

# Reginald Heber Smith and Justice and the Poor in the 21st Century

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## ABSTRACT

*Reginald Heber Smith's 1919 book, Justice and the Poor, is one of the most important books about the legal profession in history. It found that people without money were denied access to the courts. Smith argued that this failure to provide equal justice undermined the social fabric of the nation. Accordingly, he urged a number of actions, including simplifying court procedures, creating small claims courts, and providing the poor with access to lawyers. These lawyers would deliver a full range of legal services to their clients, including seeking reform of the substantive laws that burdened the poor. Smith's book shamed the elite bar into action and led to the creation of the modern legal aid movement. As we come upon the 100th anniversary of its publication, Justice and the Poor reminds us that we are not much closer to Smith's vision of equal justice than we were in 1919.*

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## INTRODUCTION

*Justice and the Poor*,<sup>1</sup> a 1919 book by Reginald Heber Smith, is one of the landmark books on the legal profession. It is credited with the expansion of legal aid in the twentieth century. Smith's book includes the first history of the development of legal aid societies, anticipates important developments in the administration of justice, and concludes with a ringing call for the bar to provide access to the legal system for people who cannot afford attorneys.

As we approach the 100th anniversary of its publication, it is time to revisit Smith's work and consider what progress, if any, we have made toward his vision of equal justice under the law. Sadly, we are no closer to providing equal justice under the law to people without means than we were in 1919. Indeed, we may be worse off today than we were when Smith wrote his book. This is due in part to structural changes in the administration of justice and in law firms. But, it is also because providing the poor with

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1. REGINALD HEBER SMITH, THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO THE LEGAL AID WORK IN THE UNITED STATES (1919) [hereinafter *JUSTICE AND THE POOR*].

access to the court system is not politically neutral, as Smith thought. Rather, providing legal assistance to the poor is freighted with political meaning that has not been lost on the opponents to the legal services program.

Part I of this article explores Smith's book and outlines its recommendations. It shows how Smith's concerns were rooted in a desire to protect the rule of law during a time of rapid social change. Part II describes the impact *Justice and the Poor* had through the middle to latter part of the twentieth century by encouraging the development of legal aid offices and the eventual creation of the Legal Services Corporation. Part III describes the current state of legal services for the poor and concludes that we have not improved much since Smith wrote *Justice and the Poor*.

### I. JUSTICE AND THE POOR

Reginald Heber Smith, as a young Harvard Law graduate, became General Counsel of the Boston Legal Aid Society in 1914 and served through 1919.<sup>2</sup> He had a keen interest in making legal aid offices efficient, which led him to introduce the six-minute time sheet and other efficiency methods.<sup>3</sup> Smith maintained his sense of justice while striving for efficiency within the profession. Unlike today's obsession with using the billable hour to maximize profit, Smith wrote that although a lawyer should aim for profit, it is sometimes necessary to bill below cost because law is a profession.<sup>4</sup> During his tenure at the Boston Legal Aid Society, the Carnegie Foundation partnered with Smith to study the question of access to the legal system by

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2. 1 EARL JOHNSON, JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 20–22 (2014) [hereinafter JUSTICE FOR ALL]. Smith took the job upon graduation from Harvard after volunteering to work there for two summers. *Id.* at 20–21. Smith later went on to become managing partner at Hale and Dorr (now WilmerHale) from 1919 to 1956. *Slice of History: Reginald Heber Smith and the Birth of the Billable Hour*, WILMERHALE (Aug. 9, 2010), <https://perma.cc/MJX7-LBZC>.

3. *Slice of History*, *supra* note 2. Smith reduced the cost per case at Boston Legal Aid from \$3.93 to \$1.63 in two years. *Id.* This focus on efficiency shows up throughout JUSTICE AND THE POOR. In 1940, the American Bar Association compiled several of Smith's articles on efficiency in the publication *Law Office Organization*, which remained in use well into the 1990s. *Id.*

4. *Id.* Smith became the namesake for the Reginald Heber Smith Community Lawyer Fellows program, a special cadre of legal services lawyers trained for and charged with a mission to engage in law reform activities. JUSTICE FOR ALL, *supra* note 2, at 118–20. The author of this article, John M.A. DiPippa, was a “Reggie” from 1978 to 1980 with the Legal Aid Society of Roanoke Valley, specializing in welfare law, especially food stamps and Medicaid.

people without means as part of its examination of legal education.<sup>5</sup> This study became *Justice and the Poor*.<sup>6</sup>

Throughout *Justice and the Poor*, Smith details the importance of ensuring access to the legal system for those who cannot otherwise afford it. Doing so, he argues, will ensure the orderly development of the law such that it addresses the needs of all people and will guarantee that the poor are able to vindicate their rights through use of the legal system. He goes on to lay out a plan for the legal profession to increase the number of legal aid societies, ensure that they are properly funded, and advocate for the rights of the impoverished, both in the drafting of laws and in their enforcement. Smith's vision was one of equity and justice, and, 100 years later, it remains only partially realized.

#### A. *Diagnosis of a Legal System in Crisis*

##### 1. *The Government's Duty to Provide Equal Access*

Smith's fundamental claim for the expansion of legal aid rested on the rule of law, premised on three basic principles. The first principle was that access to the courts was rooted in the obligation of justice. He argued that a society and an individual cannot have justice unless the courts are open to all valid claims:

Freedom and equality of justice are twin fundamental conceptions of American jurisprudence. Together they form the basic principle on which our entire plan for the administration of justice is built. They are so deep-rooted in the body and spirit of our laws that the very meaning which we ascribe to the word justice embraces them. A system which created class distinctions, having one law for the rich and another for the poor, which was a respecter of persons, granting its protection to one citizen and denying it to his fellow, we would unhesitatingly condemn as unjust, as devoid of those essentials without which there can be no justice.<sup>7</sup>

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5. See JUSTICE FOR ALL, *supra* note 2, at 21. Richard Hale, a prominent lawyer who chaired the society's board, arranged for a Carnegie grant and a leave of absence for Smith. *Id.* Hale eventually hired Smith in 1919 to become managing director at his law firm. *Id.* at 22. The Carnegie Commission issued a series of reports on professional education. *E.g.*, ALFRED ZANTZINGER REED, THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921); ABRAHAM FLEXNER, THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, MEDICAL EDUCATION IN THE UNITED STATES AND CANADA (1910).

6. Smith conceived the idea to write a book about the plight of the poor in the legal system during his first two years at the Boston Legal Aid Society. JUSTICE FOR ALL, *supra* note 2, at 21.

7. JUSTICE AND THE POOR, *supra* note 1, at 3.

Second, he argued that because equality of justice is a fundamental part of American jurisprudence, guaranteeing it is the essential role of government. He wrote:

As a matter of law, the right stands inviolable. It is recognized and established by the highest possible authority. But that is not all. Its incorporation into the Bills of Rights transformed the principle from merely a legal or juristic conception to a political consideration of supreme importance. Not only was the right to freedom and equality of justice set apart with those other cardinal rights of liberty and of conscience which were deemed sacred and inalienable, but it was made the most important of all because on it all the other rights, even the rights to life, liberty, and the pursuit of happiness, were made to depend. In a word, it became the cornerstone of the Republic.<sup>8</sup>

Finally, Smith argued that a democratic system of government which fails to so secure equality of justice for its citizens is called into question, writing:

To withhold the equal protection of the laws, or to fail to carry out their intent by reason of inadequate machinery, is to undermine the entire structure and threaten it with collapse. For the State to erect an uneven, partial administration of justice is to abnegate the very responsibility for which it exists, and is to accomplish by indirection an abridgment of the fundamental rights which the State is directly forbidden to infringe. To deny law or justice to any persons is, in actual effect, to outlaw them by stripping them of their only protection.

It is for such reasons that freedom and equality of justice are essential to a democracy and that denial of justice is the short cut to anarchy.<sup>9</sup>

In Smith's eyes, inequality bred "fraud and dishonesty"<sup>10</sup> and led to "contempt for law [and] disloyalty to the government."<sup>11</sup> Thus, any obstacle that kept valid claims from being heard—whether procedural or substantive—should be removed.<sup>12</sup>

For Smith, the legal system existed to provide litigants with worthy cases a day in court, and if the system did not provide that kind of access, then it could not be said to operate effectively.<sup>13</sup> He understood access to justice as fundamental to the rule of law and argued:

The end of all our legal institutions is to secure justice. What is the just decision in any controversy we determine, not by the arbitrary will or opinion

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8. *Id.* at 4 (footnote omitted).

9. *Id.* at 5.

10. *Id.* at 9.

11. *Id.* at 10.

12. *Id.* at 13–14.

13. *Id.* at 13.

of any individual, but in accordance with definite rules of law. This is the method of justice according to law, and because it so far surpasses all other attempts at human justice it stands as a basic principle from which we cannot safely depart.<sup>14</sup>

## 2. *Equal Access for Immigrants*

Smith saw the rule of law as an important element in the Americanization of immigrants. He believed that providing access to the legal system not only “taught” new Americans about democratic values but also dampened the prospects of radicalization.<sup>15</sup> In his view, legal aid societies’ “greatest service . . . [was] promotion of good citizenship.”<sup>16</sup> Providing access to the courts proved “the integrity and fairness” of the United States and “engender[ed] respect for law, loyalty, and patriotism.”<sup>17</sup> Smith thought that immigrants would be easy prey for unscrupulous business practices and fertile ground for radicals.<sup>18</sup> Immigrants came to this country unfamiliar with the American system of justice, often unable to understand the language, but nonetheless expecting freedom. Those hopes would be easily dashed if the system of justice failed to protect them, making them “easily subject to the influences of sedition and disorder.”<sup>19</sup>

In *Justice and the Poor*’s foreword, Elihu Root claims that no one can “question that the highest obligation of government is to secure justice for those who, because they are poor and weak and friendless, find it hard to maintain their own rights.”<sup>20</sup> In the same vein, Henry S. Pritchett, in the book’s introduction, argued that if the suspicion that law fails to secure justice is allowed to grow, “it will . . . poison[] the faith of the people in their own government and in law itself, the very bulwark of justice.”<sup>21</sup>

Smith and Pritchett noted the effect that lack of access to the court system could have on immigrants. Pritchett wrote that immigrants, perhaps even more than natural-born citizens, require access to justice that is “simple, sympathetic, and patient” because a system which provided otherwise—complex, unyielding, and impatient—would amount to a denial of justice, which “forms the path to disloyalty and bitterness.”<sup>22</sup> To Smith, a learned respect for democratic institutions was essential to the assimilation of

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14. *Id.*

15. *Id.* at 11.

16. *Id.* at 217.

17. *Id.*

18. *Id.* at 11.

19. *Id.* (footnote omitted).

