LEGAL ASSISTANCE ABROAD*

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LEGAL ASSISTANCE—as distinct from legal aid, the bar-controlled charity scheme for supplying rudiments of legal service to the very poor in very small cases—may be said to have reached the doorstep of the United States. Spiritually, at least. The day cannot be far off when easy access to legal services, the long-missing adjunct to any effective administration of American justice, will be a reality.

Any well-founded attempt to stimulate and hasten this development will have to avail itself of the significant light which foreign solutions of the analogous problem shed. A discussion of these solutions is thus timely. Yet the reader may relax. He will not be burdened with any accumulation of descriptive detail of individual systems, but merely acquainted with fundamentals and with certain controversial issues. Only these are directly pertinent to the job of social construction for which some foundation is here to be laid.¹

I. CONTINENTAL EUROPE

From the outset it seems necessary to make it clear that it is possible to speak, at least with respect to Western Europe, of a predominant Continental pattern of legal assistance. This pattern alone will occupy us here, since the departures from it—they are plentiful—pertain almost exclusively to minor points. Those which are of any significance will be touched upon as we go along.

It is likewise permissible to neglect the time element. If the common pattern can at all be said to be in a process of development, the pace of this process is extremely slow. The impact of World War II may have disrupted much of the judicial machinery in certain countries temporar-

* Except for minor changes, this article is identical with a chapter of a comprehensive study on the need for legal service in the United States as affected by our legal system in its broadest sense, and on the problems which a better satisfaction of that need involve. The study, which is expected to appear in the first half of 1950, has been prepared by the author under the sponsorship of the Russell Sage Foundation and on request of the National Association of Legal Aid Organizations. The opinions expressed in the above article are those of the author and no responsibility for them is assumed by the Russell Sage Foundation.

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¹ Readers interested in comparative information on the subject may find it in the League of Nations' publication, League of National Legal Aid for the Poor 27 V (Legal) 27 (1927), and in Egerton, Legal Aid (London, 1945).
ily. Many changes have been made necessary by economic setbacks and political shifts. Much new law has arisen, and more will undoubtedly have to be created. But certain basic institutions of the law have a way of being extremely resistant against social and political turbulence. On the Continent, legal assistance is among these. It is safely established. Its problems do not arise from any particular time. Its solutions do not look toward any particular era. We may assume that its fundamentals will in none of the countries, except perhaps those which now have slid into the “solar system” of the Soviet Union, be subjected in the near future to any considerable reform.

Legal assistance in Western Europe, thus delimited, can by no means claim to form a fully satisfactory answer to the underlying need. But it offers, in contrast to legal aid, a fairly acceptable minimum solution, and at least covers the ground almost completely: it embraces the entire expanse of the individual countries or member states of a federal union. All types of courts and tribunals, and all kinds and phases of legal action are encompassed. The eligible person is freed of his financial incapacity in all its pertinent aspects, and the services of a lawyer are supplied where they are needed, or required by law.

In evaluating the pattern we should also take into account that in each of the respective countries its features stand against the background of a judicial system reasonably free of a tendency toward making its courts into houses of occult rites, unlockable but with golden keys. Of particular significance is the momentous principle that the losing party to a lawsuit on the Continent has to pay the winner all his expenses, including those for the necessary services of a lawyer. Mention should also be made of the social-minded attitude of the inferior courts in the West-European countries, and of the special tribunals (conseils de prud'hommes, Gewerbegerichte, Kaufmannsgerichte) in which much of the litigation of the wage-earner takes place. The judges and the court personnel of all lower courts are under a statutory obligation to instruct and guide litigants unassisted by counsel.

Two features are characteristic of Continental legal assistance. One is the integration of assistance schemes with the general administration of justice. The other consists of the use of unpaid, assigned lawyers for the performance of the work. As a result of this integration with the general judicial system, the assisted litigant obtains in one arrangement the

\[\text{Most importantly, Continental legal assistance comprises also all appeal stages, either on the strength of the initial grant or on new application, and applies also to the enforcement proceedings subsequent to judgment. In some countries free legal service can be given even to persons pursuing or defending a case before administrative agencies.}\]
service of counsel and the exemption from court fees and other expenses incidental to litigation, insofar as these are payable to the court. Expenses not payable to the court are paid by the court out of public funds. To express this in terms familiar to the American lawyer: The benefits which ought to be accorded by a complete *in forma pauperis* statute and those which our legal-aid organizations have made their concern are obtained with one application.

Nevertheless, it frequently happens that a person exempted from payment of court fees and other essential disbursements, must proceed without any counsel, or proceeds voluntarily with one whom he has privately retained. However, it cannot happen, as may be the case in this country, that a person is supplied with counsel without being automatically provided also with all fee exemptions and all necessary funds for appropriately pursuing or defending the case.

Integration with the general administration of justice means further that the schemes are tax-borne, statutory, and supervised by the courts. These are aided, in the preparatory stage, by administrative officials.³

The second characteristic of legal assistance on the Continent, the reliance on unpaid assigned lawyers, displays its outstanding imperfection. While in criminal cases of the most serious kind, assigned defenders are generally accorded a fee out of the public treasury, as they are in most American jurisdictions, this fee is by no means compensatory. In civil matters and in the run of criminal cases, however, not even this incomplete compensation is available. The work must be done without pay in fulfillment of a professional duty, and suffers accordingly.

If the opponent of the assisted person in a civil case is financially irresponsible, or if a criminal case does not promise to arouse public attention, the assigned lawyer is likely to be apathetic. He will render service of a distinctly nominal kind. No pride-boosting slogans, no hollow rant about ethics can, as we should realize at long last, replace a reasonable reward as an incentive to professional efficiency.

If the opponent, however, is financially responsible, and may become liable to pay the fees of the assigned counsel in the case of defeat, the situation will be marked with some of the unpleasant implications that are suggested to us by the mere words “contingent fee.”⁴

³ In Hungary, Rumania, and in the microscopic republic of San Marino, the application is passed upon by members of the legal profession.

