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PREPAID LEGAL SERVICES AND THE ALTERNATIVE PRACTICE OF LAW

CLARA ANN BOWLER

In a previous article the effects of the OEO national legal services program on the public and the legal profession were examined. It was found that the Office of Economic Opportunity (OEO) program had greatly increased the demand for the services of lawyers among people who had hitherto handled their legal problems by themselves. It magnified the volume and range of litigation with an explosion of newly discovered “Rights,” which in turn, led to an explosion of “Grievances.” Three approaches to these developments were noted: 1) the development of new “people’s” legal institutions, 2) return to traditional uses of the legal process leaving social and economic problems to the political process and 3) expanding the scope of traditional private legal services through new “delivery of services” mechanisms. The conclusion was that the proposed National Legal Service Corporation Act, even if enacted, would not provide a workable solution to either the rising demand for free or inexpensive lawyers’ services or the current Rights and Grievances explosion.

This article will examine some new developments in the private and quasi-private (i.e., government subsized private) practice of law. It will not discuss dispute resolving mechanisms on the fringes of the practice of law such as arbitration, mediation and the ombudsman. The analysis will be built around the three approaches to the legal services problem outlined above. The “delivery of services” approach will be dealt with first because it appears to have generated the greatest volume of paper activity.

JUDICARE

Judicare is an alternative plan for government supported legal services to the indigent. It is included in this survey of private “delivery of service” programs because it involves direct payment to private

2. Id. at 425-27.
3. H.R. 7824.
legal practitioners on a case by case basis. American experiments under the descriptive title "Judicare" are actually small scale adaptations of the approach found in the British Legal Aid and Advice Act of 1949 which provided for payment on a reduced basis to solicitors and barristers who agreed to handle "legal aid" cases. The distinguishing characteristics of existing Judicare plans are rigid financial tests for eligibility, limitations on the type of cases handled and compensation to participating attorneys at levels well below the fees normally charged. The money saving theory behind Judicare programs is that attorneys will accept fees based on an hourly rate which is lower than the normal minimum. Because the legal matters of the poor are additions to a regular practice, it is assumed that overhead costs should exert less of an impact on the total fee.

Although primarily committed to the neighborhood law office model, OEO has funded two Judicare projects, one in rural Wisconsin and Upper Michigan, and the other in Montana, which have remained in operation since the mid-1960's. Researchers differ as to the effectiveness and value of these programs. A larger California project financed by a $2.5 million grant made as a compromise measure during the California Rural Legal Assistance controversy is still in the developmental stage. However, in view of the British 24-year experience with Judicare, it is unlikely that these experiments will produce any startling new approaches to the delivery of legal services to the poor. The British, in fact revised their system in 1972 in order to expand the range of financial eligibility and provide for the creation

4. 12 & 13 Geo. 6, c. 51.
6. Wisconsin's Judicare program, for example, provides for compensation at 50 to 80% of the state bar association's suggested minimum fee. Brackel, Free Legal Services for the Poor-Staffed Office versus Judicare: the Clients Evaluation, 1973 Wis. LAW REV. 532, 533; Cole & Greenberger, supra note 5, at 709.
7. Cole & Greenberger, supra note 5, at 709.
9. See Brackel, supra note 6; id., WISCONSIN JUDICARE: A PRELIMINARY APPRAISAL (American Bar Foundation, 1972); Cole & Greenberger, supra note 5.
10. Brackel, supra note 6; and supra note 8, based his research on personal interviews with clients and participating attorneys. He concludes that Judicare has served its purpose reasonably well and has possibilities as an alternative to the neighborhood legal services office. Cole & Greenberger, supra note 5, are skeptical about its future because of its low rate of compensation to participating attorneys. The ABA has dropped its support of Judicare because of its limited success in practice and the British disillusionment with their program. See 60 A.B.A.J. 144, 152 (1974).
11. Bowler, supra note 1, at 421; Brackel, supra note 8, at 113.
of "law and advice centres" staffed by salaried solicitors.\textsuperscript{12} The "law and advice centres" have yet to be implemented,\textsuperscript{13} but interest in the American OEO neighborhood law office projects is increasing.\textsuperscript{14} Even more revealing is the introduction of a private "Legal Costs and Expenses" insurance on the model of American pre-paid legal services schemes in order to remedy "the injustice caused by the gap between the income level for legal aid and the income level necessary for the strain of costs to be borne in a civil action."\textsuperscript{15}

Judicare has not captured much interest among the public in the United States. Even Backel, its staunchest supporter, admits that the attrition rate among experimental programs is higher than the number of programs still in operation.\textsuperscript{16} The new California proposal appears to be a result of the political controversy over California Rural Legal Assistance rather than a spontaneous movement for government sponsored Judicare. In the meantime Great Britain is in the process of drastically remodelling its 24-year old program even to the extent of supplementing it or replacing it with government salaried legal practitioners based on the American OEO legal services model. Apparently, Judicare is not the solution to the legal services dilemma either.

\textbf{Prepaid Legal Services: The Theory}

Prepaid legal services is a system of insurance against the cost of lawyer services based on the model of standard American health and hospitalization insurance plans. The subject matter of the insurance is lawyer's fees (and possibly court costs) as opposed to damages arising from adverse judgments. It had its origins in the American Bar

\textsuperscript{12} See Samuels, \textit{Legal Advice and Assistance Act 1972: The Scheme and An Appraisal}, 122 \textit{New Law J.} 696 (1972); Zander, \textit{supra} note 5. The major thrust of the 1972 British legislation was directed toward expanding the number of people eligible for legal aid by simplifying and liberalizing the financial eligibility standards which had become so restrictive as to exclude over 90\% of the population. Ginsburg, \textit{supra} note 5. In order to expand the scope of available services which had tended to be overbalanced with divorce cases, the case screening arrangements of the old legal aid system were dropped. However, gaps in the coverage still remain in many areas of laws such as representation before tribunals in landlord-tenant cases. 124 \textit{New Law J.} 257 (1974); 118 \textit{Sol. J.} 173 (1974).


