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An Overview of Civil Legal Services Delivery Models

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An Overview of Civil Legal Services Delivery Models

Edwin Rekosh, Pascal Dourneau-Josette, Daniel L. Greenberg, David J. McQuoid-Mason, and Anne Owers

Abstract

The panel, moderated by Edwin Rekosh, discussed access to civil legal aid in various contexts. Pascal Dourneau-Jostte described the French system of legal aid, as well as the European Court of Human Right's methods of providing free legal services. Daniel McQuoid-Mason described the civil legal aid system in South Africa; he noted that only 20% of the country's legal aid goes to civil aid. Anne Owers discussed civil legal aid in the UK. Daniel Greenberg gave an overview of civil legal aid in the United States.

AN OVERVIEW OF CIVIL LEGAL SERVICES DELIVERY MODELS

APRIL 7, 2000

- MODERATOR: Edwin Rekosh, *Director, Public Interest Law Initiative, Columbia Law School*
- PANELISTS: Pascal Dourneau-Josette, *Deputy to the Head of Private Office of the President of European Court of Human Rights*
Daniel L. Greenberg, *Executive Director & Attorney-in-Chief, Legal Aid Society, New York*
David J. McQuoid-Mason, *Professor of Law, University of Natal, Durban, South Africa*
Anne Owers, *Director, JUSTICE, London, England*

MR. REKOSH: I am going to introduce the first panel of this morning, and I want to say at the outset that I am committed to get to the discussion portion of this panel, and in that interest I have decided to initiate the first annual Association of the Bar Brevity Award, which will go to any of my panelists who manage to clock in at fifteen minutes. I will set a good example by being brief in my own introduction.

The purpose of this panel—the *Batonnier* has given us a very nice introduction for it in fact—is to focus in on one of the topics we talked about last night, namely access to civil legal aid. As was made eminently clear last night, the United States does not have a stellar track record in this area, by any means. We may hear a bit more about that this morning, but the purpose of this panel is to hear from a variety of different countries about the civil legal aid systems in some other countries.

As for introductions of the panelists, you have full biographies in your folders, so I will only give very abbreviated introductions now. Introducing the panelists in the order in which they will speak, to my right is Pascal Dorneau-Josette, who is the Secretary of the European Court of Human Rights in Strasbourg, France. To my far left is David McQuoid-Mason, Profes-

sor of Law at the University of Natal in Durban, South Africa. To my far right is Anne Owers, the Director of JUSTICE, which is an advocacy organization based in London, England. And to my immediate left is Daniel Greenberg, the Executive Director and Attorney-in-Chief of the Legal Aid Society in New York.

So with that I will turn it over to Mr. Dorneau-Josette.

MR. DORNEAU-JOSETTE: Thank you and good morning. Before beginning, I should like to congratulate the organizers of this conference for their initiative and to offer them my sincere thanks for giving me the opportunity to address such an impressive assembly.

Three topics will be covered during this talk: the French legal aid system, legal aid in proceedings before the European Court on Human Rights, and lastly the case law on legal aid in the Member States and compliance with Article 6 of the European Convention on Human Rights.

First, the French legal aid system. As you know now, the French legal aid system is regulated by a 1991 statute (it has undergone a number of amendments since), and in order to remedy the shortcomings of the previous system dating back to 1972—the ceiling on income levels for eligibility for legal aid were too low and the range of matters covered too narrow—the 1991 statute (and a number of additional provisions since 1991) made legal aid more widely available.

I don't want to repeat what Mr. Teitgen has said, so I propose to give you some general information and provide a brief outline of the position in France. First; legal aid. Legal aid enables people of modest means too obtain state financial aid to meet all costs incurred in proceedings, such as legal representation, court fees, and so on. In addition, legally-aided parties are entitled to the lawyer of their choice. The financial aid may be total or partial, in which case the legally-aided party bears part of the cost and the state, the remainder. However, the courts are empowered to order a legally-aided party to reimburse his opponent's costs incurred in the proceedings.

All French nationals, nationals of Member States of the European Union, and aliens who are lawfully and habitually resident in France are entitled to legal aid to bring or defend proceedings.

All the means—salary and other incomes—of the house-

hold, the applicant, his spouse, and people habitually living under the same roof for the calendar year preceding the application are taken into account. But persons in receipt of certain state benefits are automatically exempted from having to show that they are of insufficient means. A legally-aided person may lose his entitlement if, during the course of the proceedings, his means increase beyond the statutory maximum for eligibility.

Lawyers play a fundamental part in the system, because, in addition to a substantial increase in the remuneration paid to them and to state-employed legal officers, major institutional reforms have been made with the aim of increasing the involvement of local bar counselors in the legal aid scheme. To that end, the bar counselors have been assigned two tasks. Firstly, they are required to manage state contribution towards the remuneration of lawyers performing legal aid work. That task results from the French Legislature's desire to strike a fair balance between state authority intervention and the independence of the legal profession. The state, therefore, provides each local bar counselor with a grant representing its contribution to the cost of legal aid. The bar counselor's second task is to define the local strategy for the assignment and remuneration of lawyers.

Now, a few words on the procedure for processing applications. The legal aid offices form the bedrock of the system. One is to be found at each court of first instance to which the local bar counselors are attached, the purpose being to simplify the processing of applications and improve relations with members of the public. Where appropriate, the offices include special units for dealing with applications concerning cases before the court of appeal or administrative courts. And there is a statute. However, the legal aid offices at the Court of Cassation and the Court of Assizes, the two French supreme courts, have been retained.

The legal aid offices decide several hundred thousand applications a year. By far the most common ground for refusal is that the applicant's means exceed the maximum; and the next most common grounds are failure to provide supporting documents and the manifest inadmissibility or unmeritorious nature of the action. But the grounds of unmeritorious nature of the action are the main reason for refusal of legal aid before the supreme courts; the refusal rate being 80%.

Just a few words on the statistical studies conducted several years after the 1991 reform which have put into perspective the notion that the system is inflationary. Official surveys tend to show that there is no direct correlation between the higher number of civil and criminal actions and the increase in grants of legal aid. In other words, there is nothing to suggest that the system results in proceedings being brought unnecessarily.

