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# INSTITUTE FOR RESEARCH ON POVERTY

THE ROLE OF LEGAL RESEARCH AND LEGAL EDUCATION  
IN SOCIAL WELFARE

Joel F. Handler

DISCUSSION PAPERS

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This paper was prepared for the second of three meetings convened by the Walter E. Meyer Research Institute of Law. The title of the series is "Law for a Changing America: What Role for Research?" The purpose is "to consider how best to mobilize and deploy research resources in an effort to help better man's life through law."

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## ABSTRACT

There is a dilemma facing the academic side of the legal profession. The exposure of poor and Negro America has posed prodigious problems, and the practicing bar, for the most part, is responding to the challenge: the initiation of OEO legal services programs, American Bar Association support for the poor and for civil rights, and the impressive participation of law students and younger lawyers in a variety of civil rights and legal services activities all exemplify this response. Their academic counterparts are actively engaged in developing new rights on the basis of old and new statutes, constitutions, and cases.

But, according to this report, there is still serious doubt as to the relevance of the current efforts of the legal profession (practical and research) to the major questions facing urban America--such as the problems of the poor and disfranchised. This article addresses itself to the reasons why.

### Conclusions

The role of law in poverty issues is patently all-pervasive. Involvement of the legal system is an inescapable aspect of a poverty program, regardless of the directness or indirectness, coerciveness or voluntariness, of its features. Public money cannot be spent without law, and the public articulation of social values will have to be made through legislation if social change is to be accomplished. The "legal" aspects of poverty, then, involve the social role of law and legal institutions.

But the legal profession is oriented primarily toward legal services. And a complaining client must be the initiating factor if legal services are to be involved at all. In the problem areas within the broad umbrella of "the law of the poor," there are numerous reasons why situations, however badly in need of change, rarely reach the complaining client stage. It is also doubtful whether the legal services approach is effective in accomplishing significant changes in substantive policy, at least in the less than very long run.

### Policy Recommendations

Legal research about substantive rules and their implementation involves a fundamental shift in approach from that traditionally employed. Traditionally law faculties have been concerned with legal rules and their relationship to each other--legal rules are viewed as doctrine. For research to be relevant to the major policy issues of poverty, it must treat rules (law) as social fact.

This report, therefore, recommends development of a specialized graduate program in the law schools which offers a curriculum for the social scientific study of law. It is advocated that such a school starts as a relatively small and specialized part of the law schools--which would avoid, in the author's view, "the impossible and . . . unwarranted attempt to restructure the entire law school curriculum."

## Introduction

The Meyer Foundation's three-stage consultation on "Law For a Changing America: What Role for Research?" is symptomatic of the dilemma facing the academic side of the legal profession. The exposure of poor and Negro America has posed prodigious problems for the profession.<sup>1</sup> The practicing bar, for the most part, is responding to the challenge. The initiation of OEO legal services programs, American Bar Association support for legal services for the poor and for civil rights, and the participation of law students and younger lawyers in a variety of civil rights and legal services activities have been impressive. Public legal services organizations are competing actively and often successfully with the traditional prestigious law employers for the best graduates.

Social change always involves conflict, but change is occurring in the practicing bar despite the anxieties and hostilities of conservative segments of the profession. It should also be noted that it is primarily lawyers themselves who are the most severe critics of the laggards in the bar. Whether the introduction of lawyers into the "Other America" will be effective is another question; lawyers have been called in and they are responding with the tools that they command.

The civil rights lawyers, the lawyers leading rent strikes, and those battling the New York City Department of Welfare, exude a common air of aggressiveness and confidence. Their counterparts in academic research are actively engaged (although not rapidly enough) in developing

new rights on the basis of old and new statutes, constitutions, and cases. Legal journals increasingly contain articles and notes on the legal rights of public housing tenants, welfare recipients, and victims of discrimination. A book has been published entitled The Law of the Poor;<sup>2</sup> it certainly will not be the last. Several recent books discuss the possibilities of individual recourse against the government. But surely, the "law of the poor" is not exhausted; many areas remain to be covered. There is great difficulty even in keeping abreast of the innovative decisions of the Supreme Court, which are thrusting due process (and lawyers) into the new territory. Why, then, the restiveness among the academic lawyers? Why, after ten years of supporting legal research, does the Meyer Foundation ask, "What Role for [Legal] Research?"

The reason for the uneasiness is the concern about the relevance of current legal research efforts to the major questions facing urban America. The lawyering activities of the profession, and the research counterpart in the law schools, deal with only some of the major questions. Moreover, the problems of interest to lawyers may not be crucial ones for long-term social reform. The Meyer Foundation's question therefore is addressed to the areas untouched by lawyering activities. One of these areas is the poor and disfranchised. What are the research issues? Does legal research have a contribution to make?

## I

### THE LIMITED ROLE OF LEGAL SERVICES

An intensified demand for justice on the part of persons of low income has meant a rapid expansion of government regulation of their affairs. The poor and disfranchised want a greater share of and

participation in the affluent society. The goals are equality in civil rights, more and better education, improved housing, full employment opportunities, better police protection, and other social reforms designed to improve the quality of their life. We attempt to accomplish most of these goals by direct government intervention through enactment of social reform legislation, and by creating public agencies to implement the legislation.