\textsuperscript{14} Segal, \textit{Representing the Poor: Developments in America}, 124 \textit{New Law J.} 159 (1974); Zander, \textit{supra} note 5. The British scene is, of course, complicated by the traditional division of the legal profession into solicitors and barristers instead of the American all purpose general practitioner.

\textsuperscript{15} Vann, \textit{Legal Costs and Expense Insurance}, 124 \textit{New Law J.} 278 (1974). The plan was introduced by insurance brokers Strover \& Co. Ltd. and "is being underwritten by Lloyds, the masters of innovation." \textit{Id}.

\textsuperscript{16} Brackel, \textit{supra} note 8, at 113.
Association (ABA) as a private bar association scheme to supplement the OEO national legal services program on a more flexible and comprehensive basis than Judicare. The model chosen for the scheme was the health insurance industry and the principle consumer of legal services was to be the middle class. In the 1960's a study was conducted on the feasibility of legal services insurance directed to people over the poverty level but still too poor to pay standard legal fees out of pocket.\(^7\) The initial report was rather negative. Stolz, the researcher, concluded that "[t]here is no direct evidence that the middle class needs more legal service than it is presently getting."\(^8\)

Stolz further stated that the health insurance analogy was not applicable because the risk exposure was less, and legal costs were partially covered by liability insurance and contingent fees for plaintiffs.\(^9\) Unlike expensive hospitalization cases, the institutional costs in legal proceedings were negligible compared to professional service fees. Health insurance was built around the institutional costs of hospitalization which were easier to assess and insure than professional services fees.\(^10\) Finally, health insurance was the medical profession's response to proposed "government sponsored compulsory health insurance." Stolz did not feel that the legal profession was yet faced with a comparable threat.\(^11\)

Stolz also doubted that legal services for the middle class were proper subjects for insurance treatment on economic grounds:

\[\text{[T]he middle class apparently needs legal services that do not cost very much and that are very widely distributed. Financing these expenses through insurance will not reduce the cost to any individual, indeed it will increase the total expense because of the cost of administering the insurance program.}\(^12\)

Nor was legal service insurance good social policy because it would "encourage the use of lawyers in instances when the value of the service is disproportionate to the value of the underlying claim."\(^13\) He concluded that "the primary value of legal insurance would be as a way of encouraging people to use more legal services."\(^14\) Although

18. Id. at 419.
19. Id. at 423.
20. Id.
21. Id. at 424. Stolz qualified his conclusion by noting that a sudden increase in so-called "group legal services" could alter the situation. See discussion infra at 45.
22. Id. at 422.
23. Id. at 432.
24. Id. at 476.
advantageous to the legal profession this could become socially wasteful if expensive legal services no longer "pay their own way," because the claim was not economically worth the expense of litigating it. In short, Stolz tended to confine civil justice to traditional property interest concerns, limiting litigation to those transactions with sufficient assets to pay their own legal expenses, which follows the second approach outlined at the beginning of this paper.

Stolz's skeptical view of the need for increased legal services for the middle class was abandoned in later studies by Christensen. Christensen argued that there was a massive need for more legal services among middle class people and that when the middle class discovered that this need could be met, they would increase their demand for legal services.

[A] largely untapped potential demand for lawyers' services similarly exists among people of moderate means, awaiting only the availability of services on acceptable terms to be translated into an actual demand of substantial proportions . . . .

Although Christensen was primarily concerned with reducing the cost of legal services through law office efficiency, specialization and the use of paraprofessionals, his arguments also added a more positive note to the feasibility of prepaid legal service plans for the middle class.

As Stolz's skeptical view of increased middle class need and demand for lawyers was questioned by Christensen, his perceived threat to the private practice of law from so-called "group legal services" picked up momentum. Group legal services means different things to different people and at different points in time. Basically it involves the delivery of legal services through a lay organization either as a fringe or primary benefit of membership. The purpose of the group is to provide access to lawyers and/or money for their services. In ABA and local bar association literature, group legal services refers to plans which limit participation to either salaried attor-

26. Id. at 25. Christensen does not discuss whether the middle class is as yet award of their need. See discussion of this issue infra at 54.
27. Id. at 44-56.
28. See supra note 21.
29. ABA Sp. Comm. on Prepaid Legal Services, Preliminary Handbook on Prepaid Legal Services (1971); id., Revised Handbook on Prepaid Legal Services (1972); an extensive bibliography of prepaid legal services and group legal services materials can be found in Brickman, Legal Delivery Systems—A Bibliography, 4 Univ. Toledo L. Rev. 465 (1973).
ney employees of the sponsoring group or a selected list of private attorneys chosen by the group. This is known in the literature as the "closed panel." Prepaid legal services, by contrast, is known as the "open panel" plan where all licensed attorneys are eligible to participate. The consumer chooses his private lawyer, and the prepaid plan pays the lawyer's fee.

Group legal services (but not prepaid legal services) was considered unethical under the old ABA Cannons of Professional Ethics. However in 1963, the United States Supreme Court ruled that a group legal service plan operated by a civil rights organization to aid members in civil rights litigation was protected by the first amendment guarantees of free expression and association. The participating attorneys in this case were chosen by the Virginia NAACP Conference and paid per diem fees. A year later the Supreme Court extended first amendment protection to labor unions assisting their members to retain lawyers in workmen's compensation cases. This protection

30. 60 A.B.A.J. 369 (1974); Ellis, The Primrose Path for Lawyers, 36 Unauthorized Practice News, no. 3, at 1 (1972); ABA SP. COMM. ON PREPAID LEGAL SERVICES, supra note 29.

31. See discussion in Brickman, Of Arterial Passageways Through the Legal Process, 48 N.Y.U. Law Rev. 595 (1973). Recent literature such as Morris, Group Prepaid Legal Services—An Insurance Viewpoint, 9 Forum 163 (1973) tends to regard group legal services as an alternative form of prepaid legal services. In such discussions, the distinguishing characteristic of prepaid legal services is its insurance financing rather than its method of choosing participating lawyers.

