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***247** ENGLISH LEGAL SERVICES: A TALE OF DIMINISHING RETURNS

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This article provides an overview of the English [FN1] legal services program for the benefit of the reader in the United States. [FN2] It will suggest that the strategy adopted for the delivery of legal services in England provides a classic exposition of the law of diminishing returns. [FN3] This observation may be of particular value at a time of strategic regrouping of liberal activist movements in the United States, fueled by the new optimism generated in the early period of the Clinton administration. A study of the English approach can be perceived as being of particular value to United States legal services scholars and activists, when it is appreciated that the English system is:

1. The oldest comprehensive civil legal service system in the world;
2. The most expensive system in the world, per capita, in real terms;
***248** 3. A system delivered almost exclusively by state-subsidized private practitioners, on a fee-for-service basis;
4. A system without any appreciable law school clinical program, or pro bono dimension; and
5. A system in deep crisis.

In contrast, we see the United States legal services system as one that is relatively recent in its inception, with a considerably smaller expenditure per capita for civil legal services than in England. We see a system that has failed to maintain any growth in real terms in the period of its recent history as the U.S. Legal Service Corporation network (from 1974 on). We see a system that made a conscious decision not to adopt a judicare/private practice subsidy model at the time of its inception. [FN4] And a system that continues to make relatively little use of private practice practitioners, other than through dedicated allocation of a percentage of office budget (currently 12.5%) "to provide the opportunity for members of the private bar to assist in providing legal services to the poor" [FN5] and a relatively low-key network of pro bono activity. We see a system with a comparatively well-developed law school clinical program, albeit still a minority activity. Finally, we see a system that has lost its sense of direction. In the concluding section of this article, I will endeavour to offer some reflections upon these observations.

BACKGROUND AND STRUCTURE OF THE ENGLISH LEGAL SERVICE DELIVERY SYSTEM

The bulk of civil legal services in England are provided by private practitioners under a "judicare" model: "a system whereby legal aid is established as a matter of right for all persons eligible for legal aid, with the state paying the private lawyer who provides the service." [FN6] The system was created by statute, the Legal Aid and Advice Act of 1949, and is currently governed by the Legal Aid Act 1988. The decision to opt for a judicare rather ***249** than a salaried model, when subsidized civil legal services were first mooted in 1945, was very much a reflection of the strength of the lawyers' lobby in Parliament in the immediate postwar period. As soon as it became apparent that the provision of subsidized legal services

was to be a further plank of the postwar welfare state being constructed by Beveridge and the Labour Government, [FN7] the Law Society, [FN8] and to a lesser extent the bar, seized the initiative to ensure that they would be the primary beneficiaries of this significant new tranche of state subsidy. [FN9] Although the legislation left the door open for the development of a salaried component in the legal aid structure, subsequent history confirmed that once a particular model has been adopted, it is extremely difficult to alter.

Other civil legal services are provided by a mix of salaried and voluntary services of which the Law Centres, and the Citizens' Advice Bureaux are the most prominent. Solicitors working for such organizations are normally entitled to claim legal aid subsidy on the same basis as those working for private firms, in addition to grant income.

The body with statutory responsibility for running the civil legal aid scheme in England is the Legal Aid Board, which was created for this purpose in 1988, by virtue of the Legal Aid Act 1988. Prior to this Act, it was the Law Society, the governing body of the solicitors' profession, that had this responsibility. In its first annual report, the Legal Aid Board described its objectives as follows: "The Board's overall aim should be to ensure that legal advice, assistance and representation is made available to those who need it. It should be provided in ways which are effective and give the best possible value for money." [FN10]

The Legal Aid Board is composed of thirteen members, who are appointed by the Lord Chancellor, and who serve on the Board in a voluntary capacity for a period of three years. The Board includes the chief executive as an ex officio ***250** member. Membership of the Board reflects a blend of high profile business leaders, academics, practitioners, and people with a strong track record of work in the voluntary advice sector. The Board is responsible for the overall operation of a national network of area legal aid (judicare) offices, which organize area legal aid committees, and administer legal aid applications and payments to solicitors. The Board employs approximately 1,300 staff for this purpose, spread across the country, and has a central office in London. Its annual staff budget is around $28 million, and its total administrative costs per annum, including salaries, are approximately double this figure. [FN11]

PUBLIC SECTOR LEGAL SERVICES

In addition to the legal services provided under the judicare scheme, legal services are also provided by Law Centres, of which there are currently fifty-five in total, a figure which has remained stable for almost ten years. [FN12] Each Law Centre is managed by a volunteer local management committee which employs the staff and manages the budget. Law Centres are loosely linked in a national organization called the Law Centres Federation, which has a largely coordinating function, and serves as a disseminator of information and ideas, as a training source, and as a negotiating body with third parties on matters affecting the interests of the Law Centre movement in general. The Law Centres Federation has no executive function.

Some legal services are provided through the national network of advice centers known as the Citizens' Advice Bureaux (CABx), which are locally managed, some with central or local government funding. There is not, at present, much of a desire on the part of the CABx movement to expand its legal advice service. [FN13] There are nearly 1,000 such offices in England providing a range of advice services, which may include legal services. A few CABx employ lawyers, and many use the services of volunteer lawyers on a rotation basis. The National Organization of CABx known as NACAB, runs its own Legal Services Group, which produces information and policy documents, and promotes publications that are of assistance to the average consumer with a legal problem, but who cannot perhaps afford the services of ***251** a lawyer. [FN14] Finally, there are a number of specialist single issue organizations providing legal services on group or individual test case issues, including welfare rights, civil rights, housing, and environmental cases. [FN15]

ELIGIBILITY CRITERIA

In England, any English citizen can apply for civil legal aid, but will be subject to a detailed means test, which is designed to assess the applicant's disposable income. The means test is complex, taking into account a large number of considerations. The test essentially creates three categories of individuals:

1. Those eligible for full subsidy without contribution;
2. Those eligible for full subsidy with contribution; and
3. Those wholly ineligible for subsidy.

