatient court.

In Delhi and Madras lawyers typically operate out of offices in their homes or in chambers near the High Court or Supreme Court. In Bombay, lawyers tend to have their offices outside their homes. These offices, which usually have a conference room, an extensive law library, and a large, wide desk at which the senior sits, bustle with juniors, clerks, briefing counsel, and clients. Clients (and their briefing counsel) typically come to the lawyer's office because as one top lawyer explained, one "shouldn't go to a client's office"[20] as that indicated a degree of eagerness to please the client that denigrated the profession.

A top advocate might have anywhere from 3 to 20 juniors. A junior may work on one type of matter more than others, but explicit specialization is rare although not unheard of. In Bombay, juniors are traditionally not paid, and instead use their senior's chambers to become known amongst briefing counsel by giving noteworthy comments during conferences with clients. They use the infrastructure of their senior's chamber for their own work in their first years. In Delhi and Madras juniors generally do receive a salary, although they also take on their own work. Some seniors pay their juniors just a token salary while others pay the equivalent of salaries of junior associates at law firms. Historically in Madras pay for juniors has been higher on average even though seniors themselves are generally paid somewhat less there.

Briefing counsel drafts the initial brief, or at least set out the facts of the case. The senior then examines the draft, revising it with the help of juniors and the briefing counsel. In general the brief is given limited attention by the senior since the argument in court often deviates from it: instead he generally focuses on preparing his own notes for oral argument.

As already noted multiple senior lawyers will often be hired by a client to argue a case together. They may coordinate strategy in advance on the telephone. However, this coordination is frequently minimal and sometimes non-existent. As one Supreme Court lawyer explained, "I find there is a bizarre situation where sometimes you don't even know which lawyers are on your side. . . . The solicitor often won't tell the senior who is on their side. Maybe it's because they feel the lawyer won't study as much if they know another big gun is coming." (Int12)

Many seniors and other lawyers we interviewed commented on the lack of professionalism in litigation, which they felt meant that the quality of the work often suffered. As one rising lawyer surmised, "The expectations for work here are different [than in the West]. There doesn't need to be a high level of refinement. When you reach 85% you are good to go. The judges aren't great lawyers. The opposition lawyer will not be well prepared. It's not worth putting in the extra 15%, which takes 50% of the time. It's not that the lawyers couldn't perform, but there is no incentive."(Int23)

[20] Interview 9. Compare the observation of Theron Strong (1914: 378) who traced the transformation of the legal profession in early 20th century New York. Relations with clients, he reports, had "undergone a complete and marvelous change. …. The lawyer no longer receives the obsequious client hat in hand, but is subject to the beck and nod of the great financial magnate, who, whenever he desires to see his lawyer 'sends for him.' It would never do for the lawyer who values his practice to insist that his client should call upon him, instead of he calling upon the client."

VII. Entry and Ascent

Young lawyers often complain about how difficult it is for them to break into the elite world of litigation. Some of these barriers to entry are obvious. For example, the Grand Advocates operate in an English speaking world, where fluency is a necessity and British diction lauded. Only a minority of lawyers in India grew up in English-speaking households. Others struggled to gain the necessary command over language to become a Grand Advocate. However, language is not the only filter restricting entry into this high-end world.

Family connections, or being part of certain social stratum, have clear benefits for a young litigator. As one leading Bombay advocate recounted, "My father was a lawyer so (A) you get familiar with terms; and (B) socially you meet successful lawyers and judges. It demystifies everything. Many of the big names were my dad's close friends. The original side of the Bombay High Court is like one big family. Everyone knows everyone professionally and socially. Being part of that makes it easier." (Int17) With a family member in the profession, clients and briefing advocates become aware of you more quickly and one can use the office space and library of one's family member. All of this helps in the early years of litigation when paying briefs are rare and income negligible. Indeed, being able to make it through the early bare bones years as a litigator is perhaps the most formidable screening mechanism for the profession, favoring the survival of those who come with wealth and connections.

Being part of the same social milieu also helps in arranging to junior with a leading senior. Most of today's prominent seniors had themselves juniored for a prominent senior, and older seniors we interviewed spoke proudly of their "alumni" who had gone on to become successful lawyers themselves. There is a feeling that if you don't have an actual father in the profession you at least need a "godfather" (i.e. a prominent senior that you junior with) who can help guide you in the early years and raise your profile, bringing you critical early cases. However, most seniors said they accepted juniors on the request of friends, retired justices, or colleagues–there was no formal selection process. Thus it is beneficial, if not essential, to be located in this social stratum in order to elicit the needed referral to a senior.

