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# Law as Largess: Shifting Paradigms of Law for the Poor

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# LAW AS LARGESS: SHIFTING PARADIGMS OF LAW FOR THE POOR

DEBORAH M. WEISSMAN\*

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*[T]ear down every charitable institution in the country and build on its ruins a temple of justice.*

*- Mary Harris "Mother" Jones<sup>1</sup>*

#### INTRODUCTION

The principles of the Rule of Law are deeply embedded in the discursive structure of American legal narratives, principally as a means by which to take measure of a democratic society and render plausible the ideals of justice and fairness.<sup>2</sup> As an abstract principle, the Rule of Law serves as a marker of modernity, endowed with the promise of equality, protection from private and public abuse, and the capacity for the just resolution of disputes.<sup>3</sup> Its symbolic value cannot be overstated. Justice for all is an ideal cherished by citizens. To paraphrase Edward Rubin's description of the concept of democracy, it is the "temple at which all modern political leaders worship."<sup>4</sup>

The Rule of Law has assumed mythical proportions denoting political virtue and public morality, but it has also produced standards by which to measure fulfillment of the ideal. Themes of equality and justice resonate precisely because they are conceived as a covenant made with the body politic and generally held to be the foundation of democratic government. Efforts to enact these principles as a way of demonstrating the efficacy of liberty and justice for all have summoned into existence a variety of structures and institutions, all dedicated to upholding the Rule of Law.

1. ELLIOTT J. GORN, *MOTHER JONES: THE MOST DANGEROUS WOMAN IN AMERICA* 99 (2001) (quoting Mary Harris "Mother" Jones' reaction to a judge's lecture about her need to abandon union organizing and to devote herself to charitable activities).

2. The Rule of Law is a contested concept. For purposes of this Article, however, it refers to the traditions exemplified by John Locke and John Rawls. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 137, at 377 (Peter Laslett ed., 2d ed. 1967) (exhorting a government of settled laws, not arbitrary power); JOHN RAWLS, *A THEORY OF JUSTICE* 238-45 (1971) (linking the Rule of Law to the concept of liberty, the exercise of freedoms, the ideals of impartial justice, and the availability of courts to enforce the laws).

3. See ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* 214 (1998) ("In a civilized society, it is simply unacceptable that the only time a poor person can get into court is when he commits a crime.")

4. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 715 (2001).

At the same time, another set of principles, no less prominent in the American ethos, informs national values and acts to counter the commitments promised in the Rule of Law. The proposition of self-sufficiency, a kind of fierce independence and individualism, is extolled as a fundamental virtue and celebrates the ability of individuals to pursue and obtain economic interests in the market.<sup>5</sup> Notions of initiative and autonomy are subsumed into concepts of liberty—people acting as free individuals in pursuit of their own self-interest without outside intervention, and especially without interference, from the state.<sup>6</sup> In this view, initiative and independence serve as the minimum requirements for liberty, and success is attained through discipline, determination, and, most of all, hard work.<sup>7</sup> All that liberty asks of us is that we make use of opportunities offered, assume individual responsibility, and exercise self-discipline.<sup>8</sup> Those who do not succeed are perceived either as lacking the ability or the will to contribute sufficient value to the market exchanges upon which productivity and self-sufficiency are based.<sup>9</sup> Their failure is viewed with a mixture of suspicion and scorn and their need for public assistance clashes with prevailing economic theories and cultural norms.<sup>10</sup> Those who fail to avail themselves of the opportunities of the marketplace are deemed to have forfeited their rights to the goods and services it produces.

The tension between these two sets of principles is revealed most dramatically in the application of the Rule of Law to the poor. The Rule of Law, as an axiom, does not distinguish between those who can purchase legal services and those who cannot. On the contrary, the principles of the Rule of Law as a democratic norm suggest that all citizens, rich or poor, are beneficiaries of its

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5. See Daniel V.A. Olson, *Dimensions of Cultural Tension among the American Public*, in *CULTURAL WARS IN AMERICAN POLITICS* 237, 240 (Rhys H. Williams ed., 1997).

6. ROBERT E. GOODIN ET AL., *THE REAL WORLDS OF WELFARE CAPITALISM* 41 (1999) (observing that liberals conceive of liberty as “freedom ‘from’ interference by other human agents in one’s own pursuits”).

7. Cf. WILLIAM J. BENNETT, *THE DE-VALUING OF AMERICA* 196 (1992) (describing the “secret” of the success of Asian-American school children in contrast with African-American children).

8. *Id.* at 198-99.

9. GOODIN ET AL., *supra* note 6, at 42 (offering the failure to contribute that which other people value as one explanation for the failure to achieve self-sufficiency).

10. See *infra* notes 275-83, 366-68, and accompanying text.

actualization.<sup>11</sup> But it is also true that the values that flow from legal justice principles celebrating democracy often clash with the values of self-sufficiency that look upon reliance on assistance with disapproval. This tension produces grudging and limited assistance for the poor who require access to the law. It transforms the Rule of Law into a rigidly defined welfare benefit or donation which, in keeping with welfare strategies and principles of charity, is available only to a limited number of the poor.<sup>12</sup>

This Article examines the tension between these principles. It suggests that despite the resonance of the national narrative of the Rule of Law, this ideal is subordinate to the ideology of self-sufficiency. For those unable to purchase legal services, and therefore forced to resort to public assistance and private charitable aid to obtain access to the courts, the law is transferred from the sphere of rights to the realm of largess. Juridical and constitutional principles of equal justice under the law clash with cultural and normative stereotypes of the poor. The manner in which this tension is resolved suggests that the inability of the poor to be self-sufficient leads toward forfeiture of the benefits of the Rule of Law.

Although the tension between these principles is constant, it is also subject to changing political values and economic circumstances. Policy shifts in response to economic and political conditions, including cuts to social welfare programs, act to arrest efforts to ameliorate social inequalities.<sup>13</sup> Recent attacks on institutions that provide legal services to the poor, which have unfolded within the context of these trends, suggest an increasing willingness to deny the poor equal access to the law. The success of the challenges to legal services signifies the triumph of market

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11. See *infra* notes 30-37, 54, and accompanying text.

12. See discussion *infra* Part III.

13. See Jeff Faux & Larry Mishel, *Inequality and the Global Economy*, in GLOBAL CAPITALISM 96 (Will Hutton & Anthony Giddens eds., 2000) (suggesting that the pressures of globalization have reduced domestic concern for safety-net tax and transfer programs); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575-76 (2000) (explaining that developed countries have responded to globalization by reducing the social safety net); see also Nand C. Bardouille, *The Transformation of Governance Paradigms and Modalities: Insights into the New Marketization of the Public Service in Response to Globalization*, 6 GEO. PUB. POL'Y REV. 155, 157 (2001) (noting that globalization necessitates less government involvement in society and threatens social safety nets).

concerns over the promise of the Rule of Law. It reveals that the cultural dimensions and prevailing attitudes about public and private largesse have entered the national narrative addressing the Rule of Law for the poor.

This Article focuses on access to the law in civil matters for which there is no right to counsel. Part I reviews the principle of the Rule of Law as an ideal with rhetorical import that may exceed its ability to perform, but notes that it continually shapes national values and induces the provision of legal services to the poor. Part I examines the benefits provided by access to the law as well as its particular significance for the poor whose individual needs for relief and collective requirement for reform heighten the need for legal recourse. Part I also reviews historical efforts to meet the legal needs of the poor through legal services, with law clinics and public interest law firms serving as complementary measures.<sup>14</sup>

Part II examines recent legal events that have diminished resources by which the poor may access the law. It reviews the congressional assaults on legal services resulting in funding reductions and practice restrictions<sup>15</sup> as well as the constitutional challenge to these restrictions.<sup>16</sup> It also examines the constitutional challenges to Interest On Lawyers Trust Accounts (IOLTA) funding for legal services,<sup>17</sup> political attacks on law school clinical programs, the unsuccessful litigation to counter these attacks,<sup>18</sup> and a recent Supreme Court decision that has reduced the possibilities for funding litigation for poor people by narrowing the circumstances for awarding attorneys' fees in civil rights cases.<sup>19</sup> These events not only limit the opportunities for the poor to access the law, but also suggest that the opposition to legal services is driven by powerful

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14. "Legal services" here refers to the federally funded national Legal Services Corporation programs. Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996l (2000).

15. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-50 to 1321-59 [hereinafter OCRAA].

16. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

17. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

18. See *S. Christian Leadership Conference (SCLC) v. Supreme Court of La.*, 252 F.3d 781, 784 (5th Cir. 1999), *cert. denied*, 122 S. Ct. 464 (2001).

19. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001).

ideological currents seeking to deny equal access to those who fail to take advantage of market opportunities.

Part III examines the process and implementation of the reformulated Rule of Law as a principle of largess. It explores the mechanisms used to provide law for the poor according to the structural inequities and the normative biases by which goods and services are delivered to the needy. It uses the theories of the liberal welfare state that directly influence welfare programs to understand the view of legal services as a welfare benefit subject to the same norms that shape welfare programs generally. Part III also considers the heightened relevance and effect of the principles of philanthropy on legal services as these services become increasingly dependent on private contributions. This development suggests that justice is increasingly a function of charity rather than a right under the Rule of Law.

Recognizing that current political realities reduce the possibilities for decommodifying the law and removing it from the structures of the marketplace, Part IV suggests corrective measures to expand access to the law. It argues that ongoing efforts are required to insulate the Rule of Law for the poor from the vagaries of market forces and shifting political winds. It recommends reforming existing institutional arrangements with emphasis on public responsibility for equal access to the law and seeks to demonstrate the effectiveness and feasibility of such reforms. Part IV urges consideration of a civil *Gideon*<sup>20</sup> whereby counsel in civil cases is a matter of right as opposed to a benefit of largess.

## I. THE RULE OF LAW: THE CELEBRATION AND THE SUBSTANCE

### A. *Eulogizing the Principles of Law*

The national celebration of the Rule of Law is historic, with antecedents that reach deeply into the very origins of the nation. Its current underpinnings are derived from philosophical interpretations of liberalism giving form to democratic political states.<sup>21</sup>

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20. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing a constitutional right to counsel in criminal matters).

21. Liberalism here refers to the traditional political philosophy in which the Rule of Law



Its meaning has been contested and linked either with the rule of reason or the laws of nature, conceived alternatively as instrumentality or substance.<sup>22</sup> Yet it endures as a collective concept that constructs a national identity and provides normative guidance.<sup>23</sup> As an ideal and a guarantor of liberty, it establishes a social contract through which "the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties ... concerning any matter of right."<sup>24</sup> The Rule of Law requires legal form and more. It entails the substance of fairness as well as the instruments of impartial enforcement of the law.<sup>25</sup>

The proposition that legal justice serves as the foundation of democratic society has been central to the credo around which all branches of government obtain constitutional function.<sup>26</sup> Indeed, the very Preamble to the Constitution affirms that its central purpose is to "establish justice."<sup>27</sup> Two hundred years later, Supreme Court Justice William J. Brennan, Jr. described the principle of equal justice under the law as "an immensely moral concept" and "the cornerstone of our American concept of justice."<sup>28</sup> He observed, "we have been a legalistic society from the beginning" and have produced a nation with an "ingrained habit" to go to court and an "ingrained sense of justice and moral duty" compelling us to frame important questions of the day as legal problems for the courts to resolve.<sup>29</sup>

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assumes a prominent place and secures the basis of liberty. *See supra* note 2.

22. *See* Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 2 (1997) (noting that Aristotle equated the Rule of Law with the rule of reason and contrasting his position with those who link it to natural law); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791-92 (1989) (presenting an instrumental and substantive view of the Rule of Law).

23. *See* Fallon, *supra* note 22, at 3 (claiming that the Rule of Law is central to national identity); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1500-01 (1988) (arguing that the concept of freedom depends on a government of laws, not people). Michelman observes that the notion of republicanism relies on the legal order. *Id.* at 1504-05.

24. LOCKE, *supra* note 2, § 87, at 342.

25. *See* RAWLS, *supra* note 2, at 238; Fallon, *supra* note 22, at 9; Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 995-96 (1994).

26. *See infra* notes 27-29.

27. U.S. CONST. pmbl.

28. William J. Brennan, Jr., *The Equality Principle: A Foundation of American Law*, 20 U.C. DAVIS L. REV. 673, 678 (1987).

29. *Id.* at 675-76.

The importance of the law thus assumes mythical proportions from which an ongoing national narrative has been derived, extolling, often exhorting, the promise of equal justice.<sup>30</sup> The established prescriptive norm includes the resolution of disputes and remedying of injustices within a legal system that operates according to just, consistent rules and procedures, and upon which the core principles of democracy are said to depend.<sup>31</sup> The instruments and processes of law are understood to serve as the structures upon which democracy functions.<sup>32</sup> The law is perceived as “the fabric of our society,” protector against governmental abuses, the excess of the marketplace, and incursions of rights by other individuals.<sup>33</sup> Its very existence and accessibility is presumed to deter civil unrest.<sup>34</sup> The judicial system is intimately linked with concepts of freedom and equality;<sup>35</sup> access to the system is coupled with notions of fairness that transcend the entire social order.<sup>36</sup>

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30. See MARK KESSLER, *LEGAL SERVICES FOR THE POOR 2* (1987) (suggesting that beliefs about our system of government are guided by the “myth of rights,” which includes the notion of formal legal equality for all people regardless of wealth or status); Fallon, *supra* note 22, at 1 (describing the Rule of Law as a historic ideal that remains rhetorically powerful).

31. Earl Johnson, Jr., *Toward Equal Justice: Where The United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 203 (1994) (noting that equal justice is at the core of the American system of government); Michelman, *supra* note 23, at 1493; Christopher Stone, *Crisis In The Legal Profession: Rationing Legal Services for the Poor*, 1997 ANN. SURV. AM. L. 731, 732-33 (claiming that accessing the courts is a constituent element of a democratic society).

32. See SUSAN E. LAWRENCE, *THE POOR IN COURT* 153 (1990) (noting that classical democratic theory encompasses citizen participation and reasoned decision making exemplified in the litigation process).

33. LOCKE, *supra* note 2, § 123, at 368 (noting that without the Rule of Law, citizens are exposed to the danger of incursion and violation of their rights by others, rendering them unsafe and insecure); John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 103 (2000) (describing law as “the fabric of our society”).

34. See McKay, *supra* note 33, at 103 (“History teaches that social disharmony and upheaval is inevitable when a significant segment of society is unable to secure meaningful access to the law and protection under it.”).

35. RAWLS, *supra* note 2, at 238; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (noting the government would be one “of laws, and not of men,” if it failed to provide a judicial remedy for every violation of a vested legal right); Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 1071 n.388 (1991) (“Freedom and equality of justice are twin fundamental conceptions of American jurisprudence.”).

36. LOCKE, *supra* note 2, § 136, at 377; see also James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2218 (1993).

Nothing less than the full measure of democracy is said to rest on the principles of the Rule of Law.<sup>37</sup> International human rights and global standards of equity are identified with the proposition of enforceable legal rights.<sup>38</sup>

This imagery of justice may transcend the Rule of Law's actual achievements, but it is also true that the law's existential qualities are authoritative and impressive. The judicial forum functions by way of mandates and imperatives. It provides a mechanism to resolve disputes that affects the interests of individuals and groups in ways both specific and profound. That the principles of democracy and the interests of the citizenry are best served by ensuring access to the courts has been cogently and repeatedly demonstrated.<sup>39</sup>

On a macro level, the legal process provides citizens the opportunity to engage in judicial and administrative decision-making activities, and the process of regulating the government serves to disseminate the normative assumptions upon which legal ideals are based.<sup>40</sup> Those who engage the law participate in political life and shape the political discourse, allowing them the opportunity to construct and reconstruct social dynamics and practices.<sup>41</sup> Insofar as participation engenders a sense of inclusion and collective belonging, access to justice serves to promote social integration and fosters shared trust among those who participate in the system. The civic confidence derived from the opportunity to contend within

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37. See LAWRENCE, *supra* note 32, at 154-55 (noting that democracy is measured by the availability of political rights which must include access to the courts).

38. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1840-41 (2001) (suggesting that concepts of access to the courts affect international human rights, the enforcement of democratic norms, and the transition from totalitarian rule to democratic government).

39. See *id.* at 1916-18 (citing various articulations of access to justice as critical for social justice and democratic participation); Michelman, *supra* note 23, at 1493.

40. Hershkoff, *supra* note 38, at 1917 (explaining that justiciability affords opportunities for public decision making); Michelman, *supra* note 23, at 1501 (claiming that a government of laws renders legislative politics trustworthy); Rubin, *supra* note 4, at 772, 781 (noting the salutary effect of using the legal process to bring citizens into the administrative decision-making process).

41. See Hershkoff, *supra* note 38, at 1916 (suggesting that access to the courts provides entry into political life); Sally E. Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 892 (1992) (arguing that court hearings have the potential to be "cultural performances, events that produce transformations in sociocultural practices and consciousness").

the bounds of the law creates the social capital by which communities are strengthened and connections between individuals and groups are reaffirmed and reinforced.<sup>42</sup> Moreover, this social capital may increase if the legal system consistently demonstrates that such confidence is justified.<sup>43</sup>

The judicial system also works in more immediate and direct ways. It protects individual rights and determines fundamental issues relating to life, liberty, and property. It resolves a range of conflicts in those realms that affect all facets of public and private life. In other words, in all matters that are central to the credo by which vast numbers of people presume to order their daily lives, citizens must ultimately appeal to the Rule of Law as a guarantee of their inalienable rights.

The existence of rights and legal protection alone, however, is inadequate to give effect to the principles of the Rule of Law. Laws are not self-enforcing but instead require aggrieved parties to advance their claims for resolution in order to provide form and content to the concept of legal rights.<sup>44</sup> Rights must be "secured by structural and substantive constraints, such as ... legally enforceable claims by individuals."<sup>45</sup> It is through the legal process of adjudication that routine claims and constitutional challenges of national import may be alchemized into widely venerated principles of law.

The mechanisms by which individual issues are translated and social problems are transformed into legal claims are complex and require specialized skills.<sup>46</sup> Procedural requirements are technical

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42. See Eric K. Yamamoto, *Court and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 6 (1994) (suggesting that court processes allow people to connect with larger social movements).

43. Cf. GOODIN ET AL., *supra* note 6, at 31 (noting that the social capital produced by policies that promote social integration is likely to expand with use).

44. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 880 (2001) ("Rights do not enforce themselves. They require judicial decisions interpreting and enforcing their terms."); see also Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1193 (2000) (noting that the system requires individuals with grievances to come forward for any possibility of redress or reform).

45. Rubin, *supra* note 4, at 727.

46. See CHRISTOPHER E. SMITH, *COURTS AND THE POOR* 43 (1991) (describing the legal process as a "host of rules of substance and procedure" requiring the skills of a lawyer) (quoting HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 234 (1988)).

and often bar access to the courts.<sup>47</sup> The substance of the law, particularly when expressed in statutory and regulatory language, is often obscure and unintelligible.<sup>48</sup> Moreover, the law is not static but rather it adapts and adjusts to give legal expression to prevailing social values and cultural norms. Those who would make effective use of the law must stay abreast of the shifting nuances of legal developments and emerging theories. In this legalistic society, where “[s]carcely any political question arises ... that is not resolved, sooner or later, into a judicial question[,]” access to the courts is often impossible without the use of lawyers.<sup>49</sup>

Lawyers are necessary in order to facilitate the transformation of an individual dispute or social condition to a legal claim suitable for resolution.<sup>50</sup> They assist in navigating the complexities involved in presenting the cases in court. In addition to the traditional role of representing clients at the trial level, lawyers possess the necessary skills to advance their clients’ broad judicial agendas and contribute to the shaping of legal policy, particularly through appellate litigation.<sup>51</sup> Indeed, one task of a lawyer is to test and improve the law through debate within the scrutiny of the courts.

Lawyers are also required in settings outside of the courtroom. Legal principles are not simply confined to law suits; they have applicability in administrative agency enforcement, rulemaking and adjudicative proceedings, before legislative bodies, in transactional matters, and in private relationships that go beyond the scope of public institutional processes. Legal representation assures

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47. Cross, *supra* note 44, at 884 (arguing that procedural requirements “can result in social reform groups being unable to present their best arguments, or even have their day in court”) (quoting GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 12 (1991)).

48. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 2 (2000) (noting that for most people the justice system seems “unwieldy, unintelligible, and unaffordable”); Brennan, *supra* note 28, at 675-76 (describing the intricacies of statutory language and common law rules). During the oral argument in *INS v. St. Cyr*, one of the Justices referred to a statutory and regulatory immigration provision as a “brain teaser.” Record at 15, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767), 2000 WL 469077, at \*15.

49. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Everyman’s Library ed. 1994).

50. SMITH, *supra* note 46, at 43-44 (suggesting that because of the complexity of the process, lawyers determine who gains access to the judicial system).

51. See LAWRENCE, *supra* note 32, at 3 (noting that through litigation, lawyers and their clients bring select items of national concern to the courts’ attention).

adequate interaction between citizens and decision makers and the proper distribution of information likely to contribute to a more responsive political and administrative state.<sup>52</sup> A lawyer's familiarity with both legal substance and the structure of the law confers a benefit upon those engaged in a broad spectrum of activities associated with the law.

### *B. Principles of Law and the Poor*

The premium derived from opportunities to enforce legal rights may be categorized as a public good that confers benefits on all members of society.<sup>53</sup> But the celebration of legal principles as the foundation of a democratic society must take particular measure of the degree to which the poor and the powerless are included as beneficiaries. To deny the poor access to the courts because of economic constraints would represent an egregious failure of due process and a repudiation of democratic principles of civilized society.<sup>54</sup> In light of this fact, de Tocqueville's proposition that all political questions eventually become legal concerns assumes a heightened significance for the poor, whose conditions of poverty often raise the most serious political issues, and thus eventual justiciable controversies, of the day.<sup>55</sup> The benefits of the courts are especially important for the poor who lack the political means to

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52. See Rubin, *supra* note 4, at 713-15, 775-76 (arguing that the administrative state embodies the political commitments of our society, and thus interaction with the administrative structure to improve democratic functions is critical); see also Diller, *supra* note 44, at 1190 (noting the importance of the administrative process and the need to achieve agency accountability through rule-based mechanisms and legal procedures).

53. See William R. Mureiko, *A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes*, 1989 DUKE L.J. 438, 452 (arguing that enforcement of civil rights laws for the poor works a public good by conveying psychological as well as actual benefits to other members of society and improving quality of life generally).

54. CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 198 (1998) ("[I]f only the wealthy, or only large private business corporations, have the organizational and financial capacity to mobilize constitutional law in their favor, then judicial policy making in the area of constitutional rights is likely to be undemocratic in the extreme."); see also LIMAN, *supra* note 3, at 214.

55. DE TOCQUEVILLE, *supra* note 49, at 280; see also RUSSELL GALLOWAY, *JUSTICE FOR ALL? THE RICH AND POOR IN SUPREME COURT HISTORY, 1790-1990*, at 8 (1991) ("[T]he political and economic tension between the rich and the poor accounts for what is widely regarded as the most fundamental of all political issues.... [which] tend sooner or later to become judicial controversies ....").

defend their social and economic rights.<sup>56</sup> In a larger sense, the judicial system is the primary setting to challenge social conditions that bear oppressively on those without means. The poor may use legal strategies to reframe political, social, and economic issues according to their needs.<sup>57</sup> This process challenges the dominant narratives that limit society's understanding of its circumstances.<sup>58</sup> Indeed, the judiciary itself has recognized the necessity of legal strategies as a means by which the courts remain informed and receptive to the possibility of reallocating legal rights for the poor.<sup>59</sup>

Citizens without financial resources experience the lack of legal protection and the failure to enforce individual rights in an aggravated fashion; in fact, their legal needs are often derived specifically from their vulnerable status as it relates to poverty.<sup>60</sup> As Joel Handler observed, "it seems self-evident that the poor, minorities, the poorly educated, the newcomer, the frightened, the mentally ill, the sick, and other disadvantaged are ... more likely to suffer distress and injustice than those better off ...."<sup>61</sup> The issues for which the poor seek legal redress involve essential human needs: housing, income maintenance and basic subsistence, government and private benefits, including unemployment compensation and disability payments, access to health care, child support, and education.<sup>62</sup> The elderly poor who live on fixed incomes are more

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56. Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1428 (1995) (noting that the poor must rely on lawyers because litigation remains a vehicle for obtaining social change despite its lack of a political power base); see also Rubin, *supra* note 4, at 742-43 (commenting that those who are marginalized may be excluded from exercising political interests).

57. Yamamoto, *supra* note 42, at 6 (suggesting that by helping litigants to develop and define their present claims the legal system has value without regard to the outcome in court).

58. See *id.*

59. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (acknowledging that legal services attorneys representing the poor must be able to present a full range of legal arguments about the contested issues in order to have an informed and independent judiciary).

60. See Silverman, *supra* note 35, at 900-01 (reporting on the New York City Marrero Committee's findings that access to legal services may involve the essentials of life, making representation more vital for the poor than middle-class citizens).

61. JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 24 (1986).

62. Silverman, *supra* note 35, at 900-01 (citing the Marrero Report); see also Jeannie Costello, Note, *Who Has the Ear of the King: The Crisis in Legal Services*, 35 N.Y.L. SCH. L.

likely to fall victim to consumer fraud and predatory lending practices than people with stable and sufficient income.<sup>63</sup> Poor people who live in publicly subsidized housing and those who receive food stamps or cash public benefits, are subject to a myriad of governmental regulations. As a result, they often need legal intervention to guarantee the proper enforcement of regulations and statutes governing these programs.<sup>64</sup> When rights are violated, the poor must challenge the very agencies upon which they depend for assistance through an elaborate regulatory process. Their challenges are further complicated by a bureaucracy that serves to conceal both wrongs and remedies.<sup>65</sup>

While those without financial means are often more likely to experience acute legal needs, they are also less likely to possess the resources to negotiate the complex processes of civil litigation. The capacity of the poor to exercise their legal rights is undermined by power relationships affecting the law.<sup>66</sup> Poverty is more than an economic condition, it is also a social circumstance that acts to isolate communities and weaken support systems.<sup>67</sup> Poverty limits mobility and threatens individual health and collective well-being. Simply put, a lack of resources reduces the possibilities for enforcing one's rights.<sup>68</sup> Poor citizens' limited access to legal

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REV. 655 (1990) (arguing that access to the courts for the poor involves "the very basics of life").

