

**SEVEN YEARS WITH LEGAL AID (1972-79):
A PERSONAL VIEW OF SOME EVENTS AND
BACKGROUND LITERATURE†**

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I have written elsewhere the history of legal aid in Manitoba up to 1977.¹ Soon after that piece was written, several events occurred which spelled an end to many of the dreams and much of the idealism which suffused Legal Aid Manitoba from its start in 1972. In this paper, I wish to write briefly of those events, and to discuss some aspects of the experience of Legal Aid Manitoba which I think are of significance not just to those of us who lived through them, but to other legal aid plans as well.

The Context

In 1969, the New Democratic Party was elected and, for the first time, formed the government of the province of Manitoba. Numerous innovations relating to law soon occurred. Among them were the creation of a Human Rights Commission, Rentalsman, Ombudsman, Law Reform Commission, and the Legal Aid Services Society of Manitoba. The Legal Aid Services Society (hereinafter referred to as Legal Aid Manitoba or "LAM") was a statutory corporation established by an act passed by unanimous vote in the legislature in 1971. The Act was based on the report of a Task Force which had gathered a considerable amount of its information and impressions in the United States.

Legal Aid Manitoba had a Board of Directors of nine people, five of whom were required by statute to be lawyers. This group directed the spending of a budget which rose from \$850,000 in 1972 to \$3,200,000 in 1977. The number of people assisted increased from 12,000 in 1972 to more than 50,000 in 1977.² Legal Aid services were delivered by a combination of *judicare* (lawyers in private practice) and neighbourhood law centres (full time employed staff lawyers). By 1977, more than 500 of Manitoba's 1,000 lawyers were participating in the plan, while 25 staff lawyers and three paralegals were located in six neighbourhood law centres (also known as "community law offices").³

Not long after it started, Legal Aid Manitoba was recognized well beyond the provincial borders as an ambitious and vibrant plan. Visitors from other provinces and countries invariably went away impressed by the enthusiasm of the staff and directors, by the size of the undertaking, and by the rapidity with which programs were being established in courts and institutions throughout the province. The 1974 report of the Osler Task Force on Legal Aid in Ontario remarked on the "zeal, idealism and energy" of the

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† Quotations in the article for which citations are not provided are from unpublished materials in the author's possession.

1. N. Larsen, "Legal Aid In Manitoba" in *The Law Society of Manitoba: 1977 - 1977* (C. Harvey ed. 1977).

2. Legal Aid Services Society of Manitoba Annual Reports (1972-77).

3. Manitoba has a population of about one million people, half of whom are located in the city of Winnipeg. Three law centres are located in Winnipeg and three in rural areas. See also *infra* n. 77.

staff, and on the "single-mindedness" of the administrators.⁴ An observer from England wrote of the high quality of leadership in the plan, and its "intellectual open-mindedness".⁵ A delegation from the Caribbean looked at several Canadian legal aid plans in 1976 and returned home with a recommendation that the Manitoba plan be adopted.

In retrospect one can see that the enthusiasm and accomplishments reached their peak in Legal Aid Manitoba in 1975, just about the same time as the Canadian legal aid movement also "peaked out". For many of us the beginning had been the "National Poor Peoples' Conference" in Ottawa in 1971, while the ironic end — or the beginning of the end — of this first phase was the National Legal Aid Conference in Victoria in 1975. (I have more to say on these conferences later in this paper.) Most of the people who were at those conferences have since left the legal aid field, though a few retain some connection with the legal aid movement as lawyers in private practice, or as law school professors. None of them saw legal aid accomplish anything near what they had once hoped for and what, at the start, they regarded as achievable and even inevitable.

In Manitoba, the dream — somewhat the worse for its contact with some of the harsh reality described below — came to an abrupt end in 1977.

Legal Aid Manitoba had developed over five years (1972 - 1977) as a child of the New Democratic Party government. Although relations between the government and Legal Aid had been good, the rapidly escalating budget had been of considerable concern to the Premier, members of his cabinet and several senior civil servants. In 1976 and 1977, meetings were arranged by the Premier's office. The subject at both meetings was the budget, with respect to which Legal Aid had requested sizeable supplements. Attending the meetings were the Premier, other senior cabinet members, several senior civil servants, and the directors and senior administrators of Legal Aid — some thirty people altogether.

At the meeting in 1977, the Premier expressed concern that Legal Aid was too easy to obtain and that it might be clogging up the courts. In what was to become a classic story illustrating the level of governmental understanding of Legal Aid, a cabinet minister mentioned as an example the possibility of a court case involving a farmer's cow wandering into the field of some other farmer. The Chairman of the Legal Aid Board of Directors gave assurances that there had been no case of that kind in the first five years of Legal Aid. One of the cabinet ministers asked whether applicants for legal aid could not be put on a waiting list, "as doctors list people for elective surgery", so as to stretch out cases and costs over a longer period. This unfortunately was the level of debate, at times. But in the end there was no doubt of the Premier's basic support of the program. At both meetings, after having had all his questions answered, he abruptly expressed confidence that the extra funds requested by Legal Aid would be wisely spent, stood up and left the room. Given the negative attitude that permeated both meetings up to this point, everyone was surprised, and

4. Report of the Task Force on Legal Aid In Ontario (1974) 22.

5. R. Brooke, "Legal Services in Canada" (1977), 40 Mod. L. Rev. 533, at 548-9.

several (including myself) were not at all sure that they had heard correctly.⁶

Late in 1977, the Conservatives won the provincial election. By March of 1978, Legal Aid had a new Chairman and seven new Directors. It also had a suddenly and arbitrarily reduced budget, and a major financial crisis.

The Legal Aid Society had been established as an agency separate from government, run by an "independent" Board of Directors. Although Board members were appointed by the government, the first group — which remained more or less intact for the first five years — had a mind of its own. So too may have the Board that existed after March, 1978, but for as long as I was there; the hard times made it difficult for them to demonstrate an independence of mind.

All the money came from the provincial government through the Attorney-General's Department, with which Legal Aid met each spring to discuss its proposed budget for the following year. Most of the funds for Legal Aid were gathered by the provincial government from the federal government and from the interest on lawyers' trust funds. However, none of this played any part in the budget discussions. The government was usually concerned less with the source of funds than with total expenditures. Legal Aid made no issue of this because it was unsure of how stable the interest on trust funds was as a source of revenue. The federal government appeared to be on the verge of requiring banks to calculate interest on a daily basis — which of course would have been the end of any revenue from that source. Similarly, Legal Aid had little or nothing to do with negotiating the federal government's contribution for legal aid. Legal Aid dealt only with the Attorney-General's staff, who took the budget request to the Management Committee of Cabinet and to the Cabinet, and to whomever else was involved. Legal Aid knew virtually nothing about the internal process. For example, when in March, 1978, the budget request of 3.6 million dollars came back to Legal Aid reduced to 3.2 million, the typed figure had been crossed out and some still unknown person had written in the figure of 2.8 million.

While it was true that the government literally did not, to my knowledge, try to interfere with the handling of any individual cases, Legal Aid's financial dependence on government ultimately made the Society's autonomy tenuous. The 1978 budget was short by \$800,000 of the estimated need to operate the programme on the same level as in the previous budget year. Consequently, the Board of Directors rushed through a number of financial restraint measures, including a \$35.00 user fee (the first one in Canada) reduced coverage, and frozen financial eligibility guidelines.⁷ There was little or no alternative to this. The government was cutting the budget of many agencies, as it had promised it would if elected. The decisions were purely political, implemented without regard to factors like the efficiency of the program, its relative youthfulness as compared to other government agencies, or the quality of the service. It was not known who

6. I was not present for the meeting in 1976, but several people who were at both meetings told me that they were much the same in content, and completely the same in result.

7. See L. Krotz and S. Alexander, "Act II" *The Continuing Saga of Legal Aid* (1978), 2(4) *Canadian Lawyer* 22.

was making the decisions: the Premier? the Cabinet? the Attorney-General? senior civil servants?

When government is providing funding, as it probably always will for legal aid, independence will always have its limits.⁸ But for five years, the struggle for money was essentially successful, and Legal Aid Manitoba had a chance to develop a program such as no other similar agency has had. Many of the concepts and projects that were tried turned out well, though some failed. The balance of this paper is my personal view of what happened with two concepts which were fundamental to the plan: citizen participation and neighbourhood law centres. I also consider some background materials, particularly from the United States — which is really where it all began.

Since my conclusions that follow are not totally positive, let me emphasize that I do not regard Legal Aid Manitoba as a failure. Many things might have been done differently and perhaps better, but, on balance, it seems to me that we did not do badly. In fact, in the area of developing a workable mix between judicare and community legal services, we did very well indeed. I wish we could have done more.^{8A}

8. At the time of the enactment of the *Legal Aid Act* in Ontario (1967), the Premier of Ontario was reported to have commented: "The objective of Legal Aid in Ontario is to ensure that everyone enjoys the right to obtain legal advice or to be represented by the counsel of his choice regardless of financial ability to pay for counsel. However, we must keep in mind at all times that any programme in which society provides protection for the basic rights of those people who cannot help themselves cannot be permitted to become too great a burden upon society".

8A. A great deal of what happened in Legal Aid Manitoba from 1972 to 1977 was inspired by the first Chairman of the Board of Directors, Roland Penner. At the time he was appointed Chairman, he had been active for eleven years in the practice of law. At the time of his appointment he was a full-time professor at the Faculty of Law at the University of Manitoba. He was well-known for his public speaking, quick wit, and interest in the arts. He had been especially noted for his left-wing views, though he had not been politically active since the early 1960's. These political beliefs were sometimes at the root of criticism of Penner or Legal Aid in the first few years. From time to time, there was suspicion that the socialist government and Penner were plotting a form of lexicare for Manitoba. Prior to the provincial election in 1977, the chairman of the provincial Conservative Party announced that if the Conservatives were elected, Penner would be the first to go.

In addition to his offices at the University and law firm, Penner maintained an office at Legal Aid as well. Virtually every day, he would appear with a list of questions and ideas, and a check list of past items. In this way he goaded and inspired the staff to expand and improve services as rapidly as possible. Unlike most of the other members of the Board of Directors and the administrators, Penner had a realization that time was of the essence. The government was liable to cause legal aid services to be restricted by cutting off funds before the plan was anywhere near its potential. As it happened, the inevitable cutbacks came after a broadly-based plan had been established, and as the demand for service was levelling off. To some extent, Penner was prepared to risk a lesser quality of service for the time being in order to establish an extensive plan.

As the plan expanded, it gathered both critics and friends. In the latter group were not just clients, but prison officials, prosecuting attorneys, family court counsellors, criminal court judges and other service and court personnel who came to rely on legal aid services. When the regular service to Stony Mountain Penitentiary was threatened in 1978, the protest was loudest from prison officials. When services to Juvenile Court were reduced in 1978, their partial restoration within a few months was the result of complaints from probation officers. When law firms in one area threatened in 1979 to refuse to do legal aid work, the local prosecuting attorney supported their demand for increased compensation, and pointed out the impossibility of conducting court without defense counsel (though that was how it was done until Legal Aid came along in 1972).

Roland Penner believed that legal services were absolutely essential for low-income people. If he usually got his way with the politicians and his fellow Board members, it was not simply the result of his being shrewd — which is what his critics attributed his success to — but the effect of his strong belief in the value of the work that was being done, and that *could* be done. In the face of his firmly expressed confidence that Legal Aid could do the job he said it could do for low-income people, it was difficult for a "social democratic" government to stand in the way or to withhold the necessary funds.

Citizen Participation: Pursuing An Ideal⁹

In March, 1971, the Report of the Fact Finding Committee on Legal Aid in Manitoba was released by the Attorney-General.¹⁰ The eleven person committee examined firsthand the delivery of legal aid services in several cities in the United States and concluded that "none of the legal aid systems we saw there . . . appeared to us to be entirely suited to the Manitoba scene". In spite of this disavowal, the Report showed that the Committee was definitely influenced by ideas which were at the time an integral part of the legal services movement in the United States. In particular, the Committee (which included six lawyers) was influenced by the notion of "citizen participation" in the delivery of legal services, an idea which I have been able to find mentioned only once in Canadian legal writing prior to this Report.¹¹

The report recommended the incorporation of a non-profit, autonomous corporation to be known as the Legal Aid Society of Manitoba:

The Legal Aid Society should consist of 12 members who would also constitute its Board of Directors . . . We were unable to reach unanimity upon the composition of the Board: all the non-lawyer members of the Committee believe that the legal profession should not dominate the Board and that no more than, say, 40% of the Board should be lawyers; the lawyer members of the Committee believe that there should be equality of representation in the Board between lawyers and laity. Certainly, the Board should be as broadly representative as possible of other segments of the community, including potential recipients of legal aid. The latter objective can, but need not necessarily be accomplished by appointing to the Board, one or more people on the welfare rolls; alternatively, legal aid recipients can be represented on the Board by competent social workers, ministers, those elected for political office and others

There should also be established an overall Advisory Committee as well as a smaller local Advisory Committee for each area. The Advisory Committees, who should not necessarily have a majority of lawyers amongst their members, should meet as often as may be necessary . . . Ideally, each Advisory Committee should consist of six persons, three appointed by the District Bar Association and three by the Attorney-General after consultation with the Minister of Health and Social Development . . . If political affiliation is even to be a factor, it would be a minor one.

When the *Legal Aid Services Society of Manitoba Act* was passed unanimously by the legislature in July, 1971, it provided for a Board of Directors of 9 persons (increased in 1975 to 11), five of whom were required to be lawyers and four of whom were required to be non-lawyers.¹² In addition, the Regulations under the *Act* included these sections dealing with "Neighbourhood Law Offices":

Each Neighbourhood Legal Aid Centre may have an Advisory Committee, appointed by the Board from among the residents of the community served, to advise the senior attorney, and to meet at such times and places as he may decide, but in any event not less than once every two months.

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9. A note in terminology: There are some differences in the terminology used in Canada and in the United States. In the U.S., "legal aid" generally refers to schemes which delivered legal services to low-income people prior to the establishment of the Legal Services Program in 1964, after which the term used is "legal services". In Canada, "legal aid" refers to any method used anywhere at any time to deliver legal services to low-income people. The term "poor people" is more common to the U.S. In Canada "low-income people" is used by most legal aid programs. In this paper I use the terms interchangeably.
 10. The Report was never formally published and only a few copies were distributed.
 11. See *infra* n. 59.
 12. S.M. 1971, c. 76, s. 4. Amended in 1972 and 1975.

The Board shall appoint the Advisory Committee, in a number to be determined by it, from a list of nominees submitted by community organizations within the particular community.¹³

The Board of Directors was wholeheartedly behind the concept of citizen participation. In October, 1972, on the occasion of the opening of the first Law Centre, the Board released a four-page statement of "Advisory Committee Guidelines". It stated that "The Board is dedicated to the general proposition that the concept of an Advisory Committee is not mere 'tokenism', not merely paying lip service to the principle that the community to be served has the right to be heard with respect to basic matters".

On a practical level, the Guidelines provided that all Board decisions materially affecting the function of a Neighbourhood Law Centre would forthwith be transmitted to the Advisory Committee for reaction. It further provided that the Advisory Committee would be consulted prior to any lawyer being hired or fired, or any projects being carried out in the community. Everyone's heart was in the right place, and the concept was one which had no known enemies. How could it fail?

Where did this idea of "citizen participation" originate? No doubt it has a long history that could be traced through political and sociological writings. However, I direct myself here to the question of its more recent life in North American legal circles, where it started in the mid-1960's and continues even now to have support — though much reduced from what it once was.

The point of departure in tracing the history of citizen participation in Canada is the *Economic Opportunity Act* (1964) of the Congress of the United States. This was the statutory basis for what came to be known during the presidency of Lyndon Johnson as the "War of Poverty". In creating community action agencies and programs, one of which was to be the Legal Services Program, the *Act* spoke of its purpose to promote, among other things,

the development and implementation of all programs and projects designed to serve the poor or low-income areas with the maximum feasible participation of residents of the areas and members of the groups served, so as to best stimulate and take full advantage of capabilities for self-advancement and assure that those programs and projects are otherwise meaningful to and widely utilized by their intended beneficiaries¹⁴

In his book, *Maximum Feasible Misunderstanding*, Daniel Moynihan has described the steps leading to the passage of the *Economic Opportunity Act* and, in particular, the section providing for citizen participation. According to Moynihan, who participated in many of the events he describes, the first sign of anything like citizen participation came in a January, 1964, "draft specification for the poverty bill" which referred to "comprehensive action programs, initiated, planned and carried out in local communities". The communities were to prepare their own programs, including arrangements for administration, with "appropriate representation of and participation by key government agencies, community, and neighbourhood groups". Initially, the community action programs represented the thrust of the antipoverty program itself but, within one month, it became but one

13. Man. Reg. 106/72, ss. 56(1) and 56(2).

14. 42 U.S.C. s. 2781(a)(4). And see s. 2782(a)(3).

item among many which were being developed by a working group (the "Shriver task force"). Ironically, in the light of later events touched off across the United States by community action programs, Moynihan records that it was a minor matter for the working group:

Although memory too readily deceives, it may be of use to record here the impression that community action simply was not much on the minds of those who were most active in the Shriver task force. In retrospect, at least, it would seem to have assumed a kind of residual function.¹⁵

The invention and adoption of the term "maximum feasible participation" occurred at a meeting of the task force in February, 1964. Although no one who was at the meeting was later able to recall who coined it, Moynihan says it was "clearly a lawyer's term"¹⁶ and that it was intended as a device to require the poor to participate — that is, share — in the benefits of the program:

Subsequently this phrase ("maximum feasible participation") was taken to sanction a specific theory of social change, and there were those present in Washington at the time who would have drafted just such language with precisely that objection. But the record, such as can be had, and recollection indicates that it was intended to do no more than ensure that persons excluded from the political process in the South and elsewhere would nonetheless participate in the *benefits* of the community action programs of the new legislation. It was taken as a matter beneath notice that such programs would be dominated by the local political structure.¹⁷

A bill was introduced in Congress in March, 1964, and the *Economic Opportunity Act* was signed into law by President Johnson the following August. The participation clause, as drafted by the Shriver committee in February, was not altered in the legislation. There was no public discussion of it and Robert Kennedy was the only person to refer to it (in passing) in the Congressional hearings. The reason for the lack of discussion, according to Moynihan, "was simply that no one in authority at either end of Pennsylvania Avenue regarded the participation clause as noteworthy".¹⁸

Over the next year (1964 - 1965), the people in charge of administering the War On Poverty rapidly expanded the notion of how the poor were to be involved. In 1965, the Office of Economic Opportunity issued a "Community Action Program Guide" which indicates that the idea to which no one had paid much attention had, over a year, become "vital": "A vital feature of every community action program is the involvement of the poor themselves — the residents of the areas and members of the groups to be served — in planning, policymaking, and operation of the program."¹⁹

The way in which the idea of participation so quickly got blown out of proportion was not lost on everyone. A Note in the *Yale Law Journal* in 1966 commented that ". . . there is no evidence of thoughtful commitment to participation of the poor by either Congress or the majority of the drafting group. Section 202(a) was thrust into the action without any attempt to

15. D. Moynihan, *Maximum Feasible Misunderstanding* (1969) 86.

16. *Id.*, at xvi. For another account of how "community action" become part of the *Economic Opportunity Act*, see S. Rose, *The Betrayal Of The Poor* (1972) 89 - 120; L. Rubin, "Maximum Feasible Participation: The Origins, Implications, and Present Status" [1969] *Annals* 14.

