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## Crisis in Legal Services for the Poor

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## CRISIS IN LEGAL SERVICES FOR THE POOR\*

ROGER C. CRAMTON †

### I. INTRODUCTION

PRESIDENT REAGAN'S BUDGET SUBMISSION FOR 1982 alerted the nation that his Administration planned to abolish the national legal services program.<sup>1</sup> The proposal, which would take the federal government out of the business of providing poor people with lawyers in civil cases, is certain to stimulate one of the liveliest political controversies of the year,<sup>2</sup> one in which we as lawyers and potential lawyers have a special interest.

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\* This article was prepared from the fifth Donald A. Giannella Memorial Lecture of the Villanova University School of Law, April 9, 1981.

It was a special honor for me to be invited to deliver this lecture because Don Giannella was a colleague in the work of the Administrative Conference of the United States in the early 1970's before his untimely death. He was a man of quiet force, tremendous integrity, and great dedication to teaching and scholarship.

† Professor of Law, Cornell University Law School; formerly, Chairman of the Board of Directors of the Legal Services Corporation, 1975-78, and member of the Board, 1975-79. I am indebted to various friends and colleagues for their helpful comments, especially Thomas Ehrlich, Steven Gold, Alan Houseman, and Richard Schmalbeck.

1. See Barbash, *White House Wants to Cut Off Federal Legal Aid for the Poor*, Wash. Post, Mar. 6, 1981, § A, at 1, col. 5; Taylor, *Administration Seeks to Terminate U.S. Plan That Finances Legal Aid*, N.Y. Times, Mar. 6, 1981, § A, at 1, col. 2.

For the sake of convenience, material from the popular press will be cited by both author and title. Further, where citations do not include a specific page reference to the newspaper in which the source appears, a copy is on file at the Villanova Law Library.

2. See Barbash, *End to Legal Aid to Poor Opposed by ABA Chief*, Wash. Post, Mar. 7, 1981, § A, at 6, col. 1; Hume, *Reagan Plan to Drop Legal Aid Agency Assailed*, L.A. Times, Mar. 8, 1981; Ranii & Bourne, *Legal Services' Last Gasp?*, Nat'l. L.J., Mar. 23, 1981, at 1, cols. 1-2. Taylor, *Bar Groups Support Funds for Legal Aid*, N.Y. Times, Mar. 11, 1981.

(521)

Two recent reports, one prepared by the Heritage Foundation<sup>3</sup> and another by one of Mr. Reagan's transition teams,<sup>4</sup> apparently persuaded the new Administration that this national program is one of the "principal federal instrumentalities by which the personnel and institutions of the ideological 'left' in American life have been financed."<sup>5</sup> The image conveyed is of a program composed of left-wing lawyers, recently graduated from law school, engaged as self-appointed representatives of the poor in test cases and class actions designed to erode the free enterprise system and to establish a more complete welfare state.<sup>6</sup>

Defenders of the legal services program say the Administration's proposal amounts to a denial of this nation's commitment to equal justice under law — "putting a price tag on justice, just like a Cadillac or a yacht," in the words of F. William McCaIpin.<sup>7</sup> Mr. McCaIpin is chairman of the board of the independent Legal Services Corporation, which administers the program, and secretary of the American Bar Association, which has long supported it.

My purpose is to explore this debate.

## II. THE HISTORY OF CIVIL LEGAL ASSISTANCE

For most of our history, the situation with respect to civil legal aid for the poor could well have been summed up in Anatole France's famous gibe that: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."<sup>8</sup> The courts were open to all, but only the well-to-do could afford the lawyer who was necessary for the vindication of rights.

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3. HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP — PROJECT TEAM REPORT ON THE POVERTY AGENCIES (Oct. 22, 1980) [hereinafter cited as HERITAGE FOUNDATION]; Taylor, *Federal Program of Legal Aid for Poor Faces Conservative Challenge*, N.Y. Times, Nov. 25, 1980, § B, at 13, col. 3.

4. Although the transition team's report has not been made public, summaries have appeared in the press. See 17 *ABA Wash. Letter* (Feb. 1, 1981); Freivogel, *Reagan's Advisors Urge Curbs on Legal Services Corp.*, St. Louis Post-Dispatch, Jan. 18, 1981, § A, at 11, col. 2.

5. See HERITAGE FOUNDATION, *supra* note 3, at 2.

6. See *id.* at 2-10.

7. See Taylor, *Legal Aid for the Poor Did Work, and That's the Rub*, N.Y. Times, Mar. 15, 1981, col. 1.

8. A. FRANCE, *LE LYS ROUGE* c. 7 (1894), quoted in BARTLETT'S FAMILIAR QUOTATIONS 655 (E. Beck ed., 1980). The irony that France had in mind was that an apparently neutral prohibition was not really neutral if it prohibited behavior that only one economic class was inclined to engage in. The American court system operates on a converse irony: it *permits* both rich and poor to purchase access to official resolution of disputes, but the facial neutrality breaks down when the price of access is not nominal.

The legal profession recognized an ethical obligation to provide representation for indigents, and many lawyers devoted substantial portions of their time to unpaid practice, especially on behalf of criminal defendants. Substantial changes did not come about until the Supreme Court, beginning with *Gideon v. Wainwright*<sup>9</sup> in 1963, recognized a constitutional right to appointed counsel in criminal cases.<sup>10</sup> Subsequent decisions have expanded this right to misdemeanor cases and to a very limited category of civil proceedings.<sup>11</sup> The indigent criminal defendant is now provided a defense lawyer at public expense, either through a public defender or assigned-counsel system.

Except in a few special instances, however, there was and is no constitutional right to appointed counsel in civil cases.<sup>12</sup> As a practical matter, however, the contingent-fee system provided representation in cases involving personal injuries and job-related injuries. The enactment of attorney's fees provisions has provided some inducement for private attorneys to assist in the vindication of certain statutory rights such as the prohibition of employment discrimination. But most legal problems of the poor have been left unattended because the responsibility for providing assistance was a collective responsibility of the entire bar.<sup>13</sup> Like many shared responsibilities, no one felt individually responsible and the need went unmet.

Four eras in civil legal aid in the United States may be identified. Prior to 1875, legal aid was left to the unorganized and voluntary activities of individual lawyers. Although occasional representation was provided, the *pro bono* efforts of American lawyers were directed largely to the defense of indigents charged with crime, in itself no small task.

The rise of voluntary organizations — a typically American response to a tough social problem — characterizes the second era.

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9. 372 U.S. 335 (1963).

10. *Id.* at 344-45.

11. *See, e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanor cases); *In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 687, 334 N.Y.S.2d 337 (1972) (child neglect proceedings); *In re Fisher*, 39 Ohio St. 2d 71, 313 N.E.2d 861 (1974) (civil commitment proceedings).

12. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971) (filing fee for divorce cases held to violate due process); *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 656, 132 Cal. Rptr. 405 (1976) (indigent prisoner also defendant in civil action entitled to appointed counsel); *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975) (no right to appointed counsel for indigents in divorce actions). *See generally* Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670, 674-80 (1976).

13. *See generally* R. SMITH, *JUSTICE AND THE POOR* 6-12 (1919).

The year 1875 marked the beginning of traditional legal aid through private organizations financed by charitable contributions, staffed by a small number of full-time lawyers, and assisted by the volunteered time of lawyers in private practice.<sup>14</sup> Through the efforts of such pioneers as Reginald Heber Smith, and with the support of the organized bar, legal aid offices were established in most large metropolitan areas by 1962.<sup>15</sup>

Traditional legal aid was oriented toward individual client service, helping individuals with legal problems, such as landlord-tenant controversies, family quarrels, and consumer affairs. The implicit assumption was that justice was a civil right, not a commodity to be purchased.<sup>16</sup>

A more controversial approach to legal aid characterized the third era, which began in 1965 with the legal services program of the now defunct Office of Economic Opportunity (OEO).<sup>17</sup> The *Gideon* case had recognized a constitutional right to appointed counsel in criminal cases; a period of destructive urban riots had suggested the desirability of providing more peaceful methods of handling the grievances of the urban poor; and President Johnson, with large congressional support, had embarked on his War on Poverty.

The OEO legal services program did not reject the client-service objective of traditional legal aid, but it included an emphasis on two additional objectives: 1) social justice through law reform and income redistribution;<sup>18</sup> and 2) political organization of the poor.<sup>19</sup> It was assumed that legal rules and procedures would have a class bias against the poor. These rules could be reformed by impact litigation which would equalize the treatment of the poor and provide them with a larger share of the social pie. Similarly, the powerlessness of the poor — their lack of clout with elected officials — was attributed to their lack of organization. One

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14. See E. BROWNELL, *LEGAL AID IN THE UNITED STATES* 166 (1951).

15. In 1947, when Emery Brownell surveyed legal aid for the ABA, there were 70 independent legal aid organizations; by 1963, that number had increased to 249. See J. HANDLER, J. HOLLINGSWORTH, & R. GINSBURG, *ORGANIZATIONS AND LEGAL RIGHTS ACTIVITIES* 2-5 (1974) [hereinafter cited as HANDLER].

16. For discussion of the objectives and limitations of traditional legal aid, see E. JOHNSON, *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* (1974). See also HANDLER, *supra* note 15, at 737 n.15.

17. See E. JOHNSON, *supra* note 16, at 176-82, 196-221.

18. *Id.* at 222-24. See also Brill, *The Uses and Abuses of Legal Assistance*, 33 *THE PUB. INTEREST* 38 (1973).

19. See Finman, *OEO Legal Services Programs and the Pursuit of Social Change: The Relationship Between Program Ideology and Program Performance*, 1971 *Wis. L. Rev.* 1001, 1001-06.

major purpose of OEO legal services was to assist groups of poor people in organizing as groups. The formation of voting blocs would exert pressure on governmental institutions; poor people would acquire self-confidence and self-direction by participation in the power struggles of a pluralist society; and they would benefit from more favorable decisions by legislatures, administrative bodies, and the courts.

