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BUILDING ON ED SPARER'S LEGACY: REDEFINING LEGAL ADVOCACY FOR LOW-INCOME PEOPLE*

Jim Williams[†]

It is a privilege and an honor to be here with you today. Ed Sparer was a pioneer in using the law to help transform the lives of low-income people.¹ In our own modest way, the staff at the National Employment Law Project (“NELP”) is attempting to carry on this tradition. NELP employs a variety of advocacy strategies on behalf of low-wage workers and the unemployed, including litigation, policy advocacy, community education, and “support for organizing.”² Traditionally, lawyers use litigation and policy advocacy to advance the interests of their clients. But litigation and policy advocacy can also be linked to community based organizing campaigns to help our clients achieve the goals that they articulate for themselves.³

Before I tell you more about NELP’s work on behalf of and with low-income people, I want to talk to you a little bit about how I began doing the work that I do. In preparing this talk, I

* ©1999 Jim Williams. All Rights Reserved.

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¹ For a better understanding of Ed Sparer’s legacy, see generally Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984); Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401 (1995) (review of MARTHA D. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993)).

² National Employment Law Project (last modified Sept. 6, 2000) <www.nelp.org>

³ NELP’s staff includes a non-lawyer Organizing and Campaign Liaison who works with community based organizations to help them use employment law and policy to further their economic justice campaigns. NELP created this position in 1997 to better serve the needs of our group clients. The liaison helps to make the lawyer/organizer collaboration more successful. This position has been filled by people with significant organizing and policy advocacy experience.

tried to remember how I became a public interest lawyer in the first place. Because I have lived in the same place since college, and because I never throw anything away, I still have my Brooklyn Law School application. But the application provides no guidance on this issue whatsoever. Reading it eighteen years later, I am shocked that I was ever admitted to law school. Nonetheless, despite my unremarkable undergraduate performance and my lack of involvement in *any* extracurricular activities, I was admitted to Brooklyn Law School in 1983. My deepest thanks to everyone on the admissions committee at that time. I am happy and proud to report that I have made a somewhat more significant contribution to the legal profession than the application might have foretold that I would.

Three things happened in law school that led to my commitment to public interest law. First, I became active in the Lesbian and Gay Law Association of Greater New York ("LeGaL"). LeGaL is the bar association of lesbian and gay lawyers in New York City.⁴ Then, in my second year of law school, I started working at NELP as an intern. And lastly, in the same year, I started working as one of Professor Elizabeth Schneider's research assistants.

It was a profoundly different time for lesbians and gay men in the legal profession in 1983. There was no New York City ordinance banning employment discrimination based on sexual orientation.⁵ There were no openly gay faculty members at Brooklyn Law School at the time, and there were only a handful of "out" students. There were no openly lesbian or gay judges and only a few openly gay partners at New York

⁴ At the time, LeGal was called the Bar Association for Human Rights of Greater New York ("BAHRGNY"). In 1983, the New York Law Group, the predecessor organization of BAHRGNY, incorporated. There was much discussion over whether to include "lesbian and gay" in the group's new name. After polling the membership, the decision was made to adopt the less "out" name BAHRGNY. BAHRGNY changed its name to LeGaL in 1990.

⁵ Since the 1970s, the New York City Council repeatedly considered and rejected amending the New York City Human Rights Code to include sexual orientation discrimination. Ultimately, the prohibition against sexual orientation discrimination was not added until 1986. Nonetheless, New York State still lacks a state-wide prohibition on discrimination based on sexual orientation in private employment. And there is still no federal prohibition against sexual orientation discrimination in the private sector.

law firms. Feeling the need for professional role models, I became active in LeGaL soon after starting law school. Then I began organizing lesbian and gay law students at other New York area law schools. The group of law students that emerged from this effort organized the first lesbian and gay law conferences of LeGaL. These conferences continue to this day. The group also started the annual summer reception for lesbian and gay law students working in New York, which the Association of the Bar of the City of New York ("Bar Association") now co-sponsors every year with LeGaL. I served as President of LeGaL in the early 1990s, and I continue to work with LeGaL today.