It is hard to give an accurate picture of the number of people who are eligible for at least partial subsidy in England at

present, and in any event, there is considerable fluidity about the most likely entry eligibility levels for the future. Murphy has nevertheless estimated [FN16] that, ignoring capital limits, around 52% of adults now qualify for help with personal injury claims, 47% with other, non-matrimonial matters, and 37% for green form assistance. [FN17] This compares with a figure of 79% of the population eligible for subsidized legal assistance for non-matrimonial matters in 1979. [FN18]

SERVICES PROVIDED THROUGH SUBSIDY

The English civil judicare system provides two types of assistance. The first is subsidy of court costs, legal fees, and disbursements to private practitioners at fixed rates of remuneration with increases pegged roughly to the rate of inflation. These rates of remuneration are lower than those from fee-paying ***252** clients, where rates are determined exclusively by the market, although these latter fees can be challenged as excessive, either by a reference to the Law Society for a remuneration certificate, or by reference to the court for a taxation of the bill. [FN19] In recent years, solicitors have responded to the low rate of remuneration by increasing the number of hours spent on a case, and by using unqualified staff to work on cases. Thus, the actual cost per case has increased by over 50% in real terms. Notwithstanding this stark increase, the Law Society attempted to force the Lord Chancellor to raise remuneration levels to legal aid solicitors in a highly publicized judicial review appeal court case in the spring of 1993 on the basis that they were unreasonably low. [FN20] Not unsurprisingly, they lost the case, but the level of anger concerning remuneration levels among legal aid solicitors remains high.

The second type of assistance, which is a distinctive feature of not only the English, but also all the Scandinavian models of judicare, is the provision of legal advice, short of litigation. [FN21] Subsidized advice up to a fixed fee level of about $150 can be given by a solicitor to a client on the basis of a simple means test, administered by the solicitor in the office and subsequently ratified by the Legal Aid Board. This work is known generally as "green form" advice, because of the distinctive color of the form via which the subsidy is administered. The green form legal service has expanded dramatically in recent years, although private practitioners still tend to confine green form work within the traditionally narrow methods of a case by case approach, and have not seized the opportunities offered by the green form system to develop approaches, or interests, outside the mainstream. [FN22]

Civil legal aid is granted to a client, on application to the local legal aid office, through a solicitor. The decision to grant legal aid is made on a dual test of merits and means. Clients must satisfy both tests in order to receive a subsidy, which may be subject to a contribution by the client toward their costs. An appeal can be made to the area office on the denial of a legal aid grant request. Furthermore, the legal aid office can place a charge on the "winnings" of a successful plaintiff to allow the legal aid fund to recoup all or ***253** some of their costs. As it is the normal rule under the English system that the loser pays at least part of the winner's costs, there is also a provision that a winning party who is not legally aided can claim a contribution towards their costs from the legal aid fund.

THE MERITS TEST

Civil legal services are available as a matter of legal entitlement, subject to a merits test in most types of civil cases, although some categories of work, such as defamation, probate, and representation in most tribunals, are specifically excluded from the scheme. The merits test is applied by the local legal aid committee, made up of solicitors and barristers, who apply to the written application the question: "Would a reasonable solicitor, advising a reasonable client who had the means, advise that client to use his or her own money to issue, or defend the proceedings?" [FN23] In asking this question, the committee expects the request for assistance to meet two tests:

1. That the applicant has a reasonable chance of success; and
2. That it is not unreasonable for the applicant to receive legal aid in the particular circumstances of the case.

Under the second test, legal aid is likely to be refused if the costs of securing victory are out of proportion to the anticipated fruits of victory. It should be borne in mind that the legal costs of an action for less than $715 will never be awarded, even against the losing party in a civil action.

COMPARATIVE COSTS OF JUDICARE SYSTEMS

A comparative study of legal aid schemes in Europe, carried out recently by the French Conseil d'Etat, [FN24] revealed that the English system is the most expensive scheme in Europe, by a considerable margin. [FN25] Table 1 presents the findings of the study.

Table 1. Expenditures, per capita, on Civil Legal Aid (U.S. dollars)

England	$14
Netherlands [FN26]	$9
Sweden	$7
Germany	$4
Spain/France [FN27]	$1
Italy/Belgium [FN28]	Charity

***254** The English figures, based on 1989 expenditures, would now have to be adjusted upwards, as civil legal aid expenditures continue to spiral out of control, with a 35% increase in outlay in 1992.

THE NATURE OF THE EXPANSION

Subsidized civil legal services, via judicare, have expanded in England in a number of different ways. Gross state expenditures on the system have increased dramatically; the percentage of lawyers (both solicitors and barristers) involved in the scheme has increased; the number of citizens applying successfully for subsidy has increased; and the range of work now being carried out under the scheme has broadened considerably. Each of these expansions is summarized in general terms below.