20. Elihu Root, *Foreword* to JUSTICE AND THE POOR, *supra* note 1, at ix.

21. Henry S. Pritchett, *Introduction* to JUSTICE AND THE POOR, *supra* note 1, at xi–xii.

22. *Id.* at xiv.

immigrants, who often came from an oppressed society with high hopes for freedom and justice.<sup>23</sup> Smith recognized that immigrants would not develop a respect for those institutions if they lacked access to them; thus, he argued that the rule of law required equal access because even if the substantive law was fair, it was meaningless unless people could use the system to vindicate their rights.<sup>24</sup>

### 3. *Crisis in the Rule of Law*

Smith noted that rapid social changes, like massive immigration, industrialization, and urbanization, had created a crisis in the administration of justice.<sup>25</sup> Responding to the nation's increasing urbanization, state legislatures passed upwards of 12,000 new laws annually.<sup>26</sup> Americans living in densely populated cities found themselves embroiled in legal disagreements more frequently than they had in the previous century's primarily agrarian society, and courts of last resort issued more than 13,000 decisions annually.<sup>27</sup> As dockets grew, legislatures responded by creating new courts, which in turn necessitated new rules to establish jurisdiction, venue, and procedure.<sup>28</sup> The resulting system, Smith argued, had become so complex that the poor could no longer make use of it without hiring an attorney, which many could not afford to do.<sup>29</sup> Unequal access to the system of justice, he said, "actively encourage[d] fraud and dishonesty" through use of the law as a means of extortion.<sup>30</sup> More importantly, however, it created a dangerous disaffection for democratic institutions:

The effects of this denial of justice are far reaching. Nothing rankles more in the human heart than the feeling of injustice. It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy. The conviction grows that law is not justice and challenges the belief that justice is best secured when administered according to law. The poor come to think

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23. JUSTICE AND THE POOR, *supra* note 1, at 11.

24. *See id.*

25. *Id.* at 7.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 7–8. Smith wrote:

The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.

*Id.* at 8.

30. *Id.* at 9.

of American justice as containing only laws that punish and never laws that help. They are against the law because they consider the law against them.<sup>31</sup>

### B. *Legal Aid as a Solution*

After detailing the significant difficulty of the poor in obtaining legal services, Smith recounted the history of organized legal aid entities, whose missions oscillated between simply providing access and also facilitating law reform.

#### 1. *Early Legal Aid Programs*

Smith located the beginning of organized legal aid work with the 1876 establishment of the German Legal Aid Society in New York City.<sup>32</sup> Still, Smith did not believe that this was legal aid work “within the modern meaning” because it was limited to helping German immigrants.<sup>33</sup> “There was no conception of furnishing legal assistance in general, of preventing injustice except in this limited field, or of taking any part in the administration of justice.”<sup>34</sup> For Smith, the true dawn of “modern legal aid work” happened in 1890, when Arthur von Briesen took over the management of the German Legal Aid Society, dropped the “German” reference, and began publication in English, thereby broadening its scope beyond German immigrants.<sup>35</sup> Von Briesen argued that the society could get more financial support if it broadened its mission to include all poor people and not just immigrants.<sup>36</sup> The change—eventually made in 1896—led to financial support from a wide range of people, including Andrew Carnegie and John D. Rockefeller.<sup>37</sup>

Smith defined organized legal aid work as “giving legal advice and legal assistance in negotiation and litigation to poor persons, without cost to them or at a minimum cost which they can afford, in matters where no other assistance [was] available.”<sup>38</sup> Legal aid offices provided services “in cases

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31. *Id.* at 10 (footnotes omitted).

32. *Id.* at 134–35. The opening of the Legal Aid Society in 1876 was done “to protect German immigrants from the rapacity of runners, boarding-housekeepers, and miscellaneous coterie of sharpers who found that the trustful and bewildered newcomers offered an easy prey.” *Id.* at 135. No doubt this reflects the desire to “assimilate” immigrants. What better way to do that than to place them with others in the same economic condition and force them to communicate in English?

33. *Id.*

34. *Id.*

35. *Id.* at 136–39.

36. JUSTICE FOR ALL, *supra* note 2, at 7.

37. *Id.* at 8.

38. JUSTICE AND THE POOR, *supra* note 1, at 134.

where lawyers [were] necessary if justice [was] to be done, and where no other agency” provided them.<sup>39</sup> He noted that informal legal aid work (what today we would call pro bono representation) had always existed, especially in small towns.<sup>40</sup> This work, laudable as it was, was “transitory and fleeting” and left “nothing permanent on which to build.”<sup>41</sup> Smith compared this to the difference between a doctor treating an individual patient and a doctor building a hospital.<sup>42</sup> In the absence of formal legal aid programs, leaving access to the legal system to the charitable whims of individual attorneys was simply not sufficient in an era of increasing urbanization and immigration.<sup>43</sup>

Other cities like Chicago and Boston created legal aid societies with similarly broad missions.<sup>44</sup> These organizations strengthened their relationships to the organized bars, developed varied sources of funding, and found a context for their work in the ongoing reorganization of the courts.<sup>45</sup> Gradually, these lawyers understood their role was “not so much giving anything to the poor as it was obtaining for them their just dues; that [they were] not dispensing charity, but . . . securing justice.”<sup>46</sup>

Initially, pro bono work arose out of the individual lawyer’s moral obligation to clients.<sup>47</sup> Early ethical codes took their cues from David Hoffman’s admonition that free legal services should be “cheerfully given.”<sup>48</sup> Attorney oaths, developed during that time, echoed Hoffman’s

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39. *Id.*

40. *Id.* at 133.

41. *Id.*

42. *Id.*

43. *Id.* at 133–34.

44. *Id.* at 135–41. *See also* JUSTICE FOR ALL, *supra* note 2, at 19–20.

45. *See* JUSTICE AND THE POOR, *supra* note 1, at 135–41. Johnson points out that bar associations did not immediately support the nascent legal aid movement. JUSTICE FOR ALL, *supra* note 2, at 18. “[N]one of the three legal aid organizations in existence at the end of the 19th century had been started by a bar association.” *Id.* By 1913, however, bar associations started or supported thirteen legal aid offices. *Id.* at 19. Law schools also began to organize legal aid efforts; Denver and Harvard were the first. *Id.* at 19–20.

46. JUSTICE AND THE POOR, *supra* note 1, at 149.

47. *See* Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance to Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 116 (2002) (tracing the roots of pro bono service to the noblesse oblige tradition of ancient Rome); DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 12 (2005) (stating that the legal profession historically provided little voluntary pro bono service or support for organizations doing such work).

48. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 758 (2d ed. 1846) (“I shall never close my ear or heart, because my client’s means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.”).

viewpoint by having lawyers promise to never deny help to the powerless.<sup>49</sup> The American Bar Association's 1908 Canons of Professional Ethics urged lawyers to help the widows and orphans of other lawyers, but the responsibility remained with the individual lawyer to choose the morally appropriate course for an individual client in need.<sup>50</sup>

This understanding of attorney ethics was part of a larger vision that pitted lawyers' self-understanding as professionals against the crass commercialization of the marketplace. Lawyers, as professionals, occupied a higher moral sphere and needed to remain above the rough and tumble of the marketplace.<sup>51</sup> Being above the profit motive, lawyers used their skills for the public good—to provide access to the system of justice.<sup>52</sup> Their skills were at the disposal of those who needed them, whether or not those clients could pay.<sup>53</sup> Roscoe Pound's famous definition of the profession, although written during a later era, reflects this vision.<sup>54</sup>

This did not mean, however, that an attorney should feel called to accept every case that presented itself. Elihu Root urged lawyers to tell their clients no—that is, that lawyers should independently judge the social good of their client's actions and refuse to carry harmful actions.<sup>55</sup> This noblesse oblige

49. *E.g.*, ARK. R. GOV'G ADMIS. B. VII(G).

50. CANONS OF PROF'L ETHICS Canon 12 (AM. BAR ASS'N 1908) ("A client's . . . poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.").

51. *See Maute, supra* note 47, at 94–95.

52. *Id.*

53. *Id.*

54. ROSCOE POUND, ABA, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). Pound articulates the difference between a trade and the learned professions, writing:

There is much more in a profession than a traditionally dignified calling. The term refers to a *group of men pursuing a learned art as a common calling in the spirit of public service*—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. *Gaining a livelihood is incidental*, whereas in a business or trade it is the entire purpose.

*Id.* (emphasis added).

55. 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1964) ("About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."). Root expressed that sentiment in a commencement address delivered at Yale, in which he said:

To be a lawyer working for fees is not to be any the less a citizen whose unbought service is due to his community and his country with his best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law.

understanding of the lawyer's role imagined a world where lawyers waited for clients to walk through their door to ask for help with legal problems.<sup>56</sup> The lawyer, for his part (and lawyers were almost certainly men) decided if the case had merit, i.e., whether it was worthy.<sup>57</sup> Even if the case had merit, the lawyer should refuse to take it if the outcome was not good for society.<sup>58</sup> In short, the lawyer's moral obligation to do justice animated every aspect of this vision from seeking business, to taking cases, and to handling them.<sup>59</sup> If the lawyer had an individual moral obligation to do justice, then the lawyer had to be able to make all the decisions about every aspect of his practice.

Of course, like any fantasy, this vision only imperfectly reflected reality. No comprehensive studies exist to tell us whether or how often lawyers provided uncompensated services during that era, but it could not have been much. Smith detailed the vast stretches of the country where no organized effort existed to provide free legal services, the substantive areas of the law skewed against the poor, and the procedural hurdles that few lay people could overcome without a lawyer's help.<sup>60</sup>

## 2. *Smith's Ideas for Improving Legal Aid*

Smith saw the existing legal aid societies as a foundation upon which the organized bar could build to ensure that all persons were given equal access to the justice system. He sought, through *Justice and the Poor*, to lay out a comprehensive plan for doing so. His plan began by addressing the practical impediments to access for the poor: delay within the court system, the cost of court fees, and the cost of hiring private counsel.<sup>61</sup> He believed that the burden of hiring private counsel could be alleviated, or at least mitigated, by expanding the geographical coverage of legal aid societies and then strengthening them by urging national coordination among them.<sup>62</sup> He also believed that, once established, those legal aid societies should endeavor to accept a broader array of cases, ensuring that all manner of legal disputes encountered by the poor could be resolved in the justice system.<sup>63</sup> He also recognized that this new system of legal aid societies with nearly nationwide coverage would need increased funding from the private bar, which would

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Elihu Root, Some Duties of American Lawyers to American Law, Yale Law School Commencement Address (June 27, 1904), in 14 YALE L.J. 63, 65 (1904).