Now, just a few words on legal advice and assistance in the French system. Legal advice and assistance is the second part of the scheme introduced by the law of 1991. The legislature wished to fill a legal void by adding to the tradition of legal aid package a system that will come into play prior to the issue of proceedings.

Legal advice and assistance is often perceived, even in the Paris Bar, of course, as a moral obligation and has given rise to a number of local initiatives—free legal advice centers manned by lawyers, associations, and trade unions. Its rapid expansion is explained both by a constantly growing public demand linked to deterioration in the social context and by the complexity of the law.

But with legal advice and assistance, clients must be able to obtain information on the extent of their rights and obligations—not merely general pointers of no specific grievance to them—advice on how to assert their rights, and assistance in drafting legal documents.

I will describe very quickly a national system. I will now turn to the practical case of the system established by the European Court of Human Rights itself for the benefit of applicants. Our court does not charge fees. However, applicants are required to have legal representation if the Chamber decides to hold a hearing, which it generally does not, or where difficulties encountered in the case make representation necessary.

Accordingly, it was necessary for the Court to have a legal aid system for the benefit of the least-well-off applicants. The system is intended to fulfill the Court's wish that access to it is facilitated as far as possible; and it is for that reason, too, that application may be made to the Court informally by ordinary letter in which reasons are stated.

The rules of the Court provide for a system of legal aid which, once granted, continues throughout the proceedings.

However, so as to prevent the budget being burdened with cases that have no prospect of success, legal aid may only be granted for cases that have been communicated to the government. Thus, a large number of cases that are declared inadmissible directly following an initial examination by the Court are excluded.

Legal aid is granted by the president of the Chamber and two conditions must be satisfied. First, a grant must be necessary for the proper conduct of the case. This condition will not be fulfilled if the case concerns an issue that has already been settled by the case law. Second, the applicant must have insufficient means to meet all or part of the costs. The applicant must, therefore, notify the Court of all his income and financial commitments. His application must be certified either by the relevant tax authorities or, if he is in custody, by the prison registry.

We have a scale of fees for each type of service, drafting of the observations or pleadings, and for travel expenses if appropriate. The amounts awarded are assessed in the light of amounts generally granted by way of legal aid in Member States of the Council of Europe.

But while the Court's internal system represents an achievement in itself, it remains inadequate. This is partly because insufficient resources are available to meet legal aid costs. The Court has an overall operating budget in excess of 25,000,000 Euros, which is about the same in dollars. On that amount, nearly 29,000 Euros are allocated to legal aid: 29,000 Euros for 800,000,000 European citizens. The increase in the number of applications before our courts and the accession of Member States where per-capita income is very low has meant that the Court has, for the last two years, been obliged to transfer funds dedicated to other programs to meet legal aid requirements.

Finally, the system also has shortcomings from a purely practical perspective, as some countries have no authority empowered to certify that an applicant is of low income, a fact that makes the verification of applicants' means all the more uncertain.

I will now move on from the Court's legal aid system to look at the Court's case law regarding legal aid in the Member States. The European Court was first called upon to examine the legal

aid systems in the Member States and their economic implications.

In the case of *Airey v. Ireland* in 1979, the respondent state argued that its financial situation didn't allow it to develop economic and social rights, including the right to free legal aid. The Court dealt with that argument in two stages. First, it reiterated that the Convention must be read in light of present-day conditions and that the protection of the right guaranteed must be practical and effective. It went on to say that, consequently, the mere fact that interpretation of the Convention may extend into the sphere of economic and social rights shouldn't be a decisive factor against such interpretation of the Convention, especially as a number of civil rights have economic and social implications.

As regards complying with the grant as provided by Article 6 of the Convention, in particular the rights to effective access to a court, the European Court held that the Convention left to the State a free choice of the means to be used towards that end. The institution of a legal aid scheme constituted one means, but there were others. For instance, proceedings could be simplified or financial aid could be provided on an *ad hoc* basis for bringing a civil action; for example, actions against state agents, like in the *Andronico* and *Constantinu* judgments of 1997.

The Court has taken the view, since the *Airey* judgment, that it is not its function to indicate, let alone stipulate, which measures should be taken. The States are, therefore, not required to provide free legal aid for every dispute over civil rights. However, the Court has qualified that position. Although the provision of legal aid is only required under Article 6, Paragraph 3, of the Convention—that is to say, in criminal proceedings—and States have no obligation to set up a legal aid system under the Convention, that doesn't mean that legal aid in civil proceedings is systematically excluded.

The right to effective access to a court may mean that a lawyer's assistance is necessary, either because there is a statutory requirement for representation by a lawyer or because the proceedings or the case are complex. The Court laid down that principle in 1979 in its *Airey* judgment. It confirmed it nineteen years later in the case of *Aerts v. Belgium*, which concerned a mandatory requirement that parties appearing before the Court

of Cassation should be represented by a member of the Court of Cassation Bar.

The *Aerts* case also resolved a recurring problem relating to access to the courts. Remember, when describing the French system to you, I mentioned the legal aid offices and the fact that they turn down legal aid in a large number of cases, because they consider that insufficient grounds have been made out. The European Court has not yet ruled on the French position, but the Belgium system, which was considered in the *Aerts* case, is similar in many ways. What view did the Court take? It held that it was not for the Legal Aid Office to assess the prospects of success of a proposed appeal on points on law. That was a matter for the Court of Cassation and for it alone. It remains to be seen whether the European Court will follow that precedent and extend it to the other countries concerned.

But in any event, as with all cases concerning Article 6, the *Aerts* judgment shows that the fairness of proceedings must be judged on the facts of each case, as legal aid is intended to afford litigants effective access to the courts. Under no circumstances should the procedural arrangement result in an administrative body acting as a substitute for a court, even where it does so in the interest of ensuring that legal aid funds are put to good use.

I will conclude my talk with a few words regarding repayment of legal costs by a legally-aided defendant who is ultimately convicted. In the *Croissant v. Germany* judgment, the Court considered that such a system was compatible with Article 6 of the Convention, because it didn't affect the fairness of the proceedings. It took the view that the only relevant factor was that the applicant had received effective assistance in defending himself at trial. So the fact that he had been ordered to pay costs didn't affect the fairness of the proceedings.

Well, I am finished. I hope I respected the fifteen minutes and thank you.

MR. REKOSH: Thank you for a very interesting and far-ranging presentation. I don't think you quite qualified for the award, but I think we can give you an honorable mention. So thank you.