It is not surprising that a taxpayer-funded program with these objectives quickly became highly controversial. Many "poverty lawyers" funded by grants from OEO were viewed as left-wing agitators, engaged in a political agenda of their own and having little interest in the humdrum legal problems of the poor, with which traditional legal aid was almost exclusively concerned.

Political interference with the program began during the Johnson years and during the early '70's the program was fighting for its life. At one point President Nixon decided to dismantle the program and Howard Phillips, a young political lieutenant, was dispatched to the OEO to carry out the task.<sup>20</sup> A series of bruising battles in Congress and the courts left the program in place but crippled in morale and funding. The American Bar Association, which had committed itself to publicly-funded legal assistance a few years earlier under the leadership of Lewis F. Powell, Jr., now Justice Powell, fought hard for the establishment of a permanent legal services program in a form that would remove it from the immediate supervision of the President and vicissitudes of politics.<sup>21</sup> When President Nixon shifted ground and supported this approach, the Legal Services Corporation Act was signed into law,<sup>22</sup> beginning the fourth era in civil legal aid. It was the last major piece of legislation signed by Nixon before his resignation in the summer of 1974.

The early days of the Legal Services Corporation were exciting ones.<sup>23</sup> Since I had the honor of being appointed by President Ford, with Senate confirmation, as the initial chairman of the Board of Directors of the Corporation, I was, as Dean Acheson has

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20. For a good discussion of the legal and political controversies surrounding the OEO legal services program, see George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976). See also B. GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR 25-42 (1980).

21. See George, *supra* note 20, at 682-99.

22. Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified at 42 U.S.C. § 2996 (1976 & Supp. 1979)). See generally George, *supra* note 20, at 695-98.

23. For an account of these early days, see Arnold, *And Finally, 342 Days Later . . .*, 5 JURIS DOCTOR 32 (1975).

put it in another context, "present at the creation."<sup>24</sup> The Corporation started with no offices, a severe labor dispute with the small and demoralized staff inherited from OEO, and field programs that were starved for funds, low in morale, and suspicious of the new Corporation. We didn't even have a photocopy machine. I recall typing and copying our initial budget submission to Congress in the wee hours of the night in the borrowed offices of a government agency in Washington, assisted by a small band of volunteers from the legal services community. By 3 a.m., a few short hours before the hearing on the appropriation request was to begin, we had produced the necessary sixty copies.

Those were memorable days; but my story today will not dwell further upon them, since broader questions and current travails deserve your attention.

The Legal Services Corporation Act (Act) contained two features that were designed to cure most of the deficiencies of its OEO predecessor. The first was independence, both from political control by politicians and from political use by legal service attorneys; and the second was a strong focus on professionalism — delivering quality legal services in accordance with the best traditions of the profession.<sup>25</sup> The creation of a new quasi-governmental body governed by an independent and non-partisan board of directors was designed to insulate legal service programs from the kind of political intervention that had troubled the OEO program.<sup>26</sup> Statutory prohibitions prevented legal service grantees from using program funds or personnel for political purposes, organizational activities, or participation in strikes, picketing, and demonstrations.<sup>27</sup>

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24. D. ACHESON, PRESENT AT THE CREATION (1969). The phrase was taken from a statement attributed to Alfonso X, the Learned King of Spain, from 1252-84: "Had I been present at the creation I would have given some useful hints for the better ordering of the universe." See *id.* at frontispiece.

25. Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339 (1975); George, *supra* note 20, at 700-09.

26. See George, *supra* note 20, at 682-90. The efforts of Mayor Daley in the Johnson administration and Governor Reagan in the Nixon administration to affect the activities of grantees provide apt illustrations of political intervention in the operations of the OEO program. See B. GARTH, *supra* note 20, at 43.

27. See 42 U.S.C. § 2996a(7) (Supp. 1979) (forbidding legal assistance attorneys from participating in political activities such as voter registration and transportation); *id.* § 2996(b)(5) (forbidding employees of recipients providing legal assistance from taking part in or encouraging public demonstrations, picketing, boycotts, or strikes); *id.* § 2996f(a)(b) (forbidding staff attorneys from specified off-duty political activities). See also 45 C.F.R. §§ 1608, 1612 (1980) (implementing regulations). The constitutional issues raised by these and other restrictions are discussed in Note, *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734 (1976).

On the major issue of the nature and scope of representation to be provided to poor clients, the Act smothered quite different perspectives and objectives under a soothing new slogan: access to justice for all. This neutral principle clearly encompassed the individual-client service of traditional legal aid. It also included the law reform objective of the OEO program so long as the significant issues to be litigated arose out of client service in actual cases.

The governing principle was that a lawyer for the poor should do the best he can for his client, just as the lawyer for Exxon or anyone else does. If the zealous and complete representation required by the Code of Professional Responsibility<sup>28</sup> leads the lawyer to believe that framing a test case, pursuing extensive discovery, or participating in administrative or legislative proceedings will best advance the interests of the client, then these activities should be undertaken.<sup>29</sup> The explicit statutory proviso was that the legal services attorney cannot dream up the law suit and then solicit the client; the law suit must emerge out of routine client service.<sup>30</sup> Nor could the legal services attorney organize a client group so that he could litigate its rights.<sup>31</sup> But education of poor clients concerning

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28. See Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291.

29. Congress, in defining the purposes of the Legal Services Corporation, declared that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. § 2996(6) (1977). See also *id.* § 2996e(b)(3) (Corporation must not interfere with any attorney carrying out his professional responsibilities).

30. The history of the "national back-up centers" created during the OEO years provides the clearest illustration of this principle. These centers originally developed in the mid-1960's and were designed to cure caseload and staffing problems of local legal services projects by providing a national system of specialized legal services which concentrated on cases involving issues affecting the entire class of the poor and by providing expertise in poverty law that local service projects lacked. George, *supra* note 20, at 709-22. After much success, these centers were attacked by conservative politicians as an "intellectual brain trust which prepackages the lawsuits which go across the country." 119 CONG. REC. 20,721 (1973) (remarks of Representative Conlan). The result was restrictive language in the Legal Services Corporation Act prohibiting the farming out of research, training, and technical assistance by the Corporation. See 42 U.S.C. § 2996e(a)(3) (Supp. 1979). Restructured as "support centers", they now provide specialized litigation and lobbying services on behalf of particular clients and client groups in such areas as education, health, housing, and welfare. See George, *supra*, at 709-22.

31. The regulations of the Legal Services Corporation first prohibit staff attorneys from participating in demonstrations, strikes, boycotts, and other such activities, but then except "informing and advising a client about legal alternatives to litigation . . . and [a]ttending a public demonstration . . . for the purpose of providing legal assistance to a client . . ." 45 C.F.R. §§ 1612.2, 1612.3 (1980). Similarly, legislative and administrative representation may be



their legal rights, including their right to organize, was not precluded.<sup>32</sup> These competing principles obviously require making a number of fine distinctions.

Hence the present framework for legal services authorizes the full armory of legal techniques and procedures to be brought to bear on behalf of poor clients, as required in the particular case. Impact litigation and lobbying activities are included insofar as they arise out of client representation.<sup>33</sup> But the more frankly political objectives of the OEO program — to organize the poor or constituent segments as effective pressure groups — are excluded by statute.<sup>34</sup> The Act substitutes more neutral rhetoric of “access to justice” for the more emotionally charged “law reform” and “social change” rhetoric of the OEO program.<sup>35</sup>

### III. DESCRIPTION OF THE CURRENT PROGRAM

Until the crisis precipitated by President Reagan's recent decision to eliminate the program, legal services prospered under the new structural arrangement. In 1975, when the Corporation came into being, the legal services program was clustered in major cities of the North and Far West; and the programs in these areas were starved and demoralized from five years of static funding and con-

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provided “on behalf of an eligible client . . . if the client may be affected by a particular legislative or administrative measure but no employee shall solicit a client in violation of professional responsibilities for the purpose of making such representation possible. . . .” *Id.* § 1612.4.

32. *Id.* § 1612.3.

33. *See id.* § 1612.4(a)(2) (“An employee may engage in such activities [legislative and administrative lobbying and representation] on behalf of an eligible client . . . if the client may be affected by a particular legislative or administrative measure. . . .”).

34. *See* 42 U.S.C. §§ 2996e(d)(1)(4) (no use of corporation funds to advocate or oppose ballot measures, initiatives, or referenda); 2996f(a)(s)(A) (no use of corporation funds to influence executive orders, administrative regulations, or legislation unless necessary to representation of client); 2996f(b)(6) (no use of corporation funds to provide training programs to advocate or encourage public policies or political activities) (Supp. 1979). *See also* 56 C.F.R. § 1612.4(a)(2) (1980) (“no employee shall solicit a client in violation of professional responsibilities for the purpose of making such representation [administrative or legislative] possible. . . .”).