This government intervention gives rise to many types of concern. To facilitate analysis, however, I will make a somewhat arbitrary distinction: On the one hand, there are those who quarrel with the values or ideals inherent in the rules. These people criticize, for example, making a loyalty oath a condition for participation in Economic Opportunity programs, or taxing the earnings of ADC mothers at 100 percent, or requiring a means test. This is policy or substantive criticism. Another kind of criticism is directed at the way government officials administer the rules. In these situations the substantive rules conform to the values of the critics, but those charged with implementation of the rules do not themselves behave according to the rules. An example would be the rules governing police interrogation. The distinction, of course, is not clear-cut. Very often the substantive rules allow administrators a great deal of discretion, so that behavior considered objectionable is, nevertheless, within the confines of the rule. Such a situation is the granting by public housing managers of month-to-month leases. The rule seems to allow the manager to terminate a tenancy at whim. In this type of situation, the distinction between criticism of substantive rules, as distinguished from criticism of administrative practices, disappears. The substantive rule itself permits the administrative practice. We will return to this problem later. For present

purposes, we will consider two concerns: (1) "bad" substantive rules--and by "bad" we mean simply that the values expressed in the substantive rules conflict with the values held by the critics; and (2) lawless official behavior--behavior that is not within the authority granted by the rules, however broad that authority may be. Many of the criticisms of social welfare programs involve either or both of these two issues.

The academic side of the legal profession is oriented primarily toward legal services--the training of practicing lawyers. Legal services--both the practicing lawyers and their research and teaching allies can make only a limited contribution to improving the substantive content of government programs and their administrations. The complaining client must initiate the involvement of legal services. Recourse to legal services is thus contingent on (a) knowledge or perception on the part of the client that he suffered a wrong; (b) awareness of means of redress, including legal services; (c) a calculation that legal services will be the most efficacious remedy for him; (d) access to lawyers; and (e) resources with which to pursue the remedy. In the problem areas of the poor--family relationships, delinquency, dependency, and neglect; housing; education, discrimination; and employment--all of these contingencies are very problematic, as those who work in these areas well know. Not even energetic legal services programs, with allied educational and community organization programs, can resolve the access and resource problems. They can endeavor to educate the poor to recognize that they are suffering wrongs for which legal services are available if they want to use them. But the critical contingency is (c)--the reckoning of whether to use legal services. Knowledge, access, and resources only make the calculation more rational; they do not dictate which alternative remedy should be chosen.



In deciding whether to use legal services, the potential client has to balance gains against costs. Although the reasons individuals from all social classes do or do not go to lawyers are not well understood, we do know that people do not seek legal aid unconsideredly. It could be argued fairly persuasively that, in many situations, the use of a lawyer is deviant behavior; it is not the "proper" thing to do. Macaulay has presented evidence that businessmen regard the use of lawyers to resolve their conflicts as a hostile act, one not likely to promote a continuing relationship.<sup>3</sup> Persons customarily do not need specially skilled outsiders to help them settle conflicts; they can deal with each other "reasonably." A personal cost, then, of using a lawyer is that one is regarded as acting unreasonably. Another cost of using a lawyer is the likelihood of retaliation. If the first businessman introduces a lawyer into the conflict, the second will also, and furthermore may go so far as to sever his business ties with the first. In short, there may be retaliation above and beyond the immediate conflict. This phenomenon is more general. We know, for example, that if an adolescent in trouble asks to see a lawyer, the police will not try to adjust the case, but will refer the adolescent to juvenile court, which the police view as a harsher penalty. University disciplinary committees do not like students who have committed infractions to consult lawyers. There are many reasons for objecting to the introduction of lawyers, but one of the reasons, no doubt, is the feeling that the person bringing in the lawyer is unreasonable; he is not willing to "discuss" the situation like a gentleman.

The fact that lawyers are not used lightly means that when a lawyer is called in the client must perceive the injury he has suffered as

significant. If indeed the harm is sufficiently great, if a sort of "crisis situation" exists, the likely benefits derived from the lawyer's services will outweigh the costs. The injury-cost equation naturally varies from situation to situation. When a person is accused of a serious crime, the costs are very low in comparison to the potential injury. The same is true in cases of mental health commitments. In these situations, we do not doubt that persons should use lawyers. In fact, it is often insisted upon. A public housing tenant wrongly evicted or a mother wrongly declared ineligible for ADC also represent crisis situations. The harm is not as great, however, as in cases in which a person is wrongly convicted of a serious crime. Whether the tenant or the mother will call in a lawyer depends on whether it is worth the bother. At least we do not insist that they use a lawyer; it is a discretionary matter.

In the problem areas within the broad umbrella of "the law of the poor," the likelihood that legal services will be used is small. In many instances, what the middle class may think of as pernicious substantive rules or onerous invasions of privacy, may simply not be an issue for the poor. It is hard to believe that participants in OEO programs are really bothered by a loyalty oath. We lack concrete evidence that what we consider the obnoxious, degrading means test is so viewed by welfare applicants. This is not to argue that the poor ought to feel this way; but legal services require complainants, and people do not complain because constitutional lawyers or middle-class liberals think that they should. The literature is replete with accounts of lawless (or apparently lawless) behavior on the part of officials that either do not amount to a crisis situation or are so structured that the costs of seeking legal remedies outweigh passive acceptance. We are familiar with accounts of

the bullying or corrupt police officer, the harassing public housing manager, the tight-fisted, vindictive caseworker, the school teacher who subtly discriminates against minority groups or poor children, the rude and hostile receptionist at a public health clinic. People of other social classes would be outraged if they suffered these wrongs and indignities. Yet, this kind of treatment would rarely move one to consult a lawyer. A person who is illegally stopped and questioned in the street holds his anger and walks away; he does not go down to the legal aid office and initiate litigation. In many situations, officials are in a position to retaliate against a complaining person. This arises when the victim of lawless behavior is in some sort of a continuing relationship with the official. A mother thinks twice before complaining about her caseworker, or her child's teacher, and the situation would have to be grave before one would ask a lawyer to intervene. In short, there is a great amount of lawless behavior which simply does not reach a crisis level.