Increased Expenditure

The net legal aid expenditure (i.e., cost to taxpayer once client contributions have been deducted) rose from $154 million in 1980-81, to $1,086 million in 1991-92, which represents an increase of 600% in eleven years! This figure does, however, include legal aid for criminal matters in the lower courts as well as duty solicitor schemes at police stations and courts. These matters are still funded through the civil legal aid scheme for historical reasons. But, if this latter sum is removed from the calculation, we are still left with a net legal aid expenditure on purely civil matters of $678 million. The rise in expenditure in the past twelve months has been seven times the average retail ***255** price inflation. [FN29] This can be contrasted with the total Legal Services Corporation budget for 1992-93, which was $357 million, in a country with five times the population of England. [FN30] If proof were needed that judicare is a better mechanism than salaried legal services for procuring state funding, we need look no further than this statistic. [FN31]

The gross figure (i.e., the amount actually paid by the Legal Aid Board under the scheme to solicitors for the year 1991-92, including administrative costs) was $1,316 million (a staggering $24 per capita). Furthermore, it should be noted that although this figure does include criminal representation in the lower courts, it does not include expenditure on legal aid in the Crown Courts, where most serious crime is tried, and a separate but flourishing system of legal aid remuneration is in operation.

Increased lawyer involvement

The latest figures on lawyers' earnings suggest that legal aid subsidy contributes about 10.9% of the total annual turnover of practicing solicitors, and just under 30% of the total annual turnover of practicing barristers (in 1989, about 6,500 individuals total). In 1989-90, 1,036 practicing barristers earned more than $20,000 from the legal aid fund, although some 75% of this was for criminal legal aid work. [FN32] Some 11,500 solicitors' offices applied for legal aid on behalf of a client in 1991-92, out of a total number of approximately 15,000 offices, representing nearly 77% of all solicitors' outlets in the country. Payment of some legal aid money was, thus, made to approximately 75% of all law offices. The bulk of legal aid work does, however, tend to be concentrated within a minority of offices. [FN33] There is evidence that the number of firms specializing

in legal aid work is on the ***256** increase. In 1979-80, only 113 solicitors' offices received more than $86,000 in legal aid income. In 1984-85, 195 solicitors offices received over $172,000, per office, in legal aid income. This number rose to 841 offices in 1989-90. [FN34]

Increased number of applications by clients

The payment figures for 1991-92 (i.e. cases completed and payments made to solicitors) are as follows:

1. 256,000 civil legal aid certificates were paid (cases progressing through civil courts);
2. 1,230,000 green forms were paid (advice by solicitor to client on matter of law or procedure, not necessarily leading to litigation); and
3. 66,000 certificates were paid for ABWOR (advice by way of representation in certain tribunals up to a limited level of cost).

Of more significance, perhaps, was the noticeable increase in the total number of certificates issued, as these are cases which are still pending or live: 146,437 certificates were issued for matrimonial proceedings and 190,864 certificates were issued for non-matrimonial proceedings, for a total of 337,301. [FN35] The total number of people receiving civil legal aid has increased by approximately 6% per year over the past decade. In the past twelve months, however, there has been a dramatic increase of 14% over the previous year.

Widening range of work carried out under the green form scheme

When the green form scheme was first introduced in the 1970s, the majority of work done by solicitors under the scheme was simply a mirror of traditional legal aid litigation specialties: matrimonial, landlord and tenant, and employment advice. [FN36] The most recent figures show a high diversification in the types of work now being carried out by legal aid solicitors under the ***257** scheme, which offers an interesting message to the strategic planners of services that rely largely upon a salaried model. Table 2 presents the areas where private practitioners carried out subsidized legal aid advice and assistance work in 1991-92.

Table 2. Legal advice and assistance short of litigation (green form work)

Matrimonial, family and children	35%
Crime	21%
Landlord and tenant, housing	8%
Hire purchase and debt	7%
Accidents and injuries	6%
Welfare benefits	5%
Employment	2%
Consumer	2%
Immigration and nationality	2%
Other	12%
TOTAL	100%

The parallel figures for subsidized legal aid litigation are given in Table 3.

Table 3. Legal aid certificates (litigation)

Matrimonial	43%
Negligence	31%
(including, in order of importance, non-specific personal injury, road accidents, accidents at work, medical negligence, and legal negligence cases)	
Contract	7%
Adoption, custodianship, guardianship, wardship	5%
Landlord and tenant	5%
Tort (general)	4%
TOTAL	90%

No other category accounts for more than 1% of the remaining 10%, which includes: administration of estates and trusts, bankruptcy, inheritance, child abduction, and partnership disputes. The two tables do present a clear picture ***258** of the diversification of service that the extension of subsidy to advice and assistance, short of litigation, seems to have generated.

ALTERNATIVE LEGAL SERVICES

There are a number of further ways in which legal services are provided, in small part, by alternative sources. The most significant of these are discussed below.

Salaried attorneys working from Law Centres

There are fifty-five Law Centres currently in operation, receiving a total budget of approximately $14 million, of which approximately $3 million comes through the civil legal aid system, and the remainder through grant income. The majority of the grant income comes from local authority funding, or through local authority organizations. Seven Law Centres are funded directly by the central government, through the Legal Aid Board. There are also a few salaried lawyers working from Citizens Advice Bureaux, but they form only a very small part of the overall provision.

Where salaried lawyers, and in particular Law Centres are concerned, the type of work is far less precise. There is no standard pattern governing the type of work carried out by a Law Centre, as priorities are set at a local level. Law Centres are, however, entitled to reimbursement under the legal aid scheme, in which case they will be governed by the same rules as private practice lawyers. In 1991-92 Law Centres received $4 million in payments from the Legal Aid Board, an increase of 54.3% over the previous year, which no doubt reflects the loss of revenue from standard grant sources. Of this figure, 30% was by way of direct grant to seven Law Centres, 53% was for legal advice and assistance under the green form scheme, and 14% was for civil legal aid in court cases (the latter figure averaging $1,000 per client, per center). It is interesting to note that "it has been the Law Centres rather than private practice which have sought to use the green form scheme to cover issues outside mainstream legal practice." [FN37] When not carrying out legal aid work, Law Centres may be doing work from a wide range of categories and approaches. For example, Law Centres carry out much law reform work in the form of lobbying and writing of responses and briefing papers, general community education and training, such as through provision of courses for ***259** community groups, writing of leaflets on legal rights in understandable language, and community development projects--helping groups to organize their affairs, set up community businesses, and other projects. Finally, it should be

appreciated that Law Centres rely heavily upon paralegal and other suitably qualified workers, and only a small minority of Law Centres staff are solicitors. [FN38]

Networked lawyers working on group projects, multi-party actions, and test cases **[FN39]**

The civil legal aid scheme does not make any clear provision for the funding of group actions, although this is in the process of review. The current position is roughly as follows:

1. Legal aid committees should (if practicable) require those jointly interested in any proceedings to make an "appropriate" contribution to the costs (i.e., those who have an interest in the proceedings, but are not eligible for legal aid).