63. McKay, *supra* note 33, at 104 (discussing the need for legal services amongst elderly homeowners who are victims of illegal equity-stripping schemes).

64. Rubin, *supra* note 4, at 771 (noting the growth of governmental functions at the administrative level results in heightened interactions between citizens and administrators).

65. HANDLER, *supra* note 61, at 23-24 (discussing the various factors within the administrative state which prevent the recognition of legal harms, including the actions of decision makers and the prevailing ideology which discourages exercising rights).

66. See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1411-12 (1996) (noting that legal scholars from both the post-Chicago School of Law and Economics and outsider scholarship, including critical race theory, radical feminist theory, and gay legal studies, agree that the law is deeply influenced by power relationships).

67. Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2135 (1994) (describing poverty as "isolation, [a] lack of access to resources and support systems").

68. Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK L. REV. 899, 971 (1990) (observing that the ability to appropriate rights depends on empowerment; whether one has the ability to control one's environment, a sense of power, and group identification).



remedies has been characterized as "a crisis ... which jeopardizes both the welfare of poor persons and the legitimacy of the legal system itself."<sup>69</sup> The magnitude of this crisis has been described as catastrophic.<sup>70</sup>

The poor seek parity with the wealthy in the range of legal projects and lawyering strategies undertaken on their behalf. Lawyers for wealthy clients pursue economic and power advantages by "imaginatively engineering important resource gains and redistributions on their behalf."<sup>71</sup> Business lawyers have been particularly successful in their efforts to obtain economic advantages for their clients.<sup>72</sup> The poor deserve no less from their lawyers and the legal system. They too seek reallocation of rights and an equitable distribution of resources. They too require sufficient advocacy to untangle the complexities of their legal problems in all venues. They too deserve lawyers who can resort to a range of strategies to efficiently address their rights, including securing advantages through sophisticated and repeated efforts in the legal system.<sup>73</sup>

### *C. A Historical Perspective—Providing Law for the Poor*

The national narrative extolling the principles of the Rule of Law has served as a rationale for the long-standing efforts to supply lawyers to the poor. The history of these efforts has been recounted in numerous scholarly works, and legal services organizations have been the mainstay for meeting the legal needs of the poor.<sup>74</sup> Public

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69. Victor Marrero, *Committee to Improve The Availability of Legal Services-Final Report to the Chief Judge Of the State Of New York*, 19 HOFSTRA L. REV. 755, 772 (1990).

70. See Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 374 (Winter 1993-94) (stating that the "failure of the poor to receive needed legal services can only be considered catastrophic"); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 86 n.22 (1990).

71. Silverman, *supra* note 35, at 1071.

72. *Id.*

73. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-101 (1974) (arguing that repeat players who frequently use the courts are better off than those who use the courts infrequently).

74. For a history of legal services to the poor, see MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973* (1993); EARL JOHNSON, *JUSTICE AND REFORM* (1978); JACK KATZ, *POOR PEOPLE'S LAWYERS IN TRANSITION* (1982); KESSLER,

interest law firms and law school clinics complement these programs, by providing additional resources to the poor.<sup>75</sup>

### 1. *Legal Aid / Legal Services*

Legal services to the poor originated in the late-nineteenth and mid-twentieth centuries with the development of legal aid societies, which were supported principally by charities.<sup>76</sup> The initial founders of these organizations sought to assist newly freed slaves, immigrants, children, and women, and expected legal aid to challenge the exploitive economic arrangements of the day.<sup>77</sup> Those concerned with using the law for social and economic justice were soon replaced, however, by wealthy donors and powerful members of the bar whose conception of legal aid was comparatively restrained.<sup>78</sup> By the 1920s, the scope of legal aid societies was limited to routine and restricted services provided in a desultory fashion.<sup>79</sup> Although some legal aid advocates argued for a stable, federally funded program, they found themselves accused of Communist sympathies and of fomenting a threatening propaganda campaign to socialize the legal profession.<sup>80</sup> The number of charitably supported legal aid societies continued to grow, in part as a hedge against the prospect of government funded

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*supra* note 30; LAWRENCE, *supra* note 32; SMITH, *supra* note 46; Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POLYREV. 369 (1998) [hereinafter Houseman, *Civil Legal Assistance*]; Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L.J. 1669 (1995) [hereinafter Houseman, *Political Lessons*]; Joan Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223 (1998). The National Equal Justice Library maintains archival materials and historical information related to legal services for the poor. See *Bibliography to the Conference on the Delivery of Legal Services to Low-income Persons: Professional and Ethical Issues*, 67 FORDHAM L. REV. 2731 (1999).

75. See HANDLER, *supra* note 61, at 27.

76. Eldred & Schoenherr, *supra* note 70, at 369.

77. *Id.*

78. KATZ, *supra* note 74, at 7 (describing early legal aid concerns as relating to class oppression, which shifted to perfunctory representation, following the transfer of power from the initial founders to charities and elite lawyers).

79. *Id.*; Houseman, *Political Lessons*, *supra* note 74, at 1671.

80. See KESSLER, *supra* note 30, at 5-6 (recounting the National Lawyers' Guild's demand in the mid-1930s for a federally subsidized legal services program and the resulting attack upon them).

programs; however, they remained underfunded and subject to external political and ideological influences.<sup>81</sup>

From 1964 through 1967, Congress funded a number of social programs through legislation associated with Great Society programs, including legal services as part of the War on Poverty under the auspices of the Office of Economic Opportunity (OEO).<sup>82</sup> The structure of the new legal services program was influenced by legal scholars and activist practitioners whose conception of legal services was linked to a comprehensive antipoverty strategy.<sup>83</sup> Stable and adequate federal funding was viewed as the bedrock principle of the new program.<sup>84</sup> But the revised approach to legal services for the poor involved more than increased financial support. The architects of the OEO legal services programs championed new legal and social impact strategies as a means to cure the ills of poverty.<sup>85</sup> Through law reform efforts and programmatic connections to the community, the law was intended to correct injustices and bring about social change.<sup>86</sup>

OEO-funded "legal services" represented a sharp break with the traditional "legal aid" societies.<sup>87</sup> OEO-funded legal advocacy was more aggressive and lawyers used litigation of individual cases, including appellate strategies, in conjunction with lobbying and

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81. See Eldred & Schoenherr, *supra* note 70, at 369 (attributing the increase in charitably-funded legal aid to the fear of socialization of legal services for the poor); Houseman, *Political Lessons*, *supra* note 74, at 1671; see also Eldred & Schoenherr, *supra* note 70, at 370 (noting that charitable donations were insufficient to meet the needs of more than one percent of the poor); Michael Givel, *Legal Aid to the Poor: What the National Delivery System Has and Has Not Been Doing*, 17 ST. LOUIS U. PUB. L. REV. 369, 370 (1998); Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 MD. J. CONTEMP. LEGAL ISSUES 223, 230 (1994) (noting that fiscal constraints require programs to limit their work to individual cases and to avoid major litigation).

82. See Cahn, *supra* note 67, at 2135; Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

83. See Cahn & Cahn, *supra* note 82.

84. See *id.*

85. See Houseman, *Political Lessons*, *supra* note 74, at 1672 (quoting the U.S. Attorney General's comments on the need for a reformed legal services organization to serve the poor).

86. *Id.* at 1672-73.

87. See KATZ, *supra* note 74, at 13 (noting the contention over the term "Legal Aid" as "a disgraced reminder of the traditional view that legal assistance for the poor was a charitable gift, not a legal obligation of the state and a personal right of the poor").

organizing strategies, to reallocate rights and change relationships between the rich and the poor.<sup>88</sup>

But success aroused suspicion. As OEO programs opened neighborhood offices and represented community groups and individuals, they became vulnerable to political attacks and controversy.<sup>89</sup> Indeed, conflicts about the ideological impetus of the program originated from many sources, including local and national bar associations seeking to control legal services funding.<sup>90</sup> Political opposition mounted and Congress imposed restrictions related to political activity, union organizing, and cases involving reproductive rights.<sup>91</sup> Low income eligibility requirements further limited representation to only the very poorest of clients.<sup>92</sup>

As the OEO program expanded and political opposition increased, state legislatures and Congress attempted to control the relationship between the law and the poor by terminating or otherwise eviscerating federally funded legal services.<sup>93</sup> Legal

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88. See Mahoney, *supra* note 74, at 236 (observing that legal services used routine cases in an effort to: (1) change the legal relationship between the poor and their landlords, the government, and their creditors; (2) broaden the rights of the poor to access the courts; and (3) supplement courtroom strategies with lobbying and organizing tactics); Rhudy, *supra* note 81, at 232 (noting the development of a new body of poverty law as a result of strategies used by the OEO legal services programs).

89. See KATZ, *supra* note 74, at 68, 78 (stating that the representation of community groups was one of the most controversial activities undertaken by the new programs).

90. See *id.* at 7 (describing the struggle of Chicago's legal services programs to remain independent from the city's Democratic political machine); Houseman, *Political Lessons*, *supra* note 74, at 1678-79 (describing legal services opposition as fearful of competition and concerned that lawyers' obligations would arise out of federal subsidies to the profession); Mahoney, *supra* note 74, at 234 (noting the early opposition of the American Bar Association due to concerns about the actions of legal services attorneys).

91. See James D. Lorenz, Jr., *Almost the Last Word on Legal Services: Congress can do Pretty Much What it Likes*, 17 ST. LOUIS U. PUB. L. REV. 295, 302-03 (1998) (noting draft restrictions related to political opposition to the Vietnam war, union prohibitions resulting from the fear of the growing support for the farmworkers' grape boycott, and abortion restrictions, all came in the wake of the polarizing decision in *Roe v. Wade*, 410 U.S. 959 (1973)).

92. See Mahoney, *supra* note 74, at 235 (noting that the eligibility guidelines eliminated the possibility of representing the working or lower middle classes).

93. See KESSLER, *supra* note 30, at 7 (noting congressional efforts to restrict program activities following successful legal services law suits against government entities and explaining state opposition to the establishment or continuance of federally funded programs in Arizona, California, Connecticut, Florida, Louisiana, Missouri, Mississippi, and New Mexico). Even cities that felt threatened by legal services advocacy attempted to influence the programs. *Id.*

services advocates responded to political attacks by urging the establishment of a permanent and autonomous legal services organization, hoping to shield the program from political interference. After protracted negotiations, Congress passed the Legal Services Corporation (LSC) Act in 1974. The Act established a quasi-governmental agency designed to receive and distribute federal funds, regulate legal services programs, and modify the programs' agenda by removing law reform strategies as priorities of the organization.<sup>94</sup> Many expected that the passage of this Act would create a stable institution that could function within one branch of government while remaining free from the shifting political whims of the others.

But controversy and opposition to legal services for the poor continued. Despite efforts to shield legal services programs from the winds of political change, funding levels for legal services programs have fluctuated over the last twenty years depending on the political fortunes of their friends and foes. During the 1970s, the programs enjoyed relative stability and increased financial support. By the early 1980s, however, they faced drastic financial cuts and repeated efforts to eliminate the program completely, only to recover during the late 1980s and the mid-1990s.<sup>95</sup> Beginning in 1994, the programs experienced the most serious attacks, resulting in a debilitating loss of funding and the imposition of substantive and procedural restraints on programming efforts.<sup>96</sup> As a result of the funding cuts, legal services programs were obliged to once again depend on charitable contributions and grants.<sup>97</sup> The structural links to client communities and the emphasis on law reform strategies associated with programs of the Great Society are faded memories which now appear to be an anomaly in the history of legal services programs.

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94. Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. §§ 2996-2996i (2000)); see also LAWRENCE, *supra* note 32, at 12, 36; Rhudy, *supra* note 81, at 234 n.51.

95. KESSLER, *supra* note 30, at 8-10.

96. OCRAA §§ 501-509; KESSLER, *supra* note 30, at 9; Rhudy, *supra* note 81, at 235; see *infra* notes 150-62 and accompanying text for a discussion of the 1995 legal services restrictions.

97. Lorenz, *supra* note 91, at 313-14 (describing the necessary fundraising efforts by legal services programs from various charitable and granting sources).

## 2. Complementary Mechanisms

Public interest law firms and law school clinics are part of the history of legal services for the poor. Public interest law groups have existed since at least 1916 when the American Union Against Militarism was formed.<sup>98</sup> In 1939, the National Association for the Advancement of Colored People (NAACP) established the NAACP Legal Defense and Education Fund.<sup>99</sup> Other public interest organizations followed, including the Lawyer's Committee for Civil Rights under Law (1963), the Environmental Defense Fund (1967), and the Center for Law and Social Policy (1968).<sup>100</sup> These organizations have sought to accomplish poverty law reform and to achieve civil rights and civil liberties for the underrepresented, including poor workers and labor organizers, juveniles, prisoners, and freedom riders.<sup>101</sup>

Law school clinical programs were organized during the 1930s and 1940s and had developed into a model for teaching and service by the 1950s.<sup>102</sup> By the late 1970s, law school clinical programs "had arrived."<sup>103</sup> Clinical programs have long been influenced by the legal services movement and have consistently identified the delivery of legal services to the poor as the centerpiece of their purpose.<sup>104</sup> The link between the pedagogical and social justice purposes of clinics

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98. See Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1439-40 (1984) (tracing the roots of public interest practice in this country).

99. *Id.* at 1441.

100. *Id.* at 1441-43.

101. See Anita P. Arriola & Sidney M. Wolinsky, *Public Interest Practice in Practice: The Law and Reality*, 34 HASTINGS L.J. 1207 (1983) (describing the public interest law firm's focus on issues primarily concerning the poor and underrepresented); David R. Esquivel, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 336-40 (1996) (describing early developments in the public interest law movement and the expansion of groups providing services in a number of substantive areas, including environmental protection, consumer protection, employment rights, mental health rights, rights of gay, lesbian, and bisexual persons, and children); Houseman, *Civil Legal Assistance*, *supra* note 74, at 369 n.3 (noting that there have always been other providers of legal services to the poor that were not funded by LSC, including civil rights and civil liberties organizations).

102. See Douglas A. Blaze, *Deja Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 939-42 (1997) (reviewing the origins of clinical legal education).

103. *Id.* at 942.

104. *Id.* at 944.

is often mediated by law student practice rules, many of which restrict clinical representation to indigent clients only.<sup>105</sup>

## II. DIMINISHING RESOURCES OF LAW FOR THE POOR: RECENT DEVELOPMENTS

Despite the national rhetoric of equal justice and the tradition of concern about legal access for the poor, recent legal developments have decreased funding for lawyers for the poor, narrowed the categories of people eligible to receive free legal assistance, and curtailed the scope of available services.<sup>106</sup> These measures have undermined the principles of equal justice and must be understood in the context of the changing tides of the political economy. The decrease in legal resources for the poor has occurred at a time of renewed laissez-faire economic policies and increased political influence by corporate interests.<sup>107</sup> These policies have widened disparities of wealth, which are tolerated as an acceptable trade-off for overall economic growth.<sup>108</sup> This has been a period distinguished by an ideological shift that seeks to reduce government intervention; concerns about global competition have also had a withering effect on the welfare state, labor unions, and wages.<sup>109</sup>

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105. See David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 S.M.U. L. REV. 1507, 1515-16 n.28 (1998) (noting that most student practice rules limit student representation to indigent persons).

106. See, e.g., OCRAA §§ 501-509.

107. Faux & Mishel, *supra* note 13, at 108 (noting "a shift in domestic political power in favour of the owners of capital"); see also Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later*, in THE TRANSFORMATION OF LEGAL AID 33 (Francis Regan et al. eds., 1999) (noting the link between the assault on legal services and the influence of major private donors who influence politicians through campaign contributions); John Kilwein, *The Decline of the Legal Services Corporation*, in THE TRANSFORMATION OF LEGAL AID, *supra*, at 41 (describing a shift in the 1990s in which both Democratic and Republican leaders favored a focus on retrenchment, including cutting taxes and shifting power to the markets).

108. Faux & Mishel, *supra* note 13, at 95, 101-02 (noting that in the mid-1960s, the salary ratio of top CEOs to the average worker was 39 to 1; however by 1997 it skyrocketed to 254 to 1).

109. See *id.* at 101; Will Hutton & Anthony Giddens, *Preface* to GLOBAL CAPITALISM, *supra* note 13, at viii-ix. The environment of global competition has resulted in the inability of domestic systems to provide sufficient income maintenance, health care, and education benefits to the poor. *Id.* at 108; see also Robert Kuttner, *The Role of Governments in the Global Society*, in GLOBAL CAPITALISM, *supra* note 13, at 147-48 (noting enormous mergers on a global scale).

The reduction of welfare programs generally is part of a larger process in which the defense of global economic interests demands "one true path to the efficient allocation of goods and services.... [which] includes, above all, the dismantling of barriers to free commerce and the free flows of financial capital."<sup>110</sup> These interests have successfully pushed for the election of officials with similar ideology to carry out their goal of redefining the role of government to assist in a laissez-faire economy.<sup>111</sup> They have also operated through conservative organizations committed to the protection of property rights and the limitations of government intervention.<sup>112</sup> They have influenced national policy, including legal policy, through aggressive litigation strategies in order to strengthen free market enterprise.<sup>113</sup>

This shift has been difficult to counter. A void has been created in the climate of global economy and laissez-faire policies, making it increasingly difficult to respond to these circumstances.<sup>114</sup> Many people who do not achieve economic success nevertheless assimilate the values and attitudes of the market and conclude that their economic distress is of their own making. This reflects a long tradition of depoliticizing issues of poverty.<sup>115</sup> The reinvigoration of private market concerns has similarly reactivated the perception that the status of the poor is related to personal failures and defects.

Legal services programs are situated in the vortex of these political and economic changes. Most notably in 1995, LSC came under attack by conservative politicians eager to "reinstat[e] the proper limits for government" and reduce government subsidies for

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110. Kuttner, *supra* note 109, at 149.

111. *Id.* at 149-50 (noting that wealthy corporations have actively supported the election of those with similar views to reduce the government's regulatory role and to limit it to assisting the laissez-faire agenda).

112. *Id.* (noting efforts of large corporations to sway policy and to influence business-created entities carrying out regulatory roles despite their lack of democratic accountability); see *infra* notes 123, 178, 183-85, 216, 234, 362, and accompanying text.

113. See Kuttner, *supra* note 109, at 149-50.

114. See *id.* at 155. Workers concerned that their jobs will be transferred abroad accept lower wages and fewer people vote. Faux & Mishel, *supra* note 13, at 103.

115. See Kuttner, *supra* note 109, at 155. Kuttner suggests a slogan for the new economy: "Anyone can be Bill Gates, and if you're not Bill Gates it's your own fault." *Id.*



the poor.<sup>116</sup> Congress reduced the funds to LSC by one-third, imposed new restrictions on the range of work the programs could undertake, and limited the clients it could represent.<sup>117</sup> At the same time, a conservative legal policy foundation dedicated to “advocating free-enterprise principles, responsible government, and property rights”<sup>118</sup> successfully challenged the constitutionality of IOLTA.<sup>119</sup> For many legal services programs IOLTA is the second largest revenue stream, so the threat to this source of funding could have dire consequences.

In addition to legal services, political and business interests, angered by what they considered to be interference by a law school clinic with their efforts to locate industry in Louisiana, successfully challenged the ability of clinical law programs to represent poor communities.<sup>120</sup> This attack on law clinics resulted in diminished access to legal services for the poor in Louisiana and may portend diminished possibilities for law clinics elsewhere.<sup>121</sup>

Public interest law firms that rely on attorney’s fee awards to make it economically feasible to represent poor victims of civil rights deprivations have been jeopardized by the recent decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.<sup>122</sup> In *Buckhannon*, the Supreme Court pushed the pendulum further toward a reinvigorated “American” rule whereby each party bears its own attorney’s fees. This decision limited the possibilities for funding

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116. Kilwein, *supra* note 107, at 61 (quoting the manifesto of the Conservative Action Team, a group of conservative House Republicans whose goals included the elimination of LSC).

117. *Id.*

118. Washington Legal Foundation, *Mission Statement*, at <http://www.wlf.org/resources/WLFMission/> (last visited Nov. 1, 2000). More fully, the Washington Legal Foundation describes its mission as “advocating free-enterprise principles, responsible government, property rights, a strong national security and defense, and balanced civil and criminal justice system.” *Id.* The Foundation further asserts that it “has shaped public policy through aggressive litigation.... to strengthen America’s free enterprise system.” *Id.*

119. *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

120. *See SCLC v. Supreme Court of La.*, 252 F.3d 781, 784 (5th Cir. 1999), *cert. denied*, 122 S. Ct. 464 (2001).

121. *See id.*

122. 532 U.S. 598 (2001).

litigation for poor people by narrowing the circumstances in which attorney's fees may be awarded in civil rights matters.<sup>123</sup>

It may not be surprising that the shift in economic and political policies has influenced the provision of the law to the poor. But there has been little acknowledgment of the ways these changes have disturbed the national narrative about the prominence of the Rule of Law. Legal resources for the poor have been cast as tentative and problematic. The proposition of equal access to the law currently appears as something less than a guiding principle of democratic process. An examination of recent developments demonstrates a widening gap between those who have access to the law and those who do not, and the transformation of law for the poor from democratic principles to contingent possibilities yielding to prevailing norms of self-sufficiency and related principles of largess.

#### A. *The Assault on Legal Services*

##### 1. *Congressional Restrictions*

In 1995, foes of federally funded legal services mounted the most serious assault in the history of the LSC, aimed at its complete abolishment.<sup>124</sup> The campaign began with the 104th Congress and continued unabated for the next three years.<sup>125</sup> Congress provided a venue for more diatribe than debate, and ultimately a narrative about law for the poor emerged that all but eviscerated the notion of equal justice for all.<sup>126</sup> The themes reverberating during this

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123. See *id.*; *infra* notes 248-51 and accompanying text.

124. See 141 CONG. REC. 16,994 (1995) (statement of Sen. Helms) (proposing the elimination of all funding to LSC); BRENNAN CENTER FOR JUSTICE, INST. NO. 3, AN UNSOLVED MYSTERY: WHY ARE ROGUE POLITICIANS TRYING TO KILL A PROGRAM THAT HELPS THEIR NEEDIEST CONSTITUENTS? 2 (2000) [hereinafter AN UNSOLVED MYSTERY] (noting that in 1995, twenty-seven conservative members of Congress wrote to then-House Speaker Newt Gingrich asking that LSC be abolished).

125. See 141 CONG. REC. 16,994 (1995) (statement of Sen. Helms) (launching the assault on the LSC).

126. See *supra* notes 124-25 and accompanying text; *infra* notes 128-31 and accompanying text.

period celebrated laissez-faire economics, free market relationships, and minimal government intervention in human affairs.<sup>127</sup>

The issues were framed largely by opponents of the program motivated more by ideological objectives than budgetary constraints.<sup>128</sup> Conservative members of Congress argued that legal services ranked “at or near the bottom” of funding priorities and questioned whether it was the responsibility of the government to fund law for the poor at all.<sup>129</sup> Characterizing LSC as “[b]ig Government legal services,”<sup>130</sup> and a “government bureaucracy ... out of control ... [which] must be tamed,” opponents advocated a return to charitable programs or alternatively suggested that market-driven private legal services could provide low-cost aid to the poor.<sup>131</sup>

Using a strategy described as “argumentative bludgeoning,”<sup>132</sup> critics denounced legal services for seeking the destruction of legitimate businesses and small farmers.<sup>133</sup> LSC was charged with assisting undeserving poor people, and criticized for “taking money away from law-abiding, hard-working taxpayers and then giving it to the likes of convicted felons, delinquent fathers, illegal aliens, and even to drug dealers.”<sup>134</sup> Lobbying efforts by legal services

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127. See Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 52 (1995) (noting the association with laissez-faire economics and that this period of congressional activity was dominated by the Republican Party platform known as “The Contract With America”).

128. 141 CONG. REC. 16,994 (1995) (statement of Sen. Helms) (“Should Congress continue to force the American taxpayers to provide \$400 million every year to pay the salaries of, and otherwise fund, a cadre of liberal lawyers to push their social policies down the throats of local governments and citizens?”); *id.* at 15,464 (statement of Rep. McCollum) (accusing LSC of engaging in “impact litigation in an attempt to socially engineer change in our laws and rules”).

129. 142 CONG. REC. 18,630 (1996) (statement of Rep. Doolittle).

130. *Id.* at 18,626 (statement of Rep. Taylor).

131. *Id.* at 18,627 (statement of Rep. Ballenger) (noting the existence of “sufficient private alternatives”).

132. Steven Lukes, *Cultural Relativism and Liberal Principles*, TIMES LITERARY SUPPLEMENT, Oct. 5, 2001, at 19 (describing philosopher Robert Nozick's term for manipulative argument).

133. See 141 CONG. REC. 16,994 (1995) (statement of Sen. Helms) (accusing legal services of “unmercifully harass[ing] law-abiding citizens ... hapless small businessmen, farmers, and so forth”).

134. 142 CONG. REC. 18,626 (1996) (statement of Rep. Taylor); see also *id.* at 18,633 (statement of Rep. Dornan); AN UNSOLVED MYSTERY, *supra* note 124, at 4 (describing accusations by Representative Steve Largent who, in 1995, accused legal services of protecting drug dealers from eviction from housing projects and helping fathers to avoid

attorneys were deemed unrelated to the needs of the poor and beyond the array of services to which the poor were entitled, even if funded by private sources.<sup>135</sup> LSC was characterized as arrogant and corrupt, a hotbed of government mismanagement; its lawyers were portrayed as duplicitous and dishonest for evading statutory and regulatory program limitations.<sup>136</sup>

Congressional opponents relied largely on unspecified anecdotes, often provided by conservative activists, and frequently lacking any documentation to corroborate their claims.<sup>137</sup> Although the arguments exceeded the evidence and the charges against legal services were frequently disproved, the smear campaign continued to fuel the invective against LSC funding.<sup>138</sup> For example, the failure to include information about the overlap of domestic violence issues in divorce cases allowed opponents to manipulate financial statistics and distort LSC programmatic expenditures in an attempt to depict legal services as antifamily.<sup>139</sup> Statements were incorrectly attributed to LSC lawyers, suggesting an intent to evade

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paying child support).