My experience working with LeGaL led me to become active in Bar Association work generally. Specifically, I have been active on City Bar Association Committees.⁶ I also served as President of the Network of Bar Leaders from 1995 to 1996, an association of forty local and specialty bar associations in the New York Metropolitan Area. I often encourage other public interest attorneys to get involved in Bar Association work, as it presents an opportunity to generate support for public interest work among the more "mainstream" folks of the legal community. My experience in bar associations has really helped me in my efforts to generate support at large law firms for NELP's work.

Then, in my second year of law school, I started working as an intern at NELP. At the time, NELP was a national support center for legal services funded by the Federal Legal Services Corporation. NELP worked with attorneys in local legal services offices throughout the United States providing assistance on employment law issues. In addition to NELP, there were a dozen other National Support Centers that worked with local legal services offices on specific legal issues like housing, public benefits, and family law.

⁶ City bar committees provided many opportunities to work on significant projects. As a member of the Committee on Sex and Law, I was primary author of the report that led to the formation of the City Bar's Special Committee on Lesbians and Gay Men in the Legal Profession, and I co-drafted a report on the experience of lesbians and gay men in law school. I also co-authored an *amicus* brief to United States Supreme Court in a Title VII sex discrimination case, *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

My work at NELP was the beginning of my interest and commitment to employment law advocacy for low-income workers. What excited me about employment law at the time was its emphasis on individual rights. Employment law provides workers with rights in an employer-employee relationship, where the terms and conditions of employment are generally controlled by the employer. Relying on employment laws, workers can sue their employers for employment discrimination based on race or gender or other personal characteristics. Or, workers who lose their jobs through fault of their own can be found eligible for unemployment benefits. What I find compelling about employment law has evolved over time.

Lastly, in my second year of law school, I also began working as one of Elizabeth Schneider's research assistants. Liz was a role model to me, as I am sure she was for so many students that followed me. She suggested the possibility of integrating a commitment to progressive ideals with the practice of law. I also worked with Liz on generating student interest and support for the Sparer Public Interest Fellowship Program (the "Sparer Program").⁷ Again, I drew on my organizing skills and helped organize the kickoff fund-raising party for the Sparer Program.

When I graduated from Brooklyn Law School in 1986, I began working at NELP as a staff attorney. I worked there for three years. I left NELP in 1989 because I felt that it was not

⁷ The Sparer Public Interest Law Fellowship Program enables law students to work in public interest organizations.

The Sparer Public Interest Fellowship Program brings to the Brooklyn Law School community a joint faculty-student commitment to promoting legal work on behalf of people and interests who have been underserved in our courts and legislators. Drawing especially on the rich resources of metropolitan New York, the Sparer Program has placed its student Fellows in summer job positions at the leading public interest organizations in the United States. During the academic year, Sparer Fellows and faculty sponsor forums, symposia and lunches that foster ongoing discussions of cutting-edge issues in public interest law. The [Sparer] Program is named after Ed Sparer, a 1959 graduate of Brooklyn Law School who founded the first community-based legal services program for the poor and the first legal services support center in the United States.

Edward V. Sparer Public Interest Law Fellowship Program (last modified Feb. 22, 2000) <<http://www.brooklaw.edu/school/sparer>>.

providing me with the opportunity to develop litigation skills. While I was doing some litigation work, Legal Services Corporation restrictions, based on NELP's funding and project priorities at the time, interfered with NELP's ability to develop an active litigation docket. Thus, from 1990 to 1995, I was an Assistant Attorney General ("AAG") in the Labor Bureau of the New York State Attorney General's office. There I worked under the supervision of a wonderful litigator and legal strategist, Tricia Smith, and I did some really exciting work.

My work at the Attorney General's office provided me with the opportunity to practice employment law somewhat differently than at NELP. In addition to enforcing individual employment rights under state law, I was also enforcing minimum employment rights as basic state policy. Suing employers on behalf of the people of the State of New York is much different from suing employers as a plaintiff's employment lawyer. Sad, but true, courts take the state more seriously; employers take the state more seriously. For example, the state can issue subpoenas as part of the investigation prior to serving a summons and complaint.