35. 42 U.S.C. §§ 2996b, 2996e (Supp. III 1979). *See Bellow, Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 107-08 (1977). Bellow describes the approach of the Legal Services Corporation as that of more of the same. *Id.* at 107. He describes the current technique of the Corporation as one to “expand existing programs, establish new ones in areas where services have not previously been available, dampen any excessively political rhetoric which might evoke images of the more controversial sixties, and eventually establish a ‘national delivery system’ of legal help to the poor.” *Id.* at 107-08.

stant attack.<sup>36</sup> In five short years, legal services has become a national program providing a minimum level of service to poor people in all parts of the country.<sup>37</sup> Funding grew rapidly from \$70 million in 1975 to \$321 million in 1981.<sup>38</sup>

The structure of the program is worth a brief explanation. The Corporation is not empowered to provide legal services to anyone.<sup>39</sup> It is a grant-making and regulatory organization that funds and supervises community-based organizations which hire attorneys to represent eligible poor persons.<sup>40</sup> The Corporation is governed by an eleven-member board of directors which selects a president, who in turn supervises an administrative staff.<sup>41</sup> The Corporation issues regulations governing the program (for example, defining the group eligible for service pursuant to general statutory guidelines),<sup>42</sup> makes grants to the local program for the delivery of legal services, audits the activities of these programs, and carries on general support activities such as training and research that assist the program as a whole.<sup>43</sup>

Representation of poor clients is carried on by 323 local programs funded by the Corporation.<sup>44</sup> They include a few specialized litigation organizations (referred to as support centers and having a national scope), a small number of specialized client programs for native Americans and migrants, and a large number of community-based programs scattered throughout the country, each serving a particular geographic area. Each local program is a separate non-profit corporation, with its own board of directors and staff. Statutory provisions and Corporation regulations govern the composition and functions of the governing boards.<sup>45</sup>

The 323 independent programs funded by the Corporation are staffed by about 6,200 attorneys, 2,800 paralegals, and a large num-

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36. See Cramton, *supra* note 25, at 1339-41.

37. LEGAL SERVICES CORPORATION, ANNUAL REPORT 7-8 (1979) [hereinafter cited as ANNUAL REPORT].

38. *Id.*

39. See 42 U.S.C. § 2996e(a) (1976) (outlining the powers, duties and limitations of the Corporation); *id.* § 2996f (outlining the requisites and limitations on recipient organizations and clients in making grants and contracts).

40. See *id.* §§ 2996b, 2996e.

41. *Id.* § 2996c (dealing with the board of directors); *id.* § 2996d (dealing with the appointment and powers of the president).

42. See 45 C.F.R. § 1611 (1980).

43. See ANNUAL REPORT, *supra* note 37, at 21-27 (describing the work of the Corporation).

44. *Id.* at 30-35 (listing the 323 independent programs funded in 1979).

45. 42 U.S.C. § 2996f(c) (1976); 45 C.F.R. § 1607 (1980).

ber of secretaries and clerks.<sup>46</sup> They handle more than 1,000,000 poor clients a year through about 1,200 local offices.<sup>47</sup> Although the independent programs receive support from other sources, over two-thirds of the total funding comes from the Corporation. Other federal funding sources provide about 22%, with private contributions and state and local government contributing the remaining 11%.<sup>48</sup>

The staff lawyers employed by the local programs are generally relatively young and low paid; entering salaries average about \$14,000 per year and average salaries for all lawyers are less than \$17,000; both figures are well below compensation provided by private law firms or other government offices.<sup>49</sup> Case loads are large, ranging up to 150-250 open cases per attorney.<sup>50</sup> The new attorneys are generally liberal and idealistic, and there is a high turnover. About one-fourth of new attorneys leave the program in a year or less; more than 80% are gone after three years.<sup>51</sup> Those who survive more than three years are likely to make a career of legal services; they become the leaders and supervisors of the more inexperienced attorneys who join the program, work with a burst of enthusiasm for a year or two, and leave "burned out" by the constant pressure of handling a large volume of generally routine cases.

An American Bar Foundation study of the legal needs of the public suggests that nearly one-fourth of poor people have a civil legal problem each year deserving of a lawyer's attention.<sup>52</sup> Under current eligibility standards, which permit an annual income no larger than \$4,738 for a single person and \$9,313 for a family of four,<sup>53</sup> about 29 million Americans fall within the pool of eligible clients.<sup>54</sup> Obviously, only a small fraction of them receive service each year. Although no precise information is available, it is estimated that the current program handles about one-eighth of the legal needs of eligible poor persons. An enormous but unlikely

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46. ANNUAL REPORT, *supra* note 37, at 8. See also LEGAL SERVICES CORP., CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORP. 7 (Feb. 1981) [hereinafter cited as CHARACTERISTICS].

47. ANNUAL REPORT, *supra* note 37, at 8.

48. CHARACTERISTICS, *supra* note 46, at 18.

49. *Id.*

50. See Bellow, *supra* note 32, at 117.

51. CHARACTERISTICS, *supra* note 46, at 18.

52. B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC c. 4 (American Bar Foundation 1977).

53. 45 C.F.R. § 1611 (app. 1980). Somewhat higher amounts apply to Alaska and Hawaii. *Id.*

54. Cramton, *supra* note 12, at 672-73.

expansion in the program would be required to meet the needs of all.

Last year the legal services program handled about one and one-half million matters for over a million poor persons.<sup>55</sup> The average cost of each matter handled is about \$200. The program's clients are 51% white, 30% black, and 10% hispanic. Only one-fifth of them are employed; most are living on welfare or Social Security.

The types of cases fall into expected categories. Thirty-four percent involve family matters; 17% involve landlord-tenant or other housing problems; 14% are concerned with income maintenance; and 12% involve consumer disputes. The rest involve an enormous variety of subjects.<sup>56</sup>

#### IV. CRITICISMS OF THE LEGAL SERVICES PROGRAM

Criticisms of the current legal services program fall into three categories: 1) the program is a political instrument of activist lawyers; 2) it is not a poor people's program but a lawyers' program; and 3) it is inefficient both in assisting poor people and in the costs it places on others. Each of these charges deserves examination.

##### A. Political Activism

The most common criticism of the legal services program is that it embodies or encourages activism by staff attorneys who seek to stir up litigation to force judicial resolution of matters that should be left to elected officials.<sup>57</sup> Even the statement of the criticism raises fundamental questions not limited to legal aid, concerning the appropriate role of courts, legislatures, and the executive in a democratic society, to say nothing of the difficulty of characterizing particular issues as "political" or "activist." The

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55. Data on the matters dealt with in this paragraph are contained in annual reports of the Legal Services Corporation. See ANNUAL REPORT, *supra* note 37, at 14-20.

56. *Id.* at 15.

57. See Ostroff, *Legal Aid is Target of Conservatives Who See It As Subsidized Liberalism*, Kansas City Times, Jan. 26, 1981, § A, at 1, col. 1. See also Schlafly, *Lawyers for Poor Loaded with Fat*, St. Louis Globe-Democrat, Mar. 13, 1981, col. 1. Ms. Schlafly argues that the "Legal Services Corp. . . . has turned into a monster which is fomenting radical and revolutionary programs at the taxpayers' expense. . . . Many activists financed by the Legal Services Corp. are committed to the goal of implementing a radical social and political agenda." *Id.*

legal services program is attacked because it tempts judges to venture into areas in which critics believe they should not enter.

Howard Phillips, who led the Nixon administration's unsuccessful attempt to dismantle the OEO legal program in 1973, and who now heads the National Defeat Legal Services Committee of the Conservative Caucus says:

[I]t is a violation of the constitutional rights of every American to be required to subsidize activities which are essentially political in nature but are not accountable to the market place or the ballot box. . . . Legal services attorneys have been involved in virtually every liberal cause . . . . And through the Legal Services Corp., Congress has subsidized the liberal faith.<sup>58</sup>

If the facts were as implied by Mr. Phillips, most people would agree that taxpayers' funds should not be devoted to essentially political activities. But no factual support for these charges is supplied. Further, the examples given by Mr. Phillips and others are not convincing. In one recent statement, he cited representation of Iranian student protestors, suits promoting affirmative action in employment and education, and claims of American Indians for tribal lands as typical activities of the program.<sup>59</sup> Although it is arguable that neither college students nor aliens should be represented by the federal legal services, it is not apparent to me why deportation proceedings, the enforcement of nondiscrimination in employment and education, and Indian land claims are not appropriate areas in which the rights of poor people should be enforced. The well-to-do utilize members of the private bar to litigate educational discrimination,<sup>60</sup> deportation, and entitlement to federal land. Those claiming interests in federal lands or in their use frequently litigate those claims against the federal government. Why is it "political activism" when poor people enforce their rights in these areas and not when other private interests do so?

All assertions of rights on behalf of a particular class of persons are "political" in the sense that they involve the social distribution of benefits and status. Rights that are recent creations of legislatures or administrators, such as rights relating to affirmative action in employment, are especially likely to be viewed as controversial

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58. Ostroff, *supra* note 57, at 1, 4.

59. Freivogel, *Legal Aid For Poor Faces Fight*, St. Louis Post-Dispatch, Jan. 4, 1981.

60. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

in character and hence as "political." In the labor field, for example, statutory provisions relating to union organization were much more bitterly contested, and hence controversial, in the 1930's than they are today. The passage of time may similarly mute some areas of current controversy. But it is not the enforcement of statutory rights in the courts that is "political," since access to the courts is a neutral principle applicable to all rights. The "political" label attaches to the fact that some people, despite the legislative or judicial creation of rights, continue to view them as controversial.

The "political activism" critique, insofar as it does not overlap with more general concern about judicial activism, appears to involve two subthemes: the propriety of the government funding law suits against itself, and the relative emphasis in the legal services program of impact litigation as against individual client service.

Should the federal legal services program permit representation involving suits against governmental units or before legislative bodies, including administrative rulemaking? It is apparent that the program as we now know it would be crippled if these forms of representation were to be prohibited. Poor people would have effective recourse against merchants, landlords, and other private persons, but not against governmental agencies or officers.

In an area in which there is large and reasonable concern about the scope of governmental activity and the heavy hand of bureaucrats on private activity, it is surprising to hear voices from the right arguing that poor people should not be able to obtain representation to challenge the validity of governmental action which affects them. One would suppose that policing the bureaucracy on behalf of private individuals would appeal to conservatives.

