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BOOK REVIEWS

JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO
LEGAL SERVICES PROGRAM. By Earl Johnson, Jr.¹
New York: Russell Sage Foundation. 1974.
Pp. xiii, 416.

Reviewed by Howard C. Westwood²

Earl Johnson has produced a book that ranks, in the literature of Legal Aid,³ with Reginald Heber Smith's *Justice and the Poor*. Smith was published in 1919. In all the years since, the influence of that book has been pervasive. But the impetus given Legal Aid by the OEO Legal Services program provided a new dimension requiring a new survey of Legal Aid's development and direction. Such a survey, brilliantly done, is Earl Johnson's. In years to come, its influence, I would predict, will be nearly as pervasive as was Smith's. It will be a long time before any Legal Aider can regard himself as educated for his mission until he has read and pondered Johnson's book.

The book is an account, both expository and analytic, of the genesis of OEO's Legal Services program, its evolution from 1965 to 1972, and the issues posed by the OEO experience for Legal Aid's future organization and thrust.

Johnson has written with three great advantages. First, he had a key post in the beginning days of the Neighborhood Legal Services Program of the District of Columbia, one of the very first of the pioneering OEO projects. Second, he became deputy to E. Clinton Bamberger, Jr. when in September 1965 Bamberger took office as the first autonomous boss of OEO's Legal Services, and he succeeded Bamberger less than a year later. And third, in academia since leaving OEO, he has had time to think, interview, research and write, the while keeping closely in touch with the OEO program.

1. Associate Professor of Law, University of Southern California.

2. Member of the District of Columbia Bar. LL.B., Columbia, 1933.

3. "Legal Aid" in this review refers only to civil legal aid—not criminal legal aid.

The result is a book full of episode that makes its reading fun; recording significant events, heretofore known to few, that provide fascinating revelation; and discussing the key ideas and devices in the OEO program that maintains interest to the last page. Nor should the reader omit the footnotes; they are full of meat.

One of the principal elements of Johnson's survey is his development of a thesis that (a) pre-OEO Legal Aid was concerned *only* with providing the individual poor man with a lawyer and fair procedure, but (b) the OEO Legal Services program added to that concern the aim of changing the substantive law to eliminate unfairness to the poor and to provide advantages to the poor. The shorthand for (a) is "due process" Legal Aid. The shorthand for (b) is "law reform" Legal Aid.

In the long future it will seem of little moment whether Johnson is right or wrong respecting pre-OEO Legal Aid or the extent to which the OEO program introduced a new concept into Legal Aid philosophy. Nor, if Johnson is wrong, would that detract significantly from the value of his book; its great value lies in its brilliant account of what has happened under OEO, not of why that was different from pre-OEO days. Nonetheless, if Johnson is wrong—and I think he is—it might be worthwhile just now to suggest his error. For during the three-year controversy on Capitol Hill and in the White House over permanent Legal Services legislation to supersede OEO's program,⁴ obscuring heat has been generated by the right wing's charge that "law reform" is an alien, even revolutionary, concept foisted upon us by OEO. It is time that that heat be cooled.

Among the more telling items invoked by Johnson to prove that pre-OEO Legal Aid was concerned only with "due process" and not with "law reform" is a quotation from Smith saying that "the substantive law, with minor exceptions, is eminently fair and impartial."⁵ That quotation is at Johnson's page thirteen. But two hundred and sixty-seven pages later—five pages from the end of his text—Johnson gets around to referring to "an entire chapter" in Smith's book devoted to what, in OEO parlance, was the "law reform" activity of "pioneer legal aid societies" which Smith most strongly endorsed.⁶ That activity included appeals where "matters of general legal or social interests are involved."⁷ It also included legislative lobbying on which Smith laid particular emphasis; if legal aid societies were to be effective

4. Johnson's survey does not reach this legislative history; it only brings us to its threshold.

5. R.H. SMITH, *JUSTICE AND THE POOR* 15 (1919).

6. *Id.* at 200-09.

7. *Id.* at 206.

"in their fight against injustice," Smith wrote, they must "take a part in the formulation of remedial legislation."⁸ All this Johnson quotes (p. 280).

No doubt conscious of the inconsistency of his thesis with this significant chapter in Smith's book, Johnson rather subtly modifies the thesis two sentences later by saying that it was "the primacy" of the "law reform" mission in the OEO program that was different from the pre-OEO Legal Aid philosophy (*id.*). Thus his thesis finally is (apparently) that pre-OEO Legal Aid sought, first, "due process" Legal Aid and, secondarily, "law reform;" but that the OEO program made "law reform" the *primary* goal.

