

85-70

INSTITUTE FOR
RESEARCH ON
POVERTY DISCUSSION
PAPERS

LAW, LEGAL SERVICES, AND SOCIAL CHANGE: A
NOTE ON THE OEO LEGAL SERVICES PROGRAM

Jack Ladinsky

UNIVERSITY OF WISCONSIN - MADISON



LAW, LEGAL SERVICES, AND SOCIAL CHANGE:
A NOTE ON THE OEO LEGAL SERVICES PROGRAM

by

Jack Ladinsky

The author is an Associate Professor of Sociology and Staff member, Institute for Research on Poverty at the University of Wisconsin. This paper was presented at the annual meeting of the Midwest Sociological Society, St. Louis, April 1970.

The research reported here was supported by funds granted to the Institute for Research on Poverty at the University of Wisconsin by the Office of Economic Opportunity pursuant to the provisions of the Economic Opportunity Act of 1964. The conclusions are the sole responsibility of the author.

November 1970

ABSTRACT

The first part of this paper is a general consideration of the relationship between law and social change. It is an effort to specify what social change through law is and is not, and is organized around a typology of legal change based on the sources of pressure for change and the points of impact of any changes. The second part of the paper looks at some of the problems of achieving social change through law, drawing upon experiences in poverty law of the Legal Services Program under the Office of Economic Opportunity.

It is commonplace to note that we live in a period of rapid and pervasive social change. It has in recent years also become common to express disappointment and impatience with the pace of social change in critical areas of life, such as civil rights, urban problems, and poverty. In these instances it is said that the legal system is failing to bring about the expected institutional changes promised by progressive legislation and judicial enactments. Indeed, many citizens, especially young people, have come to question whether the law can serve at all as an instrument of social change. Having accepted the conclusion that society is capable of no positive action, but only reaction, some have become thoroughly alienated from social institutions and have embraced revolutionary strategies for radical social change. But while some have turned away from the orderly processes of law, others in much larger numbers have turned increasingly to the law for the conscious purposes of implementing and directing social change. There truly has been a law explosion in civil rights, environmental planning, and alleviation of poverty, and it shows no sign of subsiding.

At this critical period in our national development, it is important, first, that we have a clearer understanding of the complex relationship between law and social change, and second, that we progress in the difficult task of specifying the most significant factors necessary for the achievement of institutional change through the law. Both are appropriate tasks for social scientists and social research. But up to now social scientists have made few contributions to these questions. This paper is a preliminary attempt to address these two questions, in the hope of stimulating a social science revival of interest in law and social change which

would build on the tradition only begun in the first quarter of this century by men like Max Weber, Roscoe Pound, and Karl Llewellyn.

Social change as resource reallocation. Before we begin our inquiry, it is appropriate to consider just how the term social change is being used. Social change has been simply defined as "any non-repetitive alteration in the established modes of behavior in . . . society."¹ For our purpose this definition is acceptable. In the last analysis social change has to do with alterations in the ways people or groups of people influence each other. It is a behavioral, not an attitudinal, phenomenon. With regard to law in the initiation of social change, we are concerned with significant alterations in the distribution of social, political, and economic resources between classes of people. In short, we look for significant alterations in authority relationships, in the sense that Weber uses authority as legitimate power.

A Perspective on Social Change through Law

Not all change that takes place in legal systems is social change. It is possible to distinguish between change in the law, i.e., change internal to legal agencies, and change through the law, i.e., change in social institutions. Similarly, it is possible to distinguish between points of origin of pressures for change as being internal to legal agencies or external, i.e., in social institutions. This latter distinction is not always clear cut. In reality it is not easy to distinguish between demands that originate outside legal agencies and those that originate internally. Nevertheless for classificatory purposes the dichotomy can be made, and if we cross-classify these two dimensions, we