The next speaker is David McQuoid-Mason.

MR. McQUOID-MASON: Thank you.

I have been asked to talk on the delivery of civil legal aid

services in South Africa. What I am going to try to show you is how we've tried to develop a legal aid system. We've sort of "*ad hoc*'ed it," if I can use that expression, and we are moving towards a holistic approach, and I want to show you towards the end how that has developed.

When I initially was asked to talk, I saw that there were a whole lot of categories of legal aid services they were interested in, so what I have done is taken our experiences in South Africa to try to show you how we have dealt with different ones, but I am going to focus more particularly on what I think are home-grown South African solutions. They might not be home-grown, as we discover in the discussions.

Before we do that, what I need to do is tell you a little bit about the background to our legal profession as well, because you've got to look at this in context. South Africa has about 14,000,000 people, and we have about 12,000 lawyers, which is probably, a third or something that New York has, but it is not very many.

We have the British system of a divided bar, so we have advocates and attorneys or barristers and solicitors. We have the British system of internships, in that all law graduates have to do an internship period of one or two years before they can be admitted to practice.

We have a legal profession that is 85% white, although our population is 85% black, so we have a minority of black lawyers. We have a minority of woman lawyers. All those issues should be looked at in context when we are talking about the delivery of legal aid services.

We have about 3000 law graduates graduating every year from our twenty-one law schools; so, that is another factor that one should look at because that is important for resources in our country.

At the moment, because of the impact of the Constitution—I will come back to that—80% of our state budget on legal aid goes to criminal legal aid services. So we are getting less than 20% being spent on civil cases, and I will come back to that as well.

I want to say a little bit about the impact of the Constitution very briefly, a little bit about existing rules, and then come back to the different mechanisms. The Constitution has a right to

counsel in criminal cases clearly spelled out in detail. There is a general reference in the Constitution that people have to have a fair public hearing, and in the light of what Judge Johnson said yesterday and what we have heard now about the European Court, maybe someone could make an argument there that includes civil legal aid. But we have very specific provisions in terms of criminal legal aid, and so that is a gray area for us.

We have for the first time the introduction of class actions available for breaches of our bill of rights and we have very broad standing provisions, so that will impact on the mechanisms that can be used in the court. Those provisions are being used mainly, at the moment, in terms of rate-payers complaining about discriminatory, affirmative action-type rate situations. Also, they have been used by the courts to strike down attempts to limit claims in terms of what we call proscription or statutes of limitation. So that is being used to try to give access to justice when state bodies have said "You've got to give us notice within six months and you can only sue within two years." Those sorts of things are being struck out.

So the Constitution is starting to impact on the civil practice there. But its major impact has been the burden it has placed on the Legal Aid Board in terms of delivery in criminal legal aid defenses.

We have a number of court procedures that exist. Again, I think we inherited some from the British. We have *in forma pauperis* proceedings. Poor people can get lawyers to act for them *pro amica*, and then the lawyers just recover their costs and a reasonable fee—we have that sort of provision.

We have small claims courts. We are about to introduce consumer affairs courts. In the rural areas, where many of our people live, probably 50% of the population, we have traditional tribal courts and chiefs' and headmen's courts. There is a whole array of other mechanisms operating.

But I have been asked to focus really on the more traditional mechanisms. What I am going to do is make a few brief comments on things like uncompensated private counsel or *pro bono* and state-compensated or duty care. State-funded candidate attorneys, I think, are specific to us. State-funded law clinics are something you might find interesting. We also are moving towards justice centers, one-stop legal aid shops, which I will talk

about. We do have some private specialist law firms, and we will talk about that. We are starting to get prepaid legal insurance schemes. Contingency fees are being explored, and we are looking now at something called community service as well. I will talk about that. Those are some more South Africa-specific things.

But all of this has to be seen in context, because unless people understand what their legal rights are and where they can go for help, this isn't really going to add up to very much. So I am going to say a little bit about law-related education right at the end.

Let me begin very briefly with *pro bono*—I don't want to say much about it. We have procedural rules in our high court rules that allow poor people to go there. It is a procedure that is still used. When the Legal Aid Board was introduced, we thought we could scrap this rule, but what has happened is, when the Legal Aid Board runs out of money, you can revert back to this old rule again. So we have kept it on the statute book. It only affects about 800-900 cases a year at the moment, but it is a useful safety net.

Interestingly enough, the first attempt to set up a legal aid system in our country in 1992 was based solely on *pro bono*, and it didn't work, of course, because we all know that unless you pay lawyers for their services, you are not going to get a proper service. Lawyers say they do a lot of *pro bono* work. We don't have any official statistics, but I agree with what was said yesterday: *pro bono* is supplementary, but you cannot drive a legal aid system using *pro bono* services.

"Judicare" is the next thing I want to just mention briefly. When our Legal Aid Board was set up in 1970, they followed the British model—you are going to hear about it—which was based on judicare or referring matters to private lawyers. That is really how the Legal Aid Board has operated for many years. We have a means test which is less than US\$100 a month for a single person and less than US\$200 a month for married couples. We have a whole list of exclusions, such as when you can and when you can't qualify for legal aid. I am not going to go into all that; I have done it all in a paper for you.

Judicare stumbled along and worked okay, although it was expensive, until we got the new Constitution. Since 1971, when

the Legal Aid Board was up and running, we have had just under a million cases referred to private lawyers. But of that million, over half a million of them have been referred since 1994, which is when the new Constitution came in. Virtually 80% of those are in criminal cases.

With the new Constitution and the right to counsel enshrined in that Constitution, it means there has been a massive burden on the Legal Aid Board now—more than half the cases since 1994. That is in five or six years, it's over half a million cases. The result of that was to break the infrastructure that was operating.

The Legal Aid Board could handle *judicare* administratively when it wasn't dealing with so many cases, but once you started getting more accounts coming in than you could settle, the staff increments for the Legal Aid Board weren't keeping up with the requirements. Literally, the whole system has broken down, and we are busy having a look at the situation now, and it has really told us that (a) a *judicare* system is expensive and we can't really afford it, and (b) it is administratively taking up a lot of resources, and so we have had to look elsewhere, moving towards a salaried lawyer approach. We have done—and I will come back to it shortly—a public defender model, but that is too expensive for us. I am going to tell you a little bit more about our alternatives to that. Again, my paper has got lot of statistics if you want to explore that a little bit more.

