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# MEETING LEGAL NEEDS: A NEW MALTHUSIAN DILEMMA

BY ALAN MERSON\*

*In spite of its continued growth, the legal profession is being sorely challenged. The population growth of our country has been far outstripped by an unprecedented acceleration of legal needs. Further, our country's lawyers are demonstrating an ever increasing inability to meet this deficiency. Focusing on noncourtroom settings, Professor Merson suggests a new role for the modern lawyer within both public and private institutional settings. He concludes by calling for a restructuring of the profession directed towards providing less costly and more efficient legal services in a manner which truly satisfies the heightened demand.*

## INTRODUCTION

**D**ESPITE a lawyer population which has more than kept pace with the general population increase,<sup>1</sup> the legal profession finds itself criticized for its inability to respond to critical needs,<sup>2</sup> increasingly demeaned in the public esteem,<sup>3</sup> and pre-empted in its work by many who are not lawyers.<sup>4</sup> How can we explain this apparent inability of a growing army of practitioners to meet the public need? Assuming, as I trust we may, that today's lawyer is better trained and more fully equipped to handle the traditional work of a private practitioner, the single most plausible explanation for this paradox would seem to lie in an unprecedented acceleration of legal needs far outstripping population growth. These unmet needs can be documented statistically. In the

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1 U. S. POPULATION PER LAWYER  
compiled by J. B. Regnell  
Stanford University Law Library

Year	People per Lawyer	Year	People per Lawyer
1951	696	1960	632
1954	672	1963	637
1957	653	1966	625

Statistics for 1951-1963 are cited from Table II, National: Population-Lawyer Ratio, 1948-1963, AMERICAN BAR FOUNDATION, THE 1967 LAWYER STATISTICAL REPORT 12 (F. Weil, ed. 1968). The population/lawyer figure for 1966 is cited from UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967, at 161 (hereinafter cited as ABSTRACT).

<sup>2</sup> The current Legal Services Program of the Office of Economic Opportunity was inaugurated in response to just such an attack. NATIONAL CONFERENCE ON LAW AND POVERTY, CONFERENCE PROCEEDINGS (1965).

<sup>3</sup> See, e.g., M. BLUM, THE TROUBLE WITH LAWYERS (1968); N. DACEY, HOW TO AVOID PROBATE (1967).

<sup>4</sup> See, e.g., Comment, *The Unauthorized Practice of Law by Laymen and Lay Associations*, 54 CALIF. L. REV. 1331 (1966); Llewellyn, *The Bar's Troubles, and Poultices — and Cures?*, 5 LAW & CONTEMP. PROB. 104 (1938).

case of the less affluent members of our society, legal problems have been researched to the point of redundancy.<sup>5</sup> And in terms of satisfying those needs, the poor may not have fared too badly, especially in comparison to the plight of their slightly more affluent middle-class neighbors.<sup>6</sup> But most Americans are not poor, and it is their needs which tax the resources of the legal profession.

Beyond mere population growth, there appear to be at least three factors influencing the expansion of legal needs. First, urbanization and highly complex societal settings require more elaborate regulatory mechanisms.<sup>7</sup> New forms of social interaction give rise to new legal needs. Second, as a more highly educated populace<sup>8</sup> gains increased insight into law's role in and the ordering of life, a greater proportion of the population demands legal services. Third, a new and enlarged role for the lawyer, imposed by contemporary public and private institutional settings, suggests a new set of legal needs quite different in scope from those heretofore served by lawyers. This paper will address itself primarily to the third of the enumerated causes, the enlarged role of the lawyer, and the necessary expansion of legal resources implied therein.

## I. THE EXPANDING ROLE OF THE LAWYER

Traditional legal work may in the future seem far less significant than newer, more rapidly developing roles for lawyers inherent in several contemporary public and private institutional settings. For example, the needs of today's consumer for traditional legal services may soon be rivaled by needs which reflect a clearer recognition of the crucial part played by the administrative process in our lives. The ability of the legal profession to respond to these changing needs requires a much greater understanding of their precise nature and character. Perhaps we can apprehend something of their profile.

### A. *Public Institutional Settings*

#### 1. The Administrative Process

The granting and withholding of governmental largess through the administrative process has an impact upon individual and corporate

<sup>5</sup> The most recent studies have been summarized in UNIVERSITY RESEARCH CORP., *PARA-PROFESSIONALS IN LEGAL SERVICES PROGRAMS: A FEASIBILITY STUDY* (1968).

<sup>6</sup> Sykes, *Legal Needs of the Poor in the City of Denver*, 4 *LAW & SOC'Y REV.* 255, 265-66 (1969).