32. ABA CANNONS OF PROFESSIONAL ETHICS No. 35. For a history of attacks on group legal services by the organized bar, see Riedmueller, Group Legal Services and the Organized Bar, 10 Col. J. Law & Soc. Prob. 228 (1974).

33. NAACP v. Button, 371 U.S. 415 (1963). The NAACP argued on the basis of "due process" and "equal protection" as well as the first amendment right of association. The Court rejected the due process and equal protection arguments, but held that the NAACP did have a protected right under the first amendment to "associate for the purpose of assisting persons who seek legal redress for infringement of their constitutionally protected rights." Id. at 428. It should be noted that Button arose not as an attempt on the part of Virginia to regulate group legal services, but as an attempt "to penalize the NAACP because it promotes desegregation of the races." (Douglas, J., concurring) id. at 445; Kalven, The Negro and the First Amendment 75-90 (1965). It has been suggested that the existence of group legal services plans sponsored by labor unions was first mentioned by the Court in Button as an attempt to neutralize the racial issue. Kalven, supra at 89-90.

34. Bhd. of Trainmen v. Va. State Bar, 377 U.S. 1 (1964). The Court held that the workman's compensation act was "authorized by Congress to effectuate a basic public interest." Id. at 7. Thus the State of Virginia could "no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resoiting to courts to vindicate their legal rights." Id. at 7. The Court upheld the model of group legal service plans sponsored by diverse organizations for diverse purposes it had set up in Button despite the argument that "personal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims." (Clark, J., dissenting) id. at 10; see also Stolz, Sesame Street for Lawyers: United Transportation Union v. The State Bar of Michigan, 36 Unauthorized Practice News No. 2, at 14 (1971).
was later extended to unions which retained salaried attorneys for use by their members and which set limits on the size of the fee which their recommended attorneys could charge members.

Despite the urging of Christensen, Stolz, and others the ABA's rewriting of the Cannon in 1969 as the Code of Professional Responsibility sought to limit group legal service plans to non-profit organizations "to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities." Hostility to group legal services within the ABA also resulted in restrictions on the purpose of organizations providing "constitutionally protected" legal services. In February 1974, the Code was further amended to include group legal service plans in areas not specifically covered by the Supreme Court decisions. However, plans sponsored by groups not under constitutional protection (i.e., other than civil rights groups and labor unions) must agree to reimburse non-participating attorneys who may be selected by members of the group and to register with "the court or other authority having final jurisdiction for the discipline of lawyers within the state."

35. United Mine Workers v. Ill. Bar Ass'n, 389 U.S. 217 (1967). This case involved workman's compensation claims under a state rather than a federal statute. The Court rejected any distinction based on the federal nature of the claims to be litigated in Bhd. of Trainmen, holding that first amendment rights related "to matters of local" as well as "of federal concern." Id. at 227, n.7. The Court further rejected any distinction between "political" activity (such as civil rights litigation in Button) and other activities in the extension of first amendment protections. Id. at 233. See generally ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971).

36. United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971). It should be emphasized that all three labor union decisions involved plans to assist members in their individual workman's compensation claims, and not for legal representation in union business.

37. See, for example, Stolz, supra note 34.

38. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-103(D)(5).

39. The "primary purposes" of the lay organization can not "include the rendition of legal services;" at the same time "the recommending, furnishing, or paying for legal services" must be "reasonably related to the primary purpose" of the organization. Disciplinary Rule 2-103(D)(3)(b) & (c). If this appears to be confusing and contradictory, it is because it is.


41. Disciplinary Rule 2-103(D)(3)(a)(v) as reprinted in 60 A.B.A.J. 448 (1974). The point of a closed panel plan is that only the lawyers recommended by the sponsoring group may participate in the plan. This provision allows any member of the group to turn the plan into an open panel by selecting a lawyer not on the group's approved panel. In other words, it requires that a closed panel plan become an open panel plan whenever any member of the sponsoring group so desires. This is, of course, absurd. Further, it is open to attack on both constitutional and antitrust grounds. See discussion infra at 48-49, 63.

There is reason to believe that such attempts by the organized bar to forcibly prohibit group legal services on "closed panel" plans on professional grounds are doomed to failure. The success union sponsored group legal service plans have had in the United States Supreme Court has encouraged other types of organizations to experiment with closed panel referral and insurance arrangements. The state bar association of California, for example, reported over 192 group plans in existence in the state as of October 1971. Although most of these plans were sponsored by labor unions, the California Teacher's Association with 176,000 members, public employee associations with a total of 180,000 members, and smaller organizations such as employee credit unions, small business associations, farm cooperatives, college student associations, fraternal organizations, consumer leagues and community-interest groups registered closed panel plans. There seems no reason to believe that the Supreme Court would not uphold most of these if they were challenged by the organized bar.

Despite the new ethical restrictions, the closed panel supporters within the ABA have been gaining strength. Recent proposals include group legal services plans as possible mechanisms for the delivery of prepaid legal services. One particularly speculative theory is presented by Brickman, in a recent article in the NEW YORK UNIVERSITY LAW REVIEW. He traces universal access to "dispute-solving forums" back to a fifteenth century English statute.

Several states have independently adopted registration requirements for group legal services. Murphy, Group Legal Service Plans, 36 UNAUTHORIZED PRACTICE NEWS, no. 3, at 7, 8 (1972). It is hoped this provision will encourage more states to adopt such registration plans.

43. Murphy, supra note 42, at 7, 8. California has had a registration requirement for group legal service programs since 1970. Id. at 8; CALIF. ST. BAR ASS'N, RULES OF PROFESSIONAL CONDUCT, RULE 20. It is believed that only a fraction of the existing groups actually comply with the registration procedure. Id. at 7-8.

