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### The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary

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**THE LEGAL SERVICES PROGRAM: UNACCOUNTABLE,  
POLITICAL, ANTI-POOR, BEYOND REFORM AND UNNECESSARY**

KENNETH F. BOEHM\*

I. INTRODUCTION

Imagine designing a federal program to promote poverty.

Imagine you had over \$5 billion in federal funds to spend over several decades. You also had a national network of thousands of lawyers largely free to decide which cases they would take and what causes they would support with litigation and lobbying.

Keeping in mind that the goal of this imaginary exercise is to design a program to maximize poverty, consider the following approaches to achieve such a dubious goal:

- Promote welfare dependency by litigating to expand the number of poor people dependent on welfare programs.
- Encourage drug and alcohol abuse by subsidizing addiction through SSDI checks. If drug and alcohol abusers beat their addiction, they lose their check.
- Use legal action to thwart drug-related evictions from public housing. Litigate against public housing authorities which try to screen out drug criminals from getting public housing units.
- Promote unemployment among farm workers by filing numerous abusive lawsuits against farmers, forcing them to mechanize to avoid going out of business.
- Encourage broken homes by stressing the welfare benefits of divorce, discouraging mediation and providing more than a million free divorces to poor clients.

The above approaches to increasing poverty do work. Increasing welfare dependency, subsidizing substance abuse, promoting unemployment, breaking up families and thwarting drug-related evictions all contribute to the perpetuation of poverty.

Unfortunately, the federal program which funds these debilitating actions is not imaginary. The program just described is the Legal Services

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\* Chairman, National Legal and Policy Center; Assistant to the President and Counsel to the Board, Legal Services Corporation, 1991-94.

Corporation (LSC), funded entirely with federal tax dollars since its founding in 1974.

## II. A UNIQUELY UNACCOUNTABLE FEDERAL PROGRAM

### A. Introduction

The Legal Services Corporation was established by the Legal Services Corporation Act of 1974 to provide free legal assistance to the poor in civil matters. It was the successor to the Office of Economic Opportunity (OEO) program which originated under Lyndon Johnson's "War on Poverty" in 1965. Unlike the OEO program, which was part of the executive branch of government, LSC was organized as a non-profit corporation. While it received its funding from the federal government, LSC was largely independent from the many federal laws and oversight procedures associated with federal programs. This independence was said to be necessary to keep the program free from political interference. In practice, the lack of oversight and accountability allowed the program's activist lawyers wide latitude to pursue political and ideological causes which would never have been possible in a program which was organized as a federal government agency.

### B. Unaccountable by Design

In part, the legal services program is uniquely unaccountable as a federal program because it was designed to be that way. The original LSC Act was written by a former legal services lawyer and incorporated many features making oversight difficult.<sup>1</sup> One important feature of the program's structure is that more than 95% of the federal funds given LSC each year are granted out to just under 300 separately incorporated local legal services groups.<sup>2</sup> These local groups have a great deal of independence from LSC. While the LSC's eleven-member board of directors is appointed by the President and subject to Senate confirmation,<sup>3</sup> this board has very little influence over local grantees and how they spend their funds. By law, the LSC budget does not go through the executive branch but is rather submitted directly to Congress. The Office of Management and Budget can do little more than review the LSC budget.<sup>4</sup>

LSC's independence from the executive branch contributes to the lack of accountability. For example, the General Accounting Office has repeatedly probed allegations of waste, fraud and abuse within the legal services program

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1. 42 U.S.C.A. § 2996 (West, 1998).

2. SEN. JEREMIAH DENTON, *THE LEGAL SERVICES CORPORATION, ROBBER BARONS OF THE POOR* 23 (Washington Legal Foundation, 1985).

3. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996(c) (1974).

4. 42 U.S.C.A. § 2996d.

but it has also determined that the federal government has no apparent authority to recover misspent funds.<sup>5</sup>

The LSC Act states that “officers and employees of the Corporation shall not be considered officers and employees, and the Corporation shall not be considered a department, agent, or instrumentality of the Federal Government.”<sup>6</sup> In practice, that means that a host of federal laws meant to ensure ethical conduct by federal employees simply do not apply to legal services officers, employees or agents. For example, it is a federal felony for a federal official to misappropriate government funds but it is not a federal felony for legal services officials to do so.

### *C. Mismanagement and the Lack of Accountability*

While the independence of the legal services program from the executive branch and the laws and procedures associated with federal agencies has allowed the program to indulge in controversial political causes, that same independence has also created significant management problems. Dr. Douglas Besharov, an attorney and resident scholar at the American Enterprise Institute, studied the operations and management of the legal services program and concluded that “the federal legal services program has not adopted the kind of management tools necessary to ensure efficient use of taxpayer’s funds.”<sup>7</sup>

Dr. Besharov’s study concluded that there was a substantial decline in productivity by field programs in the resolution of cases. One factor which contributes to the lack of productivity is the lack of competition for legal services grants. The prevailing practice within the program of “presumptive refunding” has meant that once a local group has become a grantee, it will typically get automatic renewals of that grant in perpetuity. There is little incentive to provide excellent legal services because the grant is renewed regardless of whether the group has done a good, poor or mediocre job. The size of the grant is calculated based on the poverty population of the service area, not the quality of service.

Critics of legal services have contrasted this lack of competition with the competition which is not only the fundamental element of the free enterprise system but also a routine factor among non-profit groups which must strive to excel in the fierce competition for grants from private foundations.<sup>8</sup> Congress sought to remedy this flaw in the legal services program by passing a

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5. See Summary, GENERAL ACCOUNTING OFFICE REPORT B202116, September 19, 1983 to U.S. Senators Orrin G. Hatch and Jeremiah Denton, Committee on Labor and Human Resources at 16.

6. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996d(e)(1) (1974).

7. LEGAL SERVICES FOR THE POOR: TIME FOR REFORM (Douglas J. Besharov, ed. 1990).

8. W. Clark Durant III, *Delivering Legal Services to the Poor* in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM 77; Thoams Morgan, *Innovation, Evaluation and Competition: The Board Context* in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM at 78-80.

requirement tied to the 1996 appropriations bill funding LSC which required that LSC set up a program to require competition for LSC grants.<sup>9</sup> Like other LSC reforms attempted by Congress, the competition requirement was easily evaded by legal services lawyers. Not a single legal services group lost their grant to a new competitor. Moreover, no legal services program has lost their grant for violating the LSC Act in more than ten years.

Along with automatic grant renewals, the lack of effective oversight by the Legal Services Corporation contributes to the mediocrity which has plagued the legal services program. The only entity with oversight authority is LSC. If any other individual or group discovers a violation of the LSC Act by a legal services group, there is no private right of action to enforce the Act.<sup>10</sup> During periods of time when LSC has sought to conduct effective monitoring of grantees, monitors found that most of the records found in a typical legal services office were off limits to them because they were case files protected by attorney-client privilege. The use of professional privilege to keep monitors from seeing documents when they are investigating allegations of waste, fraud or abuse is yet another way the legal services program is unaccountable. Other federally funded programs allow for limited access to documents protected by professional privilege when there is an investigation into possible fraud or other crimes. For example, Medicare fraud investigators may obtain access to documents typically protected by physician-patient privilege.

The fact that legal services lawyers know that violations of the LSC Act or regulations are almost never punished with the loss of the grant, that very little monitoring is possible and that no party but the LSC has standing to challenge a violation of the LSC Act all contribute to the attitude among legal services providers that the LSC grant is something akin to an entitlement.

The disparity between the legal services program's accountability for federal funds and that found elsewhere in the federal government was highlighted by the former Chairman of the Legal Services Corporation, William J. Olson:

Who would trust a Department of Defense contractor for a \$1 million grant or contract without full audit investigatory rights and powers by the agency giving the money? Who would trust an LSC grantee for \$1 million without those same powers? Indeed, there should be more oversight of a grant, which is spent in broader ways than a contract.<sup>11</sup>

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9. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

10. *Grassley v. Legal Services Corp.*, 535 F. Supp. 818, 820 (S.D. Iowa 1982).

11. William J. Olson, *Program Monitoring in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM*, *supra* note 8, at 127.

#### D. What LSC Doesn't Know

Perhaps nothing more starkly illustrates the lack of accountability within the federal legal services program than the sheer lack of knowledge about how tax dollars are spent by the local groups funded by LSC. Although the Legal Services Corporation has oversight responsibility for the program, no one within LSC has the slightest idea how much is spent by any program on any single case, let alone any category of cases. Such information is not required to be kept and never has been.

The type of information which routinely is available to the public, the media and the management of most federal agencies about federally funded programs is simply not available from the legal services program.

##### 1. Freedom of Information Act

The Freedom of Information Act allows the public and the media access to a wide range of documents from the files of executive branch departments and agencies. The law is relatively user-friendly and has been a major tool for reporters investigating allegations of waste, fraud or abuse in government programs. While the Freedom of Information Act does apply to the Legal Services Corporation itself,<sup>12</sup> it does not apply to any of the programs funded by LSC. Since typically about 96% of the funds appropriated to LSC go to the programs, only about 4% of the legal services resources are utilized in offices subject to the Freedom of Information Act.

##### 2. Case Information

Even the most fundamental information about how programs funded by LSC spend their funds, namely what cases are being taken, has been largely unavailable to the public, the media, and LSC itself. Up until the appropriations bill funding the Legal Services Corporation for Fiscal Year 1998,<sup>13</sup> there was no legal requirement that programs file even a simple listing of the lawsuits on which they were spending federal dollars.

While critics of the legal services program were able to document hundreds of examples of legal services abuses<sup>14</sup> from news accounts and reported court cases, the public, the media and LSC itself had no legal right to obtain a listing of cases filed by legal services programs. Since most lawsuits do not result in news articles or become reported cases, searchable through LEXIS/NEXIS or Westlaw, a good deal of the litigation subsidized by

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12. 45 CFR § 1602 (1998).

13. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, No. 105-119, III Stat. 2440.

14. *Hearing on the Reauthorization of Legal Services Corporation before the House Judiciary Subcommittee on Commercial and Administrative Law*, 104th Cong., 2nd Sess., 36-81 (June 26, 1996).

taxpayers money was hidden behind a wall of secrecy. Reporters wishing to look at cases filed by a local legal services program generally found that court records of civil lawsuits are searchable by the names of the parties involved, not by whether the attorney for one party was employed by a legal services program.

This fundamental lack of basic information itself became an issue in the policy debate over legal services. Critics would cite numerous abusive cases undertaken by legal services lawyers, while defenders of the program attacked the critics for only offering “anecdotal information” and further claiming that such abuses were isolated instances. Of course the legal services advocates militantly opposed all attempts to allow public access to information about legal services cases. When Representative Dan Burton (R-IN) successfully proposed the legislative rider to the 1998 appropriations bill for LSC requiring public disclosure of basic legal services case information, LSC proponent Rep. Alan Mollohan (D-WV) opposed the rider, citing LSC objections to it.<sup>15</sup>

One aspect of the debate over legal services in which scope of legal services involvement was an issue was the question of the degree to which legal services attorneys were thwarting drug-related evictions from public housing. Legal services programs had been involved in numerous cases in which legal action was used to challenge drug-related evictions.<sup>16</sup> In response to the negative publicity, legal services advocates countered that the controversy was over isolated cases but could not even estimate how many such cases existed because there was no such information available to LSC or the public. Further weakening the legal services position in the debate were the public statements of many of those on the front lines of the war on drugs in public housing, the officials of the public housing authorities. Wallace Johnson of the Public Housing Authority Directors Association summed up that sentiment categorically:

To the best of my knowledge we have never received any support from any Legal Services lawyer anywhere in the country assisting us in efforts to help us get rid of these thugs.<sup>17</sup>

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15. 143 CONG. REC. H8005 (daily ed. Sept. 26, 1997).

16. See, e.g., *Housing Auth. of the City of Hoboken v. Alicea*, 297 N.J. Super. 310, 688 A.2d 108 (N.J. Super. Ct. App. Div. 1997); *Charlotte Hous. Auth. v. Fleming*, 123 N.C. App. 511, 473 S.E.2d 373 (N.C. Ct. App. 1996); *Taylor v. Cisneros*, 102 F.3d 1334 (3d. Cir. 1996); *Hinojosa v. Hous. Auth. of City of Laredo*, 1996 WL 411191 (Tex. Ct. App. July 24, 1996); *Village West Apartments v. Miles*, No. 95-XX-0001 (Ky. Cir. Ct. 1995). See also, Shawn G. Kennedy, *Tenants Press for Easier Eviction of Drug Dealers*, N.Y. TIMES, Aug. 15, 1994, at B1; Bill Alden, *Court Blocks Drug-Related Eviction*, N.Y. L.J., Aug. 14, 1996, at 1; Tom Ernst, *East Tenants Face Eviction*, BUFF. NEWS, May 25, 1996, at C5; William Cooper, *'One Strike' Public Housing Drug Policy Backfires*, PALM BEACH POST, Apr. 22, 1997, at 1B.

17. Rael Jean Isaac, *War on the Poor*, NATIONAL REVIEW, May 15, 1995, 32, at 35.

Congress responded to the issue of legal services involvement in drug-related evictions by restricting, but not eliminating, such activities.<sup>18</sup>

Justice Louis Brandeis' famous metaphor about open government being the best way to fight corruption, "Sunshine is the best disinfectant," explains one of the reasons for the decades of controversies associated with the legal services program. A program which could not even list the litigation it subsidized is in no position to clean up its abuses.

### III. A UNIQUELY POLITICAL AND IDEOLOGICAL FEDERAL PROGRAM

*CALS (LSC-funded Community Action for Legal Services) was where the federal suit against New York's antiabortion statute was conceived, truth-in-lending legislation proposed, and mountains of ideologically motivated litigation prepared.*<sup>19</sup>

Geraldo Rivera, describing his life as a legal services lawyer in his autobiography

*You have many attorneys engaging in political activity rather than meaningful legal representation. A lot of people feel that they should not be forced to subsidize political activities with which they don't agree.*<sup>20</sup>

U.S. Representative Lamar Smith

*As a political organization, LSC is designed to establish the political and social agenda of every state and community across the United States, and it does so.*<sup>21</sup>

William F. Harvey  
Former Chairman, LSC

*People have a right to promote their own agenda, but they do not have a right to do it with the taxpayers' money.*<sup>22</sup>

Senator Phil Gramm

18. Pub. L. No. 104-134, 110 Stat. 1321-55 (1996).

19. GERALDO RIVERA, *EXPOSING MYSELF* 55 (1992).

20. Naftali Bendavid, *Budget Matters Set Sight on LSC*, LEGAL TIMES, Mar. 27, 1995, at 1.

21. William F. Harvey, LSC – *The Greatest Fraud Ever?*, in LEGAL SERVICES FOR THE POOR: TIME FOR REFORM, *supra* note 8, at 83.