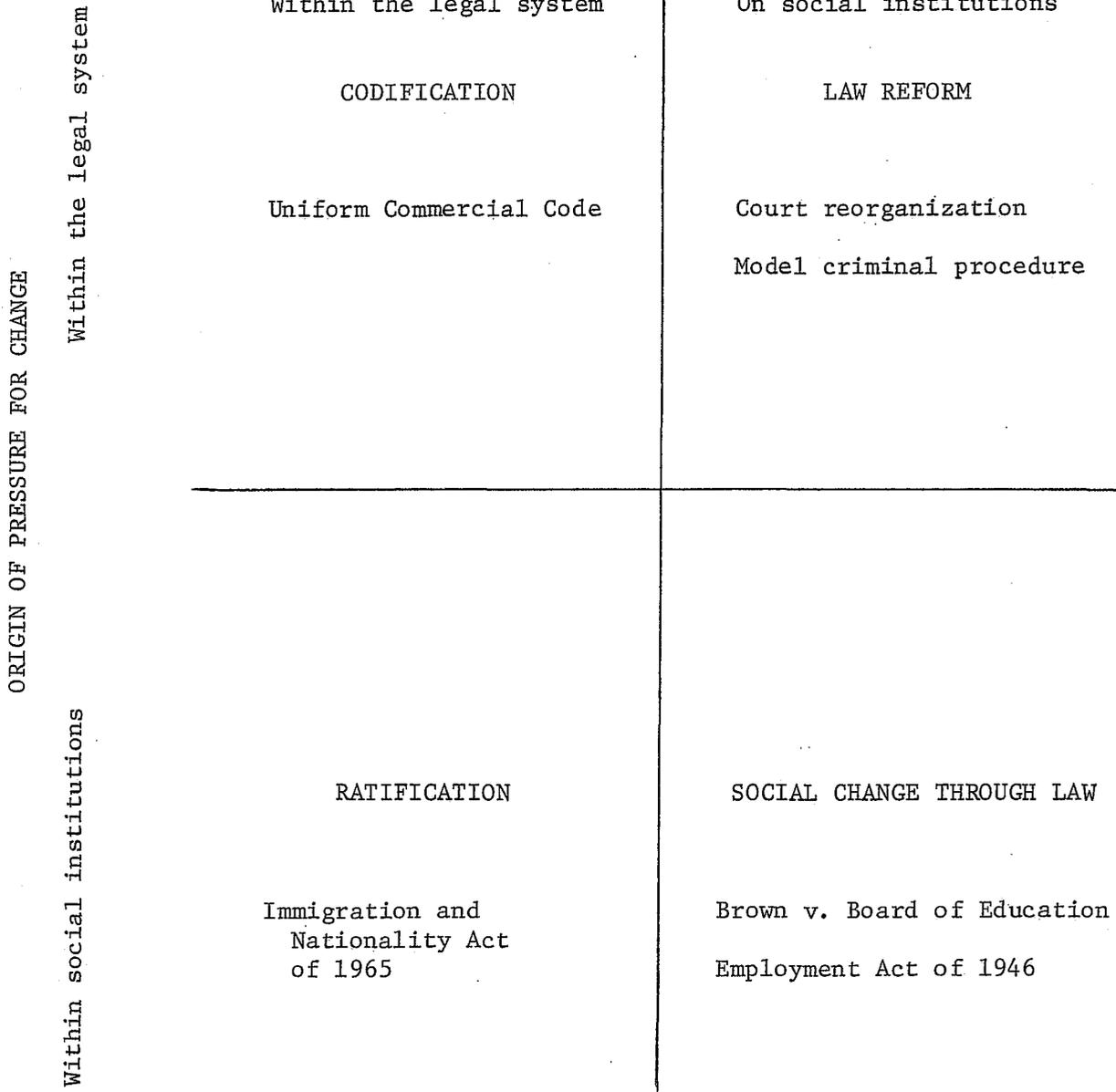
generate a typology that yields four general types of change, as shown in Figure 1: (1) change which originates within the legal system and is felt only in the legal system, or codification; (2) change which originates within the legal system but which effectuates change in social institutions, or law reform; (3) change which originates in social institutions but is felt only within the legal system, or ratification; and (4) change which originates in social institutions and is felt as change back on social institutions, or true social change through law.² Let us consider each of these briefly.