⁴ Continental lawyers do not, as a rule, press the defendant or his relatives into some kind of underhand payment as American assigned defenders are frequently reported to do. The ingenuity of the former is either less enterprising, or the supervision of their conduct is more effective.
One of the most satisfactory points of the Continental systems, on the other hand, is the flexible and relative poverty formula used in the awarding of the privileges. The legislative "boner" of providing a rigid "means test," such as the Anglo-Saxon countries employ, has been completely avoided. The formula is called flexible because it does not indicate a specified sum of income or property as a rigid criterion for eligibility. It is called relative because it takes into account the expenditure involved in the conduct of the legal action at hand. Both flexibility and relativity are achieved simply enough. The privilege is declared available to any person who is unable to pursue or to defend the case at hand without jeopardizing his own support or that of his dependents.

Even more important than the affirmative discretion thereby given to the selecting officials, and the full independence of the test from changes in the buying power of a currency, is the spirit of the entire scheme which this one incidental solution expresses and fosters. As soon as the eligible person need not be "poor" in the sense that he does not have an income above a certain low amount, or is not "worth" more than a certain sum of property, eligibility loses its humbling implications. We are no longer confronted with a public charity, but with a service belonging to a complete administration of justice.

Further, let us imagine the case of a person with moderate means who has a large claim, or one likely to require complicated and expensive court action. While that person may have sufficient funds to carry on a small law suit without encroaching upon his support and that of his dependent family, he may perhaps be unable to afford the sizeable action which his particular situation demands. The relative formula of Continental legal assistance accords him the means for pursuing his rights. The rigid formula used in the British Commonwealth of Nations leaves this applicant in the cold. In the United States he will be delivered to the mercy of a contingent-fee lawyer. The very situation which under the relative formula may be instrumental in providing him with assistance—the volume of his claim or suit—would in Britain and the United States deprive him of legal aid. In other words, the man who under the

5 Only the complicated means test of Spain falls short of the mark. In it, a relation between the permanent wages or salary of the applicant and the daily wages of a manual laborer of the same community is established. Spain, on the other hand, stands out from the general Continental pattern by including in its scheme persons who cannot fully meet the poverty test. They are entitled to 50 per cent of the benefits. Other Continental countries which know assistance in part are Belgium, Germany, and Poland.

Almost every legal-aid attorney will claim that he is applying a flexible means test. This is incorrect. He is merely permitted to disregard, to a very limited extent, a rigid figure of income and property. The flexible formula does not express any amount.
relative formula is eligible in pursuit of a small claim, is eligible all the more in litigating a large one. In the United States aid to such an individual would be denied unless his particular circumstances tallied with the concept of the poor wretch who would, except for an act of grace, stand deprived of his “day in court.”

Another characteristic of all Continental systems is the complete separation of litigious assistance from legal advice and preventive work. This separation appears to have confused some American writers on the subject. Legal assistance on the Continent has been described by them as having been founded on group lines, and at the same time it is held to be based on the assigning of counsel under judicial control. These are inconsistent assertions.6 The fact is that in practically all the countries in question two distinct schemes are at work. Each is independent of the other. Assistance in litigations and criminal matters is a part of the general administration of justice. Legal advice and preventive work are left to the local authorities or to the self-help endeavors of occupational groups.

The two services are distinct also with respect to the time of their origin. While litigious assistance in most instances was brought into being, or into its current shape, as a part of the procedural innovations of the nineteenth century, the legal advice offices arose, by and large, in the first decades of the twentieth century. These advisory programs have not attained the same significance in the legal affairs of the people as the more developed litigious schemes.

This should not be understood as implying that any resident of a country in Western Europe would find it difficult to avail himself of gratuitous legal information and of the minor preventive services usually given together with such information. Offices serving this purpose are plentiful. But the legal assistance statutes under the administration of the judiciary are of more far-reaching significance. It is through them that the courts are open to everybody irrespective of financial considerations, and that everybody who so requires may have his case presented by a lawyer.

The common features of Continental legal assistance outlined above do not prevent a marked division of the individual schemes into two major groups. This dichotomy is the result of a difference in approach to a single crucial issue. Should the grant of assistance be made dependent on an examination of the legal merits of the case? Or should the applicant’s financial situation be the only test? Minor though this issue may

6 See, e.g., Smith, Justice and the Poor 231, 247 (1924).
seem, great practical consequence springs from the manner in which it is resolved.

The countries which make the award of litigious assistance depend solely on the financial status of the applicant, and have the case considered no further than to eliminate obvious nuisance litigation, manage to get along with a very small administrative apparatus. The ordinary court departments and trial judges suffice. Their role in the program is part of their regular work, and increases it but imperceptibly.

The countries, however, which insist on an additional investigation into the legal merits of the case, find it necessary to administer their schemes through separate bureaus. The sifting of the applications by these special offices is combined with attempts at conciliation. Prospective members of the bar are generally required to participate in this work, and are thus given a valuable chance to acquire practical experience in their profession.

Austria, Czechoslovakia, Germany, and various Swiss cantons have adopted the less elaborate procedure. Belgium, France, Italy, and the Principality of Monaco add the "legal merits" test to the "means" criterion.

The preponderantly Germanic pattern has the advantage of being simple and liberal. It gives wholehearted recognition to the fact that in the majority of instances the legal merits of a case can be decided only by means of a judicial trial. No short cut to judicial determination of an applicant's rights is deemed adequate.

The second type of scheme, on the other hand, weeds out obnoxious litigation more strictly and thereby brings about greater protection to the opponent of the assisted party. Whether or not this type lessens the expense to the public treasury depends on the costs connected with the administration of the separate bureaus as compared to savings made by reason of cases which it serves to eliminate, either through rejections or through successful conciliation.

The present writer believes in the superiority of the second approach. Legal assistance must not only create a broad avenue to the benefits of the law, but should at the same time restrain shady or outright extortionate litigation. It is partly because of a total neglect of this second purpose, or actually the fostering of its very opposite, that the American contingent fee must be denounced emphatically as a socially undesirable substitute.