My five years as a government attorney were invaluable. I did a lot of affirmative litigation and appellate work, and I worked closely with really good attorneys. Looking back, I think I gained a deep understanding of how the state bureaucracy works. There were, however, many limitations to working in the office of an elected government official: the layers of bureaucracy were often quite thick, decision making is sometimes guided by politics, and, most fundamentally, the client is always the state, not workers. And, as happened in 1995, an Attorney General might get elected, and you cannot imagine yourself working in an office run by him.

In the election of 1994, conservative republican Dennis Vacco was elected New York State Attorney General.⁸ Vacco narrowly defeated the candidate that I was working for—progressive, openly lesbian, Karen Burstein. Luckily,

⁸ One of the first things that Dennis Vacco did upon entering office was eliminate the Department of Law's internal prohibition against discrimination based on sexual orientation. I circulated a letter among the other AAGs calling for Vacco to reconsider the change in policy. Many AAGs signed, but Vacco never responded to the letter.

Vacco could not imagine me working in an office run by him. I was among the first of many people fired. I contemplated suing for discrimination, but I really did not want to work there with him as Attorney General. Some of my former colleagues were able to do really good work despite Vacco, but I did not have the will to try. And, besides, I was fired.

I took almost two years off from the practice of law; it was really a wonderful time. I got very involved in local electoral politics, and I became President of the Village Independent Democrats. For work, I was the lead researcher and writer on a book project. The project was a legal and financial guide for people with life threatening or chronic illnesses.⁹ As much as I enjoyed not practicing law, I really missed advocacy. I actually articulated it at the time by saying, "I feel like suing someone." But really, what I meant was that I missed advocacy.

As the book project was winding down, I got a call from the then Director of NELP, Sara Rios. NELP Litigation Director Cathy Ruckelshaus was taking a six month parental leave and they needed someone to stand in for Cathy. At first, I was not very enthusiastic. I had that, "been there, done that" feeling. But I had been hearing really good things about NELP's work. And, given my desire to do advocacy work again, I figured, "Why not? It's only six months." That was six years ago.

When I returned to NELP in 1997, the staff was doing really exciting work. The office was no longer a legal services support center. In 1995, Congress stopped funding all of the support centers. Overall, this was a very bad development because Congress eliminated a significant resource for legal services attorneys and their low-income clients. But in terms of the organizational development of NELP, the loss of legal services corporation funding provided the opportunity to move in directions that would not have been possible with legal services funding.

In the closing years of the 1990s, NELP became a non-profit advocacy organization focusing on litigation, policy advocacy, community education, and support for organizing around economic justice issues. We began working more closely

⁹ See DAVID S. LANDAY, *BE PREPARED: THE COMPLETE FINANCIAL, LEGAL, AND PRACTICAL GUIDE FOR LIVING WITH A LIFE-CHALLENGING CONDITION* (1st ed. 1998).

with progressive labor unions on policy issues, and we served as the link between progressive labor unions and community based organizations confronting the ramifications of welfare reform¹⁰ and the expansion of contingent work.¹¹ We also began working closely with community based organizations providing employment law technical assistance to help them move their economic goals forward. These organizations include membership-based groups of welfare recipients, low-wage workers and immigrant-based groups. Finally, we started doing litigation again in a very significant way. As I will discuss later, employment law for me now in my work at NELP has become much more than enforcing individual rights, although that remains an essential part of the work. Instead, employment law presents many opportunities to advance the concerns of low-income people in today's economy, an economy that to a significant degree has relied on their labor, but left low-wage workers behind.

On a side note, NELP continues to work with many legal services advocates on employment law matters, and our work with legal services offices is a much needed component of meeting the legal services needs of low-income people.¹² But more resources are necessary to expand this aspect of our work.

¹⁰ NELP played a central role in advocating successfully for the U.S. Department of Labor to establish a clear set of guidelines concerning the protection of workfare workers by federal employment laws, including the Fair Labor Standards Act ("FLSA"), to the same extent as all other workers. See generally U.S. DEPT. OF LABOR, HOW WORKPLACE LAWS APPLY TO WELFARE RECIPIENTS (May 22, 1997).

