

However this may be, it would appear that the intellectual hazards inherent in the writing of a lengthy book are not unlike those attending a long life: the opportunities for self-contradiction, and even more serious lapses, tend to multiply. It is regrettable that Mr. Pusey has spoiled an otherwise truly superior biography by overdrawing the image of his subject. Blanket comparison with Marshall will not erase the fact that as Chief Justice, Hughes failed, on several critically important occasions (before 1937, to be sure), to perceive the real nature of the problems confronting his country and of the constitutional powers to deal with them.

But the life and achievements of Charles Evans Hughes were distinguished enough not to require artificial inflation. Even after allowing for his limitations, the biographer could still have said of him what Holmes said of Brandeis: "I think he has done great work and I believe with high motives."

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LEGAL AID IN THE UNITED STATES—A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES. By Emery A. Brownell. Rochester: Lawyers Co-operative Publishing Company, 1951. Pp. 333. \$4.50.

THIS volume is the end result of a major effort of the Survey of the Legal Profession. The author, Emery A. Brownell, has had a distinguished career in legal aid work and is therefore exceptionally well qualified. Using as a starting point Reginald Heber Smith's pioneer study, *Justice and the Poor*, published in 1919 but reviewing the conditions as they existed in 1916, the study traces the history and development of legal aid in this country since that time, analyzes the existing services, the unmet needs both in civil and criminal cases, and the steps necessary to meet these needs. It brings together all available materials, and in addition the results of several studies made expressly for this volume. The book is accompanied by 39 statistical tables and 5 charts, a foreword by Harrison Tweed, President of the National Legal Aid Association, and a lengthy and provocative introduction by Reginald Heber Smith. It is without question the most comprehensive study of legal aid service in this country ever published, and the first important study since the great depression. It will be of great value in providing a basis for charting and promoting legal aid work in this country.

One of the chief contributions of the book is the completeness of its study of legal aid in criminal cases. The principal facts are marshalled covering assigned counsel, public defenders, private defenders and other methods of providing counsel to accused. The evaluation of these several approaches is

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based on the hard core of experience of the experts on the advisory committee which assisted Brownell.

The study concludes that the public defender system is the most effective. As to the most common objection, the fear of graft or inertia, the following statement is made:

“[T]here are undoubted advantages in having defense counsel completely independent, but the experience of the past thirty-five years has shown that this can be achieved in a public as well as a private setting if proper safeguards are observed. There is no inherent reason why a Public Defender should not be as conscientious and as trustworthy a public official as the judge who sits on the bench.”

In the field of legal aid, the basic question always is: What is the need and to what extent is the need being met? In connection with criminal cases, the study concludes that approximately 63% of the defendants in criminal cases are unable to employ counsel. In 1947, an estimated 97,000 persons who could not afford a lawyer faced prosecution in serious criminal charges, and not more than 22,000 were assisted by public or volunteer defender organizations. At least 38,000 went without any form of legal aid whatever. The study points out that the need for counsel is not limited to felonies, but extends also to certain types of misdemeanor and other less serious offenses, particularly those which present issues not readily understood by laymen, and which carry substantial penalties.

As to civil cases, the study concludes: (1) that legal aid service in civil cases is required for 30 million persons, or 20% of the population, of whom 16 million live in urban areas in which the services must be more highly organized; (2) only slightly more than half of those in urban areas has an adequately organized legal aid service, but little has been done in rural areas, even on a volunteer basis; and (3) in contrast with 265,224 civil cases handled by legal aid organizations in 1947, the need is for a service that can handle 615,000 civil cases annually.

While these conclusions show a serious gap between services provided and need, the statistical standard used in the study in connection with measuring the need for legal services in civil cases brings about a gross understatement of the unmet needs for legal aid services.

The measurement of need adopted is stated as follows: “The conclusion is irresistible that experience has confirmed a standard of 10 cases per thousand of population as a reasonable guide by which to judge whether the full need for Legal Aid service in civil matters is being met.” The statistical basis for this conclusion is a special study made for the Survey of the Legal Profession of the actual experience of 43 representative legal aid organizations over a period of 12 years, 1936-1947 inclusive. This shows a result of 7½ cases per thousand of population. In reference to this study Brownell states, “It is apparent, however, that this is a measure of the extent to which the