56. Maute, *supra* note 47, at 113.

57. *Id.*

58. *See id.*

59. *Id.*

60. JUSTICE AND THE POOR, *supra* note 1, at 13–16.

61. *See* discussion *infra* Section I.B.2.a.

62. *See* discussion *infra* Section I.B.2.b.

63. *See* discussion *infra* Section I.B.2.c.

require eliminating the indifference that he saw within the bar.<sup>64</sup> And, finally, he believed that legal aid should be the responsibility of the government, which should take the charge of building a permanent infrastructure around the expanded private legal aid societies.<sup>65</sup>

*a. Solving the Three Problems of Access: Delay, Court Fees, and Cost of Counsel*

Smith identified three problems that blocked access to the legal system for the poor: delay, court fees, and the cost of counsel.<sup>66</sup> Because he saw the problem of access embedded in the proper administration of justice, he devoted most of his book to the elimination of various procedural hurdles. For example, he lauded the simplification of pleading and procedures,<sup>67</sup> the development of *in forma pauperis* rules,<sup>68</sup> the creation of small claims courts,<sup>69</sup> and the extension of administrative insurance schemes like worker's compensation, which could each help extend access to the courts or avoid the necessity of it altogether.<sup>70</sup>

Solving the problem of the cost of lawyers was more difficult. Smith saw three choices: abolish lawyers, make lawyers unnecessary, or provide lawyers for free.<sup>71</sup> Small claims courts and conciliation were reducing the need for lawyers in some cases, but these reforms were not enough to solve the problem for large numbers of people whose cases required the assistance of counsel.<sup>72</sup> It would be unrealistic and counterproductive to abolish lawyers, so the issue became how to provide enough legal assistance to make the promise of equal justice viable. He proposed (1) expanding legal aid societies to all cities of 300,000 people or more and creating a national body to coordinate their work,<sup>73</sup> (2) allowing legal aid societies to broaden their scope of work by handling appeals, accepting a broader array of cases, and engaging in legislative advocacy,<sup>74</sup> (3) increasing funding by assessing dues

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64. See discussion *infra* Section I.B.2.d.

65. See discussion *infra* Section I.B.2.e.

66. JUSTICE AND THE POOR, *supra* note 1, at 15–16.

67. *Id.* at 19.

68. *Id.* at 30.

69. *Id.* at 22.

70. *Id.* at 83.

71. *Id.* at 39.

72. *Id.* at 29–30.

73. *Id.* at 188–89, 245–46.

74. *Id.* at 243–44.

to each attorney to fund legal aid societies,<sup>75</sup> and (4) eventually making legal aid a governmental responsibility.<sup>76</sup>

*b. Expanding Geographical Coverage and Urging National Coordination*

When Smith wrote *Justice and the Poor*, legal aid societies were concentrated on the East and West Coasts, leaving huge swaths of the country without access to legal aid. Smith described the problem, writing:

If the cities in which legal aid organizations are to be found were marked on a map of the United States, the eye would at once see that there are two great areas wherein legal aid work is non-existent. One is the far west. Bounded by lines running Duluth—Minneapolis—Omaha—Dallas on the east and Portland—San Francisco—Los Angeles on the west, there is an enormous extent of territory without legal aid organizations. . . .

The second area is that of the southeast. South and east of a line running Richmond—Louisville—Nashville—New Orleans no legal aid work is done.<sup>77</sup>

The Far West consisted of “new territory” with few people and few cities, and Smith believed that legal aid societies would arise with the growth of population.<sup>78</sup> The southeastern territory was more perplexing. In diplomatic fashion, he noted that, although great need for legal aid existed in the Southeast,

[h]ere is to be found the only general failure of the legal aid idea. No satisfactory explanation of this condition has ever been offered. Apparently there is need for the assistance of some strong central organization to coöperate with local groups and to assist the work until it shall have won local interest and support.<sup>79</sup>

Thus, it was apparent to Smith that legal aid societies had to expand to all areas where the need existed, but especially into the cities of the Southeast. The need for such services in that region was apparent, but there was no concerted effort to meet it.

In addition to broadening legal aid’s range, Smith sought coordination among the programs across the United States. He saw a lack of national coordination as limiting the effectiveness of legal aid work.<sup>80</sup> Attorneys around the country could benefit from the experiences of lawyers in other

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75. *Id.* at 237, 239.

76. *Id.* at 246.

77. *Id.* at 187.

78. *Id.*

79. *Id.*

80. *Id.* at 197.

areas who handled similar problems for their clients.<sup>81</sup> Moreover, he saw the need for “concerted action” by legal aid lawyers on national problems.<sup>82</sup> Such national coordination would result in “more concerted, aggressive, vital, and intelligent” representation.<sup>83</sup>

*c. Broadening Case Coverage, Pursuing Final Judgments, and Influencing Legislation*

Smith also believed there was a need for legal aid societies to do more than simply resolve minor grievances. He wanted the societies to accept a broader array of cases,<sup>84</sup> pursue appeals,<sup>85</sup> and advocate for legislative changes that would benefit the poor.<sup>86</sup>

Smith wanted legal aid societies to function as general practitioners and accept most cases, including criminal cases, personal injury, bankruptcies, and complaints against attorneys.<sup>87</sup> For example, he saw no reason for legal aid societies to turn down personal injury cases when representation was not otherwise available.<sup>88</sup> He described the paradox that required the legal aid lawyer to turn down the case but, because of prevailing ethics rules on referrals, also prohibited him from suggesting another lawyer to the applicant.<sup>89</sup> Smith believed that the legal aid societies made a bad decision when they initially prohibited personal injury representation and urged that that original mistake not be compounded by continuing it into the future.<sup>90</sup> Smith acknowledged that bankruptcies should be generally discouraged, but he also said that “neither ethics nor morals enjoin a resort to the bankruptcy court” when collection practices became abusive.<sup>91</sup>

There was one area, though, where Smith did not seek expansion of legal aid coverage: divorce. Although Smith believed that there should be no moral criteria for accepting cases, he followed the prevailing attitude about divorce.<sup>92</sup> He noted the “clear and well-justified rule to refuse to

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81. *Id.* at 197–98.

82. *Id.* at 199.

83. *Id.*

84. *Id.* at 156–58.

85. *Id.* at 206.

86. *Id.* at 200–05.

87. *Id.* at 152–53. Smith wrote that “[t]he only test is the intrinsic merit of the claim plus a due regard for those restrictions which good ethics impose on all members of the bar.” *Id.* at 162.

88. *Id.* at 157–58.

89. *Id.* at 157.

90. *Id.* at 158.

91. *Id.* at 153.

92. *Id.* at 155.

institute divorce proceedings” and the “strong public policy against making divorces easy and cheap.”<sup>93</sup> However, he distinguished “legal action which breaks up a home forever and legal action which preserves the home or leaves the path open for reconciliation.”<sup>94</sup> Thus, he would allow legal aid societies to defend petitions filed against a woman or to represent women in non-support actions.<sup>95</sup>

In addition to the impact legal aid societies would have for individual cases, Smith also believed that legal aid societies had a role to play in the development of the law. According to him, it was problematic for the common law to develop only through property disputes of those with money. The result, he said, would be that the law would not develop to allow redress of the grievances and disputes of the poor.<sup>96</sup> For that reason, he believed that appellate work was crucial. As he said:

The common law is the people’s law; it has had its being in their life; it has been able to develop in a comprehensive way through the controversies of all classes of citizens, high and low, in all sorts of cases, big and little. This sturdy, all-round development is not so clear to-day. The poor cannot afford appeals, the small case does not warrant the incurring of large expense, and the large private offices, engaging in general practice and doing legal aid work as a part of that practice, no longer exist.<sup>97</sup>

According to Smith, legal aid societies should pursue final judgments in all cases “wherein new important points of law and matters of general legal or social interests are involved.”<sup>98</sup> If the societies did not bring appeals, then the common law system could not work as it was intended.<sup>99</sup> Appellate court decisions would be limited to those cases for which the litigants had the means to sustain them, thus skewing the development of the law.<sup>100</sup>

Smith’s vision for legal aid also included lobbying and law reform, which were essential features of securing equal justice for the poor. He saw that statutory law, like the common law, was developing in a way that disfavored the poor.<sup>101</sup> Many people and groups can afford to pay attention to the formulation of legislation and policy, but “[t]he poor are not in a

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 207.

97. *Id.* at 206–07.

98. *Id.* at 206.

99. *Id.*

100. *Id.* at 207.

101. *Id.* at 204–05.

position to understand or to act.”<sup>102</sup> Legal aid societies, on the other hand, could rectify this imbalance. Smith said:

[L]egal aid organizations have taken up the burden of trying, through remedial legislation, to keep the law equal in the face of changes . . . which tend to destroy equality. It is clear that the societies come into contact with legal abuses which would not appear in the ordinary private law office, and which the community in general would not be in a position to detect or understand.<sup>103</sup>

Smith insisted that care must be taken to ensure that the substantive law, like the common law, develops with an eye toward fairness, which he saw as a “requisite foundation for an equal administration of justice.” He believed that legal aid societies were the organizations best suited to speak for the poor—“an estate in the community which by reason of its own limitations [was] inarticulate.”<sup>104</sup>

Finally, Smith noted that both remedial legislation and final appellate decisions had broad effects. They served to educate people about their rights and prevent future disputes.<sup>105</sup> Perhaps most important to Smith, he believed that educating the community about their rights encouraged and inculcated good citizenship by developing “respect for law, loyalty, and patriotism.”<sup>106</sup>

*d. Eliminating Indifference and Increasing Funding through the ABA*

Smith declared that legal aid societies were “grossly under-financed” and faced an uncertain future because of it.<sup>107</sup> Funding restraints forced societies to reduce services and underpay staff.<sup>108</sup> Executive attorneys received, on average, \$2,217 annually,<sup>109</sup> roughly equivalent to \$30,800 today.<sup>110</sup> Full-time staff attorneys fared no better with an average salary of

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102. *Id.* at 204.

103. *Id.* at 203–04.

104. *Id.* at 205.

105. *Id.* at 210.

106. *Id.* at 217.

107. *Id.* at 193. “The greatest weakness of organized legal aid work, the one great factor which constantly bars its path, and which may ultimately prove its undoing, is its lack of funds.” *Id.*

108. *Id.* at 194.