I want to now move to a model which I think is unique in South Africa. As I mentioned, about 50% of our people live in rural areas. In the rural areas, in the small country towns, you cannot really set up a sophisticated legal aid office, but we have private law firms to employ students—because all our law graduates have to do an internship program before they can qualify. So the Legal Aid Board, after a selection process with Lawyers for Human Rights, identifies a law firm, which is prepared to take in a young clerk who would then be employed by the firm and paid by the Legal Aid Board, would be required to do ten legal aid matters a month and one day of community service for that firm.

That person would be someone from the community, so it would open up opportunities also for young people, particularly from disadvantaged communities, to get employed in law firms

and to provide a service for legal aid. So it is a fairly cheap method of doing it, but we are getting a good service from it, and it is one mechanism that is working. It might be something that could be used in some of the more rural Eastern European countries as a model as well.

The other innovation, I think, that we have in South Africa is a pilot public defender's office. We only got as far as Johannesburg, and the costs, once they start getting fitted into civil/public service scales, get a little bit more expensive. But what we have gotten is 3000 law graduates a year graduating, and we have law graduates looking for articles of clerkship, which are difficult to get. If you go to Poland, there is a huge problem, I know. We are not as bad as there, but probably 50% of these law graduates can be placed.

So what we came up with as a scheme was that the Legal Aid Board would set up a law clinic where we would employ ten of these law graduates as clerks and public defenders initially. These law clerks then are trained to not only do criminal defenses, but also civil law work. Our Attorneys Admission Act was amended so that students can do community service instead of simply going to private law firms. At the moment, we have something like twenty-two law clinics funded by the state's Legal Aid Board, each of those with between eight and ten clerks operating.

These state-funded legal aid clinics are doing, at the moment, about 33,000 cases a year—that is, twenty-two clinics. Fifty-nine percent are criminal cases; 41% are civil cases. But again, it is a very cost-effective way, much cheaper than the public defender office, of delivering legal aid services, particularly in the district courts.

The law clerks appear in the district courts. If they have been in the program for a year and have qualified and written their exams, they can move into the regional courts. The supervisors can appear in the high court as well. That is a model that we have used that we think is one worth looking at.

We are now moving with a more holistic approach into what we call Justice Centers, which is a one-stop legal aid shop, where we put together the bureaucrats who were running the legal aid offices plus these interns, plus a senior lawyer, who would be the supervisor for them, plus an advocate, a barrister, and paralegals.

I will talk about them later as well. So we are now trying to provide a full legal service for everybody.

But the main engine for that again is the interns. Sixty percent of those interns are from disadvantaged backgrounds and 49% of those interns are women, so we are trying to address the sort of skewed demography of our legal profession at the same time.

We also have private specialist law firms, and the best one in the country is Legal Resources Center—Vincent Saldanha and others will be talking about that later on for you—but they have been a very successful and very important component of access to justice in South Africa. Prior to the new Constitution, they were litigating huge actions against the apartheid state; now they are moving into the enforcement of social and economic rights, and you will hear all about that and land restitution, and so on.

Then we have the independent law clinics, and you can read about that in the Ford book that has been dished out to you. But we have had, since the early 1970s, law clinics in South Africa. All our twenty-one law schools now have them. They started off again providing general services across the board. There was the usual tension between service and academic training. Some of the clinics, and our clinic in particular at our university, with the advent of the new Constitution look to a more targeted approach: how can we ensure that Constitutional rights are being protected; how can we ensure that delivery is taking place.

So our clinic, for instance, focuses in three areas: domestic violence against women and children, administrative justice, and land restitution. Land restitution for us—that is, victims whose land was taken away from them during the apartheid era can get their land back—has proved a source of income for our clinic, because the land claims court has allowed the clinic to represent thousands of clients. We recently were representing 2500 clients, and that generated US\$100,000 for the law clinic. So it is a mechanism that clinics can use to assist the new government in delivery, at the same time to generate income for them.

As was said a long time ago in a book edited by Fred Zeeman (phonetic)—I thought Fred was going to be here; is he in the audience?

MR. REKOSH: I don't think so.

MR. McQUOID-MASON: But, anyway, a long time ago, one of his contributions in a book on legal aid mentioned that students represent a cheap source of manpower, and in countries like in Africa, where there isn't a lot of money available, you can use law students and law clinics as a very valuable resource, and this still holds true today. You can read about the details later.

Paralegal advice officers for us also are very important, because paralegal advice officers are really at the front line. They are based in the communities. In South Africa, we have something like 350 of these community paralegal advice officers, particularly out in the rural areas. They link up with organizations like the Legal Resources Center, Lawyers for Human Rights, National Association of Democratic Lawyers, and the Black Lawyers Association. They provide a very important function, because they are at the grass-roots level. Recently the Legal Aid Board and our one-stop shops are trying to bring these into the system as well.

We have a program at my university, a Community Law and Rural Development Center, where the people in a village will elect a committee of ten to set up a paralegal committee. The paralegal committee will nominate two people and send these individuals to the university to be trained in an intensive three-month program on how to run an office and educate people about their rights. They go back, live in their communities and service the communities, and they link up with lawyers. So you have to look at legal aid services holistically as well. It is not just lawyers; it is paralegals as well.

Prepaid legal services insurance schemes are something that is just starting in our country. You can read about it. We have about 600,000 members at the moment. The contributions might be interesting for you. At the moment you can get schemes for less than US\$6 a month and US\$12 a month, and that gives you cover up to the equivalent of US\$12,000.

Contingency and speculative fees, I will not dwell on them. You can read about them. Like the British, we have been very nervous about contingency fees. I don't know, we will hear later whether the British are introducing them. We have always had speculative fees—I don't think this is really a distinction—which allows you to take on a case and agree on a fee, as long as it not

twice the normal tariff. We have very strict tariffs. That is something for the future; the Law Commission is looking at it.

An innovation that they introduced for medical students about two years ago in our country was compulsory community service. All medical graduates have to do a housemanship or internship. Now they have to do it for the state as community service, because we had a problem where everyone wanted to go to the big cities and the rural hospitals were neglected. We are now looking at that. It was suggested by Justice Arthur Chackalson, President of our Constitutional Court, a couple of years ago, that we should look at that for law students. The law students are excited about it, because many of them cannot get articles and internships. Unlike the medics, who are horrified about it, the law students are very keen, because they are going to get practical experience.

