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THE CRISIS OF POVERTY LAW AND THE DEMANDS OF BENEVOLENCE

PAUL R. TREMBLAY

I INTRODUCTION

Today's Symposium confronts a "crisis" in the legal profession. That crisis concerns rationing legal services for the poor. What this means, we can assume, is that in the late 1990s the methods for providing legal services to our poorest citizens¹ are dysfunctional, leading to palpable tragedies which warrant our most urgent attention. Indeed, these tragedies are readily apparent; citizens with legitimate legal claims, whether for housing, income, education, health care, or safety, are unable to pursue them because of an unfair and inadequate distribution of legal assistance.²

Even the most cynical of us will recognize, though, that this state of affairs is not new to the 1990s. The shortage of available

Clinical Professor of Law, Boston College Law School. This essay represents a revision of remarks presented at the 1997 Symposium hosted by the *Annual Survey of American Law* at New York University School of Law on October 31, 1997, entitled "Crisis in the Legal Profession: Rationing Legal Services for the Poor." I thank the student organizers of this conference and Professor Paula Galowitz for their kind invitation to me to participate in this event. I also thank Amy DeLisa for valuable research assistance.

1. I use the term "citizen" here as a more apt term than "client" and without any intended implication that only persons who are United States citizens are the subject of the present crisis and resulting tragedies. See Peter Margulies, *The Mother With Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 Nw. U. L. REV. 695, 695 n.1 (1994) (defending the use of the term "'citizens seeking legal services'—citizens for short" as a preferable alternative to the more submissive-sounding term "clients").

2. All available data, of which there is a great deal, indicate that a large proportion of poor citizens with legal needs cannot obtain meaningful legal representation. See, e.g., Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1536 (1995) (noting the chronic shortage of legal services for the poor, both historically and at present); Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 372-73 (1993-94). Eldred and Schoenherr cite a survey by the American Bar Association indicating that only 20% of the legal needs of the poor are being addressed. Prior studies have consistently shown the same scarcity of representation for persons who cannot afford to pay. See CHARLES WOLFRAM, *MODERN LEGAL ETHICS* § 16.7.3, at 938 (1986) (reporting studies which demonstrate a lack of available legal services for the poor in the mid-1980s).

legal services has been endemic for as far back as anyone can recall.³ What is it, then, that attracts our attention *now* to consider the present state of affairs as “critical”? Perhaps such a relative or comparative assessment is unnecessary—the fact that a tragedy is persistent does not mean that it cannot also be a critical one. But it seems that a comparative assessment is indeed at work here, and that there are many within the relevant corner of our profession who believe that the present times do represent a distinct emergency, significantly different from those emergencies of the past. This crisis is not the result of the fact that legal services must be “rationed;” legal services for the poor will always be rationed, regardless of the funding scheme adopted.⁴ The new crisis, it seems, reflects the predicament created by the current Congress, with its imposition of fiscal and operational restrictions.⁵

Money has always been a problem for legal services providers, of course. Even in the greenest of the salad days, for instance, federal funding for legal services through the Legal Services Corporation (“LSC”) was targeted to provide two full-time lawyers for every ten thousand poor people.⁶ That target was never reached, but even if it were, one lawyer would have been grossly inadequate to meet the needs of five thousand people. What is additionally worrisome today is the source of the limited, and now increasingly restricted, federal funds. A more and more conservative Congress has

3. It is not difficult to find similar complaints in the 1970s and 1980s. *See, e.g.*, Mauro Cappaletti & James Gordley, *Legal Aid: Modern Themes and Variations*, 24 STAN. L. REV. 347, 379 (1972) (characterizing state and federal funding for the poor in the early 1970s as “trivial”); Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521 (1981) (reporting President Reagan’s threats to abolish the Legal Services Corporation); WOLFRAM, *supra* note 2, at 938.

4. I have argued that the elasticity of the demand for lawyer assistance by poor citizens makes rationing a fact of life for poverty law practices. The interesting questions surround how the rationing takes place. *See* Paul R. Tremblay, *Toward A Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

5. Others see the current “crisis” as a reflection of the confusion and emasculation of modern poverty law practice. *See, e.g.*, Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 775 (1992); Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1424 (1995); Feldman, *supra* note 2, at 1530; David R. Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 327 (1996).