135. 142 CONG. REC. 15,464 (1996) (statement of Rep. McCollum) (describing the intent of Congress in funding legal services as relating to the "legal system" and as excluding any lobbying activity as inappropriate).

136. *Id.* at 18,633 (statement of Rep. Dornan) (calling LSC "arrogant and corrupt" and accusing LSC of "exacerbat[ing] illegal immigration"); *id.* at 18,639 (statement of Rep. Radanovich) (calling LSC "a portrait of Government mismanagement"); *id.* at 18,627 (statement of Rep. Burton) (accusing LSC lawyers of "getting around the restrictions so they can do whatever they damn well please").

137. *See* 141 CONG. REC. 16,994 (1996) (statement of Sen. Helms) (relying on information provided by Heritage Foundation publications supporting budget cuts to welfare, and an editorial by the president of the Washington-based Institute for Justice suggesting that welfare reform would be impossible to accomplish without first fighting LSC). The National Legal and Policy Center, a conservative organization funded in large part by conservative foundations such as the Sarah Scaife Foundation, the Carthage Foundation, and the John M. Olin Foundation, was active in congressional hearings and targeted congressional supporters of legal services. *See* BRENNAN CENTER FOR JUSTICE, INST. NO. 7, HIDDEN AGENDAS: WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS? 11-12 (2001) [hereinafter HIDDEN AGENDAS].

138. *See* Alexander D. Forger, *Address: The Future of Legal Services*, 25 FORDHAM URB. L.J. 333, 339 (1998) (noting that in legislative debates "[i]f you're against legal services, you say whatever you want; that's ok. You can even make up quotes.... You say what you want to say—black is white or red—and you pass around all of the long ago discredited stories").

139. *See* HIDDEN AGENDAS, *supra* note 137, at 15 (describing then-Christian Coalition Director Ralph Reed's accusation that legal services used excessive expenditures in divorce cases).

federal restrictions.<sup>140</sup> Opponents claimed legal services programs contributed to the destruction of the economy.<sup>141</sup> LSC was characterized as a bully funded by hard-earned tax dollars that “unmercifully harassed law-abiding citizens.”<sup>142</sup> Its critics called for its “quiet funeral.”<sup>143</sup>

The most pointed attacks denounced legal services for attempting to undermine congressional efforts to limit the government by reforming welfare while reinvigorating principles of personal responsibility.<sup>144</sup> Indeed, the linkage between the campaign to dismantle welfare and the determination to disable legal services repeatedly surfaced during the legislative debates.<sup>145</sup> Programs were accused of using taxpayer money to undermine local government policies related to eliminating entitlement programs.<sup>146</sup> Welfare challenges based on constitutional theory were characterized as “legal sleights of hand,”<sup>147</sup> and “arrogant absurdit[ies],” orchestrated by “a cadre of liberal lawyers [who] push their social

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140. See 142 CONG. REC. 18,628 (1996) (statement of Rep. Burton) (urging an end to legal services and misattributing a statement to an LSC lawyer that allegedly evinced an intent to evade the restrictions). Representative Burton also wrongfully accused programs in Philadelphia and California of evading restrictions on welfare reform litigation. See *id.* (statement of Rep. Burton). One congressman pointed out that “the facts show[ed]” that Representative Burton had misattributed the statement to an LSC program. *Id.* at 18,628 (statement of Rep. Fox). Another representative agreed that Representative Burton had made erroneous accusations. *Id.* at 18,635 (statement of Rep. Lofgren). Although advised of his error, Representative Burton continued to misattribute these statements to LSC programs. *Id.* at 18,640 (statement of Rep. Burton).

141. *Id.* at 18,630 (statement of Rep. Doolittle) (arguing that LSC programs are “destroying our economic growth”).

142. 141 CONG. REC. 16,994 (1995) (statement of Sen. Helms).

143. *Id.* (statement of Sen. Helms).

144. *Id.* (statement of Sen. Helms) (accusing LSC of fighting the American people on welfare reform and working to enshrine a constitutional right to advocacy aimed at thwarting the will of the people); see also AN UNSOLVED MYSTERY, *supra* note 124, at 4 (noting Representative Largent’s accusation that legal services was to blame for slowing down the process of welfare reform); Kilwein, *supra* note 107, at 54 (quoting an LSC opponent who accused legal services of “creat[ing] a permanent class of welfare recipients who drain resources from the rest of society”). Limited government and personal responsibility were key principles of the “Contract With America” which dominated congressional activity during this period. See Braucher, *supra* note 127, at 55.

145. The OCRAA of 1996, by which restrictions to legal services were enacted, was the same legislative vehicle for the historic reform of welfare programs. OCRAA §§ 501-509.

146. See 141 CONG. REC. 16,994 (1995) (statement of Sen. Helms).

147. 142 CONG. REC. 18,633 (1996) (statement of Rep. Dornan).

policies down the throats of local governments and citizens."<sup>148</sup> Welfare reform issues, LSC opponents insisted, were political issues without relevance to the legal rights of the poor.<sup>149</sup>

LSC just barely survived the call for its total elimination, but not without suffering a crippling loss of funds.<sup>150</sup> Program funding was reduced by thirty percent and resulted in dramatic reductions in staff and office closings.<sup>151</sup> Aside from the loss of funding, new restrictions added new burdens on programs. Certain classes of clients were eliminated from eligibility for legal services, including prisoners (those already convicted as well as pretrial detainees), many categories of immigrants, and public housing residents alleged to have been involved in criminal drug activity.<sup>152</sup> Those who remained eligible were limited in the types of legal issues which could be addressed on their behalf.<sup>153</sup> Congress added to the list of prohibited substantive legal issues and forbade LSC-funded attorneys from engaging in any advocacy that challenged the constitutionality of state or federal welfare statutes or regulations in any forum.<sup>154</sup>

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148. 141 CONG. REC. 16,994 (1995) (statement of Sen. Helms). Representative Burton characterized litigation to challenge a family cap on welfare benefits to mothers who have additional children as promoting a radical agenda. *See Dep't of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations for 1997: Hearings Before a Subcomm. of the Comm. on Appropriations*, 104th Cong. 130 (1996) (statement of Rep. Burton).

149. 141 CONG. REC. 23,988 (1995) (statement of Rep. Kassebaum) (criticizing legal services for addressing "political causes, such as welfare reform").

150. *See* OCRAA §§ 501-509.

151. Houseman, *Civil Legal Assistance*, *supra* note 74, at 378 (stating that funding cuts resulted in a loss of nearly thirteen percent of the staff and office space). Without adjusting for inflation, federal funding is currently less than the allocation in 1981; when adjusted for inflation, it is less than half of the 1981 appropriation. *See* HIDDEN AGENDAS, *supra* note 137, at 2.

152. *See* OCRAA § 504(a)(15) (prohibiting representation of incarcerated persons); 45 C.F.R. § 1637 (1997) (same); § 504(a)(11) (prohibiting representation of certain noncitizens); 45 C.F.R. § 1626 (1997) (same); § 504(a)(17) (prohibiting representation of certain public housing tenants accused of criminal drug-related activity); 45 C.F.R. § 1633 (same). In 1997, an amendment to the statute allowed a narrow exception to the prohibition on representation of undocumented immigrants: non-LSC funds could be used to serve indigent aliens who were victims of domestic violence matters directly related to the abuse. 45 C.F.R. § 1626.4(a)(1)(2). This was known as the "Kennedy Amendment." *Id.*

153. *See generally* OCRAA § 501-509; *Accountability for Legal Services*, WALL ST. J., Sept. 13, 1995, at A12 (arguing that legal services should be limited to helping poor people with "normal legal problems").

154. OCRAA § 504(a)(1); 45 C.F.R. § 1632; OCRAA § 504(a)(14) (prohibiting abortion-

Moreover, the legal tools and strategies available to pursue permissible representation were severely circumscribed. Class actions, characterized by opponents as “the sexier lawsuits,” were prohibited.<sup>155</sup> Congress prohibited LSC lawyers from representing anyone who might have been provided with “unsolicited advice” to protect their rights by obtaining counsel or taking legal action.<sup>156</sup> LSC lawyers were prohibited from lobbying legislative and administrative rule-making bodies.<sup>157</sup> They were also denied the right to seek state or federal statutorily authorized attorney’s fees from adverse parties. This thwarted the ability of LSC clients to enforce statutory rights, to deter against repeated wrongdoing, and deprived LSC programs of the opportunity to obtain additional revenue for program work.<sup>158</sup> These restrictions distorted the traditional attorney-client relationship; they required disclosure of information related to the identity of legal services clients as well as the substance of their cases, neither of which is permitted in private attorney-client relations.<sup>159</sup>

The restrictions encumbered all nonfederal program funding as well.<sup>160</sup> In an effort to assure complete control of LSC program activity, Congress banned the use of all funds, public or private, on behalf of any activity prohibited from using federal funds.<sup>161</sup> Congress extended its control to non-LSC entities as well, by

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related litigation); § 504(a)(16) (prohibiting challenges to welfare reform laws); 45 C.F.R. § 16 (same).

155. 142 CONG. REC. 18,629 (1996) (statement of Rep. Hunter) (stating that legal services programs are supposed to be doing “ham and eggs work for the poor”); *see also* 141 CONG. REC. 23,988 (statement of Rep. Kassebaum) (referring to the need to “protect against the filing of frivolous class action law suits”); 45 C.F.R. § 1617.

156. OCRAA § 504(a)(18); 45 C.F.R. § 1638.

157. OCRAA § 504(a)(2)-(6); 45 C.F.R. § 1612; 142 CONG. REC. 15,464 (1996) (statement of Rep. McCollum) (suggesting that poor people’s rights could be sufficiently limited to the forum of the courts alone).

158. OCRAA § 504(a)(13); 45 C.F.R. § 1642.

159. Clients must disclose their name, address, and other identifying information about their case to the national LSC office as well as the general public in order to remain eligible for services. 45 C.F.R. § 1644.1-44.4 (1998). Clients must also agree to give LSC a signed written statement of facts to which the attorney-client or attorney work product privilege no longer applies. 45 C.F.R. § 1636 (1998); *see also* Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187, 2221-31 (1999) (providing an overview of ethical issues posed by the restrictions).

160. 42 U.S.C. § 2996i(c) (2000); *see also* OCRAA § 504(d)(s)(B); 45 C.F.R. § 1610.

161. OCRAA § 504(d)(2)(B); 45 C.F.R. § 1610.

imposing restrictions that prevented LSC-funded organizations from transferring non-LSC funds to non-LSC entities as an alternate means of carrying out prohibited advocacy.<sup>162</sup>

The restrictions imposed by the 104th Congress remain virtually intact, with the notable exception of the ban on welfare advocacy.<sup>163</sup> This is due in part to new regulations enacted in 1998 that were designed to discourage programs from challenging the restrictions.<sup>164</sup> LSC programs have also endured similar ideological attacks at the state level with federal restrictions being sedimented by "state-level copy cat restrictions."<sup>165</sup> In sum, congressional foes succeeded in

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162. OCRAA § 504(d)(2)(B); 45 C.F.R. § 1610.7. This was eventually challenged and modified so that LSC programs could allocate non-LSC funds to be used for prohibited activities but only to an entity that was organizationally separate and independent from the LSC program. See 45 C.F.R. § 1610 (1997). For a discussion of the inefficiencies and additional burdens created by this restriction, see David Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL'Y REV. 337 (1998).

163. 45 C.F.R. § 1639 (1997); see also 45 C.F.R. § 1626.4(a)(1)(2) (1997) (noting an exception for representation of battered immigrants); *Velaquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997) (addressing changes to restrictions on transfer of funds). A lawsuit, *Dobbins v. Legal Services Corp.*, No. 97-00182 (E.D.N.Y. filed Dec. 14, 2001), challenging LSC restrictions on the use of private funds, is pending. For a discussion of the challenge to welfare advocacy restrictions, see *infra* Part II.A.2.

164. See Houseman, *Civil Legal Assistance*, *supra* note 74, at 380 n.37 (citing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-19, § 504(a), 11 Stat. 2440 (1998), which allows LSC to debar programs from future grants if they substantially violate the restrictions or if they sue LSC because of the restrictions). The regulations also eliminated the right to a hearing before an independent hearing officer when LSC sought to terminate or deny refunding. *Id.* at 380 n.38.

165. Ralph Ranalli, *Bar Group Seeks to Boost Legal Services to the Poor; Conservative Think Tank Files Dissenting View*, BOSTON GLOBE, May 29, 2000, at B1 (noting opposition to state funding for the Massachusetts Legal Assistance Corp. because of the program's involvement in rent regulations, parental leave, and work requirements for welfare recipients); see Silverman, *supra* note 35, at 978 (noting efforts by New York state and local government officials to condition the receipt of "homelessness prevention grants" by restricting the type of suits that could be filed); BRENNAN CENTER FOR JUSTICE, LSC RESTRICTION FACT SHEET NO. 1: THE RESTRICTION BARRING LEGAL SERVICES CORPORATION-FUNDED LAWYERS FROM BRINGING CLASS ACTIONS, at [http://www.brennancenter.org/resources/resources\\_act\\_classactfactsheet](http://www.brennancenter.org/resources/resources_act_classactfactsheet) (last visited Nov. 1, 2002) (noting duplication of class action restrictions in several states and IOLTA funded programs); BRENNAN CENTER FOR JUSTICE, LSC RESTRICTION FACT SHEET NO. 4: THE RESTRICTION BARRING LEGAL SERVICES CORPORATION-FUNDED LAWYERS FROM ASSISTING ALIENS, at [http://www.brennancenter.org/resources/resources\\_act\\_alienstfactsheet](http://www.brennancenter.org/resources/resources_act_alienstfactsheet) (last visited Nov. 1, 2002) (stating that legal services opponents influenced Virginia's decision to ban any state funding for legal services for representation of migrant workers in employment matters); see also



reshaping law for the poor to conform to political economic interests of the day.

## 2. *Challenging the Restrictions*

Legal challenges to the 1996 restrictions eventually reached the Supreme Court in *Legal Services Corp. v. Velazquez*.<sup>166</sup> The plaintiffs included an LSC program client who lost her public benefits for allegedly failing to comply with job search requirements.<sup>167</sup> She challenged the constitutionality of New York State's welfare reform laws which denied her the opportunity to demonstrate in a pretermination hearing that her physical impairments prevented her from work-related activities.<sup>168</sup> The suit was pending when the LSC restrictions were enacted which barred legal services attorneys from raising such issues, whereupon Velazquez's attorney withdrew.<sup>169</sup> Efforts to obtain substitute counsel in the case failed and Velazquez lost her benefits.<sup>170</sup>

The suit challenged the scope of the restrictions imposed on both federal and nonfederal funds.<sup>171</sup> The Court of Appeals for the

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Houseman, *supra* note 159, at 2196-97 (reviewing state restrictions in Texas and Washington).

166. 531 U.S. 533 (2001). The plaintiffs filed suit against LSC for implementing the 1996 restrictions, and the Government intervened in district court to defend them. *Id.* at 537. For an overview of *Velazquez* authored by lead counsel for plaintiffs, see Burt Neuborne & David Udell, *Legal Services Corporation v. Velazquez*, 35 CLEARINGHOUSE REV. 83 (2001). Prior to *Velazquez*, a New York state case held that an LSC lawyer financed by non-LSC funds did not have to withdraw from representation. *Varshavsky v. Geller*, No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996), *reprinted in* N.Y. L.J., Dec. 31, 1996, at 22. A federal district court also issued an injunction in favor of five LSC-funded programs which challenged the constitutionality of restrictions related to non-LSC funds. *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1420-22 (D. Haw. 1997). The same court, however, vacated the ruling after LSC issued amended regulations. *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 981 F. Supp. 1288, 1294 (D. Haw. 1997), *aff'd in part and vacated in part on other grounds*, 145 F.3d 1017 (9th Cir. 1998).

167. Neuborne & Udell, *supra* note 166, at 85-86 n.16. Other plaintiffs included LSC-funded attorneys, elected officials of the City and State of New York, and a private program donor. *Id.*

168. *Id.* at 86 n.16.

169. *Id.*

170. *Id.*

171. *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323, 326-27 (E.D.N.Y. 1997). Although the district court initially questioned the constitutionality of the restrictions on non-LSC funds, it eventually found the saving regulations issued by LSC adequate, and the remaining

Second Circuit affirmed the constitutionality of the restrictions attaching to non-LSC funds, but found the prohibition on welfare reform litigation to be impermissible, viewpoint-based discrimination in violation of the First Amendment; the court enjoined its enforcement.<sup>172</sup> The Supreme Court granted certiorari limited to the welfare reform restriction.<sup>173</sup>

In a five-to-four decision, the Court affirmed the injunction, finding that the restriction banning challenges to welfare reform was an impermissible violation of the First Amendment.<sup>174</sup> The Court distinguished *Velazquez* from its previous decisions involving restrictions on government-funded speech and expressed concern about the autonomy and integrity of the judicial process.<sup>175</sup> It identified the traditional flow of advocacy in a courtroom as a particular "medium of expression" which the LSC regulations distorted.<sup>176</sup>

The Court determined that the obligation of LSC-funded lawyers is to facilitate the speech of their clients within the venue of the judicial system.<sup>177</sup> The restrictions were found to alter the traditional role of the attorneys in the courtroom, disturb the development and maintenance of a well-informed judiciary, and threatened "severe impairment of the judicial function."<sup>178</sup> Such an effect, the Court determined, was "inconsistent with the accepted separation-of-powers principles" and implicated First Amendment interests by insulating welfare laws from constitutional scrutiny,

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restrictions valid. *Id.* at 344.

172. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 765-67 (2d Cir. 1999).

173. *Velazquez*, 531 U.S. at 537.

174. *Id.*

175. Specifically, the Court distinguished *Rust v. Sullivan*, 500 U.S. 173 (1991), which upheld restrictions on government-funded speech when the government is the speaker or when it uses private speakers to convey its message, and *Rosenberger v. Rector*, 515 U.S. 819 (1995), which struck down speech restrictions that arise in a traditional public forum (the University of Virginia) designed to facilitate divergent views. *Velazquez*, 531 U.S. at 540-43.

176. *Velazquez*, 531 U.S. at 534.

177. *Id.* at 542-43.

178. *Id.* at 544-45 (acknowledging that an informed judiciary presumes an informed, independent bar which would be impaired if regulations inhibited an attorney from presenting "all the reasonable and well-grounded arguments necessary for the proper resolution of the case").

particularly because there was “no alternative channel for expression of the advocacy Congress seeks to restrict.”<sup>179</sup>

The Court, however, diminished the significance of the holding for poor people and their lawyers by clearly pronouncing that legal services to the poor are a function of government largess without right of entitlement.<sup>180</sup> Although the Court considered the degree to which the government could attach conditions to its largess, and objected to the impact the ban on welfare reform had upon the integrity of the courts, it accepted without discussion the long-standing limitations on legal services funds and declined to consider the constitutionality of the remaining conditions imposed on federal funding.<sup>181</sup>

Despite an otherwise significant victory for LSC programs and their clients, a substantive problem remains embedded in the Court’s decision: Legal protection for the poor stands as a discretionary service that the government may or may not choose to fund. The Court understood that poor clients lack alternative resources to obtain legal assistance, but it also held that it was not the responsibility of the government to subsidize such services or sanction all cases in federally funded programs.<sup>182</sup> Law for the poor was construed as a privilege. This construction effectively undermines the implementation of Locke’s social contract through which the legal system provides the mechanism for the resolution of

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179. *Id.* at 546-47 (noting the unlikely possibility that an indigent client wishing to challenge the constitutionality of welfare reform laws could find other counsel).

180. *Id.* at 548 (“Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships.”). The Court made reference to LSC funding as a government subsidy program throughout its decision, noting that the suit involved a subsidy. *Id.* at 544.

181. *Id.* at 537-38. Although both sides in *Velazquez* petitioned for a writ of certiorari, the Court only granted the defendants’ writ. *See* Neuborne & Udell, *supra* note 166, at 88. The Court recognized that the restrictions established two tiers of legal cases and created “lingering doubt” about the efficacy of “truncated representation” provided by LSC attorneys. *Id.* at 534. However, it has subsequently refused to consider the remaining limitations on advocacy or acknowledge that matters worthy of constitutional review had been raised in *Velazquez*. *See Velazquez v. Legal Servs. Corp.*, 532 U.S. 903 (2001) (denying certiorari regarding challenges to remaining issues).

182. *Velazquez*, 531 U.S. at 548.

disputes concerning any matter of right, governed by standing rules applicable to all parties, both rich and poor.<sup>183</sup>

*B. Challenges to Interest on Lawyers Trust Accounts (IOLTA) Programs*<sup>184</sup>

While the original assault on legal services was maintained largely by politicians seeking to redefine the role of government to facilitate a laissez-faire economy, a conservative organization seeking to affect legal policy in the courts on behalf of principles of property rights, economic liberty, and free enterprise led the next challenge to legal services for the poor.<sup>185</sup> The Washington Legal Foundation (WLF) initiated several lawsuits around the country to challenge IOLTA funding for legal services.<sup>186</sup>

IOLTA programs, usually located within state bar organizations, provide significant funding to programs designed to improve the administration of justice and expand legal services to the poor.<sup>187</sup> IOLTA accounts were developed as a result of the 1980 changes to federal banking laws. These laws authorized interest-bearing checking accounts for individuals and charitable organizations thus allowing lawyers to combine client trust accounts which, if deposited separately would yield no interest because of their nominal amount or short-term nature.<sup>188</sup> In combination with other

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183. See *supra* note 24 and accompanying text.

184. IOLTA programs also are known as Interest on Lawyers Accounts (IOLA) programs. See Joseph H. Genova, *A Key Victory for IOLTA*, N.Y. L.J., Feb. 17, 2000, at 2.

185. See Washington Legal Foundation, at <http://www.wlf.org/resources/WLFMission> (describing the Washington Legal Foundation, the chief litigator against IOLTA, as a public interest law and policy center devoted to promoting individual freedom, limited government, a free market economy, and a strong national security and defense) (last visited Nov. 1, 2002).

186. For a list of IOLTA legal challenges by WLF and other groups see *infra* note 191. See Plaintiffs' Complaint, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578), 1997 WL 525726, at \*5a (filed Feb. 7, 1994) for an additional description of the organization; Joint Appendix at 5, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578).

187. See Christine A. Klein, *Beating a Dead Mouse: Do IOLTA Programs Create an Unconstitutional Taking of Private Property?*, 1999 L. REV. MICH. ST. U. DET. C.L. 1, 5-6. LSC notes that as a national average, state funding accounts for the second largest funding stream, followed closely by IOLTA funds. See LEGAL SERVICES CORP., *SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, A SPECIAL REPORT TO CONGRESS* 9 (2000).

188. See Consumer Checking Account Equity Act of 1980, Pub. L. No. 96-221, § 303, 94 Stat. 132, 146 (1980) (codified at 12 U.S.C. § 1832(a) (2000)); see also 12 C.F.R. § 204.130

client trust funds, however, these accounts could yield significant interest.<sup>189</sup>

IOLTA funds were first distributed to offset the loss of revenue suffered by LSC programs in the early 1980s, and to provide support for legal advocacy in cases where access to federal funds was barred.<sup>190</sup> Opponents of legal services objected to the manner in which the funds were allocated and filed suits in a number of states. They claimed that IOLTA programs violated their First and Fifth Amendment rights by coercing financial support for programs with which they disagreed, and by taking property without just compensation.<sup>191</sup>

The centerpiece of the litigation campaign was *Phillips v. Washington Legal Foundation*,<sup>192</sup> filed in February 1994, which challenged the Texas IOLTA program. The WLF claimed that the interest accruing in IOLTA accounts constituted property belonging to individual client depositors and expressed political and ideological disagreements with IOLTA recipients which "advocated various 'liberal' causes, such as the expansion of anti-discrimination rights" as well as the "expansion of the rights of undocumented aliens."<sup>193</sup> On June 15, 1998, in a five-to-four decision, the Supreme

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(1997) (clarifying which individuals and organizations are eligible for these accounts).

189. See Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, FLA. B.J., Apr. 1999, at 12, 16; Michael A. Heller & James E. Krier, *Making Something Out of Nothing: The Law of Takings and Phillips v. Wash. Legal Foundation*, 7 SUP. CT. ECON. REV. 285, 286 (1999); Klein, *supra* note 187, at 2.

190. See Lorenz, *supra* note 91, at 314.

191. See Wash. Legal Found. v. Mass. Bar Found., 795 F. Supp. 50, 56 (D. Mass. 1992) (granting defendants' motion to dismiss), *aff'd*, 93 F.2d 962 (1st Cir. 1993); Cone v. Fla. Bar, 626 F. Supp. 132, 137 (M.D. Fla. 1985), *aff'd, sub nom.*, Cone v. State Bar of Fla., 819 F.2d 1002 (11th Cir. 1987); *In re Interest on Trust Accounts*, 402 So.2d 389, 395-96 (Fla. 1981); *In re Interest On Lawyers' Trust Accounts*, 672 P.2d 406, 408 (Utah 1983); *In re Minn. State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982); *In re N.H. Bar Ass'n*, 453 A.2d 1258, 1260-61 (N.H. 1982); see also Heller & Krier, *supra* note 189, at 287-88 n.12 (noting that the highest courts of seven states have determined that IOLTA programs are not a taking and that thirty-seven state supreme courts adopted IOLTA programs pursuant to rule-making authority while five states did so through legislation); Plaintiffs' Complaint, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578), 1997 WL 525726, at \*15a-16a (filed Feb. 7, 1994); Joint Appendix at 14-15, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578).

192. 524 U.S. 156 (1998).

193. See Plaintiffs' Complaint, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578), 1997 WL 525726, at \*9a-10a (filed Feb. 7, 1994); Joint Appendix at 9-10, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578).

Court sided with IOLTA opponents on Fifth Amendment grounds, finding that the interest generated by IOLTA accounts was the property of the client depositors.<sup>194</sup>

In the absence of any economic value which might inure to client depositors, the Court nonetheless recognized the depositors' "valuable rights" in IOLTA accounts.<sup>195</sup> Because these "valuable rights" do not have positive existence and are not available to the depositors except as the power to deprive IOLTA programs of their use, the Court had to shift its focus from what the owner had lost to what IOLTA had gained in order to reach its conclusion. The Court derived property interests from the right of depositors to exclude others from that which they themselves could never obtain; property interests which could not exist but for the very program the WLF was challenging.