17. *Supra* n. 15, at 87.

18. *Id.*, at 91.

19. *Id.*, at 97.

accommodate the rest of the poverty program to this revolutionary concept of participation".²⁰

Earlier, in 1964, the Yale Law Journal had published an article, by Edgar Cahn and Jean Cahn, which was to have an immense influence on poverty law and poverty lawyers in the United States and Canada.²¹ The Cahns promoted the idea of client control of the delivery of legal services in terms which were to be echoed in many subsequent articles and speeches by lawyers involved in the delivery of legal aid services.

What was the point of citizen participation?

There are at least two compelling reasons for fostering and, where appropriate, subsidizing institutions and vehicles of dissent in slum communities. First, free expression by the slum community is a concomitant of our faith in the dignity and worth of its individual members Second, protest and criticism can be viewed as a form of dissent which should be promoted for the corrective insights and wisdom it may offer To date, the silence of the poor has deprived us of a major relevant source of information and insight.²²

How was it to be accomplished?

No prediction can be safely ventured about the forms which the civilian perspective should or must take, for that will necessarily depend on the context within which it operates and the problems upon which it focuses (T)he underlying problem becomes how, with any fidelity, to reproduce and amplify the voices of protest and grievance One answer — but it is only a partial answer — is to create within those segments of the populace a supply of persons (often referred to as "indigenous leaders") who are capable of articulating the demands and concerns of their "constituency".²³

What was the test for determining whether there was "maximum feasible participation"?

The ultimate test, then, of whether the war on poverty has incorporated the "civilian perspective" is whether or not the citizenry have been given the effective power to criticize, to dissent, and where need be, to compel responsiveness.²⁴

In June, 1965, Jean Cahn spoke at the National Conference on Law and Poverty in Washington. Her speech reflected the confidence she had in the concept of citizen participation and where it would lead:

In community after community, I have seen among the indigent a mounting frustration, a mounting sense of indignity, the mounting expectations And despite the attempts of the entrenched to keep control, the poor will increasingly demand their due The time is upon us then . . . all the poor . . . will one way or another throw off the yoke of enslavement in the daily details of their lives and demand the right to participate as equals in the political, economic and social benefits of this country.²⁵

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20. Note, "Participation of the Poor: Section 202(a)(3) Organizations Under The Economic Opportunity Act of 1964" (1966), 75 Yale L.J. 699, at 602.
In arguing that the neighbourhood lawyer should concentrate on providing service for the individual low-income client, two lawyers made passing reference to "the unthinking fixation on participation by the poor, misleading and perhaps dangerous as it may be". Matthews and J. Weiss, "What Can be Done: A Neighborhood Lawyer's Credo" (1967), 47 B.U.L. Rev. 231, at 236.
21. E. Cahn and J. Cahn, "The War On Poverty: A Civilian Perspective" (1964), 73 Yale 1317. For some background on the article see E. Johnson, Jr., *Justice and Reform: The Formative Years of the OEO Legal Services Program* (1974), 32 - 34, 40 - 43.
22. Cahn and Cahn, *supra* n. 21, at 1330.
23. *Id.*, at 1331-2.
24. *Id.*, at 1329.
25. Address by Jean Cahn before the National Conference On Law and Poverty, Washington, D.C., June 24, 1965 (Unpublished).

In those times of campus unrest, boycotts, marches, protest rallies, office seizures, protest songs, picketing and mass demonstrations, Jean Cahn was not the only one who saw inevitable results:

The people today are angry, fearful and contemptuous of the government, and both the rhetoric and the physical expression of rebellion are becoming increasingly violent. This situation may lead to forceful repression of dissent and rebellion by the central government; it may die out for internal reasons (although this is the least likely possibility), or it may result in revolution.²⁶

In 1966, A Note in the Harvard Law Review commented on the spirit of the times: "The feeling of being in the vanguard of impending institutional change accounts for the sense of excitement and crusade expressed by so many of the participants in the program."²⁷

The feeling that a social revolution was just around the corner created an excitement that was infectious. Although in 1964 Sargent Shriver had a limited faith in the potential of Community leadership,²⁸ and the idea of community action was a long way down his list of concerns, by 1965 he was a strong advocate. In August of that year, he addressed the American Bar Association, speaking as the first Director of the Office of Economic Opportunity:

Our statute requires maximum feasible participation of the poor in all aspects of anti-poverty programs. We intend to carry out the mandate of Congress on this. But to do so does not require the imposition of inflexible and arbitrary quotas. We have already financed legal service programs approaching this requirement in a variety of ways. We believe in flexibility. But flexibility cannot become an euphemism for evasion of our statutory duty.²⁹

Shriver's conversion to the idea of citizen participation was paralleled at the Legal Services Program, an arm of the Office of Economic Opportunity.³⁰ In September, 1965, Clinton Bamberger became the first director of Legal Services. In November, he chaired the first meeting of the National Advisory Committee, a group of lawyers who were to set the guidelines for the Legal Services Program. Earl Johnson has described that meeting, at which the main topic was "maximum feasible participation".³¹ Bamberger started by saying he was "*willing to have the idea discarded*. I am not personally convinced that representation of the poor on the board is always the best way to get this" Yet, by the end of the meeting, which does not by Johnson's account seem to have been anything out of the ordinary, Berberger was a changed man: "Bamberger, who entered the meeting with his own serious doubts about the wisdom of requiring representation of the

26. Kotler, *Neighborhood Government: The Local Foundation of Political Life* (1969).

27. Note, "Neighborhood Law Offices: The New Wave In Legal Services For The Poor" (1966-67), 80 Harv. L. Rev. 805, at 805.

28. *Supra* n. 15, at 82 and 90.

29. Address by Sargent Shriver to the American Bar Association, Miami, Florida, August 11, 1965. Quoted by K. Pye, "The Role of Legal Services In The Anti Poverty Program" (1966), 31 L. and Contemp. Prob. 211, at 226. In a review of Daniel Moynihan's book (*supra* n. 15) in the New York Times on February 2, 1969, Adam Walinsky, Robert Kennedy's legislative assistant, asserted that the war on poverty was lost as early as January of 1966, partly because Shriver ignored employment problems while giving attention to "high visibility programs like Legal Services and Headstart".

30. For the history of the Legal Service Program, see E. Johnson Jr., *Justice and Reform: The Formative Years Of The American Legal Services Program* (1974); P. Francis, "Legal Aid: The Demise Idealism" (1976-77), 23 Wayne L. Rev. 1261; S. Scheindlin, "Legal Services — Past and Present" (1974), 59 Cornell L. Rev. 960; S. Huber, "Thou Shalt Not Ration Justice: A History Aid Bibliography of Legal Aid In America", (1978), 44 Geo. Wash. L. Rev. 754; J. Hee, "Community Law: An Alternative Approach To Public Legal Services" (1978), 18 Santa Clara L. Rev. 1054.

31. E. Johnson Jr., *supra* n. 30 at 108-112.

poor, emerged with a strong conviction of its necessity."³²

Soon after, at a symposium at Notre Dame Law School, Bamberger spoke about citizen participation:

[T]here must simply be meaningful representation — representation which will bring to the councils of charity voices angry with the failures of charity and which will produce a fruitful dialogue between groups that may have never talked to one another before

This principle of participation is not a conversation piece; it has been applied.³³

The call for participation was something about which some people were skeptical, but few spoke against it, and no one wrote against it. After all, it was democracy in action:

Community work is only one aspect of the far broader issue of how to meet people's needs and give them an effective say in what these are and how they want them met. It is part of a protest against apathy and compacency and against distant and anonymous authority . . . (It) boils down to the problem of how to give a meaning to democracy.³⁴

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The residents of slums feel that they lack "access" to the government in the sense that they are not confident of their ability to transmit their views to the city administration and have them taken seriously Decentralization of big city government offers a means of providing this access.³⁵

With these kinds of attitudes in the air, it was not long before legal aid lawyers began to feel guilty if they were not consulting with the poor. The guilt feelings appear to have started at a conference of lawyers and law professors in Washington in 1964. The topic was "The Extension of Legal Services To The Poor". The later report stated:

There is the problem of the resistance of the poor to any service program for them, no matter how good and well designed by professionals. Significantly, it was noted that no representative of the poor was present at the conference. There is too much of providing services *for* them, doing things *to* them, instead of *with* with³⁶

As time went by, nothing specific appeared in law journals as to how citizen participation was working out. Though it was soon generally apparent that there were problems with it, the fault was seen to be not in the fundamental concept but in a lack of effort or commitment by those in the process who were not poor:

The problems of defining and interacting with the appropriate lesser public are undeniably difficult and possibly frustrating. But without commitment to

32. *Id.*, at 112.

33. C. Bamberger, "The Legal Services Program Of The Office Of Economic Opportunity" (1965-66), 41 *Notre Dame Law* 847, at 851 - 852.

An early expression of the administrator's view of participation is found in the address of Theodore Berry (Director, Community Action Program, Office of Economic Opportunity) to the National Conference On Law And Poverty, Washington, D.C., June 25, 1965 in P. Wald, *Law and Poverty: 1965*. Mr. Berry said, in part: "We must recognize that one of the most common characteristics of poor people is their apathy and suspicion toward law and lawyers The best method for overcoming these attitudes is to give the poor direct participation in the legal program . . ." (At p. 124.)

34. *Community Work And Social Change, A Report of a Study Group On Training*, set up by the Calouste Gulbenkian Foundation (1968).

35. R. Babcock and F. Bosselman, "Citizen Participation: A Suburban suggestion For The Central City" (1967), 32 *L. and Contemp. Prob.* 220, at 229.

36. U.S. Department of Health, Education and Welfare, *Conference Proceedings: National Conference on Law and Poverty* (1965) 101.

democratic procedures — without a concern for program legitimacy — the promoters of legal aid may well confess their unconcern for the dignity of their clients.³⁷

The “citizen participation” literature in the 1960’s was always rather idealistic, hopeful and vague in practicalities. Poverty lawyers were urged to work with citizen groups in order to get the best and broadest results.³⁸ But where were the groups? It was often assumed they were there, knowledgeable and easy to consult with. Occasionally there was mention of the fact long accepted by sociologists that “the poor are characterized by a relatively low level of organizational participation; they belong to few if any voluntary organizations, and they are ordinarily not even members of unions”. The authors who made these points, in a law review article in 1965, offered an answer to the problem: “It may be necessary, therefore, to create new types of organizations for the poor”.³⁹

Perhaps the most fundamental and agonizing question had to do with selecting representatives of the poor, a subject discussed in a Note in the Harvard Law Review in 1966.⁴⁰ The Note first stated that “most legal service programs have approached it [participation] with indifference or reluctance”. It went on to describe some depressing aspects of participation, but then argued for a deeper commitment to the idea:

The representatives’ effectiveness might also be increased by the very act of giving them additional power. Power might lessen their diffidence and induce them to put forth more effort, and it might induce more, and better, candidates to seek the available positions. In addition, the other members of the board would be likely to listen more attentively and to consider the suggestions of the poor more seriously if the representatives’ votes were likely to be decisive.⁴¹

The Note went on to discuss different methods of selecting representatives of the poor, each alternative fraught with problems: the low turnout of voters for elections in low-income communities, and even lower turnout for town meetings, the question of whether those elected are truly representatives of the poor, the influence of “machine politics”, whether program administrators can or should choose representatives, and so on. This part of the Note concluded by suggesting that poor people could be involved as well by being employed as receptionists, clerical workers, and “out-reach” workers, in order to have the lawyers “surrounded by poor people”. The ending was optimistic: “If this is done, and if the lawyers and the poor are willing to learn from each other, ‘maximum feasible participation’ can meaningfully be applied to legal services programs.”⁴²

As usual, there was no reference in the article to where these suggestions had been tried and how they had worked out. This lack of concreteness was not restricted to legal articles and lawyers. In 1967, a social

37. J. Ferren, “Preliminary Thoughts About Public Decision-Making and Legal Aid: The Prospects For Legitimacy” (1968), 1 Connecticut L. Rev. 263 at 287. Ferren was echoing the words of Jean and Edgar Cahn: *supra* n. 21.

38. For example: “What is urged here is that the use of lawyers’ time on welfare matters, and the strategy they are to follow, be worked out with the organized recipients — with the ultimate decisions made by the recipients. In other words, the first step in a grand strategy for lawyers in advancing welfare rights is to serve, and thereby help build, an independent rights movement.” Sparer, “The Right To Welfare”, in *The Rights of Americans* (Norman Dorsen ed. 1970) 88.

39. J. Carlin and J. Howard, “Legal Representation And Class Justice” (1965), 12 U.C.L.A. L. Rev. 381, at 428-9, 431. See also R. Kramer, *Participation of the Poor: Comparative Community Case Studies In The War On Poverty* (1969).

40. *Supra* n. 27, at 828-833.

41. *Id.*, at 829.

42. *Id.*, at 833.

worker wrote about the problems associated with obtaining the participation of low income people in solving community social problems. Some of the problems were:

- low-income people are overwhelmed by concrete daily needs;
- low-income people often lack the necessary resources of knowledge and information to scrutinize social policies;
- when leaders emerge, the poor have few incentives to offer them, and scarce means of controlling them;
- potential leaders tend to take advantage of opportunities which move them away from low income concerns;
- low-income people have few of the requirements out of which stable organizations are generated: less organizational skill, less expertise, less money, — and they do not have the resources lent by a stable livelihood which are required merely for regular participation or organizations.⁴³

In spite of these basic problems, the author wrote of five new strategies being employed to facilitate citizen participation. But there was a caveat: "Some early experience with these program strategies reveals persisting problems in overcoming barriers to low-income participation and influence in community affairs".

In a review of "maximum feasible participation" from 1964 to 1968, an article in the Connecticut Law Review pointed out the conflicts and dilemmas that arose when "vague ideals wrestle with practical implementation". But the authors ended on a positive note:

Our recital of difficulties and tensions in the unfolding of citizen participation in the sixties could lead to the conclusion that it should be abandoned. That would be a grievous error. The idea of participation will be tremendously important in humanizing and democratizing institutions While the road is not easy or smooth, public policy cannot retreat from the course of expanding participation. "Maximum feasible participation" has ushered in a new era — stormy and hopeful — in the life of bureaucracy, professionalism and democracy.⁴⁴

Cataloguing the difficulties involved in citizen participation, yet ending on a positive note, was not unusual in articles on the subject. One of the better examples appeared in an article by Irving Lazar in 1971. Near the end of the article, to which point the author had not been at all positive about the concept, he commented: "To summarize the gloomy picture painted above is to point out that not all is gloom".⁴⁵

The point of all this is that the prevailing attitude of the time was definitely optimistic. The way it was passed down to poverty lawyers was that participation could work if they really wanted it to work, and that if it did not work, the lawyers were not trying hard enough to overcome their professional elitism. There was little talk or writing about the problems of dealing with low income people, their "misconceptions, false optimism, and illusory hopes",⁴⁶ their tendency to authoritarianism, and so on. For

43. F. Piven, "Resident Participation In Community-Action Programs: An Overview" in *Community Action Against Poverty* (G. Brager and F. Purcell eds. 1967).

44. M. Rein and S.M. Miller, "Citizen Participation and Poverty" (1968), 1 Connecticut L. Rev. 221, at 242 - 3.

45. I. Lazar, "Which Citizens To Participate In What?" in *Citizen Participation: Effecting Community Change* (E. Cahn and B. Passett eds. 1971) 107.

46. C. Grosser, "Middle-Class Professionals and Lower-Class Clients: Views of Slum Life" in *Community Action Against Poverty* (G. Brager and F. Purcell eds. 1967) 70. In *Participatory Democracy: Developing Ideals of the Political Left* (1972), Daniel Kramer argued that low income people have little time or energy to be interested in participation, and that even in small scale organizations the ideal of participation is "rarely attained". (At 109.)

the lawyers, an unaccustomed Latin phrase: *mea culpa*.

Gradually, though no one write anything about exactly what was happening in specific projects, it came to be recognized that the concept was not working out. Some put the blame on the top administrators:

How this strategy was to be implemented was never made entirely clear In retrospect, many of the lawyers who became involved in community action endeavors were too unaware of the social science implications to give appropriate direction.⁴⁷

* * *

[E]very program featured a vague mystique of local diversity and creativity which was largely a cover for the lack of coherent national program.⁴⁸

Others praised OEO for taking "a courageous stand by making a large issue out of participation of the poor in poverty programs"⁴⁹ and found the source of failure of the concept at the local level where there was often "little grass-roots participation".⁵⁰ This had been the case since the very beginning, when OEO financed elections on low income areas, with minimal turnouts.⁵¹

As it became common knowledge that participation was not working out as it had been hoped, there were fewer articles promoting it. Even those who kept the faith apparently had little ammunition to back up their hopes that it might work. In 1966, Earl Johnson Jr. was enthusiastic about the prospect of citizen participation:

[R]epresentation of the poor on policy-making bodies promises to provide legal aid programs with a fresh perspective on the needs of the low-income community, and with a fresh dialogue between diverse community residents who may never before have communicated with one another. This dialogue may be the key to the fruitful resolution of numerous problems confronting the poor.⁵²

But when Johnson wrote the history of Legal Services in 1974, he described citizen participation in these undocumented (in an otherwise well-documented book) and simple terms:

It may be debatable whether these representatives contributed much to board deliberations. But even if they did not, the importance of this particular guideline cannot be over-estimated But the policy became significant because it represented a major departure from traditional legal aid thinking. It marked the OEO Legal Services Program as something new and different. From the very beginning, it confronted legal aid societies interested in acquiring Federal funds with the necessity of reorienting old structures and existing patterns of doing things. Un-

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47. J. Shestack, "The Right To Legal Services" in *The Rights of Americans* (N. Dorsen ed. 1970) 119.
48. S. Krislov, "The OEO Lawyers Fail to Constitutionalize A Right To Welfare: A Study In The Uses And Limits Of The Judicial Process" (1973-74), 58 *Minnesota L. Rev.* 221, at 216.
49. S.M. Miller and P. Roby, "The War On Poverty Reconsidered", in *Poverty: Views From The Left* (J. Laner and I. Howe eds. 1970) 72.
50. *Id.*, at 73.
51. *Supra* n. 6, at 137. Moynihan asked, "If theory held the poor so apathetic, why proceed as if this were not so?" Some decent degree of voter interest was usually assumed by people keen on citizen participation. See e.g., W. Ryan *Blaming The Victim* (1971): "I would propose, therefore, that the solution to the problem of participation requires an organization with a mass base, with elected representation, and with specific tasks to perform and primary decisions to make. The twin problems of decentralization and participation can be dealt with by a new level of city governmental machinery that meets these requirements: an elected district council in every district of a city." (At 270.) For some statistics on voter turnout, see (1966), 75 *Yale L. J.* 599, at 617 ff. and D. R. Marshall, *The Politics of Participation in Poverty* (1971) 19 ff.
52. E. Johnson Jr., "An Analysis of The OEO Legal Services Program" (1966-67), 38 *Mississippi L. J.* 419, at 424.

doubtedly this prospect turned some societies away from OEO. But many others accepted the bargain and thereby became more receptive, flexible institutions.⁵³

Not everyone saw it that way. Kenneth Pye and George Cochran seemed to express the facts of the matter and the more general consensus when they wrote in 1969 that "in just about all cases, participation became mainly nominal"⁵⁴ and that the insistence of OEO on "poor on the board" had created many problems. They did not go so far as to say that the idea had not been worth the trouble it caused, but they concluded that the development of legal service programs in some areas, and hence the legal needs of some low income people, were sacrificed to "an OEO principle of limited utility".⁵⁵

Pye had earlier predicted that "Lawyers will listen, they may even be influenced, but they will decide themselves".⁵⁶ Ten years later, in 1976, one of the few empirical studies of citizen participation came to just about that conclusion: "Each board used the presence of these representatives [of the poor] to justify policy decisions made by the lawyer-members of the board . . . and to give judgments about program priorities the gloss of citizen participation."⁵⁷

A more extensive study, more statistical in nature, was conducted in 1970. The results were summarized by Anthony Champagne:

[I]t was concluded that while attorneys do tend to dominate the governing board, the representatives of the poverty community participate in policy-making. The original ideology of the program — the "consumer perspective" which allows for poverty community control of legal services decision-making — has not been completely lost. Control of the projects by poor people has been sacrificed, though their voice in determining policy has not.⁵⁸

This was as hopeful as the facts of the matter ever seem to have been.