The powerful role of social networks in acquiring clients and setting up a practice helps perpetuate the disproportionate presence of certain ethnic and religious groups in the profession. For example, in Madras elite Brahmins dominate the upper ranks of the bar because of their tight networks and long-standing proficiency in English. In Bombay, the Parsis, Gujratis, and Bohra Muslims were early first movers in the profession and continue to dominate its upper reaches.[21] In the Delhi High Court, post-partition refugees, particularly Sikhs from the Lahore High Court had an advantage, and their descendants continue to be disproportionately represented in the top ranks of the bar. The Supreme Court bar tends to be an amalgam of these privileged groups from around the country. Despite repeated inquiries we could not identify any Scheduled Caste, Scheduled Tribe, or Other Backward Class advocates who were regarded as part of the elite stratum of lawyers.[22]

[21] Marathi speakers dominate the bar of the less prestigious appellate side of the Bombay High Court

[22] Scheduled Caste is the official term for the groups formerly referred to as 'untouchables' or Depressed Classes and more recently as Dalits; Scheduled Tribe is the official term for the many aboriginal peoples of India; the "Other Backward Classes" are a set of groups officially determined to be underprivileged and, like the SC and ST, entitled to be beneficiaries of government "affirmative action" programs, typically in

Women also have had a difficult time breaking into the small group of Grand Advocates and into the upper ranks of litigation more generally. Of the 81 senior advocates designated by the Bombay High Court in the 20 year period, 1991-2010, only three were women. No women have been designated since 2006 (Menon: 2011). Historically, women have faced discrimination from colleagues, judges, and clients, even if there are signs such barriers may be lessening. As one seasoned woman lawyer explained, "Women lawyers before me were not married. Clients didn't use to take you seriously then. If you did get married then you moved with your husband so you couldn't set up a practice. . . . Some judges treated us well. Others were patronizing. [The discrimination] . . . isn't as bad now, but it hasn't totally vanished. I find if a woman raises her voice they don't like it, even though a male could do the same thing." (Int5) In 2012, after a woman lawyer was slapped by a male colleague in the Delhi High Court, 63 women lawyers successfully petitioned the Supreme Court to set up a committee to hear complaints of sexual harassment at the Supreme Court and in the lower courts (Times of India: 2012). More women are entering litigation, but clearly discrimination and obstacles still remain.

Many leading lawyers we interviewed bemoaned the deficiency of their own formal schooling, although it frequently did provide them with future networking resources. For example, many Bombay High Court lawyers are graduates of the Government Law College, while many Delhi High Court lawyers are graduates of Delhi University. During the 1990s, as law became a more fashionable field of study as liberalization provided increasing opportunities for graduates, the National Law Schools achieved prominence in legal education. These schools were originally created to produce high quality publicly-minded litigators to strengthen the "public interest" salient of the bar (Menon: 2009). However, graduates of the National Law Schools were in marked demand by law firms and corporations flourishing in the post-liberalization economy and many entered practice as in-house counsel or with firms in India and abroad. Some though have entered litigation and are becoming an increasingly prominent network in the courts.

In earlier generations, aspiring lawyers like Motilal Nehru, Mohandas Gandhi, and Mohammed Ali Jinnah pursued a university education abroad (almost always in Britain) and enrolled at the Inns of Court to qualify as barristers. But few of today's top advocates were educated in other countries, perhaps in part because in the decades after Independence, there were severe restrictions on foreign exchange and law had lost its standing as a path for ambition. In recent years, far more rising lawyers have gone abroad for education, particularly to obtain an LLM in the United States or United Kingdom, perhaps signaling that foreign credentials are returning in importance.