6. *See* DAVID LUBAN, *LAWYERS AND JUSTICE* 241 (1988). Luban notes that at that time the national average was one lawyer for every 470 people. *See id.* Compare this with *Foreword: Pennsylvania Legal Services at Risk*, 68 TEMP. L. REV. 541, 552 n.62 (1995), a more recent commentary which describes the ratio in 1994 as one lawyer for every 305 United States citizens.

slashed LSC budgets⁷ and saddled its programs with elaborate restrictions and reporting requirements intended to prevent those programs from advocating effectively on behalf of their clients.⁸ In the early 1980s, legal services lawyers confronted an unfriendly President but a somewhat accommodating Congress. That anguished time was nevertheless survivable, for even the most malicious President has a limited capacity to shut down a congressionally approved program, just as his control over the ultimate budget is similarly limited.

The mid-to-late 1990s have introduced a reversed political arrangement which is far more threatening to federally funded legal services work. The combination of a mildly supportive President and an openly hostile congressional leadership leaves LSC extremely vulnerable, for even an intensely sympathetic President cannot single-handedly augment a budget or pass legislation. This, then, is the "crisis" that we face today, and in these terms it is one that is different from—and arguably more threatening than—the usual crises that advocates for the downtrodden are accustomed to enduring.

7. See, e.g., David Barringer, *Downsized Justice*, A.B.A. J., July 1996, at 60. The LSC budget grew until the Reagan presidency, at which point the budget was slashed and people who did not approve of LSC were appointed as directors. After these initial cuts, one research group noted that 61 programs funded by LSC lost 30% of their staff attorneys and several Legal Services offices had to close down. See Eldred & Schoenherr, *supra* note 2, at 370-71 (reporting that in the 1996 budget, Congress cut Legal Services funding by one-third, reducing the budget from \$400 million to \$278 million); see also LUBAN, *supra* note 6, at 241-42; Barringer, *supra*, at 61.

8. See Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996). Disallowed activities include: "participation in redistricting matters, lobbying, class actions, representation of illegal aliens, abortion-related litigation, litigation on behalf of prisoners, and eviction proceedings of individuals charged with selling drugs." Benjamin L. Liebman, *Recent Legislation—Congress Imposes New Restrictions on Use of Funds by Legal Services Corporation*, 110 HARV. L. REV. 1346, 1347 n.8 (1997). Congress also barred legal services lawyers from pursuing constitutional challenges to welfare laws, see OCRAA § 504(a)(16); imposed substantial record-keeping and time-keeping requirements, see OCRAA § 504(a)(8)-(10); and forbade legal services offices from claiming, collecting, or accepting attorneys fees, see OCRAA § 504(a)(13).

For further discussion of recent congressional restrictions, see Barringer, *supra* note 7, at 60; John G. Taylor, *House Wants Legal-Aid Funding to Continue Near Current Levels*, SACRAMENTO BEE, Sept. 26, 1997, at A8. For a review of the traditional congressional restriction against lobbying by poverty lawyers, see Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39 (1994).

What I wish to do in these remarks is to consider, in the wake of this new crisis, some ideas about lawyering for poor people and to revisit some familiar questions about the appropriate role for lawyers in the lives of the poor. There are four areas I wish to explore. I first examine the crisis mentality, in order to ask whether the present state of affairs is really so bad after all. I then argue that, while there are some prominent views within contemporary poverty law discourse that might imply the contrary, this crisis is real, and our fears warranted. I next review some institutional implications of our rejection of the cynics and rebels who would downplay the crisis. Finally, I touch upon the respective roles of poverty lawyers and community members in allocating the scarce legal and advocacy resources.

II THE MYTH OF A CRISIS?

I can imagine two arguments that might lead one to conclude that the present fears about the loss of all federal funding of legal services are overstated. These arguments do not discount the likelihood of the loss of funding, but instead question whether the abolition of LSC would in fact be a terrible event. Let us call these arguments the Cynic's View and the Rebel's View.

The Cynic makes the following point: legal aid advocates have lobbied state and federal officials and potential pro bono lawyers with impressive studies showing that only the tiniest fraction of the legal needs of the poor is being met. For instance, a 1993 Project Advisory Group⁹ study estimated that \$3.6 billion (in 1993 dollars) would be necessary for LSC to meet the legal needs of poor people.¹⁰ Funding for 1997 is less than \$300 million—less than 8% of PAG's 1993 target.¹¹ From these statistics, the Cynic carefully reasons that if more than 90% of poor people are already getting by without a lawyer's help, it would not be a revolutionary change—

9. The Project Advisory Group ("PAG") is an organization dedicated to lobbying in support of, and monitoring the status of, federal and state funding for civil legal services for the poor. PAG has recently announced that it will cease operations as a distinct entity and merge with the National Legal Aid and Defender Association ("NLADA"), a professional association of civil legal services lawyers and public defender attorneys. See NLADA, *NLADA/PAG Joint Committee Report (September 1997)* (visited Feb. 7, 1999) <<http://www.nlada.org/jointrpt.htm>>.