Canada

Support for the idea of citizen participation had been slowly growing in Canada. In 1967, the National Film Board of Canada released a thirty-minute film called "The Point" which showed some of the activities of a neighbourhood law office in the Point St. Charles area of Montreal. The highlight of the film was a raucous meeting of the office staff with local citizens. By all appearances, the citizens were in charge. This appeared to many people in Canada, including myself, to be living proof that citizen participation could and did work in a legal setting. To the best of my knowledge, no one associated with the Point St. Charles office ever wrote

53. E. Johnson Jr., *supra* n. 30, at 112. Johnson's positive evaluation of the overall experience is rare, but not unique. Another appeared in S. Levitan and R. Taggart, *The Promise of Greatness* (1976). They provide no documentation for their conclusion (at 186-7):

While there may be less than "maximum feasible participation" in decision making, recipients have a much greater voice than in the past . . . Community participation was not substantial in terms of election turnouts or influence on the boards of community-based organizations. Yet these organizations did represent their constituencies . . . The experience of the *Great Society's community-based organizations* should be reviewed as proof that even a relatively minor redistribution of power and control can have long-run benefits for the social system.

54. K. Pye and G. Cochran, "Legal Aid — A Proposal" (1969), 47 N. Carolina, L. Rev. 528, at 571.

55. *Id.*, at 572.

56. K. Pye, "The Role Of Legal Services In The Anti-Poverty Program" (1966), 31 L. and Contemp. Prob. 211, at 246.

57. M. Girth, *Poor People's Lawyers* (1976) 56.

58. A. Champagne, "The Internal Operation of OEO Legal Services Projects" (1963), 51 J. of Urban L. 649.

anything about the operation, or how effective the participation was, and for how long, what type of relationship the office staff had with the community, the accuracy and effect of the film, and so on. All we had was the film.

The first reference I have been able to locate in Canadian legal writings to the notion of participation appears in a brief to the Attorney-General's Committee on Legal Aid in Nova Scotia in 1970.⁵⁹ The brief recommended that legal aid services be delivered through the neighbourhood legal services model, and, without any background comment or discussion, that control of legal aid be vested in an independent corporation with a Board of Directors drawn from the Bar, social services, government, and the community at large.

The idea had gathered strong momentum by October, 1971, when the National Conference on Law and Poverty took place in Ottawa.⁶⁰ The Conference, sponsored by the federal government, was attended by 125 people from across Canada, including lawyers, law professors, community organizations, and poor people. Typical of the times, experts of any kind were frequently hissed when they addressed the Conference,⁶¹ and the organizers of the Conference were constantly criticized for having included too many professionals and not enough poor people and for having chosen the wrong topics for discussion. By the last afternoon of the three-day Conference, proceedings had drifted into chaos and most of the delegates departed earlier than planned.

Early in the Conference, Jean and Edgar Cahn addressed the delegates. Although Edgar Cahn had only recently co-edited a book on citizen participation,⁶² the Cahns' joint speech on "The New Orthodoxies" was not as enthusiastic about the subject as were most of the delegates:

Perhaps the most disturbing orthodoxy is the way in which participation of the poor has been elevated to a doctrine so sacrosanct that it is exempt from rational scrutiny. The question is not do you agree with the principle — in principle. Nor is the question one of mere numbers. The real issue is "participation for what purpose". And the question becomes: "What kind of participation, in what form, is

59. D. Lowry, "Social Justice Through Law", brief submitted to the Attorney-General's Committee on Legal Aid in Nova Scotia (1970). Unpublished.

60. The proceedings of the Conference were eventually edited and published in *The Law and The Poor In Canada*, I. Cotler and H. Marx feds. (1977).

This was the first of three major conferences on law and poverty in Canada. The other two were held in Levis, Quebec (1973), and Victoria, British Columbia (1975). These dates and events were part of the basis for my sometime observations that legal aid in Manitoba was running about seven years behind general developments in the United States, where the three major conferences on poverty law were in Washington, D.C. (one each in 1964 and 1965), and Cambridge (Harvard Law School) (1967). For a brief discussion of the U.S. conferences, see S. Huber, "Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid in America" (1976), 44 *Geo. Wash. L. Rev.* 754, at 759.

61. The headline across the top of page one of the *Toronto Globe and Mail* of November 1, 1971, was "Delegates hiss Supreme Court judge at law-and-poverty conference". This was a report of a session in which Mr. Justice Emmett Hall (ironically, one of the most liberal judges in the country) was shouted and sworn at by some conference delegates.

62. E. Cahn and B. Passett (eds.), *Citizen Participation: Effecting Community Change* (1971). Although the book contains many specific examples of citizen participation, there are few with any connection to legal services. In 1970, the Cahns wrote "Power To The People Or The Profession? The Public Interest In Public Interest Law" (1970), 79 *Yale L. J.* 1005 in which there appeared signs of disillusionment with ideas set out in their 1964 article (*supra* n. 21), including citizen participation in neighborhood law centres. Yet Edgar Cahn's confidence in the future of citizen participation (perhaps outside the legal field) was apparently unimpaired. In an article he co-authored with Jean Cahn in the book cited above, he wrote that "the reality of citizen participation — on an expended and intensified scale — is here to stay".

necessary to perform the function which participation uniquely is required to perform”⁶³

The Cahns pointed out the knowledge and expertise of the poor and the need for the poor to be involved in setting priorities and policing programs. This was not so different from what they had written seven years earlier.⁶⁴

Later in the Conference, in a session entitled “Dialogue with Community Representatives”, a community organization was asked about how he organized the poor. He replied: “Perhaps later you could ask some of us individually. I just don’t feel that that is relevant in this conference and we sort of agreed not to go into that kind of mish-mash.”⁶⁵ A person from a poor people’s organization was more helpful:

There are a thousand-and-one ways to reach out If you really want to work jointly with citizens, it was said a while ago that you could sit around a local welfare office, or if you want to organize, get into a courtroom for a week or two or three days and listen to some of the cases. Find out where they are from. You know that this guy comes from a certain area, you know that it is a poverty area, you get with him and ask how many other people are in the same situation. He’s got neighbours. That is just one way of reaching out to people.⁶⁶

This is as specific as the Conference ever got about organizing poor people. But what was the lawyers’ role to be? In a panel discussion entitled “Community Participation in Poverty Law: The Self Help Process”, a lawyer offered the only answer given by the Conference to the question:

The lawyer’s role includes building confidence in the community, to do certain things for themselves; for example, the community must learn to negotiate, to talk to one another, and solicit support by letters. The lawyer’s role will be to organize the resources and where necessary to radicalize the community.⁶⁷

Among many young lawyers, there was deep faith in these kinds of ideas, though no one had any clear notion of how to implement them. An example of this was contained in an article written by a third-year student at Osgoode Hall Law School about the first five months of a legal aid clinic in Toronto in 1972. He referred to the lawyer’s responsibility to help organize the poor, how a neighbourhood law office is “amenable to community control”,⁶⁸ and since it existed “only to serve a given community, it can respond to that community’s particular needs and desires”.⁶⁹ This was the theory. Some of the reality was the difficulty the office was having in getting organized along these lines, a problem attributed to the “highly transient nature of the community”.⁷⁰

There was one voice of partial dissent on the subject of participation. In a report dated August, 1972, the Legal Aid Committee of the Law Society of Upper Canada advised against community control of legal aid services because it was considered “virtually impossible to create a community

63. *Supra* n. 60, at 47.

64. *Supra* n. 21.

65. *Supra* n. 60, at 108.

66. *Id.*, at 108-9.

67. *Id.*, at 143.

68. D. Ewart, “Why The Neighborhood Law Office?” (1972), 20 *Chitty’s L. J.* 159, at 161.

69. *Ibid.*

70. *Id.*, at 160.

board that is truly representative of the community-at-large",⁷¹ and because lay people were seen as "highly susceptible to subtle manipulation (often well-motivated) by salaried lawyers."⁷² The report also expressed concern about community boards setting priorities and the question of accountability. In the end, the report recommended that there be an advisory committee in each legal aid area: "To provide for maximum local influence, the new [committees] should be comprised of a majority of suitable lay individuals."⁷³

Two years later, the Report of the Ontario Task Force On Legal Aid contained no discussion or background information on citizen participation, but one of its recommendations related to it:

Each neighbourhood legal aid clinic will be encouraged as soon as possible after its formation to establish a Community Advisory Board comprising both lawyers practicing in and lay members residing in the community that the clinic is designed to serve. The function of such a Board would be exclusively advisory and it is not intended that it should exercise any degree of control. In small communities there may be no need for such a Board, but in metropolitan areas especially where there may be more than one clinic such Boards can assist in determining community needs.⁷¹

Manitoba

Several people from Manitoba attended the Ottawa Conference and were aware of the theory of citizen participation. As already mentioned above, it was part of the legislation establishing Legal Aid Manitoba in 1971. Everyone was committed to participation, though no one had any direct experience with it in a legal setting. In 1972, the experiment began.

From the start, there were problems of the kind referred to earlier. A memorandum dated July 3, 1973, from the Chairman of the Board of Directors to other Board members set out the difficulties at that level:

Experience with a mixed board of lawyers and laymen indicates that while the impact of non-professionals can be valuable and is probably essential, care has been exercised in choosing very strong laypersons. The professionals dominate the Board and would probably do so even if there were only four lawyers out of nine members. Most major Board discussions assume some working knowledge of the legal process and some of them assume some knowledge of the substantive law. It might well be advisable to provide lay members with a short formal course in legal process and legal institutions very early in their period of tenure as board members.

As time went by, the situation did not change. It came more and more to be accepted as a problem without a solution. The lawyers did most of the talking, and the vast majority of motions were passed by unanimous vote. Only once in seven years was there a split vote, with laypeople on one side and the lawyers on the other. That was on a relatively minor matter.⁷⁵ Thus while it may be said, as a study in the United States did,⁷⁶ that the laypeople participated in the setting of policy, the participation was primarily that of voting after hearing the lawyers discuss the issues.

71. Report of the Legal Aid Committee of the Law Society of Upper Canada on Community Legal Services (1972) 90.

72. *Ibid.*

73. *Id.*, at 121.

74. Report of the Ontario Task Force On Legal Aid ("The Osler Report") (1974), Pt. 1, 55.

75. In 1977, after the resignation of the first Executive Director of Legal Aid Manitoba, an advertisement for a replacement resulted in only one application. The Board split on a motion to re-advertise farther afield. The motion was defeated on the Chairman's negative vote and the single applicant (me) was subsequently accepted for the position. (When the job was advertised again two years later, there were 42 applications from across the country.)

76. *Supra* n. 58. In *Lawyers and Client: Who's In Charge Here?* (1974), Douglas Rosenthal says, "Lawyers, and perhaps other professionals, seem to have two human needs in disproportionately great measure: the desire to control their environment and aggressive (and competitive) feelings".

It is not to be assumed that the laypeople on the Board were not articulate. Quite the opposite. Each was rather well-known in the community and entirely capable of speaking his or her mind. Several were professional people: a social worker, a school principal, a minister, a community worker, a school teacher. But at meetings of the Board, their specialized knowledge and their obvious general abilities took second place to the highly articulate and confident expertise of the lawyers.

One of the laypeople, who was well-known as a voluble advocate of minority rights in the community, spoke only twice during his several years on the Board. As fearless as he was in public, he was apparently overwhelmed by the knowledge of the lawyers — or the knowledge he thought they had.

Lawyer members of the Board have said privately that the very presence of laypeople at the meetings affected the way they (the lawyers) expressed their opinions, if not the formulation of the opinions themselves. Perhaps the generally liberal attitude of the lawyers, most of whom were well-known as defense lawyers in criminal cases, made the contribution of laypeople less necessary. In any event, it is difficult to estimate the effect of their having been on the Board, and what differences there might have been if Legal Aid had remained in the hands of the Law Society (where it had been before 1972). The direct contribution, in terms of discussions at Board meetings, was not substantial.

Advisory Committees were appointed by the Board of Directors for each of the three Neighbourhood Law Centres in Winnipeg.⁷⁷ The first office was the Isabel Street Neighbourhood Law Centre, opened in October, 1972. The Citizen Advisory Committee ("C.A.C.") immediately began meeting one evening each month. There were six members at the start, including a community organizer, a social worker from a neighbourhood medical clinic, and four persons who might be termed "poor people". All had been appointed on the recommendation of a number of agencies to which the Board of Directors had written for advice.⁷⁸

From the start, there were organizational problems. Affected by what some of them had seen and heard at the Ottawa Conference and elsewhere, and fearful of being "co-opted" or of "selling out" or of being the least bit undemocratic, the C.A.C. decided there should be no chairperson and no formal agenda. This was to ensure that no one dominated the meeting and everyone had a chance to say exactly what was on his or her mind at any

77. One law centre was opened in Winnipeg every year over four years: Isabel Street (1972), Main Street (1973), Ellice Avenue (1974), amalgamated with Isabel in 1976 in the Ellen Street Office; and La Sen (1975). Law Centres were also set up in Dauphin (1974), Brandon (1975) and The Pas (1975). Although some 75 residents attended a meeting in Brandon in 1975, calling for the opening of a law centre in that city, no Citizen Advisory Committee was ever appointed. The Senior Attorney later said that he just never got around to it, and there never was any demand from the community after the initial meeting.

The office in The Pas, in northern Manitoba, had an Advisory Committee for a short time, but it soon folded. The reason given by the Senior Attorney was the long distances committee members had to travel for meetings, frequently in sub-zero temperatures.

The Dauphin office still has a C.A.C. I attended meetings in 1977 and 1978, but I am not familiar enough with the details of its operation to be able to comment.

78. When the Isabel Street Law Centre opened, it was intended that it serve just the residents of the immediate area (known as "Urban 2"). This was abandoned as a policy for a number of reasons, including the discovery that very few people in the area used the office, many of the residents were financially ineligible for legal aid services, and there was a heavy demand for service from various low rental projects around the city.

given moment.⁷⁹ As the Senior Attorney of the Law Centre, I brought a personal agenda to each meeting, and this was eventually accepted as a general guide for discussions. After a few meetings had relentlessly dragged on, it was agreed that there should be a "rotating chairperson".

Discussions were often short and not very illuminating. I would report on what the office was doing, in the form of statistics and commentary on case load, preventive law activities, and contacts with other agencies. The C.A.C. members would ask a few questions, and we would pass on to the next item. At this point it may have been the hectic schedule of the office staff which got things off to a bad start. As the only Law Centre in Winnipeg, the office was then inundated by people and telephone calls. A policy decision was made, to which the C.A.C. (but not all staff) agreed, that rather than restrict access to the office by clients, an attempt should be made to handle the entire demand for service. The main basis for the decision was the fact that most eligible clients were referred to the private bar (the "judicare" part of the Manitoba scheme). There was also the prospect of additional law centres opening within a year or two.

In the face of the massive demand for service, it is perhaps not so surprising that the C.A.C. had little in the way of suggestions as to what the office should be doing. It was open more than 50 hours each week, and the three lawyers were putting in many more hours to keep up.

In order to help the C.A.C. members better understand the law and how lawyers work, there were instruction sessions at the start of each meeting. This had no noticeable effect on the quantity or quality of discussion in the meeting proper. The other lawyers in the office soon stopped attending the meetings when it appeared that they were not at all what we had expected and hoped them to be. When the lawyers attended, they inevitably dominated, though we had all discussed at one of the C.A.C. meetings the danger of that very thing happening.⁸⁰

The C.A.C. felt it could not articulate the needs of the community because it had not heard from the community. A regular topic was the question of how the Committee could put its finger on the community's pulse. Insofar as there were any "indigenous community leaders", the Committee members seemed to be it, but they did not feel representative of low-income people. It was never clear just who would be recognized by anyone as speaking for the community.

In order to "hear from the community about its needs", the C.A.C. decided to distribute a leaflet door to door throughout the community, inviting residents to attend a C.A.C. meeting. The contents of the leaflet were the subject of much agonizing over several meetings, but the Committee was finally able to agree on wording it felt would most likely ap-

79. See T. Cook and P. Morgan; "An Introduction To Participatory Democracy" in *Participatory Democracy* (1971) 30: Advocates of participatory democracy have often discounted the value of formal procedures for decision-making in stark contrast to the elaborate rules of procedure used in other assemblies, such as legislatures. In general, advocates emphasize the spontaneous, unstructured, rather amorphous realization of the will of those assembled . . . The idea is that unstructured discussions, resolutions, and voting will generate the truest expression of the people's will.

See also Note, "The Legal Service Corporation, Curtailing Political Interference" (1971), 81 Yale L. J. 231, at 276 ff.

80. The focus of that discussion was an article by S. Arnstein, "Eight Rungs On The Ladder of Citizen Participation", in *Citizen Participation: Effecting Community Change* (E. Cahn and B. Passett eds. 1971).

peal to low-income people, and the leaflet was distributed. Not a single person responded in any way.

One of the non-lawyer members of the Board of Directors attended two of the C.A.C. meetings and reported back to the Chairman, who in turn advised the Board (July, 1973):

Great difficulty has been encountered in getting the Isabel Street Advisory Committee to function in any meaningful sense. This is partly due to the way in which the Advisory Committee was chosen and partly due to errors in the way in which both the Isabel staff and the Board have functioned. The Advisory Committee was chosen by the Board from a list of nominees supplied to it from community and self-help groups. However this list was not really representative of the particular community and the persons had on the whole no real roots in the community. It may take some time before Isabel develops the kind of community legal aid work which brings it into contact with those from whom a truly representative Advisory Committee can be chosen. The Board is formally committed to having the Advisory Committees play real and not token roles but in practice has tended to make decisions affecting Isabel without prior consultation. More experience and greater effort will be required before we can begin to assess the usefulness of Advisory Committees.