Codification. A substantial amount of the work of law professors and lawyers in the employment of law institutes, bar associations, state legislatures, and Congress has to do with the simplification, clarification, and systematization of statutes. These efforts are carried out to make the administration of law more efficient and straightforward. Over time, laws do become complex and are amended so often that ambiguities creep in, or inconsistent language usages emerge, or conflicts in application are discovered. These problems can become formidable obstacles to the administration of justice and call for laborious efforts at unification and rationalization. Law revision or codification of this kind is often called law reform. It is reform in only the narrowest sense. It is law "clean-up" and does not make for social change. Indeed, the efforts at codification are made precisely to preclude inadvertent change due to misapplication or inconsistent application of the law. Codification is technical law writing, or "lawyers' law"; it is what many law professor labor at as legal research, and it occupies substantial amounts of time and resources of the organized legal profession, certainly more time and resources than true law reform.

Figure 1

A Typology of Legal Change

POINT OF IMPACT OR OUTCOME



or efforts at social change through law. Examples of important codification in America are the Uniform Commercial Code and the Federal Rules of Civil Procedure. They make the work of lawyers and judges easier, but they do not embody the creation of new rights for a class of citizens or the transfer of social resources from one stratum of society to another.

Law reform. Certain kinds of lawyers' work can comprise social change, and on those rare occasions when it does, we can properly call it law reform. At least two kinds of legal reconstruction and reorganization are of this nature: major court restructuring and the establishment of new legal procedures. Court reform can have widespread and critical ramifications if it involves the creation of special trial courts or more appellate divisions, or changes in limitations upon certiorari, or changes in selection and tenure of judges. Unfortunately, we know little about the impact of court reform on the administration of justice, because we have few major studies that measure social changes that have occurred as a consequence of reorganization. Adoption of the Model Criminal Procedure, which the American Law Institute was constructing, would also represent significant law reform. This effort began after the United States Supreme Court decision in Escobedo,³ which granted right of counsel to criminally accused before police interrogation, but was cut short by the Supreme Court's later decision in Miranda,⁴ which substantially expanded the procedural safeguards against improper custodial interrogation. Harlan expressed the law reform position in his dissent in Miranda:

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive re-examination of

criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association...; a distinguished study group of the American Law Institute...; and the President's Commission on Law Enforcement and Administration of Justice.... Studies are also being conducted by the District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research. There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to adjust compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past. But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.⁵

Ratification. It is often the case that legislation or judicial pronouncement takes place which appears to be earth shattering in its profound implications for social change, but on close study it is found to be little more than a public ratification of a change that is already widespread in society. The law merely legalizes what has already come about. But ratification is not unimportant. Often it is sensible to enact such legislation or establish judge-made law to remove dead-letter law from the books, or to speed up the diffusion of change, or to serve some symbolic interest in the body politic. A famous example of the removal of an archaic law in England was the abolishment in 1819 of trial by battle, after an unusual case came

up, in which it was properly argued that trial by battle was still a legal method of proof in murder appeals. An example of a judicial decision that speeded social change is the now-famous Gideon⁶ decision by the United States Supreme Court, in which the duty of the state to provide free lawyers for indigents in criminal proceedings was established as a Constitutional right. In a number of states this right was already established, and it was spreading to other states at the time. In Florida, where Gideon originated, no such right was recognized. For the states that provided free counsel to indigent criminal defendants, Gideon was a ratification; in Florida it was real social change. An example of a law that basically served a symbolic function was the Immigration and Nationality Act of 1965.⁷ This law ended the quota system in immigration that had prevailed in the United States since 1924. It was and is hailed as a gigantic step forward for the United States, and a major social change in that it ended discriminatory legislation against Southeast Europeans, Asians, and Africans. But the fact is that the quota system had already been thoroughly undermined by a vast number of amendments and was a nuisance due to private Congressional bills in the thousands dating back to 1952. During that period we made exceptions to quota rules to allow thousands of Yugoslavian and Cuban refugees and more thousands of military brides and their relatives to enter the country. In 1961-62, 21,400 Italians were admitted when the Italian quota was a mere 5,600; in 1956-57, 95 percent of the Yugoslavs admitted were outside the quota. In the 87th Congress 3,592 private immigration bills were introduced by Congressmen for their constituents and 544 were passed.⁸ It must also be said that by the 1960's it was clear that there was no massive demand by any Europeans or