So we are looking at how to introduce that. We had a national legal aid forum a couple of years ago. We have almost 432 magistrates' courts where these students could be placed. We need to work out mechanisms on how we are going to control them, maintain standards, and so on.

The last point I am going to finish off with is law-related education. All of this is very well to have all these wonderful schemes, but if people don't know what their rights are or where to go for help, it is not going to work. And so one of the programs we use is a program we call Street Law. We borrowed it from the United States; you guys invented it in 1972. We took it to South Africa in 1986, changed it around, indigenized it, and we now run it at sixteen of our twenty-one universities. Law students are trained to go into high schools and teach students about their legal rights. We train community people. It is a mechanism that is also used out in the rural areas by the paralegals, and so on.

So I think, at the end of the day, what we are learning in South Africa is we have tried all these different sort of methods of doing things, but really, you've got to look at access to justice holistically; you've got to look at it from the educational point of view; you've got to look at it from the paralegal grassroots point of view; and you've got to also look at it in the traditional categories. We are sort of moving towards, we hope, a one-stop/one-shop sort of holistic approach.

Thank you.

MR. REKOSH: Thank you, David. Another honorable mention. You managed to pack a huge amount of information into something very close to fifteen minutes, so thank you very much. Anne?

MS. OWERS: There's a challenge. I've got two challenges. One is the fifteen-minute challenge and the other one is having been trailed yesterday as representing the one legal aid system that's got it right.

Before I start talking about the new system, which just came into effect last Monday—we are talking about something very new—I just want to talk a little bit about the system that preceded it and perhaps qualify some of the things that were said yesterday. Of the US\$1,500,000,000 (1.5 billion) spent on legal aid, only half of that was on civil legal aid; the other half was on criminal legal aid.

I think one of the problems about our legal aid system that existed was due to three characteristics. It was demand-led and billed by the hour, largely by the hours spent by lawyers, and by lawyers in private practice. The only way of controlling what was spent was by decreasing the number of people who were eligible to get legal aid at all. So, increasingly, governments dealt with a burgeoning legal aid budget by decreasing the number of people who could have access to legal aid, to the extent that, unless you were on benefits or earning very, very low incomes, you could not get legal aid. That, of course, is a particular problem in a legal system where, if you lose a case, you face having to pay the other side's costs. So people of very moderate means would be very nervous about being able to exercise any rights to access to justice.

The other thing was that though there had been a large increase in the number of lawyers, the proportion of welfare law advice and poverty law advice still remained very small. In the 1970s, I was instrumental in setting up an advice center and then a law center in a very poor area of South London, where at that time there was not a single firm in private practice that offered any welfare law, housing law, immigration law, or any of those kinds of areas. And it is still the case that most of the welfare law within the United Kingdom is done by very low-paid, salaried

lawyers with a few exceptionally good and very good legal aid firms.

A lot of private legally-aided work went towards matrimonial work and personal injury work. Also, although the legal aid budget was expanding, 31% fewer cases were being taken on at a time when the budget expanded by nearly UK£200,000,000 (two hundred million).

Legal aid also wasn't available, and still isn't available, for areas where a lot of low-income people want to assert their rights to employment and welfare benefits in the tribunal system. And there were also issues about the quality of advice offered and in some cases about the fund actually being abused by lawyers, particularly with a small minority of firms in immigration law—one of the most expanding areas of the legal aid budget.

Nevertheless, the interplay between a very small salaried sector and the lawyers in private practice doing legal aid did have some significant benefits in some particular areas of law. I could mention, for example, the growth of civil actions against the police for people who died or were mistreated in police custody, which may be something of particular interest in this city just now.

So that was a very brief thumbnail sketch of the old system. What then is the new system doing, and how will it differ? The new system aims to take greater control over the legal aid budget, both by way of controlling expenditure, the quality of those who can give advice and representation, and also by controlling to a greater extent the areas of law that legal aid will be provided under.

The Lord Chancellor set out in a very early document that he produced, once the new government was elected, what the priorities he saw were for legal aid, and I am quoting from him. He hoped to set up a community legal service which would revolutionize ordinary people's access to information about their rights. "It will be a cornerstone of the government's pledge to protect everyone's basic rights. The disadvantaged and socially excluded will find help with the issues that affect their everyday lives at the heart of the new service. Legal aid spending will be refocused on the people and cases where it is most needed and can do most good."

The Lord Chancellor, of course, is a very important player

in the United Kingdom, being the head of the judiciary in England and Wales, a Cabinet minister with his own government department, and the Speaker of the House of Lords. So you can see that whatever else we have in the United Kingdom, we don't have the separation of powers.

Those priorities were reflected in the first directions under the new system which the Lord Chancellor set for legal aid. In it, he emphasized priorities such as child protection, cases where life and liberty were at issue, child welfare, domestic violence, breaches of human rights by public authorities, and social welfare law concerning debt, housing, employment, and benefits. He also promised to spend an additional UK£23,000,000 (twenty-three million) on asylum cases and an additional UK£23,000,000 (twenty-three million) on things like mental health, community care, and human rights cases.

Legal aid will now be delivered, as of the third of April, by a new body called the Legal Services Commission which was set up to take over from the Legal Aid Board. The Legal Services Commission, operating on a fixed budget, will only contract for legal aid to quality-assured suppliers on exclusive contracts. So it will no longer be the case that any lawyer operating within the United Kingdom can take on legally-aided work. They will only be able to do so if they have been contracted to do so by the Legal Services Commission, which will require certain quality standards from them in the area of law where they practice.

One of the immediate shakeouts has been a substantial reduction in the number of private law firms offering legal aid, from around 11,000 to around 5000. That has to be qualified by saying that the 5000 were offering, in practice, about 80% of delivery of legal aid, so they were the ones majoring in legal aid before. But it is undoubtedly the case that the geographical spread of where you can get legal aid advice and the amount that you can get will at least initially be reduced under the new plans.