The basic problem was seen to be that the C.A.C. was not made up of people "truly representative" of the community. There always seemed to be good reasons why participation did not work, and this was probably the most common one.⁸¹ Perhaps somewhere there were indigenous leaders in and of the community, people truly representative of the community. But these people were never found, though the C.A.C. continues to this day to exist and efforts have been made from time to time to locate new representatives.⁸² Such changes as there were in membership made no difference to the way the meetings went.

The lawyers in the law centre had attended the Ottawa Conference and they were familiar with the writings of the Cahns and Stephen Wexler.⁸³ As busy as the lawyers were, they had pangs of conscience about "reaching out to the community" as they had gathered from the literature and the Conference was part of the job of the Poverty Lawyer. One of the lawyers literally tried an approach suggested at the Conference. He stood on a street corner near the office and tried to engage passers-by in conversation. He did it only once, with no success and a good deal of embarrassment. In the 1980's this sounds strange, but anyone who was in the legal aid movement in the 1960's and early 1970's will recall that this was consistent with the

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81. See e.g., Cook and Morgan, *supra* n. 79, at 24: Sir Ivor Jennings' critique of Woodrow Wilson's principle of national self-determination of geographic frontiers: "On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people". This problem of defining the "people" is often largely ignored. And see D. Rothman et al., *Doing Good: The Limits of Benevolence* (1978) 83: Whereas Progressive reformers did recognize . . . the inadequacy of institutions . . . invariably they blamed the frugality of legislators, or the incompetence of administrators, or the cupidity of superintendants for the failures. The system was benign; the problem was with its implementation.
82. See H. Ehrlich, "The Social Psychology of Reputations For Community Leadership", in *The Search for Community Power* (W.P. Hawley and Wirt eds. 1974).
83. *Supra* n. 21.; S. Wexler, "Practicing Law for Poor People" (1970), 79 Yale L. J. 1049. This article made a powerful impression on me when I first read it, as I think it has on many lawyers. Wexler was at the 1971 Ottawa Conference and spoke fervently about Poverty Law. A few months later a Winnipeg lawyer wrote to Wexler in British Columbia, where he was then teaching, asking how he was. The letter was returned with a brief reply on the back side. Wexler had apparently burned out in the interval.

idealism of the times.⁸⁴ Such idealism does not come upon lawyers very often, but it has been known to happen at other times.⁸⁵

My own faith in citizen participation had been shaken by my experience with it, but the people who were recognized as leaders in the field of legal aid appeared to be as strong as ever in their belief. In 1973, for example, there was an article in the *Canadian Bar Review* on "The Future Of Legal Services In Canada":

[T]he local legal services offices will ultimately be community-controlled. The development of this process will, of course, vary depending on time and place. The demands and tensions are already strongly articulated in some areas and incipient in most others . . . the very existence of the neighbourhood law offices will itself tend to catalyze these developments.⁸⁶

I had (and still have) a good deal of respect for the authors of the piece, Larry Taman and Fred Zemans. Thinking that perhaps my faith was not deep enough or my knowledge not extensive enough, I visited two other provinces to observe citizen participation in three neighbourhood law offices, two of which were well-known for their emphasis on community participation. In one city, my visit coincided with the annual meeting of the office. It was painful to observe the unabashed way in which the lawyers dominated the meeting with the agenda they had drawn. It included what strongly appeared to be manufactured issues on which the assembled citizenry voted unanimously, as the senior lawyer not-so-subtly directed. Although it seemed that the office was doing much good work, citizen participation — as far as I could tell — had nothing to do with it.

In another city, I attended the monthly meeting of the staff and advisors of a legal aid office. The major topics of the evening were a financial crisis and the lack of a senior secretary. The professionals dominated the discussion and made all the motions, which always passed unanimously.

As odd as it now seems, these observations did not depress or deter me. I resolved to try harder. I prepared six pages of "Common Questions and Issues" about Citizen Advisory Committees, in which I tried to set out in a very practical way just what I thought participation meant and how the C.A.C.'s could work. I visited each C.A.C. for at least one evening and discussed what I had written. The response was good, and my hopes once again were buoyed. But subsequent reports and later visits to the C.A.C.'s indicated that meetings were still aimless, and office staff considered them pointless. Yet the groups continued to meet. The only reason for the continued attendance by basically the same people, month after month, year after year, seemed to be the social aspect of the evenings. So far as I could tell, very little of practical value was happening. Even if it were true at the level of the Board of Directors that the very presence of laypeople affected what was happening this was not true in the law centres. Although the

84. Another example of how yesterday's idealism can be today's chuckle was the belief of some people in the late 1960's that a poverty lawyer could do the best job by living in the same low-income community in which s/he was working. Though it was never anything more than a comment between commas, I for one took it quite seriously, agonized about it, and ultimately dropped it. This is but one of the idealistic notions I had when I dashed off "Poverty Law In Manitoba: The Beginning" (1972), 38 *Man. B. News* 283.

85. See J. Auerbach, *Unequal Justice* (1976): references to the zeal and idealism of labour lawyers in the 1930's (p. 222), New Deal Lawyers in the late 1930's and early 1940's (p. 224 ff.), legal service lawyers in the 1960's (p. 263 ff.), and to burn out (p. 188, p. 190).

86. L. Taman and F. Zemans, "The Future of Legal Services In Canada" (1973) 51 *Can. B. Rev.* 32, at 35.

C.A.C.'s had all discussed how to encourage staff attendance at their meetings, the lawyers seldom appeared, and there was literally no sign that the activities of the staff lawyers were the least affected by the C.A.C.'s.

In retrospect, it seems clear that the idea of citizen participation had passed its peak in Canada by the time of the conference on legal aid held in Victoria in June, 1975.⁸⁷ But it was still very much in the air. Fred Zemans, long associated with the legal aid movement in Canada, spoke to the delegates about one of the fundamental goals of legal aid being "to make the legal system responsive and ultimately controlled by low income people." He urged that "it is important to again set our ideals . . . and to make sure that we rededicate ourselves to these fundamental ideals."⁸⁸ Ellsworth Morgan, President of the National Clients' Council in Washington, D.C., addressed the delegates on "Legal Services From The Client Perspective".⁸⁹ It was a rousing speech and well received by everyone. But again, in retrospect, one can see that a more accurate sign of where poverty law then was in Canada was the later champagne dinner which got so far out of hand that most people were unable to hear the speech of the federal Minister of Justice on "The Future of Legal Aid In Canada". It was obvious that not only would there not be another national conference on legal aid for a long time to come, but that the hopes and dreams which had seemed so recently to be certain to be attained were in trouble. The movement, if indeed that was what it was, had lost its steam.

But in Manitoba, in spite of disappointment with the Conference, there was a renewed faith in participation. It is difficult to imagine where this faith came from, since we still had no factual basis for believing that it could work, and the rhetoric was already at least four years old. All of our experience showed that it did not work, but perhaps the speech had rekindled some of the old hopes. Soon after the Conference, the Board of Directors, with leadership from its Chairman, issued a five-page memorandum to the C.A.C.'s and staff. It ignored past problems and stressed what C.A.C.'s could do:

[T]he way in which these programmes are to be carried out, the amount of staff and other resources to be devoted to each item, the groups to be represented, the institutions to be served, the method of giving informal advice (e.g., outreach clinics, night hours, telephone answering services), even the kinds of individual cases to be handled are very much a matter for each community law office to decide for itself, subject only to certain basic policy, management and budget decisions. And in this area the advisory committee can and should play a powerful role. The Committees should insist on regular reports on centre activities and discuss with the Senior Attorney and staff what re-allocations of staff time should be made to carry out the kind of programs the advisory committee thinks most suited to its community.

Also in 1975, on recommendation from the Board of Directors, the provincial government (still the New Democratic Party) amended the *Legal Aid Act* to increase the number of Board members from nine to eleven, and adopted a policy of choosing the two new members — who did not have to be lawyers — from the C.A.C.'s. This of course was intended to strengthen and increase the amount of citizen participation along the lines often suggested by supporters of the idea: they said that if participation did not

87. Canadian Council On Social Development, *Access to Justice: Report On The Conference On Legal Aid* (1975).

88. *Id.*, at 55.

89. *Id.*, at 59.

work, it was because the citizens were not given enough responsibility.⁹⁰ This argument could be extended, and often was, through to total community control.

The methods may have been wrong, but there was no lack of trying. In November, 1976, Legal Aid Manitoba sponsored a one-day seminar on "Citizen Involvement In Legal Aid". There were speeches and discussion groups and a wind-up commentary by Barnard Veney of the National Clients' Council in Washington, D.C. He noted the amount of "bitching and complaining" among the delegates about who had what power, how sincere the Board was, and who was to blame for this and that. He expressed surprise at the liberal attitudes of the Board of Directors, and concluded: "I don't hear restrictions coming from the Board of Directors. Why don't C.A.C.'s take the power and 'do it'?"

However, in the language of the times, the C.A.C.'s could not "get it all together". Two of the Winnipeg C.A.C.'s amalgamated, hoping to find inspiration in each other. To find out "the needs of the community", that constant concern which was by now a rather hollow expression, they decided to make up a questionnaire to hand to people in the waiting rooms of the law centres. It took many meetings to put together questions satisfactory to everyone. Some forms were eventually filled out by clients, but the project soon petered out.

At a meeting of some Senior Attorneys in 1977, I asked who they thought had the responsibility to make the C.A.C. meetings meaningful. The answer was that it was my responsibility and that of the C.A.C.'s themselves. The lawyers saw it in this way because they had long since lost whatever faith they had in participation, and they saw me as the field representative of an administration and Board that was still pushing it — though considerably less than in earlier years.

Early in 1977, I started "The Advisor: The Newsletter of the Citizen Advisory of Legal Aid Manitoba". Two issues of one page each were printed, the second one ending with this:

The C.A.C. "work year" is more than half over. Has your office set its priorities? Has your C.A.C. discussed and prioritized the Community's problems and priorities? Have you discussed and worked out the objects of your C.A.C.? Are you assessing the programmes of your office? Is your office in touch with the Community's groups and agencies?

It's time.

An attempt was made to introduce to the C.A.C. some of the concepts contained in the National Legal Aid and Defenders Association (NLADA) publication *Too Many Clients, Too Little Time*.⁹¹ Several of the basic ideas and suggestions in the book were summarized and distributed. Again, the response was good, but there were no practical results.

In June, 1977, I completed an evaluation of one of the Winnipeg law centres. I found that the Senior Attorney had no faith in citizen participation. He also had no plans or priorities for the office, for which he blamed the C.A.C.:

90. *Supra* n. 27, at 829.

91. E. Metzner, *Too Many Clients, Too Little Time* (1974).

The Senior Attorney asserts that establishing office goals is not the responsibility of the staff, but of the C.A.C. Yet no goals at all have been set by the C.A.C. Consequently, of course, no plan of action has been suggested to the legal staff by the C.A.C. No plan of any kind exists.

The attitude of the Senior Attorney was loaded with irony, but it seemed to be lost on the C.A.C. and on the legal staff. A meeting of the Board of Directors with the office staff was arranged, but other events intervened. The evaluation never was discussed.

In October, 1977, the provincial government changed. Five months after the Conservatives took power, several new Directors were appointed, with none of the citizen members chosen from the C.A.C.'s. There was no objection from the C.A.C.'s, nor any comment from them when the budget was cut and restraint measures instituted. Yet the new Board accepted the existence of the C.A.C.'s. As the months rolled by, the Board replaced any departing advisors with new people, always as recommended by the Senior Attorneys. The old system apparently was to continue. When I left Legal Aid in 1979, I regarded citizen participation as a dead issue. We had done about as much as it seemed to me was possible to do, but the theory had not worked out in practice.

Verbal and written commitment to citizen participation in the delivery of legal services decreased during the 1970's but there is still the occasional call for it, reminiscent of the late 1960's. Writing in the *Queen's Law Journal* in 1977, Thomas Wakeling of Saskatchewan quoted with approval a statement from a provincial organization: "They [low income people] are the ones who are experiencing the problems and are in the best position to know how services should be provided to them, under what conditions and what kind of services."⁹²

Wakeling made no reference to the experience of Saskatchewan Legal Aid, which went further than any legal aid plan in placing control of the program in the hands of the laypeople. To my knowledge nothing has been published by any of the people involved in that experiment, but it is generally known that there have been considerable problems with it.

When the Legal Services Corporation was established in the United States in 1974, replacing the former program operated as an arm of the Office of Economic Opportunity, the legislation provided that a majority of the eleven-member Board of Directors was to be from the bar, and that membership was to include eligible clients. Each state was to have an advisory council, also with a majority from the bar.⁹³ To date, nothing has been written on how the Board and councils are working out.⁹⁴ In fact, the only legal article published in the last few years which makes any reference to citizen participation is something of a throwback to the early 1970's.⁹⁵ It

92. T. Wakeling, "A Case For The Neighborhood Legal Assistance Clinic" (1976-77), 3 *Queen's L. J.* 99, at 120.

93. See 42 U.S.C.A., ss. 2996c(a) and 2996c(f).

94. In *A Decade of Federal Antipoverty Programs* (R. Haveman ed. 1977) there is an article on citizen participation and on legal services. The only reference to citizen participation in legal services is a brief comment by Edward Sparrer (at p. 236):

The answers should in large part be framed by a constituency — the clients and client city of a legal service office. This is how answers are found (or should be found) by labor union lawyers, corporate lawyers, etc. — with regard to the way these lawyers service both individuals and organizations within their area.

95. J. Hee, "Community Law: An Alternative Approach to Public Legal Services" (1978), 18 *Santa Clara L. Rev.* 1054.

explains away the failure of the concept in terms of the domination of the bar. Community representation did not work because the people who were chosen "were not truly representative of the client community since they were not chosen by the poor themselves".⁹⁶ It is almost as if nothing has been learned from the experiences of the last 15 years when that kind of a statement is made without any comment on the persistent practical problem of how to go about having the poor elect anyone, let alone someone "truly representative". Likewise the author makes the old assumption about community leadership: "Leaders from the community should be encouraged to communicate their needs and to become a part of a network of people who can mobilize the community to support issues important to its members".⁹⁷ At this point, perhaps I might be forgiven some skepticism: Where has this suggestion ever been tried? How were the leaders located? What determined that they were leaders, and that they knew and could communicate the needs of their communities? Exactly what needs were identified, and what was done about them? How does one mobilize a low income community? How does one develop a "network" of organizers? What is the role of lawyers in all this?

Some Conclusions

There are many reasons why citizen participation failed in Manitoba, as I think it did in the case of Citizen Advisory Committees. Some of the old reasons experienced in other places probably applied to some extent: we did not try hard enough, we went about it the wrong way, the lawyers were not sufficiently committed to the idea (perhaps because in their youthfulness they were insecure in their professionalism),⁹⁸ the C.A.C.'s were given too little power, the C.A.C.'s were not "truly representative" of the poor, there was not sufficient search made for (and use of) "indigenous community leaders". And of course we relied too much on the rhetoric, and not enough on the actual experience of people in the United States. Perhaps people with training in sociology or some field other than law would have better understood the theory and developed the practice. Perhaps a full-time person, working exclusively with the C.A.C.'s, could have made them work.

Then again, maybe there was no "indigenous community leadership", and the citizen representatives and the lawyers were as good as could ever be found, and everyone did their best, and the C.A.C.'s could not handle the responsibility they were given — let alone any more than that. Maybe it did not work for reasons outside of the people involved, such as the fact that the City of Winnipeg does not have ghettos like those found in other cities in Canada and the United States.

There are any number of factors one may consider, but all in all it seems to me that Legal Aid Manitoba gave the idea as good a try as could reasonably be expected. In writing this account I am surprised that we retained faith in the basic idea for as long as we did, in spite of the many disappointments with it. Our persistence came from the success of many

96. *Id.*, at 1067-8.

97. *Id.*, at 1081.

98. "In a number of ways, community action and community involvement in services may be seen as part of a growing assault on the profession itself The professional traditionally interprets the clients' needs through a filter of specialized knowledge but community action often suggests that this professional filter must be put aside and the demands of the client met directly." P. Leonard, "Professionalization, Community Action and the Growth of Social Service Bureaucracies" in *Professionalization and Social Change* (The Sociological Review, Monograph No. 20, 1973).

other ideas, and the hope that this one too would eventually work out.

I do not conclude that citizen participation cannot work in the legal aid setting. I have not seen it work, and I am somewhat skeptical after my experience with it, but my continued hope is that what I have described here represents some personal failings and not the failure of an idea. Oddly enough, I do not feel disillusioned with it. For it seems to me that if citizen participation cannot somehow be made to work, at least from time to time, if not continuously or in every place and setting, legal aid will do no more than process individual cases, greasing the wheels of the legal system rather than having a hand in changing some of the machinery. But if the idea is to work, there must be more to work with than rhetoric and faith — which is just about all there was in this first use of it in the legal setting. Theorizing in law articles must be replaced or supplemented by solid examples of how the idea has actually worked and *not* worked in practice. These words, written in 1971, remain true: “Although many have advocated participatory democracy as the appropriate response to twentieth-century challenges, theory about the ideal and practice of this method of decision-making has remained quite limited.”⁹⁹

It may be that all kinds of research will have results no more definite than, or different from, what I have experienced. Participation involves a combination of numerous individual and group relationships, among people from different backgrounds and social classes, and with vastly different hopes and dreams for the future. The success of the idea largely depends on an unique blend of personalities, knowledge, objectives, and ideals. It may turn out that the best we can say about participation is that — like so many other concepts, such as democracy — it works when it works. If at least that much is true (there is so little literature from which one can learn whether it is) the opportunity should always be available for it to work when its time comes, as one may expect it will every now and then. In Manitoba in the 1970's it may have been a forceful idea for which the time had just passed. Until the next cycle of societal discontent of the type experienced in the 1960's, participation in legal aid may limp along. It seems unlikely to totally disappear.¹⁰⁰ For at least the time being, even ineffective participation may be worth the trouble: “The argument here is that some participation is better than no participation. Access to the decision-making process without power to determine the outcome is better than no access.”¹⁰¹

Neighbourhood Law Offices and Staff Lawyers: Dream and Reality.

There were salaried lawyers in the legal aid movement in the United States long before the OEO began setting up neighbourhood law centres (also known as “community law offices”) in 1964. But this was to be a different breed with broad objectives which would include, in the hopes of

99. Cook and Morgan, *Supra* n. 79, at 2.

100. See L. Rubin, *supra* n. 16, at 29: “I must agree (that) the seed has been planted, and the idea will not die out . . . Maximum feasible participation has, indeed, captured the imagination of the poor with the force of an idea whose time has come.”

And see D. R. Marshall, *supra* n. 51, at 150:

“In spite of difficulties in all suggestions for increasing the power of the poor, and in spite of the national trend away from organizing the poor, conversation with community confirms that the idea will not die out.”

