

The Community Legal Clinic Movement in Ontario:

Practice and Theory,
Means and Ends

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I: Introduction

In movements for social change, the law plays a seemingly paradoxical combination of roles. It is at once the guarantor of justice for all and the guardian of privilege. Sometimes it is the friend of the powerless and dispossessed; sometimes the tool of the oppressor. It can be both profoundly anti-democratic and the great equalizer. For poor people, for women, for cultural minorities, the promise of equality before the law is a cruel joke and yet a hopeful invocation of a better world. As one writer puts it:

... in its relation to custom and other sources of normative expectations, law represents *both* the status quo *and* the device of revolution. It guarantees and enforces traditional expectations against those of "bad faith" who would wilfully ignore them or challenge the system. In this role, law is the guardian of the status quo. We capture that role in our contemporary term "law and order". At the same time, law is the only device capable of bringing instant moral and coercive authority to bear on behalf of new expectations and of challenging the authority of organizations and markets. Thus, it is also the most powerful device for politically instantiated change.¹

This ambiguity has also been a puzzlement for theorists of social change, who have been divided over the possibilities for using legal resources in struggles for social justice. Amongst those whose aspirations can be generally termed leftist, the prevailing view is that the law is designed to serve and protect the interests of the dominant groups in society. It reflects the ideology of the dominant groups and it is an instrument for the enactment and enforcement of that ideology. While marginal reforms can be achieved by working within its institutions and structures, fundamental change can be brought about only by the collective exertion of previously untapped political and economic power by large-scale social movements. Legal resources can be usefully deployed in rearguard actions designed to shield these movements and their leaders from excesses of state repression. (When peace activists are arrested for invading the property of weapons manufacturers, their lawyers know that they won't get very far arguing that the threat of nuclear holocaust establishes the defence of necessity but that the judge might well be interested in hearing that the charge is improperly drafted.) This view is generally associated with theories of social change predicated on a belief in a historical sequence of types of social organization, each with its distinct "deep structure". In the leading genre of deep-structure theory, Marxism and its derivatives, the cultural, political and legal formations of a society are more or less determined by the material, economic relations of that society. The fundamental economic structure places limits on the extent of change that can occur at other levels of organization (i.e. cultural, political and legal), and is relatively immune from itself being changed by pressure applied at those other levels.

In such evolutionary deep-structure theories, the would-be agent for social change is presented only with a choice between acting either in or out of step with the arrow of history. Wherever the possibility seems to exist for trying to bring about

¹ Phillip B. Heymann, "A Law Enforcement Model for Legal Services" (1989), 23 Clearinghouse Review 254, at 256.

some localized or marginal reduction in the power of some to reduce others to a state of dependency and exploitation, one is therefore confronted with a series of dilemmas; or perhaps one basic dilemma which can be described in several different ways: First, if gradual reform can never surpass the limits set by the basic structure of social division, there is always the danger that the reformer is merely contributing to the hold of that basic structure by softening (either actually or only apparently) the conflicts which it would otherwise engender. This works against the arrow of history by allowing people to think that the social structure is more just or legitimate than it really is and thereby reducing the pressure for fundamental change. Second, those who benefit by the underlying economic distribution of power must be taken to understand this; thus through their control over the terms of cultural, political and legal interaction they will be able to effectively co-opt reformist efforts into unwitting collaboration in maintaining the essential elements of the status quo. Third, there is the danger that reformist goals will divert scarce energy, time and resources away from the more important task of building broad-based collective actions aimed at intensifying the conflict at the more fundamental, structural level.² Finally, the realization of the foregoing causes the aware agent for social change to adopt an instrumental and sometimes cynical stance towards reformist movements — she will tend to see participation in them as instrumentally useful only insofar as they may help bring about the conditions under which (according to her guiding theory) the quantum leap from one form of society to another can take place. Thus she may believe that those with whom she is temporarily allied in localized or modest efforts are actually misguided by the illusion that the immediate goals they seek are worthwhile for their own sake.

The main problem posed by belief in evolutionary deep-structure theories of social change, however, is the fact that history has refused to bear them out.³ The malaise that this fact has induced among progressive people who have been willing to face it may stem from a fear that one can never be sure of what to do without the guidance of such a theory — the fear of getting lost in a tangle of particularities without a compass that points constantly towards the goal. It may also reflect a feeling that without the guarantee of the inevitability of success that such theory hoped to provide, the risk of futility is overwhelmingly high.

Hence the ultimate paralysing dilemma: anything within reach seems hardly worth fighting for, and anything worth fighting for seems hopelessly unattainable.

² For variations on these themes with respect to the usefulness of *Charter* litigation to progressive movements, see e.g. Judy Fudge, "The Public/Private Distinction: The Possibilities Of and the Limits To the Use of Charter Litigation to Further Feminist Struggles" (1989), 25 Osgoode Hall L.J. 485; Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda", [1987?] *The Advocate* 857; Allan Hutchinson & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988), 38 U.T.L.J. 278; and with respect to the function of legal forms under capitalism, R. Weitzer, "Law and Legal Ideology: Contributions to the Genesis and Reproduction of Capitalism" (1980), 24 *Berk.J.Soc.* 137; Harry Glasbeek & Michael Mandel, "The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984), 2 *Socialist Studies* 84.

³ See, e.g., Roberto Unger, *Social Theory: Its Situation and Its Task* (New York: Cambridge University Press, 1987) at 109-117.