2. Committees cannot grant legal aid to individuals who will themselves gain no sufficient benefit, even if successful, even though their success might confer benefit on others. This rule is a result of a very conservative interpretation of both the remit of a representative action, and the definition of locus standi by the House of Lords in earlier case law. [FN40]

3. Committees must be watchful for applicants who have been put up to obtain a benefit on behalf of a group which is not prepared to make reasonable contributions to the procurement of that benefit.

Changes in this system are close at hand, however. The Civil Legal Aid ***260** Regulations of 1992 vested new powers in the Legal Aid Board to improve the conduct of legally aided multi-party actions. At present, the costs of test case representative actions have to be shared equally between legally aided and non-legally aided beneficiaries; that is, no free riders are permitted. In response to this vested power, the Legal Aid Board has drafted letters inviting tenders, and a leaflet explaining the special arrangements for contracted multiparty actions. A Multi Party Actions Committee has been set up. Organizations such as the National Consumer Council and the Association of Personal Injury Lawyers are actively involved in the development of this new initiative.

Law student clinical programs

The concept of clinical programs is little developed in England, with perhaps four of the seventy-five law schools providing some form of limited clinical practice. The most recent of these programs was set up at the University of Northumberland, which has created its own law office. It uses a student clinical program to advise and represent approximately 200 clients a year. [FN41] It is interesting to speculate as to the reasons why, in contrast to the United States, clinical programs have not developed in England. There are a number of possible explanations for this state of affairs. First, the practical skills aspect of law training has traditionally been associated with the second phase of legal training, the "vocational" phase, which has, until very recently, been the province of the vocational law schools, and has not been seen as part of the "academic" phase carried out in the university law schools. Second, the academic and the practitioner community in England have traditionally operated as totally distinct and separate worlds, despite the fact that every lawyer has passed through the former to arrive at the latter. The lack of movement between the two careers, and the ivory tower mentality of the typical law school, have not facilitated the development of clinical projects. Third, there is significantly less theorizing about the mechanics of practice in England than in the United States, where law review articles on the clinical experience and on the theoretics of practice have proliferated over the past twenty-five years. [FN42] Fourth, clinical programs are very labor intensive, needing qualified practitioners, expert small group supervision, and ***261** experienced back-up support. There is simply not enough money in the majority of English law schools to establish such programs, even if the will was there to do so.

Pro bono lawyers

The Bar has long supported an organization called the Free Representation Unit, a coalition of law students, trainee advocates and experienced lawyers, who offer free representation to needy litigants at tribunals. They operate from a small office, set in the Inns of Court, [FN43] with a full time paid organizer. Similar operations are now in place in Manchester and in Wales. The recent Bar Chairman, John Rowe QC, is seeking to expand this network considerably, and hopes to see a unit operating in every court circuit in England. Rowe has specifically called upon every barrister, of all level of experience, to take on a minimum of one case a year on a pro bono basis.

The potential for the solicitors' profession to provide a more structured approach to pro bono work is greater, due to the fact that first, they operate as businesses and partnerships, and therefore, have more scope to free up the time of particular individuals; and second, the new training courses (in particular the Professional Skills Course, taken during the apprenticeship stage) for trainee solicitors require that each trainee spends a specified number of hours engaged in advocacy,

professional conduct training, and personal work management, all of which could be acquired in the context of properly organized pro bono work in legal aid firms or Law Centres. This in turn could lead to the forging of stronger links between some of the big commercial firms, who find it difficult to offer trainee solicitors this type of experience, and legal aid firms and Law Centres, who find it hard to afford to employ trainee solicitors under new legal aid cost constraints and would welcome the opportunity to ask for the further financial support that might flow from the creation of such links. A number of large city firms already operate pro bono programs with Law Centres in London. Regular advice sessions, on a weekly rotation basis, the provision of small grants, redundant computers, office space, photocopy support, publicity and "adopt a centre" ***262** schemes, are a few examples of the fruits of these partnerships. If pro bono time in Law Centres and legal aid firms were to be formalized by the Law Society as a way of accruing the necessary hours to pass the legal skills component of the legal practice course, pro bono would have the potential to become an important piece in a new legal services policy.

THE CURRENT CRISES IN THE SYSTEM: THE LAW OF DIMINISHING RETURNS

As mentioned in the introduction to this article, legal services in England are in deep crisis as they continue in an out-of-control spiral, costing ever more to produce less. A number of key organizations are currently putting forward serious, well-conceived strategies for reform. At the same time, the government, through the Lord Chancellor's Department, is putting forward its own strategy which is based heavily upon a sense of a desperate need to keep the out-of-control legal aid budget in check. In December 1992, after almost two years of deliberation, the government announced that as of April 1993, legal aid will be reduced in five ways, making "the most draconian cuts since the scheme was introduced in 1949." [FN44] One leading legal aid solicitor has predicted that the cuts will mean that legal aid solicitors will lose at least one quarter of their civil legal aid work. [FN45] The Law Society tried to contend in the High Court that these cuts were outside the Lord Chancellor's powers under the Legal Aid Act 1988, because they undermined the Act's purpose of providing publicly funded advice, assistance, and representation for people who would otherwise be unable to obtain it. [FN46] It also argued that the Lord Chancellor's failure to consult the legal profession and consumers' bodies before announcing the cuts, rendered them unlawful. [FN47] The case, however, failed. [FN48] Although the government is not, as yet, proposing that there should be any cuts in the remuneration levels, a longer term likely target is the introduction of fixed hourly payments to solicitors for civil non-matrimonial ***263** cases, leading to a 30% reduction of current hourly rates, and the reduction in the level of fees paid to barristers and expert witnesses.