Several top advocates used government positions to further their careers. In their early years being a panel lawyer or standing counsel for a state government or public sector undertaking could bring assured income and visibility. Later, being Assistant Solicitor General, Solicitor General, or Attorney General often cemented an already prominent reputation and brought advocates into the elite heights of the profession. One lawyer discussed how he, "used these government jobs to work my way up." (Int8) Many

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the form of "reservations" (i.e., quotas) in educational institutions and government jobs. These groups comprise somewhere between one half and two thirds of the entire population of India. On the programs for their advancement, see Galanter 1984; Mendelsohn and Vicziany 1998; Thorat and Kumar 2008; Deshpande 2011, Verma 2012.

lawyers claimed they were simply asked one day to take on such a government appointments, although others suggested securing such appointment required significant networking. One well-known lawyer even cast aspersions on those taking political appointments, saying, "For a political appointment you have to hob-nob with industrialists and politicians. It's crony legalism." (Int9)

Another, less frequently taken, path to the upper ranks of the profession is to become known for one's academic work, usually by writing a treatise in an area of law.[23] As one lawyer who took this route explained, "When my first book came out my income went up four times." (Int9) No full-time academic is known as a leading lawyer, likely in part because academics are prohibited from practicing law in India (although practitioners can and do hold appointments to teach) (Bar Council of India Rules, Part VI, Ch II, Sect VII).

Public interest litigation (PIL), though only a tiny fraction of what the higher courts do, plays an important role in the public image of the judiciary and in the self-perception of the bar. Of the small set of lawyers who have a practice focused on public interest cases, variously defined, there is a tiny subset who are regarded as peers of the GAs. Such lawyers may be supported by a NGO or may be able to fund their operations from their personal wealth. A few other GAs combine extensive PIL with a commercial practice, while a large number of the top lawyers engage in occasional pro bono work that may include PIL or a prominent constitutional law or environmental matter. This pro bono work can help to establish an advocate's reputation in high profile matters and later helps maintain public visibility while supporting a cause lawyers are passionate about.[24] Relying too much on engaging in pro bono type work though has potential pitfalls for an aspiring senior lawyer. Advocates are designated Senior Advocates by the bench. This means that lawyers that are perceived to be too far outside the mainstream may be overlooked for this designation by the judges.

For many GAs, the media offers an important means to gain and maintain visibility. Advocates can be found regularly giving interviews on the news channels, which have multiplied since liberalization. This practice is controversial amongst some GAs who prefer to keep a low and, they argue, more dignified profile. They view interviews as a form of advertisement, which is banned for lawyers in India. Yet, such publicity, either through direct interviews or simply through newspaper reports about their cases, has assured that many advocates have become familiar presences in middle class households. For example, Ram Jethmalani, a well known criminal lawyer, had his name referenced in 499 articles between 2009 and 2012 in the *Times of India*, a leading English daily that also sets story trends for many local language papers. This was a comparable amount of reporting to the most covered judges on the Court and far more coverage than prominent law firms or law firm partners receive.

Table 2
Public visibility of various sectors of the legal profession:

[23] Such treatises, typically organized around the annotation of a statute, are the mainstay of the working library of most Indian lawyers. Many of the classics of the genre were produced by practitioners.
[24] As a side effect PIL cases provide work for other lawyers representing concerned clients. As one prominent PIL lawyer recounted, "The big commercial lawyers are happy with me because I bring them business. They have told me this several times. They must have earned crores from me." Interview 12.

Number of Articles in the Times of India from 2009 to 2012 Referencing (Source: Factiva):

Judges		**Top Advocates**		**Prominent Law Firms/ Partners**	
Justice Sathisivam	524	Prashant Bhushan	638	Amarchand Mangaldas	27
Chief/Justice Kapadia	491	GE Vahanvati	568	J Sagar	16
Justice Aftab Alam	408	Ram Jethmalani	499	AZB	10
Justice Singhvi	369	Harish Salve	385	Zia Mody	9
Justice Kabir	265	Gopal Subramaniam	368	Trilegal	5
Justice DK Jain	213	Shanti Bhushan	233	Cyril Shroff	2
Justice Dattu	147	Mukul Rohtagi	147		
Justice Lodha	147	KK Venugopal	145		
		Abhishek Manu Singhvi	139		
		Darius Khambata	133		
		Colin Gonsalves	88		
		PP Rao	83		
		Indira Jaising	81		
		Soli Sorabjee	70		
		Fali Nariman	43		

A few GAs contribute occasional op-ed articles to the English-language newspapers. Lawyers and judges in the upper reaches of the system are avid readers of these papers, whose contents become generally known in these circles. Other lawyers have used professional associations as part of their rise or as a signal of their clout. Many leading advocates are or were Presidents of their respective High Court Bar Associations, the Supreme Court Bar association, or the Bar Association of India.