¹¹ NELP has worked on behalf of contingent workers for years, and its efforts continue to grow and evolve as United States employment patterns change. In 1994, NELP testified before a special session of the Department of Labor's United States Commission on the Future of Worker-Management Relations (the Dunlop Commission). In joint testimony with organized labor and several grassroots groups, NELP offered an agenda for reforming labor and employment laws to meet the needs of contingent workers.

¹² NELP attorneys authored a recent article that outlines the ways that legal services advocates can use employment law to benefit low income clients. See generally Sharon Dietrich et al., *An Employment Law Agenda: A Roadmap for Legal Services Advocates*, 33 CLEARINGHOUSE REV. 541 (2000). NELP also conducted a very popular employment law training session at the July 1999 annual substantive law training conference of the National Legal Aid and Defender Association ("NLADA") in Berkeley, California.

Employment law advocacy has become even more important for low income people in the era of "welfare reform," the expansion of contingent work and the globalizing economy. The requirement that public assistance recipients engage in work activities is central to the Temporary Assistance for Needy Families Program ("TANF").¹³ As a condition of receiving benefits, TANF requires current welfare recipients to work.¹⁴ TANF also imposes a five-year lifetime limit on benefits,¹⁵ and some states have adopted even shorter time limits. Thus, welfare recipients must find employment to support their families, or they risk being left without any source of income.¹⁶

People required to participate in "work activities" as a condition of receiving public assistance encounter the same employment problems all workers do: discrimination, wage and hour violations, and health and safety issues.¹⁷ Former public assistance recipients attempting to obtain paid employment face significant barriers to employment. One of the myths of welfare reform is that there are jobs available to everyone who wants one. Putting aside the fact that in both rural and urban areas there is a scarcity of living wage and benefit paying jobs for low skilled workers, there are also significant barriers to employment including discrimination based on race, gender, sexual orientation, disability, and other characteristics including substance abuse history and criminal records.

Welfare reform has meant that advocates for low-income people must also pursue alternatives to workfare for their

¹³ The Block Grants to States for TANF is codified at 42 U.S.C. §§ 601-1788 (1998). It is part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996).

¹⁴ TANF requires non-exempt parents to engage in work activities no later than twenty-four months after receipt of assistance. See 42 U.S.C. § 602(a)(1)(A)(ii). It also anticipates that non-exempt recipients who are not employed will perform community service after two months of receiving benefits, unless the state opts out of this requirement. See *id.* § 602(a)(1)(B)(iv).

¹⁵ See *id.* § 608(a)(7).

¹⁶ For more on the relationship between welfare reform and employment law, see generally Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 STANFORD L. & POL'Y REV. 53 (Winter 1998).

¹⁷ NELP has published an advocacy guide that outlines the employment rights of workfare participants. See generally EMPLOYMENT RIGHTS OF WORKFARE PARTICIPANTS AND DISPLACED WORKERS (2ed. 1999).

clients—job creation, education, and training. At the same time, there is the profound need to preserve public assistance for those who for a variety of reasons are unable to work.

The changing economy and employers' increased reliance on "contingent workers" (i.e., a part-time, temporary or subcontracted workforce) requires that employment law advocates approach the practice of employment law expansively. At NELP, we have been focusing on ensuring that all workers are covered by the employment laws, regardless of what type of employee their employer calls them. The basis of liability under most employment laws is whether a worker is an "employee" covered by the law. Thus, employers argue that a worker is not an employee, but rather an independent contractor or the employee of a subcontractor or temporary agency. The state has argued that workfare participants are not workers, but rather are public assistance recipients required to participate in work programs. NELP has also been focusing on ensuring that employment laws evolve to meet the needs of all of today's workers. For example, the Federal Family and Medical Leave Act (the "FMLA")¹⁸ has provided some workers with the opportunity to take unpaid leave because of a personal or family medical emergency. The vast majority of people cannot take leave because they cannot afford to. NELP is working with state based advocacy groups to urge that states allow workers on such leave to be eligible for unemployment insurance.¹⁹

As I stated earlier, NELP uses litigation and policy advocacy to support organizing efforts. A couple of examples can illustrate what this means. NELP let low-wage worker organizers know that we were interested in litigating a case that attempted to hold a manufacturer liable for the wage underpayments of a sweatshop subcontractor. In the garment industry, designers and manufacturers frequently contract out cutting and sewing functions to subcontractors. These subcontractors are often undercapitalized, relying on rented

¹⁸ 29 U.S.C. § 2601 (1994).