101. D. R. Marshall, *supra* n. 51, at 142.

many, the re-ordering of society. In a speech in 1965, Clinton Bamberger outlined the aims of the Legal Services Program of which he was the first director:

We cannot be content with the creation of systems of rendering free legal assistance to all the people who need but cannot afford a lawyer's advice. This program must contribute to the success of the War on Poverty. Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effect of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition.¹⁰²

Somewhat less voluble, Bamberger spoke in 1966 to a symposium at Notre Dame Law School about the neighbourhood lawyers being "able to devote the time, achieve the perspective and accumulate the knowledge to attack the legal problems of the poor in a broad and deep scale."¹⁰³

Although some services were to be delivered by private lawyers ("judicare"), Legal Services put most of its money into the neighbourhood law office/staff lawyer (also called "poverty lawyer" or "community lawyer") delivery system. Bamberger said there were reservations about judicare based on cost (then estimated at two or three times more than the staff lawyer approach) and its perceived tendency to stress "the mere resolution of controversies". Legal Services had "far greater ambitions".¹⁰⁴

Some other concerns about judicare had to do with the difficulty of predicting costs, establishing eligibility, controlling possible administrative abuses, and the question of whether private lawyers were really all that concerned about low-income people.

The controversy over the two basic methods of delivering legal aid services has continued through the years, but the debate is no longer quite what it was.¹⁰⁵ The past tendency for people to take one side or the other has moved on, in most places, to the question of what the blend is going to look like.

There were several advantages seen in the staff lawyer approach, other than cost savings. The most important factor had to do with the quality of service. Jean Cahn expressed the hope in 1965:

We must stand ready to provide the poor with more highly personalized relationships than our institutions or our professional temperament has permitted in the past (W)e must gear our education system to prepare lawyers who can deal with a wide range of legal problems, who are sensitive to non-legal problems and who have an appreciation of the client not simply as a case but also as a person.¹⁰⁶

102. Address by E.C. Bamberger to the National Conference of Bar Presidents, Chicago, Illinois, February, 1965: "Legal Aid: An Opportunity For The American Bar" (1966), 42 North Dakota L. Rev. 287, at 291-2.

103. E. Clinton Bamberger, Jr., "The Legal Services Program Of The Office Of Economic Opportunity" (1966), 41 Notre Dame Law. 847, at 850.

For another early view of an OEO official on the aims of Legal Services, see E. Johnson, Jr. and G. Caplan, "Neighborhood Lawyer Programs: An Experience In Social Change" (1965-66), 20 Univ. of Miami L. Rev. 184; and E. Johnson, Jr., "An Analysis of the OEO Legal Services Program" (1966-67), 38 Mississippi L. J. 419.

104. *Supra* n. 102, at 291.

105. A summary of many of the points on either side (with numerous footnotes), and an example of how intense the debate can be, is found in Brakel, "Styles Of Delivery Of Legal Services To The Poor: A Review Article", [1977] Am. B. Foundation Research J. 219, and E. Johnson, Jr. and M. Cappelletti, "Toward Equal Justice Revisited: Two Responses To A Review", [1977] Am. B. Foundation Research J. 943.

106. Address by J. Cahn before the National Conference On Law And Poverty, Washington, D.C., June 24, 1965. (Unpublished).

This kind of empathy would also result in poverty lawyers working with (if not actually organizing) community groups, including community self-help groups, and developing citizen participation in legal services. Not having to be concerned like private lawyers with billing and collecting, salaried lawyers could devote all their professional energies to helping the poor wage war on poverty. The low-income clients would not be competing with paying clients for the lawyers' time, something often cited as a problem with *judicare* schemes. Working, and perhaps living in low income areas, visible and easily accessible to the community, poverty lawyers would develop a body of expertise about the poor, their neighbourhoods and their legal problems, all of which could result in far better advocacy than the poor ever had before. No case would be too small, since every issue could be important to the client and perhaps to the community. The neighbourhood offices would establish their reputations in the community through quick, concerned responsiveness to all requests for help.

The anticipated result of these activities was that the poor would be better able to help themselves, both as a group, and individually:

[T]he feeling of a competent professional agent "on his side," ready to represent him when needed, will bolster the indigent's confidence, encourage him to assert himself politically and economically, and so be a factor in breaking through the apathy of the poor and interrupting the cycle of poverty.¹⁰⁷

"Law reform" was often cited as an object of Legal Services, though there was some disagreement as to exactly what it meant.¹⁰⁸ Peter Salsich set out his definition in an article written in 1968:

[Law reform] is taking three essential forms:

1. Prosecution of "test cases" designed to overturn harsh laws or correct inequities in the operation of agencies and individuals dealing with the poor.
2. Organization of neighborhood corporations and other groups capable of negotiating directly with governmental agencies.
3. Drafting and actively seeking enactment of changes in existing laws or new laws designed to equalize the relationship between the poor and the rest of our society.¹⁰⁹

In all that was written about the staff lawyer concept, there was little anticipation of problems. If my experience is at all typical, little of what actually happened was expected. All we could see and imagine were the immense possibilities of what could be done.

The Harvard Law Review had a concern which turned out to have some validity:

Young and dynamic lawyers of high quality are being attracted to legal services by the promise of being in the vanguard of legal, political, and economic reforms. If this promise is not kept, if they find that all their time is required for routine matters, they will leave, and their replacements will be lawyers content to handle the routine matters. If the neighborhood law offices are manned by unimaginative

107. D.H. Lowenstein and M.J. Waggoner, "Neighborhood Law Offices: The New Wave In Legal Services For The Poor" (1967), 80 Harv. L. Rev. 805, at 810. As to the legal education of the community, see page 820.

108. See E. J. Hollingsworth, "Ten Years of Legal Services for the Poor" in *A Decade of Federal Antipoverty Programs* (R. Haveman ed. 1977).

109. P. Salsich Jr., "Reform Through Legislative Action: The Poor and the Law" (1968-69), 13 Saint Louis Univ. L. J. 373, at 373-4.

lawyers, orientation of the offices toward the routine handling of the service function will increase.¹¹⁰

Carlin and Howard were two of the few who anticipated other problems:

We see three major problems with the neighborhood law office program: *First*, the more independent and aggressive the neighborhood office, and the more it is dedicated to bringing about institutional changes (in welfare agencies, police departments, landlord practices, etc.) the more likely it is to alienate those very interests upon which it must depend for financial support. *Second*, the more the neighborhood lawyer becomes integrated with other staff positions in the multi-service center, the greater the risk of his succumbing to the "social welfare ideology" and becoming less committed to seeking legal solutions. *Third*, there is the problem of staffing the neighborhood law office with competent, dedicated lawyers, particularly after the initial enthusiasm for this program begins to wane. Practice in the larger firms still represents the most lucrative and prestigious career for the bright young law graduate. It is doubtful to what extent the neighborhood law office will be able to compete for these fledgling lawyers.¹¹¹

Canada

In Canada, the debate over *judicare* and staff lawyers first became prominent in 1971 with the publication of *The Legal Services Controversy: An Examination Of The Evidence* by Larry Taman. He made an unequivocal choice between the two alternatives, favouring the neighbourhood law office approach and suggesting there was an onus on advocates of *judicare* to justify their position because, he said, it cost from three to six times more than the neighbourhood law office model. Taman's overall conclusion was as follows:

It is submitted . . . that the evidence cited above makes one thing abundantly clear: all those potent factors which inhibit the poor from seeking legal services are infinitely more likely to be overcome through the use of full-time lawyers who will accept as part of their work . . . the task of reaching behind those barriers.¹¹²

An opposing view, taken as a reply to Taman, was published one year later in the "Community Legal Services Report" of the Legal Aid Committee of the Law Society of Upper Canada. One of its four major conclusions was under the heading "salaried lawyers": "The use of salaried lawyers operating from "storefront" facilities is not a technique that permits greatly expanded service in advice and assistance matters at reduced cost."¹¹³ The Report stated that in spite of some dramatic cases arising from the Legal Services program in the United States, "we are of the view that the elimination or substantial alleviation of poverty through legal services invokes a promise by the legal profession which is largely undeliverable".¹¹⁴

The Committee suggested some reasons why the neighbourhood law office concept was not appropriate for Canada and why *judicare* (which was about ten years old in Ontario) was the better way: reform-oriented litigation was possible in the United States — but not in Canada — because of the U.S. Constitution and court rules allowing class actions; there were dif-

110. *Supra* n. 27, at 825.

111. J. Carlin and J. Howard, "Legal Representation and Class Justice" (1964-65), 12 U.C.L.A. L. Rev. 381, at 436 [emphasis added].

112. L. Taman, *The Legal Services Controversy: An Examination of the Evidence* (1971) 81.

113. Legal Aid Committee of the Law Society of Upper Canada, *Community Legal Services Report* (1972) 118.

114. *Id.*, at 86.

ferent attitudes in the two countries to "controlling committees" for administrative purposes; there was an unfamiliarity in many parts of the United States with what in Canada was a well-established and long-accepted method of external control of lawyers' fees. The basic point was that lawyers in the United States would not accept practices which were already common in Canada and which were basic to the *judicare* approach.

Just as in the United States, the *judicare*-staff lawyer debate in Canada has mellowed somewhat through the years. The notion of a "mixed system" has been slowly gaining ground, though there are several provinces which cling to one delivery approach or the other.¹¹⁵

Manitoba

The *Legal Aid Services Society of Manitoba Act* of 1972 made provision for both *judicare* and neighbourhood law centres. The Task Force of 1970 recommended that a neighbourhood office be established in Winnipeg on a one-year trial basis:

The experience of a great number of legal aid programmes throughout the United States Of America, funded by the Office of Economic Opportunity, had convinced your Committee that, as an adjunct to, and not in substitution for, a comprehensive system of legal aid, every major urban centre needs a full-time legal clinic located in or very close to the area of greatest poverty, staffed by lawyers who have or are prepared to acquire specialized knowledge in the fields of what have become known as "poverty law" The Neighbourhood Law Clinic, while by no means restricting itself to comparatively minor problems . . . would be able to deal with them, dispense advice, refer to the Legal Aid Society any matters of apparent gravity that could not be readily handled at the Clinic level, act as a sieve whereby much needless work on the part of the Executive Director could be avoided, and serve as a constant reminder to the people living within the immediate area that help is, in fact, available.

In 1972, the Board of Directors of Legal Aid Manitoba set out its "Ideas on the Function and Operation of the Neighbourhood Law Office". It echoed, as had the Task Force Report, some ideas from the United States:

There will be an attempt to focus on "test cases" which might go beyond the actual case and have repercussions for a larger group of people. For example, submissions might be made to the Law Reform Commission. As well, there will be an attempt to focus on cases concerning "poverty law".

It is important that the staff become aware initially of the make-up of the community, i.e., the individuals and groups operating within it, what is their purpose and how the Law Office might act as a resource to them.

The main purpose of the Law Office is to assist people in the area, but also it is to act on behalf of low-income people generally by looking at the effect of the law on poor people.

Such was the dream.

* * *

The first sign that the dream might be heading for disappointment

115. See I. Cowie, *The Delivery Of Legal Services In Canada* (1974); and "Legal Aid in Canada, 1975" in *Access to Justice*, (Canadian Council on Social Development 1976).

In the Annual Report of the Legal Aid Committee of Ontario for 1976, the Chairman (John Bowlby) stated:

It has become apparent that in certain jurisdictions, the line between the *judicare* concept and the public defender or salaried lawyer approach is much too rigid and the public must inevitably suffer by an refusal to either compromise or accept a combination of both approaches.

116. *Supra* n. 21.

came, perhaps appropriately, from Jean Cahn and Edgar Cahn in an article published in 1966. Referring to their seminal article published in 1964¹¹⁶, two scant years earlier, they noted that:

Underlying our exposition of the neighborhood law firm was the belief that we have provided a blueprint for an institution which would be responsive to the poor because of the nature of the obligation of the lawyer to the client. . . . (w)e failed to consider that in theory all instrumentalities of law are founded upon a principle of responsiveness — but nonetheless they have not worked. And slowly, but surely, neighborhood law firms . . . have already begun the long road to unresponsiveness.¹¹⁷

The Cahns listed problems already then evident: heavy case loads, legal help arriving too late, heavy involvement in individual cases rather than in group actions, insufficient research on broad issues, absence of any relationship between the neighborhood law offices and citizen groups, and the lack of training and use of paraprofessionals.

In 1970, the Cahns expressed increased disillusionment with legal services programs:

We have observed — both in the law reform units set up in legal service programs and also in day to day interaction between legal service attorneys and their clients — that there is a greater tendency to manipulate, to usurp group decision-making functions, to use clients to fit the private agenda of the lawyer than is to be found in private practice All contribute: the arrogance of youth, the monopoly power of attorneys, and condescension based on race and class.¹¹⁸

In the same article, the Cahns poured praise on the good will and expertise of the private bar. They were acknowledging, somewhat sooner than others in the legal services movement, that there was a substantial place and need for the private bar in delivering legal services to low income people. At the Ottawa Conference in 1971, they counselled the delegates not to give up on the private bar and not to under-estimate its possible contribution, but it was a message that few heard.¹¹⁹ In the heat of the debate then going on, no one wanted to hear it. The lines in the Canadian debate had only recently been drawn, and the choices were still seen by many as clear and definite, between good guys and bad guys, idealists and mercenaries.

No everyone was as disappointed as the Cahns were with staff lawyers. Though there have been problems with evaluating legal service offices,¹²⁰ and some questions about how much law reform was actually done,¹²¹ Earl Johnson was able in his history of Legal Services up to 1974 to point out some spectacular results.¹²² Nonetheless, it has been generally agreed that the results have been a long way from the dream. For example, the relationships which were to be basic to everything else seldom developed. In addition to the problems with citizen participation, the attempts to blend the ex-

117. J. Cahn and E. Cahn, "What Price Justice: The Civilian Perspective Revisited" (1965-66), 41 *Notre Dame Law* 927, at 927.

118. J. Cahn and E. Cahn, "Power To The People Or The Profession? — The Public Interest In Public Interest Law" (1969-70), 79 *Yale L. J.* 1005, at 1035-6.

119. Cotler and Marx, *supra* n. 60, at 46.

120. There were arguments for restricting access, but I was never sympathetic to them because the Manitoba system did not require a law centre to handle the cases of all eligible people who applied through those centres. They could be referred to the private bar.

See supra n. 108, at 288-289. *See also* the comment of Earl Johnson, Jr. in the same volume at 317, and *infra* n. 124.

121. *Supra* n. 108, at 306 ff. and 316 - 7.

122. E. Johnson, Jr., *Justice and Reform* (1974) 232.

pertise of different professions for the benefit of the poor also did not work out. Lawyers and social workers, in particular, were expected to develop close working relationships, but it did not happen. The two professions have continued to discover each other from time to time.¹²³

The relationships between legal service lawyers and clients also was nothing new or different. A comment based on the results of two studies of legal service offices stated the central problem:

In many agencies, staff attorneys apparently tend to think and behave just as if they were employed by traditional legal aid societies where services are dispensed on an individual case basis This should not happen to any OEO project which adheres to program goals (M)any attorneys may be providing services received by poor people from traditional legal aid lawyers.¹²⁴

Handling an individual case was not seen as a problem for poverty lawyers,¹²⁵ though case-overload was commonly regarded as "the most serious problem facing legal services".¹²⁶ Some observers felt that the real problem was not the number of cases but the attitude of the lawyers who seemed to prefer case load, whatever may have been the dreams of Poverty Law or the goals of Legal Services. Anthony Champagne suggested an answer:

Perhaps in order to encourage greater non-individual case handling interest and activity, the Office of Legal Services should concern itself with recruitment and dismissal of the local project attorneys and directors, hiring and retaining only those supporting national programme goals.¹²⁷

In Manitoba, a staff of 25 lawyers in six offices was in place by 1976. (The three rural law centres had special problems arising mainly from the long distances which had to be travelled. I am not referring to those offices in what follows.)

There were some outstanding cases and good results in matters handled by the staff lawyers over the years, though I wonder in retrospect whether they would not have come to light and been handled as well by the private bar if law centres had not been created. The question is particularly significant, since law reform work, the development of poverty law issues, and working with community groups never became well established in the law centres. Most of the lawyers fell into the common rut of the case-by-case approach based on "duty counsel" attendances at various courts and institutions. This was in spite of policy statements from the Board of Directors setting case load as the last of five named priorities. The first statement appeared in January, 1974:

We now envisage a number of "Community Legal Service" offices each staffed by from two to four lawyers plus articled students and support staff. The function of each centre will be (and we set it out in terms of priority):

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123. The most recent articles in the field discuss the hostilities between the professions, out of step with attempts through the years to forge an alliance: A. Phillips, "Social Work and the Delivery of Legal Services" (1979), 42 Mod. L. Rev. 29; R. Ferruggia, "Attorneys and Social Workers: A New Alliance" (1978), 35 NLADA Briefcase 134; P. Barton and B. Byrne, "Social Work Services in a Legal Setting". (1975), 56 Social Casework; A. Smith, "The Social Worker in the Legal Aid Setting: A Study of Interprofessional Relationships" (1970), 44 Social Services Rev. 155; C. Grosser and E. Sparer, "Social Welfare and Social Justice" in *Community Action Against Poverty* (G. Brager and F. Purcell eds. 1967); S. M. Isaac, "Status of Lawyer-Social Worker Co-operation" (1963), 3 J. of Fam. L. 53.
124. A. Champagne, "The Internal Operation of OEO Legal Services Projects" (1973-74), 51 J. of Urban L. 649, at 654 and 663.
125. *Id.*, at 653.
126. *Supra* n. 107, at 823.
127. *Supra* n. 124, at 663.

1. The development and delivery of community legal education services (preventive law).
2. Aiding and representing groups and organizations within its community in matters relating to "poverty law" (e.g., consumer protection; environmental protection; housing; welfare and related social rights).
3. Providing "institutional services": Juvenile Court duty counsel system; Family Court Duty Counsel system; services to senior citizens through the Age and Opportunity Bureau programs; services to inmates within the correctional and . . . mental institutions; services in association with social agencies . . . and services in remote communities. . . .
4. Informal advice to people in the community . . . and in outreach programs in association with a variety of community organizations.
5. The carrying by the staff of a manageable case load which will include advice, assistance and representation in both civil and criminal matters.

This statement had no noticeable effect on staff, who continued the case-by-case approach.

It should be mentioned that all of Legal Aid's staff were hired through the Civil Service of the provincial government. This requirement apparently was put into the original *Legal Aid Act* at the insistence of the government, which was nervous about creating an entirely independent agency. In 1973, Legal Aid asked that the *Act* be changed by striking out this requirement, because there were problems at the time in recruiting lawyers. The government refused to make a change. Along with the hiring procedure of the *Civil Service Act*, came the government salaries schedule and other benefits, like tenure after six months of probation.

In 1976, with budget pressures increasing, the Board of Directors issued another position paper, reaffirming the earlier list of priorities and the basic autonomy of the neighbourhood offices:

This leads to the central thrust of this paper, namely, a firm statement of the substantial program autonomy of the C.L.O.'s; and in that context the importance of the role of staff attorneys in helping to make program decisions in association with their Senior Attorneys, Citizen Advisory Committees, paralegal and support staff.