FRANCHISING: THE BOLD NEW VISION

A key new strategy, currently being tested by the Legal Aid Board, [FN49] is "franchising." [FN50] Under its original strategy, a legal advice and assistance outlet (which might be a firm of solicitors, a Law Centre, or even a specialist advice agency) could be invited to tender with the Legal Aid Board for a franchise to carry out certain specified areas of work, in exchange for a lump sum payment, and certain devolved powers. A pilot scheme has been in operation in Birmingham over the past two years to test the concept in practice. [FN51] It is clear however, that the concept is changing all the time and is far from finalized. To quote Bawdon:

> Since the concept of legal aid franchises was first mooted, it has undergone a complete metamorphosis. From being thought of as a method to involve agencies without solicitors in the delivery of legal aid, the Board's chief executive now describes it as "an indication of quality for the entire legal profession." There is strong speculation that there will be still further changes and that the scheme may yet develop into franchises as they would be recognised in the commercial sense: exclusive contracts to deliver service in a particular area. [FN52]

The essential elements of a franchise are supposed to be the imposition of agreed management systems, a business plan, training packages, regular internal auditing systems, and proven expertise in the relevant fields. A further area of controversy, is the development of transaction criteria by which the quality of advice and assistance given will be monitored and ensured. [FN53] At present, the Legal Aid Board intends to issue franchises for green form advice in the areas of matrimonial and family law, crime, housing, debt, ***264** personal injury, welfare benefits, employment, immigration, and consumer law. It wishes to grant the first franchises to begin in the summer of 1994. Whether they will be exclusive in nature, guaranteeing the monopoly of specified areas of work to successful bidders, remains an open question. But, what is clear is that the competing giant concerns of quality control and cost control are locked in a gargantuan struggle, the outcome of which will not truly be known for years to come.

The tension between the Lord Chancellor, spokesman for the Cabinet, and the Legal Aid Board was manifest in an article by the Lord Chancellor in The Times on January 22, 1993, in which he wrote:

I expect to see the Legal Aid Board offering contracts to accredited firms of solicitors, undertaking blocks of cases following competitive tendering. In the largest cases, fees and rates will be negotiated in advance in ways which allow firms to compete for work. Firms offered a block contract will probably seek an assured volume of cases, and this may require some restriction on the number of firms offering legal aid. I can envisage that, in some areas and for some types of work, only accredited firms might be eligible to do legal aid cases. [FN54]

In contrast, the Legal Aid Board had been proposing that franchising should be non-competitive, and that firms outside the scheme could still continue to do legal aid work and be given delegated powers to grant certain forms of payment such as green form extensions. Its position is certain to change as the debate firms into hard decisions for operation in 1994, although it is unlikely that the full shape of the franchising approach will emerge for some years. What does seem clear is that the system is designed to remain flexible and to respond positively to any proposal that blends quality with cost efficiency. The chief executive of the Legal Aid Board is on record as saying, "We can, while legal aid remains demand led, foresee no circumstances where the board excluded from franchising any organisation that could meet the franchising criteria." [FN55]

***265 THE CITIZENSHIP FOUNDATION**

A small but significant innovation in the range of approaches to the wider issues of legal services and social values is the creation of the Citizenship Foundation. The Foundation, which is committed to education in the triple issues of law, morality, and citizenship, rests on the following basis: "A properly functioning democracy needs well informed and responsible citizens, who respect the rule of law, understand their system of government and have the necessary skills to participate in the community to which they belong." [FN56]

One of the major achievements of the Foundation, which has been in existence since 1989, has been the development of a series of teaching materials on the concept of citizenship. They have been widely used in school courses across the country with startling effectiveness, such that they have become part of the national curriculum and are used in 3,000 of the country's 5,000 secondary schools. The Foundation is now publishing its second series of materials, aimed at 11-14 year olds, called Understand the Law. It also runs a very successful mock trial competition, generously backed by the bar, in which pupils from 130 schools take part in a reconstruction of the trial process. The Foundation wishes to develop its activities further, and is seeking financial support by the use of a voluntary levy from every firm of solicitors in the country.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR has been defined by the Legal Aid Advisory Committee as: "any means of providing a resolution of a dispute between the parties which does not involve an open court trial--that being "dispute resolution" in the traditional sense. Its components may include a continuum of stages such as negotiation, arbitration, and mediation." [FN57] A number of interesting developments are taking place in this respect in the United Kingdom, and they are well summarized, together with a set of proposals for reform, by the National Consumer Council in a recently published report entitled, Settling Consumer Disputes: a Review of ADR. [FN58]