22. David G. Savage, *Budget Ax Hangs Heavily Over Legal Aid Services for the Poor*, L.A. TIMES, Feb. 15, 1995, at A5.



*I was also pressured and penalized for not imposing a far left political philosophy on my clients' immediate legal needs by convincing them to become parties to class actions which were contrary to their best interests.*<sup>23</sup>

Chris T. Searer, Esq.

Former legal services lawyer

#### A. Introduction

From its origins as a small program within President Lyndon Johnson's War on Poverty agency, the Office of Economic Opportunity, to the present day, the legal services program has been associated with the promotion of a liberal political and ideological agenda. By the time the Congress undertook to change the legal services program from a federal agency program to a program administered by a non-profit corporation, the Legal Services Corporation, the battle lines over the political and ideological activities of legal services lawyers were already drawn. When the House of Representatives took up the issue in 1973, it passed 24 amendments restricting activities of legal services lawyers.<sup>24</sup>

Federally funded programs are not typically in the business of promoting political or ideological causes. The legal services program represents a unique exception to that general rule. Because the legal services program funds a network of thousands of lawyers in private groups free to exercise a wide degree of discretion in which cases are selected for representation, the case selection process has become a leading tool to promote the liberal causes favored by the attorneys in the program. Those poor people with cases which could advance the agenda get representation while those whose cases don't pass the political litmus test do not receive representation. While proponents of the legal services program invariably cite the concept of equal access to justice as a reason for supporting increased federal funding for LSC, the reality is that there is nothing resembling equality in the case selection process.

This bias in case selection has long been part of the debate over the existence of the program. U.S. Representative Charles Taylor summed up the bias in case selection this way:

Of the 1.6 million legal matters they say they handled last year, at our request, they could not find one case where they helped throw a drug dealer out of public housing or helped protect a home schooler. They never have stepped forward to help on the moderate or conservative front.<sup>25</sup>

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23. *Legal Services Corporation Oversight: Hearing before the House of Representative Judiciary Subcommittee on Commercial and Administrative Law*, 108th Cong., (1996)(statement of Chris T. Searer, Esq.).

24. 119 CONG. REC. 20,344 (June 19, 1973).

25. William Booth, *Attacked as Left-Leaning, Legal Services Suffers Deep Cuts*, THE WASH. POST, June 1, 1996, at A1, A19.

The political bias associated with the legal services program goes far beyond case selection. There has been a long association with liberal and radical groups of all sorts. For example, the national Lawyers Guild, the major organization of radical lawyers in the U.S., claimed it had 1000 members working in legal services programs in 1979<sup>26</sup> and in 1995 the LSC President was the keynote speaker at a National Lawyers Guild event honoring a legal services lawyer who was also a National Lawyers Guild leader.<sup>27</sup> Similarly, legal services publications routinely feature political material far removed from day-to-day issues which affect the poor. Prior to its funding being cut by Congress, the monthly legal services publication *Clearinghouse Review* carried such items as critiques of the legislative rating system used by the National Taxpayers Union.

While critics of legal services have long contended that the program has a political agenda, many legal services lawyers have candidly admitted the same thing, as did former legal services lawyer Geraldo Rivera with his reference to "mountains of ideologically-motivated litigation."<sup>28</sup> Some have gone so far as to state that the real purpose of the legal services program was to effect political change, not to help the poor with their routine legal problems.<sup>29</sup> Former legal services lawyer Mike Daniel recently spoke out against attempts by Congress to curb legal services political advocacy:

I don't know how you justify taking federal money to provide routine legal services. There are other lawyers who will do those legal services.<sup>30</sup>

#### *B. Promoting Causes and Playing Politics in The Name of Helping the Poor*

Virtually any ideological or political issue can be advanced or opposed through legal action. The fact that legal services lawyers have litigated to expand the welfare state, overturn elections, challenge political redistricting, promote gay rights, oppose welfare reform, and support welfare for illegal aliens is beyond dispute. Given the arbitrary manner of case selection, it should come as no surprise that the common denominator of legal services cause-related litigation in ideological issues is the adherence to a liberal litmus test.

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26. RAE JEAN ISAAC AND ERICH ISAAC, *THE COERCIVE UTOPIANS: SOCIAL DECEPTION BY AMERICA'S POWER PLAYERS* 238 (1983).

27. Traci Gentilozzi, *National Lawyers Guild Honors Ann Arbor Lawyer*, MICHIGAN LAWYERS WEEKLY, Apr. 17, 1995, at 6A.

28. GERALD RIVERA, *EXPOSING MYSELF* 55 (1992).

29. Ed Housewright, *Legal Limits: Agency Giving Free Counsel Faces Cutbacks as Demand Peaks*, DALLAS MORNING NEWS, Aug. 21, 1996 at 25A.

30. *Id.*

### 1. Congressional Redistricting Cases

When a number of legal services programs filed lawsuits challenging congressional redistricting plans following the 1980 census, it underscored the charges by critics that the programs were playing politics in the name of helping the poor. While congressional redistricting plans are frequently the target of lawsuits, the subject is far removed from the day-to-day legal needs of the average poor person. As one critic asked, "Did a poor person walk into a legal services office and say, 'I feel malapportioned today.'?"

The Reagan-appointed LC board responded by passing a regulation<sup>31</sup> prohibiting involvement in redistricting cases by legal services programs. The LSC board cited the language in the LSC Act stating that legal services attorneys were prohibited from engaging in political activities while engaging in activities supported with LSC funds.<sup>32</sup>

The legal services program involved responded by suing LSC, challenging its right to pass a regulation forbidding involvement in political redistricting cases. The regulation was upheld by Judge Abner Mikva when the case reached the U.S. District Court of Appeals for the District of Columbia.<sup>33</sup> Congress added a prohibition of redistricting cases to its list of reforms added to the appropriations bill funding LSC for the Fiscal year 1996.<sup>34</sup> That prohibition has been incorporated into each subsequent annual appropriation for LSC.

### 2. Challenging Elections

It is hard to imagine an activity more intrinsically political than challenging an election. Yet the legal services programs have had a long involvement in election activity. In case after case, the political involvement of legal services attorneys has been partisan, often for the apparent reason of opposing political foes or supporting political allies. When conservative Democratic Congressman Phil Gramm of Texas switched parties and announced that he would seek his re-election as a Republican in a special election, attorneys with the LSC-supported Texas Rural Legal Aid, Inc. (TLRA) filed a lawsuit to seek to delay the election.<sup>35</sup>

In a recent case which recently drew widespread criticism of legal services, attorneys for the same Texas program, TLRA, filed a lawsuit challenging the right of military personnel to vote for local officials by absentee ballot.<sup>36</sup> The attack on voting rights of active duty military personnel, some of whom were

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31. 54 Fed. Reg. 31,954 (1989)(to be codified at 45 C.F.R. § 1632).

32. 42 U.S.C. § 2996e(b)(1)(A), 2996f(a)(2)(C), 2996f(a)(3), 2996g(e) (West 1998).

33. *Texas Rural Legal Aid, Inc., v. Legal Services Corp.*, 941 F.2d 685 (D.C. Cir. 1991).

34. Pub. L. No. 104-134, 110 Stat. 1321-52.

35. *Texas Suit on Vote Dismissed*, N.Y. TIMES, Jan. 31, 1983, at 18.

36. *Casarez v. Val Verde County*, No. DR-96-CA-108 (W.D. Tex., filed January 24, 1997).

serving in Bosnia at the time, proved a public relations fiasco for legal services activists. Major General J. C. Pennington (retired), President of the National Association for Uniformed Services wrote a letter to President Clinton which summed up the sentiment of many:

TRLA contends that these military personnel are not eligible to vote in Val Verde County because they have been absent from the county for several years. Of course they have been absent, *because of their service to our country*.<sup>37</sup>

In the end, the public reaction to the lawsuit forced TRLA to withdraw as counsel, although a legal services lawyer remained in the case as an “expert witness.” The lawsuit failed to overturn the election of the two Republicans and TRLA received a modest sanction of \$7500, not for trying to overturn an election, but for seeking attorneys fees. In fact, LSC made it quite clear that there was nothing illegal in using taxpayers money to overturn elections. LSC spokeswoman Niki Mitchell stated:

[I]n terms of the program’s priorities and in terms of the restrictions placed on Legal Services by Congress, the suit was perfectly valid. The program didn’t do anything illegal in terms of filing a voting rights case.<sup>38</sup>

While critics asked how overturning an election could not be considered a political activity in violation of the LSC Act, as interpreted by Judge Mikva in the *TRLA, et al. v. Legal Services Corporation* case,<sup>39</sup> LSC is the only entity with legal authority under the LSC Act to enforce the LSC Act.<sup>40</sup> If the LSC under the Clinton Board determines that overturning elections is proper, there is no private right of action available to get the question before a court.<sup>41</sup>

### 3. Supporting/Opposing Referenda

As with congressional redistricting and election law cases, litigation involving referenda questions is typically very political. Legal services activists have been involved in referenda ranging from Proposition 9 (a proposition seeking to reduce state income tax rates)<sup>42</sup> to Proposition 187 (a

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37. Letter from Major General J. C. Pennington, U.S. Army Retired, President of the National Association for Uniformed Services, to President of the United States William Jefferson Clinton, December 31, 1996.

38. Steven A. Schwalm, *Federally Funded Lawyers Harass Voting Servicemen*, HUMAN EVENTS, Feb. 7, 1997, at 8.

39. *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, *supra* note 37, at 691.

40. SEN. ORRIN HATCH, *THE LEGAL SERVICES CORPORATION: THE ROBBER BARONS OF THE POOR?* 9 (Washington Legal Foundation, 1985).

41. *Grassley v. Legal Services Corp.*, 535 F. Supp. 818 (S.D. Ia. 1982).

42. DENTON, *supra* note 3, JAMES T. BENNETT & THOMAS J. DILORENZO, *POVERTY, POLITICS, AND JURISPRUDENCE: ILLEGALITIES AT THE LEGAL SERVICES CORPORATION*, 118-119.

proposition which passed by a wide margin curtailing California benefits to illegal aliens).<sup>43</sup>

In the Proposition 187 battle, legal services activists spoke out against the proposition prior to the election,<sup>44</sup> and filed lawsuits to challenge portions of the proposition when it passed overwhelmingly.<sup>45</sup>

Aside from the policy question as to why a program which is supposed to be helping poor people with their legal problems is spending tax dollars to oppose the results of referenda, there is a real question as to who should decide what poor people want in such political representation. Under LSC's stewardship of the legal services program, it is clear that the activist lawyers decide and the poor have no say. Indeed, the fact that Proposition 187 passed with a huge plurality, including the votes of many poor persons, is irrelevant to deciding how legal services resources are spent.

#### 4. Expanding the Welfare State

If there is a core ideological belief to the legal services movement, it is in the efficacy of the welfare state. At a time when there has been a broad, bipartisan consensus that the welfare state has failed and that welfare reform must be pursued, legal services lawyers remain zealous advocates of expanding the welfare state.

The real cost of the legal services program to the taxpayer is not the more than \$5 billion in federal government appropriations to the program since its inception. The real cost is conservatively estimated in the hundreds of billions of dollars in increased welfare spending which has directly resulted from litigation pursued by legal services lawyers.<sup>46</sup> Legal services lawsuits have resulted in expanded Aid to Families with Dependent Children, Medicaid and food stamp benefits.

Other ways legal services has expanded the welfare state is by seeking to nullify "moral" conditions connected to its provision, such as a requirement for identifying the fathers of illegitimate children;<sup>47</sup> by attacking citizenship<sup>48</sup> and

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43. Hannah Nordhaus, *No Quiet Fronts on This War*, THE RECORDER, Nov. 10, 1994, at 2. See also Maura Dolan *Prop. 187 Ban on Higher Education Barred*, L.A. TIMES, Feb. 9, 1995, at A3.

44. Carl P. Leubsdorf, *Immigration Proposal Divides Californians; Measure Would Curb Aid to Undocumented Aliens*, DALLAS MORNING NEWS, Sep. 26, 1994, at 1.

45. SACRAMENTO BEE, Mar. 26, 1995, at A13.

46. See HOWARD PHILLIPS & PETER J. FERRARA, THE REAL COST OF THE LEGAL SERVICES CORPORATION: A TWO TRILLION DOLLAR BYPASS OF ELECTORAL ACCOUNTABILITY?, (The Conservative Caucus Reserach, Analysis, & Education Foundation, Inc., Vienna, VA., 1995). See also *Statutory Authorization of the Legal Services Corporation Should Be Rejected* before Oversight Hearing of the House Judiciary Subcommittee on Commercial and Administrative Law, 104th Cong., 1st Sess. 258 (June 15, 1995)(Testimony of Howard Phillips).