Asians to immigrate. The quota system was an irrelevant piece of legislation that served only to brand America as a racist society in the eyes of foreign nationals. The Secretary of State, Dean Rusk, made the point very clear in his testimony before the House hearings on the proposed bill when he stated that "the action we urge...is therefore not to make a drastic departure from a long-established immigration policy but rather to reconcile our immigration policy as it has developed in recent years with the letter of the general law."⁹

Social change through law. This fourth possibility, the conscious use of law as an instrument of social change, is, of course, of most interest and of the greatest importance. It is also the most complex and the most controversial.

The ultimate test of whether a law is an instrument of social change is the extent to which it effectively brings about the new social relationship that it pronounces. Few laws, if any, command total compliance. In the case of the Brown¹⁰ decision to desegregate schools, handed down in 1954, there was still only token integration in the Deep South ten years later, and in civil rights legislation to bring about voter registration, open housing, and equal employment, movement has been incremental. There is little doubt that social change has taken place, but few would conclude that the law has been a swift channel carrying blacks to levels of equality with white America.

The problem of compliance has attracted substantial attention of legal scholars and social scientists and can be dealt with on many levels. Most discussions have been around case studies of laws or judicial decisions, and specific attempts at enforcement or measurement of compliance.

There are, first, considerations of the ways the law can act and the conditions under which it acts as an authoritative instrument of social change, i.e., whether it sharpens perceptions of the behavior involved, or in any way acts as a form of education, and whether it carries moral persuasiveness or in some other way creates a climate conducive to change. Second, there are considerations of the kind of law for which the structural context in which compliance is most effectively carried out, i.e., concern with variations in compliance due to differences between laws (emotionally laden topics as opposed to neutral topics); variations in effectiveness of different modes of enforcement (force as opposed to persuasion and reward); differences due to politics, the character and structure of communities, and the roles played by critical elites. Third, there are considerations of whether the law is an independent vehicle for change or merely a reflection of changes already extant in society (ratification). This latter problem is an exceedingly complex one requiring measurements that can unscramble independent effects or determine the kinds of interaction effects taking place. Finally, there are considerations of the role played or not played by universal factors, such as public opinion, communication, authority of law and the courts, traditional obedience to the law, timing, historical antecedents, and so on. Few authors have felt secure enough to attempt generalizations about necessary and sufficient conditions for a law to act as an effective agent in changing behavior, or alternatively to generalize about the limits of effective legal action.

Not all social change through law is intentional or planned. The Employment Act of 1946¹¹ is a case in point. In its inception the Act had only symbolic value, and very little of that. It did not commit the nation,

as is often claimed, to full employment, and the establishment of the Council of Economic Advisors appears to have been a compromise extracted by key conservative Congressmen and calculated to torpedo the entire measure.¹² Moreover, the law carried close to no enactment clauses. About the only significant directive it imposed was that the President appoint a Council of Economic Advisors and consult with his Council for the purpose of releasing an economic report. Truman made little use of the Council and Eisenhower made even less use of it. It was not until John F. Kennedy's day and the appointment of Walter Heller as chairman that the Employment Act and the Council emerged as powerful tools of federal economic planning.¹³ After the successful tax cut of 1965, the Council was hailed as a pioneer in bringing Keynesian economics to the federal budget. The Heller Council also established for itself the role of monitoring the economy and moved forward rapidly in the development of economic indicators. It has acted as an impetus to the whole field of social indicators, which for good or for evil, has now overtaken us.

