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## Litigating Against Poverty: Legal Services and Group Representation

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## I. INTRODUCTION

Public debate over the fate of the Legal Services Corporation (LSC) has grown increasingly political, with Reagan Administration officials continuing to call for the total elimination of this poverty law program.<sup>1</sup> Newly appointed LSC officers have seized regional office files in an attempt to investigate the propriety of regional managers' activities.<sup>2</sup> They have proposed and adopted regulations restricting LSC attorneys' representational and nonrepresentational activities.<sup>3</sup> Most recently, LSC has proposed regulations restricting financial eligibility of applicants for a program which once stressed the need for local communities to set such standards.<sup>4</sup> Our Article will focus less on the political than on the more thoughtful debate between two traditionally divergent groups in the Legal Services community, whom we will call law reform advocates and equal access defenders. While the positions these groups espouse are often used to justify restrictions or expansions in the LSC man-

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1. See, e.g., 127 CONG. REC. H2968 (daily ed. June 16, 1981) (statement of Rep. Kastenmeier); Gest, *Deep Discord Hobbles Legal Aid for Poor*, U.S. NEWS & WORLD REP., Oct. 31, 1983, at 66; N.Y. Times, Dec. 24, 1982, at B4, col. 3; and Nov. 14, 1981, at 8, col.4.

President Reagan has been supported in his efforts by conservative groups who wish to eliminate LSC. See Heritage Foundation Mandate for Leadership Project Team Report—The Poverty Agencies: Community Services Administration, Legal Services Corporation, Action 17, 28 (1st draft, Oct. 22, 1980). The report suggested that failing abolition of the LSC, the Administration should abandon case limitation restrictions and aim restrictions at class actions, support centers, and budget cuts to "limit L.S.C. lawyers to representing individuals in individual lawsuits." *Id.* See also OFFICE OF MANAGEMENT & BUDGET, REPORT ON LEGAL SERVICES 1-3, 46 (June 4, 1981) [hereinafter cited as OMB REPORT]. By contrast to the Heritage Foundation report, this transition team report did not recommend abolition of LSC but rather reduction of appropriations, a requirement of more funding for judicare and private bar models of delivering legal services to the poor, abolition of support centers, and removal of the presumptive right of refunding. Other suggestions were to allow gubernatorial vetoes over grantees, to decentralize LSC by region or state, or to require clients to pay five to 10% of the cost of representation. Apparently, the transition team ignored the results of the LSC Delivery Systems Study of 1980, which found that judicare models are either too costly or too limited to serve clients and that *pro bono* models work well only when there is a staff component. LEGAL SERVICES CORPORATION, THE DELIVERY SYSTEMS STUDY 6-11 (1980). The report also ignored the previous history of Office of Economic Opportunity (OEO) problems with local vetoes or defunding rights. See *infra* notes 6 and 12.

2. See, e.g., TIME, Oct. 3, 1983, at 83; Gest, *supra* note 1, at 66.

3. LSC's representational activities have been restricted with the passage of new eligibility requirements for alien clients. A written attestation of the client's citizenship is required. See Act of Dec. 21, 1982, Pub. L. No. 97-377, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1830. The use of any continuing resolution funds on cases already in progress for alien clients who fail to meet the new eligibility guidelines is prohibited. The rule offers Legal Services lawyers a guide for withdrawing under such circumstances from the case of an ineligible client; yet the potential ethical problems are apparent. See Restrictions on Legal Assistance to Aliens, 48 Fed. Reg. 19,750 (1983) (to be codified at 45 C.F.R. pt. 1626).

LSC has sought to regulate subgranting of its funds to third parties by requiring prior approval for subgranting in some cases. Moreover, it has attempted to prohibit use of its funds for membership fees and dues, such as voluntary bar association dues, or other contributions without prior approval. See Limitations on Transfer of Corporation Funds by Recipients and on Certain Expenditures, 48 Fed. Reg. 28,485 (1983) (to be codified at 45 C.F.R. pt. 1627) (proposed June 22, 1983).

4. These significant financial eligibility restrictions would reduce the number of families eligible for Legal Services. Many homeowners, particularly the elderly, would become ineligible. The proposed regulations also require that public benefits be considered income, that Legal Services programs assume that all those in a household share income, and that clients prove their eligibility. Other factors relevant to determining eligibility would be divided, in proposed § 1611.5 of the Code of Federal Regulations, into factors weighing in favor of eligibility and against eligibility. The proposed rule allows consideration of favorable factors to remain a local decision but mandates consideration of each unfavorable factor to assure denial of assistance whenever possible. Also, financial eligibility of groups is substantially narrowed under proposed § 1611.5(c). Only those groups composed primarily of eligible clients who are able to show a lack of means to obtain private representation would qualify for Legal Services. A group whose purpose furthers the interests of eligible clients, but that is not composed primarily of eligible clients, would be denied legal assistance even if it can show a lack of means to obtain private counsel. Compare Eligibility, 48 Fed. Reg. 39,086 (1983) (to be codified at 45 C.F.R. pt. 1611) (proposed Aug. 29, 1983) with 45 C.F.R. § 1611.5 (1982); see also N.Y. Times, Sept. 4, 1983, at 1, col. 5.

date, the political debaters often fail to understand the philosophical underpinnings of the traditional justifications for poverty law programs.

Since its creation in 1974,<sup>5</sup> LSC has been mandated to provide high quality civil legal services to low-income people and to be free from political restraints in pursuing this task.<sup>6</sup> This mandate has been weakened not only by severe funding cutbacks,<sup>7</sup> but also by restrictions on what LSC funds can be used for. Critics of LSC have virtually prohibited the Corporation from representing the poor in abortion, school desegregation, criminal, and military cases.<sup>8</sup> Furthermore, LSC attorneys have been prohibited from representing illegal aliens, and there have been attempts to prevent litigation of issues concerning homosexual persons and other unpopular groups.<sup>9</sup>

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5. LSC succeeded the highly politicized OEO Office of Legal Services. See E. JOHNSON, JUSTICE AND REFORM 71-146 (1974); George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 682-99 (1976); Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231, 238-63 (1971).

In 1980, 323 Legal Services programs handled 1.5 million cases for America's 29 million poor. See 127 CONG. REC. H2967 (daily ed. June 16, 1981) (statement of Rep. Railsback). In 1976 LSC handled about 1 million cases. By contrast, OEO programs handled 290, 934 cases in 1967. For further information on OEO statistics, see Stumpf, *Law and Poverty: A Political Perspective*, 1968 WIS. L. REV. 694, 698-701.

6. The Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996f (1976 & Supp. V 1981), declares that "there is a need to provide high quality legal assistance" to those unable to afford it. *Id.* § 2996(2). The need to mandate independence was made clear by various actions taken within and without OEO to curtail the Legal Services program. For instance, a report commissioned by OEO attempted to make LSC lawyers answerable to nonlawyer Community Action staff and to regionalize the program. See, e.g., George, *supra* note 5, at 687-90, citing McKinsey & Co., Management Study of OEO. Local boards refused to permit community education or group representation; bar associations in major cities set per case upper dollar limits (\$300 in one city), required racial segregation of staff, prevented economic development, interfered after eligibility decisions were made, and made other demands curtailing services. See Note, *supra* note 5, at 247-56. Vice-President Agnew spoke out against the Legal Services program in Camden, New Jersey, arguing that the professional independence of lawyers conflicted with the need for public accountability and declaring that the mayor of Camden represented the poor better than their attorneys could. See George, *supra* note 5, at 694. In 1973 President Nixon's handpicked OEO Director, Howard Phillips, began his job by limiting program refunding, firing the Legal Services director, eliminating law reform from program goals, and preparing to excise backup centers, saying that Legal Services lawyers would not spend public funds to oppose the President's policies. His activities were soon enjoined, and his appointment declared illegal. See *id.* at 695. Some courts even tried to restrict legal aid programs by requiring them to get permission to practice in the trial courts and limiting their right to represent certain clients. See Botein, *The Constitutionality of Restrictions on Poverty Law Firms: A New York Case Study*, 46 N.Y.U. L. REV. 748, 749-50 (1971).

7. The Corporation's budget was reduced in fiscal year 1981 from \$321 million to \$241 million for 1982 and 1983. See 129 CONG. REC. S5160 (daily ed. Apr. 21, 1983) (statement of Sen. Kennedy); 127 CONG. REC. H2968 (daily ed. June 16, 1981) (statement of Rep. Kastnmeier); N.Y. Times, Sept. 4, 1983, at 1, col. 5. Kennedy noted that Legal Services had lost 24% of its lawyers due to cutbacks from its 1980 appropriation. LSC began with a budget of \$92 million in 1975. *Legal Services Corporation Act Amendments of 1977: Hearings on S. 1303 Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 41 (1977). From 1966 to 1971 the OEO Legal Services budget rose from \$20 million to \$53 million. Pearson, *To Protect the Rights of the Poor: The Legal Services Corporation Act of 1971*, 19 U. KAN. L. REV. 641, 642 (1971).

8. 42 U.S.C. § 2996f(b) (Supp. V 1981) prohibits criminal representation, except with respect to misdemeanors; collateral attacks on convictions; and proceedings to procure nontherapeutic abortions, to force people to perform abortions, or to provide facilities for abortions in violation of their religious or moral convictions. It also prevents representation in any proceeding concerning desegregation of elementary and secondary schools, or, except for improper classification cases, violations of the Selective Service Act or military desertion. For a short history of these amendments, see George, *supra* note 5, 696-98.

9. H.R. 3480, 97th Cong., 1st Sess. (1981) [hereinafter cited as H.R. 3480], the 1981 LSC reauthorization bill, provided for prohibitions against legal assistance to "promote, defend or protect homosexuality" or to "adjudicate the legalization of homosexuality," and cut off funding for promulgating proposed LSC regulations on homosexuality. Abortion restrictions were further tightened to prevent all assistance except legal advice, unless the abortion was necessary to save the life of the mother. H.R. 3480 prohibited representation of aliens, other than those lawfully admitted, spouses, parents, or children of citizens, certain refugees, and those for whom deportation was withheld. The bill also included restrictions on cases relating to education. See the floor debates, 127 CONG. REC. H3073-105 (daily ed. June 18, 1981) and 127 CONG. REC. H2974 (daily ed. June 16, 1981) (statement of Rep. Wirth) (education cases). H.R. 3480 was passed by the House, see 127 CONG. REC. H3127-28 (daily ed. June 18, 1981), but was never acted on by the Senate. However,

Finally, legislation has curtailed the ability of LSC attorneys to lobby, to organize client groups, to file class actions against government officials, and to receive attorneys' fees for certain kinds of cases.<sup>10</sup>

Such restrictions are based on congressional concern over alleged violations of statutory requirements by LSC grantees.<sup>11</sup> However, the most persistent of these and other charges<sup>12</sup> have been refuted by government investigators. Objections made in House and Senate floor debates, other than those involving alleged violations, have

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many of the restrictions contained in the House bill were incorporated in a series of resolutions continuing appropriations for LSC. *See, e.g.*, Act of Dec. 21, 1982, Pub. L. No. 97-377, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1830. For a summary of Congressional actions on LSC reauthorization and appropriations, see 37 CONG. Q. ALMANAC 412-14 (1981); 38 CONG. Q. ALMANAC 246-49, 412-13 (1982). Similarly, the Family Protection Act, S. 1378, 97th Cong., 1st Sess. (1981), would have prohibited LSC funds from being used in abortion, gay and lesbian rights, school busing, and divorce cases. 127 CONG. REC. S6324-638 (daily ed. June 17, 1981) (statement of Sen. Jepsen).

10. 42 U.S.C. § 2996f (Supp. V 1981). Specifically, § 2996f(a)(5) prohibits LSC lawyers from attempting to influence passage or revocation of federal, state, and local laws and regulations, unless either the action is necessary for a particular eligible client's case and the client is not solicited for the purpose of obtaining authorization to lobby, or the government body requests information or testimony. LSC funds may also be used to lobby these entities if the measures directly affect it or its grantees. *Id.* § 2996f(a)(5)(B)(ii). Nonetheless, members of Congress frequently claim this lobbying is improper or illegal. *See, e.g.*, 127 CONG. REC. H3015-16 (daily ed. June 17, 1981) (statement of Rep. Collins). Legislation pending in Congress, S. 1133, 98th Cong., 1st Sess. (1983), would add further restrictions to class action litigation. *See* 129 CONG. REC. S5158-60 (daily ed. Apr. 21, 1983) (statement of Sen. Eagleton).

11. In successive congressional deliberations on continuing appropriations for LSC, there have been furious floor debates about these restrictions, particularly on lobbying and organizing. *See, e.g.*, 127 CONG. REC. H3073-128 (daily ed. June 18, 1981); 127 CONG. REC. H2966-96 (daily ed. June 16, 1981); 121 CONG. REC. 35,269 (1975) (statement of Rep. Ashbrook); 120 CONG. REC. 24,014-60 (1974); 120 CONG. REC. 14,995-15,014 (1974); 120 CONG. REC. 1620-32, 1634-723 (1974); 119 CONG. REC. 41,458-64 (1973); 119 CONG. REC. 20,685-758, 41,068-88, 41,629-36, 41,654-58 (1973). General Accounting Office (GAO) investigators and congressional hearings have failed to discover more than one or two violations of controversial restrictions such as lobbying. *See Oversight Hearings on Legal Services Corporation Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 29 (1980) (statement of Edward Densmore, GAO); GENERAL ACCOUNTING OFFICE, REVIEW OF LEGAL SERVICES CORPORATION'S ACTIVITIES CONCERNING PROGRAM EVALUATION AND EXPANSION, REPORT NO. B-199777, 14-17 (Aug. 28, 1980); *see also* TIME, Oct. 3, 1983, at 83. While some members of Congress who were lobbied expressed their concerns to the GAO, no evidence showed this activity to be outside the bounds of the statute. *But see* Currin, *Legal Services Corporation* 3 (Sept. 25, 1980) (report prepared by assistant to Sen. Helms) (on file at Ohio State University Law Library); Gest, *supra* note 1, at 66-67.

At most, these hearings have uncovered complaints from farmers that LSC attorneys representing farm workers were interfering with their contractual relationships and complaints from defendants defeated by LSC lawyers in court.

*See* 49 Fed. Reg. 6943 (1984) (proposed rule concerning restrictions on lobbying and certain other activities).

12. The most renowned example is Governor Ronald Reagan's attack on the California Rural Legal Assistance Program (CRLA) in 1970 and 1971. CRLA was OEO's prize program, noted for its law reform successes and administrative improvements, such as implementation of a priority-setting system. Then Governor Reagan vetoed CRLA's funding on December 26, 1970, several weeks later offering a report by California OEO Director Uhler as evidence in support of his action. This report catalogued alleged disruptions in the California prison system and public schools, solicitation of clients, stirring up litigation, and other CRLA actions, including organizing farm workers and taking criminal cases. CALIFORNIA OFFICE OF ECONOMIC OPPORTUNITY, A STUDY AND EVALUATION OF CALIFORNIA RURAL LEGAL ASSISTANCE, INC. (1971). Uhler refused to produce any witnesses to support his report at hearings on the report before a commission of the national OEO, or to take part in the proceedings, preferring to conduct his "trial" by press with the support of Governor Reagan. After several days of hearings, the commission issued a 400-page report stating that various charges were "completely unwarranted" and without "a shred of evidence," and that Uhler's report as a whole was "totally irresponsible and without foundation." REPORT OF THE OFFICE OF ECONOMIC OPPORTUNITY COMMISSION ON CALIFORNIA RURAL LEGAL ASSISTANCE, INC. 55, 82, 84 (1971). For a detailed account, see Falk & Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599 (1973). *See also* George, *supra* note 5, at 683-87; Gest, *supra* note 1, at 66; Pearson, *supra* note 7, at 646-47.

concerned the substantive goals of LSC clients.<sup>13</sup> In addition, members of Congress and others have objected to the use of federal funds to provide legal services for the poor,<sup>14</sup> and even to any subsidization of legal services by local government.<sup>15</sup> Such concerns, as we will show at the end of this Article, are only remotely relevant to the specific congressional restrictions which have been passed to limit LSC attorneys.

One recurring debate which does bear directly on how Legal Services' funds are allocated is between law reform advocates and equal access proponents. The former group views LSC's chief goal as provision of legal assistance to attack the causes and effects of poverty, whereas the latter group believes that LSC should primarily provide equal access to the courts for as many poor individuals as possible. Marshall Breger, one of the most articulate new critics of LSC, has claimed that the fundamental right to counsel for the poor can be protected only through allocation and litigation procedures which give equal weight to each poor person's complaint, not by procedures which also weigh the group impact of a given poor person's case.<sup>16</sup> Seizing on this rationale, new LSC officials have urged further restrictions on case

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13. For years, critics have claimed that the private sector can provide adequate legal services for the poor without public intervention. See, e.g., Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699, 700 (1969); OMB REPORT, *supra* note 1, at 1-3, 46; Gest, *supra* note 1, at 67; N.Y. Times, Dec. 24, 1982, at B4, col. 3 (quoting Edwin Meese). The American Bar Association and others have refuted arguments that private lawyers can fully meet the need for legal services for the poor. See, e.g., OMB REPORT, *supra* note 1, at 9-10; E. JOHNSON, *supra* note 5, at 55-64 (discussing a speech by then ABA President Lewis Powell and subsequent adoption by the ABA of a resolution endorsing the OEO Legal Services Program); Pye, *The Role of Legal Services in the Antipoverty Program*, 31 LAW & CONTEMP. PROBS. 211, 214-18 (1966). As a report by the Office of Management and Budget (OMB) admitted, unless the bar requires *pro bono* service as a condition of licensure (OMB estimates that 30 hours per year per attorney would equal the amount of hours LSC attorneys now provide in legal services to the poor) or assesses itself to pay for legal services, even the current level of services cannot be provided. OMB REPORT, *supra* note 1, at 8-16. Donald Bogard, President of LSC, acknowledges the possibility that mandatory private bar involvement may be sufficient. Gest, *supra* note 1, at 67. All the hard evidence currently available suggests that without forced labor, assessment, or alternative programs paid from some source, the serious legal needs of the poor in both urban and rural areas will remain unmet. See, e.g., Widiss, *Legal Assistance for the Rural Poor: An Iowa Study*, 56 IOWA L. REV. 100, 114-24 (1970).

Other LSC opponents continue to argue that lawyers should not be suing the government that pays them. See, e.g., Pearson, *supra* note 7, at 644; see also floor debates, 127 CONG. REC. H3014-16 (daily ed. June 17, 1981) (especially statement of Rep. Collins, at H3015-16); 120 CONG. REC. 1685-86 (1974) (statement of Sen. Long). As Representative Rousselot described it, LSC would "conscript the dollars of taxpaying citizens and . . . use those dollars to effect a redistribution of wealth and political power in this country in favor of the legal services attorney and the militant pressure groups which have already grown rich and powerful as a result of this program." 119 CONG. REC. 20,705 (1973).

A third position is that the poor are suffering at the hands of social activist lawyers. See OMB REPORT, *supra* note 1, at 16-21; 127 CONG. REC. H3123-24 (daily ed. June 18, 1981) (statement of Rep. Lagomarsino). Poor people's perceptions seem to contradict this argument. In one study, those lawyers most ideologically in favor of social reform were found most active in community groups and least likely to be perceived as part of the power structure oppressing poor people. Finman, *OEO Legal Services Programs and the Pursuit of Social Change: The Relationship Between Program Ideology and Program Performance*, 1971 WIS. L. REV. 1001, 1053-56, 1072-73. Legal Services lawyers have even been criticized for opting for overly traditional solutions to client problems. See Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 108-09 (1977); Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599, 607-08 (1979).

14. See, e.g., 127 CONG. REC. H3015 (daily ed. June 17, 1981) (statement of Rep. Collins).

15. See, e.g., 127 CONG. REC. S13,345-59, 13,360-68 (daily ed. Nov. 13, 1981) (particularly statements of Sen. Denton, at S33,353-54, and Sen. Thurmond, at S13,354, regarding deleting all funding); 127 CONG. REC. H2936 (daily ed. June 16, 1981) (statement of Rep. Hyde proposing funding through individual attorney income tax credit).