Whatever Johnson really means, the simple fact is that he is wrong when he asserts a philosophical difference between pre-OEO Legal Aid and the OEO program.

As to pre-OEO Legal Aid, Smith wrote somewhat carelessly, perhaps, when he said that, "with minor exceptions," the substantive law is "eminently fair" to the poor man. I say perhaps he wrote carelessly. Quite possibly he was not so far wrong in 1919, a time far simpler in both law and economics than later years. In any case, Smith's chapter on "law reform" leaves no doubt whatever that this most authoritative expounder of pre-OEO Legal Aid philosophy regarded the reform mission as of eminent importance.

As to the OEO program, it is true that in March 1967, in a speech at a Harvard conference of Legal Services people, Johnson, by then the OEO Legal Services boss, announced that "the primary goal of the Legal Services Program should be law reform" (p. 133). But in the same speech he hastened to say that he was not suggesting abandoning "due process" Legal Aid; he meant only that Legal Services offices should "make time for work on law reform" (*id.*). And in his book he adds, on the same page where he quotes his Harvard speech, that the OEO decision was merely "to get *some* priority as official policy" for "law reform" (emphasis in original).

Nor in fact, despite much OEO rhetoric in following years, did "law reform" ever become the *primary* goal of the OEO program. The real program was not the rhetoric. The real program was the day-to-day labor of the working stiffs in the OEO-financed offices. Johnson, who is no less honest than he is idealistic, would be the first to agree that "law reform" has been a very minor component of that day-to-day labor. Nor would he, or OEO, have had it otherwise. Every week, at every OEO-financed office, scores of poor clients have been clamoring for help, more help than the available lawyers possibly could give, help in their mundane, everyday problems. Johnson, neither in his heart nor his mind, would advocate that the OEO

8. *Id.* at 200.

program should have subordinated those immediate needs to the planning and attempted implementation of "reform" in the substantive law.

No doubt a few of the Young Turks in the OEO program seriously sought the primacy of "reform." And the right wing, so much of which has been opposed to any effective Legal Aid program, just as rightists have opposed Legal Aid from the beginning, cleverly has seized on the OEO "law reform" rhetoric to misrepresent what the program was all about. They have charged that it was a program to bring about changes in the law according to the whim of federally subsidized young lawyers—and that, they have contended, is not the traditional Legal Aid so long supported by the bar. But that is not the fact.

The fact is that it is at least likely that pre-OEO Legal Aid devoted nearly as great a portion of its available resources and energy to "law reform" as has the OEO program. The reform accomplishments, by appellate litigation and legislative advocacy, referred to by Smith in his book and the similar efforts of legal aid societies in the years after 1919 were quite as notable, *relatively*, as any of the dramatic accomplishments of the OEO reformists—taking into account the opposition to Legal Aid in the years before OEO, the pitiful pittance on which it barely survived, and the much less effective legal tools available in the courts and in what passed for administrative agencies during most of those years.

Johnson recalls that in the nearly ninety-year history of pre-OEO Legal Aid there seems not to have been a single case brought to the United States Supreme Court by a civil Legal Aid lawyer (pp. 13-14). That he cites as probative of the absence of a "reform" mission pre-OEO. It proves no such thing. Aside from the fact that, for most of that time, the scope of issues that would have been entertained by the Supreme Court was much narrower than now, legal aid societies had neither time nor money to reach so far. Until nearly the 1960's the Legal Aid Society of the District of Columbia was gasping for life on a yearly income of some \$25,000 or less, and it was trying to serve most of the metropolitan area. Its occasional foray into local courts or agencies on what would now be labeled "law reform" was more notable, I submit, than any grand Supreme Court litigation pursued by OEO'ers with their relatively rich resources. And the situation in the District of Columbia was not atypical.

Johnson also cites the deemphasis of "reform" in the standards promulgated by the National Legal Aid and Defender Association in 1948 for its member legal aid societies (p. 13). But Johnson fails to appreciate the need that those standards be tailored to the slender means that NLADA members had available. They could require no more of a member legal aid society

than its poverty would make feasible; for its standards to have required more would have been an absurdity.