It is also doubtful whether legal services are effective in accomplishing significant changes in substantive policy. Legal training emphasizes the landmark case, the test case that changes the course of events at the stroke of a judge's pen. And it is true that one opinion from an appellate tribunal can wipe out a loyalty oath, a means test, or a residence requirement. But it is also true that such decisions are extremely difficult to obtain. The road to the top is long, time-consuming and expensive, and the judicial outcomes in the "law of the poor" arena are by no means certain. Moreover, a decision from a high court by no means assures changes of behavior on the street or in the welfare offices. No one expects instantaneous application of the

Miranda decision. Given the number and variety of problems, the test case, it would seem, is not a highly efficacious remedy.

Law schools and legal research have traditionally emphasized the role of the lawyer (and the role of law) in adversary terms which focus on protecting the interests of individual clients. This is a microscopic view of correcting lawlessness and changing policy. The limitations of this form of redress are forcefully documented in the most comprehensive work to date on remedies against the government. Walter Gellhorn, in When America Complains,<sup>4</sup> describes the difficulties of complaining against the government and moving the government to respond to complaints. Significantly, this is not a book about lawyers. In only very few instances are lawyers even mentioned. There are two reasons for this. Most of the complaint procedures that Gellhorn describes are situations in which the private person either is going to complain himself or is not going to complain at all. They are not the crisis situations that call for lawyers. In his terms, people in these situations are the "silent sufferers." The ombudsman, police review boards, the New York Commissioner of Investigation, and congressmen are all channels for registering complaints that are to be used by the injured party, and not by lawyers. Second, and more important, Gellhorn clearly doubts the effectiveness of adversary complaining (with or without lawyers) in either checking lawless behavior or in changing policy. The book contains countless statements such as:

Beyond a doubt many genuinely difficult problems of law run through the field of welfare administration . . . . What is questionable is whether litigation should be the sole or even the chief means of marking out the boundaries of permissible administration.<sup>5</sup>

The mere threat of litigation, according to some who have long been in a position to observe welfare administration, arouses administrative hostility that dies slowly.

Without further belaboring, the conclusion can be stated that administrative critics are on sounder ground when dealing with omissions of specific duties owed to identifiable persons or groups than when building new governmental policies or castigating generalized failures of law administration.<sup>7</sup>

Administrative critics do not produce good government. They cannot themselves create sound social policies.<sup>8</sup>

All of the existing ombudsman system have exhibited a common weakness, namely, the ineffectiveness of the ombudsman's general proposals.<sup>9</sup>

These arguments challenge not only the past directions of legal research, but also the assumptions about the relevance of legal education and the role of the profession in the law of the poor. As noted earlier, the regulatory controls on the poor are multiplying. The weight of government regulation in urban America lends urgency to the protests against the administration of the law of the poor. The poor are more and more victims of ill-conceived substantive rules and maladministration. But, the traditional remedies--essentially the provision of legal services--are becoming less and less effective in coping with the issues. The development of sound social policy and the proper implementation of that policy are beyond the competence of most lawyers, and outside the scope of most academic legal research. The crucial battlegrounds of social direction and control of the urban scene will not be the individual suits against bureaucrats or other court cases. From the worm's eye view, lawyers, law schools, and current legal research are geared to defending the downtrodden from the bureaucrats. From the bird's eye view, the activity generated by law schools is minor border skirmishing or sniper fire, as the vast public programs take shape and begin to involve the city populations.

## II

### THE CHALLENGE OF POLICY AND THE ROLE OF LAW

The role of legal research is tied to our conception of the role of law in a particular social context. The legal services perspective stems from a view of what the "legal" aspects of poverty are. The "legal" problems of poverty are viewed in an adversary, lawyer-client framework. The function of lawyer's law is the creation and defense of rights on behalf of clients. The research issues have been identified--the substance of public policy and its implementation--but the role of law has been viewed from too narrow a perspective. The legal services approach starts by asking how the traditional lawyering functions can be adapted to poverty problems. A sociological approach inquires into the nature of the social situation and the relationship of the legal order to that situation. It asks the questions: Who are the poor? What are the issues involved in eliminating poverty? And what is the role of the legal process in attempting to confront these issues?

There is no agreement on what poverty is, much less on what to do about it. Nevertheless, there does seem to be agreement on two basic concepts of poverty which have important implications for public policy. In economic terms, poverty seems to be largely "structural"; in social terms, the poor are heterogeneous. Structural poverty means that, even with a rapidly expanding, stable economy, the condition will not gradually disappear.<sup>10</sup> Who the poor are depends on where the "poverty line" is drawn. Over the years the poverty line has consistently and precipitously risen. Most economists would agree that the percentage of poor people within the total population has declined. Still, by current estimates, and whether or not the poverty line is fixed or flexible, "nearly a fifth of the American population is poverty

stricken by the standards that we are inclined to use today, however much higher these standards may be than those which our parents or grandparents might have used."<sup>11</sup> Where the poverty line is drawn also determines the incidence of poverty. Using the Social Security Administration's flexible standard, the incidence of poverty today is highest among nonwhites, broken families, families without a breadwinner or with a very young head, very large families, families headed by farmers or unskilled laborers, the unemployed, the aged, and individuals living alone. According to R. A. Gordon, if we do not raise the poverty line, if per capita income rises at about the same rate as it has during the past decade, and if the government takes no additional remedial measures, the poor of tomorrow will be roughly these same groups. Some of these high-poverty groups actually increased in absolute terms between 1947 and 1962. Of particular importance is the growing number of poor families with three or more children. Mollie Orshanasky states that "some 17 to 23 million youngsters, or from a fourth to a third of all our children, are growing up in the gray shadow of poverty."<sup>12</sup> Because this poverty is structural, "it feeds on itself," Gordon states. "It does not automatically disappear as the favored majority becomes more affluent. We are reaching the hard core of the underprivileged and the unfortunate. The time has clearly come for strong measures aimed directly at the specific and particular problems of the poor."<sup>13</sup>