16. See Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. REV. 282, 286-97 (1982).

selection procedures employed by LSC grantees as well as restrictions on the use of class actions.<sup>17</sup> This once largely theoretical debate, then, has produced quite serious statutory restrictions on the provision of legal services. We will therefore consider the validity of these equal access objections to group impact considerations, but will also weigh the impact of those objections on the legal ethics of poverty litigation. Moreover, we will demonstrate how such misplaced objections have resulted in recent congressional placement of unsound procedural restrictions on Legal Services programs.

In this Article we will evaluate the objections of equal access advocates in order to see if these objections justify currently proposed restrictions on LSC. As we will indicate, we support the theory's initial assumption that the poor have a right to legal services in civil cases. But we will then dispute three assumptions made by Breger and other equal access defenders. First, we will contest Breger's contention that access rights are different from and more important than welfare rights. Second, we will dispute the conclusion that a concern for rights prohibits the consideration of group impact in decisions about which clients obtain legal assistance. Rather, we argue that equal access concerns and group impact considerations are compatible. Third, we will counter the argument that prohibiting LSC lawyers from serving group interests poses no ethical problems. We will demonstrate that a concern for the ethical requirements of the Code of Professional Responsibility is consistent with use of the class action device by LSC lawyers. Finally, we will discuss the most recent set of procedural restrictions on Legal Services programs' use of the class action. Not only are these restrictions, born of the conservative mood of 1980, unnecessary from the perspectives of indigent clients, potential defendants, and the public; they also run contrary to the dictates of the Code of Professional Responsibility as well as to the tenets of proponents of both equal access and law reform models for delivering legal services to the poor.

## II. THE POLITICS OF POVERTY LAW

Defenders of both dominant models of poverty law agree that the poor have a greater need for publicly financed lawyers than do the non-poor. Equal access proponents believe that the right to counsel is essential for procedural justice; and law reform proponents believe that the right to counsel is essential in the fight to end poverty in America. But neither group has been successful in convincing those who control any of the three branches of government that such a right should be recognized in civil as well as criminal cases. The Supreme Court has consistently refused to extend the constitutional right to counsel to civil cases. Congress has traditionally provided funds for only about ten to fifteen percent of the civil legal needs of the

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17. See, e.g., *Legal Services Corporation—1981: Oversight Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 6-7, 17, 22, 33-34, 41 (1982) (testimony of Donald Bogard, LSC president; William F. Harvey and William E. Olson, LSC board members); see 49 Fed. Reg. 1088 (1984) (proposed rule requiring equal access for all clients in case selection).

poor.<sup>18</sup> Most recently, President Reagan has tried to use his executive powers to dismantle LSC altogether. As we will discuss later, Congress has also passed unnecessary procedural restrictions on the filing of class actions that cut deeply into the ability of LSC lawyers to represent clients as the statute mandates. As a result of these actions, the politics of poverty law are the politics of scarce legal resource allocation.

Because of the refusal of all branches of American government to fully support and finance counsel for the poor, defenders of poverty law programs have split over allocation procedures for these scarce resources. Defenders of the law reform model favor case selection strategies within poverty law programs that are directed toward having a maximum impact (hereafter called "group impact") on eradicating poverty.<sup>19</sup> This first model has been criticized for placing too little emphasis on the specific and often unique problems of individual poor clients.<sup>20</sup> By contrast, the proponents of the equal access model generally favor case selection strategies that are directed toward the legal problems of each individual poor client who seeks help from the Legal Services program.<sup>21</sup> This second model has been criticized for failing to consider the problems of the poor as a group, problems which often cannot be understood from the individual poor person's perspective alone.<sup>22</sup> In the more detailed discussion which follows we will contend that the models are not as distinct as their adherents claim, and that neither model is incompatible with case selection procedures or litigation strategies designed to maximize group impact.

#### A. *The Right to Counsel for the Poor*

Defenders of poverty law programs have argued that the right to counsel for each poor person is a fundamental right. They have not had much luck convincing the members of the three branches of government to accept such a strong claim. As background, we will sketch how the Supreme Court has receded from requiring appointed counsel in civil cases, while affirming the importance of counsel, to illustrate why allocation of Legal Services resources is a crucial issue to the poor. In refusing to require counsel in civil cases, the Court has made the liberty interest

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18. In 1976 Roger Cramton noted that only 1.2 million of the 29 million poor in the United States had real access to a Legal Services program, and only about 15% of the total need was being met. Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670, 672-73 (1976) [hereinafter cited as Cramton, *Promise and Reality*]. In 1981 he estimated that one-eighth of the legal needs of the eligible poor was being met with LSC's \$321 million. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521, 530 (1981). With the budget reduction to \$241 million and inflation, probably less than 10% of those needs are being met at the present time. Excluding inflation, full funding for Legal Services would cost only about \$2.6 billion, based on these figures, or less than one-sixth of the federal Medicaid budget for 1981.

19. E. JOHNSON, *supra* note 5, at 248-84; see Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U.L. REV. 1115, 1137-38 (1982); George, *supra* note 5, at 710-11.

20. See E. JOHNSON, *supra* note 5, at 10-14; Breger, *supra* note 16, at 342.

21. Breger, *supra* note 19, at 1138.

22. See, e.g., Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1052-54 (1970). Moreover, some of the equal access rhetoric is predicated on the assumption that lawyers work within existing law rather than to change law. See, e.g., 127 CONG. REC. H3031-32 (daily ed. June 17, 1981) (colloquy between Reps. Shamansky and Sawyer). This understanding may treat law as an independent entity not subject to criticism, and lawyers may thus perpetuate coercion of some individuals by others. See McBride, *An Overview of Future Possibilities: Law Unlimited?*, in NOMOS XV: THE LIMITS OF LAW 28, 31-37 (1974).

which is at jeopardy in criminal prosecutions the Court's doctrinal focal point. In cases that do not threaten loss of liberty, such as civil matters, the Court merely uses a due process tests balancing state and individual interests to determine whether counsel is necessary.

After several years of requiring counsel selectively based on the circumstances of individual cases,<sup>23</sup> the Court in *Gideon v. Wainwright*<sup>24</sup> extended the right to appointed counsel to indigent criminal defendants in all cases involving imprisonment. For some time, it appeared that the Court's decisions on right to counsel would rest on equal protection and due process grounds which would be equally applicable to civil cases in which appointed counsel was sought. In a series of cases attempting to equalize access to the courts by challenging financial barriers to access by indigents, the Court relied on the equal protection and due process clauses to invalidate monetary preconditions to appeals. For instance, in *Douglas v. California*,<sup>25</sup> the Court held that the state was required to provide an indigent defendant with free counsel for purposes of appellate review,<sup>26</sup> and in *Griffin v. Illinois*,<sup>27</sup> a free appellate transcript was required.<sup>28</sup> Later, filing fees and other costs barring access for mandatory appeals were eliminated.<sup>29</sup> *Griffin's* wisdom that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,"<sup>30</sup> seemed to presage later equal protection scrutiny which was levelled at wealth classifications.<sup>31</sup> Moreover, access to the courts, emphasized by *Griffin*, appeared to be only one in an expanding array of fundamental rights protected strictly by the courts.<sup>32</sup> When such wealth classifications were conjoined with fundamental in-

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23. *Carnley v. Cochran*, 369 U.S. 506, 508-13 (1962) (technicality of procedural rights and possible defenses, illiteracy, absence of cross-examination of state's potentially biased witnesses); *Hudson v. North Carolina*, 363 U.S. 697, 703 (1960) (technicality of possible defenses); *Moore v. Michigan*, 355 U.S. 155, 159-60 (1957) (youth, lack of education, severity of penalty, technicality of possible defenses); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (ignorance of law, illiteracy, youth, public hostility, imprisonment and close surveillance by military, difficulty of communication with friends and family, severity of penalty). *But see Johnson v. Zerbst*, 304 U.S. 458, 462-63, 468 (1938) (unconditional right to counsel).

24. 372 U.S. 335 (1963).

25. 372 U.S. 353 (1963).

26. *Id.* at 355-57.

27. 351 U.S. 12 (1956).

28. *Id.* at 18-20.

29. *Roberts v. LaVallee*, 389 U.S. 40 (1967) (right to free transcript of preliminary hearings); *Long v. District Court*, 385 U.S. 192 (1966) (right to counsel and free transcript for habeas corpus appeal); *Lane v. Brown*, 372 U.S. 477 (1963) (right to free appellate transcript despite state requirement that public defender request one); *Smith v. Bennett*, 365 U.S. 708 (1961) (right to waiver of filing fee for application for writ of habeas corpus). States are not required to provide an appellate review process, *see Griffin v. Illinois*, 351 U.S. 12, 18 (1956), but if they elect to do so they may not bar indigents because of their poverty. *But cf. Ross v. Moffitt*, 417 U.S. 600 (1974) (free counsel not required when appeal is discretionary with state supreme court).

30. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

31. *See Boddie v. Connecticut*, 401 U.S. 371, 383-86 (Douglas, J., concurring), 386-89 (Brennan, J., concurring in part) (1971).

32. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-54 (1973) (right to privacy in procreative matters); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (right to travel); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (right to vote).



terests, such as the right to vote, state requirements which prohibited or infringed on exercises of such rights were struck down.<sup>33</sup>

Very early after *Griffin*, however, the Court began to distinguish its rationale for requiring appointed counsel from the rationale on which it invalidated other barriers to court access. In both *Gideon* and *Argersinger v. Hamlin*,<sup>34</sup> which extended the right to appointed counsel to misdemeanants facing significant incarceration, the Court relied on the sixth amendment's guarantee of counsel rather than the general provisions of the fourteenth amendment.<sup>35</sup> In such cases, the Court stressed one factor also applicable to civil settings: the need for equal representation of the parties in court, demonstrated by the public's practice of hiring lawyers as prosecutors. However, in distinguishing criminal from civil cases, the Court emphasized the particular burden on a defendant when the state is both prosecutor and judge.<sup>36</sup>

Perhaps the most hopeful sign for the civil defendant or plaintiff facing odds similar to those faced by criminal defendants was *Boddie v. Connecticut*,<sup>37</sup> in which the Court appeared ready to erase the distinction between civil and criminal cases, and establish a right to access to the courts which would include the counsel necessary for all indigent litigants to have a meaningful day in court. In *Boddie*, indigent persons challenged a civil filing fee required before a divorce could be pursued.<sup>38</sup> The Court, in invalidating the fee under the due process clause, stressed the need for civil litigants to be able to procure divorces in the state's monopolistic adjudicatory system.<sup>39</sup> However, the special emphasis which the *Boddie* Court placed on the fact that the case concerned divorce, which could be obtained exclusively through the

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33. See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254-62, 269 (1974) (wealth classification infringes right to travel); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969) (wealth classification infringes right to vote); see also Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. REV. 595, 600-07 (1973) (discussing fundamental rights cases and arguing that access to the courts is a fundamental right).

However, the trend toward coupling fundamental interests and potential wealth classifications to justify heightened scrutiny was halted in *San Antonio Indep. School Dist. No. 1 v. Rodriguez*, 411 U.S. 1 (1973). While the Court's reluctance to level strict scrutiny at classifications involving wealth or necessities of life had become apparent in *James v. Valtierra*, 402 U.S. 137 (1971) (challenge to requirement of referendum before development of low-income housing), and *Dandridge v. Williams*, 397 U.S. 471 (1970) (rejecting challenge to AFDC grant computations), the Court, by clearly holding in *Rodriguez* that wealth is not a suspect classification and that education is not a fundamental interest, 411 U.S. 1, 18-39 (1973), slowed the further evolution of fundamental rights decisions; see G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 961-68 (10th ed. 1980). This rationale was extended to claims that court filing fees discriminated against the poor in *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973).

34. 407 U.S. 25 (1972).

35. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 27-31 (1972). Although the sixth amendment is made applicable to the states through the fourteenth amendment, the *Argersinger* Court did not rest its decision on the fundamental fairness arguments made in other due process cases. The Court has also refused to extend the *Argersinger* rationale to cases in which incarceration is not a possibility. See *Scott v. Illinois*, 440 U.S. 367, 369 (1979).

36. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). Professor Lester Brickman agrees that the prosecutorial role, the threat of loss of life, and the indigent's lack of choice underscore the need for counsel, but argues that the courts are the exclusive forum for ultimate resolution of all disputes. See Brickman, *supra* note 33, at 608.

37. 401 U.S. 371 (1971).

38. *Id.* at 372-73.

39. *Id.* at 375-77.

courts and touched on the fundamental right of marriage, was subsequently used to block other attempts to seek access for indigents unable to pay fees.<sup>40</sup>

Any doubt about the fact that the Court was creating separate due process requirements for criminal and civil litigants was dispelled recently in *Lassiter v. Department of Social Services*.<sup>41</sup> Before *Lassiter*, *Boddie* (and other case law which extended the right of access to the courts to inmates in a variety of situations)<sup>42</sup> could arguably be extended to civil cases where the interest involved was compelling and the inequality of the parties clear. In *Lassiter*, however, the Court rejected an absolute rule requiring appointed counsel in civil cases under the due process clause in favor of a balancing test which the Court had developed in the administrative due process cases.<sup>43</sup> Thus, the Court ruled that appointment of counsel might be required when the balance of the indigent person's interest, the state's interest, and the risk of error pointed to such appointment. Significantly, however, the Court skewed that balance from the start by stating emphatically that courts should begin with the presumption that counsel need not be appointed unless the indigent person's freedom was at stake.<sup>44</sup> That presumption appears to have been the deciding factor in *Lassiter*, which involved termination of parental rights. Despite the Court's candid recognition that the parent's interest was fundamental, at least as strong as the state interest, and that there was significant risk of error in the proceeding, *Lassiter* was not granted the

40. See *id.* at 374. The Court later retreated from its *Boddie* analysis in *United States v. Kras*, 409 U.S. 434 (1973), upholding a filing fee as a condition to discharge of debts through voluntary bankruptcy, and *Ortwein v. Schwab*, 410 U.S. 656 (1973), denying waiver of a filing fee for an appeal from a reduction of welfare benefits. The Court distinguished these cases from *Boddie* because the interests sought to be defended were not as fundamental as divorce, and litigation was not the only means to protect the interests of the indigents. The Court's analysis, particularly in *Ortwein*, is troubling because it involved the denial of basic human needs in a setting in which only litigation could force the welfare agency to reverse its decision. The Court justified its holding on the theory that the right to judicial appeal is discretionary with the state. It appears that, as in its decisions involving prisoners' access to counsel, *e.g.*, *Bounds v. Smith*, 430 U.S. 817, 827-28 (1977), the Court was attempting to distinguish between the need for access at the trial and appellate levels, and considered the latter less crucial. Neither of these analyses, however, appears consistent with *Douglas*, which admits the importance of counsel at the appellate stage. *Douglas v. California*, 372 U.S. 353, 355 (1963).

For cases denying the right to appointed counsel in civil cases, see *Breger*, *supra* note 16, at 290 n.42 (1982).

41. 452 U.S. 18 (1981). *Lassiter's* parental rights were terminated because she had not had contact with her neglected child for over two years. In part, that lack of contact resulted from her serving a prison sentence for most of the period during which the alleged non-contact occurred. Thus, *Lassiter* was not only unrepresented by counsel, but was unable to prepare for her defense because of her incarceration. *Id.* at 20-21.

42. See, *e.g.*, *Bounds v. Smith*, 430 U.S. 817 (1977). *Bounds* required inmate access to the courts to be "adequate, effective, and meaningful." *Id.* at 822. The state had to provide either an adequate law library, as the district court had ordered, or essentially equal opportunities for prisoners to be assisted in filing their petitions, such as adequate assistance from persons trained in law. While the Court emphasized the importance of habeas corpus petitions and civil rights actions, its holding on access to the courts was not specifically limited to prisoners. See also *Wolff v. McDonnell*, 418 U.S. 539 (1974) (right to lay assistance in prison disciplinary hearings); but see *Payne v. Superior Court*, 17 Cal. 3d 903, 914-19, 553 P.2d 565, 570-73, 132 Cal. Rptr. 405, 410-13 (1976) (right to access to courts for imprisoned civil defendant).

43. 452 U.S. 18, 27-33 (1981). The Court relied on its analysis in *Mathews v. Eldridge*, in which it held that Social Security disability recipients need not be given a hearing prior to termination of their benefits. 424 U.S. 319, 334-35 (1976).

44. 452 U.S. 18, 26-27 (1981). As Justice Stevens pointed out in his dissent, there is no due process clause basis for elevating the physical liberty interest over others protected by the fourteenth amendment. *Id.* at 59-60 (Stevens, J., dissenting); see also *id.* at 40-42 (Blackmun, J., dissenting); *Brickman*, *supra* note 33, at 623, citing *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (Powell, J., concurring). Moreover, the Court has required appointed counsel even when only changes in confinement were contemplated rather than direct infringement of liberty. See, *e.g.*, *Vitek v. Jones*, 445 U.S. 480, 492-94 (1980) (transfer of prisoner from prison to mental hospital infringed protected liberty interest).

right to counsel.<sup>45</sup> By its reliance on case-by-case determinations, *Lassiter* left open the question of what interests should be protected in civil cases, and how the balance should be struck by trial courts. However, given the Court's rejection of requests for counsel in other cases,<sup>46</sup> the decision bodes ill for further extension of the right to counsel in civil cases.

### B. Poor People and the Need for Counsel

Despite the Court's rulings, individual Justices have suggested the need for stricter standards for determining when counsel was required than the balancing test used by the Court in *Lassiter*. For instance, Justice Stevens, dissenting in *Lassiter*, pointed out that the provision of counsel in such cases should not be determined by balancing financial cost against societal benefits, but on the basis of "fundamental fairness."<sup>47</sup> Similarly, Justice Brennan in *Boddie* argued that wealth-related barriers to access to the courts must swiftly be removed under the due process and equal protection clauses.<sup>48</sup> Perhaps one of the most significant declarations of the universal applicability of the right to access to the courts was made by Justice Black, who had dissented in *Boddie*:

In my view, the decision in *Boddie vs. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to

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45. 452 U.S. 18, 28–30, 33 (1981). As the dissent pointed out strongly, the Court recognized the "commanding" interests of parents in caring for their children and the significant risk of error due to the lack of education of most parents faced with termination, the stress of the situation, and the liberal use of expert testimony by the state. *Id.* at 35 (Blackmun, J., dissenting). The Court seemed to draw the strange conclusion that the balance of these factors, as well as the state's interest in accurate determination, against the state's interest in efficiency and economy, was insufficient to require counsel because the evidence in the record showed that counsel would not have helped *Lassiter*. Since the record was made by an incarcerated defendant without the help of appointed counsel, it is not surprising that the evidence was preponderately in favor of the welfare department.

46. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (right to any counsel denied in school disciplinary proceedings); *Ross v. Moffitt*, 417 U.S. 600, 614–16 (1974) (no right to counsel for habeas corpus action); *Gagnon v. Scarpelli*, 411 U.S. 778, 787–90 (1973) (case-by-case rule adopted for denial of counsel to probationers); *see also* *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (no right to counsel in civil rights cases); *Caruth v. Pinkney*, 683 F.2d 1044, 1048–49 (7th Cir. 1982); *cf. Rhoades v. Penfold*, 694 F.2d 1043, 1049–50 (5th Cir. 1983) (*Lassiter* requires only individual determinations of whether counsel is needed in termination of parental rights cases).

Conceivably, the Court's decisions, except for *Kras* and *Ortwein*, can be explained by the fact that the Court is much less willing to acknowledge the right to counsel than the right to elimination of other financial access barriers, perhaps because counsel is much more costly and the results of supplying counsel more speculative. For instance, in the same term it decided *Lassiter*, the Court held in *Little v. Streater*, that an indigent paternity defendant's inability to pay could not justify denial of a blood grouping test to prove his innocence. Again, the Court used the *Mathews* balancing test. 452 U.S. 1, 13–16 (1981). It would seem odd if the Court believed that the putative father's interest in avoiding support payments was more compelling than *Lassiter*'s interest in keeping her children. Moreover, the risks of error in both cases appear to be similar, given the educational levels of the defendants and the possibility of using expert evidence. Apparently, the state's more significant financial interest in providing counsel is the only distinction that can justify the divergence between *Lassiter* and *Little*. *See Lassiter v. Department of Social Service*, 452 U.S. 18, 58 (1981) (Blackmun, J., dissenting), in which Justice Blackmun discusses the discrepancy between *Little* and *Lassiter*. The Court's decisions under the first amendment, *e.g.*, *NAACP v. Button*, 371 U.S. 415 (1963), have led to some speculation that the first amendment confers a right to group legal services. *See Brickman, supra* note 33, at 628–37.