This paper is an account of the experience of a progressive movement which hints at the possibility of a different way of thinking about social change — one that replaces the problem of aligning theory and practice with an immersion in practical, localized struggles which nevertheless can be guided by general principles. In particular, it suggests that a “bottom line” for the strategy and tactics of social justice should be a refusal to divorce means from ends: that whatever long-term utopian vision one has of a transformed society, one needs to look for opportunities to live out and realize elements of that vision, however fragmentarily or imperfectly, in the “here and now” of political and personal interaction. It suggests, also, that such efforts need not be limited by the assumptions of deep-structure social theory because experience shows that there is no clear division between conflicts that take place *within* a given context and conflicts *about* the basic terms of that context.

The story presented here is about a struggle for “access to justice”, a phrase that can stand for freedom from exploitation, powerlessness and poverty or only for the right to have a lawyer tell you that law doesn’t recognize your right to be free from those things.

II: The Story of Community Legal Clinics in Ontario

A: Background

The first publicly-funded legal aid program in Ontario was inaugurated by the *Legal Aid Act* of 1966.⁴ Before that, the ability of persons who could not afford lawyers’ fees to obtain legal representation was dependent on the charitable *pro bono* work of the private bar. In the report leading up to the implementation of the Ontario Legal Aid Plan, it was recognized that “... legal aid should form part of the administration of justice in its broadest sense. It is no longer a charity but a right.”⁵ The basis of the Plan was the idea that equal access to justice could be achieved by making available to the poor the same lawyers and legal services as were available to the well-to-do individuals and corporations traditionally served by the private bar.

It became apparent relatively quickly that this approach left almost totally unaddressed vast areas of need for legal advice and representation. Apart from criminal and family law matters,⁶ most of the types of legal assistance required by poor people were unrecognized by the Plan⁷ and, more fundamentally, involved matters in which very little expertise or experience was to be found among the private bar. Furthermore, many problems were not recognized as *legal* by the people affected themselves. These problems — in the shape of hostile landlords, unfair welfare officials and so on — were too woven into the fabric of everyday life to fit the traditional model of non-poor legal clients, the people of whom it has been said that:

⁴ S.O. 1966, c. 80. This was the first such plan in Canada; the rest of the Provinces and Territories followed suit over the next decade or so.

⁵ *Report of the Joint Committee on Legal Aid* (March 1965) at 97.

⁶ For example, of legally-aided cases completed in the year ending March 31, 1970, 90% involved litigation and of these 85% involved criminal or family law matters: *Ontario Legal Aid Plan Annual Report, 1970*, at 14.

⁷ For example, the Plan specifically excluded from coverage proceedings for the enforcement of landlords’ obligations: *Legal Aid Act, 1966*, S.O. 1966, c. 80, s.15.

[i]n so far as the law is concerned, they lead harmonious and settled private lives; except for their business involvements, their lives usually do not demand the services of a lawyer. Occasionally, one of them gets hit by a car, or decides to buy a house, or lets his dog bite someone.⁸

Even when poor people identified their problems as having a legal dimension, they were extremely unlikely to consider the possibility of legal resources being brought to bear on their behalf. A myriad of physical and psychological barriers stood in the way.⁹ Lawyers were often regarded (not inaccurately) as being on “the other side”. For these and other reasons, the goal of providing equal access to justice for rich and poor could not be well served by a legal aid system that was based on the norm of the fee-paying client.

B: The Early Clinic Movement

In Ontario, the response to this deficiency was the creation of alternative legal services by community organizations, self-help groups and sympathetic law faculties and students. Operating with or without lawyers, and with unreliable funding from an assortment of sources ranging from the federal Justice Department to the U.S. Ford Foundation, these new “legal clinics” took a quite different approach from that followed by the Ontario Legal Aid Plan. Among the main elements which characterized this approach (although they were by no means all shared by all the groups and individuals involved in the field) were the recognition of the following guiding principles:

1. The provision of high-quality services in relation to matters affecting poor people could be achieved only by relative specialization — and that expertise in these matters, just as in the areas traditionally served by the private bar, was more likely to be attained by a small group of people devoting their full-time attention to specific types of problems and sharing the results of their research and experience than by lawyers engaged in quite different areas of practice who take the occasional “poverty law” case.
2. The “one-shot” case-by-case approach was wholly inadequate to respond to the legal problems that attended poverty because these problems were mostly of a systemic nature. Access to the courts meant nothing if one had no legally recognized right to enforce once inside. Even where legal remedies were possible, they would not be realized unless the people who could benefit from those remedies were aware of them and were willing to assert them. Thus it was necessary both to engage in aggressive outreach and educational activities to encourage potential clients to attempt to assert their claims and, as well, to develop organizations that could serve as a voice for the articulation of the interests of poor people with a view to changing the policies, structures and laws which operated against those interests.
3. The services provided by clinics must be responsive to the needs of the communities being served. This objective could not be realized under the traditional

⁸ Stephen Wexler, “Practicing Law for Poor People” (1970), 79 Yale L.J. 1049 at 1049.

⁹ For an account of some of these barriers, see Larry Taman, *The Legal Services Controversy: An Examination of the Evidence*, Ottawa: National Council of Welfare (1971) at 13—21.

social service or professional/client relationship models, which tended to reinforce the disempowerment of poor people by denying their ability to make choices and take action on their own behalf. These traditional conceptions of provision of service increased people's dependency on "experts" whose assessments of what was in the best interests of their clients was often seriously mistaken and whose training and social location often led them to narrow definitions of the problems and possible courses of action. The new clinic movement, therefore, looked for models in which the ideal of "user control" could best be realized — ways of involving, to the greatest degree possible, members of the client communities in the design and delivery of the clinics' services.