The Legal Services Commission is, however, also looking at things like second-tier advice, specialist agencies to help front-line advisors, and things like telephone advice and information, which have not traditionally been funded at all under legal aid. The system is clearly a much more controlled system, and as I indicated at the beginning, the priorities and the aims—the aim

of quality and the aim of redirecting legal aid towards some of the poorest and most disadvantaged in society—are ones that most of us would sign up to. We do not have problems with the system when it is run by a beneficent Lord Chancellor and a beneficent Legal Services Commission. But some of you may have experienced the differences that arise when political control changes or priorities change and those running the system are not so keen to have those areas litigated. That has certainly happened in some countries.

The other kind of problem hovering over is the fact—it has already been mentioned in South Africa—that criminal legal aid can take over. The priority for providing counsel in criminal cases is much higher. With the Human Rights Act coming on stream, we are going to get a great deal of litigation in criminal cases. It has happened in every other country that has brought in constitutional rights. There is no reason to suppose it will not happen in the United Kingdom. And with a fixed budget, it is possible that that will eat into civil legal aid.

There will also be a lot of litigation on the Human Rights Act, and some of that will be at a very high level rather than at the low level of social-welfare law.

The counterweights to this fixed budget by the Legal Services Commission are two. One is the existence of conditional fee arrangements. It is now possible to get conditional fee arrangements between lawyers and their clients in a much greater variety of cases than was possible before; also, some cases like personal injury cases that can be funded through conditional fee agreements will by and large be outside legal aid. Legal aid will no longer pay for those kinds of cases.

That involves setting up insurance against those cases—insurance to cover expenditures—and setting up the possibility of recovering expenditures as part of the recovery of costs. That is still very new, and it is much too early to say whether that will really provide the additional boost and allow the Legal Services Commission money to be used for the purposes for which it is intended.

The other side of this is something called the Community Legal Service itself. One of the funds the Legal Service Commission operates is its Community Legal Service Fund, but it is not the only player providing legal services at community level.

One of the other things that has been happening and that was launched on the third of April is a community legal service that is based upon the notion of local partnerships between funders and suppliers of legal services. The Legal Services Commission, via legal aid, is one of those funders, but it is by no means the only one. Many local authorities (local governments) fund advice centers, citizens' advice bureaus, law centers, and places which would have largely been at the forefront of social welfare law. Also, increasingly, charities are moving in. Our National Lotteries Charities Board is funding some of the legal services provided for disadvantaged people and for children.

The idea of the community legal service is very much to front-load advice, to emphasize the importance of initial advice, initial information, and its provision by paralegals and salaried lawyers, as well as by private practice; and to try to rationalize the very fragmented way those services have been provided up until now with a variety of funders, a variety of quality standards, a variety of requirements from different funders, gaps in the provision of services, and a great reluctance to refer cases from the front line to the specialists.

There have been some "Pioneering Partnerships" set up at the local level to look at ways of dealing with structural funding and quality problems. Six pioneer partnerships, plus forty others, have been working over the last year or so, and there has been a research report upon what they have done. They have tried to identify good models for structuring the funding and supply of legal services at a local level, and to try to work out better ways for funders and suppliers to work together.

Clearly, some problems have emerged out of that exercise, as well as some possibilities. There are differences between the priorities of both those funding and supplying legal services. I think the two principal concerns one would have about funding and supplying legal services are accountability and independence. The community legal service partnerships, although they are local, are very heavily led by the funders. One of the funders is the Legal Services Commission, which has essentially driven the set of priorities and budgets derived from the Lord Chancellor and its statutory duties under the act. And how you link that with trying to identify and respond to local need is a concern.

The involvement of local authorities or local government,

one of the other funders, has the potential for conflicts. One of the things that the research study pointed out is that local authorities may be keener to fund welfare benefits advice programs, which increase the wealth of those in their community without any expense to the local authority, rather than, for example, housing disrepair work, which may place a significant financial burden upon the local authority itself.

The suppliers have less of a voice than the funders, and it is feared that some of the big suppliers, like the National Association of Citizens Advice Bureaus, that they may get a stronger voice than some of the little local advice and law centers who have been doing extremely good work locally.

The missing voice in the community legal service partnerships is largely, I would say, the consumers. There is some use of focus groups and questionnaires, but there is no sense of bottom-up consultation or any power to the consumers of legal services. So that would be a concern.

A second concern is as follows: although the models that are being developed are good models, where are the resources to develop those models and the resources to roll them out across the country in something that we will actually be able to deliver? Solving the problem of fragmentation requires a bit more than just pressing a defrag button.

The decrease in lawyers in private practice operating legal aid may mean that there is a front-line service, but there is nowhere to provide the specialist legal help that people need. So front-loading a service may actually become downloading, de-skilling, and depending too greatly upon overworked local suppliers.

At the same time as community legal service has been developing the structural partnerships, it has also been developing a quality mark and assured competencies, which it is hoped will ensure quality. But again, there are some problems about that, principally the problem of properly monitoring quality and also making sure that the quality level, which should be a minimum benchmark, doesn't become all that you aspire to and discourage innovation.

There is a Web site for the Community Legal Service, but at the moment it is largely a sign-posting service. It is hoped that it can be developed into something more than that.

So where are we then in the brave world of the U.K. legal services? I would say we are somewhere that offers a lot of opportunities. There are an awful lot of good fairies at the christening of the new system, with some very good ideas and aims: better service delivery that recognizes the importance of the salaried sector, paralegals, referrals, new methods of delivery, the provision of information, and paying lawyers not to do case work but to provide information.

The principal concerns must be the power of the funders of the service, the fact that it is centrally driven and topdown and has a fixed budget and a fixed number of suppliers. The control that is exercised is a very great control. If it is used to provide a better service, that will be good, but there is a concern that it will be driven by other priorities. Funders in the past have tended to sacrifice quality to quantity and outcome to output. There is a fear that this will carry on.

The greatest fear, of course, would be that the good thing, the concentration on social welfare poverty law, would become literally "poor law," where there will be over-reliance on front-line, non-specialist, overworked, and underfunded agencies which do not have the ability or skills to process matters that ought to be litigated or to deal with the underlying legal issues.

In conclusion, when I presented a similar paper in Australia a year ago, I said the jury was still out on whether the United Kingdom could square the magic circle of delivering better quality, better targeted legal services at no additional cost or very minimal additional cost. That jury has now been sitting for over a year, which is probably in breach of its human and constitutional rights, and its verdict is still not settled.