47. 452 U.S. 18, 59–60 (1981) (Stevens, J., dissenting).

48. 401 U.S. 371, 388–89 (1971) (Brennan, J., concurring in part).

hire an attorney. . . . I believe there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes.<sup>49</sup>

Thus, although the Court has failed to require counsel except in a small class of civil cases, several members of the Court have spoken strongly on the general need for the poor to have lawyers in adjudicating disputes.

The poor have needs entitling them to special protection in the legal process. First, the kind of legal problems common to the poor entail interests that are comparable to those of criminal litigants. In criminal litigation, the defendant risks loss of liberty, loss of control over his or her means of support, loss of spouse and children and, in some instances, loss of life itself. Similarly, the unsuccessful poor civil litigant risks loss of economic liberty, loss of means of support, loss of spouse and children, and even loss of those basic necessities which support life itself. For example, despite the holding in *Lassiter*, a civil suit in which a poor person risks being declared an unfit parent and being deprived of his or her children would seem to be just as serious as the loss of liberty risked by a defendant in a criminal proceeding.

Second, the poor do not arrive before judicial tribunals on an equal footing with the non-poor adversaries they sometimes face. This is especially true with regard to their obtaining competent and zealous legal representation. Since courtroom proceedings are supposed to be fair and unbiased to all parties, justice seems to dictate that the poor be provided with the means necessary to equalize their status in the courtroom.

As with the courts, the current administration has also failed to recognize the right and need of the poor for legal counsel in civil cases. Indeed, President Reagan first sought to eliminate LSC and then to diminish greatly its budget. Historically, Congress has also failed in this respect by consistently refusing to authorize sufficient funding to provide free attorneys to all poor persons who may need them, and the private sector has been unable to make up the difference. Since the previous level of funding was reduced even further by recent presidential and congressional decisions,<sup>50</sup> LSC's ability to provide procedural justice for the poor has been greatly hampered.

Some of Legal Services' chief critics such as Marshall Breger claim that the group orientation of many Legal Services programs is a violation of the rights of those poor persons who are thereby denied service.<sup>51</sup> To understand the impetus for such charges we must recognize that legal services for the poor are a scarce commodity. This scarcity is artificially generated since the government could easily decide to

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49. *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 955-56 (1971) (Black, J., dissenting from a denial of certiorari). Also among the cases denied certiorari was a neglect proceeding similar to *Lassiter* brought against a welfare mother in which counsel was denied. *Robinson v. Kaufman*, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970), *cert. denied*, 402 U.S. 964 (1971).

50. *See supra* notes 1 and 7.

51. Breger, *supra* note 16, at 295, 344-52.

allocate sufficient funds to meet the entire estimated need.<sup>52</sup> Presidential and congressional unwillingness to provide adequate funding requires Legal Services boards and directors to make hard choices about which poor person's complaints will receive legal attention and which will not (the problem of scarce legal resource allocation). The lack of funding to ensure counsel to all of the poor, since sufficient funds are available to meet fully the legal need, is a serious indictment of a society that claims to take this entitlement seriously, not a basis for restricting group-oriented approaches to poverty law. What seems strangest to us is that the current critics of resource allocation in Legal Services programs generally take funding shortfalls as a given.<sup>53</sup> Many of the people who criticize legal services for the way in which hard choices are made in allocating these artificially scarce resources are also the same people who do not actively support increased funding for legal services so that the poor clients would not have to be turned away.

In defense of the current critics, Marshall Breger contends that even with more funding, hard choices would still have to be made since the demand for legal services, like that for health services, increases with increases in the supply.<sup>54</sup> Admittedly, as legal services attorneys diligently represent clients, they find the same people turning up again and again after the first successful legal services experience. Yet, there is no good reason to think that the demand for legal services will expand indefinitely with every increase in supply. Current increases in demand reflect the fact that the poor are often uninformed about the law, but become better informed after the first encounter with a Legal Services lawyer. As the poor become more aware of their legal rights, they will place more demands on Legal Services. Such demands are reasonable given the needs these people face. We will not detail here other reasons why some who wish to restrict LSC resource allocation procedures do not put their energies into meeting the demands for legal services.<sup>55</sup> But, for the time being, we will discuss the division in the legal services community caused by inadequate funding, and show that currently employed group-based selection procedures for allocating scarce legal resources do not constitute a denial of the rights of the poor persons involved.

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52. Congressional unwillingness to admit that the scarcity is artificially generated may spring from the public's unwillingness to admit that it sets a price on justice. At some point, the cost of equal access must be considered too high because it requires sacrifice of other desired goods. However, the price the public is willing to pay for justice is obscured because of the damage done to this society's values if the price of justice is set too high. Only when attention is focused in a sustained way on particular situations in which lack of counsel results in injustice does public pressure seek correction of the problem. See generally G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 17-28, 134-43 (1978).

53. See, e.g., Breger, *supra* note 16, at 294-96, arguing that society's decision not to provide legal services to all does not violate the right of poor people to be treated as equals with respect to the need for legal assistance.

54. *Id.* at 285 nn.14 & 17; see also Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 *MINN. L. REV.* 211, 218 (1973).

55. Those who oppose the court victories won by LSC clients in suits against the government in the 1970's may see the 1983 restrictions as a means to thwart the enforcement of those orders. See Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 *N.C.L. REV.* 1133, 1143-58 (1976). Members of Congress have also seen case restrictions on Legal Services programs as a way of preventing judicial legislation.

### C. Law Reform and Equal Access Rights: A False Dichotomy

In the last twenty years, two distinct models for providing legal services for the poor have emerged: the law reform model and the equal access model. The first model views legal services as one of many tools to be used to combat the institutional problems of poverty, so that preference or interest satisfaction can be maximized within society.<sup>56</sup> Proponents of the second model argue that poverty law programs are a means for placing individual poor clients on an equal legal footing with the non-poor, so that justice, which depends on this formal equality, can be advanced, resulting in the optimal protection of the legal rights of all citizens.<sup>57</sup> The split between these two groups has been exacerbated by the increasing scarcity of funds for poverty law programs. Yet, as we will argue, the reasoning used to justify even the equal access model often supports group-impact case selection.

The law reform model takes as its guiding premise the belief that existing law reinforces and even intensifies the plight of the poor. When the Office of Economic Opportunity (OEO) first proposed a legal services program in the latter part of the 1960's, the founders contended that the war on poverty needed a publicly financed cadre of lawyers who would seek extensive changes in existing legal structures and relationships.<sup>58</sup> The attack on these institutions and relationships was not to be confined to individual courtroom legal action, but was to include group litigation (especially class action suits) as well as social organizing, lobbying, and legal education of poor persons who might be potential clients.<sup>59</sup>

Since law reform proponents were often explicitly utilitarian in their political philosophies, they did not attempt to narrow the focus of poverty law strategies,

56. The law reform model draws on the utilitarian philosophical tradition. For the clearest statement of this view, see J. S. MILL, *UTILITARIANISM* ch. 2, especially pp. 6-14 (G. Sher ed. 1979). Law reform theorists believe that existing law reinforces privations caused by poverty and that lawyering involves changing legal structures and relationships. See, e.g., E. JOHNSON, *supra* note 5, at 26, 34-35, 198-224. For other discussions of the differences between the equal access and law reform models, see Finman, *supra* note 13, at 1002-04; Hannon, *National Policy Versus Local Control: The Legal Services Dilemma*, 5 CAL. W.L. REV. 223, 223-29 (1969); Hazard, *supra* note 13, at 702-04; Pearson, *supra* note 7, at 643-45; Stumpf, *supra* note 5, at 703-04. Even the ABA has cited with approval impact litigation and other services, such as lobbying, designed to establish new rights and entitlements. See ABA Section of Individual Rights and Responsibilities, and Standing Committee on Legal Aid and Indigent Defendants, *Joint Informational Report, The Corporation for Legal Services: A Study* 13-15 (1971).

57. This model is heavily influenced by the philosophical "rights of man" tradition and recent work in liberal and libertarian entitlement theory. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. VI (1977); E. JOHNSON, *supra* note 5, at 10-14; R. NOZICK, *ANARCHY, STATE, AND UTOPIA* pt. II (1974); J. RAWLS, *A THEORY OF JUSTICE* ch. II (1971); Breger, *supra* note 16, at 287-88; Cramton, *Promise and Reality*, *supra* note 18, at 674-78. Both the equal access and law reform models recognize the importance of legal services for the public perception that the "law does strive for fairness and can be an instrument for the change of our social order," thereby reducing citizen hostility. Pearson, *supra* note 7, at 643. For an intermediate view, see Hazard, *supra* note 13, at 700-02.

58. While there was some dispute about whether social work professionals, lawyers, or clients should control these efforts, E. JOHNSON, *supra* note 5, at 34-35, Jean and Edgar Cahn, who were at the center of the movement, came out strongly in favor of client domination. See Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1332-33, 1338-40 (1964). Thus, it is inaccurate to portray law reform proponents as opposing implementation of client desires because they prefer to further social goals. The Cahns believed that control by clients was necessary to promote meaningful dissent inside the monolithic, self-perpetuating bureaucracies in charge of winning the war on poverty.

59. Ironically, the Cahns stressed case orientation and partisanship on behalf of clients, but their perceptions of what a case was went far beyond judicial parameters to include both presenting any grievance of the poor to those capable of affecting it and organizing the poor where appropriate. See Cahn & Cahn, *supra* note 58, at 1344-46.

except so as to guarantee that poverty was combatted in the most vigorous way possible. However, most of these adherents assumed that group impact litigation and extra-judicial law reform strategies would lead to fairer treatment of the poor at law by equalizing the influence and power of poor clients and the non-poor.<sup>60</sup> Perhaps the chief difference between this model and the equal access model is that law reform proponents first seek collective solutions to the problems of the unequal legal standing of the poor, while equal access proponents start with individual solutions. Law reform proponents try to achieve changes that will improve the legal standing of the poor by employing all possible avenues open to lawyers, whereas equal access proponents have stressed only those changes that can be accomplished through individual litigation strategies.<sup>61</sup>

A law reform orientation might lead a lawyer to assist a client wanting changes in nursing home conditions, by helping the client organize a group of similarly minded nursing home residents, by obtaining media coverage for them to air their grievances and demands, by aiding the group in drafting petitions and testimony before legislative committees, and most importantly for our study, by initiating a class action law suit against the owners of the nursing home. In this way, the initial unequal power relationship that existed between the poor person and the nursing home owners might be overcome with the additional possibility of far-reaching changes for nursing home residents other than the individual who came to the Legal Services office. By contrast, the equal access model would normally favor only the individual negotiations or suit brought in behalf of this one poor resident against the nursing home owners, a suit which would be vigorously pursued, but which would not be supplemented by any non-court representation and would probably not seek classwide relief.

Equal access proponents agree that poor people do not normally confront the non-poor on equal footing in the legal process.<sup>62</sup> However, they believe that if all poor clients had competent and zealous legal counsel, the judicial proceedings would produce results that were much fairer. Courts are presumed to be relatively independent of other political, social or economic influences. Additionally, the factual record at trial is thought to be sufficiently closed to these legally extraneous matters so that an impartial decisionmaker can regard the two parties fairly. But such fair decisionmaking requires that each party have an articulate defender, marshalling relevant facts to support his or her client's position, as well as challenging and exposing weaknesses in the opponent's case.<sup>63</sup> According to these proponents, if such defenders' skills are roughly equal, a fair verdict can then be rendered regardless of who the parties are. Since each side is represented by savvy, articulate, and

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60. See, e.g., Hannon, *supra* note 56, at 226-31; see also Hazard, *supra* note 13, at 699-704.

61. See Breger, *supra* note 19, at 1137-38; Hazard, *supra* note 13, at 708. Equal access proponents who came from the legal aid experience often stressed accommodation over litigation to solve individual problems.

62. See, e.g., Breger's statement that those without lawyers in America's system are disadvantaged, *supra* note 16, at 291; see also Cramton, *Promise and Reality*, *supra* note 18, 674-78.

63. Hazard, *supra* note 13, at 703; see also Brickman, *supra* note 33, at 617.

respectable lawyers (who in these respects resemble the judge), outside bias will not be likely to enter into the judge's decisionmaking.

The equal access proponents thus put exclusive emphasis on providing high quality legal counsel for those who seek and yet who cannot afford such counsel. These proponents argue forcefully that the law reform proponents contribute to the plight of individual poor persons by disregarding the particular problems and desires of those who seek their help, instead lumping the poor together into one homogenous group for class representation.<sup>64</sup> According to equal access proponents, only by viewing the poor as discrete individuals can the poverty lawyer represent the poor in the same way his or her counterparts represent the non-poor clients and thus ensure that the legal rights of the poor are as secure as those of all other citizens.

The proponents of the two models claim that their differences come out most clearly in the type of case selection procedures sanctioned by their respective views. Put simply, law reform proponents sanction case selection procedures which would consistently choose the suit or legal action which has the greatest impact on the greatest number of poor persons' interests; whereas equal access proponents sanction case selection procedures which give equal weight to the unique interests of individual poor persons who seek legal help. Assuming that funds for Legal Services programs for the poor are scarce, how will these models help lawyers decide which poor persons' cases to handle? It appears that group-oriented, utilitarian schemes are favored by law reform models, and random schemes, which put equal weight on each poor person's case, are favored by equal access models.

Yet not all law reformers or equal access proponents favor these schemes rigidly. Most equal access proponents prefer selection procedures which are not totally random, some allowing emergency cases to override all others.<sup>65</sup> But as with any other exceptions, what counts as an emergency is often hard to determine without weighing the interests in the so-called emergency case against those who would have to be turned away, and thus the equal weight principle is not consistently adhered to.<sup>66</sup> A second preference is for non-random procedures which put case selection into the hands of client boards.<sup>67</sup> But such procedures also fail to give equal weight to

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64. See, e.g., Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A. J. 930, 931-32 (1972); Breger, *supra* note 16, at 349-51.

65. Breger, *supra* note 16, at 354-58. Breger would also give preference, at least in allocating government funding, to indigents who might be denied counsel because their opponents were receiving LSC assistance. Legal Services cannot represent indigents who are opposing parties because of the apparent conflict of interest (although Breger suggests otherwise). Yet, in Breger's view, if only one indigent party has LSC counsel, he or she has an unfair advantage over the other. Apparently, Breger does not find the imbalance created when a non-indigent person with counsel faces an unrepresented indigent sufficiently compelling to require appointed counsel for the indigent in all cases. See Breger, *supra* note 19, at 1139-41 and accompanying notes.

66. See Breger, *supra* note 16, at 354-55. As any Legal Services lawyer can relate, what constitutes an emergency is often in the eye of the client. However, under the equal access model, it is difficult to explain why Legal Services lawyers may rely on their own values and priorities to identify an objective emergency, disregarding clients' demands for immediate service, but not to decide which cases are more socially useful. For instance, it would be difficult to choose the most urgent case among an imminent child custody hearing, an eviction (Breger's emergency case), or a divorce when one spouse is being beaten or not receiving support. It would be a rare Legal Services office in which the majority of cases were not emergencies, if that term is used to define cases in which "a great deal is at stake," or in which a client's basic needs or fundamental rights are implicated.

67. *Id.* at 332-34. Certainly, LSC has considered the utility of client input since it is required to include clients on local boards, see, e.g., 42 U.S.C. §§ 2996c(a), 2996f(c) (Supp. V 1981), and to consider client needs in setting priorities. *Id.* § 2996f(a)-(c) (1976 & Supp. V 1981).



each poor client's desires and needs, for such boards will consistently look to many of their own subjective factors. The ideal of giving equal weight to each poor person's problem is at least partially abandoned by these more realistic legal services allocation considerations. By contrast, law reform proponents often stress that programs should consider exceptions to the rule of greatest group impact, such as emergencies, hardship cases, or problems of serious concern to the clients.<sup>68</sup> Like equal access proponents, their proposed allocation schemes are by no means "pure."

#### D. *Group Impact and the Class Action*

Law reform proponents have argued that emphasis on the group impact of cases, that is, the aggregate effect of a given case on the poor as a group, is the most effective way to combat the causes of poverty which invidiously affect individual poor persons. One of the central assumptions of their position is that the poor do indeed share common interests as a class which are often best served by group-oriented case selection and litigation strategies. However, such "group impact" strategies often redound to the benefit of individuals, even if their cases are considered in isolation. As we will show in the next section, group impact approaches to poverty law do not necessarily work to the disadvantage of the individual poor persons who seek legal assistance for their problems. Supporters of equal access models are generally not willing to admit that group-oriented approaches to poverty law secure the rights of poor individuals. Yet, the fact is that group representation devices such as the class action are often the most effective way of representing an individual poor person. First, consider the poor client who has been denied benefits by a welfare official. The attorney who files (or threatens to file) suit on behalf of this person alone generally will not be taken as seriously as the lawyer who attempts to file a class action law suit on the same matter. Moreover, unlike the class suit,<sup>69</sup> the individual suit will often be rendered moot if the welfare official grants the client the minimal benefit to which he or she was entitled if the suit were successful. But, as often happens, a month or two later the same official may vindictively deny the benefits again, perhaps in retaliation for the lawsuit. The individual lawsuit, which may restore some of the economic benefits lost by the poor person, cannot remedy past and future harassment or restore the political balance of power between the institution and the individual. By contrast, the class suit can secure relief for the client that is not only longer-lasting but also broader-based. Additionally, the publicity accompanying the class suit places more of a burden on the welfare official to explain his or her conduct to supervisors and members of the public, providing some accountability and checking some arbitrariness. Moreover, the class action is a more effective deterrent than an individual suit.<sup>70</sup> The welfare official is better checked by a classwide injunction securing the named plaintiff and others against future wrongdoing, than by

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68. See, e.g., Kettleson, *Caseload Control*, 34 NLADA BRIEFCASE 111, 113 (1977).

69. See *Sosna v. Iowa*, 419 U.S. 393, 399-402 (1975); see also *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397-98 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

70. The deterrent effect of a class suit may be particularly important when compensation of plaintiff's claims is not feasible. See Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 54-56, 60-61 (1975); Denvir, *supra* note 55, at 1136.

a resolution of the particular client's entitlement claim to that month's welfare payment. Finally, the increased clout the poor client obtains when he or she has a group of others behind him or her means that class action suits will often be more effective for even individual complainants than suits which are individually filed.

Second, the legal problems of individual poor people may be institutional in nature, requiring institutional change to secure a given poor person's legal rights.<sup>71</sup> Consider the poor person who experiences periodic and increasing delays in obtaining Social Security payments. The source of the problem may be management and budget policies, which may not be remediable by even a hundred successful individual suits. Institutional change rarely results from individual suits because individual problems are not traceable much beyond the particular administrative officials with whom the client has dealt personally.

Such considerations should lead equal access proponents to recognize that group-oriented approaches to poverty law often obtain better results for the individual poor clients. Of more concern to us, though, is to demonstrate to equal access proponents that their approach does not necessarily rule out all group-oriented case selection procedures. Not every calculation in terms of group impact is an unjustifiable denial of the access rights of poor persons who are turned away by such procedures. It is not inconsistent for Legal Services lawyers to claim to be serving the interests of the poor as a group as well as the interests of individual poor clients when these lawyers engage in group litigation.

### III. THE PHILOSOPHY OF SCARCE LEGAL RESOURCE ALLOCATION

Marshall Breger has voiced perhaps the most detailed philosophical objections to group impact decision procedures employed in poverty law programs.<sup>72</sup> Although many of his arguments have been made by earlier equal access proponents,<sup>73</sup> he brings together the chief conceptual points that such proponents have used to criticize publicly funded group litigation for the poor. We begin this section of our Article with a thorough philosophical examination of Breger's arguments, which can be summarized as follows:

(1) The judicial process in America is a monopoly due to control by the state. This, then, limits the extent to which individuals can successfully resolve disputes on their own.

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71. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

If the law were enforced by officials with greater frequency, as in civil-law countries, part of the need currently being met by private class action litigation would be eliminated. However, little progress toward governmental enforcement has been made. See Taylor & Head, *Representing Collective Interests in Civil Litigation: A Comparative Synopsis*, 58 U. DET. J. URB. L. 587 (1981); see also Dam, *supra* note 70, at 66-70. Moreover, the results of public enforcement have led some to urge that the role of private group and class actions should be increased to foster pluralistic protection of the individual interests at stake. See Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 794, 831-68 (1975).