<sup>7</sup> Holme, *Paralegals and Sublegals: Aides to the Legal Profession*, 46 *DENVER L.J.* 392, 396 (1969).

<sup>8</sup> *ABSTRACT*, *supra* note 1, at 114. For persons 25 years and older residing in the United States, median school years completed rose from 8.6 in 1940 to 12.0 in 1966.

conduct which may still be but dimly perceived.<sup>9</sup> With this impact comes the very considerable stake lawyers have in the smooth functioning of the process. Thus, whether a citizen deals with his employer, the public school, or various agencies of local, state, and federal government, he needs representation, usually the kind of representation a lawyer is best equipped to provide.<sup>10</sup> Recognition of the inherent unfairness of not providing welfare recipients with legal representation at administrative hearings is evidenced by the Department of Health, Education, and Welfare's recent decision to afford such representation at all "fair hearings."<sup>11</sup>

Conversely, the administrators themselves require legal guidance in properly performing their functions. Who today would deny the importance of legal advice for school administrators at every level?<sup>12</sup> The need is no less critical for an administrator of welfare programs, public housing, a municipal zoo, or indeed anyone who must reconcile competing interests, public and private. The existence of a general counsel's office for virtually every major agency of federal government is evidence of this need.

## 2. The Legislative Process.

A lawyer may be viewed today as an advocate, a planner, an organizer, and a negotiator.<sup>13</sup> In the administrative process we have seen him as an advocate, a negotiator, and to some extent, a planner. But his role as an advocate is certainly not limited to either the administrative process or judicial settings. If *lawyer* and *law* are related, the lawyer's role in the legislative process is no less significant. Presently, only a limited clientele employs lawyers for the purpose of gaining access to the legislative process.<sup>14</sup> There is an obvious need for representation of a much wider range of interests. Groups or individuals who have been previously deprived of representation in the legislative process,<sup>15</sup> due either to economics or ignorance, should be provided this service by lawyers.

<sup>9</sup> Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>10</sup> Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 527 (1969).

<sup>11</sup> Title 45 — Public Welfare, 45 C.F.R. § 205.10 (1969). See Robb, *HEW Legal Services: Beauty or Beast?*, 55 A.B.A.J. 346 (1969).

<sup>12</sup> See generally, *Symposium — Legal Aspects of Student-Institutional Relationships*, 45 DENVER L.J. 497 (1968).

<sup>13</sup> THE AMERICAN ASSEMBLY, REPORT OF THE AMERICAN ASSEMBLY ON LAW AND THE CHANGING SOCIETY 2 (Mar. 17, 1968).

<sup>14</sup> Carlin, Howard & Messinger, *Civil Justice and the Poor*, 1 LAW & SOC'Y REV. 9, 13-16 (1966); Willier, *Legislation to Help the Poor Consumer and How to Get It*, in OHIO STATE LEGAL SERVICE ASS'N, COURSE ON LAW AND POVERTY: THE CONSUMER § 2.01 (1968).

<sup>15</sup> See C. HORSKY, THE WASHINGTON LAWYER 38-40 (1952).

### 3. The Judicial Process.

The need for advocacy on behalf of a more broadly defined clientele is nowhere more evident than in the relative paucity of so-called public interest lawsuits. Ralph Nader points out that

lawyers labored for polluters, not anti-polluters, for sellers, not consumers, for corporations, not for citizens, for labor leaders, not rank and file, for, not against, rate increases or weak standards before government agencies, for highway builders, not displaced residents, for, not against, judicial and administrative delay, for preferential business access to government and against equal citizen access to the same government, for agricultural subsidies to the rich but not food stamps for the poor, for tax and quota privileges, not for equity and free trade.<sup>16</sup>

Until recently, the permissible scope of litigation has been so narrowly defined that the prospects for representing a broader public interest in the framework of a formal adjudicative proceeding have been slim indeed.<sup>17</sup> Today, however, with the relaxation of standing requirements,<sup>18</sup> public interest lawsuits become possible if a mechanism exists for competent representation. In a recent California case, a federally-funded legal services program insured the representation of a large group of low income citizens of San Francisco in an action to enjoin a poorly conceived urban renewal project.<sup>19</sup> Hopefully, public interest lawsuits will proliferate, as lawyers discover that some *pro bono* lawsuits may be *pro pecuniae* as well. Within a 6 month period in Colorado private attorneys have filed three important lawsuits relating to environmental protection.<sup>20</sup>

#### B. Private Institutional Settings

##### 1. Organization

The lawyer's skills as an advocate would be of little value within a public institutional setting if at the same time he were not an effective organizer within the private sector. This applies not only to the organizational skills of a trial attorney but to the employment of equally effective organizational techniques for enhancing the coalescence of groups devoted to specific social, political, or economic goals. The Economic Opportunity Act of 1964 has spawned not only the Com-

<sup>16</sup> Nader, *Law Schools and Law Firms*, THE NEW REPUBLIC, Oct. 11, 1969, at 20, 21.