10. See Working Paper by PAG to Advocate for Equal Justice, *Equal Justice for People in Poverty: The Long-Term Goal of Legal Services 13* (1993) (on file with *Annual Survey of American Law*).

11. See Omnibus Consolidated Appropriations Act of 1997, tit. 5, Pub. L. No. 104-208, 110 Stat. 3009, 3059 (1996) (appropriating \$283,000,000 to LSC).

hardly a crisis—to eliminate LSC altogether, thereby leaving approximately 95% of the poor without legal assistance.¹² Put another way, the legal needs studies actually imply that it is not necessary to provide lawyers for this small segment of poor people, since so many are able to survive without such services. And so, the argument goes, it would not be so dramatic if the funding was discontinued. Because these studies' statistics seem reliable,¹³ the Cynic does need to be heard.

The Rebel takes another approach, but ends up at a similar conclusion: that the end of federal funding for legal services for the poor is no cause for significant worry. She argues that the demise of LSC would not only be tolerable, but might even be somewhat advantageous if we take the long view about the plight of disadvantaged citizens. Her reasoning derives from the classic "sublimation" argument, which appears in both historical assessments about the beginning of federal legal services and in more critical literature from the 1990s about poverty lawyers.¹⁴

The sublimation argument says that the real reason the power structure has invited and permitted the funding of legal aid is that law offices in poor communities serve to forestall insurrection.¹⁵

12. The continued availability of private foundation and state money for legal services accounts for the Cynic's conclusion that approximately 5% of needy poor people would still receive some representation after the demise of LSC. *See, e.g.,* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 612 (1997) (noting "\$640 million from Congress and private donors" for LSC purposes in 1994, when the federal LSC budget did not exceed \$400 million). *See also* Brief for Petitioners, *Phillips v. Washington Legal Found.*, 118 S. Ct. 1925 (1998) (No. 96-1578), available in 1997 WL 525726 (pointing out that nationwide Interest on Lawyer Trust Accounts ("IOLTA") programs generate about \$100 million per year).

13. *But see* Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MARY. L. REV. 274 (1986). Professor Rhode, while quite supportive of legal services for the poor, notes that the definition of a "legal" problem can be very expansive. As a result "there is considerable fuzziness to the concept" of greater access to justice as discussed in the legal needs studies. *Id.* at 281; *see also* RICHARD ABEL, AMERICAN LAWYERS 128 (1989) ("Further analysis reveals that the relationship between consumers and lawyers is more complex" than the legal needs studies imply.).

14. *See, e.g.,* Raymond H. Brescia et al., *Who's in Charge Anyway? A Proposal for Community Based Legal Services*, 25 FORDHAM URB. L.J. 831, 831-38 & n.43 (1998); Feldman, *supra* note 2, at 1597 n.192 & 1617-18; Kenneth L. Penegar, *The Five Pillars of Professionalism*, U. PITT. L. REV. 307, 325-26 (1988).

15. *See* Feldman, *supra* note 2, at 1617-18 ("stress[ing] the 'remissive' role of law and its lawyer-agents in sublimating conflict and politics") (citing PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD* 236 (1966)). David Luban relies on this theme when he argues that the alternative to funding legal services for the poor is a Lockean "state of war": "If have-nots are excluded from

Legal aid offers a patina of justice, a convenient deception that implies to the power structure that poor people are treated with the same respect as the rest of the world.¹⁶ If a poor person loses public benefits or forfeits her right to stay in her apartment, those actions should not really be perceived as “unjust” because the government has established law firms ready and able to protect those poor people who need it most. This image of free legal services diverts creative, rebellious energy away from true social change and towards incremental, “regnant” change.¹⁷

Without legal services, or at least without the kind of legal services that we see now, one might conclude that this rebellious energy would be directed toward community action, collectivization, and grass-roots movements—real progress instead of illusory progress.¹⁸ A Rebel would then conclude not only that it is no major tragedy to discontinue legal services funding, but also that conservative legal services critics will come to rue the day the system of injustice is exposed for what it really is. The illusions of due process and fairness and the opportunity to be heard will finally have been removed.