44. Murphy, supra note 42, at 8-9. One of the most publicized of these non-union plans is the Berkeley Consumers Group Legal Service Plan described in Note: Prepaid Legal Services and their Feasibility in Ohio, 41 U. CINN. L. REV. 841, 848-49 (1972).


47. Harris, Prepaid Legal Services Primer, 2 STUDENT LAWYER, no. 8, at 22 (1974); Morris, supra note 31; Ohio Prepaid Legal Services, supra note 44; Symposium, supra note 45; Brickman, supra note 31.


49. 2 Henry 7, c. 12 (1495).
the judiciary in civil cases is such a basic right that it should be protected by the fourteenth amendment to the Constitution as it is in criminal cases. However, since this has not been recognized under due process of equal protection, it must be argued as an extension of the first amendment, starting from the group legal service decisions. In order to buttress his argument, Brickman adds the assumption that

since access to the judiciary is meaningless without the assistance of those skilled in the invocation of claims, lack of access to lawyering services is equally damaging to our system of justice.

He believes that civil legal services can be analogized to the criminal justice system because “[m]ost fundamentally, the distinction between criminal and civil cases on the basis of rights to liberty as opposed to property is specious.”

Brickman forsees an extension of the protected rights of groups under such cases as Button, Board of Trainmen, United Mine Workers and United Transportation Union to individuals. In the absence of such an extension, he discusses alternative plans to expand access to courts such as legislation treating the bar as a public utility and the removal of bar association restrictions setting minimum fees and prohibiting advertising. He states that such bar association restrictions are products of a “litigation is evil” catechism, pointing out that

litigation has become a ‘protected activity’ which serves vital social functions and prohibitions which are an outgrowth of an outdated philosophy are equally antiquated and unresponsive to present needs.

On the practical level, Brickman falls into the same trap as neighborhood law office enthusiasts. In attempting to support new delivery of legal services mechanisms through a constitutionally guaranteed

50. The fundamental interest (in divorce cases) protected by Boddie v. Connecticut, 401 U.S. 371 (1971) (court costs in divorce cases a violation of due process) was successfully circumvented by U.S. v. Kras, 409 U.S. 434 (1973) (court costs upheld in bankruptcy cases, because no fundamental interest was involved). Brickman, supra note 31, at 597.


52. Brickman, supra note 31, at 597.

53. Id. at 623. The analogy weakens his first amendment argument because the right to counsel in criminal cases has been extended under due process, not the first amendment. See, for example, Gideon v. Wainwright, 372 U.S. 335 (1963).


55. Id. at 626-29.

56. Id. at 641-49.

57. Id. at 646-47.

58. Bowler, supra note 1.
universal right of access to courts and "lawyering services," he will only succeed in generating still more popular demand for legal services which cannot be met. He will increase America's already over extended propensity for litigation\(^5\) by contributing to the current Rights and Grievances Explosions. The more he increases demand for lawyers, the more difficult it becomes for his new delivery of legal service mechanisms to meet this demand, and the less chance they have of being successful. In short, Brickman is engaged in promoting the new delivery of legal service mechanisms in a manner which exacerbates the very problems they were designed to solve.

A potentially more disruptive threat to the organized bar is shaping up in congressional activities and antitrust litigation. The consumer movement and Senator John V. Tunney's Subcommittee on the Representation of Citizen Interests of the Senate Committee on the Judiciary have launched a full scale attack on the present attitudes of attorneys in dealing with the small consumer of legal services.\(^6\) The first target was not group legal service restrictions, but minimum fee schedules, a long time bar association device to keep attorneys from offering cut-rate fees for legal services. The minimum fee schedule was successfully challenged as a price fixing device by a private antitrust suit last year.\(^7\) In the face of threats of future antitrust actions, the ABA has retreated from its previous support of minimum fee schedules and a number of state bar associations have dropped them.\(^8\) Despite the attempted change in policy of the organized bar, a civil antitrust suit was recently filed by the Justice Department in Portland, Oregon.\(^9\)

The monopolistic character of group legal service restrictions is only slightly less apparent than minimum fee schedules. Spurred on by consumer groups and Senator Tunney, the Justice Department is presently threatening antitrust action against the ABA for its attempt


\(^8\) *ABA and Justice Dept Explain Positions on Minimum Fee Schedules to Senate Subcommittee*, 59 *A.B.A.J.* 1296, 1299 (1973).

to restrict group legal service plans through professional sanctions, as discussed above. Attacks on other monopolistic practices enshrined in the legal ethics system are sure to follow. It is much too early to speculate on the potential effect of antitrust litigation against the traditional organization of the legal profession. Even if unsuccessful, the echoes of antitrust activities against one of America's largest professional monopolies is bound to lend support to those within the ABA calling for a more flexible policy towards reforms in the delivery of legal services.

**PREPAID LEGAL SERVICES: THE REALITY**

In January 1971 a legal costs insurance plan went into operation in Louisiana under the title "Shreveport Prepaid Legal Service Plan." This program, administered by the Shreveport Bar Association (with assistance of the ABA) and Local 229 of the Laborers International Union of North America, was guaranteed by the Ford Foundation as an experimental open panel prepaid legal service plan. An extensive American Bar Foundation report concluded that it was basically successful from the point of view of both the members of the Shreveport Bar Association and the members of Local 229. The American Bar Foundation study of the Shreveport plan has not been without criticism. The primary objection is the same argument which applies to the American Judicare programs, the participating group is too small and too isolated from the mainstream of American culture to be representative. The researchers admit that "the Shreveport experiment is an inadequate base upon which to form final judgments about the utility of a specific legal delivery system." Nevertheless,

64. *Id.;* Chicago Sun Times, May 15, 1974, at 48; Chicago Tribune, May 17, 1974, at 1. Antitrust can be a doubled edged sword. The ABA could conceivably argue that closed panel plans are monopolistic practices *vis-a-vis* the non-participating members of the bar.