VIII. The Impact of GAs

The flourishing of Grand Advocates is intertwined with other features of the Indian legal system, such as congested courts, insular social networks, overwhelmed and under-resourced judges, and the centrality of the judiciary to Indian political life. And their out-sized presence has numerous consequences for the legal system itself.

Many younger lawyers and briefing counsel view Grand Advocates with resentment. One rising advocate repeated a common refrain that many of the top lawyers are unnecessarily idealized by clients and judges, noting that, “We have given up maharajas on elephants, but we still have this.” (Int6)

Lawyers that we interviewed at law firms and in other practice settings often reported that at the outset of their careers they had considered litigation, but thought the field would be too difficult to break into given the social connections that were

perceived to be a prerequisite. They viewed workplaces like firms as providing a more professional and meritocratic environment. Even as globalization has channeled more money into the legal profession, the top rungs of litigation are still seen as an old boys' network where social connections amongst a select community, and face value with judges, are put at a premium. Indeed, these networks may be getting further entrenched instead of swept away (Dezalay and Garth: 2010).

An older lawyer lamented what he saw as the decline of the profession led by the Grand Advocates, "There is a lack of competence and discipline amongst the lawyers. They no longer tell clients they have a frivolous case. They don't try to figure out the best remedy based on cost-benefit analysis. Now it's just about familiarity of faces in the Supreme Court and who can speak best." (Int7) As one senior commented, "In the old days our role models were people like Seervai and Gupte[25] who didn't have massive work or the most earnings. Now the role model is the lawyer who is earning most." (Int27) A younger top leading lawyer described his generation as more "client and service oriented while the older seniors are more classical. We are more aggressive in my generation, less moral and not as much about the jurisprudence." (Int14)

Because their attention is spread so thinly amongst so many cases, some view the GAs as hurting the quality of jurisprudence as they do not spend as much time as they should developing their oral and written arguments resulting in poorly briefed judges (Int33). Further, since GAs often have multiple matters scheduled on the same day, they frequently have conflicts requiring judges to reschedule matters, contributing to delays in the judicial system overall. GAs also price out many clients, meaning only those who can afford these lawyers benefit from the distinct advantage they bring in either receiving admission for their matter or more favorable orders (Galanter: 1974).

Despite these complaints, senior counsel frequently noted their positive impact on the judicial system, upholding the rule of law. They commended themselves as a check on overstepping or unaccountable judges. The GAs prize their independence from firms and other corporate and government interests, which they view as giving them the ability to speak out more readily if they see problems in the justice system.

Their generalist knowledge and prominent stature also enables GAs to more actively push novel lines of argument in court, pushing jurisprudence in new directions. Perhaps the best known example of this is the celebrated role senior advocate Nanabhoy Palkhivala had in shaping the basic structure doctrine in the landmark Supreme Court case *Kesavananda Bharati v. Union of India,* AIR 1973 SC 1461 (Andhyarujina: 2010: 19). In that case the Court held that there was a certain "basic structure" to the Indian constitution that could not be amended, including its democratic, federal and secular nature. Arguably having a preeminent lawyer advocating for a controversial position allows judges more intellectual and reputational cover to take a new jurisprudential initiative, particularly if the judges do not feel confident in their own standing.

Conclusion

[25] H.M. Seervai (1906-1996) was a distinguished Bombay lawyer and Constitutional scholar whose highly respected commentary on the Indian Constitution, was first published in 1967. S.V. Gupte was a distinguished Bombay lawyer who served as Attorney General of India during the 1977-79 Janata government and was the author of a leading commentary in the field of Hindu law.

If Motilal Nehru or Muhammad Ali Jinnah[26] visited the Supreme Court today they would find a Court not altogether different than the Allahabad or Bombay High Courts in which they argued in the early years of the 20th century. The multiple court rooms, buzz of lawyers and clients in the hallways, and the structure of the bar would all seem quite familiar. Independence, liberalization, and globalization may have changed some of the clients, key provisions of law, and office technology—briefs are now neatly typed on a computer—but many elements of the culture of the justice system have remained surprisingly constant. In particular, the steeply hierarchical structure of the bar has endured, suggesting that it is an expression of more deeply entrenched features of Indian social life, or at least of Indian legal institutions. The reputational capital of the Grand Advocate remains one of his primary assets in a court system marked by overwhelmed judges with little assistance, the multiplicity and blurriness of precedent, and the centrality of oral presentation. In such a context, being known and trusted by judges is a positional good of which there can only be so much, placing those who have it in both a potentially lucrative and commanding position in relation to the rest of the bar.