Even though public savings through close-to-judicial examinations of requests for legal assistance may, in the end, be imaginary, these exam-
inations are the best answer to critics who frown upon an expenditure of public funds which "encourages" litigation. Those persons who would continue to use even court fees as a means of discouraging unmeritorious litigation by the poor ought to look with special favor upon any effective and impartial method of restricting assistance.\(^7\)

The elaborate legal examination of the cases, together with the element of conciliation characteristic of the preponderantly Latin schemes, makes it finally possible to use legal assistance for aims of legal education. The prospective French or Belgian lawyer serves, as pointed out above, part of his required postgraduate apprenticeship training in the special court departments administering legal assistance.

One of the features of these Latin schemes requires special mention. The decisions of the departments for sifting and passing upon the applications, in France and Belgium called *Bureaux d'assistance judiciaire gratuite*, are not appealable, except by the *procureur général*, the highest officer in the system of public prosecution.\(^8\) This is a palpable weakness. Because of it, the departments are accorded too much discretion for pursuing a narrow policy. The feature is, however, not inherent. Nothing in these schemes conflicts with subjecting the decisions of the *bureaux* to ordinary judicial review upon appeal by either party.

**II. ENGLAND AND WALES**

The short but lively history of legal assistance in England and Wales may be visualized as a continuous effort of the legal profession to thwart a set of court rules which, variously amended, aimed to render access to litigation less dependent on wealth. Prior to these rules the poor had been wholly excluded from the use of certain courts. The obstruction posed by the English lawyers against any effective administration of these not exactly ambitious court rules runs like a red thread through all

\(^7\) The English Committee on Legal Aid for the Poor in its 1928 report rejected the plan for a legal dispensary or hospital system with the quip that "it is in the interest of the State that its citizens should be healthy, not that they should be litigious." Report of the Committee on Legal Aid for the Poor 9-10, Cmd. 3016 (H.M. Stationery Office, 1928).

The writers of this report had obviously not yet gotten it through their heads that litigation, in full analogy to medical treatment, is often conducive to a condition that can be described as social health. Like medical, especially psychiatric, treatment it gives to the individual his full capacity for work and his full preparedness to cooperate with his fellow citizens. An individual embittered against society may be more dangerous to the common welfare than a diseased person. See Jones, Free Legal Advice in England and Wales 53 (Oxford 1940).

\(^8\) On the Continent the head of the prosecution system is charged with the prevention of judicial abuses in various instances. While the position and function of the *procureur général* are not identical with those of an attorney general in the United States, American readers may find the parallel useful.
successive phases and transitions of the development. For an enlightened description of the course of events I highly recommend Egerton’s earlier cited study.\(^9\)

But the little chapter of social history which that description represents is, nevertheless, not the indictment of the English bar that it seems. For, in a deeper sense, it traces the dubious attempt of a government to evade one of its own important responsibilities by “passing the buck” to the legal profession. There can be no doubt that legal assistance is a governmental responsibility and that it has been shirked by this means in almost all countries.

As soon as this governmental lapse is taken into account, the lingering resistance of the English lawyers becomes not only understandable but even courageous and honorable. Their refusal to submit to an unwarranted levy as readily as their Continental counterparts reveals the larger measure of freedom enjoyed by them. Nor can the opposition of the English barristers and solicitors to the various Poor Persons’ Rules be called inconsistent with their simultaneous struggle for exclusive control of the scheme. Attainment of control, the English bar well realized, was the most effective means of reducing its “voluntary” contribution, and of reducing it in the degree and manner dictated by its own judgment.

But whatever view may be taken of the past—a drawn-out bickering about the legal predicament of the wretched “poor persons” and a pittance of help unworthy of a great and profoundly generous nation—the picture is no longer hopeless. The interest of the English in the improvement of their judicial system has of late shown a gratifying vitality.

Legal assistance in particular has in recent years been more vigorously tackled than ever before. There seems at last to be a realization in England that progress in this area at the expense of the legal professional groups must be definitely discarded. The measure of political significance that has been attributed to establishment of better legal assistance emerges clearly from the fact that two momentous reports on the subject, the so-called Rushcliffe plan and the proposals of the English Haldane Society (the organization of lawyers affiliated with the English Labour Party), were instigated and delivered amid the tribulations of World War II. But for the country’s financial difficulties, they might already have been followed by action. Legislation seems, however, to be impending.

Attention will be given here to these two plans as representative of the thinking which England has done, and as an index of the reality which is

\(^9\) Egerton, op. cit. supra note 1, at 10-25.
in the process of emerging. Only for the better evaluation of these two plans will a brief glimpse be thrown on the past and present situation.

THEAILING "POOR PERSONS’ PROCE" 

In 1883 rules of the High Court, intended to improve the utterly crude and worthless *in forma pauperis* proceedings then existent in that court, set a rigid poverty line at £25 of capital. An application had to be supported by the opinion of a barrister concerning the legal merits of the case and by an affidavit of a solicitor. The applicant was compelled, therefore, to find a solicitor who not only provided the affidavit but who in addition might induce a barrister to join the philanthropic action by giving an opinion on the case. What this requirement amounted to in practice need hardly be elucidated.

The Poor Persons’ Procedure of 1914 extended this scheme so as to cover also the Court of Appeals, but omitted all other courts, most important of which were the county courts. It raised the poverty line and created a separate court “department,” the so-called Poor Persons’ Department, for administering the rules. The poor would-be litigant who was unable to find a barrister and a solicitor to recommend his case could now apply directly to a master of the Supreme Court. This officer elicited the opinions of voluntary reporters, barristers and solicitors, and then presented the application to the court.

The rules, thus improved, met with no more success than those which they replaced. The legal profession shirked the work, and the Treasury failed to cover the incidental expenses of litigation. It refused even to pay the so-called “office expenses” of the reluctant lawyers. Half-hearted amendments failed to halt the scheme’s gradual breakdown. Among them, surprisingly enough, was the addition of a rigid income test to the previous capital test. Repeated reports of various committees and repeated appeals to the solicitors were of little avail. The final result was a complete slump in the governmental efforts and a full abandonment of the scheme to the control of the professional organization of solicitors, the Law Society. But even this organization’s victorious ascendancy to control, though implemented by a governmental grant covering the administration expenses, failed to effect any marked improvement in the indigent litigant’s lot.