One prominent feature of most of the early clinics was the employment of "community legal workers"; generally persons without formal legal training but often having a background in grass-roots community organizing activities or coming from the client groups being served by the clinics. It was not, at first, a matter of recruitment and training by the clinics of persons from the client community to act as community legal workers; rather, the community legal workers were often people who, having achieved some expertise in a particular legal area through their own efforts in dealing with problems they were personally experiencing, had gone on to organize self-help groups around these issues in which this expertise could be shared. These people and organizations were not the creations, but rather the creators, of the first clinics.

The community legal worker model was seen to be an important embodiment of the principles outlined above. First, by focusing on particular practical legal issues, they were able to achieve high levels of expertise not found anywhere else, including the private bar. Their activities would often revolve around a set of institutions and entitlements based in particular statutory provisions; for example, unemployment insurance, general welfare assistance, refugee claims, tenants' rights. Not only were they able to become highly conversant with these statutes and the jurisprudence surrounding them, but they also attained a great deal of familiarity with the relatively informalized or "discretionary" aspects of policies and procedures practised by the agencies and tribunals administering them — the kind of familiarity with "the law in action" that, as most lawyers know, is only learned through practice and which can make the difference between merely technical competence and truly effective advocacy. Because lawyers were generally much less familiar with these substantive areas and specialized agencies, community legal workers could usually beat them at their own game.

Secondly, the model of the community legal worker emphasized skills and experience relevant to the activities of community legal education and organizing necessary in the attempt to address problems at a more systemic level than was possible under the individual case, litigation-based approach supported by the legal aid plan. Furthermore, they were more willing than were lawyers generally to engage in such activities and to see them as at least equally important and legitimate as litigation. This idea was stated bluntly by a group of community legal workers: "A community legal worker is often better suited than a lawyer to achieve the long range goal of social

change because they do not have a vested interest in maintaining the legal system and the status quo.”¹⁰

Thirdly, community legal workers were more likely to share with members of client groups similarities in life experience, social status and thus attitude to the status quo than were most lawyers. As a result, they were better equipped to understand the situations clients found themselves in, and the features of their lives that formed the contexts within which their “legal” problems arose. They saw themselves as playing a facilitative role directed towards the achievement of self-definition and empowerment of client groups rather than the role of the expert in whose hands clients place responsibility for the solution of their problems. The socialization and training of lawyers was seen as being less conducive to the formation of such attitudes, although there were certainly lawyers involved in clinics who were exceptions to the general rule.

The other operational feature of clinics that was tied to the implementation of the principles noted above was their independence from the official Legal Aid Plan (run by the Law Society) and from government. But while the Plan did not direct or interfere in the operations of the clinics, neither did it provide any financial support. As will be discussed below, the issue of independence was to become increasingly crucial and problematic after the advent of public funding for community legal clinics. But the early clinics saw independence from government (and from the Law Society, which they did not regard as significantly distinct from government) as essential to their effectiveness. Independence was crucial in two distinct, but interrelated ways: (1) It was an important value for the same reasons that an independent bar generally is considered to be necessary to the ideals of democratic government and the rule of law — reasons made all the more apparent in the case of clinics whose activities, more often than not, placed them in an adversarial role with respect to government departments, agencies and, in law reform and organizing activities, the political party in office itself. Thus, independence was necessary to ensure, in both appearance and reality, that clinics were able to act faithfully in the interests of their clients free from conflicting loyalties, pressures or duties. (2) Independence also had a more positive and global aspect: it was essential in order to ensure that clinics could continue to be guided by the principle of client influence, and ultimately control, over the design and implementation of their services — input which meant a focus on organizing, lobbying, and other forms of collective action instead of the narrower individual client-based mandate of the Legal Aid Plan.

In accordance with this commitment to grass-roots control and accountability, clinics began to develop the model which, in form at least, continues to be followed today: the community-based Board of Directors. These Boards were drawn largely from the communities served by the clinics, they were chosen by election of the memberships of the clinics (generally, anyone eligible for service or supportive of the clinic’s goals and objectives could become a member, and membership was usually actively encouraged among client groups), and they would be responsible for setting the policies of the clinic and directing its staff. The Board’s control was to be real and

¹⁰ From a “Statement by a group of community legal workers”, (undated) prepared for a conference workshop (time, place and name of conference unknown, but probably around 1975-76 in Toronto).

would mean, "... having power to hire the staff most suitable to the community; having the power to define its own and its staff's responsibilities; having the power to direct the 'style' of the service provided, and most important, having the power to establish priorities for the organization that reflect social/political/legal objectives for reform and change."¹¹ With control came the need for accountability, and the building of democratic organizations of client constituencies from whom Board members would be drawn, and to whom they would be responsible, was seen as the best way to meet this requirement. The model of staff control, even with the institution of the community legal worker and however high a degree of rapport and understanding existed between clinic staff and clients, was not seen as adequate for true accountability and community control.