Yet, there are signs that larger structural shifts are afoot that may affect the Grand Advocate's privileged position in this system. Law firms are increasingly looking for ways to bypass senior advocates. As one top firm partner indicated, "We have taken the step of encouraging our own inhouse lawyers to argue. There are two reasons. First, arguing counsel are hugely expensive and really unreliable. . . . Second, it adds value for money." (Int20) As more firms develop more of their own competent lawyers to argue for them this may undercut some of the business of Grand Advocates. Eventually, senior lawyers may even be brought into law firms where they can be given more extensive infrastructure for research and case management. Currently, there is little incentive for GAs to agree to such an arrangement because they would then lose the clients who come to them through other law firms or briefing counsel and their reputational capital is not shareable in the same way as a law firm partner's.

Meanwhile, the courts themselves are becoming less the exclusive site for litigation, affecting the business model of the Grand Advocates. The development of tribunals for tax, competition, telecom, airports, and other areas means that advocacy is becoming increasingly specialized. It is more difficult for a GA to visit all these venues compared to going from courtroom to courtroom in a High Court or the Supreme Court. These tribunals are developing specialized bars and although some tribunal judges are former High Court or Supreme Court judges, many of the other judges on the tribunal are not even legally trained, meaning they are not well acquainted with the reputations of the top lawyers, thus depriving them of much of their face value. Arbitration is also increasingly attracting lawyers' time as companies try to avoid the delays and unpredictability of the courts. Harish Salve, a prominent Indian senior advocate, joined Blackstone Chambers in London in 2013 in a move designed to allow foreign companies to more easily approach him to represent them in international arbitration or to consult him regarding the Indian market.[27]

[26] Muhammed Ali Jinnah (1876-1948) was a prominent lawyer in Bombay, a founder of the movement to partition British India and create Pakistan, and that country's first Governor-General.

[27] Ganz 2013. Salve continues to maintain a flourishing Delhi practice where he is well-known for representing and advising Indian and multi-national corporate clients.

The proliferation of forums and the attendant specialization in the law is inducing more lawyers to become experts in certain areas of law. Generalist advocates may increasingly be relegated to procedural matters and points of natural justice, while more substantive arguments about intellectual property or competition law gravitate to specialists. Meanwhile, some Grand Advocates may voluntarily turn away from litigation and spend less time in the courtroom, acting more as advisors or consultants to a client. As one leading advocate explained, "Today where law ends is not clear. It is becoming a mesh of consultancy and law. It's about policy." (Int10)

In addition, there are new pressures on GAs to increase the quality of their work. As one lawyer noted, "It might not be specialization that brings the leading lawyers down, but professionalization which requires more time on each case–briefing, preparing argument, and the court limiting its time so it's more content, less fluff." (Int13) Such professionalization might be prompted by the entry of foreign law firms. These firms would likely not litigate directly themselves and instead the initial effect of their arrival would likely be an initial upsurge in demand for the service of the GAs. But over the long run, as increasingly important customers of top advocates, they might demand higher standards and more emphasis on reliability, leading to a narrowing of grand advocates' famously sweeping portfolios.

A demand by clients for enhanced professional performance of GAs would be more likely if it was also demanded, or at least rewarded, by judges. For example, if judges admitted cases more selectively, punished lawyers for failing to appear at hearings, and placed more reliance on written arguments (and less on often repetitious oral advocacy) this might push GAs to more finely tune their briefs and schedules. Yet, given the pay disparities between the bar and the bench, it is unlikely in the near-term that a widespread improvement in the quality of judges will occur that might push for more professionalization amongst GAs.

The increasing number of talented students entering legal education means that there is a larger group of high quality young lawyers graduating each year. This group of rising lawyers may eventually help professionalize standards in litigation. More broadly, since so many of these top law graduates are now entering firms rather than litigation, the balance of power within the profession may eventually shift away from litigators and towards law firms and other forms of legal practice.

Studying the continuing vitality of segments of the bar like Grand Advocates allows us to better understand how the law is actually practiced, applied, and produced in India today. While some aspects of the legal profession may seem to be outwardly "converging" in a country like India – such as the increasing presence of domestic law firms that look like those found elsewhere in the world - the comparative uniqueness of Grand Advocates demonstrates how certain structural features of a nation's legal system can also generate and support a markedly divergent pattern of legal practice.