***266 LEGAL ACTION GROUP: STRATEGY FOR JUSTICE**

The Legal Action Group is the principal lobbying organization in England for reform in legal services. Its monthly journal, Legal Action, is a highly informative, and generally well respected, source of views and information on the legal service reform debate. In the past fifteen years, it has published two major documents setting out a detailed reform strategy. [FN59] Neither has cut any ice with the government of the day. Its third, and most recent, effort to influence change appeared in a wide ranging report, published in 1992, as A Strategy for Justice: Publicly Funded Legal Services in the 1990s, in which the group set out its detailed proposals for change. The report calls for a national policy for publicly funded legal services which would integrate all advice services within an overall pattern of provision, with one government minister in charge of the policy and funding of all the services. It also stresses that publicly funded legal services should be considered along with any new reform in procedural or substantive law to ensure that changes are not made without public access to the changes. Its third recommendation is for an increased commitment by government to more education and information about legal matters, following similar initiatives that have taken place in Quebec and in Australia. [FN60]

LAW CENTRES FEDERATION PROPOSALS FOR A SALARIED SERVICE

In a briefing paper, dated February 1993, the Law Centres Federation set out its own reform proposals for public legal services, although a number of these proposals had already been foreshadowed in previous publications. [FN61] In a broad outline, the Legal Action Group argued for the following changes:

1. The creation of a legal services system based on a salaried service comprising independent, generalist, front-line advice and legal casework agencies, strategic services and specialist centres. All elements are to be coordinated both regionally and nationally.

***267** 2. Within this new system, the generalist advice and casework service would provide a full range of services. Staffed by salaried lawyers, caseworkers, advisers, and other appropriate workers, it would combine much of the work currently done by the advice sector and by legal aid practice, but would also include areas of work not currently covered by the legal aid scheme.

3. The strategic services and specialist centres would work closely with the front-line service taking referrals and concentrating on cases with a wide impact, including group work.

Once again, unless these reform strategies can somehow be merged into the franchising framework, there is little prospect of any change in the direction that the Federation desires.

CONCLUSIONS

I offer a number of observations by way of conclusion. First, it appears to be the case that once a civil legal service system has been set up, it will, by and large, retain the model that it adopted at the outset. To change the fundamental structure of the delivery of legal services once a model has been established has been seen throughout the world as a virtual impossibility. [FN62] Law Centre activists in England may believe that one day a huge network of salaried legal service providers will operate in a radical swathe across the country, but history is against them. Lawyers, by instinct, are powerful lobbyists for the status quo. Legal aid commands a high budget, and litigation structures and methods are extremely hard to undo.

Second, I suggest that developments in England, at present, reveal a deep paradox. The prevailing view in legal service circles is that salaried legal services provide the opportunity for a more radical, strategic, and innovative approach to the delivery of legal services to the poor and disadvantaged than ***268** any judicare model. It is, therefore, an irony indeed that the move towards a salaried approach in England, manifest in the underlying agenda of franchising, should have been provoked by the high cost of providing the more conservative judicare system. [FN63] Furthermore, it is clear from the data set out earlier in this article that the diversification of private lawyers into new areas of work with poor clients has been specifically stimulated by the green form subsidy, used in a largely reactive, traditional mode. There is much food for thought in this observation for United States legal services strategists.

Third, judicare is manifestly a system that cannot be cost-controlled, a fact that has been discovered wherever in the world judicare has been developed. [FN64] It has rightly been observed that supply creates demand in the legal service sector, [FN65] and there is little doubt that a legal aid budget that is case-driven will not only be impossible to control, but also that the rate of increase will be exponential. Although nobody has yet provided any convincing socioeconomic explanation as to why the cost of litigation is rising steeply at an alarming annual rate, few deny the fact of its happening.

Fourth, I would argue, drawing from the evidence of this article and others in this issue, that the mixed delivery system may provide the best solution. Monopolistic judicare systems are narrow, expensive, reactive, and conservative, but they do engage a high percentage of the legal profession in the cutting edge of working with poor people. Pure salaried systems offer the opportunity for prioritization, experimentation, strategic planning, and start with high ambitions. But they also find it manifestly hard to expand, [FN66] they lead to high levels of burn out amongst personnel, and they find it hard to retain staff in competition with the allure of the private sector.

On both sides of the Atlantic, the scent of compromise between the two traditionally embattled and opposing visions of legal service provision is just ***269** beginning to fill the air. Nietzsche once wrote that "many are strong in the pursuit of the path they have chosen, but few in pursuit of the goal." If legal service activists are able to keep sight of their goals, and not confuse debates about means with a commitment to a common end, the time is ripe for real progress to be made in the restructuring of legal service delivery to poor people, in ways that can satisfy both the vision of the radical and the parsimony of the guardians of the common purse of the state.

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[FN1]. Throughout the text of this article the description "English" is used to include the legal services operating in England and Wales, but does not extend to Northern Ireland or Scotland, both of which have similar, though separately administered, systems.

[FN2]. This article is based on a presentation made to a one day symposium on Legal Services to the Poor in Other Countries--A Comparative Review. The symposium, co-hosted by the Maryland Legal Services Corporation and the University of Maryland School of Law, was held at the University of Maryland School of Law in Baltimore, Maryland on April 14, 1993.

[FN3]. First expounded by Thomas Malthus in the Essay on Population (1798), the theory argues that population always increases faster than the means of subsistence, with inevitable diminishing returns for human kind from its investment. By analogy, its application to judicare argues that more investment will inevitably lead to less returns for the lawyer.

[FN4]. See infra note 6 and accompanying text (defining "judicare"). See also EARL JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE O.E.O. LEGAL SERVICES PROGRAM (1974).

[FN5]. See LEGAL SERVICES CORPORATION, THE DELIVERY SYSTEMS STUDY: A POLICY REPORT TO CONGRESS AND THE PRESIDENT OF THE UNITED STATES (1980); Jeremy Cooper, The Delivery Systems Study: A Policy Report to the Congress and President of the United States, 44 MODERN L. REV. 308 (1981).