III

A “CRISIS” IN FACT

A. *The Day-to-Day Crisis*

I wish to defend the crisis mindset. I mean to try to understand why these two arguments do not persuade me, or (I’d wager) very many of us. And I shall agree immediately that I have perhaps set up straw people, but my main purpose is not necessarily to show

access to the legal system, ‘the end whereof being to protect and redress the innocent’, their alternative is the law of the streets, of resistance that is entirely right-ful.” LUBAN, *supra* note 6, at 255 (quoting JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 20, at 322 (Cambridge Univ. Press 1960)) (citation omitted).

16. *Cf.* Diller, *supra* note 5, at 1413 (commenting that test case litigation might be perceived as counterproductive because “small successes won in litigation may reassure the public that society is responsive to the grievances of poor people.”).

17. *See generally* GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992). López develops his ideas of “rebellious” and “regnant” lawyering in his famous book on rebellious lawyering.

18. *See id.* at 28 (arguing that regnant lawyering “helps undermine the very possibility for re-imagined social arrangements that lies at the heart of any serious effort to take on the status quo”); *see also* Anthony V. Alfieri, *The Antinomies of Poverty Law Practice and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 665 (1987-88) (the conventional practices of poverty lawyers “decontextualiz[e], atomiz[e], and depoliticiz[e]” their clients’ class struggle).

why these hypothetical arguments are wrong, but to use them to recognize a deeper truth about the angst of legal services practice.

This deeper truth is about pain. I do not know exactly what advocates for the poor might accomplish in the long term, but I know for certain that an effective lawyer can reduce felt pain for real people.¹⁹ Perhaps I should choose a different verb—perhaps I should be saying that lawyers can *defer* pain, or *postpone* pain. But either way the pain is diminished. Neither of the above arguments sufficiently acknowledges that realization, nor do many of the arguments, so common in today's literature, about the ineffectiveness of legal services lawyers.²⁰ I work in a legal aid office, albeit one operated as a law school clinic. When we win or settle an eviction case, we keep a family in an apartment, off the streets, or out of a shelter for a few months, or perhaps even a few years. Their lives, in that respect, are much less tormented than had I not been there. If we win SSI benefits, or an unemployment case, or welfare benefits, we have made a palpable difference in the daily life of that family. Maybe there are fewer sleepless nights. Maybe there is some real food on the table. Maybe, with some of the worst financial fears ameliorated, there will be less worry, and less frustration, and more kindness among family members, and maybe children will do better in school, and parents will have more patience

Do I claim too much here? Of that I have no doubt. But there is a real immediacy to alleviating the suffering that comes from a lack of money, the worry about having to live in a shelter, the fear of domestic violence, or of losing custody of a daughter, even if only for a short while. And those who are facing the pain seem to ask us, the legal aid lawyers, for help in getting this short term relief.²¹

19. For a defense of conventional, instrumental lawyering, see Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law Practice: A Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 *BROOK. L. REV.* 889 (1995).

20. See, e.g. Feldman, *supra* note 2. See also LÓPEZ, *supra* note 17; Anthony V. Alfieri, *Reconstructive Poverty Law and Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107 (1991); Symposium, *The Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 *HASTINGS L.J.* 717 (1992); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990).

21. See Diller, *supra* note 5, at 1429 ("Most clients represented by legal services programs . . . have a material objective of unusual importance, such as avoiding eviction or obtaining critically needed subsistence benefits."); see also Mansfield, *supra* note 19, at 905.

Will the benefits I have just described be long-lasting? As the critics argue, and as I am inclined to agree, probably not. These clients will soon fall behind in their rent once again. They will still be unable to live off of their disability or welfare checks. They will still be desperately poor, and legal services will have done nothing to change that. Nothing. That is the fly in the ointment, the sobering and perhaps deflating reality.

B. *The Cynic's and Rebel's Shortcomings*

The Cynic's view, even if accepted, misses the fact that the few people who get through the door are able to reduce or postpone their crises because of legal services, and without legal services would not be able to do so. The reason the Cynic fails so deeply to resonate with us is that regardless of the numbers that we miss, we know that we are touching a significant number of people even with our limited funding. With the triage typical of poverty law practice, the cases that are handled now—even if they turn out to be, statistically, a small sample of the country's population in distress—will tend to represent those who are hurting most deeply. The Cynic's perspective ignores those folks.