65. MARKS, HALLAUER, & CLIFFTON, THE SHREVEPORT PLAN: AN EXPERIMENT IN THE DELIVERY OF LEGAL SERVICES 1-7 (1974); *see also* Hallauer Shreveport Experiment in Prepaid Legal Services, 2 J. LEGAL STUDIES 223 (1973); Roberts, Shreveport Plan for Prepaid Legal Services—A Unique Experiment, 32 LA. L. REV. 45 (1971).

66. MARKS, HALLAUER & CLIFFTON, *supra* note 65, at 93-95. The American Bar Foundation is the research wing of the ABA.


68. See discussion supra at 41-43.

69. The 583 members of Local 299 were almost all black, male, married and had a median and mean age of about 50. MARKS, HALLAUER & CLIFFTON, *supra* note 65, at 20. The Judicare programs served small numbers of rural whites and Indians in northern Wisconsin and Montana.

70. MARKS, HALLAUER & CLIFFTON, *supra* note 65, at 95.
they feel that the Shreveport experiment provides sufficient evidence that "the legal insurance concept works."\(^7\)

Observers outside the ABA are more cautious about the future of both open and closed panel plans.\(^2\) A few difficult legal problems remain in the path of both types of plans. One of these was solved in August 1973 when Congress amended the Taft-Hartley Act to include union group legal service plans as a proper subject for collective bargaining.\(^8\) For the first time since the passage of the Taft-Hartley Act in 1947, employer contributions to legal service plans for their employees can be held in jointly administered trust funds.\(^9\) Another problem involves tax deductibility of employer contributions, taxability to the employee and taxation of the fund.\(^10\) The ABA is currently lobbying for an amendment to the Internal Revenue Code which would prevent employer contributions to legal service plans from being taxed to the employee.\(^11\)

A more difficult legal problem concerns control over prepaid legal service plans. The ABA envisions bar association initiative and control over both open and closed panel plans. Their pilot plan in Shreveport was controlled by the bar, the new amendments to the Code of Professional Responsibility provide for registration of group legal service plans with the state bar,\(^12\) and ABA sponsored literature on the topic calls for programs planned and promoted by local bar associations.\(^13\) The insurance industry, however, looks to the analogy

\(^7\) Id.
\(^8\) Haneberg, Group Legal Services—The "Fringe" of the Future?, 112 TRUSTS & ESTATES 266 (1973); Green, Labor Union Group Legal Service for Member, 18 CLEV.-MAR. L. REV. 39 (1969).
\(^9\) Pub. L. 93-95, amending § 302(c) of the Labor-Management Relations Act, 1947. Pub. L. 93-95 excludes employment practices, grievances and disputes with the sponsoring union from coverage under the legal service plans. Both of these areas are potential sources of substantial blue collar legal problems.
\(^10\) The open panel vs. closed panel spilled over into Congress where the House sought to limit approval to open panel plans, despite the fact that most union plans are closed panel. See LEGISLATIVE HISTORY OF JOINT LABOR-MANAGEMENT TRUST FUNDS FOR LEGAL SERVICES, 93d Cong., 2d Sess. (Comm. Print, January 1974). The final act, however, provides for a "trust fund established . . . for the purpose of defraying the costs of legal services for employees . . . for counsel or plan of their choice." Pub. L. 93-95 (emphasis added). This means the union members can choose a closed panel plan if they so desire.
\(^11\) Haneberg, supra note 72, at 268; Ohio Prepaid Legal Services, supra note 44, at 874.
\(^12\) Ohio Prepaid Legal Services, supra note 44, at 874.
\(^13\) ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-103(D)(5)(a) (viii).
\(^14\) Symposium, supra note 45; Bibliography id. at 465; Ohio Prepaid Legal Services, supra note 44; ABA Sp. Comm. on Prepaid Legal Services, supra note 29.
with health insurance, and is speculating about state regulation of prepaid and group legal service plans under insurance statutes.\textsuperscript{79} In Ohio, the state bar association is attempting to circumvent regulation of its prepaid legal services plan under the state insurance statute by establishing a “trust fund” with contributions from participating attorneys in the Ohio Bar Association.\textsuperscript{80}

Suggestions have also been made to establish state agencies outside both the organized bar and insurance departments to control legal service plans.\textsuperscript{81} Not all private insurance schemes are in competition with the organized bar,\textsuperscript{82} but past experience suggests that unions in particular and perhaps the other interested parties involved directly or indirectly are not about to have programs dictated to them by those whose services will be utilized.\textsuperscript{83}

A final problem of prepaid legal service plans is that almost all of the literature is written by the promoters or potential promoters of such plans. There is almost nothing written by the proposed recipients of these services. This is significant because as the insurance lawyers point out “the biggest unanswered question . . . is whether the average worker wants or needs prepaid group legal services.”\textsuperscript{84}

Christensen’s studies\textsuperscript{85} appeared to demonstrate a middle class need for more legal services based on the frustrations of increased contact with judicial tribunals brought about by the growing complexities of personal transactions in the twentieth century world. These in-

\textsuperscript{79} Haneberg, supra note 72; Dunne, \textit{Prepaid Legal Services—For Whose Benefit?}, 46 N.Y. STATE BAR J. 167 (1974); \textit{Ohio Prepaid Legal Services, supra note 44}, at 886; Wall Street Journal, Oct. 6, 1972, at 24.

\textsuperscript{80} Jetter, \textit{Prepaid Legal Services: The Ohio Experience}, 41 INSURANCE COUNSEL J. 50 (1974); \textit{Ohio Prepaid Legal Services, supra note 44}, at 886; Hoffman & Fingerman, \textit{Prepaid Legal Services—A 'Hospitalization' Plan for the Law}, 1 CINN. BAR ASS'N J. 6 (1974). The program is still in the planning stages and appears to be a small scale experimental project.

\textsuperscript{81} Cole, \textit{An Act to Regulate Group Legal Service Plans}, 11 HARV. J. LEG. 68 (1973). Cole’s model legislation suffers from acute confusion over the subject matter of his regulations. At one point he resorts to defining a “nonidentified group legal service plan.” \textit{Id.} at 82. The metaphysics which would be involved in regulating a “nonidentified plan” is mind boggling.