109. *Id.*

110. *Relative Values - US \$*, MEASURINGWORTH, <https://www.measuringworth.com/uscompare/> (last visited Nov. 4, 2017) [hereinafter *Relative Values*] (type “1919” into the box for Initial Year; type “2217” into the box for Initial Amount; type “2017” into the box for Desired Year; then click the “Calculate” hyperlink; read the results for “historic standard of living value of that income or wealth”). The conversion calculator provided on the “Relative

\$1,887,<sup>111</sup> roughly \$26,200 today.<sup>112</sup> Part-time attorneys scraped by on \$628,<sup>113</sup> or \$8,710 in today's dollars.<sup>114</sup>

Volunteer lawyers could not fill the gap. Smith critiqued the volunteer counsel plan—a plan that sounded remarkably like modern-day pro bono efforts.<sup>115</sup> He understood that lawyers would volunteer their services out of a sense of moral obligation and justice, but he also believed that volunteerism could never fully satisfy the need for free services because private attorneys also needed to devote time to paying clients to make a living.<sup>116</sup> Thus, requests for service made to attorneys who would not be paid for their services may not be met promptly, receive a high priority, or fall within the attorney's area of expertise.<sup>117</sup>

Smith's most stinging criticism was reserved for the legal profession and the indifference he saw as contributing greatly to the lack of funding for legal aid societies. Legal aid societies discharged the legal and moral responsibility of the legal profession in general.<sup>118</sup> Their work strengthened the "reputation and popularity" of lawyers, identified "abuse and misconduct by individual" lawyers, and bettered "the administration of justice."<sup>119</sup> The obligation to provide access to justice, Smith believed, devolved to each individual lawyer by virtue of the attorney's oath.<sup>120</sup> The oath imposed, and continues today to impose, the duty of service in all cases and is owed by every lawyer to the poor.<sup>121</sup> "[T]his duty is in part a legal obligation because the lawyer is a minister of justice, and in part an ethical responsibility because of his membership in a profession."<sup>122</sup> While the legal aid movement ranked as one of the great reform movements of the time, most lawyers were, at best, indifferent and, at worst, ignorant of its developments.<sup>123</sup> Indifference was not an option: "To know nothing about

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Values - US \$" page of the MeasuringWorth website was used to calculate the present-day value of financial references discussed in this article.

111. JUSTICE AND THE POOR, *supra* note 1, at 194.

112. *Relative Values*, *supra* note 110.

113. JUSTICE AND THE POOR, *supra* note 1, at 194.

114. *Relative Values*, *supra* note 110.

115. JUSTICE AND THE POOR, *supra* note 1, at 220.

116. *Id.*

117. *Id.* at 220–21.

118. *Id.* at 226.

119. *Id.*

120. *Id.* at 230.

121. *See id.* at 232–33 (describing the attorney's oath and duty to render services to the poor).

122. *Id.* at 232.

123. *Id.* at 234.

legal aid work, to care nothing about it, and to do nothing for it is to doom it as effectively as by open opposition.”<sup>124</sup>

Because lawyers, as individuals and professionals, have an obligation to provide access to justice, Smith believed the chief financial support for legal aid should come from members of the bar.<sup>125</sup> Legal aid organizations should not have to seek contributions unless they could say that the bar had done its fair share.<sup>126</sup> “It is common knowledge that the bar as a profession is not considered charitable. The contrast with the medical profession is frequently drawn.”<sup>127</sup>

Smith argued that lawyers should provide the primary means of financial support for legal aid societies, not only because of the lawyer’s moral obligation to provide access to justice, but also because the legal aid societies make it possible for lawyers to increase their profits.<sup>128</sup> By discharging the bar’s obligation to the poor, legal aid societies made it possible for private attorneys to devote more time to paying clients.<sup>129</sup> Thus, Smith wanted every lawyer to be assessed a fee to cover the expense of legal services.<sup>130</sup> He estimated that the total budget in 1919 for all national legal aid societies, if they were expanded in accordance with his plan, would have been \$658,500.<sup>131</sup> That amounts to about \$9 million today.<sup>132</sup> He urged a \$5 annual fee on every lawyer to cover the expense.<sup>133</sup> As he noted:

[T]he American Bar has it easily within its power to permit legal aid work to develop to its natural completion, to perform the full measure of the responsibility which rests on it as a profession, and thereby to put to an end the existing denial of justice to the poor in the United States.<sup>134</sup>

*e. Making Legal Aid a Public Responsibility*

Smith believed that, ultimately, legal assistance to the poor had to become a public responsibility. “Inasmuch as the legal aid organizations are rendering an essential public service, it is likely that ultimately their work

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124. *Id.*

125. *Id.* at 245.

126. *Id.*

127. *Id.* at 237.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 239.

132. *Relative Values*, *supra* note 110.

133. JUSTICE AND THE POOR, *supra* note 1, at 239. This would amount to about \$70 today. *Relative Values*, *supra* note 110.

134. JUSTICE AND THE POOR, *supra* note 1, at 239.

will pass under public control.”<sup>135</sup> Smith came to this conclusion after a conversation with Louis Brandeis, where Brandeis argued that equal justice is a right, not charity.<sup>136</sup> Still, Smith did not make an unequivocal statement in support of immediate public funding. Rather, he “sen[t] a nuanced message on this important question,” attempting to strike a balance between the responsibilities of the private bar and those of government.<sup>137</sup>

In the long run, though, he believed that access to justice was a public responsibility and that public funding was not socialism but equality.<sup>138</sup> The state should foot the bill in proper cases where a lawyer’s services were necessary to achieve equality before the law because the state was a silent party in interest in every case.<sup>139</sup> The state built the courthouse, paid the judge, paid the clerk, and forced litigants to use these institutions. In other words, the state monopoly on the mechanisms of justice dictated that it must take the primary responsibility for securing access to its system.<sup>140</sup>

In sum, Smith described a system of justice that failed to live up to its promise of equality. Its cost excluded people without means, and its custodians—the lawyers—failed to correct this deficiency. Smith forcefully argued that lawyers had a moral and political responsibility to take action promptly.

## II. LEGAL AID AFTER *JUSTICE AND THE POOR*

For nearly 100 years since Smith first published *Justice and the Poor*, the availability of legal services for the poor has been evolving—slowly at first, with a period of substantial expansion through the second half of the 20th century. Unfortunately, many of those gains have been lost in the first two decades of the 21st century. This Part will begin with a review of the initial reaction and early response of the bar to Smith’s publication. Next, it will discuss the subsequent report prepared by the American Bar Association to evaluate progress on the provision of legal services to the poor in 1951. Finally, this Part will discuss the formation of the Office of Economic Opportunity and the Legal Services Corporation in the latter part of the century.

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135. *Id.* at 246. Smith believed that legal aid should be placed under the supervision of the judiciary. *Id.* at 247.

136. *JUSTICE FOR ALL*, *supra* note 2, at 34.

137. *Id.*

138. *JUSTICE AND THE POOR*, *supra* note 1, at 182, 246.

139. *Id.* at 182.

140. *Id.*

A. *The Early Impact of Justice and the Poor*

Urged on or, perhaps, shamed by Smith's account, the organized bar began to respond to Smith's critique. Smith's ideas did not get a warm reception at the start. The President of the New York Bar Association criticized Smith for his critique of the legal system during a "period of unrest."<sup>141</sup> Shortly thereafter, when the Carnegie Foundation sought the American Bar Association's mailing list so that it could send free copies of Smith's book to ABA members, the ABA refused.<sup>142</sup>

Despite this initial chilly reception, the ABA soon found itself under new leadership who welcomed Smith's ideas. Charles Evans Hughes, a former Justice of the United States Supreme Court and Governor of New York, replaced Arthur Von Briesen as head of the Legal Aid Society of New York.<sup>143</sup> Hughes was already aware of Smith's work because he had received an advance copy of *Justice and the Poor*'s manuscript.<sup>144</sup> As Earl Johnson notes, "Hughes was not surprised when *Justice and the Poor* was published. He already was fully aware of its contents, had contributed to its analysis, and valued its revelations . . . ."<sup>145</sup> Hughes' prominence gave him influence in national legal circles. He made legal aid the subject of the 1920 ABA annual meeting and invited Smith to speak.<sup>146</sup> Smith's speech urged the bar to "take command of the moral forces which [were] stirring throughout the nation" and "champion the rights of the poor, the weak, and the defenseless."<sup>147</sup> Hughes helped to convince the group to create a Special Committee on Legal Aid Work and served as its first chair.<sup>148</sup> This led to the creation of the American Bar Association's Standing Committee on Legal Aid in 1921, which Smith went on to chair for its first 20 years.<sup>149</sup>

Smith's call to reform and subsequent developments were no panacea. Lawyers were supposed to take "worthy" cases, but it was very easy to find little worthiness in the run-of-the-mill disputes of poor people as opposed to

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141. Henry W. Taft, *Justice and the Poor*, N.Y. TIMES, Jan. 4, 1920, at X3.

142. JUSTICE FOR ALL, *supra* note 2, at 22.

143. *Id.* at 23–24.

144. *Id.* at 24. Smith indicated that Hughes "knew the subject, and he helped me greatly in defining my ideas and clarifying my objectives." *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 25 (quoting Reginald Heber Smith, *The Relation Between Legal Aid Work and the Administration of Justice*, 43 ANN. REP. A.B.A. 217, 226 (1920)).

148. *Id.*

149. *Id.* at 24–25, 27–28. Hughes moved to create the committee and arranged for the support of William Howard Taft, former President of the United States and then Chief Justice, and Elihu Root, former President of the American Bar Association and Secretary of State. *Id.* at 25.

the law firm's regular, corporate clients. Legal worthiness took on a moral dimension and led to imposition of restrictive case selection policies on bar-sponsored legal aid societies.<sup>150</sup> Limitations on bankruptcies and divorces were a few of the "morally improper" cases legal aid societies were not allowed to handle.<sup>151</sup> And, although Smith argued otherwise, legal aid societies were also not allowed to take fee-generating cases because such cases could theoretically find ready takers among the private bar.<sup>152</sup>

In hindsight, we can see other gaps in Smith's vision. Smith believed that the substantive law was almost entirely free of bias, yet he failed to mention the existence of segregation and racially restrictive statutes in place all over the country at that time. If an immigrant's lack of access to the legal system might radicalize the immigrant, Smith is curiously silent about this possibility for African-Americans. Perhaps this reflects the class bias prevailing in 1919 or Smith's naïveté about people with whom he had little contact. Later, concerns about Communist radicalization of African-Americans and the United States' international standing would play a prominent role in the Supreme Court's *Brown v. Board of Education* decision.<sup>153</sup> Ironically, it was persistent and longstanding access to the courts that led to segregation's fall.<sup>154</sup>

Perhaps the best example of Smith's naïveté is his lack of recognition that simple access to courts by poor people is itself a powerful and potentially destabilizing political force. Indeed, it should have been obvious to Smith at the time that the reason legal aid organizations failed to prosper in the South was due to the white establishment's fear of black political and legal power. Often, these fears were cloaked in the language of professionalism. For example, attempts to discipline civil rights attorneys seemed politically and professionally motivated.<sup>155</sup>

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150. See EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* 10 (2d ed. 1978) [hereinafter *JUSTICE AND REFORM*].