C: The Advent of Public Funding

Growing awareness of the deficiencies of the Ontario Legal Aid Plan led to the appointment in January, 1974 of the Osler Task Force on Legal Aid. In its Report of November, 1974, the Task Force made certain recommendations concerning what it called "neighbourhood legal aid clinics". Most significantly, it recommended that they be funded through the Legal Aid Plan (which was to be run by a statutory non-profit corporation named Legal Aid Ontario whose Board of Directors would be comprised mainly of equal numbers of appointees of the Law Society and the Provincial Cabinet). It recommended that some of the then-existing clinics in Metropolitan Toronto, which were "independently operated under direction of community organizations or well intentioned individuals", be "invited to come within the ambit of the Plan".¹² However, the role envisaged for the community organizations that had established independent clinics was to be "exclusively advisory". Decisions as to the establishment of further clinics were to be made by the Board of Legal Aid Ontario, and such newly-created clinics would be "encouraged", not required, to establish Community Advisory Boards made up of lawyers practicing in and "lay persons" residing in the geographical community served by the clinic. The Board of Legal Aid Ontario, and not the community groups or advisory boards, was to have control over appointment of staff to the clinics, establishment of staff requirements, special projects and priorities, and power to impose any further terms and conditions of funding that it considered advisable.¹³

For the people involved in the early clinic movement, the Report, despite its lack of support of any strong version of the principle of community control, was most notable for the hope that it held out for relatively secure funding. The clinics' lobby group, Action on Legal Aid, precursor of the Ontario Association of Legal Clinics, apparently gave qualified support to the recommendations of the Task Force, probably based on a perception that the maintenance of community input through advisory boards together with the vesting of control over the Legal Aid Plan in the proposed new statutory corporation, in which neither the Law Society nor the provincial

¹¹ *Ibid*, "Pre-conference workshop report on community control", prepared by "a group of community members of Boards of Directors of Community Clinics".

¹² *Report of the Task Force on Legal Aid, Part I*, Mr. Justice Osler, Chairman (Ontario: Ministry of the Attorney-General, 1974), p. 112.

¹³ *Ibid.*, 123-24.

government had a decisive voice, would assure a sufficient degree of independence for clinics.¹⁴

The Ontario Government responded with the proclamation of the Clinical Funding Regulation, which authorized the Legal Aid Plan to fund “independent community-based clinical delivery systems”.¹⁵ The term “independent” was not defined; its meaning was highly ambiguous in light of the fact that other recommendations of the Task Force, notably the creation of a statutory legal aid corporation with extensive control over clinic operations and the relegation of community boards to an advisory role, were not implemented. Perhaps predictably, the views of the Law Society and those of the clinics diverged sharply on this question.¹⁶

In the meantime, tensions between the clinics and the Law Society had been fanned considerably with the “defunding” of the “People & Law” clinic, a move that many involved in the clinic movement saw as reflecting a policy decision by the Clinical Funding Committee not to fund law reform activities. The summary way in which the defunding decision had been reached (the Regulation required no formal notice or hearing and none had been provided) was regarded as unacceptable interference with the autonomy of the clinic’s community-based Board of Directors and brought home to clinics the ease with which the Committee’s control over the flow of money could translate into a veto power over clinic policies and practices. These concerns led to the appointment, in June 1978, of a Commission on Clinical Funding to be conducted by Mr. Justice Samuel Grange.

D: The Grange Report

The Commission’s mandate was to make recommendations for “improvements to the Regulation and its administration by the Law Society of Upper Canada” and for “firm guidelines to govern the working relationship between the clinical delivery systems and the Clinical Funding Committee”. It was instructed further

To have regard in all of the foregoing to the need for the independence of clinical delivery systems, funded under the Regulation, the need for accountability for the expenditure of public funds, the need to maintain good standards of service to the public, the need to deliver service at

¹⁴ This is largely conjecture on my part; see: Mary Jane Mossman, “Community Legal Clinics in Ontario” (1983), 3 Windsor Yearbook of Access to Justice 375, at p. 382, where she notes that: “In a brief to the Ontario Government, the early clinics supported the Report’s recommendations and urged the creation of a new legal aid corporation in which neither the Law Society nor government representatives should have any special status. However, the brief is also important for identifying the fiscal dilemma then faced by the early clinics...” [quotation from brief and footnotes omitted].

¹⁵ *O. Reg.* 160/76, s. 147.

¹⁶ In a letter to the Attorney-General dated May 10, 1978, the Clinical Funding Committee of the Ontario Legal Aid Plan urged the speedy resolution of these disputes by a third party, saying tactfully that “... until the rules of the relationship [between the Committee and the clinics] are defined, full co-operation between all parties will not be realized. ... The system would be impaired if the Clinical Funding Committee and the Clinics were forced to continue their relationship under the current regulation into another fiscal year.” (Ontario: *Report of the Commission on Clinical Funding*, Hon. S.G.M. Grange, Commissioner (1978), Appendix ‘F’) (hereinafter “Grange Report”).

reasonable cost to the taxpayer, and the need for orderly growth and development of the clinical portion of the Ontario Legal Aid Plan.¹⁷

After hearing from almost everyone involved in the clinic movement, as well as from the Law Society and the Clinical Funding Committee, the Commission issued a report that was very strongly supportive of the original vision of community controlled clinics, with a broad mandate which included organizing and law reform activities. With respect to the latter, the Report had this to say:

“... the field [of law reform] is not unknown to the private Bar in its service to its clients and it is perhaps even more the proper concern of lawyers who serve the poor because the poor are less articulate and their concerns less often heard by the legislators. While there may have once been doubt of the propriety, it does not exist now. Many clinics, to a greater or lesser degree, engage in some form of law reform activity including lobbying of legislatures and organizing of their clients for the purpose. ... The definition of ‘legal and para-legal services’ I have set out above is intended to encompass law reform.”¹⁸

The Report also affirmed the need for real community control, and not just an advisory role for clinic boards; the Clinical Funding Committee’s intervention was to be limited to exceptional circumstances:

... to the extent that the poor have now placed their confidence in the clinics, much of the credit must go to the strong role played in their development and operation by the boards of directors. If the movement is to develop and progress with the continuing confidence of the clients, that role must not be eroded. The boards must continue to govern the affairs of the clinics, both as to policy and administration, *subject only to accountability for the public funds advanced and for the legal competence of the services rendered*. [...] I think the matter should be viewed in this light: the Boards have control over the operations of their clinics and the Committee may interfere in that control only if it can bring the interference within one or other of the public’s legitimate spheres of interest.¹⁹

Other recommendations were aimed at instilling the values of procedural “due process” into the decision-making function of the Committee. The Committee was to have under its general direction a staff who would be responsible for making all initial funding decisions. The Committee was to assume an appellate jurisdiction with respect to these decisions, with an appeal lying as of right to any established clinic whose funding the clinic funding staff proposed to reduce. In its appellate role the Committee would be required to hold hearings to which the *Statutory Powers Procedure Act* would apply.²⁰ The composition of the Committee was also addressed: there were to be five

¹⁷ *Grange Report, ibid*, Appendix “A”.

¹⁸ *Ibid.*, 15-16.

¹⁹ *Ibid.*, 22 [emphasis added].

²⁰ *Ibid.*, 35-36, 41, 43.

members; two representatives of the Law Society, one of “the Attorney-General and the public” and two of the clinics themselves.²¹

With the proclamation in June, 1979 of a new Clinic Funding Regulation²² most of Grange’s recommendations were implemented. A significant exception was the absence of designated clinic representatives on the Clinic Funding Committee. The new Committee was to consist of three appointees of the Law Society and two of the Attorney-General, with the proviso that at least two members of the Committee be persons previously “associated” with community legal clinics. And significantly, too, the new Regulation provided for the funding of “independent” clinics without defining the scope of that independence against the Committee’s power to make policy with respect to funding and to impose terms and conditions on the use of public funds by clinics.

E: The Erosion of Community Control

At the time of the Grange Report, the public funding of clinics through the Ontario Legal Aid Plan was already in a trajectory of explosive growth as existing community-based self-help groups took the opportunity for obtaining secure funding bases and expanded resources.²³ Since then the growth in funding, while it has not been as rapid as in those initial years, has consistently outstripped the growth of the original fee-for-service component of the legal aid budget, and that of the Attorney-General’s budget as a whole, with the result that there are now 67 publicly-funded community legal clinics with a total budget of approximate \$25 million.²⁴ The Clinic Funding Committee²⁵ now directs a full-time staff of 9, who have responsibility for initial decisions respecting funding of new and existing clinics. There is now almost complete geographical coverage of the entire Province by clinics, and several more specialized clinics have been funded to serve “communities of interest”.²⁶ By these measures, the clinic movement has been a spectacular success, probably far beyond the expectations of its originators. But there is another side to this growth which reflects an underlying dissent among the various participants and observers concerning the role of community boards and, relatedly but more broadly, the mission of the clinics themselves.

²¹ *Ibid*, 37-41. But the sense in which Committee members were to be “representative” was vague, since the Attorney-General was to have the sole power to appoint all five.

²² R.R.O. 1980, Reg. 578. The mandate of the clinics was described, in s. 148(s), as the provision of “legal and paralegal services or both, including activities reasonably designed to encourage access to such services or to further such services and services designed solely to promote the legal welfare of a community.”

²³ Funding levels had grown from about \$913,000 for 13 clinics in 1976-77 to almost \$2.6 million for 35 clinics in 1977-78 (*Grange Report, supra*, n.16, Appendix “E”).

²⁴ This is the amount requested by the Clinic Funding Committee for the fiscal year 1988-89 and, at the time of this writing, had not yet received final approval from the Attorney-General.

²⁵ As it is now called — the “-al” was dropped with the new Regulation which followed the Grange Report.

²⁶ Examples of such communities of interest served by specialized clinics include children and youth, residential tenants, Chinese & South-East Asian immigrants, non-unionized workers (occupational health & safety matters), native communities and reserves, differently-abled persons and injured workers.

Perhaps inevitably as a result of the lack of any legislative definition of the word “independent” as applied to clinics and of any precise delimitation of the scope of the Clinic Funding Committee’s powers, there continued to be conflicts between the Committee and the established clinics over these issues. These conflicts reached a culmination point as a group of lawyers employed in some of the newer clinics began to campaign for a dominant role for lawyer-directors within the Ontario Association of Legal Clinics (OALC), the umbrella lobbying and information-sharing organization of the clinic movement.

With moral and tactical support from the Clinic Funding Committee and its staff, this group of clinic lawyers put forward a proposal for a thoroughgoing restructuring of the OALC which reflected their view that lawyer-directors were the appropriate people to direct the work of the clinics, to identify training requirements and so on. The proposal was defeated at a general meeting of the OALC which voted instead to initiate a process of deliberation over the issues raised which would allow for wider participation and cooler thinking than was possible in the crisis atmosphere in which the proposal had been brought forward. The response of the Clinic Funding Committee was astonishing to most participants — rather than awaiting the outcome of the democratic and participatory process which the OALC had set in motion; or, better yet, making no response at all, the Chairman of the Committee announced to stunned observers outside the convention hall that the OALC would be defunded, effective the following business day. And so it was. It was, in some respects, a replay of the People & Law fiasco of the early days — no notice of intention to defund had been given to the Association and no hearing was afforded it either before or after the decision was taken. The Clinic Funding Committee had, however, made it fairly clear that they would be displeased if the lawyer-directors’ proposal were not approved; thus the vote to reject it was in part an act of defiance against what was seen as an improper attempt by the Committee to interfere with the Association’s internal decision-making process.

