

Maurer School of Law: Indiana University

## Digital Repository @ Maurer Law

---

Articles by Maurer Faculty

Faculty Scholarship

---

1978

### With Justice for All (and Legal Services for Some)

Thomas Ehrlich

*Indiana University School of Law*

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

---

#### Recommended Citation

Ehrlich, Thomas, "With Justice for All (and Legal Services for Some)" (1978). *Articles by Maurer Faculty*. 1811.

<https://www.repository.law.indiana.edu/facpub/1811>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**LAW LIBRARY**  
INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# With justice for all\*

---

## **Creating the Legal Services Corporation was a major step towards eliminating this contradiction. We need more**

**by Thomas Ehrlich**

---

A half-century ago, Learned Hand wrote in *The Speech of Justice*:

"The profession of the law has its fate in its own hands. . . . It must assimilate society before society will assimilate it. . . . The lawyer must either learn to live more capaciously or be content to find himself continuously less trusted, more circumscribed, till he becomes hardly more important than a minor administrator, confined to a monotonous round of record and routine, without identity, inspiration, or respect. . . ."

Judge Hand's admonition is as pertinent today as it was then: unless the legal profession accepts its opportunity and obligation to help establish standards of decent legal care for all Americans, and to help develop and implement a plan

for providing that care throughout the country, the lawyer will become "continuously less trusted, more circumscribed, until he becomes hardly more important than a minor administrator. . . ."

An essential first step in the process of establishing and implementing standards of decent legal care was the survey undertaken by the ABA Special Committee to Survey Legal Needs. As the report of the special committee makes clear, the results of the survey are ambiguous on many issues. But those ambiguities, and the controversies that will no doubt develop over interpretations of the results, should not obscure two essential points that emerge from the survey. First, the operations of our legal system today do not result in decent legal care for most Americans, and they know it. Second, most Americans view the legal profession as an inherent part of the legal system, and they are right.

The first point means that a coordinated public-planning process is needed to reallocate the resources of the legal system in ways that will meet the needs of average citizens for decent legal care. The second point means that reform is needed not only of the institutions of the legal system and of the rules they

apply, but also of the process by which citizens have access to the law. The legal profession is, of course, central to that process.

Both points are underscored by the special committee's report, which states that "more than half of the respondents answering each question expressed the view that the legal system is set up to deal with problems involving large sums of money, that the system favors the rich and powerful, and that lawyers work harder for rich and important clients." These views "are by no means limited to the poor, the ill-educated or the inexperienced. In a few instances, indeed, the more affluent and better educated are slightly more cynical than those lower on the socio-economic scale."

The Legal Services Corporation was established by Congress with a mandate "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel." We are charged with particular responsibility to support legal services for the 29 million persons whose incomes are inadequate for minimum subsistence.

Following the Corporation's congressional mandate, we are working on plans to provide decent legal

\* and legal services for some

care to all poor people throughout the country. We expect to do this in coordination with client groups and the bar, as well as government agencies and other interested organizations. We hope that this effort will be a catalyst for developing general standards of decent legal care and for designing arrangements to deliver that care to all Americans.

**At this point**, it is not possible to do more than speculate on the general structure of this plan, and how it might be coordinated. The special committee's report emphasizes that we currently have "no single yardstick for measuring unmet legal needs." The initial step in the planning process, therefore, must be to develop the standards of legal care to which our citizenry is entitled.

Why entitled? The answer may be obvious, but it bears emphasis. Decent legal care is an inherent right of every American, and individual liberty in this country can be achieved only if that right is realized. All citizens are required to live under the law, regardless of their wealth or poverty; all citizens are entitled to use the law as well. If they are not able to do so, the substantive rights to which the law entitles them are a sham, and the legal system itself is dangerously skewed.

The public obligation to provide decent education for all was recognized long ago in this country. The public obligations to provide decent nutrition and decent housing are more recent. Decent health care for all citizens is the next area of legislative attention; it is already an entitlement for some groups.

From what I have read of the literature in the fields of education, food, housing and health, I gather that no standards are universally accepted in any of these areas. But those who work in them appear to be substantially further along in establishing standards of decent care than are we in the legal profession.

---

*Thomas Ehrlich is president of the Legal Services Corporation.*

The work done in those areas suggests that *decent* means more than the minimum necessary for survival—more than literacy, more than not starving, more than a roof that doesn't leak. *Decent* means a standard that is appropriate to human dignity, to an individual's worth as a human being. *Decent* is not a static concept. It expands as technology, learning and capability—the attributes of civilization—grow.

**Decent legal care** includes both protective and expansive components: the shield and the sword. For some matters, the legal process provides the exclusive remedy, and legal counsel is a necessary part of that process. Generally, for example, a lawyer is required for a divorce, or for a response to a writ of garnishment. On the other hand, decent shelter, food and health are to a certain extent basic entitlements, guaranteed by the government, and legal assistance is often needed to realize the benefits of these rights.

In developing the standards of legal care, we will have to consider a number of dimensions. Without being sure of all those dimensions, certainly the quality and quantity of care, the types of problems to be handled, and the capacity of the individuals facing the problems to handle them without help are all involved.