151. *Id.* at 10, 244–45.

152. *JUSTICE AND THE POOR*, *supra* note 1, at 25–30.

153. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–26 (1980) (arguing that the decision in *Brown* was the result, in part, of the feeling of policymakers that it would help raise the prestige of the United States in the eyes of the residents of emerging third-world, communist countries).

154. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975).

155. See, e.g., *NAACP v. Button*, 371 U.S. 415, 428–29 (1963) (holding that discipline for solicitation violated NAACP's First Amendment rights); *Talley v. California*, 362 U.S. 60, 64–65 (1960) (holding that the First Amendment protects anonymous speech); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958) (holding that forced disclosure of NAACP membership lists violated right of association).

As a result, even if the bar had reacted initially with a full-throated and vigorous endorsement of Smith's visions, fully implementing his plan would still have left many without access to justice, particularly African-Americans. Nevertheless, members of the bar did make important strides toward accomplishing Smith's vision throughout the next thirty years.

*B. Justice and the Poor's Impact on Access to Justice by the Middle of the Twentieth Century*

Smith and others kept the issue alive by issuing periodic reports on the state of legal aid to the poor.<sup>156</sup> Progress proved hard to measure, so, in the late 1940s, the ABA commissioned Smith to revisit and update *Justice and the Poor*.<sup>157</sup> A special council was formed with Arthur Vanderbilt as Director, Reginald Heber Smith as consultant, and Emery Brownell as his assistant.<sup>158</sup> Before Smith could get started, however, Dean Vanderbilt received a judicial appointment, and the council named Smith the chair and assigned Brownell the task of researching and writing the updated report.<sup>159</sup> The resulting report, *Legal Aid in the United States: A Study of the Availability of Lawyers' Services for Persons Unable to Pay Fees*, gave mixed grades to legal aid's post-1919 progress. Brownell found that the need had increased significantly during those years while funding stayed relatively flat.<sup>160</sup> The number of unserved cities with at least 100,000 people had increased from thirty-four to fifty, while funding had only increased about \$2,700 per organization.<sup>161</sup> Although the national bar responded with some enthusiasm during that time, local and state response was erratic and spotty.<sup>162</sup>

Smith wrote the introduction to Brownell's report and echoed the themes of *Justice and the Poor*. As he did before, Smith located equal access to justice at the heart of the democratic process.<sup>163</sup> This time, however,

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156. See, e.g., REGINALD HEBER SMITH & JOHN S. BRADWAY, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 398, GROWTH OF LEGAL-AID WORK IN THE UNITED STATES (1926); REGINALD HEBER SMITH & JOHN S. BRADWAY, U.S. DEP'T OF LABOR, BULL. NO. 607, GROWTH OF LEGAL-AID WORK IN THE UNITED STATES (1936).

157. See Reginald Heber Smith, *Introduction to Emery A. Brownell, Legal Aid in the United States: A Study of the Availability of Lawyers' Services for Persons Unable to Pay Fees*, at xiv (1951).

158. *Id.*

159. *Id.*

160. See BROWNELL, *supra* note 157, at 246-47.

161. *Id.*

162. See *id.* at 29-31, 248.

163. Smith, *supra* note 157, at xiii ("Legal Aid means providing lawyers for persons who are unable to pay fees for legal services. Its object is to make it impossible for any man,

concern for naïve immigrants faded with the end of mass immigration and was replaced by the fear of communism:

It is a fundamental tenet of Marxian Communism that law is a class weapon used by the rich to oppress the poor through the simple device of making justice too expensive. According to this view, lawyers are simply the mercenaries of the propertied classes. The danger of this attack lies in the fact that it awakens a response in all those who feel they have been denied their rights. Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with; but injustice makes us want to pull things down.<sup>164</sup>

Smith noted that the needs of the poor were still unmet and called for a doubling of legal aid facilities.<sup>165</sup> Lest he give fodder to radicals, he added that:

[T]o say that millions of persons in the United States are unable to pay for lawyers' services is to tell the truth; but to stop there would appear to prove that Marx' indictment of our legal system was justified. Conversely, it is entirely accurate to say that our Legal Aid offices have already given assistance to more than 8,000,000 clients and are serving more than 300,000 persons every year. . . .<sup>166</sup>

Smith devoted most of his introduction to the issue of public funding for legal aid offices. Backing off from his previous endorsement of public funding and control, Smith argued for locally controlled, bar association-funded legal aid offices.<sup>167</sup> He noted by name the council members who wanted their "strong feelings" about the dangers of public funding to be included in the report.<sup>168</sup> In answer, Smith provided a quote from his own previous report: "Legal Aid Offices and Legal Service Offices *are* much better when entrusted to bar associations rather than to governmental bureaus; but Legal Aid Offices and Legal Service Offices conducted by the government are much better than nothing."<sup>169</sup> He concluded that the fear of "creeping socialization" from federal funding was unwarranted because the cost of legal aid was so modest that the societies would have no "excuse for

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woman, or child in the United States to be denied the equal protection of the laws simply because he or she is poor. Legal Aid is an essential part of the administration of justice in a democracy; and the primary responsibility for the establishment and maintenance of an adequate number of legal aid officers and committees in all parts of the nation is one of the cardinal obligations of the legal profession.").

164. *Id.*

165. *Id.* at xv.

166. *Id.*

167. *Id.* at xix–xx.

168. *Id.* at xviii.

169. *Id.* at xix (quoting Reginald H. Smith, *Legal Service Offices for Persons of Moderate Means*, 1949 WIS. L. REV. 416, 447 (1949)).

running hat in hand to Washington unless [they were] prepared to abdicate [their] right to home rule over [their] own affairs in [their] own communities.”<sup>170</sup> In other words, legal aid could be provided to everyone who needed it for such a modest cost that there would be no need to rely on government funding. And, if the members of the bar were concerned about that “creeping socialization” and the potential forfeiture of their own “home rule,” the answer was simple: the private bar should pay for the programs.<sup>171</sup>

Smith once again, in no uncertain terms, charged the bar with the primary responsibility to establish, pay for, and control legal aid activities. He wrote:

Legal Aid is unquestionably best off, and best managed, when it becomes a *community* enterprise, with its roots deep in the community from which it draws its support.

Responsibility for the lawyerlike conduct of a Legal Aid office and for the selection of a competent staff must rest on the legal profession. And unquestionably lawyers ought to give, and easily could give, more money to support Legal Aid in their own communities than they have done in the past . . . .<sup>172</sup>

Smith cited the 1950 ABA resolution that bar associations should support the creation and maintenance of “adequately” and privately funded legal aid societies “to forestall the threat to individual freedom implicit in growing efforts to socialize the legal profession.”<sup>173</sup> Smith concluded that in the thirty-two years since he first published *Justice and the Poor*, events had only increased his optimism and deepened his conviction “that the organized bar [would] live up to its golden opportunity and [would], in improving measure, faithfully perform its responsibility.”<sup>174</sup> He seemed confident that the bar would respond to Brownell’s report with more enthusiasm and fortitude than it had to his report more than thirty years earlier.

Brownell’s study sought to examine what exactly had been done in response to Smith’s critiques. The study attempted to determine whether

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170. *Id.*

171. *Id.*

172. *Id.* at xx.

173. *Id.* (quoting Am. Bar Ass’n, *Proceedings of the House of Delegates - September 18-22, 1950*, 36 ABA J. 948, 971 (1950)).

174. *Id.* at xxi–xxii. Interestingly, neither Smith nor Brownell use the term “pro bono” to refer to individual lawyers rendering uncompensated service. The dominant paradigm at the time saw all lawyers as working for the public good. Thus, by that definition, any competent representation was pro bono publico. Pro bono’s narrower connotation came later. *See, e.g.*, BROWNELL, *supra* note 157, at 3 (“The term ‘Legal Aid’ applies if they are supplied through a facility organized for this special purpose and if they represent something more than *the free service which individual attorneys render in the course of private practice.*” (emphasis added)).

services had kept up with the increasing needs of an “urban population and the multiplication of legal problems brought on by the continued extension of legal controls over the everyday affairs of citizens . . . .”<sup>175</sup>

Brownell found some progress in the number of legal aid societies. More communities with a population of more than 100,000 had some form of legal aid in 1949 as compared to 1919.<sup>176</sup> Fifty-six of the 124 communities with a population of at least 100,000 had paid staff in 1949.<sup>177</sup> The number rose to seventy-three when combined with the seventeen communities of that size with volunteer programs.<sup>178</sup> That amounted to 59% of those communities as compared to 49% in 1919.<sup>179</sup>

Nevertheless, the progress was less than stellar. Most of the growth had occurred in the years following World War II.<sup>180</sup> In 1917, every city with a population of more than 350,000 people had some form of legal aid society, but, at the time of Brownell’s report, Birmingham, Alabama, had reached that size and still had no legal aid services at all.<sup>181</sup> A significant coverage gap existed in every region of the country but was “substantial and critical” in the Southeast.<sup>182</sup> Brownell delicately suggested that the lack of foreign immigrants, large urban populations, and “a somewhat patriarchal system of dealing with problems both legal and social, ha[d] no doubt contributed to the lag.”<sup>183</sup>

In any event, Brownell laid the blame squarely at the feet of state and local bar associations:

A major reason has been the failure of the Bar to recognize the problem and to deal with it realistically. Whether due to unfounded fear of competition, inherent lethargy, or mere lack of interest, the failure of local bar associations to give leadership, and in many cases the hostility of lawyers to the idea, have been formidable stumbling blocks in the efforts to establish needed facilities.<sup>184</sup>

Eight states had no organized legal aid at either the state or local level.<sup>185</sup> Of those, the need was especially critical in Alabama, Mississippi,

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175. BROWNELL, *supra* note 157, at 25.

176. *Id.* at 26.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *See id.* at 29–30.

183. *Id.* at 29.