\textsuperscript{82} The Insurance Company of North America, for example, is presently planning a jointly sponsored “pilot plan” with the Philadelphia Bar Association. Wall Street Journal, Oct. 6, 1972, at 24; \textit{The NAT'L UNDERWRITER, Jan. 12, 1974}, at 14 (Life & Health Ins. Ed.).

\textsuperscript{83} Haneberg, supra note 72, at 268.

\textsuperscript{84} Id.

\textsuperscript{85} \textit{CHRISTENSEN, supra note 25}.
Increased contacts are already straining the functional capacity of the traditional judicial system. If prepaid legal insurance were to succeed, this contact must continue to increase until the risk of litigation expenses to each insured member is substantial enough to justify the insurance. If Stolz's analysis is correct, the risk is presently too low for legal services insurance to be successful. However, it is questionable that the judicial system can survive the increase in regular use of legal services necessary for the success of the insurance. In other words, the present mechanism for the delivery of judicial services may collapse long before the prepaid legal services promoters can drum up enough demand for legal services to insure the success of their new delivery of legal services mechanisms.

Christensen's book rested on the further assumption that because the middle class had a need for increased legal services, they were aware of that need and were simply waiting for a system of delivering legal services at prices they could afford. This assumption may prove to be unwarranted. It can be shown that OEO neighborhood offices were inundated by demands for lawyers' services, and that the civil rights and anti-poverty movements resulted in an explosion of new Rights and Grievances to be litigated. However, the fact that litigation has become the popular means of attacking social and economic problems and that minority groups are proliferating legal Rights and Grievances to be asserted by their attorneys, does not mean that the middle class is ready to jump at the chance to buy traditional individual and family legal services. To put it another way, the citizen who now files a complaint about job discrimination, writes to Ralph Nader about his consumer problems and joins the Sierra Club, is not necessarily ready to purchase insurance against the costs of writing his will and divorcing his spouse.

Ultimately the delivery of service approach fails to consider exactly what kind of services are being delivered and whether the pro-

86. Carrington, supra note 59.
87. Stolz, supra note 17, at 423.
88. CHRISTENSEN, supra note 25.
89. An inquiry into the feasibility of establishing a legal insurance plan in Ohio lists "the Public" as the first "obstacle to prepaid plans." Ohio Prepaid Legal Services, supra note 44, at 848. "The public must be educated respecting the law and the services that lawyers can effectively and appropriately perform." Id.
90. See Bowler, supra note 1.
91. Carrington, supra note 59; see also Zashin, supra note 59; Bowler, supra note 1.
posed consumer of the services really wants them to be delivered at all. It is quite possible the middle class will look on prepaid legal service plans in the same cynical fashion as a local New York bar association commentator:

Were pre-paid [legal services] to come law in this state... the legal profession could expect the same tremendous influx of income as the medical profession experienced after the adoption of pre-paid medical insurance.92

In short, is prepaid legal services the answer to the problems of moderate income clients or not so moderate income lawyers?

THE ALTERNATIVE PRACTICE OF LAW93

While the ABA is caught up in new mechanisms for the delivery of legal services, other trends within the legal profession are moving toward the development of new, more generally accessible legal institutions,94 and a return to the traditional use of the political process to solve the social and economic problems which have been spilling over into the courts in the past decade.95 One of these trends is the increase in pro bono publico work in some of the large law firms. Pro bono publico (for the good of the public) is a traditional term for charity work done by established law firms in order to promote their public image.96 It could conceivably include Judicare, with its below average level of remuneration.97 In the absence of Judicare plans in urban areas where the large firms are situated, pro bono publico experiments are usually directed to indigents, or to so-called "public interest" work.98 More ambitious firms have subsidized branch offices on the model of the OEO neighborhood law office.99

The pro bono publico approach is most suitable for large, well-capitalized, prestigious law firms. It is significant because of the recent increases in the percentage of lawyers turning to large firm as

93. The phrase was taken from a seminar sponsored by the National Lawyers' Guild at Northwestern University, April 20, 1974. Although the Lawyers' Guild used the phrase to refer to politically "radical" lawyers, the author believes it is a useful description of a number of new developments in the practice of law generally.
94. See discussion supra at 41.
95. See discussion supra at 41.
97. "[I]t has been used to designate work for which the lawyer is not paid or paid at a rate lower than a lawyer... applying the term customarily receives." Id.
98. See discussion of "public interest" law, infra at 59.
opposed to small firm or solo practice of law.\textsuperscript{100} Many of these younger lawyers have social consciences which need a new outlet. Although often described as the development of a new legal services institution,\textsuperscript{101} the actual effect of pro bono publico work on the public has been small and mainly along traditional lines of volunteer charity work by the legal profession.\textsuperscript{102}

Politically radical lawyers were described in connection with the OEO legal services program in a previous article.\textsuperscript{103} Radical lawyers were traditionally associated with civil libertarian litigation, especially first amendment cases. Their most recent successors, however, are gravitating into marginally successful private practice arrangements representing aspiring radical political groups.\textsuperscript{104} Curiously, although purportedly committed to the development of new legal institutions for "the people," many young radical lawyers are drifting into more traditional practice, on the model of the small partnership or solo practitioner. The scope of their litigation is turning to "bread and butter" legal services designed to insure their economic survival, leaving the transformation of society to their outside political activities.\textsuperscript{105} This development is also an interesting counter trend to the current movement of young attorneys into salaried positions with large firms. The independent small practitioner may not become an extinct species after all.\textsuperscript{106}

On the forefront of trends towards the development of legal insti-

\textsuperscript{100} Large firms traditionally hire law school graduates as salaried "associates" and submit them to a long and intensive apprenticeship. Those who do well may ultimately be admitted to the controlling partnership. A recent study claims that the percentage of "associates" within the legal profession from 1948 to 1970 has increased from 4\% to 8\% generally and in urban areas has gone from 6\% to 10\%. The percentage of solo practitioners, on the other hand, has declined from 61\% of the profession in 1948 to 37\% in 1970. York & Hale, \textit{Too Many Lawyers?}, 26 J. Legal Ed. 1, 7, 12 (1974).