<sup>17</sup> *Colegrove v. Green*, 328 U.S. 549 (1946); *Frothingham v. Mellon*, 262 U.S. 447 (1922).

<sup>18</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>19</sup> *W. Addition Community Organization v. Weaver*, 294 F. Supp. 433 (1968).

<sup>20</sup> *Defenders of Florissant, Inc. v. Park Land Co.*, Civ. No. 1539 (D.C. Colo. 1969) in defense of ancient fossil beds; *Colorado Open Coordinating Council v. Austral Oil Co.*, Civ. No. 1712 (D.C. Colo. 1969) opposing the Project Rulison underground atomic explosion; *Lamm v. Volpe*, Civ. No. 1870 (D.C. Colo. 1969) seeking to enforce the intent of the federal Highway Beautification Act with respect to billboard removal.

munity Action Agencies directly provided for the legislation,<sup>21</sup> but a host of additional community organizations, including cooperatives, tenants' unions, welfare rights groups, and neighborhood development corporations. The organizational skill for this effort has been derived largely from the Office of Economic Opportunity's Legal Services and Vista Lawyer Programs.<sup>22</sup> In an era of pluralism, it seems natural that the legal profession is properly looked to for providing organizational expertise.

## 2. Negotiation, Arbitration, and Conciliation

If the profession has thus far fallen short in providing its potential clientele with effective advocacy and organizational skills, how much more so has it failed to provide attractive alternatives to adversarial litigation? The techniques of negotiation, arbitration, and conciliation are surely to be prized in any highly complex, sophisticated society.<sup>23</sup> The courts daily concede their inability, both quantitatively and qualitatively, to be the prime mechanism for dispute resolution. The growing use of referees not only in bankruptcy, divorce, and juvenile matters but in complex cases of every genre, *e.g.* natural resource allocation, attests to this. The lawyer is constantly looked to as a "tension-manager,"<sup>24</sup> capable of employing the more informal non-adversarial processes. As these processes grow in use, whether it be within the National Labor Relations Board or a family counseling service, the legal profession must increase its capacity to provide the necessary expertise.<sup>25</sup>

## 3. Planning

It may well be the lawyer's planning function which best serves to highlight the widening abyss between the promise and the performance of the legal profession. Planning, in the sense here intended, encompasses everything from consumer counseling and debt management to estate and business planning. The lawyer's more affluent clients already benefit from the type of comprehensive counseling which the profession acknowledges to be the needed counterpart to a medical checkup.<sup>26</sup> Up to now, however, the overwhelming proportion of legal

<sup>21</sup> 42 U.S.C.A. § 2701 *et seq.* (1970).

<sup>22</sup> See Note, *Beyond the Neighborhood Office — OEO's Special Grants in Legal Services*, 56 GEO. L.J. 742 (1968); *Advocates of Change — A Challenge for Lawyers*, 4 VISTA VOLUNTEER MAGAZINE 16 (Mar. 1968).

<sup>23</sup> Ample evidence of this is afforded by the success of the American Arbitration Association in bringing an increasing number of disputes within the ambit of arbitration. The A.A.A.'s Mediation Center in Los Angeles and their co-sponsorship of the Hough Housing Improvement and Arbitration Project in Cleveland are two recent examples of their continuing activity. The Center for Teaching and Research in Dispute Settlement, located in Madison, Wisconsin, is also pursuing new approaches to this expanding field.

<sup>24</sup> W. MOORE, *SOCIAL CHANGE* 10 (1963).

<sup>25</sup> See H. ROSS, *SETTLED OUT OF COURT* (1970).

<sup>26</sup> Brown, *Corporate Counsel — At the Forefront of the Practice of Preventive Law*, 42 J. STATE BAR CALIF. 261 (1967); Brown, *Legal Audit*, 38 S. CALIF. L. REV. 431 (1965).

services is of the "one shot" variety. Instead of a complete legal "check-up,"<sup>27</sup> the typical client will usually get what he asks for, but precious little else. Clearly, when money is not the object, the lawyer easily perceives his preventive law function and the necessity for examining his client's legal "health" from head to toe.<sup>28</sup> Comprehensive counseling of this sort requires patience, probing and a well structured interviewing technique. No wonder that the economics of the profession now rule this out for the vast majority of clients.