I noted above that the ultimate test of a law as an instrument of change is the extent to which it delivers the social change in question. It is not always easy to determine what change is intended by the law. But even where it is more or less obvious, there is always a discrepancy between the ideal of the law and the practical effects. The task of a social science of law is to understand why the gap exists, and, equally important, to provide the kind of information that can suggest remedies that will narrow the gap. It is unrealistic to aspire to a systematic theory based on knowledge of the necessary and sufficient conditions, or prerequisites, for the successful operation of law, but we can realistically

provide significant insights about the critical factors for and the obstacles to the achievement of social change through law.

To this end I wish to turn in the remainder of this paper to a consideration of some of the critical factors for social change that are evident from experiences in the United States with implementing parts of the Economic Opportunity Act of 1964.¹⁴ Specifically, I wish to look at the implications of developments and consequences in the provision of legal services to the poor under the Office of Economic Opportunity.

The Office of Economic Opportunity Legal Services Program

The Legal Services Program (LSP) under the Office of Economic Opportunity (OEO) was established as a semiautonomous unit under the Community Action Program in the fall of 1965. It did not appear in the original Economic Opportunity Act of 1964. The idea emerged among certain prominent members of the bar and from staff lawyers inside OEO. Levitan¹⁵ indicates four major sources of pressure for a legal services program: (1) the experiments with provisions for attorneys in the community action programs under the Ford Foundation Grey Area Projects and the President's Committee on Juvenile Delinquency that preceded the federal war on poverty; (2) the United States Supreme Court decisions in the early sixties emphasizing the role of lawyers in safeguarding indigent defendants; (3) the existence of a national system of legal aid societies, which provided the structural base on which to build a federal program; and (4) an important article by Edgar and Jean Cahn, in The Yale Law Journal in the summer of 1964,¹⁶ soon after President Johnson declared unconditional war on poverty, which argued persuasively for the establishment of neighborhood law firms in the service of the poor.

During the first year of operation LSP received \$24.8 million, which was double the budget for all existing legal aid societies affiliated with the National Legal Aid and Defender Association. At the present time, LSP is funding over 200 legal services projects with over 2,000 lawyers in 800 neighborhood offices at a cost of \$42 million.¹⁷ The objectives of LSP, as set forth in the Legal Services Program Evaluation Manual, are as follows:

1. To provide quality legal services to the greatest possible number of poor, consistent with the size of the staff and other goals of the program.
2. To educate target area residents about their legal rights and responsibilities in areas of critical concern to them.
3. To ascertain what rules of law affecting the poor should be changed to benefit the poor, and to achieve such changes either through test cases and appeals and statutory reforms or changes in administrative processes.
4. To serve as advocate for the poor in the political arena.
This might be done by representing a neighborhood association at a zoning hearing, or before a city council at which a street improvement decision was being considered. It could also mean the organization and representation of tenants to secure a standard lease fair to both landlord and tenant.
In short, LSP was to provide for the poor the same order of concerned advocacy that other citizens have long enjoyed.
5. To assist the poor in the formation of self-help units, such as cooperative purchasing organizations, merchandising ventures, and other economic experiments.

6. To involve the poor in the decision-making process of the Legal Services Program, and to the extent feasible, to include target area residents on the staffs of programs.¹⁸

The typical big-city Legal Services Program today has a staff of seven full-time attorneys located in from two to five neighborhood law offices. A few programs have as many as ten to thirteen offices and are staffed by as many as twenty attorneys. Some programs have volunteer lawyers who work part time. Some have community aides, or liaison people, attached to the neighborhood offices. One program we visited recently anticipates that during the next year its legal staff alone will reach sixty, including staff attorneys, VISTA lawyers, and volunteers.

Obstacles in the Use of Law To Achieve Social Change

Bringing about social change through the law has proved to be an arduous undertaking. Much impatience and frustration has grown out of a naive expectation that social change would occur rapidly if only the legal manpower and auxiliary resources were made available. Let us look at some of the major obstacles that have arisen out of the OEO Legal Services Program experiences.