\textsuperscript{101} For example, \textit{The New Private Practice}, supra note 99.

\textsuperscript{102} See generally \textit{Marks}, supra note 96.

\textsuperscript{103} Bowler, \textit{supra} note 1, at 421-23.

\textsuperscript{104} See description of the "group representative" in Bowler, \textit{supra} note 1, at 422-23. Disaffected radical OEO attorneys have been attempting to continue this type of practice on a self-financing basis, often with the aid of a spouse employed in a better paying occupation. Panel discussion at seminar described \textit{supra} note 93.

\textsuperscript{105} \textit{Id}.

\textsuperscript{106} There are two current sourcebooks on the activities of radical lawyers in America: \textit{Ginger, The Relevant Lawyers} (1972); and \textit{James, The People's Lawyers} (1973). Both are based on oral interviews. James' description of trends among radical lawyers was confirmed on the local level by the discussion at the seminar described \textit{supra} note 93. The key speaker, Pearl Hart, was a civil libertarian. The young practitioners were either operating on the "group representative" model or drifting into small firm general practice of law.
tutions more accessible to the general public are the class action and the public interest cases. Class actions and public interest cases are procedural approaches to litigation which do not necessarily alter the traditional organization of the legal profession or the class of people served. However, a brief discussion of these devices is included because of their potential for transforming the entire problem of access to legal remedies for perceived injustices to the lower and middle classes.

Class actions and public interest cases arose out of the interaction between suits concerning certain private property rights and those involving public law. The class action was originally a procedural device whereby one or more individuals sued on behalf of a numerous class of individuals similarly situated where it was impractical to join all members of the class as parties to the action.\textsuperscript{107} Current interest in class actions arose after the federal court system adopted new Rule 23 which established a specific list of requirements for class actions in federal courts.\textsuperscript{108} Rule 23 applies to private actions under general federal jurisdiction,\textsuperscript{109} jurisdiction by reason of diversity of citizenship\textsuperscript{110} and provision by federal statute.\textsuperscript{111} Actions under general and diversity jurisdiction require a minimum jurisdictional amount of $10,000. In Snyder v. Harris\textsuperscript{112} the Supreme Court held that the claims of members of the class can not be aggregated to meet the jurisdiction amount. This restriction was later extended in Zahn v. International Paper Co.\textsuperscript{113} where the court held that each member of the class, whether or not present in court, must satisfy the jurisdictional amount. Since most class actions are based on numerous small claims, these decisions have effectively limited class actions to statutory actions where no jurisdictional amount is required.\textsuperscript{114}

\textsuperscript{107} Homburger, Private Suits in the Public Interest in the United States of America, 23 Buffalo Law Rev. 343, 348 (1974); see also Class Actions Primer (Fuchsb erg ed. 1973).

\textsuperscript{108} Fed. R. Civ. Pro. 23 (effective July 1, 1966). The new rule was designed to expedite class actions in federal courts.


\textsuperscript{112} 394 U.S. 332 (1969).

\textsuperscript{113} 94 S. Ct. 505 (1973).

\textsuperscript{114} Eisen Note, supra note 111, at 426-27. It should be noted that this decision could be changed by Congressional action expanding federal jurisdiction over small claims in class actions. There is a movement in this direction in the Senate. 120 Cong. Rec. S. 855 (Jan. 31, 1974).
An even more basic problem is the issue of managibility of extremely large class actions with many small claims. In the recent Supreme Court decision Eisen v. Carlisle and Jacquelin the class consisted of more than 6 million purchasers of odd lot shares on the New York Stock Exchange in 1962 to 1966.115 The issue was not so much proof of the defendant's wrongdoing but the administration of a judgment effecting so many often unidentifiable plaintiffs.116 The Supreme Court held that the plaintiff had the responsibility of individually notifying all members of the class who could be identified with reasonable effort. Inasmuch as the plaintiff in question had stated that he was unwilling to undertake this expense, the Court was able to dispose of the case without passing on the fluid class recovery scheme proposed by a lower court to administer the damage claims.

This very complicated and expensive litigation had all been undertaken by a named plaintiff who had a statutory claim for treble damages of $210117 (the action was brought under the Securities Exchange Act which requires no jurisdictional amount). But although each individual claim was small, the private law action brought to light a massive violation of the Securities Exchange Act which cost over 6 million people more than $65 million.118 At this point, the strictly private law action expanded into a matter of public concern.119 It is through such actions that the consumer's movement hopes to assert the very real grievances of large segments of the public in areas where large business concerns have engaged in small violations of government regulations on a massive scale. Unfortunately, present limitations on aggregation to meet the jurisdictional amount, the burden of notice requirements and the uncertainty of the manageability issue in statutory actions such as Eisen have temporarily halted further developments in class action litigation.

Class actions, if allowed to continue to represent plaintiffs with

115. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied 386 U.S. 1035 (1967), rev'd and remanded 391 F.2d 555 (2d Cir. 1968), rehearings 50 F.R.D. 471 (S.D.N.Y. 1970), 52 F.R.D. 253 (S.D.N.Y. 1971), 54 F.R.D. 565 (S.D.N.Y. 1972), rev'd 479 F.2d 1005 (2d Cir.) (dismissed as class action), aff'd 42 U.S.L.W. 4804 (U.S. May 28, 1974). The basic issue in Eisen involved a damage payment scheme known as "fluid class recovery." See discussion in Eisen Note, supra note 111; Homberger, supra note 107, at 345, 371-73; CLASS ACTIONS PRIMER, supra note 107, at 147-59. However, the dispositive issue before the Supreme Court was notice to the members of the plaintiff "class."