#### 4. Education

The lawyer's planning function really incorporates an additional role expected of the lawyer, but all too rarely articulated. This is the lawyer as an educator or a communicator of useful information which both his client and the public at large ought to know. There is a vast amount of general legal knowledge which would enable a citizen to conduct his personal and business affairs more intelligently. A successful preventive law program should educate the larger community about the intricacies of purchasing a home, renting an apartment, obtaining consumer credit, applying for a driver's license, making bail, and a hundred other challenges of daily living.

There are, apparently, many instances in which individuals become involved with the criminal law, particularly in the areas of misdemeanors and traffic offenses, with little realization of their legal rights; and, similarly, many individuals seem to be unaware of their legal rights in matters involving workman's compensation, unemployment benefits, and welfare payments. . . . More generally, however, there is the difficult question of why there are so many legal needs which go unnoticed. It is possible that the need for a lawyer is in fact recognized, but is defined out of existence by the people themselves. It is also possible, however — and this seems more likely — that people are frequently ignorant of their legal rights and duties, that they do not recognize the legal implications of a variety of situations or the fact that legal remedies are available for many of their problems. And this is probably true of a great many people at all socio-economic levels.<sup>29</sup>

The public wants to know, but the legal profession has yet to devise a satisfactory method for dispensing this knowledge.

## II. THE REQUIRED EXPANSION OF RESOURCES

### A. *More Efficient, Lower Cost Service*

If the volume of legal services is to grow in response to the foregoing needs, the legal profession must provide these services in a less costly and more efficient manner. This can be accomplished in several ways.

<sup>27</sup> Brown, *Preventive Law in OEO Legal Service Offices*, 41 J. STATE BAR CALIF. 295, 302 (1966); Sykes, *supra* note 6, at 33.

<sup>28</sup> Freeman, *Role of Lawyers as Counselor*, 7 WM. & MARY L. REV. 203 (1966).

<sup>29</sup> Sykes, *supra* note 6, at 28-30.

First, there must be the recognition and encouragement of specialization within the profession.<sup>30</sup> Adam Smith's parable about the division of labor could hardly be more in point.<sup>31</sup> The public, it would seem, may have a far greater appreciation than most bar associations for the degree to which the profession has in fact specialized. The first question often asked of a lawyer is "What *kind* of law do you practice?" If lawyers ever fashioned themselves renaissance men, it seems quite clear that public attitudes, as well as the economics of the profession, will deny them this status today.<sup>32</sup>

Second, there must be far better use of advanced technology. This may range from nothing more than a greater sophistication in current office equipment, including typewriters,<sup>33</sup> duplicating and copying equipment,<sup>34</sup> dictating machines,<sup>35</sup> and the omni-present telephone,<sup>36</sup> to the most advanced computer techniques for electronic data processing.<sup>37</sup> Indeed, experimentation is well advanced on the use of computers for case law searching<sup>38</sup> and for performing such highly specialized tasks as estate planning.<sup>39</sup> Mass production technology and techniques have already been applied to certain types of legal services which are relatively unsophisticated and easy to render. Thus, the processing of divorces constitutes a significant share of legal business,<sup>40</sup> and is amenable to routine handling,<sup>41</sup> although still relatively expensive for the amount of legal expertise required. The same is true for the so-called consumer bankruptcy and a host of small claims, including tort, contract, and real property cases.<sup>42</sup> In the latter instances, the amounts at issue are frequently less than the legal fee exacted.

<sup>30</sup> See generally STANDING COMMITTEE ON ECONOMICS OF LAW PRACTICE OF THE AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE THIRD NATIONAL CONFERENCE ON LAW OFFICE ECONOMICS AND MANAGEMENT 9 (1969); Greenwood & Frederickson, *Specialization in the Medical and Legal Professions — Part I*, 5 L. OFFICE ECON. & MAN. 175 (1964).

<sup>31</sup> A. SMITH, *THE WEALTH OF NATIONS* Bk. I, Ch. I, at 1-12 (1786).

<sup>32</sup> See Cheatham, *The Growing Need for Specialized Legal Services*, 16 VAND. L. REV. 497 (1963).

<sup>33</sup> See Mucklestone, *Automatic Typewriters*, in PARTNERSHIP PROBLEMS AND NEW DEVELOPMENTS IN LAW OFFICE EQUIPMENT 123 (prepared by the Standing Committee on Economics of Law Practice of the American Bar Association, 1967) (hereinafter cited as PARTNERSHIP PROBLEMS).

<sup>34</sup> See Stolper, *Duplicating and Copying Equipment in the Law Office — Some Interesting Uses*, in PARTNERSHIP PROBLEMS, *supra* note 33, at 149.