[FN6]. FLORENCE ACCESS TO JUSTICE PROJECT (Mauro Cappelletti ed., 1978-79).

[FN7]. In a seminal report published at the end of World War II, Beveridge laid the groundwork for a universal scheme of social insurance, replacing "survival" with "subsistence" as the baseline.

[FN8]. This is the professional body that regulates the solicitors' profession in England, and is roughly equivalent to state bar associations.

[FN9]. See A. SETON POLLOCK, LEGAL AID: THE FIRST 25 YEARS (1975); JEREMY COOPER, PUBLIC LEGAL SERVICES: A COMPARATIVE STUDY OF POLICY, POLITICS, AND PRACTICE (1983).

[FN10]. LEGAL AID BOARD, 1991-92 ANNUAL REPORT 1-2 (1992) [hereinafter ANNUAL REPORT].

[FN11]. Id. at 98-99.

[FN12]. For histories of the English Law Centre movement see BRYANT GARTH, NEIGHBOURHOOD LAW FIRMS FOR THE POOR (1980); COOPER, supra note 9; M. STEPHENS, COMMUNITY LAW CENTRES: A CRITICAL APPRAISAL (1991); LAW CENTRES' FEDERATION, DELIVERING LEGAL SERVICES LOCALLY (1993).

[FN13]. Roger Smith, Return to Go: NACAB View on Legal Services, LEGAL ACTION, November 1991, at 7.

[FN14]. For further information on the "public advocacy" role of CABx, see Jeremy Cooper, The Advice Business: A Question of Priorities, in VRAAG EN ANTWOORD 33-56 (C. Schyut ed., 1987).

[FN15]. For a full account of these organizations, see JEREMY COOPER, KEYGUIDE TO INFORMATION SOURCES IN PUBLIC INTEREST LAW (1991); CAROL HARLOW & RICHARD RAWLINGS, PRESSURE THROUGH LAW (1993); PRESSURE GROUPS (Jeremy J. Richardson ed., 1993).

[FN16]. M. MURPHY, CIVIL LEGAL AID ELIGIBILITY ESTIMATES, 1979-90 (1991).

[FN17]. See infra text accompanying note 22 for a discussion of green forms.

[FN18]. See TAMARA GORIELEY, LEGAL AID AND FAMILY AND CARE WORK 12-17 (1992).

[FN19]. Information from the Solicitors' Complaints Bureau.

[FN20]. See Regina v. Lord Chancellor ex parte The Law Society (C.A. 1993), reported in THE TIMES, Aug. 11, 1993, available in LEXIS, World library, TTimes file.

[FN21]. See Jon T. Johnsen, Nordic Legal Aid, 5 MD. J. CONTEMP. LEGAL ISSUES 301 (1994).

[FN22]. But see infra text accompanying note 37 on Law Centres' use of the green form.

[FN23]. LEGAL AID BOARD, LEGAL AID HANDBOOK (1992).

[FN24]. CONSEIL D'ETAT, L'AIDE JURIDIQUE: POUR UNE MEILLEUR ACCES AU DROIT ET A LA JUSTICE (1990).

[FN25]. See also Erhard Blankenburg, Comparing Legal Aid Schemes in Europe, 11 CIVIL JUSTICE Q. 106 (1992); LEGAL ACTION GROUP, A STRATEGY FOR JUSTICE (1992); M. Cousins, Civil Legal Aid in France, Ireland, the Netherlands and the United Kingdom, 12 CIVIL JUSTICE Q. 154 (1993).

[FN26]. See also GORIELEY, supra note 18.

[FN27]. See also M. Cousins, France's Reforms, LEGAL ACTION, July 1992, at 10; M. Cousins, Civil Legal Aid in France, Ireland, The Netherlands, and the United Kingdom, 12 CIVIL JUSTICE Q. 154 (1993).

[FN28]. See Luc Hyse, Legal Experts in Belgium, in LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 225 (Richard L. Abel & Philip S.C. Lewis eds., 1988).

[FN29]. See ANNUAL REPORT, supra note 10.

[FN30]. Figure provided by Emelia DiSanto, Vice President of the Legal Services Corporation, in her presentation at the University of Maryland Symposium, see supra note 2 (transcript on file with the Maryland Journal of Contemporary Legal Issues).

[FN31]. This observation is merely about hard financial statistics. Of course it can be argued that judicare is a grossly inefficient way of delivering legal services, that it is too reactive, that it over-provides to private sector lawyers, and so forth.

[FN32]. Figures taken from H.C. Written Answers col 575, 1.7.92; ANNUAL REPORT, supra note 10; LAW SOCIETY ANNUAL STATISTICAL REPORT (1991); GENERAL COUNCIL OF THE BAR, STRATEGIES FOR THE FUTURE (1990); E. Blankenburg, Comparing Legal Aid Schemes in Europe, CIVIL JUSTICE Q. 106 (1991).

[FN33]. See Jeremy Cooper, Public Interest Lawyers in England and Wales, in PUBLIC INTEREST LAW 161-92 (Jeremy Cooper & R. Dhavan eds., 1986).

[FN34]. See ANNUAL REPORT, supra note 10; Tamara Gorieley, Legal Aid in the Netherlands: A View from England, 55 MODERN L. REV. 803 (1992).

[FN35]. See GORIELEY, supra note 18, at 12-17.

[FN36]. See MICHAEL ZANDER, LEGAL SERVICES FOR THE COMMUNITY (1978).

[FN37]. J. BALDWIN & S. HILL, THE OPERATION OF THE GREEN FORM SCHEME IN ENGLAND AND WALES (1988).

[FN38]. See F. STEVENS, LAW CENTRE STAFF RESEARCH PROJECT (1983); C. Grace & P. Lefevre, Legal Services, Law Centres and the Public Interest, in PUBLIC INTEREST LAW, supra note 33.