¹⁹ For the latest information on our work on this issue, see generally National Employment Law Project (last modified Feb. 29, 2000) <www.nelp.org>.

machinery and living from contract to contract. Frequently, they are unable or unwilling to pay their workers, and instead, they close up shop.

NELP successfully litigated *Lopez v. Silverman*,²⁰ a case in the Southern District of New York involving the Federal Fair Labor Standards Act. The court held a garment manufacturer liable for the wage underpayments of a sweatshop subcontractor.²¹ The *Lopez* case is important for several reasons. First, it achieved NELP's goal of ensuring that all workers are covered by the employment laws regardless of what their employer calls them. Holding a manufacturer liable for unpaid wages ensures that workers will be paid the wages owed to them if a subcontractor fails to pay wages due.²² Moreover, *Lopez* supported and benefitted workers involved in an organizing campaign led by Union of Needletrades, Industrial and Textile Employees' Garment Workers Justice Center. Finally, it provided the opportunity to draw attention to the fact that sweatshops are still thriving in New York City.²³

NELP has also worked with community based organizations at the city and state level in New York to design job creation programs as an alternative to workfare programs.

²⁰ See *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998).

²¹ See *id.* at 423.

²² For a more in-depth discussion of these issues, see generally Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (April 1999); Cathy Ruckelshaus & Jim Williams, *Down by Law: New Ideas for Defeating Sweatshops*, 4 NEW LABOR FORUM 57 (1999).

²³ In an effort to build on the success of *Lopez*, NELP recently filed a suit for unpaid wages on behalf of grocery deliverers for the large supermarket chains in New York City. See generally *Ansoumana v. Gristedes Operating Corp.*, No. 00-CIV-0253 (S.D.N.Y. filed Jan. 13, 2000) (for a copy of the Complaint, see National Employment Law Project <http://www.nelp.org/pubs_online.htm>). Like the garment manufacturer, a supermarket had contracted out a core function of its operation—delivery service—to a contractor. The contractor was not meeting its obligations under the federal and state minimum wage and overtime laws. The lawsuit has aided the largely immigrant plaintiff class to organize and assert its rights. With the help of a Ford Foundation grant, NELP recently brought together organizers and advocates for workers in other industries that rely on subcontracting—building services, homecare, food services and others—in a two day working conference to develop common organizing and advocacy strategies. Focusing on subcontracting has presented the opportunity to work at the intersection of immigrant and contingent worker advocacy.

These efforts highlighted the deficiencies of New York's workfare program and provided community organizing groups and their members with a real alternative to dead-end, no-wage workfare assignments.

Unfortunately, the vast majority of low and moderate income people do not have access to legal assistance. Given the limited resources and significant unmet needs, there is a profound need to leverage scarce legal resources through public education, pro bono involvement, fellowship programs, and other strategies.

Public education provides an opportunity for lawyers to train people to advocate for themselves. For the past three years, NELP and a community based organization, Community Voices Heard ("CVH"), have been co-sponsoring a bi-weekly group legal advice and referral walk-in clinic.²⁴ CVH is an East Harlem based organization of low-income people, predominately women on welfare, working together to improve our community and advance the political, economic, and social rights of low-income people on welfare and other low-wage workers. At an initial intake, we assess what employment law issue participants are presenting. The first part of the clinic is a presentation of the legal framework relating to the problems presented. During the second part of the clinic, participants work together to come up with strategies for resolving employment-related problems.

At NELP, we have had growing success in our efforts to involve large firm pro bono lawyers in litigation and policy advocacy projects. However, many firms shy away from employment law cases, and therefore there has been an ongoing educational process necessary to overcome the perception of "issue conflicts." An issue conflict occurs when a firm concludes that litigating a particular issue would not be in the interest of its paying clients. Thus, most, if not all, law firms with a management side labor and employment law practice have a prohibition against being involved in plaintiff side employment law litigation.