The Rebel's perspective resonates quite a bit more with us, but suffers from the same serious counterargument created by the specter of immediate pain. There are important reasons why the Rebelious perspective, even if we agree with it, does not appear all that frequently in our practices.²² The routines and habits of legal services lawyers evidence a rejection of the Rebel's View, even though, when pushed, most would accept its underlying premises.²³

One apparent difficulty with the Rebel's view is that in order to adopt it we have to ignore the pain that exists right in front of us. We have to say, expressly, that we will not ease that pain, because we are busy doing other things, more important things, greater things in the long run.²⁴ The Rebel's view might make a much more substantial difference, but can we be sure? No—we are not sure, but

22. See, e.g., Feldman, *supra* note 2, at 1536-56 (describing the tendency of legal aid offices to focus their resources on individual cases rather than on impact work).

23. See, e.g., Diller, *supra* note 5, at 1426 (agreeing "with the critics that the attainment of political strength provides the best, and perhaps the only, prospect for the lasting and fundamental transformation of poor communities"). See also *id.* at 1428 (conceding that, the just-expressed sentiment notwithstanding, litigation is frequently the most effective instrumental use of lawyer resources).

24. For an example of an office that has made that kind of trade-off in a thoughtful and community-supported way, see Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Eco-*

we *are* sure that we can postpone or reduce some of the immediate discomfort. And, in addition to that, if we ask our clients what they want, if we are responsive to that community, we will hear a lot of calls for short-term relief.²⁵ The more ambitious relief is much harder to achieve, and in the meantime there are bills to pay, kids who need clothes, boyfriends who are threatening, and landlords who will not provide heat.²⁶

IV THE FELDMAN VIEW

Nobody—well, almost nobody²⁷—will deny that the existing legal services structure offers credible ameliorative benefits to the poor people who happen to be fortunate enough to come to the law office when there are openings for new clients. The two most

nomie Justice: The East Brooklyn Experience, 23 N.Y.U. REV. L. & SOC. CHANGE 105 (1997).

25. It may be the case (as many commentators maintain) that the preferences of the citizens whom the legal aid workers serve are the product of false consciousness, and ought not be taken as evidence of what those same citizens would choose under better conditions of choice. See, e.g., William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994) (“The Dark Secret of Progressive Lawyering is that effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments.”) I do not mean to imply that this view is incorrect. My point is that actual conversations between lawyers and their clientele include many direct pleas for immediate, conventional lawyering assistance.

26. There is a wonderful remark by Oscar Wilde of which Marc Feldman reminds us. According to Wilde, “[t]he trouble with socialism is that it takes too many evenings.” Feldman, *supra* note 2, at 1542 n.29. Wilde’s point is that greater involvement requires greater resources. If legal services provides for either short-term relief or long-term remedies, we can expect clients to opt for the short-term relief. In fact, this is precisely the Rebel’s argument: sublimation. There is redirection: short-term anxieties trump long-term benefits.

27. While it is hard to accept them as good faith suggestions, the voices of the right wing of our country claim that legal services offices do very little to assist the “worthy poor,” but instead divert their resources into political efforts that the poor clients neither need nor want. See, e.g., Rael Jean Isaac, *War on the Poor: Criticism of the Legal Services Corporation*, NAT’L REV., May 15, 1995, at 32 (describing legal services programs as “designed to implement the philosophy of an elite corps of Sixties-style radicals . . . who use the poor as tools and then leave them behind as victims”). Congressional critics of legal services programs have similarly described LSC as “a relic of the welfare state that has espoused a leftist agenda.” Taylor, *supra* note 8, at A8; see also W. Clark Durant, *Maximizing Access to Justice: A Challenge to the Legal Profession*, in DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 832-40 (1992) (arguing for the abolition of LSC, and its replacement with a network of lay advocates and law students).

trenchant criticisms of the traditional legal aid role are (1) that the energies expended in those ameliorative efforts undercut a larger goal of ending poverty, and (2) that the present legal aid model does not even accomplish its current ameliorative goals very well. The first of these criticisms is the Rebel's View; the second accepts the conventional legal aid goals on their own terms (unlike the Rebel), but laments the record of the nation's legal services lawyers in achieving that goal. To keep our labels separate, let us call this latter criticism the Feldman View, after its most recent proponent.²⁸

Both criticisms are essentially sound, despite their divergent foundations. As noted above, the Rebel's View makes sense from the distant perspective of theory, even if the lawyers and clients struggling with day-to-day crises find it nearly impossible to accept. The Feldman View also makes good sense, but it also encounters resistance within the practicing legal aid world.²⁹ Both criticisms are likely to remain primarily concerns of academics, just as they have been over the past two decades, unless the *institutional* structures within which legal aid lawyers work are changed to accommodate the wisdom of the critics. And, more importantly perhaps, those institutional adjustments needed for such accommodation frequently will marginalize the present voices of the client community and the legal services staff members.