It may not be possible to define the standards with the precision that applies to the numbers of calories, vitamins and food types needed for decent nutrition. But it should be feasible to set standards of decent legal care at least in the substantive areas where the survey showed most people to be in need of it. Family law, housing law and consumer law are three areas common to the poor and the non-poor alike. For poor people, a fourth area is administrative benefits; for the non-poor, it is wills and estate planning.

Against the background of these standards, it should be possible for a local or state bar association, with the active participation of clients, to develop measures of the quantity of different types of assistance needed to ensure that all citizens in

a community are provided with decent legal care.

It is important particularly to involve clients in this process. The bar has just engaged in a massive survey of what real and potential clients need and want. The survey underscores a number of key problems, and it would be extremely foolish to ignore non-lawyers in fashioning solutions to those problems.

**Local and state bar** associations, in collaboration with non-lawyer groups, should develop inventories of the legal needs of their communities and the extent to which those needs are met. A legal-needs inventory would have several components. One is the type of legal problems that arise in a particular community. As the survey results indicate, different groups of people have different types of legal problems and, therefore, different types of needs.

A second component is the number of lawyers, legal clinics, group and prepaid plans, legal services programs, and other delivery arrangements, and the scope of their coverage.

A third component is what might be called access devices. The special committee's report emphasizes that the use of lawyering services is directly related to education: the more education, the more use. The inventory should include an analysis of the varying ways in which the people in a community obtain information about legal problems, and of the means to handle those problems.

The next step, an enormously difficult one, is for the bar and other groups to design arrangements that will provide decent legal care, to the extent that it is not available, for the poor and middle-income persons in a community. The step is difficult, but the number of new (and very bright and well-trained) lawyers coming to the bar provides not only an opportunity but an obligation to match talents with need.

These arrangements should ensure that decent legal care is available at costs that can be met without forcing an individual to cut into

the necessities of life. Legal care is not an end in itself. The law defines and facilitates interpersonal relations and economic transactions. It imposes sanctions against conduct prohibited by the state, and protects against encroachments by the state on individual rights. But most basically, the law must ensure that an individual's entitlement to the basic necessities of life, such as decent shelter, health and education, are achieved.

For the poor, legal services funded through the Legal Services Corporation must be the primary source of decent legal care. As the corporation's short-term goal, we are seeking funding to provide the equivalent of two lawyers per 10,000 poor people across the country. But this is only our short-term goal, and the next stage will be to work with the bar and other groups in designing standards of decent legal care, and in developing arrangements to provide that care.

**The staff-attorney model** is the basic approach to legal services for the poor funded by the corporation, but we are also experimenting with a variety of other delivery techniques, including *judicare*, prepaid legal insurance, contracts with private lawyers, and the *pro bono* clinic.

For middle-income persons, my strong conviction is that prepaid and group plans and legal clinics are techniques well-designed to bring mass production to the delivery of legal services on the scale that is needed, and to help take our profession out of the cottage-industry era. In my view, these techniques will expand rapidly throughout the country even without the active encouragement of the bar. But that encouragement should come. Our profession has been far too reluctant to take the lead in sponsoring these approaches.

Much more widespread advertising by lawyers than has been permitted in most states should come with these approaches. The survey underscores the needs of average citizens for information about lawyers, their specialties and their

costs. Indeed, the Supreme Court has opened the door to this.

For the near-poor—those above poverty lines but far below average middle class incomes—some combination of reduced fees, public subsidies and *pro bono* efforts by private lawyers is essential to make even prepaid and group plans realistically available. Bar associations should concentrate particularly on individuals in this category. While the kinds of possible arrangements are almost infinite, local and state bar associations should take the lead in developing comprehensive plans for providing decent legal care to all within their jurisdictions.

The components of such plans will certainly vary widely from area to area. Let me suggest a few of the elements that might be involved. The current arrangements are already satisfactory to some extent. In certain situations, such as accidents, fees may be paid by an adverse party. For these problems, the only special arrangements needed are those that will minimize overall legal costs, such as no-fault insurance.

It may also be that a substantial range of problems can be covered by low-cost prepaid and group plans. But for many matters within the ambit of decent legal care, the current costs of individual lawyering preclude those in the low income group from obtaining that care.

**Substantial pro bono** contributions by private lawyers, to fulfill their obligations under Canon 2, are needed to help meet this need. The *pro bono* component might include, for example, a telephone advice panel, staffed not only on weekdays but also in the evenings and on weekends. Other attorneys might donate a minimum number of hours to give counsel in person, to draft simple documents, and to handle a limited number of cases that can be resolved in a short time.

A small, permanent staff would be needed to assist the voluntary lawyers in handling legal problems that require extended periods of time. This staff might be coordinated with a program providing

legal services for the poor. The staff might also coordinate outreach efforts with those designed for low-income groups.

For those in the middle class whose incomes are above the "near poor" level, it seems to me that some comprehensive insurance arrangement is needed to protect against extraordinary legal costs arising out of accidents and other unforeseeable crises. At such times, the burdens of legal fees can be overwhelming, and bar groups could lead in designing programs to spread the risks.