Legal services lawyers sue governmental bodies to vindicate the legal rights of the poor. While it rankles some politicians to use government funds this way, there is every reason to make a large, bureaucratic, and fallible government accountable in its own courts. The legitimacy of the claims asserted, of course, is determined by the independent judiciary, not by the indigent clients or their lawyers. The counter argument appears to rest solely on a concern that such suits increase the cost of government because of the expense of defense and the fact that litigation sometimes requires increased expenditures such as payment of welfare benefits wrongly withheld. But such representation of the poor often reduces the work load of government agencies by putting the claims of poor people into a comprehensible form so that they may be handled easily and cheaply. Even if the increased costs more than

offset the savings, the enhanced legitimacy of the government resulting from its compliance with the rule of law is itself of incalculable value.

The second subtheme concerns the relative emphasis of the legal services program on impact litigation rather than individual client service. The critics of the legal services program talk as if the only cases that a program should handle are those that are routine and unimportant, affecting the individual client and no one else. The normal rules of *stare decisis* and *res judicata* make that an impossible goal since a judicial precedent affects all persons similarly situated and *res judicata* may bind the same defendant when sued by other plaintiffs, now that issue preclusion has moved away from the former requirement of mutuality of estoppel.<sup>61</sup>

Moreover, whether the result in a law suit will turn out to be significant cannot be determined at its commencement. The importance of a decision results from the particular findings of fact and rulings of law that a court makes at the conclusion of a case. Many lawyers have been disappointed when their "landmark" cases were ultimately decided on trivial points, and major rulings have often emerged from routine cases. Nor can it be assumed that significant cases will all be decided in favor of the indigent client, since major cases can be lost as well as won.

It is true that the legal services movement has a shared ideology in which "law reform litigation" is highly valued.<sup>62</sup> Abandonment of any opportunity to engage in significant litigation or legislative activity would make the program uninteresting to many of the better lawyers who now find it a fulfilling career. Inability to raise and win significant victories for poor people — however "significance" is determined — would also make a mockery of our claim of equal justice under law. The lawyer for the poor client would be restricted to repetitive and insignificant problems, and presumably would have to abandon his client's interests, in violation of professional ethics, when an issue of importance to others emerged.

Aside from these practical and philosophical difficulties with the concern about law reform, there is an efficiency concern. Repetitive litigation of the same problem in one-by-one litigation is wasteful of private and public resources. The disposition of significant issues in a manner that affects a large number of people

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61. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (authorizing offensive use of issue preclusion in the federal courts).

62. See e.g., E. JOHNSON, *supra* note 16, at 278-84; Bellow, *supra* note 35, at 106.

provides a much more efficient use of taxpayer funds for legal services. Any other approach would be wasteful and duplicative, even if feasible.

The concern about impact litigation also rests on an inaccurate perception of the underlying facts. The critics of legal services have been mesmerized by the publicity given to a small number of highly visible controversies and by the ambitious rhetoric of an occasional legal services lawyer, who may talk enthusiastically and unrealistically about changing the world through test cases or class actions. The reality of day-by-day work in a legal services office, however, is far different.<sup>63</sup>

An examination of the caseload of the legal services program as a whole indicates that the vast bulk of the cases and attorney effort is directed to individual client service. As Howard Eisenberg, executive director of the NLADA, has stated: "There's a good deal of misinformation about what legal aid lawyers do. Basically, they spend most of their time providing bread and butter and nuts and bolts legal services for the poor."<sup>64</sup> In recent years only two-tenths of one percent of all completed cases nationwide have been categorized by the independent programs that handled them as "significant", having importance beyond the individual client.<sup>65</sup> Since more than a million cases are handled each year, only about 2,000 cases nationwide are thus viewed as significant by the lawyers who handled them. Moreover, this number probably overstates the number of cases of widespread importance. Because law reform litigation has a high status among legal service attorneys, there is a strong tendency among them to exaggerate rather than denigrate the significance of a program's cases.

Evaluations of individual programs and of the national effort almost invariably conclude that most programs are devoting a disproportionate amount of their time to routine matters and that federal dollars would be more effective if a larger portion were devoted to significant matters.<sup>66</sup> Data concerning the frequency of

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63. See Bellow, *supra* note 35, at 108-09 (stating that the recurrent features of legal services programs are routine processing of cases, low client autonomy, narrow definitions of client concerns, and inadequate outcomes).

64. Goldenberg, *Legal Aid for the Poor Is Facing Rough Future*, Memphis Press-Scimitar, Feb. 12, 1981, at 107.

65. Houseman, *Class Actions and Legal Services* 11 (1980) (unpublished memorandum for the Legal Services Corporation). Mere numbers, of course, do not reveal the proportion of effort devoted to "significant" cases or class actions. But the numbers are so small that they carry some implications for proportion of effort as well.

66. See Bellow, *supra* note 35, at 121-22.



class actions point in the same direction. A survey of a random sample of legal services attorneys in 1978 revealed that only 29% of them had participated in at least one class action during the immediately prior period of more than three years.<sup>67</sup> These figures suggest that, whatever the occasional rhetoric may be at national meetings at which legal services attorneys exchange views, the individual programs find it impossible to resist the enormous pressure of the hurt, troubled people who fill their waiting rooms and request, with the most obvious need, routine legal services.

As Colman McCarthy has said:

The image of poverty lawyers coming into an area to rabble-rouse or shake up the local powers, as Mayor Daley of Chicago viewed the program in the mid-60's, was always false. . . . [T]he 5,000 lawyers in the 335 programs around the country [know] that the daily work is an unglamorous mix of merely winning for the poor a few of their rightful crumbs or keeping them from being snatched away.

Some days, it is sorting out food stamp problems. Other times, it is taking action to keep a mother on welfare or settling a landlord-tenant dispute. With about 120 open cases to deal with — 60 would be a heavy load — [a legal services attorney] is kept busy.<sup>68</sup>

In short, the charges of political activism are lacking both in logic and factual support. Legal services lawyers are not ideological ambulance chasers but reasonably ambitious and idealistic attorneys who are trying to do good legal work under trying circumstances. The sheer pressure of numbers and the desire to provide minimum service to as many as possible are dominant characteristics of the existing system.

### B. *A Lawyers' Program, Not a Poor Peoples' Program*

A more fundamental but less common critique of the legal services program is that, despite its noble pretense, its benefits go largely to lawyers instead of poor people. The argument has been most fully stated by Stephen Chapman.<sup>69</sup> Mr. Chapman raises

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67. See Houseman, *supra* note 65, at 11.

68. McCarthy, *With Justice For All Who Can Afford It*, Wash. Post, May 11, 1980, § K, at 10, col. 1.

69. See Chapman, *The Rich Get Rich, and the Poor Get Lawyers*, The New Republic, Sept. 24, 1977, at 9, reprinted in 126 CONG. REC. 6863 (1980) (remarks of Sen. Helms).

provocative questions concerning the purposes and effects of the legal services program.

Who benefits from the program?, asks Mr. Chapman. He answers that its principal benefits run to its lawyer supporters and proponents, not to the poor people who are its ostensible beneficiaries. The legal services program, according to Mr. Chapman, is a full employment bill for lawyers.<sup>70</sup> The ABA and other bar associations support the program because it provides employment for the current overflow of young lawyers from the law schools, who would otherwise be in competition with the existing private bar. Since legal services programs are prohibited from taking fee-generating cases, they do not compete with private lawyers. Even more important, every case handled by a legal services lawyer creates new business for other lawyers, since the opposing parties need the services of a lawyer. Thus the program has a tremendous multiplier effect; it not only relieves the competitive pressures of new lawyers entering the legal market, but also requires additional compensated lawyer time to defend the claims brought by legal services lawyers.

There is an old adage that provides jocular support for this view. In a small town in Vermont one lawyer was struggling along, barely eking out a living. Another lawyer moved to town and now both are doing nicely. The point is obvious: the presence of lawyers increases the demand for their services.

The second wing of Mr. Chapman's argument characterizes the program as paternalistic and doubts the importance of the public provision of legal services in contrast to other possible benefits for the poor, especially money. Mr. Chapman argues that lawyers exaggerate the importance of legal counsel, regarding it, "like food, shelter, and medical care, as a basic right, the lack of which makes life practically intolerable."<sup>71</sup> Lawyers, like every other group, tend to "magnify the importance of what they do."<sup>72</sup> This is especially so when public provision of legal services serves lawyers' self interest and relieves them of the duty to provide *pro bono* services to those who can't afford to pay.

Mr. Chapman notes:

The legal services program may be the most extreme example of the paternalism of the American welfare state:

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70. *Id.* at 10. Chapman argues that: "LSC-funded programs offer jobs that otherwise wouldn't exist, making the program something of a Humphrey-Hawkins bill of the legal community." *Id.*

71. *Id.*

72. *Id.*

denying the poor what they explicitly lack — money — in favor of the goods and services the government thinks they should have, in the amount and proportion it deems appropriate. There is much validity in the libertarian argument that this approach denies the poor both the freedom to decide their own needs and the responsibility, essential to individual independence and self-reliance, to accept the consequences of such decisions.<sup>73</sup>

If a negative income tax or other program redistributed income to the poor, some of them might purchase legal services with the money. Chapman guesses that most poor people would not value legal services very highly since food, shelter, clothing, education, or even entertainment are likely to have a higher value to them.