The groups that make up the poor share the characteristic of lack of command over goods and services. But the dissimilarities among the groups suggest different remedies to eliminate poverty. One of a number

of sociologists who have pursued this theme, S. M. Miller, in an essay entitled "The American Lower Class: A Typological Approach,"<sup>14</sup> points out that in the sociological literature two approaches have been used in defining the lower class: the "class" approach, which emphasizes economic role and income, and the "cultural" or "status" approach, which deals with style of life. There are, of course, variations among the poor within the scope of each of the approaches; for example, only about a fifth of the poor, when defined by class, are on welfare. Most of the rest are irregular and low income earners. For the purposes of this introductory essay, Miller combines the various components of the income criteria into a single indicator called "economic security." For the style-of-life variable, he draws a rough distinction between familial "stability" and "instability"; the purpose is to distinguish families according to their ability to cope with the necessities and crises of social existence: food, shelter, debts, delinquency, etc. Combining the two indicators, he posits a four-fold classification of the lower class, but emphasizes that there are many variations within each category, and that there are many variations within each category, and that there is inter-category movement as well as movement in and out of the lower class altogether.

The stable poor are "regularly employed, low-skill, stable-poor families." Most are white, rural, and southern, but there are also a number of Negroes in this category. Although many are aged, and have a poor economic future, Miller thinks that this is the "take off" category--the children of this group are most likely to be upwardly mobile.



The second category is called the strained poor--a stable economic, but unstable familial, situation. We tend to think of such families as skidding; family or personal problems make it increasingly difficult to maintain economic stability. Miller thinks that this is not necessarily the case. Immigrant families, for example, experienced considerable family conflict, yet the second generation usually improved its position. Even today, the mobility predictions are not clear with respect to children of families where there is drinking, fighting, sexual misconduct, or child abuse. In short, this might or might not be a transitional group.

The copers are the third group--exhibiting economic insecurity but familial stability. Miller thinks that this group contains a disproportionate number of downwardly mobile families who are likely to maintain stable family relationships. There is apparently evidence that children of these families are more likely to improve their economic situations than are children of families who have remained in this income position for generations.

At the bottom are the unstable poor. But even here, we lack definite evidence that this status is chronic, and that there is no movement in or out of this category. Not every family in this group is "hard core" or a "multi-problem family." This too is a heterogeneous group with great differences in the causes of dependency and in the potential for upward mobility. The margin of security is very low for this group; a sickness or other mishap can throw the family into chronic dependency. Miller, as distinguished from many sociologists, emphasizes the importance of structural factors to the development of a chronic dependency pattern. The number of so-called "hard core" families does

shrink considerably during periods of high employment. A prolonged unfavorable economic situation can lessen abilities to cope with various social crises.

The heterogeneity in the composition of the lower class necessitates flexibility and adaptability in reform programs. Miller uses the concept of elasticity:

Some types of poor have high income-elasticity--a little change in income produces a big change in behavior; other types may have low income-elasticity. Still other types will respond rapidly and deeply to new housing, to a steady job, to counseling, or to a package of such ingredients rather than to, say, casework. The concept of elasticity introduces frontally the issues of variable remedies for different types. The issues of costs, substitutions, and choice of different services or resources are made vivid by the notions of elasticity and productivity.<sup>15</sup>

Miller postulates that the single most meaningful gain to most members of the lower class probably would be a good, steady job. "My feeling," he writes, "is that structural forces have been underplayed recently as a mode of change, and the 'culture of poverty' has been overstressed."<sup>16</sup> Nevertheless, he emphasizes the importance of identifying the target groups and then finding the "right things for the right groups at the right time."

There is another dimension to the sociological view of poverty--stigma. Laying bare the "target" groups may be necessary to achieve program efficiency, but the political consequence of exposing certain poverty groups may be defeat for social reform altogether. It is no accident that neither Congress nor the Federal welfare "establishment" has ever seriously come to grips with the major issues of ADC--race and illegitimacy. Miller describes the people in his four categories in neutral terms--"insecure," "unstable," "downwardly mobile," etc. But in fact

they are dregs, bums, alcoholics, criminals, addicts, prostitutes, unwed mothers, members of minority groups, as well as the aged, the handicapped, and the low-income earner. In short, many (although by no means all) of the target groups are stigmatic, and this appears to be reflected in the substantive content of social welfare programs. David Matza, along with several others, claims that concepts of pauperism infect much of the treatment of certain groups of the poor today--that they are constantly made to feel that they are "something less than human," or are reminded of "their dismal moral condition and of their basic differences with the rest of humanity."<sup>17</sup> Fear of the demoralizing effect of the dole appears to shape even our most recent social welfare efforts; the emphasis is still on rehabilitation, reform, and work. The designation of specific poverty groups for specific public programs, as called for by Miller, requires a more precise definition and ordering of values, most of which are highly charged politically.