But what is clear is that we are going to have a very interesting time in the United Kingdom over the next year or two, with new legal services provisions, a new Human Rights Act, and probably a public-defender system for criminal cases. So it is going to make for a very interesting time for public-interest lawyering in the United Kingdom.

Thank you.

MR. REKOSH: Thank you very much, and I am particularly pleased that we have now heard an alternative version of an assessment of how civil legal aid is provided in the United Kingdom, because I do hope we will have a little bit of time for discus-

sion, and it is controversy like that that creates a good discussion. So thank you very much.

MR. GREENBERG: We usually begin talks when we are on panels by noting how pleased we are and honored we are to be in a group as distinguished as this, and we often say that people in the audience certainly have as much to say as we do.

I am particularly reminded of this because my friend David, when he was talking about South Africa in one of the throw-away lines in his very good presentation this morning, had the phrase that I wrote down. He said, "And then, of course, there are the bureaucrats running legal aid offices." That resonated particularly with me as I looked around the room at people who are still doing the work. I have grown up to be a bureaucrat running a legal aid office, albeit a very large legal aid office.

So I thought that I would try to very briefly touch on some of the models in the United States and thank Earl Johnson and Mike Cooper who started yesterday, because they said much of what I wanted to say. Therefore, I may get in within the 15-minute limit set by Ed, because they talked in great detail about the lack of legal services, although we ostensibly have a very large Legal Services Corporation that is supposed to be funding this. They really did go through the numbers and the eligibility and the fact that it cannot even begin to approach what is needed in this country, notwithstanding the great wealth that the country has.

What I thought I would then do—which I think would be of great service to those of you who are here as visitors to this country and are going to be spending the next day and a half here—was to point out to you the people in the audience who really are the experts in some of the delivery models that we have. I am really just going to ask them in one sense to just stand or wave or something. In one particular case, I may call on them to say something. But I just wanted to highlight a little bit of that and then just save a minute or two for some questions about why it is that, with these delivery services in this great country, we don't even begin to tap into what is needed by poor people within the legal system.

The primary way that poor people get their services is through the Legal Services Corporation offices. Again, you heard a great deal about that, a US\$600,000,000 (six hundred million) figure leveraged but really only US\$300,000,000 (three

hundred million) which Congress gives. It is estimated, however, that only one out of every ten people who need legal services can get it through those offices that have restrictions on them.

Robert J. Rhudy is in the front row. He runs the Maryland program. It not only has the Legal Services Corporation programs but, like a lot of states, it tries to integrate all of the services, and he will be here and he will be glad to talk to you and really go into some details about that.

David talked a little bit about law school clinics. Apparently, in South Africa, they actually do deliver a great number of services. Rick Wilson is sitting in the back; he is a clinician. Bruce Green is somewhere over there; he is at Fordham Law School. Both of you raise your hands and stand up for a second.

Rick, I am going to call on you because you are a professor and I get to do this. Do you think that clinics here actually deliver a good deal of legal services, or do they have some other role that they really play?

MR. WILSON: This is unfair.

MR. GREENBERG: Well, that's right. I did it deliberately. To call on a professor when he is unprepared, what could give you more pleasure? It is about as good as it gets, really, huh?

MR. WILSON: Well, I think the law school clinic picture in the United States and the delivery of legal services is best embodied in David's description of the tension between service delivery and educational goals. I think that, by and large, clinics in the United States have decided to focus on the educational objectives first, so there are lower caseloads and attempts to limit the expansion of the caseloads, so that students have an opportunity to learn how to practice, rather than carrying extensive caseloads. In part, this decision is driven by the sense that government has an affirmative obligation to provide the resources necessary for the provision of trained legal professionals to represent poor people in both civil and criminal matters where the Constitution requires the provision of counsel.

The Legal Services Corporation, for some period of time, funded law school clinics and the experiment was, most would say, partially successful. I think it did expand service provision in some areas of critically needed legal services. In fact there was a move in the early 1980s to transfer the entire burden of legal

services provision in civil cases to law school clinics as a political strategy by President Reagan to attempt to de-fund the national Legal Services Corporation. That was unsuccessful. It was resisted by the organized bar, the lawyers who participate in the program, and the clinics.

MR. GREENBERG: And now I am going to cut you off.

MR. WILSON: So that's the story.

MR. GREENBERG: So I think that's the story. I think clinics here in fact are not a large source, that the pedagogical component of it is so much more important, although in fact law students through some *pro bono* programs also do provide some degree of legal services to poor people.

Thank you, Rick. You were terrific for someone unprepared.

There are *pro bono* services. There is no *judicare* in this country, but there are *pro bono* services. Those will be dealt with in a panel tomorrow in greater detail, and I need not go into it except to say that Joan Vermeulen, who is one of the key people in putting this together, her organization, New York Lawyers in the Public Interest, works very closely with the private bar, as does the Legal Aid Society. And so there are resources there to talk about it.

The last model is public interest law firms, law firms put together in large part by foundation grants or some private fundraising that do very specific and targeted kinds of work. They may represent African-Americans. The greatest and the first was the NAACP Legal Defense and Education Fund that brought the great case of *Brown v. Board of Education* in this country in the 1950s.

David Udell is here. He is from the Brennan Center, which is on the forefront by being not only a private law firm—well, public because it is at New York University Law School—but also by being very, very keyed in to legal services. David is a long-time legal services lawyer who is now fighting some of the restrictions that the Legal Services Corporation has put on those programs that want to do that work, and so David is here as a resource.

Also, there are other people. Clint Bamberger, whom you will hear from later, runs the gamut from law schools to Legal Services Corporation to just being the all-around guru to many of us in these areas.

That is the model of delivery. Again, what Mike Cooper and Earl Johnson said yesterday was so important to it. But to the extent that in yesterday's panel Earl Johnson did spend his time talking about access to lawyers and the others talked a little bit about the politics that underlie what was going on in their country, I thought that I would just spend a minute or two trying to pick up that thread and ask the simple question of what is going on. Why is it that a country this wealthy has such little resources going to it? Six hundred million dollars on the budget of trillions of dollars is a joke. It is no money on legal services. Congress appropriates more for an inch of a B-52 bomber than it does for the entire Legal Services Corporation's budget. An inch of a B-52 bomber is more money than all of the money spent to provide access to justice to poor people.