Two lessons are to be drawn from this episode in the history of the clinic movement. One was that the Clinic Funding Committee, as representatives of the Law Society and the Attorney-General, wielded through their control over funding decisions the ultimate power to dictate terms to the clinics, and there was no apparent limit to the degree of interference which could be effected through the exercise of this power. Thus it became a serious question whether anything at all remained of the “independence” of the clinic Boards. The other lesson was that there was division within the clinic movement itself over the fundamental philosophy behind the movement — indeed, this division was reflected rhetorically in the question of whether clinics any longer constituted a “movement” at all, or whether, as some would have it, they were now a “system”. This division was in large measure responsible for making possible the overt interference in the internal affairs of the OALC by Legal Aid officials, and it is therefore worth conjecturing about its causes.

Even during the period of rapid growth, the increase each year in the overall funding level for clinics was insufficient to meet the demand placed on it by existing and newly-forming groups who wanted clinics established to serve their constituencies. The clinic funding staff was therefore required to prioritize among the applications received each year, and gradually a pattern of standardized evaluative factors emerged upon which such decisions were based. There was thus a strong, even irresistible, pressure

on applicants to make their proposals conform to the standard model, often at the cost of sacrificing responsiveness to particular community needs that had been identified.

This standard model was in several important respects quite different from characteristics typically found in the early clinics of diverse origins. For example, this model excluded the possibility of any of the kinds of collective or egalitarian staffing structures which were common among the older clinics, in favour of a traditional hierarchical arrangement with an executive director at the top of the chain of command. The model was heavily lawyer-based: the executive director had to be a lawyer and, while the original clinics relied more heavily on community legal workers than on lawyers, the standard model's staffing component consisted of two lawyers, two secretaries, and one community legal worker. Later versions of the model sometimes included *no* community legal workers. Board composition was also a critical factor — the funders wanted to see that the proposed clinic had the support of the community, including the local Bar Association²⁷ — and the presence of one or more lawyers and other professionals on the Board was a *de facto* requirement. Perhaps most importantly, members of the clinic funding staff routinely insinuated themselves into, and often took over completely, the process of hiring staff for newly-funded clinics. Thus, overall, the persons hired, particularly for the sensitive executive-director positions, tended to share the funder's vision of the role and nature of the clinic "system". Those development groups who started with high hopes of effective community control were quickly disillusioned and disempowered even before their clinics first opened their doors.

Largely as a result of the funder's ability to virtually dictate the design of each new clinic, there grew up a large contingent of clinics which, while ostensibly community-based, in reality behaved much like a series of local offices of a centralized bureaucracy. With their acquiescence and cooperation, the Clinic Funding Committee and its staff assumed ever greater control over almost every aspect of their operations. The clinic Boards were in many cases reduced to the kind of advisory role that had been envisaged by the Osler Task Force Report. Representatives of client groups lost interest in participating as their control was eroded and as Board meetings became increasingly dominated by the need to deal with the avalanche of paper they received each month from the clinic funding staff. Boards were manoeuvred into a role of unpaid middle management — they bore the brunt of personnel and other problems within the clinics while the funder refused to provide them with funds with which to access resources and advice. They were sent into bargaining sessions with unionized staff with their hands tied by mandatory terms and conditions of funding.²⁸ They had to make tough decisions about service priorities in a high-pressure atmosphere, knowing that if problems developed the funders would be there to call them to account and to second-guess the wisdom of their every move. It is no wonder that many of the more recently

²⁷ This was well demonstrated by their refusal, for several years in a row, to fund a proposed clinic in Peterborough for the sole apparent reason that it was vehemently opposed by the district Bar Association, and despite the fact that the proposal was ranked very highly on all other counts.

²⁸ This was recognized by the Ontario Labour Relations Board when it made a declaration under s. 1(4) of the *Labour Relations Act* naming the Ontario Legal Aid Plan as a co-employer in two out of the three clinics in respect of which an application was made by the union: *O.P.S.E.U. v. O.L.A.P. et al*, [1989] OLRB Rep. Aug. 862; application for judicial review dismissed by Div. Ct., January, 1990. O.L.A.P. is currently seeking leave to appeal from the Div. Ct. decision.

funded clinics uncritically accepted the funding staff's directives with respect to almost every detail of clinic operations.

By the mid-1980's the clinics that had formed the backbone of the movement in its beginning now found themselves outnumbered by what some observers dubbed the "Kentucky Fried Clinics", and the principle of community control had become an endangered species. An ominous sign of the times was this remark by the Ontario Attorney-General:

I think that one issue that remains on the decks is the community role. I think the community has some concerns about what its role is. I think the Law Society and the lawyers also have some concerns about what that role is and I'm not sure that we have really reached the end of that exercise.²⁹