47. S.N.S. v. N.D. Department of Human Services, 499 N.W.2d 891 (N.D. 1993); Perry v. Dowling, 963 F. Supp. 231 (W.D.N.Y. 1997).

residency requirements;<sup>49</sup> and by signing up thousands of alcoholics and substance abusers for Social Security disability benefits.<sup>50</sup>

The mindset of legal services lawyers on the importance of being on welfare can best be illustrated by the absurd lengths to which they go to keep the poor dependent on welfare, such as when poor people find themselves the beneficiary of a financial windfall. Western Massachusetts Legal Services (WMLS) has published a brochure advising lottery winners that they can stay on welfare by such devices as prepaying rent, buying a special gift, or taking a vacation.<sup>51</sup> In 1994, WMLS filed a lawsuit to get a Mr. Arthur Cooney back on welfare after he admittedly had spent the \$75,000 he won in a 1992 lottery on drugs and gambling.<sup>52</sup>

Critics of legal services are not the only ones pointing to the success of legal services lawyers in expanding the cost of the welfare state. From the inception of the legal services program in the Office of Economic Opportunity, legal services advocates viewed expansion of welfare programs through legal services litigation as a point of pride. For example, in 1974, former OEO Legal Services Director Earl Johnson, Jr., wrote that "A bare handful of lawyers, scarcely a footnote in the federal budget, has produced massive transfers of goods and services to the poor - some from the private sector and some from the public treasury."<sup>53</sup> Johnson pointed to the initial period between 1965 and 1972, when federal legal services programs cost the taxpayer a total of \$290 million:

[T]he 1969 welfare residency decision already has produced between \$300 and \$600 million added income for the poor, the 1968 man-in-house decision \$400-\$800 million, the 1969 and 1970 food stamp cases thus far have produced over \$450 million in additional food allotments, the prior hearing case \$200-\$300 million. The California Medicaid suit saved \$200 million in health services, the New York Medicaid case thus far has saved \$367 million, and other actions undoubtedly have generated several million in additional income. Thus a total dividend in excess of \$2 billion actually has been received by the poor since the beginning of the Federal investment in legal services to the poor.<sup>54</sup>

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48. *Smart v. Shalala*, 9 F.3d 921 (11th Cir. 1993).

49. *Mitchell v. Stetfen*, No. C8-91-11691 (Minn. Dist. Ct. Ramsey County, filed Jan. 8, 1992).

50. See, e.g., CLEARINGHOUSE REVIEW, Dec. 1993, at 923; See also JOHN K. CARLISLE, LEGAL SERVICES HORROR STORIES (National Legal and Policy Center, McLean Va., 1997).

51. See *Buy A Special Gift*, READER'S DIGEST, July 1994.

52. *Across the USA*, USA TODAY, Jan. 10, 1994, at 4A.

53. EARL JOHNSON, JR., JUSTICE AND REFORM —THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM, 234 (1974).

54. Johnson, *supra* note 57, at 232.

Asserting that the program's "benefits" outweighed its "cost" by a ratio of 7 to 1, Johnson further calculated that since benefits were won in the form of entitlements, and therefore would continue for many years into the future, the actual ratio was closer to 34 to 1.<sup>55</sup>

The same mindset that viewed expansion of welfare as a benefit of the legal services program continues to this day. Following the passage of welfare reform by Congress and its signing into law by President Clinton, some attempts have been made to curtail legal services lawyers involvement in expanding the welfare state. The 1996 appropriations law funding LSC<sup>56</sup> and subsequent such appropriations measures have restricted legal services lawyers from legal challenges to welfare reform as well as eliminating the use of class action suits.<sup>57</sup> Nevertheless, legal services activists remain committed to a wide range of legal actions which add people to the welfare rolls, as has been documented by both legal services advocates,<sup>58</sup> as well a critics.<sup>59</sup>

##### 5. Opposing Efforts to Stop Welfare Fraud

*These legal advocacy groups are defenders of an old and failed system that has hurt the city and the recipients in the program for many years.*<sup>60</sup>

Richard Schwratz

Chief welfare policy advisor to Mayor Rudolph Giuliani

At the same time legal services lawyers have been in the forefront of legal efforts to expand the welfare state, they have also played a leading role in thwarting efforts to crack down on welfare fraud.

The cases in this area show a common denominator of undercutting laws aimed at reducing fraud and abuse of the welfare system. Those critical of legal services have pointed out that welfare fraud undercut public support for welfare programs and hurt those poor people, such as the aged and infirm, who truly depended on welfare benefits. Legal services activities have ranged from

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55. *Id.* at 233.

56. 110 Stat. at 321-53.

57. Pub. L. No. 104-208, § 502(a)(2) (1997); Pub. L. No. 105-119, § 502(a)(2) (1998); Pub. L. No. 105-277, § 502(a)(2) (1999).

58. See National Clearinghouse for Legal Services website, *Case Developments: Welfare*, (visited March 2, 1999) <<<http://www.povertylaw.org>>>.

59. JOHN K. CARLISLE, LEGAL SERVICES ACCOUNTABILITY PROJECT REPORTS, NOS. 1-68 (National Legal and Policy Center, McLean, VA., 1995-98).

60. Kimberly McLarin, *City Sued Over Program to Curb Welfare Fraud*, N.Y. TIMES, Dec. 30, 1995, at 31.

lawsuits attacking state regulations to stop Food Stamp fraud<sup>61</sup> to public denunciations of welfare anti-fraud programs.<sup>62</sup>

Efforts by several California counties to crack down on welfare fraud by requiring welfare recipients to provide fingerprints as a means to prevent potential abusers from signing up more than once, came under fire from Legal Services of Northern California. The program in Los Angeles had saved \$4.5 million in one month and was estimated to have potential savings of \$116 million. When Sacramento County announced that it would start fingerprinting, a lawyer from Legal Services of Northern California said it was unfair because it would deter those with outstanding warrants and arrest records from applying. A survey of welfare recipients showed that 95% supported the program because it would make welfare more credible.<sup>63</sup> The legal services mindset of opposing an anti-fraud program because it would deter those with outstanding warrants from applying while ignoring the views of 95% of poor people on welfare speaks for itself.

When Mayor Rudolph Giuliani of New York City instituted a successful program to crack down on welfare fraud, Bronx Legal Services, an LSC grantee filed a lawsuit in federal court opposing the effort. The program, known as the Eligibility Verification Review, was instituted in January 1995 and succeeded in weeding out fraud in the city's Home Relief program, where the number of individuals receiving benefits dropped from 244,000 to 179,000.<sup>64</sup>

## 6. Promoting Homosexual Rights

Virtually every major liberal cause has benefited from the free legal representation provided by the taxpayer through legal services in the name of helping the poor. Promoting special legal rights for homosexuals has long been a favorite cause of legal services lawyers. Legal services lawyers have filed lawsuits to require the upgrading of Armed Forces discharges based on homosexuality,<sup>65</sup> advocated that homosexual partners should have the same rights as spouses in rent-controlled apartments,<sup>66</sup> litigated for the rights of

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61. *Devi v. Senior and Disabled Services*, 137 Ore. App. Ct. 481 (1995); *Garcia v. Concannon*, 67 F.3d 256 (9th Cir. 1995).

62. See Leslie Berger, *Welfare ID Program a Cost-Saver*, L.A. TIMES, Oct. 15, 1994, at B1. See also Maria Camposeco, *New Welfare Anti-fraud Effort Comes Under Fire*, SACRAMENTO BEE, Dec. 26, 1994, at B1.

63. Berger, *supra* note 66.

64. McLarin, *supra* note 64.

65. *Elsie Simer v. Graciela Olivarez*, Civil Action No. 79 C 3960 (N.D.II. Oct. 29, 1980)(mem. op.).

66. *Braschi v. Stahl Assoc. Co.*, 1989 WL 73109 (N.Y. 1989).



homosexual couples to adopt children,<sup>67</sup> and filed legal actions to award child custody to homosexuals.<sup>68</sup>

All too often, the pursuit of ideological goals runs demonstrably counter to the best interests of the very poor which the legal services program is charged with representing. In 1994, Greater Orlando Area Legal Services (GOALS), forced the Orange County Jail in Orlando to stop segregating AIDS-infected inmates from the general population. The jail started the policy in 1989 to protect other inmates and employees from possible infection. Immediately, GOALS filed a lawsuit which dragged on for five years. The Center for Disease Control estimates that 5000 prisoners per year across the country contract the AIDS virus each year.<sup>69</sup>

The typical response of legal services advocates to those who criticize them for taking cases to promote homosexual rights, feminist causes, and a host of other liberal causes is that poor people whose legal rights are being represented should not be denied counsel simply because critics may disagree with the views of the clients. Of course, there is not a ready response to critics who point out that legal services representation in such cause-oriented litigation is overwhelmingly one-sided. If providing legal representation to the poor regardless of the poor clients' views was actually the standard there would be cases in which legal services lawyers opposed those supporting homosexual rights, feminist causes, etc. In the public debate over the legal services program there is an almost total lack of cases in which legal services lawyers provided representation for poor clients who did not pass the ideological and political litmus tests endemic to the legal services program.

#### IV. LEGAL SERVICES VS. THE POOR: PROMOTING WELFARE DEPENDENCY, DRUG AND ALCOHOL ABUSE, CRIME, UNEMPLOYMENT, AND BROKEN HOMES

*In a real sense, Legal Services is a giant enabling program for dysfunctional behavior.*<sup>70</sup>

Rael Jean Isaac, Ph.D.  
Author & Sociologist

Many factors contribute to poverty in the United States. Increasingly there has been a consensus that the "law of unintended consequences" affected many well-meaning government programs intended to assist the poor which instead promoted a welfare dependency which perpetuated poverty. In addition to

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67. *Cox v. Florida Dep't of Health and Rehabilitative Serv.*, 686 So.2d 902 (Fla. 1995).

68. *Thomas S. v. Robin Y.*, 157 Misc.2d 858, 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993), *rev'd and remanded*, 209 A.2d 298, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994).

69. See Jim Leusner, *Jail Will Stop Segregating AIDS Inmates*, THE ORLANDO SENTINEL, Sept. 30, 1994, at C1.

70. Isaac, *supra* note 22, at 36.

welfare dependency, other factors contributing to poverty include the effects of crime, drug and alcohol abuse, unemployment, and broken homes.

All too often the net effect of the billions of dollars spent of the legal services program has been to aggravate the problems of welfare dependency, crime, substance abuse, unemployment and broken homes. Common sense has long been that practices that are rewarded, subsidized and provided with incentives will multiply, while those which are punished, sanctioned or otherwise discouraged will diminish. Apply that basic observation to the cases regularly brought by the activist lawyers of legal services and it is easy to see how their activities have hurt the very poor people that they are charged with helping.

#### A. *Welfare Dependency*

*Today, welfare rights advocates funded by LSC use a variety of methods to increase eligibility for receipt of welfare. The main tactic is to exclude various resources and income from calculations of recipients income so they will be eligible for receipt of benefits. In order to expand the group of persons eligible for benefits, LSC-funded attorneys routinely favor exclusion of resources from income calculations,<sup>71</sup> including income from illegal sources,<sup>72</sup> and income from other family members.<sup>73</sup> Another tactic is to attack procedures used to*

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71. *See, e.g.*, Byrd v. Weil, No. 94 CV 2710 (D. Colo., filed Nov. 23, 1994)(challenging Colorado's restrictions on the use of trusts to insulate income in order to obtain Medicaid eligibility); Geest v. Commissioner of Minn. Dept. of Human Services, No. 04-C90-94-000604 (Minn. Dist. Ct. Beltrami County, filed August 18, 1994)(challenging inclusion of monthly payment from sale of a tractor as income); Golis v. Rubin, 857 F. Supp. 1407, 1409 (D. Ha. 1994)(challenging inclusion of one-quarter property interest as a resource); Hillman v. Towey, No. 94-797-CIV-FtM-S1D (M.D. Fla., filed Mar. 7, 1994)(challenging inclusion of fixed pension benefits placed in trust as income); Davis v. Lukhard, 788 F.2d 973 (4th Cir. 1986)(challenging Virginia's inclusion of non-liquid assets as resources); Reed v. Health and Human Services, 774 F.2d 1270 (4th Cir. 1985), *rev'd* 481 U.S. 368, 107 S.Ct. 1807 (1987)(challenging inclusion of personal injury awards as income).

72. *See, e.g.*, Jones v. Shalala, 21 F.3d 191 (7th Cir. 1994)(challenging disqualification from disability benefits due to income from thievery).

73. *See, e.g.*, Cherry v. Sullivan, 30 F.3d 73 (7th Cir. 1994)(challenging inclusion of spouse's income); Davis v. Snider, No. 1:CV-90-1884 (M.D. Pa. Feb. 25, 1994)(challenging inclusion of stepparent income); Sneed v. Kizer, 951 F.2d 362 (9th Cir. 1991)(inclusion of total family resources in calculating Medical eligibility); Lynch v. Rank, 747 F.2d 528 (9th Cir. 1984)(inclusion of other family member's SSI benefits as income); Grey Panthers v. Administrator, Health Car Financing Admin., 566 F. Supp. 889 (D.D.C. 1983)(challenging inclusion of spouse's income); Herwig v. Ray, 455 U.S. 265 (1982)(same), Norman v. St. Clair, 610 F.2d 1228 (5th Cir. 1980)(same). Recently, legal services lawyers have begun trying to secure benefits eligibility for aliens even when their sponsors have resources. *See, e.g.*, Barannikova v. Town of Greenwich, 643 A.2d 251 (Conn. 1994); Woe v. Gallant, No. 92-4041-E (Mass. Super. Ct. Suffolk County, Dec. 21, 1993).

*determine eligibility for benefits.*<sup>74</sup> *And LSC-supported attorneys also routinely challenge the exclusion of certain categories of people from benefits.*<sup>75</sup>

William Mellor<sup>76</sup>  
 President & General Counsel  
 Institute for Justice

While the issue of the legal services role in expanding the welfare state has already been addressed, there are many other actions taken by legal services in the welfare area which reward dysfunctional, illegal or immoral behavior and hurt the law-abiding poor in the process.

A prime example of this is the incentive of welfare programs which reward recipients with increased welfare when additional children are born to the recipient. When New Jersey passed a "Family Cap" law eliminating increased AFDC payments to mothers, Legal Services of New Jersey, along with the American Civil Liberties Union of New Jersey and the NOW Legal Defense & Education Fund, filed a lawsuit challenging the law.<sup>77</sup> New Jersey implemented the cap to remove the perverse incentives for having additional illegitimate children while on welfare. Legal Services argued that the cap unconstitutionally infringed upon a woman's private procreative choices. Their belief was that since a woman's right to reproduce is constitutionally protected then it is incumbent upon government to subsidize it. However, the

74. *Hill v. Bechtel*, 444 S.E.2d 186 (N.C. 1994)(challenging procedures for expedited food stamp applications); *In Re Walker*, 641 A.2d 1021 (N.H. 1994)(challenging procedure for determining eligibility for AFDC Unemployed Parent Program); *Loomis v. Dalton*, No. LR-C-94-551 (E.D. Ark. Nov. 21, 1994)(challenging procedures for processing Medicaid applications); *Sorenson v. Concannon*, 893 F. Supp. 1469 (D. Or. 1994)(class action challenging method of determining eligibility for disability payments); *Crayton v. Shalala*, 1995 WL 605599 (N.D. Ala. 1994)(same); *Carmack v. Campbell*, (E.D. Ky., filed Feb. 24, 1994)(same); *Oregon Human Rights Coalition v. Concannon*, No. 93-159 JO (D. Or., filed April 12, 1994)(challenging policies of state agency in verifying eligibility for AFDC, food stamps, general assistance, and Medicaid); *Singleton v. Shalala*, No. CV4-94-99 (S.D. Ga., filed April 12, 1994)(same).