72. Breger, *supra* note 16.

73. See E. JOHNSON, *supra* note 5, at 10-14, 247-48.

(2) The right to counsel is a procedural right which guarantees that individuals have access to the legal process. Without counsel, individuals would be at a great disadvantage in the monopolistic legal system.

(3) The right to access to the legal system, which entails the right to counsel, is an *entitlement* based on what is due each and every citizen of a country that has a monopoly on the legal system; these rights are *not* merely *socially useful* devices.

(4) Rights can only be overridden by other rights claims. All denials of a right must have another (or the same) strong competing right as the basis for their justification. A mere increase in social utility is never strong enough to override an individual's right to legal access.

(5) Since there are not, and are unlikely ever to be, enough funds to provide for counsel to all who cannot pay for legal counsel, someone's legal access rights will always be denied. Considerations of group impact or utility cannot be used to determine which persons are to receive the benefits these funds afford. Any such numerical calculation violates the basic entitlements and dignity of those individual poor persons thereby deprived of legal access.

(6) In scarcity situations, failure to provide for each person's access right is not necessarily a denial of respect for these citizens as persons. A system of distribution that puts equal weight on each potential client's complaint maintains respect for persons. Group impact allocation systems, insofar as they put unequal weight on some complaints, fail to respect the rights of the poor.

We agree with Breger that the state has an effective monopoly over the court system in America. This means that most attempts to resolve problems through private means are stymied by the fact that one party can always appeal to a court of law and force the other party to renegotiate through the state-run process. We also agree that if one does not have legal counsel in this state-run system of justice, one is at a great disadvantage. The legal process in America is inordinately complex and the methods of pleading are generally not comprehensible even to well-educated citizens. Furthermore, while we support Breger's argument that each citizen has a right of access to the court system and that this entails a right to counsel even in civil cases, we disagree with Breger that this right is merely procedural in nature.

Our major disagreement with Breger concerns his contention that any numerical calculations violate the access rights of those poor people thereby denied legal services. Breger claims to derive this position from the assumption that only rights claims can override other rights claims. We agree that rights generally should not be overridden by mere considerations of utility. But we fail to see why rights theory would rule out scarce resource allocation procedures that attempt to maximize the fulfillment of access rights claims. We will support the contrary contention that at least some group impact case selection procedures do not fall prey to the standard rights-based arguments against utility calculations employed by Breger. To reach this conclusion, we first dispute the contention advanced by Breger that rights theory requires that exactly equal weight be placed on the complaints of each poor person, by showing that exactly equal treatment would not maintain respect for persons. Furthermore, we argue that group-impact allocation procedures need not be seen as

utilitarian if their purpose is to maximize rights fulfillment rather than preference satisfaction. Equal access proponents should come to see that some group-impact case selection procedures are compatible with a concern for the rights of poor persons.

#### A. *Procedural Rights and Welfare Rights*

When the OEO first funded a legal services program in 1970, the mandate given to this program was to "[e]nsure use of the judicial system and the administrative process to effect changes in laws and institutions which unfairly and adversely affect the poor."<sup>74</sup> Thus, from the beginning, the federally funded poverty law program was directed to serve the interests of the poor as a group, not just to serve individual clients who merely happened to be poor. The chief practical reason for this has been that Congress has never been willing to fund fully all of the legal needs of poor persons. Goodman and Walters pointed out that

[i]n 1975 there were approximately 11.2 lawyers for every 10,000 persons above the federal poverty line. Even with over \$100 million in federal subsidies, there was less than one lawyer for every 10,000 people below the poverty line. Only about 15% of the legal problems of the poorest segment of the population receive any kind of legal attention.<sup>75</sup>

The scarcity of legal counsel makes it plausible that some type of collective resource allocation procedure is warranted to increase the number of legal problems of the poor that can be handled by available services.

One of Breger's assumptions is that access rights, and the right to counsel entailed by them, are of a higher standing than are welfare concerns such as eliminating poverty. According to him, it is an unjustified denial of access rights to turn clients away based merely on such welfare considerations. Yet Breger offers no convincing argument to show that we should conceive of things in this way. Why is not welfare also something which is a matter of right in American society? Why should the right to subsistence food and housing be seen as less important than the right to equal access to the legal process? And why cannot the right to equal access itself be justified by reference to welfare considerations? It is to these basic conceptual questions, largely left unaddressed by Breger's analysis, that we now turn.

According to Breger, rights are individualistic in that they are justified independently of, and are often opposed to, the collective goals of the community. He claims that to "say that X has a right to Y is to give X a claim to Y regardless of the utility of doing so."<sup>76</sup> Yet, the form of a right thus does not immediately rule out the possibility that both equal access and welfare are rights. Breger admits this point but

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74. *Dep'ts of Labor, and Health, Education, and Welfare, and Related Agencies Appropriations for Fiscal Year 1971: Hearings on H.R. 18515 Before the Subcomm. of the Senate Comm. on Appropriations, 91st Cong., 2d Sess. pt. 2, at 534 (1970).*

75. Bellow & Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337, 342 n.26 (1978), citing L. GOODMAN & M. WALTERS, *THE LEGAL SERVICES PROGRAM: RESOURCE DISTRIBUTION AND THE LOW INCOME POPULATION* 11-59 (1975).

76. Breger, *supra* note 16, at 292.

he maintains that if this is so, it is nonetheless true that equal access and welfare are rights of very different types. Breger's argument is stated as follows:

[T]he right to legal assistance has been declared an "inherent right of a citizen" in that "individuals can hardly be expected to live under and respect the law unless they have an opportunity to use it." Thus the right to counsel may be defined as a civil or juridical right rather than a welfare right.<sup>77</sup>

Such civil rights are granted to citizens to protect their interests,<sup>78</sup> whereas a welfare right is a social right of the sort that rights to adequate food, shelter, and clothing are.<sup>79</sup> Breger is justifiably wary of recognizing welfare rights, but nothing in his article rules out this possibility.

Yet, if Breger admits that there are welfare rights, such as the right to have sufficient food, shelter, and clothing, he must then explain why appeals to such rights cannot justify denials of equal access rights. He appears to imply that "inherent rights of citizens" are more important than mere "welfare rights," because if individual citizens do not have their civic freedoms guaranteed above all else, democratic decisionmaking cannot take place. It seems to us implausible that an individual's right to obtain counsel is generally more important than having sufficient food, shelter, and clothing (welfare rights) provided. To paraphrase an argument by Henry Shue,<sup>80</sup> if basic economic needs are not met, what is to prevent a government from holding one's other rights hostage in exchange for those economic necessities? Some economic rights are as basic to our security from governmental tyranny as are certain political or civil rights. Indeed, the main conceptual distinction should be between those political or economic rights which are basic to security and those political or economic rights that are not.<sup>81</sup> Without the protection of all our basic rights, the protection of procedural rights alone will have little effect.

Moreover, those access rights which are vitally important for the maintenance of our system of government are both politically and economically basic. They are politically basic insofar as they provide the means of each citizen to express himself or herself through the chief political mechanism of conflict resolution. But they are also economically basic in that they provide, especially to the poor, the legal means to defend their basic economic interests (most importantly those concerning food, housing, and income) against those who hold economic power in the society.

The conceptual distinction between procedural rights and welfare considerations begins to break down when it is recognized that some procedural rights are important for economic as well as political reasons. It is then possible to argue that basic

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77. *Id.* at 289 (footnotes omitted).

78. *Id.* at 289 n.39.

79. See *id.*; Gordley, *Variations on a Modern Theme*, in *TOWARD EQUAL JUSTICE* 77, 85-88, 109-12 (1975), cited in Breger, *supra* note 16, at 289 n.39.

80. H. SHUE, *BASIC RIGHTS* 22-34 (1980).

81. As Breger notes, Rawls makes a similar distinction between primary social goods, which parallel basic liberties, and secondary goods, which are prerequisites to realizing other rights or interests and to ensuring equality of opportunity. Breger, *supra* note 16, at 293.

procedural rights, such as the poor's right to equal access to the legal system, are themselves at least partially justified by reference to collective economic well-being, that is, by reference to welfare considerations. Furthermore, basic economic rights, such as the right to subsistence food, clothing, and shelter, are also at least partially justified by reference to political or procedural justice for the individuals who happen to be poor. Thus, claims to equal access rights cannot hold independently of welfare considerations, and certainly they are not opposed to welfare considerations. It may then be argued that not all calculations which look to the collective goals of a community of poor persons are unalterably opposed to the access rights of individual poor persons. It is not conceptually implausible to believe that equal access rights can be the subject of allocation schemes that are oriented toward the collective goals of a group of poor persons. However, concern for individual dignity may suggest that random allocation schemes which center on individual cases be used, even if a concern for equal access does not.

### *B. Equal Opportunity and Case Selection Procedures*

A number of authors writing about scarce medical resources have argued in a similar vein with Breger that respect for the individual transcendent dignity of each person requires that these persons be provided equal opportunity to receive scarce resources. James Childress, for instance, has argued that a "first come, first served" or lottery method of allocating scarce lifesaving medical resources is the only way to preserve respect for persons and human dignity.<sup>82</sup> If we take into account who each person is, what contributions that person is likely to make to the social good, or what responsibilities that person has to family, or friends, or even the nation in deciding to whom to give lifesaving medical resources, we fail to give each person that respect which each person deserves merely by being human. These utilitarian considerations submerge what is transcendent and unique about each person into that person's social role, thereby denying to each person the dignity that should be afforded to him or her alone. Equal opportunity and equal rights cannot be preserved through such utilitarian distributional schemes.<sup>83</sup>

We will advance two arguments against the equal opportunity critique of utilitarian calculations used in the allocation of scarce resources. First, we will contend that equal opportunity does not entail radical equality of treatment, that is, exactly equal treatment of each person. Second, we will contend that the cases of medicine and law are not formally analogous in any event, precisely because of the ability of a lawyer to handle more than one client's problems through one suit. While Breger does not support totally random decision procedures in legal services allocation, consideration of Childress' stronger position will allow us to see what is at stake more clearly when equal opportunity arguments are advanced against utilitarian calculation schemes.

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82. Childress, *Who Shall Live When Not All Can Live?*, 53 *SOUNDINGS* 339, 347-54 (1970).

83. *Id.*

If two people apply for a job it is not more protective of their individual dignities to flip a coin to decide whom to hire than to determine which person best meets a rational set of criteria designed to pick the best worker. Concern for equality and respect for persons, as Ronald Dworkin and others have argued at great length, does not necessarily entail exactly equal treatment.<sup>84</sup> Indeed, exactly equal treatment (in this case, an exactly equal chance of getting the scarce job) fails to take account of just those personal differences which must be considered if people are to be treated as unique and autonomous members of a moral community. Treating people as if there were no differences between them does not respect their individuality. Random methods take no account of personal circumstance, degree of need or merit, as well as a host of other factors based on uniqueness of individuals. It is true that irrelevant differences among persons should not be used as a basis for distinguishing among them. But not all differences are irrelevant to modes of treatment such as hiring practices. Random selection procedures completely fail to capture any of the relevant differences among persons and hence treat these persons as mere faceless numbers, hardly a practice which generally would preserve or protect individual dignity.

Childress argues that any attempt to provide non-medical criteria of selection in scarce lifesaving medical resource cases would fail to treat individuals with the respect they deserve.<sup>85</sup> Instead, each person should be seen as having equal claims on these resources based on his or her equal need. To employ other non-medical criteria is to elevate one person's need over that of another. Since to do so effectively condemns one person to death, this practice would utterly fail to respect these persons as equals. When two rights of equal weight conflict, we cannot treat the persons fairly by considering less important factors in deciding which right to respect. Random criteria at least preserve the equality among persons to which their equal rights claims entitle them. But we contend that this is only true when there is no other relevant basis for distinguishing among these persons which would preserve respect for the values their rights claims are supposed to advance.

Childress has only established that allocation decisions based on irrelevant differences among persons fail to provide concern for equality and dignity. In medicine what should count as a relevant difference among persons, after it has been determined that all candidates do have roughly equal medical need for a scarce resource, is hard to determine. These choices are made all the more difficult by the fact that such medical decisions concern life and death matters. Hence, deciding to employ a certain criterion to refuse treatment to one person is in fact to condemn that person to die. In law, decisions about allocating scarce resources rarely have such drastic results. Thus, the decision to employ a certain criterion for refusing legal service to one person who needs it does not necessarily create an irreversible predicament for that individual. For instance, the person denied legal help for his or her divorce in May can reapply in December with considerable but not devastating consequences due to the initial denial of service. This means that allocation schemes

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84. R. DWORKIN, *supra* note 57, at 227.

85. Childress, *supra* note 82, at 348-50.

in law are not as likely to be all-or-nothing matters as they are when lifesaving medical resources are allocated, and also not as likely to be disrespectful of individual dignity.

Scarce resource allocation in medicine is not properly analogous to that in law, precisely because law cases can concern more than one individual person, whereas medical decisions rarely concern treatment which may directly alleviate the suffering of more than one person at a time. As we will next indicate, group-oriented calculations about the allocation of scarce legal resources do not necessarily all turn out to be utilitarian calculations. Unlike medicine, a single legal case can meet more than one individual's rights claim. Yet the time an attorney spends in vindicating ten people's rights claims in one suit will rarely equal that spent in adjudicating ten or even fewer rights claims through individual cases. Thus, consideration of group impact is relevant for legal allocation decisions in ways that it is not for medical decisions.

### *C. Maximizing Equal Access*

Breger maintains that it is a denial of the right to equal access for poverty law attorneys to decide which cases to take based on social utility or any other consideration that would look to the needs of groups of clients rather than to those of individuals. Consideration of the following three hypothetical cases (based largely on decisions which are commonly made by Legal Services attorneys) will show that Breger's conclusion is implausible even assuming his equal access perspective.

Case 1.—Two prospective clients arrive at a Legal Services office each seeking legal counsel. The first person wants to get a divorce from his or her spouse, while the second wants to challenge the gas company's shutoff policy following nonpayment of bills. Breger would maintain that it is unfair to allow the poverty lawyer to make the decision of which case to take (assuming that he or she can only take one case). According to him, the party who is turned away can legitimately complain that his or her rights have not been taken seriously as rights, since they have been overridden by the lawyer's utility calculations. If a lottery had been used, or if it could be shown that one person's rights claim was of higher standing than that of the other (perhaps because it was an emergency, while the other claim could wait), or if one person voluntarily decided to step aside in favor of the other, or if all poor persons relegated this kind of decision to a citizen board in advance, then, as Breger would have it, the right to access to one of those persons would not necessarily be infringed. For him, distinguishing one case on its subject matter unjustly rewards the rights claim of the other person.

Case 2.—Eleven prospective clients arrive at a Legal Services office each seeking legal counsel. The first person wants to get a divorce from his or her spouse, while the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh clients want to challenge their gas company's shutoff policy. Again the lawyer can only handle one case—which case should he or she take and what considerations is he or she allowed to make in determining an answer according to Breger's conceptual analysis? Given the fact that the lawyer can provide counsel to ten of the prospective clients by handling any one of their complaints as a class action



suit, and thereby provide access to all ten of these people, it seems counterintuitive to maintain that this consideration should not weigh heavily in the lawyer's decision.

If one places access to the legal system high on one's list of goods or values in a society, as Breger surely does, then a decision that provides this good for ten and denies it to one is surely better than a decision that provides it to one and denies it for ten. Or to use rights terminology, handling the gas company case as a class action would meet more access rights and deny the least number of access rights claims. Even in a universe where only rights claims can legitimately override other rights claims, the numbers should count in the sense that the option of providing for more rights fulfillment would override the option of providing less rights fulfillment. This conclusion is seemingly consistent with Breger's strong emphasis on equal access.

Case 3.—Two prospective clients arrive at a Legal Services office each seeking legal counsel. The first person wants to get a divorce from his or her spouse, while the second person wants to challenge the gas company's shutoff policy. The Legal Services attorney has good reasons for believing that at least nine other people in the community would also want to change the gas company's policy but they have not yet presented themselves to the Legal Services attorney in the office. Should this case be viewed as closer to case one or to case two? Should the lawyer disregard the fact that there are at least ten people whose legal needs will be met by handling the gas company suit instead of the divorce? Is it a denial of the right to access of the first person, or is it a justified overriding of his or her right in order to maximize access rights? On Breger's own grounds it is justified, indeed perhaps even required, that the lawyer choose to handle the suit which will provide the greatest fulfillment of access rights. Again, if such a high value is placed on the mere fulfillment of access rights, one need not look to social utility to show that some calculations based on group impact can be justified.

Conceptually, Breger has confused two rather different kinds of calculations. The first is the standard utilitarian calculation that looks only to the preferences or interests of the greatest number of people in attempting to maximize well-being or happiness. The second is the calculation that looks to the rights of individuals but recognizes that these rights are not all unique. This second calculation recognizes that many people or even groups of people may have similar rights claims. It would require that, where possible, such claims be joined in order to maximize the fulfillment of these rights claims, or at least to minimize their infringement.

Appeals to access rights will not allow Breger to block this second kind of calculation since it maximizes the fulfillment of these access rights. Perhaps it could be shown that allowing the rights of many to override the right of one is to treat this one person as not fully human. However, not even Breger contends that each denial of right constitutes disrespect, for he maintains that a right may be respectfully overridden if one can show that a more important right conflicts with it.<sup>86</sup> Rights claims stand high in our universe of moral discourse because rights are thought to

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86. Breger, *supra* note 16, at 292.

protect individuals from being treated as means for the majority's benefit. But not every overriding of rights automatically signals a denial of respect for the person involved. If such denials must occur so that the rights of many are not denied, and if the rights of the many as well as the rights of the one person are the same type of right, then it does not seem to be disrespectful to deny the right of the one to protect the rights of the many.

#### D. *Group-Impact Allocations and Rights Theory*

Breger maintains throughout his essay that any attempt to allocate legal resources by reference to group impact is the kind of utilitarian calculation that is incompatible with access rights theory.<sup>87</sup> In this section we will argue that certain numerical calculations are not incompatible with what is at the basis of rights theory. Rights theory does not require that we disregard the number of individuals whose rights claims are affected in allocation decisions. \*

Underlying any rights theory is the idea that each person should count for one and only one, that is, that each person should be afforded equal respect—not equal respect when compared with ten other people all also viewed as persons, but equal respect with each other person, each seen as just *one* other person. When there are no relevant differences among persons we may flip coins to decide the outcome because that gives each person an exactly equal chance of getting the desired outcome. In these cases we have no basis for distinguishing among individuals, and any non-relevant basis would provide less opportunity to one or another of these persons, thereby failing to treat that person equally to each of the others. Is it true that the number of people who have a right is irrelevant, and if considered, would fail to treat the persons involved with equal respect?

Consider a lifeboat case where we can either save one person (who needs three gallons of water) or we can save three persons (each of whom needs only one gallon). Assume that there is no relevant basis for distinguishing among them and that each has a right to life which entails that we should do that which is necessary to save their lives, if we can do so without major loss of something morally valuable to us. That is, each has a right to life and a corresponding right to be saved. But we are in a situation of scarcity—not all can be saved. Either one can be saved and the other three die, or the three can be saved and the one dies. As we have suggested, this situation is closer to that facing the Legal Services lawyer, than the medical scenario where only two persons are involved. So that we do not beg the question, also assume that the only thing which is relevant in this case is the right to be saved, and no amount of social good can override this right for any person. We will show that, by appealing to rights theory alone, it is permissible to decide the issue by choosing the greatest number rather than the one person to be saved.

Those who deny our thesis seem to be committed to the following premise: "If one person is harmed, that would be just as bad as if any number are each equally harmed."<sup>88</sup> But what could possibly support such a view? One might try to claim that

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87. *Id.* at 287, 295, 340, 344.

88. See Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977).

the harms of the larger number cannot be summed, that they must be taken and compared with the harm to each, one by one, and in this scenario it would never be justified to pick the one over the other.<sup>89</sup> But again, why must we be limited to this non-aggregative view of harms? Rights theory does not rule out all group-oriented allocation procedures.