The Court's method, which conceptually and contextually severed the question of property from the issues of taking and just compensation, allowed IOLTA's social purpose and the values of equal justice otherwise relevant to the remaining Fifth Amendment concerns to remain unexplored.<sup>196</sup> In its effort to define and protect

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194. *Phillips*, 524 U.S. at 160. The Fifth Circuit had previously ruled only that the interest constituted property and did not address the question of whether IOLTA programs constituted a taking. *See Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 94 F.3d 996, 1004 (5th Cir. 1996).

195. *Phillips*, 524 U.S. at 169-170. The Court noted that the "interest income at issue here may have no economically realizable value to its owner." *Id.* at 170.

196. *See Heller & Krier, supra* note 189, at 291-93 (coining the phrase "contextual severance" "in order to echo the familiar problem of 'conceptual severance' in takings law"); Frank I. Michelman, *Property, Utility, and Fairness: Comments on Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1172 (1967) (discussing the social purpose component of takings law). The constitutionality of IOLTA programs is uncertain, as it continues to be litigated in a piecemeal fashion. In October 2001, the *Phillips* case returned to the Fifth Circuit on appeal. The circuit court ruled that the IOLTA program amounted to a *per se* taking of client property. *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180, 188 (5th Cir. 2001), *reh'g en banc denied*, 293 F.3d 242 (5th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3092 (2002) (No. 02-1). Without IOLTA, however, there was no interest to allocate to depositors as just compensation, so the appellate court determined that the only remedy was injunctive relief and remanded the case. *Id.* at 194-95. WLF also filed suit challenging IOLTA as it applied to licensed professional officers authorized to conduct real estate transactions. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 841 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 2355 (2002). The Ninth Circuit upheld IOLTA on Fifth Amendment grounds but remanded it for consideration on First Amendment grounds. *Id.* at 861-64. A Boston nonprofit law firm filed suit against the Massachusetts program in January of 2002. Citizens for the Preservation of Constitutional Rights, Inc., *Justices of the*

property rights, the Court avoided weighing the social gain derived from IOLTA against the loss of the power to exclude, now conceived as a property right. It ignored issues of fairness that required balancing government interests against private losses inherent in Fifth Amendment concerns.<sup>197</sup>

In addition to the ideological interests advanced by WLF, the statements of interest of amici in the *Phillips* case revealed the tension between the principles of equal justice and the interests of the free market economy with which the Court sided. For example, the Mountain States Legal Foundation, organized for the “defense and preservation of individual liberty, the right to own and use property, limited government, and the free enterprise system,” filed an amicus brief arguing in support of the “constitutional vitality of private property rights” at stake.<sup>198</sup>

Similarly, the Pacific Legal Foundation, which advocates for “less government and the preservation of free enterprise, private property rights and individual liberties,”<sup>199</sup> entered as amicus in furtherance of its goals. The National Right to Work Legal Defense Foundation,<sup>200</sup> an organization opposed to “compulsory unionism” in the name of “individual freedom,” urged the Court to consider the Fifth Amendment property rights of those opposed to funding legal services organizations. The *Phillips* decision can be viewed as a demonstration of the supremacy of property and free market interests over social programs that fund access to the law for the poor.

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*Supreme Judicial Court Sued for Violating Federal and State Constitutions*, at <http://www.julyfourth.net/pressrelease-iolta020123.pdf> (Jan. 23, 2002). For a copy of the complaint in the case, see *Citizens for the Preservation of Constitutional Rights v. Marshall*, available at <http://www.julyfourth.net/iolta020123Complaint.pdf> (last visited Nov. 1, 2002).

197. Michelman, *supra* note 196, at 1193, 1218-19 (discussing Fifth Amendment requirements that necessitates balancing social needs against private losses and concerns of compensation and fairness).

198. Brief of Amicus Curiae Mountain States Legal Found., *Phillips v. Wash. Legal Found.* 524 U.S. 156 (1998) (No. 96-1578), 1997 WL 634323, at \*1-2.

199. See <http://www.pacificlegal.org> (last visited Nov. 1, 2002); Brief of Amicus Curiae Pacific Legal Found., *Phillips v. Wash. Legal Found.* 524 U.S. 156 (1998) (No. 96-1578), 1997 WL 631770, at \*2-3.

200. See <http://www.nrtw.org> (last visited Nov. 1, 2002); Brief of Amicus Curiae National Right to Work Legal Defense Found, Inc. at \*3-4, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578), 1997 WL 626850.

IOLTA opponents have not only sought to eliminate funding streams for legal services through litigation, but they have also lobbied state bar organizations responsible for funding priorities to restrict and curtail the use of these funds.<sup>201</sup> As a result of these tactics, combined with IOLTA's uncertain legal status, it is likely that previous innovative proposals to expand IOLTA funding will be abandoned.<sup>202</sup> Program regulations may be introduced to require attorneys to obtain consent from clients before their deposits may be aggregated into IOLTA accounts, which will result in a reduction of funds.<sup>203</sup> IOLTA requirements may include "opt out" provisions, which will lead to the same effect.<sup>204</sup> Recently, IOLTA programs have imposed additional restrictions on their funding by mirroring federal LSC restrictions and diverting funds previously used to support representation of persons off-limits to LSC programs to advocacy deemed to be less controversial.<sup>205</sup>

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201. HIDDEN AGENDAS, *supra* note 137, at 10 (noting that the Farm Bureau, a long-standing opponent of legal services, targeted IOLTA funding for legal services programs). Brief of Amicus Curiae National Right to Work Legal Defense Foundation, Inc., *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578), at 1997 WL 626850, at \* 3-4.

202. *See* Meeker & Dombink, *supra* note 36, at 2228 (proposing to expand IOLTA to real estate escrow accounts). Another likely effect may be attorney reluctance to continue to deposit client funds in IOLTA accounts. *See* Deborah Goldberg, *Interest on Lawyers' Trust Accounts: Private Interest in the Public Interest*, N.Y. L.J., July 15, 1998, at 2 (reporting that "lawyers are wondering whether they should continue to place client money in pooled interest-bearing IOLTA accounts"); George M. Kraw, *A Matter of Principle: IOLTA Programs are Wrong Unless They are Voluntary*, RECORDER (San Francisco), Jan. 25, 2001, at 5, (arguing that Mandatory IOLTA programs are illegal and that "individual legal consumers" should not be required to contribute to them), available at <http://www.law.com/jsp/printerfriendly.jsp?c=LawArticle&t=PrinterFriendlyArticle&cid=1015973978656> (last visited Nov. 1, 2002).

203. Lorenz, *supra* note 91, at 315-16.

204. Heller & Krier, *supra* note 189, at 301.

205. *See* Houseman, *supra* note 159, at 2196-97 (noting new IOLTA restrictions in Texas and Washington). In New York, four law school clinics funded with IOLTA money to initiate class actions and to represent immigrants and prisoners no longer eligible for legal services recently lost IOLTA funding despite having received favorable evaluations. *See* Randal C. Archibold, *Funds Stopped for Legal Problems Helping Illegal Immigrants*, N.Y. TIMES, July 6, 2001, at B6; *see also* Victoria Rivkin, *IOLA Funding Changes Prompt Attacks*, N.Y. L.J., Mar. 20, 2000, at 1 (noting a substantive shift in philosophy in the grants and a significant reduction in funding for class actions against the government); Victoria Rivkin, *IOLA Gives \$11 Million to 76 Nonprofits*, N.Y. L.J., Jan. 6, 2000, at 2 (describing various IOLA-funded programs).



### C. Constraining Law School Clinics

Powerful forces have also targeted law school clinical programs that are perceived to be at odds with business and political interests.<sup>206</sup> The most notable attack on law clinic advocacy involved Tulane Law School's Environmental Law Clinic (TELC), in which amendments to the Louisiana state student practice rule limited the clients law school clinical programs could serve.<sup>207</sup> Opposition to the clinic was motivated by Tulane law students' representation of a low-income, predominantly African-American community organization which sought to halt the proliferation of hazardous environmental wastes, by preventing the local construction of another chemical plant.<sup>208</sup> Using established regulatory procedures under the Environmental Protection Act (EPA), law students attended administrative hearings and successfully raised issues of environmental discrimination to challenge the improper issuance of state pollution permits.<sup>209</sup>

Adverse reaction to TELC's representation followed immediately. Business interests seeking to locate the new plant in the state joined with the Governor, who had acted on their behest by offering large tax incentives, and exhorted the president of Tulane University to prevent TELC from engaging in any further environmental justice advocacy.<sup>210</sup> The Governor pressured university donors to suspend contributions as a means of influencing the

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206. See Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 269 (1999) (noting that law clinic involvement in desegregation, prison conditions, death penalty, civil rights, suits against governmental bodies, and environmental advocacy have precipitated efforts to terminate faculty members, eliminate law school-legal services partnerships, and narrow the types of cases law clinics can accept).

207. *Id.* (providing a comprehensive overview of the legal challenges involving the attack on the Tulane Environmental Law Clinic).

208. See *SCLC v. Supreme Court of La.*, 252 F.3d 781, 784 (5th Cir. 1999), *cert. denied*, 122 S. Ct. 464 (2001); 252 F.3d at 784; see also Joy, *supra* note 206, at 243. Members of the community group were residents of St. James Parish, known as "Cancer Alley" because of the elevated cancer rates in the area attributed to the chemical and industrial plants. See Joy, *supra* note 206, at 243.

209. *SCLC*, 252 F.3d at 784; Joy, *supra* note 206, at 243. As noted by the district court, the clinic received only private funds. See *S. Christian Leadership Conference (SCLC) v. Superior Court of La.*, 61 F. Supp. 2d 499, 511 (E.D. La. 1999).

210. See Joy, *supra* note 206, at 243-44.

work of the clinic.<sup>211</sup> Business organizations called upon the Louisiana State Supreme Court to investigate the clinic, charging that the clinic's use of the EPA regulatory process was tantamount to the imposition of "social views of the faculty and students in the courts of the State of Louisiana as well as before Administrative Bureaus ... in direct conflict with business positions."<sup>212</sup> Business organizations and politicians urged the court to amend the student practice rule authorizing law students to provide legal assistance.<sup>213</sup> Clinic students and faculty who used established EPA complaint procedures on behalf of their clients were referred to as "modern day vigilantes" and "storm troopers."<sup>214</sup>

The campaign had the desired effect. The state supreme court amended the student practice rules by restricting the class of eligible clients and limiting group representation.<sup>215</sup> The new rules prohibited law students from representing any individuals or groups with whom the clinic had initiated contact in order to advise them of their legal rights.<sup>216</sup> The new rules also required disclosure of individual group members' income, thereby exposing membership rosters to privacy violations while creating practical difficulties in accumulating such information.<sup>217</sup>

In response to the amended rules, in *Southern Christian Leadership Conference (SCLC) v. Supreme Court of Louisiana*, a coalition of plaintiffs filed a civil rights suit against the Supreme Court of Louisiana in federal court seeking relief on First and Fourteenth Amendment grounds.<sup>218</sup> The suit charged that business and political forces seeking to protect their economic interests influenced the state supreme court through extrajudicial

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211. *Id.* at 244.

212. *Id.* at 246.

213. *Id.*

214. *Id.* at 243.

215. See LA. SUP. CT. R. 20, §§ 4-5 (as amended Mar. 22, 1999). These rules have been described elsewhere as the most restrictive rules limiting clinic representation in the country. See Joy, *supra* note 206, at 238.

216. LA. SUP. CT. R. 20, § 10.

217. See *id.* § 5.

218. *SCLC*, 252 F.3d at 783. Plaintiffs included four classes of affected persons and entities identified as community organization clients, student organizations, law faculty, and law students. *Id.* at 783 n.1.

machinations.<sup>219</sup> The Louisiana Supreme Court allegedly responded to external pressure by reducing the capacity of law clinics to serve as legal advocates for the poor.<sup>220</sup>

The district court dismissed the plaintiffs' claims first by confirming the lack of a constitutional right to legal representation in a civil case.<sup>221</sup> Having anchored the plaintiffs' claims with the weight of that reaffirmation, the court then characterized clinic representation as a government benefit made possible through state-sponsored student practice rules.<sup>222</sup> It noted that courts have routinely upheld conditions imposed on government benefits; therefore the plaintiffs could not sustain their complaint against stricter indigency standards.<sup>223</sup> The plaintiffs' charges that undue political pressure and business influence were used to obtain the state supreme court amendments were deemed insufficient to raise a justiciable controversy.<sup>224</sup>

The Fifth Circuit Court of Appeals affirmed and held that the student practice rules amendments did not constitute constitutional violations, although it did acknowledge that "the motivation of a state actor can transform an otherwise permissible action into a violation of the First Amendment."<sup>225</sup> The court noted that the plaintiffs had alleged sufficient facts to support their claim that the state supreme court "reacted to pressure from the Governor and business interests who bore the TELC significant animus," and found viable allegations of extrajudicial interference with the court's rule-making processes.<sup>226</sup> But it distinguished the act of

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219. *Id.* at 784.

220. *Id.* at 785.

221. *SCLC v. Superior Court of La.*, 61 F. Supp. 2d 499, 506 (E.D. La. 1999).

222. *Id.* at 506, 511 (rejecting the plaintiffs' argument that no government funds were at issue and noting that without the student practice rules enacted by the state supreme court, clinic students could not serve as student attorneys; thus the rules themselves were held to constitute some sort of government benefit).

223. *Id.* at 511.

224. *Id.* at 513.

225. *SCLC*, 252 F.3d at 792 (relying on *Edwards v. Aguillard*, 482 U.S. 578 (1987), which struck down a state statute requiring equal time for "creation-science" because of the improper motivation of the state legislature and *Perry v. Sindermann*, 408 U.S. 593 (1972), which upheld the constitutional claims of a professor whose contract with a state university had not been renewed in retaliation for the professor's public criticism of the Board of Regents).

226. *Id.* at 794 (noting that the plaintiffs had alleged that the Governor and business

influence-peddling from those of consequence, thereby absolving the Louisiana Supreme Court for responding to business interests and their political backers.<sup>227</sup>

Perhaps the pivotal issue in the TELC controversy was revealed in the reply of the Governor of Louisiana when he was asked whether low-income residents seeking enforcement of the environmental laws had a right to counsel: "Let them use their own money, not Tulane's."<sup>228</sup> The *SCLC* decision replicated the Governor's objections to poor citizens' use of the law to challenge business interests when the legal representation was provided free of charge and outside the realm of the market. By accepting the underlying claim that clinical legal services to the poor are a benefit subject to the mediation of the state supreme court, the appellate court effectively reduced indigent citizens' access to the law to that of a gratuity.<sup>229</sup> Furthermore, *SCLC* made it manifestly clear that the limits of gratuity are constrained when the poor seek to challenge established economic and political interests.

The consequences of the TELC controversy were both immediate and persistent. Tighter indigency standards, enacted without regard to an accurate measure of poverty, reduced the number of clients eligible for TELC services.<sup>230</sup> Stringent eligibility requirements for community organizations curtailed legal assistance for groups who are unlikely to obtain a substitute source of legal counsel. As a result of the constraints on group representation, it is likely that the nature of advocacy provided by TELC will shift. Community groups often raise broad social and political issues that

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groups bore animus toward the clinic but did not allege that the Louisiana Supreme Court held such views).

227. See *id.* at 794-95.

228. Joy, *supra* note 206, at 244 (quoting Murphy J. Foster, Governor of Louisiana).

229. See *SCLC*, 252 F.3d at 791-92. The appellate court also acknowledged that the Supreme Court's holding in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), limited the government's power to place conditions on legal services-related government benefits. *Id.* at 791. However, the appellate court ruled that the state supreme court had not abused its power and claimed that none of the special considerations present in *Velazquez* applied in *SCLC*. *Id.* at 792.

230. See Louis Uchitelle, *How to Define Poverty? Let Us Count the Ways*, N.Y. TIMES, May 26, 2001, at B7 (noting that the determination of the poverty level to which federal aid programs are indexed is out of touch with reality and commenting that even the Census Bureau, which produces the data, does not believe its own numbers).

require complex legal responses and result in substantive reforms by means of litigation.<sup>231</sup> The Louisiana student practice rule amendments are likely to inhibit law reform litigation for the poor, which is precisely the outcome sought by TELC's opponents.

The TELC case may also portend more things to come. A new environmental law clinic at the University of Pittsburgh lost all state funding, and was threatened with having all its ties to the university severed.<sup>232</sup> Nationally, law school clinics have been assailed by the Washington Legal Foundation. The WLF launched an offensive campaign through paid advertisements, warning that "[o]ur next generation of lawyers and judges are being inundated with a heavy dose of ideological activism as they are encouraged to join the radical causes of the day."<sup>233</sup> Four law school clinic programs providing services that are banned from LSC funded programs, including services to poor, undocumented immigrants, prisoners, and class action suits, recently lost funding under circumstances suggesting political interference.<sup>234</sup> Efforts to curtail law clinic advocacy seem to replicate other events which have resulted in diminished legal resources for the poor.

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231. KESSLER, *supra* note 30, at 76-77 (noting that legal services programs that work with community groups often engage in law reform activity and address problems "endemic to a poverty class").

232. See Don Hopey, *Law Clinic at Pitt Feeling Pressure: Controversy Swirls Over Environmental Clients*, PITTSBURGH POST-GAZETTE, Oct. 17, 2001, at B1 (reporting that the elected officials were acting on behalf of business interests who were outraged that the clinic had represented groups opposed to the development of a new expressway and logging efforts); see also Terry Carter, *Law Clinics Face Critics*, ABA JOURNAL, July 2002, at 24 (noting "the prevalence of attacks by business interest on law school environmental clinics across the country"); Don Hopey, *Law Clinic Reaction Unusual, Others Say Pitt Response to Issue Unlike Other Schools'*, PITTSBURGH POST-GAZETTE, Dec. 2, 2001, at B1 (noting that Pitt's administration responded equivocally in defense of its environmental law clinic).

233. Advertisement, *In All Fairness: A One-Sided Paper Chase*, N.Y. TIMES, Feb. 28, 2000, at A19. The advertisement argued that students "should have the opportunity also to work in clinical programs that defend property rights and limited government," and promoted the group's own Economic Freedom Clinic at the George Mason University Law School. *Id.*

234. The clinics were defunded despite favorable evaluations about their work and the decision to defund was made along party lines: "All five who voted against the programs were Republicans and the four supporters were Democrats." Archibold, *supra* note 205.

*D. Reducing Opportunities for the Award of Legal Fees:*  
*Buckhannon Board and Care Home, Inc. v. West Virginia*  
*Department of Health and Human Resources*

*Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*<sup>235</sup> is yet another recent case that is likely to limit the opportunities for poor people to protect their rights. In *Buckhannon*, the Supreme Court considered the circumstances in which a plaintiff could recover attorney's fees when litigating important civil and constitutional rights claims. Plaintiffs brought suit under the Fair Housing Amendments Act (FHAA) and the Americans With Disabilities Act (ADA), both of which provide for attorney's fees for the prevailing party.<sup>236</sup> They alleged that state requirements that led to the closing of assisted living residences were in violation of both the ADA and the FHAA and sought declaratory and injunctive relief.<sup>237</sup> The state legislature responded to the suit by enacting corrective legislation, whereupon the district court granted the defendants' motion to dismiss the case as moot.<sup>238</sup> Plaintiffs then moved for attorney's fees, claiming status as the prevailing party pursuant to both the FHAA and the ADA under the "catalyst theory" which grants fees for a lawsuit that achieves the desired result even if the defendant remedies the violation without court order.<sup>239</sup>

In a five-to-four decision affirming the Court of Appeals for the Fourth Circuit, the Supreme Court denied the plaintiffs' request for attorney's fees and held that a party could not be considered to have prevailed "except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought."<sup>240</sup> The Court repudiated the holdings of all other circuit courts that had considered the issue and discarded previous statutory interpretations that had recognized the "catalyst theory"

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235. 532 U.S. 598 (2001).

236. *Id.* at 601 (citing Fair Housing Amendments Act, 42 U.S.C. § 3613(c)(2) (1988) and Americans With Disabilities Act, 42 U.S.C. § 12205 (1990)).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 602 (quoting *S-1 & S-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc)).

as consistent with legislative meaning and purpose.<sup>241</sup> The majority delineated the conditions by which a party might be considered to have prevailed in a lawsuit in order to be eligible for fees.<sup>242</sup> It ruled that obtaining the desired outcome as a result of filing suit was not sufficient, but rather that a “judicially sanctioned change in the legal relationship of the parties” was the determining factor for awarding fees.<sup>243</sup>

The legislative history concerning fee-shifting awards is at odds with *Buckhannon*: Both House and Senate Reports explicitly state that the phrase “prevailing party” does not require the conclusion of a lawsuit with formal judicial endorsement.<sup>244</sup> Nor do the statutory provisions of the Civil Rights Act of 1964<sup>245</sup> or the Civil Rights Act in 1976, which includes the Civil Rights Attorney’s Fees Award Act,<sup>246</sup> include language that would require a court resolution. The purpose of attorney’s fees pursuant to fee-shifting statutes was not to privilege judicial determinations. On the contrary, the “catalyst rule” is fully consistent with the congressionally recognized need to encourage and empower citizens to vindicate important civil rights and constitutional violations.<sup>247</sup>

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241. *Id.* at 601. The Court noted that nine circuit courts followed the “catalyst theory.” *Id.* at 602 n.3.

242. *Id.* at 603 (obtaining guidance on the definition of “prevailing party” from *Black’s Law Dictionary*); see Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Remains a Fortress: An Update*, 5 GREEN BAG 2D 51 (2001) (critiquing the Court’s reliance on the dictionary in resolving constitutional claims).

243. *Buckhannon*, 532 U.S. at 605.

244. See H.R. REP. NO. 94-1558, at 7 (1976) (“The phrase ‘prevailing party’ is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits.”); S. REP. NO. 94-1011, at 5 (1976) (“[P]arties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.”).

245. 42 U.S.C. §§ 2000a-2000h (2000). “In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs, and the United States shall be liable for costs the same as a private person.” *Id.* § 2000a-3(b).

246. *Id.* § 1988.

247. See *id.* § 2000a-3(b) (providing attorney’s fees for violations in public accommodations); *id.* § 2000e-5(k) (providing attorney’s fees for violations in employment); *Buckhannon*, 532 U.S. at 598 (Ginsburg, J., dissenting) (“[T]he judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant ....”) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)).

*Buckhannon* also reaffirms free enterprise interests which discourage intervention on behalf of the poor except through market corrections by reinvigorating the “American” rule that each party bear its own litigation expenses.<sup>248</sup> It reflects an endorsement of the Rule of Law as a private matter, “giv[ing] precedence to the autonomy of individual parties and idealiz[ing] free exchange” and freedom of contract.<sup>249</sup> Support for this view has reemerged in the last ten years: in 1991, the President’s Council on Competitiveness urged a moratorium on fee-shifting statutes operating in favor of successful plaintiffs.<sup>250</sup> This idea has garnered support from the conservative organizations who filed as amicus briefs in *Buckhannon*, expressing concern for the preservation of free enterprise, minimal government interference, and a commitment to the unfettered ability of businesses to make decisions in the marketplace.<sup>251</sup>

*Buckhannon* reflects a deepening hostility toward poor people who rely on fee-shifting statutes and the lawyers who represent them; *Buckhannon* may be seen as part of the larger trend to eliminate these practices.<sup>252</sup> The *Buckhannon* decision will make it

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248. See *Buckhannon*, 532 U.S. at 602, 607; *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975).

249. Joshua P. Davis, *Toward a Jurisprudence of Trial and Settlement: Allocating Attorney’s Fees by Amending Federal Rule of Civil Procedure 68*, 48 ALA. L. REV. 65, 91 (1996) (describing the libertarian view of the legal resolution of disputes as a private affair); see also John M. Blumers, Note, *A Practice in Search of a Policy: Considerations of Relative Financial Standing in Cost Awards Under Federal Rule of Civil Procedure 54(d)(1)*, 75 B. U. L. REV. 1541, 1563 (1995) (suggesting that the “American” rule may derive from resistance to fee regulation in favor of freedom of contract by which clients might be charged “whatever the market would bear”).

250. Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2039-40 (1993).

251. See Brief Amicus Curiae for the Pac. Legal Found., *Buckhannon Bd. and Care Home Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598 (2001) (No. 99-1848), 2000 WL 1873812, at \*1 (speaking to “support[] the concept of limited government”); Brief Amicus Curiae for the Alliance of Automobile Manufacturers, Inc., *Buckhannon Bd. and Care Home Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598 (2001) (No. 99-1848), 2000 WL 1868106, at \*5 (seeking “to preserve their freedom to make decisions regarding the safety and satisfaction of their customers”). Twenty-seven states also filed as amici, concerned about state coffers and state responsibility for fees in civil rights matters. See Brief of the States ... as Amici Curiae in Support of Respondents, *Buckhannon Bd. and Care Home Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598 (2001) (No. 99-1848), 2000 WL 1868103, at \*1.

252. In 1995, Congress passed the Prison Litigation Reform Act of 1995 (PLRA), Pub. L.



more difficult for the poor to litigate in behalf of their constitutional and civil rights, with far-reaching consequences. Those without resources to litigate privately formerly turned to public interest law firms that collected attorney's fee awards to advance their clients' agenda of achieving social reform.<sup>253</sup> But as a provider of collective goods, public interest law firms rarely generate sufficient resources from private interests and therefore frequently encounter difficulty in sustaining adequate funding.<sup>254</sup> Most depend on grants, donations, and court-ordered fees for much of their income and revenue.<sup>255</sup> Without attorney's fees, public interest law firms may be unable to provide legal counsel for poor people, thereby further reducing the poor's access to the judicial process.