75. *See, e.g.*, *Calaf v. Secretary of HHS*, 1994 U.S. Dist. LEXIS 10751 (1st Cir. 1994)(asserting eligibility of a man released from prison and subject to home monitoring program); *Howard v. Dep. of Social Welfare*, 655 A.2d 1102 (Vt. 1994)(asserting 19-year-old's right to benefits until he graduated from high school); *Campos v. Carr*, No. SA-93-CA-0348 (W.D. Tex. Mar. 1994)(challenging standards of eligibility for AFDC Incapacitated program); *Roy v. Rhode Island Dept. of Human Services*, 624 A.2d 1092 (R.I. 1993)(challenging denial of General Assistance to certain caretakers); *Doe v. Reivitz*, 830 F.2d 1441 (7th Cir. 1987)(challenging denial of AFDC benefits to citizen or legal resident children of illegal aliens); *Williams v. St. Clair*, 610 F.2d 1244 (5th Cir. 1980)(asserting Medicaid eligibility of non-institutionalized patients).

76. *Legal Services Corporation: Roadblock to Welfare Reform, Hearing before the U.S. Senate Labor and Human Resources Committee*, 104th Cong., 1st Session (June 23, 1995) (Testimony of William Mellor).

77. *C.K. v. Shalala*, 883 F. Supp. 991 (D. N.J. 1995).

court held that a woman's right to reproduce does not in any way entitle her to government financial assistance.<sup>78</sup>

The penchant for legal services lawyers to use unusual legal arguments in their ongoing efforts to promote welfare extends to their attacks on any type of welfare reform. For example, in 1993, the Western Center on Law and Poverty, an LSC grantee, challenged California's work incentive program on the grounds that it violated federal laws against experimentation on human research subjects. The work program's goal was to encourage recipients to seek gainful employment by allowing them to earn more money while reducing benefit levels 1.3% to make welfare less attractive. Legal services lawyers argued that the work program was illegal because it was an experiment that posed a danger to the physical, mental, or emotional well-being of the human participants and thus could only be implemented with their written consent. The court rejected the claim because the law against human experimentation was primarily designed to protect individuals involved in medical experiments.<sup>79</sup>

So strong is the legal services' opposition to any type of welfare reform that they have repeatedly represented those whose presence on welfare rolls was voluntary. Legal services lawyers have challenged reduction in welfare to individuals who voluntarily quit their jobs<sup>80</sup> and sought Social Security Disability benefits for a healthy beggar who was well enough to spend time at the beach and shooting pool at the local billiards hall.<sup>81</sup> In the latter case the judge wisely ruled that if the individual could go to the beach and shoot pool, he could find a job.<sup>82</sup>

In the view of legal services lawyers, there appears to be no claim to public assistance that is so weak that it can't be argued. In 1996, Neighborhood Legal Services of Buffalo, New York tried to get disability for a man whose only claim to welfare was that he was too lazy to work.<sup>83</sup> In arguing for Luis Velezquez's right to collect Social Security Disability benefits, legal services lawyers asserted that Velezquez suffered from a variety of physical ailments which prevented him from working.<sup>84</sup> However, examining doctors testified that these so-called "disabling" ailments included a relatively minor bout with bronchitis that left no long term respiratory problems.<sup>85</sup> Furthermore, based on his last exam, doctors reported that the worst thing Velezquez was suffering from was a headache and nasal congestion, symptoms of a common cold that

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78. *Id.*

79. *C.K. v. Shalala*, 883 F. Supp. 991 (D. N.J. 1995).

80. *See e.g., Smith v. Babcock*, 19 F.3d 257 (6th Cir. 1994).

81. *Pena v. Chater*, 968 F. Supp. 930 (S.D.N.Y. 1997).

82. *Id.* at 938.

83. *Velezquez v. Chater*, 93-CV-0264E(f) 1996 WL 107109 (W.D. N.Y. 1996).

84. *Id.*

85. *Id.*

doctors felt was too minor to recommend treatment.<sup>86</sup> A federal judge concluded that about the only thing wrong with Velezquez was that he was lazy.<sup>87</sup> The court referred to a variety of observations made by welfare officials evaluating Velezquez's application: "The claimant leads a totally empty life and does not care to work."<sup>88</sup> He "lives with his father, with whom he fights. His brothers take care of him. He does not cook. He does practically nothing. He watches television and sleeps around twelve hours daily and eats well. He is not married but he has a child. He does not take care of him."<sup>89</sup> He has lived in the United States for five years, but has not learned English and "has never worked."<sup>90</sup> According to his own brother, Velezquez just "does not care too much."<sup>91</sup> Nevertheless, legal services lawyers argued that this wasn't enough evidence to deny Velezquez's welfare claim.<sup>92</sup> Specifically, they argued that "the speculation" on which officials based their denial "falls well short of the 'substantial evidence' doctrine, requiring the quantum of evidence together with the principle rationale, that a reasonable person would accept as adequate to support a conclusion."<sup>93</sup> The federal judge rejected legal services' arguments as "meritless," and "illusory."<sup>94</sup>

When legal actions have no hope of success, legal services lawyers have resorted to public relations campaigns. Such was the case in Massachusetts when the state instituted a program called Massachusetts Jobs. This program offered AFDC recipients the option of enrolling in education courses of job training programs. Individuals deemed job-ready were assigned to work in a non-profit agency or nursing home while those who refused work lost part of their welfare benefit. Massachusetts Welfare Commissioner Joseph Gallant stated that the purpose of the program was to "make sure they're doing something to move off welfare and not just sitting home and not doing anything." However, the LSC-supported Massachusetts Law Reform Institute strongly condemned workfare as nothing more than "an outgrowth of the Reagan-era ideology that says you should look out for yourself, and take responsibility for yourself."<sup>95</sup> When the state sent letters to 2,000 non-profit groups asking that they accept welfare recipients as volunteers, a coalition of activist groups, including the Massachusetts Law Reform Institute, sent letters

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86. *Velezquez v. Chater*, 93-CV-0264E(f) 1996 WL 107109 (W.D. N.Y. 1996).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Velezquez v. Chater*, 93-CV-0264E(f) 1996 WL 107109 (W.D. N.Y. 1996).

92. *Id.*

93. *Id.*

94. *Id.*

95. Teresa Hanafin, *Stooborn Welfare Rolls Spur Aid Alternatives*, BOSTON GLOBE, June 21, 1992, at 1.

to the non-profit groups telling them not to cooperate with the state. State Human Services Secretary Charles Baker called the actions of legal services and their allies “outrageous and disgraceful.” Said Baker, “What this tells me is that there are apparently more people in the human services community . . . who aren’t that interested in helping welfare recipients improve their lot in life.”<sup>96</sup>

The cycle of poverty which has seen successive generations of families remain on welfare can only be broken by policies which do not treat being on the welfare rolls as an unlimited right for any who wish to avail themselves of it. The new consensus is that incentives within welfare policy should be to encourage where possible, and force where necessary, able-bodied individuals to limit their stays on welfare. This new consensus is antithetical to everything the legal services program uses tax dollars to achieve in welfare litigation.

### B. Drug and Alcohol Abuse

No discussion of contributing factors to poverty in the United States would be complete without an examination of the serious role of drug and alcohol abuse. Substance abuse is clearly a widespread contributing factor to homelessness, crime, and unemployment among the poor. Unfortunately, legal services has long advocated policies which have demonstrably aggravated the problem of substance abuse in the lives of the poor. Legal services lawyers have been in the forefront of the legal efforts to:

- thwart drug-related evictions from public housing
- stop attempts to screen drug criminals from public housing
- subsidize drug and alcohol abuse through welfare
- provide free representation in civil matters to drug criminals
- frustrate attempts to counter the drug problem among the poor

#### 1. Drug-related Evictions

*Drugs are the No. 1 issue facing managers of public housing today.*<sup>97</sup>

Wallace Johnson

Public Housing Authorities Directors Association

*After a policeman was shot to death in a drug raid in a public-housing project in Alexandria, Virginia, Jack Kemp, then Secretary of Housing and Urban Development, wrote to all 3,300 public housing authorities asking them what was the extent of the drug problem in their projects and what in their judgment could be done. In a flood of letters, PHA directors cited Legal Services as the chief impediment to eliminating drug dealers from public housing.*<sup>98</sup>

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96. Don Aucoin, *Some Groups Skirt Welfare Job Program*, BOSTON GLOBE, Jan. 29, 1994, at 5.

97. Isaac, *supra* note 14, at 35.

98. *Id.*

*In 1992 a young attorney named Philip Stinson submitted an article to "Clearinghouse Review," the Legal Services journal, in which he outlined how nuisance-abatement acts, some of them specifically designed to deal with drug-related activity, could be used to cleanse public housing of drug dealers. "Clearinghouse Review" did not publish it.*<sup>99</sup>

No single issue in the last ten years has gotten the legal services program in more trouble with Congress or the public than its leadership role in thwarting drug-related evictions in public housing. The subject has bedeviled legal service advocates in Congressional hearings, media debates and in the general policy debate over the future of LSC, and with good reason. Legal services lawyers have used taxpayers dollars to take legal action to hamstring efforts at every level of government to rid public housing of drug criminals.

In New York City, the Legal Aid Society of New York went to court in 1994 to challenge the New York Housing Authority's plan to make it easier to evict drug dealers by cutting the process (which could take as long as three years) to only three to four months. The Interim Council of Presidents, an organization representing the hundreds of thousands of poor tenants in New York's public housing, filed a brief of support for faster evictions. Tenants said that the drug problem meant that they could not sit outside at night, let their children play after dark, or even visit others in their own building.<sup>100</sup> The irony of New York's poor public housing tenants siding with the housing authority while the legal services lawyers, who were supposed to be helping the poor, taking the side of drug criminals, was an irony repeated across the country.

In Pittsburgh, Neighborhood Legal Services (NLS) has sued Northside Tenants Reorganization (NTR) repeatedly to prevent drug-related evictions as well as evictions for violence and vandalism. NTR is a group of poor tenants who manage and own their own low-income housing. NTR Executive Director Harriet Henson and a building manager said they saw a tenant's boyfriend complete a heroin deal. "It took us two years to evict because [NLS] took us to appeal and appeal and appeal."<sup>101</sup>

In Pennsylvania, when the Philadelphia Housing Authority (PHA) attempted to evict a woman who was allegedly dealing drugs, loan sharking, and extorting money from other tenants, an LSC grantee filed a federal civil rights suit on her behalf and won on the grounds that the PHA had not given her adequate notice of the charges. Legal Services lawyers obtained \$5,500 in legal fees.<sup>102</sup>

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99. *Id.*

100. See Shawn G. Kennedy, *Tenants Press for Easier Eviction of Drug Criminals*, N.Y. Times, Aug. 15, 1994, at B1.

101. *House Judiciary Subcomm. on Commercial and Administrative Law*, 104 Cong. 1st Sess. 519 (1995)(Testimony of Harriet Henson, Exec. Dir., Northside Tenants Reorganization).

102. *Id.*

In 1995, Hudson County Legal Services failed in its attempt to prevent the eviction of a man convicted of illegal drug activity. Between 1992 and 1994, Silas Taylor, a resident of the Bayonne Housing Authority was twice convicted of drug crimes. After the second conviction, the housing authority initiated eviction proceedings against Taylor citing state law which allows eviction of public housing residents involved in illegal drug activity. However, legal services argued that evicting Taylor was unconstitutional because it violated the Eighth Amendment prohibitions against cruel and unusual punishment. A federal court rejected this claim, ruling that "evicting an insidious tenant is a rational and effective means of protecting" law-abiding tenants from crime.<sup>103</sup>

Not all of the legal services lawsuits to stop drug-related evictions were local. In 1992, legal services lawyers won a lawsuit against the Department of Housing and Urban Development for attempting to evict drug dealers from public housing. The case began in 1990 when HUD and the Justice Department teamed up to implement the Forfeiture Project, an aggressive program to combat drugs in public housing by allowing authorities to quickly evict suspected drug criminals. HUD Secretary Jack Kemp said that such swift and dramatic evictions would send a signal that the government was determined to rid public housing of drugs. However, Central Virginia Legal Aid Society, an LSC grantee, immediately challenged the policy in court on the grounds that it violated constitutional rights to due process. A federal court agreed and struck down the policy.<sup>104</sup>

The public outcry against legal services involvement in thwarting drug-related evictions resulted in a restriction against the representation of drug criminals by legal services in eviction cases being added to the 1996 appropriations bill for LSC.<sup>105</sup> The restriction was narrowly drawn, allowing legal services lawyers to continue to thwart drug-related evictions where the tenant being evicted for allowing their unit to be used in drug activity was not the person actually charged with the crime. The restriction also did nothing to stop legal services lawsuits attacking eviction policy changes, lawsuits which can affect thousands of poor tenants. Legal services lawyers lost no time in resuming their legal actions to challenge drug-related evictions.<sup>106</sup>

Closely related to the efforts of legal services lawyers to keep drug dealers safe from public housing eviction is the campaign to stop efforts by public housing officials to screen drug criminals from entering public housing. Across the country, public housing authorities have adopted a variety of

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103. *Id.*

104. *Richmond Tenants Org. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992).

105. Pub. L. No. 104-134, § 504(a)(17), 110 Stat. 1321-56 (1996).

106. See Tom Ernest, *Eight Tenants Face Eviction*, *The Buffalo News*, May 25, 1996, at 5C. See also *Hoboken v. Alicea*, A-5639-95T3 (NJ Appeals Ct. 1997).



screening practices to keep out drug criminals. These screening practices have faced a barrage of legal services technical and legal objections.