Perhaps it could be argued that the harm of having a right overridden is a harm of the sort which is of overwhelming significance regardless of how many persons are so affected. Is this plausible? If we look at it from the perspective of any one person who might be so harmed, it might appear that this is so. Most would not agree to suffer so that others will not have to suffer, and this is surely the case when a person's own life is at stake. But how does this person explain his or her position to the others who each must suffer, especially when that person suffers equally to what each of the others would have suffered? It would appear to the others that their collective suffering, and in the case at hand, their loss of lives, is not worth what the loss of life was worth to the one. To say, for instance, that Jones' suffering is equal to the suffering of three is to say that the suffering of any one of the three is only equal to one-third of Jones' suffering—and this would surely not be to treat each person with equal respect.

Furthermore, if we let the numbers count then we can say that Jones' suffering is not equal to the suffering of the three. Instead, Jones' suffering is equal to only the suffering of one-third of the three (where each suffers equally), and this would seemingly preserve the sense in which we respect each person's suffering or loss of rights equally. No person will be given enough weight to his or her own (equal) suffering so as to override the suffering of more than one. To disallow quantification is to deny the thesis, thought to be essential to rights theory, that each person is to be treated with equal respect. As Derek Parfit quite succinctly puts it: "Why do we save the larger number? Because we do give equal weight to saving each. Each counts for one. That is why more count for more."<sup>90</sup> Only if we were also to allow that individual rights could be overridden by the weaker interests of others would we be vulnerable to the charge that we had slipped from the maximization of rights to the maximization of preferences, and only then would we be vulnerable to the charge that we had not taken rights, and respect for persons, seriously. Looking to the group impact, in seeking to minimize the number of those whose rights will be denied, is not the kind of utilitarian concern which is incompatible with what has traditionally been the basis for rights theory.

### E. *The Benefits of Group-Oriented Decisionmaking*

We have shown that group-oriented case selection procedures and litigation strategies are not inherently inconsistent with a concern for individual rights. Indeed we will now briefly show that such procedures and strategies perform useful roles in maximizing access, given the nature of much poverty litigation. First, and perhaps

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89. Derek Parfit, responding to Taurek's article, *supra* note 88, argues that, to be at all defensible, this must be one's position. Parfit, *Innumerate Ethics*, 7 PHIL. & PUB. AFF. 285 (1978).

90. Parfit, *supra* note 89, at 301.

most obviously, such procedures and strategies are often the most efficient way to vindicate rights. Second, group litigation procedures and strategies increase the likelihood that conflicting concerns among the poor, particularly about appropriate remedies, can at least be considered by the adjudicator. Third, the poor have unique common concerns, which give them interests as a group, interests which cannot wholly be responded to even through repetitive individual litigation. Finally, many government and other institutional adversaries of the poor treat the poor as a group, and their invidious actions can only be effectively met by strategies which recognize and respond to such group treatment.

The aggregation of rights claims into a single suit may not only maximize rights, as we have shown, but also may be the most efficient way to settle disputes between the poor and their opponents. Even equal access proponents, such as Breger, admit that efficiency considerations are relevant "insofar as they have an impact on the quest for procedural justice."<sup>91</sup> Moreover, such proponents do not deny that certain efficiency considerations, *e.g.*, whether the client's claim can succeed,<sup>92</sup> can be used in deciding to whom scarce legal resources will be allocated.

Rule 23 of the Federal Rules of Civil Procedure adopts such efficiency considerations as its primary rationale.<sup>93</sup> The aggregation of individual claims avoids duplication in discovery, pleading, and trial preparation. Rule 23 not only permits a saving of judicial resources, but it also allows attorneys to save time by litigating a case on behalf of a class rather than trying each case separately. The resulting savings in attorney time can, in the Legal Services context, redound to the benefit of those clients who would not otherwise be served because they requested or needed services after the program's capacity at any particular time had been reached.

Furthermore, many recent civil rights cases have illustrated that group litigation is the only means to ensure that an appropriate remedy can be provided. As we have previously noted, poor people's problems often result from institutional unresponsiveness. The poor are generally dependent on governmental agencies for many of their basic needs such as welfare, medical care, and public housing. The poor, more often than the non-poor, are also opposed by private institutions such as nursing homes, mental health facilities, and housing corporations. In the individual case, evidentiary considerations limit the framework for the court's decisions, and precedent circumscribes the scope of relief which the court may order to vindicate an individual's claim.<sup>94</sup> Often, such relief is retrospective only, even when realistically speaking, the illegal practices are bound to recur.

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91. Breger, *supra* note 16, at 286 n.19.

92. *Id.* at 357.

93. FED. R. Civ. P. 23 advisory committee note.

94. *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (Rule 23(b)(2) requirement of commonality of relief is to be read liberally in civil rights class actions in keeping with the Rule's purpose of vindicating civil rights); *Senter v. General Motors Corp.*, 532 F.2d 511, 525-26 (6th Cir.) (class action appropriate for allegations of classwide discrimination because of common evidence and need for single injunctive remedy), *cert. denied*, 429 U.S. 870 (1976); *EEOC v. Printing Indus. of Metropolitan Washington, D.C., Inc.*, 92 F.R.D. 51, 54 (D.D.C. 1981) (allegations of employment discrimination are inherently class action suits); *Bryan v. Amrep Corp.*, 429 F. Supp. 313, 318 (S.D.N.Y. 1977) (class action superior to other procedures when plaintiffs have a common legal grievance, and time, effort, and expense would be saved thereby).

Second, even though somewhat limited, the precedential impact of an individual lawsuit may affect the interests of other poor persons who are not heard in the suit. Recent class action litigation has demonstrated that a narrow definition of the plaintiff class may exclude participation of people who have legitimate interests in the outcome of the suit. Such litigation may artificially restrict the facts and remedies which the court may consider in framing relief. For instance, in *Halderman v. Pennhurst State School & Hospital*<sup>95</sup> conditions in a Pennsylvania institution for the mentally retarded were challenged.<sup>96</sup> Narrow definition of the class to include only institutionalized individuals and their guardians *ad litem* resulted in a sweeping judicial remedy which effectively closed down the Pennhurst facility.<sup>97</sup> This remedy was later challenged by parents not consulted in the original case, who claimed to be injured because their children could no longer remain in Pennhurst.<sup>98</sup> Similarly, individual litigation such as the *Bakke*<sup>99</sup> case may cause the reordering of legal relationships of many who cannot, for one reason or the other, establish their right to different treatment based on their individual circumstances. This is particularly problematical because the poor generally lack funding (given LSC's scarce resources) to vindicate their rights to different treatment by distinguishing their own situations.

Third, the poor have common economic interests which are often in jeopardy in civil suits. Such common interests result from the unique difficulty which the poor have in meeting their minimum needs. It is surely true that the "package" of what counts as minimum needs is not the same from society to society or from time to time.<sup>100</sup> Such variations do not indicate that the poor in any given society have no unique and common interest in meeting their needs. For instance, in advanced societies where electricity and natural gas for heating are considered minimum needs, the poor, like everyone else, must pay more for these services when utility rates increase.

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95. 612 F.2d 84 (3d Cir. 1979) (en banc), *rev'd*, 451 U.S. 1 (1981).

96. *Id.* at 88-89.

97. *Id.* at 90, 116; see Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1211-12 (1982). See generally Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482-87 (1976) (discussing conflicts among class members, attorneys, and unrepresented parties in three school desegregation cases).

98. Rhode, *supra* note 97, at 1211-12, 1225, 1252, 1259 nn.288 & 289.

99. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *Bakke* the Supreme Court invalidated the University of California-Davis Medical School's special admission policy, which allowed minority applicants to meet lower admissions standards until a quota was met, as violative of either the equal protection clause of the fourteenth amendment to the United States Constitution, *id.* at 320 (opinion of Powell, J.), or Title VI of the Civil Rights Act of 1964 as amended (42 U.S.C. § 2000d (1976)), *id.* at 421 (opinion of Stevens, J.).

100. Some economists have argued that the difficulty in defining poverty is reason for regarding it as merely a subjective, relative, or ethical term with little real descriptive meaning. See Orshansky, *How Poverty Is Measured*, MONTHLY LAB. REV., Feb. 1969, at 37, 37. However, the approach of Amartya Sen in *Poverty and Famines: An Essay on Entitlement and Deprivation* (1981) recommends itself. Sen argues that poverty should be defined on the basis of standards measuring minimum needs, those necessary to escape the kind of economic deprivation that leads to hunger and starvation. A. SEN., *POVERTY AND FAMINES* 24-38 (1981). Although one need not be a member of the group of poor people throughout one's whole life in the way members of other disadvantaged groups (*e.g.*, blacks or women) are immutably locked into those groups, at any given time it is possible to determine that a person is unable to meet minimum needs. Welfare officials have been making these calculations for some time, and economists and social scientists recognize the minimum needs standard in identifying the poor. See, *e.g.*, Sneden, *The Measurement and Definition of Poverty*, in *POVERTY: A PSYCHOSOCIAL ANALYSIS* 2, 3-6 (L. Sneden ed. 1970); B. SCHILLER, *THE ECONOMICS OF POVERTY AND DISCRIMINATION* 11-22 (3d ed. 1980) (discussing various poverty indicators).

Unlike all other persons, however, those who are poor must dip into the money they have reserved for other minimum needs in order to pay for the increase in utility costs, or go without minimum electricity or heat. All members of a society have some interest in the price of providing for their minimal needs. Yet the poor have a uniquely pressing interest in these matters since the poor can pay for these increases only by going without other minimum needs.

The common interests of the poor create a situation in which group impact litigation will have at least an indirect effect on all of the poor in a given region. Thus, any conflict that might exist between the interests of an individual who has been turned down for legal services and the interests of the group who will be made the object of a class action suit is somewhat mitigated. The poor person who is turned down for service for a divorce is quite likely to be benefitted by a case which seeks to challenge utility rate increases. While it is true that the divorce may be more important to that person than the rate increase, it is nonetheless true that his or her interests, which include an interest in the rate increase, are not strictly in conflict with the interests of the people who want to challenge the utility rate increase through a class action.

The poor also face problems which do not seem to constitute severe enough difficulties for any particular individuals to warrant litigation, but which have an adverse impact on a group of the poor taken collectively. Think of the decision not to construct a public housing project in a certain neighborhood. Such a decision may have a severe adverse effect on all of the residents of their neighborhood. But if we try to separate these harms and address them as harms to individuals, such that we are only concerned in a given case with the effects of this decision on one member of this community, the harm is not the sort that seems likely to be taken seriously by a judge. It is very difficult to predict that a given poor person would have been eligible to get into a public housing complex, and what harm that person suffers because he or she now is not in that complex. The harm, though, is fairly easy to see when the whole group of neighbors is considered. Without the new complex, overcrowding and inadequate housing create difficulties for every member of the neighborhood; and ancillary problems of crime and sanitation, well-known in overcrowded areas, become real possibilities.

In similar ways, the unresolved legal problems of the poor perpetuate and contribute to poverty in America. But poverty itself is hard to understand as the plight of isolated individuals. It is even more difficult to remedy when our attention is fixed on the individual case. Let us only reiterate the most obvious factor here. When individual suits are filed, defendants commonly try to settle out of court. These settlements often effectively pay off the individual poor person, but leave the cause of the problem untouched for this individual and most especially for those others similarly situated. This is the converse of the problem of precedent we mentioned before. Out-of-court settlements do not even afford the slight relief that court-supervised settlements offer to those unnamed in the suit.

Finally, the poor more often than the non-poor face institutional opponents in

legal proceedings.<sup>101</sup> These institutional opponents tend to view the poor as a class. In this context, think of the food stamp program. The regulations promulgated affect every person whose income is under the federal poverty line.<sup>102</sup> If a decision is made to lower eligibility standards, then every person who falls between the old eligibility line and the new line, regardless of differences in individual situations, is affected by that decision. A class is created by the actions of the food stamp director. It is true that not all of the poor are here treated as a class, but the institutional opponent has categorized situations in such a way that individual poor persons are not distinguished except according to overly broad characteristics such as income.

The actions of the institutional officials in creating classes of poor individuals require appropriate response from the legal system. We suggest that such response cannot be made by characterizing adjudication according to an individualistic conception of law. Civil lawsuits are often characterized, especially by rights theorists, as involving essentially private disputes between discrete, individual plaintiffs and defendants.<sup>103</sup> The law is merely one of many ways that individuals may attempt to settle their problems. The law enters only as a third party to the conflict between these private parties.

However, when the parties in a case are an institution and the class it has created, then the adjudication problem facing a judge is as much a political problem as a problem of dispute resolution. In class action suits the named plaintiff is merely a representative member of an aggrieved group. Class action suits explicitly recognize that institutional actions create a pattern of treatment of a group of individuals. From the earliest use of this type of suit, the interest which constitutes the group of litigants has been something like their social status, something which was not understood to be a feature of each individual member of the group *qua* individual.<sup>104</sup>

A group of poor tenants residing in a public housing project may be said to have similar economic status, defined by their dependence on the public housing authority, which creates problems of status rather than of rights for them as a group. By

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101. Because the poor often face institutions as legal opponents, their problems are more difficult to solve than those raised in a non-poor person's disputes, which are usually private. See Stumpf, *supra* note 5, at 721. In addition, the lawyer may spend up to five times as much effort to solve a poor person's problem because of cultural and educational differences between lawyer and client. See *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1399 (1981) [hereinafter cited as *Developments*], citing Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 U. DET. J. URB. L. 217, 220 (1969).

102. See 7 C.F.R. § 273.9(a)(2) (1983).

103. See Breger, *supra* note 16, at 287–88; Chayes, *supra* note 71, at 1282–83. Professors Fiss and Chayes have definitively explicated the differences between a dispute resolution model and a broader model to which we refer, which Fiss denominates the structural reform model. See generally Fiss, *supra* note 71, at 2, 17–28.

104. The legal historian Stephen Yeazell contends that “[s]eventeenth century group litigation is not about the legal rights of aggrieved individuals but about the incidents of status flowing from membership in an agricultural community not yet part of a market economy.” Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 871 (1977). Yeazell argues further that contemporary class actions neither deal with, nor concern, these clearly demarcated social classes but deal with groups of individuals bound together only by one common interest, normally established by contractual rights, such as all those who buy Pintos and receive the express warranty of safety. *Id.* at 894–96; see also Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514, 517–20 (1980).

contrast, when litigation is brought in behalf of all antibiotic purchasers, they are regarded as a class only for convenience; they could be viewed as individuals with similar problems without any loss of conceptual understanding of their legal problems. Yet, the class designation of the members of the public housing project is not merely one which originates in convenience.

The welfare official or public housing administrator does not promulgate a regulation or take action based on information about its effects on each and every poor person within the ambit of a program. Rather the official weighs considerations of the poor tenants as a homogeneous group against public concerns such as saving money in order to implement sweeping changes that impact on all equally. The benefits and burdens which such an official distributes are proffered in identical ways to each member of the group, based solely on his or her membership in the group of the poor, and not by individually considering whether any particular member of the group should have received those benefits and burdens. These actions violate the dictates of, or purposes behind, laws passed to aid the poor as a group. In such circumstances, only legal responses which recognize the poor as a group will sufficiently guard the interests of all members.

Class action litigation represents the most effective way to represent the interests of the group as a whole. In the public housing example, the class action, particularly under Rule 23(b)(2), will aid in establishing how the group-oriented perspective of the housing authority has visited harms on some individuals, and is likely to do so on others, because of broadened discovery and proof rules. By allowing the court to remedy not only past injuries but also contemplated injuries to members of the group, the class action device goes beyond the scope of the individual lawsuit, in which rights and remedies flow only between individual persons who have caused or suffered specific harms. In this way the class action suit can benefit poor individuals by having an impact on the chief problem facing the poor as a group: their poverty.

#### IV. THE ETHICS OF RESTRICTIONS ON CASE ACCEPTANCE AND STRATEGY DECISIONS

So far our dispute with equal access proponents has centered on issues in philosophical ethics. Now we turn to the more practical issues of professional ethics commonly faced by lawyers today. Supporters of Legal Services, as well as American Bar Association ethics officials, have maintained for some time that many limitations on what Legal Services lawyers may do for clients, such as class action restrictions, are unethical.<sup>105</sup> However, Breger and other equal access critics of LSC suggest that these restrictions are not unethical because no attorney is required to accept all cases, or to pursue all possible strategies on behalf of a client.<sup>106</sup> Thus, they

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105. See, e.g., 120 CONG. REC. 24,036 (1974); 119 CONG. REC. 20,703; 40,460; 40,760-62 (1973); cf. 119 CONG. REC. 20,738 (1973) (statement of Rep. Meeds) (legislative advocacy); 119 CONG. REC. 20,702 (1973) (statement of Rep. Abzug) (restrictions on legislative and administrative advocacy, provision of advice); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334, reprinted in 60 A.B.A. J. 1273, 1275 (1974).

106. Breger, *supra* note 16, at 311.



imply that statutory restrictions on Legal Services lawyers simply take away unnecessary, and potentially pernicious, options which private attorneys may eschew by choice.

These equal access proponents assume a model of legal ethics which we will challenge. In their model, before case acceptance, the attorney is thought to have no obligations. After he or she accepts a case, the attorney becomes merely the agent of the client, who is the principal. We will contend that the Code of Professional Responsibility supports neither of these assumptions. Instead, the Code and current professional practice imply a partnership between attorney and client in, as well as out of, Legal Services. In the partnership model, the attorney and client negotiate the parameters of their relationship, based on mutual respect for their individual interests and the obligations they may have. The LSC attorney has an important obligation of public service, which often dictates group-oriented decisions on case selection and strategy. Along with this obligation, the client's interest in preserving his or her dignity must be reflected in case acceptance and strategy decisions.

As we will argue, when these interests are negotiated fairly by lawyer and client, many of the client conflicts inherent in group representation can be resolved without violating either the lawyer's or the client's interests. This negotiation may even enhance the client's participatory rights. By contrast, we will show that congressional restrictions on group representation by LSC violate both the lawyer's obligation of public service and the client's interest in dignity.

#### A. *Two Models of the Attorney-Client Relationship*

The principal-agent model and the partnership model of the attorney-client relationship make very different assumptions about the lawyer's obligations both before and after case acceptance. In the principal-agent model, the private lawyer has unlimited freedom before he or she accepts a case, and little freedom after case acceptance, because he or she must serve only the client's interests. Because the Legal Services lawyer is government-supported, he or she loses even the freedom of choice which the private lawyer has in the case acceptance decision. By contrast, in the partnership model, both the private lawyer and the Legal Services attorney have obligations which limit their freedom in accepting cases, but they still retain some discretion not only in accepting cases, but in directing their progress.

The principal-agent model assumes that the private attorney may accept or reject cases based solely on personal interests or dislikes, or solely on the basis of who walks through the office door looking for a lawyer. This assumption may stem in part from early twentieth century constitutional theory that professionals should be allowed to practice without government interference.<sup>107</sup> Equal access proponents would contend that the Legal Services lawyer gives up these rights in selecting cases when he or she agrees to work for a government-funded law firm.<sup>108</sup> Rather than

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107. See G. GUNTHER, *supra* note 33, at 502-03, 509-19.

108. See, e.g., Breger, *supra* note 16, at 326.

having the freedom to reject a case for any reason whatsoever, the Legal Services lawyer must put aside personal beliefs, personal interests, and other obligations. Unless he or she does, the Legal Services lawyer will be subverting the statutory goal of equal access, which requires the provision of legal services based solely on the client's expressed desire for them.

According to the principal-agent model, both the private attorney and the Legal Services lawyer take on obligations to their clients when the case is accepted. At that point, they give up their freedom to make decisions and bind themselves to serve their clients' interests exclusively. At the extreme, they must pursue any legal course which the client chooses, regardless of its consequences, in order properly to represent the client.<sup>109</sup> Nonetheless, the government may impose further restrictions on Legal Services lawyers' activities because it provides the funds for these activities.<sup>110</sup>

By contrast, the partnership model views the attorney-client relationship as a negotiated and renegotiated agreement. This agreement is created from interests and obligations that arise well before case acceptance, and continue to inform strategic decisions in a case. The lawyer's and client's agreement on the scope of representation includes both the lawyer's professional obligations and personal interests and the client's interests in being respected and in controlling the goals of the litigation. Admittedly, the attorney's decision to accept the case changes the balance of interests, with the individual client's interests taking on significantly more weight. However, to suggest that the lawyer becomes merely a tool or a "hired gun" for the client at the point of case acceptance is to belie both the Code's mandates and the customs of current practice.