Glossary

Admission (miscellaneous) Days At the Supreme Court justices hear requests for the admission of a petition (generally on Monday and Friday). If accepted regular hearing is (generally) on Tuesday, Wednesday, and Thursday. Currently, all filings are heard by a

bench of at least two judges to decide whether a matter should be admitted for regular hearing. If a case can be disposed of quickly through a short order it may be done so during the admission hearing, instead of waiting for a regular hearing.

AOR [Advocate on Record] An advocate of at least four years experience who has passed a specially designated exam that enables him or her to act and plead for a client in the Supreme Court of India. The advocate must have an office within 16 kilometers of the Supreme Court. Only AORs may file a case in the Supreme Court under the Supreme Court Rules of 1966.

Blocking – negative retainer When an advocate is paid a fee by a litigating party to not appear for the opposing party.

Briefing or Instructing Counsel An advocate who does not argue a matter in court, but instead briefs the arguing counsel on the matter, and is often charged with writing the brief.

Constitution Bench – A Supreme Court bench of five judges or more which hears a substantial question of constitutional law

Crore A unit of 100 lakhs or ten million.

Division Bench A bench of two judges, the standard format in the High Courts and now the Supreme Court.

Face Value A colloquial term used to describe the perceived respect and deference a judge treats an advocate with by way of his or her reputation

Full Bench A bench of three judges

Juniors Advocates who typically work for a senior advocate at the beginning of their career in a type of mentoring or apprenticeship relationship.

Lakh Unit of 100,000. See also *Crore*

Leading lawyer A lawyer recognized by other members of the legal community (judges, lawyers, clients) to being one of the preeminent practicing attorneys at a given court.

Mukhtar In British India, originally unauthorized law agents, eventually recognized in 1879 as the lowest grade of lawyers, merged into the advocate category by the Advocates Act, 1961.

Original Side The jurisdiction of some of the High Courts extends to certain original civil and criminal cases as well as to appeals and the Courts have separate rules, procedures and dockets for these "original side" cases.

Panel lawyer. A lawyer who is on a panel of lawyers who is contracted to a public or private entity to appear, for a fee, on its behalf upon request.

Passover. A judge's indulgence of a lawyer's non-appearance or unpreparedness when his case is called, agreeing to call it again later in the session.

PIL [Public Interest Litigation]. A writ petition brought in the public interest in a High Court or Supreme Court to enforce a fundamental right of any citizen.

Pleader. One of the several grades of legal practitioners before the profession was unified by the Advocates Act, 1961. The pleaders practiced in the district courts, but could not appear in the high courts without becoming an advocate.

Rajya Sabha The upper house of the Central legislature. Members of the Rajya Sabha are predominantly selected by state legislative assemblies. Service in the upper house is not considered a full time government job and those who serve there are not disqualified from practicing law.

Regular Hearing Day. Generally Tuesday, Wednesday, and Thursday at the Supreme Court. When judges hear admitted matters to dispose of them through final orders. Judges typically hear more cases on admission days than regular hearing days. Miscellaneous matters (which might involve requests for interim orders, the addition or subtraction of parties, or other "miscellaneous" matters) may be heard on either admission or regular hearing day. The Supreme Court at different times in its history has heard admission and regular hearing matters on the same day or on different days than it does now.

Senior Advocate A honorific designation, conferred on an advocate by a High Court or the Supreme Court under the Advocates Act of 1961, based on the advocate's high standing in the Bar or special knowledge or experience in law.

SLP [Special Leave Petition] A petition to the Supreme Court under Article 136 of the Constitution of India by which the Supreme Court through its discretion can choose to hear any appeal.

Vakalatnama. Letter of authority from client to attorney.

Vakil. Originaly an agent, a person invested with authority to act for another, an ambassador or representative. In British India a practitioner authorized to appear in law courts, a grade of legal practitoners lower than barristers and advocates, but higher than pleaders. Merged into the advocate category by the Advocated Act, 1961 but the term is in wide use as a synonym for lawyer.

Zamindar A landlord (usually large), who had duties to collect revenue from, and rights of governance over, his tenants. Zamindars were abolished by various land reform acts in the 1950s and 1960s.

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