Dissension arose in the legal profession. One faction still resented the unpaid work which the scheme involved and sought to make the burden less onerous. The government, they insisted, should pay fees to the solici-
itors who worked for the scheme. Another faction, represented by the Council of the Law Society, resisted efforts to this end.\textsuperscript{10}

Not until World War II made the better handling of legal assistance a patriotic venture and a part of the war effort, was the calamitous situation temporarily relieved. A department for assisting poor parties to matrimonial actions in the High Court was instituted by the Law Society in 1942.\textsuperscript{11} Help was extended to impecunious couples if at least one spouse belonged to the armed forces. Later on, a civilian section was added. But even this more determined contribution of the legal profession left many needed improvements uneffect. It applied, for example, only to the High Court and its type of litigation.

PRIVATE ORGANIZATIONS—ASSISTANCE IN CRIMINAL MATTERS

The above sketch did not touch upon the legal advice offices established and operated by private philanthropy. Failure to take stock of them would leave the picture of English legal assistance incomplete, especially since some of these offices amplify their counseling with an appreciable measure of litigious and preventive services. Outstanding among the offices with the larger scope are those of the Bentham Committee and the legal assistance centers, Cambridge House and Toynbee Hall. Their main object is to provide some amount of legal service in the county courts and police courts which have never been covered by the Poor Persons’ Procedure. Outside of London the same purpose is pursued by the provincial Poor Man’s Lawyer Associations.

In criminal matters English legal assistance is based upon the Poor Prisoners’ Defense Act of 1930. To judge from the statute itself, its offerings seem to form a poorer replica of the poor enough Continental schemes pertaining to criminal matters. Yet the progressive and exacting Haldane Society considers the Act satisfactory or nearly satisfactory.\textsuperscript{12} In order to reconcile this appreciation with the contents of the law, we would have to assume that the English scheme is administered in a far more liberal spirit than that animating the defense of poor defendants on the Continent.

Of the flaws which emerge from a perusal of the Act the most

\textsuperscript{10} If an organization constituted of persons who are not exactly saints in money matters declines payment for rendered services, we may wonder about its motives. It should be noted in this connection that the New York Legal Aid Society, in order to please the bar, has consistently refused to accept the public appropriation made to it by the city.

\textsuperscript{11} In American terminology such a department would be called a bar association law office.

\textsuperscript{12} See Legal Advice and Legal Aid for Poor Persons, 88 Sol.J. 349, § 2 (14) (Oct. 14, 1944).
striking are: The grant of a so-called "defense certificate" is not an unquestionable right of any defendant, unless the charge is murder. In all other cases the trial court or the police court which passes on the application must deem the certificate "desirable in the interest of justice." The fees which the assigned solicitors and barristers are paid by the state are not compensatory. No legal assistance is extended in actions based on an appeal from a decision of a police court. As to appeals from the ordinary criminal courts to the court of Criminal Appeal, assistance as of right is available only when murder charges are concerned. When lesser crimes are tried, it may, or may not, be granted.

THE RUSHCLIFFE PLAN

Under this name have become known the recommendations of a committee which in 1944 was charged by the Lord Chancellor with the task of examining anew the total field of legal advice and assistance in England and Wales. The name of the committee's chairman has served to earmark the proposals. The report was delivered in May 1945 and should from the outset be understood as having been prompted by widespread dissatisfaction with the inadequacies of the existent scheme as they appeared under the strain of wartime conditions, and by an increasing concern over the seriously affected morale of the armed forces.

Because of the very circumstances of its origin, the report hardly could have helped embodying some progressive thought. The document marks an undeniable step forward. But, owing to the conservative nature of the circles from which it issued, it disregards sound doctrine and sad experience at various points.

To begin with the progressive features, easily the most important is the recognition that legal assistance can no longer be allowed to function as a voluntary, if publicly subsidized, undertaking of the bar, and as a venture in fulfillment of professional-ethical duty. The work must be compensated work, insofar as it does not pay for itself. Its payment devolves upon the public treasury.

As soon as this chief recommendation is carried out, English legal assistance will have ceased to be philanthropic fumbling. The burden of expense will be carried by the same population which is the receiver of the benefits. The unpaid assigned-counsel system, the chief purpose of

13 This is an amendment introduced by the Criminal Appeals Act, 7 Edw. VII c. 23 (1907). The denial of assistance in appeals from the police courts was remedied to some extent in 1933 by the Summary Jurisdiction (Appeals) Act, 23 and 24 Geo. V c. 38.

the myth of an obligation of the legal profession toward the poor, will, in England, have come to an end. No regrets from any quarters are likely to mourn its exit.

Another conformation to modern thinking lies in the report's refusal to limit legal assistance to the ill-starred "poor." A combined scheme for providing free legal services and low-cost legal services is envisaged. Not only those virtually unable to pay for legal service and court fees are provided for, but also persons who cannot afford to pay a lawyer to the traditional extent.

The report, moreover, aims to establish a unified and uniform system of rendering legal assistance in all courts. This includes especially the important county courts. Only the work in the criminal courts is excepted. The extension of the work to all courts is, from the theoretical viewpoint, but a matter of course, and an overdue abolition of an age-old incongruity.

As for the shortcomings of the plan I shall try to progress from the lesser flaws toward the more important. Even the least of them is, however, serious enough.

1. The rigid means test in the procedure for sifting the applications is retained. One can hardly understand how this serious mistake was made by a committee which describes itself as bent upon removing the hardship arising from fixed limits. Some improvement of the present situation, it is true, may result from the suggested raising of the limits. Hardship may, moreover, be prevented to some extent by the partial assistance (low-cost legal service) which is to amplify the scheme and may be available to applicants excluded from free assistance by the rigid income and capital test. But neither of these alleviating factors means that the momentous step from a rigid test to the flexible formula has been taken.