The list of possible arrangements is almost endless. But except for legal services to the poor, there is currently no organized effort to structure them. I hope organized bars around the country will take on a major share of the responsibility for developing the arrangements needed for the middle class, and that they will do so in ways that promote decent legal care.

Equal justice requires direct legal assistance to individuals and groups, but equal justice means more. Lawyering is only one aspect of decent legal care. The institutions and rules of the legal system are also central to that care. The legal profession has an obligation to help ensure that those institutions and rules are responsive to public needs. To that end, the survey reflects strong public support for three related goals that can and should be pursued by the leadership of our profession.

**The first goal** is to reduce the flood of problems that are currently susceptible only of a legal solution, and particularly of a solution that requires the assistance of a lawyer. The special committee's report abounds with suggestions along these lines. Title searches are a clear example. The committee's report comes right up to the point of suggesting what most of us know is true: in the guise of protecting the public, our profession has too often tried to protect itself.

The second goal is to increase efforts to prevent legal problems from arising. An ounce of prevention is worth a pound of cure, and

that adage takes on special meaning in relation to the daily legal concerns of 220 million people. The problem is endemic throughout the legal system. To allocate the resources of that system fairly, it is essential to move upstream: to prevent legal problems whenever possible.

A program to make the benefits of prevention much more widely available should include a number of elements. Increased incentives are needed, particularly for businesses, to reduce dependency on legal institutions. Consumer-review panels and boards to conciliate consumer complaints, for example, could be subsidized to encourage businesses to avoid consumer lawsuits, and to meet standards that assure a high level of consumer satisfaction. Similarly, if public counsel were available to all people in preparing their wills—just as counsel is available through the Internal Revenue Service on federal tax matters—much legal controversy could be prevented.

As many have urged, simplification and standardization are also essential to a program of prevention. Years ago, this lesson was learned in the realm of commercial law, and the Uniform Commercial Code resulted. Many other fields that affect average citizens much more directly, however, are still in need of reform. Public regulation is essential in these situations to ensure that standardized arrangements approximate just results.

Perhaps most important, a major effort is required to ensure that, to the maximum extent possible, average citizens know what legal problems may result from actions they propose to take. The United States is virtually alone in treating legal education solely as professional education. Law training belongs at the graduate level for those who will become practicing lawyers. But law should be part of primary and secondary schooling for everyone, and the report of the special committee stresses this point. We make a serious mistake when we stop that training at the level of fifth-grade civics for all but the few who will become attorneys. Fortunately, many bar organizations, including the ABA, are taking steps in these directions.

The third goal is increased emphasis on handling legal problems through techniques of aggregation that avoid the need for individual handcrafting. Aggregation is hardly a new idea. It now occurs widely but haphazardly in various contexts. A district attorney may refuse to bring an action until there are several complaints against a landlord. Police may refuse to prosecute a bad check passer until they have evidence of numerous bad checks. But careful study is needed to learn more about how to handle such matters in an aggregate fashion.

The current common-law system that depends on litigation to develop the law imposes heavy costs on the individuals involved,

though the benefits of that litigation can be spread widely. As a result, the law in many areas does not develop at all in response to new problems and needs. Few people can afford to sue; and the wealth of those who can afford litigation inevitably distorts the path of the law.

Aggregate handling also generally means cheaper handling, because of the economies of scale. But even more important than those benefits, aggregation is a way to bring the collective interests of society and the individual interests of disputants more into congruence. By spreading resources more equitably, it can lead to equality between adversaries not possible if one person acts alone.

All three of these goals—reduction in the number of problems needing the assistance of a lawyer, increased efforts to prevent legal problems from arising, and greater emphasis on handling legal problems through techniques of aggregation—as well as improved means of making legal assistance available, are essential to an overall plan to provide decent legal care for all Americans.

Perhaps this is no more than wild dreaming. But it is time to wake up to the need to make good on our promises of justice for all. hr

---

*This article is adapted from a speech before the Conference on Legal Needs at Northwestern University School of Law, June, 1977.*

---

## from no rights *(Continued from page 14)*

his baby personally, was held entitled to the same child-in-care benefits a widowed mother receives. The Court perceived, as it did not in widower Kahn's case, that women were harmed by this classification. Paula Wiesenfeld, the covered wage earner, paid Social Security taxes at the full rate. When Paula died in childbirth, the payout to her survivors, husband Stephen and infant Jason

Paul, was subject to a drastic discount. The law assumed that fathers, of course, would prefer full-time gainful employment to rocking cradles.

Following up on *Stanton*, the Utah age-of-majority case, in 1976 the Court struck down a "boy-protective" law in *Craig v. Boren*.<sup>28</sup> Under the law, Oklahoma allowed girls to purchase 3.2 beer (and to work in a beer parlor) at 18, but

made the boys wait till 21. A new standard for testing sex classifications was announced in *Craig*: line-drawing by gender was unacceptable, the Court said, unless important governmental interests were substantially furthered thereby.

*Califano v. Goldfarb*,<sup>29</sup> decided in 1977, followed the reasoning of the Court's earlier opinions in *Wiesenfeld* and *Frontiero*. It held that a female wage-earner's Social