One of the reasons that can underlie this disparity is the contradictions of this society. We have a Declaration of Independence, our great founding theoretical document that gives people the right to life, liberty, and the pursuit of happiness. A few years later, when that gets translated into the Constitution, it becomes life, liberty, and the protection of property.

In many ways, the economic system here has an underlying premise that everyone can be rich and powerful, and the only reason you are poor is because you are lazy and wasteful at best, and harmful at worst. It has always been a struggle to get resources for those people who most need them.

When you put together that the legal services movement has actually been quite successful, has won most of the cases that it brings, and has actually made a profound difference in poor people's lives in getting benefits and rights to housing and protecting people within the limited range that law allows it, you understand that we are operating within a political system where it is really very smart of government not to fund legal services.

The mayor of this great city, who appears daily in our newspapers and in the *New York Times*, de-funds my program because we win. That seems pretty logical on his part, if he could get away with it. It doesn't seem to be something that is in his interest to fund us when we keep beating him.

I think that the central contradiction of relying on government funds to sue the government is one that has to be dealt with in a way better than we have been able to. We have certain

rhetoric about access to justice. We talk about all people having the right to be heard. We talk about being safety valves, that without Legal Services there would be riots, and aren't you better off having people in court with jackets and ties arguing instead of having people in the streets throwing bricks? But now that people are picked up on the streets for just sitting around, people who throw bricks will be arrested even more so, that argument begins to lose its resonance as well.

So I guess I just wanted to say that as we analyze this and as developing nations and those in transition struggle with how to create a network that gives poor people dignity through the law on the most limited amount of resources balanced against the right to give it to people who are accused of crime, the great challenge for my country, I think, is that there are so many resources, and nonetheless, the amount given to poor people for access to justice is so pitifully small.

So it is not only the amounts that a country can give; it is the will to be able to bring the people of the country into the belief that there is something valuable in letting people have access to courts, that there is something right about it that it transcends laws and codes. It transcends laws and codes whether you use this system or that system, because, in the end, the systems aren't all that important. If you set up a system that is inadequately funded, it doesn't matter in the end which one you inadequately fund. And in the end, it doesn't matter what source they have if you set up systems that are well-funded.

So I think that all of us who come to this Congress, to this conference—Congress is on my mind a lot lately—all of us who come to this conference have different ways and different struggles of thinking it through. I have already, just from last night, learned an enormous amount, by hearing people who struggle with racism and are faced with the kinds of repression against women that endanger their lives. It makes those of us here who merely get pilloried in the press or merely have a mayor attack us recognize the firmer footing that we are on, and that in some ways our challenges are much harder.

But I think that conferences like this will give us all energy, and I hope that those of you for whom this is a talk at five o'clock in the afternoon because your internal clocks have not yet caught up with you can nonetheless stay awake enough to

hear my colleagues in the afternoon and tomorrow so that we can all get sustenance from each other.

Thanks.

MR. REKOSH: Thank you, Danny, for a very fitting summing-up of our panel.

I have been promised that we have an extra five or ten minutes, since we started late and we can pass along some of that burden to the next panel, if there are any questions in the audience or comments in the audience. So I would like to now open the floor to see if there are any questions or comments. If you have one, please come up to the microphones, because I understand that the video won't capture the question without your doing that.

AUDIENCE: I am very concerned about the situation in the United States with respect to restrictions that are being imposed on legal services advocates that prevent them from taking certain kinds of cases and with the difficulty in budgeting and monetary resources, why haven't the organizations that you're part of formed some kind of political committees? Are you prohibited from lobbying, from trying to put pressure on Congress? You would think lawyers would be more sophisticated in terms of dealing with politicians and promoting the interests that are so important.

I don't know, in each country, if there are restraints on you from doing so, or does it take a certain amount of money to start these things up, and since you have a lack of funds to begin with, you never get off the ground to do it? It would seem to me that is something very fundamental; and as noble and as worthwhile as your efforts are, it would seem to me raising money by bringing political pressures to bear or getting those who professionally know how to do so, that you would somehow bring that about. Why not?

MR. REKOSH: Do you want to answer that, Anne? Do you want to stay away from that one?

MS. OWERS: Not particularly. I mean, I think there has been quite a bit of political pressure in the United Kingdom both from the bar associations, who operate quite good politically, but also from those of us outside in the non-governmental sector. I think that has helped to reshape thinking; I hope it has helped to reshape thinking.

Lawyers are not the most popular group of the community to campaign for and, as in the States, in the United Kingdom, the equivalent of shroud-waving is the fee note-waving that a minister will do when he stands up in Parliament and tells you how much of your taxpayers' money is going to subsidize a million-pounds-a-year income. That is very rare at the very top end. But it makes political lobbying quite difficult, and I guess it's the same over here.

MR. McQUOID-MASON: I think with us as well in South Africa, when you are trying to restructure housing, education, health, and everything else, it's the bottom of the pile, and particularly when the criminal legal aid defense money is rolled up together with the civil legal aid money, and the minister moves his budget vote, and everybody is saying the crime rate is so high here, why the hell is so much money being spent on criminals? It is not a very popular mechanism, really, to deal with it.

So it is difficult for a minister, when he is competing with a lot of other ministers in our country, particularly, and, I imagine, other societies in transition. Legal aid is not always seen as a big priority in most countries.

MR. GREENBERG: In this country the private bar has actually, in one way, been very successful. The fact that the Legal Services Corporation still exists, I think, is largely due in part to the American Bar Association and others who have fought for it. Even as its funding has diminished it is still there, which, given the conservative mood, is a great benefit.

As to the power of lawyers to do it, I will simply tell you that early in the administration in this city, when the Legal Aid Society went up very much against this mayor and he forced a budget cut on us, someone made the observation that the mayor had on his side the triple crown: he got to beat up on lawyers, who were paid by the government and representing people that nobody liked.

That's a triple threat in a political arena that is often hard to overcome, as much as we do rely on the private bar and others to be helpful to us.

MR. REKOSH: If there aren't any other burning questions, I think we've probably run out our welcome. But I would like to say that I think, in my opinion, our panelists all deserve an award for providing us so much food for thought in such a concentrated amount of time. Thank you very much.