Moreover, Mr. Chapman argues, the subsidized availability of lawyers to the poor

. . . turn[s] another ordinary piece of social friction into a legal dispute . . . inevitably [reducing] the areas of social life where people are free to interact without the formalities of legal procedures, and without the assistance of lawyers. . . . Few trends are more depressing than the increasingly litigious character of American society and government. Our growing inclination to handle every dispute through our lawyers brings to mind Judge Learned Hand's remark that he feared only death and illness as much as a lawsuit . . . "Thickening layers of legalism seem to surround our lives." . . . [T]he blame for too much law can be laid on too many lawyers and their dogmatic reliance on the adversary process as a solution to all social problems.<sup>74</sup>

Lawyers need to struggle with these arguments. The tendency of every group to identify its interest with that of society is almost universal. Lawyers as a class do benefit in many ways, psychic as well as economic, from the legal services program. And the trends toward litigious formalism and social fragmentation are painfully evident.

The issues presented by these arguments are very broad, far beyond the scope of this discussion, but a brief response is required.

First, the opportunity to enforce legal rights and responsibilities involves more than just economics and efficiency. It is a question

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73. *Id.* at 14.

74. *Id.*

of the moral tone of a society and the legitimacy of its institutions. Although we must be self-critical of our tendency as lawyers to prefer the virtues of law over other things, many laymen share our view of the priority of the rule of law.

Second, the economic arguments in favor of distribution of money rather than legal services assume that substantial amounts of money would be available for distribution and that market imperfections do not prevent rational choices by poor people. Both assumptions are dubious. The current appropriation for the national legal services program amounts to only about ten dollars per eligible poor person.<sup>75</sup> That amount of money will not purchase much in the way of legal services or anything else. And poor people, precisely because they are often uneducated and uninformed, may lack reliable information concerning their need for legal services and how to get them, as well as the ability to pay for them.<sup>76</sup> In using money made available by the state, they may not be able to make informed choices.

Finally, especially in situations in which poor people are affected, but each with respect to a small amount, there is a free-rider problem.<sup>77</sup> No one has an incentive to expend the amount necessary to litigate a \$100 claim, but the pooling effect of legal services operates to confer a benefit on all members of the group by supporting litigation based on the aggregated value of the claims, which may be very large.

### C. *Economic Efficiency*

Arguments that the legal services program is paternalistic and lawyer-oriented are closely related to attacks on the program on grounds of economic efficiency. Professor Posner, for example, states some of the same points made by Chapman in language more

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75. About 29 million Americans fall within the eligible-client population; since the expenditures for the program were \$300 million in 1980, the amount expended per eligible person was about ten dollars. See notes 52-55 and accompanying text *supra*.

76. I am uncomfortable with the paternalism implicit in this argument. Moreover, even if there is a lack of information concerning legal needs and substantial options among poor people, a less intrusive approach for government would be to provide relevant information rather than the service itself.

77. "Free riders" are those who receive the benefits of successful litigation although they bear none of the costs. For discussion of the "free ride" problem in the administrative law field, see Cramton, *The Why, Where, and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972). For discussion of the alternative of aggregating numerous small claims through class action proceedings, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 449-50 (2d ed. 1977).

familiar to economists.<sup>78</sup> Providing legal services to the poor at no price, he argues, "prevents many poor people from achieving their most efficient pattern of consumption."<sup>79</sup> A poor person will accept free legal services unless their value to him is outweighed by the lost time and other inconvenience of dealing with a lawyer. The demand for free legal services will invariably exceed the available supply, creating a serious rationing problem.<sup>80</sup> Since the value to some recipients will be less than its cost to the taxpayers, the distribution of free services is wasteful. It is better, in his view, to give poor persons \$100 and let them decide how to spend it.<sup>81</sup>

Posner also argues that free legal services misallocate resources in other respects. Since legal services are usually employed in a dispute with another, the adverse party must increase its legal expenditures or abandon its stake in the dispute. These costs, if a market for services and products is involved, will inevitably be passed on as costs of production. Thus, for example, enforcement of building codes against landlords will result in a substantial reduction in the supply of low-income housing, and a substantial rise in the price of the remaining supply.<sup>82</sup>

Litigation against governmental agencies has somewhat different effects, Posner argues, since the costs are borne by taxpayers rather than by those purchasing the product or service. In some situations such litigation may redistribute income to the poor who are beneficiaries of the social program under consideration, while in others it may merely redistribute the program's benefits among groups of beneficiaries.<sup>83</sup> In any event, if litigation results in increased taxes, legislative efforts may be made to reduce future eligibility or benefits.

The provision of free legal services also creates opportunities for abuse when particular opponents are singled out for extensive and repetitive litigation.<sup>84</sup> The typical litigant's hunger for justice

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78. See R. POSNER, *supra* note 77, at 355-59.

79. *Id.* at 355.

80. *Id.*

81. *Id.*

82. *Id.* at 356-59. The effects of the enforcement of housing codes is discussed in Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971). See also Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973).

83. See R. POSNER, *supra* note 77, at 356.

84. See Bellow, *supra* note 35, at 122. Bellow writes:  
[W]here such a "focused case" strategy is followed, illegal and exploitative practices that affect poor people can be changed. This is

is moderated by the relationship between what is at stake and the costs of getting it. The appetite for litigation will disappear as legal expenses approach the value of the expected outcome. Because a subsidized litigant does not operate under the same constraint, there is always the possibility that his willingness to devote an indefinite amount of legal resources to a case will extort unjust settlements.

A similar problem arises when the stakes of the parties in a legal controversy are widely disparate. If an injured plaintiff in a mass tort situation has only \$1,000 at stake while the defendant is worried about the res judicata effect of an adverse decision on claims of a much larger amount, the willingness of the latter to litigate may force a settlement for an amount well below the value of the claim. Institutional litigants may thus often be able to bring great pressure upon individual litigants because they have more at stake.<sup>85</sup>

The ability to whipsaw opponents is present in some situations involving publicly funded legal services. As a factual matter, abuses do not appear to occur with great frequency, partly because legal services programs have such limited resources spread over so many potential cases.<sup>86</sup> An amendment to the statute now provides protection for those inconvenienced by frivolous suits.<sup>87</sup>

Arguments concerning the efficiency effects of the legal services programs fail to reflect the benefits provided to poor people as a

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so because they are often the product of cost calculations which are radically altered when (a) confronted with a substantial number of complainants; (b) with a real stake in the outcome; (c) who do not have to absorb the attorney and other costs which would ordinarily be involved in pursuing such grievances to completion. . . . [T]here is a great deal of potential for organization and leverage for low-income clients in systematically focusing intake and advocacy in individual cases in this way.

*Id.*

85. See Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

86. See Bellow, *supra* note 35, at 108-09, 119-22. Bellow describes the actual practice of legal services programs as conforming to a "minimal help-maximum numbers" approach which provides routinized and limited service to as large a number of clients as possible. *Id.* at 110, 117. He severely criticizes this approach, urging a more focused law-reform strategy that would provide a much higher quality of service to a smaller group of clients. *Id.* at 121-22.

87. See 42 U.S.C. § 2996d(f) (Supp. 1980). As amended, the statute provides that a defendant who prevails in an action brought by a legal services program is entitled to an award of reasonable costs and legal fees incurred in defense of the action if the court finds that the action was commenced or pursued for the sole purpose of harassment of the defendant or that the corporation or the plaintiff maliciously abused legal process.

class when small claims, uneconomic to be litigated individually by any claimant, are pursued systematically on behalf of such persons as consumers or tenants.<sup>88</sup> Moreover, one of the great advantages of the program is that substantial benefits accrue even to those who are not represented. To the extent that legal rules and procedures are modified in favor of welfare recipients, consumers, tenants, and other classes, everyone in the class, even those not eligible for free legal services, is benefitted. By assisting a small proportion of poor people, benefits are produced for a much larger group. Costs to the same class may also rise, but the choice of enforcing or not enforcing legal rights should be left to litigants rather than decided in the abstract by the social critic.

Supporters and critics of the legal services program do not question its effectiveness as an instrument for enforcing the legal rights of the poor.<sup>89</sup> Both agree that it produces substantial results. The criticisms, rather, are that the assertion of these claims tempts judges to do things they shouldn't do, benefits lawyers more than clients, or misallocates resources in the community.<sup>90</sup>

Although the philosophical and economic objections of critics such as Chapman and Posner raise serious questions, the political opposition to the legal services program is based on its very success and the erroneous perspective that views its law reform aspect as more dominant than it really is. Lawyers who do a good job representing poor people inevitably will collide with the interests of powerful business groups and government agencies; those who are on the receiving end of these not-so-tender ministrations of justice will usually not be pleased.

The claims brought by legal services programs on behalf of poor people are decided by judges, not by legal services lawyers. Approximately 85% of all matters are resolved favorably to the program's clients, a remarkably high success rate. The rub about

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88. See Brooke, *Legal Services: Government at its Best*, Wash. Star, Mar. 9, 1981, col. 3.

89. See Brill, *Reagan Voters: Don't Read This*, *The American Lawyer*, Oct. 1980. Brill describes the effectiveness of the legal services program in New Haven, Connecticut: "Morrison's work punctures these myths [that government poverty programs are ineffective] so clearly that Reagan should send a hit squad after him." *Id.*, col. 1. See also Cockburn & Ridgeway, *Poor Law: The Attack on Legal Services*, *Voice* (Feb. 4, 1981), at 12, col. 1 ("Of all the liberal programs generated by the reforming spasm of the 1960s, [the legal services program has] been particularly successful, in terms of dollar value, effectiveness, and absence of corruption."). Similarly, critics of the program emphasize the effectiveness of the program in advancing what are perceived as ideological objectives. See notes 3-6 and accompanying text *supra*.

90. See Taylor, *supra* note 7.

the legal services program may be that it is successful, and its very success creates opposition among interests adversely affected. "Political activism" and similar slogans may be code words for another complaint: "their just claims have been upheld against us and we resent it."