During the lean years, Emory Brownell and Junius Allison, staff heads of the NLADA, always were trying to inspire their members to move forward, to be more aggressive. Here in the District of Columbia they tried to needle. Indeed, in the early 1950's the NLADA staff prepared a formal evaluation of the Legal Aid Society of the District which was quite critical of its inadequacies. In the main, inadequacies stemmed from the Society's lack of funds. A body of skin and bones has precious little energy for aggression.

Yet even in such a body there was aspiration. Long before OEO the District of Columbia Legal Aid Society had wangled a modest grant from a local foundation to finance the opening of a neighborhood law office, located in the Howard Law School building. Barely suitable to the purpose, it nonetheless seemed a beginning toward realizing an impossible dream of Mr. Allan Fisher, staff head of the Society, who for years had hoped for neighborhood offices, with all that they would mean in terms of vigorous lawyering closer to the heart of the communities to be served.

The real difference, I submit, between pre-OEO Legal Aid and the OEO Program is to be found in this: the former had only pennies and nickles, with very uncertain, and often inconstant, backing by the bar and Community Chest organizations; the latter has had millions, with the powerful backing of the authority and the prestige of the federal government.

Johnson, of course, is fully aware of this difference. Early in his book he has an interesting discussion of pre-OEO Legal Aid's attitude toward seeking government financial support (pp. 14-19). Smith had favored government support (though doubtless when he wrote he barely thought of the possibility of federal support). As a matter of fact, in 1919 there were indications that very significant municipal government support was on the way; that was the trend. Had the trend continued it is quite conceivable that state support also would have come about. But the trend soon came to an end.⁹

The flavor of Johnson's discussion is that, pre-OEO, Legal Aid had become opposed to any government financial support. Also he brings out forcefully the opposition, pre-OEO, sometimes voiced by a few leaders of the bar (and, a time or two, by the ABA) to government support (pp. 17-19).

But Johnson never quite sees the full pre-OEO picture. One most important factor he seems to overlook: the danger in state and municipal financing of Legal Aid. As Johnson knows from OEO experience, state and

9. This was in contrast to a more or less continuous increase in government support for criminal legal aid.

local governments often are extremely antagonistic to full scale, vigorous Legal Aid because the legal problems of the poor involve controversies with local officialdom and with private interests powerful in local politics. Obvious, then, is the danger in state and municipal financing. Unquestionably, pre-OEO, there were some Legal Aiders who were wary of such financing; as long ago as 1920 Charles Evans Hughes had warned of the danger (p. 15). Moreover, there were practical complications, since pressures on Community Chests made it always possible, if not probable, that some government financing would result simply in a commensurate reduction in private support. Nonetheless, by the late 1950's and early 1960's, Legal Aiders' sentiment favoring state or local government support had begun to revive and some notable steps to that end had been taken.

It is quite true, however, that Legal Aiders, pre-OEO, had not sought federal support, a support which has the great virtue of providing an important degree of protection from the political pressure that is almost inevitable in state and local government financing. But Johnson is off base when he implies that, because some Western European governments finance Legal Aid, our Legal Aiders and bar should have been clamoring for federal financing long before OEO (p. 14). Our federalism was not abolished by the New Deal. Prior to OEO it is fair to say that not even the most diligent effort by Legal Aiders and the bar could have won any significant consideration of congressional action. The Legal Aid Commission of the Bar Association of the District of Columbia, in a notable report issued in 1958, had recommended that Congress provide partial financial support for a combined civil and criminal Legal Aid organization in the District.¹⁰ The Circuit Judicial Conference took up the recommendation and sought such legislation. But at the very outset it was made crystal clear on Capitol Hill that no such support would be given unless civil Legal Aid were eliminated.¹¹ With that reaction by Congress to financing Legal Aid in its own municipality, one can well understand that a proposal for federal support for Legal Aid country-wide would have got nowhere.

Yet it must be confessed that, as Johnson brings out clearly, the proposal to create the OEO afforded an opportunity that neither Legal Aid nor the bar had the imagination to discern. Only the merest handful of people saw and pursued the opportunity, and they were non-establishment types. It is

10. REPORT OF THE COMMISSION ON LEGAL AID OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA 182-87 (1958); *cf. id.* at 48-55.