The raised poverty limits in the free scheme and those newly introduced concerning partial assistance are, moreover, far too restricted. A single person with a weekly income in excess of three pounds is to be excluded from free legal assistance, as is a married person with a weekly income in excess of four pounds. If the single person possesses savings in excess of £25 and the married person savings in excess of £50 the surplus must be paid by him toward his legal bill. Any applicant for partial assistance, single or married, is excluded if his, or their, annual income exceeds £420. To all these income tests are added capital tests which are far too restrictive.\footnote{Report, op. cit. supra note 14, at §§ 148, 152, 156. The definitions of income and capital are, on the other hand, rather liberal. This mitigates somewhat the import of the recommended poverty lines.}
The proposal of the committee to replace the odious expression "poor persons" with the words "assisted persons" is undoubtedly gratifying. But words mean little if facts disclaim them, and once again only the "poor" in the obsolete, melodramatic sense of the nineteenth century are granted free access to justice.

A single example may serve to illustrate the proposals on this point. A person who, together with his wife, possesses capital adequate to meet the probable costs of the litigation at hand cannot be given free services. A person who, together with his wife, has savings of £500, (approximately $2,000) will in all probability be denied even partial assistance, no matter what his liabilities, health and age are. While it may, or may not, be justifiable to let a young man exhaust his savings on legal trouble, any concept of social justice is flaunted if an old man cannot be given free legal service because he and his wife have been able to lay aside an amount not larger than that which one single litigation would devour. It is likewise unacceptable that he be denied partial assistance if he and his wife have, perhaps through the work of their lifetime, saved up not more than $2,000.

Conceivable justification for a rigid means test could only lie in legislative desire to reduce the discretion of the administering agency: that is to say, to prevent too narrow an administration of the scheme. But this desire was obviously absent from the minds of the drafters of the discussed plan. Had they intended to set a limit to the granting authority's power to reject applications, the rigid means test would have had to have based on minimum, and not on maximum, limits of income and capital. If not exceeded, the minimum amounts would have been an absolute bar to rejection for financial reasons.

2. The plan does not provide for the entire low-income group. This failure is related to that discussed under the preceding point. The income limit of £420 annually, pertaining to partial assistance, is not more than about $1,700 in American currency. But the low-income group must be assumed to reach, by very modest standards, up to an annual income of $5,000 for a single person and up to $8,000 for a family of two. A considerable social stratum, which in fairness cannot be expected to face the unpredictable bill of a private lawyer, is thus omitted from the benefits of the scheme.

3. Nobody should indulge the belief that the circumstances of applicants for free or partial assistance ordinarily obviate need for legal services other than advice and help in small litigations. Yet preventive legal

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16 Ibid., at § 152.  
17 Ibid., at § 156 (8).
services are not embraced by the plan. Accordingly the scheme falls short of its own pretense of completeness, not only by omitting a substantial part of the low-income group, but also by failing to provide for all the legal needs of those served. Only legal advice, amplified at best by assistance in trifling transactions such as the writing of a letter or the drafting of a simple document, is contemplated.

Negotiations in settlement of disputes are offered, if in a cumbersome manner. The person with a case requiring such services must apply for a legal-assistance certificate, which will cause the work to be performed by the lawyers on the litigation panel, not by those in the legal advice office. Whether precautionary services such as the drafting of wills, the preparation of little partnership agreements, sales contracts, tax returns, and so forth, can be obtained in this way does not emerge from the pertinent passage of the report.\textsuperscript{18}

No objection can be raised against the plan’s proposal that legal advice be provided not entirely free of costs, but for a fee of 2s. 6d. in each instance, subject to remission in suitable cases. That is reasonable and fully acceptable. Similarly moderate fees—an entire schedule of them—should be made to cover the gamut of preventive legal exigencies.

But it should be understood that the report has not advanced to an acceptance of the right of everyone to legal advice at the above mentioned moderate fee. That it has might erroneously be gathered from the omission of any means test for persons who need advice only. The committee simply felt that to institute a means test for the procurement of a mere bit of information would be a disproportionate effort. Yet advice may be refused where it is apparent to the lawyer at the advice office that the applicant can pay the regular fee of a private lawyer.

4. While the proposed Local Committees for issuing the assistance certificates are deprived by the rigid means test of any discretion to administer the scheme broadly, they are given freedom to administer it narrowly. No judicial review of their decisions is provided. These can be appealed only to the Area Committee, another auxiliary of the Law Society. Here is a particularly disappointing feature and an outstanding fault of the scheme. Through it, applicants for legal assistance are to be abandoned, as they are today, to the mercy of an organization which in democratic countries are embodied in judicial procedure. The importance of judicial review in legal assistance is obvious if one considers that the withholding of its benefits shatters a legal claim or de-

\textsuperscript{18} Ibid., at § 178 (7).
fense as finally as if a court of last resort had declared it unjustified. Traces of the "charity pattern" will survive and legal assistance will be denied its place within the general administration of justice, unless adequate judicial review is provided.

We must understand, of course, that one of the temptations to administer the scheme narrowly—the most important—will disappear as soon as the lawyers participating in the scheme no longer have to do unpaid work. The proposed rate of their payment is, however, not equal to that obtainable through private practice. Situations can be imagined which would further diminish the incentive of the envisaged fees. Especially in times of ample opportunity for fully paid work, there might arise on the part of the cooperating lawyers a propensity to restrict the less rewarding work.

5. Regarding criminal matters, the report advocates retention of the Poor Prisoners' Defense Act of 1930. The simultaneously suggested improvements of the Act concern mainly the compensation of the lawyers. They fail particularly to include the removal of the highly objectionable provision of that statute by which the accused person's defense by a lawyer must be "in the interest of justice." The applicant will not only have to be poor and indicted for a criminal act, but in addition, the court must acknowledge the existence of some mysteriously reinforced necessity for his defense by a lawyer. This is a potential gangway to arbitrariness and moralistic prejudice. A plan recommended in our supposedly enlightened era might well have been expected to call for its abolishment.

If "the interest of justice" does not demand in every case that a defendant be given the necessary means for presenting his defense, then why do not the English courts also bar moneyed defendants from employing lawyers unconditionally? Is it not true that in any case a defense, as effective as it legally can be, is "in the interest of justice"? Are we confronted with one more head of that unslayable hydra, legal charity? And is there not a disturbing resemblance to class justice?