Clearly, then, one of the first steps in researching the substantive issues of public policy in poverty ought to be an analysis of values and of the process by which values get infused in social legislation. Those who are not caught up in the absorbing need for day-to-day administration ought to take the opportunity to discuss where we have been and where we are heading. Historical, or trend, studies of major values in social legislation are relevant to more specific studies of the politics of welfare: what groups in society support what issues and with what consequences, in the legislatures, in the executive branches of the various governments, in and the courts. In other words, what are the political determinants of change?

Other types of information about substantive issues are also badly needed. Gilbert Steiner, in his recent book, Social Insecurity,<sup>18</sup> points to the almost total lack of reliable knowledge about the impact of 30 years' experience of the Social Security public assistance programs. Patently fallacious justifications for dubious policies have been stoutly advanced for years. Scott Greer, in Urban Renewal and American Cities, states,

It is anomolous. We are willing to spend billions of dollars for radical social action, but almost nothing for knowledge to guide such action and measure its effects. So global is our ignorance that one's first reaction might well be to call the whole thing off for a decade or two while we try to understand the nature of the problems. But this does not seem sensible. The metropolitan areas are flourishing and spreading and the present urban renewal program constitutes a beginning . . . for an attack on the problems of living in an urban world . . . . Rational intervention into ongoing social systems is the most promising way of gaining efficient knowledge of those systems. But this is true only when we know (1) what the preexistent situation was, (2) what the treatment was, and (3) what the effects were. In the case of the present urban renewal program, we are all too often ignorant of all three. This ignorance is dangerously near sanctification.<sup>19</sup>

We may be fairly sure that many--if not most--of the War on Poverty programs were based on the weakest of data. Indeed, the absence of focus of many of our programs, and the vague abstractions in policies make it difficult, if not impossible, to pin down goals and priorities and evaluate costs and benefits.

I am not arguing that scientific study and research are preconditions of social change and will determine the content of future programs. Scholarly research, however, is important for those in positions of power. There are many instances, although not enough, to be sure, in which scientific studies have generated ideas that ultimately led

to changes in policy. Surely the careful work of the Brookings Institution and the Council of Economic Advisors has had an impact on monetary and fiscal policies. Academic research no doubt was responsible, at least in part, for touching off the debate over the negative income tax. What mix of politics and information produces programs varies, of course, with the issue and the actors involved. But, again, we know of many instances in which facts were persuasive with politicians.

The implementation of policy requires the study of how formal organizations (bureaucracies) behave. Organizations are deliberately planned and structured to carry out goals. The goals are usually specified by the enabling legislation and the policy interpretations of those at the top of the organization. One of the central problems of organizations is control--getting lower level participants to carry out tasks in accordance with organizational goals. "Most organizations most of the time cannot rely on most of their participants to carry out their assignments voluntarily, to have internalized their obligations. The participants need to be supervised, the supervisors themselves need supervision, and so on, all the way to the top of the organization."<sup>20</sup> Complex "organizations . . . are continuously at the mercy of their lower participants."<sup>21</sup>

Perhaps the crucial factor producing a disjuncture between the work actually being done by the organization (the behavior of the lower level participants) and the goals of the organization are the demands generated by the work itself. A caseworker bends a little or overlooks some evidence to get his client some benefit not strictly provided for by the rules. Those who have to deal with the day-to-day problems often are in a position to judge whether or not conformity to organizational goals is justified in particular cases. Control is complicated, of

course, when the organizational goals themselves are vague or conflicting, which is true in many instances; ignorance of how to accomplish the goals of the organization produces built-in flexibility and unanalyzed abstractions. Different organizations use different forms of control with, of course, varying results. We lack solid, generalizable information on what the determinants of official behavior are. It is claimed that, in addition to the nature of the work to be done, other "variables" influence the behavior of participants, their ability and willingness to carry out organizational goals: the selection of personnel, the vertical and peer socialization process, patterns of interaction, access to information and other materials and persons of value to the organization, possession of expertise, leadership styles, and outside professional orientations. The behavioral scientists maintain that the behavior of officials can be studied systematically, that there are behavioral regularities largely determined by the positions persons occupy in the organization, and that organizational patterns are not explainable solely or even mainly on personality grounds. Role theory maintains that "knowledge of one's identity or social position is a powerful index of the expectations such a person is likely to face in various social situations. Since behavior tends to be highly correlated with expectations, prediction of behavior is therefore possible."<sup>22</sup> The implication of role theory, of course, is that once the variables that determine the expectations are understood, the variables may be modified to produce predictable changes in behavior.

At the present time, we lack adequate information about rules in organizations. Yet, rules play a critical role in organizational behavior and in particular, the problem of hierarchical control. Rules

are the measure of deviance. This is true whether the behavior of lower level participants is viewed by the supervisors or by the clients and outside critics of the organization (e.g., the legal service program lawyers). The rules of the organization authorize the public housing manager to give month-to-month leases; in this situation (which is not uncommon), the rules delegate legitimate discretionary authority. Rules outlawing search practices define as illegitimate certain police behavior. The promulgation of certain types of rules may produce patterned evasions. We need information on why particular types of rules are created, what types of behavior they produce, and why lower level participants obey some rules but not others. What is the process by which public policy in the form of legislation gets converted into organizational rules? It is here that the consequences of unresolved conflicting legislative goals and unanalyzed abstractions are felt. To function, the various levels of the organization must formulate concrete directives from the vague policy guidelines they often receive. But what determines the choices that are made, and what are the consequences?