*Buckhannon* is likely to affect public interest law firms in other ways as well. Public interest law firms engage in more than litigation.<sup>256</sup> They also provide research and educational materials, assist with grass roots organizing, legislative lobbying, and administrative agency advocacy; these are all activities likely to be

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No. 104-134, §§ 801-810, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626 (2000), 28 U.S.C. § 1915 (2000), 28 U.S.C. § 1346 (2000), and 42 U.S.C. § 1997 (2000)), which limited fees for attorneys undertaking prisoners' civil rights lawsuits. For an overview of the Act's limitations on attorney's fees and its impact on civil rights enforcement for prisoners, see David C. Leven, *Justice for the Forgotten and Despised*, 16 *TOURO L. REV.* 1 (1999). The PRLA fee reduction provision was not designed to discourage frivolous law suits as fees are paid only if the suit is successful. *Id.* at 16. Congress' intent, rather, appears as an effort to discourage prisoner litigation altogether. *Id.* at 16-17. See generally Karen M. Klotz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 *TEMP. L. REV.* 759 (2000).

253. See Martha F. Davis, *Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation*, 9 *Am. U.J. GENDER SOC. POLY & L.* 119, 119-20 (2001) (describing legal organizations which assist the poor such as NOW Legal Defense and Education Fund and NAACP Legal Defense Fund which generally do not receive federal funds and litigate a coordinated agenda on behalf of interest groups); see also Earl Johnson, *supra* note 107, at 39 (noting the significance of court-awarded fees for private lawyers in filling gaps created by LSC restrictions).

254. See BURTON A. WEISBROD, *THE VOLUNTARY NONPROFIT SECTOR* 5 (1977) (noting the difficulty of public interest law firms in obtaining revenue from the private market because of the collective goods they provide and the attendant free-rider problems); Mureiko, *supra* note 53, at 440 (arguing that civil rights fee-shifting statutes function to provide public goods).

255. WEISBROD, *supra* note 254, at 5-6 (discussing how public interest law firms are highly dependent on nonmarket sources of funds, including grants, contributions, and court-ordered fees).

256. See BURTON A. WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 22 (1978).

adversely affected by loss of fees.<sup>257</sup> *Buckhannon* not only reduces the opportunities for reform and rights enforcement in the courts, but it may actually contribute to the demise of an institutional forum that serves the interest of the poor in a variety of settings.

These events serve to expel poor citizens from the process of enforcing laws and eliminate a class of people from the social discourse that informs the litigation process.<sup>258</sup> They also demonstrate that former suggestions that public interest law firms could minimize the impact of the LSC restrictions on law reform activity may need to be reconsidered in light of *Buckhannon*.<sup>259</sup> In the end, legal rights may have “no greater reality than an aspiration for those without the financial resources to exercise [them].”<sup>260</sup> Such a system which “guarantees to the poor that their basic human needs will be met but which provides individuals no realistic means with which to enforce that right” has been described as “grotesque.”<sup>261</sup>

### III. LAW AS LARGESS: PUBLIC WELFARE AND PRIVATE CHARITY

The tension between the principles of the Rule of Law as understood in the national narrative and the values of the marketplace that reject government interference in favor of free enterprise exchanges is made evident through a consideration of the provision of legal services to the poor. The weakening of legal

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257. See *id.* at 554-55.

258. See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (describing the benefits of including private citizens in the process of reforming unconstitutional practices); Kilwein, *supra* note 107, at 52 (noting many of the public interest law firms likely to be affected by the *Buckhannon* decision frequently co-counseled significant litigation with legal services programs).

259. See Lorenz, *supra* note 91, at 318 (suggesting legal services programs should resolve to leave the impact work to the non-LSC funded public interest law firms); Rhudy, *supra* note 81, at 230-31 (discussing an increase in public interest advocacy organizations and the proliferation of single issue nonprofit organizations which can retain counsel to continue law reform efforts on behalf of the poor).

260. Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1254 (1990) (describing constitutional rights as wealth-dependent and noting that the Supreme Court in *Harris v. McRae*, 448 U.S. 297 (1980), came close to acknowledging that enforcement of constitutional rights, specifically the abortion right, may be dependent on financial means).

261. See Marrero, *supra* note 69, at 775.

institutions that assist the poor demonstrates the ascendancy of the values of the market which subsume concerns for equal justice. As standards of justice yield to the normatively derived ideology of self-sufficiency, the Rule of Law is fashioned as a privilege. It is transferred from the context of rights with presumptive canons to the setting of largess, with a discretionary ethos.

To understand this transformation, it is necessary to consider the recent challenges to legal services for the poor in the larger context of structural inequities and the political biases by which goods and services are delivered to the needy through public welfare programs and private philanthropy. The theories and practices of these mechanisms are derived from historical traditions that bear on cultural conventions, religious beliefs, philosophical perspectives, and economic policies.<sup>262</sup> An examination of largess in both the public realm and private spheres demonstrates that they share common programmatic and conceptual norms and are validated by similar discursive motifs.<sup>263</sup> Although government relief and voluntary giving typically involves the delivery of food, shelter, medical care, and subsistence cash allowances,<sup>264</sup> the shared principles and norms by which basic goods and services are distributed are embedded in subsidizing legal services or “donating” access to the law. This Part provides an overview of the salient concerns relative to public welfare and private charity for the purposes of examining their relevance to legal services for the poor and the deficiencies that result from either method of largess. It reveals the transformation of law for the poor from rights to privilege and the resulting loss of the benefits of the social contract underlying the Rule of Law.

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262. WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 1-12 (6th ed. 1999) (tracing religious, philosophical, and historical political institutional roots of welfare and charity); DAVID WAGNER, *WHAT'S LOVE GOT TO DO WITH IT? A CRITICAL LOOK AT AMERICAN CHARITY* 75-88 (2000) (same).

263. WAGNER, *supra* note 262, at 8.

264. GOODIN ET AL., *supra* note 6, at 29-30 (noting consensus about the need to distribute food, housing, and health care regardless of wealth); WAGNER, *supra* note 262, at 9 (citing social security pensions, health care, and other income supports as examples of public programs).

*A. Public Welfare in the Liberal Political and Economic State**1. Political and Economic Theory*

The proposition of public responsibility for the general welfare of citizens is deeply rooted in the narrative of national well-being. The discourse incorporates philosophical and moral precepts examining the very underpinnings of a just society.<sup>265</sup> But despite the long-standing significance of social arrangements for the well-being of the poor shaping the characteristics of civil society, welfare systems remain consigned to a wary and unsettled place.

A number of dominant themes can be distilled from the political and economic debates by which the liberal welfare state validates the welfare system. The liberal political theory that emerged with the rise of the capitalist state has been premised on the proposition of liberty, which is generally conceived as freedom and autonomy.<sup>266</sup> As a concomitant of liberal political theory, liberal economic theory has extolled relations of free exchange of mutual benefit from which assumptions about poverty and notions of a just society are derived.<sup>267</sup> Although it has been argued that liberal political theory is a contextual concept linked to historical conditions, beliefs about liberty and individuality have been frozen as “immutable and absolute truths” firmly established as the bedrock of laissez-faire economy and have “transformed liberalism into a conservative ideology.”<sup>268</sup>

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265. RAWLS, *supra* note 2, at 473-74 (suggesting adherence to morality principles is motivated by the desire to create just institutions to benefit others); TRATTNER, *supra* note 262, at 1-12 (tracing the customs and background of social welfare programs to philosophical and religious foundations).

266. See generally GOODIN ET AL., *supra* note 6, at 40 (noting that although the formulations of liberalism's values vary, they may be best expressed as a concern for liberty as John Stuart Mill expressed: freedom and autonomy); JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., 1978) (1859) (constructing a theory of liberty based on freedom and autonomy).

267. See GOODIN ET AL., *supra* note 6, at 41 (describing liberalism as “endorsing ‘capitalist acts between consenting adults’” and “relations of free exchange” (citing Nozick)); Amy L. Wax, *A Reciprocal Welfare Program*, 8 VA. J. SOC. POL'Y & L., 477, 479 (2001) (describing John Rawls' and David Gauthier's contractarian approaches to justice as requiring people to make positive contributions to society in order to receive corresponding support from others).

268. ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 432 (1991).

Liberal welfare states, like their social democratic and corporatist counterparts, seek to reduce poverty and to promote economic efficiency, social equality, and autonomy.<sup>269</sup> Different systems may share similar goals, but the difference in emphasis sets the contrasts in normative hierarchies in sharp relief, and inevitably results in dramatic programmatic shifts and variances in outcomes.<sup>270</sup> The liberal welfare system stresses economic efficiency.<sup>271</sup> The model relies primarily on economic and market factors and secondarily on kinship systems, community ties, and private charities.<sup>272</sup> The market is prized as the optimal regulatory mechanism for the distribution of goods and services and its superiority is said to foreclose the need for safety-net programs except through a residualist welfare system.<sup>273</sup>

## 2. Characterizing the Poor in a Liberal Welfare State

Liberal economic theory constructs a parallel principle that those who require assistance do not offer contributions that are valued by society and hence forfeit the possibility of economic exchanges.<sup>274</sup> The failure to contribute or otherwise derive benefit from economic participation is perceived as a default of an over-riding social contract.<sup>275</sup> The theories contained in free market

269. GOODIN ET AL., *supra* note 6, at 22. The authors note that the liberal welfare state remains the dominant model in the United States. *Id.* at 40.

270. *See generally id.* at 260-84 (examining a number of different systems). Social democratic regimes emphasize social equality and the elimination of poverty. The regimes also rely primarily on economic factors, but are predisposed to manipulating key features of the market economy and market distribution to assist the poor. *Id.* at 267. The corporatist welfare model relies on social integration into the paid workforce to achieve its main purpose. *Id.* at 273.

271. GOODIN ET AL., *supra* note 6, at 88.

272. Feminist theorists argue that the system is premised upon kinship systems involving unpaid work in the family. *See* SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 123 (1989).

273. *See Anthony Giddens and Will Hutton in Conversation, in* GLOBAL CAPITALISM, *supra* note 13, at 44 (noting that markets are considered superior in all regards compared to government and that markets foreclose the need for social justice programs).

274. GOODIN ET AL., *supra* note 6, at 42 ("If the market fails to reward certain people very much, ... those people do not make very much of a contribution that other people value very much. They do not have anything that very many other people want very badly.")

275. *See* Wax, *supra* note 267, at 478-80.

economies thus presume a pathology of poverty, whereby persons unable to subsist without intervention are judged as defective.<sup>276</sup>

Poverty serves as an ongoing issue in the national debate centered on public obligations versus private responsibility. Efforts are made to determine if poverty is a product of subjective conditions such as personal character flaws or circumstances of objective factors such as compelling adversity.<sup>277</sup> Is poverty due to an unwillingness to work or an inability to work? Is one lazy or is one ill? The poor frequently are classified in such familiar formulaic terms as “deserving” or “undeserving.”<sup>278</sup> At the core of this formulation, set in bold relief in the form of a moral distinction, is whether one can work or whether one is otherwise excused from such an obligation.<sup>279</sup>

The condition of those unable to maintain themselves through productive economic relations is explained as a function of their individual or idiosyncratic deficiencies. Those deemed as the able-bodied poor who do not work have historically been stigmatized as deviants and criminals, living on the margins of society, and a potential threat to social order.<sup>280</sup> Joblessness and idleness are coterminous, and about idleness the culture is clear: it is the devil’s workshop. Poverty thus assumes an ominous form as the specter of a threat, requiring surveillance and control of all who descend into this netherworld. More recently, suspicion of the poor has focused on recipients of welfare. Recipients are depicted as deviant families,

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276. JOEL F. HANDLER, *REFORMING THE POOR* 5 (1972). A “deviant” strand of liberalism exists that considers poverty to be a function of market failures, but is not the dominant trend. See GOODIN ET AL., *supra* note 6, at 44-45.

277. See HANDLER, *supra* note 276, at 6 (noting that the traditional basis for distinguishing among the poor is fault).

278. Joel F. Handler, *The “Third Way” or the Old Way?*, 48 U. KAN. L. REV. 765, 787 (2000) (summarizing welfare history as separating the “deserving poor” from the “undeserving poor”).

279. See Handler, *supra* note 68, at 906 (“Those who are excused are the ‘deserving poor;’ those who must work are the ‘undeserving.’”); Wax, *supra* note 267, at 481-82 (noting assumptions that everyone should work for a living unless they are exempted because of a dependency not of their own making). It is interesting to note that the affluent with independent incomes derived from sources other than their labor and who do not work are not stigmatized, and are often praised for their independent means. See Samuel Brittan, *In Praise of Free Lunches*, TIMES LITERARY SUPPLEMENT, Aug. 24, 2001, at 9.

280. Handler, *supra* note 278, at 778; see also Sylvia A. Law, *Ending Welfare As We Know It*, 49 STAN. L. REV. 471, 492 (1997).

sexually promiscuous and immoral single women, drug addicts and derelict mothers, unworthy of assistance, and the source of myriad contemporary social problems.<sup>281</sup> The vilification of the poor even has entered the legal text of constitutional claims related to welfare benefits; including insinuations that the poor are unwilling to work, commit fraud, child abuse, and otherwise behave in ways that breach legal and moral norms.<sup>282</sup> On the other hand, those perceived to be incapable of self-support due to age or disability are viewed more sympathetically and considered generally to be worthy of relief.<sup>283</sup>

The representation of the able-bodied idle as morally deficient is driven by a desire to discourage dependency on public assistance and a belief that goods and services are best allocated through free commerce and market exchanges.<sup>284</sup> In these formulations, the government is portrayed as performing a disservice to the very people it seeks to aid.<sup>285</sup> Public assistance, the argument claims, acts to undermine the work ethic and contributes to generational cycles of welfare dependency and a culture of poverty.

Myths and misconceptions loom large in the debates.<sup>286</sup> Despite claims of generational dependency, the research suggests that the period of dependency is often relatively brief.<sup>287</sup> Accusations of

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281. Handler, *supra* note 278, at 793 (suggesting that welfare has become a code word for inner-city substance abusing women who are breeding a criminal class).

282. See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1522-25 (1991) (suggesting that in *Wyman v. James*, 400 U.S. 309 (1971), the Court attempted to redefine a challenge to the constitutionality of home visits, required as a condition of receipt of AFDC, into a challenge concerned with the propensity of poor mothers on AFDC to abuse their children, despite the fact that the state had not claimed abuse as a basis for requiring the home visits). Ross further suggests that in *Bowen v. Gilliard*, 483 U.S. 587 (1987), the Court conveyed the immorality of the poor by depicting them as undeserving beggars without a basis to complain about welfare benefits. Ross, *supra*, at 1530-31.

283. See Handler, *supra* note 68, at 928 (noting that if the inability to work is clear, a recipient is spared the stigma of being scorned as "undeserving").

284. See GOODIN ET AL., *supra* note 6, at 45 (describing the fear that the poor will rely on public handouts as a first line of support rather than a last recourse); Law, *supra* note 280, at 477 (describing historic principles of welfare programs which granted the poor aid but left them miserable enough that they would choose work over aid).

285. See Law, *supra* note 280, at 492 (observing that "[p]olitical leaders ... can at once define welfare as society's central problem and 'solve' it by ending it").

286. For a general discussion of welfare myths, see *id.* at 474-83.

287. Half of AFDC recipients rely on aid for less than a year and three-fourths leave

excessive welfare spending on the unworthy poor as the source of government debt and a burden improperly borne by the hard-working taxpayer overshadow the truth of the matter. These sums amount to less than expenditures on non-means tested programs and are comparatively less than what is spent in most European countries.<sup>288</sup> Perhaps the most persistent myth is that the poor need only to work in order to avoid dependency. In addition to the lack of sufficient work to meet the demand for full employment, large numbers of working people live in conditions of indigence due to low wages.<sup>289</sup> Thus, the very dichotomy between the deserving and the undeserving poor is suspect.

A corollary assumption about the dispensation of public subsidies as a function of social relationships is the expectation that recipients be grateful for the aid they receive. In another context, historian Louis A. Pérez, Jr. describes gratitude as a means to achieve social control and domination.<sup>290</sup> Pérez reviews the literature of philosophy and social science in describing gratitude as a "moral duty" which imposes an indebtedness on the recipient of a benefit and ingratitude as "the essence of vileness and wickedness."<sup>291</sup> For the poor who depend on government assistance to survive, the reciprocities implicit in "aid" ratify hierarchies of domination and subordination. Public assistance is contingent on uncritical acceptance, a transaction that serves to deny agency to

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within two years. *Id.* Other studies demonstrate that economic class and education, not welfare receipt, are the valid predictors of generational welfare and poverty. *Id.* at 476-77; see also E. J. Dionne, *Muddying the Water with Facts*, WASH. POST, May 28, 1996, at A11 (debunking myths spread by politicians who exaggerate the time and amounts spent on welfare, and other untruths about the numbers of children of welfare recipients).

288. Law, *supra* note 280, at 474-75 (refuting assumptions about the costs of welfare and noting the comparatively low amounts that the United States provides for poor children); see also GOODIN ET AL., *supra* note 6, at 11 ("Over four-fifths of the money the U.S. government spends on social protection goes not on means-tested benefits of the sort most strongly associated with the liberal welfare regime but rather on social insurance schemes of a more corporatist sort ....").

289. Stephen Wizner, *Rationing Justice*, 1997 ANN. SURV. AM. L. 1019, 1024 (noting studies that demonstrate a significant number of working people live in poverty).

290. Louis A. Pérez, Jr., *Incurring a Debt of Gratitude: 1898 and the Moral Sources of United States Hegemony in Cuba*, 104 AM. HIST. REV. 356, 359 (1999).

291. *Id.* at 360 (quoting IMMANUEL KANT, THE DOCTRINE OF VIRTUE 123, 128 (Mary J. Gregor trans., 1964)).



poor people, and specifically undermines the moral basis to challenge conditions of public welfare.

### 3. Resulting Welfare Policies and Programs

Welfare policies constructed around the dominant liberal economic and political ideologies have produced minimalist benefits that are targeted to the fewest eligible recipients.<sup>292</sup> Cycles of greater generosity that provide increased aid or a moderated rhetoric about the character of the poor are often designed to regulate the labor supply, maintain social control, and quiet civil unrest, as much as they are to relieve the misery of the poor.<sup>293</sup> Increases in government support for the poor also occur as domestic extensions of foreign policy initiatives.<sup>294</sup> Welfare programs are tightly controlled through elaborate screening processes designed to exclude as many people as possible and suggest a lack of trust in the poor.<sup>295</sup> Those who are deemed eligible for aid are further subjected to conditions of other types. Mandatory work requirements and compulsory participation in programs designed to "improve" the poor have been a historic feature of public aid.<sup>296</sup> Payments may be conditioned on additional prerequisites to locate absent fathers, obtain child support payments from unwilling

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292. GOODIN ET AL., *supra* note 6, at 45, 240-41. Transfer payments have been so low that the "undeserving" poor located at the lower tier receive amounts considered punitive. *See id.* at 44-45.

293. *See* TRATTNER, *supra* note 262, at 280 (noting an increase in public welfare during the Great Depression to prevent disorder and talk of revolution); Handler, *supra* note 65, at 926 (explaining that welfare policy focuses on the need to maintain social control and the ability to maintain economic production and quell disorder).

294. TRATTNER, *supra* note 262, at 313 (noting that the Soviet Union's embarrassing exploitation of the United States' domestic poverty influenced welfare policy during the Cold War).

295. *See* GOODIN ET AL., *supra* note 6, at 51 (describing elaborate mechanisms to prevent ineligible individuals from seeking benefits). A recent lawsuit challenged welfare practices in two counties in California requiring home searches as a condition of receiving welfare benefits. *See Welfare Home-Search Case is Widened to a Class Action*, SAN DIEGO UNION-TRIBUNE, Jan. 5, 2002, at B5. Recipients are scrutinized periodically to corroborate extreme levels of impoverishment and satisfaction of eligibility conditions. *See* HANDLER, *supra* note 276, at 2.

296. *See* HANDLER, *supra* note 276, at 3 (noting mandatory participation in programs to "improve family and personal functions"); Handler, *supra* note 278, at 784-85 (explaining that mandatory work programs have been historic features of welfare programs).

parents, or endure home searches.<sup>297</sup> Current policies contain work and counseling requirements, time restraints, benefit amounts conditioned on family composition, and restrictions on family allowances when teens leave school.<sup>298</sup> These policies have neither alleviated suffering nor affected rates of dependency; instead they have resulted in increasing levels of inequality.<sup>299</sup>

### *B. Law for the Poor as Public Largess*

Law for the poor's station within the realm of the liberal welfare state is two-fold. First, it is provided principally through federal subsidy in the form of legal services programs which, as the Supreme Court noted in *Velazquez*, are an entitlement that the government may chose to fund or not.<sup>300</sup> Second, much of legal services' instrumental purpose relates to securing government benefits and employing state redistributive mechanisms. This Part examines the principles of the liberal welfare state as applied to law for the poor and considers the treatment of legal services as a welfare benefit and as an entity whose identity is often conflated with the impoverished constituency it serves.

#### *1. Law for the Poor Shaped by Political and Economic Theory*

The prevailing liberal welfare state theories that view market relationships as the preferred mechanism for the distribution of goods and services make no exception in the realm of law.<sup>301</sup> The

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297. HANDLER, *supra* note 276, at 2. The ACLU reports that about 9000 people annually are subjected to home searches as a condition of welfare benefits. *Welfare Home-Search Case is Widened to a Class Action*, *supra* note 295.

298. See 42 U.S.C. § 608 (2000).

299. See GOODIN ET AL., *supra* note 6, at 241-42 (noting that liberal welfare policies that emphasize economic growth and efficiency over government transfer payments as the primary means for alleviating poverty do not achieve their goals, and when compared with more generous social democratic or corporatist welfare regimes, these policies rank the lowest in stimulating income growth and are the least effective in reducing poverty rate); Faux & Mishel, *supra* note 13, at 99, 102 (claiming that in the United States, the tax and transfer system increases levels of inequality and that per capita income growth in the United States is below that of other advanced countries).

300. See *supra* note 180 and accompanying text.

301. See Jon Johnsen, *Legal Needs Studied in Market Contexts*, in THE TRANSFORMATION

legislative debates about legal services are instructive here: federally subsidized legal services programs are said to interfere with marketplace solutions.<sup>302</sup> Congressional opponents proposed private attorneys as the preferred method of providing law for the poor and denounced free legal services as an impediment to the markets' ability to supply such services.<sup>303</sup> Other detractors of federally-funded free legal services have advocated for the deregulation of the legal profession in order to create a second-tier of lawyers limited to the "simpler cases ... most often handled for the poor."<sup>304</sup> Adversaries have employed classic liberal market rhetoric to criticize the program as a manifestation of a federal government that has expanded beyond its proper size; a big government out of control.<sup>305</sup> Those Republicans who supported legal services have been attacked by more conservative colleagues for abandoning a "supply-side, limited government agenda."<sup>306</sup>

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OF LEGAL AID, *supra* note 107, at 219 (noting that in liberal welfare states, the market is the main mechanism for distributing legal services); Johnson, *supra* note 253, at 34-35 (reviewing proposals such as diminished contingent fee arrangements and fee-shifting measures requiring "losers" to pay fees and costs as a means to lower the legal cost of certain institutional interests). The trends of mandatory private arbitration and alternative dispute resolutions further limit remedies and serve to remove the state as an intervening force. See *id.*

302. See *infra* notes 303-06 and accompanying text; Kilwein, *supra* note 107, at 60.

303. See 142 CONG. REC. 18,627 (1996) (statement of Rep. Ballenger); OFFICE OF MANAGEMENT BUDGET REPORT 14-15 (June 4, 1981) (on file at National Equal Justice Archives, Inc. (NELJ), papers of Burton Fritz) (noting that so long as free legal services are available, the private bar's ability to supply low cost representation will not be explored).

304. W. Clark Durrant II, Access to Justice: A Challenge to the Legal Profession, Address to the American Bar Association Board of Governors in New Orleans, Louisiana (Feb. 12, 1987) (on file at NELJ archives, Box #1). Durrant, then Chairman of the LSC under President Reagan, who sought to terminate the legal services program, proposed that a type of law school be established which would train "lawyers ... in significantly less time and at less cost ... to provide basic services. Competent practitioners who are not looking for Wall Street but simply wish to handle the simpler, less costly cases, cases most often handled for the poor." *Id.*

305. See *supra* notes 130-31 and accompanying text.

306. See Robert Schlesinger, *New Group Supports "Reaganites" but Breaks 11th Commandment*, HILL, Dec. 1, 1999, at 13 (noting that the conservative political group "Club for Growth" criticized some Republican members of Congress for supporting legal services as not sufficiently dedicated to "a supply-side, limited-government agenda").

## 2. Law for the Poor as Welfare: Characterizing Poor Clients and Their Lawyers

Liberal welfare policies that stigmatize the poor have particular application to the poor with legal problems. From the early periods of legal aid, legal difficulties among the poor were viewed as a result of "personal pathology rather than structural injustice."<sup>307</sup> Representation was offered selectively to carefully screened clients deemed deserving; undeserving clients were denied assistance.<sup>308</sup> Federal regulations institutionalized these distinctions by creating categories of ineligible clients and limitations on the types of cases that could be handled.<sup>309</sup>

In recent years, the classification of clients into "deserving" and "undeserving" has dominated federal funding decisions for LSC and has resulted in harsh program eligibility criteria. Congressional critics have characterized a large segment of legal services clients as cheats, criminals, and deviants whose poverty and dependency are both avoidable and a function of individual fault.<sup>310</sup> Community groups seeking free legal assistance are viewed suspiciously as deviating from the profile of the deserving poor. Programs feel pressure from critics to create a litmus test by which to judge client morality rather than the legal merit of the claim.<sup>311</sup> Moral judgments about legal services clients are not limited to federal funding controversies and have appeared in the debates about state funding

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307. KATZ, *supra* note 74, at 39.

308. Houseman, *Political Lessons*, *supra* note 74, at 1671 (noting that early legal aid programs excluded the "undeserving" and were prohibited from offering assistance in many types of cases, including divorces, which were considered luxuries); *see also* KATZ, *supra* note 74, at 44 (describing limitations on legal aid cases considered necessary as a result of personal pathology).

309. Russell G. Pearce et al., *Ethical Issues Panel*, 25 *FORDHAM URB. L.J.* 357, 360 (1998) (reporting the panel discussion comments of Helaine Barnett).

310. *See supra* note 134 and accompanying text.