III: Conclusion: Ends & Means

The conflict between the original and the "Kentucky Fried" models of legal clinics illustrates the conundrum of co-optation and the dangers of separating ends from means. The apparent lack of success of the community-based approach is easily explained in terms of, and is perhaps predicted by, theories of social change which assume a qualitative distinction between reform and revolution. According to these theories, the underlying structures of political and economic power are relatively immune from changes and adjustments which may be brought about at the level of dependent or derivative phenomena—what marxian theory calls the superstructure. Thus government support for projects like legal clinics—projects which, on their face, are directed against established power relations—can be understood as actually reinforcing the status quo in several ways. First, according to this sceptical view, clinics provide a means of channeling and containing forces which might otherwise threaten to escalate into serious political challenges to prevailing power relations. Grassroots movements are invited to join the highly formalized and technical game of expressing demands in terms of desired legal regulation. The clinics, as the means of such expression, themselves become calcified mini-bureaucracies whose established operating procedures and vested interest in self-preservation serves as a front-line filtration system against radical claims. Whenever clinic activities overstep the bounds of polite supplication (in law reform efforts), "neutral" information providing (in community legal education) and professional norms of devotion to established procedures (in the more traditional litigation-based advocacy work), they can be reigned in through the imposition of terms and conditions of funding. The supposed inevitability of this kind of limitation is summed up in the maxim, "Who pays the piper, calls the tune."

Second, public support for progressive projects enhances the legitimacy of prevailing social arrangements by providing a symbol of equality. If poor people can be said to enjoy access to the institutions that make and apply the law, then the outcomes produced by those institutions are sanctified as being free of the systemic bias that would be produced by an obvious and persistent pattern of unequal access. This

²⁹ From an interview with Ian Scott in *Equity* (Ontario Association of Legal Clinics, December, 1987), 3.

sense of legitimacy is only confirmed by the occasional successes achieved by the poor in describing and asserting rights within that framework. These effects work to reinforce the existing structure by diverting the view of its potential critics and disempowered people themselves away from the overall injustice of the system and fixing in the public mind the imagery of equality and justice.³⁰ A probably unintended, but quite accurate, description of this aspect of the state's interest in making available clinic resources to the poor was provided by an Attorney-General of Ontario, one whose personal enthusiasm for legal clinics was largely responsible for the growth in provincial funding from the late 1970's to the mid-1980's. He said:

The clinics ... can reach out to advise people of their rights. They take law to the people ... In doing all of this, the clinics help *convince* the poor that they have a stake in this society.³¹

In the context of publicly-funded clinics, the tension between the opposing roles of reinforcing or challenging the status quo is centred on the conflicting demands of client community control on one hand and the interests of the funding source on the other. To the extent that clinics take seriously the pursuit of real power for poor people, they will become targets for defunding.³² Therefore it is important to ask what is the basis, if any, for the protection of the independence of clinics and of their ability to withstand the pressures, exercised through the funding power, which conflict with their duty to advance the interests of their clients.³³

It has been argued that such independence is assured through the unique funding structure which provides that specific funding decisions are made by the Clinic Funding Committee—a body independent of the governmental source of funds—while the overall allocations of legal aid funding as between the clinics and the fee-for-service (certificate) program are made by the Attorney-General—a party who does not share the Law Society's interest in favour of the certificate program whereby funds flow directly to its members.³⁴ While these factors are important, at least in avoiding a

³⁰ For a powerful account of the role of formal equality of access in legitimating oppressive laws, albeit in a quite different context, see Douglas Hay, "Property, Authority and the Criminal Law", in D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson and C. Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, (New York: Pantheon Books, 1975) 17 at 32-39.

³¹ Hon. R. Roy McMurtry, "Notes for a Statement to the Ontario Legislature Standing Committee on the Administration of Justice", December 1, 1982, 30-31 [emphasis added].

³² For an account of the blatantly political defunding of a university-based clinic by the Nova Scotia government, see Joan Dawkins, "Living to Fight Another Day: The Story of Dalhousie Legal Aid" (1988), 3 J. of Law & Social Policy 1. See also Larsen, "Seven Years with Legal Aid (1972-79): A Personal View of Some Events and Background Literature" (1981), 11 Man. L.J. 237.

³³ There may also be pressures, due to the division of funding responsibilities between the federal and provincial governments, against the deployment of clinic resources in the very areas of civil law which had been neglected by the certificate program: see Mossman, "Legal Services and Community Development: Competing or Compatible Activities" (1984), in *Community Legal Worker Forum Resource Manual*, Ontario Association of Legal Clinics, January 19, 1985. Professor Mossman also rightly points out in that paper that the cost-benefit style of program evaluation employed by government creates a subtle pressure in favour of case-by-case delivery of legal services rather than community organizing activities, which do not generate impressive statistical reports.

³⁴ Mossman, "Community Legal Clinics and Independent Legal Services" (1982), (unpublished). See also Mossman, *supra*, n.14.

technical appearance of fiduciary conflicts of interest, this funding structure is clearly insufficient to avoid the more subtle interference and co-optation which has been observed as a long-term trend in the movement. As mentioned earlier, from the perspective of clinic client communities, there is not a great distinction in the political orientation of members of the provincial Cabinet and the Benchers. Neither the legal nor the political establishments can be counted on to have much dedication to attacking systemic inequality and exploitation; on the contrary, they are both perceived (and not inaccurately, I suggest) as having an interest in the maintenance of the very institutions that disempower and oppress poor people. And as repeated experience, exemplified by the defunding of the OALC discussed above, has shown, even the presence on the Committee of individuals who have some personal sympathy for what they perceive to be the goals of the clinics, is not a reliable assurance that the principles of community control will be respected. Such persons, however well-intentioned, are not in a position to evaluate and second-guess the decisions of community Boards because of their very different perspectives, biases and assumptions about social change and the role of legal advocacy. Thus I conclude that the presence of a funding “barrier”, as in the present funding structure, is a necessary but clearly insufficient condition for the maintenance of community control.