### V. THE CURRENT CRISIS

In March 1981, a spokesman for the Office of Management and Budget announced that the new Administration's budget for the next fiscal year would not include any funds for the Legal Services Corporation.<sup>91</sup> President Reagan hopes to abolish the national legal services program. The current situation is a parlous one for several reasons. First, an appropriation for the Corporation must be approved by October 1st in order for it to receive any money in fiscal year 1982.<sup>92</sup> Given the disarray of the economy and the strength of the popular sentiment to cut both taxes and expenditures, Congress may be expected to give considerable deference to the President's recommendation that legal services are an appropriate area in which to make cuts. Second, the legislative authorization for the Corporation expires this year and new legislation authorizing appropriations for future years must be enacted if the program is to continue.<sup>93</sup> Even though the program has substantial support in the House of Representatives, the road ahead looks rocky in the more conservative Senate and bleak indeed if it becomes necessary to muster a two-thirds vote to overcome a presidential veto. Third, President Reagan will have an early opportunity to replace all eleven members of the Corporation's board of directors and, even if he fails in his effort to eliminate the program entirely, it may be reshaped out of recognition if unsympathetic board members are nominated by the President and confirmed by

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91. See note 1 and accompanying text *supra*.

92. The annual budget cycle must result in enactment of an appropriation bill containing budget authority for expenditures for the Legal Services Corporation for fiscal year 1982, beginning October 1, 1981. If the appropriations process is not completed at that time, a continuing resolution to continue spending until the appropriations process is completed is always a possibility. See Jackson & Merry, *Special Interests Fear Congress Will Approve Most of Reagan's Cuts*, Wall St. J., Feb. 20, 1981, at 1, col. 6 (considerable legislative deference will be given to presidential recommendations).

93. See H.R. 2506, 97th Cong., 1st Sess. (1981). This bill would extend the Legal Services Corporation. Hearings on the bill were held in March 1981 before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary.



the Senate.<sup>94</sup> In short, the legal services program is now fighting for its life on a number of fronts.

The threats to the program may bring about any of three alternative fates: termination, transformation, or slow, painful death. Brief remark on each is appropriate.

### A. Termination

As previously indicated, President Reagan seeks to abolish the current program, leaving nothing in its place. Members of the private bar would once again assume collective responsibility for meeting the legal needs of the poor. Non-federal funds now available for legal services, estimated at about \$48 million in a recent year, might continue to flow to legal services organizations;<sup>95</sup> and strenuous fundraising efforts at the state and local level might expand this total somewhat.

If termination of federal funding occurs, the legal services program will revert to the situation prevailing prior to 1965: traditional legal aid on the charity model. The American bar would then be faced with the tremendous challenge of meeting the most essential needs through volunteered services and financial contributions.

### B. Transformation

Two major alternatives have been advanced that would transform the legal services program. One would abolish the Corporation as a governing body and funding conduit, and allow states to

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94. See Ranii & Bourne, *supra* note 2, at 1, col. 1. In addition to failing to obtain confirmation of five nominees in 1980, President Carter also established an undesirable precedent by ignoring the spirit of the statutory requirement that "no more than six [members of the board] shall be of the same political party." See 42 U.S.C. § 2996c(a) (1976). During the Carter years very few Republicans were appointed to the board; except for a few members, the Board consisted of Democrats and independents who had been active in the Carter campaign. With the change in the composition of the Senate in the 1980 election, President Reagan is not likely to encounter the difficulties faced by President Ford in nominating persons who were perceived by Senate liberals as unsympathetic to the objectives of the federal legal services program. For a discussion of the difficulties encountered by President Ford, see Arnold, *supra* note 23.

95. See LEGAL SERVICES CORPORATION, DELIVERY SYSTEMS STUDY: A RESEARCH PROJECT ON THE DELIVERY OF LEGAL SERVICES TO THE POOR. This study reported that in 1976, 67% of total funds expended by legal services programs for civil legal assistance came from the Legal Services Corporation. *Id.* Almost two-thirds of the non-Corporation funding also came from federal sources. Funds from state and local governments and from private sources provided only about 9% of total funding.

devote a portion of a federal block grant to legal services.<sup>96</sup> Under this proposal, the administration of a large number of human-service programs would be transferred to the states under a block grant. No funds would be included in the initial block grant for legal services, and all of the transferred programs would be reduced by 25%.<sup>97</sup>

Each state would decide whether and how much support would be provided for legal services. Badly needed health and human services programs would compete against each other for shares in a smaller pie, with legal services prejudiced in this competition by the fact that it had contributed nothing to the kitty to be divided. For legal services, adoption of this approach would end the national program, lead to highly variable and inconsistent state responses, and probably result in partial or total elimination. In states in which legal services has a high priority *vis-a-vis* the programs with which it would be competing, strong local programs might continue.

It is not apparent that lumping legal services with programs combatting high blood pressure and rat infestation is a desirable course. Legal services are unique in many respects and, in my view, more important than many of these social service programs. History also suggests that turning over the future of the program to state officials would reinstitute the political interference that hampered the OEO programs.<sup>98</sup> Disputes of the poor with public officials who make decisions about their housing, welfare, health care, and the like would be communicated to the state officials passing on legal service funding. The Legal Services Corporation was created in large part to provide independence from political pressures of the kind this would involve.

A second proposal for the transformation of the legal services program is also lurking in the wings. This is a substitution, in whole or part, of a judicare system for the current staff-attorney system.<sup>99</sup> Judicare, the legal analog to medicare, involves the provision of legal services to eligible clients by members of the private bar, who are then paid by the government for their services. A study by a Reagan transition team recommended a move to judicare, coupling it with a funding cut, the abolition of support centers,

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96. See MacKerron, *Legal Services Corp. Supporters Fear It May be 'Block Granted' to Death*, NAT'L. J., Feb. 28, 1981, at 358-60; Freivogel, *U.S. Plan Readied To Replace Legal Aid*, St. Louis Post-Dispatch, Mar. 1, 1981.

97. See Ranii & Bourne, *supra* note 2, at 1, col. 2.

98. See note 26 and accompanying text *supra*. See also Turner, *Proposal by Reagan Opens an Old Wound*, N.Y. Times, Mar. 15, 1981, col. 1.

99. See Cockburn & Ridgeway, *supra* note 89, at 13, col. 2.

and legislation restricting both eligibility and representation.<sup>100</sup> The study recommended that the portion of the Corporation budget devoted to judicare be increased from less than 1% now to 15% next year, 35% the following year, and 50% the year after.

The questions of organizational structure and relative efficiency raised by a judicare alternative are complex and controversial.<sup>101</sup> This is not the place for a full exploration of them. My view is that a complete legal services program would have staff attorney and judicare components, since each has some advantages. In some sparsely settled areas, reliance on private attorneys may be necessary, and for some routine problems such as divorces, bankruptcies, and the like, private attorneys may be able to perform the tasks at least as efficiently, leaving the staff attorneys to provide more specialized legal services for poor people. It is one thing, however, to add a judicare supplement to the existing programs, and quite another to dismember the existing staff attorney program, which is operating effectively, for an uncertain merger with judicare at lower funding levels.

The politics of judicare are troublesome because the organized bar, which is the most active lobbyist for legal services, is divided on the subject. Large firm lawyers tend to support the existing staff-attorney system, while solo practitioners and small firm lawyers, who feel increasingly threatened by the many changes affecting the legal profession, are very supportive of judicare. Under pressure from some state bars and its own general practice section, the ABA recently adopted a resolution urging Congress to amend the Act "to mandate the opportunity for substantial involvement of private lawyers in providing legal services for the poor."<sup>102</sup> This ambiguously worded resolution includes *pro bono* involvement of the private bar as well as compensated services, and in this form it is receiving the wholehearted support of the Legal Services Corporation. It seems likely that language along the lines of the ABA resolution, if not stronger, will be included in the Act if the reauthorization legislation is enacted this year.

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100. See note 4 *supra*.

101. For the views of the Legal Services Corporation, see THE DELIVERY SYSTEMS STUDY: A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES (June 1980). For other views, see Brakel, *Styles of Delivery of Legal Services to the Poor: A Review Article*, 1977 AM. B. FOUNDATION RES. J. 219, criticizing Earl Johnson's views as expressed in the first part of M. CAPPELLETTI, J. GORDLEY & E. JOHNSON, TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 140-90 (1975).

102. 66 A.B.A.J. 1058 (Sept. 1980).

### C. *Slow, Painful Death*

If the challenges described above are not immediately fatal, slow, painful death may be the fate of the national legal services program through: 1) drastic reductions in funding; 2) crippling restrictions on the types of cases that may be undertaken or the scope of representation; or 3) harassment from an unsympathetic governing board.

#### 1. *Funding*

The outlook for funding for fiscal 1982, assuming the continuance of the program, is not hopeful. Newspaper reports have mentioned \$100 million as a likely Senate figure for the Corporation's appropriation next year; this amount should be compared with current funding of \$321 million.<sup>103</sup> A cut of \$221 million would have disastrous effects on the scope and quality of the existing program.

A funding cut of this size would probably require the elimination of all training activities, the support centers, the Reginald Heber Smith program, some special programs, and a reduction of all field programs to approximately one-third of their current level. It would lead to bitter internal quarrels among client groups, such as those representing migrants and welfare recipients, and between staff components of each program. Most of the attorneys and staff would have to be fired. The disastrous effect on morale would also tend to lessen the quality of the remaining program. Programs would be unable to undertake new cases or hire new staff members, and all of their energy would have to be devoted to completing work on present cases.

The funding outlook in the House of Representatives, however, is substantially more favorable toward legal services. There is a possibility that the House and Senate conferees will negotiate an appropriations figure somewhere between \$100 million and \$260 million.