Sociologist Rael Jean Isaac, who has studied and written extensively on the negative impact of legal services activities on the poor, summed up the problem this way:

*Keeping public-housing projects free of drugs requires more than the ability to evict drug dealers; screening to keep known criminals from moving in is also essential. Here, too, Legal Services throws up roadblocks to the most modest efforts to ensure the safety of residents. In 1994, the Atlanta Legal Aid Society brought a class action suit against the Atlanta Housing Authority on behalf of those who had been denied admission on the grounds of their criminal history. Although the AHA denied housing only to those with criminal histories in the last three years, Legal Services argued it was unfair to exclude people who had "successfully rehabilitated" as evidenced by their completing their sentence, probation, or parole! The Americans with Disabilities Act is providing Legal Services yet another handle. "All of a sudden," says John Hiscox [Macon, Georgia Housing Authority official] "screening out someone who is a substance abuser is screening out someone with disabilities, which is a protected class."<sup>107</sup>*

Put simply, legal services lawyers do their best to make sure drug criminals can get into public housing and then fight all attempts at eviction to make sure they can stay there, all in the name of helping the poor.

## 2. Subsidizing Alcoholism and Drug Addiction

It would be difficult to imagine a more effective way to promote alcoholism and drug addiction than in rewarding such substance abuse with a monthly government check. For good measure, the checks would cease when the alcoholic or addict found the strength to beat their problem. In short, the taxpayer would provide cash incentives for a person to get and stay inebriated or stoned. As with other activities which hurt the poor, legal services lawyers used tax-supported legal action to make this Kafkaesque situation a reality.

In a landmark case, *Purter v. Heckler*,<sup>108</sup> Neighborhood Legal Services of Pittsburgh, an LSC grantee, successfully argued for the rights of alcoholics to receive Social Security Disability benefits (SSDI). In the 1970's and early '80's, legal services client, Charles Purter, had applied three times for assistance but was turned down by the Social Security Administration because his ailments were largely the result of chronic alcoholism. Purter drank an average of two pints of alcohol a day, had been in and out of rehab programs and was unable to hold a steady job. Purter even admitted that he "can't stop drinking." In 1985, the U.S. Court of Appeals for the Third Circuit struck

107. Isaac, *supra* note 14, at 35.

108. *Purter v. Heckler*, 771 F.2d 682 (3d Cir. 1985).

down the Social Security Administration's prohibition of dispensing financial payments to alcoholics. It was argued that alcoholism is a disease not subject to individual control and since Purter was unable to control his drinking, that alone justified his eligibility for benefits.<sup>109</sup> Thanks to legal services an estimated 250,000 alcoholics and drug addicts began receiving \$1.4 billion annually in benefits to support their alcoholism and addiction.<sup>110</sup>

But the battle to subsidize alcoholism with tax funds was not over. Legal services continued to weigh in on individual cases, as when the Social Security Administration determined that a person's drinking problem was controllable. A typical case from among the many handled by legal services lawyers:

*In 1992, Community Legal Services of Philadelphia represented a man in his claim for social security benefits. The Social Security Administration had originally rejected the man's claim for disability because they reasoned that his alcoholism was a condition he could control. However, legal services argued that his alcoholism was so severe that it was beyond his control. As evidence, they cited the fact that he drinks half a gallon a day of wine, begins drinking in the morning, drinks all day and uses cocaine on occasion. As further evidence to get SSDI, they said their client drinks whenever he has something important to do like visit his doctor - or pick up his welfare check.<sup>111</sup>*

The legal services efforts to subsidize alcoholism were extended to subsidizing addiction to illegal drugs, even in cases where the legal services client was an admitted criminal as well as a drug addict. Another federal case undertaken by legal services illustrates this practice:

*In 1994, the Legal Assistance Foundation of Chicago sued the federal government demanding Social Security Disability benefits for a man who admitted to making a living from crime. The client in the case, one Jimmie Jones, freely admitted that he robbed people and stole cars to support his \$60 a day drug habit. Jones, who had been arrested more than 100 times in his life, also received welfare so that the money he earned from theft apparently went solely to support his drug habit. Nevertheless, legal services lawyers argued that even though Mr. Jones could support himself through illegal "gainful activity," he was still incapable of finding legal gainful employment. The judge in the case ruled that if Jones could make a living from a life of crime, he was certainly capable of earning a living from legal employment.<sup>112</sup>*

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109. *Id.* at 697.

110. Hearings on Federal Disability Benefits Before the House Ways and Means Subcomm. on Social Security and Subcomm. on Human Resources, 103d Cong. 2d Sess. (1994)(testimony of Sen. William S. Cohen).

111. *Dennis v. Sullivan*, 787 F. Supp. 89, 93 (E.D. Penn. 1992).

112. *Jones v. Shalala*, 21 F.3d 191 (7<sup>th</sup> Cir. 1994).

### 1. Free Lawyers for Drug Criminals

While government at the local, state, and federal levels has spent many billions of tax dollars fighting the war on drugs, the network of legal services lawyers has been spending federal tax dollars in a wide array of legal actions on behalf of drug criminals.

One of the most controversial areas of legal services activism has been in stopping the deportation of drug criminals. These cases illustrate the problem:

*Greater Boston legal Services tried to prevent the deportation of an alien resident who had been convicted of serious drug offenses. US law clearly allows for the deportation of a non-citizen who "at any time has been convicted of a violation of . . .any law or regulation of a State. . .relating to a controlled substance."<sup>113</sup> The alien in this case was tried, convicted, and sentenced on four drug charges including two counts of possession of cocaine with intent to distribute. Nevertheless, legal services argued that the client deserved to stay in the country. A US Court of Appeals rejected the claim.<sup>114</sup>*

At times the criminals being deported have included murderers as well as drug traffickers. Once again, legal services, which perennially claims to have insufficient funds to represent the poor, had enough resources to help drug dealers with their civil litigation:

*In 1993, the Atlanta Legal Aid Society attempted to halt the deportation of Cuban nationals convicted of committing serious crimes including murder and drug trafficking. Part of the 1980 Mariel Boatlift, the Cubans committed the crimes while on immigration parole. After release from prison, their immigration parole was revoked and they were subsequently placed in detention to await return to Cuba. Atlanta Legal Aid said their detention was a violation of their constitutional at right to due process of law. A US Appeals Court rejected the petition.<sup>115</sup>*

Free lawyers from legal services have helped drug criminals with their civil legal problems in other ways. One useful type of representation is fighting property forfeiture, a common occupational hazard faced by many drug criminals:

*In 1991, Legal Services Corporation of Iowa (LSCI) tried to stop the federal government from seizing the house that convicted drug dealers used to commit their crimes. Throughout the 1980's, John and Judy Bly systematically used their home to buy, sell, and use illegal drugs. In March 1988, police raided the house and arrested the Blys after discovering illegal drugs and drug paraphernalia. Both Blys were later convicted of serious drug charges. In 1990, the US Attorneys office initiated forfeiture proceedings of the Bly's*

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113. *White v. I.N.S.*, 17 F.3d 475, 478 (1<sup>st</sup> Cir. 1994), *citing* Immigration and Nationality Act § 241(a)(11), 8 U.S.C. § 1251(a)(11).

114. *Id.* at 480.

115. *Gisbert v. U.S. Att'y Gen.*, 988 F.2d 1437 (5<sup>th</sup> Cir. 1993).

*property under federal law which requires that all property used to commit or facilitate a felony be forfeited. However, the legal services lawyer unsuccessfully tried to keep the property in the Bly's hands by resorting to a litany of often far-fetched arguments. For instance, legal services argued that it was unconstitutional for the government to seize the Bly's house because even though they had used it to deal drugs, they had legitimately acquired it. The federal judge rejected the argument noting that legal services lawyers failed to "explain how using properly acquired real estate to facilitate drug transactions is constitutionally protected conduct."<sup>116</sup>*

Given the legal services attitude that welfare is something akin to a natural right, it has only been natural for legal services to wage the fight for welfare for drug criminals:

*In 1989, legal services lawyers filed a class action lawsuit against the city of Lawrence for confiscating the welfare ID cards of the people arrested in Lawrence for drug crimes. Mayor Kevin Sullivan implemented the policy after discovering that 80% of the people arrested in Lawrence on drug charges were also receiving welfare. Sullivan argued that individuals arrested for dealing drugs and making \$50,000 a month had no right to be on welfare. He pointed to one case where a woman on public assistance paid \$10,000 to bail out her husband within hours of his being arrested. However, Merrimack Legal Services sued against the policy claiming that it was unconstitutional to deprive criminal defendants of their "property," meaning their welfare benefits. Sullivan lashed out at legal services, accusing them of taking the side of criminals who are destroying the community and ignoring the rights of law-abiding citizens. In vowing to fight for his confiscation policy, Mayor Sullivan said he would not allow "some legal services attorney to dictate to me what the quality of life will be in this city."<sup>117</sup>*

### C. Crime

There is little argument that the poor are all too often the victims of crime, especially street crime. Since legal services lawyers decide which clients they will represent among the many who seek such free representation, the recurring question in the legal services debate is why do legal services lawyers ever take civil cases for criminals while turning down law-abiding citizens?

#### 1. Prisoner lawsuits

Throughout most of its history the legal services program was one of the leading sources of representation for lawsuits by prisoners. The most criticized type of lawsuits were those forcing the early release of thousands of criminals for reasons of overcrowding. In one Kentucky County alone, a legal services

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116. *United States v. 1606 Butterfield Road*, 786 F. Supp. 1497, 1510 (N.D. Ia. 1991).

117. See Renee Graham, *Lawrence Mayor's Tactics on Drugs Stirs Rights Fears*, BOSTON GLOBE, June 27, 1989, at 13.

lawsuit resulted in more than 15,000 prisoners being released early in a six-year period.<sup>118</sup> Between 1992 and 1994, the Legal Aid Society of Lorain County, Ohio, forced the Lorain County jail to prematurely release more than 3,500 criminals to avoid what Legal Aid defined as overcrowding. In 1994, Legal Aid also filed suit against Lorain County for violating prisoners' constitutional rights. They contended that housing 45 criminals in a jail designed for 39 constituted cruel and unusual punishment prohibited by the Eighth Amendment. Among the other violations alleged by Legal Aid: poor laundry services, life-threatening levels of tobacco smoke, and inadequate recreational facilities. They specifically cited the fact that the ping pong table had no paddles.<sup>119</sup>

While by their own telling, legal services lawyers have been turning away hundreds of thousands of potential clients a year for representation, they seemed to have the resources to handle a long list of civil legal services for the incarcerated criminals of the country:

- suing a jail for placing a prisoner planning an escape in solitary confinement<sup>120</sup>
- suing a prison for punishing a prisoner planning a riot<sup>121</sup>
- suing a prison for extending an inmate's sentence for attempting to escape<sup>122</sup>
- suing a county jail while asserting a constitutional right to daily visits<sup>123</sup>
- suing a state correctional system, asserting a constitutional right to, among other things, hot pots<sup>124</sup>

Congress responded to the legal services prison lawsuit efforts by banning such representation in the appropriations law covering LSC for 1996<sup>125</sup> and in subsequent years. LSC, the American Bar Association and the legal services community strongly objected to the restriction. Since the restriction on prisoner lawsuits does not exist in the LSC Act, but only in the appropriations law governing LSC funding, it must be renewed each year.

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118. See Kay Stewart, *New Limit on Inmates*, THE COURIER-JOURNAL, Dec. 25, 1991, at 1A. See also Kay Stewart, *154 Are Released to End Crowding*, THE COURIER-JOURNAL, Jan. 24, 1992, at 1B.

119. See Stephen Hudak, *Inmate Sues Over Conditions*, THE PLAIN DEALER, Sept. 2, 1994, at 6B. See also Elyria to House Inmates, THE PLAIN DEALER, Jan. 21, 1993, at 1B.

120. *Chandler v. Baird*, 926 F.2d 1057 (11<sup>th</sup> Cir. 1991).

121. *Cook v. Lehman*, 863 F. Supp. 207 (E.D. Penn. 1994).

122. *Mayner v. Callahan*, 873 F.2d 1300 (9<sup>th</sup> Cir. 1989).

123. *Benson v. County of Orange*, 788 F. Supp. 1123 (C.D. Cal. 1992).

124. *Savko v. Rollins*, 749 F. Supp. 1403 (D. Md. 1990) (Legal services argued that the prohibition of electric hot pots in prisoners' cells violated the Eighth Amendment's prohibition of cruel and unusual punishment. The court rejected the claim because the inmates only reason to have the hot pots was convenience, which the court observed is "not the standard by which Eighth Amendment violations are to be judged." *Id.* at 1415.).

125. Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321-55 (1996).

## 2. Illegal Aliens

No organization in the United States has done more legal work to promote special rights and government benefits for illegal aliens than the Legal Services Corporation.<sup>126</sup>

As with other areas in which legal services lawyers have used taxpayer funds to provide free representation to criminals, the range of legal services provided to illegal aliens is wide:

- sued California for passing a law requiring those seeking Medi-Cal to disclose their immigration status<sup>127</sup>
- sued the INS for enforcement of immigration laws<sup>128</sup>
- sued the INS for prohibiting residency for criminals<sup>129</sup>
- sued California for denying drivers licenses to illegals<sup>130</sup>
- sued a US Attorney for investigating allegations that illegals were registering to vote<sup>131</sup>
- sued California State Department of Transportation for building a fence near the border to prevent hundreds of illegals from running across a busy highway to avoid an INS check point.<sup>132</sup>

As with prisoner lawsuits, Congress used the 1996 appropriations bill for LSC<sup>133</sup> to restrict lawsuits on behalf of illegal aliens. Subsequent appropriations bills have kept the restriction over the objections of legal services attorneys and their allies.

## 3. Legal Services for the Undeserving Poor

At the turn of the century there was a phrase used to describe the law-abiding poor person who often could trace their poverty to hard times or personal misfortune through no act of their own: the deserving poor. This phrase or some variation of it is used when legal services advocates are making the case for increased funding. The Legal Services Corporation Act, however, allows broad discretion in case selection and all too often legal services

126. See Kenneth F. Boehm, *Legal Services Corporation Programs Aid Illegal Immigrants*, IMMIGRATION REVIEW, Summer 1997, at 6.

127. See *Medicaid: Right to Ask Immigration Status Prior to Emergency Care Left Intact*, BNA HEALTH CARE DAILY, Dec. 30, 1994.