311. *U.S. Letter: McFarland*, *NEW YORKER*, Nov. 4, 1967, at 173-74 (quoting an LSC program attorney that opponents to the program's litigation agenda "really want us to be judges rather than lawyers. They want us to make certain that the client's case is worthy and that the client is worthy."); *see also* HIDDEN AGENDAS, *supra* note 137, 12-13 (suggesting that the National Legal and Policy Center, a legal services foe, would prefer legal services to only represent those clients which they consider morally worthy); Wizner, *supra* note at 289, 1020 (rejecting an alternative to an equal justice model of legal services requiring programs to screen applicants and accept only the "worthy" cases of the "deserving" poor).

as well.<sup>312</sup> Program supporters are compelled to rely on the same dichotomized framework by defending the program as one that helps the blameless victim, the elderly, and children.<sup>313</sup>

The stereotypes of poor clients as culpable for their dependence on legal services are employed to justify the limitations and conditions of the services. Such fallacies, however, fare no better under close scrutiny than the typecasting of the poor who rely on government benefits generally. Many legal services clients are employed; many have suffered involuntary unemployment because of market failures through no fault of their own.<sup>314</sup> They may be more accurately described as the working poor, veterans, family farmers, people with disabilities, and victims of natural disasters.<sup>315</sup>

In addition to clients, legal services as an institution has been cast in terms of the “unworthy” and condemned in antiwelfare discourse as fraudulent and wasteful.<sup>316</sup> The motives and means used by legal services lawyers have been impugned, by which they are also stigmatized. Congressional opponents describe legal services attorneys as ideologically-driven radicals, neo-Marxists, and socialists dedicated to “promoting divorce and homosexuality,

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312. For the past three years, the Governor of New York has proposed a budget seeking the elimination of funding for prisoners' legal services. This funding was established in 1971 in the aftermath of the 1971 Attica Riots in order to assist inmates with their legitimate legal grievances. See Matthew Cox, *The State Budget: Pataki Seeks a Hike*, NEWSDAY, Jan. 12, 2000, at A5.

313. 142 CONG. REC. 18,634 (1996) (statement of Rep. Baldacci) (highlighting legal services' advocacy for battered women and their children); *id.* at 18,636 (statements of Reps. Collins and Pelosi) (emphasizing legal services' representation of battered women); *id.* at 18,636-37 (statement of Rep. Costello) (discussing legal services and domestic violence victims); *id.* at 18,553 (statement of Rep. Loewy) (emphasizing legal services' assistance of battered women); *id.* at 18,630 (statement of Rep. Schiff) (typecasting a 65-year-old grandmother as the worthy client often assisted by legal services); *id.* at 19,425 (statement of Rep. Cummings) (focusing on legal services and domestic violence victims).

314. See BRENNAN CENTER FOR JUSTICE, MAKING THE CASE: LEGAL SERVICES FOR THE POOR 17-18 (1999) (noting that in most programs, at least one-third to one-half of clients work, and many clients were once comfortably middle class, but lost their jobs as companies downsized). Those that reentered the workforce often were paid less with fewer benefits, but were carrying the debt burdens incurred earlier. *Id.*

315. LEGAL SERVICES CORPORATION, SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, A SPECIAL REPORT TO CONGRESS 13 (2000), available at <http://www.lsc.gov/pressr/exsum.pdf> (last visited Nov. 1, 2002).

316. See *supra* notes 135-36, 5-36 and accompanying text.

helping drug dealers, and putting farmers out of business.<sup>317</sup> They are portrayed as “a gaggle of political activists run amok”<sup>318</sup> and are accused of “social engineering, social campaigning, and rabble-rousing”<sup>319</sup> and are denounced for representing clients against market interests.<sup>320</sup>

However, accusations about program fraud and waste have proven to be misleading.<sup>321</sup> Contrary to charges that legal services has become an expensive bureaucracy, the LSC budget, both in terms of overall budget expenditures and the total justice system budget, is an insignificant figure that has continually been reduced since 1980.<sup>322</sup> Typecasting legal services attorneys similarly fails. While most legal services attorneys wish to help the poor, more specific motivations vary; however, there is no demonstrated correlation between law reform efforts and lawyers’ political motivations.<sup>323</sup> In fact, the majority of cases handled by legal services lawyers are individual cases considered nonthreatening to the status quo.<sup>324</sup>

As a final comparison to the general workings of the welfare state, the corollary expectation of gratitude and the ensuing state of dependency of the poor has inserted itself firmly into the discourse and practice of law for the poor, affecting both clients and their lawyers. Dependency discourages poor people from exercising

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317. HIDDEN AGENDAS, *supra* note 137, at 2.

318. KESSLER, *supra* note 30, at 1 (quoting Sen. Jesse Helms).

319. *Id.* at 54 (quoting various judges).

320. Statement of Samuel T. Currin, Legal Assistant to Senator Helms (Sept. 25, 1980) (on file with NELJ archives, papers of Burton Fritz).

321. LSC had been accused of spending public funds on luxurious board meetings and tropical getaways when in fact, the accusations stemmed from a letter written by a longtime critic of the legal services program produced as an April Fool’s joke, but bearing the unauthentic signature of John McKay, then-LSC president. The “April Fool’s” letter described first-class flights and extravagant vacations paid at government expense, when in fact, at least eighty percent of LSC board meetings are held in or near Washington, D.C. and ninety-seven cents of every federal dollar for LSC goes to local programs that provide direct client services. ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE REPORT (on file with NELJ archives, Ross Box #1).

322. Johnson, *supra* note 253, at 31-32.

323. See KESSLER, *supra* note 30, at 87-88. Lawyer characteristics are not shown to affect program activities and whatever values they do share have no discernable impact on litigation strategies. See *id.* at 103-04.

324. Kilwein, *supra* note 107, at 52-53.

their rights, particularly when their action is contingent on discretionary government benefits. Clients are expected to be uncritically grateful for the assistance they receive without regard to issues of quality of representation.<sup>325</sup> Legal services programs indebted to government funders have often adopted case priorities and fashioned case strategies designed to avoid giving offense.<sup>326</sup> Indeed, the power of gratitude as a means of control may have constrained some lawyers from contesting the constitutionality of the congressional restrictions despite widespread opinion that they are illegal and unfair.<sup>327</sup>

### *3. Legal Services Restrictions in the Service of the Liberal Welfare State*

Policies shaped by the ideological concerns of the welfare state and distorted by stigmatization of clients have produced a legal services system with features typical of welfare programs. First, federal regulations severely limit those who are entitled to legal services benefits. Resources are so limited that the needs of no more than twenty percent of eligible clients can be met.<sup>328</sup> The restrictions on class actions and outreach to those whose rights are

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325. Paterson & Sherr, *Quality Legal Services: The Dog That Did Not Bark*, in *THE TRANSFORMATION OF LEGAL AID*, *supra* note 107, at 255.

326. See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1796 (2001); see also KESSLER, *supra* note 30, at 61 (explaining that funding issues heavily influence the character of legal services and program staff are wary of filing suits against the institutions that fund them or that may be perceived as controversial); Johnson, *supra* note 253, at 18 (describing programs as “captive[s] of its principal financial supporters” that forgo some law suits because of pressure from their financial supporters) (quoting J. HOWARD CARLIN & S. MESSINGER, *CIVIL JUSTICE AND THE POOR* 50 (1966)).

327. Neuborne & Udell, *supra* note 166, at 84 (noting that members of the civil justice community registered concern about challenging the restrictions for fear of expressing opposition to federal funders); see also Jennifer L. Jung, *Federal Legislative and State Judicial Restrictions on Representation of Indigent Communities in Public Interest and Law School Clinic Practice in Louisiana*, 28 *CAP. U. L. REV.* 873, 885 (2000) (describing programs as fearful, thus refraining from opposing restrictions that impair the programs and their clients’ well-being).

328. *LEGAL SERVICES CORPORATION: STATE PLANNING & RECONFIGURATION 3* (2001) (on file with author). One jurist noted “the judiciary’s greatest dilemma is ‘an avalanche of unrepresented people’” resulting from federal cuts. Editorial, *Lawyer-Funded Fellowship Meets Growing Legal Need*, *PORTLAND PRESS HERALD*, Dec. 24, 1999, at 8A (quoting Chief Justice Daniel Wathen of the Supreme Court of Maine).

violated also deny benefits to broader categories of the poor, assuring that services are tightly targeted and that no benefits inure to any unqualified individuals.

Next, the restrictions justify the free-market ideology that posits that the poor are not entitled to the same level of representation as clients who pay for their lawyers. Opponents have argued that government funds are limited to a narrow range of services and limited forums.<sup>329</sup> These restrictions deny the right to seek assistance in reform-related matters such as redistricting issues, abortion-related cases, school desegregation concerns, workplace organizing problems, or seeking attorney's fees as legal protection and enforcement of rights; all of these rights are considered far too substantial to be offered gratis.

Opponents have criticized legal services lawyers for providing too much of a benefit and complained when attorneys for the poor litigate cases too vigorously. It's as if they think the poor are getting too much for nothing.<sup>330</sup> Such arguments fashion a consensus that deems some legal challenges appropriate only if made by private lawyers for paying clients.<sup>331</sup> This proposition has been stated bluntly by one legal services foe who said: "Let them do it on their own nickel."<sup>332</sup>

In keeping with typical welfare programs, the restrictions also impose difficult conditions on legal services clients in exchange for services. Regulations undermining client confidentiality and requiring certain claims and remedies to be abandoned exact a forfeiture designed to dissuade reliance on legal services programs.<sup>333</sup> The restrictions also levy a cost on the programs that lose revenue in the form of fees, and must endure inefficient

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329. See *supra* notes 153-60 and accompanying text; OCRAA § 504(a)(2)-(6) (prohibiting representation in the political and administrative law-making processes while acting in the capacity of an LSC representative); 45 C.F.R. § 1612 (1997) (same).

330. Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509, 517 (1996) (noting that although private lawyers often express support for legal services for the poor, their support turns to disapproval if they perceive their paying clients incurring greater litigation expenses).

331. Geoffrey C. Hazard, Jr., *After Legal Aid is Abolished*, 2 J. INST. STUD. LEGAL ETHICS 375, 381 (1999).

332. *Accountability for Legal Services*, WALL ST. J., Sept. 13, 1995, at 12.

333. See *supra* notes 153-60 and accompanying text.



program configurations in order to comply with program integrity rules, using nonfederal funding to fill the gaps created by the restrictions.<sup>334</sup> Audits, routine waste, and fraud investigations are more punitive than regulatory and distract the attorneys from legal work and representational activity.<sup>335</sup>

Legal services programs benefit from increased funding when it meets the needs of government and business interests. Cycles of government support for legal services have corresponded to the treatment of welfare programs broadly defined. Subsidies for legal services increased at a time when welfare benefits expanded.<sup>336</sup> At the height of its popularity during the "War on Poverty" days, support for legal services was based in part on the fear of impatient poor communities and a desire to channel their growing organizational capacities into the legal system as a means of orderly change.<sup>337</sup> The importance of legal services was emphasized during the urban riots of the 1960s when summaries were compiled of all activities of legal services programs located in the cities where the disturbances took place.<sup>338</sup> Communities praised programs offering to ease tension through legal counsel and advice in almost all cases.<sup>339</sup> During this period the government was exhorted to expand legal services to combat "poverty's warping of mind and spirit that leads many to strike out blindly against their fellow man and against society."<sup>340</sup> Conversely, when funding for welfare programs

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334. David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL'Y REV. 337, 351-53 (1998) (describing duplicative efforts and inefficiencies as legal services programs spin off separate entities).

335. See Forger, *supra* note 138, at 336-37 (describing contact with the Office of the Inspector General: "It's like having the Secret Service living in your organization").

336. Stephen Loffredo, *Poverty Law and Community Activism: Notes From a Law School Clinic*, 150 U. PA. L. REV. 173, 173-74 (2001) (noting the relation between the liberalization of the welfare system and an increase in support for institutional legal services in the 1960s); see Handler, *supra* note 68, at 899. For a review of the relationship between welfare and legal services, see DAVIS, *supra* note 74.

337. Bamberger Papers Box #1 (on file with NELJ archives).

338. *Id.*

339. *Id.* The communities notably did not praise and support legal services related to program efforts soliciting information regarding improper police conduct. *Id.*

340. Lewis F. Powell, Jr., *Land and Poverty*, Address at the National Conference on Law and Poverty, Washington D.C. (June 25, 1965) (on file with NELJ archives).

suffered, so too did legal services.<sup>341</sup> During the 1980s, foes of welfare programs also attacked legal services, a pattern repeated in the 1990s.<sup>342</sup>

The treatment of legal services as a welfare program is also based on its instrumental purposes that historically have included enlarging welfare entitlements and promoting redistributive strategies benefitting the poor. During the OEO period, legal services lawyers won historic victories related to welfare rights and entitlements.<sup>343</sup> Attorneys have viewed legal services' court victories as capable of achieving reforms that expand the welfare state contrary to free-market exchanges.<sup>344</sup> The belief that legal services attorneys "creat[e] a permanent class of welfare recipients who drain resources from the rest of society" is a significant factor in the efforts to weaken legal services during times of austerity as the government seeks to curtail welfare programs.<sup>345</sup> As a program that invites heightened government intervention and seeks increased forms of social income, legal services is an entity operating contrary to an economic regime that favors the very opposite.<sup>346</sup> Legal services may function as a vehicle to implement the Rule of Law, however, in these times, this function does not provide it with sufficient support to prevail against the current political and economic agenda.

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341. See Erhard Blankenburg, *The Lawyer's Lobby and the Welfare State: The Political Economy of Legal Aid*, in *THE TRANSFORMATION OF LEGAL AID*, *supra* note 107, at 118-19 (noting a direct correlation between the status of welfare programs in general and the well-being of legal services).

342. See *id.*

343. Kilwein, *supra* note 107, at 48-49 (describing how court decisions reshaped the welfare system and established constitutional doctrines supporting such entitlements).

344. Johnsen, *supra* note 301, at 205-06 (noting that legal services is perceived as a "political tool" that could "trigger reforms" in housing and consumer relations, and could affect the manner in which the welfare state operates).

345. Kilwein, *supra* note 107, at 54 (noting the arguments of LSC opponent Howard Phillips); see also Blankenburg, *supra* note 341, at 129-30 (observing legal services' forced retreat when government called for austerity). During the 1995 congressional debates, the government demonstrated this view by linking legal services to the protection of welfare benefits the government sought to eliminate. See *supra* notes 144-49 and accompanying text.

346. See Kuttner, *supra* note 109, at 150-51 (describing the role of government under global capitalism as assisting with a laissez-faire agenda and providing reduced forms of welfare).

### *C. The Culture of Philanthropy*<sup>347</sup>

#### *1. Principles of Philanthropy*

The tradition of voluntary giving as a means to care for the poor has produced a culture and rhetoric that is similar to, but can also be differentiated from, welfare theories. Charity has historic, religious, and symbolic importance, and is perceived as an expression of virtue and good will.<sup>348</sup> Charity mediates at the intersection of the public institutions and the private market. Society considers charity a response to distress and need, and a mechanism for defining, categorizing, and prioritizing social problems to determine their resolution.<sup>349</sup> As a method of private intervention, charity is often presumed more creative and efficient than government programs.<sup>350</sup> Historically, charity sans legal entitlements and claims of right, has been considered less likely than government programs to create work disincentives.<sup>351</sup>

Charity is a complex issue and has been characterized by a contentious and contrasting discourse. Charity involves social interactions between rich and poor designed to relieve suffering of the have-nots. Society has also considered charity a means by which the wealthy donor assumes the role of creditor in the transaction of

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347. The term "philanthropy" here is used interchangeably with charity and refers to "the process of using money to create change, whether for the betterment of humanity or not, depending on the project in question." MARK DOWIE, *AMERICAN FOUNDATIONS*, at xvi (2001). Charity is sometimes distinguished from philanthropy by scale and focus. See, e.g., Penina Kessler Lieber, *An Anniversary of Note*, 62 U. PITT. L. REV. 731, 734 (2001).

348. For a review of religions and charity, see TRATTNER, *supra* note 262, at 1-11; WAGNER, *supra* note 262, at 75-88; Maurice G. Gurin & Jon Van Til, *Philanthropy in its Historical Context*, in *CRITICAL ISSUES IN AMERICAN PHILANTHROPY* 4-5 (John Van Til et al. eds., 1990).

349. ALTHEA K. NAGAI ET AL., *THE CULTURE OF PHILANTHROPY: FOUNDATIONS AND PUBLIC POLICY* 5 (William T. Poole ed., 1991).

350. See Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433, 436 (1996) (noting a prevalent view that the government taxes and wastes too much).

351. *Id.* at 442 (describing early debates advocating charity, "which did not carry the stamp of right" as an improvement over poor laws) (quoting from Elizabeth Wisner, *The Puritan Background of the New England Poor Laws*, 19 SOC. SERV. REV. 381 (1945)). The issue of diminished work incentives, however, still looms large in charity policies. See *infra* notes 392-96 and accompanying text.

giving and receiving.<sup>352</sup> Acts of charity are conceived as positive contributions to the common good that transcend the particular gift and serve as a manifestation of virtue and benevolence.<sup>353</sup> Alternatively, critics have characterized philanthropy as a means of protecting and enhancing the interests of the wealthy who wish to maintain their control and influence, and to preserve their fortunes.<sup>354</sup> The ambiguous status of charity is further complicated by differences between proponents of charity, some of whom fund conservative interests, while others support more substantial material aid and advocacy for the poor.

The discourse reveals principal attributes about charity not in dispute: Philanthropic entities possess wealth and the ability to shape social policy and influence social institutions.<sup>355</sup> Philanthropies engage in the social issues of their choosing, without accountability to political processes, yet often perform government functions and influence state power.<sup>356</sup> A sociologist described philanthropies as “brokers of ideas and ... cultural transmission belts.”<sup>357</sup> The power to allocate funds has enormous repercussions on the lives of the poor and the organizations that serve them.

Philanthropies have engendered a sense of mistrust because of their concentration of power and wealth, added to their ability to

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352. WAGNER, *supra* note 262, at 82 (noting that in religious tradition, charity was an exchange: “The almsgiver could now become God’s creditor”) (quoting R. CARTER, *THE GENTLE LEGIONS* 29-30 (1961)).

353. See Leon R. Kass, *Am I My Foolish Brother’s Keeper? Justice, Compassion, and the Mission of Philanthropy*, in *THE ETHICS OF GIVING AND RECEIVING: AM I MY FOOLISH BROTHER’S KEEPER?* 10 (William F. May & A. Lewis Soens, Jr. eds., 2000) [hereinafter *THE ETHICS*] (suggesting that acts of charity exceed the particular benefit bestowed upon the poor and contribute to society by the benevolence the acts manifest); Robin W. Lovin, *Compassion and the Norms of Philanthropy*, in *THE ETHICS*, *supra* at 27 (noting that acts of charity are deeds which connote unselfish care for others).

354. See TRATTNER, *supra* note 262, at 72-73 (describing charity as a means for the wealthy to control the poor); Mark Dowie, Editorial, *Grant Makers: Choose Democracy over Elitism*, *CHRON. PHILANTHROPY*, May 3, 2001, at 55, 56 (arguing that philanthropies fund causes which will create influence and greater wealth for them in the future).

355. Dowie, *supra* note 354, at 56 (observing that philanthropic foundations possess wealth and influence the nature and quality of American life).

356. Lieber, *supra* note 347, at 736-37; see also Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 *GEO. L.J.* 299, 305 (2002).

357. NAGAI ET AL., *supra* note 349, at 1 (quoting LEWIS A. COSER, *MEN OF IDEAS: A SOCIOLOGIST’S VIEW* 337 (1970)).

control valuable assets that might otherwise go to public coffers.<sup>358</sup> Public investigations have criticized philanthropy as a means of preserving established economic relations, giving credence to accusations that they are “organizational extensions of the ruling power of the American economic elite.”<sup>359</sup> Philanthropy’s occasional purpose as a means to blunt the protests of the poor and to deter efforts to seek redistribution of wealth and power has been chronicled by both scholars and ethicists.<sup>360</sup>

The influence of philanthropic entities has grown exponentially as a result of favorable tax treatment and the increased privatization of government. Charities are positioned to make important decisions on matters of social urgency and, in effect, provide cover for the government’s retreat from such responsibility. But charity may function more as a symbolic concern or “false generosity”<sup>361</sup> than a force capable of providing sufficient material aid to the poor.<sup>362</sup> Even as charitable entities have increased their

358. See Lieber, *supra* note 347, at 736 (noting that the Tax Reform Act of 1969 was a response to concerns about philanthropy’s “unbridled power and the potential for abuse”).

359. See NAGAI ET AL., *supra* note 349, at 1; Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 923-24 (1997) (describing congressional investigations regarding whether philanthropies preserve large sums of wealth in order to wield influence).

360. See WAGNER, *supra* note 262, at 52 (observing that charity was deemed essential to control the poor who inspired fear and dread amongst religious and political leaders). Wagner notes that philanthropic trends often correspond with times of social unrest and the mobilization of grassroots movements. *Id.* at 104 (noting the influence of protest movements in the 1960s and 1970s on corporate donations); see also DOWIE, *supra* note 347, at xxxiv (describing charities as “cooling out agencies”); NAGAI ET AL., *supra* note 349, at 3 (noting that critics accuse charities of dampening efforts towards significant structural reform); David H. Smith, *Help or Respect: Priorities for Nonprofit Boards*, in THE ETHICS, *supra* note 353, at 58 (disagreeing with the argument, but noting the purpose of giving to the poor is to “keep them from becoming so envious and angry”); Libby S. Adler, *The Meaning of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 13-14 (2001) (noting that a fear of social upheaval spurred funding of charitable organizations such as orphanages); Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle-and Low-Income Generosity*, 6 CORNELL J.L. & PUB. POL’Y 325, 343 (1997) (describing philanthropic giving as a means to perpetuate the interests and concerns of the wealthy). *But see* NAGAI ET AL., *supra* note 347, at 3-5 (identifying contrasting views of charity as a manifestation of diverse values providing necessary resources to the poor).

361. Bullock, *supra* note 360, at 348 (borrowing the phrase from Paul Friere to describe the tax policy favoring charitable contributions of the wealthy but paid for by the disempowered).

362. WAGNER, *supra* note 262, at 11-12 (describing the discourse of caring and

assets, levels of wealth inequalities have increased.<sup>363</sup> Private philanthropy is a poor alternative to progressive taxation schemes and redistributive transfer payments.<sup>364</sup> Philanthropy celebrates the virtues of private giving as altruistic and patriotic, even as it acts to foreclose taxation and the development of adequate public policies which would establish humanitarian relief based on a firm set of institutional principles.

## 2. Operative Principles

As charity moved from philosophical and religious moorings, its development reflected assumptions similar to those relied upon by the state in fashioning welfare policies.<sup>365</sup> Charities characterized impoverished classes as dangerous and depraved. They viewed assistance as an opportunity to wield moral and religious authority and used it to reform the character of the poor.<sup>366</sup> Although in the late 1880s, the project of charity relied on theories of poverty that underscored environmental causes, by the early 1920s its concerns were refocused largely on individual traits and psychological impediments as the basis for poverty.<sup>367</sup> The current discourse has

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volunteerism as symbolism with little or no material or economic benefit to the poor); Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 635 (1990) (quoting PAUL FRIERE, *PEDAGOGY OF THE OPPRESSED* 25-51 (1993)); Brody, *supra* note 359, at 876 (noting that philanthropies often care more about saving foundation assets than spending them); Bullock, *supra* note 360, at 346 (noting that charities give meager amounts to the poor compared to contributions to the arts, education, etc.).

363. DOWIE, *supra* note 347, at x.

364. Atkinson, *supra* note 362, at 635; see DOWDIE, *supra* note 347, at x ("Foundation giving is minuscule compared to the income adjustment that would be required to bring the United States up to the income and wealth-distribution levels of Europe."); see also WAGNER, *supra* note 262, at 11 (describing the discourse of caring as a symbolism that does not necessarily serve the best interests of the poor in practice).

365. See Gurin & Van Til, *supra* note 348, at 5 (describing the development of charitable institutions in a climate of suspicion and distrust of the poor).

366. TRATTNER, *supra* note 262, at 69-70 (describing the concerns of the New York Association for Improving the Condition of the Poor (AICP) in the mid-nineteenth century that the poor, like thieves and beggars, would overrun the city). Trattner further notes that the AICP blamed poverty on behaviors including crime, sexual promiscuity, and drunkenness. *Id.*; see also WAGNER, *supra* note 262, at 51, 65.

367. TRATTNER, *supra* note 262, at 101. Trattner describes several movements, including the "Settlement House Movement," that sought to improve conditions in cities and factories as a preventive approach to poverty. *Id.* at 163-87. Changes in social work that saw poverty

continued this approach, identifying such terms as “dysfunctional,” “anti-social,” and “dependent personality disorder” as new pathologies to implicate the poor in deviant behavior.<sup>368</sup>

The culture of philanthropy has incorporated the notion of poverty as personal pathology and favors aid for limited individual relief over structural reform.<sup>369</sup> In recent years, the increasing influence of free market interests has created pressure on charities to avoid large-scale funding initiatives and to remain focused on limited giving to individuals.<sup>370</sup> Moreover, conservatives have challenged the practice of institutional giving altogether and have urged individual volunteerism typified by the first Bush Administration’s 1988 “Points of Light” initiative as the proper centerpiece of charitable activity.<sup>371</sup> Philanthropic entities that target structural reforms have come under increasing attack by conservatives who insist that charity should be guided by earlier principles, typified by religious groups providing for only minimal short-term needs.<sup>372</sup> Any other agenda, it is argued, promotes a

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as a personal problem called for moralistic approaches focusing on individual traits. *Id.* at 254.

368. WAGNER, *supra* note 262, at 65 (noting that in today’s parlance, charities are more likely to use terms such as “dysfunctional” or “anti-social” to impugn the morality of the poor); Nancy Fraser & Linda Gordon, “Dependency” *Demystified: Inscriptions of Power in a Keyword of the Welfare State*, in CONTEMPORARY POLITICAL PHILOSOPHY 624-26 (Robert E. Goodin & Philip Pettit eds., 1997) (describing psychological discourses used to associate the dependency of the poor with pathology).