117. Id.

118. Id.

119. Id. at 345-46.
small claims, could provide another outlet for the Rights and Grievances Explosion. It is very possible that the current popular insistence on abstract personal Rights is not the result of a few big abstract Grievances, but the accumulation of many small concrete Grievances. The consumer's movement may be correct in asserting that a remedy for small injuries systematically imposed on large numbers of people, can alleviate the frustration and feeling of powerlessness of the middle and lower classes. On the other hand, an admission by the institutions of civil justice that laws do not apply to those who cheat large numbers of people if they keep the injury to each individual small enough is dangerous to the integrity of the entire legal system.

Public interest actions are concerned with the enforcement of rights vested in the general public or a segment thereof. They traditionally challenge "alleged unconstitutional or illegal exercise of power by the political branches of government." The current round of public interest cases was begun by F.C.C. v. Sanders Brothers Radio Station dealing with broadcast regulations. Other examples of public interest cases are first amendment and environmental cases.

The problem here is standing to sue. The theory behind public interest suits is that the plaintiff acts as a "private attorney general." However, under Sierra Club v. Morton the private attorney general is now required to prove that he, personally, was injured by the action which is the subject of the suit. On the one hand, the private class action case is being restricted because it deals with private property interests even though the scope and number of people involved bring it into the sphere of general public concern. But on the other hand, the public interest case is limited to plaintiffs who can show a private interest (albeit the interest need not be economic) in the suit, thereby

120. Id. at 387. As opposed to the private property concerns of straight class actions. See Presser, Public Interest Litigation in the U.S. Ct. of Appeals for the D.C. Circuit: A Current Perspective, 41 GEO. WASHINGTON L. REV. 260 (1972) for an analysis of the subject matter of public interest cases brought in the D.C. Circuit from March 30, 1970 to June 30, 1972.

121. Homburger, supra note 107. For a discussion of the evolution of federal public interest law, see id. at 388-95.

122. 309 U.S. 470 (1940). The Court granted standing to a radio station to appeal an F.C.C. decision in the absence of property interest in order to sustain the public interest in radio service. See Homburger, supra note 107, at 386.


124. Sierra Club v. Morton, 405 U.S. 727 (1972). The Court denied standing to the Sierra Club to challenge the conversion of a game preserve into a privately operated resort.

125. Id. at 398-403.
bringing it closer to the private class action. In short, further development in this area, either by the Supreme Court or through congressional legislation, is needed before the federal class action and public interest case can become a viable vehicle for consolidating and implementing large scale claims and grievances.

CONCLUSION

We have seen three different approaches of the private legal profession to the problems of increased demand for lawyers and the Rights and Grievances Explosions discovered by and possibly created by the OEO legal services program. The area of greatest potential, the development of new "peoples" legal institutions, appears to be immobilized by the current uncertainties regarding class actions and public interest law on the federal level. A minor renaissance of pro se representation in small claims courts is attracting some interest.\textsuperscript{126} To the extent that small claims courts can provide an outlet for the Rights and Grievance Explosions, it is a healthy sign. However, small claims courts in the United States are hardly a new legal institution.\textsuperscript{127} Their limitation is that they are only equipped to deal with small scale, tangible property disputes. Experience indicates that, in their present form, they may provide some measure of satisfaction for small property owners with litigious designs on their neighbor's property, while pushing larger social and economic problems back into the political process.

Like the small claims court, the second approach holds that civil justice is and should be primarily concerned with property rights and that massive social and economic problems can be better dealt with in the political process. This seems to be the conclusion of politically radical lawyers who were disillusioned by the failure of the OEO legal services to initiate any large scale social revolution. It also is the view of Senator Tunney's supporters\textsuperscript{128} and the sponsors of the proposed Consumer's Protection Agency.\textsuperscript{129} In a backhanded way, it appears

\textsuperscript{126} National Institute for Consumer Justice, Redress of Consumer Grievances (1973); S. 2928, "A bill to establish national goals for the effective, fair, inexpensive, and expeditious resolution of controversies involving consumers . . . ."


\textsuperscript{128} See supra note 60.

\textsuperscript{129} S. 707; Senate Report 93-792, 93rd Cong., 2d Sess. (1974). This bill is the political process' (i.e., Congress') answer to the consumer movement. It would establish a federal consumer advocacy agency to aid consumers without any regulatory litigation initiating powers. A similar bill, H.R. 13163, was passed by the House of Representatives, April 3, 1974, 120 Cong. Rec. H.2517-2564.
to be the view of the Justice Department in attacking the organized bar on antitrust grounds at the very moment it is attempting to mobilize a large scale delivery of legal services program to meet a perceived need on the part of the middle and lower classes for better access to legal services.

Finally, the third approach is the development of a new system for delivering more legal services to meet the increased demand. The ABA is presently in the forefront in this area with its prepaid legal services insurance scheme. This scheme is clearly of economic benefit to the organized bar. However, it is inflationary and potentially bad for the general economy. It promises to further overburden an already overloaded court system. Finally, it does not address itself to the social and economic problems which gave rise to the present demand for legal services.

History being a cyclical development, the future is probably in the hands of the second approach which would retreat to more traditional roles for institutions of civil justice. However, one can not help but be attracted by the potential for new legal institutions on the American scene, as one gains an understanding of the complexity of the relationship between civil justice and the social problems these new legal institutions represent.

130. Current observers believe that the large scale purchase of health insurance by corporations for their employees is a major factor in the rapidly escalating costs of health care in the United States. Proposals have been made for scrapping the health insurance approach in favor of more efficient and economic private programs as well as government health care. See for example, Platou & Rice, Multihospital Holding Companies, 50 HARV. BUS. REV. May-June, 1972, at 14; Ellwood & Herbert, Health Care: Should Industry Buy It or Sell It?, 51 HARV. BUS. REV. July-Aug., 1973, at 99. Prepaid legal insurance supporters should also note that health insurance plans have not solved the problem of delivering health care services in the United States.