need for legal aid service is being met and not a true measure of the probable actual need." He adds  $2\frac{1}{2}$  cases after taking into account that *Justice and the Poor* uses a 1916 standard of 13 cases per thousand based on the experience of two public bureaus, that Smith and Bradway in their 1936 study of legal aid work used a standard of 10 cases, and that the special study did not include the experience of certain public offices. In contrasting the extent of legal aid work for the years 1916 and 1947, Brownell makes use of the 10 case per thousand standard. However, in determining the extent of present unmet needs in urban areas, he reverts, without explanation, to the standard of  $7\frac{1}{2}$  cases per thousand to reach the conclusion that the need presently is for a legal aid service that can handle 615,000 cases annually. Considering the careful manner in which almost everything else has been approached in the study, it is difficult to understand why Brownell adopts a standard which so obviously flaunts the most elementary principles of statistical research.

An actual study of the legal problems of a representative sample of persons in the lower income group would provide the only sound approach to determining a standard of need. No such study was carried on by the Survey.

Two additional references are made by Brownell in attempting to estimate legal need: the study made by Earl Koos, Professor of Sociology, University of Rochester, and the experience of the armed forces. The Koos study, digested and analyzed in Chapter III, was primarily concerned with determining whether laymen recognized their legal problems and their attitudes toward lawyers. Determining the volume of legal need was only an incidental part of that study. The study showed that 35.6% of working class families have legal problems but no attempt was made to determine the number or frequency of legal problems for such families.

During the period of March 16, 1943, to December 31, 1948, the Army legal assistance officers handled in excess of 10 million cases. During the same period, using the standard of  $7\frac{1}{2}$  cases per thousand, the legal aid needs of the entire country, including the armed forces, would be in the neighborhood of 7 million cases. Brownell also calls attention to the fact that recent reports of the Navy Department's legal assistance branch reveal that since the war 10% of the Navy personnel seek legal advice of some sort every six months. This would establish a standard of 200 cases per thousand on an annual basis. Attention is also called to the fact that the Air Force has an even higher incidence, 14% of its personnel calling for legal assistance during the first six months of 1949. While it is possible that the frequency of personal legal problems among the armed forces is substantially higher than that of citizens at home, it is also true, as Brownell recognizes, that "a higher percentage of the military and naval personnel are relatively young, have not yet married, or acquired homes or committed themselves to innumerable contractual obligations which beset the average citizen."

The great disparity between the standard adopted and the actual use of lawyers when available, as they are in the armed forces, would indicate that

the standard represents a serious distortion of the need. Certainly the least that can be said is that the absence of a study devoted to the problem of determining the need deprives the conclusions of real validity.

Brownell estimates that 20% of the population, or 30 million persons, are eligible for legal aid. It would not be unreasonable to assume that during a 12 months' period, at least one out of ten persons in that group would have a legal problem. This conservative estimate would establish a standard of 20 cases per thousand population. But the underlying assumption of this estimate, which is no worse than the assumption underlying the 7½ cases per thousand standard, is no proper substitute for the facts which can be established.

It is disappointing that in the first comprehensive survey of legal aid work in many years that a more scientific attempt was not made to determine the extent of the unmet need. The approximate determination of this need is fundamental. Its size becomes exceedingly relevant in determining how legal aid should be financed. A statistically sound estimate rather than guesswork must be the basis for making the vital policy decisions involved in formulating a program for effective legal aid work in this country.

A second weakness of the study grows in part out of the failure properly to calculate the need and in part from a serious division of opinion among the members of the Survey Council. The study recognizes that the most serious obstacle confronting organized legal aid work both on the criminal and civil side is financial, and that lawyers cannot alone bear the financial burden involved. It points out that at the present time 60% of the legal aid work is provided by Community Chest, an additional 24% comes from private contributions, including lawyers and bar associations. Of the balance the clients pay 6% of the cost, and tax funds account for 9.5% of the total income, giving effect to the value of rent free quarters, which a number of organizations occupy in public buildings.