Marc Feldman, in his polemic about the present crisis in legal services, identifies a major failing of subsidized poverty law to be its exclusive focus on the here-and-now, on the citizens in distress who happen by the office.³⁰ If we accept his data, for the sake of argu-

28. See Feldman, *supra* note 2.

29. In some respects Marc Feldman's suggestions mirror those raised at least 20 years ago by Gary Bellow. See Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978). Bellow and Kettleson (now Charn) continue to sympathize with the Feldman View, even though they disagree with many of Professor Feldman's specific criticisms and recommendations. See Gary Bellow & Jeanne Charn, *Paths Not Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633 (1995).

30. See Feldman, *supra* note 2, at 1537-38; see also *id.* at 1539 ("[A] program spends the vast majority of its legal resources on cases in which the horizon of ambition is defined, even at its maximum, by the individual client."). As a prominent example of the inefficiency and lack of vision of legal services programs, Feldman cites the response of legal aid to the cutbacks in Social Security programs in the early 1980s, when the Reagan administration targeted over a million Social Security Disability Insurance ("SSDI") and Supplemental Security Income ("SSI") recipients for termination. Feldman describes that crisis as a paradigmatic example of the kinds of political forces one finds marshaled against poor persons in our

ment, he is justified in his complaint that legal services programs operate inefficiently. The solution to this criticism, of course, is *not* to respond to the here-and-now, and not to attend to or even hear the pleas of the suffering women and children who show up in the waiting room. Feldman may not expressly advocate that approach,³¹ but such distancing is a necessary corollary of his complaint. That solution is relatively easy for law professors and bureaucrats to suggest, but terribly difficult for the lawyers, paralegals, intake workers, and other staff members who work in poverty law offices every day.

otherwise enlightened nation. *See id.* at 1613-14. He then proceeds to criticize the lawyers' effort to defend against the massive cutbacks, not because it was not successful, but because "[i]t did not diminish Social Security's or its sponsoring administration's power, nor even the inclination to employ such tactics and to make such wholesale cuts in the future." *Id.* at 1619.

31. In fact, his suggestions are remarkably inconsistent in this respect. Readers of Feldman's critical assessment of legal services lawyers are entitled to feel enormous frustration on this point. Feldman is articulately direct about two significant criticisms. The first criticism is that legal services lawyers "respond to the immediate problems of specific clients who present themselves at the program's offices seeking assistance," and that, as a result, their work is inefficient, unfocused, lacking in planning, and insufficiently political. Feldman, *supra* note 2, at 1537-38; *see also id.* at 1546-47 (describing legal services work as too reliant on constituent preferences); *id.* at 1575-78 (stating that the originators of the federal legal services programs have succumbed to "the volume problem" and sacrificed law reform). The second criticism is that these attorneys are committed to "the dominance of lawyer preferences," and "are ultimately disrespectful of client interests." *Id.* at 1593; *see also id.* at 1540-41 (arguing that lawyers are permitted too much discretion to determine the quality and quantity of their work); *id.* at 1552 (decrying lawyers' lack of accountability to clients).

Feldman never acknowledges the apparent inconsistencies in these two sentiments. He embraces the "client voice" theme so common in critical literature and chides poverty lawyers for dominating their clients and disrespecting their choices, preferences, values, and priorities. At the same time, without blinking, he condemns those lawyers for succumbing to the "rescue mission," responding to the community members who ask for their help, and ignoring the broader commitments that the lawyers ought to recognize and respect. He fails to see that good faith lawyers cannot *both* commit their agenda to constituent direction *and* resist the requests for help with the crises that those constituents encounter. In fact, his most telling criticisms of the staff lawyers—that they settle too easily, forgo sustained litigation, privilege smaller or "routine" cases over larger litigation efforts—all reflect, most plausibly, the lawyers' respect for the choices of their distressed clients.