The courts and legislatures. The first problem lawyers for the poor encounter when pursuing social change through law is that there has been little constructive positive law for the poor on which to draw for model or precedent. With rare exceptions case and statute law reflect the interests of the middle-class majority in the United States. The problems of the poor are rarely reflected in the law, because historically the poor have had no interest groups to press their claims. Indeed, until the past decade the poor hardly knew that they suffered legal disablements, or how

to go about correcting them. Until the establishment of OEO the mass of poor people had no resources for self-education, or for formation of pressure groups, or for hiring of lawyers to act in their interest.

A second problem is that American court practices make it difficult to successfully challenge wrongs of long standing against the poor. In protest cases against public welfare and public housing agencies or against exploitative merchants, the defendant will often correct the wrong against the individual client, which precludes achievement of a precedent-setting decision. American courts have traditional practices of interpreting legislation in constitutional terms, a powerful weapon which trial judges are reluctant to use. As a consequence, settlement becomes the occasion for "mooting out" challenges of a constitutional nature.

A third problem is the age-old one of court delays. It is impossible to gain precedent-setting decisions in our courts without delays that can run into years. One experienced legal services lawyer, Harold Rothwax, has noted:

As legal services programs push for dramatic social change, they will engage the full resources of those they are contending against. These forces, with their power, will resort to all-out battles, to continual appeals which are going to delay clear-cut decisions.¹⁹

A fourth problem is that precedent-setting cases, by themselves, are often no solution for the poor because the rules are not self-executing. Agencies do not always comply with the decisions, or worse, they evade them by creating new regulations. Legal services attorneys are now well aware that on-the-line justice, where it really counts, demands that they maintain constant vigilance and unremitting pressure on the agents with whom the poor have day-to-day encounters.

The bar. From its beginning, the Legal Services Program sought to retain the support of the organized legal profession. Regardless of the overall guidelines, bar proposals and negotiations with the bar at the local level determine the character and emphasis of programs. While support from the American Bar Association has been steadfastly in favor of law reform and legal representation of groups, local bar support tends to run more toward provision of services to individual poor persons. In many communities the endorsement of the bar would surely be jeopardized if legal services attorneys moved to represent the Black Panthers, or groups planning rent strikes and economic boycotts, or if program attorneys moved aggressively to load up the welfare system with fair hearing appeals, or the trial court dockets with hoards of comparable challenges. Bar-controlled programs have been timid, with the consequence that social change through the law has not always been aggressively pursued.

Professionalism. As paradoxical as it may seem, professional norms and expectations can act as obstacles to the effective delivery of legal services to the poor. Perhaps the most common impediment is the norm of individual client care. Where resources are scarce, the idea of service to individuals, if allowed to dominate, thwarts any efforts at law reform.

A second profession-based impediment is the legal canons, which prohibit unauthorized practice of law by laymen and the use of lay intermediates who might stir up or solicit litigation. The consequence of these canons, where taken seriously, is to weaken organizational outreach by social workers and community aides.

Critical factors in institutional change through law. If it is not possible to specify all the ingredients necessary for effective social

change through law, or to provide a theory of social change through law, it is possible to begin to state some of the critical variables. I think we can summarize these variables under two general themes: organizational staging-power and organizational innovation.

It is by now very clear that efforts at institutional change through law demand concentrated and ongoing action to implement legal rules. We cannot expect change to occur rapidly because it is not always clear precisely how to enforce rules so as to maximize conformity and minimize side-effects. Building conformity to law is an organizational development process and demands organizational problem-solving mechanisms. Like any other problem-solving process it requires experience with alternative strategies, and it will inevitably involve inefficiencies, failures, false starts, and substantial rethinking. Americans are able to accept this kind of failure in space exploration, but when it involves experiments in group problem solving, we have little tolerance. The immediate response is to terminate programs rather than reevaluate and reconstruct them. In the war on poverty new problem-solving mechanisms are emerging out of the experiences with complex human confrontations. Innovations, compromises, and new perceptions are coming about. The need is for building strong action organizations with deep roots in the community; organizations that can weather crises, innovate, and get moving again. This demands resources, creative manpower, and the proper societal milieu in which to perform.