The "Position Paper" went on to say that there was no "quota" of cases per lawyer per month, as had been rumoured, but that budget planning had required that some kind of estimate of staff case load be made. The average for the previous year had been eleven cases per month per lawyer rising as the year progressed to 12.5 cases per month. The Board set, for budget purposes, eleven new cases per month per lawyer as a system-wide goal:

There is much misunderstanding and more than enough misinformation about "quotas". There are no "quotas" as such set by the Board, nor should there have to be . . . Clearly the size of case load has to be an individual thing based on a staff attorney's experience, interest and the demands of his or her program assignments *Because of the substantial financial implication and the need for the most careful fiscal planning due to budget restraints, we must reach consensus on (a) figure and in relation thereto, establish program priorities.* The minimum acceptable figure on a system wide basis works out to an average of 11 new cases per month per staff attorney. This goal will have to be carefully monitored and if, *with present program demands*, it proves impossible of achievement then some programs will have to be reassessed.

This statement created some consternation among the staff lawyers, who feared that with the time required for duty counsel work, eleven new cases per month could be too much. Yet, no submissions were made to the Board of Directors, nor did the Legal Aid Lawyers' Association raise case load or the goals of the agency or the needs of the client community as bargaining issues (up to at least September, 1979). The reason for this had nothing to do with the quality of legal staff, most of whom were very good lawyers. The problem lay elsewhere. As it became more and more clear that the staff lawyers as a group were content in their activities to be little more than traditional lawyers — in spite of what seemed to be a genuine opportunity to be more than that — I began to wonder whether the reason for their attitude was to be found in the character of the bureaucracy of which there were such an important part. Obviously the agency had an effect on everyone who worked in it. What was its effect on the professionals, and what was the effect of the professionals on the bureaucracy?

Several studies in the 1950's and 1960's concluded that bureaucracy can be detrimental to professionals because it limits the autonomy which is such an important part of professionalism.¹²⁸ The "typical view" as described in one study in 1970 was of the professional employee having to choose between the conflicting values of the profession and the organization.¹²⁹ Later studies have concluded that the picture of inherent conflict between bureaucratic control and professional autonomy is "unwarranted" and "an outdated stereotype".¹³⁰ Though there has been relatively little research into the inter-relationships between professionals and bureaucracies, and virtually none at all on lawyers in bureaucracies, the current view seems to be that professionals can retain their basic independence, whatever the size or nature of the organization, and that a large organization (like a corporation with its own law department) is not inherently more bureaucratic than an autonomous professional organization (like a private law firm). Though a bureaucracy may restrict the freedom of a professional and control the use of the professional's knowledge and skills, it may also provide opportunities not otherwise available to the professional:

Bureaucracies, especially professional bureaucracies, can serve the needs created by these alterations in professional practice by supplying those professionals who work within bureaucracies with funds, various kinds of equipment, technical personnel, and other professional facilities essential for contemporary professional performance, and with a stimulating intellectual climate for interchanging information and controlling quality of performance. These organizational characteristics will enhance the development and performance of today's professional. Working in isolation, he is less likely to have access to the social and physical features which bureaucracies can provide.

This could explain why the professionals in the moderate bureaucracy perceived

128. *Supra* n. 60, at 56.

129. G. Engel, "Professional Autonomy and Bureaucratic Organization" (1970), 15 *Administrative Science Q.* 12.

130. Russell Thornton, "Organizational Involvement and Commitment To Organization and Profession" (1970), 15 *Administrative Science Q.* 417; Peter Blau, "The Hierarchy of Authority In Organizations" in *Comparative Organizations: The Results of Empirical Research* (Wolf Heydebrand ed. 1973).

130. R. Hall, "Professionalization and Bureaucratization" (1968), 33 *Am. Soc. Rev.* 92, at 104; *See also* N. Toren, "Bureaucracy and Professionalism: A Reconsideration of Weber's Thesis" (1976), 1 *Acad. of Management Rev.* 36.

themselves as having more autonomy than those in either the nonbureaucratic or the highly bureaucratic setting.¹³¹

In 1971, Melvin Kohn published the results of a study which concluded that far from developing unthinking conformity, bureaucracy produces greater intellectual flexibility, a higher valuation of self-direction, and more openness to new experience. All of this seemed to be a "consequence of . . . far greater job protections, somewhat higher levels of income, and substantially more complex work".¹³²

Another study concluded that "bureaucratic organization can provide the professional with the opportunity to be more faithful to the ideals of the professionalism in several ways Within the organization the opportunity for such a nicety as altruism is increased since, relatively free of financial concerns, the professional is better able to participate in a reward system of a different type, one which is based on work achievement as an end in itself, not merely as a means of personal gain".¹³³

Having spent a part of my law career in a private law firm and a larger part in a fledgling government bureaucracy, I am able to vouch for the view that bureaucracy can mean freedom for the professional. Liberated from the agonies of overhead and billing and collecting, the legal aid lawyer can (or at least could in the agency in which I was practicing) pick and choose cases and projects, and experience the practice of law at its best.¹³⁴ This is what it was for some of the lawyers. They took advantage of the policy statements of the Board of Directors and of the "mixed system" of service delivery which allowed case assignments to be reduced (and referred to other staff or to the private bar) whenever a lawyer was overloaded or had a project to work on. Two staff lawyers received no case assignments at all for a lengthy period in 1977 while they worked on a public utility matter. In a number of ways, this was a rare case. Among other things, it was one of the few times that staff lawyers requested time to work on a special project, though the opportunity to do so had existed from the very beginning.

For most of the lawyers, Legal Aid was a step on the way to somewhere else. It paid well, the benefits were good, and there were the usual amenities enjoyed by professionals — such as a fairly loose attitude about hours of work. The work was initially demanding, but it provided excellent experience for young lawyers, and it soon became routinized and only as time-consuming as one chose to make it. If the bureaucracy asked for law reform, group actions or anything other than cases, it also had an unending supply of cases which it was increasingly grateful to have handled by the fixed-cost part of the delivery system, and it was rather difficult for the bureaucracy to be critical of its professionals for doing what private lawyers were doing, and what lawyers have always done. As the initial enthusiasm and idealism declined within Legal Aid, and as the number of cases and

131. *Supra* n. 41, at 19. See also R. Hall, "Some Organizational Considerations In The Professional-Organizational Relationship" (1967), 12 *Administrative Science Q.* 461.

132. M. Kohn, "Bureaucratic Man: A Portrait and an Interpretation", (1971), 36 *Am. Soc. Rev.* 461.

133. G. Engel and R. Hall, "The Growing Individualization of the Professions" in *The Professions and Their Prospects* (Eliot Freidson ed. 1971). See also H. Arthurs, "Discipline In The Legal Profession In Ontario" (1970), 7 *O.H.L.J.* 234, at 265.

134. "Legal service programs generally are not characterized by the kind of tight administrative management and the necessity to justify one's expenditure of time (for billing purposes) that characterizes private practice." *Supra* n. 118, at 1032.

budget problems increased, the pressures to do something other than individual cases gradually eased and then disappeared.

Thus, it seems to me that the reason why staff lawyers turned out to be traditional lawyers had nothing to do with case load, which was controllable in the Manitoba context, but which was virtually never in fact controlled. In this regard, I disagree with the common diagnosis of the same basic problem in the United States. Gary Bellow has described problems like "routinization" and the general absence of empathy with clients which he has found in legal services offices in the United States. He traces the cause back to heavy case loads.¹³⁵ If Manitoba is any indication, that is not the cause.

Nor, as I have suggested, is the cause to be found in the mere fact that the lawyers were working within a bureaucracy. For at least three or four years, the bureaucracy was sympathetic to a non-traditional legal practice. On the basis of the priorities set out in its Position Papers, the Board of Directors would have been hard-pressed — but was never pressed at all — to refuse any lawyer's request to do anything outside of individual cases.

There were tensions between Legal Aid's lawyers and its Board of Directors and administration, but not quite of the kind a sociologist might have predicted. In 1966, an American sociologist named Richard Scott wrote an article which I have found interesting and helpful, and which I shall use here as a guide to what I saw happen at Legal Aid Manitoba. Scott described "four areas of conflict which are likely to occur when professional workers are employed by a bureaucratic organization":

1. *The professional's resistance to bureaucratic rules:*

The professional expects to be allowed maximum discretion in the selection of means for achieving desired results, being constrained in his operations only by internalized norms which indicate accepted procedures. The bureaucracy, however, superimposes its own rules on the professional constraining his behavior in various ways and specifically restricting his choice of means.¹³⁶

In common with other legal aid plans, Legal Aid Manitoba has standard forms for everything from the client's application to the lawyer's Final Report. It has rules about what people are eligible, and when money can be spent, and how the forms are to be processed — all in the name of efficient service and the wise spending of the taxpayers' money. The forms and rules are soon learned and, as is the case in most other organizations, most people learn to live with them most of the time. But the professional may, as the last quotation suggests, see himself or herself as above the rules, at least to the extent of ranking them second to the rules of the profession. Thus, indeed, the bureaucracy may find itself unable to control its professionals very tightly, or perhaps at all. From the point of view that the object of legal aid and of professionals is to help people, this is not necessarily bad.

Bending, twisting and breaking rules is possible in all bureaucracies, and Legal Aid was no exception. The wise bureaucracy will expect and tolerate, perhaps even encourage a certain amount of such attitudes toward

135. G. Bellow, "Turning Solutions Into Problems: The Legal Aid Experience" (1977), 34 NLADA Briefcase 106.

136. W. Scott, "Professionals in Bureaucracies — Areas of Conflict" in *Professionalization* (H. Vollmer and D. Mills eds. 1966) 270.

rules and regulations, since it often reflects a keen and healthy desire to help people, a trait which can be strangled to death by red tape and by a fear of losing one's job. Lawyers, who know better than most people how rules can be bent, should be an exception to the more common variety of bureaucrat. Since lawyers are often involved in the interviewing of people applying for legal aid services, legal aid should be an exception to the usual rule governing bureaucracies:

[B]ureaucrats in the lower echelons, those who have the greatest amount of contact with lower-class clients, are also the most bound by rules . . . [T]he lower-class person, whose knowledge of the system is least adequate, must interact with the very officials who are most constrained by the formal rules.¹³⁷

Unfortunately, however, an easy attitude toward rules is not necessarily what one finds among lawyers in bureaucracies:

In order to make a sharp contrast with the bureaucratic approach, one would like to say that procedures as viewed by professionals are merely means to an end which when proved ineffective are ignored or discarded. And one would like to say further that the professional's orientation toward the "whole" problem and his corresponding assumption of responsibility make it possible to evaluate his performance entirely on the basis of results achieved rather than on his conformity to specific procedures. But however neat and logical this argument appears, it does not describe the situation accurately. Indeed, many analysts have noted that from the point of view of an impartial observer, the professional often seems more concerned with following correct procedures than with the success or failure of his efforts.¹³⁸

As Legal Aid Manitoba grew older, and as the times changed from the aftermath of the liberal 1960's to the conservative 1970's (when poverty reverted to being understandable and acceptable to the general public only at Christmas), the signs of bureaucratization increased in the attitudes of staff lawyers. As an administrator, I observed it in the telephone calls I received from staff lawyers asking for permission to bend or break a rule in circumstances which frequently had me asking the caller whether s/he really thought permission was necessary or whether s/he believed anyone would have been upset for any good reason if the deed had been done without permission. It was often amazing to me how independent-minded professional people could feel constrained by a rule standing in the way of helping a person with a legal problem.

Of course, rules can be handy for a lawyer who has no inclination to help: the emergency which cannot be immediately handled because the rules require an application to be made and approved; an ineligible person under stress who is not referred to a private lawyer with expertise in the legal problem because the rules forbid such referrals; interviews with applicants completed in five or ten minutes; troublesome clients referred to another Legal Aid office. These types of incidents were not necessarily typical of staff lawyers, but the fact that they happened as often as they did was in discouraging contrast to the philosophy behind law centres.

Hiding behind rules, forms and procedures is as possible for a profes-

137. G. Sjöberg, R. Brymer and B. Farris, "Bureaucracy and the Lower Class" in *Bureaucracy and the Public* (E. Katz and B. Danet eds. 1973), 65-66.

138. *Supra* n. 136, at 270. See also M. Lipsky, *Street-Level Bureaucracy* (1980).

sional as for a non-professional, and, in my experience, just as likely.¹³⁹ Non-professional "intake workers" often seemed to me to be more concerned than many of the lawyers to apply the general rule of making each applicant or client better off for having seen them.

2. *The professional's rejection of bureaucratic standards:*

The bureaucrat, possessing only partial skills, is much more likely to receive on-the-job training, which will include some indoctrination as to the proper goals and objectives of his activities. He has relatively little basis or social support for questioning the appropriateness of these objectives. The professional employee's case is quite different. He comes equipped with a set of standards shared with many of his colleagues which can be used to evaluate the standards and objectives of his employer. Where the standards conflict he can marshal wide social support to countenance criticisms of or deviations from organizational policy in the directions advocated by professional standards.¹⁴⁰

I have already commented on how the staff lawyers were by and large unable to respond to the freedom offered by the Board of Directors of Legal Aid Manitoba to pursue objectives other than the handling of individual cases. At the start, it was perhaps a rare case of the directors of a bureaucracy being more liberal than its professional employees. Like staff lawyers elsewhere, many of the Manitoba lawyers showed signs of "cautious conservatism", "rigid attitude" and "self-imposed restraint". And "some assumed that they should not act unless the board had ordered action, rather than acting with prudence if the board had not denied authority".¹⁴¹ As stated above, I view the reasons for this to lie outside the Legal Aid bureaucracy at least as it existed up to 1977. Though the lawyers were individually capable of exercising independent judgment, it was regrettably, though understandably, within the bounds of their professional training and the typical professional model. It was a new illustration of the old saying about lawyers: they are sharp, but like anything sharp, they are narrow.

3. *The professional's resistance to bureaucratic supervision.*

A great many studies indicate that professionals are uncomfortable with bureaucratic authority, at least to the extent of expressing dissatisfaction with supervisory arrangements and complaining about managerial "interference".¹⁴²

At Legal Aid, this issue arose in connection with the evaluation of individual lawyers. In the beginning, the administration depended on the senior attorney in charge of each law centre to provide evaluations. The reports were required while an individual was on six months of probation as

139. I do not exempt myself from this statement.

140. *Supra* n. 136, at 272.

141. A. K. Pye, "The Role of Legal Services In The Antipoverty Program" (1966), 31 L. and Contemp. Prob. 211, at 242. See also B. Baum, *Decentralization of Authority In A Bureaucracy* (1961) 138:

Decentralization of authority in [government] operation, . . . may differ from decentralization of authority in private industry. In private industry the maxim might be stated as: Except for what is specifically prohibited, officials have authority to do whatever is to the best interests of management as they view it In the Government, the maxim which characterizes the present program is: Officials may do only that which is specifically permitted; all else is prohibited.

And see W. Heydebrand and J. Noell, "Task Structure and Innovation in Professional Organizations" in *Comparative Organizations: The Results of Empirical Research* (W. Heydebrand ed. 1973).

The problem is not new. In *The Administrative Process* (1938), James Landis wrote (at page 75):

Standards . . . afford great protection to administration. By limiting the area of the exercise of discretion they tend to routinize administration The pressing problem today, however, is to get the administrative to assume the responsibilities that it properly should assume The easiest course is frequently that of inaction. The legalistic approach that reads a governing statute with the hope of finding limitations upon authority rather than grants of power with which to act decisively is thus common.

142. *Supra* n. 136, at 273.

a new employee, and thereafter as often as s/he became eligible for a "merit increase" in salary (about once each year). As might be expected, loyalties developed within the law centres and the reports were seldom critical. In two cases in which lawyers were eventually asked to leave, the state of their practice was discovered by head office administrators as a result of comments made by persons outside of Legal Aid. The evaluations had been satisfactory. The staff as a whole seemed to consider these as unique cases, and questioned the need for any outside (i.e., someone from outside the law centres) evaluations. It was argued that once a lawyer had survived the probation period, s/he had proven capabilities — presumably forevermore.

Gary Bellow has analyzed and written about these types of problems in more detail than anyone. He has suggested the need for systematic self-scrutiny by staff lawyers:

[I]t is important that lawyers agree to accept some direction in the way they are handling cases The importance of individual judgment in legal work notwithstanding, it is essential that lawyers in the offices begin to accept some limits on their freedom to practice law "as they choose".¹⁴³

This is fine. But how to do it? This is another matter which was not anticipated by the directors or administrators until it was on top of them in the form of lawyers in difficulty. Devising an effective, fair, regular method of evaluation is complicated by the professional standing of the employees, who tend to regard themselves as being like their colleagues in the private bar, responsible only to their clients and the Law Society — even if the government is issuing the pay cheques.

The resistance to the evaluation of individuals made the evaluation of complete offices even more difficult.¹⁴⁴ Owing to a lack of administrative personnel, an office evaluation was done only once. It is a growing problem which has yet to be fully confronted in Manitoba.

4. *The professional's conditional loyalty to the bureaucracy.*

The worker exposed to such a training program [law school] often comes to develop a professional self-image in the sense that he values his skills highly and is more concerned with getting and maintaining a reputation among his peers than he is with pleasing his organizational superiors The professional advances by finding more and more desirable work locations — locations which have superior facilities and allow a maximum freedom for him to pursue his interests While the professional follows his career line between organizations, the bureaucrat achieves success by moving up within a single organization.¹⁴⁵

Most of the lawyers who left Legal Aid went into private practice. That prospect always exists to some degree, and is considered from time to time by lawyers working for a government agency of any kind. Within Legal Aid, there is little room for advancement, even for the rare lawyer who has any interest in administrative work.

143. *Supra* n. 135, at 120.

144. The games played in regard to monthly statistical reports often reflected the comments from a study of a social service agency: "An instrument intended to further the achievement of organizational objectives, statistical records constrained interviewers to think of maximizing the indices as their major goal, sometimes at the expense of these very objectives". P. Blau, *The Dynamics of Bureaucracy: A Study of Interpersonal Relations In Two Government Agencies* (1963) 46.

145. *Supra* n. 136.

As Legal Aid grew older and larger, and the excitement of working for a new organization gradually disappeared, loyalty to the original ideals and to the agency (which were one and the same thing for many of the first employees) decreased.^{145A}

The organization had changed as the loyalty of the professionals had changed. Some skeptics had assured me, at the start of Legal Aid in 1972, that the poor could be counted on to get their usual short end of the stick, while the lawyers would look after themselves. So it seemed to me as I contrasted those early days with the attitudes of 1979.

There were stresses and strains between the Legal Aid bureaucracy and its professional employees, but I do not believe this had anything to do with why the lawyers were unable to carry out the broad goals of the agency. The fact that there was no formal objection to any of the Board's goals or to administrative requirements suggests that the lawyers were spending their time on case work because that was exactly what they wanted to do, in spite of some rhetoric to the contrary. It is surprising *now* that we were surprised *then* by their being just that way, when there were two compelling reasons why they could hardly have been any different. Those of us who had idealistic dreams failed to take account of the obvious: the law school experience, and the structure of the legal profession.