Oddly enough, Feldman may be *right* in both critiques, but blame is misplaced. *Cf. id.* at 1531 (asserting that the current crisis "is . . . a crisis of Legal Services lawyers' own making"). A more apt reaction would include sympathy for the double bind in which these committed attorneys repeatedly find themselves.

To accept the dominant suggestions for reform, an institution must either: (a) instruct the front-line staff members to tell the needy citizens in the waiting room that the lawyers and paralegals will not help them; or (b) develop institutional measures to preclude the front-line staff from interacting with those citizens at all. The first solution may prove entirely unrealistic. It is true that intake workers and Information & Referral³² staff routinely inform prospective clients every day that there is no room for new cases and that, sadly, they must be turned away. It does seem, though, that doing so is more palatable when the staff members understand that the reason is that the legal staff is helping other similarly situated people who came in last week, or last month, or last year. When the legal staff is committed not to direct service but to projects which have less visible short-term results, it is much harder for front-line staff to explain why they send suffering applicants away. In any event, regardless of how the lawyers are otherwise disposed, the staff that greets citizens at the door will always feel some need to attempt to persuade the legal staff to assist the neediest.

When Feldman complains that legal services lawyers find it hard not to separate themselves from the here-and-now, we understand why he might observe that phenomenon. Advising lawyers not to do so, however, is of quite limited utility unless one can separate the distress in the waiting room from the staff in the office. The tensions that account for the Feldman observations disappear, or at least are lessened considerably, if the legal services institution opts to close its doors to walk-in business. If legal services lawyers believed that their energies would be better spent on projects aimed at longer-term success, and that their responses to the here-and-now only distracted them from more efficient ends, then it would follow that legal services institutions ought to separate their staff from the citizens in their community. That solution, however, is extraordinarily problematic and inconsistent with the other values embraced by critics of legal services lawyers: respect for clients and community-members and encouragement of their participation in the office's functioning.³³

32. Most urban legal aid programs offer Information & Referral ("I & R") services in conjunction with their intake responsibilities. Since no program will come close to accepting or offering even brief services to all the potential clients who call, the I & R staff are trained to offer referrals to other community-based organizations and pro bono services to those whom the legal aid program must turn away.

33. See, e.g., Bellow & Charn, *supra* note 29, at 1638-41.

One suggestion that might accommodate the legitimate concerns expressed by Feldman and others, as well as the felt experiences of the staff of a street-level legal aid office, would be to craft a distinct division of labor within each institution. While some legal staff would not respond to any immediate crises, other staff would respond as well as triage principles would permit. The division would need to be clear, if the pleas of the distressed are to be ignored effectively, for otherwise the danger of "slippage" is too great. Note that this division begins to resemble, in many respects, the conventional demarcation between impact lawyers and direct-service lawyers, a demarcation of which legal aid critics have consistently disapproved.³⁴

The suggestion just offered has implications for the "crisis" theme which introduced this Essay. If the crisis is real, as we can sadly assume it is, then the available pool of money for the representation of poor citizens will continue to shrink. The bureaucracies using these increasingly scarce funds will need to do so with even greater efficiency. The heightened need for efficiency will mean less attention to the here-and-now, and therefore more separation from that suffering which—through the application of triage principles—the institution will be forced to ignore.

V

WHO DECIDES?

This discussion leaves one important concept yet to be addressed. Scarcer funds means more pointed triage. More pointed triage means segments of the poverty population which might have been served with more money available will no longer be served. It seems an undeniable assumption that the remaining lawyers will not be able to do all that was accomplished before with greater funding. At least, let us accept that as a plausible result. The obvious question that arises is who chooses, and how they choose, the product of the triage decisionmaking. While that topic is an enormously complicated one,³⁵ it warrants a few words here.

34. See, e.g., Feldman, *supra* note 2, at 1538-39 (suggesting, although never defending fully, that the distinction is illusory and hence should be discarded); Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 MICH. J. GENDER & L. 493 (1996) (arguing that what some criticize as "routine" service work has important political implications).

35. A 1998 symposium sponsored by the Stein Center for Ethics and Public Interest Law at Fordham University School of Law addressed that question in considerable depth. See Symposium, *Conference on the Delivery of Legal Services to Low*

Marc Feldman and others have criticized legal services institutions for failing to accomplish what might be called "maximum feasible participation" of the citizens within the poverty community in the choices made about allocation of scarce legal resources.³⁶ I think these criticisms are overstated. I think the criticisms are overstated. I so conclude because the systems of arriving at principled group decisionmaking on the allocation questions are extraordinarily imperfect; and, as a result, the best available solution in many instances is for the management of the institution—the lawyers, in other words—to mediate among the competing interests.