In concrete terms, for legal services centers, this means maximizing organizational effectiveness like any other problem-solving organization. But unlike most other organizations legal services centers must hang on under pressures from political leaders, the bar, the courts, the agencies

and even the resident poor. Like any organization, they must concern themselves with employee morale, job mobility, and careers for workers. One of the major problems has been recruitment and retention of talented attorneys. Low salaries, long hours, and frustrating work make for high turnover.

In addition, a quid pro quo must be reached with the bar, in which it is made clear that public legal services to the poor do not work an economic hardship on private attorneys. It not only relieves them of the ethical duty to undertake pro bono work, it also generates substantial referrals of clients who do not meet eligibility standards, and it creates the demand for attorneys among those individuals and agencies who are the target of grievances by the poor.

There must also be provision for alternative forms of legal services besides neighborhood offices. There should be a greater willingness to experiment with judicare plans where clients can have the option of taking their case to private attorneys. Given the case loads of the neighborhood offices, a judicare option would pose no threat to the center and might prove an effective means of promoting greater efforts at law reform.²⁰

Sociologists have an important role to play in the effective use of law as an instrument of social change, because we have the concepts and the tools for translating organizational experiences into systematic knowledge. It is up to us to bring these skills to where the action is and not shy away from involvement in policy-oriented research. In the long run, both policy and research will profit by the mix.

NOTES

¹Ronald Freedman et al., Principles of Sociology (1st ed.). New York: Holt, 1952, p. 312.

²An earlier version of this typology appears in Lawrence M. Friedman and Jack Ladinsky, "Law as an Instrument of Incremental Social Change" (Paper delivered at the annual meetings of the American Political Science Association, Chicago, September 1967).

³Escobedo v. Illinois, 378 U.S. 478 (1964).

⁴Miranda v. Arizona, 384 U.S. 436 (1966).

⁵Ibid., pp. 751-52.

⁶Gideon v. Wainwright, 372 U.S. 335 (1963).

⁷Public Law 89-236, 89th Cong., 1st Sess.

⁸Annual Report of the Immigration and Naturalization Service (1957), p. 20; ibid., (1962), p. 23.

⁹Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess., on H.R. 2580, to amend the Immigration and Nationality Act, p. 89.

¹⁰Brown v. Board of Education, 347 U.S. 483 (1954).

¹¹Public Law 304, 79th Cong., 2d Sess.

¹²See Stephen K. Bailey, Congress Makes a Law: The Story Behind the Employment Act of 1946. New York: Vintage Books, 1950, p. 226.

¹³See Walter W. Heller, New Dimensions of Political Economy. Cambridge: Harvard University Press, 1966.

¹⁴Public Law 88-452, 88th Cong., 1st Sess., and Economic Opportunity Amendments of 1965 (Public Law 89-253, 89th Cong., 1st Sess.) and 1967 (Public Law 90-222, 90th Cong., 1st Sess.).

¹⁵Sar A. Levitan, The Great Society's Poor Law. Baltimore: Johns Hopkins Press, 1969, pp. 177-79.

¹⁶Edgar S. and Jean C. Cahn, "The War on Poverty: A Civilian Perspective." Yale Law Journal 73 (July 1964) 1317-52.

¹⁷Office of Economic Opportunity Press Release, July 14, 1969.

¹⁸Evaluation Manual, Legal Services Programs Section 205 Grants, August 1967, pp. 1-2.

¹⁹Harold Rothwax, "The Law as an Instrument of Social Change," in Harold H. Weissman (ed.), Justice and the Law in the Mobilization for Youth Experience. New York: Association Press, 1969, pp. 137-44.

²⁰See A. Kenneth Pye and Raymond F. Garraty, Jr., "The Involvement of the Bar in the War against Poverty." Notre Dame Lawyer 41 (Symposium, 1965-66), 860-86.