The Law School Experience

Most of the lawyers hired by Legal Aid in its first seven years were fresh out of law school or within one or two years of graduation. For three years prior to joining Legal Aid they had been part of an intensive educational experience which placed little or no stress on poverty law or service to "others less fortunate", but did place a lot of stress on commercial and corporate law and money. Those people who arrive at law school with idealistic notions about joining a "helping profession" and helping low-income people are unlikely to see those ideals survive to graduation day.¹⁴⁷ The few who make it that far run the risk of all law students leaving the university ivory tower: "reality shock". The images which students frequently take with them from law school have been described as follows:

Analysis of the modal images held of law as work discloses the gradual replacement of an exotic and dramatized image by one which takes account of routine and pedestrian elements. The dominant initial image — "the courtroom version" — is highly theatrical. Content analysis reveals the recurrent themes of an advocate contesting in the defense of a man wrongly charged of a serious crime; the scene is one

145A. This was illustrated after the budget cuts in 1978, when it came to my attention (as then Executive Director of Legal Aid) that one of the more experienced lawyers in the law centres had been telling other staff about the amount of money involved in his representation of a private party in a property transaction. I was aghast. I threatened dismissal if the lawyer did not immediately stop doing "outside work". He said he would stop, but a grievance was soon filed on his behalf by the Legal Aid Lawyers' Association. In later testifying before an arbitration board, I mentioned several practical reasons for the stand I had taken, including the political sensitivity of Legal Aid, and the unmet legal needs of low-income people. The summary of my testimony in the board's decision could have been taken from a speech at a legal aid convention sometime between 1965 and 1975, but in the context of 1979 it was embarrassing for me to read:

(The Society's executive director . . . was its only witness. His vision of the Society projects the Society in the image of a group of vital, energetic, idealistic lawyers, dedicated to the cause of advocacy and justice on behalf of the poor and the underprivileged, committed to that cause to the exclusion of any other professional endeavour. In hiring lawyers, he indicates that he seeks to select men and women who are wholly committed to that cause.

146. See R. Clark, "Memorandum to Committee on Planning and Educational Development: The Goals of Legal Education At Harvard Law School", November 12, 1979 (Unpublished). Clark observed: "One critical and not clearly implausible account of the Harvard Law School goes something like this: the *observed tendency*, or "actual goal", of the Harvard Law School's educational program is to obtain the smartest and most diligent American law students and have them trained . . . to be competent legal servants to the most elite institutions and groups in the United States . . ."

147. Cramton, "Legal Education and Legal Services — Some Reflections" (1978-79), 12 *Creighton L. Rev.* 487, at 490. *And see* H.W. Arthurs, "The study of The Legal Profession In The Law School" (1970), 8 *O.H.L.J.* 183, at 189, 198 - 200.

of electric tension, and resolution is through the almost magical powers of a passionate lawyer showing his mastery of the sudden switch, the devastating deduction, the moving plea. The image is a prism of potent American values (courage, association with the right, pragmatic brilliance) and human motives (narcissism, messianic duty, masculine aggression) or no less power. Perhaps the crucial attribute of the image is its charismatic rather than routine quality — it is the antithesis of the prosaic.¹⁴⁸

The gap between image and reality may be less now than when the comment was made in 1959, but of course there will always be a gap, and for young lawyers joining legal aid, the dreams are likely to be grander and the gap greater than for those joining the main stream of private practice.

Poverty law courses are no longer as popular as they once were, but even when they were offered and students were interested, my impression is that the approach taken by teachers was either extremely broad or, more commonly, very narrow:

Legal education, for the most part, treats law as doctrine, not as social fact Some law schools are experimenting with new courses bearing "law in action" titles such as "legal aspects of welfare" . . . but these courses typically depart less from traditional law school concerns than their titles imply. Occasionally they are taught jointly with social scientists But the social scientists talk about their concerns, the lawyers talk about cases and statutes, and the connection between the disciplines remains tenuous and strained.¹⁴⁹

Anyone who graduates from a law school with any practical ideas about how to resolve any of the problems of low-income people is going to be an extremely unique person. Such a person needs time to develop legal skills. But once the skills are developed, it is unlikely that the person will still be interested in poverty law, for reasons described under the next heading.

The staff lawyers of Legal Aid Manitoba worked as if they preferred a case load crisis. There was an attitude formed by their training in law school, by the traditional model of a law practice (which is what most of the staff lawyers' colleagues in law were doing), and by the crisp certainty of opening a file, dealing with a definite problem, and closing the file. In contrast to this, the lawyers were asked to approach broad problems in a context wider than just that of the law, to pursue issues which could take months or perhaps years of persistent research, interviewing, meeting and submitting before there might be some progress. The lawyers had no training or patience for this and virtually no role models other than the distant Ralph Nader. The Board of Directors provided the opportunity, but it was almost never taken. Generally unprepared for the demands of Poverty Law, and for the most part neither political nor politicized (after the neutralizing effect of the study of law), the lawyers faced a freedom with which they did not know how to deal.¹⁵⁰

At one point, the Board of Directors met with the Senior Attorney of a law centre and sketched out some issues and broad programs which were

148. D. Lortie, "Laymen to Lawmen: Law School, Careers, and Professional Socialization" (1959), 29 *Harv. Educ. Rev.* 352, at 364.

149. J. Handler, "The Role of Legal Research and Legal Education in Social Welfare" (1968), 20 *Stan. L. Rev.* 669, at 681.

150. Erick Fromm argued in *Escape From Freedom* (1941) that modern man cannot handle the agony of what to do with his freedom. It is an idea which often came to my mind as we tried to come to grips with the problem of case load and broader objectives. See also F.A. Hayek, *The Constitution of Liberty* (1959): "Liberty not only means that the individual has both the opportunity and the burden of choice; it also means that he must bear the consequences of his actions and will receive praise or blame for them. Liberty and responsibility are inseparable" (At page 71). And see D. Boorstin, *The Decline of Radicalism* (1969).

considered appropriate for the office to take on as concerns of its "community". This included educational programs in schools, the establishment of a domestic squad in the police department, the formation of a group to make application to the federal government for funds to build low-rental housing, legal education programs for juvenile workers, submissions to government on the level of welfare rates, and so on. Beyond a one-day education effort for community workers, the law centre was unable to respond. The Senior Attorney resigned soon after, and returned to private practice.

The Structure of the Legal Profession

The vast majority of cases handled by Legal Aid have been in the fields of family law and criminal law. These areas of law have never been highly remunerative for most lawyers. Largely for that reason, they have been handled mainly by younger lawyers who tend to move on within five or six years to the more prestigious and more highly paying corporate and commercial work.¹⁵¹ This accounts in part for the fact that Legal Aid has seldom been criticized by senior members of the bar, who are generally sympathetic to the idea of legal aid and accustomed to seeing such work done by the younger bar with little or no compensation.

Manitoba staff lawyers have had a wider range of matters to handle than their counterparts in the United States, but there have always been preferred types of cases, just as in the private bar. The problem was that within the fields covered by Legal Aid, the preferences of younger counsel in the private bar and in the law centres were essentially the same: they did not particularly want separations and simple divorces, and they *did* want appeals, jury trials, unusual cases, cases in the higher courts, cases with solid legal issues. Working with groups or on educational programs was "something different", but not what the staff lawyers wanted.

In many parts of Canada, a pattern has developed of prosecuting attorneys going into private practice after four or five years with the government. This has long been accepted as a common trend, based on bar attitudes to criminal work, the possibilities of more money to be made in private practice, and to the "persistent ideal among lawyers [of] the model of the lawyer as the independent professional."¹⁵² It is against these long-time professional attitudes and tendencies that legal aid plans are competing, and against which they are almost certainly bound to fail.

Staff Lawyers: Turnover and "Burn-Out"

The rate of turnover of lawyers working with Legal Services in the United States has often been the subject of comment and concern. The rate in 1976 was thirty-six per cent.¹⁵³ Recent studies show that Legal Service lawyers have stayed for an average of three to four years.¹⁵⁴ In some offices

151. See generally: J. W. Hurst, *The Growth of American Law* (1950), 297; M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations On The Limits of Legal Change" (1974), 9 L. and Soc'y Rev. 95, at 116; J. Auerbach, *Unequal Justice* (1976) 26, 48 - 49, 219, 295; L. Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (1965) 147; L. Friedman, *A History Of American Law* (1973) 502; E. Laumann and J. Heinz, "Specialization And Prestige In The Legal Profession: The Structure of Deference" [1977] A.B.F.R.J. 155.

152. J. Handler, E. J. Hollingsworth, H. Erlanger, *Lawyers and the Pursuit of Legal Rights* (1978) 9.

153. J. Katz, "Lawyers For The Poor In Transition: Involvement, Reform and the Turnover Problem In The Legal Services Program" (1978), 12 L. and Soc'y Rev. 275, at 286.

154. *Supra* n. 152, at 66 - 7. See also *Supra* n. 108, at 305.

the average term has been less than one year, even in earlier years when enthusiasm for the work was running generally much higher than it has been in the last decade.¹⁵⁵ In this respect, Legal Services is not so different from other agencies which have relied a good deal on the energy and idealism of young people.¹⁵⁶

In the first seven years of Legal Aid Manitoba, there were forty-two lawyers employed. They stayed for varying lengths of time:

- among the 20 lawyers employed at Legal Aid Manitoba in 1979, the average time with Legal Aid was three years.
- the average time at the bar among the 20 lawyers was about 4.5 years.
- of the other 22 lawyers hired by Legal Aid, all of whom had left, the average time with Legal Aid was 2.5 years. The longest terms were one of seven years and two of five years.
- Thirteen of the lawyers stayed for exactly 2 years.

This is where the 22 lawyers went:¹⁵⁷

- | | |
|-------------------------------------|---|
| — joined a private firm: | 8 |
| — started own firm: | 2 |
| — returned to private practice: | 2 |
| — returned to university: | 4 |
| — teaching position at university: | 1 |
| — appointed to the bench: | 1 |
| — joined another government agency: | 2 |
| — no plans: | 1 |

Numerous reasons have been suggested for the turnover rate among poverty lawyers, including these:

- overwhelming case load
- the nature of the work (repetitive, boring)
- the quality of leadership
- the desire to earn more money
- the desire to try private practice
- the desire for change
- emotional exhaustion

The above statistics show that Manitoba's experience with staff turnover has been much the same as elsewhere. However, the reasons attributed to turnover in other places have not been the reasons in Manitoba — other than as minor factors. For instance, salaries were not the reason why so many lawyers left after two and one-half years. It was generally accepted that salary levels were generous.¹⁵⁸ Nor was a conservative leadership from the Board of Directors, or heavy case load, or external pressure the reason why.¹⁵⁹ Criticism of the program, particularly by judges, became isolated as Legal Aid became an accepted part of the "Justice System".¹⁶⁰ Physical facilities were somewhat roughhewn in the first year or two (a fac-

155. M. Girth, *Poor Peoples' Lawyers* (1976) 70.

156. W. Crook and R. Thomas, *Warriors For The Poor: The Story of VISTA, Volunteers In Service To America* (1969) 92: "Not everyone who volunteers for VISTA serves America for a full year. They drop out, they are asked to leave, they become ill, or they simply wake up one morning and decide that they have made a mistake. The rate of attrition among Volunteers for all reasons is approximately 15 percent."

157. Three of the lawyers took study leaves of one year each, after which two of them worked a further year and then quit. These leaves of absence have not been counted in the statistics.

158. In 1979, salaries ranged from \$16,000 (for a first-year lawyer) to \$36,000. In contract negotiations, the Lawyers' Association asked that salaries be reduced in return for more holidays.

159. See generally T. Finman, "OEO Legal Service Programs And The Pursuit Of Social Change: The Relationship Between Program Ideology And Program Performance", [1971] Wisconsin L. Rev. 1001, at 1071-73, 1076. See also *Supra* n. 155, at 76-7.

tor which added to the exhilaration of the time), but after that the Law Centres were at least comfortable, and staff were seldom heard to complain about them. Staff training was part of Legal Aid until budget cuts in 1978, and members of the private bar were available for staff to consult or understudy, if staff chose to make use of the opportunity. Supervision of the predominantly youthful staff was another problem at the start, but this too became less of a problem as time went by and the average experience at the bar increased; the degree of supervision was probably no worse and frequently better than what was being given in private offices.

What then were the major reasons for the turnover? From my knowledge of 42 lawyers, I would say that the main factor was, again, the attraction of the private bar. No doubt, the nature of legal aid work and other factors contributed, but sooner or later a staff lawyer who has not tried private practice will find the attraction to be very strong. The attraction is often very specific as well, since a staff lawyer who becomes established as a "good lawyer" will soon receive offers from private firms.

For a small number of staff lawyers, the reason for leaving legal aid work is "burn-out", a term often applied — wrongly, in my view — to *all* lawyers who leave.¹⁶¹ Though it applies to only a few, the concept is an important one, because the few it affects are usually the ones who can do the kind of job originally envisioned for neighbourhood law centres.

Judging by the little that has been written about it, the term "burn-out" is relatively new in the social service field.¹⁶² Though it is often referred to among legal aid lawyers, only one article on the subject has appeared in a legal journal. In that article, Dr. Christina Maslach, apparently the leading expert on the subject, described burn-out in these terms:

Burn-out is a syndrome of emotional exhaustion in which the attorney has very little concern, sympathy or respect for clients. Over time, there is a psychological detachment from clients and a shift in the attorney's attitudes toward the cynical or negative. It is not unusual to hear such comments as, "I just don't give a damn anymore", "I can't stand working with clients so much" or "I wish they would all go away and leave me alone." In addition to thinking of clients in increasingly derogatory terms, attorneys begin to believe that clients are somehow deserving of any problems they have — a "blame the victim" orientation . . . This close, continuous contact with clients involves a chronic level of emotional stress, and it is the inability to cope successfully with this stress that is manifested in the emotional exhaustion and cynicism of burn-out.¹⁶³

Dr. Robert Coles has described similar symptoms which he says emerged in civil rights workers of different classes and ages, who had different motivations for their work, and whose characters and defense mechanisms varied:

To develop they [clinical symptoms] take time and certain kinds of experiences; but given both, they occur, in my experience, almost universally. They are clinical signs of depression . . . Depressions occur, characterized by loss of hope for victory,

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160. H. Stumpf and R. Janowitz, "Judges And The Poor: Bench Responses To Federally Financed Legal Services" (1969), 21 Stan. L. Rev. 1058 at 1065: "[T]hese responses [to the questionnaire answered by judges and legal service workers] suggest that many staff lawyers have a hard row to hoe in their day-to-day court work". See also *Supra* n. 155, at 76.
161. See e.g., *Supra* n. 152 at 66-7; A. Watson, *Psychiatry For Lawyers* (1968) 25; J. Hee, "Community Law: An Alternative Approach To Public Legal Services" (1978), 18 Santa Clara L. Rev. 1054 at 1078; W. George, "Development Of The Legal Services Corporation (1975-76)", 61 Cornell L. Rev. 681, at 711; Cramton, *supra* n. 147, at 494.
162. A bibliography on the subject appears in a pamphlet entitled, "Worker Burnout Among Child Protective Service Workers" (1979) by the National Centre on Child Abuse and Neglect. Some twenty articles and speeches are listed from 1965. Less than half have been published.
163. C. Maslach and S. Jackson, "Lawyer Burn Out", (1978), 5 A.B.A. Barrister 8, at 8.

loss of sense of purpose, and acceptance of the power of the enemy where before such power was challenged with apparent fearlessness.¹⁶⁴

Stephen Wexler has suggested these reasons for burn-out among poverty lawyers: low salaries, hassles with the government-employer, the dull routine of most cases, the slant of the law against low-income people, ungrateful clients, and the vastly different life styles of lawyers and clients.¹⁶⁵ Another writer has argued that lawyers leave legal aid work because they "cannot grow with their clients, as private lawyers often do".¹⁶⁶

Psychiatrists have another view. Dr. Alan Stone has described the causes of burn-out as based on emotional entanglements with clients, for which law schools do virtually nothing to prepare its students. In the late 1960's, radical and activist students sought to practice law with a new value system:

They seek to develop a new professional role that allows them more interpersonal contact with clients on an egalitarian basis. They throw themselves into complex relationships with clients and open themselves to an unending sequence of dependent and insatiable demands. They face extraordinary emotional entanglements because this new professional demeanor places no limits on their clients' conscious or unconscious expectations.¹⁶⁷

Dr. Andrew Watson suggested a related reason for the "interesting but sad characteristic" of burn-out among idealistic young lawyers:

[I]t seems that the primary reason was the frustration caused by the rude discovery that there is a veritable mountain of problems to be solved for the poor and disadvantaged of our society, which no amount of zeal and concern can significantly affect. When young lawyers confront this fact, it forces recognition of some of their hidden motivations, including the omnipotent fantasy of curing the ills of society by dint of concern for one's fellowman. Since this aspiration is doomed, a sense of frustration and failure sets in, and withdrawal is necessary to insure psychological survival. Even though good and useful work had been done, it felt like failure because the fantasied total cure was not affected. It is sad that this crucial altruistic concern is thus lost, for it is precisely this kind of motivation that must be delicately nurtured and preserved if society is ever to change for the better. But a special kind of self-awareness is needed to save it.¹⁶⁸

Much of what has been written about burn-out relates to preventive measures: taking temporary leaves, developing a private life entirely apart from one's work, preparing for the emotional demands of the work, discussing and sharing problems with others, frequently re-evaluating one's hopes and goals, and so on.¹⁶⁹ In these ways it is thought that burn-out can be avoided, or that its incidence can be reduced or modified so as to prolong the work life of dedicated people.

I have observed lawyers in legal aid work over seven years, and I have experienced burn-out. My view is that the concept has been incorrectly used to describe the turnover of many lawyers who never did burn-out. For, as the term suggests, before there can be burn-out, there must be a flame, an unusual level of dedication to the work. Most people do not have it most of the time, and they have difficulty understanding it when they see it in others. Most legal aid lawyers do not have it and never did have it. It affects (perhaps "afflicts" is the better word) only a small number of people, and

164. R. Coles, "Social Struggle And Weariness", (1964), 27 Psych. 305, at 308.

165. S. Wexler, "Practicing Law For Poor People" (1970), 79 Yale L. J. 1049, at 1051.

166. *Supra* n. 153, at 298.

167. A. Stone, "Legal Education On The Couch" (1971-72), 85 Harv. L. Rev. 392, at 433.

168. A. Watson, *Supra* n. 161. And see P. Chance, "That Drained-Out, Used-Up Feeling", Psychology Today, January, 1981, at 88.

169. See *supra* n. 163. See also H. Freudenberger, *The Staff Burn Out Syndrome* (1975).

usually for only a brief period, two or three years. There are several characteristics:

- a high level of dedication to, and empathy with low-income people
- an emotional attachment to the broad goals of legal aid
- a high level of energy and creativity within the field of law
- a capacity for large amounts of work of high quality
- a willingness to take on any task, and the capacity to find time for everything.

In an evaluation of several Legal Service offices in 1971, Ted Finman found one office with a group of lawyers who had these characteristics:

Without any prodding, all [the lawyers] identified test cases and legislative change as program goals, and most mentioned activity of this sort before talking about individual clients; some spontaneously talked of aiding in the development of cooperative apartments, credit unions and the like; several spoke of representing poverty community groups, and all expressed a positive attitude toward such work. Every lawyer indicated that concern for the rights and well-being of the poor was important, usually crucial, in motivating him to work in the program.¹⁷⁰

In contrast, Finman described the legal staff of another office:

The lawyers saw serving individuals as the only function of their program. They uniformly opposed working with community organizations. None spontaneously identified law reform as a goal; when specifically asked about it, though voicing no objections, they said that the press of day-to-day business made such activity impossible. In explaining why they had come to work in [Legal Services], all mentioned money and experience first, and only one went on to express some desire to help the poor.¹⁷¹

I suggest the lawyers described in the first office are certain to experience burn-out, while those in the second office will not burn-out, whether or not they stay with Legal Services, because their commitment to the work is of a completely different kind.