#### 2. *Crippling Restrictions*

Another mode of attack on legal services is to cripple it with demeaning or inappropriate restrictions. Current hearings in the House of Representatives on the reauthorization are exploring a variety of restrictions on the persons eligible for service, the types of cases that may be undertaken, the scope of representation, and

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103. The Corporation request for fiscal 1982 was \$399.6 million; President Carter's budget recommended \$347 million. See *Legal Services Corporation News*, Jan.-Feb. 1981, at 1.

similar limitations. The harmful effect of such restrictions turns entirely on the content and effects of the particular restriction.

The Act has always contained restrictions on the availability and type of service. Questions of policy in the provision of publicly-funded services are appropriate for legislative resolution, especially when choices as to who enjoys a social benefit must inevitably be made. Examples of longstanding restrictions are those relating to criminal cases and fee-generating cases, which prevent the use of Corporation funds in situations in which representation is available from other sources.<sup>104</sup> More controversial are present restrictions on handling school desegregation cases, draft matters, abortion cases, and cases involving homosexual rights.<sup>105</sup> The ABA, the Corporation, and the legal services community have opposed such restrictions,<sup>106</sup> but the existing restrictions have not been especially troublesome because their scope is so limited and most programs are inactive in the areas involved.

During the reauthorization hearings in 1980, however, and again in the current session, a number of restrictions were proposed which would have a more substantial effect on the program.<sup>107</sup> Some of the major proposals are: exclusion of aliens or migrants from representation,<sup>108</sup> prohibition of class suits,<sup>109</sup> prohibition of administrative or legislative representation,<sup>110</sup> and prohibition of suits against governmental units or officers.<sup>111</sup> Any such restrictions on service would be highly unfortunate. Here again, however, there are substantial differences in relative effect. Exclusion of service to aliens, for example, especially if limited to illegal aliens,

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104. See 42 U.S.C. 2996f(b)(1) (1976) & 45 C.F.R. § 1609 (1980) (fee-generating cases); 42 U.S.C. § 2996f(b)(1) & 45 C.F.R. § 1615 (1980) (criminal cases).

105. See 42 U.S.C. § 2996f(b)(8)-(10) (Supp. III 1979).

106. See H.R. REP. No. 96-996, 96th Cong., 2d Sess., at 9. The report notes:

A number of public witnesses, including the Corporation, the American Bar Association, the Project Advisory Group and the National Clients Council, testified on the general subject of restrictions on representation of legal services clients . . . . The basic thrust of the testimony heard by the subcommittee was that all such restrictions should be removed from the Act, because they tend to reinforce the belief among both clients and lawyers that the practice of publicly-supported legal services law is a second class practice. . . .

*Id.*

107. See Freivogel, *supra* note 4, at 11, col. 1; MacKerron, *supra* note 96, at 358-60.

108. MacKerron, *supra* note 96, at 358, col. 2.

109. HERITAGE FOUNDATION, *supra* note 3, at 17.

110. Freivogel, *supra* note 4, at 11, col. 1.

111. HERITAGE FOUNDATION, *supra* note 3, at 17.

would not be disastrous and could be justified as expressing a legislative priority concerning the use of a scarce public resource.

Because of the political sensitivity concerning class actions, there has been a great deal of discussion of a broad prohibition of the use of this procedural device by legal services lawyers.<sup>112</sup> Some opponents of the legal services program appear to suggest that withdrawal of this weapon would eliminate impact litigation. They are uninformed or engaged in wishful thinking. Prohibiting class suits would have some adverse consequences on the program, but it would not eliminate law reform through impact litigation. This is so because individual cases against the same defendants would have much the same effect as class suits: the rules of stare decisis and res judicata would extend the benefits of one poor person's suit to others similarly situated.

The effects of a restriction of this kind would be more symbolic than practical. Concerning practical effects, discovery might be somewhat more limited in an action brought by an individual plaintiff than it would be in one brought on behalf of a class, and the contempt sanction for violation of a decree would not be as readily available. Each of these effects is relatively minor.

The real cost of a class action restriction is symbolic: the attorneys who represent the poor would not be able to employ the same armory of procedural devices that are available to other litigants. This pointed message would adversely affect the morale and self-image of legal services lawyers, who already feel besieged, and who are working for low salaries in unfavorable and often hostile environments. Statutory restrictions that prevent them from providing the complete and zealous representation that the Code of Professional Responsibility requires<sup>113</sup> — and that is available to other litigants — reinforces an image of second-class citizenship for themselves and their clients.

Of the possible restrictions listed above, the ones most damaging to the effective operation of the program and to any semblance of equal justice under the law are those which would prohibit suits against governmental units and all forms of legislative representation before legislatures and administrative bodies concerning statutes and rules affecting the poor. These restrictions would destroy the legal services program as we now know it.

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112. *Id.*; notes 84-90 and accompanying text *supra*.

113. ABA CODE OF PROFESSIONAL RESPONSIBILITY (August 1977): Canon 6: "A lawyer should represent a client competently." Canon 7: "A lawyer should represent a client zealously within the bounds of the law."

### 3. *Unsympathetic Board*

As previously indicated, President Reagan will have an early opportunity to appoint all eleven members of the board of directors of the Legal Services Corporation.<sup>114</sup> This oddity, given the statutory policy of staggering board appointments over a three-year period, resulted from the failure of the Carter Administration to obtain reappointment of the five board members whose terms expired in July of 1980.<sup>115</sup> Since the terms of the remaining six board members expire during the summer of 1981, an entirely new board may be in place by the fall.

Since the board appoints the president of the Corporation, who in turn controls the staff of the Corporation, a dramatic change in the attitudes of the board would have immediate repercussions on the Corporation's staff. Moreover, the board has large, if not well defined, authority to issue regulations interpreting the Act and its provisions.<sup>116</sup> The establishment of national priorities and imposition of restrictions through Corporation regulations are a distinct possibility.

Despite the ominous quality of these dark clouds, I refuse to be a pessimist. The legal services program has a proud record, and it has many friends. The ideological conservatives who oppose it are profoundly ignorant of it. I believe that they, along with the millions of Americans who are unfamiliar with the program and open-minded about it, can be educated concerning its goals and achievements. The broad middle ground of American politics, I believe, will support the integrity of the program when the facts are known.

James Kilpatrick, the conservative columnist, illustrates this point. When I began my service as chairman of the Corporation board, Kilpatrick was writing regular columns attacking the Corpo-

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114. See note 94 and accompanying text *supra*.

115. See 42 U.S.C. § 2996c(b) (1976) (setting terms of office for Board members).

116. The Board is authorized to establish general policies for the Corporation. *Id.* § 2996d. Its powers in funding recipients and in engaging in research, training, and information activities are stated in general terms in § 2996e(a). Section 2996e(b) authorizes the Corporation to "insure the compliance of recipients and their employees with the provisions of this subchapter and the rules, regulations, and guidelines promulgated pursuant to" it, but termination or defunding of recipients is subject to procedural safeguards. See *id.* § 2996j. The specification of a number of requirements that the Corporation is to implement and enforce in making grants and contracts impliedly limits the Board's authority to impose other or differing requirements. See *id.* § 2996f. The extent of the Corporation's authority to establish national priorities and restrict eligibility is largely undetermined.

ration and the legal services program, but the force of reason has changed his mind. In mid-1980 Kilpatrick wrote:

[W]hen the bill to create the Legal Services Corporation was pending in Congress, I was among many conservatives who fought it to the last ditch. [The Corporation's predecessor, the OEO] had become a playpen for happy hot dogs fresh out of law school.

. . . [W]hile a few of the hot dogs still romp through the law here and there, the Legal Services Corp. has proved itself a tremendous force for good in our society. Nothing rankles like injustice. The poor person who feels that he has been denied his day in court suffers a wound that never heals. The corporation hasn't wrought miracles in its first five years, but those who know of its quiet, unpretentious labors will wonder how our system of justice survived so long without it.<sup>117</sup>

Although some backsliding from this support of the Corporation is evident in a more recent column, Kilpatrick continues to support the ideal of publicly funded legal aid.<sup>118</sup>

#### VI. WHY LEGAL SERVICES FOR THE POOR?

The legal services program is commonly viewed by its proponents, as well as its critics, as a mechanism for redistribution of social wealth to the poor.<sup>119</sup> There are three difficulties with this view: 1) economic theory often denies that changing a legal rule will have the effect of redistributing income within the larger community; 2) the redistribution theory invites courts to decide issues that are more properly left to resolution by policy makers; and 3) it is inconsistent with the facts, both in respect to the bulk of the activities of legal service programs and in its overestimation of the capacity of litigation to perform such dramatic changes in economic well-being.

These arguments have been touched upon at other points in this paper, so I offer only a brief recap at this point. Global changes such as large-scale redistribution of income within the community cannot be accomplished by lawsuit except in rare and limited situa-

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117. Kilpatrick, *When Hot Dogs Help*, NATION'S BUSINESS 13, 14 (July 1980). See also Kilpatrick, *Of Justice for All*, Wash. Star, June 10, 1980, § A, at 11, col. 1.