A glance at a typical business lawyer's relationship with his or her clients underscores the fact that in much legal practice, attorneys and their clients perceive themselves to be partners.<sup>111</sup> The experienced client rarely uses the lawyer simply as an agent to carry out instructions he or she may give. Often the client gives the lawyer free rein, subject to the client's ultimate veto, to use his or her skills to solve a problem, without questioning the cost or the methods the lawyer intends to use. For example, the lawyer is often the one who initiates proposals to acquire property or enter into business arrangements. Similarly, he or she may investigate and propose litigation or lobbying based only on a general notion of what the client would like to achieve. Since the client usually considers the attorney's opinions essential in making decisions, that client will frequently defer to the attorney when the legality of a matter is the central concern. Sophisticated clients recognize that the lawyer contributes time and talents while the client contributes money and cooperation.

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109. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, 7-2, 7-3 (1980); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 and comment (1983), *reprinted in* 52 U.S.L.W. 1, 4 (1983).

110. *See* Breger, *supra* note 16, at 310, 326.

111. G. HAZARD, ETHICS IN THE PRACTICE OF LAW 140-44 (1978); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 comment (1983), *reprinted in* 52 U.S.L.W. 1, 3 (1983); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17 (fee), 2-26 (unpopular causes) (1980).

When the attorney exceeds his or her area of expertise, however, the client will often remind the lawyer emphatically that some choices are business decisions, thereby regaining significant control in the relationship. It is also not a rare phenomenon for lawyers to “fire” clients who ask for services which go beyond legal or ethical limits, or even those that the lawyer feels ill equipped to handle or morally bound not to undertake.

Such interaction is best understood as a partnership rather than a principal-agent relationship. The attorney-client partnership may not be so transparent in Legal Services practice. However, the LSC lawyer also often explores alternatives with only a sketchy idea of the client’s goals. The LSC client frequently expects such independent initiative from his or her attorney for precisely the same reason the business client relies on his or her attorney to suggest opportunities or solutions for problems. Both recognize that the resolution of the legal aspects of their problems may be central to resolving the problems themselves. Both respect the lawyer’s skills at analyzing the client’s goals and proposing efficient, appropriate solutions. Yet the participation of clients in gathering facts and taking action is critical in both contexts: without the client’s help, a resolution of the legal problem is unlikely. In addition, just as the business client retains the right to make the ultimate decision about the course of action to be taken, so the Legal Services client has the final choice of options to be pursued to solve his or her legal problem.

Equal access proponents often intimate that private clients who believe that their attorneys are intruding on “business decisions” hold the power of the purse as an ultimate check on their attorneys’ actions. By contrast, they would argue that Legal Services clients have no way to stop their lawyers if the lawyers file class actions over their protest or lobby against their wishes. Equal access proponents ignore the fact that LSC clients may file grievances against their lawyers.<sup>112</sup> They similarly fail to consider professional oversight from supervisors, project directors, and disciplinary commissions, as well as both political oversight from local Legal Services boards<sup>113</sup> and legal oversight from courts. These safeguards provide deterrents to overreaching as powerful as the purse.

In our view, all lawyers must have respect for clients’ interests, but all lawyers also have personal interests in maintaining some control over the attorney-client relationship. The private lawyer must reject some cases in order to develop and diversify his or her skills. Similarly, the LSC lawyer must be able to reject some persistent clients with only simple legal problems if he or she is to become a first-class litigator.<sup>114</sup> For instance, the lawyer may never learn how to litigate properly a child custody case, where the client’s interest is substantial, if he or she concentrates exclusively on delaying evictions briefly for all of the tenants behind in their rent who

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112. See 45 C.F.R. pt. 1621 (1983).

113. See, e.g., 42 U.S.C. § 2996f(a)(7), (c) (1976 & Supp. V 1981).

114. See Bellow, *supra* note 13, at 118.

seek help with their cases. The interest in diverse case selection and control is not just a matter of personal development; it is essential if the lawyer is to meet his or her obligations under the Code of Professional Responsibility.

### B. *The Lawyer's Interests*

Beyond the personal interests of both Legal Services and private lawyers, all attorneys have affirmative and prohibitory ethical obligations<sup>115</sup> to the public in addition to those owed to individual clients. Most lawyers recognize as an integral part of their case selection and preparation process the significance of prohibitory ethical obligations. For instance, reputable attorneys do not take cases which require them to violate the law to achieve their client's goals or pursue cases in which the client demands that they suborn perjury or harass opponents with unfounded discovery and motions.<sup>116</sup> However, the Code's affirmative obligations to act in the public interest are often neglected. These obligations, which include the obligations to improve the legal system, to provide legal education to the public, and to make legal services widely available, must necessarily play a part in case selection and strategy if the Code is to be followed. Because of the scarcity of resources in the Legal Services context, such obligations often dictate group-oriented decisions on case selection and strategy.

In 1955, the Joint Conference on Professional Responsibility described the legal professions's highest obligation as one to "procedures and institutions. . . . [It is] a trusteeship for the integrity of those fundamental processes of government and self-government which enable society to function."<sup>117</sup> That paramount obligation to the institution of law, rather than specific obligations to individual clients, is embodied in the Code of Professional Responsibility's prescription that the lawyer "should participate in proposing and supporting legislation and programs to improve the [legal] system, without regard to the general interests or desires of clients or former clients."<sup>118</sup> Lawyers must oppose any law, substantive or procedural, which "contributes to an unjust result,"<sup>119</sup> and support those changes that are "in the public

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115. In referring to affirmative and prohibitory obligations, we do not distinguish the aspirational from the mandatory as does the Code. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1980). Rather, those obligations, whether or not the subject of disciplinary action, which require the lawyer to act are distinguished from those which prohibit action. The Model Rules of Professional Conduct acknowledge explicitly that many of the affirmative obligations of lawyers, such as the obligation to provide *pro bono* services, are imperative and not subject to the discretion of the attorney, even though they may not be proper subjects of discipline. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT preamble, Rule 6.1 comment (1983), reprinted in 52 U.S.L.W. 1, 1-2, 23 (1983).

116. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4)-(6); 2-103(E); 7-102(A)(1), (2), (4), (7), (8) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1, 3.3(a)(4), 3.4(b), (d) (1983), reprinted in 52 U.S.L.W. 1, 17-18 (1983).

117. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958) [hereinafter cited as *Joint Conference Report*]. The responsibility of public service is conjoined with the obligation to make legal services available.

118. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (1980) (footnote omitted); but see MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983), reprinted in 52 U.S.L.W. 1, 23 (1983), narrowing the scope of this consideration to provision of, or support for, *pro bono* services or "service in activities for improving the law, the legal system or the legal profession."

119. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-2 (1980).

interest."<sup>120</sup> The Model Rules of Professional Conduct, though more narrowly focused, continue the obligation to render public interest legal service, that is, *pro bono* legal services or assistance in "improving the law, the legal system or the legal profession."<sup>121</sup> The obligation to improve the law entails the same commitment as any other moral precept. Rather than erasing the lawyer's moral sensibilities and his or her beliefs about what is just, as the equal access approach suggests, the obligation to improve the law requires the lawyer to exercise good professional judgment. The lawyer must make hard choices and must commit himself or herself to a position on the fairness of a law or procedure, rather than hiding behind a client's wishes or interests.

The Legal Services lawyer is not exempt from these obligations to improve specific laws, the legal system, or the profession. By virtue of the special nature of his or her practice, the LSC lawyer is often in the peculiar position of witnessing the most compelling instances of arbitrary mistreatment by government. Ironically, this mistreatment may result from good legislative intentions gone awry.<sup>122</sup> The Legal Services lawyer often works with clients who need help coping with onerous welfare reporting or workfare requirements ostensibly adopted to ensure that the poorest receive help or to improve the dignity of their lives. The LSC lawyer often represents those burdened by landlord-tenant laws which have become inequitable in present-day economic circumstances. Just as frequently, however, the Legal Services lawyer encounters one of the fundamental paradoxes of government under law—the illegal operations of legally constituted government agencies.<sup>123</sup> Legal Services lawyers routinely oppose welfare departments that refuse to obey laws requiring prompt provision of benefits and housing authorities which neglect their statutory duties to repair public housing units.

The Legal Services lawyer sees perhaps the most significant harms that government can inflict on human beings—deprivation of their means of life as well as injury to their self-respect. It would be odd to prevent the LSC lawyer from deciding that a law is unjust and acting on that decision, while at the same time compelling private lawyers to seek improvement in the law. These disparate requirements would be particularly incongruous in light of the Legal Services lawyer's statutory responsibilities. Unlike the private lawyer's ethical obligation to the public at large, the LSC statute focuses the Legal Services lawyer's ethical obligations specifically on the poor. It obligates the lawyer to fulfill the statute's goals of improving the opportunities of the poor and of strengthening their faith in the legal system.

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120. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-4 (1980).

121. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983), *reprinted in* 52 U.S.L.W. 1, 23 (1983).

122. See Stumpf, *supra* note 5, at 723-24. Perhaps the most poignant recent example is the Aid to Families with Dependent Children (AFDC) provisions of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981) (AFDC provisions codified in scattered sections of 42 U.S.C.). These provisions were touted in part for their emphasis on getting people off welfare rolls and putting them to work to increase their self-respect. Actually, they had the effect of encouraging the marginally employed to quit jobs to retain service benefits accompanying AFDC, such as Medicaid, or because AFDC benefits were higher than the net gain from working. See Comment, *The 1981 AFDC Amendments: Rhetoric and Reality*, 8 U. DAYTON L. REV. 81, 87 n.34, 91-92 (1982).

123. See Bellow, *supra* note 13, at 121; Denvir, *supra* note 55, at 1135; Stumpf, *supra* note 5, at 723 (quoting P. WALD, LAW AND POVERTY: 1965, at 30-31 (1965), on welfare abuses of discretion).

The second public obligation which affects case selection and strategy decision is the lawyer's obligation to educate the public. The lawyer is obligated to improve the public's understanding of the legal process and of its own legal rights.<sup>124</sup> The lawyer must fulfill this obligation either through community legal education meetings or private discussions in which the lawyer exposes unrecognized legal problems of those whom he or she encounters. In many respects the Code anticipates that the public will be treated as a client. It is true that the lawyer is forbidden to use legal education sessions to solicit clients for personal gain.<sup>125</sup> However, the lawyer's obligations to provide competent advice and to suggest appropriate solutions to members of the public parallel his or her obligations to accepted clients.<sup>126</sup>

The obligation to provide legal education and advice is generally ignored by private lawyers. When Legal Services staff members attempt to remedy the legal ignorance of their clients by conducting the educational sessions suggested by the statute, they are often accused of being "ideological ambulance-chasers."<sup>127</sup> Part of the neglect and mistrust of these community education efforts may stem from the fact that lawyers and those who have used lawyers in the past assume that people with legal problems know how to find a lawyer. Yet studies confirm that many middle- and low-income people simply have too little information or do not possess the skills to recognize when they need a lawyer.<sup>128</sup> In addition, their shared distrust of lawyers often prevents these people from seeking legal advice<sup>129</sup> unless it is brought to them in a personal, non-threatening way, such as through a community meeting. These realities suggest that all lawyers, including Legal Services attorneys, must not wait to see who walks through their doors, but must seek out those traditionally underserved by the profession in order to help them discover their legal problems and find appropriate solutions. Those handicapped in their ability to find lawyers because of mental, physical, linguistic, transportation or financial limitations deserve special attention from the legal profession if equal access is really to be achieved.<sup>130</sup>

A third public obligation of lawyers is to make services available to all those needing legal assistance.<sup>131</sup> As we have suggested, the profession allows lawyers great latitude in shaping their practices according to their own skills and interests. Yet the ethics of the profession do not contemplate, as equal access proponents suggest, that the private lawyer may simply turn his or her back on a case for any reason whatsoever.<sup>132</sup> Rather, the Code underlines the lawyer's obligation to ensure in-

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124. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1, 2-2 (1980).

125. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-3, DR 2-104; MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983), reprinted in 52 U.S.L.W. 1, 24 (1983).

126. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1, 2-2 & n.4 (1980); cf. EC 2-5 & n.10 (discussing general solutions in public fora prohibited when individual facts may vary).

127. Ronald Reagan, quoted in S.F. Chron., Apr. 28, 1971, at 1, col. 4, 20, col. 6, quoted in Falk & Pollak, *supra* note 12, at 615; see also 127 CONG. REC. H3016 (daily ed. June 17, 1981) (statement of Rep. Collins).

128. SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS, AMERICAN BAR ASS'N, FINAL REPORT 53-54 (1978).

129. *Id.* at 55; *Developments*, *supra* note 101, at 1402 n.32.

130. See 42 U.S.C. § 2996f(a)(2)(C) (Supp. V 1981); Wexler, *supra* note 22, at 1055; *infra* note 145 and accompanying text.

131. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 6.1, 6.2 (1983), reprinted in 52 U.S.L.W. 1, 23 (1983).

132. See Breger, *supra* note 16, at 311, 326-28; Kettleleson, *supra* note 68, at 112 & n.2.

dividuals equal access to the legal system by insisting that lawyers not decline employment lightly or for personal reasons.<sup>133</sup> Similarly, the Model Rules of Professional Conduct require acceptance of the very kinds of cases that the lawyer might be most inclined to reject: those in which the client is unable to pay a fee or those involving unpopular clients or causes which might adversely affect the lawyer's relationship with judges, members of the bar, and important public figures.<sup>134</sup> While each lawyer is not expected to take all indigent clients or unpopular causes with which he or she is confronted, the mere facts of a client's indigency or unpopularity are not grounds to decline representation, absent compelling considerations such as the lawyer's inability to represent that client properly.<sup>135</sup>

Admittedly, the obligation to accept indigent, unpopular, or repugnant clients is often not respected in practice. Yet it remains an established, significant element of both the Code and the new Model Rules. By arguing that private lawyers, unlike Legal Services lawyers, may decline cases for any reason, equal access proponents do violence to what the Code and the LSC statute seek to achieve—response to all needs for legal assistance regardless of who is paying the bill. Moreover, by suggesting that the Legal Services lawyer may not exercise his or her judgment in accepting cases, equal access proponents frustrate their own purpose of making equal access available to all.

The Legal Services case selection process represents a particularly appropriate way for the Legal Services lawyer to fulfill his or her obligation to improve the law, to educate the public, and to make legal services available. The LSC statute not only stresses the need to ensure equal access to the justice system, as equal access proponents seem to claim. It also suggests that Legal Services programs serve worthy utilitarian purposes—the promotion of justice and the improvement of the status of the poor.<sup>136</sup> These statutory goals cannot be met unless clients are educated to know their rights and both clients and attorneys work together for changes in the law that will improve poor people's opportunities. Thus, rather than counseling abstinence in judging the fairness of the laws which affect clients' cases, the statutory goals suggest that the LSC lawyer must make reasoned evaluations of these cases and their potential for improving the law.

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133. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26, 2-27, 2-28, 2-29 (1980) (prohibiting refusal of a case because the client is unable to pay or the cause is unpopular). Other Legal Services restrictions, such as the proposed ban on representation in gay and lesbian rights cases and provision of abortion advice, have been criticized as unethical for this reason. See 127 CONG. REC. H3075, 3090 (daily ed. June 18, 1981) (statement of Rep. Leach). The obligation not to refuse a case because the client or cause poses particular problems for the public interest lawyer who operates within a corporation or association formed to meet particular legal needs. See Bellow & Kettleston, *supra* note 75, at 343-53. (1983); see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25, 2-27, 2-28 (1980).

134. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 and comments (1983), reprinted in 52 U.S.L.W. 1, 23 (1983); see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25, 2-27, 2-28 (1980).

135. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 and comments (1983), reprinted in 52 U.S.L.W. 1, 23 (1983). This inability might result from an unreasonable financial burden imposed by the case, the client's cause being so repugnant that it is likely "to impair the lawyer's ability to represent the client," conflicts of interest, or incompetency. *But see* Breger, *supra* note 16, at 322.

136. 42 U.S.C. § 2996(1), (3) (1976 & Supp. V 1981). Among the statute's stated purposes is that Legal Services will help to improve opportunities for the poor, among which Congress originally included opportunities for education, training, work, and a life "live[d] in decency and dignity." See Declaration of Purpose, Economic Opportunity Act, Pub. L. No. 88-452, § 2, 78 Stat. 508, 508 (repealed 1981).

Moreover, the case selection process meets the attorney's need to fulfill public obligations for practical reasons as well. Statutory restrictions on LSC especially hamper the Legal Services lawyer's ability to fulfill the obligation to improve the law. The private attorney may be able to juggle these obligations by devoting some time to unpopular clients and other time to trying to change unjust laws by serving on bar or legislative committees or by working for candidates who support change. By contrast, the Legal Services lawyer is prohibited from significant participation in partisan politics and from spending working hours lobbying for legal change, unless it is on behalf of a specific client in narrowly defined circumstances.<sup>137</sup>

Arguably, the lawyer may pursue some of these obligations after hours. However, even if legislators could be persuaded to reschedule sessions, this kind of lobbying would require most Legal Services lawyers to make hard choices since much after-hours time is spent on behalf of additional clients whom the program might not otherwise serve. Moreover, the very position which lends credibility to the lawyer's views, his or her experiences as a Legal Services lawyer, is that to which the statute forbids the LSC lawyer to refer in any lobbying efforts. If the Legal Services lawyer is thus essentially precluded from seeking improvement in the law outside of his or her work, the case for allowing time to integrate that obligation into his or her job becomes strong, particularly when case acceptance decisions involve the very illegalities the lawyer would otherwise attempt to remedy.

The obligations to improve the law and to make legal services available often suggest only one avenue: accepting the case which can affect a class of poor people as opposed to an individual poor person. In a world of scarce legal resources, group impact litigation may be the only way to provide adequate relief not only to clients who apply for services, but also to those served informally through education and advice. As we have previously demonstrated, even those committed to serving only individual clients who request help must recognize that filing a class action often provides that client with the most competent, zealous representation. When additional demands of client groups and the legal system are figured into the case acceptance procedure, the use of the class action may often be necessary to assure the most comprehensive impact on behalf of all interests.

Cases in which class litigation, rather than the purely individual orientation of the equal access model, is the only means to fulfill public obligations are not hard to find in Legal Services work. For instance, many states have general assistance or poor relief programs which meet the ongoing basic needs of both the chronically poor as well as those temporarily in need who are not covered by federal aid programs, for example, unemployed, uninsured, unskilled persons without children.<sup>138</sup> Some of these programs include work relief requirements, ostensibly designed to add some

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137. 42 U.S.C. § 2996c(e) (1976 & Supp. V 1981) (politics); *see id.* § 2996f(a)(5) (Supp. V 1981) (prohibiting lobbying except where necessary in representing clients or on legislative request through formal channels); *Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (unsuccessful challenge to political restrictions); Gest, *supra* note 1, at 67.

138. *See Rosenberg, Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND. L. REV. 385, 387 (1973).



dignity to the process of seeking public aid and to improve the marketable skills of the recipients. Actually, these statutes are often administered by local officials using subjective standards which make it difficult for the temporarily and permanently poor to obtain benefits.<sup>139</sup> Poor relief officers often look for reasons to reject applicants to save money, using the work requirement to discourage applicants. For example, poor people may be required to prove they are looking for work by getting numerous statements from potential employers denying them jobs. Yet they are not provided help in obtaining transportation and clothing necessary for job hunting. They may also be harassed about being lazy and unwilling to work, or asked to pay partially for assistance through jobs, such as polishing courthouse doorknobs, that provide them no skills for future employment.

If an applicant tells the Legal Services lawyer he or she was denied aid because of an unwritten work requirement, the equal access view would limit the Legal Services lawyer to negotiating with the poor relief officer or filing for judicial review<sup>140</sup> for benefits due the client in the month he or she was denied help. Because of the nature of the right infringed, the court will seldom order a remedy which will protect that individual or others experiencing the effects of the same policy in the future. Moreover, the lawyer will have no real way to stop future harassment.