128. See *Judge Upholds \$ 70 Fee to Renew Green Cards*, L.A. TIMES, Nov. 6, 1993 at B4.

129. *Naranjo-Aguilera v. I.N.S.*, 30 F.3d 1106 (9th Cir. 1994).

130. *Lauderbach v. Zolin*, 35 Cal. App. 4th 578 (1995)(rejecting legal services' argument and ruled that the "DMV is not only authorized but obligated" to deny license to illegal aliens. *Id.* at 585.).

131. *Olagues v. Russoniello*, 770 F.2d 791 (9th Cir. 1984).

132. See Seth Mydans, *One Last Deadly Crossing for Illegal Aliens*, N.Y. TIMES, Jan. 7, 1991, at A1.

133. 111 Pub. L. No. 104-134, § 504(a)(11), 110 Stat. 1321-54 (1996).

lawyers choose to represent criminals and those who are anything but the deserving poor.

The range of activities is broad. While the LSC Act does not allow representation of criminal defendants in criminal cases, imaginative legal services lawyers have found many ways to represent criminals and others who hurt the poor:

- legal action to get a man with a long criminal record who brutally killed his grandparents released from maximum security mental hospital<sup>134</sup>
- lawsuit on behalf of jailed rapist for parental rights to child fathered by rape of a 13-year-old girl<sup>135</sup>
- lawsuit to overturn city ordinance against aggressive panhandling, i.e., use of harassment, intimidation and derogatory remarks to exact contributions<sup>136</sup>
- lawsuit for social security benefits for felon while he was still serving his sentence<sup>137</sup>
- lawsuit against school district for expelling violent students<sup>138</sup>
- lawsuit against Cleveland for requiring its police cadets take drug tests<sup>139</sup>
- lawsuit against housing authority for evicting vandals<sup>140</sup>
- lawsuit challenging county prosecutor's policy of confiscating the property of criminal defendants who are also deadbeat dads<sup>141</sup>
- lawsuit against county effort to recoup fraudulently acquired welfare<sup>142</sup>
- lawsuit against Cook County prosecutor for calling convicts "savages"<sup>143</sup>

134. Barry Siegel, *Sarig: Killer of 2 in Georgia May Be Freed to Satisfy Law*, TIMES, Nov. 12, 1994, at A1.

135. Gay Elwell, *Dad's Request Denied*, THE MORNING CALL, Allentown, PA, Mar. 2, 1995.

136. *Roulette v. City of Seattle*, 850 F. Sup. 1442 (W.D. Wash. 1994). See also, *Young v. New York Transit Auth.*, 903 F.2d 146 (2d Cir. 1991).

137. *Calaf v. Secretary of Health and Human Services*, No. 93-30168-FHF, 1994 WL 405744 (D. Mass. 1994).

138. See Sandra Fish, *Suit Challenges Expulsion Policy*, ORLANDO SENTINEL TRIB., Apr. 27, 1992, at B1.

139. *Feliciano v. Cleveland*, 988 F.2d 649 (6th Cir. 1993).

140. *Stark Metro. Hous. Auth. v. Kirksey*, No. CA-9116, 1993 WL 135735 (Ohio Ct. App. 1993).

141. See Sandra Clark, *Lawsuit Argues Against Taking Property*, THE PLAIN DEALER, Nov. 12, 1994 at 1B; See also Molly Kavanaugh, *Suit Not Halting Creative War*, THE PLAIN DEALER, May 20, 1995, at 1B.

142. *Wantland v. Ohio Dept. of Human Services*, No. 94CA30, 1995 WL 557005 (Ohio Ct. App. 1995).

- lawsuit to stop eviction of violent, abusive tenant<sup>144</sup>
- lawsuit against bail bondsmen for apprehending fugitive<sup>145</sup>
- legal action against the eviction of a psychotic from public housing after the psychotic attempted to run down a neighbor with a car<sup>146</sup>
- lawsuit against a school for expelling student who burglarized the school<sup>147</sup>
- lawsuit against Indiana for denying unemployment for man fired for being in jail<sup>148</sup>

#### D. Employment

*If taking as a client a person you want to put out of business is not a conflict of interest, I don't know what is. You are taking on a client with the express purpose of doing him out of a job without his knowing about it.*<sup>149</sup>

Libby Whitley  
Farm-Business Coalition

Frequently, the path from poverty to a better life begins with employment. Given the infatuation of legal services lawyers with the welfare state, employment has never been valued for the important it has truly had in helping the poor leave a life of poverty. This attitude can be seen in the militant opposition of legal services attorneys to workfare programs as well as other various welfare reform efforts at promoting private employment.<sup>150</sup>

Even more damaging to the prospects of the poor are the numerous lawsuit campaigns waged by legal services attorneys against farmers which have resulted in massive loss of jobs through driving the employers out of business, forcing them to switch to less labor-intensive crops or forcing them to switch to mechanized harvesting. The long history of this type of activity by legal services activists has been documented repeatedly.<sup>151</sup>

143. See David Bailey, *Prosecutor Comments on Jail-Bound Convicts Upheld*, CHICAGO TRIB., May 1, 1994, at 20.

144. See *Who Murdered Quiet Enjoyment?*, REAL ESTATE WEEKLY, June 21, 1995, at 10.

145. *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200 (5<sup>th</sup> Cir. 1996).

146. *Everett Housing Auth. v. Terry*, 789 F.2d 745 (Sup. Ct. Wash. 1990).

147. *Rodiricus v. Waukegan Sch. Dist.*, 90 F.3d 249 (7<sup>th</sup> Cir. 1996).

148. *Hughey v. Indiana Dept. of Emp. and Training Serv.*, 639 N.E.2d 1044 (Ct. App. Ind. 1994).

149. RAELE JEAN ISAAC, *HARVEST OF INJUSTICE, LEGAL SERVICES VS. THE FARMER* 22 (1996).

150. See Matt Gryta, *Judge Urges Accord*, THE BUFFALO NEWS, May 18, 1995 at D4 (county sued for requiring welfare applicants to look for work); See also *Lee v. Wisconsin*, 531 N.W.2d 337 (Ct. App. Wis. 1995).

151. Isaac, *supra* note 127, at 19-20, 26-27. See also *Hearing of the House Judiciary Subcomm. on Comm. and Admin. Law*, June 26, 1996. Reauthorization of Legal Services, *supra* note 80.



In one instance, a series of lawsuits drove one major employer of agricultural workers from Puerto Rico, Glassboro Service Association, out of business not from the amounts won by the workers, which were very modest, but from the legal costs. The Association's General Manager, Joseph Garofalo, described how his group was put out of business by legal services lawsuits and the resulting loss of thousands of jobs for the poor agricultural workers from similar lawsuits:

*[M]any of the growers that used to use contract workers have refused to do so. The Shade Tobacco Growers Association from Windsor Locks, Connecticut, who were a large user of contract Puerto Ricans, using between five and six thousand workers, were harassed the same as we were and, because of the legal costs and harassments, the growers refused to utilize contract Puerto Ricans any longer, they closed their programs entirely because of the high and unnecessary legal costs that they were incurring.<sup>152</sup>*

Destroying thousands of farm workers jobs by ruinous legal services litigation campaigns hurts the poorest of the poor, migrant farm workers. Nothing better illustrates this point than the destruction of thousands of farm labor jobs for sugar cane cutters in Florida. After two decades of litigation, legal services succeeded in destroying close to 10,000 jobs in Florida's sugar cane industry. As recently as 1988, more than 10,000 Jamaican guest workers would migrate to Florida to cut sugar cane as part of the special government program to bring in essential foreign workers. These workers were given free housing, free transportation to and from Jamaica, health care, and guaranteed wages above minimum wage. Yet, each year, Florida Rural Legal Services would take sugar growers to court alleging a myriad of labor violations. A series of suits culminated in a \$51 million judgment being handed down in 1992, forcing the growers to switch to mechanization. In 1993, only 2,100 workers were employed in the harvest. When warned four years prior that the companies may tire of the ceaseless litigation and switch to mechanical harvesting, a legal services lawyer said it was a bluff and that they would eventually negotiate.<sup>153</sup>

The legal services lawyers appeared totally insensitive to the loss of jobs. Sociologist Rael Jean Isaac reported:

*When a journalist for the "Miami Herald" asked an attorney with Florida Rural Legal Services about the role of his program in putting sugar-cane cutters out of work, his response was that he did not know "whether there's any point in having people employed in a situation where they're not paid right." In fact, Jamaican workers were being paid \$40 a day in Florida*

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152. Sen. Jeremiah Denton, *supra* note 3, at 100, at 101.

153. See Jon Jefferson, *Cane Workers Accord Means Big Job Loss*, NAT'L L. J., November 8, 1993, at 9. See also Rosalind Resnick, *Sugar Companies and Cane Cutters Battle in Florida*, NAT'L L.J. April 1, 1992, at 1.

*compared to the \$3.10 they would have earned in Jamaica. By 1993, the number of H2A workers in Florida had dropped from a peak of 10,000 to 1,000. Libby Whitley says: "It boggles my mind. If a group of employers had decided to get together and conspire to put 9,000 minority workers out of jobs, everybody would have gone bananas. But Legal Services does it and they're hailed as heroes."*<sup>154</sup>

Congressional hearings into legal services abuses have documented other instances where the zealotry of legal services activists has cost their poor clients their jobs. In one instance, twenty Ohio growers quit growing vegetables because of legal services lawsuits, costing a great number of migrant workers their jobs.<sup>155</sup> A series of legal services lawsuits against vegetable growers in the High Plains area of Texas at the same time a union was trying to organize the farm workers brought a dismissal by a federal judge of all charges against the farmers but huge legal bills to growers. Of the 19 major growers in the High Plains area of Texas before the lawsuits, only two remain today.

The negative impact of legal services lawsuits on employment conditions of poor agricultural workers has also included the near disappearance of employer-provided housing because virtually any kind of housing becomes a litigation magnet for legal services. California grower Dan Gerawan described how a barrage of legal services litigation forced him to no longer provide housing to workers.<sup>156</sup> In Gerawan's case, his family farm provided not only wages above the industry scale but also the option of quality housing. Even the legal services lawyer involved in the case against Gerawan admitted that the housing was superior farm labor housing. During a union organizing campaign, Fresno County officials observed that housing was being damaged faster than it could be repaired. There was testimony at the trial that a legal services representative told a farm foreman not to make repairs and to "get the hell out of here." When legal services lawyers attempted to strike the testimony at trial, Judge Price responded:

*This is the baldest, most astonishing motion I've every heard in my life. Here, the plaintiffs are in court complaining that the labor camp was not repaired, and the Defendants say, "we came to repair it and the Plaintiffs' officials told us we couldn't come in." You can't be serious about this motion, can you?*<sup>157</sup>

Mr. Gerawan eloquently summed up the net results of the legal services campaign against him:

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154. See Rael Jean Isaac, *War on the Poor*, NAT'L REV., May 15, 1995, at 34.

155. See *Statement of Farm Business Council, Hearing of the House Judiciary Subcommittee on Commercial and Administrative Law*, June 26, 1996, at 195.

156. See *Hearing of the House Judiciary Subcommittee on Commercial and Administrative Law*, June 15, 1995 (testimony of Dan Gerawan).

157. *Id.*

*Though Legal Services Corporation funding is provided under the guise of helping the poor, the opposite is often the result. No one was helped by CRLA's attack on us. In fact, during their attack, the CRLA shunned the genuine needs of the area's financially challenged citizens. Moreover, farmworkers were most harmed by Legal Services Corporation funding because CRLA's activities have created a strong disincentive for farmers to provide housing. The result has been that wherever CRLA goes, farmworker housing disappears. Perhaps it is summarized best by CRLA representative Gloria Hernandez who recently said, "I can count on the fingers of my hands the places where there's available housing for farmworkers." (Vida en el Valle, June 7, 1995).<sup>158</sup>*

E. *Legal Services v. The Family*

*The family, it has been said, is the original department of health, education, and welfare. The family provides the basic needs of life; children are reared and values are transferred from generation to generation. If these functions are not furnished by the family, the cost is dear. Just how dear has become evident from data concerning the breakdown of families, through divorce, abandonment, and illegitimacy, which has led to an increase in the number of people who must rely on the government instead of the traditional family.*

Kathleen B. deBettencourt, Ph.D.

*Legal Services Corporation and the Impact  
on the Family: A Preliminary Report*

*When it comes to families in crisis, Legal Services grantees seem to be more interested in facilitating divorce than in helping repair marriages. Legal Services grantees have argued that mediation, an important way of resolving domestic disputes, should be avoided because, they allege, the woman is always at a disadvantage. They have also advised lawyers working on divorce agreements to reduce the father's visitation time and avoid cash settlements so that the mother can be eligible for welfare. The agenda here is clear: Break up the family and replace Dad with a welfare check.*

Gary L. Bauer

Former Domestic Policy Advisor to President Reagan  
President, Family Research Council

Poverty and many of the most serious problems of the poor can be statistically tied to the breakdown of the family. The correlations are apparent in study after study:

- The one-parent family is six times more likely to be poor than the two-parent family.<sup>159</sup>

158. *Id.*

159. *Illegitimacy's Disastrous Effects*, In Focus policy paper, Family Research Council, Washington, DC, March 1995.

- More than 70% of all juveniles in state reform institutions come from fatherless homes. The relationship between crime and one-parent families is so powerful that controlling for family structure erases the relationship between crime and race and poverty.<sup>160</sup>
- The likelihood that a young male will engage in criminal activities doubles if he is raised without a father and triples if he lives in a neighborhood with a high concentration of single-parent families.<sup>161</sup>
- Children from one-parent families are two to three times more likely to have emotional or behavioral problems than children from intact homes.<sup>162</sup>
- Children from fatherless homes have lower educational aspirations and a low level of educational achievement.<sup>163</sup>

Legal services lawyers have subsidized divorce among the poor on a massive scale while discouraging mediation to save marriages and routinely advised their poor clients of the many welfare benefits which can flow from divorce.