Because there is neither space nor time to develop this argument here,³⁷ a few observations will have to suffice. First, I am not suggesting that the lawyers managing the legal services office ought to ignore the views and the experiences of those who live in their service area. Of course, those data are among the most important to consider in triage. The lawyers who develop priority schemes have a mandate, approaching a fiduciary duty, to take account of those interests and preferences.

Second, assuming (as will always be the case) that there are more legal needs than legal resources available to meet them; and assuming (as will always be the case) that the citizens of the poverty law community will not speak with one voice about how to evaluate the needs and the resulting triage, and will have understandably differing *interests* with respect to that topic; and assuming (as will always be the case) that there is no clearly defined representative organization to perform the "logrolling"³⁸ necessary to mediate

Income Persons: Professional and Ethical Issues, 67 *FORDHAM L. REV.* (forthcoming 1999).

36. The criticism comes from both the left and the right. See, e.g., Feldman, *supra* note 2, at 1542-45; DOUGLAS BESHAROV, *LEGAL SERVICES FOR THE POOR: TIME FOR REFORM* 3-5 (1990).

37. I have provisionally developed this argument elsewhere. See Tremblay, *supra* note 4, at 1144-49. For a more extended treatment of this issue, see Paul R. Tremblay, *Acting 'A Very Moral Kind of God': Triage among Poor Clients*, 67 *FORDHAM L. REV.* (forthcoming 1999).

38. "Logrolling" is a term of art in politics that is defined as "the trading of votes by legislators to secure favorable action on projects of interest to each one." Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 *PEPP. L. REV.* 488 n.187 (1997) (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 1895 (G. & C. Merriam Co. 1986)). See generally James B. Kau & Paul H. Rubin, *Self-Interest, Ideology, and Logrolling in Congressional Voting*, 22 *J.L. & ECON.* 365 (1979); Gordon Tullock, *A Simple Algebraic Logrolling Model*, 60 *AM. ECON. REV.* 419 (1970). The political art of logrolling is not unlike the task that community groups must perform in their efforts to accommodate many conflicting interests.

among the differing views and interests; and assuming (as will *sometimes* be the case) that the staff lawyers can act in good faith to mediate among those interests as well as they can;³⁹ then it makes sense that the lawyers perform that function. Note that in some instances the lawyers will not act in good faith and will place their own needs (or likes, or insecurities) ahead of those of the community. That fact is sad and regrettable, but its existence does not negate the force of the argument that the lawyers are still best situated, relative to the alternatives, to perform the necessary triage.

VI CONCLUSION

Money for lawyers for the poor is a scarce commodity and is becoming even more scarce as the forces opposing the interests of the poor become more influential. The "crisis" represented by the current federal legislators and their hostility to this funding will be magnified substantially if IOLTA schemes are found to violate the Constitution.⁴⁰ A scarcity of funding means increased conflict and debate about how lawyers work when they are paid with those funds.

I try here to defend the work of staff lawyers, working with too many clients in too much distress, against academic criticisms complaining about the limited vision of privileging short-term results over grander, long-term goals. In doing so, I recognize the truth in the critics' positions and the wisdom of their insights. But I remind the critics to account for the practice experiences and the institutional implications of their suggestions that poverty lawyers practice with greater vision and creativity. There are costs, difficulties, and considerable pain which accompany these creative and visionary proposals. We owe it to the dedicated poverty lawyers to acknowledge those trade-offs before denouncing their "routine" attention to the daily misfortunes and injustices they encounter from the needy citizens who appear at their doors.

39. For some empirical evidence that this expectation is not implausible, see Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 GEO. J. LEGAL ETHICS 1101 (1996).

40. See *supra* note 12 (discussing IOLTA funds); see also *Phillips v. Washington Legal Found.*, 118 S. Ct. 1925 (1998). Editor's Note: On June 15, 1998, the United States Supreme Court held that the interest income generated from aggregated client funds held in IOTLA accounts was the private property of the owner of the principal (the client) for purposes of the Takings Clause of the Fifth Amendment to the U.S. Constitution. The Court remanded the case for a determination of whether the funds have been "taken" by the State, and if so, the amount of "just compensation" due to the plaintiff-clients.