118. Kilpatrick, *Legal Services: Death by Suicide*, Universal Press Syndicate, Mar. 14, 1981.

119. See E. JOHNSON, *supra* note 16, at 235-84 (1974) (arguing that civil legal assistance is an effective instrument in redistributing wealth to poor people). See also notes 3-6 and accompanying text *supra*.



tions.<sup>120</sup> The cooperation and action of legislative bodies is required for accomplishments of this character. Usually the power of the fisc is required; and this remains an area from which courts are almost totally excluded. Moreover, unforeseen consequences as well as political retaliation are often associated with efforts to do the impossible through court order. For example, studies indicate that the long effort in several states to require landlords to comply with building codes has tended to reduce the supply of low income housing and increase its price, leaving a doubt about whether poor people were the victors or the victims of the engagement.<sup>121</sup> In general, as Milton Friedman has said, there is no such thing as a free lunch.<sup>122</sup>

I confess to some hope that legal services attorneys will moderate their social change rhetoric and eschew cases that really belong in the political realm. I was not pleased, for example, to read that our new attorney general, William French Smith, reportedly is upset because a legal services program in California, CLRA, has sued the University of California, which Mr. Smith serves as a regent, for sponsoring research into heavy agricultural machinery which allegedly reduces employment opportunities for farm labor.<sup>123</sup> I know very little about the case and this ignorance must qualify my remarks, but it strikes me as the kind of problem that deserves resolution through the political process rather than in the courts. Perhaps the University of California should change its research policies so that more effort is directed to the needs of farm laborers or small

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120. Marc Galanter sums up a large number of studies in the following sentences:

Legal professionals have tended to overestimate the benefits that could be delivered through obtaining rule-changes from eminent institutions, especially from courts. A vast literature has documented the constantly rediscovered and never-quite-believed truths that judicial . . . pronouncements do not change the world; that the benefits of such changes do not penetrate automatically and costlessly to their intended beneficiaries; that often they do not benefit the latter at all. We have some notion of why rule-changes produced by courts are particularly unlikely to be important sources of redistributive change. . . . Like everything else, favorable rules are resources and those who enjoy disproportionate shares of other resources tend also to reap the benefit of rules.

Galanter, *Delivering Legality: Some Proposals for the Direction of Research*, 11 LAW & SOC. REV. 225, 228-29 (1976). See also Hazard, *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242 (1970).

121. See note 82 and accompanying text *supra*.

122. M. FRIEDMAN, *THERE'S NO SUCH THING AS A FREE LUNCH* (1975).

123. For a discussion of the Attorney General's reaction to this case, see Cockburn & Ridgeway, *supra* note 89, at 12, col. 2. See also Taper, *The Bittersweet Harvest — Machines on Trial: Has the Mechanization of American Agriculture Gone Too Far?*, SCIENCE, Nov. 1980, at 79-84.

farmers; perhaps the U.S. Department of Agriculture, which supplies the research funds involved in this controversy, should modify its funding policies in the same direction; and perhaps either the state or the federal legislature should move in the same direction. These are arguable questions of public policy, but why are they submitted to a court in a highly publicized law suit? As the *Los Angeles Times* commented in an editorial entitled *Trying to Hold Back Tomorrow*: "CLRA forgot to name progress as a co-defendant."<sup>124</sup>

It is inevitable in a decentralized legal services system, which leaves the judgments about allocation of resources and selection of clients to the local programs, that a few highly publicized situations of this kind will cause embarrassment and difficulty for the legal services program as a whole. My view is that the virtues of decentralized decision-making, responsive to local interests and communities, is far better than any attempt on a national level to spell out detailed priorities. Usually the judgments made by local programs will be sound ones. And the virtues of a responsive decentralized system vastly exceed the costs of occasional instances of poor judgment.

So far, my justification for publicly-funded legal services has been negative in character, expressing doubts that broad claims of social justice are an achievable and appropriate goal of the national legal services program. But much of a positive nature needs to be said as to why publicly-funded legal assistance for the poor is an essential buttress of our enduring values. The arguments will be marshalled under three heads: 1) access to justice, 2) the bias of law against the unrepresented, and 3) helping individuals to help themselves.

#### A. Access to Justice

Provision of legal services for the poor is a conservative program in the sense that it helps preserve the enduring values of our republican form of government — access to justice on reasonably equal terms, and due process and equal justice for all. The program provides living proof that our ideal of the blind lady with the scales is not a figment of the imagination; she is really there and is prepared to give a fair shake to the poor and the oppressed.

The courts are not merely another social institution; they provide the essential confirmation that our legal rights are real, meaningful, and enduring. On some occasions, an individual needs to resort to the courts for relief; on other occasions, one needs a lawyer

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124. See Taper, *supra* note 116, at 84.

to conduct an adequate defense or prosecution of a claim. Political liberty requires access to the courts as much as it requires access to the voting booths. Provision of such access supplies a further reason why citizens may be expected to resort to political or legal processes for orderly change rather than to the violent and disruptive path of self-help reflected by the call, "to the barricades." James Kilpatrick, the conservative columnist, has put it well:

If there is one concept that our nation cherishes more than any other, it is the commitment that is carved in stone at the Supreme Court. The legend reads, "Equal Justice Under Law." Year by year we creep a little closer toward that distant goal. . . . [I]n the nature of things, poor families can accept the realities of being poor; they are not going to have the food, clothing, housing, higher education and material amenities of the rich. What they cannot accept is the sense of being unfairly ground down by the millwheels of the law.

We never will achieve the ideal of truly equal justice. Outside the antiseptic realms of mathematics, literal equality does not exist and ought not to exist. But at law, we must keep trying. The preamble to the Constitution pledges a national purpose "to establish justice." Let us get on with the job.<sup>125</sup>

#### B. *The Bias of the Law Against the Unrepresented*

The legal services program improves legal rules and procedures so that poor people get a fairer break. The thought behind this assertion is the reality that all of our institutions tend to respond to the interests that are present and represented. Just as regulatory agencies, if they are closeted with industry representatives for a period of years are frequently captured by them,<sup>126</sup> so legislatures, courts, and administrative bodies respond to the viewpoints that are presented and the arguments that are made.

Some people consider comments such as this subversive of American institutions. In fact, it is paying our institutions a compliment to recognize that they are responsive to the people. But to what people? In general, to those who make their views known.

If, for example, all cases involving borrowers and finance companies were collection suits brought by well-represented creditors against unrepresented debtors, the law in the area would be skewed

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125. See Kilpatrick, *Of Justice for All*, *supra* note 117, at 11.

126. See Cramton, *supra* note 77, at 528-30.

toward the creditor interests. Representation of even a small portion of debtors will have a remarkably salutary effect. The most egregiously unfair rules will be eliminated immediately, and intelligent law reform will take place on more closely balanced issues. The development of sound common law precedent is dependent upon adversary presentation of facts and arguments; if one side of a controversy is repeatedly unrepresented, the quality of decisions will suffer.

Legal services for the poor offer an effective and efficient remedy. It is an efficient remedy because it is not essential that representation be provided to every tenant, consumer, borrower or the like in order for beneficent effects to be felt. Provision of legal services for some of the poor changes rules and procedures that benefit everyone in the affected class, even those who are not poor. There is a tension, of course, between the idea that the legal services program is primarily delivery of routine "nuts-and-bolts" legal services to the poor and the economic arguments that the cases brought have a significance that goes far beyond the needs of the particular litigants. A degree of tension between goals is often beneficial and stimulating. Controls in local programs, reinforced by national policies, can retain a client-oriented focus that prevents staff attorneys from engaging in random forays against windmills of their devising. And there are both political (increased respect for the law) and economic (improved efficiency in the dispute-resolution process) reasons that justify provision of services whose cost may often exceed what a middle-class litigant would pay for the services.

### *C. Helping the Hurt and Suffering*

Finally, in a society that values the dignity of the individual, the role of legal services in helping the poor to help themselves must remain the basic justification. The legal services program helps bring justice to individuals who are hurt, troubled, unfortunate and dispossessed. What further justification is required other than: "Because they need it and they are important?"

A short time ago Colman McCarthy of the *Washington Post* devoted a column to the memory of a Catholic woman, who had devoted her life to the service of the poor:

Miss Day had spent most of her 83 years in the simplest but rarest form of humane service: feeding, clothing and housing whoever of the earth's wretched came to her. "We confess to being fools," she said once about her-

self and her small band of pacifists and personalists, "and we wish we were more so."

. . . Dorothy Day argued that the problem of poverty was its being left too much to professional problem-solvers. People with empty bellies got turned into Profound Questions, with poverty brokers on the hunt for Profound Answers. In seminar after seminar and report after report, the poor are given the bum's rush. In the end, as Miss Day said, "there are too few who will consider themselves servants, who will give up their lives to serve others."

. . . Dorothy Day used her faith as a buffer against burnout and despair. Fittingly, it will have to be taken on faith that her life of service made a difference. She issued no progress reports on neighborhood improvement, summoned no task forces on how to achieve greater efficiency on the daily soup line. Nor did she ever run "follow-up studies" on whether the derelicts of the Bowery renounced their drunken and quarrelsome ways. As her favorite saint, Theresa of Lisieux, taught, results don't matter to the prayerful.

At [Miss Day's] requiem mass, the prayers for the dead were joyously sung. A conviction was shared . . . that here was one of Christ's faithful — one who full-heartedly followed what she called, "the strange upside-down teaching of the Gospel." The mourning poor best understood: this life of exquisite foolishness made absolute sense.<sup>127</sup>

Can we save the world by providing free legal services to the poor? Surely not, because history tells us that the use of litigation, backed by the coercive power of the state, will not produce heaven on earth. And there will be abuses as in the exercise of all power over others. But we can bring a little light into the lives of others — and some self-respect into our own — if we devote at least a portion of our time to what is ultimately important: improving the lot of others.

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127. McCarthy, *A Life of Exquisite 'Foolishness'*, Wash. Post, Dec. 3, 1980, § A, at 19.

EDITOR'S NOTE: For historical purposes, it should be noted that the fourth Donald A. Giannella Memorial Lecture was delivered on April 10, 1980 by the late Monrad G. Paulsen, then Dean and Vice-President for Legal Education at the Benjamin N. Cardozo School of Law of Yeshiva University. Publication of the lecture, entitled "The Fundamentals of American Criminal Procedure," was prevented by Dean Paulsen's untimely death.

For an interesting commentary reflecting on Dean Paulsen's views of legal education, see Graetz & Whitebread, *Monrad Paulsen and the Idea of a University Law School*, 67 VA. L. REV. 445 (1981).