While many marriage counselors, family law lawyers and others involved with couples from troubled marriages encourage mediation as an alternative to divorce - or at least something to be tried before taking the major step of filing for divorce - legal services lawyers have a long history of advising clients to avoid mediation. The National Center on Women and Family Law, a national support center funded until 1996 by the Legal Services Corporation, specifically has criticized mediation, claiming it puts women at a disadvantage.<sup>164</sup> When *Cosmopolitan* recently ran an article on mediation as an affordable alternative to divorce, it was a senior attorney from the National Center on Women and Family Law, Joan Zorza, who criticized mediation by stating, "Women tend to be more accommodating than men, and that works to our disadvantage."<sup>165</sup>

Thanks largely to a series of lawsuits by legal services lawyers over the years challenging laws which reward families for remaining intact, there are now clear economic benefits within the welfare system for families to break up. Legal services lawyers have routinely counseled their clients on the welfare benefits that can flow from divorce. For many years, the legal services

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. See Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985).

165. See Anne Field, *Divorce Mediation and Other Cheap Ways to Split*, COSMOPOLITAN, August 1995, at 136.

publication, *Clearinghouse Review*, has emphasized this aspect of family law.<sup>166</sup>

As Dr. deBettencourt recounts in *Legal Services Corporation and The Impact on the Family: A Preliminary Report*,<sup>167</sup> legal services lawyers played major roles in shaping welfare policy with lawsuits which undercut the favored position of the family on the welfare law:

*One of the earliest cases concerning the food stamp program to reach the Supreme Court, U.S. Department of Agriculture v. Moreno, was brought by the Food Research and Action Center, a legal services support center.<sup>168</sup> The legal services attorneys filed a class action suit claiming that since the food stamp program provided benefits only for family household of "unrelated individuals" and therefore violated the "equal protection component" of the due process clause of the Fifth Amendment.<sup>169</sup>*

Based on the Legal Services case services reports, a database of broad case types maintained by LSC, it has been estimated that legal services lawyers provide representation in about 200,000 divorces for the poor each year. This estimate has been confirmed by LSC representatives at a recent appropriations hearing.<sup>170</sup>

When President Kennedy was proposing his welfare program to Congress in 1962, he stated that the first policy of a sound welfare program was "to stress the integrity and preservation of the family unit." The record of the legal services program in challenging many of the welfare laws which provide incentives for keeping the family intact is voluminous. Legal services lawyers have challenged regulations which denied AFDC benefits to women cohabiting with men,<sup>171</sup> have litigated to support public housing benefits for unwed minors,<sup>172</sup> and filed a class action representing minor children who wanted AFDC benefits without living at home.<sup>173</sup>

Welfare policies intended to provide incentives for keeping families intact have often clashed with the agenda of the legal services program with its

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166. See Paula Roberts, *Representing Low-Income Parents Who Are Seeking A Divorce*, CLEARINGHOUSE REV., November, 1982.

167. See LEGAL SERVICES CORPORATION AND THE IMPACT ON THE FAMILY: A PRELIMINARY REPORT (Legal Services Corporation, March 1988).

168. 413 U.S. 528 (1973). Food Research and Action center was created under the original Office of Equal Opportunity Legal Services Program and retained funding as a support center under Legal Services Corporation.

169. See Dr. deBettencourt, *supra* note 170, at 11.

170. See Hearing on the Legal Services Corporation before the House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies, May 24, 1996.

171. King v. Smith, 392 U.S. 309 (1968).

172. Rodriguez v. Reading Housing Authority, 8 F.3d 961 (3rd Cir. 1993).

173. Nafzinger v. Blum, No. 80-CV-623 (N.D.N.Y. 1982).

emphasis on the welfare state. When this has happened, legal services lawyers have a long history of challenging the pro-family policies in court.

## V. BEYOND REFORM

*[House Appropriations Subcommittee Chairman] Rogers also angrily accused the LSC of trying to get around congressionally mandated restrictions on the legal work its lawyers can handle. Unless the LSC quickly changed its "attitude," Rogers said, it would erode its already tenuous base of support on Capitol Hill.*

"Congress Sharpens Ax With LSC in its Sights"

The Recorder

March 5, 1997

*The Moorhead amendment and subsequent restrictions now in effect on the use of appropriated funds by LSC and its grantees are very clear, yet blatant violations of those riders have gone unreported, uncorrected and unpunished.*

Senator Jeremiah Denton

*And let me tell my colleagues, Mr. Chairman about the arrogance with which Legal Services attorneys approach efforts by those of us in this body to be good stewards of taxpayer money. The Legal Aid Society of Santa Clara has a vice president named Elizabeth Shivell and she said, in the wake of the restrictions that Congress has attempted to place on the ability of Legal Services Corporation to enforce a political agenda in the courts at taxpayers expense, this is what she said, "If Congress can screw people with technicalities, we can unscrew them with technicalities. That is why we are lawyers and not social workers. Two can play this game."<sup>174</sup>*

Rep. Bob Barr (R-GA)

U.S. House Floor Debate on LSC Appropriations

September 25, 1997

The history of the federal legal services program is the history of failed attempts to reform the program. The best indicator that the many attempts to reform legal services have failed is the fact that the same problems cited in the 1970's are still being cited today. From the very inception of the legal services program as part of the Office of Economic Opportunity, to the present form as a network of private groups funded through the Legal Services Corporation, the controversies which have plagued the program remain the same. The central criticism then, as now, was that legal services lawyers should not use taxpayer funding to push a liberal political agenda. Much of the 1973 debate in the U.S. House of Representatives over the pending legislation to establish the Legal Services Corporation dealt with which restrictions should be applied to the program to prevent a repeat of the political and ideological campaigns associated with the program when it existed under the Office of Economic

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174. *Legal Aid Divides to Conquer*, CAL. LAW., February 1996.

Opportunity.<sup>175</sup> Indeed, the LSC Act faced a presidential veto from President Nixon because of the controversies. The Act itself was the last piece of legislation signed by Nixon prior to his resignation, the veto threat reportedly being bargained away by Nixon in exchange for political support for funds to cover the costs of his Watergate attorneys.<sup>176</sup>

The accountability issues, including presumptive refunding, lack of access to case files, lack of LSC oversight, legal services lawyers' control of case acceptance and the inapplicability of federal open government and ethics laws to program activities, only partially explain the failure of reform in the legal services program. Other factors played major roles in frustrating legislative attempts to restrict the political activism of legal services lawyers. One such factor was the fact that programs were largely free to use certain outside funds that many of them received from sources such as Interest on Lawyer Trust Accounts (IOLTA) to take cases which were restricted or prohibited, through appropriations riders on LSC funding, with LSC funds. The catch was that it was virtually impossible to effectively determine whether the LSC funds were subsidizing the improper activities because legal services program was not required to keep time sheets and the case files were off limits to monitors. The result was that for years legal services lawyers undertook abortion litigation, represented illegal aliens, and pursued a variety of activities forbidden with LSC funds.

With the passage of the appropriations measure funding LSC for 1996 came not just a number of new restrictions, but also a provision which extended the restrictions applying to LSC funds to all funding received by legal services programs from whatever source.<sup>177</sup> Legal services programs responded to the 1996 reforms, as they had responded to all previous attempts at reform, by a concerted effort to use legal tactics to challenge, water down and evade them.

The legal challenge to the reforms came in a lawsuit filed in federal court in Hawaii in January 1997 by five legal services programs against the Legal Services Corporation.<sup>178</sup> On February 14, 1997, the federal judge in the case issued a preliminary injunction enjoining LSC from enforcing the restrictions on the use of non-LSC funds for lobbying, rulemaking, political redistricting cases, challenges to welfare reform, litigation on behalf of prisoners, abortion-related litigation, and litigation to stop drug-related evictions from public housing. Despite that early victory, the challenge failed and the legal services programs have appealed that decision. A similar legal challenge to the

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175. 119 CONG. REC. 20,344, June 19, 1973.

176. See Rael Jean Isaac, *War on the Poor*, NAT'L REV., May 15, 1995, at 38.

177. Pub. L. No.104-134, 110 Stat. 1321.

178. *Legal Aid Society of Hawaii v. Legal Services Corp.*, 981 F. Supp. 1288 (1997).

constitutionality of the restrictions was filed in federal court in New York<sup>179</sup> and also failed.

The reforms passed by Congress were challenged on another front: the Legal Services Corporation board of directors. The Clinton-appointed board had made no secret of their opposition to the reforms prior to their passage. Once the reforms became law, it was up to the LSC board to develop regulations interpreting those reforms. The LSC board came under fire from Congress and others for drafting watered down or loophole-riddled regulations.

Despite the clear intent that legal services lawyers get out of the business of thwarting drug-related eviction, there were loopholes in both the legislative and regulatory language which allowed legal services attorneys to continue this controversial activity. David C. Morton, Vice President for Housing of the Public Housing Authorities Directors Association testified before the Senate Banking, Housing and Urban Affairs Committee about the appropriations act and the drug-related eviction restriction:

*That same act stipulated that the Legal Services Corporation could no longer spend either public or private funds to defend eviction actions against those charged with drug-related and other crimes. In our opinion, the recently published final rule subverts this intent and permits inappropriate involvement.*<sup>180</sup>

While the restriction stopped drug-related evictions of actual drug dealers, it did not stop drug-related evictions of tenants who allowed their units to be used in drug crimes. Typically, public housing leases forbid any kind of drug crime in units by tenants, their family members or guests, with eviction the penalty for violation of the provision. After Congress passed the restriction, legal services lawyers remained active in using legal action to stop such evictions despite widespread support for such evictions by most poor tenants of public housing:

- Neighborhood Legal Services of Buffalo, N.Y. represented six tenants in drug-related evictions. Housing authority executive director Charles Barone asked, "And what about the rights of the other tenants? They have the right to privacy and to not having people pounding on their doors at 2 a.m. looking for drugs."<sup>181</sup>
- In January 1997, Hudson County Legal Services stopped the drug-related eviction of a client from Hoboken public housing.<sup>182</sup>

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179. *Velazquez v. Legal Services Corp.*, No. 97 00182 (E.D.N.Y. filed Jan. 14, 1997).

180. *Senate Banking, Housing and Urban Affairs Committee*, April 9, 1997 (testimony of David C. Morton).

181. See Tom Ernst, *Eight Tenants Face Eviction*, THE BUFFALO NEWS, May 25, 1996, at 5C.

182. *Housing Auth. of Hoboken v. Alicea*, 688 A.2d 108 (N.J. Super. Ct. App. Div. 1997).



- In August 1996, Brooklyn Legal Services represented a tenant even though police found 54 vials of crack cocaine in the unit during a raid.<sup>183</sup>
- In August 1996, Legal Services of Southern Piedmont stopped the eviction of a tenant whose son was arrested for dealing cocaine. Housing officials also charged that the tenant represented by legal services had interfered with policy efforts to combat drug crime in the housing project.<sup>184</sup>

Numerous other cases involving legal services involvement in drug-related evictions<sup>185</sup> have been documented after Congress passed the restriction tied to the 1996 appropriations law for LSC. Ironically, legal services lawyers have fought housing authorities responding to the Clinton Administration “One-Strike” policy which allows beleaguered housing authorities to evict residents who allow family members or guest to engage in criminal activity. For example, Florida Rural Legal Services has tried to stop five drug-related evictions from Palm Beach and Boca Raton housing authorities. The housing authorities had cracked down on drug crime in response to the “One-Strike” policy.<sup>186</sup>

The Legal Services Corporation went even further to scuttle the reform mandated by Congress that legal services lawyers no longer seek or accept attorneys’ fees. The LSC board passed a regulation which actually allowed legal services attorneys to collect fees from poor, disabled clients in some Social Security cases. This attempt to circumvent the will of Congress was too much for Rep. Hal Rogers, Chairman of the House Appropriations Subcommittee on Commerce, Justice, the Judiciary, and Related Agencies. After a member of the LSC board told Chairman Rogers that the regulation allowing attorney’s fees from the poor was not a final regulation and claimed that the statute did not explicitly prohibit seeking payments from clients in all cases, Rogers stated, “It’s outrageous that your interpretation would be that minute, considering the hot water you’re in.”<sup>187</sup>

Taking attorneys’ fees from poor, disabled clients in certain Social Security cases is a practice which was banned for many years in the legal services program. The fact that the LSC board would allow such practices while purportedly enacting the regulation for the ban on such fees speaks volumes about how ingrained is the resistance to reform at all levels of the

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183. See Bill Alden, *Court Blocks Drug-Related Eviction*, N.Y. L.J. (1996).

184. *Charlotte Housing Auth. v. Fleming*, 473 S.E.2d 373 (N.C. App. 1996).

185. LEGAL SERVICES HORROR STORIES (National Legal and Policy Center, McLean, VA 1997).

186. See William Cooper, *One-Strike Public Housing Drug Policy Backfires*, THE PALM BEACH POST, April 22, 1997, at 1B.

187. See Robert Schmidt, *Congress Sharpens Ax With LSC in Its Sights*, THE RECORDER, March 5, 1997, at 1.

legal services program. Chairman Rogers, whose subcommittee funds LSC and who had opposed elimination of LSC, did his best to express the frustration of Congress with the legal services resistance to reform by telling LSC officials:

*You're in the fight of your life, and I would do everything I could to be nice to the people who have their hands around your neck—the Congress. Some of us are losing patience, and we've gone out on 10 million limbs.*<sup>188</sup>

Another reform required by Congress as part of the 1996 appropriations law for LSC was competition by legal services programs for LSC grants. The requirement for competition was passed with broad bipartisan support. The old system simply provided the same network of groups automatic refunding of their grants from LSC regardless of the quality or quantity of services provided to the poor. As with the other reforms, the leadership of LSC was strongly opposed to the requirement that LSC grants be competed. Congress had to rely on LSC to set up the policies for competition as well as administer the competition process. The net result was that LSC management did all they could to make sure that existing groups did not have much real competition for their grants.

There was only one instance in which established legal services programs lost out in competition to a new program. A Philadelphia area law firm, Dessen, Moses & Sheinoff, successfully competed for grants which had previously gone to two legal services programs, Montgomery County Legal Aid and Delaware County Legal Assistance.<sup>189</sup>

The new legal group, which won the competition despite the tremendous bias of the competitive system for existing programs, soon found itself picketed by legal services lawyers from the losing programs.<sup>190</sup> One of those lawyers, Roger Ashodian, President of the Delaware County Legal Assistance, called on Dessen, Moses to withdraw its winning bid. This is the same attorney who in 1992 had been sanctioned by a judge for engaging in unethical tactics to increase litigation costs in a lawsuit that had been filed against a non-profit group that provided affordable housing for the poor.<sup>191</sup>

The losing programs mounted a campaign of political pressure to force the winning program to withdraw its bid. Congressman John Fox went to a LSC board meeting in January 1997 in an effort to make sure Montgomery County

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188. *Id.*

189. See Zan Hale, *Law Firm Awarded Federal Legal Aid Grant*, THE LEGAL INTELLIGENCER, January 3, 1997, at 1.

190. See Michael Riccardi, *Picketing Against Privatization*, THE LEGAL INTELLIGENCER, February 25, 1997, at 1.

191. *Collman v. Flower Manor*, Civ. A. No. 91-4890, 1992 WL 368457 (E.D. Pa. 1992).