6. The report recommends that the scheme be administered by the Law Society, hence by the solicitor's branch of the legal profession. Lay influence and representatives of those served and those paying for the scheme are banished. The suggestion that the Law Society be answer-

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18 In High Court matters solicitors and barristers would be paid fees amounting to 85 per cent of those taxable in ordinary cases. This means, according to the report, that a solicitor would receive 50 per cent of the profit normally remaining to him after deduction of his overhead expenses. In other court matters too the fees would be somewhat smaller than in unassisted litigation. See Report, op. cit. supra note 15, at §771 (24, 25).
able to the Lord Chancellor and thus under theoretical supervision of a member of the government, is nothing but a face-saving device. No counterweight to the predominant influence of the profession upon the scheme can be expected from this supervision, or from the “central advisory committee” by which the Lord Chancellor shall be assisted.

The motives advanced by the Rushcliffe committee for placing the scheme under the administration of the legal profession are classic examples of threadbare rationalization. Upon examination these allegedly “unanswerable” arguments—derived from witnesses and submitted memoranda, and merely accepted by the committee—lack cogency on their very face. Legal assistance may be sought, so goes the foremost of these rationalizations, in order to sue the state. Were government officials put in charge of the scheme, they would be prone to turn down such applicants. But if this fear is justified, how, we may ask, can judges, who are also officials of a branch of government, be trusted to pass impartially on a claim against the state or the Crown? They are special officials, it is true, but when all is said and done, officials nevertheless. Furthermore, how could it happen, as it frequently does, that one governmental agency defends with unrelenting zeal the interest of the state against another governmental agency? And how would it be possible to establish any administrative procedure or review if it were necessary to assume that government officials would disregard their sworn duty every time that this duty’s performance cost the state money?

By advising separate treatment of legal assistance in criminal matters, and thereby exempting them from administration by the Law Society, the Rushcliffe committee appears to have displayed some doubt in the wisdom of its own suggestion concerning the plan’s administration. Of the two branches of legal assistance, that pertaining to the criminal law has justifiably always been treated as the more important. Undoubtedly owing to this distinction the report suggests that assistance in the criminal courts remain under the control of the courts. In so expressing itself, it admits that judicial control better safeguards the public interest than bar control, and insures more evenhanded policy. Probably another fifty years will have to pass before England will have advanced to the recog-


21 Egerton deplores the attempt to place exclusive control of the plan into the hands of the Law Society: "... it is unfortunate that the claims of the general public to be represented in the administration of the legal aid scheme have not been recognized. Social service agencies throughout the country have played such a large part in setting up and improving legal advice facilities that they could contribute a great deal to the successful running of the new scheme and there is no doubt that the legal profession badly needs to be made aware of the intelligent layman’s attitude to the administration of the law." Op. cit. supra note 1, at 147.
nition that assistance in civil matters is no less a public concern than criminal defense, and no less in need of a truly impartial and reviewable administration.

To use, then, the Rushcliffe plan as a model in the developments which will sooner or later materialize in the United States, would appear contrary to good judgment, even to those who admire, in the province of the law, English example and tradition. Some of the plan's objectionable features would be even more serious if they were to be adopted in this country. It is one thing to place legal assistance in the hands of lawyers who have shown their professional mettle by banishing the contingent fee, thus eliminating the zone of conflict to which legal aid in the United States is falling victim. It is another thing to do the same in a nation where the bar insists upon keeping three types of clients: those able to pay an attorney, those too poor to do so, and those who, equally poor, can be deprived of a part of their claim.

Much as the shortcomings of the Rushcliffe plan detract from its value, high credit must be given to the public interest and spirit of social responsibility which prompted it. The intensity of these two forces with regard to legal assistance might well make us look across the ocean with a sense of envy. Even if the forthcoming act of Parliament should not remedy the major weaknesses of the report, England and Wales will yet be given a minimum solution for closing the gap between their people and the law. A substantial layer of the people, no matter in what part of the country they live, no matter in what court their case is tried, will be able to look to a practical, uniform scheme for obtaining the basic requirements of justice.

THE PLAN OF THE HALDANE SOCIETY

A short time before the Lord Chancellor initiated the Rushcliffe report, the Haldane Society had begun to investigate the problem of a new and better legal-assistance plan through a committee from among its members. The resultant proposals show that English thinking on the subject has advanced beyond the official report. The Haldane plan avoids several of the errors of the Rushcliffe report and must altogether be rated as a superior treatment of the problem. If the plan has been given the "silent treatment" in this country, this may be partly due to the fact that the Rushcliffe report was initiated and sponsored by the English government, thus foreshadowing emerging law more than any private plan could.

It may not be far amiss to assume that the offerings of the Rushcliffe
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plan represent the maximum of progressive thought that even the vanguard of the American bar would be able to "take." The proposals of the Haldane Society even further outdistance the thinking of the majority of the American bar. Not backed by any authority beyond their own merits, the proposals do not, it seems, appear to American lawyers worthy of serious attention.\(^{22}\)

Of the points on which the plan of the Haldane Society scores, the most important are the following:

1. The rigid means test is eliminated. Neither an income nor a capital limit is laid down. The legal-advice bureaus, the main certifying authorities, are given full discretion to grant or refuse free assistance or low-cost legal services according to the circumstances of the case. The fees for the low-cost services are not rigidly and uniformly defined but may be adapted to the capacity of the individual client. By thus eliminating the Rushcliffe plan's upper limit of £420 annual income and the possession of £500 capital as barriers to low-cost service, the Haldane Society covers the whole low-income group.\(^{23}\)

I should like to say at once that, in my opinion, the blank check thus given to the granting authority overshoots the mark. Objective criteria, such as even a flexible formula contains, should be laid down and made to provide a basis of judicial review.

2. The decisions of the granting authority are subjected to a kind of judicial review. I submit, however, that the specification that they shall be appealable to the county court registrar amounts neither to sufficient control nor to control of a strictly judicial sort. The refusal of legal assistance, it cannot be repeated often enough, affects the rights of a citizen in exactly the same manner as does an adverse judgment of a court of ultimate jurisdiction.