²⁴ The clinic began as part of the Skadden Fellowship Project of former NELP Staff attorney Karen Yau. Ms. Yau is now an associate at Vladeck, Waldman, Elias & Engelhard.

This is just as well. The likelihood of NELP's developing a successful co-counseling relationship with a management side labor law firm is highly improbable. Even when NELP is co-counsel with other public interest organizations, disagreements invariably arise over strategy. Working with large law firm attorneys—even those who are progressive—generally involves us educating our co-counsel on the experiences of our clients and litigation goals.

For example, we recently were involved in a dispute on behalf of a "perma-temp"²⁵ for a city agency. The city frequently uses perma-temps because they are less expensive than salaried employees with full benefits. Also, perma-temps have no sick days or vacation days, and they can be fired at will. In this dispute, the worker had been employed in the same clerical job for a few years under a couple of different temporary agencies. She had taken time off under the FMLA, and when she attempted to return to work, a new temp agency was in place. The agency claimed that she was not their employee, and thus, they were not obligated to re-employ her. For NELP, this dispute was an opportunity to establish that the city was the joint employer, and thus, the city and temporary agency were liable for the re-employment of the worker. NELP was working as co-counsel with a large law firm that was working pro bono, and NELP agreed to do the demand letter. In response to the letter, the city agreed to provide the worker with a position, but it provided no back pay and no agreement about what to do in similar future situations. The pro bono counsel met with the client without NELP and urged her to take the city's offer. While this is a very practical response, the client was not counseled about other options, including the possibility of filing a lawsuit and obtaining broader relief.

However, even many of my plaintiff-side employment law colleagues were not troubled by this outcome. The worker wanted the job, she got it. It was a success. But that dispute was not just about that particular worker. It also provided the opportunity to draw attention to the city's abuse of temporary workers, and it presented the opportunity to establish the

²⁵ A perma-temp is someone who is permanently hired as a temporary employee.

city's obligation under the FMLA. The worker should have at least had the opportunity to consider moving forward with a suit, considering the opportunity to get relief for others as well as herself. The dispute reminded NELP that part of what we need to do is educate our co-counsel on NELP's goals on behalf of low-wage workers.

Over all, pro bono involvement is a good thing.²⁶ More lawyers get involved in public interest work, more clients get served. But it is a mistake to conclude that pro bono work can meet all the employment law needs of low-wage workers. As part of NELP's ongoing relationship with legal services offices, we continue to try and foster the creation or re-creation of employment law units focusing on low-wage worker issues. And one way that some legal services offices have been able to create employment law units is through post graduate fellowships.²⁷ Post graduate fellowships have exploded in number over the past several years. Fellowships provide the opportunity to develop new project areas. But how do you sustain the new projects once the fellowship ends? And how much can be accomplished in a two year fellowship?

While the scarcity of legal resources has provided NELP with many opportunities to be very creative in meeting the legal services needs of our clients, the fact that we are dealing with scarce resources in these times of economic prosperity is disturbing. Low and moderate income people still cannot readily access civil legal services. The commitment to ensure that access continues to be debated. Every year there is a struggle in Congress and in state legislatures to maintain the barely adequate levels of funding for legal services for the poor. There are huge numbers of low and moderate income people still unable to access the legal system. This is not acceptable, and lawyers must take the lead to ensure that everyone in

²⁶ NELP has worked happily, closely and successfully with lawyers at a number of firms, most notably Shearman & Sterling, Sidley & Austin, and Davis, Polk & Wardwell.

²⁷ Two-year postgraduate legal fellowship programs, such as those sponsored by the Skadden Foundation and the National Association of Public Interest Law ("NAPIL"), have also significantly expanded the range of opportunities for law school graduates interested in pursuing public interest careers.

need is able to access the legal system in a meaningful way. I am thankful that there were people like Ed Sparer, whose work has laid the foundation for meeting this yet unfulfilled need. It is the responsibility of each of us to carry on his work.