Knowledge about rules has special significance for those interested in controlling official behavior. The legal literature on the law of the poor is replete with the examples of the frustration that comes from dealing with official discretion. Organizations have to delegate authority to obtain necessary flexibility; but delegation means loss of control for both the supervisors and the victims of maladministration. Delegation has also been remarkably effective in sabotaging the efforts of courts to control administrative activity. It would seem, therefore, that rationalizing the administrative process is the long-term goal of those concerned with controlling official behavior. Rationalizing means

increasingly subjecting lower level officials to enforceable rules. Enforceable rules are rules that enable performance to be objectively measured. Such an objective is an ideal only. The social demands on line officials that are created by the work are constantly changing. There is constant change in Miller's categories of the lower class. Thus, enforceable rules tend to be a restraining or conservative force. In any given situation, both now and in the future, the ability to impose objectively enforceable rules will be a more-or-less proposition. And other social constraints that aid in producing conformity to rules should certainly be encouraged. Supervisors within organizations need not have this ultimate goal of rationalization. It would seem that if conformity is produced by recruitment, or socialization, or other behavior systems, the interests of supervisors are satisfied. This should not be true, however, for those on the outside--the legislators, for example, who delegate the substantive administration to the organization--and the clients of the organization and the wider community. Behavioral systems may provide for internal control, but they add little or nothing to the problem of control by outsiders who have an interest. Objectively enforceable rules enable outsiders to measure the performance of the organization. To the extent that the evaluation of official behavior is not susceptible to quantifiable objective measures, that behavior is uncontrollable.

The importance of rules for those interested in social change is self-evident. Public programs are made by the enactment of new substantive rules and providing for their implementation. The success of many of these programs depends on the reception of the rules among lower level officials. This is the fact of life of public administration. In most of the major social reform programs we have delegated uncontrollable discretion to



lower level officials. Consequently, we lack clear evidence that programs are carried out as intended. The consequences of official discretion in programs such as public housing, public assistance, policing and juvenile delinquency, suggest that perhaps regulation should extend no further than our ability to control it. The requirement of participation in ill-defined unmeasurable, rehabilitation programs as conditions for receiving assistance should be seriously questioned. Given the diversity of social characteristics of the lower class and our limited knowledge, we ought to think twice about subjecting people to state coercive powers where the rules are so vague as to render impossible the task of measuring official compliance. One of the appeals of negative income tax schemes, for example, is that they seek to avoid detailed administrative control over people. Until we are more sure of our knowledge of what makes administration work, we should opt for more simplified, general programs, perhaps emphasizing incentive and subsidy rather than coercion.<sup>23</sup> All too often the efficiency that we try to achieve from detailed administrative regulation is illusory.

The role of law in the poverty issues that we have been discussing is pervasive. Practically every aspect of the public welfare programs advocated by social scientists, politicians, and the community, at large, impinges on the legal system. Government intervention to eliminate the structural poverty identified by the economists will have to be accomplished through the enactment and implementation of legislation. This is also true for specific welfare programs designed for special target poverty groups. The legal system is the principal instrument for the orderly public reallocation of power; in the poverty area, at least it is the principal instrument for effecting social change. Involvement of the legal system is an inescapable aspect of a poverty program, regardless of the directness or indirectness, coerciveness or voluntariness, of its

features. Public money cannot be spent without law. Many problems in poverty research concern the legal system. The public articulation of social values, whether vague or precise, will have to be made through legislation if social change is to be accomplished.

Controlling official behavior by measuring performance in terms of conformity to rules is another way of saying that we must bring officials within the rule of law. The rules that I have been talking about are laws. In many instances they are promulgated by legislatures. The 1962 amendment to the Social Security Act, for example, required a "rehabilitation" plan for every ADC mother. In other instances, the rules are promulgated by administrative agencies under rule-making authority that has been delegated to them by the legislatures.

The "legal" aspects of poverty, then--and the aspects that ought to be researched--involve the social role of law and legal institutions. How is law used to effectuate public policy? What happens to social goals when they enter the legal system--the legislature, the executive, the courts, administrative agencies, and lawyers? What factors in society facilitate the social functioning of legal institutions and what factors constrain legal institutions? In short, what are the social consequences of legal institutions including legal services?

III

LEGAL EDUCATION AND THE SCIENTIFIC STUDY OF LAW

Legal research about substantive rules and their implementation involves a fundamental shift in approach from that traditionally employed. Law professors and law students have been studying the legal rules and their relationship to each other; legal rules are viewed as doctrine. For research to be relevant to the major policy issues of poverty, it must treat rules (law) as social fact. Laws--whether Social Security Act amendments, War on Poverty programs, anti-discrimination statutes, public housing regulations, or court decisions--are social facts which are designed to influence behavior in certain ways. The research questions are "how" and "why." The task is to study the impact of these various facts in their social contexts. The research goal is to generate empirically grounded predictions of the likely results of alternative courses of action. This is scientific study; its research methods and assumptions are those of the social sciences. Hypotheses are tested on the basis of experiments, observations, measurements, and other types of data extracted from the social context of the rules and the institutions that create the rules.

At the present time, there is very little of this type of research and training going on in the law schools. There is good reason for legal education to treat law as doctrine, not as social fact. The central task of the LL.B. (J.D.) program is to train professional lawyers to serve clients and "understanding and applying legal doctrine to client problems is the main job of lawyers."<sup>24</sup> Students in this course of study and preparing for this career need the skills that are most relevant--working through court decisions, analysis of legal theory, analysis of language.