184. *Id.*

185. *Id.* at 30. The states were Alabama, Mississippi, Montana, New Mexico, North Dakota, South Dakota, West Virginia, and Wyoming. *Id.*

and West Virginia.<sup>186</sup> Many cities and counties with significant populations had little or no access to lawyers.<sup>187</sup> Even when bar associations appointed legal aid committees, the coverage was spotty, uncoordinated, and often dependent on the enthusiasm and energy of the bar president.<sup>188</sup>

It is clear from Brownell's report that legal aid societies had not kept up with the increased need for legal services among the poor. An increasing standard of living, along with technological and social change, greatly complicated Americans' lives.<sup>189</sup> Brownell explained the circumstances leading to this increased need, writing:

Two world wars, astonishing technological advances and an accelerated expansion [sic] of mass production in industry, based upon an ever-rising standard of living for a constantly increasing number of citizens, have wrought many changes in family life—changes in purchasing habits, changes in housing, changes in the way of making a living. The changes have multiplied the problems of people by making much more complex their relationships: the relationships of employers and employees, of buyers and sellers, of landlords and tenants, of husbands and wives, and even of parents and children.<sup>190</sup>

This more complicated world led to an explosion of law and regulation and intruded into formerly sacrosanct areas like the family. Brownell summed this up by saying:

[O]ur people have a relatively greater need to use the specialized knowledge of lawyers; the "preventive" side of law practice has become more essential to the general welfare; and sociologists and legal scholars find that the law has an expanding function in our increasingly complex, economically organized society. Seen in this light, the Legal Aid movement, despite the increase in the number of service units, has not grown fast enough.<sup>191</sup>

Thus, legal aid organizations faced a more complex world than they did in 1916, in a society brimming with new laws and increasingly complex ways for its people to embroil themselves in legal squabbles. Unfortunately, the legal aid societies were essentially meeting the same level of need as they had in 1916, at a time when they needed to be ramping up the number of

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186. *Id.*

187. *Id.* ("According to the 1940 census, there were 412 places [with more than 25,000 people] but in the whole country there were in 1949 only 56 bar association committees on Legal Aid to supplement the work of 90 Legal Aid organizations. In 34 of the large cities [with more than 100,000 people] . . . the bar has failed to appoint service committees." (footnote omitted)).

188. *Id.* at 30–31.

189. *Id.* at 31.

190. *Id.* (citing ROBERT E. L. FARIS, *SOCIAL DISORGANIZATION* 267, 270, 289, 302–03 (1949)).

191. *Id.* at 32 (emphasis omitted).

cases they accepted.<sup>192</sup> Using the metric of ten cases per 1,000 people, Brownell computed that any increase was negligible.<sup>193</sup> The organizations were “[l]ike the Red Queen of Alice in Wonderland . . . obliged to run as fast as they could to stay where they were.”<sup>194</sup>

Lack of staffing was an ongoing problem for legal aid societies. Some legal aid groups used volunteer lawyers instead of their staff lawyers for court appearances, often limited to emergencies, and the resulting inability to threaten litigation weakened the legal aid lawyers’ hands in negotiation.<sup>195</sup> Most legal aid cases fell into familiar categories: family, landlord, welfare, consumer protection, and employment.<sup>196</sup> As Brownell said, the lack of lawyers to handle these cases created an unacceptable dual system of justice—one for the poor and the other for everyone else.<sup>197</sup>

These are not weighty matters of corporation and business law, or lucrative problems of trusts and estates or the subjects of hotly contested litigation which in the popular mind constitute most of a lawyer’s practice. They are everyday problems of plain people, but as important to the total well-being of a community as are the cases which attract public attention and involve large interests. They require service of a less dramatic nature, and they are less time-consuming, but they require expert knowledge, a sympathetic understanding of people, and professional skill.<sup>198</sup>

Provision of legal services was a matter of common dignity requiring full-time staff attorneys with sufficient resources to handle the matters.

Case restrictions and income levels limited the reach of many legal aid organizations. As in 1919, some societies did not take divorces, most turned down bankruptcies, and all refused personal injury cases.<sup>199</sup> The development of worker’s compensation schemes, the professionalization of their administration, and the growing willingness and competence of private attorneys to take them led many legal aid societies to reduce or eliminate worker’s compensation cases from their coverage.<sup>200</sup> Additionally, the

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192. *Id.* at 33.

193. *Id.* More recent legal needs studies reach a much higher number using a different, more accurate formula. *See, e.g.,* Legal Servs. Corp., *Documenting the Justice Gap in America*, 2007 LEGAL SERVS. CORP. 13 [hereinafter *Documenting the Justice Gap*] (discussing various assessments that determined that upwards of 80% of the legal needs of the poor are not being met).

194. BROWNELL, *supra* note 157, at 33.

195. *See id.* at 46.

196. *Id.* at 44–45.

197. *Id.* at 46.

198. *Id.* at 49.

199. *Id.* at 71–75.

200. *See id.* at 74–75.

number of people who qualified for services at existing legal aid societies was restricted by income guidelines that, while low, were often more generous than today. For example, the average weekly income for a family of four to be eligible for service in 1947 was \$45,<sup>201</sup> or \$483 in today's money.<sup>202</sup> That equates to approximately \$25,116 per year today. The federal poverty level guideline for a family of four in 2017 was \$24,600.<sup>203</sup> But, legal aid societies did not subscribe, generally, to hard and fast rules for eligibility.<sup>204</sup> Gross family income was only one of several factors that were taken into account to determine eligibility.<sup>205</sup> Family size, recent illness, and net assets were also taken into account.<sup>206</sup> Many societies denied eligibility if the applicant owned a home, and ownership of a car was generally a disqualifying factor, as well, unless it was necessary for a trade.<sup>207</sup> Overall, the legal aid societies exercised a great deal of discretion in accepting or rejecting applicants, and, with limited resources, this may have played a role in keeping qualification numbers low.

The salaries of legal aid lawyers continued to lag behind most attorneys. The average salary of junior legal aid staff attorneys was approximately \$30,000 in today's dollars, while the average salary for an experienced legal aid attorney was approximately \$53,000.<sup>208</sup> In contrast, the average lawyer at the time made about \$80,000 in 2016 dollars.<sup>209</sup> Legal aid lawyers were also expected to carry extraordinarily high caseloads—an average of 1,402 cases per year.<sup>210</sup> Bar association reluctance played a role in setting this unduly low pay despite the high caseloads and inefficient operations. Some legal aid societies changed lawyers yearly.<sup>211</sup> Others set the pay low because they believed that legal aid work was simple and that any attorney could handle the cases without a need for special skill or experience.<sup>212</sup>

The Brownell report showed precious little progress in meeting the legal needs of the poor. By 1962, legal aid accounted for less than one-tenth

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201. *Id.* at 70.

202. *Relative Values*, *supra* note 110.

203. Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 8831, 8832 (Jan. 31, 2017).

204. BROWNELL, *supra* note 157, at 69.

205. *Id.* at 68.

206. *Id.*

207. *Id.*

208. *See id.* at 214–15; *Relative Values*, *supra* note 110.

209. *See* BROWNELL, *supra* note 157, at 216; *Relative Values*, *supra* note 110.

210. *See* BROWNELL, *supra* note 157, at 220–21.

211. *Id.* at 222.

212. *Id.* at 214–15.

of one percent of the nation's total expenditures on legal services.<sup>213</sup> The roughly 400 full-time legal aid lawyers were expected to represent nearly 37 million impoverished persons—a ratio of one lawyer for every 92,000 potential legal aid-eligible clients, compared to one lawyer for every 600 persons in the rest of the population.<sup>214</sup> While the profession had not seen the kind of progress Smith had hoped for by the 1960s, his biggest contribution may have been to simply raise the issue for national bar leaders and elevate their concern for it. That attention helped spread access to legal service programs in the second half of the 20th century.

C. *Brief Progress: Law Reform and the Development of the Office of Economic Opportunity and the Legal Services Corporation*

The conventional history of Smith and the legal aid movement focuses on access to justice but forgets Smith's desire that legal aid should take on substantive reform, too.<sup>215</sup> The first legal aid societies did not just seek to provide simple access; rather, their founders also wanted to combat the substantive and procedural injustices visited upon vulnerable populations.<sup>216</sup> The Legal Aid Society of New York originally sought to protect German immigrants from unscrupulous landlords, predatory lenders, and rapacious merchants not only through access to the courts, but also through efforts to substantively reform the law.<sup>217</sup> Smith lauded legal aid societies' charter amendments to officially acknowledge the mission of promoting "protective measures" for the poor.<sup>218</sup> Although he can be read as a proceduralist,<sup>219</sup> he also praised substantive reform efforts as integral to the fair administration of the law.<sup>220</sup> Indeed, he could not see how legal aid lawyers could adequately represent their impoverished clients unless they also pursued substantive legal reform through the appellate courts and the legislatures.<sup>221</sup>

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213. JUSTICE FOR ALL, *supra* note 2, at 38.

214. *Id.*

215. *Id.* at 41. The early '60s picture of legal aid gave a false impression of the "ambitious vision Reginald Heber Smith articulated in *Justice and the Poor*. This was especially true for the value [Smith] placed on appellate litigation and legislative advocacy aimed at leveling the legal playing field." *Id.*

216. *Id.* at 28.

217. *Id.* at 3–4, 29.

218. *See id.* at 28–31 (quoting JUSTICE AND THE POOR, *supra* note 1, at 200).

219. *See* Thomas M. Hilbink, *You Know the Type. . . : Categories of Cause Lawyering*, 29 L. & SOC. INQUIRY 657, 665–73 (2004) (defining different orientations to cause lawyering).

220. *See* JUSTICE AND THE POOR, *supra* note 1, at 205; *see also* JUSTICE FOR ALL, *supra* note 2, at 41.

221. JUSTICE AND THE POOR, *supra* note 1, at 200.

This concern with the fairness of the substantive law joined a parallel law reform stream that flowed during the same time.<sup>222</sup> Other groups advanced reformist litigation and lobbying strategies to advance civil rights agendas. The long campaign against segregation began at Howard University in 1928 and followed a carefully crafted but evolving route to *Brown*.<sup>223</sup> Indeed, *Plessy* was a failed test case carefully orchestrated between civil rights activists, the transportation company, and the police—each of whom shared a reason to undermine segregation laws.<sup>224</sup>

These two strands of Smith's vision—access to justice and law reform—combined and took root in the 1960s. With the creation of the Office of Economic Opportunity (OEO) legal assistance program, which later morphed into the Legal Services Corporation, Smith's vision of a (nearly) full-service law office for every poor person in the country seemed fulfilled.<sup>225</sup> Politics, however, intervened and led to a cutback and reversal of many of these gains.<sup>226</sup> The Johnson administration's anti-poverty program, the War on Poverty, provided federal funds for the provision of free legal services to people without means for the first time.<sup>227</sup> The administration provided money to anti-poverty grantees for legal services equally weighted among service to individual clients (access), law reform activities, and community education.<sup>228</sup> These efforts mirrored an earlier effort by the Ford Foundation for public interest law firms to take on civil rights and other self-conscious reform efforts.<sup>229</sup>

Many of Smith's ideas, as well as the need for active law reform, were incorporated into the OEO legal services programs and, later, in the Legal Services Corporation program. For example, OEO programs represented the first federal investment in the delivery of legal services to people without

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222. See, e.g., Felice Batlan, *The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863–1910*, 28 L. & HIST. REV. 931, 969–71 (2010) (arguing that male bar associations co-opted the more reform-minded women's movements); Felice Batlan, *The Ladies' Health Protective Association: Lay Lawyers and Urban Cause Lawyering*, 41 AKRON L. REV. 701, 704 (2008) (arguing that the women of the Ladies' Health Protective Association, despite a lack of formal legal training, functioned as "cause lawyers"); see also JUSTICE FOR ALL, *supra* note 2, at 14–16 (noting the early campaigns to change workplace conditions, consumer lending, and debt collection practices (citing JOHN MACARTHUR MAGUIRE, *THE LANCE OF JUSTICE* (1928))).