[FN39]. See generally T. PROSSER, TEST CASES FOR THE POOR: LEGAL TECHNIQUES IN THE POLITICS OF SOCIAL WELFARE (1983); C. HARLOW & R. RAWLINGS, PRESSURE THROUGH LAW (1993).

[FN40]. See Jeremy Cooper, Poverty and Constitutional Justice: The Indian Experience, 44 MERCER L. REV. 611 (1993).

[FN41]. H. Brayne, New Ways to Learn, LEGAL ACTION, May 1992, at 10.

[FN42]. See, e.g., William H. Simon, Visions of Practice in Legal Thought, 36 STAN. L. REV. 469-507 (1984); Anita Arriola & Sidney Wolinsky, Public Interest Law in Practice: The Law and Reality, 34 HASTINGS L.J. 1207- 27 (1983); Gary Bellow & Jeanne Kettleson, From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice, 58 B.U. L. REV. 337-90 (1979). For a full discussion of this topic see JEREMY COOPER, KEYGUIDE TO INFORMATION SOURCES IN PUBLIC INTEREST LAW (1991). In the autumn of 1993, a new journal, The International Journal of the Legal Profession, came into being in England, which may indicate a welcome new interest in such issues.

[FN43]. The Inns of Court are where most barristers have their offices. To practice, a barrister must be a member of one of the four "Inns."

[FN44]. Unprecedented Legal Aid Cuts, LEGAL ACTION, Dec. 1992, at 4.

[FN45]. Henry Hodge, Legal Aid Round-Up, LAW SOCIETY'S GUARDIAN GAZETTE, Mar. 24, 1993, at 19 (Henry Hodge is a leading legal aid solicitor and a member of the Council of the Law Society).

[FN46]. Regina v. Lord Chancellor ex parte The Law Society (C.A. 1993) reported in THE TIMES, Aug. 11, 1993, available in LEXIS, World library, TTimes file.

[FN47]. Id. It must be a matter of bizarre fascination to the United States observer that the minister responsible for legislation relating to legal services is not only the head of the judiciary, but he is also now being taken to court by way of judicial challenge to the alleged unlawful exercise by him of his executive function!

[FN48]. Id.

[FN49]. See LEGAL AID BOARD, FRANCHISING: THE NEXT STEP (1992); Steven Orchard, The Board's Agenda, LEGAL ACTION, June 1993, at 7.

[FN50]. See AVROM SCHERR ET. AL., TRANSACTION CRITERIA (1992).

[FN51]. Fiona Bawdon, The Birmingham Pilot, LEGAL ACTION, May 1993, at 7.

[FN52]. Id.

[FN53]. See SCHERR, supra note 50; Avrom Scherr et al., Transaction Criteria: Back to the Future, LEGAL ACTION, May 1993, at 7.

[FN54]. See Lord Mackay of Clashfern, Litigation in the 1990s, 54 MODERN L. REV. 171 (1991).

[FN55]. Orchard, supra note 49. See also, Gary Bellow, Closing Remarks: Legal Services in Comparative Perspective, 5 MD. J. CONTEMP. LEGAL ISSUES 371 (1994).

[FN56]. Andrew Phillips, A Foundation for Learning, LAW SOCIETY GAZETTE, Mar. 24, 1993, at 25.

[FN57]. LEGAL AID ADVISORY COMMITTEE REPORT (1990).

[FN58]. NATIONAL CONSUMER COUNCIL, SETTLING CONSUMER DISPUTES: A REVIEW OF ALTERNATIVE DISPUTE RESOLUTION (1993). See also 56 MODERN L. REV. 277 (1993) (special edition devoted exclusively to alternative dispute resolution).

[FN59]. LEGAL ACTION GROUP, LEGAL SERVICES: A BLUEPRINT FOR THE FUTURE (1977); LEGAL ACTION GROUP, A NEW START: LAG'S RESPONSE TO THE REPORT OF THE ROYAL COMMISSION FOR LEGAL SERVICESSS (1980).

[FN60]. See generally Frederick H. Zemans, Can Ontario Sustain Cadillac Legal Aid?, 5 MD. J. CONTEMP. LEGAL ISSUES 271 (1994); Mark Richardson & Steven Reynolds, The Shrinking Public Purse: Civil Legal Aid in New South Wales, Australia, 5 MD. J. CONTEMP. LEGAL ISSUES 349 (1994).

[FN61]. See, e.g., Orchard, supra note 49; Jeremy Cooper, A Legal Services Policy for the Future: New Bottles for Old Wine, in PUBLIC INTEREST LAW, supra note 33.

[FN62]. It is interesting to note that according to Gary Bellow, who was one of the main architects of the U.S. legal services network in the mid 1960s, those who fought for the salaried model privately believed that, eventually, it would be replaced by a judicare model, once private attorneys understood that there were many dollars for the taking. They clearly underestimated the actual difficulties involved in changing a legal service infrastructure once it is in place. See Bellow, supra note 55.

[FN63]. LEGAL SERVICES CORPORATION, supra note 5, did make an exhaustive case for the relative cheapness of the salaried model, as against judicare, although this was probably once again an example of the piper calling the tune.

[FN64]. In 1983 I was commissioned to write a report on legal services delivery for the Attorney General of Australia, who was concerned to keep a grip on his "out of control" judicare budget. What I wrote in that report in 1983 could be repeated in 1993 without changing a word. See Jeremy Cooper, A REPORT ON THE FUTURE OF LEGAL SERVICES IN AUSTRALIA (1983).

[FN65]. See Bellow, supra note 55.

[FN66]. See, for example, the current situation in the United States.

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