The failure to provide for genuine judicial review is, moreover, inconsistent with the particulars of a very sound, if minor, suggestion of the plan. According to it, the trial courts are to have some direct power to receive and decide applications for legal assistance. Such decisions would issue either from the clerk of a justice, the registrar of a county court, or a master of the High Court in London, and be appealable to a full-fledged judge.\(^{24}\)

3. The suggested measures for publicizing the service are more concise and yet more inclusive than those of the Rushcliffe report. The

\(^{22}\) For detail concerning the proposals see Legal Advice and Legal Aid for Poor Persons, 88 Sol. J. 340–50 (1944).

\(^{23}\) Ibid., at § 2, ¶3.

\(^{24}\) Ibid., at § 2, ¶6.
latter's specifications pertain mostly to criminal cases. In civil matters reliance is placed upon the Citizen's Advice Bureaus, which are expected to advise potential applicants about the scheme. The Haldane Society, however, suggests that "every person served with any process instituting any action cause or matter" be simultaneously given a notice advising him of his right to apply for legal assistance. Posters giving information about the right and the procedure of application are to be displayed prominently in the precincts of every court.

4. Although the Haldane plan, like the Rushcliffe report, has been drafted by lawyers, it does not suggest that the scheme be administered and dominated by the legal profession. That is significant. Evidently there exists a group of solicitors who are far-sighted enough to believe that joint administration is the appropriate way in which the potentialities of a scheme of legal assistance can best be translated into practice. One-third of the members of proposed District Committees for supervising the work are to consist of lawyers, barristers, and solicitors. Another third would consist of delegates of local authorities and, possibly, of nominees of the Lord Chancellor. The last third, and this is a very constructive suggestion, would consist of spokesmen for the assisted group. Representatives of local trade councils and of the Councils of Social Service are most likely to serve in this function. Accordingly, two-thirds of the administration is to be in the hands of laymen.

On two important points, the Haldane plan has failed to advance as far as one might have hoped. Like the Rushcliffe report, it is content in criminal matters with retention of the Poor Prisoners' Defense Act of 1930 in a slightly altered form. But significantly the suggested changes include the demand for statutory specifications as to how the clause "in the interest of justice" should be construed. The attention of the courts should no longer be limited to the question of "whether any substantial point of law or of fact is involved." They should also consider "whether it seems likely that there is anything which might be said about the accused which he seems unlikely to be able to say for himself." In cases of doubt, consultation would be had with the probation officer.

Like the Rushcliffe plan the Haldane proposals do not pay enough attention to preventive work. The offices which are to function as the

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25 Ibid., at § 1, ¶4.

26 The topic is dealt with searchingly in a chapter entitled "Legal Assistance—Whose Responsibility?" of the study from which this article is excerpted. It is treated also by way of practical recommendations in the blueprint for an American scheme of legal assistance which the study contains.

27 Legal Advice and Legal Aid for Poor Persons, op. cit. supra note 12, at § 2, ¶¶ 14–18.
certifying agencies are expected to restrict themselves to mere counseling and to trifling services connected with advice. Any action beyond this limit is to be referred to the private lawyers working under the plan. But the proposals are at least, in contrast to the Rushcliffe report, explicit to the effect that the referrals are to include all preventive legal services and not only negotiations. Hence preventive services are, after all, available, if only in the more cumbersome manner provided for assistance in litigation.28

This arrangement means that the best opportunity for integrating social casework with the legal services is lost. In other words, both of the English plans overdo the virtue of establishing legal assistance "as of right," in contrast to legal aid "as on condition" of meeting a behavior pattern superimposed upon the law by philanthropic sponsors. They fail to afford social casework even to clients who are amenable to a broadened "social treatment," or who ask for it.

A last weak point of the plan arises from an objective which, though in itself commendable, would undoubtedly lead to unfortunate results. The fees to be earned by the performing solicitors and barristers are set too low. They amount roughly to 66 per cent of those charged in ordinary cases, as compared to the 80 per cent accorded by the Rushcliffe plan.29 The proponents obviously wish to curtail the financial burden which the plan imposes upon the public. But this modesty creates too large a difference between the regular fees and those that the lawyers can earn through assisted work. The evils of a restrictive policy in granting applications and the reluctant participation of lawyers which are thrown out by the main door might thus reappear by a side door. The fact that only one-third of the members of the District Committees which supervise the certifying agencies will be composed of lawyers is no adequate safeguard against this danger.

III. Sweden

In order to conclude our brief survey on a reassuring note, I have singled out the Swedish system with its large number of gratifying features for a few additional comments. In the main contours, this scheme, as it emerges from the Swedish statute of June 19, 1919, is almost identical with the pattern employed on the Continent by the Germanic countries. All the difference, however, arises from the use of the assigned-

28 Ibid., at § 2, ¶5.
29 This pertains to the High Court, Court of Appeal and to certain cases in the county courts. Ibid., at § 2, ¶¶ 8, r2.
counsel system in its sound version. The performing lawyers are paid compensatory fees out of public funds. The rate equals approximately that which the losing party to a legal action has to pay to satisfy the fees of his opponent's lawyer.

Financial eligibility to legal assistance is tested under a flexible formula. The merits of the cause or the chances of its success are not examined, although claims of an obviously petty nature are not eligible.

Legal advice and all preventive legal services are offered in the public legal-assistance offices. More than any other country, Sweden gives recognition to the need for preventive legal services, and to the fact that even the best reference scheme needs to be supplemented by a permanent office whose scope transcends that of a mere referral agency and certifying authority. The offices are operated by municipalities and subsidized by the royal government. No means test is demanded of those desirous of obtaining nonlitigious services; the applicant's statement that he cannot get legal services through the ordinary channels is deemed sufficient proof of his need.

The granting of legal assistance in litigation is a judicial function. If a court is not in session the decision is made by the president of the court. Only in this case can a refusal of the application be appealed to the court as a whole. Here too, then, broader provision for judicial review is needed.

The actual work is performed either by attorneys on the staff of the legal-assistance offices or by assigned attorneys. While preference should be given to the attorneys of the legal-assistance offices, private lawyers are not excluded. In the choice of these two possibilities and in the selection of the individual lawyer, the courts are advised to abide by the applicant's wish, unless particular reasons advise against the attorney so chosen.