The provision in the funding Regulation of a more detailed definition of the scope of the Committee’s disciplinary powers is desirable, but would also be insufficient for similar reasons. At minimum, the Committee’s power would have to include some formulation of its responsibility for the proper expenditure of public funds. This would necessarily involve defining the outer limits of permissible clinic activity—a matter on which there is unlikely to be any consensus among the various participants. It has been suggested that the Committee has no jurisdiction over questions of quality or competence of the services provided by clinics, these being matters of professional standards administered by the Law Society through its Discipline Committee. But the professional norms enforced by the bar were hardly designed with clinic clients in mind—indeed, clinics have been obliged to seek ad hoc exemptions from various Rules of Professional Conduct which would have greatly inhibited their effectiveness.³⁵ While exemptions have been obtained, there is probably a general suspicion on the part of the Law Society that clinics and clinic lawyers sometimes push up against the limits of acceptable professional conduct.³⁶ Another factor that makes this backdrop of professional norms troublesome for clinics is the promotion by clinic adversaries (notably certain large landlords and their organizations) of a general policy of making formal complaints against clinics and clinic staff as part of their tactics in every major litigational encounter. These complaints usually allege some combination of professional misconduct and misappropriation of public funds, and, although groundless, have a serious cumulative effect both on the resources of the clinics (which are diverted in responding to these accusations) and on the level of mutual trust between the Clinic Funding Committee (which is required to investigate every such complaint, no matter how frivolous or vexatious) and the targeted clinics.

³⁵ For example, the rules against “touting”, if strictly interpreted, would prohibit virtually all the proactive work routinely undertaken by clinics.

³⁶ I am advised that, in what may be taken as a symbolic expression of this attitude on the part of the Law Society, a complaint of unauthorized practice brought against a community legal worker in Toronto in the late 1970’s has never been finally disposed of, and officially still stands adjourned *sine die*.

All these suggested factors for the protection of the integrity of community control of clinics are ultimately inadequate because they place reliance on the self-interested support or mere toleration of the movement on the part of established power centres such as the Law Society and the provincial government. What these factors are lacking, and what, in my view, is the most important potential source of strength for the clinic movement lies in the guiding principle which is common to both the ends and means of clinic practice—the empowerment of constituent communities. Such empowerment is often thought of only in terms of the substantive legal goals of the clinics, but the means by which these goals are to be pursued—the ideal of client control—also needs to be conceived of as an exercise in empowerment. The various aspects of the design of service delivery which are aimed at correcting the dependency-fostering effects of the traditional lawyering and social service models, including the central role of community legal workers and the systemic approach to analyzing problems, are all important, but the bottom line factor for ensuring the continuing ability of clinics to develop these non-traditional methods is the presence of strong community-based Boards. To the extent that these Boards truly reflect community involvement in and support of the clinics, they represent a political power base that can counteract the pressures emanating from government, the traditional bar, and organized clinic adversaries.

There is a mutually reinforcing relationship between clinic activism on behalf of client groups and the development of representative and committed Boards. A clinic that sees organizing and outreach as integral to its work will find that among the client groups with whom it works there will be many people who will take an active interest in supporting the clinic and having input into its policies and practices; thus such a clinic is more likely to develop a strong, representative and committed Board. Such a Board is, in turn, more likely to see the maintenance of that broad range of clinic activities as important to its constituency and to be prepared to guard its independence from the funders in order to protect those activities. Conversely, if a clinic has a more traditional view of the provision of legal aid services that does not include a commitment to social change, the work it engages in is less likely to result in the recruitment of a strong Board, since its contact with clients will tend to be limited to discrete encounters coterminous with the formal or informal disposition of the individual clients' particular problems.

Board development and the building of a strong clinic movement should be seen as being among the most crucial community development projects that clinics can, and must, engage in. The strengthening of community control is important not just for its effect on the "outputs" of the system, but also for its intrinsic value as an experience in the building of democratic and participatory structures designed to facilitate the community's own articulation of its needs and goals and the collective action necessary for their advancement.

This last observation leads to a more "philosophical" view of the mutuality of means and ends. The vision that emerges is one in which the substantive social goals—more democracy and equality; less hierarchy and enforced dependency—are reflected in the methods, organizational structures and interpersonal relations which are used in working toward those goals. In this way, the means of social reform attain

a more than merely instrumental significance in relation to the ultimate ends. They can be experiments in, and living examples of, different and better ways of doing things. They have an intrinsic value which does not depend on the ultimate success of preformulated long-term goals.

It is only by striving to actualize in the here and now aspects of a social ideal, however partially and tentatively, that the conceptual and practical divide between realism and utopian inspiration can be mediated and the sense of futility which that divide engenders avoided. The mechanisms of power can never completely foreclose the possibility of such actualization. The paralysing dilemma posed by the reform versus revolution dichotomy of traditional left social theory is thus dissolved by refusing to suppose a radical disjunction between a movement's (or an individual's) ultimate goals and the local and immediate struggles in which it is engaged. And in the case of community legal clinics, the strategic benefits to the movement of taking seriously the development of strong and committed grassroots accountability suggests that the fusion of ends and means also coincides with the strengthening and consolidation of local and incremental social justice struggles into secure bases for further and wider progress. The admonition of the present Attorney-General of Ontario, that "[l]egal clinics are not open-ended institutions for social reform",³⁷ just "ain't necessarily so".³⁸

³⁷ Interview with Ian Scott, *supra*, n.29, 4.

³⁸ George Gershwin and DuBose Heyward, "It Ain't Necessarily So", from the musical *Porgy and Bess*.