Historical trends and social science data about law in society lend perspective; knowledge about what makes administration tick will help a lawyer to assess his client's position and strategy; small field research projects will enrich class discussions. But such knowledge is secondary to the core task of training professional lawyers. Legal research is, and should be, tied to the law school curriculum. The role of the law school teacher is to advance knowledge and to improve the training of the professionals, and this is primarily doctrinal research.

Many of the new courses and seminars in law schools that have law-in-action titles, such as "legal aspects of welfare" or "urban legal studies," are rarely departures from traditional law school concerns. Sometimes these courses are taught jointly with social scientists, or social scientists give guest lectures. But the critical question is what is done with the "legal" parts of these courses. The social scientists talk about their concerns; the lawyers talk about cases and statutes; the connection between the disciplines is tenuous and strained. Law students in these courses legitimately ask, "Of what relevance is social science to me? I will be representing clients." They are interested, however, in the doctrinal analysis of "welfare law." In the scientific study of a problem area such as welfare or urbanization, there are no "legal" aspects which can be distinguished from social and political aspects. Law is one of many social facts in a context, and this is not of much interest to the professional lawyer. The scientific study of law in society has little connection with mainstream legal education because it is remote from the central purpose of professional education.

Thus far law schools have tended to ignore the conflict between professional education and a teaching and research program for the

scientific study of law. However, to the extent that researchers want to teach and to be a relevant part of the curriculum, legal education either must change or those interested in the scientific study of law will find an intellectual home elsewhere. Most law schools will probably opt for the latter alternative; and it is an alternative that is not without merit. Providing quality legal services in sufficient quantity is a worthy challenge to the profession. This course of training can be enriched by the selective consumption of the results of the scientific study of law. Professional education can be expansive and creative training, even though it is not scientific training.

Those interested in studying law in action will find a close similarity of interests with sociologists and political scientists. As yet, few sociologists are studying the legal system, but this appears to be changing; at least more graduate students are interested in law. Political scientists have had a long-standing interest in law; today, there are more behavioral and empirically-oriented political scientists who seem to be concerned with law. It is important that the researchers of law in society should be teaching those students for whom the research questions are relevant. Law-trained researchers taking a social science approach will find themselves increasingly teaching social science graduate students (where this is permissible) and those law students who do not desire to pursue a career in private practice or who are looking for a change of pace from the staple curriculum. The latter students will be reaching for a "perspective" course and will be assuming that they already have acquired sufficient skills for a professional career or that the traditional curriculum has nothing further to add. Both types of law students taking these courses will not be in the mainstream of the LL.B. program.

As long as legal education remains in its present position, the scientific study of law in the law schools will inevitably remain on the fringe. The questions of substantive policy and its administration will be studied by the social scientists.<sup>25</sup> Law schools would still be doing valuable work--training for legal services--but they would not be dealing with the more central issues facing an urban country. We would witness one more instance of the displacement of lawyers by more efficiently trained persons in other disciplines.

The way out of this dilemma confronting legal research is to develop a specialized graduate program in the law schools which offers a curriculum for scientific study. This part of the graduate program should, in addition, move closer to, and perhaps eventually become integrated with, the liberal arts graduate schools. The questions asked and the research methods used are becoming so similar that the traditional divisions of academic disciplines are becoming increasingly irrelevant.

The future division of labor in research and education perhaps will be decided on pragmatic rather than on historic or philosophic grounds. A specialized graduate school in law will serve a number of important functions. It will recognize that different curricula are needed for different types of students. This type of thinking is long overdue in the law schools, and is central to the proposal in this paper. By starting as a relatively small and specialized part of the law school, it avoids the impossible, and in my view, unwarranted, attempt to restructure the entire law school curriculum. The extent to which the LL.B. curriculum adopts the teaching and research of the scientific curriculum will depend on its worth and relevance to the core task of educating professionals, rather than on dogmatic appeals to faith which so often in the past have

characterized efforts to introduce social science into law schools.<sup>26</sup>  
A graduate school will also maximize flexibility for talented students who are undecided and want to experiment. For those students who do want a career in the scientific study of law, it will provide a research, faculty-student relationship that approximates the relationship in graduate schools in liberal arts. Most critically, there will be a joining of interests between the students in this program and their faculty. They will be researching and exploring common problems, and many of the students will be aiming for the same careers as their professors. There can be other benefits as well. Since this is graduate education, outside, nonacademic constraints on the law curriculum, such as bar admission requirements, are not relevant. Students can take a variety of types of programs for S.J.D. or Ph.D. degrees, bridging different substantive fields. Some law schools already have small graduate schools taking this approach, but these efforts are little known or discussed.

We have not yet seriously faced up to the obvious fact that the scientific study of law requires scientific training. At present, the recruitment of law faculties does not recognize the need for this type of special scientific education. Most law schools still look only for excellence of performance in undergraduate legal education. It seems evident that if legal services education does not envisage practitioners dealing with the major issues of the day, then it also follows that legal services education is also not suitable for training those who propose to research these major issues. The generalist, all-purpose LL.B. (or the man who continues an additional year and acquires an LL.M.) is perhaps adequately trained for legal services and its research needs,

but is not sufficiently trained for scientific study. Many of those who have thought about this problem look at existing social science training and research and recoil in horror; much of it seems weak, or mystifying, or irrelevant. This is not surprising. Most social scientists are not concerned with the study of law. Why should their courses be relevant? Social science students who take occasional law school courses that are designed for the professional lawyer have the same negative reaction. But a start has to be made somewhere. Recognition of a specialized graduate school with a scientifically trained faculty should lead to the search for and development of new courses designed for these particular ends.