11. The legislation was enacted in 1960. Act of June 27, 1960, Pub. L. No. 86-531, 74 Stat. 229. It created the forerunner of the present District of Columbia Public Defender Service. Sponsors were able to squeeze into it legal aid in juvenile and mental health cases, along with criminal legal aid.

to their eternal credit that they did so, and to Sargent Shriver's eternal credit that he had the wisdom to respond to their plea. OEO's original statute did not specify Legal Aid, but its general language was broad enough to allow Shriver to embrace it. Embrace it he did, with a fervor and fidelity that paled the Legal Aid endorsements that had become commonplace year after year in resolutions of the organized bar.

If Shriver and his OEO were ahead of the organized bar, it was not for long. Johnson tells well the story of the bar's quickly coming to stand shoulder-to-shoulder with OEO. This was due to the wisdom of now Mr. Justice Powell, then the ABA President, and some of his trusted advisers (pp. 49-70).

In suggesting, as I have, that there was no basic philosophical difference between pre-OEO Legal Aid and the OEO program, that the real difference was money and the backing that the federal government could provide against the attacks that rightists always have mounted, I certainly do not minimize the importance of that difference. It had enormous consequences. Most important was the bringing into Legal Aid's service, full time, of a great corps of able, ingenious, dedicated young lawyers who have made things hum. Sometimes they have been overly impetuous. Sometimes their judgment has been faulty. Among them, now and then, there has been a kooky sort. But in the large they have done lawyering that is superb. Theirs is a chapter in the legal profession's record that glows.

Since attention to "law reform" is inherent in the most elementary conception of Legal Aid, precisely as Smith in 1919 said it was, it was inevitable that such vigorous lawyering would step on toes of landlords, merchants, bankers, government officials. Pre-OEO Legal Aid never had had enough resources to be much more than an occasional nuisance. Under OEO, Legal Aid was given such strength that it could not be ignored. No longer could a slum landlord dispose of a case with a legal aid society and continue his exploitation in other cases, knowing that the society had not the means to catch up with him. He had to face the fact that a skilled organization would be on his trail week after week if need be, with the routine case, the test case, or the class suit, as Legal Aid strategy might dictate.

So, with OEO support, Legal Aid finally came to be a force in our society to be reckoned with, not because it was philosophically different, but because it had muscle.

Reckoning, right-wing opponents tried hard, in the recent legislative battle, to kill it off or, failing that, drastically to restrict its reach. Their assault scored some successes, but they were limited. Legal Aid came through with a strong, permanent federal charter.

The great question now is whether there will be administration of that charter with the vision and the understanding that inspired Reginald Heber Smith in 1919, Earl Johnson in 1974, and the hundreds of able young lawyers that OEO brought forth. However sound the charter, administration can stultify. The great advances chronicled by Johnson can be reversed. Legal Aid always has been embattled. It always will be. Its opponents never give up. Legal Aiders, and the supporting bar, must never nap. May they read Earl Johnson and be determined anew that the advances since 1965 will be a springboard for more.

JOHN MARSHALL: A LIFE IN LAW. By Leonard Baker.¹
New York: Macmillan Publishing Company, Inc. 1974.
Pp. xv, 846. \$17.95.

Reviewed by Joseph H. Smith²

This sprawling book by a Washington journalist (apparently not a lawyer) is the most recent of the many books, biographical, historical, and legal, dealing with John Marshall, the fourth Chief Justice of the United States (1801-35). It will not be the last. *The Papers of John Marshall*, at Williamsburg, Virginia, with Herbert A. Johnson and Charles T. Cullen as co-editors, brought out its first volume in November 1974. Also promised within the next few years are three volumes of the *Oliver Wendell Holmes Devise History of the Supreme Court* under the general editorship of Paul A. Freund. One, co-authored by George L. Haskins and Herbert A. Johnson, covering the period from 1801 to 1815, bears the title *Foundations of Power—John Marshall*. The two others, both by Gerald Gunther, are respectively entitled *The Struggle for Nationalism: The Marshall Court, 1815-25* and *The Challenge of Jacksonian Democracy: The Marshall Court, 1826-35*.

As "the Expounder of the Constitution" Marshall in his years as Chief Justice handed down many controversial decisions. Praised and lauded by the Federalists, he was bitterly assailed by the Jeffersonians and the Republican press. At his death he was fortunate in that Joseph Story, his close friend and Associate Justice on the Court, and Horace Binney, the noted

1. Mr. Baker is a free lance journalist.

2. George Welwood Murray Professor of Legal History, Columbia University. A.B., Yale, 1935; LL.B., Columbia, 1938.