369. Handler, *supra* note 278, at 779 (noting that historically charities were not concerned with structural reform); see also ELEANOR L. BRILLIANT, PRIVATE CHARITY AND PUBLIC INQUIRY: A HISTORY OF THE FILER AND PETERSON COMMISSIONS 156 (2000) (noting criticisms of philanthropies for failing to fund social change groups); Charles E. Curran, *The Nature of Philanthropy*, in THE ETHICS, *supra* note 353, at 36-38 (criticizing charity that focuses on individual behavior and ignores needs arising from structural problems); GORN, *supra* note 1, at 62 (noting that in the depression of 1893 when layoffs and pay cuts were prevalent, policy makers avoided structural reform and urged “that charity be given sparingly to protect the poor’s ambition”).

370. See Peter Dobkin Hall, *Business Giving and Social Investment in the United States, 1790-1995*, 41 N.Y.L. SCH. L. REV. 789, 790 (1997).

371. *Id.* at 790, 793 (noting that conservatives have argued for a return to individuals and communities as sources of charity rather than institutions and governments by quoting President Bush’s introduction in 1988 to his “Points of Light” program where he said: “[a]t the bright center is the individual”).

372. The Ford Foundation has provided support to minority and civil rights groups, as have the Carnegie and Rockefeller Foundations, and the Open Society Institute. In response to such funding, opponents have criticized these foundations for failing to limit funding to

welfare agenda, provides support for radical causes, and undermines the poor's sense of responsibility.<sup>373</sup>

The principles of charity operate to create a social hierarchy of authority where philanthropic decision makers are perceived as possessing superior wisdom and capacity to select the causes and individuals worthy of aid.<sup>374</sup> Conversely, the needy who appeal for funds to their benefactors are dependent and constrained.<sup>375</sup> Deviation from the norms of gratitude undermines the balance of power between the donor and the recipient and is unlikely to occur without negative repercussions for the recipient.

### 3. Resulting Philanthropic Policies

The culture of charity has failed to develop policies that provide sustained relief to the poor.<sup>376</sup> The needy receive only a fraction of philanthropic funds, a statistic that suggests material aid is often not the purpose of charitable aid.<sup>377</sup> Research data indicates that

scientific and medical institutions, libraries, and cultural arts. See DOWIE, *supra* note 347, at 36, 40 (noting that conservatives criticize foundations seeking structural reform of public schools to improve education for the poor); Thomas J. Billitteri, *Donors Big and Small Propelled Philanthropy in the 20th Century*, CHRON. PHILANTHROPY, Jan. 13, 2000, at 29 (reporting on political conservatives urging a retreat to a nineteenth-century model when religious groups were responsible for short-term needs); Pablo Eisenberg, *Drucker on Philanthropy: Without Foundation*, CHRON. PHILANTHROPY, July 29, 1999, at 40 (describing criticisms of conservative think tanks such as the Manhattan Institute and the Capital Research Center toward charities that address social and economic issues such as poverty, race, and gender).

373. See THE ETHICS, *supra* note 353, at xxiii (describing attacks on charities and recipients as being by leftists and radicals).

374. Billitteri, *supra* note 372, at 29 (describing Andrew Carnegie's imprimatur on American philanthropy in his exhortation to the wealthy to use their "superior wisdom, experience, and skills" in selecting the causes to support); see also NAGAI ET AL., *supra* note 349, at vi (noting descriptions of foundations as the "philanthropic elite" and as the "knowledge class").

375. See Pérez, *supra* note 290, at 360 ("[T]o be indebted is to be subject to an unending constraint....") (quoting IMMANUEL KANT, LECTURES ON ETHICS 118-19 (Lewis White Beck ed. & Louis Infield trans., 1963)).

376. GOODIN ET AL., *supra* note 6, at 243-44 (noting that the majority of poor remain poor despite receipt of private or charitable transfers).

377. DOWIE, *supra* note 347, at x; see also Estelle James, *Commentary, in WHO BENEFITS FROM THE NONPROFIT SECTOR?* 244-48 (Charles T. Clotfelter ed., 1992) [hereinafter WHO BENEFITS]; Colin Burke, *American Generosity: Its Rise and Fall*, CHRON. PHILANTHROPY, Jan. 13, 2000, at 56.



only twenty-seven percent of social services charities claimed to focus on serving the poor; twenty percent had “some” poor clients; and fifty-three percent had few or no poor clients.<sup>378</sup> Only sixteen percent of not-for-profit human services organizations provided any material assistance to the poor.<sup>379</sup>

That charities have provided less than generous amounts to the poor has not gone unnoticed. It has prompted investigations and criticisms about the relatively meager giving and the hoarding of wealth.<sup>380</sup> But the trend demonstrates further retrenchment and decline in charitable donations. Over the past two decades, new economic elites have donated less than their wealthy predecessors of earlier years.<sup>381</sup> Patterns of philanthropic giving continue to raise questions about charity’s purposes in providing for the poor: The wealthiest foundations give a disproportionately small percentage of their assets and the size of the awards have not kept pace with asset growth.<sup>382</sup>

A significant amount of philanthropic dollars are transferred to organizations that claim to be charities but whose objectives more accurately reflect the interests and values of those with means.<sup>383</sup> Moreover, the increasing influence of conservative interests in the realm of philanthropy has had a significant impact on charitable

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378. Lester Salamon, *Social Services*, in WHO BENEFITS, *supra* note 377, at 144-47.

379. *Id.* at 147.

380. See BRILLIANT, *supra* note 369, at 92 (reviewing the findings of the 1970 *Report of the Commission on Foundations and Private Philanthropy* and criticizing foundations for sluggish payout rates to charitable causes); *supra* notes 358-59, 372-73, and accompanying text; see also Vince Stehle, *The Danger of Comparing Different Types of Giving*, CHRON. PHILANTHROPY, June 15, 2000, at 54 (reporting mounting criticism of foundations for their failure to give away enough money each year to justify their tax exemptions).

381. Burke, *supra* note 377, at 56 (reporting that affluent classes behave differently from a previous generation of the wealthy contributing to a decline in giving).

382. See Brody, *supra* note 359, at 922-23 (suggesting that funds be made available for charities to perform service instead of being held in endowments); Marina Dundjerski, *Playing the Percentages*, CHRON. PHILANTHROPY, Oct. 21, 1999, at 21 (demonstrating that the percentage of assets distributed by foundations to charitable causes declined from 7.9% in 1981 to only 4.8% in 1997).

383. Henry Goldstein, *Curbing the Shift From Need to Greed*, CHRON. PHILANTHROPY, Jan. 13, 2000, at 57 (noting that charity has moved from the needs of the poor to reflect the values and interests of the middle class); see also Brody, *supra* note 350, at 438-39 (describing wealthy philanthropic families in Boston who “endowed universities, hospitals, and other charities ... then managed these endowments by investing in local industrial and commercial enterprises” which they controlled).

activities. Conservative foundations have successfully raised and distributed funds to promote their agenda: private enterprise, property rights, welfare reform, social entitlement termination, school vouchers, and faith-based social services.<sup>384</sup> The emergence of an activist network of conservative charities belies the myth of the liberal foundation world and has been a set back for those who pursue a social justice agenda.<sup>385</sup>

When charities do fund antipoverty efforts, their funding strategies are likely to reflect ideas about the pathology of the poor. Traditional efforts to improve the morality of the poor reappear in funding determinations designed to support counseling or mentoring programs.<sup>386</sup> Noncontroversial poverty programs, such as food banks, are more likely to be funded than grassroots organizations, advocacy initiatives, or public policy efforts.<sup>387</sup> Charities often require donees to avoid activism in general and provide narrow services at the expense of structural reform.<sup>388</sup>

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384. DOWIE, *supra* note 347, at 37 (noting efforts of conservative foundations to dismantle social entitlements); *see also* NAGAI ET AL., *supra* note 349, at vi; Elizabeth Greene, *Reinventing Philanthropy on the Right: Changes Spur Debate Over Future of Conservative Foundations*, CHRON. PHILANTHROPY, Aug. 23, 2001, at 7 (reporting on the Lynde and Harry Bradley Foundation, a conservative foundation supporting vouchers for private schools and the use of religious groups in providing human services, and the John M. Olin Foundation funding conservative groups such as the Heritage Foundation and the American Enterprise Institute for Public Policy Research).

385. *See* DOWIE, *supra* note 347, at 22, 40; Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 511, 541-45 (1998) (describing "public interest legal foundations" whose goals are to protect free enterprise and property rights).

386. WAGNER, *supra* note 262, at 10 (noting that current charitable trends support funding for night basketball, Big Brother mentoring programs, and job training instead of direct material aid to the poor); *see* Hall, *supra* note 370, at 792 (noting that some corporations stress mentoring instead of cash donations); *see also* DOWIE, *supra* note 347, at 203 (noting little enthusiasm by charities for antipoverty initiatives).

387. DOWIE, *supra* note 347, at 208-09 (suggesting wealthy donors are most likely to donate funds to programs that they can identify with); *see also* Hildy Simmons, *Symposium: Corporate Philanthropy Law, Culture, Education and Politics*, Luncheon Address, in 41 N.Y. L. SCH. L. REV. 1013, 1016-17 (1997) (suggesting corporate investors discourage contributions to certain charities, and thus force companies to have a diverse investment portfolio).

388. Pablo Eisenberg, Editorial, *Nonprofit Groups Must Do More to Fight Harmful Presidential Policies*, CHRON. PHILANTHROPY, May 3, 2001, at 57 (observing that grant makers are often unwilling to finance advocacy work and prohibit their grantees from engaging in such efforts); *see also* DOWIE, *supra* note 347, at 203 (noting the lack of charitable funding for activist grassroots organizations). Charities are increasingly structured like big corporations and businesses, and their giving strategies reflect corporate culture. Justin

Mainstream groups such as the United Way have historically resisted the inclusion of social change groups in their on-the-job giving campaigns.<sup>389</sup> Civil rights organizations that focus on racism and discrimination are forced to modify their strategies in order to obtain foundation support.<sup>390</sup> Although a new generation of philanthropists has emerged with profits earned largely from technology, current patterns differ little from traditional foundations that avoid funding organizations that advocate social change.<sup>391</sup>

Philanthropic organizations not only fail to provide significant material aid to the poor, they also interfere with goals of organizational recipients by requiring modification of programs hoping to qualify for charitable dollars, often at the expense of organizational priorities. Organizations dependent on philanthropy are required to “prospect” for funders at a cost of time, money, and efficiency, while always mindful of donor interest as a primary concern.<sup>392</sup> The unequal power between donor and recipient often

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Fink, *Philanthropy and the Community*, in CRITICAL ISSUES IN AMERICAN PHILANTHROPY 143 (1st ed. 1990) (noting that charitably funded groups have been required to offer “hard services” and abandon “change-oriented activities”); Tom Knudson, *Conservation Giants Grow Rich*, RALEIGH NEWS AND OBSERVER, May 27, 2001 at 1A.

389. Stehle, *supra* note 380, at 53.

390. See DOWIE, *supra* note 347, at 209 (reporting on the Ford Foundation’s splintering, relocating, and weakening of civil rights groups to appease critics); Michael Anft, *Nonprofit Leaders Urged to Seek Greater Support From Black Donors*, CHRON. PHILANTHROPY, May 31, 2001, at 12 (noting that African-Americans have been urged to rely more on African-American donors to avoid having to distort their message in order to get funding from established, white-run foundations). Current legislative initiatives to allow charitable religious groups latitude to discriminate in the hiring and firing of employees based on religious beliefs have raised concerns that charities will have greater license to exert their religious and moral views and shape the nature of social services programs in the name of giving. Pablo Eisenberg, *Senate Should Start Fresh on Crafting Faith Measure*, CHRON. PHILANTHROPY, Aug. 23, 2001, at 40.

391. Pablo Eisenberg, Editorial, *New Giving Reflects Old Priorities*, CHRON. PHILANTHROPY, Mar. 9, 2000, at 34.

392. Susan A. Ostrander & Paul G. Schervish, *Giving and Getting: Philanthropy as a Social Relation*, in CRITICAL ISSUES IN AMERICAN PHILANTHROPY, *supra* note 348, at 74 (describing “prospect” as a term within fundraising literature describing an organization’s constant search for funding opportunities); see also Bullock, *supra* note 360, at 344-45 (noting that wealthy donors who determine what to fund often do not make choices that serve the needs of the poor); Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 435 (1999) (noting that individual taxpayers have power in determining government fund allocations to charities).

forces organizations to adopt donor-determined projects. This results in fragmented organizations in competition with each other, often at the expense of those who rely on their services.<sup>393</sup>

Other inefficiencies result from charity's episodic and inconstant nature. Donors are wary of dependency by recipients and therefore disinclined to provide permanent funding, preferring instead to fund pilot projects. In order to appear competitive to grant makers who often limit their charity to one-time awards, applicants must demonstrate their ability to become self-sufficient and must demonstrate that they possess revenue-generating characteristics similar to those of the "for-profit world."<sup>394</sup> As a result, organizations such as museums and performing arts groups that can easily generate fees and revenue tend to be more competitive in fund raising than organizations serving clients unable to pay for their services.<sup>395</sup> Paradoxically, organizations that rely on charity are required to alter their objectives in order to appeal to donors, and thus may lose their effectiveness in responding to the needs of the poor.

#### *D. Law as Charity*

##### *1. The Influence of Principles of Philanthropy on Law for the Poor*

Charity influenced the early development of legal aid and in recent years has reentered the realm of legal services for the poor as government subsidies have declined. Programs and their clients have once again become more dependent on voluntary pro bono efforts and foundation grants for their survival.<sup>396</sup> The same

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393. William F. May, *Preface to THE ETHICS*, *supra* note 353, at xiv-xv (observing that there is little coordination or cooperation among service providers that rely on charities as they seek funds, a problem which results in conflicting responsibilities and tensions at odd with the purposes being served).

394. *See* Lieber, *supra* note 347, at 737.

395. Goldstein, *supra* note 383, at 57 (noting that higher education, performing arts, and museums are more likely to raise revenue through fees and sales and are more competitive in raising charitable dollars compared with groups serving inner-city and rural minorities).

396. *See* Legal Services Corporation, *LSC Statistics: 1998 LSC and Non-LSC Funding - All Programs*, at [http://www.lsc.gov/press/pr\\_progs.html](http://www.lsc.gov/press/pr_progs.html) (last visited Nov. 1, 2002) (reporting

principles and ambiguities of philanthropy that affect funding decisions and charitable acts in other categories of voluntary giving are mirrored in the decisions of organizations and individual lawyers that donate to legal services.<sup>397</sup> Pro bono service is generally viewed as a manifestation of public spirit, an expression of virtue and morality, and an act of individual conscience motivated by the desire to “do good.”<sup>398</sup> At the same time, pro bono lawyers because of the voluntary nature of their acts, decide who gains access to the law as well as the nature of problems that will be addressed. Similarly, charitable organizations that fund legal services are a part of a larger philanthropic community possessing the wealth and authority to control the nature of the advocacy provided by their funding choices.<sup>399</sup> These entities influence the development of poverty law in the same way they shape social policies and institutions and with similar, significant repercussions.

The influence of donors on the type of legal services to be provided was demonstrated with the earliest charitably funded legal aid offices. Programs were constrained by their funding sources, requiring them to avoid high profile advocacy as well as competition with the private bar, thus limiting their services to

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statistics for 1998 showing federal LSC funds at fifty-three percent of the total funding, and private and other non-LSC funding, excluding state and local government grants having grown to approximately twenty-five percent); Legal Services Corporation, *Serving the Civil Legal Needs of Low-Income Americans* (Apr. 30, 2000), at <http://www.lsc.gov/pressr/Exsum.pdf> (last visited Nov. 1, 2002) (reporting 1999 statistics showing federal LSC funds down to approximately fifty-one percent of the total funding, and private and other non-LSC funding, excluding state and local government grants increased to approximately twenty-seven percent).

397. See Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1448-49 (2000) (noting that legal services are frequently not acknowledged as valuable contribution to charity).

398. See Hon. Joseph W. Bellacosa, *Obligatory Pro Bono Publico Legal Services: Mandatory or Voluntary? Distinction Without A Difference?*, 19 HOFSTRA L. REV. 745, 746 (1991); Michael A. Mogill, *Professing Pro Bono: To Walk The Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 6 (2001) (describing pro bono contributions as “morally commendable” and a “common decency”) (quoting David Luban, *Mandatory Pro Bono: A Workable (and Moral) Plan*, 64 MICH. B.J. 280, 282 (1985)). David Hall has a different emphasis and suggests that while pro bono is important for the charitable reasons usually proffered, it is “the saving grace of the legal profession.” David Hall, *Access to Justice*, 70 MICH. B.J. 1189, 1189 (2000).

399. See *supra* notes 38-64 and accompanying text (illustrating how charitable organizations and communities control funding choices).

small cases.<sup>400</sup> The culture of charity replicated itself within the programs; legal aid lawyers had “little interest in litigation” and even less in testing laws and changing judicial policy.<sup>401</sup> Their case statistics were low in keeping with principles of charitable constraint.<sup>402</sup> Foundations continue to have authoritative weight in the choice of legal strategies employed on behalf of the poor as legal services lawyers are often required to accommodate the prejudices and priorities of their funders, regardless of the most critical legal needs of the poor.<sup>403</sup>

Currently, charitable pro bono services act as a delivery mechanism of law for the poor and create “unintended cultural consequences” affecting the value assigned to law for the poor.<sup>404</sup> Some pro bono proposals would assign representation of the poor to those lawyers with the lowest professional status, suggesting a lack of status and value of legal services for the poor.<sup>405</sup> Moreover, in recent years, the debate about the pro bono obligations of lawyers has diverted the profession’s attention away from the challenges of demanding and implementing an adequate and stable publicly funded legal services program.<sup>406</sup> It has construed the controversy about law for the poor as a private, moral, or professional obligation as opposed to a public responsibility.<sup>407</sup>

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400. Lorenz, *supra* note 91, at 298 (noting that charitably funded legal aid is limited to services too small to likely be of interest to private lawyers); *see also* LAWRENCE, *supra* note 32, at 37 (asserting that reliance on charity required programs to be cautious about what cases they undertook).

401. LAWRENCE, *supra* note 32, at 149 (describing legal aid lawyers as having “little interest in litigation and even less in appellate advocacy”).

402. *See* KATZ, *supra* note 74, at 41 (noting that legal aid programs kept their percentages of litigated cases low to avoid being considered too aggressive).

403. *See* WEISBROD, *supra* note 254, at 96 (observing that public interest law firm dependence on foundations funding affects choices of activities and techniques).

404. Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936, 939 (1991). Pildes uses the phrase to describe the unintended but negative repercussion of pro bono policies affecting legal services for the poor. *Id.* at 947-51.

405. *Id.* at 950.

406. Lardent, *supra* note 70, at 101 (noting that the focus on “mandatory pro bono blurs the critical issue” of establishing adequate legal assistance for the poor).

407. *Id.*

## 2. Law as Charity: Operative Principles

Principles of philanthropy that distinguish between the “deserving” and “undeserving” poor continue to penetrate charitable efforts to provide legal assistance.<sup>408</sup> Stigmatization has provided a means by which to minimize pro bono obligations.<sup>409</sup> As a result, some law firms go to great lengths to avoid direct pro bono service to the poor.<sup>410</sup> Although clearly not descriptive of all lawyers and law firms, many object to charitable legal work for fear that the presence of poor people in their offices may “[offend] the aesthetic and other sensibilities of some clients and firm employees.”<sup>411</sup> Those who do represent the poor on a pro bono basis more readily represent the elderly, the disabled, and children than those perceived to be responsible for their poverty.<sup>412</sup>

The charitably funded legal aid program of the past which limited cases and selected only “worthy” clients is feared to be the model of the future.<sup>413</sup> The norms of gratitude and dependency affect clients as well as legal services programs and their benefactors.<sup>414</sup> Legal services programs relying on philanthropy are in a “state of dependency,” and in many ways similar to other not-for-profit organizations, as they are “dependent on external units for

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408. Jacobs, *supra* note 330, at 515 (relating lawyers’ reluctance to do pro bono work to the tendency of distinguishing between those who deserve assistance and those who do not); see KATZ, *supra* note 74, at 40 (noting the exclusion of clients with criminal histories).

409. Silverman, *supra* note 35, at 956-57 (reviewing the arguments used to oppose mandatory pro bono). For example, clients who may have spent their rent money “on something else” are deemed “unworthy.” *Id.* at 956.

410. *Id.* at 926 (noting that some lawyers and law firms who find poor clients distasteful try to avoid direct contact with them through “distancing cash contribution[s]” to a legal services program as a means of discharging their professional responsibilities). It should be noted that many legal services programs would prefer cash to pro bono services because their lawyers may be better able to handle poverty related legal matters. *Id.* at 927.

411. *Id.* at 936; see also CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 73 (1993) (describing a study demonstrating that many large firms refuse to represent the poor out of concern that this would offend their wealthy and corporate clients).

412. See Silver & Cross, *supra* note 397, at 1479 (“All persons of means should be charitable, especially to widows, orphans, the handicapped, and others whose poverty results from circumstances that are largely or wholly beyond their control.”).

413. See Kilwein, *supra* note 107, at 62-63 (suggesting that some areas will revert back to days when there were not legal faculties to assist the poor).

414. See Johnson, *supra* note 263, at 18 (noting that legal services have been captive to its principle financial supporters).

the procurement of resources without having sufficient counter-vailing powers vis-à-vis these units.<sup>415</sup>

### 3. Programmatic Effects

Common charitable principles are responsible for the historic insufficiency of funding for legal aid societies; resulting in restricted client services limited to the most perfunctory tasks, often to the point of being unable to offer court representation.<sup>416</sup> Philanthropic contributions are presently inadequate to maintain legal services programs; indeed, most foundations have been reluctant to fund any attorney services.<sup>417</sup> Until recently, charitable organizations, such as the United Way, have historically resisted including legal services. Although programs currently receive funding, the grants do not support law reform or civil rights advocacy.<sup>418</sup> Even in times of generally increased charitable contributions, funds for legal services agencies have declined.<sup>419</sup> Individual pro bono services

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415. Salamon, *supra* note 378, at 170-71.

416. LAWRENCE, *supra* note 32, at 20; Houseman, *Political Lessons*, *supra* note 74, at 1670-71.

417. Equal rights groups and legal services combined received only 2.5% of foundation grants in 1988. Robert A. Margo, *Foundations*, in WHO BENEFITS, *supra* note 377, at 224. Of the nine top recipients of charitable giving, civil rights and legal aid organizations did not feature. JAMES J. FISHMAN & STEPHEN SCHWARTZ, NONPROFIT ORGANIZATIONS 12 (2000) (citing data from the American Association from Fund-Raising Counsel, Giving USA (1998-99)). There are notable exceptions including the Ford, Rockefeller, and Carnegie Foundations, and Open Society. *See id.* The new philanthropists have also demonstrated an unwillingness to fund legal services. Eisenberg, *supra* note 388, at 34.

418. Support for civil rights work has been a minuscule part of total charitable giving. DOWIE, AMERICAN FOUNDATIONS, *supra* note 347, at 210 (noting that it has not been "a line item in the Foundation's Center annual report of giving"); *see also* Stehle, *supra* note 380, at 53 (noting long-standing criticism of the United Way for keeping social change groups out of the on-the-job giving campaigns); Greg Truog, Editorial, *Competition and the United Way*, CHRON. PHILANTHROPY, Apr. 20, 2000, at 36 (criticizing the United Way for failing to fund civil rights groups); Grant Williams, *Advocating Legal Aid to Charties: Report Urges Increase in Grants for Lawyers Upholding Civil Rights*, CHRON. PHILANTHROPY, Apr. 5, 2001, at 7 (reporting on the Rockefeller Foundation's findings that foundations are hesitant to fund lawyers, particularly civil rights lawyers). *But see* Thomas J. Billitteri, *United Ways Seek a New Identity*, CHRON. PHILANTHROPY, Mar. 9, 2000, at 1 (describing the United Way's efforts to reinvent itself to provide more material aid to the poor and address strategic reforms).

419. Salamon, *supra* note 378, at 138, 144-47 (reviewing data on charitable contributions to the human services sector including legal services, and reporting that from 1970 through 1987, charitable contributions increased but allocations to the human services agencies,



make little impact in the deficit and fail to provide a significant source of legal aid.<sup>420</sup> The poor and their representatives report difficulty in securing the services of volunteer lawyers, particularly in complex matters.<sup>421</sup>

Voluntarism as a means for funding legal services can also compromise legal strategies. Although not descriptive of all volunteer attorneys, pro bono lawyers have been reported to abridge their services and pursue their cases with less than zealous efforts.<sup>422</sup> Many private lawyers motivated by charity are insufficiently invested in their cases to overcome concerns of provoking the ire of current or prospective fee-generating clients.<sup>423</sup> Pro bono services, like foundation funded projects, do not typically include representation in matters that challenge structural inequities, nor do they seek solutions to fundamental injustices.<sup>424</sup>

Charity funding brings its own financial and administrative inefficiencies. Programs are required to expend tremendous resources seeking grants, which come at the expense of client services.<sup>425</sup> Pro bono contributions are inconsistent and often reflect

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including legal services, decreased).

420. Rhode, *supra* note 326, at 1809. Rhode notes that attorneys who want to do pro bono cases are discouraged by law office policies that fail to credit such efforts toward billing requirements nor are these services valued in promotion or compensation considerations. RHODE, *supra* note 48, at 38.

421. Greg Winter, *Legal Firms Cutting Back on Free Services*, N.Y. TIMES, Aug. 17, 2000, at C5.

422. SMITH, *supra* note 46, at 43 (noting that the poor who receive pro bono services are likely to have their cases settled so that the attorney can devote attention to paying clients).

423. See RHODE, *supra* note 48, at 63 (describing studies of small town lawyers who are likely to "curtail their representation" of the poor for fear of alienating a paying or prospective client).

424. Pro bono lawyers are generally unwilling to address fundamental inequities and the need to accomplish social justice. Jacobs, *supra* note 330, at 514-15; see also Fink, *supra* note 388, at 143 (noting that charities funding not-for-profits push them to deliver "hard services" and ignore "change-oriented" services).