<sup>35</sup> See Habermann, *Dictating Equipment*, in PARTNERSHIP PROBLEMS, *supra* note 33, at 165.

<sup>36</sup> See Mansell, *The Telephone*, in PARTNERSHIP PROBLEMS, *supra* note 33, at 137.

<sup>37</sup> See Chatterton & McCoy, *A New System for Legal Services Through the Use of Electronic Data Processing*, in PARTNERSHIP PROBLEMS, *supra* note 33, at 239.

<sup>38</sup> See Wilson, *Case Law Searching by Machine*, in PARTNERSHIP PROBLEMS, *supra* note 33 at 235.

<sup>39</sup> See Paffendorf, *Estate Planning by Computer*, in PARTNERSHIP PROBLEMS, *supra* note 33, at 283.

<sup>40</sup> J. CARLIN, *LAWYERS ON THEIR OWN* (1962).

<sup>41</sup> Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>42</sup> Bonfield, *supra* note 10, at 527.

A third way to provide for more efficient, lower cost service, would be to reduce labor costs. Much of a lawyer's routine work is capable of more standardized performance by a subprofessional.<sup>43</sup> The use of paralegal practitioners, those who work for 5 dollars an hour instead of 35,<sup>44</sup> would not only provide lower cost service for many who do not receive it now, but a significant expansion of vocational opportunities as well.<sup>45</sup>

### B. *Accessibility*

A formidable obstacle encountered by the legal profession in attempting to keep pace with growing legal needs is the relative inaccessibility of lawyers — inaccessibility, not in a geographical, but in a psychological and sociological sense. Many people "just don't know" lawyers.<sup>46</sup> For that reason alone they may be reluctant to call upon them. One should not underestimate the fears and misconceptions about the nature of legal services which keeps many from seeking legal advice.<sup>47</sup>

In a very real sense, one of the profession's most urgent challenges is to provide lawyers with the kind of exposure that will insure their most widespread employment. This can be done both through better communication of the lawyer's role and through new institutional settings. Conceivably, some admixture of legal clinics, group legal services, and legal insurance may serve to place the legal profession in a better position to reach this larger clientele.<sup>48</sup>

<sup>43</sup> CARLIN, *supra* note 40, at 52, 71, 72 *et seq.*

<sup>44</sup> See generally Holme, *supra* note 7.

<sup>45</sup> R. YEGGE, W. MOORE & H. HOLME, *NEW CAREERS IN LAW 71* (1969) (hereinafter cited as *NEW CAREERS*). Lest it be feared that the introduction of paralegals presages a decline in the quality of service, the *NEW CAREERS* report continues:

Services provided by paralegals, though high volume and inexpensive, should be of equal quality to similar services provided by lawyers. We have found that lawyers often perform essentially paralegal functions. In breaking down and standardizing these functions, the profession should make certain that they will be executed as well — or better — by paralegals as by bored and unchallenged lawyers. Of course, newly-created paralegals and sublegals would be obliged to comply with existing legal ethics. The confidentiality of the lawyer-client relationship would be maintained in contacts between client and sublegal, just as the essence of the patient-doctor relationship is preserved in intercessions by the nurse. The work of sublegals would be thoroughly supervised and checked by lawyers, and lawyers would be called upon to execute court actions, in compliance with law, in cases where sublegals have done most of the routine preparation. This preceding requirement does not preclude the hope that in certain standardized cases, such as uncontested divorce and bankruptcy, the law might be changed either to permit paralegals to make appearances in court or that the procedures might be made administrative and removed from court, reducing both the cost of services and the needless waste of lawyer's valuable time. In addition, changes in the *Canons of Ethics*, without altering the basic ethical responsibilities of the lawyer, might facilitate the use of paralegals and broaden their potential responsibilities.

*Id.* at 72.

<sup>46</sup> See Sykes, *supra* note 6, at 47.

<sup>47</sup> PARAPROFESSIONALS, *supra* note 5, at 65, 66.

<sup>48</sup> *NEW CAREERS*, *supra* note 45, at 48-50.

## CONCLUSION

In spite of its continuing growth, the legal profession is being severely challenged. Lawyers are called upon to perform old tasks more efficiently and new tasks with imagination and creativity. The profession must make it possible for the lawyer to fulfill his role as advocate, organizer, planner, and negotiator in a manner which truly satisfies the heightened demand for these services. If it does not, these roles will nevertheless be performed — whoever the performer and whatever the quality. The call then must be for nothing less than a major restructuring of the profession itself. Only then can we provide an acceptable response to a dilemma which grows with each passing day.