223. See generally KLUGER, *supra* note 154 (discussing the difficulty African-Americans faced when seeking legal equality and a plan for remedying the inequality).

224. See generally CHARLES A. LOFGREN, *THE PLESSY CASE* (1987).

225. See JUSTICE FOR ALL, *supra* note 2, at 61–101.

226. *Id.* at 121–22.

227. *Id.* at 62–64.

228. *Id.*

229. *Id.* at 45–46.

means.<sup>230</sup> In addition, their focus on community education, appellate work, and legislative advocacy echoed Smith's endorsement of those concepts.<sup>231</sup>

The OEO was immediately controversial and engendered significant political opposition. In particular, the OEO took on powerful interest groups who did not like having their entrenched power challenged.<sup>232</sup> Richard Nixon's election in 1968 shifted the political winds and rang the death knell for the ambitious War on Poverty. Beginning early in Nixon's term, OEO lawyers, the ABA, and members of Congress and the Administration worked on a proposal to create an independent structure and funding for the federal government's civil legal services efforts.<sup>233</sup> Several proposals went nowhere, and Nixon forced the issue by appointing Howard Phillips, an avowed foe of the legal services movement, to be head of the OEO.<sup>234</sup> Phillips took actions designed to undermine and, perhaps, fatally weaken the program. For example, he put all grantees on a thirty-day funding cycle, removed law reform as a priority, and appointed administrators hostile to the program.<sup>235</sup> Phillips' actions galvanized the legal services movement, and, in a combination of effective lawsuits and impeachment politics, the Legal Services Corporation (LSC) was born.<sup>236</sup>

The Legal Services Corporation Act created a non-profit corporation in the District of Columbia "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."<sup>237</sup> The LSC represented a compromise among various visions for the provision of civil legal services for the poor.<sup>238</sup>

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230. *See id.* at 100. The Office of Economic Opportunity gave out \$25 million in grants in 1966. *Id.* The \$6 million in grant money it awarded in April of that year alone was more than the total budgets of all the existing legal aid societies in the country at that time. *Id.*

231. The OEO offices grew from an influential law review article, Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317 (1964). Sargent Shriver, then head of the Office of Economic Opportunity, received a draft of the article, read it, and immediately hired the Cahns to help create a legal services component to the War on Poverty. *See JUSTICE FOR ALL*, *supra* note 2, at 66–67.

232. 2 *JUSTICE FOR ALL*, *supra* note 2, at 442–43.

233. *Id.* at 353–54.

234. *Id.* at 386–87. Phillips promised to "destroy" the "rotten" legal services movement. *Id.* at 388.

235. *Id.* at 387–89.

236. *See id.* at 399–426. President Nixon signed the legislation creating the LSC two days before the House reported the first article of impeachment against him. *Id.* at 425. It is not known exactly why Nixon would sign a piece of legislation that might cost him support in the impeachment battle. *Id.* at 424. Earl Johnson suggests that the President may have wanted to leave something positive in the wake of his impeachment. *Id.* at 425.

237. Legal Services Corporation Act, 42 U.S.C. § 2996b (2012).

238. *See generally* 2 *JUSTICE FOR ALL*, *supra* note 2, at 414–20.

It also represented a combination of Smith's vision for an efficient, nationally coordinated series of law offices for the poor. It established a standardized national grant system, created support centers run by the Corporation, and allowed a broad range of activities, including legislative advocacy and community education.<sup>239</sup> Any law reform efforts would be undertaken if they represented a proper allocation of resources, echoing Smith's penchant for efficiency.<sup>240</sup>

The LSC's minimum access goals, achieved in 1980, attempted to bring Smith's dream of total access to the system of justice to fruition.<sup>241</sup> Moreover, LSC's training programs and back-up centers followed Smith's call for national coordination, training, and management.<sup>242</sup> In spite of initial opposition to the concept, the organized bar at the national level ultimately became strong proponents of federal funding for legal services.<sup>243</sup>

OEO and LSC offices were designed to be full-service law offices for the poor. These offices provided not only basic access but also legislative advocacy, community education, and law-reform litigation.<sup>244</sup> Prior to 1967, no legal aid office had ever taken a case to the United States Supreme Court.<sup>245</sup> Yet, between 1967 and 1974, LSC and OEO offices took 110 cases to the Court.<sup>246</sup> The Court accepted 110 of those cases and returned victories in 62% of them.<sup>247</sup> For a time in the late 1970s, it appeared that the twin promises of access and reform could be accomplished. The LSC not only embodied Smith's desire for national coordination, it also made real the promise of access to justice to everyone in the country.<sup>248</sup>

However, Ronald Reagan's election in 1980 was the beginning of the end for this integrated vision. Reagan brought to the White House an antipathy toward legal services borne of his experiences when he was governor of California.<sup>249</sup> President Reagan's budgets consistently

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239. *Id.*

240. *Id.* at 447 (“[A]ny improvements in poor peoples’ lives would be a by-product of giving them access to the range of legal services they deserved.”).

241. *Id.* at 501–02. Minimum access was defined as one lawyer for every 5,000 eligible clients. *Id.* LSC never had a chance to reach its second target, called “adequate access,” which aimed to have four lawyers for every 10,000 eligible clients. *Id.*

242. *Id.* at 466.

243. *Id.* at 512–14.

244. *Id.* at 443–44.

245. *Id.* at 437.

246. *Id.*

247. *Id.*

248. *See id.* at 477–503.

249. 1 *id.* at 121–22.

recommended elimination of LSC funding.<sup>250</sup> He appointed a board openly hostile to the legal services program,<sup>251</sup> which then attempted to impose restrictions on the kinds of cases legal services grantees could handle, as well as limitations on the way money could be spent on cases taken.<sup>252</sup>

Although the legal services program returned from the wilderness during the early years of the Clinton Administration,<sup>253</sup> the Republican takeover of 1994 led to another round of funding cuts and case restrictions.<sup>254</sup> By 2000, LSC's budget was \$330 million, nearly \$400 million dollars less than what was needed to achieve the same "minimum access" level of service it had provided in 1981.<sup>255</sup>

### III. CURRENT STATE OF LEGAL AID

Presently, funding for legal aid programs, including government-funded programs, continues to decrease. Legal aid attorneys continue to be dramatically underpaid and are expected to carry monstrous caseloads. These fluctuations in funding and the various private and public mechanisms for providing legal services have left the poor in substantially the same position as Smith found them in 1919, with limited access to the American justice system and very little advocacy for law reform.

#### A. *Decreasing Funding and Increasing Pessimism*

The reduction in funding and restrictions on service, which began in 1982, was amplified in 1995 when the House Committee on the Budget recommended a three-year plan to entirely phase out the LSC's budget.<sup>256</sup> Although aggressive negotiations and compromises with Congress were successful in preventing the complete elimination of the LSC, the reductions in funding and restrictions on service have continued to the present.

Funding reached its peak with \$321 million in 1981,<sup>257</sup> which is the equivalent of \$1 billion today.<sup>258</sup> The largest amount appropriated by Congress since that time was in 2009, when it appropriated \$440 million, the

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250. 2 *id.* at 511–12.

251. *Id.* at 531–33.

252. *Id.* at 574–78.

253. 3 *id.* at 721–65.

254. *Id.* at 758. These restrictions included prohibiting class actions, legislative advocacy, and the receipt of statutory attorney's fees. *Id.*

255. *Id.* at 809.

256. See H.R. REP. NO. 104-120, at 119, 203 (1995).

257. 2 JUSTICE FOR ALL, *supra* note 2, at 502.

258. *Relative Values*, *supra* note 110.

equivalent of just \$178 million in 1981.<sup>259</sup> President Trump has proposed eliminating all legal services funding.<sup>260</sup> State and local funding has stepped in to pick up the slack, but, like the distribution of legal aid societies in 1919, the areas of greatest need do not always have the necessary supplemental funding.<sup>261</sup>

Legal services offices are barely meeting the basic needs of their clientele. The LSC met its goal to provide one staff attorney for every 5,000 eligible clients in 1980; however, the Reagan budget cuts immediately undermined that achievement.<sup>262</sup> Today, there is less than one legal aid attorney for every 10,000 people eligible for legal services from the corporation.<sup>263</sup> These attorneys and the support needed for them are unevenly distributed throughout the country.<sup>264</sup>

Fewer attorneys means fewer needs being met. Legal needs studies consistently show that as much as 80% of the legal needs of the poor go unmet.<sup>265</sup> Many people who have legal needs fail to seek legal advice. One study conducted by Rebecca L. Sandefur in 2014 found that 66% of respondents indicated they experienced a legal problem, yet only about 22% sought help from a third party, and even fewer sought help from a lawyer.<sup>266</sup> Often, the respondents did not realize they had a legal problem at all.<sup>267</sup> Even

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259. 2 JUSTICE FOR ALL, *supra* note 2, at 502; *Relative Values*, *supra* note 110. A typographical error in JUSTICE FOR ALL indicates that the 2009 appropriation “was the equivalent of only \$178 million *in 2011 dollars*,” but this calculation is grossly incorrect, and it is clear that the comparison should be to the 1981 funding level. 2 JUSTICE FOR ALL, *supra* note 2, at 502 (emphasis added).

260. Debra Cassens Weiss, *Trump Budget Eliminates Legal Services Corp. Funding*, A.B.A. J. (Mar. 16, 2017, 8:45 AM), <https://perma.cc/VG9Y-7KK7>.

261. For an example of one such source of supplemental funding, see *What is IOLTA*, IOLTA, <https://perma.cc/FR8P-FGWW>. The IOLTA—Interest on Lawyers Trust Accounts—program collects interest on attorney trust accounts that is nominal enough not to be allocated to a specific client and uses those funds to provide legal services to the poor. *Id.*

262. See 2 JUSTICE FOR ALL, *supra* note 2, at 529. Congress cut the budget from \$321 million to \$241 million, but even that amount is the equivalent of \$600 million today, far more than the current appropriation. *Id.*

263. Nat’l Ctr. for Access to Justice, *Number of Attorneys for People in Poverty*, THE JUSTICE INDEX 2016, <https://perma.cc/CE5V-F9WE>. By comparison, there are nearly 40 lawyers per 10,000 people in the general population. *Id.*

264. See generally REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA (2014) [hereinafter ACCESSING JUSTICE].

265. See *Documenting the Justice Gap*, *supra* note 193, at 13.

266. ACCESSING JUSTICE, *supra* note 264, at 7–11. “[P]oor people were significantly more likely to report civil justice situations than people in high or middle income households, and African Americans and Hispanics were more likely to report civil justice situations than were Whites.” *Id.* at 8.