Despite the heartbreaking effort to raise funds over the years for legal aid work, no clear-cut concept of responsibility emerges from the book. There seems to be a reluctance to state in a forthright fashion that the responsibility for carrying out a function of the government, such as the administration of justice, is that of government, and that it is unwise and perhaps unfair to expect an activity of this character to be financed by private contributions. The reluctance to state the obvious seems to stem from the debate among the members of the Survey Council revealed more clearly in Smith's introduction, surrounding the use of government funds. Speaking of the use of public funds, Smith states that the Survey Council as a whole preferred to postpone any conclusion until the Director's final report, but because of the belief on the part of some members that silence on the subject would be misconstrued, a summary statement is made in his introduction. He states the principal fear surrounding use of public funds as follows: "If Legal Aid attorneys receive their salaries from the public treasury (either directly or as staff members of a public bureau), will that—despite its innocent and appealing

appearance—be the first step, the entering wedge, leading to ‘socialization’ of the legal profession?” He states that certain members of the Survey Council believe that this risk is grave and the danger imminent. His own conclusion is stated as follows:

“Inasmuch as Legal Aid is essential to an impartial administration of justice, what is to happen if private support of Legal Aid should falter or fail? Are we forced to the conclusion that the lesser of the two evils would be to let Legal Aid languish and die?

“The answer which seems inescapable to me is contained in my report to the Survey on ‘Legal Service Offices for Persons of Moderate Means’ which was published by authority of the Council and which contains (at p. 53) this paragraph:

“ ‘Legal Aid Offices and Legal Service Offices *are* much better when entrusted to bar associations rather than to governmental bureaus; but Legal Aid Officers and Legal Service Offices conducted by the government are much better than nothing.’ ”

Smith then presents his solution based on his Boston study that it is possible to finance legal aid in civil cases out of private funds.

Actually there is a straw man aspect to the entire controversy of socialization of the legal profession which I am certain both Brownell and Smith fully appreciate, and which I regret was not dealt with forcefully in the study. The issue of socialization of the bar, in the sense of putting the lawyers under the administrative direction of a government agency, is not a real issue since it is not advocated in this country so far as I know. It is not even advocated in England where the administration of the Legal Aid and Advice Act is left entirely in the hands of the Law Society. The use of federal funds is but one alternative. Municipal funds, the study shows, have been used for many years for financing legal aid work, and there is no reason why State funds should not be used for this purpose just as such funds are used for paying the cost of administering State judicial systems, without radically altering the existing methods for providing legal aid service.

Brownell makes the point that “the source of a lawyer’s fee, in and of itself, has little effect upon either the competency or the zealotry of his service.” He states, “An independent bar, like an independent judiciary is indispensable to liberty and equal opportunity. But just as judges are uninfluenced by the fact that they are in the pay of the state, so Legal Aid attorneys, to the extent that they have like status and freedom from political control, are committed to fulfill their professional obligations.” He has little hesitation in approving grants of public monies to private societies or the use of public funds to establish a department of local government. He would approve appropriations of tax funds to bar associations on a state or local basis, but is fearful that a federal grants-in-aid program to State bar associations along the lines of the English Legal Aid and Advice Act may not be feasible without introducing

some national regulation over the bars of each state. He appears to advocate appropriations of public funds to a quasi-public body similar to library boards or port authorities, which could be representative of the court, the organized bar and the general public. He would also like to see implementation of the Poor Litigants Statute, a proposal which dates back to 1924.

In summarizing the problem of financing generally, he concludes that "If Legal Aid Officers and attorneys in private practice could both receive reimbursement from public funds, in proper cases and under suitable safeguards, for necessary court work carried on in behalf of persons unable to pay attorneys' fees, it would relieve materially the financial burden on private resources." My quarrel here is with the apparent assumption that the primary source should be private sources. In view of the large sums which, I am convinced, an accurate study of need would show are necessary, the principal financial support should come from public funds. And these funds should be supplemented, as far as possible, by private resources. Privately financed legal aid offices should be continued to provide leadership in developing techniques and standards of service.

Brownell eloquently states:

"The individual does not exist to serve the state. The state exists to serve the individual. The object of law is to protect the dignity and worth of every human being, whatever his income. American history demonstrates that our national strength is founded on individual opportunity and freedom.

"If law is to fulfill its important mission, the facilities of Legal Aid in the United States must be materially strengthened, for here is the tested and exclusive means of assuring that every citizen stands equal before the law."

My only regret is that an otherwise excellent study should be marred by differences of opinion among the members of the Survey Council on an issue which does not exist.

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SOVIET LEGAL PHILOSOPHY. Translated by Hugh W. Babb. Introduction by John N. Hazard. 20th Century Legal Philosophy Series: Vol. V. Cambridge: Harvard University Press, 1951. Pp. 456. \$7.50.

WHEN the American Council of Learned Societies sponsored its translation of Vyshinsky's *The Law of the Soviet Union* many turned to it with high hopes of finding an exposition of the basic premises and intellectual currents of Soviet legal thought. But its 750 pages of tedious formal description, in-

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