425. See Lardent, *supra* note 70, at 79 (describing the administrative burdens of seeking charitable funding); Judith Resnik & Emily Bazelon, *Legal Services: Then And Now*, 17 YALE L. & POL'Y REV. 291, 293 (1998); see also Project to Expand Resources for Legal Services, *A Chart of Significant Fundraising Activities for Legal Services*, at [http://www.abanet.org/legalservices/sclaid/sclaid\\_body.html](http://www.abanet.org/legalservices/sclaid/sclaid_body.html) (last visited Nov. 1, 2002) (showing how states' legal services programs obtain funding to support their programs); cf. Fink, *supra* note 388, at 145 (describing the costs on not-for-profits as a result of "incessant scanning of the grants economy that enable an agency to survive and grow"). Lawyers comment that legal projects that rely on funds from the private sector may distort client goals. Roundtable Discussion:

market conditions as opposed to client needs. During economic downturns, firms often discourage volunteer efforts as a result of the need to dedicate all available efforts to billable hours. Ironically, a strong economic market may also discourage pro bono activity because of the abundance of paying clients.<sup>426</sup>

Principles of charity do not inevitably result in donations in support of legal services for the poor. The reinvigoration of a laissez-faire market has increased charitable contributions to entities actively opposed to legal services.<sup>427</sup> Having determined that their interests are diametrically opposed to law for the poor, these organizations have been successful in lobbying efforts against the LSC in Congress and in litigation strategies against legal services and public interest law firms providing assistance to the poor.<sup>428</sup>

Currently, welfare and charity provide insufficient funds for the task of implementing the principles of the Rule of Law. Subsidies and charitable acts of giving rest on relationships of inequality and exact dependency. Public welfare and private charity are both unstable and impermanent, conditional and contingent. Voluntarism and philanthropy, in combination with current federal subsidies, fall short of providing necessary legal services to meet the needs of the poor.<sup>429</sup> At best, law is reduced to largess, contrary to the principles of equal justice and in all ways insufficient for the task.

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Visions for the Future, *Lawyering for Poor Communities in the Twenty-First Century*, 25 FORDHAM URB. L.J. 729, 736-37 (1998) (remarks of Anthony Alfieri).

426. Jennifer Peltz, *Lawyer Group Working to Help Less Fortunate; More Pro Bono Aid is Encouraged*, CHI. TRIB., Nov. 12, 1999, at N3 (reporting that pro bono declines in good economic times because there is no time for voluntary efforts).

427. A national network of conservative foundations inaugurated their own public interest law movement as early as the 1970s and has been influential in legal policy matters in a range of cases they have characterized as the defense of free enterprise, property rights, and reduction of government intervention. See *supra* notes 384-85 and accompanying text.

428. NAGAI ET AL., *supra* note 349, at 38 (noting that the formation of the Washington Legal Foundation and the Federalist Society as a forum for conservative legal scholars and law students were both supported by The Sarah Scaife Foundation).

429. LSC programs provide representation to only twenty percent of eligible clients. See *supra* note 396.

## IV. ACTUALIZING THE PRINCIPLES OF LAW

[Congressman:] *[W]hat distinguishes the program you represent from all these others requiring tough funding choices, Small Business Administration, tree planting, all of these other issues that are very important to our constituents. And how can you conceivably distinguish yours?*

[Alexander Forger, former LSC President:] *Fortunately, I recalled there was a Constitution. I didn't see anything there about tree planting or small business, but there was something about justice in the Constitution, and particularly in its Preamble. I offered that up as a sufficiently distinguishing factor.*<sup>430</sup>

National ideals celebrating the Rule of Law convey the law's potential to serve as a powerful equalizing force, endowed with the capacity to guarantee rights and resolve disputes peacefully and equitably. A commitment to these principles should be understood as an endorsement of the concept that legal justice cannot be treated as a commodity.<sup>431</sup> Principles so deeply embedded in the celebratory narratives of the nation should be insulated from the vagaries of market forces and protected against shifting political winds.

Current conditions are not likely to produce such lofty results. The challenge thus consists of reforming existing institutional arrangements within the present political and economic environment. To that end, this Part offers several modest propositions and urges that the primary mechanism for delivering legal services to the poor should be a publicly funded and national institution that is stable, unrestricted, and adequately funded. It suggests reforms within philanthropy that may serve to realign principles

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430. Forger, *supra* note 138, at 334 (describing questions put to him by a congressman during the 104th Congress during which efforts were mounted to eliminate funding for legal services).

431. See David Kairys, *Some Concerns About Context and Concentration of Power*, 72 TEMP. L. REV. 1019, 1021 (1999) ("Monopolization and extreme concentration of power in law—which potentially encompasses our democratic, participatory, and law-making, as well as adjudicatory and dispute-resolution institutions—seem different and potentially more onerous to society than in medicine, finance, or media.").

and practices of charity in a manner consistent with the fundamental values that promote justice and democracy. It advocates the establishment of a civil *Gideon*<sup>432</sup> to allow all citizens to participate fully in the legal system.

### A. *Public Responsibility*

#### 1. *Expressing National Values*

For those who believe that access to the legal system by all citizens serves the interests of democracy and justice, the need to support legal services for the poor through a national public policy financed with federal funds is as self-evident as it is self-explanatory. Access to the law is a prerequisite for social citizenship. Legal access creates the conditions for mutual respect and shared values, which are the sources of national cohesion.<sup>433</sup> Access to the law must be distinguished from commodities bought and sold in the routine transactions of the marketplace. Recourse to legal justice should not depend on the accumulation of wealth or the uncertainties of charity.<sup>434</sup> What is required is a strong, stable, and unfettered national legal services program to provide effect to the eminent status of equal justice in the hierarchy of public values.

In the absence of the guarantee of counsel rooted in constitutional principles, federal funding alone will not transform government largess into enforceable rights. Legal services, however, when firmly embedded within the public trust, assume some of the qualities of entitlements and are more likely to endure as an efficient and effective agency.<sup>435</sup> Although distinctions between public functions and private sector responsibilities may be blurred, some fundamental differences exist. The legal needs of the poor are

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432. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (establishing a constitutional right to counsel in criminal matters).

433. Cf. William N. Eskridge, Jr., *The Relationship Between Obligations And Rights Of Citizens*, 69 *FORDHAM L. REV.* 1721, 1724 (2001) (observing that the reciprocal relationship between rights and obligations can "create conditions for mutual respect among citizens" and "facilitate the operation of rights").

434. GOODIN ET AL., *supra* note 6, at 29-30 (contending that those goods and services so fundamental to citizens' well-being should be distributed without concern for monetary payment).

435. D'Alemberte, *supra* note 189, at 12, 14.

better served by government programs that operate according to explicit criteria than private charities whose distributions are discretionary.<sup>436</sup> A public institution that distributes benefits in accordance with objective standards, subject to public scrutiny, is better suited to assume obligations for financing legal services.<sup>437</sup> Although conditions may attach to government benefits, the possibility exists for challenging unconstitutional viewpoint discrimination in public funding, which is not present in private funding determinations.<sup>438</sup>

## 2. *Unrestricted Programs: Affecting Outcomes for the Poor*

The history of legal services illustrates that during the OEO era, legal services for the poor were integrated into the national War on Poverty, and it benefitted from strong federal support and public guidelines urging law reform activities.<sup>439</sup> Indeed, exceptional results were obtained on behalf of the poor. Sweeping legal reforms in matters of landlord-tenant relations, consumer law, debtor-creditor relations, and due process protections for welfare beneficiaries were unprecedented gains of the day.<sup>440</sup>

Susan Lawrence has studied the Supreme Court during this period extensively.<sup>441</sup> Her examination of the effect of expanded access to the Supreme Court's docket reveals how the transition from charity's legal aid programs to relatively unrestricted, federally funded legal services programs resulted in new opportunities for the Court to consider the claims of the poor.<sup>442</sup> Lawrence documents that during the nine terms between 1965 and 1974, legal services attorneys brought 164 cases before the Supreme Court of

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436. Cf. GOODIN ET AL., *supra* note 6, at 43 (describing how to tightly target the distribution of benefits).

437. See Brody, *supra* note 350, at 443 (restating the view that "only the government can fairly distribute benefits, free of the paternalism of private charity").

438. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001).

439. See KATZ, *supra* note 74, at 91.

440. See Diller, *supra* note 56, at 1415 (describing Supreme Court decisions that overturned unconstitutional conditions on the receipt of welfare and tenants' rights to habitable premises).

441. LAWRENCE, *supra* note 32.

442. See *id.* at 3 ("Each age brings the Court its own special anxieties and concerns. The main outlines of the life of the nation are mirrored in the cases filed with us.") (quoting Justice William O. Douglas).

which 119 were accepted for review.<sup>443</sup> She contrasts this to the six Supreme Court poverty law-related decisions before the OEO legal services era, and notes that none of them were brought by legal aid societies.<sup>444</sup> Legal services programs were successful in sixty-two percent of the cases they litigated in the Supreme Court, a statistically remarkable rate of achievement, especially because the government was the opponent in eighty-seven percent of the cases.<sup>445</sup> This period of strong national policies supporting legal services witnessed the emergence of poverty law as a distinct legal genre and a powerful Supreme Court jurisprudence to protect the interests of the poor.<sup>446</sup>

Moreover, during the OEO period, publicly supported legal services undertook a range of advocacy efforts and assumed enterprising strategies beyond litigation.<sup>447</sup> In addition to law reform in the courts, legal services attorneys succeeded in influencing the development of statutes and rules affecting the poor.<sup>448</sup> They worked within a network of community organizations, which in turn helped to establish program priorities.<sup>449</sup> National support thus helped to create a legal culture that valued legal services lawyers and their efforts in defense of the poor.

### 3. Feasibility Issues

There are at least two signposts to suggest that a national policy in support of a federally funded legal services program may once again be achievable: (1) public opinion, and (2) comparative legal services models that demonstrate its feasibility. First, citizens differentiate between effective federal programs that help the poor and wasteful government bureaucracies.<sup>450</sup> They further distinguish

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443. *Id.* at 9. Legal services also filed a great number of amicus briefs during this period, totaling twelve percent of all such briefs filed in this time period. *Id.* at 62.

444. *Id.* at 9 n.22.

445. *Id.* at 99-100.

446. *Id.* at 9-10.

447. See KESSLER, *supra* note 30, at 4 (describing OEO legal services strategies including class action litigation and appellate work, as well as lobbying activities).

448. *Id.*

449. *Id.* at 74 (describing community groups' influence on the policies of legal services).

450. DAVID STOESZ & HOWARD JACOB KARGER, *RECONSTRUCTING THE AMERICAN WELFARE STATE* 172 (1992) (reporting that seventy percent of Americans support social programs that

between programs that are more suitable for charitable operations and those that are properly the responsibility of the government.<sup>451</sup> More specifically, polls conducted on federally funded legal services reveal steadfast public endorsement of government support for programs providing representation for the poor.<sup>452</sup> Interestingly, in a series of surveys, increasing numbers of people responded, albeit erroneously, that the Constitution provides a right to counsel in civil matters for persons sued for money who cannot afford to hire counsel.<sup>453</sup>

Second, comparative studies of legal services also suggest that public responsibility for funding lawyers in civil matters is both normatively desirable and economically feasible. Justice Earl Johnson, Jr. has studied legal services models in countries with political and economic structures similar to that of the United States.<sup>454</sup> He notes that Switzerland and Germany, both of which have similar constitutional due process and equal protection language to that found in the United States Constitution, require free legal services in civil cases as a matter of constitutional principle.<sup>455</sup> Public obligations to provide free legal services have been incorporated into common law principles and statutory law in

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help the poor but balk at subsidies for programs that are wasteful).

451. Report, *Faith-Based Funding Backed, But Church-State Doubts Abound*, at <http://pewforum.org/events/0410/report/execsum.php3> (last visited Nov. 1, 2002) (revealing a general consensus that government agencies are better than religious or secular private groups at providing certain services such as literacy training, health care and job training).

452. See Forger, *supra* note 138, at 342 (describing a 1996 poll in which people opposed by a two-to-one margin cutting federal funding for legal services); Johnson, *supra* note 31, at 201 (revealing seventy percent of those surveyed said that the government should provide free legal assistance to someone sued in civil court but who could not afford counsel); Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 504 (1998) (citing a national study demonstrating that seventy-one percent of Americans favor government funding to provide lawyers to anyone who needs one); Press Release, Low Income Legal Assistance Poll, at [http://www.lsc.gov/pressr/pr\\_poll.htm](http://www.lsc.gov/pressr/pr_poll.htm) (last visited Nov. 1, 2002) (publishing a 1999 Harris poll revealing that between sixty-six percent and eighty-one percent of those surveyed supported the provision of legal services in a variety of civil cases for the poor).

453. Johnson, *supra* note 31, at 201; Sweet, *supra* note 452, at 504.

454. Johnson, *supra* note 31; Transcript, *What Is Access to Justice? Identifying The Unmet Legal Needs of the Poor*, 24 FORDHAM INT'L. L.J. S187, S190-95 (2000) [hereinafter *What Is Access*] (comments from Justice Earl Johnson, Jr. of the California Court of Appeals). For another perspective, see MAURO CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975).

455. Johnson, *supra* note 31, at 206.

most European and British Commonwealth nations.<sup>456</sup> In England and in most Canadian provinces, the amount spent on civil legal services is a much larger percentage of their overall judiciary budget than that of the United States.<sup>457</sup> Comparative studies not only reveal that the United States lags far behind other industrial democracies in per capita spending for civil legal services, but they also demonstrate that well-funded legal services do not harm national economic interests.<sup>458</sup> These studies provide both incentive and instruction for providing equal justice to the poor.

Other events suggest an international trend. New reforms have passed that expand eligibility criteria to ensure that those who need representation will be assured of access to lawyers.<sup>459</sup> Recent litigation in South Africa may result in a recognition that constitutional guarantees to a fair hearing require representation by legal counsel in certain civil cases.<sup>460</sup> The European Convention on Human Rights has also been interpreted to require member governments to provide free legal representation in civil matters as a means of giving effect to the Convention's mandate to provide a fair hearing.<sup>461</sup> These events suggest that the state of law for the poor in the United States does not measure up to developing international norms.

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456. *Id.* at 210-11 (reviewing constitutional law and statutory rights in England, France, Germany, Scandinavian and northern European countries, Austria, Greece, Australia, New Zealand, Hong Kong, and Canadian provinces).

457. Johnson, *supra* note 253, at 13, 31.

458. Johnson, *supra* note 31, at 212-15; *What Is Access*, *supra* note 454, at S194 (comparing U.S. expenditures at \$2.25 per person with English expenditures of \$32 per person and considerably higher amounts expended by the major Canadian provinces, the Netherlands, New Zealand, and Sweden). Johnson notes that the data provides reassurance that adequate funding for guaranteed free counsel in legal matters does not "break the bank." *Id.* at 219.

459. *Increasing Access to Legal Advice and Assistance*, M2-PRESSWIRE, July 11, 2001, available at 2001 WL 23558441 (reporting on the lowering of eligibility criteria to increase the number of people eligible for legal assistance in England and Wales).

460. Carmel Richard, *Court Asked to Find Farm Workers Have a Right to Free Legal Help*, SUNDAY TIMES (South Africa), July 1, 2001, available at <http://www.suntimes.co.za/business/legal/2001/07/01/carmel01.asp> (last visited Nov. 1, 2002).

461. Johnson, *supra* note 31, at 207 (citing *Airey v. Ireland*, 2 Eur. Ct. H.R. Rep. 305, 317 (1979)).



### *B. Reforms to Charity*

The likelihood of continuing dependence on charity is an inducement for reforms to philanthropic institutions in order to transform expressions of compassion into commitments to justice. Charitable endeavors have the potential to give voice to the interests of the poor and should be encouraged to demand that government fulfill its obligation to care for all its citizens.<sup>462</sup> Reforms have been proposed that democratize the decision-making processes within philanthropies to include the poor as a means to promote better funding decisions.<sup>463</sup> Recommendations include regulations limiting the size of endowments, mandating the donation of a larger percentage of foundation assets, and restricting the number of family members who may serve on a foundation board.<sup>464</sup> Other proposals would require foundations to fully disclose information about their finances and operations.<sup>465</sup>

Some oversight commissions recommended that well-established philanthropic institutions abandon their near-monopoly on workplace giving campaigns and accommodate new groups that advocate community causes related to race, class, gender, and ethnicity.<sup>466</sup> Other studies exhorted philanthropies to increase funding for lawyers who represent the poor in civil rights and community economic development projects.<sup>467</sup> Public support exists for requiring faith-based charities that provide services to the poor

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462. Mark Rosenman, *Nonprofit Leaders Must Help to Restore the Nation's Democratic Principles*, CHRON. PHILANTHROPY, Nov. 30, 2000, at 42 (urging charities to become actively engaged in advocacy in the realm of public policy on behalf of the poor and organizations that serve them).

463. DOWIE, *supra* note 347, at 259-62 (urging charities to work with those who have experienced poverty or injustice as a means to find more realistic solutions); Truog, *supra* note 418 (advocating that charities develop constituent-led strategies to fight poverty).

464. DOWIE, *supra* note 347, at 258-59.

465. Eisenberg, *Why Charities Think They Can Regulate Themselves*, CHRON. PHILANTHROPY, Mar. 4, 2000, at 47 (promoting federal responsibility to obtain full financial and operational disclosure from charities that use funds that would go to federal coffers but for tax exemptions).

466. Billitteri, *supra* note 372, at 29 (reporting on the Filer Commission which expanded the philanthropic community to include organizations representing disenfranchised groups and individuals).

467. See *supra* note 417 and accompanying text.

to adhere to federal legal standards prohibiting discriminatory practices.<sup>468</sup>

Reconceptualizing pro bono as a professional obligation in lieu of a charitable gesture may also promote the ideals of justice and maximize resources. It may, as expressed in the words of David Hall, allow lawyers to experience "the saving grace of the legal profession."<sup>469</sup> This may increase lawyers' contact with a range of people and social issues and help put to rest the mythical characterizations and stigmatization of the poor. Florida's pro bono plan is an example of modest reforms which seek to increase the number of pro bono service hours.<sup>470</sup> The key features of the plan include setting minimum guidelines for annual pro bono contributions and mandatory reporting of service hours.<sup>471</sup> It also requires local communities to develop pro bono plans, and include legal services programs well-suited and capable of articulating the needs of the poor.<sup>472</sup> Although no baseline calculation exists against which to measure the effectiveness of the plan, it appears that it has garnered additional resources for the poor in large part because of the mandatory reporting requirement.<sup>473</sup> These reforms are rudimentary, but they may also provide an incentive for additional scholarly studies on philanthropy and its impact on the poor. The paramount purpose of these recommendations, however, is to restore dignity to those dependent on philanthropy and transform acts of charity into gestures of justice.<sup>474</sup>

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468. Cf. Laurie Goodstein, *Support for Religion-Based Plan Is Hedged*, N.Y. TIMES, Apr. 11, 2001, at A14 (reporting on a poll finding that Americans who approve of giving government money to religious organizations to provide social services do not want those groups to proselytize the poor or to use religious guidelines in deciding whom to hire).

469. Hall, *supra* note 398, at 1189.

470. D'Alemberte, *supra* note 189, at 13 (describing Florida's pro bono plan).

471. *Id.* at 13, 19-20 (specifying that pro bono efforts may include either a minimum of twenty hours of direct legal services per year or an annual buy-out payment of \$350).

472. *Id.* at 25.

473. *Id.* at 22-23.

474. "Pity may be the perversion of compassion, but its alternative is solidarity." HANNAH ARENDT, *ON REVOLUTION* 84 (1963); see also GORN, *supra* note 1, at 80 (describing supporters who opened up their homes and shared food with striking miners as acts of solidarity in contrast with acts of charity); cf. Thomas A. Kelley, Editorial, *There's No Such Thing as 'Bad' Charity*, CHRON. PHILANTHROPY, Aug. 9, 2001, at 43 (describing the complexities of charity and the possibilities for empowerment).

### C. A *Civil Gideon*

The issues that arise in civil matters often implicate the inalienable rights to life, liberty, and the pursuit of happiness. The poor often face legal issues that have a profound effect on their well-being and safety, including housing and homelessness, access to health care, nutrition, protection from violence and abuse, and general economic exploitation that may render them destitute. These are fundamental concerns that require adequate legal representation to give meaning to the constitutional guarantees of due process and equal protection under the laws.<sup>475</sup>

The idea of a civil *Gideon* has been explored by scholars and practitioners, as well as the Supreme Court.<sup>476</sup> In *Lassiter v. Department of Social Services of Durham County*, the Court noted that special circumstances may require the appointment of counsel in civil matters and held that in parental termination proceedings such a determination must be made on a case-by-case basis.<sup>477</sup> *Lassiter* may be an indication that the right to counsel in civil matters is evolving in ways similar to the development of the right to counsel in criminal matters. Prior to *Gideon v. Wainwright*, in which the Court upheld the right to appointed counsel in capital as well as noncapital criminal offenses, the courts approached the right to an attorney on an ad hoc basis.<sup>478</sup> In deciding *Gideon*, the majority explained not only that the decision was a return to prior precedents, but that "reason and reflection" warranted such a ruling.<sup>479</sup> Indeed, in his concurring opinion, Justice Harlan traced the evolution of "the special circumstances rule," by which the right to counsel had been established, concluding that all criminal

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475. U.S. CONST. amend. XIV.

476. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981); McKay, *supra* note 33; Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1 (1967); Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317 (2001); Sweet, *supra* note 452, at 505; *What is Access*, *supra* note 454, at S187.

477. *Lassiter*, 452 U.S. at 31-32 (denying the petitioner's right to appointed counsel, but holding that such right in parental termination proceedings should be determined on a case-by-case basis and subject to appellate review).

478. *Id.* at 35 (Blackmun, J., dissenting).

479. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

matters were tantamount to special circumstances.<sup>480</sup> In civil matters reasoning and reflection may also demonstrate that ad hoc determinations will render indistinguishable the exception from the rule, resulting in the expansion of the right to counsel.

In both *Velazquez* and *SCLC*, the Supreme Court and the lower federal courts respectively based their decisions on the lack of a constitutional right to legal representation in a civil case.<sup>481</sup> But specific omissions in constitutional language do not necessarily mean that certain unspecified rights are not inherent in the basic protections offered by the Constitution.<sup>482</sup> Constitutional guidance is often vague, but as Justice Johnson has noted, an emerging consensus about the meaning of core principles, such as fair hearing or due process, and equality before the law or equal protection of the laws, may succeed in locating within the Constitution a right to counsel in civil matters.<sup>483</sup> The justification for the right to counsel in civil matters will be substantiated only if courts are asked to contemplate the ramifications of unassisted litigants in certain civil controversies, especially in those cases where the outcomes threaten the litigants' very freedom.<sup>484</sup> Moreover, courts must be pressed to consider the effect of the government's power, derived from the lack of an enunciation of a constitutional right to counsel in civil matters, to impose conditions on federal subsidies for legal services.<sup>485</sup>

### CONCLUSION

National legal narratives have long paid tribute to the importance of the Rule of Law and the notion of equal justice.

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480. *Id.* at 350-52 (Harlan, J., concurring).

481. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001); *SCLC v. Superior Court of La.*, 61 F. Supp. 2d 499, 506 (E.D. La. 1999).

482. *Cf. Baker v. Carr*, 369 U.S. 186, 243 (1962) ("So far as voting rights are concerned, there are large gaps in the Constitution. Yet the right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution.") (Douglas, J., concurring).

483. Johnson, *supra* note 31.

484. *See Forger, supra* note 138, at 337 (noting that the loss of freedom is often considered no worse than homelessness, domestic violence, or deprivation of other basic needs).

485. *See Baker, supra* note 260, at 1189 (noting that without a constitutional entitlement, government may impose conditions to its largess).

Despite the glorification of legal justice, however, its actualization has been a function of its commodification: To obtain benefit from its promise, one has to pay.<sup>486</sup> Government subsidies for legal services, like welfare programs, generally have provided limited legal benefits while stigmatizing the poor. Current trends emphasizing minimal government intervention promise to further reduce the possibilities for justice. In the absence of adequate government support, responsibility for providing lawyers for the poor has shifted to charity. But it has been the “general, though not universal, view of charitable bodies that those who received their help had no personal right to claim it.”<sup>487</sup> Justice should not depend on charity.

Those who are concerned with transforming the Rule of Law and the principles of equal justice from the theoretical to the real must find ways to engage in the “normative enterprise of the law” and challenge those traditions and practices that limit legal rights for the poor.<sup>488</sup> Legal advocates for the poor must consider possibilities for contesting the proposition of law as largess.<sup>489</sup> Such efforts may have larger implications as recent economic trends, which have exacerbated inequalities of wealth, further erode the attributes of democratic citizenship.<sup>490</sup> Therein lies what may be the most important lesson in *Velazquez*, correctly characterized as an act of resistance undertaken despite constraints of dependency: Courageous challenges serve as reminders that it is only in the striving that ideals of justice find fulfillment.

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486. See *supra* notes 131, 228, 248, 304, 330-32, and accompanying text.

487. T.H. Marshall, *Citizenship and Social Class*, in CONTEMP. POL. PHIL. 291, 301 (Goodin & Pettit eds., 1997).

488. Cf. Rubin, *The New Legal Process*, *supra* note 66, at 1436 (urging legal scholars to “fram[e] prescriptions about how the law should tell citizens to behave, public officials to decide, and society to organize” through full engagement in the normative enterprise of law).

489. Another challenge to the federal restrictions on legal services has been filed in *Dobbins v. Legal Serv. Corp.*, No. 97-00182 (E.D.N.Y., filed Dec. 14, 2001), which focuses on the program integrity regulations requiring LSC-funded programs to establish separate offices in order to use non-LSC funds. The suit claims that the restriction prohibits publicly funded services from combining with private charitable services to assist poor people. See Press Release, *Foundation, Private Attorneys and Legal Services Lawyers Challenge Government Bar to Helping Low-Income Clients*, at [http://www.brennancenter.org/presscenter/pressrelease\\_2001\\_1214.html](http://www.brennancenter.org/presscenter/pressrelease_2001_1214.html) (last visited Nov. 1, 2002).

490. Kuttner, *supra* note 109, at 154.