If, on the other hand, the Legal Services lawyer takes seriously the duty to improve the law and make legal services available, the information obtained in representing other clients, as well as research into systemic defects, will be used in deciding whether to take the case and how to pursue it. Such broadened inquiry may uncover defects in the local officer's financing system which are contributing to the denial of assistance, or harassment which has not been sufficient to make a legal challenge in any individual case worthwhile. The lawyer may use knowledge obtained in cases that were mooted when clients received jobs or other benefits. Information from clients unwilling to file suit because they fear retaliatory deprivation of their benefits or court proceedings, or publicity about their poverty may also aid in the decision about case acceptance and strategy. This broad-based approach may cause the lawyer to bring injured clients together to seek publicity or to protest to higher officials. It may suggest that the lawyer seek changes in the financing system or staff training which give rise to abusive treatment. If the lawyer approaches the problem on behalf of all of these clients through group impact litigation or a class action, the clients may receive more enduring, comprehensive relief than they could have obtained individually. The attorney will also have fulfilled both his or her obligation to rectify injustices in the benefit allocation system and obligations to specific clients. The class suit, unlike the individual appeal, provides the vehicle for more broad-based remedies attacking the causes, and not just the symptoms, of the clients' injuries.

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139. See *id.* at 391, 402-03, 417-18; see also Denvir, *Controlling Welfare Bureaucracy: A Dynamic Approach*, 50 NOTRE DAME LAW. 457 (1975) (documenting similar problems in other welfare programs).

140. See Rosenberg, *supra* note 138, at 393.

Statutory restrictions which limit the scope of relief that the Legal Services lawyer may seek obviously interfere with the fulfillment of these public obligations, especially when the obligations point toward group solutions to a classwide problem. If the Legal Services lawyer must seek an alternative which provides more limited relief, his or her fulfillment of one of these obligations must suffer. Of course, equal access proponents might justify limits on these obligations out of respect for the dignity and interests of clients.

### C. *The Client's Interests*

Lawyers who are selecting cases and deciding strategy must carefully consider both the client's interests and the lawyer's. Equal access proponents translate concern for client interests into a blanket rule that all client/applicant demands for service must be fulfilled without question until resources are exhausted, subject only to a few minor exceptions. In formulating this rule, they make two mistakes about the client/applicant's role in case selection. First, they assume that the client/applicant is the person who walks through the door to request services.<sup>141</sup> But LSC client/applicants include not only those who apply for services, but also those poor people who need legal services although they have not specifically requested them. Any restrictions on case selection unfairly limit the provision of services to this latter group and do not necessarily help those client/applicants who actually seek services.

Equal access critics make a second mistake by assuming the client/applicant's wishes must be fulfilled unquestioningly if he or she is to be given the respect due him or her. The client/applicant's right to dignified treatment mandates that he or she be fully informed and given the right to participate meaningfully in case selection and strategy decisions, not necessarily that he or she be given ultimate freedom to decide that his or her case will be selected. The client's right to meaningful participation can be accommodated in the partnership model, even in the class action situation, by negotiating an agreement that provides the client an even greater opportunity for meaningful citizenship.<sup>142</sup> In contrast, statutory restrictions deny the client both the right to be heard and the right to the other protections the Code offers: the right to the lawyer's independent judgment, and to zealous, competent representation.

#### 1. *Who Is the Client?*

When equal access proponents criticize Legal Services lawyers for group-oriented case decisions, they usually assume that these lawyers should attend only to the interests of those who have sought their services. The contention that group-oriented decisions are irrelevant and even counterproductive to the client's in-

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141. See, e.g., Breger, *supra* note 16, at 336-40.

142. In arguing for meaningful citizenship, we adopt Professor Karst's formulation in his discussion of the right of equal citizenship based on the philosophy and structure of the fourteenth amendment to the United States Constitution. That right, Karst suggests, encompasses three intertwined values: the value of participation in the processes of government and the moral decisionmaking of the community; the value of equal respect; and the value of responsibility for the members of the democratic community. See Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-9 (1977).

terests<sup>143</sup> takes on more meaning if the LSC statute can be construed to benefit only those who come through the door of the Legal Services office. In some cases affecting a number of poor people, such as utility shutoffs in public housing, only a few poor tenants will know to seek legal advice, and their interests can be served efficiently through the joinder device. In other areas, ignorance, mistrust, handicaps, geographical maldistribution of services, and community and even poor people's attitudes toward seeking government assistance ensure that some legal problems of the poor will rarely be brought to the Legal Services office. Thus, when welfare programs are particularly abusive and threatening to recipients, transportation is difficult, and recipients are ashamed of being poor, only a very small number of those affected by the policy will dare to challenge it.

If clients are only those who apply for service, the Legal Services office can quite easily meet the equal access goal of providing services to all who request them simply by increasing access barriers. Legal Services offices, using the equal access rationale to defend their failure to add branch offices, to increase outreach, or even to provide enough telephone lines so that client/applicants can communicate with intake personnel,<sup>144</sup> could argue that they are serving as many clients as possible with their resources. To inform others who have legal problems about the availability of services and allow them access would be to require the Legal Services program to make unnecessary choices about who should get services.

The LSC statute does not support such a narrow conception of who the Legal Services client is. The statute shows special concern for those persons who may not be able to come to the office. For instance, Congress specifically required LSC to determine whether traditionally underserved groups, for example, veterans, native Americans, migrants, rural poor, and language-disadvantaged minorities need special attention in the provision of services.<sup>145</sup> It also required local programs to set priorities with due consideration for special access problems. Furthermore, it mandated that poor people's needs for outreach, training, and support services be included in the allocation of legal services.<sup>146</sup> In the past few years, before survival became its main concern, LSC made the problem of access a major priority. It has devoted special resources to minority groups within the poverty community, funded backup programs to address special legal problems, placed major emphasis on achieving "minimum access" for all the poor in its funding requests to Congress, and spent considerable money on studying the access problems of the disadvantaged groups targeted by Congress and others.<sup>147</sup> These efforts underscore a broader understanding of who the client is than the equal access conception will admit.

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143. See, e.g., Breger, *supra* note 16, at 295-96, 351-52.

144. Some offices have employed similar procedures to limit their intake, including instituting waiting periods and changing office locations. See, e.g., *id.* at 303.

145. Pub. L. No. 95-222, § 15, 91 Stat. 1619, 1623 (1977) (not codified).

146. 42 U.S.C. § 2996f(a)(2)(C)(ii) (Supp. V 1981).

147. See, e.g., GENERAL ACCOUNTING OFFICE, FREE LEGAL SERVICE FOR THE POOR—INCREASED COORDINATION, COMMUNITY LEGAL EDUCATION AND OUTREACH NEEDED, H.R. DOC. NO. 78-164, 95th Cong., 2d Sess. (1978); S. HERR, THE NEW CLIENTS: LEGAL SERVICES FOR MENTALLY RETARDED PERSONS (1979); LEGAL SERVICES CORPORATION, OVERVIEW OF § 1007(h): SUMMARY OF CONCLUSIONS, RECOMMENDATIONS AND METHODOLOGY (1979); LEGAL SERVICES CORPORATION, DELIVERY SYSTEMS STUDY: A RESEARCH PROJECT ON THE DELIVERY OF LEGAL SERVICES TO THE POOR (1977).

Breger responds by claiming that the obligation to reach beyond those who seek legal services extends only to providing knowledge about the availability of legal services to other poor people.<sup>148</sup> Assuming that this knowledge makes it possible for all eligible persons to apply for legal services, it seems unnecessary for the program to make choices about which cases can best protect the rights of those who have not applied. Group-oriented strategies, according to Breger, denigrate the rights to dignified treatment of those who *have* applied.

There are three possible responses to the contention that the only permissible way of attacking uneven demand for legal services is through outreach and support services. First, the LSC statute does not support this position. The statute specifically requires programs to evaluate the nature of the special legal problems of various groups in deciding how services will be allocated.<sup>149</sup> While the statute does not include criteria for deciding which cases are more important to the poor or which groups' cases should be considered more significant, it does require local programs to make these determinations as part of their case selection procedures.

Second, the outreach and support approach still requires the program to make major value choices because of the scarcity of program funds. The economist's world, in which everyone with equal knowledge is presumed capable of expressing his or her desire for a good, assumes that such knowledge is free. Yet each dollar spent in informing potential clients of available Legal Services is a dollar taken away from direct representation of applicants. If completely adequate outreach and support services were to be provided to all client groups, programs might have no money to pay attorneys to represent such persons once they gained access. Moreover, given the variety of barriers which inhibit the poor from seeking legal services, and the extent of our ignorance about how to overcome them, the goal of providing all of the poor with truly equal access to legal representation remains as elusive as providing them with equal access to the courts. Accordingly, it is unfair to deny those poor people who cannot obtain access to Legal Services the same legal protections as those available to individuals with precisely the same legal problems who do gain access. If the Legal Services lawyer makes allocation decisions without considering the interests of those who do not come for assistance, these people are denied access in the same way that the program without outreach services denies access. Similarly, by denying Legal Services clients and lawyers the right to file class actions or restricting their abilities to represent groups, equal access proponents preclude those who cannot achieve access to the Legal Services program from any legal relief.

Third, the random approach to allocation of legal services, which relies on the client to seek representation but prevents group case selection considerations from being used in allocating services, often serves no purpose for the client who does gain access to the system. Provision of services to those who seek them on a random basis excludes those poor persons who are to be protected according to the LSC statute. However, as we have previously argued, group-oriented case selection procedures

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148. Breger, *supra* note 16, at 336-40.

149. 42 U.S.C. § 2996f(a)(2)(C)(i) (Supp. V 1981); *see also* 45 C.F.R. § 1620.2(b)(2) (1983).

help these people *and* do not necessarily harm those clients who in fact seek services. Often, the client's individual interests will be better served by a class action or group approach to a problem, merely because of the increased clout, public attention, and broadened possibilities for relief which attend such actions. Restricting group-oriented action thus harms those individual applicants who can benefit from such action, as well as those who do not apply.

No less than the private attorney, the Legal Services lawyer has obligations to poor persons who do not seek services at the office. Admittedly, an individual applicant's wishes for service may at times conflict with the group's demands: in the case we previously discussed, representing the group wishing to challenge utility policies will result in denial of some service to the divorce client. The question then becomes whether, even given the lawyer's public obligations and responsibility to those client/applicants who do not obtain Legal Services representation, any one applicant has interests in individual dignity which override the interests of those who do not seek service. We next argue that the client's interest in individual dignity does not require that he or she be given a veto in the case selection procedure, although his or her interests must be seriously considered.

## 2. *The Partnership Model*

The equal access position assumes, on one interpretation, that the client/applicant must be provided individual legal services without any evaluation of his or her case or its potential impact on the poor as a whole if the client/applicant's right to individual dignity is to be protected.<sup>150</sup> In contrast, we suggest that the client has a right to full information and free participation in case selection and strategy decisions. The paramount ingredient of the right to participate is the right of the individual client to be heard concerning the special circumstances of his or her case. This right can be accommodated within the attorney-client relationship, even in the class action context, if the lawyer adheres to his or her ethical obligations.

The initial prerequisite to preserving client dignity in the lawyering process is client enlightenment. The attorney, as advisor, must provide the client with a full understanding of the legal framework and use predictive skills and his or her moral perspective<sup>151</sup> to inform the client's understanding of his or her actions and their consequences. In the case selection process a right to full information implies standards governing case selection, and the staff and community interests on which they are based. The knowledge provided by the attorney is fundamental to the exercise of the client's rights of participation and of choice safeguarded by the Code. Without appropriate counseling, consent to a proposed strategy cannot be informed.<sup>152</sup>

However, the client's newly acquired knowledge is valueless if the client cannot

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150. See, e.g., Breger, *supra* note 16, at 295-97, 307-08, 349-52.

151. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 and comment (1983), *reprinted in* 52 U.S.L.W. 1, 15 (1983).

152. See generally Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 72-123 (1979).

participate both in case selection and case control. The partnership model of the lawyer-client relationship requires not that the lawyer protect just his or her own interests, but that all relevant facts and the client's values be considered. The client must be fully heard, and his or her wishes must be carefully considered. The Legal Services attorney may have to be exceptionally careful to encourage the low-income client to express concerns. Otherwise, the client's fears may preclude his or her participation as a partner in the case.

A Legal Services program which does not recognize the client's right to participate may violate the client's individual dignity at any stage in the proceeding. The case selection committee which uses arbitrary criteria for selecting cases—for instance, refusing assistance to all divorce applicants without children, regardless of the facts—can deny the client/applicant's right to be heard. Such standards, though useful guidelines, should not close off the client/applicant's right to plead the special circumstances of his or her case. Similarly, in choosing criteria for case selection, the Legal Services program must give due consideration to client concerns. Since the best option, allowing client/applicants competing for service to participate with lawyers in making case allocation decisions, is not practical,<sup>153</sup> the advice of clients during priority-setting and at local board meetings deserves serious attention.

A Legal Services program can undercut the client's right to participate in strategy decisions by failing to heed the client. The attorney may stereotype the client's problem, believing that a simple solution can suffice. As a result, more crucial problems may be buried by the attorney's haste to solve the problem which is most familiar.<sup>154</sup> Similarly, if the attorney uses inappropriate strategies in handling the case, the client will lose trust in the attorney and revert to the familiar pauper's role—obeying orders instead of giving them, being acted on rather than acting on his or her own behalf.

Unless the right to participate is kept firmly in the minds of both attorney and client, the gap between their values and lifestyles might frustrate the client's partnership role by imposing false goals on the process of solving the client's problem. For instance, the Legal Services lawyer who represents a client in a neglect proceeding may become frustrated when the client does not "obey orders" about finding a job, securing a stable home, and, in some areas, conforming to a social conduct that is morally acceptable to the welfare department and the courts. The attorney may believe that the solution is to make the client see that his or her primary interest is in getting his or her children back and that the client should regulate his or her behavior accordingly. By ignoring whether return of his or her children is most important in

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153. It would be impossible for all affected clients to meet on allocation decisions since the clients span great geographical distances and request services over long periods of time. Moreover, they would have to be educated about the magnitude of other clients' problems and the relief potentially available to each. It is also not clear that they, any more than the non-poor, hold values that favor another person's greater interest above their own, even when this preference maximizes the interests of all.

154. See, e.g., Bellow, *supra* note 13, at 108. Bellow documents that legal aid lawyers often impose their views of the problem and solution, pursue only those problems known to be legal problems by the clients, and talk clients into settling cases because of lack of time and experience, as well as pressure from legal peers. See also Hosticka, *supra* note 13, at 607-08.

the client's hierarchy of desires and by disregarding the client's willingness to compromise to get immediate results, the lawyer preempts the client's role in the partnership. True, without attorney participation, the partnership loses the benefit of the lawyer's often accurate understanding of the norms of the court or of the agency which will decide the client's case. However, without client participation, the partnership loses the knowledge of the client's wishes and of his or her willingness to take risks or to cooperate in order to realize those wishes.

In class action litigation, the need to preserve the partnership balance is even more crucial. Most often the lawyer will have to raise the question of the class suit because the client is unaware of its function or potential result. Often, the lawyer may need to persuade the client that the client's chosen solution, which may involve individual action, does not adequately protect his or her interests in the long run. Yet such persuasion may be interpreted by the client to mean that his or her case will not be handled if he or she does not consent to represent a class. The lawyer must then walk a fine line between persuasion that will provide the client with an informed perspective and influence that might coerce the client to adopt the lawyer's preferred strategy at the expense of the client's own desires and interests.

Nevertheless, if truly equal negotiation and compromise can be achieved through the partnership model, attorney and client can agree when the case is accepted about who will be represented. This agreement can reflect both the lawyer's public obligations and the client's right to dignified free choice. While a freely reached agreement requires particular foresight by the attorney who must map out and explain the potential direction of the case, it is achievable. To the extent that the attorney sees divergences between the client's immediate desires and those of the broader group that he or she may seek to represent, the lawyer must discuss that divergence with the client and reach some mutual understanding about the implications of that divergence on both the identity of the "client" and possible remedies.

If an agreement can be reached, however, some of the potential conflicts between attorney, client, and class, which proponents of class action restrictions anticipate, can be removed when the case is accepted.<sup>155</sup> A client who has been completely informed about the consequences of a case decision, and has participated freely in it has truly accepted the fiduciary role under Rule 23 as the class representative,<sup>156</sup> and is bound by his or her obligation of loyalty and care to class

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155. This is not to suggest that the conflicts that occur in a class case are always so simply resolved. Often, serious disagreements between attorney and named plaintiff, or among class members, will reflect divergence in class interests and class desires. See, e.g., Dixon, *Representation Values and Reapportionment Practice: The Eschatology of "One-Man, One-Vote"* in NOMOS X: REPRESENTATION 167-83 (1968); Rhode, *supra* note 97, at 1183-86; see also MANUAL FOR COMPLEX LITIGATION § 1.42 (1982) (obligation of court to identify separate groups with conflicting interests and provide appropriate representation); *Developments, supra* note 101, at 1453; Comment, *Factors Considered in Determining the Fairness of a Settlement*, 68 Nw. U.L. REV. 1146, 1152 (1974).

156. This obligation adequately to represent the class emanates from due process rights of absent class members. See *Hansberry v. Lee*, 311 U.S. 32, 42-45 (1940); *Continental Ill. Nat'l Bank & Trust Co. v. John Mohr & Sons, No. 80-C-2642* (N.D. Ill. June 25, 1980) (available on LEXIS, Genfed library, Dist file); see also *Bogges v. Hogan*, 410 F. Supp. 447, 448 (N.D. Ill. 1976).

members. Such a partnership approach will avoid many of the class conflicts which have arisen in settings other than Legal Services.<sup>157</sup> The agreed objectives will remind the client that he or she has relinquished some freedom to assure that his or her own interests will be served. Moreover, both client and attorney will have agreed at the outset that the attorney's obligation is not only to the individual but to the client, that is, the class.<sup>158</sup>

Thus conceived, class litigation implies a broader partnership for the benefit of other poor people. The class representative invites the scrutiny of the court and the lawyer, both of whom must determine that the litigation protects those class members whose absence makes them vulnerable because they are not even heard. The private communication within the attorney-client relationship becomes a decisionmaking dialogue among all those entrusted with the class members' interests. In that process, as in the attorney-client relationship, decisions are reached not by fiat but by compromise, based on a realistic assessment of the case. The communication between the court, the plaintiff's attorney, and the named or intervening plaintiffs resembles negotiation, permeated by a sense of responsibility to other class members. As a freely assenting member of that dialogue, the client can realize goals shared with other poor people to whom the Legal Services lawyer has ethical and statutory commitments. As a partner, he or she also claims a more important right: in Professor Karst's terms, the client's right to equal citizenship.<sup>159</sup> Participation in such a suit gives the client the chance to be a responsible "member of a moral community, who counts for something in the community's decision-making process[,] . . . one who owes obligations to his fellow members [of society]."<sup>160</sup> For the poor person, who suffers humiliation, stigmatization, and loss of responsibility for his or her own destiny and that of others through the twisted dependencies and indignities of the welfare state, this small vindication of the client's right of equal citizenship may be significant.

### 3. *Statutory Restrictions*

In contrast to the partnership model, which is flexible enough to allow the client's interests to be heard, statutory restrictions on LSC significantly hamper the client's right to participate. These restrictions not only limit the choices a Legal

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157. Most class conflict cases involve settlement proposals to which named plaintiffs objected because the proposal did not satisfy their personal demands for damages or back pay. See *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981), and cases cited therein; *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892, 894 (10th Cir. 1975); *Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines*, 490 F.2d 636, 639-42 (7th Cir. 1973), cert. denied, 416 U.S. 993 (1974); cf. *Burns v. United States Postal Serv.*, 380 F. Supp. 623, 629 (S.D.N.Y. 1974).

158. See, e.g., *Developments*, supra note 101, at 1447-57, suggesting that the lawyer's obligation runs to each class member, rather than to the class as an entity or the named plaintiff. See also *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 14 (S.D.N.Y. 1980).

As many commentators have indicated, the role of an attorney is unique in that he or she acts without the consent of the class and even over the objections of class representatives and members in order to safeguard the interests of the class. The ethical obligations of loyalty and obedience therefore conflict at times. See *Developments*, supra note 101, at 1448-54.

159. Karst, supra note 142, at 5-9.

160. *Id.* at 8.



Services client may make, but also change the nature of the information the lawyer will provide to, and seek from, the client. The essence of any informed client's right of choice is the ability to command as many options for the resolution of his or her case as possible. Forcing Legal Services attorneys to provide their clients with more limited information or options than those available to non-poor clients, constitutes the kind of denial of client participation which the Code prohibits.