What should be done in the meantime? Even if the Meyer Foundation were willing to wait for long-term changes, it has to make decisions now.

Thus far the Foundation has, for the most part, funded particular research projects with a scientific orientation. Yet, in the words of its president, "It has not been embarrassed by the volume of applications emanating from the nation's law schools." One reason, of course, is that Meyer is competing with other sources of funds for the time and research expenses of the few law-trained people who are doing scientific study. But the other reason for the lack of more widespread interest is that the proper foundations for basic research have not been laid. Basic research requires an intellectual climate, or a community of scholars and teachers with an identity of philosophy and approach. Most good econometricians will gravitate to economics departments where other good econometricians are working. The same is true for mathematical sociologists and political scientists, as well as others. The importance of intellectual



interchange is recognized. Whether the funding of scientific law research projects will help promote such a climate in a law school is problematic. The odds in favor of the research being a "one-shot" affair, or for the professor remaining a loner among his colleagues, I would guess, are high.<sup>27</sup>

My suggestion is that the Meyer Foundation should address itself seriously to the question of training law professors who are interested in teaching and researching in social problems from the policy and administrative point of view, rather than from the legal services point of view. Retraining can be accomplished, of course, through social science type research projects, by the teaching of joint courses, and by talking to social scientists. But this method is inefficient and will still leave those professors on the fringes of the law school. More fundamental action is needed. Law professors, in short, need social science graduate school education. Many are amenable to this idea. If law schools would recognize the need for special scientific training for their faculty, if funds were made available, and if careful programs of graduate study were worked out, then we would begin to develop graduate education in law schools that would be concerned with the scientific study of law. This, in turn, should have a multiplier effect on legal research in these areas. Graduate students would be writing dissertations, scientifically trained law professors would be exploring ideas in seminars and courses with students who have similar interests and career plans, and legal education and research would be in a position to become an integral part of integrated social science studies.

NOTES

<sup>1</sup>Anthony Costonis, Jack Ladinsky, J. Willard Hurst, and William Whitford read an earlier draft of this paper and offered valuable suggestions.

<sup>2</sup>Jacobus tenBroek, (San Francisco: Chandler Press, 1966).

<sup>3</sup>Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," American Sociological Review, February, 1963, Vol. 28, No. 1, pp. 55-67.

<sup>4</sup>Cambridge: Harvard University Press, 1966.

<sup>5</sup>Gellhorn, op. cit., pp. 199-200.

<sup>6</sup>Ibid., p. 200.

<sup>7</sup>Ibid., p. 55.

<sup>8</sup>Ibid., p. 53.

<sup>9</sup>Ibid., p. 99.

<sup>10</sup>R. A. Gordon, "An Economist's View of Poverty," in R. A. Gordon, (ed.), Poverty in America, (San Francisco: Chandler Publishing Co., 1965), p. 3.

<sup>11</sup>Ibid., p. 6.

<sup>12</sup>Ibid., p. 10.

<sup>13</sup>Ibid., p. 11.

<sup>14</sup>In Arthur B. Shostak and William Gomberg, (eds.), New Perspectives on Poverty, (Englewood Cliffs, N. J.: Prentice Hall, 1965), p. 22.

<sup>15</sup>Ibid., pp. 33-34.

<sup>16</sup>Ibid., p. 38.

<sup>17</sup>David Matza, "Poverty and Disrepute," in Robert K. Merton and Robert A. Nisbet, (eds.), Contemporary Social Problems, (New York: Harcourt, Brace and World, 1966), pp. 619, 657.

<sup>18</sup>Chicago: Rand McNally and Co., 1966.

<sup>19</sup>Indianapolis, Indiana: Bobbs-Merrill Co., 1965, pp. 186-87.

<sup>20</sup>Amitai Etzioni, "Organizational Control Structure," in James March, (ed.), Handbook of Organizations, (Chicago: Rand-McNally and Co., 1965), p. 650.

<sup>21</sup>David Mechanic, "Sources of Power of Lower Participants in Complex Organizations," Administrative Science Quarterly, Vol. 7, No. 3, December 1962, pp. 349, 351.

<sup>22</sup>Ibid., p. 354.

<sup>23</sup>Some of these ideas are expressed in Robert A. Levine, "A Note on Bureaucracy, Creative Federalism, Business, The War on Poverty and Several Other Things," (unpublished manuscript).

<sup>24</sup>Quintin Johnstone, "Report of the Curriculum Committee," in Proceedings of the Association of American Law Schools, 1966 Annual Meeting, Part One, Reports of Committees and Projects, pp. 37, 43.

<sup>25</sup>There is also some concern about the relevance of social science research to the content and implementation of policy. There is uneasiness about what seems to be a trend toward "pure" research and a snobishness toward applied social research.

<sup>26</sup>For a discussion of the Columbia Law School experience in the late 1920's and 1930's, see Brainerd Currie, "The Materials of Law Study," Journal of Legal Education, Vol. 8, (1955), p. 1. The Columbia attempt to introduce social science into legal education was truly ambitious and was led by extremely thoughtful and able advocates. It failed, according to Currie, because it did not successfully resolve the relationship of social science to professional education, and its sponsors attempted to restructure the entire curriculum.

<sup>27</sup>The Meyer Foundation seems to recognize the problem of climate as a precondition for research of its interest in urban legal studies. But the critical issue is the intellectual conception of what "legal" means between "urban" and "studies." This problem is discussed in the text at p. 23 ff.