Where does a high level of dedication come from? Why do some people concern themselves about the welfare and happiness of others, and make it more important, for at least some period of time, than their own? The question is all the more difficult to answer when applied to lawyers, since such impulses are certainly not nurtured by the experience of attending law school with its oft-noted insensitivity to human problems and its unemotional atmosphere. And, of course, the legal profession is not noted for its warm-hearted tenderness.

Pitirim Sorokin studied altruism in the 1940's, seeking its source. After considering such factors as intelligence, economics, emotional stability, and ideas about religion, ethics and politics, he concluded:

Each of the single factors considered, and the same is true of any other single factor, is found to be utterly inadequate to explain why persons and groups differ so widely in their altruistic and egoistic behavior, why this behavior changes, and why now altruistic and now egoistic tendencies increase or decrease.¹⁷²

This is consistent with my own experience. Of the five or six lawyers I have known to burn-out, the only common denominators of which I am

170. Finman, *supra* n. 159, at 1057.

171. *Id.*, at 1057.

172. P. Sorokin, *The Reconstruction Of Humanity* (1948) 88. See also J.A. Matter, *Love, Altruism, and World Crisis: The Challenge of Pitirim Sorokin* (1974).

aware are the factors I have listed above. So far as I have been able to tell, there was no way to predict that they would be as good as they turned out to be as poverty lawyers. I think their performances surprised even them, for the capacity to do large volumes of good quality work is based on a commitment which cannot be willed beyond a certain point. From that point, the person is picked up by idealism (or whatever it is) and carried into more dedication and work than s/he ever thought possible. But just as the idealism and highly intense emotions of romantic love have been said by social scientists to last usually no longer than about two years, so does this kind of idealism which is centred on disadvantaged people (and which is possibly another form of romanticism). There must come a time when the intensity will give way, whatever the wishes of the individual, because of other personal concerns, or the accumulated frustrations of dealing with people locked into poverty, or perhaps because of an organization, including one's fellow workers, locked into bureaucracy. The altruism withers or is re-directed to a new love such as another cause, or a spouse, or a child.

I think it is generally true that lawyers with the strongest ideological commitment often have the shortest tenure.¹⁷³ But this may change, as it did in Legal Aid Manitoba, when the program is just starting. The length of dedicated service is extended by the excitement of starting new things and by mutual encouragement. As the "originals" left, their places were seldom taken by others as keen about the whole thing. The sense of having a crack at changing the world soon dissipates.

I personally experienced burn-out rather suddenly in 1978, after five years with Legal Aid.¹⁷⁴ In those years, I was deeply committed to all that legal aid stood for, somewhat, as I have come to realize, to my personal detriment. But it was not as if I had a choice. The ideals of the legal aid movement captivated me and made me oblivious to most everything else, including any and all opposition. Judges could make remarks about "do gooders" or about my being "not a lawyer, but a social worker!" (obviously intended by its tone as an insult). Private lawyers could express skepticism about the growing size of Legal Aid and about how genuine and honest its motives were. But my energy and devotion kept me going. Burn-out was inevitable, but there was no way that anyone could have convinced me of the need to slow down or to do any of the other things that psychologists now say will delay or prevent burn-out.

173. H. Erlanger; "Lawyers And Neighborhood Legal Services: Social Background And The Impetus For Reform" (1978), 12 L. and Soc'y Rev. 253. It is interesting to note that in a description of the staff of fifteen lawyers who were part of the staff of Clinton Bamberger at Legal Services in 1965-1966, all (apparently) had left by 1974, and several left in less than two years. See E. Johnson Jr., *Justice and Reform The Formative Years of the OEO Legal Services Program* (1974) 72, 312.

174. I am writing this two years after burn-out, and eight months after leaving Legal Aid, facts which of course must colour my attitudes and conclusions. Each person who experiences the kind of addiction I describe will have his or her own story as to how and why it could have happened. Altruism is "rarely an unalloyed virtue": G. Vaillant, *Adaptation To Life* (1977) 110.

Lest my comments be taken to suggest that I regret my legal aid experience, let me note here that there is a good deal of joy in looking back to a time of high ideals and strong commitment. One of the very few expressions of it that I have found in law is the Civil War experience of Oliver Wendell Holmes. Long after the war he said that "Through our great good fortune, in our youth our hearts were touched by fire". In the war, Holmes' idealism transcended everything, including personal safety. He never forgot his three years as a soldier, an experience which may help to explain his dog-eat-dog view of life and his concern in law to limit the liability of the man of action. See *Touched With Fire: Civil War Letters And Diary of Oliver Wendell Holmes Jr., 1861-1864* (Mark De Wolfe Howe ed 1946), and Grant Gilmore, *The Ages of American Law* (1977) 48-56.

I began to have doubts after about two years, as Legal Aid expanded. Several of the lawyers filling the new positions showed none of the passion that was driving me and some of the other lawyers. The new people would do the basic job but, as it seemed to me at the time, little or nothing beyond that. I noticed a gap developing in the performance of some of the older lawyers who could make emotional speeches about the aims of legal aid, but without signs of follow-up in their daily work. Personal problems got in the way of some lawyers who might well have otherwise done much more and better work. Gradually, the intensity of feeling for the work seemed to dissipate, and I started to have doubts about my future. I had assumed I would have a long career with Legal Aid, perhaps a lifetime. But after three years, I knew it was only a matter of time before I too would leave.

My dedication was ultimately killed off by government action on one side and the selfish attitude, as I was then given to seeing it, of many staff lawyers on the other. When the budget was cut in 1978, I took it personally, in spite of myself: the thanks, I felt, for five years of hard work.

Although it is probably true that burn-out can be delayed by the measures suggested by Maslach and others, I doubt that the delay can be for very long and I do not believe that it is possible for dedicated people to avoid it altogether. For most people, wholehearted commitment to any cause must eventually end, usually within a few years.

It is a phenomenon known among social service workers, teachers, athletes, politicians, missionaries, nurses, police, and others. There are celebrated examples of people in high stress occupations suddenly losing their nerve, a form of burn-out: mountain climbers, racing-car drivers, bullfighters, fighter pilots. The stress is obviously of a different kind for legal aid lawyers, but burn-out can occur no less abruptly. I have known a few legal aid lawyers, and I have heard of others, who simply awoke one day to the realization that they could not do the work any longer. For such people, perhaps for one brief period in their lives, it is an all-or-nothing commitment.

* * *

Most of the discussions I have heard and read about turn-over in legal aid treat it as a depressing, negative thing — a black eye for legal aid. The argument has been that it is best to have long-term, career-minded staff lawyers who can develop expertise in poverty law and empathy with low-income people, who will make investments in training programs more financially worthwhile, and who will reduce the disruption and waste of time involved in finding new people and shifting files and clients to develop, but they have begun to show themselves. They run along these lines: never have been slow to develop, but they have begun to show themselves. They run along these lines:

1. Most staff lawyers cannot do the job that was once envisioned for them. Since the basic job they are doing is case load, something which can be learned fairly quickly by new graduates, there is no

point to long-term service. It does not develop or promote greater empathy for the poor, but rather a bureaucratic attitude.¹⁷⁵

2. The best work in legal aid tends to be done by young lawyers who still have a good deal of idealism about the practice of law, and little or no concern about the levels of prestige attached to different types of legal work.¹⁷⁶
3. Most legal aid lawyers are going to end up going to their greater reward in the private bar and elsewhere. This should be accepted as a fact about legal aid life, and steps should be taken to minimize the disruption. For example, employment of staff lawyers should be for a period of not longer than three years, with possible (but rare) extensions of no more than one year. This would regulate the comings and goings of staff, possibly increase the number of lawyers who would gain legal aid experience and provide greater opportunity to discover and enjoy the benefits of the occasional lawyer who will translate idealism into action, before burning out.
4. Private lawyers who have at one time practised with legal aid have been found to retain some interest in poverty law.¹⁷⁷ It is, therefore, to the benefit of legal aid plans and of low-income people to have as many lawyers as possible exposed to poverty law. The number of lawyers available and willing to do legal work can be vastly expanded in this way.
5. Staff lawyers who remain in legal aid offices as a career are liable to develop more sensitivity for the needs of the bureaucracy than for the needs of low-income people, illustrating the words of Edward Sparer: "No more a significant participant in grand change, he [the poverty lawyer] appears reduced to what the revolutionist has often accused the lawyer of being — a technical aide who smooths the functioning of an inadequate system and thereby helps perpetuate it"¹⁷⁸

Addendum: The Role of the Private Bar

As the Cahns had presaged in their 1970 article and in their speech to the Conference in Ottawa in 1971, the private bar came to have a much greater role than many of us had expected they would have in the delivery of legal aid services in Manitoba. As the gap grew between the dream and the reality of what staff lawyers could do out of law centres, the significance of the private bar in legal aid increased. If legal aid could not reorder society or even individual lives, such that traditional legal services were to be the major part of the service, the private bar by its size alone obviously had an important role to play.

175. Jack Katz (*Supra* n. 153, at 298) asks: "Should the institution define the systematic turnover of its personnel as a moral imperative so as not to sacrifice its reformist purpose?" Kenneth Pye says (*supra* n. 141, at 244): "It may be true that some existing legal aid organizations may have replaced creativity and imagination with settled routine. However, . . . there is no reason to believe that new organizations will not fall prey to bureaucratization as time passes and youthful optimism is blunted by a realization of the dimensions of the problems".

176. H.W. Arthurs, *supra* n. 147.

177. *Supra* n. 152.

178. E. Sparer, "The Right To Welfare" in *The Rights Of Americans* (N. Dorsen ed. 1971) 84. Sparer was later referred to by Samuel Krislov as, in effect, a case of burn-out: see "The OEO Lawyers Fail To Constitutionalize A Right To Welfare: A Study In The Uses And Limits Of The Judicial Process" (1973-74), 58 Minnesota L. Rev. 211, at 241.

There were unexpected advantages of having private lawyers handle certain cases. While staff lawyers might well face criticism for "wasting the taxpayers' money" (a recurring criticism) by bringing action on the price of milk or defending a heinous crime, the private bar was seldom so criticized. The very appearance of a staff lawyer showed that Legal Aid and tax money were involved. But while it might be guessed (particularly in criminal cases, most of which involved legal aid) that a private lawyer was appearing in a matter that was "legally aided", it was considered bad form to breach confidentiality by asking about it, or to criticize the handling of a case merely because it was, or might be, legally aided. Such criticism of the private bar was rare and usually done privately, out of court.

As overhead costs and especially the salaries of staff lawyers increased rapidly (to the point that none of the lawyers complained at all about salaries), the tariff established for the private bar in 1971 either did not change, or was reduced, or was changed from an hourly rate to block fees. The tariff was based on a rate of \$25.00 per hour, but it was subject to the availability of funds.¹⁷⁹ In three of the first seven years of Legal Aid, all billings were reduced by holdbacks of ten or fifteen per cent. Because of lack of funds, the holdbacks could not be paid and were written off in two of the three years. The result of this was that, by 1979, the hourly cost of staff lawyers, including a share of the basic administrative costs (an elusive item to calculate) and the cost of operating law centres, had approached what Legal Aid was paying the private bar. In some cases, it was clearly more expensive to use Legal Aid staff than to use the private bar, as, for example, in indictable criminal cases. The block fee paid to the private bar was based on an hourly rate of \$25.00, and contemplated an "average" case. On the other hand, there was no control over the number of hours a staff lawyer might spend on any case, and since Legal Aid's staff tended to be younger and less experienced, it was quite certain that they would spend more time on a case than what was built into the block fee allowed the private lawyer. The economic arguments of 1972 were thus turned partly around by 1979. Even the major virtue of the predictability of costs of the staff lawyer component could be balanced on the judicare side as long as the private bar would continue to accept holdbacks and the possibility that the holdbacks might well not be paid at the end of the year. Although it was certain that the private bar would not continue indefinitely to accept a low tariff, it was also certain that the costs of operating law centres would continue to rise.

The private bar proved to be helpful in many situations in which it had been thought the poverty lawyers would develop expertise. For example, when the expropriation of homes for the building of a bridge became an issue in a low-income community, a private lawyer from the large firm appeared — on the invitation of a staff lawyer — at several public meetings and advised on procedures and options. This was done on a voluntary basis.

179. Man. Reg. 106/72, s. 80(2): "The Board may, as circumstances warrant, order that the fees payable . . . shall be reduced by a percentage to be determined by the board; and the board shall forthwith give notice in writing of such reduction to all members of the various legal aid panels".

In another case, a staff lawyer managed to uncover a procedural error in connection with governmental action in an environmental matter. The statute provided a time limit for court action. There was one day left when the procedural error was found. The lawyer, realizing the case was too complex for him, called several private lawyers, and ended up after midnight at the home of one of them. They worked for several hours drafting documents which were filed the next day. The private lawyer took over conduct of the matter, to the relief of the staff lawyer. Consulting the expertise of the private bar was common among staff lawyers, though not usually in circumstances quite like this.

Partnerships between staff and private lawyers also occurred in other areas. One of the main advantages of having staff lawyers turned out to be the ease with which Legal Aid could arrange "duty counsel" for courts and institutions throughout the province. The private bar had been found not to be totally reliable in their attendance, nor were they especially keen on doing follow-up on cases picked up on duty counsel assignments. On the other hand, staff lawyers would find even the best courts rather repetitive and dull after attending as duty counsel week after week. Scheduling, therefore, often included both staff and private lawyers.

Private lawyers as a group tended in my administrative experience to be more responsive to requests for help in emergency situations or after regular working hours. This was not just a matter of being agreeable, though that was sometimes a factor, but also of court schedules and the office duties of staff lawyers. For the private lawyer, it was partly a matter of more business in generally hard times or the need of a young lawyer (perhaps a former Legal Aid employee) to be busier.

When lawyers left Legal Aid for the private bar, they were usually glad to have as much legal work as possible while starting out. One ex-staff lawyer had a special interest in welfare matters. His expertise was such that most welfare matters were referred to him in private practice. This would likely continue until he arrived at the point — as most private lawyers do — of being too busy with more complex or lucrative matters to do any more legal aid. Others would take his place.

There was some irony in the referral of welfare matters and other "pure" types of poverty law to the private bar, since the original conception of neighbourhood law centres was that they would develop special expertise in such matters. Several other types of poverty law also ended up in places other than law centres. The first law centre had expected a massive number of landlord-tenant cases, but they never appeared, because at just about the same time as Legal Aid started, the provincial government created a Rentalsman Office. And most consumer matters went, at least in the first instance, to the new Consumer Protection offices of the provincial government. Theoretically, this diversion of cases should have helped the law centres to concentrate on the broad problems of low-income people, as would the availability and willingness of the private bar to handle individual cases.¹⁸⁰

180. The holdbacks and low tariff were criticized mostly by younger counsel who relied on legal aid cases for experience and income. The older members of the bar tended to be more accepting of the situation, not only because they did so little legal aid, but also because they recalled the days before 1972 when there was little or no payment in it. By 1977, Legal Aid Manitoba was paying out more than \$1,200,000 to the private bar each year.

Not everything was roses with the private bar. There was the occasional problem of a private lawyer using Legal Aid as a lever for a fee ("Of course, you can go to Legal Aid, but if you want a real lawyer . . ."), or not telling clients eligible for legal aid that there was such a thing.¹⁸¹ "Scooping" the clients of other lawyers was sometimes a problem involving young lawyers looking for experience, for the certain though modest fee from Legal Aid, and particularly the "spin off" work. Legal Aid was concerned about the concentration of legal aid work among a relatively small number of lawyers: in 1977, 13 lawyers did forty per cent of all legally aided cases. When an attempt in 1976 to restrict lawyers to 75 legal aid cases per year met strong opposition from the bar, the drafted legislation was dropped.

If there have been successes in Legal Aid Manitoba, as I believe there have, one of the better ones has been its managing to combine some of the advantages of the *judicare* and neighbourhood law centre systems, a partnership in the delivery of services to individual clients which worked better than in any other place.

Some Conclusions

The inevitable fate of all reformist movements . . . is to grow conservative in the course of becoming organized.¹⁸²

When he made the comment, Peter Blau probably had no thought of lawyers or legal aid, but it applies nonetheless to Legal Aid Manitoba. After an initial burst of activity over three or four years, the agency developed a life of its own that was beyond the capacity of anyone to control. A variation of the old impasse developed: the desired reforms could occur only through an organized bureaucracy, but the bureaucracy abandoned the original aims as it grew. The original aims may have been unrealistic, the ultimate example of the conceited belief of lawyers that they can solve any problem if they just put their minds to it. So that it was not bureaucratization alone that scuttled the dream, nor the conservatism of the 1970's, nor the recalcitrance of lawyers. It was the dream itself.

The opportunity was unique. The times were favourable (at least at the start). So was the government, the attitude of the leadership, and the enthusiasm of staff. The theory had been developed elsewhere, and there was the experience from other places to draw on. All of these factors are difficult to bring together, and it seems improbable that it could happen again for a good long while. Insofar as the broad objectives of poverty law are concerned, it may be that this is not merely the end of the first phase, but that the experiment has exhausted itself. At a "Conference On The Cost of Justice" in 1979, Avrim Lazar of the Department of Justice commented on the future of legal aid:

If legal aid can demonstrate that it is the means by which the most impact can be made on a social problem then legal aid may legitimately lay claim to resources which might have gone to a less effective traditional social service approach. This

181. I am advised that the Discipline Committee of the Law Society of Manitoba made a decision some years ago that a lawyer was not guilty of anything at all, including a breach of the Code of Ethics, for having failed to advise a low-income person of the existence of legal aid services. However, within the last year, both the Legal Aid Committee and the Discipline Committee of the Law Society considered the responsibility of a lawyer to advise a client about legal aid "if the circumstances were such that it appeared he would be eligible for legal aid". Both Committees concluded that there was an obligation in the lawyer to inform the client of the availability of legal aid. These decisions have since been questioned by the same Committees, and the question remains controversial.

182. P. Blau and M. Meyer, *Bureaucracy In Modern Society* (1956) 94.

could give legal aid lawyers, who may be becoming frustrated with their traditional case load, an opportunity to try to improve basic conditions that affect the disadvantaged in our society.¹⁸³

I think it doubtful that legal aid lawyers will develop the impulses, or that legal aid will be able to demonstrate the kind of impact to which Lazar refers. Both ideas are based on a breed of lawyer that simply does not exist in any great numbers. This will not change until there is a substantial change in legal education and in the legal profession, to an extent which none of us can realistically hope to see in our lifetime.¹⁸⁴

183. Address by A. Lazar to the Conference On The Costs Of Justice in Toronto, Ontario, November 16, 1979 (Unpublished).

184. If ever. Matthew 26:11 advises that the poor will be with us always.