Competition between the public legal-assistance offices and the private members of the bar is in no way interfered with. The earlier cited study of the League of Nations, Legal Aid for the Poor, contains an appended memorandum of the director of the Stockholm municipal legal-assistance office, Göster Swartling. In it the writer expresses satisfaction that the Swedish law did not create for the assistance offices an exclusive right to deal with assisted cases: "The free competition which exists between the institutions and private advocates has had a stimulating effect and has given the staff of the institutions an added interest in the cases they have to defend." I can well imagine how devious this situation must appear to a majority of the American bar. It almost suggests that the
enactors of the Swedish law and the Swedish bar really meant to establish free legal service on a par with private practice.\textsuperscript{80}

When compared with the financial effort which America has made until now on behalf of legal aid, the expenditure of Sweden for the analogous problem is impressive. The legal-assistance office of Stockholm, backed by a fully effective system of tax-paid legal assistance, had a budget in 1944 of approximately 293,000 Swedish kroners. The city's population numbered at that time 700,000 persons and the buying power of the kroner equaled fifty cents, according to information from reliable sources. The New York Legal Aid Society, with an incomplete \textit{in forma pauperis} statute as its background, serves potentially a population of 7.7 million, eleven times the number of that of Stockholm. The office was operated in 1944 on a total expenditure of $142,245, of which $11,553 was spent on the expensive annual fund-raising campaign, and thus could not be converted into service. To equal the effort of the capital of thrifty and comparatively poor Sweden, the City of New York would need to have a legal assistance office with an annual budget of $1,611,500, hence with a budget more than ten times that of the New York Legal Aid Society.

\section*{IV. Conclusion}

The long drawn-out trouble of England and Wales with respect to legal assistance, as well as the tolerable Continental pattern, elucidate principles which any effective, modern scheme must not fail to embody. The experience of England and Wales in particular should be understood as one continuous denunciation of the attempt to create legal assistance along voluntary charitable lines. The results of any such venture are bound to prove disappointing. In those countries which adopt the charitable approach to legal assistance it makes little difference whether, as is true in the United States, the government displays no direct interest in the manner of its performance, or whether under the pressure of public opinion, as in England, the government has prodded the legal profession into assuming the charitable burden.

The breakdown of the various Poor Persons' Procedures presents the strongest possible argument for the proposition that legal assistance is a \textit{task for organized society as a whole}, hence for government. To leave

\textsuperscript{80} Equally outside the range of American thinking on this subject are the free legal services and incidental expenses rendered in some countries in certain types of cases, \textit{irrespective of the financial status} of a person. Belgium, Holland, Norway, Denmark, Hungary, and parts of Argentina offer them to persons accused of crime. In Denmark and Norway free representation by counsel is provided, under certain circumstances, in matrimonial matters.
the problem to the legal profession leads only to a mock solution. Again it matters little whether the conflict between the public interest and that of the profession has taken shape merely as the latter’s reluctance to do unpaid work, as it has in England; or whether, as in America, the “apple of discord” is the profession’s refusal to drop the contingent fee, and its fear lest the inveterate, general anarchy in the charging of fees be remedied.

But there is a particular lesson to be learned from legal assistance in England. To understand its implications we must know that the spokesmen of legal aid within the American Bar Association have long realized that a new, state-sponsored version of the scheme would, sooner or later, become a necessity. Concerned about the continuation of bar control over such a new scheme, they gave thought to the manner in which possible public resistance against its administration by the bar could be met. The answer to the difficulty was seen in the establishment of the frequently postulated integrated bar.

A bar in which, by requirement of law, every lawyer must be a member, a bar vested with certain powers relating to standards of admission and ethical conduct, would, Smith and Bradway asserted, instantly become a “quasi public, if not indeed a public institution.” None of the apprehension which might be harbored against the control of a public scheme by the existing type of bar association would militate against control by a “quasi public” or “public” body; for the integrated bar would provide all safeguards for emphasis on the public interest, if necessary in preference to that of the bar.

The Incorporated Law Society, the professional association of the English solicitors, amounts, in most respects, to what would be called in this country an integrated bar association. It obtained control over English legal assistance in 1926. The effect was that the Poor Persons’ Procedure continued for almost twenty years to prove as disappointing as before. Egerton tells with commendable insight and frankness how, even in this era, English lawyers resorted to a host of justifications for reducing the volume of their unpaid work, and thus have until now thwarted any effective legal protection of the poor. He opens his account of the facts which amount to so strong a case against bar control by saying with typical English restraint: “It is not until he comes to study the systems of other countries that an English lawyer realizes

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31 See Egerton, op. cit. supra note 1, at 58–67.
that the system, whereby the legal profession or one branch of it, decides whether a grant of legal aid shall be made or withheld, is open to question."

That voluntary legal assistance under the control of a bar of any description is obnoxious and at variance with the nature of legal assistance as a phase of the general administration of justice, is thus no longer a mere conjecture. It is proved by experience, and, what is more, by the experience of a nation and a bar both of which are marked by an outstanding sense of social responsibility. We may safely assume that not even the momentous shift from a voluntary scheme to one under which the performing lawyers are compensated out of a public treasury would be fully able to veil the harmful and undemocratic anomaly of bar control.

In the public scheme for popularizing legal service which the future must bring forth in America, the role of the bar is that of the competent executor. The profession will be wise not to aim for any other. Its desire for administrative domination would be ill advised, and not in accord with a sound concept of the lawyer's place in society.

This concept envisages the bar as an independent, self-governed body of spokesmen for the individual, and a guardian of the authorities in their application of the law. No other function, office, or allegiance must be permitted to diminish this freedom and the aggressive force it gives. If, under this philosophy, lawyers will lead the people in the effort to obtain legal assistance, and will perform their role with sincerity, they cannot fail to establish those desired public relations which they have vainly tried to foster with the palliative legal aid.

Easy access to justice for the average citizen is bound to raise the income of the rank and file of the profession. It will, better than any other measure, enhance the prestige of the American lawyer.