Yet one might argue that statutory restrictions on a client's options to receive legal services or pursue strategies are no different from restrictions imposed because of the other demands of the partnership model. In the partnership model, the lawyer will not simply acquiesce to an individual applicant's demands to be served, or to have his or her chosen strategies pursued. Rather, the lawyer's interests, and obligations to the public and the poverty community, may suggest that the lawyer decide to deny legal assistance to an individual client/applicant, or counsel a broader strategy than the client/applicant wants to pursue. An equal access proponent would argue that congressional denial of the client/applicant's ability to get help with an abortion or desegregation case, or to file a class action, is no different since the client/applicant is informed of the limitations and given assistance within them.

Yet statutory limitations deny the client's right to participate in a fundamental way not present in negotiation of the partnership. Statutory restrictions do not allow the client to be heard. These limitations are not premised on the client's recognized need to be protected from the attorney's overreaching; rather, they preclude the client's opportunity to argue that his or her case should be taken or that a particular strategy should be pursued. The restrictions also fail to treat the client as a person to whom attention must be paid, as a person who can change his or her mind. The negative impact of these restrictions, ostensibly designed to protect clients, is clear.

Statutory restrictions not only prevent the client/applicant from being heard, they also deny the client the other rights that he or she may demand under the Code of Professional Responsibility. For instance, these restrictions may make even more difficult the exercise of independent judgment in the client's behalf. In the Legal Services context the staff attorney is already under pressure from his or her peer group, including potential employers, judges, and other bureaucrats with educational and cultural backgrounds similar to the attorney's to subjugate the client's wishes to what he or she perceives is best for the client, or the legal system.<sup>161</sup> This pressure causes attorneys to devalue the client's ability to understand and make competent

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161. These pressures may be exerted against the program's funding or may be simply peer pressure that bestows benefits or burdens on the basis of how smoothly the lawyer allows the system to function. Norms for professional behavior, such as emotional detachment and commitment to individual treatment, exacerbate the gulf between lawyer and client. Bellow, *supra* note 13, at 118-19. See also A. DEGRAZIA, PUBLIC AND REPUBLIC 214-17 (1951); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974), reprinted in 60 A.B.A. J. 1273 (1974); Informal Op. 307, 27 VA. BAR NEWS 26 (1978) (if full representation of a client requires filing of a class action, any limitations thereon by the Board of Directors are unethical); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1208 (1972) (law school clinic guidelines barring affirmative suits against government, and particularly case-by-case decisions on these filings, conflict with the obligation of exercising independent judgment and the obligation of loyalty); Advisory Comm. on Professional Ethics, Op. 218, 94 N.J. L.J. 801 (1971) (Board of Directors cannot dictate strategy in individual cases).

decisions for himself or herself. The Legal Services lawyer also labors under heavy caseloads, often has insufficient support on his or her cases, and sometimes lacks experience.<sup>162</sup> When public condemnation embodied in a statutory restriction, such as the prohibitions on class actions, is added to these pressures, the attorney is unlikely to make decisions which provide the best and most comprehensive solutions for the client. The restrictions also make the private attorney-client relationship a public matter: the lawyer and client must answer to the special interest group that opposes abortion, or the Congressman who does not believe the state should have to pay millions of dollars in benefits because of one class action case. Each of these political actors has been given a veto over the client's choice.

When the limitations on the client's options begin to affect the attorney's willingness to provide the best service possible within the law, the requirements of competence and zeal in Canons 6 and 7 are also implicated.<sup>163</sup> The Code requires that advocates be both capable and willing to secure favorable results for the client.<sup>164</sup> The requirement of zealous representation mandates that the lawyer use every means within the bounds of the law to secure the client's chosen result.<sup>165</sup> Without zealous representation, the rationale for the entire adversary system collapses because of inequalities in advocacy and bargaining power.<sup>166</sup> If the Legal Services client is deprived of options available to the opponent, the equalizing effects of providing legal representation are destroyed.

Statutory restrictions which prevent Legal Services lawyers from achieving favorable results for their clients erode the competent, zealous representation of poor clients. "Rewarding" many significant victories of Legal Services clients only with a prohibition designed to prevent further victories only breeds cynicism and discouragement. Similarly, when court victories are overturned by legislative enactments or when poor people are denied the opportunity to defend their gains because Legal Services lawyers are precluded from lobbying, the demoralizing effect on Legal Services lawyers is significant. To expect high quality zealous representation in the face of such reactions is not realistic. Indeed, it would appear that restrictions on representation in alien and school desegregation cases, passed in response to victories won by aliens in working conditions and public benefit cases, and by blacks in bussing cases,<sup>167</sup> have slowed client gains in both areas. This cure, with its overbroad prophylaxis, is worse than the disease in that clients are deprived of autonomy and respect gained through direct involvement in their cases.

We have detailed how current equal access proponents in fact undermine the rights of poor people to access to the legal system, and how their argument undercuts

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162. Bellow, *supra* note 13, at 117-18.

163. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (competence) and Canon 7 (zealous representation) (1980); cf. Cramton, *The Task Ahead in Legal Services*, 61 A.B.A. J. 1339, 1342-43 (1975) (loyalty and zeal).

164. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1980); see also MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.3, and comments (1983), reprinted in 52 U.S.L.W. 1, 3, 4 (1983).

165. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, 7-4; cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 and comments (1983), reprinted in 52 U.S.L.W. 1, 4 (1983).

166. See *Joint Conference Report*, *supra* note 117, at 1216.

167. See, e.g., 127 CONG. REC. H3093 (statement of Rep. Gaydos), H3103-04 (statement of Rep. McCollum) (daily ed. June 18, 1981).

the essential nature of the attorney-client relationship on which our system of legal ethics is based. However, as a political weapon, the equal access position has been wielded powerfully in recent months to impose unnecessary and punitive restrictions on class actions on behalf of the poor. It is true that Congress has recently modified these restrictions perhaps because of concerns that blanket restrictions on group representation unduly interfere with the attorney-client relationship. The 1981 bill which would have precluded all class suits against governmental entities was amended to allow such suits, but only if they met rigorous prerequisites.<sup>168</sup> Yet even these restrictions have not served any of the individual client interests emphasized by the equal access proponents, nor have they served interests of other parties involved. Thus, these restrictions have significantly curtailed Legal Services clients' rights to full participation in their cases and full access to the courts without any corresponding benefit.

## V. THE RECENT CONGRESSIONAL DEBATE

Since the formation of LSC, its opponents have attempted to restrict the filing of class actions on behalf of the poor, especially those directed against government agencies.<sup>169</sup> For many years, supporters of LSC succeeded in preventing the adoption of most of these restrictions. But the Reagan Administration's firm opposition to any federally funded Legal Services program, even while it was appointing LSC board members,<sup>170</sup> coupled with the recent conservatism in Congress, has given new life to the efforts of LSC's established critics to restrict what Legal Services lawyers do for clients. The 1981 reauthorization bill contained a host of procedural restrictions to which the sponsors reluctantly agreed in order to save the corporation from defunding.<sup>171</sup> Although most of these amendments died in the Senate, restrictions on lobbying and class actions have continually been included in refunding resolutions.<sup>172</sup> These restrictions further harm poor clients by placing them on an increasingly unequal footing with other litigants without any corresponding benefit to them or to potential defendants. The only winners are those who gain politically by promoting ideologies designed to stave off any gains by the poor.

Prior to the 1981 debates on the LSC statute and reauthorization, Legal Services lawyers who wished to file class actions on behalf of their clients needed only obtain the approval of the local program director, who was restricted by the policies established by the local program's board of directors.<sup>173</sup> Such safeguards sufficiently

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168. See text of H.R. 3480, *supra* note 9, as passed by the House and amended by the Senate; H.R. REP. NO. 980, 97th Cong., 1st Sess. 170-71 (1982); *Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 602-32 (1982).

169. See, e.g., 120 CONG. REC. 1627 (1974).

170. See *supra* note 1.

171. See 127 CONG. REC. H2968 (statement of Rep. Kastenmeier), H2973 (statement of Rep. Dixon), H2975-76 (statement of Rep. Frank), H2982 (statement of Rep. Roybal) (daily ed. June 16, 1981).

172. See *Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 602-32 (1982); H.R. REP. NO. 201, 98th Cong., 1st Sess. 3-4 (1982). The provision limiting class actions has remained essentially the same as the amended version of H.R. 3480 that was passed in 1982. Act of Dec. 21, 1982, Pub. L. No. 97-377, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1830.

173. 42 U.S.C. § 2996e(d)(5) (1976). This requirement applies to class appeals and any class actions in which the program was indirectly involved. See also 45 C.F.R. pt. 1617 (1983); Mayer, *The Legal Services Corporation Act, 1977 ANN. SURV. AM. L.* 275, 294.

protected the public against possible abuses by Legal Services attorneys. In 1981, however, LSC's opponents were successful in attaching a restriction to H.R. 3480 which prohibited Legal Services programs from filing class actions against governmental entities.<sup>174</sup>

While that restriction was initially rejected by the Senate,<sup>175</sup> the rider to the 1983 continuing appropriations bill<sup>176</sup> adds four other requirements which make it very difficult for a given program's director to authorize actions. The rider requires the director to show, first, that the relief sought by the class action is for the primary benefit of persons eligible for Legal Services assistance. Second, the project director must determine, prior to filing the class suit, that the potential defendant agency is not likely to change its policies or practices without suit. Third, the director must determine that this policy or practice is one that will continue adversely to affect eligible clients. Finally, the Legal Services program must give written notice of intent to file a class action suit to the government entity and then make "responsible" efforts to resolve the problems caused by the policy or practice. These last requirements must be met prior to filing suit unless the project director determines that such efforts would adversely affect the interests of the clients.<sup>177</sup>

None of these restrictions is needed to protect the legitimate interests of clients or adverse parties. They will certainly not deter the irresponsible attorney who operates in an otherwise responsible Legal Services program, but they will stop class actions for which local community members have seen the need. The previous requirements that the local board of directors establish regulations for filing class actions, and that the local director supervise and approve all such filings were sufficient to deter individual irresponsibility. The local board, composed of community attorneys, poor people, and others,<sup>178</sup> has enough knowledge of the local situations to check any improper or unethical behavior on the part of LSC attorneys. Procedurally, the board could require that the project director obtain the client's informed consent before authorizing the suit. Substantively, the board could provide further restrictions on filings as the need arises or even force an errant attorney to resign.<sup>179</sup> Furthermore, the project director, as an attorney, is capable of judging whether a case lacks merit. As one who must be responsive to political realities, the director must engage in such monitoring or risk losing funds if class actions are recklessly filed.<sup>180</sup> Thus, the new restrictions can only be meant to curtail class action suits which the local board and the project director do not believe illegal, unethical or frivolous.

Nor do defendants need any more protection than they enjoy under the old provisions. The statute provides that a defendant who believes the class action was not filed on behalf of eligible clients, or involved matters prohibited by the LSC

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174. H.R. 3480 § 11, *supra* note 9.

175. *See supra* note 172; H.R. 3480, *supra* note 9.

176. Act of Dec. 21, 1982, Pub. L. No. 97-377, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1830.

177. *Id.* at 1875.

178. *See* 42 U.S.C. § 2996f(c) (Supp. V 1981); 45 C.F.R. § 1607.3 (1983).

179. *See supra* note 172 (guidelines set by local board); 45 C.F.R. § 1618.4 (1983) (termination of employment); *see also* Mayer, *supra* note 173, at 279.

180. *See* 45 C.F.R. §§ 1606.3-4 (1983).

statute, can complain to LSC, which will investigate and allow formal charges against the local program.<sup>181</sup> Moreover, if staff attorneys file lawsuits on behalf of ineligible persons, persistently incite litigation, or otherwise unethically solicit clients, this appeal to LSC can result in the lawyer's dismissal or in termination of the program's grant.<sup>182</sup>

The court also plays a role in checking unscrupulous attorney behavior. In addition to its powers to discipline an unethical attorney, a court can prevent harm to a defendant by early dismissal of a meritless case or denial of class certification. Furthermore, if a court decides that a suit was filed to harass the defendant or was an abuse of process, the court may award the defendant attorney's fees against LSC.<sup>183</sup> In short, any action which strays from statutory or ethical mandates or any insubstantial lawsuits can be easily checked without the 1983 rider's provisions. Admittedly, defendant agencies are not safe from lawsuits which are successful or which, though unsuccessful, are based on the reasonable belief that the client's claim was valid. But protection against the uncertainty of the law is available to no one.

The 1983 rider also imposes unreasonable burdens of foresight on the project director. First, he or she not only must determine that the policy or practice which harmed the client is currently being implemented by the proposed agency defendant, but also must predict whether it is likely to continue. Obviously, the only source of information to make that decision is the defendant agency, the last source to which a plaintiff's attorney should have to go without the benefit of sworn testimony or discovery. Second, the director must also predict the future by deciding whether the policy will continue adversely to affect his or her clients. Third, the director must decide what responsible efforts at negotiating a settlement are, or decide that efforts to negotiate would adversely affect his or her clients—two difficult judgments, especially since mistakes would put the life of the program in jeopardy. Finally, the director must decide that the action will benefit primarily poor people. When an action raises issues that probably affect not only the poor but also the non-poor, for example, a challenge to the welfare department's policy of removing children in neglect and abuse cases, or to a state agency's failure to enforce consumer protection laws or utility rate increase procedures, the statute arguably might suggest that the suit be disapproved if the defendant did not volunteer information about its impact on the poor.

By contrast to the lack of protection the 1983 rider offers Legal Services clients or their opponents, the harm likely to be caused by its chilling effect can easily be illustrated by a hypothetical case drawn from actual Legal Services experience. The federal Hill-Burton program has provided grants and low-cost loans to thousands of private hospitals since the 1950's.<sup>184</sup> In return, the hospitals are required to provide free or low-cost care to indigents for a period of twenty years, an obligation not

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181. 45 C.F.R. §§ 1618.3, 5 (1983); *see also id.* §§ 1606.3(b), .4-.5.

182. 42 U.S.C. § 2996f(a)(4), (10) (1976) (prohibited activities); 45 C.F.R. §§ 1618.4 (termination of employment), 1606.4 (termination of funding) (1983); *see also* Mayer, *supra* note 173, at 279.

183. 42 U.S.C. § 2996e(f) (Supp. V 1981).

184. *See* 42 U.S.C. §§ 291 to 291o-1 (1976).

enforced by state or federal monitoring agencies until the late 1970's. In this hypothetical case, a Legal Services program might receive complaints in all of its offices that poor clients have been denied care or sued on bills from hospitals, and that the state and federal agencies have made no attempt to enforce the provisions of the Hill-Burton Act against the hospitals. Under the provisions of the 1983 congressional rider, the program must provide notice of the possible lawsuit to potential state and government defendants and make responsible efforts to negotiate a solution with them. Several months might go by as the Legal Services lawyers present proposals, and the hospitals and government agencies reject them.

In the meantime, clients will continue to be turned away by hospitals, and the twenty-year free care periods for several hospitals begin to expire. The notice requirement has provided potential defendants, if they are unscrupulous, the chance to destroy or alter their records, to speed up collection efforts against indigents, and to moot the claims of, and intimidate, potential witnesses who may need to return to these hospitals in the future. The negotiation requirement puts the Legal Services attorney in a difficult position. If he or she decides erroneously that "responsible efforts" to negotiate have been made and that a suit to enjoin those hospitals from ending their twenty-year obligations and to force governmental agencies to begin enforcement procedures should be filed, jobs and program funding will be at risk. If the attorney continues to negotiate, hoping to find some solution which is acceptable to defendants, clients will continue to be harassed about bills or denied needed hospital care. Additionally, as time goes by, the case against the hospitals for actions they have taken years ago may seem less urgent to the federal judge who will hear the case, and the named clients may become discouraged or ineligible for services. The witnesses may move, as many poor people do frequently, and the possibility of relief for clients harmed in the past may become remote.

Of course, it can be argued that the negotiation requirement may be waived by the director if under the statute the clients' interests would be adversely affected by waiting. But the waiver requirement, along with the required certification that the other requirements of the Act have been met, puts the director in a serious conflict of interest prohibited by the Code of Professional Responsibility.<sup>185</sup> Like the attorney who holds a financial stake in the outcome of a client's case, the Legal Services program director and the staff attorney are faced with the choice of acting assertively for the client and risking loss of their jobs or program funding, or playing it safe and jeopardizing the client's interest. The alternative—filing an individual action against the governmental entity—may insufficiently protect the client's interest or inadequately restore some balance of power between the client and the agency whose action is being challenged.

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185. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5, especially DR 5-101(A) (1980). DR 5-107 prohibits lawyers from allowing third parties, even those who pay for the legal services in question, to "direct or regulate [the lawyer's] professional judgment in rendering such legal services"; see also EC 5-21 (pressures may include political pressures) and EC 5-24 (legal aid lawyer should not allow board interference in the lawyer-client relationship); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) and comment (1983), reprinted in 52 U.S.L.W. 1, 7-8 (1983); cf. Rule 2.3 (evaluation of case for use of third person).

Ironically, the new restrictions imply that the Legal Services attorney's motives are usually under suspicion and that the government official's are regarded as pure. Yet, if both are acting responsibly for their clients, any sincere difference of opinion regarding the legality of defendant's conduct will have been discussed in state administrative hearings, which are almost always required by federal exhaustion and state judicial review doctrines prior to the filing of lawsuits. If the defendant agrees that the policy or practice is illegal at that juncture, it will presumably be changed. If not, the requirements of notice and negotiation waste precious time. If the Legal Services lawyer acts improperly, the local program, the court, and LSC all have sanction mechanisms. If on the other hand, the agency that is the potential defendant is acting in bad faith, the new provisions will strengthen its ability to stall a final judgment, to alter incriminating evidence, and to tip the balance of power in later negotiations by means of threats against the lawyer or the program. Similar efforts to harass poor clients by challenging their eligibility for representation were so successful that Congress finally prohibited these challenges except by administrative appeal.<sup>186</sup> Unfortunately, the 1983 rider resurrects the specter of harassment.

## VI. CONCLUSION

As we have argued, the poor have a strong interest in publicly funded legal assistance in civil cases, despite the fact that the Supreme Court and other branches of the federal government have not recognized this interest as fundamental. Given the nature of their opponents and the deprivations which the poor face, their interests in civil legal assistance parallel the already recognized interest in obtaining legal representation in criminal cases. However, the scarcity of services resulting from governmental failure to extend counsel to the poor in civil cases has split defenders of publicly funded legal assistance into two camps. Those who espouse the equal access model stress individual procedural rights in allocation of legal services and in making strategy decisions. Those who defend the law reform model stress the welfare interests of the poor as a group. Yet both these models are often consistent with group-oriented approaches to legal assistance for the poor.

Group-oriented case selection procedures currently employed by Legal Services offices do not violate the rights of individual poor clients. As we have indicated, the right of equal access to the legal system is not a procedural right which is easily distinguished from a welfare right; hence, it is not necessarily at odds with group-oriented selection procedures. Moreover, respect for individual dignity neither mandates random distribution of legal services, nor prevents consideration of the numbers of people whose rights claims are affected by allocation decisions. Group-oriented approaches to legal services recognize that the poor have common interests and are subjected to class treatment, a reality that suggests the desirability of group legal responses.

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186. 42 U.S.C. § 2996e(b)(1)(B) (Supp. V 1981); 123 CONG. REC. 11,177-78; 38,160 (1977). For cases that turned back challenges to Legal Services representation, see, e.g., *McManama v. Lukhard*, 616 F.2d 727, 729-30 (4th Cir. 1980); *Holland v. Steele*, 92 F.R.D. 58, 60-62 (N.D. Ga. 1981); *Anderson v. Redman*, 474 F. Supp. 511, 517-20 (D. Del. 1979); *Martens v. Hall*, 444 F. Supp. 34, 35-36 (S.D. Fla. 1977).

Moreover, group-oriented legal strategies, particularly class actions, are also consistent with Legal Services lawyers' ethical and statutory obligations. The Code of Professional Responsibility assumes that attorney and client are partners in the provision of legal assistance, not principal and agent. In the partnership model the lawyer's ethical obligation of public service and the client's right to dignified treatment often cannot both be preserved without resort to group case selection and strategies.

Finally, current congressional restrictions on class action representation and hence on group-oriented case selection serve no useful purpose. Such restrictions provide no more protection for individual clients or even for their opponents than standing statutory provisions. However, they constrain the legal options available to poor people and impede their access to the legal system on an equal footing with their adversaries.