Legal Aid did not lose its grant.<sup>192</sup> In the end, Dessen, Moses was pressured into dropping its winning bid.<sup>193</sup>

The record on competition is clear. With close to 300 legal services programs, there was just one instance where a new group succeeded in winning a grant competition against established programs and they were forced to withdraw their bid following picketing, political pressure and the determined opposition of the legal services network to any competition which threatened the automatic refunding of existing programs.

The new reforms left legal services activists looking for new ways to continue their controversial activities. Using a version of a strategy tried in the 1980's, grantees sought to evade the restrictions by setting up closely affiliated but legally distinct entities. In 1985, a General Accounting Office investigation determined that closely affiliated groups engaged in activities prohibited to LSC grantees and that the relationships between the two sets of groups were so close that LSC should consider them one group for purposes of complying with the restrictions.<sup>194</sup> While the earlier version of setting up closely affiliated alternative corporations, sometimes called "mirror corporations," typically began with a legal services program providing a subgrant to the new group, that avenue was not available in the 1990's because LSC regulations interpreted subgrantees as having to comply with LSC restrictions imposed by Congress.

The new methodology was for an existing LSC-funded program with a history of political activism to renounce its LSC grant while keeping all non-LSC funding. Attorneys with the LSC program would set up a new group close by (often in the same building or on the same block) to obtain the LSC grant. The new group received the LSC grant subject to the restrictions while the older group used the funds from bar support, Interest on Lawyers Trust Accounts, state support and other sources to continue the more political cases now forbidden by Congress. The catch is that the two groups would work closely together, sharing resources and sometimes even office space and staff. Once again, it would be difficult for anyone on the outside to determine if federal funds were being used to subsidize prohibited activities.

Early signs of the close ties between original legal services programs and their spin-off groups soon became apparent. The Philadelphia Legal Assistance Center was formed by 12 lawyers from Community Legal Services to assume CLS's non-prohibited cases, setting up shop in the same building as

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192. See Zan Hale, *Firm Moves Toward Accepting Legal Aid Contract*, THE LEGAL INTELLIGENCER, January 8, 1997, at 7.

193. See Martin Indars, *Concern Over Client Led to Dropping Legal Aid Grant*, THE LEGAL INTELLIGENCER, March 19, 1997, at 5.

194. See *The Establishment of Alternative Corporations By Selected Legal Services Corporation Grant Recipients*, U.S. GENERAL ACCOUNTING OFFICE, B-202116, August 22, 1985.

CLS.<sup>195</sup> Members of the Legal Aid Society of Santa Clara's executive committee opted to refuse LSC funds and set up a new organization to take the funds. The purpose of the tactic in getting around the restrictions mandated by Congress were clear. In an unguarded moment, Legal Aid Society Vice President Elizabeth Shivell explained the tactic this way, "If [Congress] can screw people with technicalities, we can unscrew them with technicalities. That's why we're lawyers and not social workers." A bar publication reported that many poverty lawyers worried that her remarks would cause trouble with Congress.<sup>196</sup> A senior LSC official, Robert Nichols, was quoted in the same article as describing the rash of new groups as a perfectly appropriate approach.<sup>197</sup>

The Legal Services Corporation, managed at the senior-level by many individuals with strong ties to the groups they are charged with monitoring, provided guidance to its programs on this issue. In a December 1995 memo to its grantee programs entitled "Applicability of Restrictions to Interrelated Organizations," LSC set forth the factors to be considered in determining whether one group controls another, thereby subjecting both groups to the new restrictions. Among the criteria used to determine control are: any overlap of officers, directors or managers; contractual and financial relationships; a close identity of interest; and a history of relationships among organizations.

The LSC memo pointed out that any determination as to whether these two groups are subject to common control would consider the "totality of circumstances," with the "presence or absence of any one or more of these factors" not necessarily determinative. Translation: LSC staff would be the sole judges of whether two groups sharing office space, staff and other resources are subject to common control, and therefore to the new restrictions.

The Legal Services Corporation board and staff, like the program lawyers they oversee, are on record as opposing the new restrictions. Moreover, only LSC has legal jurisdiction over any violation which enabled LSC resources to be used for restricted purposes. LSC has the authority to define what is or is not an improper relationship between two closely affiliated groups. Take all these factors into account and once again there is a situation in the legal services program where it is difficult, if not impossible, to determine if activist lawyers are using federal funds to promote political and ideological causes in violation of restrictions imposed by Congress.

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195. *The Legal Intelligencer*, January 30, 1996.

196. *See* Newburgh, *supra* note 152.

197. *Id.*

## VI. IS THE LEGAL SERVICES PROGRAM NECESSARY?

Given the problems of accountability, politics, activities which hurt the poor and the failure of attempts to reform the legal services program, the question in the policy debate has increasingly become: Is this program necessary?

Until the Office of Economic Opportunity set up a legal services program during the Lyndon Johnson Administration, there was no federal program subsidizing civil legal assistance for the poor. The traditional legal aid programs around the country were typically local, sponsored by legal or charitable groups and were not controversial. The lack of controversy can be attributed to the fact that local legal aid programs generally assisted poor individuals with their day-to-day legal needs and were not vehicles for political activism.

Despite rhetoric sometimes used in the policy debate over legal services, there is no constitutional right to free legal representation in civil matters. There never has been in the United States or any other country. Given the almost unlimited possibilities of economic, personal, political and social agendas which could be advanced through litigation, any such "right" to free lawyers would quickly bankrupt any government which attempted to supply such a benefit.

The poor already have the right to free legal counsel in criminal matters. The legal services program has never supplied attorneys to defend the poor against criminal charges despite the long history of representing the civil legal needs of drug dealers, prisoners, criminals seeking welfare, illegal aliens seeking government benefits, and assorted other law breakers who used taxpayer-subsidized legal services lawyers to sue the government and law-abiding citizens.

Moreover, the legal services program has never been necessary to represent the legal needs of the poor in personal injury and other types of cases which can readily be handled by the country's record number of contingency fee lawyers.

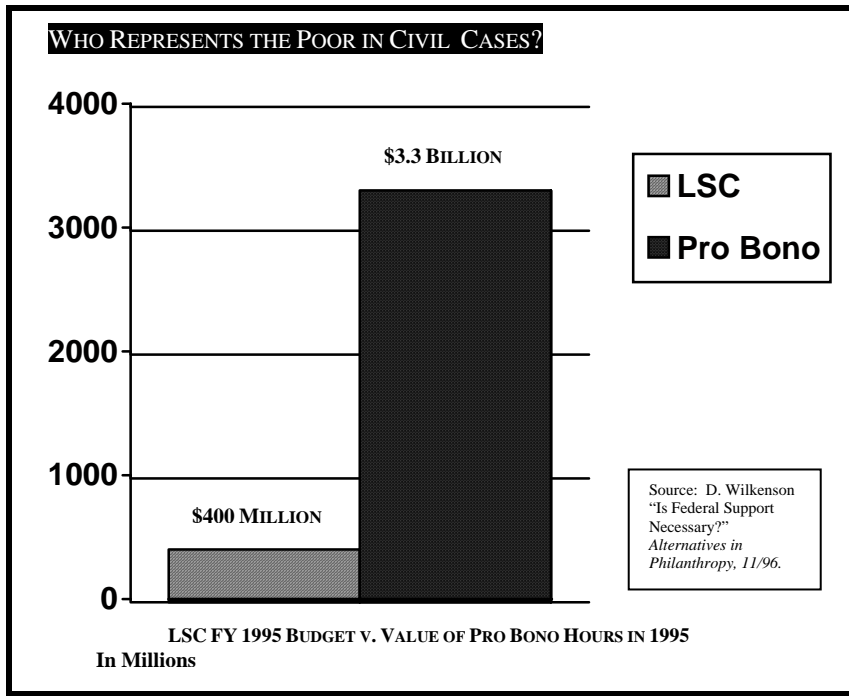
Another important fact rarely mentioned by legal services advocates is that the overwhelming number of civil legal matters involving the poor are not handled by legal services lawyers. By any yardstick, private lawyers providing free or *pro bono* (from the Latin "pro bono publico," meaning for the public good) easily provide far more representation to the poor than do legal services lawyers funded through the Legal Services Corporation.

Former LSC Inspector General David Wilkinson has studied private legal assistance to the poor extensively and concluded that whether one measures such assistance in terms of dollar value or hours of time, the *pro bono* representation dramatically dwarfs the representation provided by legal services lawyers. Mr. Wilkinson concluded:

Information on the amount and value of pro bono work lawyers perform is available for six states – California, Florida, Maryland, New York, Oregon, and Texas. Together these states contain 40 percent of all lawyers. Assuming that these states and the value placed on their lawyers’ time by their state bar leaders are representative of the total lawyer population, an estimated \$3.3-billion worth of pro bono work is performed annually in the U.S. That is over 8 times the LSC’s 1995 budget.

Critics may dismiss this figure by arguing that most LSC-funded lawyers are full-time and compensated on a salary basis; their much lower hourly rate cannot be compared to this estimated value of pro bono hours. A more accurate analysis, they say, would compare the number of hours LSC-funded lawyers work to the number of pro bono hours.

If we extrapolate the number of pro bono hours contributed in the six states surveyed (9,659,709) to all lawyers, this suggests that lawyers contribute over 24,000,000 pro bono hours per year. In other words, pro bono attorneys contribute over five times the number of hours worked annually by the 4,749 staff attorneys of the approximately 281 providers in the LSC’s network.<sup>198</sup>



198. See David Wilkinson, *Legal Services for the Poor: Is Federal Support Necessary?*, ALTERNATIVES IN PHILANTHROPY, CAPITAL RESEARCH CENTER, November 1996, at 5.

Since the inception of the legal services program, other assistance to the poor with their civil legal matters has grown tremendously. In the mid-1960's only a minority of law schools had clinical programs assisting the poor. Today virtually all law schools of any size have such programs. Small claims courts in which individuals resolving civil matters do not need attorneys have greatly increased the jurisdictional amounts of controversies they can handle. Alternative dispute resolution and mediation services have also grown, eliminating the need for attorneys in many matters which used to be handled in court. Government agencies at the local, state, and federal level have set up offices and mechanisms to resolve matters that previously were handled by attorneys. Congress itself in the last thirty years has greatly increased the number of case workers in the home offices of Congressmen and Senators to help resolve complaints and problems with government programs.

Even within the legal services program a great deal of matters which LSC counts as cases in its Case Service Reports are actually referrals to the network of offices and social services agencies which assist in the resolution of matters which alternatively could be handled by attorneys as a civil legal matter. The very nature of the poverty law caseload in the United States makes the argument for handling the cases outside of the courts. Very frequently, the amounts in controversy in landlord/tenant disputes, employment law, consumer law, etc. involving the poor are very low, making a legal approach involving lawyers and courts uneconomical as well as impractical. Put simply, subsidizing legal services lawyers to litigate civil matters with very low amounts in controversy is a waste of taxpayers' money. Far more practical would be initiatives to set up mediation, alternative dispute resolution and other programs to resolve low-dollar disputes outside the court system. Of course, curtailing the need for lawyers is not a policy favored by the organized bar, which has long recognized that the thousands of lawsuits spawned by legal services lawyers means more legal business for the thousands of lawyers who will be hired by those sued by legal services lawyers. In a very real sense, the more than \$5 billion given by the federal government to the Legal Services Corporation was a massive taxpayer subsidy of litigation and lawyers.

If Congress cut off every penny of LSC funding, the network of legal services programs funded by LSC would largely survive. Almost all of the programs get outside funding with many of the larger programs receiving most of their funds from sources other than LSC. Moreover there are more than a thousand organizations providing legal services to the poor which receive no LSC funding whatsoever.<sup>199</sup>

The legal services program funded by the Legal Services Corporation is truly an unnecessary anachronism. Originated in the Great Society's Office of

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199. *Id.*

Economic Opportunity, which has long since disappeared along with the outdated view that welfare state programs would efficiently cure poverty, the agenda of the legal services program is starkly contrary to the strong bipartisan consensus today that promoting welfare dependency hurts the poor.

## VII. CONCLUSION

Unfortunately, there is nothing new or unique about federal programs which waste funds, are unaccountable to the taxpayers, or actually worsen the conditions they were designed to improve. What's different about the legal services program is the degree to which it has succeeded in being unaccountable, political, anti-poor, and beyond any reform for so long.

Ultimately, the lack of accountability which fostered the abuses in the program has been the program's undoing. In a program where grant renewal was automatic, government ethics laws largely inapplicable, most files beyond any monitoring, and even the names of the cases taken did not have to be disclosed, it's easy to see how abuses could develop. Just as LSC could not effectively monitor its grantees, neither could the poor clients exert effective control over their activist lawyers who, after all, had largely unlimited discretion over whether clients could get representation. In a government designed by its Founding Fathers to have checks and balances to limit arbitrary power, the legal services program is unique in the absence of such checks and balances.

Contributing to the tenuous prospects for the legal services program is the utter disregard for reforms imposed by a Congress which has long tired of taxpayer funding being used to push political agendas. A program which files lawsuits against reforms passed by Congress, waters down those reforms, and sets up mechanisms to evade the restrictions is a program which is playing a very dangerous game.

Ultimately, the key test of legal services reform is whether the program would renounce its political and ideological causes and devote itself to the day-to-day legal needs of the poor. Given the major Texas election law case, the continued involvement in thwarting drug-related evictions, the numerous attempts to end-run restrictions and the continued involvement in the types of cases which got the program in trouble to begin with, it's clear that legal services is a program which does not want to reform. The activists within the legal services movement are betting they can continue their old ways and survive until a new Congress removes all recent restrictions. As long as that belief persists, the program is beyond reform and must be abolished.