267. *Id.* at 3.

if they saw their situation in legal terms, they did not believe that the legal system would help them.<sup>268</sup> Poor respondents and African-American respondents were more likely than the rest of the population to have unmet legal problems and to suffer harm from them.<sup>269</sup> Failure to seek help causes significant harm. Forty-seven percent of respondents suffered tangible harm from their legal problems—particularly to their health.<sup>270</sup>

Sandefur's study confirms Smith's belief that access to the legal system informs people of their legal rights and, more importantly, gives them faith in the system. Her findings—especially that people were pessimistic about receiving help from the legal system—document a dangerous disconnect between our ideals and our reality.<sup>271</sup>

### B. *Supplementary Pro Bono Programs*

As LSC funding was cut, pro bono service increased.<sup>272</sup> Ironically, pro bono began to take off after the 1981 LSC appropriation required grantees to devote 12.5% of their budgets to Private Attorney Involvement (PAI).<sup>273</sup> Many programs used this money to set up organized pro bono programs.<sup>274</sup> Today, pro bono service is the largest single category of legal services for the poor.<sup>275</sup> Pro bono programs have become institutionalized and sophisticated.<sup>276</sup> Yet, they fail to address the legal needs of the poor in at least three prominent ways. First, pro bono can never be as efficient as a paid staff attorney. It takes fifty-nine pro bono attorneys to handle the annual

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268. *Id.* at 12–13.

269. *See generally id.*

270. *Id.* at 3, 10.

271. *Id.* at 12–13.

272. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 24–25 (2004).

273. *Id.* at 24; *see also* 45 C.F.R. § 1614.2(a) (2016).

274. *See* Cummings, *supra* note 272, at 25.

275. *See* Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST 95–98 (Robert Granfield & Lynn Mather eds., 2009). Sandefur notes that pro bono hours amounted to between 25% and 33% of time devoted to legal services for the poor in 1997, the last time good nationwide data was available. *Id.* at 96. If pro bono contributions are measured in money, however, the proportion increases dramatically. *Id.* Measured as lost revenue, pro bono's value amounts to almost twice Congress's annual allocation for the LSC. *Id.* at 97–98. The number comes in at about 75% of the LSC budget if it is measured by the value as donated services. *Id.* at 98.

276. *See* Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST 135, 135 (Robert Granfield & Lynn Mather eds., 2009).

workload of one paid legal services staff attorney.<sup>277</sup> Although private attorneys are doing more pro bono than ever, the percentage of participating attorneys is still remarkably low.<sup>278</sup>

Second, pro bono attorneys choose “safe” cases.<sup>279</sup> Law firm pro bono is a marketing tool.<sup>280</sup> Appearing to do good is good for business. But, law firms do not want to alienate their important and paying clients. Thus, it is unlikely that a firm will take a case that is controversial to its clients.<sup>281</sup> Moreover, firms employ a generous understanding of positional conflicts to avoid taking a case where even the issue might annoy some of its clients.<sup>282</sup> The result is that the poor get more and more of what they already have: access to lawyers for cases involving other poor people, but very little access to representation in other types of cases.

Finally, pro bono service limits the capacity of the law to develop in response to the needs of poor people.<sup>283</sup> Most pro bono attorneys are not poverty law specialists. General practitioners may have some familiarity with basic issues, but the work of more specialized attorneys has no connection to most poverty law issues. A securities lawyer will not necessarily be competent to handle a welfare law or housing matter. Accordingly, most organized programs will try to match attorneys to their

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277. Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC’Y REV. 79, 97 (2007).

278. See AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III vi–vii (2013). When asked about their most recent pro bono service, 63% of respondents said that they provided the types of services that address legal problems of people who can’t afford lawyers. *Id.* at vii. Barely more than half of these lawyers (52%) provided between 1 and 10 hours. *Id.* The average in 2011 was 27 hours, while the median was 10 hours. *Id.*

279. See Cummings, *supra* note 272, at 123. In addition, firms are more likely to take cases that either are easier to handle and dispose of or, paradoxically, more difficult cases for “sexy” clients or causes that will require a significant investment of time and money. See *id.* at 123–25.

280. *Id.*

281. *Id.*

282. See Mark D. Yochum & Jeffrey Fromknecht, *Positional Conflicts and Pro Bono Publico*, 16 FLA. COASTAL L. REV. 231, 242–44 (2015); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1395 (1998) (noting that positional conflicts deter lawyers from taking pro bono cases). So-called positional conflicts are a barrier. Spaulding, *supra*, at 1409. Firms are reluctant to take cases for parties in which they might have to take a legal position contrary to that taken for other, paying clients. See, e.g., Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST 183, 199 (Robert Granfield & Lynn Mather eds., 2009).

283. See JUSTICE AND THE POOR, *supra* note 1, at 181.

expertise or provide material to assist the lawyer.<sup>284</sup> The result is that few complicated or cutting-edge cases make it to pro bono attorneys.<sup>285</sup> Rather, the basic services already provided in part by legal services organizations are handled by pro bono attorneys.<sup>286</sup>

### C. Case Restrictions

LSC grantees are prevented from handling certain kinds of cases and are also forbidden from engaging in legislative advocacy or class actions.<sup>287</sup> LSC's political opponents framed their political attacks on the program as attempts to remove "politics" from it.<sup>288</sup> Smith understood the obligation for the legal system to be open to all legal claims.<sup>289</sup> Nevertheless, Smith was reluctant for legal aid programs to institute divorce; today, however, family matters, especially divorces, are the largest single category of cases handled by LSC grantees.<sup>290</sup> They pit one poor person against another and rarely, if ever, result in any systemic change.

It is no accident that LSC has imposed case restrictions on some of the most effective advocacy tools. Whereas Smith argued that settling legal issues for broad categories was essential to the rule of law, today's LSC opponents frame the issue as abuse.<sup>291</sup> Under the cover of access, these restrictions make it difficult—if not impossible—for poor peoples' perspectives to have an influence in reforming the law.

### D. Increased Support from the Bar

The organized bar has become the LSC's most prominent supporter. The bar played an important role in brokering the compromise that led to its creation.<sup>292</sup> It has consistently supported the Corporation throughout its years of budget trouble. But, that support came with a price. "Access" was

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284. See Cummings, *supra* note 272, at 144.

285. See *id.* at 141–42.

286. See *id.*

287. See 42 U.S.C. § 2996e(c) (2012) ("The Corporation shall not itself (1) participate in litigation unless the Corporation or a recipient of the Corporation is a party . . . or (2) undertake to influence the passage or defeat of any legislation . . ."); *id.* § 2996e(d) ("No class action suit, class action appeal, or amicus curiae class action may be undertaken, directly or through others, by a staff attorney . . .").

288. See *id.* § 2996(5).

289. See JUSTICE FOR ALL, *supra* note 2, at 229.

290. See *Documenting the Justice Gap*, *supra* note 193, at 7–11.

291. See, e.g., Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321, 367 (1998).

292. See Earl Johnson Jr., *Three Phases of Justice for the Poor: From Charity to Discretion to Right*, 42 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 486, 487 (2009).

emphasized over “reform.” The LSC authorizing legislation tried to marry access and reform as though they were unrelated.<sup>293</sup> When the political trouble came, the reform functions of LSC—national support and training centers, state resource centers, specialized practice—were the first to go. In the end, access came to mean limited charity—exactly what Smith argued against.<sup>294</sup>

CONCLUSION: STILL WORK TO DO TO ACCOMPLISH SMITH’S VISION FOR  
JUSTICE REFORM

Smith’s diagnosis was correct in 1919 and remains depressingly accurate today. Lawyers have an individual and collective moral responsibility to provide access to justice. As in Smith’s day, the legal profession is failing to do so. But, Smith also argued that the duty of equal access was also society’s responsibility. Justice is a public good; although lawyers are its caretakers, a just and equal society must provide the resources to make equal access to justice possible. We have repeatedly failed to do so. This is due, in part, to our unwillingness to acknowledge that access and reform go hand-in-hand. Smith knew that a legal system that systematically ignored the interests of the poor would fail to protect them. Moreover, a system that denied access would create a disaffected populace. These predictions have come true.

Smith’s call to action shamed the elite bar of his time into action, but the decentralization of the profession and the rise of the mega law firm make any such coordinated action less likely today. Indeed, the elite bar has steadfastly supported access to justice and pro bono programs, but those programs will have little effect on the overall legal needs of the poor. Just as in Smith’s day, these well-intentioned programs are too small, too limited, and too inefficient. They cannot duplicate the efficiency of a full-time staff attorney who can perform the work of fifty-nine pro bono attorneys in one year.<sup>295</sup> They do not take many cases that will have a significant impact on the lives of the poor.<sup>296</sup> And, they fail to admit the poor to the appellate courts, the legislative chambers, and administrative agencies that make the rules.

The remedies are well-known and easy to state: Restore federal funding to at least 1980 levels, increase donations to legal services programs from

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293. See, e.g., William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960’s to the 1990’s*, 17 ST. LOUIS U. PUB. L. REV. 241, 254 (1998); 42 U.S.C. § 2996 (2012).

294. See generally Johnson, *supra* note 292.

295. *Supra* text accompanying note 277.

296. See *supra* text accompanying notes 279–82.

the bar,<sup>297</sup> remove case restrictions to allow legal services offices to act as general counsel to the poor, and increase pro bono services by lawyers. As in Smith's time, we lack the political and moral will to put these remedies in place.

In the end, Smith hoped that the public would see that access to justice was crucial not only for lawyers but for the nation. We may not have his program, but we have his words:

These suggested future developments are all practical and capable of achievement. Once these matters are given proper presentation, the loyal support of the bar, the assistance of the courts, and the sustaining interest of the public may be confidently expected. The ends which they seek to attain are of direct concern not only to the fair administration of justice, but to the well-being of the nation. It is of high importance that such developments be encouraged and supported, not for the sake of the legal aid organizations themselves,—they of themselves are nothing,—but because in them, with all their faults and weaknesses, is contained our best immediate hope for a realization of our ideal of such an equal administration of the laws that denial of justice on account of poverty shall forever be made impossible in America.<sup>298</sup>

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297. See John M.A. DiPippa, *Peter Singer, Drowning Children, and Pro Bono*, 119 W. VA. L. REV. 113, 141 (2016) (calling for a donation of two weeks of the average lawyer's salary and for law firms to dramatically increase their charitable giving to legal services organizations).

298. JUSTICE AND THE POOR, *supra* note 1, at 249.